

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

**ATOMIC SAFETY AND LICENSING BOARD PANEL
BEFORE THE LICENSING BOARD**

In the Matter of)	
Tennessee Valley Authority)	Docket Nos. 52-014, 52-015
Bellefonte Nuclear Power Plant)	ASLBP No. 08-864-02-COL-BD01
Units 3 and 4)	September 11, 2008
)	

**PETITIONERS' LATE-FILED CONTENTION REGARDING
TENNESSEE VALLEY AUTHORITY'S FAILURE TO COMPLY WITH
THE NATIONAL ENVIRONMENTAL POLICY ACT**

In accordance with 10 CFR § 2.309(c), the Blue Ridge Environmental Defense League, its chapter Bellefonte Efficiency and Sustainability Team and the Southern Alliance for Clean Energy (“Petitioners”) hereby submit a late-filed contention regarding the failure of the application for a combined construction and operation license for Bellefonte Units 3 and 4 to comply with the National Environmental Policy Act. As petitioners will demonstrate below, this contention satisfies the balance of the Nuclear Regulatory Commission’s criteria for late-filed contentions; therefore, petitioners respectfully request that the contention be admitted.

CONTENTION 20: FAILURE OF TVA TO COMPLY WITH THE NATIONAL ENVIRONMENTAL POLICY ACT

TVA's application for a combined construction and operation license for the Bellefonte site fails to include the potential public safety and environmental impacts of two additional nuclear reactors designated Units 1 and 2. TVA's August 26th letter¹ requesting reinstatement of NRC construction permits for Units 1 and 2 is an improper attempt to circumvent the requirements of the National Environmental Policy Act. .

BACKGROUND

An application for a combined construction and operation license ("COLA") for Bellefonte Units 3 and 4 was filed by the Tennessee Valley Authority ("TVA") on October 30, 2007. On June 6, 2008, Petitioners filed their petition to intervene in Tennessee Valley Authority's request for a construction and operation license at Bellefonte Nuclear Power Plant Units 3 and 4. On July 30, 2008, the Atomic Safety and Licensing Board held an initial prehearing conference in Scottsboro, Alabama for the purpose of hearing oral arguments on petitioners' proposed contentions one through nineteen in the above matter. On August 26, 2008, the Tennessee Valley Authority submitted to the Nuclear Regulatory Commission a request to reinstate construction permits CPPR-122 and CPPR-123 for Bellefonte Nuclear Plant Units 1 and 2 ("TVA Request"). Previously, on September 4, 2006, the Nuclear Regulatory Commission had granted the Tennessee Valley Authority's request to withdraw construction permits for Bellefonte Units 1 and 2.

¹ Ashok S. Bhatnagar, Senior Vice President Nuclear Generation Development and Construction, TVA to Eric J. Leeds, US Nuclear Regulatory Commission, Re: Tennessee Valley Authority (TVA)—Bellefonte Nuclear Plant Units 1 and 2—Request to Reinstate Construction Permits CPPR-122 (Unit 1) and CPPR-123 (Unit 2), August 26, 2008

DISCUSSION

The issues regarding environmental impacts fall into two general categories. The COLA environmental report 1) forms the basis for the Commission's licensing decision and 2) provides the basis for the Commissions environmental impacts statement. Therefore, Petitioner's proposed Contention Twenty asks the ASLB to consider: (1) the failure of the ER to discuss and analyze four nuclear reactors and (2) the failure of the ER to provide critical information for the NRC's environmental impact statement ("EIS").

TVA's Environmental Report

TVA's announcement of the re-instatement of Bellefonte Units 1 and 2 following on the heels of the licensing request for Bellefonte Units 3 and 4 was widely greeted as a possibility of building four units rather than two at the Bellefonte site. A perusal of the public statements by TVA officials and media reports support this possibility.² The COLA ER does not contain any discussion of environmental impact or options regarding Bellefonte Units 1 and 2, therefore it is fatally deficient. Further, as presented *infra*, the

² Contemporaneous news stories published at the time of TVA's request reflect the view that four reactors are under consideration:

- "TVA is also pursuing a partnership with private companies and others to possibly build two other reactors at the site." *Tennessean*, August 28, 2008
- "Mr. McCollum said that it makes good business sense to look at existing TVA assets at Bellefonte and evaluate them along with other power supply alternatives." *Chattanoogaan*, August 27, 2008
- "Tennessee Valley Authority has requested that the US Nuclear Regulatory Commission reinstates the construction permits for two unfinished reactors at its Bellefonte site in Alabama. It continues to pursue regulatory approval for two further units at the site." *World Nuclear News*, August 29, 2008
- "If TVA were to finish the two original reactors and build the two new nuclear units, the agency would spend up to \$20 billion at Bellefonte over the next two decades...." *Chattanooga Times Free Press*, August 21, 2008
- "'First and foremost we do feel like we need baseload generation about every 5 to 7 years,' [Bhatnagar] said." *Knoxville News Sentinel*, August 28, 2008
- "4 Bellefonte reactors possible" *The Huntsville Times* headline, August 2, 2008

deficient ER does not provide the NRC with sufficient information upon which to base its EIS.

An application for a combined construction and operating license (“COLA”) must include an environmental report. *See* 10 CFR § 51.45, 10 CFR § 51.50 and 10 CFR § 2.101. TVA submitted a COLA for a Class 103 license for a commercial nuclear power facility. *See* 10 CFR § 50.22. Pursuant to 10 CFR § 51.50, the COLA must include “a separate document, entitled ‘Applicant’s Environmental Report—Combined License Stage.’ Each environmental report shall contain the information specified in §§ 51.45, 51.51, and 51.52, as modified in this paragraph.”³ Pursuant to 10 CFR § 51.45, the environmental report must include, *inter alia*, a discussion of alternatives sufficient to aid the Commission to meet requirements of the National Environmental Policy Act (“NEPA”); specifically, to “study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources.”⁴ Pursuant to 10 CFR § 51.51, “every environmental report prepared for the...combined license stage of a light-water-cooled nuclear power reactor...shall take Table S–3, Table of Uranium Fuel Cycle Environmental Data, as the basis for evaluating the contribution of the environmental effects of uranium mining and milling, the production of uranium hexafluoride, isotopic enrichment, fuel fabrication, reprocessing of irradiated fuel, transportation of radioactive materials and management of low-level wastes and high-level wastes related to uranium

³ 10 CFR § 51.50(c) Combined license stage

⁴ NEPA section 102(2)(E)

fuel cycle activities to the environmental costs of licensing the nuclear power reactor.”⁵

Pursuant to 10 CFR § 51.52, a COLA “shall contain a statement concerning transportation of fuel and radioactive wastes to and from the reactor.”⁶ Pursuant to 10 CFR § 2.101, a COLA and its associated environmental report may be submitted in two parts, but the two parts must be submitted within six months of each other.⁷

The COLA provided by TVA describes only the impacts of prospective Units 3 and 4 at the Bellefonte site. Although the Bellefonte location is also the site of Units 1 and 2 and the COLA refers to certain components of Units 1 and 2, the COLA describes and analyzes only the impacts of Units 3 and 4, omitting impacts from Units 1 and 2. TVA states that it will provide additional information about Units 1 and 2 in Revision 1 to the COLA Environmental Report in October 2008. *See* TVA Request at 7. Accession to the TVA Request by the NRC would prevent due consideration of the environmental factors relevant to Units 3 and 4.

National Environmental Policy Act (NEPA)

Regulatory actions which require an environmental impact statement (“EIS”) include major federal actions, specifically, issuance of “a combined license under part 52 of this chapter.” *See* 10 CFR § 51.20(b)(2). NEPA requires that before undertaking a major federal action, an agency must take a “hard look” at the environmental

⁵ 10 CFR § 51.51(a)

⁶ 10 CFR § 51.52 Environmental effects of transportation of fuel and waste--Table S-4

⁷ 10 CFR § 2.101(a)(5)

consequences of the action.⁸ Where an agency has not yet taken the major federal action, it must consider “new and significant information” that bears on the environmental impacts of the proposed action.⁹ Also, federal regulations require supplementation where the proposed action has not been completed, if: “(1) there are substantial changes in the proposed action that are relevant to environmental concerns; or (2) there are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.” 10 C.F.R. § 51.92(a).

TVA’s request to reinstate raises the issues of omission of cumulative impacts and segmentation of NEPA, both of which are prohibited by law. TVA asserts that its request does not affect its plans for Units 3 and 4, adding, “Nor should TVA’s request for NRC’s reinstatement of the Construction Permits be construed as a determination that Bellefonte Units 1 and 2 represent a viable generating alternative.” TVA Request at 7. Here TVA cites 40 CFR 1502.14 in support of this assertion. However, the regulation cited requires a *rigorous* exploration of alternatives and the side-by-side presentation of the options to decision makers and the public.¹⁰ The TVA Request, if approved, would hinder the required hard look at environmental impacts and alternatives required by NEPA.

⁸ *Baltimore Gas and Elec. Co. v. Natural Resources Defense Council, Inc.*, 462 U.S. 87, 97 (1983).

⁹ *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 371-72 (1989)

¹⁰ 40 CFR 1502.14 Alternatives including the proposed action.

This section is the heart of the environmental impact statement. Based on the information and analysis presented in the sections on the Affected Environment (Sec. 1502.15) and the Environmental Consequences (Sec. 1502.16), it should present the environmental impacts of the proposal and the alternatives in comparative form, thus sharply defining the issues and providing a clear basis for choice among options by the decisionmaker and the public. In this section agencies shall:

(a) Rigorously explore and objectively evaluate all reasonable alternatives, and for alternatives which were eliminated from detailed study, briefly discuss the reasons for their having been eliminated.

Moreover, CEQ regulations call for an early incorporation and disposition of environmental factors relevant to the project.¹¹

Segmentation

Federal regulations require the Commission to develop an environmental impact statement before approving a license to operate and construct a power plant. 10 CFR § 51.20. It is well settled that the requirements of NEPA may not be avoided by segmentation of a project.¹² Segmentation arises when the comprehensive environmental impact of a project is not given full consideration or that analysis of the impact is done after permitting agency decisions are made and the project is underway.¹³

The principal criteria for the determination segmentation are whether the parts of a project are interdependent, the original intent and whether the parts may be considered alone. Petitioners believe the segmentation criteria are met. First, Units 1, 2, 3 and 4 are all located at the Bellefonte site. Major plant components would be shared by the four units. Second, in 2005 TVA and NuStart Energy Development determined that the Bellefonte site could serve as a location for a new nuclear plant licensed under the provisions of 10 CFR Part 52. *See* TVA Request at 4. Subsequently, TVA requested withdrawal of permits for Units 1 and 2. *Id.* Throughout, TVA maintained the Bellefonte site's environmental permits, including NPDES, RCRA and Clean Air Act. Third, the

¹¹ 1501.2 Apply NEPA early in the process.

Agencies shall integrate the NEPA process with other planning at the earliest possible time to insure that planning and decisions reflect environmental values, to avoid delays later in the process, and to head off potential conflicts

¹² River v. Richmond Metropolitan Authority, 481 F.2d 1280 (4th Cir. 1973)

¹³ Daniel R. Mandelker, *NEPA Law and Litigation*, 9-25 (2nd ed. 2004).

impacts of components which would be shared—water intake and discharge facilities, transmission switchyards and cooling towers—may not be considered apart or alone with respect to Units 1-2 and Units 3-4.

Case law is clear regarding the requirement to complete an EIS before final approval is given for a project. Otherwise the description of the project, the analysis of its impacts and consideration of alternatives become a meaningless paper exercise.

We are committed to the proposition that when a major federal action is undertaken, no part may be constructed without an EIS. In *Arlington Coalition on Transportation v. Volpe*, 458 F.2d 1323 (4 Cir.1972), where we concluded that an EIS was required before a road known as Arlington I-66 could be located and constructed, we considered whether construction which had already begun could continue pending completion of the EIS. We held that it could not, observing that when the Secretary of Transportation acted on the completed EIS and determined the location of the road, he could consider previous investment: "[i]f investment in the proposed route were to continue prior to and during the Secretary's consideration of the environmental report, the options open to the Secretary would diminish, and at some point his consideration would become a meaningless formality." *Id.* at 1333. For this reason we held that an injunction against further construction should issue until the Secretary took final action on the EIS. *Id.* at 1334.¹⁴

In a letter to the ASLB judges,¹⁵ counsel for TVA states that, "The combined license (COL) application for Bellefonte Units 3 and 4 states that the units will be located at the site of Bellefonte Units 1 and 2." Co-location of Units 1 and 2 with Units 3 and 4 indicates interdependence. The four units would share some systems, structures and components. The letter also states, "TVA is not planning to revise its COL application for Units 3 and 4 to address the impacts of construction and operation of Unites 1 and 2."

Counsel for TVA cites Commission decision CLI-02-14 which holds that a license

¹⁴ 808 F.2d 1039, 25 ERC 1571, 17 Envtl. L. Rep. 20499, MARYLAND CONSERVATION COUNCIL, INC. v. Charles GILCHRIST, as County Executive of Montgomery County, No. 86-3967, United States Court of Appeals, Fourth Circuit, 1986, 12

¹⁵ Letter from Steven P. Franz to G. Paul Bollwerk, III, Re: Notification of Development related to Bellefonte, August 27, 2008.

application need only consider other projects for which a proposal has been submitted. However, Petitioners note that TVA did submit an application to construct and operate Units 1 and 2 at the Bellefonte site on May 14, 1973. In the letter to the ASLB, TVA's counsel continues," [I]f TVA were to determine that completion of Units 1 and 2 represents a viable...alternative, TVA would further amend the COL application for Units 3 and 4." The reinstatement of the construction permits for Bellefonte Units 1 and 2 next to Units 3 and 4 is the very situation contemplated in *Maryland Conservation Council v. Gilchrist*. Approval by NRC of TVA's request to reinstate construction permits for Units 1 and 2 would render the NEPA process a mere formality done after the fact.

Cumulative Impacts

Cumulative actions are those which have significantly greater impacts when viewed with other actions or which have increasing effect caused by successive additions. Council of Environmental Quality Regulations Implementing NEPA¹⁶ provide that reasonably foreseeable future actions are to be considered in a cumulative impact analysis. A survey of relevant case law indicates that many government agency decisions successfully challenged for failure to consider cumulative impacts were won because the agency either left out critically important actions which were reasonably foreseeable or

¹⁶ **Sec. 1508.7 Cumulative impact.**

"Cumulative impact" is the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time.

included no cumulative impact analysis at all.¹⁷ In a case involving an oil refinery dock, the court rejected the argument that market forces would be the proximate cause of greater impacts, rather than the adjacent dock project.¹⁸ *Ocean Advocates v. US Army Corps of Engineers*, 2004, 361 F3d 1108. The TVA Request has several references to outstanding and pending economic decisions which depend on market forces.¹⁹ As demonstrated *supra*, the construction of Units 1 and 2 at the Bellefonte site is reasonably foreseeable and therefore must be included in the NRC's environmental documents for Units 3 and 4.

NON-TIMELY FILING

Construction and operation of nuclear reactors at Bellefonte would (1) present a tangible and particular harm to the health and well-being of our members living within 50 miles of the site, (2) the NRC has initiated proceedings for a combined license, the

¹⁷ *Recent Trends in Cumulative Impact Case Law*, Michael D. Smith, PhD, paper presented to the National Association of Environmental Professionals Annual Conference, April 2005

¹⁸ In *Ocean Advocates v. U.S. Army Corps of Engineers* (2004; 361 F.3d 1108) plaintiffs challenged the Corps' EA analyzing a permit application from British Petroleum to build an addition to an existing oil refinery dock in Cherry Point, Washington. The Court ruled that cumulative impacts analysis in the EA was inadequate because it did not properly consider other reasonably foreseeable future actions. The Corps concluded that any increase in crude oil tanker traffic would result from "market forces," not the dock addition or other projects. The Court ruled this conclusion was incorrect since it relied solely on a letter from British Petroleum "claiming that it had many options other than sea travel for transporting crude and refined oil to and from the refinery." According to the Court: "This finding fails to convince us that the Corps took a 'hard look' at the cumulative effects of the project, excludes the requisite quantified or detailed information necessary to support this finding, and neglects to explain why the Corps could not provide better or more specific information." *Id.*

¹⁹ Among the "market forces" justifications included in the TVA Request dated August 26, 2008: "One of the major factors taken into account in examining future use of the Bellefonte site was the estimated cost per kilowatt of installed capacity associated with the various advanced reactor designs when compared to the estimated costs of completing Units 1 and 2," "TVA decided that the Bellefonte Unit 1 and 2 Project could no longer be economically justified," and "TVA's Board would take into account the full range of...considerations associated with such a project, including the associated cost and need for power considerations."

granting of which would directly affect our members, and (3) accession to the TVA Request by the NRC would delay due consideration of the environmental factors relevant to Units 3 and 4 until after the decision by the ASLB on Petitioners' request to intervene.

Late-filed contentions must meet requirements listed in 10 CFR § 2.309(c) Non-timely filings. The following discussion demonstrates Petitioners meet the requirements.

(i) Good cause, if any, for the failure to file on time: The letter from TVA to the NRC requesting reinstatement of construction permits for Units 1 and 2 is dated August 26, 2008; it is accompanied by a cover letter dated August 27, 2008 from TVA counsel Steven P. Franz of Morgan Lewis. In his letter, Mr. Franz states, "The purpose of this letter is to notify the Licensing Board and the parties of a *recent development* related to Bellefonte." (emphasis added) These are the first official communications regarding the new state of affairs at Bellefonte and this is plainly stated in the letter to the ASLB.

(ii) The nature of the requestor's/petitioner's right under the Act to be made a party to the proceeding: Petitioners filed a request to intervene in the Bellefonte proceedings on June 6, 2008. Although the ASLB has yet to make its ruling on the request, Petitioners standing in this matter is uncontested by both TVA and NRC Staff.

(iii) The nature and extent of the requestor's/petitioner's property, financial or other interest in the proceeding: As demonstrated by the 45 declarations submitted on June 6th, 2001, Petitioners' members live within 50 miles of the Bellefonte site.

(iv) The possible effect of any order that may be entered in the proceeding on the requestor's/petitioner's interest: The possible effects include the submission of a new COLA Environmental Report which would either account for four reactors at TVA's

Bellefonte site or a presentation of the environmental impacts of the proposal and the alternatives in comparative form, thus sharply defining the issues and providing a clear basis for choice among options by the Commission and the public.

(v) The availability of other means whereby the requestor's/petitioner's interest will be protected: The Commission is the sole agency with the power to approve, to deny or to modify a license to construct and operate a commercial nuclear power plant. The NRC has approved the TVA COLA for docketing, an ASLB Panel has been appointed and a preliminary hearing has been held. The admission of this late-filed contention would be the most efficient means of considering this matter.

(vi) The extent to which the requestor's/petitioner's interests will be represented by existing parties: Petitioners' interests will not be represented by other parties. TVA's letter of request indicates that its principal interest in this matter is reinstatement of construction permits for Bellefonte Units 1 and 2. As stated by counsel, "TVA is not planning to revise its COL application for Units 3 and 4 to address the impacts of construction and operation of Units 1 and 2."²⁰

(vii) The extent to which the requestor's/petitioner's participation will broaden the issues or delay the proceeding: TVA's request to reinstate Units 1 and 2 has broadened the issues of public safety and environmental impact. Petitioners' Contention 20 itself would not unnecessarily delay the extant proceeding on the COLA for Bellefonte Units 3 and 4. An ASLB Panel has already been appointed; Petitioners have raised 19 other contentions; a ruling has not yet been issued.

²⁰ Letter from Steven P Franz to the Atomic Safety and Licensing Board, Re: Notification of Developments related to Bellefonte, August 27, 2008

(viii) The extent to which the requestor's/petitioner's participation may reasonably be expected to assist in developing a sound record: Without due consideration of the issues raised in Contention 20, the Commission's record on Bellefonte Units 1 and 2 and Bellefonte Units 3 and 4 would not be comprehensive. The potential co-location of four reactor units would be the largest nuclear power station in the United States. The reinstatement of a construction permit for Bellefonte Units 1 and 2 and a parallel but unrelated proceeding on the COLA for Units 2 and 4 would not account for the combined impacts of four units.

CONCLUSION

For the foregoing reasons, Petitioners' late-filed contention should be admitted.
Respectfully submitted,



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)

CERTIFICATE OF SERVICE

I hereby certify that copies of the PETITIONERS' LATE-FILED CONTENTION REGARDING TENNESSEE VALLEY AUTHORITY'S FAILURE TO COMPLY WITH THE NATIONAL ENVIRONMENTAL POLICY ACT was served this day on the following persons via Electronic Information Exchange.

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