

June 10, 2009

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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

NRC STAFF'S RESPONSE TO PETITIONERS' BRIEF REGARDING NRC'S
STATUTORY AUTHORITY TO REINSTATE CONSTRUCTION PERMITS AT BELLEFONTE

INTRODUCTION

Pursuant to the Commission's May 20, 2009 order ("Commission Order"), the NRC Staff ("Staff"), the Blue Ridge Environmental Defense League ("BREDL"), along with its chapter Bellefonte Efficiency and Sustainability Team ("BEST") and the Southern Alliance for Clean Energy ("SACE")(collectively, "Petitioners"), and the Tennessee Valley Authority ("TVA") filed briefs on June 3, 2009, addressing the Commission's question on legal authority to reinstate TVA's withdrawn construction permits ("CPs").¹ The Commission Order provided the opportunity for submission of responding briefs. As contemplated by the Commission Order, the Staff responds to the Petitioners' brief.²

¹ See NRC Staff's Brief in Support of NRC Authority to Reinstate Construction Permit Numbers CPPR-122 and CPPR-123 (hereinafter "Staff Brief"); Brief of the Blue Ridge Environmental Defense League, Its Chapter Bellefonte Efficiency and Sustainability Team, and the Southern Alliance for Clean Energy Regarding NRC's Statutory Authority to Reinstate Construction Permits at Bellefonte (hereinafter "Petitioners' Brief"); 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.

² In their brief, Petitioners asserted, *inter alia*, that the units were deconstructed; flooding damaged the plants; TVA irremediably abandoned its quality assurance program; there is no way of assessing the current status of the plants; the lack of information gave Petitioners no way to frame contentions; the environmental impacts of Units 1, 2, 3, and 4 are inextricably linked; and that the (continued. . .)

ARGUMENT

I. “Reinstating” A Withdrawn Construction Permit Is Not “Granting” A New Construction Permit

A. The NRC Has Broad Discretion to Reasonably Implement Statutory Gaps in the Atomic Energy Act

Petitioners, in their brief, argue that reinstatement of a permit is, in effect, the same thing as the granting of a new permit. Petitioners’ Brief at 4. Petitioners then argue that their § 189 hearing rights associated with the grant of a CP were violated when the NRC reinstated TVA’s permits. The Petitioners cite to *Citizens Awareness Network v. NRC* to support their argument that their § 189 hearing rights were violated. *Citizens Awareness*, 59 F.3d 284 (1st Cir. 1995). Specifically, Petitioners argue, “the overarching lesson of *Citizens Awareness Network* is that ‘it is the substance of the NRC action that determines entitlement to a section 189a hearing, not the particular label the NRC chooses to assign to its action.’” Petitioners’ Brief at 5 (citing to *Citizens Awareness*, 59 F.3d at 295). Petitioners’ reliance on *Citizens* is misplaced with respect to whether NRC was legally authorized to reinstate the construction permits at issue. That case, and the quoted language, refers to whether § 189 hearing rights attach to an NRC action. *Citizens Awareness* does not, however, address whether the Commission has the legal authority to reinstate a withdrawn permit. In reaching its conclusion that reinstating is equivalent to granting, Petitioners rely upon the absence of specific language in the Act authorizing reinstatement of forfeited permits. See Petitioners’ Brief at 4.

(. . .continued)

Petitioners reserve the right to file additional NEPA arguments. Petitioners’ Brief at 2-3. These arguments relate to the formulation of contentions in a possible future proceeding and go well beyond the question of whether the NRC has the legal authority to reinstate the construction permits at issue. Accordingly, the Staff will not respond in this brief to matters associated with the admissibility of contentions.

Petitioners, however, do not cite any legal authority for the proposition that an agency is prohibited from acting when a statute does not expressly contain the specific authorizing language. The absence of statutory language specifically addressing reinstatement is not dispositive of the question of whether requisite legal authority exists.

The Supreme Court routinely holds that agencies have the broad discretion to fill statutory gaps in their enabling legislation. *See, e.g., Nat'l Cable and Telecommunications Assoc. v. Brand X Internet Services*, 545 U.S. 967, 982 (U.S. 2005) (“[I]t is for agencies, not courts, to fill statutory gaps.”). This is especially true when dealing with a broad statute such as the Atomic Energy Act. *See, e.g., Siegel v. Atomic Energy Commission*, 400 F.2d 778, 783 (D.C. Cir. 1968) (noting that the Act created 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 its statutory objective.” (*citing to Power Reactor Development Co. v. Int'l Union of Electrical, etc. Workers*, 367 U.S. 396 (1961))). Therefore, although Petitioners are correct that the statute does not explain the term “reinstatement,” this does not resolve the threshold question of legal authority. Instead, one must examine whether there is a reasonable basis in interpreting the Atomic Energy Act for a Commission finding that it has the legal authority to reinstate a withdrawn permit.

B. There is a Reasonable Basis for Finding Legal Authority to Reinstate TVA's Withdrawn Permit

The NRC Staff's Brief concluded – after considering the applicable statutes, regulations, and case law – that there is a reasonable basis for finding legal authority to reinstate a withdrawn permit. Petitioners, however, argue: “Prior to the disputed NRC ‘reinstatement’ order below, *there was no permit or license in existence*. There was thus no permit or license to suspend, condition, amend, or reinstate.” Petitioners' Brief at 6 (emphasis in the original). But this statement ignores the Commission's legal test for forfeiture established in *Comanche Peak*.

Texas Utilities Electric Co. (Comanche Peak), CLI-86-4, 23 NRC 113 (1986). The utility's permit in *Comanche Peak* was, on its face, expired at the time the utility sought an extension. The Commission, though, held that “expiration of the construction permit *did not automatically effect the forfeiture* of CPPR-126.” *Id.* at 120 (emphasis added). Texas Utilities Electric Company's expired permit, therefore, did not constrain the Commission from finding authority to extend the permit. By analogy, TVA's withdrawn permit should not constrain the Commission from finding authority to reinstate a permit that had not expired.

As mentioned in the NRC Staff's Brief, the Commission in *Comanche Peak* relied upon a line of cases interpreting the Communications Act, which was used by Congress to create the Atomic Energy Act. *Id.* at 119. These cases established this legal test: permits are not forfeited unless the NRC makes an affirmative finding for cause to terminate the permit. See, e.g., *Baker v. FCC*, 834 F.2d 181, 185 (D.C. Cir. 1987) (“[A] construction permit continues unabated *until the Commission declares the permit forfeited.*” (emphasis added)).³ The Commission, in *Comanche Peak*, could have held that once a permit is expired it does not exist and is irreversibly terminated. However, this was not the approach that the Commission adopted in *Comanche Peak*; nor was it the approach that the D.C. Circuit affirmed in *Citizens Assoc. for Sound Energy v. NRC*.⁴ Petitioners' argument that TVA's permit did not exist, therefore, is simply not controlling on the legal question of authority to reinstate a withdrawn

³ For instance, the term “forfeit,” by its very nature, implies that there be cause. See WEBSTER II NEW COLLEGE DICTIONARY 439 (defining “forfeit” as “something surrendered as punishment for a crime, offense, error, or breach of contract.”). If viewed in the context of Webster's definition of “forfeit,” the NRC's approval of TVA's withdrawal letter would not constitute a forfeiture. TVA committed no offense or error; nor did they surrender the license as punishment for an offense.

⁴ *Citizens Assoc. for Sound Energy v. NRC*, 821 F.2d 725 (D.C. Cir. 1987).

permit. The proper test is whether the NRC has affected a forfeiture for cause approving the withdrawal of the applicant's permit.

Here there has not been a forfeiture of TVA's construction permits for cause. There has not been a "revocation" as defined in § 186 of the Atomic Energy Act or any other enforcement action initiated by the NRC based on TVA's request to withdraw its permits. Section 186 ("Revocation") prescribes four bases upon which the NRC can institute a proceeding to revoke a license or permit: (1) when the applicant makes a false statement in the application; (2) when there are conditions that would warrant the Commission to refuse to grant a license if those conditions were part of the original application; (3) when the applicant fails to construct or operate a facility in accordance with the terms of the permit or license; and (4) when the applicant fails to follow the Act and/or Commission regulations. 42 U.S.C. § 2236. The NRC's response to TVA's request to withdraw its permits for Bellefonte Units 1 and 2 ("BLN 1 and 2") does not fall under any of those four bases. Therefore, the NRC did not "revoke" the permits for BLN 1 and 2, and those permits were not forfeited for cause when the NRC approved TVA's withdrawal request.

CONCLUSION

Based on the foregoing discussion, and as further explained in the Staff's initial brief, the Staff submits that the NRC possesses the requisite legal authority to reinstate TVA's CPs.

Signed (electronically) by

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this 10th day of June, 2009

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "NRC STAFF'S RESPONSE TO PETITIONERS' BRIEF REGARDING NRC'S STATUTORY AUTHORITY TO REINSTATE CONSTRUCTION PERMITS AT BELLEFONTE ", dated June 10, 2009, have been served upon the following by the Electronic Information Exchange, this 10th day of June, 2009:

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⁵ Sara Barczak and SACE do not have a Notice of Appearance before the Commission, and are also not listed on the NRC's Service List in the Electronic Information Exchange (EIE), therefore a courtesy copy is being sent via e-mail. However, since Ms. Barczak and SACE have had ample opportunity to request to participate via the agency's EIE system, the Staff does not intend to continue to serve them outside of the EIE system.