

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

BEFORE THE COMMISSION

)			
In the Matter of)			
)			
TENNESSEE VALLEY AUTHORITY)		Docket Nos. 50-438 and 50-439	
)			
(Belleville Nuclear Power Plant, Units 1 and 2))		June 3, 2009	
)			

**TENNESSEE VALLEY AUTHORITY’S BRIEF IN RESPONSE TO THE
COMMISSION’S MAY 20, 2009 ORDER CONCERNING THE NRC’S STATUTORY
AUTHORITY TO REINSTATE THE BELLEFONTE CONSTRUCTION PERMITS**

Edward J. Viglucci, Esq.
Office of the General Counsel
Tennessee Valley Authority
400 W. Summit Hill Drive, WT 6A-K
Knoxville, TN 37902
Phone: 865-632-7317
Fax: 865-632-2422
E-mail: ejviglucci@tva.gov

Kathryn M. Sutton, Esq.
Lawrence J. Chandler, Esq.
Martin J. O’Neill, Esq.
Morgan, Lewis & Bockius LLP
1111 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
Phone: 202-739-5738
E-mail: ksutton@morganlewis.com

COUNSEL FOR TVA

TABLE OF CONTENTS

	Page
I. INTRODUCTION	1
II. FACTUAL AND PROCEDURAL BACKGROUND.....	2
III. ARGUMENT	6
A. The Commission Has “Broad Legal Authority” and “Substantial Discretion” Under the Atomic Energy Act (“AEA”) of 1954 to Reinstate the BLN Construction Permits.....	6
B. Nothing in the AEA or NRC Regulations Precludes the Commission’s Reinstatement of the BLN Construction Permits for Good Cause Shown	8
C. The Commission’s Reinstatement of The BLN CPs Is Well Within Its Statutory Authority and Is Eminently Reasonable As a Matter of Law or Policy	9
1. The Commission’s Decision to Reinstate the BLN CPs Is Consistent With NRC and Judicial Precedent Established During the Comanche Peak Unit 1 Construction Permit Extension Proceedings.....	10
2. The Commission’s Reinstatement of the BLN CPs Is Based on Reasoned Decisionmaking and Consistent With The NRC’s Existing Regulatory Framework for Deferred and Terminated Plants.....	13
IV. CONCLUSION.....	15

TABLE OF AUTHORITIES

FEDERAL DECISIONS

U.S. Supreme Court

<i>Chevron U.S.A. v. Natural Res. Def. Council, Inc.</i> , 467 U.S. 837 (1984)	11, 12, 13
<i>N. Ind. Pub. Serv. Co. v. Walton League</i> , 423 U.S. 12 (1975)	7
<i>Nat'l Cable & Telecomm. Ass'n</i> , 545 U.S. 967 (2005).....	12
<i>Paul v. Bethenergy Mines, Inc.</i> , 501 U.S. 680 (1991)	7
<i>Power Reactor Development Co. v. Electricians</i> , 367 U.S. 396 (1961).....	6, 7
<i>United States v. Eurodif, S.A.</i> , 555 U.S. __ (slip op. Jan. 26, 2009).....	12
<i>Vt. Yankee Power Corp. v. National Res. Def. Council</i> , 435 U.S. 519 (1978).....	6, 7, 11

U.S. Court of Appeals

<i>Bullcreek v. NRC</i> , 359 F.3d 536 (D.C. Cir. 2004)	13
<i>Citizens Ass'n for Sound Energy v. NRC</i> , 821 F.2d 725 (D.C. Cir. 1987)	<i>passim</i>
<i>Illinois v. Gen. Elec. Co.</i> , 683 F.2d 206 (7th Cir. 1982), <i>cert denied</i> , 461 U.S. 913 (1983)	6
<i>Kelley v. Selin</i> , 42 F.3d 1501 (6th Cir. 1995); <i>cert. denied</i> , 515 U.S. 1159 (1995).....	7
<i>Mass. v. NRC</i> , 878 F.2d 1516 (D.C. Cir. 1989).....	13
<i>Nader v. NRC</i> , 513 F.2d 1045 (1975).....	7
<i>Nuclear Info. Res. Serv. v. NRC</i> , 969 F.2d 1169 (D.C. Cir. 1992)	6
<i>Ohio ex rel. Celebrezze v. NRC</i> , 868 F.2d 810 (6th Cir. 1989)	6
<i>Okla. Natural Gas Co. V. FERC</i> , 28 F.3d 1281 (D.C. Circ. 1994)	13
<i>Pub. Serv. Co. of N.H. v. NRC</i> , 582 F.2d 77 (1978)	7, 8, 11
<i>Siegel v. AEC</i> , 400 F.2d 778 (D.C. Cir. 1968).....	6, 7, 13

ADMINISTRATIVE DECISIONS AND ORDERS

Commission

<i>Consolidated Edison Co. of N.Y.</i> (Indian Point, Unit Nos. 2 and 3), CLI-85-6, 21 NRC 1043 (1985).....	7
<i>Duke Cogema Stone & Webster</i> (Savannah River Mixed Oxide Fuel Fabrication), CLI-02-07, 55 NRC 205 (2002).....	7
<i>Exelon Generation Co., LLC</i> (Early Site Permit Proceeding for the Clinton ESP Site), CLI-07-12, 65 NRC 203 (2007).....	6
<i>Tenn. Valley Auth.</i> (Bellefonte Nuclear Power Plant, Units 1 and 2), Nos. 50-438 & 50-439, Commission Order (unpublished) (May 20, 2009).....	1, 5
<i>Tex. Utils. Elec. Co.</i> (Comanche Peak Steam Electric Station, Unit 1), CLI-86-4, 23 NRC 113 (1986), <i>aff'd Citizens Ass'n for Sound Energy v. NRC</i> 821 F.2d 725 (D.C. Cir. 1987).....	8, 10, 11

Licensing Board

<i>Oncology Servs. Corp.</i> , LBP-94-2, 39 NRC 11 (1994).....	7, 8
<i>Wrangler Labs.</i> , ALAB-951, 33 NRC 505 (1991).....	8

FEDERAL STATUTES

Atomic Energy Act of 1954, 42 U.S.C. § 2011 <i>et seq.</i>	7, 12
National Environmental Policy Act, 43 U.S.C. § 4321 <i>et seq.</i>	5
42 U.S.C. § 2201 (2007).....	6, 7, 8
42 U.S.C. § 2235 (2007).....	8, 12

FEDERAL REGULATIONS

10 C.F.R. § 50.35 (2008)	9
10 C.F.R. § 50.55 (2008)	2, 9
10 C.F.R. Part 51 (2008).....	5

FEDERAL REGISTER

Commission Policy Statement on Deferred Plants, 52 Fed. Reg. 38,077 (Oct. 14, 1987)2, 4, 14

Tennessee Valley Authority (Bellefonte Nuclear Plant, Units 1 and 2); Order, 59 Fed. Reg. 34,874 (July 7, 1994)2

Tennessee Valley Authority (Bellefonte Nuclear Plant, Units 1 and 2); Order, 68 Fed. Reg. 11,415 (Mar. 10, 2003)3

Tennessee Valley Authority; Bellefonte Nuclear Power Plant, Units 1 and 2, Environmental Assessment and Finding of No Significant Impact, 74 Fed. Reg. 9,308 (Mar. 3, 2009).....5, 13, 14

Tennessee Valley Authority (Bellefonte Nuclear Plant Units 1 and 2); Order, 74 Fed. Reg. 10,969 (Mar. 13, 2009)5, 7, 14

MISCELLANEOUS

COMSECY-08-0041, Staff Recommendation Related to Reinstatement of the Construction Permits for Bellefonte Nuclear Plant Units 1 and 2 (Dec. 12, 2008).....4, 10, 13

Letter from Glenn W. Morris, TVA, to the NRC Document Control Desk (Apr. 6, 2006)3

Letter from Catherine Haney, NRC, to Karl W. Singer, TVA (Sept. 14, 2006).....3

Letter from Ashok S. Bhatnagar, TVA, to Eric J. Leeds, NRC (Aug. 26, 2008)3, 10, 11

Safety Evaluation by the Office of Nuclear Reactor Regulation Relating to the Request for Reinstatement of Construction Permit Nos. CPPR-122 and CPPR-123, Bellefonte Nuclear Plant Units 1 and 2, Docket Nos. 50-438 and 50-439 (Mar. 9, 2009)3, 10, 14

SRM-COMSECY-08-0041, Staff Recommendation Related to Reinstatement of the Construction Permits for Bellefonte Nuclear Plant Units 1 And 2 (Feb. 18, 2009).....4

VR-COMSECY-08-0041 (Chairman Klein’s Comments)9

VR-COMSECY-08-0041 (Commissioner Lyons’ Comments)4, 10, 13

VR-COMSECY-08-0041 (Commissioner Svinicki’s Comments)9, 10

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

BEFORE THE COMMISSION

In the Matter of)	
TENNESSEE VALLEY AUTHORITY)	Docket Nos. 50-438 and 50-439
(Bellefonte Nuclear Power Plant, Units 1 and 2))	June 3, 2009
)	

**TENNESSEE VALLEY AUTHORITY’S BRIEF IN RESPONSE TO THE
COMMISSION’S MAY 20, 2009 ORDER CONCERNING THE NRC’S STATUTORY
AUTHORITY TO REINSTATE THE BELLEFONTE CONSTRUCTION PERMITS**

I. INTRODUCTION

On May 20, 2009, the Commission issued an Order in the captioned matter directing Tennessee Valley Authority (“TVA”), the NRC Staff, and the Petitioners in this proceeding to submit briefs on the “threshold” issue of “whether the NRC possesses the statutory authority” to reinstate the previously-withdrawn construction permits (“CPs”) for Bellefonte Nuclear Plant (“BLN”) Units 1 and 2.¹ The Commission issued the Order in response to the Petitioners’ assertion, in proposed Contentions 1 and 2 of their Petition, that the NRC lacks the statutory authority to reinstate the CPs.² As discussed below, the Commission has the statutory authority and discretion under applicable federal law to reinstate the BLN CPs.³

¹ See *Tenn. Valley Auth.* (Bellefonte Nuclear Power Plant, Units 1 and 2), Nos. 50-438 & 50-439, Commission Order at 1 (unpublished) (May 20, 2009) (“May 20 Order”). As the May 20 Order notes, Blue Ridge Environmental Defense League, (“BREDL”), its Chapter Bellefonte Efficiency and Sustainability Team (“BEST”), and the Southern Alliance for Clean Energy (“SACE”) (collectively, “Petitioners”) jointly filed a “Petition to Intervene and Request for Hearing” (“Petition”) on May 8, 2009.

² Petition at 12-14. Petitioners also have raised the same contention in a petition for review filed in the U.S. Court of Appeals for the D.C. Circuit on March 30, 2009. In its May 20 Order, the Commission did not otherwise rule on the Petition.

³ Contrary to Petitioners’ suggestion in proposed Contentions 1 and 2 (Petition at 12-13), the action at issue here does not involve the “granting” *de novo* of a CP, but rather, the reinstatement of two previously-issued CPs.

II. FACTUAL AND PROCEDURAL BACKGROUND

On December 24, 1974, the U.S. Atomic Energy Commission (“AEC”), predecessor to the NRC, issued two CPs, CPPR-122 and CPPR-123, to TVA authorizing the construction of BLN Units 1 and 2, respectively. As required, each CP included, as relevant here, the latest date for completion of construction for the respective Unit;⁴ the latest completion date for Unit 1 was December 1, 1979, and for Unit 2 was September 1, 1980. TVA began construction of Units 1 and 2, and, as authorized by subsequent extensions of the CPs, continued until 1988.

In 1988, due largely to economic and electrical-generation factors, TVA decided to defer completion of BLN Units 1 and 2, and lay them up. On October 31, 1988, the NRC approved TVA’s layup approach, finding it consistent with the Commission’s Policy Statement on Deferred Plants (“Policy Statement”).⁵ At that time, BLN Units 1 and 2 were approximately 90 percent and 60 percent complete, respectively, with the Final Safety Analysis Report (“FSAR”) having progressed through Amendment 29. Although TVA halted actual construction activities, the CPs, nevertheless, remained valid, allowing the maintenance, preservation and documentation of equipment in accordance with the Policy Statement.⁶

As noted above, the NRC extended the latest completion dates specified in the CPs, on the basis of good cause shown, in response to TVA’s requests.⁷ The most recent extension was granted by an Order dated March 4, 2003, amending CPPR-122 and CPPR-123 to extend the

⁴ 10 C.F.R. § 50.55(a).

⁵ Commission Policy Statement on Deferred Plants, 52 Fed. Reg. 38,077 (Oct. 14, 1987).

⁶ *Id.* at 38,078.

⁷ *See* 10 C.F.R. § 50.55(b).

latest completion dates to October 1, 2011 and October 1, 2014, respectively.⁸ During that time, the NRC reviewed the BLN layup program and conducted inspections of Units 1 and 2.⁹

Thereafter, on April 6, 2006, TVA advised the NRC that its Board of Directors had approved the cancellation of construction of the deferred BLN Units and, therefore, requested that CPPR-122 and CPPR-123 be withdrawn.¹⁰ On September 14, 2006, the NRC granted TVA's request to withdraw the CPs.¹¹ Accordingly, TVA ceased to perform any activities requiring an NRC construction permit.

On August 26, 2008, TVA requested reinstatement of CPPR-122 and CPPR-123. TVA asked the NRC to reinstate the CPs, in a deferred plant status, as a "preliminary step," in order to assess "whether Bellefonte Units 1 and 2 should again be regarded as a potential base load generating option."¹² TVA's request demonstrated good cause for this action.¹³ Specifically, TVA cited the favorable change in power-generation economics since 2005; possible effects of constraints on the availability of the worldwide supply of components necessary for new generation development since TVA withdrew the CPs; and the potential for a significantly lower cost per installed kilowatt, as well as a shorter schedule for the start of major safety-related construction, given the advanced stage of completion many major BLN Unit 1 and Unit 2 structures, systems and components ("SSCs").

⁸ Tennessee Valley Authority (Bellefonte Nuclear Plant, Units 1 and 2); Order, 68 Fed. Reg. 11,415, 11,416 (Mar. 10, 2003).

⁹ See Safety Evaluation by the Office of Nuclear Reactor Regulation Relating to the Request for Reinstatement of Construction Permit Nos. CPPR-122 and CPPR-123, Bellefonte Nuclear Plant Units 1 and 2, Docket Nos. 50-438 and 50-439, at 2 (Mar. 9, 2009) ("NRC Safety Evaluation"), available at ADAMS Accession No. ML090620052.

¹⁰ See Letter from Glenn W. Morris, TVA, to the NRC Document Control Desk (Apr. 6, 2006), available at ADAMS Accession No. ML061000538.

¹¹ See Letter from Catherine Haney, NRC, to Karl W. Singer, TVA (Sept. 14, 2006), available at ADAMS Accession No. ML061810505.

¹² Letter from Ashok S. Bhatnagar, TVA, to Eric J. Leeds, NRC (Aug. 26, 2008) ("Reinstatement Request") at 5, available at ADAMS Accession No. ML082410087. Thus, at this time, TVA has made no decision regarding installation of additional nuclear generating capacity, beyond the completion of Watts Bar Nuclear Plant, Unit 2.

¹³ See *id.* at 5.

Following its review of TVA's request for reinstatement of the CPs, on December 12, 2008, the NRC Staff forwarded to the Commission its recommended approach for evaluating and, if acceptable, approving TVA's request.¹⁴ Therein, the Staff concluded that: (1) its required findings underlying the December 1974 issuance of the CPs would not be affected by reinstatement of the CPs; (2) its prior determination that there is reasonable assurance that all safety questions will be satisfactorily resolved before completion of construction would not be affected by reinstatement of the CPs; (3) the construction impacts discussed in the Final Environmental Statement have largely occurred, because construction for most of the structures has been substantially completed; and (4) since reinstatement of the CPs would not allow any work to be performed that is not already allowed by the original permits, the action should not have a significant environmental impact.¹⁵ The Staff also observed that there are several steps in the regulatory process that would allow for public involvement if the CPs are reinstated.¹⁶

On February 18, 2009, the Commission issued a Staff Requirements Memorandum ("SRM") approving the Staff's recommendations, with one significant exception.¹⁷ Specifically, the Commission indicated that any NRC order reinstating CPPR-122 and CPPR-123 must place the CPs in "terminated plant" (as opposed to "deferred plant") status.¹⁸ Thereafter, on

¹⁴ COMSECY-08-0041, Staff Recommendation Related to Reinstatement of the Construction Permits for Bellefonte Nuclear Plant Units 1 and 2 (Dec. 12, 2008), *available at* ADAMS Accession No. ML083230895.

¹⁵ *Id.* at 2; *see also id.*, Encl. 1, at 3, 6-8.

¹⁶ *Id.* at 2 & Encl. 1, at 11.

¹⁷ *See* SRM-COMSECY-08-0041, Staff Recommendation Related to Reinstatement of the Construction Permits for Bellefonte Nuclear Plant Units 1 and 2 (Feb. 18, 2009), *available at* ADAMS Accession No. ML090490838.

¹⁸ *See id.* A "terminated plant" is a "nuclear power plant at which the licensee has announced that construction has been permanently stopped, but which still has a valid CP." Commission Policy Statement on Deferred Plants, 52 Fed. Reg. at 38,078. In contrast, a "deferred plant" is "a nuclear plant at which the licensee has ceased construction or reduced activity to a maintenance level, maintains the CP in effect, and has not announced termination of the plant." *Id.* A licensee holding CPs in "terminated plant" status may "pursue actions that include, but are not limited to, safety reviews, assessments of [SSCs], correction of deficiencies, replacement of components and NRC inspections." VR-COMSECY-08-0041, (Commissioner Lyons' Comments), *available at* ADAMS Accession No. ML090500374.

February 24, 2009, the NRC issued an Environmental Assessment (“EA”) and Finding of No Significant Impact (“FONSI”), addressing the proposed action, in compliance with the National Environmental Policy Act (“NEPA”) and 10 C.F.R. Part 51.¹⁹ Subsequently, on March 9, 2009, the NRC issued an Order reinstating the CPs in a terminated plant status, and the associated NRC Safety Evaluation. The Order was published in the *Federal Register* on March 13, 2009.²⁰ Consistent with the Commission’s SRM, the Reinstatement Order specifically limits any request for a hearing “to whether good cause exists for the reinstatement of the CPs.”²¹

On May 8, 2009, the Petitioners timely filed a joint request for hearing and petition to intervene asserting, *inter alia*, that the NRC lacks authority to reinstate the CPs.²² By Order dated May 20, 2009, the Commission directed the Petitioners, TVA, and NRC Staff to submit briefs “addressing the question whether the NRC possesses the statutory authority to reinstate the withdrawn construction permits.”²³ TVA herein responds to the Commission’s directive. As discussed below, the Commission’s reinstatement of the BLN Unit 1 and Unit 2 CPs was based on a permissible exercise of its broad statutory authority and discretion.

¹⁹ See Tennessee Valley Authority; Bellefonte Nuclear Power Plant, Units 1 and 2, Environmental Assessment and Finding of No Significant Impact, 74 Fed. Reg. 9,308 (Mar. 3, 2009) (“EA-FONSI”).

²⁰ Tennessee Valley Authority (Bellefonte Nuclear Plant Units 1 and 2); Order, 74 Fed. Reg. 10,969 (Mar. 13, 2009), 74 Fed. Reg. 10,969 (“Reinstatement Order”). The Reinstatement Order prescribes the specific steps that TVA must take if it decides to seek “deferred plant” status and to reactivate construction of BLN Units 1 and 2:

Should TVA choose to pursue placement of the facility in a deferred plant status, it shall ensure to the satisfaction of the NRR Director that it has complied with the guidance and provisions under Section III.A, “Deferred Plant,” of the Commission’s Policy Statement on Deferred Plants. When the results of its evaluation and inspection are satisfactory, the NRR Director may then authorize placement of the facility in a deferred plant status. Should TVA decide to reactivate construction, it shall comply with the provisions for notifying the NRR Director and shall provide the information described in the Commission’s Policy Statement on Deferred Plants.

Id. at 74 Fed. Reg. at 10,970-71.

²¹ *Id.* at 10,969.

²² Petition at 12-14.

²³ May 20 Order at 1. The May 20 Order also holds the remainder of Petitioners’ contentions (and responses thereto) in abeyance, “pending the Commission’s ruling on the threshold ‘authority’ issue.” *Id.* at 2.

III. ARGUMENT

A. The Commission Has “Broad Legal Authority” and “Substantial Discretion” Under the Atomic Energy Act (“AEA”) of 1954 to Reinstate the BLN Construction Permits

“The [AEA] sets up a comprehensive scheme of federal regulation of atomic energy, administered by the Nuclear Regulatory Commission.”²⁴ From the early days of the AEC, the exceptional breadth of the NRC’s legal authority under the AEA has been repeatedly acknowledged by the courts and the Commission alike.²⁵ “The AEA has been consistently read—as it was written—to give the Commission *broad regulatory latitude*.”²⁶ The First Circuit, citing the seminal *Power Reactor* and *Siegel* opinions, aptly summarized the breadth of the NRC’s statutory authority and discretion:

Both the Atomic Energy Act of 1954 and the Energy Reorganization Act of 1974 confer *broad regulatory functions* on the Commission and specifically authorize it to promulgate rules and regulations it deems necessary to fulfill its responsibilities under the Acts, 42 U.S.C. s 2201(p). In a regulatory scheme where *substantial discretion* is lodged with the administrative agency charged with its effectuation, it is to be expected that the agency will fill in the interstices left vacant by Congress. The Atomic Energy Act of 1954 is *hallmarked by the amount of discretion granted the Commission* in working to achieve the statute’s ends. The Act’s regulatory scheme “is virtually unique in the degree to which broad responsibility is reposed in the administering agency, free of close prescription in its charter as to how it shall proceed in achieving the statutory objective.” *Siegel v. AEC*,

²⁴ *Ill. v. Gen. Elec. Co.*, 683 F.2d 206, 214-15 (7th Cir. 1982), *cert denied*, 461 U.S. 913 (1983) (holding that the Illinois Spent Fuel Act, which prohibited shipment of spent nuclear fuel into the state for storage, was preempted by the Atomic Energy Act).

²⁵ *See, e.g., Power Reactor Development Co. v. Electricians*, 367 U.S. 396, 408 (1961) (“We see no reason why we should not accord to the Commission’s interpretation of its own regulation and governing statute that respect which is customarily given to a practical administrative construction of a disputed provision.”); *Vt. Yankee Power Corp. v. National Res. Def. Council.*, 435 U.S. 519, 525-26 (1978) (noting the Commission’s “broad regulatory authority” under the AEA); *Siegel v. AEC*, 400 F.2d 778, 783 (D.C. Cir. 1968) (explaining that “flexibility was a peculiar desideratum” of the AEA’s proponents, and that “Congress agreed by enacting a regulatory scheme which is virtually unique in the degree to which broad responsibility is reposed in the administering agency, free of close prescription in its charter as to how it shall proceed in achieving the statutory objectives”); *Ohio ex rel. Celebrezze v. NRC*, 868 F.2d 810, 813 (6th Cir. 1989) (reiterating the court’s statements in *Siegel* regarding the Commission’s uniquely broad statutory authority); *Exelon Generation Co., LLC* (Early Site Permit Proceeding for the Clinton ESP Site), CLI-07-12, 65 NRC 203, 208 (2007) (citing the Commission’s “broad legal authority” under the AEA).

²⁶ *Nuclear Info. Res. Serv. v. NRC*, 969 F.2d 1169, 1177 (D.C. Cir. 1992) (emphasis added).

130 U.S.App.D.C. 307, 312, 400 F.2d 778, 783 (1968). The agency's interpretation of what is properly within its jurisdictional scope is entitled to great deference, *Power Reactor Co. v. Electricians*, 367 U.S. 396, 408, 81 S.Ct. 1529, 6 L.Ed.2d 924 (1961); *Nader v. NRC*, 168 U.S.App.D.C. 255, 265-66, 513 F.2d 1045, 1055-56 (1975), and will not be overturned if reasonably related to the language and purposes of the statute.²⁷

The Commission itself has noted that the AEA gives it “exceptionally wide latitude in designing its own proceedings” and “broad power to organize its licensing process efficiently,” particularly in “[t]he absence of statutory procedural requirements.”²⁸ Indeed, the Commission's policy discretion is at its broadest, when, as in this case, Congress has not spoken to the specific question confronting the agency.²⁹ The great latitude afforded the Commission is especially apparent in Section 161.b of the AEA, upon which the Commission's March 2009 Reinstatement Order is based.³⁰ That provision authorizes the Commission to:

establish by rule, regulation, or order, such standards and instructions to govern the possession and use of special nuclear material, source material, and byproduct material as the Commission may deem necessary or desirable to promote the common defense and security or to protect health or to minimize danger to life or property³¹

²⁷ *Pub. Serv. Co. of N.H. v. NRC*, 582 F.2d 77, 82 (1978) (some internal citations omitted) (emphasis added). The First Circuit noted that “it is incumbent on the petitioner to point out in what manner the interpretation given by the Commission is so contrary to the purposes of the regulations or statute as to warrant intervention and correction by this court.” *Id.* at 83 (citing *N. Ind. Pub. Serv. Co. v. Walton League*, 423 U.S. 12, 14-15 (1975)).

²⁸ *Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication), CLI-02-07, 55 NRC 205, 215 (2002) (citing *Siegel*, 400 F.2d at 783; *Kelley v. Selin*, 42 F.3d 1501, 1511 (6th Cir. 1995), *cert. denied*, 515 U.S. 1159 (1995); *Vt. Yankee*, 435 U.S. at 424-25) (holding that the NRC “has ample statutory authority to establish separate construction authorization and operating license reviews (and hearings) for licensing a MOX facility”).

²⁹ *See, e.g., Paul v. Bethenergy Mines, Inc.*, 501 U.S. 680,696 (1991) (“When Congress through express delegation or the introduction of an interpretive gap in the statutory structure, has delegated policy-making authority to an administrative agency, the extent of judicial review of the agency's policy determinations is limited.”).

³⁰ *See* 74 Fed. Reg. at 10,970.

³¹ 42 U.S.C. § 2201(b). *See Consolidated Edison Co. of N.Y.* (Indian Point, Unit Nos. 2 and 3), CLI-85-6, 21 NRC 1043, 1078 (1985) (noting that the AEA, including Section 161.b, “provides ample legal authority for NRC to impose customized requirements designed to minimize risk to public health and safety”); *Oncology Servs. Corp.*, LBP-94-2, 39 NRC 11, 21 (1994) (citing *Siegel*, 400 F.2d at 783) (noting that the NRC is empowered to issue orders under AEA Section 161.b and 161.i.(3), and that “[p]revious judicial interpretation makes it clear that the Commission's authority under these provisions is wide ranging, perhaps uniquely so”).

In fact, “to permit administrative agencies to deal effectively with the varied, complex regulatory problems they face, those agencies must retain the power to address those problems on a case-by-case basis by issuing orders.”³² The Commission is no exception to this rule.

B. Nothing in the AEA or NRC Regulations Precludes the Commission’s Reinstatement of the BLN Construction Permits for Good Cause Shown

This is clearly a case in which the Commission has exercised its broad statutory authority and engaged in reasoned decisionmaking to “fill in the interstices left vacant by Congress.”³³

Section 185 of the AEA, the relevant statutory provision here, states, in pertinent part:

All applicants for licenses to construct or modify production or utilization facilities shall, if the application is otherwise acceptable to the Commission, be *initially granted* a construction permit. The construction permit shall state the earliest and latest dates for the completion of the construction or modification. Unless the construction or modification of the facility is completed by the completion date, the construction permit shall expire, and all rights thereunder be forfeited, unless upon good cause shown, the Commission *extends the completion date*.³⁴

Thus, Section 185 addresses the NRC’s initial issuance of a CP, and its extension of the construction completion date specified therein for “good cause shown.”³⁵ It does *not* explicitly address the potential “reinstatement” of a valid CP after its expiration or withdrawal by the licensee. Contrary to Petitioners’ assertion, the action at issue here is *not* the initial “granting” of a CP, but rather, the *reinstatement* of two previously-issued, valid CPs for good cause shown.

³² *Oncology Servs. Corp.*, LBP-94-2, 39 NRC at 22. As the Board noted, “a valid agency order [issued under AEA Section 161.b] mandating [specific] requirements for a particular licensee is on an equal footing with a valid regulation affecting licensees generally.” *Id.* at 21(citing 42 U.S. C. § 2201(b); *Wrangler Labs.*, ALAB-951, 33 NRC 505, 518 & n.39 (1991)).

³³ *Pub. Serv. Co. of N.H.*, 582 F.2d at 82 (citations omitted).

³⁴ 42 U.S.C. § 2235 (emphasis added).

³⁵ As the Commission previously observed in the Comanche Peak Unit 1 CP extension proceeding, which TVA discusses further below, the legislative history of Section 185 fails to shed any light on what constitutes “good cause.” *See Tex. Utils. Elec. Co.* (Comanche Peak Steam Electric Station, Unit 1), CLI-86-4, 23 NRC 113, 117 (1986), *aff’d Citizens Ass’n for Sound Energy v. NRC*, 821 F.2d 725, 731 (D.C. Cir. 1987) (“The legislative history of the Atomic Energy Act does not explicitly state the purpose underlying this provision.”).

The Commission has implemented this statutory provision at 10 C.F.R. § 50.55.³⁶

Section 50.55(a) requires that each CP “state the earliest and latest dates for completion of the construction or modification.” Section 50.55(b), in turn, provides that:

If the proposed construction or modification of the facility is not completed by the latest completion date, the construction permit shall expire and all rights are forfeited. However, upon good cause shown, the Commission will extend the completion date for a reasonable period of time.

Accordingly, the NRC’s organic statute and its implementing regulations do not address, much less prohibit or limit, the NRC’s authority to reinstate an otherwise valid construction permit. They do, however, provide a mechanism for extending CPs for a reasonable amount of time where good cause is shown. In this case, the Commission reasonably relied upon that mechanism to give the same effect where the CPs in question had not expired, but had been withdrawn for a period of time prior to their expiration dates.

C. The Commission’s Reinstatement of The BLN CPs Is Well Within Its Statutory Authority and Is Eminently Reasonable As a Matter of Law or Policy

Faced with TVA’s request to reinstate the BLN CPs, and in the absence of any statutory impediment to the requested action, the Commission majority concluded that reinstatement of the CPs to “terminated plant” (versus “deferred plant”) status reflects a “reasonable interpretation of its statutory authority under the AEA.”³⁷ As one Commissioner explained, “the agency can fully accomplish its regulatory role, with no loss of public involvement, through a path that

³⁶ Another regulation, 10 C.F.R. § 50.35(a) describes the findings that the NRC must make to issue a construction permit. 10 C.F.R. § 50.35(b) states that a CP “will constitute an authorization to the applicant to proceed with construction but will not constitute Commission approval of the safety of any design feature or specification unless the applicant specifically requests such approval and such approval is incorporated in the permit.”

³⁷ See, e.g., VR-COMSECY-08-0041 (Commissioner Svinicki’s Comments) (noting that “but for TVA’s request to withdraw, the permits in question would be valid today and Bellefonte could be in terminated plant status”); see also *id.* (Chairman Klein’s Comments) (noting that an order reinstating the CPs “will *de facto* place the facility in ‘terminated status’ as defined in the Commission Policy Statement on Deferred Plants”).

utilizes reinstatement of the construction permits, but to a ‘terminated status.’”³⁸ Towards that end, the Commission *required* TVA to demonstrate compliance with the Policy Statement on Deferred Plants—and Staff verification thereof—as a *prerequisite* to placement of the Units in “deferred plant” status.³⁹ TVA’s post-reinstatement activities will focus, in substantial part, on the quality assurance aspects of the project.⁴⁰ By authorizing reinstatement of the BLN CPs to “terminated plant” status, the Commission made a reasonable policy determination based on the specific facts of this case.⁴¹ That determination is consonant with the NRC’s broad authority under the AEA, prior agency action, and principles of regulatory flexibility and efficiency.

1. The Commission’s Decision to Reinstate the BLN CPs Is Consistent With NRC and Judicial Precedent Established During the Comanche Peak Unit 1 Construction Permit Extension Proceedings

As discussed in TVA’s August 2008 Reinstatement Request and COMSECY-08-0041, an issue reasonably analogous to the one presented here occurred in connection with the Commission’s extension of the CP for Comanche Peak Unit 1 in the mid-1980s.⁴² The *Comanche Peak* proceeding arose when Texas Utilities Electric Company (“TUEC”) applied for an extension of its CP *after* the permit for Unit 1 expired.⁴³ A petitioner argued that Section 185 of the AEA mandated the initiation of a *new* CP proceeding, given TUEC’s failure to timely apply for an extension of its construction permit.⁴⁴ The Commission disagreed. The Commission held that it “was not . . . barred from considering TUEC’s application for extension

³⁸ *Id.* (Commissioner Lyons’ Comments).

³⁹ *See, e.g., id.* (Commissioner Svinicki’s Comments) (stating that TVA must show that the programs necessary for a licensee to maintain deferred plant status have been implemented). *See also supra* note 20.

⁴⁰ *See, e.g.,* Reinstatement Request at 6; NRC Safety Evaluation at 6.

⁴¹ VR-COMSECY-08-0041 (Commissioner Lyons’ Comments) (“With regard to the precedent set by this decision, I believe that this course of action is warranted based on the merits of this situation. If similar requests are made, such requests should, likewise, be decided on their individual merits.”).

⁴² *See* Reinstatement Request at 7-8; COMSECY-08-0041, Encl. 1, at 4-5;

⁴³ *See Comanche Peak*, CLI-86-4, 23 NRC at 115.

⁴⁴ *See id.* at 116-17.

of the latest construction date” due to the expiration of the CP, and that a “complete *de novo* construction permit proceeding [was] not warranted.”⁴⁵

Notably, the Commission concluded that “the grant of the extension results in *no substantive change*: the design and construction methods will be the same as provided in the original Comanche Peak construction permit.”⁴⁶ It also noted that “[t]he amendment granting the extension merely gives [the licensee] more time to complete construction in accordance with the previously approved construction permit.”⁴⁷ The same conclusions apply here. Thus, as TVA noted in its Reinstatement Request, “the ultimate legal consequence of TVA’s request that the NRC withdraw the Bellefonte [CPs], and the Commission’s action to grant TVA’s request [for reinstatement], is not materially different from action taken in *Comanche Peak*.”⁴⁸ In both cases, a valid CP did not exist, the licensee no longer had a right to perform activities otherwise authorized by a valid CP, and the Commission restored that right via an order issued pursuant to its “broad regulatory authority” and “substantial discretion” under the AEA.⁴⁹

Significantly, in affirming the NRC’s *Comanche Peak* decision on appeal, the U.S. Court of Appeals for the D.C. Circuit found that the Commission had “adopted a permissible interpretation of the AEA.”⁵⁰ In reaching this conclusion, the D.C. Circuit applied the U.S. Supreme Court’s two-step *Chevron* analysis.⁵¹ In *Chevron*, the Court explained that:

⁴⁵ *Id.* at 120.

⁴⁶ *Id.* at 121 (emphasis added).

⁴⁷ *Id.*

⁴⁸ Reinstatement Request at 8.

⁴⁹ *Vt. Yankee*, 435 U.S. at 525-26; *Pub. Serv. Co. of N.H.*, 582 F.2d at 82. Thus, although *Comanche Peak* arose from a licensee’s inadvertent failure to timely renew its CP (in contrast to a request to reinstate a CP after its affirmative withdrawal by the licensee), the distinction, from a legal perspective, is one without a difference.

⁵⁰ *Citizens Ass’n for Sound Energy*, 821 F.2d at 731.

⁵¹ *See id.* (citing *Chevron, U.S.A. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984)).

When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. *Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.*⁵²

As the D.C. Circuit observed in *Citizens Association for Sound Energy*, “a reviewing court must determine whether the interpretation is arguably consistent with the underlying statutory scheme in a *substantive sense* and whether the agency considered the matter in a detailed and reasoned fashion.”⁵³ In that case, the D.C. Circuit found that, in extending the Comanche Peak Unit 1 completion date without a “full-scale *de novo* construction permit,” the Commission had considered the matter fully and acted consistent with the AEA.⁵⁴

These principles are instructive here. The AEA is silent with respect to the *reinstatement* of construction permits.⁵⁵ Under *Chevron*, “if [a] statute is silent . . . with respect to [a] specific issue [within the general compass of the statute], the question for the court is whether the agency's answer is based on a permissible construction of the statute.”⁵⁶ Generally, an agency's “construction of a statutory scheme it is entrusted to administer” is accorded “considerable

⁵² *Chevron*, 467 U.S. at 842-45 (emphasis added). As the Supreme Court recently reiterated, “the whole point of *Chevron* is to leave the discretion provided by the ambiguities of a statute with the implementing agency.” *United States v. Eurodif, S.A.*, 555 U.S. ___ (slip op. at 10) (Jan. 26, 2009) (citing *Nat'l Cable & Telecomm. Ass'n*, 545 U.S. 967, 981 (2005)) (internal citation omitted) (affirming, under *Chevron* and its progeny, the Department of Commerce's determination that certain “SWU” contracts for the procurement of low-enriched uranium to be used in nuclear power reactor fuel constituted sales of goods rather than services under the Tariff Act of 1930).

⁵³ *Citizens Ass'n for Sound Energy*, 821 F.2d at 731 (internal quotation marks and citations omitted) (emphasis added).

⁵⁴ *Id.*

⁵⁵ See AEA § 185, 42 U.S.C. § 2235 (authorizing issuance of CPs and extension of construction completion dates for good cause shown, but making no reference to the “reinstatement” of CPs).

⁵⁶ *Citizens Ass'n for Sound Energy*, 821 F.2d at 731 (citing *Chevron*, 467 U.S. at 843).

weight.”⁵⁷ This applies *a fortiori* to the NRC, because the AEA is “hallmarked by the amount of discretion granted the Commission in working to achieve the statute’s ends,” and the “[t]he scope of review of NRC actions is extremely limited.”⁵⁸ As the D.C. Circuit noted in rejecting a prior challenge to the NRC’s statutory jurisdiction, “[t]he court typically defers under *Chevron* . . . to an agency’s interpretation of its own jurisdiction under a statute that it implements.”⁵⁹

2. *The Commission’s Reinstatement of the BLN CPs Is Based on Reasoned Decisionmaking and Consistent With The NRC’s Existing Regulatory Framework for Deferred and Terminated Plants*

As explained above, the Commission gave full and careful thought to TVA’s request for CP reinstatement. It is noteworthy that the Commission declined to authorize reinstatement of the CPs in “deferred” status, as TVA had requested. Rather, the Commission concluded that reinstatement of the CPs to “terminated plant” status was a reasonable exercise of its statutory authority under the AEA. The Commission implicitly found that its action was “consistent with the underlying statutory scheme in a substantive sense.”⁶⁰ Its determination in this regard was both retrospective and forward-looking. In one respect, the Commission recognized the obvious potential for greater regulatory efficiency associated with reinstatement of the BLN CPs, given the extensive safety and environmental reviews previously performed by the Staff. Specifically, it concluded that “the review of a new CP application would duplicate its previous review and would not result in new or different findings that could prevent issuance of a CP.”⁶¹

⁵⁷ *Chevron*, 467 U.S. at 844.

⁵⁸ *Mass. v. NRC*, 878 F.2d 1516, 1523 (D.C. Cir. 1989) (citing *Siegel*, 400 F.2d at 783).

⁵⁹ *Bullcreek v. NRC*, 359 F.3d 536, 541 (D.C. Cir. 2004) (citing *Oklahoma Natural Gas Co. v. FERC*, 28 F.3d 1281, 1283-84 (D.C. Cir. 1994)) (holding that the Nuclear Waste Policy Act did not repeal or supersede the NRC’s preexisting authority under the AEA to license and regulate private, away-from-reactor spent nuclear fuel storage facilities).

⁶⁰ *Citizens Ass’n for Sound Energy*, 821 F.2d at 731.

⁶¹ COMSECY-08-0041, Encl. 1 at 9; *see also* VR-COMSECY-08-0041 (Commissioner Lyons’ Comments) (“After reviewing the alternatives this issue presents, the staff position that a review of a new construction permit application would largely duplicate the reviews that were conducted previously is well-taken.”); EA-FONSI, 74 Fed. Reg. at

The Commission also recognized the limited legal effect of reinstating the BLN CPs to “terminated status,” and expressly conditioned any further TVA construction activities on future NRC regulatory approvals. If TVA seeks to move the CPs from terminated to deferred plant status, and to reactivate construction, then it must demonstrate compliance with Section III.A of the Commission’s Policy Statement on Deferred Plants.⁶² Section III.A.6 requires TVA to notify the NRC in writing at least 120 days before plant construction is expected to resume.⁶³ Section III.A.7, in turn, describes the principal criteria or bases upon which the NRC Staff would evaluate the acceptability of equipment upon reactivation of a deferred plant.⁶⁴ Finally, this and other information (*e.g.*, security and other plans, operating procedures, technical specifications, and the final design) would be evaluated during the review of the OL application.⁶⁵

Thus, in the particular circumstances of this case, the Commission clearly acted both within the scope of its statutory authority and the ambit of its longstanding regulatory framework

9,309 (“The majority of construction activities have already occurred and the impacts have been assessed and documented in the original 1974 FES.”).

⁶² Reinstatement Order, 74 Fed. Reg. at 10,970-71.

⁶³ Commission Policy Statement on Deferred Plants, 52 Fed. Reg. at 38,079. The 120-day notification must include considerable substantive information. *See id.* Among other things, it must address “any new regulatory requirements applicable to the plant that have become effective since plant construction was deferred, together with a description of the licensee’s proposed plans for compliance with these requirements or a commitment to submit such plans by a specified date.” *Id.*

⁶⁴ *Id.* These criteria include: (1) reviews of the approved preservation and maintenance program, as implemented, to determine whether any SSCs require special NRC attention during reactivation; (2) verification that any design changes, modifications, and required corrective actions have been implemented and documented in accordance with established quality control requirements; and (3) the results of any licensee or NRC baseline inspections that indicate that quality and performance requirements have not been significantly reduced below those originally specified in the FSAR. *Id.*

⁶⁵ The NRC Staff’s supporting Safety Evaluation makes this clear. It states:

[R]einstatement of the CPs will not affect the health and safety of the public. A CP constitutes only an authorization to proceed with construction and does not constitute the Commission’s approval of the safety of any design feature. *The CPs are subject to the limitation that the Commission will not issue a license authorizing operation of the facility until the NRC has found that the final design provides reasonable assurance that the health and safety of the public will not be endangered by operation of the facility in accordance with the requirements of the license and the regulations.*

NRC Safety Evaluation at 7 (emphasis added). In addition to providing a hearing opportunity on TVA’s asserted reasons that show good cause justification for the reinstatement of the CPs, the Commission also concluded that reinstatement of the CPs would not foreclose future public participation on any revised OL application.

for deferred and terminated plants. As such, its action is fully “consistent with the underlying statutory scheme in a substantive sense.”⁶⁶ Moreover, the Commission clearly considered the legal, safety, and environmental implications of its action in a “detailed and reasoned fashion” before authorizing reinstatement of the CPs for BLN Units 1 and 2.⁶⁷

IV. CONCLUSION

For the foregoing reasons, the Commission plainly has ample statutory authority and discretion under the AEA to reinstate the CPs for BLN Units 1 and 2. Under the circumstances of this case, the Commission’s reinstatement of those CPs is a reasonable and permissible exercise of this broad regulatory authority. The Commission’s action is consistent with the substantive mandates of the AEA, buttressed by agency and judicial precedent, and firmly rooted in reasoned evaluation of policy and regulatory considerations applicable to this unique case.

Respectfully submitted,

/signed (electronically) by/

Edward J. Viglucci, Esq.
Office of the General Counsel
Tennessee Valley Authority
400 W. Summit Hill Drive, WT 6A-K
Knoxville, TN 37902
Phone: 865-632-7317
Fax: 865-632-2422
E-mail: ejviglucci@tva.gov

Kathryn M. Sutton, Esq.
Lawrence J. Chandler, Esq.
Martin J. O’Neill, Esq.
Morgan, Lewis & Bockius LLP
1111 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
Phone: 202-739-5738
E-mail: ksutton@morganlewis.com

COUNSEL FOR TVA

Dated in Washington, D.C.
this 3rd day of June 2009

DB1/62984294

⁶⁶ *Citizens Ass’n for Sound Energy*, 821 F.2d at 731.

⁶⁷ *Id.*

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

BEFORE THE COMMISSION

In the Matter of)	
TENNESSEE VALLEY AUTHORITY)	Docket Nos. 50-438 and 50-439
(Bellefonte Nuclear Power Plant, Units 1 and 2))	
	June 3, 2009

CERTIFICATE OF SERVICE

I hereby certify that, on June 3, 2009, a copy of “Tennessee Valley Authority’s Brief in Response to the Commission’s May 20, 2009 Order Concerning the NRC’s Statutory to Reinstate the Bellefonte Construction Permits,” dated June 3, 2009, was filed electronically with the Electronic Information Exchange.

Office of the Secretary
Attn: Rulemakings and Adjudications Staff
U.S. Nuclear Regulatory Commission
Mail Stop: O-16G4
Washington, DC 20555-0001
E-mail: hearingdocket@nrc.gov

Andrea Z. Jones, Esq.
David E. Roth, Esq.
Jeremy M. Suttenger, Esq.
Office of the General Counsel
U.S. Nuclear Regulatory Commission
Mail Stop O-15D21
Washington, DC 20555-0001
E-mail: andrea.jones@nrc.gov
E-mail: david.roth@nrc.gov
E-mail: jeremy.suttenger@nrc.gov

Office of Commission Appellate
Adjudication
U.S. Nuclear Regulatory Commission
Mail Stop: O-16G4
Washington, DC 20555-0001
E-mail: ocaamail@nrc.gov

Louis A. Zeller
Representative of Blue Ridge Environmental
Defense League (BREDL) & Bellefonte
Efficiency and Sustainability Team (BEST)
P.O. Box 88
Glendale Springs, NC 28629
E-mail: BREDL@skybest.com

Signed (electronically) by Kathryn M. Sutton
Kathryn M. Sutton, Esq.
Lawrence J. Chandler, Esq.
Martin J. O'Neill, Esq.
Morgan, Lewis & Bockius LLP
1111 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
Phone: 202-739-5738
E-mail: ksutton@morganlewis.com

Edward J. Vigluicci, Esq.
Office of the General Counsel
Tennessee Valley Authority
400 W. Summit Hill Drive, WT 6A-K
Knoxville, TN 37902
Phone: 865-632-7317
Fax: 865-632-2422
E-mail: ejvigluicci@tva.gov

COUNSEL FOR TVA