

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of Tennessee Valley Authority Bellefonte Nuclear Power Plant Units 1 and 2 Permits CPPR-122 and CPPR-123
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June 10, 2009

Docket Nos. 50-438 and 50-439

**REPLY BRIEF OF THE PETITIONERS
IN RESPONSE TO THE COMMISSION'S MAY 20, 2009 ORDER
CONCERNING THE NRC'S STATUTORY AUTHORITY TO REINSTATE THE
BELLEFONTE CONSTRUCTION PERMITS**

Pursuant to the order issued May 20, 2009 by the Nuclear Regulatory Commission, the Blue Ridge Environmental Defense League with its chapter Bellefonte Efficiency and Sustainability Team ("BREDL") and the Southern Alliance for Clean Energy ("SACE") (collectively, "Petitioners") hereby submit their reply brief in Response to the Commission's May 20, 2009 Order Concerning the NRC's Statutory Authority to Reinstate the Bellefonte Construction Permits.

In their briefs, both the Staff and TVA mistakenly rely on the permit *extension* provisions of the Atomic Energy Act, and cite a variety of precedents discussing expired or lapsed permits; however, they conveniently ignore the fact that the permits in this case did not expire and TVA did not seek reinstatement of expired permits. In this case, TVA affirmatively sought *termination* of its permits, (not a terminated plant status under the NRC's policy on deferred plants), and the Staff granted that request. This is not a case of a permittee seeking an after-the-fact extension of a lapsed permit. Instead, TVA made a business decision to forfeit its permits in 2006 and cannot now rely on statutory provisions for permit extensions. TVA had no right to seek extension of the permits

because it no longer held any valid permits for Bellefonte Units 1 and 2 and, as a result, the Staff and TVA's reliance on authority relating to permit extensions is entirely misplaced. The Atomic Energy Act provides only one means for a non-permittee to obtain a construction permit: to file an application for a new permit. Thus, the NRC should vacate its decision and void TVA's construction permits for Bellefonte Units 1 and 2.

ARGUMENT

A. "Reinstatement" of Withdrawn Permits is Not Analogous to an Extension of Expired Permits.

Both TVA and the Staff readily admit that reinstatement of a voluntarily withdrawn permit is an unprecedented situation. They then incorrectly draw an analogy to the extension of an expired permit under Section 185 of the Atomic Energy Act ("AEA").¹ Neither TVA nor the Staff provides any rational explanation why reinstating forfeited permits should fall under the statutory provisions for permit extensions. Unlike the situation in *Citizens Association for Sound Energy v. NRC* ("*Comanche Peak*"), where the court confronted extension of a lapsed permit under Section 185, TVA forfeited its rights when it sought and was granted withdrawal of its construction permits.² The AEA's permit extension provisions simply do not apply in a case where TVA did not hold any valid permits and did not seek a permit extension.

¹ 42 U.S.C. § 2235.

² 821 F.2d 725 (D.C. Cir. 1987), *affirming Texas Utilities Electric Co.* ("*Comanche Peak*"), CLI-86-4, 23 NRC 113 (1986).

In *Comanche Peak*, the permit holder, Texas Utilities Electric Company (“TUEC”), sought an after-the-fact extension of an expired permit under AEA Section 185.³ Thus, the Commission was confronted with the question:

[W]hether TUEC's failure to make a timely application for an extension prior to the expiration date of its construction permit had the effect of causing a complete forfeiture of the permit, such as to preclude the issuance of an extension and to require the initiation of an entirely new construction permit proceeding.⁴

After examining the language and legislative history of Section 185, the Commission determined that the mere expiration of a construction permit did not result in an automatic forfeiture of all rights under the lapsed permit:

[W]e hold today that the expiration of the construction permit did not automatically effect the forfeiture of CPPR-126, and that the Commission was not then barred from considering TUEC's application for extension of the latest construction date. As a result, a complete *de novo* construction permit proceeding is not warranted.⁵

On appeal, the D.C. Circuit in *Comanche Peak* similarly focused on the statutory language of Section 185, and whether it prohibited extension of an already-expired permit:

The plain language of Section 185 permits the Commission to extend a completion date for “good cause.” There is no language specifying that the expiration of the construction permit automatically effects forfeiture of the permit, or that the Commission is then barred from an application to extend the latest construction date.⁶

³ *Comanche Peak*, 23 NRC at 116.

⁴ *Id.* at 117.

⁵ *Id.* at 120.

⁶ 821 F.2d at 730.

Finding no statutory prohibition, the Court of Appeals affirmed the Commission's determination that it had authority to grant a permit extension after the permit expired.⁷

Notably, both the NRC and the Court of Appeals in *Comanche Peak* presumed that a new *de novo* permit proceeding would have been required if the construction permit had been forfeited, which is precisely the case with TVA's construction permits for Bellefonte Units 1 and 2. In contrast to *Comanche Peak*, the permits for Bellefonte Units 1 and 2 did not expire but were terminated when the NRC approved TVA's request to withdraw them. Thus, *Comanche Peak* and other cases discussing reinstatement of *expired* permits miss the point entirely because they do not address the situation of a permit holder voluntarily relinquishing its permit. Section 185 provides no basis for NRC to reinstate TVA's construction permits, which had not expired but which were voluntarily withdrawn.

B. TVA Forfeited its Permits When it Sought and Obtained Withdrawal from NRC.

The facts of the extant case show that TVA intended to terminate its construction permits for Bellefonte Units 1 and 2 when it submitted a request to NRC to withdraw the permits. The intent was clear and unequivocal: TVA terminated construction and requested that NRC withdraw (terminate) the underlying permits. There was no suggestion that the action terminating the permits was anything but final. TVA did not merely stop construction, but affirmatively forfeited all rights under the permits.

On December 12, 2005, TVA submitted a letter informing NRC that it had placed Unit 1 and 2 in terminated status, and would "submit a request for withdrawal of the

⁷ *Id.* at 731.

construction permits” within 90 days.⁸ In the letter, TVA explained the purpose of its withdrawal request: “Canceling construction of the existing facility and withdrawal of the construction permits are necessary in order to close out the existing BLN project and facilitate the future use of the BLN site for the benefit of TVA’s ratepayers.”⁹

In January 2006, TVA produced an Environmental Assessment (EA) for plant redress of the Bellefonte site.¹⁰ According to the EA:

Canceling construction of the existing facility and withdrawal of the construction permits is necessary in order to close out the existing BLN project. These actions also facilitate the consideration of other possible uses of the BLN site.¹¹

The EA considered two alternatives: (A) Retain permits and keep project in deferred status; and (B) Cancel construction, seek withdrawal of the permits, and redress the site.¹² Alternative B is identified in the EA as TVA’s preferred alternative.¹³

Consistent with the EA, on April 6, 2006 TVA submitted a letter to the NRC “request[ing] NRC approval to withdraw [the] BLN construction permits....” In the letter TVA explained that its “Board of Directors has approved the cancellation of

⁸ Letter from Glenn W. Morris, TVA, to James Dyer NRC (December 15, 2005), *available at* ADAMS Accession No. ML060120054.

⁹ *Id.*

¹⁰ Tennessee Valley Authority, Bellefonte Nuclear Plant Redress, Final Environmental Assessment (January 2006), *available at* ADAMS Accession No. ML061810465.

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

construction of the deferred Bellefonte units.”¹⁴ Additionally, the letter stated: “TVA and NRC have acknowledged that certain approvals, primarily the redress plan pursuant to 10 CFR 51.41, are necessary to allow termination of the subject construction permits.”¹⁵ Further, TVA noted in the letter that “prompt approval will allow for redress activities to commence supporting optimal use of the site.”¹⁶

In response to TVA’s request, on August 22, 2006, NRC produced an EA for the proposed withdrawal of the construction permits, which was subsequently published in the Federal Register on August 28, 2006.”¹⁷ According to the EA: “The proposed action is issuance of a letter terminating [the] construction permits,” which was “necessary in order to close out the existing BLN project.”¹⁸ The EA’s stated need for the proposed action: “TVA has terminated construction of both BLN Units 1 and 2. This action by the NRC would terminate the construction permits.”¹⁹

On September 14, 2006, NRC’s Director of Division of Operating Reactor Licensing, Office of Nuclear Reactor Regulation issued a letter to TVA formally

¹⁴ Letter from Glenn W. Morris, TVA, to NRC Document Control Desk (April 6, 2006) , available at ADAMS Accession No. ML061000538.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ Nuclear Regulatory Commission (Bellefonte Nuclear Plant, Units 1 and 2), Notice, 71 Fed. Reg. 50948 (Aug. 28, 2006).

¹⁸ *Id.*

¹⁹ *Id.*

withdrawing the construction permits for Bellefonte Units 1 and 2.²⁰ As with TVA's withdrawal request, NRC's intent was unambiguous:

As requested in your letter of April 6, 2006, your application to withdraw Construction Permit Nos. CPPR-122 and CPPR-123 is hereby granted. Accordingly, the staff considers Construction Permit Nos. CPPR-122 and CPPR-123 to be terminated.²¹

Additionally, on September 15, 2006 NRC issued a press release announcing that it "has approved the TVA's request to terminate the construction permits for the unfinished Bellefonte Nuclear Plant."²²

Unlike *Baker v. FCC*, relied upon by the Staff, here there is no doubt that the construction permits were terminated, and all rights forfeited, by the actions of both TVA and NRC.²³ In *Baker*, appellants wrote a letter to the FCC stating that their permits should be allowed to expire and that they wanted them to be considered surrendered. Because the FCC never replied to this request, the court found that the permits had not been withdrawn and thus could be extended. The court stated that, "a construction permit continues unabated until the Commission itself declares the permit forfeited." In stark contrast to the situation in *Baker*, in the Bellefonte case the NRC published notice in the Federal Register and issued a press release.

²⁰ Letter from Catherine Haney, NRC, to Karl W. Singer, TVA (Sept. 14, 2006), available at ADAMS Accession No. ML061810505.

²¹ *Id.*

²² NRC Press Release No. 06-112 (Sept. 15, 2006), available at ML062580144.

²³ *Baker v. FCC*, 834 F.2d 181 (D.C. Cir. 1987).

CONCLUSION

The Atomic Energy Act does not authorize the NRC to “reinstate” a construction permit that has been terminated. The so-called reinstatement of the CP’s at issue here was, in fact and law, the granting of new CPs. Therefore, the Commission should vacate its decision and void TVA’s permits.

Respectfully submitted,

A handwritten signature in black ink that reads "Louis A. Zeller". The signature is written in a cursive style and is followed by a horizontal line.

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CERTIFICATE OF SERVICE

I hereby certify that copies of the REPLY BRIEF OF THE PETITIONERS IN RESPONSE TO THE COMMISSION'S MAY 20, 2009 ORDER CONCERNING THE NRC'S STATUTORY AUTHORITY TO REINSTATE THE BELLEFONTE CONSTRUCTION PERMITS was served on the following persons via Electronic Information Exchange this 10th day of June, 2009.

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Signed this day, June 10, 2009, in Glendale Springs, NC

A handwritten signature in black ink that reads "Louis A. Zeller". The signature is written in a cursive style and is followed by a horizontal line.

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