

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

LBP-16-01

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 Power Plant Units 3 and 4)

Docket Nos. 52-014-COL and 52-015-COL

ASLBP No. 08-864-02-COL-BD01

February 29, 2016

MEMORANDUM AND ORDER
(Granting Motion to Withdraw Application and
Terminating Proceeding)

On February 12, 2016, the Tennessee Valley Authority (TVA) filed a motion asking that this Licensing Board authorize the withdrawal, without prejudice, of its pending application seeking 10 C.F.R. Part 52 combined licenses (COLs) to construct and operate proposed Units 3 and 4 at TVA's existing Bellefonte Nuclear Power Plant (BNPP) site in Jackson County, Alabama. See [TVA]'s Motion to Withdraw COL Application Without Prejudice (Feb. 12, 2016) at 1 [hereinafter TVA Withdrawal Motion]. In its motion, TVA states that neither the NRC staff nor intervenors Blue Ridge Environmental Defense League and Southern Alliance for Clean Energy (Joint Intervenors) oppose its withdrawal motion. See id. at 2; see also NRC Staff Response to Board Order Requesting Briefing (Feb. 12, 2016) at 1 n.4 (referencing TVA's "unopposed" withdrawal motion) [hereinafter Staff Response].

For the reasons set forth below, we grant TVA's motion to withdraw its COL application (COLA) for the BNPP Units 3 and 4, without prejudice, and terminate this adjudicatory proceeding.

I. BACKGROUND

In the Board's two previous published decisions in this case, we outlined the circumstances surrounding the October 2007 submission of TVA's COLA for BNPP Units 3 and 4 and the 2008 initiation of this adjudicatory proceeding, see LBP-08-16, 68 NRC 361, 374–77 (2008), rev'd in part, CLI-09-3, 69 NRC 68 (2009), and referred ruling declined, CLI-09-21, 70 NRC 927 (2009), and the subsequent 2011 TVA-requested suspension of the staff's technical review of that application pending a TVA analysis of its long-term energy needs, see LBP-11-37, 74 NRC 774, 778–79 (2011). The staff's suspension of TVA's application review, in effect, suspended this proceeding as well.¹ See id. at 779; see also 10 C.F.R. § 2.332(d).

Thereafter, in an August 25, 2015 issuance, the Board inquired about the status of TVA's plans for BNPP Units 3 and 4 in light of the August 21 TVA Board of Directors' approval of an Integrated Resource Plan (IRP) that suggested any renewed licensing activity at the BNPP site was anticipated to occur, if at all, in the mid-2020s or beyond. See Licensing Board Memorandum and Order (Request for Joint Status Report) (Aug. 25, 2015) at 1–3 (unpublished) [hereinafter Board Status Report Order]. Specifically, the Board asked the parties to provide a joint report addressing how this case should proceed.² See id. at 3. Among other things, the

¹ The parties continued to submit periodic mandatory document disclosures pursuant to 10 C.F.R. § 2.336(d). See Licensing Board Memorandum and Order (Revising Schedule for Mandatory Disclosure/Hearing File Updates) (Apr. 20, 2012) at 2 (unpublished).

² In requesting this status report, the Board explained that

[t]his potential decade-long hiatus once again raises the question of this adjudicatory proceeding's continued efficacy, particularly given the strong likelihood that, prior to receiving further Board consideration as part of this adjudication (or garnering additional staff attention as part of an active licensing review), TVA's current

(continued...)

Board asked that the parties consider application withdrawal or a settlement that would permit this adjudicatory proceeding to be terminated conditioned on a staff commitment to seek re-noticing of the opportunity for a hearing if the staff's TVA COLA technical review was reinstated. See id. at 3–4 (citing UniStar Nuclear Energy [COLA] for Calvert Cliffs Nuclear Power Plant, Unit 3, 80 Fed. Reg. 42,558, 42,559 (July 17, 2015) (COLA withdrawal notice); AmerenUE (Callaway Plant, Unit 2), LBP-09-23, 70 NRC 659 (2009) (COLA case settlement based on renoticing)). In a September 23 response, the parties informed the Board that (1) TVA was still evaluating its plans with respect to BNPP Unit 3 and 4 and did not intend to withdraw the COLA at that time; and (2) the parties anticipated engaging in settlement discussions and would provide the Board with another status report in early November. See Joint Status Report (Sept. 23, 2015) at 1. Subsequently, the parties filed a November 2 report declaring that no settlement had been reached and that no additional settlement discussions were planned. See Updated Joint Status Report (Nov. 2, 2015) at 2 [hereinafter Updated Status Report].

Advising the parties that it needed more information before determining how to proceed, the Board scheduled a telephone prehearing conference for December 4, 2015. See Licensing Board Memorandum and Order (Scheduling Prehearing Conference) (Dec. 1, 2015) at 1 (unpublished); see also Licensing Board Memorandum and Order (Scheduling Telephone Conference) (Nov. 23, 2015) at 2 (unpublished). During that conference call, when the Board raised the question of further settlement discussions,³ Joint Intervenors expressed a strong

²(...continued)

COLA would need appreciable revision to address intervening technical and environmental developments.

Board Status Report Order at 2–3 (citation omitted).

³ At the outset, the Board also suggested the possibility of the appointment of a settlement judge pursuant to 10 C.F.R. § 2.338(b) to aid the parties in their discussions. See
(continued...)

disinclination to engage in further talks regarding terminating this adjudication without the application being withdrawn by TVA. See Tr. at 316. Then, as a follow-up to the December 4 prehearing conference, in a January 4, 2016 issuance the Board identified additional settlement conditions that it asked the parties to confirm they had considered previously, see Licensing Board Memorandum and Order (Request for Additional Status Information) (Jan. 4, 2016) at 2–4 (unpublished), which the parties did in a January 19 filing, see Joint Response to Board Request for Additional Status Information (Jan. 19, 2016) at 1–2.

On that same date, however, Joint Intervenors submitted a separate filing asserting, among other things, that in the absence of a settlement, termination of this adjudication could result only from TVA's withdrawal of its COLA or Board dismissal of the TVA application as having been abandoned. See Joint Intervenors' Separate Statement Regarding Additional Status Information (Jan. 19, 2016) at 2 (citing P.R. Electric Power Auth. (North Coast Nuclear Plant, Unit 1), ALAB-605, 12 NRC 153 (1980)). By issuance dated January 22, the Board asked the parties to submit briefs, with TVA and staff filing first, on the issues of (1) whether the current circumstances regarding TVA planning for BNPP Units 3 and 4, as outlined in the 2015 IRP, could be considered actual or constructive abandonment of its COLA; and (2) the TVA/staff resource implications of restarting staff's suspended technical review as compared to TVA refiling the COLA if TVA decided to proceed with BNPP Units 3 and 4 in the mid-2020s or beyond. See Licensing Board Memorandum and Order (Requesting Party Briefs on the Issue of "Abandonment") (Jan. 22, 2016) at 2–3 (unpublished). But on the February 12 due date for the

³(...continued)

Board Status Report Order at 4 n.4. Although TVA initially voiced support for obtaining a settlement judge, see Updated Status Report at 2, in the face of Joint Intervenors' opposition to such a designation, both TVA and the staff indicated they did not support any effort to have a settlement judge named absent agreement by all the parties, see Tr. at 310–14.

TVA and staff briefs, TVA submitted the motion to withdraw the COLA for BNPP Units 3 and 4 that is now pending with the Board.⁴

II. ANALYSIS

The circumstances under which an applicant can withdraw an application docketed by the agency are set forth in section 2.107(a) of title 10 of the Code of Federal Regulations, entitled “Withdrawal of application,” which states in pertinent part:

The Commission may permit an applicant to withdraw an application prior to the issuance of a notice of hearing on such terms and conditions as it may prescribe, or may, on receiving a request for withdrawal of an application, deny the application or dismiss it with prejudice. . . . Withdrawal of an application after issuance of a notice of hearing shall be on such terms as the presiding officer may prescribe.

Commission caselaw also indicates that the withdrawal of an application moots any adjudicatory proceeding regarding that application. See Niagara Mohawk Power Corp. (Nine Mile Point Nuclear Station, Units 1 & 2), CLI-00-9, 51 NRC 293, 294 (2000).

Consistent with this regulation, a licensing board lacks jurisdiction to impose conditions upon, or otherwise impede, the withdrawal of an application associated with a proceeding before the board unless a notice of hearing has been issued. But once such a notice has been issued, any application withdrawal request must be approved by the licensing board and is subject to any appropriate conditions the board may impose. See Phila. Electric Co. (Fulton Generating Station, Units 1 and 2), ALAB-657, 14 NRC 967, 974 (1981); U.S. Dep’t of Energy

⁴ In addition, on February 12 TVA filed a pleading stating that, in light of its withdrawal motion, submitting a brief regarding the Board’s COLA abandonment and resource implication questions was unnecessary as being moot. See [TVA]’s Brief in Response to the Board’s January 22, 2016 Order Requesting Briefs on Abandonment (Feb. 12, 2016) at 3–4. While making much the same observation, the staff nonetheless submitted a brief addressing both the COLA abandonment and resource implication questions. See Staff Response at 1 n.4, 4–11.

(High-Level Waste Repository), LBP-10-11, 71 NRC 609, 624 (2010), aff'd by an equally divided Commission, CLI-11-7, 74 NRC 212 (2011). Further, because the filing of an application usually is voluntary, an applicant's withdrawal decision is generally considered a business judgment, the soundness of which is not a matter for licensing board consideration. See Pac. Gas & Electric Co. (Stanislaus Nuclear Project, Unit 1), LBP-83-2, 17 NRC 45, 51 (1983). If, however, an adequate showing is made of withdrawal-associated harm to a party or the public interest in general, a licensing board can act to grant either (1) a withdrawal without prejudice (signifying no merits disposition was made and the application can be refiled), albeit with appropriate conditions to protect a party or the public interest, see Duke Power Co. (Perkins Nuclear Station, Units 1, 2 and 3), LBP-82-81, 16 NRC 1128, 1134-35 (1982); or (2) a withdrawal with prejudice (which precludes an application from being refiled), see P.R. Electric Power Auth. (North Coast Nuclear Plant, Unit 1), ALAB-662, 14 NRC 1125, 1132, 1135 (1981).⁵

⁵ A licensing board has significant leeway in defining the circumstances under which an application can be withdrawn, but any withdrawal terms imposed by a board must bear a reasonable relationship to the conduct and the legal harm at which they are aimed and the record must support any findings concerning the conduct and the harm in question. See Fulton, ALAB-657, 14 NRC at 974. In addition, while the proponent of a withdrawal condition bears the burden of offering some explanation regarding the relief sought, see Sequoyah Fuels Corp., CLI-95-2, 41 NRC 179, 192-93 (1995), purported harms that generally have not been considered adequate to warrant imposing conditions on a without-prejudice withdrawal or to sustain a with-prejudice withdrawal include the uncertainty and expense associated with additional hearings or other litigation, harm to property values, and psychological harm. See N. Coast, ALAB-662, 14 NRC at 1135; Fulton, ALAB-657, 14 NRC at 973, 978-79; Phila. Electric Co. (Fulton Generating Station, Units 1 and 2), LBP-84-43, 20 NRC 1333, 1337-38 (1984); Perkins, LBP-82-81, 16 NRC at 1134-35. Further, mandating a with-prejudice withdrawal is a severe sanction that should be reserved for those unusual situations that involve substantial prejudice to a party or the public interest in general. See N. Coast, ALAB-662, 14 NRC at 1132-33.

In this instance, a notice of hearing having been issued in this proceeding,⁶ this Board has jurisdiction over TVA's February 12 request to withdraw its COLA for BNPP Units 3 and 4. Further, nothing on the record before us suggests that any harm to the other parties to this proceeding or the public interest in general will accrue from granting TVA's withdrawal request,

⁶ Generally, the initial hearing notice for an agency licensing case is a Commission-issued "notice of opportunity for a hearing," which offers any interested person the chance to file an intervention petition challenging a requested licensing action. Yet, in such a "contested" case, as it is often referred to, that hearing opportunity notice would not trigger licensing board jurisdiction over a withdrawal motion. See Pub. Serv. Co. of Ind. (Marble Hill Nuclear Generating Station, Units 1 & 2), LBP-86-37, 24 NRC 719, 723-24 (1986) (in reactor operating license case, notice of hearing, rather than notice of receipt of application or notice of opportunity for a hearing, triggers licensing board jurisdiction under section 2.107(a) to approve withdrawal motion). Instead, in such a "contested" case, in most instances licensing board promulgation of a "notice of hearing" providing board jurisdiction over a withdrawal motion comes after the board has ruled on the efficacy of any intervention petitions and determined that an adjudicatory hearing is warranted. See id.

We observe, however, that this proceeding does not necessarily conform to that procedural framework because the TVA COLA requested permission to construct a commercial production or utilization facility under section 103 of the Atomic Energy Act (AEA), 42 U.S.C. § 2133. As a consequence, consistent with the requirements of AEA section 189a.(1)(A), id. § 2239(a)(1)(A), the initial hearing notice for this proceeding was a February 2008 Commission-issued "notice of hearing," see [TVA]; Notice of Hearing and Opportunity To Petition for Leave To Intervene on a [COL] for Bellefonte Units 3 and 4, 73 Fed. Reg. 7611, 7612 (Feb. 8, 2008), denoting that a so-called "mandatory" or "uncontested" hearing would be conducted in which TVA and the staff are the parties, see Kerr-McGee Corp. (West Chicago Rare Earths Facility), CLI-82-2, 15 NRC 232, 246 (1982), aff'd, City of West Chicago v. NRC, 701 F.2d 632 (7th Cir. 1983). Additionally, a hearing opportunity component to that notice advised interested persons that they could seek to challenge the TVA COLA by attempting to become a party to a "contested" hearing, see 73 Fed. Reg. at 7612, thereby providing the genesis for this case before the Board.

In light of these circumstances, a question might be raised as to whether the Commission's initial February 2008 notice of hearing regarding the TVA COLA mandatory hearing operated, in and of itself, to give this Board jurisdiction over TVA's pending withdrawal motion in this contested case. This is an issue we need not reach, however, given the Board's own October 2008 issuance of a notice of hearing for this adjudication. See Atomic Safety and Licensing Board Panel; In the Matter of [TVA] ([BNPP] Units 3 and 4); Notice of Hearing (Application for [COL]), 73 Fed. Reg. 62,342 (Oct. 20, 2008). Moreover, whether the TVA withdrawal request requires some ruling relative to the mandatory hearing portion of this proceeding would be a matter for determination by the Commission, before which that aspect of the proceeding remains lodged.

which is not opposed by either Joint Intervenors or the staff. We thus approve TVA's motion to withdraw its application, without prejudice. See Exelon Nuclear Tex. Holdings, LLC (Victoria County Station Site), LBP-12-20, 76 NRC 215, 216 (2012).

III. CONCLUSION

In the exercise of our authority under 10 C.F.R. § 2.107(a) and consistent with that provision's dictates,⁷ the Licensing Board grants TVA's February 12, 2016 unopposed motion to withdraw its pending COLA for BNPP Units 3 and 4, without prejudice, and dismisses this adjudicatory proceeding.⁸

For the foregoing reasons, it is this twenty-ninth day of February 2016, ORDERED, that the February 12, 2016 motion of applicant Tennessee Valley Authority to withdraw its

⁷ The Board also assumes that, in accord with 10 C.F.R. § 2.107(c), in due course the staff will issue a Federal Register notice of the withdrawal of the TVA COLA for BNPP Units 3 and 4. See supra p. 3 (referencing Federal Register notice of withdrawal of Calvert Cliffs facility COLA).

⁸ Although the Board's action permitting the withdrawal of the TVA COLA for BNPP Units 3 and 4 has no effect upon the efficacy of the existing 10 C.F.R. Part 50 construction permits authorizing TVA to build BNPP Units 1 and 2, see Tenn. Valley Auth. (Bellefonte Nuclear Plant, Units 1 and 2), LBP-10-7, 71 NRC 391, appeal dismissed, CLI-10-26, 72 NRC 474 (2010), we note that TVA recently announced it is considering declaring the BNPP site as surplus and entertaining the site's sale, see TVA, Potential Sale of Bellefonte Nuclear Plant Site, <https://www.tva.gov/Newsroom/Bellefonte> (last visited Feb. 29, 2016).

10 C.F.R. Part 52 COLA for BNPP Units 3 and 4, without prejudice, is granted, and this proceeding is terminated.⁹

THE ATOMIC SAFETY
AND LICENSING BOARD

/RA/

G. Paul Bollwerk, III, Chairman
ADMINISTRATIVE JUDGE

/RA/

Anthony J. Baratta
ADMINISTRATIVE JUDGE

/RA/

William W. Sager
ADMINISTRATIVE JUDGE

Rockville, Maryland

February 29, 2016

⁹ Because TVA's without-prejudice withdrawal motion is unopposed and we have not imposed any conditions in approving the motion, we do not include in this decision a statement concerning the submission of petitions for review contesting this final licensing board determination pursuant to 10 C.F.R. § 2.341(b)(1). That being said, under section 2.341(a)(2), over the next 120 days the Commission has the opportunity to conduct its own sua sponte review of this ruling.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of)
)
TENNESSEE VALLEY AUTHORITY) Docket Nos. 52-014-COL and 52-015-COL
)
(Bellefonte Nuclear Power Plant -)
Units 3 and 4))
)

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing **MEMORANDUM AND ORDER (Granting Motion to Withdraw Application and Terminating Proceeding) (LBP-16-01)** have been served upon the following persons by the Electronic Information Exchange.

U.S. Nuclear Regulatory Commission
Office of Commission Appellate Adjudication
Mail Stop: O-7H4
Washington, DC 20555-0001
ocaamail@nrc.gov

U.S. Nuclear Regulatory Commission
Office of the Secretary of the Commission
Mail Stop: O-16C1
Washington, DC 20555-0001
Hearing Docket
hearingdocket@nrc.gov

U.S. Nuclear Regulatory Commission
Atomic Safety and Licensing Board Panel
Mail Stop: T-3F23
Washington, DC 20555-0001

U.S. Nuclear Regulatory Commission
Office of the General Counsel
Mail Stop: O-15D21
Washington, DC 20555-0001

G. Paul Bollwerk, III, Chair
Administrative Judge
paul.bollwerk@nrc.gov

Sara Kirkwood, Esq.
sara.kirkwood@nrc.gov
Olivia Mikula
Olivia.Mikula@nrc.gov
Patrick Moulding, Esq.
patrick.moulding@nrc.gov
Michael Spencer, Esq.
michael.spencer@nrc.gov
Anthony C. Wilson, Esq.
anthony.wilson@nrc.gov

Dr. Anthony J. Baratta
Administrative Judge
anthony.baratta@nrc.gov

Dr. William W. Sager
Administrative Judge
william.sager@nrc.gov

Cooper J Strickland
Law Clerk
cooper.strickland@nrc.gov

OGC Mail Center: Members of this office have received a copy of this filing by EIE service.

Bellefonte Nuclear Power Plant, Units 3 and 4, Docket Nos. 52-014-COL and 52-015-COL
MEMORANDUM AND ORDER (Granting Motion to Withdraw Application and Terminating Proceeding) (LBP-16-01)

Morgan, Lewis & Bockius, LLP
Counsel for Tennessee Valley Authority
1111 Pennsylvania Ave., N.W.
Washington, DC 20004

Stephen J. Burdick, Esq.
sburdick@morganlewis.com

Steven P. Frantz, Esq.
sfrantz@morganlewis.com

Mary L. Freeze, Legal Secretary

mfreeze@morganlewis.com

Audrea Salters, Legal Secretary

asalters@morganlewis.com

Southern Alliance for Clean Energy (SACE)
428 Bull Street, Suite 201
Savannah, GA 31401

Sara Barczak, Director

sara@cleanenergy.org

Angela Garrone, Esq.

angela@cleanenergy.org

Blue Ridge Environmental Defense League,
Inc. (BREDL)
P.O. Box 88
Glendale Springs, NC 28629

North Carolina Waste Awareness
and Reduction Network
P.O. Box 2793
Chapel Hill, North Carolina 27515

Louis A. Zeller, Administrator and
Science Director
bredl@skybest.com

John D. Runkle, Esq.
jrunkle@pricecreek.com

Tennessee Valley Authority
Office of the General Counsel
400 W. Summit Hill Drive, WT 6A-K
Knoxville, TN 37902

Christopher Chandler, Esq.

ccchandler0@tva.gov

Maria V. Gillen, Esq.

mvgillen@tva.gov

Blake Nelson, Esq.

bjnelson@tva.gov

Scott A. Vance, Esq.

savance@tva.gov

[Original signed by Clara Sola _____]
Office of the Secretary of the Commission

Dated at Rockville, Maryland
this 29th day of February, 2016