UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of	)	
	)	Docket Nos. 50-438 and 50-439
TENNESSEE VALLEY AUTHORITY	)	
	)	June 10, 2009
(Bellefonte Nuclear Power Plant, Units 1 and 2)	)	

TENNESSEE VALLEY AUTHORITY'S RESPONSE TO PETITIONERS' BRIEF OPPOSING THE NRC'S AUTHORITY TO REINSTATE THE CONSTRUCTION PERMITS FOR BELLEFONTE NUCLEAR POWER PLANT, UNITS 1 AND 2

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briefs on the "threshold" issue of "whether the NRC possesses the statutory authority" to reinstate the previously-withdrawn construction permits ("CPs") for Bellefonte Nuclear Plant ("BLN") Units 1 and 2.[1] The Commission also authorized the participants to submit responding briefs within 7 days from the filing date of the initial briefs.

On June 3, 2009, TVA, the NRC Staff, and Petitioners filed their respective initial briefs.[2] Therein, TVA demonstrates that, under the unique circumstances of this case, the Commission's reinstatement of the BLN CPs is "a reasonable and permissible exercise of this broad regulatory

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 Valley Auth.* (Bellefonte Nuclear Power Plant, Units 1 and 2), Nos. 50-438 & 50-439, Commission Order at 1 (unpublished) (May 20, 2009) ("May 20 Order").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

2 *See* 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 (June 3, 2009) ("TVA Brief"); NRC Staff's Brief in Support of NRC Authority to Reinstate Construction Permit Numbers CPPR-122 and CPPR-123) (June 3, 2009) ("NRC Staff Brief"); Brief of [Petitioners] Regarding NRC's Statutory Authority to Reinstate Construction Permits at Bellefonte (June 3, 2009) ("Petitioners' Brief").

authority" under the Atomic Energy Act of 1954, as amended ("AEA").[3] As TVA explains, neither the AEA nor NRC regulations—particularly AEA Section 185 and 10 C.F.R. § 50.55—"prohibit or limit the NRC's authority to reinstate an otherwise valid construction permit."[4] The NRC Staff similarly shows that, "[b]ecause the Commission can reasonably interpret its authority under § 185 of the [AEA], and the AEA does not prohibit reinstatement of construction permits, the NRC possesses the requisite authority to reinstate TVA's CPs for Units 1 and 2."[5]

Petitioners take a diametrically-opposed position. They assert that the AEA authorizes the "granting" of new CPs, but not the "reinstatement" of withdrawn CPs,[6] and, for that reason, the Commission violated AEA Section 189a. by not affording a hearing opportunity prior to reinstating the BLN construction permits. Thus, Petitioners request that the Commission "vacate" its reinstatement order and "void" the reinstated permits.[7]

Pursuant to the Commission's May 20 Order, TVA hereby responds to Petitioners' June 3, 2009, brief. As set forth below, TVA respectfully submits that Petitioners' arguments lack any basis in fact or law, and certainly do not require the Commission to reverse course here. To the contrary, the Commission has acted well within its broad authority and discretion under the AEA and afforded ample opportunity for public participation.

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[3] TVA Brief at 15.

[4] *Id.* at 9.

[5] NRC Staff Brief at 1. In discussing both NRC and judicial precedent stemming from the NRC's extension of the expired CP for Comanche Peak Unit 1 in the mid-1980s, TVA and the Staff note that AEA Section 185 and 10 C.F.R. § 50.55 provide a mechanism for extending CPs for a reasonable amount of time where good cause is shown. *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). As both demonstrate, the Commission reasonably relied upon that mechanism to give the same effect here, where the CPs in question had not expired, but had been withdrawn for a period of time prior to their expiration dates. *See* TVA Brief at 9; NRC Staff Brief at 5 ("Application of the principles articulated by those decisions to the relevant facts in this proceeding leads to the same reasonable interpretation that the NRC has authority to reinstate TVA's voluntarily withdrawn CPs.").

[6] Petitioners' Brief at 7.

[7] *Id*.

II. ARGUMENT

Stripped to its essence, Petitioners contend that, because the AEA does not, in so many words, provide for the "reinstatement" of a CP, the NRC is without the authority to do so. Therefore, Petitioners view the NRC's action here, in substance, as the "granting" of new construction permits.[8] From that, Petitioners believe it follows that a hearing is mandated by AEA Section 189a. before the Construction Permits are "granted." Petitioners are incorrect on all counts, as fully explained below.

A. Petitioners' Interpretation of the Atomic Energy Act of 1954, as amended, is Flawed

As a threshold matter, in arguing that the AEA does not expressly authorize the NRC to "reinstate" a CP, Petitioners conspicuously ignore established principles of statutory construction. Namely, "[i]f the intent of Congress is clear, that is the end of the matter . . . . If, however, . . . 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."[9] Petitioners provide no legal foundation for their interpretation, much less point to any *applicable* statutory provisions, regulations, or case law to demonstrate that the NRC *lacks* the legal authority to reinstate the CPs.

Thus, contrary to Petitioners' rigid approach to statutory interpretation, the AEA's silence with respect to reinstatement *does not* mandate that the action be force-fit into an otherwise enumerated action. Rather, where, as in this case, a statute is silent with respect to the precise question at issue, the pertinent inquiry is whether the agency's action is "based on a permissible construction of the statute."[10] Requiring express and literal statutory authorization for every

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[8] *Id.*

[9] *See* TVA Brief at 12 (citing *Chevron U.S.A. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984)).

[10] *Chevron,* 467 U.S. at 843; *see also* TVA Brief at 11-13.

agency action—as Petitioners demand here—would needlessly impede the NRC's efficient administration of its statutory and regulatory responsibilities.

Indeed, it was with "flexibility [as] a peculiar desideratum" that Congress enacted "a regulatory scheme which is virtually unique in the degree to which broad responsibility is reposed in the administrating agency, free of close prescription in its charter as to how it shall proceed in achieving the statutory objectives."[11] As discussed in TVA's initial brief, it is in "fill[ing] in the interstices left vacant by Congress" that the breadth of the NRC's authority and discretion is greatest.[12] Petitioners' approach to statutory construction would deprive the Commission of this authority.

The Commission's broad regulatory latitude under the AEA and its substantial discretion in construing that statute thus are firmly established. Here, the Commission reasonably concluded that reinstatement of the CPs—a narrowly-circumscribed action—was a reasonable and permissible exercise of its authority and discretion given the facts and circumstances at hand. The Commission's action, as previously explained, is consistent with the most apposite NRC and judicial precedent, including the Commission's decision to reinstate the expired Comanche Peak Unit 1 CP and the D.C. Circuit's affirmance of that decision.[13] As in that proceeding, the reinstatement of the BLN CPs "results in no substantive change: the design and construction methods [are] the same as provided in the original [BLN] construction permit[s]."[14]

Moreover, the courts have ruled 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

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[11] *Siegel v. AEC*, 400 F.2d 778, 783 (D.C. Cir. 1968).

[12] TVA Brief at 6-8 (quoting *Pub. Serv. Co. of N.H. v. NRC*, 582 F.2d 77, 82 (1978)).

[13] *See* TVA Brief at 10-13; NRC Staff Brief at 6-8.

[14] *Comanche Peak*, CLI-86-4, 23 NRC at 121.

regulations or statute as to warrant . . . correction by [a] court" or, in this instance, by the Commission itself.[15] Petitioners simply have not done so here.[16]

Rather, Petitioners have put forward no legal or factual basis to conclude that the AEA can only be interpreted to require that reinstatement of the CPs be considered tantamount to the "granting" of a CP, or that the NRC otherwise lacks authority to reinstate the BLN permits. Nor have Petitioners provided any reason to believe that the Commission's action is not fully "consistent with the underlying statutory scheme in a substantive sense" and based on reasoned decisionmaking.[17] Their disenchantment with the actions taken by the Commission in this instance is not, by itself, sufficient grounds for vacating the Reinstatement Order.[18]

B. The Commission's Reinstatement of CPPR-122 and CPPR-123 is Not the "Functional Equivalent" of "Granting" Two New Construction Permits

Apart from the fatal deficiency in Petitioners flawed interpretation of the AEA described above, Petitioners posit a similarly flawed corollary premise, *i.e.*, that reinstatement is the "functional equivalent" of "granting" these new CPs. Contrary to Petitioners' contention,

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15 *Pub. Serv. Co. of N.H. v. NRC*, 582 F.2d at 83 (citing *N. Ind. Pub. Serv. Co. v. Walton League*, 423 U.S. 12, 14-15 (1975)) (emphasis added).

16 At most, Petitioners allege (incorrectly) that TVA's quality assurance program was "abandoned permanently and irremediably," and that Units 1 and 2 are "essentially informational black holes." Petitioners' Brief at 2. Such hyperbolic and unsubstantiated assertions alone do not suffice to discharge Petitioners' burden. In fact, the NRC's Reinstatement Order expressly requires placement of the Units in "terminated plant" status and compliance with Section III.A of the Policy Statement on Deferred Plants to ensure that the temporary cessation of QA procedures at BLN does not adversely affect public health and safety. As part of its Reinstatement Request, TVA committed to reinstitute its Nuclear Quality Assurance Plan ("NQAP"), as it relates to a "deferred" plant, upon reinstatement of the CPs. *See* Letter from Ashok S. Bhatnagar, TVA, to Eric J. Leeds, NRC at 6 (Aug. 26, 2008) ("Reinstatement Request"), *available at* ADAMS Accession No. ML082410087. TVA implemented this commitment on March 13, 2009, *immediately* after reinstatement of the CPs, by submitting Revision 20 of its NQAP. *See* March 13, 2009 Letter from Michael A. Purcell, TVA, to the U.S. NRC, Encl. 1, TVA Nuclear Quality Assurance Plan, App. G at 115-19, *available at* ADAMS Accession No. ML090760973. The revised NQAP explicitly addresses the temporary termination of preventive maintenance on selected plant equipment following CP withdrawal and the potential impact of resource-recovery activities.

17 *Citizens Ass'n for Sound Energy*, 821 F.2d at 731.

18 *See In re Three Mile Island Alert, Inc.,* 771 F.2d 720, 729 (3rd Cir. 1985) ("But Congress has decreed that the agency be independent from outside control, and it would subvert this design were we to invalidate the challenged NRC action when it appears to be consonant with statutory dictates and not an unreasonable exercise of its discretion.")

reinstatement of the CPs does *not* involve the initial "*granting*" of CPs, but rather, the restoration of TVA's right to take certain NRC-approved actions pursuant to two *previously-issued* permits.[19] As the NRC Staff correctly observed:

> The reinstated permits are *the same permits as existed prior to withdrawal*, and were not amended through the reinstatement. They retain the same construction expiration dates they had prior to withdrawal. *The permit conditions are the same, and the CPs embody the same duties and limitations that existed before TVA's withdrawal request.*[20]

Importantly, the Reinstatement Order does not authorize any activity that was not already permitted by the original CPs.[21] The Commission, in fact, reinstated the CPs with far more limited authority than existed before they were withdrawn in 2006—in "terminated plant" status—only to allow TVA to "provide regulatory certainty for performing more detailed engineering and regulatory analyses . . . in considering the viability of completing the units."[22] Under the Commission's Policy Statement on Deferred Plants, a "terminated plant" is, by definition, one at which "construction has been permanently stopped."[23] Petitioners completely ignore the fact that the Commission conditioned *any* further TVA construction activities on

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[19] This critical fact was explicitly addressed by two Commissioners. *See*, *e.g.*, VR-COMSECY-08-0041 (Commissioner Svinicki's observation 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 id.* (Chairman Klein's comment 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").

[20] NRC Staff Brief at 13 (internal citation omitted) (emphasis added).

[21] Tennessee Valley Authority (Bellefonte Nuclear Plant Units 1 and 2); Order, 74 Fed. Reg. 10,969 (Mar. 13, 2009) ("Reinstatement Order"). As the Staff also aptly noted, BLN Units 1 and 2 are certainly not "new" and "are well past being preliminary design." NRC Staff Brief at 13-14. At the time TVA decided to defer further construction, Units 1 and 2 were approximately 90 percent and 60 percent complete, respectively, with the Final Safety Analysis Report ("FSAR") submitted in support of the operating license application having progressed through Amendment 29. TVA Brief at 2.

[22] 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 7 (Mar. 9, 2009) ("NRC Safety Evaluation"), available at ADAMS Accession No. ML090620052.

[23] Commission Policy Statement on Deferred Plants, 52 Fed. Reg. 38,077, 38,078 (Oct. 14, 1987)

future NRC regulatory approvals made in accordance with the Policy Statement.[24] Specifically, 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 Policy Statement.[25]

Petitioners' further claim that nothing in the AEA "authorizes 'reinstatement' of forfeited permits or licenses" also lacks merit.[26] First, the initial "granting" of a CP is premised on an applicant's demonstration of compliance with NRC safety and environmental requirements, as set forth in applicable NRC regulations.[27] Here, the requisite NRC technical and environmental findings were made at the time of *initial* CP issuance. The original findings and conclusions of the Staff and the Advisory Committee on Reactor Safeguards "are *unaffected* by the reinstatement of the CPs," because TVA has proposed no changes to the location or design of the facility as described in the PSAR and FSAR.[28] Petitioners, it seems, would have the Staff redo its prior, *still-valid* CP application reviews for no reason substantively bearing on public health and safety.

C. Petitioners' Allegation that the NRC Violated AEA Section 189a. Is Not Material to the "Threshold Authority Issue" and Is Contrary to Established Law

Finally, Petitioners also claim that the Commission violated AEA Section 189a. by not granting them "an opportunity for a hearing in advance of the decision to reinstate" the CPs.[29] First and foremost, Petitioners' argument is not material to the discrete, threshold legal question

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[24] Reinstatement Order, 74 Fed. Reg. at 10,970-71.

[25] *Id.*

[26] Petitioners' Brief at 4.

[27] *See*, *e.g.*, 10 C.F.R. §§ 50.34, 50.35.

[28] NRC Safety Evaluation at 5 (emphasis added) (finding that the Staff's "health and safety of the public would remain valid if the NRC reinstates the CPs.") Furthermore, Licensing Boards held hearings, in which members of the public participated, on site suitability, environmental, and radiological health and safety issues at the time of initial CP issuance. *Tenn. Valley Auth.* (Bellefonte Nuclear Plant, Units 1 and 2), LBP-74-66, 8 AEC 472 (1974) (Partial Initial Decision on Environmental Matters and Site Suitability); *Tenn. Valley Auth.* (Bellefonte Nuclear Plant, Units 1 an 2), LBP-74-91, 8 AEC 1124 (1974) (Initial Decision authorizing issuance of CPs).

[29] *See* Petitioners' Brief at 4-6.

posed by the Commission; *i.e.*, "*whether* the NRC possesses the statutory authority to reinstate the withdrawn construction permits."[30] Absent such statutory authority, any dispute regarding the nature and timing of the associated hearing opportunity is a moot concern.[31]

Petitioners' argument is again incorrect as a matter of law. The reinstatement of a CP is *not* one of licensing actions specifically listed in Section 189a.(1)(A) as triggering the right to request a prior hearing. As relevant here, Section 189a. grants hearing rights to persons whose interest "may be affected by [a] proceeding" for "the granting, suspending, revoking, or amending of any license or construction permit."[32] The reinstatement of a CP is none of these actions.

Petitioners' argument, to its ultimate demise, hinges on the erroneous notion that CP reinstatement is the "functional equivalent" of the "granting" of a CP. But, as explained above,[33] Petitioners are mistaken on that score. The reinstatement of the previously-issued BLN CPs in terminated plant status—many years after the Units' advanced-stage construction and placement into deferred plant status—is not remotely akin to the NRC's initial issuance of those CPs based on its review of preliminary design information. Contrary to Petitioners' claim, the subject action is not "aptly labeled" the "granting" of a permit.[34]

Accordingly, Petitioners' claim that the Commission legally erred by not granting a pre-reinstatement hearing opportunity is without merit. The Commission has held that Section 189a. "deliberately limit[s] hearing rights to those particular types of administrative actions that [are]

[30] May 20 Order at 1 (emphasis added).

[31] The underlying right to request a hearing here is not disputed. Nor is it relevant to the resolution of the "threshold authority issue." The Commission previously decided to hold a hearing on whether *good cause* exists for the reinstatement of the CPs and published a notice of opportunity for hearing. Petitioners have filed a pending Petition to Intervene.

[32] 42 U.S.C. § 2239(a)(1)(A).

[33] *See supra* section II.B., *supra.*

[34] Petitioners' Brief at 5.

listed in that section."[35] Consequently, "[i]f the form of Commission action does not fall within the limited categories enumerated in Section 189a., the Commission need not grant a hearing."[36] The federal courts also have consistently construed Section 189a.(1)(A) and its legislative history to strictly limit hearing rights to the agency actions enumerated in that provision.[37]

Petitioners try to avoid the clear import of these holdings by suggesting that "[t]he instant case is entirely different," because "there was no permit or license in existence."[38] Specifically, they attempt to contrast certain precedents cited herein by claiming that the court's finding on the availability of a hearing right hinged on its "assessment of the significance of the permit or license *alteration* at issue."[39] They also seek to analogize the NRC's action here with the NRC action overturned in *Citizens Awareness Network v. NRC*, 59 F.3d 284 (1st Cir. 1995) ("CAN").[40]

Petitioners' arguments fall flat. The Commission's reinstatement of the withdrawn BLN CPs, while perhaps procedurally unique, is not tantamount to the initial "granting" of a CP—or any other action specified in Section 189a.—including the "*de facto* amendment" at issue in the

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[35] *Commonwealth Edison Co.* (Zion Nuclear Power Station, Units 1 & 2), CLI-00-5, 51 NRC 90, 94-95 (2000) (citing *United States Dep't of Energy* (Clinch River Breeder Reactor Plant), CLI-82-23, 16 NRC 412 (1982)); *see also Zion*, CLI-00-5, 51 NRC at 96 (reviewing the legislative history of Section 189a. and stating that "[t]he upshot of this history is that Congress intentionally limited the opportunity for a hearing to certain designated agency actions").

[36] *Cleveland Elec. Illuminating Co.* (Perry Nuclear Power Plant, unit 1), CLI-96-13, 44 NRC 315, 326 (citing *San Luis Obispo Mothers for Peace v. NRC,* 751 F.2d 1287, 1315 (D.C. Cir. 1984), *reh'g on other grounds*, 789 F.2d 26, *cert denied*, 479 U.S. 923 (1986)).

[37] *See*, *e.g.*, *Mass. v. NRC*, 878 F.2d 1516, 1522 (1st Cir. 1989) ("[W]hat legislative history there exists suggests that Congress intended the provisions of [Section 189a.] to be construed quite literally. If a particular form of Commission action does not fall within one the eight categories of actions set forth in the section, no hearing need be granted by the Commission."); *Kelley v. Selin*, 42 F.3d 1501, 1514-15 (6th Cir. 1995), *cert. denied*, 515 U.S. 1159 (1995) (stating that "not every proposed action falls under this provision; the right to automatic participation applies only when the agency acts in a matter provided for in § 189(a)"); *San Luis Obispo Mothers for Peace*, 751 F.2d at 1314 (lifting of license suspension is not an amendment to the license).

[38] Petitioners' Brief at 6.

[39] *Id.* (emphasis added).

[40] In *CAN*, the First Circuit held that the NRC had abruptly changed its decommissioning policy so as to retroactively enlarge an extant licensee's authority, because the original license did not authorize the licensee to implement major-component dismantling of the type undertaken in the project. *Id*. at 294-95.

CAN case.[41] As noted above, the reinstated CPs convey to TVA no greater authority than existed *before* TVA's withdrawal request; indeed, because the CPs were reinstated in a terminated status, TVA's authority to engage in activities previously permitted is severely limited. Petitioners' attempts to both distinguish and apply judicial precedents are thus unavailing. Section 189a. does not here dictate the right to an advance or "pre-effectiveness" hearing.[42]

IV. CONCLUSION

For the foregoing reasons, Petitioners' arguments should be rejected. In these unique circumstances, the Commission's reinstatement of the BLN CPs is a reasonable and permissible exercise of this broad regulatory authority under the AEA. The Commission did not "grant" new CPs or improperly deprive Petitioners of a hearing right under AEA Section 189a.

Respectfully submitted,

/signed (electronically) by/

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COUNSEL FOR TVA

Dated in Washington, D.C.
this 10th day of June 2009

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[41] Beyond this point, the *CAN* decision does not address the pivotal issue here –whether the NRC has the authority to reinstate the CPs, other than by issuing, *ab initio*, wholly new CPs. Furthermore, unlike the situation in *CAN*, the very authority conveyed here by reinstatement of the CPs was subject to both agency review and public scrutiny, including adjudication.

[42] *See Long Island Lighting Co.* (Shoreham Nucelar Power Station, Unit 1), CLI-92-4, 35 NRC 69, 76-77 (1992) (holding that the "transfer" of an operating license (like a CP reinstatement) is not one of the four actions listed in AEA Section 189a.(1) for which the Commission is required to offer a "pre-effectiveness" hearing).

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CERTIFICATE OF SERVICE

I hereby certify that, on June 10, 2009, a copy of "Tennessee Valley Authority's Response to Petitioners' Brief Opposing the NRC's Authority to Reinstate the Construction Permits for Bellefonte Nuclear Power Plant, Units 1 and 2," dated June 10, 2009, was filed electronically with the Electronic Information Exchange.

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