

**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)	
Construction Permits CPPR-122)	July 27, 2009
and CPPR-123)	
)	
)	

**PETITIONERS' OPPOSITION TO
TENNESSEE VALLEY AUTHORITY'S MOTION TO STRIKE
PETITIONERS' SUPPLEMENTAL BASIS FOR PROPOSED CONTENTION 5**

In its July 17 Motion To Strike Petitioners' Supplemental Basis For Proposed Contention 5, Tennessee Valley Authority ("TVA") contends that "Petitioners' filing is unauthorized and procedurally defective in multiple respects...." Petitioners disagree. TVA's characterization of Petitioners' filing – and the pertinent law – is incorrect in multiple respects.

1. Joint Intervenors' Filing Did Not Contravene the Board's Order of May 20.

While Blue Ridge Environmental Defense League and its chapter Bellefonte Efficiency and Sustainability Team and the Southern Alliance for Clean Energy ("Petitioners") acknowledge the statement in the May 20 Order to the effect that "Petitioners' proposed **contentions** will be held in abeyance,..." this language does not amount to an order holding all **proceedings** in abeyance. And if it was the Commission's

intent to bar the filing of all papers of any nature, that intent was certainly not, contrary to TVA's suggestion, expressed "unequivocally." The Commission's true intent was evidenced two sentences later, where it directed TVA and the Staff not to respond to the proposed contentions so that the Commission could consider the legal issues surrounding the construction permit reinstatement issue.

Accordingly, Petitioners did not believe that simply bringing the disputed Federal Register notice to the Commission's attention would violate the letter or spirit of the May 20 Order. The filing of the Supplemental Basis was far from an attempt to add or alter the issues at play in the proceeding, nor to make new legal argument. In effect, it was nothing more than a notice of supplemental authority, which can generally be offered at any time.

2. Petitioners' Filing Was Not "an Improperly-Filed Motion That Fails to Comply with the Consultation Requirements of 10 C.F.R. § 2.323(b)"

Petitioners' filing was not a motion. It was a notice of supplemental authority. It did not seek any relief, nor did it attempt to expand the issues, change any deadlines, or in any way seek to change the procedural status quo. If we had considered it a motion seeking relief (such as TVA's current motion), we would have simultaneously filed a proposed order pursuant to 10 C.F.R. 2.323(b).

3. Petitioners' Filing Was Not Subject To 10 C.F.R. 2.309(f)(2), As It Was Not A New Or Amended Contention

On its face 10 C.F.R. 2.309(f)(2) applies only to new or amended contentions. Compliance with this rule was not necessary.

4. The Commission And Any Licensing Board That May Be Empanelled Are Required To Take Official Notice Of The Disputed Federal Register Notice.

The Commission's rules provide that:

Official notice. (1) The Commission or the presiding officer may take official notice of any fact of which a court of the United States may take judicial notice or of any technical or scientific fact within the knowledge of the Commission...

10 C.F.R. 2.711(j). *See also* 10 C.F.R. 2.337 (similar). Federal courts are affirmatively required to take judicial notice of the Federal Register. 44 U.S.C. § 1507. Therefore, the Commission is either required, or has great latitude, to receive the Federal Register notice into the administrative record.

5. Conclusion

It is a mystery to Petitioners as to why TVA, which published the Federal Register notice for public consumption, would now have legal counsel burden the Commission and the parties with legal briefing in an attempt to keep the document shielded from the view of the Commission. It was the TVA itself which published the document for public (and presumably NRC) comment.

Moreover, placing the Federal Register announcement on the record in this proceeding at this point in time can subject TVA to no prejudice, because TVA will have ample opportunity to explain and otherwise respond to it when the Commission lifts its stay on responses to the Petition to Intervene. This leaves Petitioners puzzled as to TVA's argument that Petitioners' filing of the Supplemental Basis "deprives TVA of an opportunity to address the substance of their Supplemental Basis." Motion at 4-5. Petitioners attempted to place the document on the record at an early stage precisely so

that TVA would have every opportunity to address it in its response to the Petition to Intervene.

TVA has suffered no harm; there has been no foul.

Respectfully submitted,

A handwritten signature in black ink, reading "Louis A. Zeller", followed by a horizontal line.

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CERTIFICATE OF SERVICE

I hereby certify that copies of the Joint Intervenor's Supplemental Basis For Previously Submitted Contention 5 – Lack Of Good Cause were served this day on the following persons via Electronic Information Exchange. (Service list updated July 27, 2009)

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Signed this day in Glendale Springs, NC

A handwritten signature in black ink, reading "Louis A. Zeller", followed by a horizontal line.

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