

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)	
)	
TENNESSEE VALLEY AUTHORITY)	Docket Nos. 50-438-CP & 50-439-CP
)	
(Bellefonte Nuclear Power Plant)	ASLB No. 10-896-01-CP-BD01
Units 1 and 2))	

NRC STAFF RESPONSE TO PETITIONERS' MOTION FOR ADDITIONAL TIME IN WHICH
TO (1) FILE A NOTICE OF APPEARANCE OF COUNSEL AND (2) REPLY TO TVA
AND NRC STAFF ANSWERS TO PETITION FOR INTERVENTION

INTRODUCTION

Pursuant to the Atomic Safety and Licensing Board ("Board") "Memorandum and Order (Submission of Joint Petitioners' Reply Pleading)" of February 12, 2010 ("Order"), the staff of the Nuclear Regulatory Commission ("NRC Staff") responds to the "Motion for Additional Time in Which to (1) File a Notice of Appearance of Counsel and (2) Reply to TVA and NRC Staff Answers to Petition for Intervention" ("Motion") filed on February 16, 2010 by the Blue Ridge Environmental Defense League ("BREDL") and its chapter Bellefonte Efficiency and Sustainability Team ("BEST") and the Southern Alliance for Clean Energy ("SACE") (collectively, "Petitioners"). The Motion states that "the reason that Petitioners were late in filing said documents [reply brief] is that they were diligently attempting to secure the services of counsel." Motion at 1. For the reasons discussed herein, the Petitioners' Motion should be denied for failing to demonstrate good cause for not meeting the February 5, 2010 deadline.

DISCUSSION

The Board issued a "Memorandum and Order (Initial Pre-hearing Order)" (January 15, 2010) ("January 15 Order") that required that Petitioners' submit their reply briefs to the NRC Staff and TVA's answers on February 5, 2010. For reasons related to the mid-Atlantic storms,

which resulted in the closure of federal agencies in the Greater Washington, DC metropolitan area for part of the afternoon of February 5, 2010 until February 11, 2010 and Petitioners' failure to reply by the February 5, 2010 deadline, the Board issued an Order on February 12, 2010. Order at 1, 2. The February 12, 2010 Order allowed Petitioners an opportunity to submit reply briefs to the NRC Staff's and TVA's answers with a motion for additional time to file the reply briefs by 12:00 P.M. on February 16, 2010. According to the Order, if Petitioners intended to reply to the NRC Staff's and TVA's answers, Petitioners were required to show good cause as to why they failed to submit a timely reply brief. The Board ordered that any opposition by the TVA and the NRC Staff to Petitioners' Motion be filed by 12:00 p.m. on February 17, 2010.

As a preliminary matter, the availability of the Electronic Information Exchange system prior to and after the closure of federal agencies did not preclude Petitioners from submitting a reply or timely seeking an extension. Moreover, the closure of federal agencies did not occur until the afternoon of February 5, 2010, and Petitioners have not alleged problems with the EIE system in support of their Motion. Therefore, the weather-related closures did not impact Petitioners' ability to timely file a reply or seek an extension.

While the NRC Staff is not insensitive to any unrepresented petitioners' choice to retain counsel and the challenges of these financially difficult times in the United States, Petitioners have not sufficiently explained why their inability to retain counsel resulted in their failure to meet the February 5, 2010 deadline as set by the January 15 Order. See Statement of Policy on Conduct of Adjudicatory Proceedings, CLI-98-12, 48 NRC 18, 21 (granting extensions of time is warranted only in unavoidable and extreme circumstances); see *also* Policy Statement on Conduct of Licensing Proceedings, CLI-81-8, 13 NRC 452, 454 (1981) ("while a board should endeavor to conduct the proceeding in a manner that takes account the special circumstances faced by any participant, the fact that a party may have personal or other obligations or possess fewer resources than others to devote to the proceeding does not relieve that party of its

hearing obligations”). Petitioners confirm that counsel, James Dougherty, was retained last week, after the February 5, 2010 deadline, but provide no additional information beyond that. They also claim that they “attempted to secure representation from *pro bono* counsel” without success, but, again, fail to provide any information explaining how that affected their ability to meet the February 5, 2010 deadline. Motion at 1. They provide no details regarding when their effort to retain counsel began.

More importantly, the January 15 Order, specifically at Section II.C, sets forth the procedure to follow in the event a participant determines that they are unable to meet a pleading deadline. The Petitioners, however, failed to follow that procedure or explain why they were unable to file a motion for additional time on or before February 5, 2010 because they were attempting to retain legal counsel. The Motion’s silence on these key facts can only imply that Petitioners never intended to reply to the NRC Staff’s and TVA’s answers and that their effort to retain counsel began after the February 5, 2010 deadline. Petitioners were well aware of the February 5 deadline, and their post-deadline explanations shed no light as to why they could not timely file their pleading. Petitioners’ motion does not support a finding of good cause.

Not only do Petitioners attempt to obtain a post-hoc extension without good cause to submit their attached reply, their reply contains several post-hoc bases and assertions that were not included in their original petition. See Nuclear Management Co. (Palisades Nuclear Plant), CLI-06-17, 63 NRC 727, 732 (2006) (“It is well established in NRC proceedings that a reply cannot expand the scope of the arguments set forth in the original hearing request. See, e.g., *Louisiana Energy Services, L.P.* (National Enrichment Facility), CLI-04-25, 60 NRC 223 (2004), *reconsideration denied*, CLI-04-35, 60 NRC 619 (2004). *Accord USEC, Inc.* (American Centrifuge Plant), CLI-06-9, 63 NRC 433, 439 (2006). Replies must focus narrowly on the legal or factual arguments first presented in the original petition or raised in the answers to it.”) For example, 10 C.F.R. § 51.71 and arguments related to categorical exclusions were not

presented in Petitioners' original petition in support of contentions 3 and 3a and should be disregarded. Petitioners' Reply at 7. Cases cited by Petitioners to support the standing of BEST are also inapplicable in this proceeding and should be ignored. See Motion at 1, 2. Additionally, any arguments that imply that the NRC Staff did not have authority to reinstate the CPs should also be ignored because the Commission has already denied admission of contentions 1 and 2, which raised those issues. See Motion at 3. Accordingly, the Petitioners' reply brief should be disregarded.

CONCLUSION

For the reasons explained in this response, the Petitioners' Motion should be denied.

Signed (electronically) by

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "NRC STAFF RESPONSE TO PETITIONERS' MOTION FOR ADDITIONAL TIME IN WHICH TO (1) FILE A NOTICE OF APPEARANCE OF COUNSEL AND (2) REPLY TO TVA AND NRC STAFF ANSWERS TO PETITION FOR INTERVENTION" dated February 17, 2010, have been served upon the following by the Electronic Information Exchange, this 17th day of February, 2010:

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