

December 30, 2016

**UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION**

In the Matter of: :  
: :  
TENNESSEE VALLEY AUTHORITY :  
(Browns Ferry Nuclear Plant Units 1, 2, and 3; :  
Docket Nos. 50-259, 50-260, and 50-296; :  
NRC-2016-0118) :

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**THE BELLEFONTE EFFICIENCY & SUSTAINABILITY TEAM/ MOTHERS  
AGAINST TENNESSEE RIVER RADIATION (“BEST/MATRR”) RESPONSE  
TO THE U.S. NUCLEAR REGULATORY COMMISSION STAFF AND  
TENNESSEE VALLEY AUTHORITY’S ANSWERS IN OPPOSITION TO  
BEST/MATRR’S APPEAL OF LBP-16-11**

This is the Bellefonte Efficiency and Sustainability Team/ Mothers Against Tennessee River Radiation’s (“BEST/MATRR” or “Petitioner”) response to the U.S. Nuclear Regulatory Commission (“NRC”) staff and Tennessee Valley Authority’s (“TVA”) answers in opposition to BEST/MATRR’s appeal of LBP-16-11, which are both dated December 20, 2016.<sup>1</sup>

**First**, in their answers, neither the NRC staff nor the TVA addressed the fact that Aby Mohseni, Deputy Director of the NRC’s Division of Policy and Rulemaking, disclosed the results of a computer simulation of FLECHT Run 9573 that *under-predicted* temperatures Westinghouse had reported for the section of the test bundle that incurred thermal runaway—the severe-damage zone.<sup>2</sup> In its hearing request,

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<sup>1</sup> NRC, “NRC Staff’s Brief in Opposition to BEST/MATRR’S Appeal of LBP-16-11,” December 20, 2016. And TVA, “Tennessee Valley Authority’s Answer Opposing Bellefonte Efficiency and Sustainability Team/ Mothers Against Tennessee River Radiation Petition for Review of LBP-16-11,” December 20, 2016.

<sup>2</sup> Aby Mohseni, Deputy Director of the NRC’s Division of Policy and Rulemaking, e-mail to Mark Leyse, regarding the NRC’s TRACE computer simulation of the FLECHT Run 9573 test bundle, November 24, 2015, (ADAMS Accession No: ML15341A160).

BEST/MATRR (on pages 26-28) discussed the results of the computer simulation of FLECHT Run 9573 that included the severe-damage zone. As stated on page 28, the results of that computer simulation are powerful evidence that the Baker-Just correlation is inadequate for use in computer safety models that simulate loss-of-coolant accidents (“LOCA”). This also means that 10 C.F.R. 50 Appendix K, I.A.5 is non-conservative. Nonetheless, the NRC is considering a license amendment request (“LAR”) for extended power uprates (“EPU”) for Browns Ferry Nuclear Plant (“BFN”) Units 1, 2, and 3, which is dependent on non-conservative Appendix K LOCA analyses. By overlooking the deficiencies of computer safety models, the NRC undermines its own philosophy of defense-in-depth, which requires the application of conservative models.<sup>3</sup>

**Second**, in their answers, neither the NRC staff nor the TVA addressed the fact that the NRC staff has engaged in bad faith behavior or improper behavior in its review of a 10 C.F.R. § 2.802 petition for rulemaking, PRM-50-93, submitted on November 17, 2009.<sup>4</sup> The NRC staff’s answer states that BEST/MATRR’s “contentions are inadmissible because the issues are subject to a pending rulemaking petition.” The NRC staff’s answer also states that “BEST/MATRR’s Appeal recites many of the same issues and arguments that its expert, Mr. Leyse, had raised in the rulemaking petition that is currently pending before the Commission [PRM-50-93]. In fact, the Appeal explicitly acknowledges that ‘PRM-50-93 addresses issues similar to those raised by BEST/MATRR in their hearing request’.”<sup>5</sup>

However, the NRC staff’s answer does not acknowledge that in apparent violation of Administrative Procedure Act (“APA”), the NRC staff has been reviewing PRM-50-93, for **more than seven years**.

A regulation of the APA, 5 U.S.C. § 555(b) states: “With due regard for the convenience and necessity of the parties or their representatives and *within a reasonable time*, each agency shall proceed to conclude a matter presented to it” [emphasis added].

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<sup>3</sup> Charles Miller et al., NRC, “Recommendations for Enhancing Reactor Safety in the 21st Century: The Near-Term Task Force Review of Insights from the Fukushima Daiichi Accident,” SECY-11-0093, July 12, 2011, (ADAMS Accession No: ML111861807), p. 3.

<sup>4</sup> Mark Leyse, PRM-50-93, November 17, 2009, (ADAMS Accession No. ML093290250).

<sup>5</sup> NRC, “NRC Staff’s Brief in Opposition to BEST/MATRR’S Appeal of LBP-16-11,” December 20, 2016, p. 10.

And another regulation of the APA, 5 U.S.C. § 706 states: “To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall— (1) compel agency action unlawfully withheld *or unreasonably delayed*” [emphasis added].

**A delay of more than six years was “found to be ‘nothing less than egregious’** by the D.C. Circuit; this case concerned a petition for the Federal Electricity Regulatory Commission to consult with environmental agencies under the Endangered Species Act, but the court was still interpreting the relevant standard for prompt consideration of all petitions under 5 U.S.C. § 555(b).”<sup>6</sup> (*In re Am. Rivers & Idaho Rivers United*, 372 F.3d 413, 419 (D.C. Cir. 2004)). *See also In re ICWU*, 958 F.2d 1144 (D.C. Cir. 1992) (finding that a 6 year delay likely would have been unreasonable but for the fact that the court accepted the agency’s proposed 5-month timeline to resolve the petition).<sup>7</sup>)

BEST/MATRR’S Appeal of LBP-16-11 describes other ways that the NRC staff has engaged in bad faith behavior or improper behavior in its review of PRM-50-93.

Members of BEST/MATRR and others must not be made vulnerable to *irreparable injury* by the TVA’s LAR for EPU’s for BFN Units 1, 2, and 3 because the NRC staff has engaged in bad faith behavior or improper behavior in its review of PRM-50-93. The EPU has been qualified by the type of LOCA simulation that PRM-50-93 alleges is non-conservative.

**Third**, the Atomic Safety and Licensing Board (“ASLB”) addressed BEST/MATRR’s request for a stay of the LAR for EPU’s for BFN Units 1, 2, and 3. The stay was requested on the grounds that the NRC has engaged in bad faith or improper behavior in its review of PRM-50-93. PRM-50-93 addresses issues similar to those raised by BEST/MATRR in its hearing request.

Regarding BEST/MATRR’s request to stay the LAR for EPU’s for BFN Units 1, 2, and 3, the ASLB stated that “insofar as Petitioner claims unreasonable delay by the Commission, **this Board cannot provide a remedy. The Commission—not this**

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<sup>6</sup> Jason A. Schwartz and Richard L. Revesz, NYU School of Law, “Petitions for Rulemaking,” September 25, 2014, p. 16.

<sup>7</sup> *Id.*, p. 16, Note 78.

**Board—has authority to stay a license amendment proceeding in light of pending rulemaking.** [See 10 C.F.R. § 2.802(e); Entergy Nuclear Vt. Yankee, LLC (Vt. Yankee Nuclear Power Station), CLI-07-03, 65 NRC 13, 22 n.37 (2007).] **Nor does this Board have authority to review a claim of unreasonable delay regarding a petition for rulemaking that is before the Commission.** [See APA, 5 U.S.C. § 706 (the “reviewing court” shall compel agency action unlawfully withheld or unreasonably delayed).] Any such challenge should be raised directly with the Commission, or possibly before the courts [See *In re Aiken Cnty.*, 725 F.3d 255, 267 (D.C. Cir. 2013); *Telecomms. Research & Action Ctr. v. FCC*, 750 F.2d 70, 75–77 (D.C. Cir. 1984).]”<sup>8</sup> [emphasis added].

The ASLB did not have the authority to grant BEST/MATRR’s request for a stay of the LAR for EPU’s for BFN Units 1, 2, and 3; however, the NRC Commissioners do have that authority. The NRC Commissioners also have the authority to address the fact that NRC staff has had an unreasonable delay reviewing PRM-50-93. Additionally, the NRC Commissioners have the authority to address other ways that the NRC staff has engaged in bad faith behavior or improper behavior in its review of PRM-50-93, which are described in BEST/MATRR’S Appeal of LBP-16-11.

In order to prevent *irreparable injury* to members of BEST/MATRR and others, TVA’s LAR for EPU’s for BFN Units 1, 2, and 3 should be denied or, at least, stayed.

Respectfully submitted,

/s/

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<sup>8</sup> Atomic Safety and Licensing Board, “Order: Ruling on Petition to Intervene and Request for a Hearing In the Matter of TVA’s LAR for EPU’s for BFN Units 1, 2, and 3,” LBP-16-11, November 2, 2016, pp 7-8.

