UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of Tennessee Valley Authority Bellefonte Nuclear Power Plant Units 1 and 2	Docket Nos. 50-438 and 50-439 February 16, 2010

PETITIONERS' REPLY TO NRC STAFF'S AND TVA'S ANSWERS IN OPPOSITION TO PETITION FOR INTERVENTION AND REQUEST FOR HEARING

Pursuant to 10 C.F.R. § 2.309(h)(2), Petitioners Blue Ridge Environmental Defense League, on behalf of it members and its chapter Bellefonte Efficiency and Sustainability Team ("BREDL"), and the Southern Alliance for Clean Energy ("SACE"), respectfully reply to the U.S. Nuclear Regulatory Commission ("NRC") Staff's and the Tennessee Valley Authority's ("TVA's") Answers Opposing the Petition for Intervention and Request for Hearing filed in this proceeding by Petitioners on May 8, 2009.

ARGUMENT

1. All Petitioners Satisfy the Pertinent Standing Requirements

TVA challenges the standing of Petitioner SACE on the ground that no one has submitted a Notice of Appearance on SACE's behalf. TVA Opp. at 17-18. Because the undersigned attorney has today submitted a Notice of Appearance in which he announces his representation of all two Petitioners, any alleged deficiency in this regard has now been rectified.

The Staff challenges the standing of Petitioner BEST on the grounds that BEST has failed to submit affidavits from BEST members attesting to their prospective injury from the

reinstatement of the disputed construction permits ("CPs"). Staff Opp. at 11-12. The Staff's position flies in the face of well-settled law providing that if one party's standing has been established, the standing of allied parties is not to be questioned. *See, e.g., Clinton v. City of New York*, 118 S.Ct. 2091, 2100 n.19 (1998); *U.S. Dept. of Labor v. Triplett*, 494 U.S. 715, 719, 110 S.Ct. 1428 (1990); *Board of Natural Resources of the State of Washington v. Brown*, 992 F.2d 937, 942 (9th Cir. 1993) ("If any of these [plaintiffs] has standing, we may reach the merits ... without considering whether the other two also have standing.") (citing cases).

All of the Petitioners are represented by a single attorney and speak with one voice. Given that BREDL's standing has been conceded by both TVA and the Staff and is objectively impeccable, there is no ground for further litigation of this matter, per the mandate of the Supreme Court.

2. Petitioners's Contentions Satisfy the Applicable Standards for Admissibility

A. TVA and the Staff Misinterpret the "Good Cause" Standard

On January 7 of this year the Commission rejected the Petitioners' claim that the Commission lacks authority to reinstate a CP without first holding an adjudicatory proceeding, and ordered that the instant proceeding resume progress without consideration of that issue. CLI-10-6. The Commission stated that the proceeding should focus on the question whether TVA has established "good cause" for reinstatement of the CPs. *Id.*, slip op. at 19. In so doing the Commission cast the Board and the parties into uncharted waters without a rudder, as the Commission never defined the term "good cause," and there is nothing the the Atomic Energy Act ("Act") or the Commission's regulations that provides relevant guidance.

As the Commission and TVA acknowledge,[1] this licensing is unprecedented. Never before has a Licensing Board conducted an adjudication over a request to reinstate a CP. Congress evidently never foresaw that such a proceeding would ever take place, as it failed to allow for – or set standards governing – such proceedings in the Act. This stands distinct from proceedings to obtain a CP or an operating licence ("OL"), where Congress has prescribed certain minimum requirements, including a showing that the permit or license will be "in conformity with the provisions of this Act and ... the rules and regulations of the Commission,..." Act § 185(a), 42 U.S.C. § 2235(a). The Commission has fleshed out this statutory requirement with detailed criteria that must be satisfied by any applicant. *See, e.g.*, 10 C.F.R. § 50.43(c) (The [applicant must show that] issuance of a construction permit, operating license, early site permit, combined license, or manufacturing license to the applicant will not, in the opinion of the Commission, be **inimical to the common defense and security or to the health and safety of the public**.")(emphasis added). Here, on the other hand, the Commission has merely suggested that TVA need show that "good cause" supports its request for reinstatement, and that proffered contentions go to this general question.

TVA and the Staff argue, TVA Opp. at 21-22 and Staff Opp. at 10-11, that the "good cause" standard from § 185 of the Act (dealing with proceedings to extend CPs) is relevant and provides useful guidance. "Good cause" as used in § 185 turns on questions such as whether "the applicant is responsible for the delay [that led to the expiration of the CP] and has acted intentionally and without a valid business purpose." *Public Service Company of New Hampshire, et al*. (Seabrook Station, Unit 2), CLI-84-6, 19 NRC 975,978 (1984). TVA and the

[1] TVA Opp. at 14, CLI-10-6, slip op. at 1.

Staff would use these tests as the measure of whether the contentions proffered by Petitioners in this proceeding pass muster.

Petitioners disagree. This version of the "good cause" standard is retrospective in nature, as it addresses the applicant's past negligence or culpability.[2] Here the question at bar should be prospective; it should address the question whether the applicant will be able to complete construction of the plant without jeopardizing public safety or the environment.

On its face the "good cause" standard in § 185 has no application to the circumstances of this proceeding. Obviously, TVA's decision to voluntarily surrender the CPs in 2006 was made "intentionally" and in pursuit of a "valid business purpose." Confining the scope of this proceeding to such narrow, odd questions would do nothing to serve public policy nor further the purposes of the Act.

In sum, the Staff's and TVA's crabbed interpretation of the term "good cause" finds no support anywhere in the Act or the NRC's regulations. Their attempt to squeeze all of the Petitioners' contentions through this strainer is clearly designed to produce only one conclusion – that none of Petitioners' contentions pass muster. And this is exactly what they conclude.

B. The Board Must Assume that Construction of Units 1 and 2 Will Proceed

The Staff and TVA argue that all of Petitioners' contentions are fatally flawed because they are founded an invalid assumption: if the CPs are reinstated, then construction will resume. *See, e.g.*, TVA Opp. at 37 ("Petitioners again incorrectly assume that the reinstatement of the CPs authorizes anew the construction of the reactors.") Because TVA is allegedly unsure as to when or whether it will resume construction of the plants, it would have the Licensing Board and the parties defer any consideration of the environmental or safety implications of the resumption

[2] In this respect the "good cause" standard in 10 C.F.R. § 2.309(c)(1), authorizing a Licensing Board to admit late-filed contentions, is similar – and similarly unhelpful.

of construction until that undetermined point in the future when it makes up its mind. In effect, TVA would have us assume that construction will **not** resume.

Similarly, the Staff denies that reinstatement of the CPs triggers the NEPA requirement to evaluate the cumulative environmental impact of the action. But it acknowledges that such an environmental evaluation will be required "[i]f construction activities resume..." Staff Opp. at 19.

Thus, both TVA and the Staff would have the Board assume that reinstatement of the CPs has no legally cognizable environmental or safety implications; rather, such issues become cognizable only when the permittee undertakes actual physical construction activities. Under this approach, they contend, none of Petitioners' are admissible because no construction activities have allegedly occurred.

This is illogical in the extreme. Obviously there is never a guarantee that one who obtains a government permit or license will actually use it. Sometimes circumstances change such that development plans are cancelled. In such cases, the potential harms considered by regulatory agencies in past permit proceedings were never realized.

But if this were grounds for ignoring the risks and harms presented by proposed projects until actual construction begins, then no permit proceeding could ever address the predictable adverse effects of a proposed project. Why prepare an environmental impact statement for a combined operating license if the applicant might decide not to go forward with plant construction and operation? Indeed, to take the TVA/Staff logic even farther, why consider the risks and potential adverse effects when construction begins? As we have learned at Bellefonte, sometimes construction begins but is not completed. Doubtless TVA and Staff would have the NRC postpone its regulatory review until construction is actually completed. This would be

much more "efficient" for the two agencies, as they would never have to "waste" their time on needless NEPA and other regulatory reviews.

Clearly, this argument turns logic on its head. When someone applies for a driver's license their vision must be tested regardless of whether he or she actually intends to use the license to drive a car. The government **assumes**, rightly or wrongly, that the license will be used for the activity that it authorizes. Similarly, when a permit or license is sought under the Atomic Energy Act regulators **must affirmatively assume** that the project, if authorized, will in fact go forward. Otherwise there would nothing to review. Here, the Board must assume that reinstatement of the CPs means that construction of the two plants will begin anew. All effects which **might** reasonably be expected to result from the plant's construction must be evaluated at the time that the agency's authorization is granted – or before.

Contentions 3 and 3b: NEPA Compliance

In their NEPA contentions the Petitioners alleged that (1) NEPA has not been complied with because the Staff had failed to conduct a review of the cumulative impacts of reinstating the CPs for Units 1 and 2, and (2) reinstatement triggered NEPA's requirement for preparation of an EIS. In the Petition Petitioners cited recent statements by TVA indicating that in recent years there have been significant swings in the cost of nuclear plant construction as well as shifts in the market for electrical power. Petition at 18. Changes of this nature shift the landscape on which all previous environmental reviews had been conducted, as they go to the heart of NEPA's requirement that alternatives to the proposed action be evaluated.

Chiefly for the reasons summarized above, TVA and the Staff assert that any contention dealing with environmental matters is beyond the scope of the proceeding. Staff Opp. at 15-19; TVA Opp. at 23-36. If this position is adopted by the Board, it will represent a clear violation of

the statutory requirements. NEPA applies to all agency actions except those subject to a categorical exclusion,[3] none of which are alleged to apply here. The Staff and TVA can reasonably disagree with Petitioners as to whether an EIS must be prepared for the reinstatement, but there is no ground for denying Petitioners an opportunity to prove that reinstatement will trigger the duty to prepare a Supplemental EIS,[4] or that the environmental assessment prepared by the Staff last March improperly fails to evaluate cumulative impacts as required by NEPA. As explained by the Supreme Court, NEPA is an "action-forcing" statute that requires agencies to take a "hard look" at the environmental consequences of their actions, even after those actions have been approved. *March v. Oregon Natural Resources Council*, 490 U.S. 360, 372-73 (1989).

Respectfully submitted,

Signed (electronically) this 16th day of February, 2009, in Washington, D.C.

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[3] *See* 10 C.F.R. § 51.22.

[4] *See* 10 C.F.R. § 51.71.

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Petitioners' Reply were served this day on the following persons via Electronic Information Exchange.

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