

March 13, 2008

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of)
)
) Docket Nos. 52-014, 52-015
Bellefonte Nuclear Power Plant)
Units 3 and 4)

NRC STAFF'S RESPONSE TO THE
REQUEST TO SUSPEND THE HEARING NOTICE
REGARDING THE APPLICATION FOR A COMBINED LICENSE
FOR BELLEFONTE NUCLEAR POWER PLANT UNITS 3 AND 4

INTRODUCTION

Pursuant to the Commission's Order dated March 5, 2008, the Nuclear Regulatory Commission Staff ("Staff") hereby responds to the request submitted on February 29, 2008 ("Suspension Request"), by the Bellefonte Efficiency & Sustainability Team ("BEST") to suspend the Notice of Hearing in this proceeding. As discussed below, the Staff opposes the request and believes that there has been appropriate notice and access to the application in accordance with Nuclear Regulatory Commission ("NRC") hearing procedures.

BACKGROUND

On October 30, 2007, the Tennessee Valley Authority ("TVA") tendered a Combined Operating License ("COL") application ("the application") to the NRC to construct and operate two Westinghouse Advanced Passive 1000 ("AP1000") Pressurized Water Reactors ("PWRs") — Bellefonte Units 3 and 4. On January 18, 2008, the Staff determined that the application was acceptable for docketing.¹ The Staff subsequently informed TVA by letter of the Staff's intended

¹ The notice of acceptance for docketing was published in the *Federal Register* on January 25, (continued. . .)

schedule for review of the application. See Letter from Joseph M. Sebrosky, NRC, to Ashok S. Bhatnagar, Senior Vice President, Nuclear Generation Development and Construction TVA (February 15, 2008) (ML080430572) (“Scheduling Letter”). The Scheduling Letter included target dates for standard actions and milestones such as the issuance of requests for additional information (“RAIs”), completion of and public comment on a Draft Environmental Impact Statement (“DEIS”), and issuance of the Final Safety Evaluation Report (“FSER”) and Final Environmental Impact Statement (“FEIS”). *Id.* at 3. The Staff also identified three areas of the application that introduced uncertainty into the Staff review schedule, but indicated how the staff planned to address those uncertainties and support the schedule as proposed, including by the use of RAIs. *Id.* at 1-2.

On February 8, 2008, the Notice of Hearing and Opportunity to Petition for Leave to Intervene (“the Notice”) on the application was published in the *Federal Register*. See Tennessee Valley Authority; Notice of Hearing and Opportunity to Petition for Leave to Intervene on a Combined License for Bellefonte Units 3 and 4, 73 Fed. Reg. 7611 (Feb. 8, 2008). The Notice provided 60 days for filing petitions to intervene, in accordance with 10 CFR § 2.309. *Id.* at 7613. Meanwhile, the Staff’s review has proceeded consistent with the actions described in the Scheduling Letter. On February 29, 2008, BEST made its Suspension Request.

(. . .continued)

2008. See Tennessee Valley Authority; Acceptance for Docketing of an Application for Combined License for Bellefonte Units 3 and 4, 73 Fed. Reg. 4923 (Jan. 25, 2008).

BEST's Suspension Request states three primary reasons for suspending the Bellefonte Notice. First, it states that "the TVA application is incomplete and will likely be amended and supplemented until the end of the year." Suspension Request, at 1. In support of this statement, BEST points to the target review schedule, which, according to BEST, "indicates that the Staff does not anticipate a draft Safety Evaluation Report until mid-December of this year which will still have 'opened' [sic] requests for additional information."² *Id.* Second, BEST states that certain exemptions requested in the application, such as an exemption from describing a Fitness for Duty Program ("FFDP"), burden persons who are interested in requesting a hearing on issues that are the subject of the exemption. *Id.* Finally, BEST states that the application process should not go forward because the application "fails to disclose financial information, power projections and other material that TVA claims to be covered under proprietary privilege." *Id.* at 2. BEST states that because that information is accordingly not currently publicly available, the public cannot raise contentions "concerning the correctness and/or accuracy of such information[.]" *Id.*

As explained below, the Staff has docketed, published the hearing notice of, and developed a review schedule for the application in accordance with the Commission's normal process. The Staff's anticipated use of RAIs, as well as an applicant's requests for exemptions and withholding of proprietary information as part of its application, are established aspects of

² BEST incorrectly describes "mid-December" of 2008 as the date for Staff issuance of a draft Safety Evaluation Report ("SER"). The Staff's target schedule lists December 18, 2008, as the anticipated date by which all "Chapter 2 RAIs" will be issued, not a "draft" SER. See Scheduling Letter, at 3. The Staff's target date for completion (of all chapters) of the SER with open items is August 24, 2009. *Id.*

Commission practice and are not grounds to suspend the notice of hearing in this proceeding.

DISCUSSION

BEST's arguments reflect a fundamental misunderstanding of the relationship between the Staff review of a license application and the public's opportunity to petition for intervention concerning that application. Accordingly, the Staff will begin by describing how Commission precedent has consistently characterized that relationship. The Staff will then explain why BEST's specific concerns about TVA's application do not warrant suspension of the hearing notice.

1. Under Commission Precedent, A Petitioner's Contentions Must Be Based On the Application, Not On the Staff's Review or Requests for Additional Information.

The basic framework for NRC licensing proceedings is that contentions are filed and admitted based on the application, not on any subsequent Staff review. The Commission recently reiterated this understanding:

In general, we do not endorse deferring the consideration of proposed contentions because, in our view, prompt consideration of contentions promotes the efficient and complete development of the record while conserving resources. Prompt identification of all of the contentions also allows the parties to concentrate on matters truly at issue in a proceeding. Prompt identification maintains the proceeding's primary focus on adequacy of the application at issue (rather than shifting the focus and the burden . . . to the Staff's analysis of the application), and may induce — or enhance the prospects for — early settlement. Additionally, our regulations contemplate that many hearing activities, such as document disclosure, motion practice, and the submission of late-filed contentions based on new information, will take place concurrently with the Staff review."

Shieldalloy Metallurgical Corp. (License Amendment Request for Decommissioning of the Newfield, New Jersey Facility), CLI-07-20, 65 NRC 499, 501 (2007). Commission precedent squarely forecloses the argument that simply because the Staff has identified sections of the application that will require more detailed information, the filing deadline should be suspended

or extended.

The Commission considers many applications complete for purposes of docketing and starting the adjudicatory process even though the Staff subsequently poses questions to the applicant. *Baltimore Gas & Elec. Co.* (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), CLI-98-25, 48 NRC 325, 349 (1998). The Commission has consistently held that an application may be modified or improved as NRC review goes forward. *E.g.*, *Curators of the University of Missouri* (Byproduct License No. 24-00513-32; Special Nuclear Materials License No. SNM-247), CLI-95-08, 41 NRC 386, 395 (1995).

The Commission has previously rejected similar requests to extend the filing deadline that were based on the Staff's promulgation of RAIs pursuant to 10 CFR § 2.102(a). *See Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 337-39 (1999) (finding that petitioner's request to extend deadline for filing contentions until ninety days after applicant responds to the last RAI "would turn our adjudicatory process on its head"); *Calvert Cliffs*, 48 NRC at 348-350 ("If the Commission were to take [the petitioner's] preferred approach, and allow petitioners to await completion of the RAI process before framing specific contentions, the hearing process frequently would take months or years even to begin, and expedited proceedings, such as the Commission contemplated for license renewal, would prove impossible."). The Commission has explained that "RAIs are a standard and ongoing part of NRC licensing reviews. Questions by the NRC regulatory staff simply indicate that the staff is doing its job: making sure that the application, if granted, will result in safe operation of the facility." *Calvert Cliffs*, 48 NRC at 349. Because "it is the license application, not the NRC staff review, that is at issue," the Staff's subsequent development of information underlying the application does not render the initial application an insufficient basis upon which to ground

contentions. *Id.* at 350. Indeed, in one case, the Commission has pointed out that “were the application as rife with serious omissions as” the petitioner suggested, the petitioner would have ample grounds upon which to produce admissible contentions. *Id.* at 349. Thus, because the application is the focus of the hearing and the source of contentions, the Staff’s need for more information to complete its review is not a valid basis to suspend or extend the hearing deadline. Moreover, should an applicant submit new information that would form the basis of a valid contention, the NRC has procedures that will allow a petitioner to proffer a late-filed contention. *Id.* at 350; 10 CFR § 2.309(c).

The Staff’s issuance of an SER with open items is also a normal step in the Staff’s review process. Much like the Staff’s issuance of RAIs to obtain information necessary to its review, “[o]pen items’ regarding a license application, which eventually must be dealt with by staff before a license can be granted, are not unusual[.]” *Duke Energy Corp. (Oconee Nuclear Station, Units 1, 2, and 3)*, LBP-98-33, 48 NRC 381, 387 (1998). The anticipated issuance of an SER with open items simply reflects that while the Staff expects to have its preliminary analysis documented by that time, there are likely to be certain specific issues (presumably those on which the Staff has issued RAIs to the applicant) for which the Staff’s review still will be in progress. That expectation is not in conflict with the notice of opportunity for hearing because, as discussed above, contentions are filed and admitted based not on the Staff review but on inadequacies an intervenor identifies in the application. In short, the Staff review and the initial opportunity for public intervention are separate processes, and the Staff’s review of the application is not expected to be complete at the time such intervention requests are submitted.

2. The TVA Application Is Sufficiently Complete For Docketing and Publication of a Hearing Notice.

The general discussion above helps to illustrate why BEST has misunderstood the Staff regulatory process with respect to the TVA application. After conducting an acceptance review pursuant to 10 CFR § 2.101(a)(2), the Staff docketed the TVA application and issued a notice of hearing pursuant to 10 CFR § 2.104. The acceptance review determines whether the application contains sufficient information for the Staff to begin its technical review; docketing an application does not preclude the Staff from requesting additional information from the applicant as the review proceeds, nor does it represent a final Staff determination on the merits of the application. Pursuant to Commission direction, the Staff performs an expanded acceptance review on combined license applications. The purpose of this expanded acceptance review is in part to provide for early interactions regarding review results with the applicant and identification of technical issues that are most likely to result in the Staff's needing to perform a more in-depth review. See COMDEK-07-0001 / COMJSM-0007-01, Report of the Combined License Review Task Force, at 8 (April 18, 2007), <http://www.nrc.gov/reading-rm/doc-collections/commission/comm-secy/2007/2007-0001comdek-jsm.pdf>.

The Staff employed this process in its acceptance review of the TVA application and identified areas in which the Staff would need to perform a more in-depth review and areas that inserted uncertainties into the review schedule. This technical sufficiency acceptance review does not preclude future RAIs, but instead identifies review areas that could require significant time and resources to resolve. See NRO Office Instruction, NRO-REG-100, "Acceptance Review Process for Design Certification and Combined License Applications" (ML071980027), at 8. Much as the Commission stated in *Calvert Cliffs*, the Staff identification of these issues

simply indicates that the Staff is doing its job. *Calvert Cliffs*, 48 NRC at 349. As discussed above, the Staff did not find major gaps in TVA's application; rather, it identified three areas that were likely to present a challenge to the Staff's establishing a firm schedule for the review. See Scheduling Letter, at 1. Such scheduling uncertainties do not make the application unsuitable for docketing or insufficiently complete to justify prompt commencement of the opportunity for public intervention.

Similarly, that the Staff's target review schedule includes issuance of an SER with open items does not demonstrate that TVA's application is incomplete or that open items will necessarily exist in any given technical area. The proposed schedule simply acknowledges that issuance and subsequent resolution of RAIs, as well as the identification of open items, are normal aspects of the Staff review. BEST misinterprets the Staff's future issuance of this preliminary Staff review document as evidence that TVA's application must now be incomplete for the purpose of public intervention, stating that the expectation of an SER with open items "is hardly the condition of a completed application upon which one can rely for review and filing contentions." Suspension Request, at 1. However, as discussed above, that process is consistent with Commission practice and the instruction that contentions are to be filed on the application, not on the Staff review.

3. The Status of the TVA Application Is Distinguishable from That of the Recent South Texas Project COL Application.

Furthermore, the status of the TVA application is clearly distinguishable from that of the COL application for the South Texas Project Nuclear Operating Company (STP), whose hearing notice was recently suspended by Commission order. See *South Texas Project Nuclear Operating Co.* (South Texas Project Units 3 and 4), Order, slip op. (Feb. 13, 2008)

(ML080450208). With regard to that application, STP requested that the Staff defer a small portion of its review because STP did not have adequate vendor support to respond to the Staff review. See Letter from M. A. McBurnett, Vice President, Oversight/Regulatory Affairs STP, to NRC (January 10, 2008) (ML080160242). Since the Staff controls its own resources, it determined that it would defer consideration of a large portion of the FSAR until STP was prepared to support the Staff review of the entire FSAR. See Letter from David Matthews, NRC, to Mark McBurnett, Vice President, Oversight/Regulatory Affairs STP (Jan. 30, 2008) (ML080230721). The Commission determined that the notice of hearing would be republished when STP informs the Staff that STP is prepared to support a review of the complete COL application.³

By contrast, with respect to the TVA application, the Staff has been proceeding with the entirety of its review. The Staff docketed the TVA COL application on January 18, 2008. See 73 Fed. Reg. at 4923-24. 10 CFR § 2.104(a) provides that the Secretary of the Commission will issue a notice of hearing as soon as practicable after the NRC has docketed the application. In accordance with this regulation, the Secretary signed out the notice of hearing on February 4, 2008, and it was published in the *Federal Register* on February 8, 2008. See 73 Fed. Reg. at 7611-13. No aspect of the review has been suspended or deferred, and indeed the Staff has taken the actions described in its Scheduling Letter to address the three areas of potential scheduling uncertainty that were initially identified. TVA has not withdrawn any portion of the

³ Even in the STP proceeding, however, the Staff is continuing with its environmental review, the chapters of the FSAR that are site-specific and connected to the environmental review, and select other portions of the FSAR.

application. Thus, there is no basis to support any suspension of the hearing notice.

4. The Requests for Exemptions Included in TVA's Application Do Not Render the Application Incomplete or Require Suspension of the Hearing Notice.

BEST also seeks to suspend the hearing notice because the application contains requests for exemptions from NRC regulations, such as an exemption from submitting a description of a Fitness For Duty Program ("FFDP"). Suspension Request, at 1. BEST argues that these exemption requests place a burden on persons interested in the subject matter of those exemptions (e.g., members of the public who want to examine TVA's FFDP). In effect, BEST argues that TVA's application is incomplete (or confusing to the public) to the extent that it lacks information that would be necessary absent the requested exemptions.

The Commission has the authority to grant specific exemptions from certain NRC regulations, including those in Part 52. See, e.g., 10 CFR § 52.7. Under 10 CFR § 52.93(a), a COL applicant may include such exemption requests in its application, and the Commission may grant such requests if they meet the relevant criteria. If the Commission ultimately denies the requested exemptions, the applicant would need to revise its application in order to demonstrate compliance with NRC regulations. As such, the fact that a COL application contains exemption requests – and thus does not provide certain information that the subject regulations would otherwise require to be in the application – does not make the submitted application incomplete. Requests such as TVA's are clearly contemplated by Commission procedures and do not provide a basis for delaying the opportunity for hearing; as explained in the Statement of Considerations for 10 CFR Part 52, exemptions included in a COL application

are subject to litigation in the same manner as other issues in that proceeding.⁴ See Licenses, Certifications, and Approvals for Nuclear Power Plants, 72 Fed. Reg. 49352, 49449 (Aug. 28, 2007). Their evaluation is part of the Staff's review of the application and the Staff has not yet made its determinations on those requests.⁵ Because contentions are to be filed on the application, not on the Staff review, TVA's exemption requests do not warrant suspension of the hearing notice.

5. TVA's Requests for Withholding Certain Information are Not a Basis to Suspend the Hearing Notice.

BEST also requests suspension of the hearing notice on the basis that TVA has requested that certain material in the application be withheld from public disclosure. As discussed below, BEST's arguments do not justify suspension of the hearing notice. In any event, the Staff has not yet made a final determination on those TVA requests.

Under 10 CFR § 2.390, persons submitting a document to the NRC may request that the document (or portion thereof) be withheld from public disclosure because it contains, inter alia, confidential commercial or financial information. See 10 CFR § 2.390(b). Accordingly, such requests are permissible with respect to portions of a license application document if the requests meet the withholding criteria of § 2.390. Even if the Commission determines that the document in question does contain privileged commercial or financial information, the

⁴ Accordingly, to the extent BEST seeks to address the substantive merits of any particular exemption request, its means for doing so is to file a petition to intervene that meets the criteria of 10 CFR § 2.309.

⁵ Moreover, the exemptions requests that were submitted as part of the application do contain technical justifications in support of those requests. The Staff will review these justifications in determining whether to grant the exemptions.

Commission must determine “whether the right of the public to be fully apprised as to the bases for and effects of the proposed action outweighs the demonstrated concern for protection of a competitive position[.]” § 2.390(b)(5). In sum, because some types of information may be properly withheld from public disclosure, the mere fact that an applicant has requested that information be withheld does not indicate either that the application is incomplete or that withholding would necessarily be inconsistent with adequate public access to the application. Accordingly, that TVA has requested withholding of information does not demonstrate that BEST’s hearing rights are being improperly limited.

Even if the Staff grants TVA’s withholding requests, directly concerned persons such as admitted parties to the proceeding may still be permitted to obtain the information through a proper request, subject to a protective order.⁶ See § 2.390(b)(6). Assuming BEST intends to seek intervention on the application, that process, not a suspension of the proceeding, is BEST’s remedy under agency precedent.

⁶ In the context of license transfer proceedings, when “critical information has been submitted to the NRC under a claim of confidentiality and was not available to petitioners when framing their issues, it is appropriate to defer ruling on the admissibility of an issue until the petitioner has had an opportunity to review this information [under a protective order] and submit a properly documented issue.” *Power Authority of the State of New York and Entergy Nuclear Fitzpatrick LLC, Entergy Nuclear Indian Point 3 LLC, and Entergy Nuclear Operations, Inc.* (James A. FitzPatrick Nuclear Power Plant and Indian Point Nuclear Generating Unit), CLI-00-22, 52 NRC 266, 300 n. 23 (2000); see also *Consumers Energy Company, Nuclear Management Company, LLC, Entergy Nuclear Palisades, LLC, and Entergy Nuclear Operations, Inc.* (Palisades Nuclear Power Plant) CLI-07-18, 65 NRC 399, 413-14 & n.46 (2007). Nonetheless, in that context, the Commission has found a petitioner still “obligated to put forward and support contentions when seeking intervention, based on the application and information available.” *Palisades Nuclear Power Plant*, 65 NRC at 414 n. 46. This is because petitioners “have an obligation to examine the application and publicly available information, and to set forth their claims at the earliest possible moment.” *Id.* (quoting *Duke Energy Corporation* (McGuire Nuclear Station, Units 1 & 2; Catawba Nuclear Station Units 1 & 2), CLI-03-17, 58 NRC 419, 429 (2003)).

6. Petitioning To Intervene In This Proceeding Is The Appropriate Mechanism For BEST To Address Its Concerns.

As discussed above, BEST's stated concerns regarding the completeness of TVA's application, as well as regarding the substance of TVA's exemption requests, are matters appropriately addressed in a petition for intervention in accordance with the requirements of the existing Notice. Likewise, BEST's apparent desire for information that TVA has requested be withheld from public disclosure (although, as noted, the Staff has not yet made final determinations on those requests) can already be addressed by BEST's seeking intervention and subsequent disclosure, if appropriate. The deadline under the Notice for BEST to file such a petition has not yet passed, and the issues BEST has raised do not require or justify suspension of the notice of hearing.

CONCLUSION

For the reasons described above, the Staff opposes the Suspension Request.

Respectfully submitted,

/signed (electronically) by/
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Dated at Rockville, Maryland
this 13th day of March 2008

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of)
)
) Docket Nos. 52-014, 52-015
Bellefonte Nuclear Power Plant)
Units 3 and 4)

NOTICE OF APPEARANCE

Notice is hereby given that the undersigned attorney herewith enters an appearance in the above-captioned matter. In accordance with 10 C.F.R. § 2.314(b), the following information is provided:

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Respectfully submitted,

Executed in Accord with 10 CFR § 2.304(d)

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Dated at Rockville, Maryland
this 13th day of March, 2008

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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Bellefonte Nuclear Power Plant)
Units 3 and 4)

NOTICE OF APPEARANCE

Notice is hereby given that the undersigned attorney herewith enters an appearance in the above-captioned matter. In accordance with 10 C.F.R. § 2.314(b), the following information is provided:

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Dated at Rockville, Maryland
this 13th day of March, 2008

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S RESPONSE TO THE REQUEST TO SUSPEND THE HEARING NOTICE REGARDING THE APPLICATION FOR A COMBINED LICENSE FOR BELLEFONTE NUCLEAR POWER PLANT UNITS 3 AND 4" and "NOTICE OF APPEARANCE" for Ann P. Hodgdon and for Patrick A. Moulding have been served upon the following persons by Electronic Information Exchange this 13th day of March, 2008:

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