UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	
	)	Docket Nos. 52-014 and 52-015
TENNESSEE VALLEY AUTHORITY	)	
	)	September 25, 2008
(Bellefonte Nuclear Power Plant, Units 3 and 4)	)	

TVA'S ANSWER OPPOSING LATE-FILED CONTENTION NEPA-R

On August 27, 2008, Tennessee Valley Authority ("TVA") submitted a letter[1] informing the Licensing Board of a recent development related to the Bellefonte site and enclosed an August 26, 2008 letter[2] from TVA to the NRC. Those letters explain that—entirely separate from this proceeding—TVA is requesting that the construction permits for Bellefonte Units 1 and 2 be reinstated in a deferred status in order to allow TVA to evaluate the viability of completing Units 1 and 2.[3]

On September 11, 2008, the Intervenors[4] filed "Petitioners' Late-Filed Contention Regarding Tennessee Valley Authority's Failure to Comply with the National Environmental Policy Act" ("Late-Filed Contention"). That contention argues that the Environmental Report for Bellefonte Units 3 and 4 is deficient because it fails to evaluate the cumulative environmental

1 Letter from S. Frantz, Co-Counsel for TVA, to the Licensing Board, Notification of Developments Related to Bellefonte (Aug. 27, 2008) ("Frantz Letter").

2 Letter from A. Bhatnager, TVA, to NRC, 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) (Aug. 26, 2008) ("TVA Letter").

3 Frantz Letter at 1-2; TVA Letter at 1, 7.

4 The Late-Filed Contention was filed before two of the Petitioners were admitted as Intervenors. *Tennessee Valley Authority* (Bellefonte Nuclear Power Plant Units 3 and 4), LBP-08-16, 68 NRC __ (slip op. at 1-2) (Sept. 12, 2008).

impacts of Bellefonte Units 1, 2, 3, and 4. In accordance with 10 C.F.R. § 2.309(h) and the Licensing Board's September 12, 2008 Order, TVA hereby files its Answer to the Late-Filed Contention. As demonstrated below, there is no legal basis for requiring an evaluation of the cumulative impacts of Bellefonte Units 1, 2, 3, and 4, because TVA has not proposed to complete construction of Units 1 and 2. Therefore, the Late-Filed Contention should be denied.

I. INTERVENORS' LATE-FILED CONTENTION IS INADMISSIBLE

The Late-Filed Contention states:

> 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 letter 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.[5]

In essence, the Late-Filed Contention claims that the combined license ("COL") application for Bellefonte Units 3 and 4 is deficient because it does not address the environmental impacts of Bellefonte Units 1, 2, 3, and 4.[6]

The Late-Filed Contention does not satisfy the admissibility requirements of 10 C.F.R. § 2.309, because it does not present a litigable issue.[7] As explained below, the Late-Filed

---

5 Late-Filed Contention at 2 (citation omitted).

6 *See id.* at 3-10.

7 10 C.F.R. § 2.309(f)(1) specifies that an admissible contention must satisfy six criteria, including a requirement to demonstrate that the issue is within the scope of the proceeding and show that a genuine dispute exists with regard to a material issue of law or fact. The Commission has stated that it "should not have to expend resources to support the hearing process unless there is an issue that is appropriate for, and susceptible to, resolution in an NRC hearing." Final Rule, Changes to Adjudicatory Process, 69 Fed. Reg. 2182, 2202 (Jan. 14, 2004). In addition to proffering an issue that is not litigable, the Late-Filed Contention does not present a genuine dispute on a material issue of law, contrary to 10 C.F.R. § 2.309(f)(1)(vi). Failure to comply with any one of the six admissibility criteria is grounds for rejecting a proposed contention. *See id.* at 2221; *see also Private Fuel Storage, L.L.C.* (Independent Fuel Storage Installation), CLI-99-10, 49 NRC 318, 325 (1999).

Contention is based on Intervenors' misunderstanding of TVA's actions and Intervenors' faulty application of legal precepts.[8]

A. TVA Has Not Proposed to Complete Units 1 and 2

Intervenors argue that the COL application for Units 3 and 4 must address the environmental impacts of Units 1 and 2. However, TVA has not proposed to complete construction of Units 1 and 2. Instead, TVA has only requested reinstatement of the construction permits in a "deferred status" in order for TVA to evaluate whether completion of Units 1 and 2 is a viable option.[9] A significant factor in determining the viability of completing Units 1 and 2 will be consideration of the licensing process that will apply to those units.[10] TVA will best be able to determine the regulatory framework and licensing basis for completing Units 1 and 2, and whether the current engineering and design features of those units will be adequate to support a completion decision, after a determination of whether the previously-applicable construction permits can be reinstated.[11] Completion of Units 1 and 2 would be a unique licensing undertaking, and the licensing regime that will apply will be a major factor in determining the viability of such a project.

Even if the NRC were to reinstate the construction permits, TVA could not resume construction of Units 1 and 2 until certain other regulatory actions are taken, as provided in the

---

8 Intervenors have also failed to follow the Licensing Board's procedural instructions regarding late-filed contentions. The Board's June 18, 2008 Order states that late-filed contentions must not exceed 10 pages. *See* Memorandum and Order (Initial Prehearing Order) at 5 & n.2 (June 18, 2008). The Intervenors' Late-Filed Contention is 13 pages. Furthermore, Intervenors have not addressed the requirements for late-filed contentions in 10 C.F.R. § 2.309(f)(2). However, TVA does not object to the showing made by the Intervenors pursuant to the criteria governing late filings in 10 C.F.R. § 2.309(c).

9 Frantz Letter at 2; TVA Letter at 6-7.

10 TVA Letter at 5, 7.

11 *Id.*

Commission's Policy Statement on reactivation of deferred plants.[12] The Policy Statement instructs, among other things, that a plant in a deferred status provide the NRC with a 120-day notification before resuming construction, together with a significant amount of substantive information regarding the plant.[13]

B. The Environmental Report for Units 3 and 4 Does Not Need to Address Cumulative Impacts of Bellefonte Units 1, 2, 3, and 4

Given the current status of Bellefonte Units 1 and 2, Intervenors are incorrect in claiming that the cumulative impacts of all four units need to be addressed in the COL application for Units 3 and 4. In the *McGuire* decision, the Commission established principles to be used in determining whether an application needs to consider the cumulative impacts of a future project.[14] The Commission ruled that an application must consider the cumulative impacts of a future project only if there is a "proposal"[15] for the other project *and* if there is "interdependence"[16] between the application and the other project.[17] Specifically, in *McGuire*, the Commission stated "that to bring [the National Environmental Policy Act ("NEPA")] into

---

12 Frantz Letter at 2; TVA Letter at 6-7; *see* Final Policy Statement, Commission Policy Statement on Deferred Plants, 52 Fed. Reg. 38,077, 38,079 (Oct. 14, 1987).

13 Commission Policy Statement on Deferred Plants, 52 Fed. Reg. at 38,079.

14 *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-14, 55 NRC 278, 294-97 (2002). The NRC has also adopted the Council on Environmental Quality regulations that define "cumulative impact" to include "reasonably foreseeable future actions." 40 C.F.R. § 1508.7; *see also* 10 C.F.R. § 51.14(b) (indicating that the NRC will use the definitions in 40 C.F.R. § 1508.7).

15 For a discussion of what constitutes a proposal, *see Kleppe v. Sierra Club*, 427 U.S. 390, 410 & n.20 (1976) (holding that a programmatic EIS is required only when an agency makes a precise "proposal" for an action and not when an action is only planned or contemplated); *Nat'l Wildlife Federation v. FERC*, 912 F.2d 1471, 1478 (D.C. Cir. 1990) (holding that an EIS "need only focus on the impact of the particular proposal at issue and other pending or recently approved proposals that might be connected to or act cumulatively with the proposal at issue").

16 For a discussion of what constitutes interdependence, *see Webb v. Corsuch*, 699 F.2d 157, 161 (4th Cir. 1983) (holding that the EPA did not need to consider the impact of future planned mines because the operation of the mines then under consideration by the EPA "did not represent a practical commitment to the others").

17 *See also Society Hill Towers Owners' Ass'n v. Rendell*, 210 F.3d 168, 182 (3d Cir. 2000) (holding that a court must also "consider the likelihood that a given project will be constructed along with the interdependence of other projects. The more certain it is that a given project will be completed, the more reasonable it is to require a[n] . . . applicant to consider the cumulative impact of that project.").

play, a possible future action must at least constitute a 'proposal' pending before the agency (i.e., ripeness), and must be in some way interrelated with the action that the agency is actively considering (i.e., nexus)."[18] Furthermore, the Commission stated that an environmental impact statement ("EIS") "need not delve into the possible effects of a hypothetical project."[19]

In *McGuire*, a petitioner claimed that an EIS for an application to renew reactor operating licenses should consider impacts related to the use of mixed-oxide ("MOX") fuel in those reactors. The Commission found that there was no proposal for MOX fuel because the applicant had not filed a license amendment application to use MOX fuel, even though the applicant had signed a contract with the Department of Energy to use MOX fuel. The Commission also found that the two actions were not interrelated because the license renewal could go forward without regard to the MOX issue and because the plants could operate throughout the license renewal term without using MOX. Therefore, the Commission ruled that the license renewal application need not consider the environmental impacts of using MOX fuel.[20]

Similar to *McGuire*, there is no proposal before the NRC to complete construction of Units 1 and 2, much less a proposal to construct Units 1, 2, 3, and 4 together. TVA's request for Units 1 and 2 is limited to NRC's reinstatement of the construction permits so that TVA may restore the units to a deferred status for the purpose of determining whether construction and operation is viable.[21] The Commission has stated that "proposals" are "concrete or reasonably

---

18 *McGuire*, CLI-02-14, 55 NRC at 295.

19 *Id.* (quoting *Nat'l Wildlife Federation*, 912 F.2d at 1478).

20 *Id.* at 295-97.

21 TVA has stated that "[t]he entire purpose for reinstating the Construction Permits for Units 1 and 2 would be to assist TVA in determining whether these units should once again constitute a viable, or in terms of NEPA requirements, whether they should represent a 'reasonable' power generating alternative." TVA Letter at 7.

certain projects, not projects that are 'merely contemplated.'"[22] As discussed above, TVA has not decided to complete construction of Units 1 and 2; therefore, the project is not yet "sufficiently concrete"[23] and the reinstatement request is not a "proposal" that would impact the COL application for Units 3 and 4.[24]

Additionally, when the "interdependence" test is applied to the Late-Filed Contention, the contention also fails. The Commission has stated that "an agency must consider the impact of other proposed projects 'only if the projects are so interdependent that it would be unwise or irrational to complete one without the other.'"[25] This obviously is not the case at Bellefonte. TVA's request for reinstatement of the construction permits for Units 1 and 2 does not depend on its request for COLs for Units 3 and 4. Construction of Units 1 and 2 began decades ago without Units 3 and 4. Furthermore, the COL application for Units 3 and 4 only envisions construction of those two units, and the COL application could be approved if Units 1 and 2 are never completed. Therefore, the projects are not interdependent.[26]

In summary, TVA has not proposed to construct and operate Units 1 and 2, and Units 1 and 2 and Units 3 and 4 are not interdependent. As a result, Intervenors have failed to demonstrate that the cumulative impacts of construction and operation of Units 1 and 2 must be

---

22 *McGuire*, CLI-02-14, 55 NRC at 295. In this regard, the Commission has clearly distinguished between a deferred plant and a plant that is under active construction. *See* Commission Policy Statement on Deferred Plants, 52 Fed. Reg. at 38,078.

23 *See Society Hill Towers Owners' Ass'n*, 210 F.3d at 182 (finding that there was no proposal because planning documents were not "sufficiently concrete" and because the action was not likely to be completed).

24 Intervenors' reliance (Late-Filed Contention at 10) on *Ocean Advocates* is misplaced. In that case, the court disagreed with the Corps' analysis that an increase in the number of crude oil tankers would result from market forces instead of a dock addition. *See Ocean Advocates v. U.S. Army Corps of Engineers*, 361 F.3d 1108, 1128-29 (2004), *as amended*, 402 F.3d 846 (2005). In particular, the court found that the application for a dock extension, "along with the existing and proposed projects," could lead to cumulatively significant environmental impacts. *Id.* at 1129. That case is distinguishable from the situation involving Bellefonte Units 1 and 2, which does not involve either existing or proposed construction.

25 *McGuire*, CLI-02-14, 55 NRC at 297 (quoting *Webb*, 699 F.2d at 161).

26 *See also Society Hill Towers Owners' Ass'n*, 210 F.3d at 180-82 (finding that two actions were not interrelated because the success of one was not tied to the completion of the other).

evaluated in the COL application for Units 3 and 4. Therefore, the Late-Filed Contention should be dismissed.[27]

C. The Environmental Report Does Not Engage in Impermissible Segmentation

As support for their contention that the Environmental Report must consider the impacts of Bellefonte Units 1, 2, 3, and 4, the Intervenors claim that a failure to do so would constitute improper "segmentation" of Units 1 and 2 from Units 3 and 4. As discussed below, this argument is legally and factually baseless.

The NRC has explained that segmentation "occurs when environmental review of the total effects of a project is thwarted because portions of the project are dealt with separately."[28] The following factors are considered in determining whether NRC should confine its environmental analysis under NEPA to the portion of the plan for which approval is being sought:

> (1) whether the proposed portion has substantial independent utility; (2) whether approval of the proposed portion either forecloses the agency from later withholding approval of subsequent portions of the overall plan or forecloses alternatives to subsequent portions of the plan; and (3) if the proposed portion is part of a larger plan, whether that plan has become sufficiently definite such that there is high probability that the entire plan will be carried out in the near future.[29]

Those factors are not satisfied in the case of the COL application for Bellefonte Units 3 and 4. TVA's steps to evaluate the viability of completing Units 1 and 2 are not part of the same project that is the subject of the COL application for Units 3 and 4. In fact, TVA partially

---

[27] *See e.g.*, *McGuire*, CLI-02-14, 55 NRC at 294 (holding that a contention that incorrectly claimed NEPA required discussion of certain cumulative impacts was outside of the scope of the proceeding).

[28] *Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, and 3), LBP-98-33, 48 NRC 381, 390 (1998) (citing *City of Rochester v. U.S. Postal Serv.*, 541 F.2d 967, 972 (2d Cir. 1976)).

[29] *Commonwealth Edison Co.* (Braidwood Nuclear Power Station, Units 1 & 2), LBP-85-43, 22 NRC 805, 810 (1985) (citing *Swain v. Brinegar*, 542 F.2d 364, 369 (7th Cir. 1976)).

completed construction of Units 1 and 2 without proposing Units 3 and 4. Furthermore, after halting construction of Units 1 and 2, TVA submitted its COL application for Units 3 and 4 without any plans to complete construction of Units 1 and 2. In short, TVA could complete Units 1 and 2 without completing Units 3 and 4 and TVA could complete Units 3 and 4 without completing Units 1 and 2. In this regard, Units 1 and 2 and Units 3 and 4 are subject to separate applications and proceedings, and the NRC could approve one application and not the other. Thus, Units 1 and 2 and Units 3 and 4 have independent utility, and are not part of the same plan.[30] TVA has not proposed constructing all four units together. Therefore, there is no basis for the Petitioners' claim that failure to consider Units 1 and 2 in this proceeding would lead to "segmentation." Furthermore, approval of either Units 1 and 2 or Units 3 and 4 would not foreclose the NRC from performing an independent assessment of the other units if TVA were to propose them in the future. As a result, under NRC precedent, NRC does not need to consider all four units as a single project.

Intervenors state (without any citation to authority) that "[t]he principal criteria for the determination [sic] segmentation are whether the parts of a project are interdependent, the original intent and whether the parts may be considered alone."[31] Even if it were assumed that those criteria are applicable, none of these criteria is met with respect to Bellefonte Units 1 and 2. First, as discussed above, the COL application and reinstatement of the construction permits are not parts of the same project. Second, as discussed above, TVA has not proposed to construct all four units. Finally, as discussed above, "the parts may be considered alone"

---

30 Intervenors claim that the projects are interdependent because "[m]ajor plant components would be shared by the four units." Late-Filed Contention at 7. The Intervenors have provided no basis for this claim. Although the COL application for Units 3 and 4 does propose to use some of the existing structures for Units 1 and 2 (*see, e.g.*, Environmental Report, p. 9.4-2), TVA has provided no proposal to use this equipment for all four units.

31 Late-Filed Contention at 7.

because the construction permits for Units 1 and 2 were issued years ago without Units 3 and 4, while the COL application for Units 3 and 4 was submitted in 2007 and does not depend upon completion of Units 1 and 2.[32]

In summary, there is no need to consider all four units as a single project, and concepts related to segmentation are not applicable.

II. CONCLUSION

As demonstrated above, TVA has not proposed either to complete Bellefonte Units 1 and 2 or to complete all four units. Therefore, NEPA does not require that the Environmental Report for Bellefonte Units 3 and 4 evaluate the environmental impacts of all four units. As a result, Intervenors' Late-Filed Contention does not present a litigable issue and does not satisfy the requirements of 10 C.F.R. § 2.309(f)(1). Accordingly, the Late-Filed Contention should be denied.

Respectfully submitted,

/signed (electronically) by Steven P. Frantz

Edward J. Vigluicci
Scott A. Vance
Tennessee Valley Authority
400 W. Summit Hill Drive, WT 6A-K
Knoxville, TN 37902
Phone: 865-632-7317
E-mail: ejvigluicci@tva.com
Counsel for TVA

Steven P. Frantz
Stephen J. Burdick
Morgan, Lewis & Bockius LLP
1111 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
Phone: 202-739-3000
E-mail: sfrantz@morganlewis.com
Co-Counsel for TVA

Dated in Washington, D.C.
this 25th day of September 2008

[32] Intervenors incorrectly rely on *Maryland Conservation Council v. Gilchrist*. Late-Filed Contention at 8-9. In *Gilchrist*, the issue was whether construction of a particular road was a "federal action" and whether construction could continue prior to issuance of an EIS. 808 F.2d 1039, 1042-43 (1986). This issue is unrelated to construction of Bellefonte Units 3 and 4, which is undisputedly a federal action, and TVA has not attempted to construct the units without a proper EIS. Furthermore, *Gilchrist* does not even address segmentation under NEPA, and therefore provides no support for Intervenors' position.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	
	)	Docket Nos. 52-014 and 52-015
TENNESSEE VALLEY AUTHORITY	)	
	)	September 25, 2008
(Bellefonte Nuclear Power Plant, Units 3 and 4)	)	

CERTIFICATE OF SERVICE

I hereby certify that on September 25, 2008 a copy of "TVA's Answer Opposing Late-Filed Contention NEPA-R" was filed electronically with the Electronic Information Exchange on the following recipients:

Administrative Judge
G. Paul Bollwerk, III, Chair
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
E-mail: gpb@nrc.gov

Administrative Judge
Dr. Anthony J. Baratta
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
E-mail: ajb5@nrc.gov

Administrative Judge
Dr. William W. Sager
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
E-mail: wws1@nrc.gov

Office of the General Counsel
U.S. Nuclear Regulatory Commission
Mail Stop O-15D21
Washington, DC 20555-0001
Ann P. Hodgdon
Patrick A. Moulding
Maxwell C. Smith
Jody C. Martin
E-mail: Ann.Hodgdon@nrc.gov; Patrick.Moulding@nrc.gov; Maxwell.Smith@nrc.gov; Jody.Martin@nrc.gov

Office of the Secretary
U.S. Nuclear Regulatory Commission
Rulemakings and Adjudications Staff
Washington, DC 20555-0001
E-mail: hearingdocket@nrc.gov

Office of Commission Appellate Adjudication
U.S. Nuclear Regulatory Commission
Mail Stop: O-16C1
Washington, DC 20555-0001
E-mail: ocaamail@nrc.gov

Louis A. Zeller
Blue Ridge Environmental Defense League
P.O. Box 88
Glendale Springs, NC 28629
E-mail: bredl@skybest.com

Sara Barczak
Southern Alliance for Clean Energy
428 Bull Street, Suite 201
Savannah, GA 31401
E-mail: sara@cleanenergy.org

Signed (electronically) by

/s/ Steven P. Frantz

Steven P. Frantz
Morgan, Lewis & Bockius LLP
1111 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
Phone: 202-739-3000
E-mail: sfrantz@morganlewis.com

Co-Counsel for TVA