

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD PANEL

Before the Licensing Board:

G. Paul Bollwerk, III, Chairman
Dr. Anthony J. Baratta
Dr. William W. Sager

In the Matter of

TENNESSEE VALLEY AUTHORITY

(Bellefonte Nuclear Power Plant Units 3 and 4)

Docket Nos. 52-014-COL and 52-015-COL

ASLBP No. 08-864-02-COL-BD01

October 14, 2008

MEMORANDUM AND ORDER
(Ruling on Request to Admit New Contention)

In this proceeding regarding the 10 C.F.R. Part 52 application of the Tennessee Valley Authority (TVA) for a combined operating license (COL) for two new nuclear units at the existing Bellefonte nuclear facility site, before the Licensing Board for resolution is a September 11, 2008 motion submitted by Joint Intervenors¹ seeking the admission of a new contention. This new contention concerns the purported need to provide an additional National Environmental Policy Act (NEPA)-related analysis of any environmental impacts associated with an August 27, 2008 TVA request that the NRC reinstate the previously terminated 10 C.F.R. Part 50 construction permits (CPs) for the two existing, albeit never completed, nuclear units at the Bellefonte site. Both TVA and the NRC staff have filed responses objecting to the admission of this contention, which Joint Intervenors have designated as NEPA-R.

¹ Joint Intervenors are the Southern Alliance for Clean Energy (SACE) and the Blue Ridge Environmental Defense League (BREDL).

For the reasons discussed below, we find that Joint Intervenors contention NEPA-R is inadmissible.

I. BACKGROUND

On October 30, 2007, TVA applied under Part 52 for a COL for two new reactors, Bellefonte Units 3 and 4, that are to be constructed utilizing the AP1000 certified design. This COL application did not contain any analysis of the impact of the operation of the existing Units 1 and 2 on the Bellefonte site. At TVA's request, the Part 50 CPs for these facilities were terminated by the NRC on September 14, 2006, prior to the completion and operation of these two units.

This adjudicatory proceeding regarding the TVA application for a Part 52 COL for Bellefonte Units 3 and 4 was initiated by a single June 6, 2008 hearing petition. While the Board was considering whether the hearing petition should be granted, TVA submitted an August 27, 2008 letter to the Board detailing a request it had made to the staff to reinstate the previously terminated Part 50 CPs for Bellefonte Nuclear Power Plant Units 1 and 2 and then hold those permits in a deferred status in accordance with agency's deferred plant policy. See Letter from Steven P. Frantz, Co-Counsel for TVA, to the Licensing Board at 1 (Aug. 27, 2008) [hereinafter TVA Letter]. Attached to the August 27 letter to the Board was an August 26, 2008 letter to the NRC staff that, in discussing the implications of the TVA request to reinstate the construction permits, explains:

It is important to understand that in making the subject request for reinstatement of the Construction Permits, TVA is in no way indicating any preference or prejudgment in favor of completing the existing Bellefonte units. Should NRC reinstate the Construction Permits, any future decision to resume Units 1 and 2 construction and completion activities would require approval by the TVA Board. . . . In addition, should the TVA Board later decide to move forward with the completion of Bellefonte Units 1

and 2, TVA would follow the notice of resumption of construction directions included in NRC's Deferred Plant Policy.

See id. unnumbered attach. at 7 (Letter from Ashok S. Bhatnager, Senior Vice President, TVA, to the NRC Document Control Desk (Aug. 26, 2008)). The August 26 TVA letter to the staff also stated:

because TVA is not proposing to resume construction of Units 1 and 2 (and would immediately place the CPs into a deferred status should NRC elect to reinstate the CPs), 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.

TVA Letter at 2.

This letter was the apparent genesis of the September 11, 2008 motion to admit a new contention that is now before the Board. See Petitioners' Late-Filed Contention Regarding [TVA's] Failure to Comply with [NEPA] (Sept. 11, 2008) at 3 [hereinafter Joint Intervenors Submission]. The following day, in conjunction with the issuance of its decision granting the petition to intervene submitted by Joint Intervenors and another organization,² and admitting four contentions for litigation, see LBP-08-16, 68 NRC __, __ (slip op. at 1-2) (Sept. 12, 2008), the Board issued an order setting a briefing schedule regarding the motion to admit new contention NEPA-R, see Licensing Board Memorandum and Order (Establishing Briefing Schedule Regarding Joint Intervenors Request for Admission of New Contention) (Sept. 12, 2008) at 2 (unpublished) [hereinafter New Contention Briefing Order].³

² The third group, BREDL's Bellefonte Efficiency and Sustainability Team chapter, failed to make the requisite showing to establish its standing, and so was not admitted as a party to this proceeding. See LBP-08-16, 68 NRC at __ (slip op. at 10).

³ Joint Intervenors originally labeled the new contention "Contention 20." See Joint Intervenors Submission at 1. Having previously requested that all contentions be designated with one of nine specified labels indicating the subject matter of the contention, the Board afforded Joint Intervenors an opportunity to re-label their contention, see New Contention Briefing Order at 1, which they did on September 16, 2008, see Petitioners' Response to the
(continued...)

Both applicant TVA and the staff filed responses to Joint Intervenors new contention submission on September 25, 2008, in which they stated their opposition to the admission of contention NEPA-R. See TVA's Answer Opposing Late-Filed Contention NEPA-R (Sept. 25, 2008) at 2 [hereinafter TVA Answer]; NRC Staff Answer to "Petitioners' Late-Filed Contention Regarding [TVA's] Failure to Comply with [NEPA]" (Sept 25, 2008) at 1 [hereinafter Staff Answer]. On October 2, 2008, Joint Intervenors filed a reply to the answers of both TVA and the staff, asserting that contention NEPA-R should be admitted. See Joint Intervenors Reply to TVA and NRC Staff Answers Regarding Late-Filed Contention NEPA-R (Oct. 2, 2008) [hereinafter Joint Intervenors Reply].

II. ANALYSIS

A. Applying Timeliness Standards Governing New Contentions to NEPA-R

The language of 10 C.F.R. § 2.309(f)(2) suggests that in an instance, such as this one, in which a petitioner that has submitted a timely hearing petition later seeks admission of a new environmental contention before the staff's draft or final environmental impact statement (EIS) has been issued, the new contention must comply with the timeliness standards of 10 C.F.R. § 2.309(f)(2). Under section 2.309(f)(2), for the new contention to be admissible it must be shown that:

- (i) the information upon which the amended or new contention is based was not previously available;
- (ii) the information upon which the amended or new contention is based is materially different than information previously available; and

³(...continued)
Atomic Safety and Licensing Board's Order Regarding Admission of New Contention (Sept. 16, 2008) at 1.

(iii) the amended or new contention has been submitted in a timely fashion based on the availability of the subsequent information.

10 C.F.R. § 2.309(f)(2).

Joint Intervenors have satisfied those section 2.309(f)(2) precepts, as their motion clearly indicates that (1) the information in the August 27 TVA letter was not previously publicly available; (2) the information in the August 27 TVA letter, i.e., that TVA was seeking to reinstate the Bellefonte Units 1 and 2 CPs, was materially different from previously available information, i.e., that the CPs for Bellefonte Units 1 and 2 had been terminated;⁴ and (3) the period between the date this newly available information becoming available, i.e., on August 27, 2008, and the time the new contention was filed, i.e., on September 11, 2008, complied with the Board's previous directive that new contentions must be filed within thirty days of the availability of the new information upon which they are based, see Licensing Board Memorandum and Order (Initial Prehearing Order) (June 18, 2008) at 6 n.4 (unpublished) [hereinafter Initial Prehearing Order].⁵ See Joint Intervenors Submission at 11.

Additionally, given the contention was filed after the date for submitting hearing petitions had passed, we look to see if, consistent with the provisions of 10 C.F.R. § 2.309(c)(1) governing late-filed submissions,⁶ Joint Intervenors have demonstrated that the new contention

⁴ Section 2.309(f)(2) also states that "[t]he petitioner may . . . file new contentions if there are data or conclusions in the NRC draft or final environmental impact statement . . . or any supplements relating thereto, that differ significantly from the data or conclusions in the applicant's documents." If this post-draft/final EIS standard were to be applied to the new contention proffered here, we would have no problem concluding it has been met.

⁵ Although both TVA and the staff claim Joint Intervenors fail to meet the standards of section 2.309(f)(2) because they have not "directly" addressed the standards, see TVA Answer at 3 n.8; Staff Answer at 6, we find Joint Intervenors have made a sufficient showing to satisfy section 2.309(f)(2).

⁶ The other three standards in section 2.309(c)(1) -- nature of requestor's right to be a
(continued...)

satisfies the balancing test of section 2.309(c)(1). In pertinent part, the provision sets forth six factors to be weighed in determining the admission of a new contention subsequent to the time the filing party's hearing petition is granted:

(i) Good cause, if any, for the failure to file on time;

* * * * *

(v) The availability of other means whereby the requestor's/petitioner's interest will be protected;

(vi) The extent to which the requestor's/petitioner's interests will be represented by existing parties;

(vii) The extent to which the requestor's/petitioner's participation will broaden the issues or delay the proceeding; and

(viii) The extent to which the requestor's/petitioner's participation may reasonably be expected to assist in developing a sound record.

10 C.F.R. § 2.309(c)(1)(i), (iv)-(viii).

In their motion to admit new contention NEPA-R, Joint Intervenors have evaluated each applicable factor under section 2.309(c)(1). See Joint Intervenors Submission at 11-13.

Looking to whether Joint Intervenors have satisfied the first and most important factor -- good cause for their late-filing -- we find that the showing they have made relative to the section 2.309(f)(2) factors as discussed above, see supra p. 5, establishes the requisite good cause and places this item on the admissibility side of the timeliness balance. So too, given there are no other means or parties to protect their interests, these factors come to rest on the admissibility side of the scale. The factor regarding issue broadening and delay does provide

⁶(...continued)

party, nature and extent of requestor's interest in the proceeding, and possible effect of the proceeding on the requestor's interest -- are matters that go to the standing of a petitioner. Compare 10 C.F.R. § 2.309(c)(1)(ii)-(iv) with id. § 2.309(d)(1)(ii)-(iv). In this instance, the Board already has determined that Joint Intervenors BREDL and SACE have standing in this proceeding. See LBP-08-16, 68 NRC at ___ (slip op. at 8-9).

some weight on the inadmissibility side of the balance, albeit very little given this proceeding has just started and is not likely to go to hearing on admitted issues for a year or more as we await the issuance of the staff's final environmental impact statement and safety evaluation report. Finally, given Joint Intervenors failure to provide any supporting affidavits or proposed testimony of supporting witnesses, the ability to assist in sound record development factor is one that weighs in on the inadmissibility side of the balance, albeit not significantly given the essentially legal nature of this contention. In the end, however, an assessment of all the applicable section 2.309(c)(1) factors based on Joint Intervenors showing in their submission establishes that the resulting balance supports a finding in favor of the timeliness of their new contention admission request.

B. Applying Contention Admissibility Standards to NEPA-R

In addition to showing that the section 2.309(c)(1) and (f)(2) factors support the admission of the contention as timely submitted, Joint Intervenors must show that their new contention meets the substantive contention admissibility requirements of section 2.309(f)(1)(i)-(vi). See Sacramento Mun. Util. Dist. (Rancho Seco Nuclear Generating Station), CLI-93-12, 37 NRC 355, 362-363 (1993). We detailed the six requirements that must be met for Joint Intervenors new contention (or any other contention) to be deemed admissible in our hearing petition determination, see LBP-08-16, 68 NRC at __ (slip op. at 14-19), and will not repeat that discussion here, noting only the Commission's admonition that these contention admission requirements are "strict by design." See Dominion Nuclear Connecticut, Inc. (Millstone Nuclear Power Station, Units 2 & 3), CLI-01-24, 54 NRC 349, 358 (2001).

As set forth in Joint Intervenors new contention admission request, the new issue statement they seek to have accepted for litigation provides as follows:

[NEPA-R]: FAILURE OF TVA TO COMPLY WITH THE NATIONAL ENVIRONMENTAL POLICY ACT

[CONTENTION:] 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.

Joint Intervenors Submission at 1-2 (footnote omitted). For the reasons detailed below, we find this contention inadmissible in that this contention and its foundational support raise a matter that is not within the scope of this proceeding and fail to present a genuine dispute regarding a material issue of law or fact. See 10 C.F.R. § 2.309(f)(1)(iii), (vi).

Joint Intervenors claim that, in light of the August 27 TVA letter, the environmental report (ER) submitted by TVA in support of the COL application for Bellefonte Units 3 and 4 now is deficient because it fails to include information pertaining to the environmental effects of a four-unit site, an analysis purportedly needed for the staff to complete its environmental impact statement. See Joint Intervenors Submission at 3. Joint Intervenors state further that although the TVA ER discusses the environmental impacts of Units 3 and 4, and refers to components of Units 1 and 2 at the co-located Bellefonte nuclear facility site, notwithstanding the stated TVA intent to have the CPs for these units reinstated, the ER fails to include any analysis of the impacts from Units 1 and 2 in violation of NEPA. See Joint Intervenors Submission at 5. Joint Intervenors claim that under 10 C.F.R. § 51.92(a), the agency is required to consider "new and significant information" that would have environmental impacts on the proposed action, such as the impacts of four units operating on one site, versus the two units that are discussed in the COL application. See Joint Intervenors Submission at 5-6. Joint Intervenors also reject the TVA assertion in its letters to NRC that the reinstatement of the construction licenses for Units 1

and 2 does not impact the COL proceeding or analyses performed for Bellefonte Units 3 and 4. See Joint Intervenors Submission at 6-7.

Additionally, Joint Intervenors claim that because of the interdependence of the four units, the failure to consider the impacts of a renewed construction permit for Units 1 and 2 in the context of the COL application for Units 3 and 4 results in an impermissible segmentation in violation of NEPA. See Joint Intervenors Submission at 7-9; see also Joint Intervenors Reply at 5. They also state that the potential construction of Units 1 and 2 on the site where Units 3 and 4 are being proposed is a “reasonably foreseeable future action[]” that under NEPA should constitute new information to be analyzed as cumulative impacts in the ER part of the TVA COL application for Bellefonte Units 3 and 4. See Joint Intervenors Submission at 9-10; see also Joint Petitioners Reply at 4-5.

In response to Joint Intervenors assertions, both TVA and the staff claim the new contention is inadmissible. They assert that because the activity outlined in the August 27 TVA letter to the Board does not constitute a “proposal” and the request to renew the construction license for Units 1 and 2 does not rise to level of an interdependent project required to undergo a cumulative impacts review, the Joint Intervenors contention raises a matter that is outside the scope of this proceeding. See TVA Answer at 6-7 & n.27; Staff Answer at 7. TVA further states that the Joint Intervenors request is premature in that it intends to reinstate the construction permits in a “deferred status” so that the viability of starting construction and of undergoing the agency licensing process to complete the units can be evaluated. According to TVA, assuming it were to move forward to propose the completion of construction of Units 1 and 2, it would modify the COL application for Units 3 and 4 as appropriate to account for that decision, which makes any impact consideration premature at this point. See TVA Answer at 7-8.

In resolving this dispute, we note that the Commission has set forth a standard governing whether an application needs to consider the cumulative impacts of potential future projects, stating:

[C]ontentions that are based on projected changes to a license, not currently before the NRC in any proceeding or application, are not sufficient to support admission of a contention. An NRC proceeding considers the application presented to the agency for consideration and not potential future amendments that are a matter of speculation at the time of the ongoing proceeding.

Duke Energy Corp. (McGuire Nuclear Station, Units 1 and 2 and Catawba Nuclear Station, Units 1 and 2), CLI-02-14, 55 NRC 278, 294 (2002) (footnote omitted). Furthermore, the Commission has indicated that to establish that cumulative impacts must be addressed, a petitioner must first show that the applicant has made a “proposal” that is interdependent with the application at issue. See id. at 295.

In the case of contention NEPA-R, Joint Intervenors have failed to show how the future hypothetical reinstatement of the construction permits for Units 1 and 2 is a concrete proposal that is interdependent with the construction and operation of Bellefonte Units 3 and 4. As the Commission has stated, “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.’” Id. at 297 (quoting Webb v. Corsuch, 699 F.2d 157, 161 (4th Cir. 1983)). Certainly, at this juncture August 26 TVA letter requesting that the NRC reinstate the construction permits for Units 1 and 2 does not constitute a “proposal” that is interdependent with the Bellefonte Unit 3 and 4 COL application that is before the agency. We thus agree with TVA and the staff that the TVA request to reinstate the construction permit for Units 1 and 2 fails to constitute a “proposal” of the type that would trigger a NEPA cumulative impact analysis regarding the operation of Units 1 and 2 in the NEPA analysis for proposed Units 3 and 4, thereby rendering the reinstatement matter outside the scope of this proceeding.

Additionally, we find without substance Joint Intervenors argument that the failure to consider the impacts of the renewed construction permit for Units 1 and 2 results in an illegal segmentation. The NEPA precept of avoiding improper segmentation requires that the portions of a project should be dealt with as a whole, rather than as separate parts. Segmentation “occurs when environmental review of the total effects of a project is thwarted because portions of the project are dealt with separately.” See Duke Energy Corp. (Oconee Nuclear Station, Units 1, 2, and 3), LBP-98-33, 48 NRC 381, 390 (1998) (citing City of Rochester v. United States Postal Serv., 541 F.2d 967, 972 (2d Cir. 1976)). Here, however, it is apparent only Bellefonte Units 3 and 4 can be considered a “project.” The TVA COL application for Bellefonte Units 3 and 4 is completely different from the TVA request to reinstate a construction permit for Bellefonte Units 1 and 2. Additionally, the August 26 TVA letter to the staff and the August 27 letter to the Board from TVA co-counsel indicate that the goal of reinstating the construction permits is to evaluate in the future the viability of possible Units 1 and 2 operation. See TVA Letter at 2, id. unnumbered attach. at 7. Further, there is no impermissible segmentation because, as TVA stated,

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. 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.”

TVA Answer at 8 (footnote omitted); see also Staff Answer at 7-8. As a consequence, Joint Intervenors contention fails to create a genuine dispute as to a material issue of law or fact.

In sum, on the matter of contention admissibility relative to the section 2.309(f)(1) factors, we find the allegations brought by Joint Intervenors in connection with the August 27, 2008 TVA letter fail to frame an issue that is within the scope of this proceeding or to create a

genuine dispute as to a material issue of law or fact. As applicant TVA and the staff both noted, the apparent purpose of reinstating the construction permits is to allow TVA to consider whether the operation of Units 1 and 2 would be a viable option for a future proposal. That letter imposes no burden upon the TVA to input additional analyses into the ER for Bellefonte Units 3 and 4, nor would NEPA require that either TVA or the staff complete an environmental impact analysis regarding such a hypothetical future possibility.⁷ Therefore, Joint Intervenor's contention NEPA-R fails to meet the section 2.309(f)(1) standards for admission as a contention and so must be rejected.⁸

⁷ Of course, if TVA is able to have the Units 1 and 2 construction permits reinstated and later reaches a determination to continue with the construction of those facilities, that may well present a different situation relative to the need for TVA and/or the staff to assess the impacts of that construction relative to Units 3 and 4, as well as the need to consider the impacts of the construction and operation of Units 3 and 4 in the context of any additional licensing action regarding Units 1 and 2.

⁸ In addition to its assertions regarding the failure of Joint Intervenor's new contention admission request to meet the timeliness and contention admission requirements of section 2.309(c), (f)(1)-(2), TVA also points out that Joint Intervenor's motion fails to comply with the ten-page limit imposed by the Board for all motions. See TVA Answer at 3 n.8; see also Initial Prehearing Order at 5 n.2. Because we find Joint Intervenor's contention request fails to meet the section 2.309(f)(1) contention admissibility requirements, we need not reach this issue, but note that Joint Intervenor should, in the future, submit a request to exceed the Board-established page limit if they find a motion or motion response runs in excess of ten pages.

IV. CONCLUSION

For the reasons set forth above, we find that new contention NEPA-R submitted by Joint Intervenors is inadmissible for litigation in this proceeding in that it fails to meet the contention admissibility standards of 10 C.F.R. § 2.309(f)(1)(iii), (vi).

For the foregoing reasons, it is this fourteenth day of October 2008, ORDERED, that the September 11, 2008 submission of Joint Intervenors requesting admission of new contention NEPA-R is denied.

THE ATOMIC SAFETY
AND LICENSING BOARD⁹

/RA/

G. Paul Bollwerk, III
ADMINISTRATIVE JUDGE

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Anthony J. Baratta
ADMINISTRATIVE JUDGE

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Rockville, Maryland

October 14, 2008

⁹ Copies of this memorandum and order were sent this date by the agency's E-Filing system to the counsel/representatives for (1) applicant TVA; (2) Joint Intervenors; and (3) the staff.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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Units 3 and 4))
)

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LB MEMORANDUM AND ORDER (RULING ON REQUEST TO ADMIT NEW CONTENTION), have been served upon the following persons by the Electronic Information Exchange.

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[Original signed by R. L. Giitter]
Office of the Secretary of the Commission

Dated at Rockville, Maryland
this 14th day of October 2008