



UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D.C. 20555-0001

July 7, 2016

OFFICE OF THE
SECRETARY

MEMORANDUM TO: Board and Parties
Tennessee Valley Authority (Bellefonte Nuclear Power Plant,
Units 3 and 4)
Docket Nos. 52-014-COL and 52-015-COL

SUBJECT: MEMORANDUM AND ORDER DATED FEBRUARY 29, 2016,
GRANTING MOTION TO WITHDRAW APPLICATION AND
TERMINATING PROCEEDING (LBP-16-01)

This is to inform you that the time provided by NRC regulation within which the Commission may act to review the decision of the Atomic Safety and Licensing Board (LBP-16-01) in this docket has expired. The Commission has declined any review of this decision. Accordingly, the decision became final agency action on June 28, 2016.

Attached are the separate views of Commissioner Svinicki regarding case management.

A handwritten signature in cursive script that reads "Andrew L. Bates".

Andrew L. Bates
Acting Secretary

Views of Commissioner Svinicki Regarding Case Management

I do not believe that any error in LBP-16-1 is sufficient to meet our stringent standard for *sua sponte* review¹ and have not engaged my colleagues in seeking such review. I am motivated to write separately, however, sharing my observations about the exercise of case management by this Board and in general. While responsible case management is the obligation of licensing boards, the aggressive over-application of the Commission's sanctioned case management tools can venture into the territory of misuse of these tools. Whether or not such misuse occurred is fundamentally unknowable after the fact – in this case and likely in general – because it turns on the question of what actions parties would have taken had certain events not occurred. Therefore, I offer these observations solely for any generic effect, however modest, in informing the application of case management in the future.

PROCEDURAL BACKGROUND

TVA filed a combined operating license application to build two new nuclear reactors using the Westinghouse Electric Corporation AP1000 advanced passive power reactor certified design at its Bellefonte site in Alabama in October 2007.² In 2011, TVA asked the agency to suspend review of the application, and the agency did so.³ Thereafter, this adjudicatory proceeding remained in abeyance as well.⁴ In 2015, the TVA Board of Directors released an

¹ *Northern States Power Co.* (Prairie Island Nuclear Generating Plant, Units 1 and 2), CLI-10-27, 72 NRC 481, 489 (2010).

² LBP-16-1, 83 NRC __, __ (Feb. 29, 2016) (slip op. at 2); LBP-08-16, 68 NRC 361, 373 (2008).

³ LBP-16-1, 83 NRC at __ (slip op. at 2).

⁴ *Id.*

Integrated Resource Plan stating that TVA would not reinstate work on the Bellefonte Combined Operating License application until the mid-2020's if it pursued the application at all.⁵

In response, the Board requested a joint filing from the parties "outlining their views regarding how this case should proceed."⁶ In that order, the Board suggested that the parties may consider ways to settle the proceeding and specifically noted that "withdrawal is an option."⁷ When the parties replied that they were unable to reach a settlement agreement, the Board responded by again directing the parties to consider further settlement discussions.⁸ Once again, the parties replied that the discussions were not fruitful, and the intervenors replied separately that absent a settlement, the proceeding could not be lawfully terminated until TVA withdrew the application or the Board determined TVA had abandoned the application.⁹ Shortly thereafter, the Board requested briefs from the parties on whether TVA had abandoned its application and what resource implications would accompany a withdrawal and refiling of the application.¹⁰ On the day briefs were due, TVA moved to withdraw its application in lieu of responding to the abandonment question.¹¹ The Board granted the motion without prejudice

⁵ Licensing Board Memorandum and Order (Request for Joint Status Report) (Aug. 25, 2015) at 2 (unpublished).

⁶ *Id.* at 3.

⁷ *Id.*

⁸ Licensing Board Memorandum and Order (Request for Joint Status Report) (Jan. 4, 2016) at 4 (unpublished).

⁹ *Joint Intervenors' Separate Statement Regarding Additional Status Information* (Jan. 19, 2016) at 2 (Separate Statement).

¹⁰ Licensing Board Memorandum and Order (Requesting Party Briefs on Issue of "Abandonment") (Jan. 22, 2016) at 2-3 (unpublished) (Order Requesting Briefs).

¹¹ LBP-16-1, 83 NRC at ___ (slip op. at 4-5); see *Tennessee Valley Authority's Brief in Response to the Board's January 22, 2016 Order Requesting Briefs on Abandonment* (Feb. 12, 2016).

and terminated the adjudicatory proceeding.¹² What cannot be established is whether the timing of TVA's motion to withdraw suggests that the Board's request for briefing may have been, in some measure, a driver of the decision.¹³

DISCUSSION

The Commission has long expressed its expectation that licensing boards will effectively manage pending adjudicatory proceedings.¹⁴ Thus, we have encouraged boards to achieve this goal by "setting reasonable schedules for proceedings; consolidating parties; encouraging negotiations and settlement conferences; carefully managing and supervising discovery; issuing timely rulings on prehearing matters; requiring trial briefs, pre-filed testimony, and cross-examination plans; and issuing initial decisions as soon as practicable."¹⁵

In this case, the first two orders directing the parties to consider settlement negotiations appear to have been appropriate, if arguably aggressive, case management activities in response to announced delays. Once the parties determined that they were unable to agree on terminating the adjudication, the Board can be viewed to have fulfilled the Commission's direction on case management. At that point, the parties could have pursued one of the many alternate courses suggested by the Board if they felt the prospect of a lengthy delay in the

¹² *Id.* at __ (slip op. at 8).

¹³ The Staff noted in its thorough response brief that the agency does not appear to have ever found abandonment and the few cases that refer to the principle provide little in the way of framework or standards for answering this question. *NRC Staff Response to Board Order Requesting Briefing* (Feb. 12, 2016) at 4-10. Perhaps the uncertainty associated with such an open-ended question provided further incentive for TVA to step away from its application.

¹⁴ Statement of Policy on Conduct of Adjudicatory Proceedings, CLI-98-12, 48 NRC 18, 19 (1998); Statement of Policy on Conduct of Licensing Proceedings, CLI-81-8, 13 NRC 452, 453-54 (1981).

¹⁵ Statement of Policy on Conduct of Adjudicatory Proceedings, CLI-98-12, 48 NRC at 20.

adjudication would prove unduly burdensome.¹⁶ Additionally, if they found it in their interest, one of the parties could have moved for the Board to find abandonment.¹⁷ It is the Board's additional step of asking for briefs on abandonment on its own motion that puzzles me. To the extent that a board action hectors a party into relinquishing its position, such a measure would venture beyond the case management tools sanctioned by the Commission into territory that the Commission has never indicated as an appropriate role for a licensing board.¹⁸

The misapplication of case management tools by licensing boards also has the potential to implicate the licensing policies of the agency. For example, while timely proceedings are valued, the agency's practice of allowing applications to pend for many years is reasonable, given the long-range nature of the estimates that are inherent to energy planning.¹⁹ In such long-range planning, projects that look hopelessly speculative one year may ultimately be constructed many years later in the evolving energy markets. In light of such uncertainties,

¹⁶ LBP-16-1, 83 NRC at ___ (slip op. at 3-4); Licensing Board Memorandum and Order (Request for Joint Status Report) (Jan. 4, 2016) at 2-3 (unpublished); Licensing Board Memorandum and Order (Request for Joint Status Report) (Aug. 25, 2015) at 2-3 (unpublished).

¹⁷ Notably, the intervenors' separate statement to the Board's second order on settlement negotiations did not clearly make such a motion. Separate Statement at 2. Rather, the statement clarified why the intervenors believed the Board could not terminate the adjudication without a settlement agreement. *Id.* at 1. In making this argument, the intervenors did express a belief that "the appropriate remedy in these circumstances is withdrawal or dismissal . . . for abandonment." *Id.* But, the Board does not appear to have treated this as a motion, Order Requesting Briefs at 1-2, and I agree that this statement alone does not meet our requirements for a motion, see 10 C.F.R. § 2.323.

¹⁸ We have previously overturned a board's decision to hold an adjudication in abeyance indefinitely in light of uncertain business plans in *Hydro Resources. Hydro Resources, Inc.* (P.O. Box 15910 Rio Rancho, NM 87174), CLI-01-4, 53 NRC 31, 71 (2001). However, that proceeding appears significantly different because the license had already been issued and the parties had developed detailed technical and legal positions in contemplation of the hearing. *Id.* at 39-44. Indeed the Commission noted that based on the Board's proposed schedule, the hearing could actually be held after the license expired. *Id.* at 39. Those considerations are not present in this proceeding.

¹⁹ Nuclear Power Plant License Renewal, 56 Fed. Reg. 64,943, 64, 9463 (1991) (noting that industry studies suggest energy planning necessarily requires lead times in excess of 10 years).

neither the agency nor the licensing board is in a position to guess which applications should be culled from the docket.

In light of the foregoing, while I questioned whether the Board's order on abandonment crossed the line between effective case management and questions of agency-wide policy that are beyond the purview of the Licensing Board, and offer cautions on this point, I do not seek *sua sponte* review. Rather, I share these views to illuminate the issue generically.

UNITED STATES OF AMERICA
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TENNESSEE VALLEY AUTHORITY) Docket Nos. 52-014-COL and 52-015-COL
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(Bellefonte Nuclear Power Plant -)
Units 3 and 4))
)

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing **MEMORANDUM FROM THE SECRETARY TO THE BOARD AND PARTIES** have been served upon the following persons by the Electronic Information Exchange.

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MEMORANDUM FROM THE SECRETARY TO THE BOARD AND PARTIES

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[Original signed by Clara Sola _____]
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Dated at Rockville, Maryland
this 7th day of July, 2016