

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD PANEL

Before the Licensing Board:

G. Paul Bollwerk, III, Chairman
Dr. Anthony J. Baratta
Dr. William W. Sager

In the Matter of

TENNESSEE VALLEY AUTHORITY

(Bellefonte Nuclear Plant Units 1 and 2)

Docket Nos. 50-438-CP and 50-439-CP

ASLBP No. 10-896-01-CP-BD01

February 18, 2010

MEMORANDUM AND ORDER

(Ruling on Motion for Additional Time; Prehearing Conference
Argument Time Allocations; Webstreaming;
Written Limited Appearance Statements)

A. Motion for Additional Time

In response to the Licensing Board's February 12, 2010 memorandum and order regarding the timing of the submission of the Joint Petitioners¹ reply to the January 29, 2010 responses of the Tennessee Valley Authority (TVA) and the NRC staff to the Joint Petitioners May 8, 2009 hearing petition, by motion dated February 16, 2010, Joint Petitioners have requested additional time within which to submit their reply pleading and a notice of appearance of counsel. See 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 (Feb. 16, 2010) [hereinafter Additional Time Motion]. Accompanying the motion are the reply pleading and the appearance notice, as well as a 10 C.F.R. § 2.323(b) certification

¹ Joint Petitioners include the Blue Ridge Environmental Defense League (BREDL) and its Bellefonte Efficiency and Sustainability Team (BEST) chapter and the Southern Alliance for Clean Energy (SACE).

regarding the efforts of Joint Petitioners' counsel to consult with the other participants regarding the motion. See Petitioners' Reply to NRC Staff's and TVA's Answers in Opposition to Petition for Intervention and Request for Hearing (Feb. 16, 2010); Notice of Appearance of James B. Dougherty (Feb. 16, 2010); Certificate of Counsel in Support of Motion (Feb. 16, 2010). In February 17, 2010 responses, both TVA and the staff oppose the motion and assert that the reply pleading should not be accepted. See [TVA] Answer Opposing Petitioners' Motion for Additional Time to File Reply (Feb. 17, 2010) [hereinafter TVA Opposition]; 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 (Feb. 17, 2010) [hereinafter Staff Opposition].

According to the motion, Joint Petitioners did not file their reply by the February 5 due date established in the Board's January 15, 2010 initial prehearing order because "they were diligently attempting to secure the services of counsel to represent them henceforth in this proceeding." Additional Time Motion at 1. Their motion also indicates that although Joint Petitioners were having difficulty finding counsel because of a lack of financial resources, a circumstance exacerbated by the current economic downturn, last week the attorney whose appearance notice accompanied their motion for additional time agreed to represent them. As a consequence, the motion requests that the accompanying reply pleading and counsel's appearance notice be accepted out of time. See id.

In response, TVA asserts that the Joint Petitioners motion fails to meet the "good cause" standard in that it does not support the requisite showing of "unavoidable and extreme circumstances" mandated under a 1998 Commission decision in the Calvert Cliffs operating license life extension proceeding and a Commission policy statement issued that same year. TVA Opposition at 3 (quoting Baltimore Gas & Elec. Co. (Calvert Cliffs Nuclear Power Plant,

Units 1 & 2), CLI-98-25, 48 NRC 325, 342 (1998), and Statement of Policy on Conduct of Adjudicatory Proceedings, CLI-98-12, 48 NRC 18, 21 (1998)). According to TVA, in addition to Joint Petitioners' failure to seek an extension of the February 5 filing deadline prior to its expiration, neither Joint Petitioners purported difficulties in obtaining counsel nor their pro se status provide sufficient grounds to justify allowing their reply pleading to be filed out-of-time. See id. at 3-4 & nn.12-13. The staff likewise asserts that Joint Petitioners have failed to establish "unavoidable and extreme circumstances," noting they have not provided any details regarding their attempts to obtain counsel or how the lack of counsel affected their ability to meet the February 5 filing date for their reply. See Staff Opposition at 2-3. Additionally, the staff contends that the Joint Petitioners reply improperly contains bases and assertions that were not contained in their original petition. See id. at 3-4.

In ruling on the Joint Petitioners motion for leave to file out of time, we note initially that we do so under a "good cause" standard that is somewhat different from that championed by TVA and the staff. In its April 2005 rulemaking adopting model milestones for NRC adjudicatory proceedings, see Model Milestones for NRC Adjudicatory Proceedings, 70 NRC 20,457 (Apr. 20, 2005), the Commission revised 10 C.F.R. § 2.334(b) to establish a "good cause" standard for modifications to a hearing schedule that

take[s] into account the following factors, among other things:

- (1) Whether the requesting party has exercised due diligence to adhere to the schedule;
- (2) Whether the requested change is the result of unavoidable circumstances;
- (3) Whether the other parties have agreed to the change and the overall effect of the change on the schedule of the case.

This standard, as it applies to changes in the overall schedule for a proceeding, likewise seems an appropriate one to apply to a possible change in the schedule for a particular filing in a proceeding.

In this instance, the Board is frank to state that Joint Petitioners have not done much to help themselves in terms of meeting this standard. Clearly, the better approach would have been to advise the Board before the February 5 deadline, via a timely motion to extend the reply filing date, of any impact on that submission date associated with their difficulties in obtaining counsel. Moreover, the pro se status of the one representative designated by Joint Petitioners does not fully excuse this digression, given his prior participation in the Bellefonte combined license (COL) proceeding and other NRC COL adjudications. On the other hand, just as the Board had difficulty in issuing an order inquiring into the lack of a filing because of the four-and-one-half-day closure of federal government offices in the Washington, D.C. area between February 5 and 11, 2010, in what was (hopefully) a once-in-a-decade series of snow storms, Joint Petitioners' new counsel, who apparently is from the same area, may also have had trouble, once retained last week, in preparing and submitting an appropriate motion and pleading. Moreover, given there will be nearly two weeks from the submission of the Joint Petitioners seven-page reply filing until the oral argument regarding the viability of the Joint Petitioners hearing request, the overall effect upon the schedule for this proceeding, as well as the other participants' ability to address the matters raised in the reply filing, is marginal.

As a consequence, under the unique circumstances here, we grant the Joint Petitioners February 16, 2010 motion for additional time/leave to file, time having expired, regarding their reply pleading and will accept the entry of appearance by Joint Petitioners' new counsel,² albeit

² It appears from the service list that accompanied the E-Filing form and the transmission e-mail for these submissions that Joint Petitioners' new counsel may not have taken the steps to permit him to utilize the E-Filing system. If he has not already done so, he should complete the process to ensure that he is able to electronically sign and file any future submissions on behalf of Joint Petitioners.

without prejudice to any challenges by TVA and/or the staff regarding (1) the standing of SACE;³ and (2) whether the Joint Petitioners reply brief improperly expands the scope of the arguments set forth in their hearing petition. In doing so, we take note of the explicit representation by Joint Petitioners' new counsel that "future Board-established deadlines will be met."⁴ Additional Time Motion at 1.

B. Argument Order and Time Allocations

For the initial prehearing conference in this 10 C.F.R. Part 50 construction permit (CP) reinstatement proceeding currently scheduled for Monday, March 1, 2010, beginning at 9:00 a.m. Eastern Time (ET) in the Licensing Board Panel's hearing room in Rockville, Maryland, the order of argument and the allocation of time for argument by participant counsel/representatives as to each of the issues or contentions outlined below is as follows:

1. Application of Atomic Energy Act section 185's "Good Cause" standard in a CP reinstatement proceeding
Joint Petitioners -- 10 minutes (includes rebuttal)
TVA and NRC staff -- 10 minutes (total for both participants)

³ Since Joint Petitioners, including SACE, now have counsel to represent their interests who presumably will be appearing in person before the Board during the March 1, 2010 initial prehearing in the Licensing Board Panel's Rockville hearing room, it appears unnecessary for an SACE representative to have a teleconference connection to the hearing room, as was requested in the January 26, 2010 joint scheduling report, see Letter from Andrea Z. Jones, NRC Staff Counsel, to Licensing Board (Jan. 26, 2010) at 1. Anyone is, of course, free to view the proceeding via the webstreaming link provided in section C below.

⁴ In this regard, we would add that our willingness to consider the "overall effect of the change on the schedule" element as one that favors the moving party is not likely to be repressed in any instance in which, absent unavoidable circumstances, an motion to extend a deadline has not been timely proffered before the deadline in question.

2. The admissibility of the Joint Petitioners contentions, in the following sequence:
 - a. Contention 3: The Environmental Assessment Violated NEPA
Joint Petitioners -- 10 minutes (includes rebuttal)
TVA and NRC staff -- 10 minutes (total for both participants)
 - b. Contention 4: Plant Site Geologic Issues Are Not Adequately Addressed
Joint Petitioners -- 10 minutes (includes rebuttal)
TVA and NRC staff -- 10 minutes (total for both participants)
 - c. Contention 5: Lack of Good Cause for Reinstatement⁵
Joint Petitioners -- 20 minutes (includes rebuttal)
TVA and NRC staff -- 20 minutes (total for both participants)
 - d. Contention 6: The Re-instatement Was Improper Because TVA Has Not and Cannot Meet the NRC's Quality Assurance and Quality Control (QA/QC) Requirements⁶
Joint Petitioners -- 20 minutes (includes rebuttal)
TVA and NRC staff -- 20 minutes (total for both participants)
 - e. Contention 7: The BNL Units 1 and 2 Cannot Satisfy NRC Safety, Environmental and Other Requirements That Have Been Imposed or Upgraded Since 1974
Joint Petitioners -- 10 minutes (includes rebuttal)
TVA and NRC staff -- 10 minutes (total for both participants)

⁵ This allocation includes any arguments relating to the July 15, 2009 Joint Petitioners supplemental basis for Contention 5 and the associated July 17, 2009 TVA motion to strike that pleading.

⁶ This allocation includes any arguments relating to the January 11, 2010 Joint Petitioners supplemental basis for Contention 6 and the associated January 14, 2010 TVA motion to strike that pleading.

f. Contention 8: Bellefonte Units 1 and 2 Do Not Meet Operating Life Requirements

Joint Petitioners -- 10 minutes (includes rebuttal)

TVA and NRC staff -- 10 minutes (total for both participants)

g. Contention 9: Impacts on Aquatic Resources Including Fish and Mussel of the Tennessee River

Joint Petitioners -- 10 minutes (includes rebuttal)

TVA and NRC staff -- 10 minutes (total for both participants)

At the beginning of the argument regarding each matter, Joint Petitioners will be asked to specify how much of their total allotted time they wish to reserve for rebuttal while TVA and the staff will be asked to indicate how they have agreed to divide their time. Only one counsel per participant will be permitted to make a presentation regarding any single matter/contention.

In making their arguments, the participants should bear in mind that the members of the Licensing Board will have read their pleadings. As such, they should focus their presentations on the critical points in controversy as those issues have emerged as a result of the various participant filings.⁷ And in this regard, as may be appropriate to a particular contention, the Board would ask the participants to be prepared to address whether or not the issue statement would more appropriately (1) abide a 10 C.F.R. Part 50 operating license proceeding; or (2) be the subject of a petition under 10 C.F.R. § 2.206.

C. Opportunity to View the Proceeding Via Webstreaming

In accordance with the Licensing Board's January 21, 2010 memorandum and order, see Licensing Board Memorandum and Order (Scheduling Initial Prehearing Conference)

⁷ If any of the participants require any special audio/visual equipment for making their March 1 argument presentations (e.g., projector, screen), they should contact Licensing Board Panel law clerk Ann Hove (301-415-5117 or ann.hove@nrc.gov) and apprise her of those needs on or before Wednesday, February 24, 2010.

(Jan. 21, 2010) at 2 (unpublished), the proceeding will be made available for live viewing via an internet webstreaming feed at:

<http://www.visualwebcaster.com/event.asp?id=66071>

D. Limited Appearance Statements by Members of the Public

Relative to the opportunity for members of the public to present limited appearance statements in accord with 10 C.F.R. § 2.315(a), the Board does not intend to conduct oral limited appearance sessions at this juncture. Any person not a petitioner to this proceeding that wishes to make a statement regarding the issues in the proceeding can do so in writing. Limited appearance statements, which are placed in the docket for the hearing, provide members of the public with an opportunity to make the Board and/or the participants aware of their concerns about matters at issue in the proceeding.

A written limited appearance statement can be submitted at any time and should be sent to the Office of the Secretary using one of the methods prescribed below:

Mail to: Office of the Secretary
Rulemakings and Adjudications Staff
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001

Fax to: (301) 415-1101 (verification (301) 415-1966)

E-mail to: hearingdocket@nrc.gov

In addition, a copy of the limited appearance statement should be sent to the Licensing Board Chairman using the same method at the address below:

Mail to: Administrative Judge G. Paul Bollwerk, III
Atomic Safety and Licensing Board Panel
Mail Stop T-3F23
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001

Fax to: (301) 415-5599 (verification (301) 415-7550)

E-mail to: paul.bollwerk@nrc.gov

It is so ORDERED.

FOR THE ATOMIC SAFETY
AND LICENSING BOARD

/RA/

G. Paul Bollwerk, III
CHAIRMAN

Rockville, Maryland

February 18, 2010

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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Units 1 and 2))
)
)

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LB MEMORANDUM AND ORDER (RULING ON MOTION FOR ADDITIONAL TIME; PREHEARING CONFERENCE ARGUMENT TIME ALLOCATIONS; WEBSTREAMING; WRITTEN LIMITED APPEARANCE STATEMENTS) have been served upon the following persons by the Electronic Information Exchange (EIE) with additional service by email on persons marked with*.

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 PREHEARING CONFERENCE ARGUMENT TIME ALLOCATIONS; WEBSTREAMING;
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[Original signed by Evangeline S. Ngbea]
 Office of the Secretary of the Commission

Dated at Rockville, Maryland
 this 18th day of February 2010