November 20, 2008

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

NRC STAFF'S RESPONSE TO THE APPLICANT'S MOTION FOR RECONSIDERATION OF THE BOARD'S CLARIFICATION ORDER REGARDING CONTENTION NEPA-N

INTRODUCTION

Pursuant to 10 C.F.R. § 2.323(c), the NRC staff ("Staff") responds to the Tennessee Valley Authority's ("Applicant") Motion for Reconsideration of the Board's Clarification Order Regarding Contention NEPA-N ("Motion"). For the reasons discussed below, the Staff agrees that there is a clear split between the Shearon Harris Licensing Board ("Harris Board") and the Bellefonte Licensing Board ("Board); thus, reconsideration is warranted. Further, the Staff believes the Harris Board's ruling regarding what information is required in the alternatives section of an environmental report ("ER") is correct and the Motion should be granted.

BACKGROUND

On September 12, 2008, the Atomic Safety and Licensing Board ("Board") issued a Memorandum and Order, admitting the Blue Ridge Environmental Defense League ("BREDL") and the Southern Alliance for Clean Energy ("SACE") as Joint Intervenors and admitting four contentions. *Tennessee Valley Authority* (Bellefonte Nuclear Power Plant, Units 3 and 4) LBP-08-16, 67 NRC __ (slip op.). Contention NEPA-N, as admitted, reads "TVA's cost comparison is inadequate to satisfy the National Environmental Policy Act ("NEPA") or NRC regulations at 10 C.F.R. § 51.45(c) because it fails to provide reasonably up-to-date and

accurate information regarding the estimated electrical generation costs of the proposed new nuclear power plant." *Id*. at Appendix A. On September 22, 2008, the Applicant filed a motion seeking clarification on the scope of two of the admitted contentions ("Motion for Clarification"), Contentions NEPA-B and NEPA-N. As relevant here, the Applicant sought to clarify that Contention NEPA-N should only apply to the cost-benefit analysis in section 10.4.2.1.1 of its ER and that it did not apply to section 9.2.3.3 of the ER.

On October 14, 2008, the Board issued a Memorandum and Order ("Order") ruling on the Applicant's Motion for Clarification. *Tennessee Valley Authority* (Bellefonte Nuclear Power Plant, Units 3 and 4) available at ML082880539, *slip op.* (October 14, 2008) (unpublished order) ("Order"). Regarding Contention NEPA-N, the Board denied the Applicant's Motion for Clarification, holding that "at this juncture we are not willing to presume that if the new Bellefonte units' cost figures should turn out to be in the neighborhood suggested by Joint Intervenors, the cost/benefit balance that would be struck in comparing the Bellefonte facilities to the combined baseload alternative is nonetheless preordained (or otherwise immaterial)." *Id*. at 4. On October 30, 2008, a Licensing Board in the Shearon Harris proceeding issued a Memorandum and Order in which it found a similar contention inadmissible. *Progress Energy Carolinas Inc.* (Shearon Harris Nuclear Power Plant, Units 2 and 3) LBP-08-21, 67 NRC __, (slip op. at 23-27) ("Harris Order"). On November 10, 2008, the Applicant filed its Motion, seeking reconsideration of the Board's Order due to the inconsistencies between the Harris Order and this Board's Order.

DISCUSSION

Because there is a clear split between Licensing Boards, the Staff believes that reconsideration is warranted.

I. Legal Standard

A motion for reconsideration may not be filed except with leave of the Licensing Board, "upon a showing of compelling circumstances, such as the existence of a clear and material error in a decision, which could not reasonably have been anticipated, that renders the decision invalid." 10 C.F.R. § 2.323(e). When revising its hearing procedures in 2004, the Commission strengthened the standard for reconsideration motions, stating that:

> This standard, which is a higher standard than the existing case law, is intended to permit reconsideration only where manifest injustice would occur in the absence of reconsideration, and the claim could not have been raised earlier. In the Commission's view, reconsideration should be an extraordinary action and should not be used as an opportunity to reargue facts and rationales which were (or should have been) discussed earlier.

Final Rule: Changes to Adjudicatory Process, 69 Fed. Reg. 2,182, 2,207 (Jan. 14, 2004). In ruling on a petition for reconsideration filed under section 2.345[1], the Commission stressed that it does "not lightly revisit our own already-issued and well-considered decisions." *La. Energy Servs., L.P.* (National Enrichment Facility), CLI-04-35, 60 NRC, 619, 622 (2004) ("LES"). Instead, it "do[es] so only if the party seeking reconsideration brings decisive new information to our attention or demonstrates a fundamental Commission misunderstanding of a key point." *Id.*

II. Harris Order

In the Harris Order, the Harris Board ruled that a contention challenging an applicant's cost benefit analysis in the alternatives section of the ER was inadmissible. The Harris Board held "Commission precedent establishes that NEPA requires an Applicant to present a cost-benefit analysis (and therefore provide cost estimates) for nuclear power plants and facilities only where the Applicant's alternatives analysis indicates that there is an environmentally preferable alternative." *Id*. at 25 (emphasis in original). The Harris Board

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[1] The standard for a petition for reconsideration filed under section 2.345 is the same as the standard for motions for reconsideration filed under section 2.323(e). *Id*. at 2,207, 2,224.

supported its conclusion by citing an Appeals Board case that held "if there are no preferable environmental alternatives, such cost-benefit balancing does not take place." *Id*., quoting, *Consumers Power Co.* (Midland Plant, Units 1 and 2), ALAB-458, 7 NRC 155, 162 (1978).

The Harris Board sought to distinguish its holding from this Board's holding on the basis that "in Bellefonte TVA actually identified environmentally preferable alternatives to the nuclear plant, thus requiring the applicant to undertake a cost benefit analysis in the ER." *Id*. at fn 26. This statement is incorrect. In fact, as the Applicant and Staff asserted in the Motion for Clarification and Response,[2] the ultimate conclusion of Section 9.2.3.3 of the Bellefonte ER is that "*neither* a coal-fired, *nor* natural gas-fired plant, *nor* a combination of alternatives would be *environmentally preferable* to the proposed project." ER at 9.2-38 (emphasis added). Thus, there is no factual distinction between the contention in the Harris proceeding and this proceeding.

II. The Applicant's Motion Should be Granted.

As the Commission held in *LES*, a motion for reconsideration should only be granted "if the party seeking reconsideration brings decisive new information to our attention or demonstrates a fundamental Commission misunderstanding of a key point." CLI-04-35, 60 NRC at 622. In this case, the Harris Order constitutes decisive new information. Because there is no factual distinction between the cases, there is a clear split between two licensing boards on the same question of law. This means that in one of the cases there has been a clear and material error in a decision that renders that decision invalid. 10 C.F.R. § 2.323(e).

The Staff believes that the Harris Board correctly applied the *Midland* case regarding what information is required in the alternatives section of an Applicant's ER. The Harris Board pointed to clear precedent showing that if there is no environmentally preferable alternative, a

[2] Applicant's Motion for Clarification at 3-4; NRC Staff's Response to the Applicant's Motion for Clarification at 3.

cost benefit analysis is not necessary.[3] LBP-08-21, slip op at 25. The Bellefonte ER states that there is no environmentally preferable alternative; thus, there is no requirement that the Applicant perform a cost-benefit analysis. Consequently, the Motion should be granted and Contention NEPA-N should be limited to the accuracy of the figures presented in Section 10.4.2.1.1 of the Applicant's ER.

CONCLUSION

For the foregoing reasons, the Staff supports the Applicant's Motion for Reconsideration of the Board's Order regarding the scope of Contention NEPA-N.

Respectfully submitted,

/signed (electronically) by/
Jody C. Martin
Counsel for NRC Staff

Dated at Rockville, Maryland
this 20th day of November, 2008

[3] This analysis is further supported by the NRC's Draft Environmental Standard Review Plan, NUREG-1555 (2007). This section states, in part, that "*[w]hen one or more environmentally preferable alternative sites are identified*, the scope of his review should be extended, using benefit-cost techniques and other procedures to determine if any environmentally preferable site can be shown to be obviously superior to the applicant's proposed site." P.1 (emphasis added).

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CERTIFICATE OF SERVICE

I hereby certify that copies of the NRC Staff Response to "Applicant's Motion for Reconsideration of the Board's Clarification Order Regarding Contention NEPA-N," dated November 20, 2008, have been served upon the following persons by Electronic Information Exchange:

Administrative Judge
G. Paul Bollwerk, III, Chair
Atomic Safety and Licensing Board Panel
Mail Stop – T-3 F23
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
(E-mail: gpb@nrc.gov)

Administrative Judge
Dr. Anthony J. Baratta
Atomic Safety and Licensing Board Panel
Mail Stop – T-3 F23
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
(E-mail: ajb5@nrc.gov)

Administrative Judge
Dr. William W. Sager
Atomic Safety and Licensing Board Panel
Mail Stop – T-3 F23
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
(E-mail: wws1@nrc.gov)

Office of the Secretary
ATTN: Docketing and Service
Mail Stop 0-16C1
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
(E-mail: HEARINGDOCKET@nrc.gov)

Office of Commission Appellate Adjudication
U.S. Nuclear Regulatory Commission
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
Savannah, GA 31401
(E-mail: sara@cleanenergy.org)

Steven P. Frantz, Esq.
Stephen J. Burdick, Esq.
Mauri T. Lemoncelli, Esq.
Jonathan M. Rund, Esq.
Alan H. Gutterman, Esq.
Morgan, Lewis & Bockius LLP
1111 Pennsylvania Avenue, NW
Washington, DC 20004
(E-mail: sfrantz@morganlewis.com
sburdick@morganlewis.com
mlemoncelli@morganlewis.com
jrund@morganlewis.com
agutterman@morganlewis.com)

Edward J. Vigluicci, Esq.
Scott A. Vance, Esq.
Tennessee Valley Authority
400 W. Summit Hill Dr., WT 6A-K
Knoxville, TN 37902
(E-mail: ejvigluicci@tva.gov
savance@tva.gov)

Louise Gorenflo
Bellefonte Efficiency & Sustainability Team
185 Hood Drive
Crossville, TN 38555
(E-mail: lgorenflo@gmail.com)

/signed (electronically) by/
Jody C. Martin
Counsel for NRC Staff
U.S. Nuclear Regulatory Commission
Mail Stop O-15 D21
Washington, DC 20555-0001
301-415-1569
Jody.Martin@nrc.gov