

April 20, 2010

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

Docket Nos. 50-438 and 50-439

BRIEF ON APPEAL OF LBP-10-07 BY
BLUE RIDGE ENVIRONMENTAL DEFENSE LEAGUE, ITS CHAPTER BELLEFONTE
EFFICIENCY AND SUSTAINABILITY TEAM AND
THE SOUTHERN ALLIANCE FOR CLEAN ENERGY

I. INTRODUCTION

Pursuant to 10 C.F.R. § 2.311(a), the Blue Ridge Environmental Defense League, its Chapter Bellefonte Efficiency and Sustainability Team and the Southern Alliance for Clean Energy (collectively “Appellants”) hereby appeal LBP-10-07, in which the Atomic Safety and Licensing Board (“ASLB”) refused to admit them to this proceeding as intervenors, Tennessee Valley Authority (Bellefonte Nuclear Power Plant), LBP-10-07, __ NRC __ (April 2, 2010), and provide briefing in support of their appeal. In its ruling the ASLB dismissed the Appellants’ meritorious contention regarding quality assurance on the improper ground of Appellants’ alleged failure to supplement the contention to deal with inconsequential information that had been transmitted by Tennessee Valley Authority (“TVA”) to the Nuclear Regulatory Commission (“NRC”) Staff. Therefore the Commission should reverse LBP-09-26’s ruling with respect to Appellants and remand it to the ASLB with a directive to proceed with the licensing proceeding.

II. FACTUAL AND PROCEDURAL BACKGROUND

On August 28, 2008, TVA sent a letter to the NRC asking that the agency reinstate the 10 C.F.R. Part 50 construction permits (“CPs”) for Bellefonte Nuclear Plant, Units 1 and 2, two partially completed Babcock and Wilcox pressurized water reactors located on TVA’s Bellefonte site approximately seven miles northeast of Scottsboro, Alabama. On February 18, 2009, the Commission issued an order authorizing reinstatement of the construction permits.

ML090490838. On Mar. 13, 2009, the NRC Staff published a notice of opportunity to petition to intervene and request a hearing on the matter of the reinstatement of the CPs.

On May 8, 2009, the Appellants filed such a petition and submitted several contentions that it intended to litigate. Among these was:

Contention 6. The re-instatement was improper because TVA has not and cannot meet the NRC’s Quality Assurance and Quality Control requirements.

On January 7, 2010, the Commission reaffirmed its decision of February 18, 2009, to reinstate the CPs for Units 1 and 2.

III. STANDARDS FOR ADMISSIBILITY OF CONTENTIONS

A contention is admissible when it meets the requirements in 10 C.F.R. § 2.309(f)(1):

(1) A request for hearing or petition for leave to intervene must set forth with particularity the contentions sought to be raised. For each contention, the request or petition must:

(i) Provide a specific statement of the issue of law or fact to be raised or controverted;

(ii) Provide a brief explanation of the basis for the contention;

(iii) Demonstrate that the issue raised in the contention is within the scope of the proceeding;

(iv) Demonstrate that the issue raised in the contention is material to the findings the NRC must make to support the action that is involved in the proceeding;

(v) Provide a concise statement of the alleged facts or expert opinions which support the requestor's/petitioner's position on the issue and on which the petitioner intends to rely at hearing, together with references to the specific sources and documents on which the requestor/petitioner intends to rely to support its position on the issue; and

(vi) Provide sufficient information to show that a genuine dispute exists with the applicant/licensee on a material issue of law or fact. This information must include references to specific portions of the application (including the applicant's environmental report and safety report) that the petitioner disputes and the supporting reasons for each dispute, or, if the petitioner believes that the application fails to contain information on a relevant matter as required by law, the identification of each failure and the supporting reasons for the petitioner's belief.

The purpose of the contention rule is to “focus litigation on concrete issues and result in a clearer and more focused record for decision.” 69 Fed. Reg. at 2202; *see also Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 553-54 (1978); *BPI v. AEC*, 502 F.2d 424, 428 (D.C. Cir. 1974). The purpose of the basis requirements is: (1) to assure that the contention raises a matter appropriate for adjudication in a particular proceeding; (2) to establish a sufficient foundation for the contention to warrant further inquiry into the assertion; and (3) to put other parties sufficiently on notice of the issues so that they will know generally what they will have to defend against or oppose. *Ariz. Pub. Serv. Co., et al.* (Palo Verde Nuclear Generating Station, Units 1, 2 and 3), LBP-91-19, 33 NRC 397, 400 (1991); *Philadelphia Electric Co.* (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-216, 8 AEC 13, 20-21 (1974).

At the contention-filing stage, petitioners need not prove that a contention is true; all that is required of a contention is that it be specific and have a basis. *Washington Public Power Supply System* (WPPSS Nuclear Project No. 2), ALAB-722, 17 NRC 546, 551 n.5 (1983), citing *Houston Lighting and Power Co.* (Allens Creek Nuclear Generating Station, Unit 1), ALAB-590, 11 NRC 542 (1980). *See also* Final Rule, Rules of Practice for Domestic Licensing Proceedings – Procedural Changes in the Hearing Process, 54 Fed. Reg. 33,168 at 33,171

(August 11, 1989) (“[t]he protestant must make a *minimal* showing that material facts are in dispute, thereby demonstrating that an ‘inquiry in depth’ is appropriate.” (emphasis added), citing *Connecticut Bankers Association v. Board of Governors*, 627 F.2d 245, 251 (D.C. Cir. 1980). See also *id.*: “the quality of the evidentiary support provided at the summary disposition stage is expected to be of a higher level than at the contention filing stage.”

A final and over-arching consideration is that the Petition to Intervene was submitted on a *pro se* basis. NRC precedent makes it clear that *pro se* petitioners are to be held to less rigid standards for pleading. *Public Service Electric & Gas Co.* (Salem Nuclear Generating Station, Units 1 & 2), ALAB-136, 6 AEC 487 (1973); *Shieldalloy Metallurgical Corp.*, CLI-99-12, 49 NRC 347, 354 (1999); *Crow Butte Resources, Inc.* (North Trend Expansion Project), LBP-08-6, 67 NRC 241 (2008).

IV. ARGUMENT

In their Contention 6 and supporting explanatory material, Appellants described how TVA had halted construction of its Bellefonte Units 1 and 2 and let the two plants sit idle for 17 years before voluntarily withdrawing its CPs in 2005. In the explanation, the Appellants then drew the ASLB through the detailed and extensive “non-concurrence” that had been submitted by NRC staffer Joseph Williams. Mr. Williams, who had worked on the Bellefonte matter personally and therefore had direct knowledge of many of the underlying facts, stated that TVA had taken many actions at the site that “were not conducted in accordance with NRC-approved programs, and were not subject to NRC inspection.”

In addition, Appellants submitted with their petition the declaration of Arnold Gunderson, an expert with a Master’s Degree in Nuclear Engineering and 35 years’ experience

in the nuclear power industry. In his 15-page declaration Mr. Gunderson, drawing on his extensive review of the file in this proceeding, including the “non-concurrence” by Mr. Williams, explained in great detail the difficulties that TVA would inevitably face in attempting to validate the safety and environmental acceptability of the structures, systems and components of Units 1 and 2. Mr. Gunderson explained his opinion that TVA would not be able to demonstrate compliance with the requirements of General Design Criterion 1. His conclusion with regard to quality assurance:

[D]ue to the lack of a viable and rigorous Quality Assurance Program for more than 3 years, it is my professional opinion that Reinstatement of TVA’s Bellefonte Units 1 and 2 Construction Permits without an entirely new Construction Permit process constitutes a grave risk to public safety.

At oral argument, counsel for the Appellants laid out the argument at length, emphasizing the unique difficulties of demonstrating compliance with the NRC’s quality assurance requirements once a permit holder has abandoned its quality assurance program. *See* Transcript of Prehearing Conference, March 1, 2010. In response, ASLB Judge Barrata indicated his agreement with Appellants’ general approach:

JUDGE BARRATA: I don't disagree. I agree 100 percent with you...

Transcript of Prehearing Conference, March 1, 2010 at 130.

Ultimately, however, the ASLB found “this issue statement to be inadmissible because it lacks adequate support.” The key problem with the contention, according to the ASLB, was that after it was submitted, TVA sent a letter to the Staff indicating that a corrective action program had been instituted to address quality assurance problems. According to the ASLB, the sending of this TVA letter triggered a duty on the part of Appellants to submit additional analysis addressing the inadequacies in TVA’S corrective action plan. Since Appellants did not do so, there was evidently nothing to litigate:

TVA documents that supply previously unavailable information central to the focus of this contention have not been referenced or made the subject of any additional analysis by Joint Petitioners in seeking to have this contention admitted. As a consequence, we find this contention essentially has been rendered moot by subsequent events, i.e., the submission of information that, at least facially, addresses Joint Petitioners concern about TVA QA/QC compliance, and thus is inadmissible.

LBP-10-07 at 34 (footnote omitted).

The ASLB's dismissal of Contention 6 is profoundly inconsistent with the applicable regulations and principles regarding the admissibility of contentions, as set forth in section II of this brief. The Appellants' contention was supported by virtually all that one could reasonably expect:

- a clear expression of the nature of the contention;
- support already in the record by a whistleblowing NRC Staffer to the effect that conditions at the plant were so dangerous that the CPs should not be reinstated; and
- a declaration and the promise of future assistance and expert testimony of a seasoned expert witness who had obviously studied the record in depth.

Further, this was not the typical CP, OL, or COL proceeding, in which a petitioner for intervention can formulate contentions based on an existing, substantial, technical/environmental record (*e.g.*, an Application and an Environmental Report). Rather, when Appellants submitted their contentions there was nothing the file other than a few letters that had been exchanged between TVA and the Staff. This provides precious little for concerned neighbors to go on.

Perhaps the most troubling aspect of the ASLB's decision was its central basis: that two pieces of correspondence between TVA and the Staff indicated that a corrective action program had been put in place, which could, in some unspecified manner, resolve all of Appellants' concerns regarding quality assurance. *See* LBP-10-07 at 33-34. Evidently the ASLB believed all of the statements in the two letters to be true, and that there was no way that Appellants and

their expert witness could find fault in the purported corrective action program. Perhaps the ASLB wanted Appellants, based on these two letters, to formulate contentions demonstrating that the purported corrective action program was technically deficient.

Whatever its poorly explicated rationale, the ASLB established a bar that is virtually unattainable, especially in a case, like this, where the file contains virtually no information. In so doing the ASLB committed reversible error. Its decision should be remanded.

Respectfully submitted,

Signed (electronically) this 20th day of April, 2010, in Washington, D.C.

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Brief on Appeal, and associated Motion for Leave, were served this day on the following persons via Electronic Information Exchange:

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