UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Gregory B. Jaczko, Chairman
Dale E. Klein
Kristine L. Svinicki

In the Matter of	)	
	)	Docket Nos. 50-438-CP &
TENNESSEE VALLEY AUTHORITY	)	50-439-CP
	)	
(Bellefonte Nuclear Plant, Units 1 and 2)	)	

CLI-10-06

MEMORANDUM AND ORDER

Before us today are two contentions claiming that the Nuclear Regulatory Commission (NRC) lacks authority to reinstate construction permits for nuclear power reactors that the holder of the permits voluntarily surrendered. The Tennessee Valley Authority (TVA) and the NRC Staff maintain that the NRC has authority under the Atomic Energy Act (AEA) to reinstate voluntarily-surrendered construction permits. Petitioners, the Blue Ridge Environmental Defense League (BREDL), its chapter Bellefonte Efficiency and Sustainability Team (BEST), and the Southern Alliance for Clean Energy (SACE) (hereinafter "petitioners"), argue that by law such permits have expired and cannot be revived. After careful consideration of this issue of first impression, we find that the NRC does have the authority to reinstate voluntarily-surrendered construction permits.

FACTUAL BACKGROUND

In June 1973, TVA filed an application to construct two nuclear reactors at the Bellefonte site, located on the Tennessee River in northwestern Alabama, approximately seven miles

northeast of Scottsboro, Alabama. After docketing this application in June 1973, the Atomic Energy Commission (AEC) published a notice of hearing in the Federal Register, notifying interested persons of their right to intervene and request a hearing in the AEC's proceeding that would determine whether the agency would grant or deny the Bellefonte construction permits.[1]

Interested persons filed petitions to intervene. An Atomic Safety and Licensing Board held a prehearing conference on proposed contentions and ultimately granted one petition to intervene, admitting one contention. In addition, the Board permitted the Alabama Department of Public Health to participate in the proceeding as an interested government entity. The Board conducted an evidentiary hearing on the admitted contention in 1974. At the hearing, the intervenors and TVA reached an agreement on the sole contention. The Board then considered and resolved uncontested construction-permit issues in favor of the applicant.[2]

Ultimately, in December 1974, the AEC issued two construction permits to TVA authorizing the construction of Bellefonte Units 1 and 2.[3] The construction permits for Units 1 and 2 were originally set to expire in December 1979 and September 1980, respectively. Thereafter, TVA began construction on both units. In February 1978, TVA applied for operating licenses for Units 1 and 2. Five months later, the NRC published both a notice of receipt of the operating license applications and a notice of opportunity for hearing, inviting interested persons

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[1] *See* 38 Fed. Reg. 20,932 (Aug. 3, 1973).

[2] *See Tennessee Valley Auth.* (Bellefonte Nuclear Plants, Units 1 and 2), LBP-74-66, 8 AEC 472, 473-476 (1974).

[3] CP Nos. CPPR-122 and CPPR-123. *See* 39 Fed. Reg. 45,313 (Dec. 31, 1974).

to intervene in the NRC's operating license proceeding.[4] There were no hearing requests and, consequently, no hearing.

Due to lower-than-anticipated power needs, TVA determined it would not need to operate Units 1 and 2 until the mid-1990s. In 1986, TVA requested that the NRC[5] extend the completion dates for its Bellefonte construction permits. The NRC granted TVA's request in June 1987. Unit 1's construction permit was now set to expire in July 1994 and Unit 2's in July 1996. Subsequently, in 1988, TVA submitted a letter to the NRC giving notice that it had decided to defer construction of both units until the late 1990s. TVA stated that this deferral was due to reduced power needs as well as for economic reasons. At the time of this request, Units 1 and 2 were 88 percent complete and 58 percent complete, respectively.

As part of the deferral TVA included a list of specific activities it would undertake during the deferral period pursuant to Commission guidance in the Commission's Policy Statement on Deferred Plants (Commission Policy Statement).[6] TVA also stated that it would place Units 1 and 2 in deferred plant status. This meant that although TVA still possessed valid construction permits, construction ceased and it would perform only maintenance activities onsite. The NRC agreed to TVA's deferral request, finding TVA's proposed list of deferral-period activities consistent with the Commission Policy Statement.[7] In addition, because TVA's construction

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[4] *See* 43 Fed. Reg. 30,628 (July 17, 1978).

[5] The Atomic Energy Commission became the Nuclear Regulatory Commission (NRC) on January 19, 1975, pursuant to the Energy Reorganization Act of 1974.

[6] *See* 52 Fed. Reg. 38,077 (Oct. 14, 1987).

[7] *Id*.

permits were set to expire during the deferral period, the NRC noted that TVA would have to request a timely extension of its construction permits.

Several years later, in March 1993, TVA submitted a letter to the NRC stating that it intended to resume construction activities on Units 1 and 2. However, TVA said it could not begin construction until after July 1994, because it first had to conduct a resource planning process. As Unit 1's construction permit was set to expire in July 1994, TVA asked the NRC to extend the dates of its construction permits for both Bellefonte units. The NRC granted this request, setting Unit 1's new expiration date for October 2001 and Unit 2's for October 2004.[8]

In July 2001, TVA once again applied to extend the expiration dates of the Bellefonte construction permits, stating this time that an extension would enable TVA to better identify competitive energy needs and power issues.[9] The NRC again agreed to extend the permits, with October 2011 the new expiration date for Unit 1 and October 2014 for Unit 2.[10] Units 1 and 2 remained in "deferred" plant status. The NRC determined that TVA was maintaining both units and that TVA was interested in constructing the units at a future date.[11]

A few years later, however, in 2005, TVA notified the NRC that TVA was placing

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[8] *See* 59 Fed. Reg. 34,874 (July 7, 1994).

[9] *See* 68 Fed. Reg. 11,415 (Mar. 10, 2003).

[10] *See id*.

[11] *See id*.

Bellefonte Units 1 and 2 in "terminated" status, as opposed to "deferred" status.[12] In accordance with the Commission Policy Statement, this meant that TVA had permanently ceased construction on the Bellefonte facilities, although TVA still retained valid construction permits for both units. A year later, TVA notified the NRC that TVA's Board of Directors had voted to cancel construction of Bellefonte Units 1 and 2 due to anticipated reductions in power needs.[13] TVA thus requested that the NRC "withdraw" the construction permits for both Units 1 and 2. On September 14, 2006, NRC granted TVA's withdrawal request, stating "the staff considers Construction Permit Nos. CPPR-122 and CPPR-123 to be terminated."[14] TVA ceased maintenance of the partially constructed units and the NRC Staff stopped conducting inspections.

In 2008, TVA changed its mind. In two letters, TVA asked the NRC to reinstate its previously-withdrawn construction permits for Bellefonte Units 1 and 2. This request was prompted in part by increased economic opportunities in power generation. TVA stated this constituted good cause for reinstatement.[15] As part of its request, TVA said it wished to transfer

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[12] *See* Letter from TVA to NRC, Bellefonte Nuclear Plant (BLN) Units 1 and 2 -- Notification: Construction Permits CPPR-122 (Unit 1) and CPPR-123 (Unit 2) Placed in Terminated Status (Dec. 12, 2005) (ML060120054).

[13] *See* Letter from TVA to NRC, Bellefonte Nuclear Plant (BLN) Units 1 AND 2 – Withdrawal of Construction Permits CPPR-122 (Unit 1) and CPPR-123 (Unit 2) -Request for Approval (Apr. 6, 2006) (ML061000538).

[14] Letter from Catherine Haney to Karl W. Singer, Bellefonte Nuclear Plant, Units 1 and 2 - Withdrawal of Construction Permit Nos. CPPR-122 for Unit 1 and CPPR-123 for Unit 2 (Sept. 14, 2006) (ML061810505).

[15] *See* Letter from TVA to NRC, Tennessee Valley Authority (TVA) - Bellefonte Nuclear Plant Units 1 and 2 - Request to Reinstate Construction Permits CPPR-122 (Unit 1) and CPPR-123 (continued. . .)

Units 1 and 2 from terminated to deferred status. Thereafter, TVA said it could begin to assess whether it was financially and practically possible to complete construction and ultimately, operate the units.[16]

In response to TVA's reinstatement request, the NRC Staff sent us a memorandum recommending that the Commission authorize the Staff to grant reinstatement of TVA's construction permits for Bellefonte Units 1 and 2.[17] On February 18, 2009, we authorized the Staff to issue an order reinstating the construction permits and placed Bellefonte Units 1 and 2 in "terminated" status under our Policy Statement, rather than the "deferred" status TVA sought.[18] We also directed that the NRC Staff offer a hearing opportunity on the question of whether TVA had established "good cause" for reinstatement.

The NRC Staff then prepared an environmental assessment which concluded that reinstatement of the construction permits would not result in a significant environmental impact.[19] After making this determination, the Staff granted TVA's request to reinstate the

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(Unit 2) (Aug. 26, 2008) (ML082410087).

[16] *See id*.

[17] *See* COMSECY-08-0041, Staff Recommendation Related to Reinstatement of the Construction Permits for Bellefonte Nuclear Plant Units 1 and 2 (Dec. 12, 2008) (ML083230895).

[18] *See* Memorandum from Andrew L. Bates to R.W. Borchardt, Staff Requirements-COMSECY-08-0041-Staff Recommendation Related to Reinstatement of the Construction Permits for Bellefonte Nuclear Plants Units 1 and 2, at 1 (Feb. 18, 2009) (ML090490838).

[19] *See* 74 Fed. Reg. 9,308 (Mar. 3, 2009).

construction permits and placed the units in "terminated" plant status.[20] The Staffs' Federal Register notice also afforded interested persons the right to request intervention and a hearing, limited to whether "good cause exists for reinstatement of the CPs."[21]

Petitioner BREDL filed suit in the United States Court of Appeals for the District of Columbia Circuit, and along with other petitioners also sought an NRC hearing to contest the lawfulness of reinstating the Bellefonte permits.[22] The D.C. Circuit has held BREDL's lawsuit in abeyance.[23] In the NRC proceeding, petitioners filed nine contentions, including two (Contentions 1 and 2) maintaining that the NRC did not possess the statutory authority to reinstate the previously-withdrawn construction permits. We viewed the authority question as a potentially dispositive matter warranting our attention and resolution before the remainder of the adjudication proceeds. Thus, we issued an Order in May directing petitioners, TVA, and the NRC Staff to submit briefs on Contentions 1 and 2.[24] We also ordered that the remaining Contentions 3 through 9 be held in abeyance pending our ruling on the threshold authority issue.[25]

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[20] *See* 74 Fed. Reg. 10,969 (Mar. 13, 2009).

[21] *Id*.

[22] Petition for Intervention at 1.

[23] *See Blue Ridge Envtl. Def. League v. NRC*, Order Granting Mot. to Hold Case in Abeyance, (D.C. Cir. June 11, 2009).

[24] *See Tennessee Valley Authority* (Bellefonte Nuclear Power Plant, Units 1 and 2), 69 NRC__, (May 20, 2009).

[25] There have been subsequent developments not directly pertinent to the authority issue before (continued. . .)

THE LITIGANTS' POSITIONS

All litigants filed initial briefs and replies. Petitioners argue that the AEA does not authorize NRC to reinstate expired construction permits and that under Section 185[26] of the AEA, all rights under expired permits "are forfeited." According to petitioners, therefore, the NRC lacks statutory authority to reinstate a voluntarily-surrendered permit. Petitioners also maintain that allowing reinstatement prior to an agency hearing violates Section 189 of the AEA.[27] TVA, on the other hand, argues that given Congress's extremely broad delegation of authority to the NRC, and given that the AEA does not prohibit reinstatement of construction permits, the agency has inherent discretion to allow reinstatement in appropriate circumstances. No prior hearing is necessary, TVA contends, because no fresh construction permit is necessary. The NRC Staff agrees with TVA's position, arguing that a voluntary surrender of construction permits, before the permits expire and without any claim of wrongdoing, does not

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us today. On July 15, 2009, petitioners filed a "Supplemental Basis for Previously Submitted Contention 5-Lack of Good Cause." Contention 5, entitled "Lack of Good Cause for Reinstatement," is currently being held in abeyance pending our decision on the threshold authority issue. Petitioners' filing rests on a June 15, 2009 Federal Register notice and seeks to amend Contention 5. The June 15 Federal Register notice announced that TVA is studying its Integrated Resource Plan "to evaluate TVA's portfolio of resource options for achieving a sustainable future and meeting the future electrical energy and resource stewardship needs of the Tennessee Valley." The notice also indicates that TVA plans to prepare an Environmental Impact Statement (EIS) and is seeking public comments on the scope of the EIS and the issues that the EIS will address. TVA has moved to strike petitioners' proposed supplemental basis for Contention 5. More recently, on August 11, 2009, TVA submitted a letter to the Commission requesting that the NRC move Bellefonte Units 1 and 2 from "terminated" to "deferred" plant status.

[26] 42 U.S.C. § 2235.

[27] 42 U.S.C. § 2239.

equate to forfeiting all rights to seek reinstatement.

DISCUSSION

We previously authorized NRC Staff to issue an order that would reinstate the Bellefonte construction permits. However, our action came in response to an NRC Staff recommendation, in the exercise of our supervisory agency-oversight responsibility. Our decision to authorize reinstatement was in no sense a *final* agency action, for it expressly was made subject to a hearing opportunity, an opportunity petitioners have now taken up. In today's decision, we act as adjudicators and in that light we consider the reinstatement issue afresh, without regard for our earlier views.[28]

Accordingly, we have carefully reviewed the litigants' pleadings and briefs, and have reexamined the underlying law and policy in depth. For the reasons we give below, we conclude that the AEA grants NRC sufficient flexibility to allow the agency to reinstate surrendered construction permits in appropriate circumstances.

1. Statutory Language

In deciding whether the Commission has the authority to reinstate a voluntarily-surrendered construction permit, we start by examining Section 185 of the AEA, the only statutory provision that addresses construction permits. The term "reinstatement" is not directly or indirectly mentioned in this section.[29] Nor does any other provision in the AEA speak to

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[28] *See e.g.*, *Withrow v. Larkin*, 421 U.S. 35, 53 (1975); *see also Career Educ., Inc. v. Dep't of Educ.*, 6 F.3d 817, 820 (D.C. Cir. 1993).

[29] (a) Completion date

All applicants for licenses to construct or modify production or utilization facilities shall, if the (continued. . .)

reinstatement of voluntarily-surrendered construction permits. It cannot be said, therefore, that the AEA itself prohibits reinstating surrendered construction permits.

Petitioners claim that TVA forfeited its construction permits under the AEA when TVA asked the NRC Staff to withdraw them in 2006.[30] Petitioners point out that "TVA did not merely stop construction, but affirmatively forfeited all rights under the permits."[31] Thereafter, petitioners maintain, TVA no longer possessed valid permits, was not an NRC licensee, and was not bound by NRC regulations. As a result, petitioners argue that TVA must now file a new application for construction permits.

But the AEA, in its terms, does not support petitioners' dogmatic approach to surrendered construction permits. Section 185, the only arguably relevant AEA provision, provides for a "forfeiture" of rights under a construction permit only where a construction permit

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application is otherwise acceptable to the Commission, be initially granted a construction permit. The construction permit shall state the earliest and latest dates for the completion of the construction or modification. Unless the construction or modification of the facility is completed by the completion date, the construction permit shall expire, and all rights thereunder be forfeited, unless upon good cause shown, the Commission extends the completion date. Upon the completion of the construction or modification of the facility, upon the filing of any additional information needed to bring the original application up to date, and upon finding that the facility authorized has been constructed and will operate in conformity with the application as amended and in conformity with the provisions of this chapter and of the rules and regulations of the Commission, and in the absence of any good cause being shown to the Commission why the granting of a license would not be in accordance with the provisions of this chapter, the Commission shall thereupon issue a license to the applicant. For all other purposes of this chapter, a construction permit is deemed to be a "license."
42 U.S.C. § 2235(a).

[30] Petitioners' Brief at 6; *see also* Petitioners' Reply at 5.

[31] Petitioners' Reply at 4.

has "expired" and has not been extended. Specifically, Section 185 says, "[u]nless the construction or modification of the facility is completed by the completion date, the construction permit shall expire, and all rights thereunder be forfeited, unless upon good cause shown, the Commission extends the completion date."[32]

Thus, under the plain language of Section 185, the voluntary surrender of a construction permit that has not in fact "expired" – that is where the construction completion date had not yet arrived – does not constitute a situation to which the "forfeiture" provision under Section 185 applies.[33] Forfeitures in Section 185 only cover expired construction permits. TVA's Bellefonte construction permits that are at issue here never "expired." They were simply surrendered before their expiration dates had arrived (in 2011 and 2014). Hence, no "forfeiture" within the meaning of Section 185 took place.

Neither does voluntary surrender of a not-yet-expired construction permit fit within the ordinary meaning of "forfeiture." The dictionary defines "forfeit" to mean "1. Something surrendered as punishment for a crime, offense, error, or breach of contract."[34] The dictionary definition indicates that forfeiture is generally understood as a consequence for a wrongful act. But the scenario we are addressing here is one where a licensee had not engaged in any form of wrongdoing but, rather, *voluntarily* chose to surrender its construction permit.

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[32] 42 U.S.C. § 2235(a).

[33] The legislative history of Section 185 does not speak to what constitutes "good cause" for the purpose of avoiding forfeiture.

[34] WEBSTER'S NEW COLLEGE DICTIONARY 448 (3d ed. 2005).

2. NRC's Broad Statutory Discretion

Although the AEA is silent on the NRC's authority in the event of a voluntarily-surrendered construction permit, it has long been established that the NRC possesses broad discretion in deciding how to proceed in the face of congressional silence. "The Atomic Energy Act of 1954 is hallmarked by the amount of discretion granted the Commission in working to achieve the statute's ends. The Act's regulatory scheme 'is virtually unique in the degree to which broad responsibility is reposed in the administering agency, free of close prescription in its charter as to how it shall proceed in achieving the statutory objective.' *Siegel v. AEC*, 400 F.2d 778, 783 (1968)."[35]

Our broad discretion under the AEA has been confirmed in numerous court decisions, including one approving our decision in the *Comanche Peak* construction permit proceeding to extend an already-expired construction permit under Section 185.[36] In that case, the licensee inadvertently allowed its construction permit to expire. After the licensee realized its error, it applied for an extension of its permit, which the NRC granted. Deferring to the NRC's view of its statutory authority, the court found no forfeiture under Section 185, despite the expiration of the permit, because Section 185 did not specify when a showing of good cause for a construction permit extension had to be made. Similarly, in this case Section 185 does not specify whether a relinquished construction permit may be reinstated. This statutory silence leaves the NRC room to allow reinstatement if reasonable.

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[35] *Pub. Serv. Co. of N.H. v. NRC*, 582 F.2d 77, 82 (1st Cir. 1978) (some internal citations omitted); *see also Massachusetts v. U.S.*, 522 F.3d 115, 126-127 (1st Cir. 2008).

[36] *See Citizens Assoc. for Sound Energy v. NRC*, 821 F.2d 725, 731 (D.C. Cir. 1987).

3. AEA's Overall Statutory Scheme

Contrary to petitioners' position, construing the AEA to authorize the Commission to reinstate a voluntarily-surrendered construction permit does not conflict with the AEA's statutory language or objectives. In addition to Section 185, which we have already considered, two other sections of the AEA, Sections 186 and 189, may arguably bear on our interpretation of our reinstatement authority. We find, however, that our exercise of reinstatement authority does not conflict with either of these provisions.

Section 186 authorizes the NRC to revoke licenses where there is wrongdoing or other misfeasance:

> a material false statement in the application…or because of conditions revealed by such application or statement of fact or any report, record, or inspection or other means which would warrant the Commission to refuse to grant a license on an original application, or for failure to construct or operate a facility in accordance with the terms of the construction permit or license […][37]

However, a voluntary surrender of construction permits amounts to no sort of wrongful activity that may justify revoking a license under Section 186. That provision, accordingly, does not bear on the issue before us today.

Neither does Section 189, which calls for a mandatory hearing for the granting of a construction permit and a hearing upon request for the granting, revoking, or amending of any permit or license, undercut our authority to reinstate a surrendered construction permit.[38] As in the Bellefonte case before us today, in any situation involving a request to reinstate a previously-issued construction permit, the required construction permit hearing process would

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[37] 42 U.S.C. § 2236(a).

[38] 42 U.S.C. § 2239a.(1)(A)

necessarily have *already* taken place at the time of the initial grant of the permit. Petitioners' argument that Section 189 requires a new "prior" hearing begs the very "authority" question at issue here. Petitioners would be correct, of course, if fresh construction permits were required. But because we hold they are not, Section 189 does not prevent NRC's reinstating surrendered permits.

It is worth noting that NRC has provided an opportunity to request a hearing on the question whether TVA has shown "good cause" to reinstate the Bellefonte permits, an opportunity petitioners have partaken. In addition, should TVA prevail in that hearing and then apply for an operating license, there will be a future hearing opportunity on that application. Petitioners cannot fairly maintain they are not being given a meaningful opportunity to be heard.

4. General Administrative Law and Policy

As a general matter, administrative agencies have inherent authority to change and modify their own prior decisions.[39] Indeed, in the particular area of licensing, statutes and regulations often provide for reinstating surrendered licenses in appropriate circumstances. For example, the Federal Communications Commission (FCC) has authority to reinstate expired broadcasting permits: Section 312(g) of the Communications Act of 1934 provides that the FCC may reinstate a broadcasting station license that has expired.[40] Another example is law and

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[39] *See generally United Gas Improvement Co. v. Callery Properties, Inc.*, 382 U.S. 223, 229 (1965); *Gun South, Inc. v. Brady*, 877 F.2d 858, 862-63 (11th Cir. 1989).

[40] "If a broadcasting station fails to transmit broadcast signals for any consecutive 12-month period, then the station license granted for the operation of that broadcast station expires at the end of that period, notwithstanding any provision, term, or condition of the license to the contrary, except that the Commission may extend or reinstate such station license if the holder (continued. . .)

medical licensing. Many jurisdictions allow non-practicing lawyers or doctors who have voluntarily terminated their licenses to reinstate their licenses if they meet certain conditions.[41] The reinstatement problem has not occurred previously at the NRC, so neither Congress nor the Commission has had occasion to codify a particular NRC approach to reinstatement. But it is clear that our decision today is in line with common licensing schemes and with general administrative law practice.

Today's decision is also sound from a policy perspective. Exercising reinstatement authority here promotes regulatory efficiency by allowing the agency to credit both the licensee and the NRC Staff for work already completed during the initial construction permit proceeding and subsequent construction. This avoids repeating unnecessary procedures or reviews that may be legally required were the agency to insist on a fresh construction permit application.

At bottom, reinstating surrendered permits in appropriate circumstances is consistent with the NRC's duty to protect public health and safety. Reinstatement does not allow a licensee to conduct any activities that were not sanctioned by its original construction permits and all regulatory requirements for an operating license would have to be met before constructed plants could begin operating.[42] Nor does reinstatement – in any way – affect the

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of the station license prevails in an administrative or judicial appeal, the applicable law changes, or for any other reason to promote equity and fairness." 47 U.S.C. § 312(g).

[41] *See, e.g.,* D.C. Bar Bylaws, Art. III, § 4(a) and (b); *see also* District of Columbia Municipal Regulations for Medicine §§ 4606.1, 4606.4, and 4615.1.

[42] COMSECY-08-0041, Staff Recommendation Related to Reinstatement of the Construction Permits for Bellefonte Nuclear Plant Units 1 and 2.

right of interested members of the public to raise safety, security, and environmental issues in connection with any future operating license application.

Finally, our decision today is confined to the unusual facts of this case, involving a previously-withdrawn but not-yet-expired construction permit. As such, our reinstatement authority could be invoked again, if ever, only in the rarest of circumstances.

We find Chairman Jaczko's dissent unpersuasive. A reader would not know, based on the Chairman's full-throated rhetoric, that the Commission in actuality has acted with great deliberation and transparency in its reviews and actions, and has sought public participation, to ensure that any reinstatement of the Bellefonte Units 1 and 2 construction permits is fully protective of public health and safety and the environment. We see no need to reiterate our full rationale here, but we find a few of the dissent's points worthy of further discussion.[43]

We are especially perplexed by the dissent's claim that the majority has provided no rationale or justification for our decision. As set forth above, today's decision explains the legal and policy reasoning for our position at considerable length. Disagreement with our reasoning does not erase it.

We also disagree with the dissent's notion that we have changed our prior position on an established policy matter, without explanation and without public participation. The Chairman apparently believes that *Citizens Awareness Network v. NRC* calls for a notice-and-comment

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[43] One minor but notable point warrants mention. The Chairman's dissent mischaracterizes the majority's position that reinstating the permits avoids repeating unnecessary procedures or reviews. Contrary to the Chairman's description, the majority did not state that "'legally required' procedures and reviews *are* 'unnecessary.'" (Emphasis added.) The majority had no reason to make such a definitive proclamation; it did not find that new construction permit applications were necessary.

process before the Commission may allow reinstating the surrendered Bellefonte construction permits.[44] But *Citizens Awareness Network* dealt with a situation quite different from the one before us today. In *Citizens Awareness Network*, the First Circuit struck down an NRC effort to change a settled interpretation of its regulations.[45] Here, by contrast, we are changing no prior interpretation of our regulations. Rather, in today's decision we answer a question that we have not addressed prior to the *Bellefonte* controversy. And, unlike the NRC decision at issue in *Citizens Awareness Network*, today's decision offers a full and rational explanation of our views, in the context of a hearing opportunity with briefs from all litigants.[46] *Citizens Awareness Network*, in short, does not undercut the approach we take in today's decision.

The dissent charges that the majority is allowing utilities to avoid statutory and regulatory requirements, thereby compromising the agency's duty to protect public health and safety. That conclusion appears to flow in large part from the Chairman's narrow reading of the Commission's authority and his conclusion that TVA must begin afresh in seeking construction permits for Units 1 and 2. Contrary to the impression left by the dissent, the agency's consideration of matters of safety and the environment have been paramount in decisions about whether and how TVA may proceed.[47] Moreover, the dissent should not obscure the

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[44] 59 F.3d 284 (1st Cir. 1995).

[45] *Id*. at 291.

[46] Additionally, the Staff's previous memorandum to the Commission in response to the TVA request was publicly available, and subsequently the Commission's voting records and direction to Staff were made public. *See* fn. 17, *supra*.

[47] *See, e.g.*, COMSECY-08-0041, Staff Recommendation Related to Reinstatement of the Construction Permits for Bellefonte Nuclear Plant Units 1 and 2; NRC Staff's Environmental (continued. . .)

Commission's application of its fundamental and traditional regulatory processes in regard to these construction permits.[48]

Lastly, we object to the dissent's insinuation that the majority merely rubber-stamped its prior policy decision without considering the litigants' arguments fully. While the Commission's previous decision to authorize the Staff to reinstate the permits was premised on the belief that this was within its authority, that step did not preclude the Commission from considering its position further, as this agency and other adjudicatory bodies are often permitted to do.[49] Public involvement in this decision is not a pretense; it is real and it is meaningful. Indeed, we requested briefs on the question of our authority to reinstate the construction permits for the

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Assessment and Finding of No Significant Impact, 74 Fed. Reg. 9308 (Mar. 3, 2009); Safety Evaluation by the Office of Nuclear Reactor Regulation Relating to the Request for Reinstatement of Construction Permit Nos. CPR-122 and CPR-123, Bellefonte Nuclear Plant, Units 1 and 2 (Mar. 9, 2009) (ML090620052).

[48] For example, in addition to the instant hearing on the issue of TVA's "good cause" for reinstatement, the necessary safety and environmental reviews and public hearing on the applications for the construction permits were conducted prior to their issuance in the 1970s; in 2003, the NRC evaluated the environmental impacts relating to TVA's request to extend the construction permits to 2011 and 2014 and concluded that there was no significant effect on the quality of the human environment associated with continued construction activities up to the extended dates (*see* 68 Fed. Reg. 3571, 3573 (Jan. 24, 2003)); and, before any application for authority to operate these units would be determined, the application must be re-noticed, the necessary safety and environmental reviews must be conducted, and a hearing must be held.

[49] For example, we can take certain enforcement action or issue license amendments in certain circumstances before completion of any associated hearing. As the courts have held repeatedly, following the Supreme Court's lead in *Withrow v. Larkin*, in practicality an agency head often must act on the same matter initially as supervisor and later as adjudicator. This dual role is not illegal and does not equate to unfair pre-judgment of adjudicatory issues. As we think is evident from our opinion today, we gave full and fair consideration to the arguments raised in the litigants' briefs.

very purpose of ensuring a full legal and policy understanding of the reinstatement issue. The Chairman may disagree with our conclusions but statements which call into question the good faith of our deliberations have no place in the Commission's discourse.

5. Remainder of Proceeding

This decision addresses the "authority" question only, a question raised in petitioners Contentions 1 and 2. We hold that NRC has authority to reinstate surrendered construction permits. We refer the remainder of the petition to intervene and request for hearing, including petitioners' July 15, 2009, supplemental filing to the Atomic Safety and Licensing Board Panel for further proceedings. Once a Licensing Board is convened, it will have to decide in the first instance whether petitioners have established standing and have raised admissible contentions and if so, given their claims, whether reinstatement on the particular facts presented here is lawful and proper—that is, whether there is "good cause" for reinstatement.

CONCLUSION

Accordingly, for the reasons given, the Commission has the authority to reinstate the Bellefonte Construction Permits for Units 1 and 2. Contentions 1 and 2 are *denied*. The remainder of the petition to intervene is referred to the Atomic Safety and Licensing Board Panel under 10 C.F.R. Part 2.

IT IS SO ORDERED.

For the Commission

(NRC Seal)

/RA/

Annette L. Vietti-Cook
Secretary of the Commission

Dated at Rockville, Maryland,
this 7th day of January, 2010.

Chairman Jaczko, respectfully dissenting:

I disagree with the majority's finding that the Commission has the authority to reinstate the Bellefonte Construction Permits for Units 1 and 2. I believe that the argument regarding the legal authority to reinstate a construction permit (CP) which the NRC has terminated at the request of the holder is weak at best. In addition, I disagree with the decision on policy grounds because it allows a utility to simply opt out of NRC requirements concerning maintenance and preservation until it decides to reactivate the permit to resume construction. In my view, we establish a dangerous precedent by allowing a utility to avoid these important regulatory requirements and NRC oversight by withdrawing its permit, knowing that it can be simply reinstated later regardless of the condition of the site.

Section 185a of the Atomic Energy Act (AEA), addresses the expiration of construction permits in section 185a, which states:

> The construction permit shall state the earliest and latest dates for the completion of the construction or modification. Unless the construction or modification of the facility is competed by the completion date, the construction permit shall expire, and all rights thereunder be forfeited, unless upon good cause shown, the Commission extends the completion date.

This language reflects Congress' expectation that permit holders that do not maintain a valid permit forfeit all rights under that permit. This means that a new permit must be obtained through our application process before activities authorized under the permit may commence.

When TVA deliberately and voluntarily surrendered its construction permit, the NRC terminated the permit and TVA forfeited all rights under the permit. Like a permit which has expired, a permit which has been purposely and explicitly abandoned by the holder and terminated by the NRC no longer exists. Therefore, TVA cannot resume any activities authorized by a CP without applying for, and being granted, a new permit.

The majority concedes that the AEA calls for the forfeiture of permit rights upon the expiration date of the permit and is silent on “reinstatement.” Faced with a statute that requires expiration and, upon expiration, forfeiture of all rights associated with construction permits, the majority resorts to misinterpreting the language of the statute in order to allow TVA to resurrect a long-terminated construction permit. This interpretation is inconsistent with the statutory language and establishes a policy that allows permit holders to avoid important regulatory obligations. Importantly, other statutes - such as the Communications Act - explicitly provide for reinstatement. Thus, there is ample support for the argument that, had Congress envisioned such an approach under the AEA, they certainly knew how to include it in the statutory language. That Congress chose not to provide for reinstatement should be informative.

Moreover, the majority appears to be relying primarily upon the underlying assumption that expiration date of the CP prevails. In other words, "forfeiture" does not matter because the expiration matters and in this case, the CP had not expired. But that logic does not play out as neatly as the majority would like. Following that chain of logic, the applicant could have come in requesting an extension of the CP time frame (thus, not allowing it to expire), even though there was no current CP to extend.

The AEA places an obligation upon the NRC to determine if we can grant a CP and to determine when a CP has been forfeited. A permit holder can request to seek an end to its permit obligations at any time, but the agency still has to undergo an analysis to determine if we are ready to relieve the permit holder of the duties required of them under the permit. It is not automatically forfeited even upon a permittee's request. The *Comanche Peak* analogy misses this point. In that instance, everyone – including the permit holder and the NRC - was operating under the presumption that the authority and obligations under the construction permit

continued even though, unbeknownst to them, the permit had expired. It was in the line of a clerical error, not a conscious business decision where the permit holder sought and obtained permission to end its obligation to remain in compliance with NRC requirements and NRC oversight. We also know that TVA understood this distinction very well because it made a different business decision for Watts Bar II where it maintained its CP and is now following the established regulatory process to come in and seek an operating license for that facility.

The fact is that TVA has not held a CP for Bellefonte Units 1 or 2 since September 2006. Without a permit, TVA – like any other utility – is required by the AEA and our regulations to apply for a permit by submitting an application that satisfies 10 C.F.R. Part 50 or Part 52 requirements. To say otherwise – that termination of a permit does not matter - is to say that not having a permit is the same as having had a permit. Certainly, a regulatory agency should, at a minimum, defend its regulations and the need for them. Bypassing our application requirements by "reinstating" a non-existent CP does the opposite.

Nor is this decision consistent with the Commission's regulations, guidance and procedures, as explained in the Policy Statement on Deferred Plants. NRC regulations provide that if the proposed construction is not completed by the latest completion date, the CP shall expire and all rights forfeited. 10 C.F.R. § 50.55(b). Thus, our regulations, like the AEA, require forfeiture of all rights under the CP upon termination. Before deciding to permanently cancel construction, TVA had maintained the option of resuming construction by obtaining a deferred construction status while maintaining its CP. The Commission's expectations regarding regulatory compliance while construction is deferred are detailed in the Commission's Policy on Deferred Plants. As the policy explains, CP holders are required to maintain a quality assurance program in order to ensure that equipment and materials are preserved and

maintained and that documentation of those activities is preserved.

The Commission's policy on construction deferral is grounded on the need to ensure that safety related structures and components are not compromised during the time construction is deferred. The Commission developed this policy in order to provide substantive guidance on the applicability of regulatory requirements in precisely this situation - when construction of a new power reactor ceases and is later restarted. Proposed Commission Policy Statement on Deferred Plants 52 Fed. Reg. 8075 (March 16, 1987). The policy made clear that licensees must assure that their CPs do not expire and that, during the time that construction has ceased, licensees must comply with NRC requirements for verification of construction status, retention and protection of records, and maintenance and preservation of equipment and materials. *Id* at 8077; Final Commission Policy Statement on Deferred Plants 52 Fed. Reg. 38,077 (October 14, 1987). TVA, fully aware of those requirements, chose to obtain termination of the CP to allow it to sell, take apart, remove, abandon in place or demolish structures without oversight or accountability to the NRC. Having made that choice, TVA should be required to establish entitlement to a Part 50 Construction Permit or a Part 52 Combined License.

The majority provides no rationale for suddenly departing from our established policy of ensuring that the safety related structures, systems and components are continuously maintained and preserved if construction is allowed to resume after being deferred. Without continuous regulatory authority, and the associated requirements for maintenance activities and record keeping, the staff loses any assurance of the integrity or reliability of existing structures. While this is precisely the purpose behind the Commission's policy, this decision permits TVA to resume construction after obtaining CP termination – and abandoning preventive maintenance - for the sake of "regulatory efficiency." However, this action will have the opposite effect. For, by

allowing CP termination, we have lost the pedigree and certification of an ongoing QA program and NRC inspections. The potential that undocumented work activities, introduction of unapproved chemicals, corrosion and other unknown degradation has occurred since the QA program was halted calls into question the integrity of and reliability of safety related structures, components and systems. This substantially increases the difficulty of assessing safety, a burden which is shifted to the staff. The true impact of majority's decision is to increase the staff's regulatory burden.

Moreover, the majority decision adopts this policy shift on generic and broad policy grounds. Finding that our regulations and policy on deferred construction may be simply ignored, without requiring an exemption or waiver, is to abandon them. The majority did not reach a site-specific decision as to whether circumstances warrant an exemption. Indeed, the decision does not grant an exemption or discuss any site-specific reasons for allowing this unprecedented action. Instead, the decision relies only on the Commission's broad authority to change and modify policy and cites policy concerns regarding regulatory efficiency.

Further, this decision to abandon our longstanding regulatory and policy stance on CP's was reached without offering any public notice or opportunity for comment. The First Circuit Court of Appeals addressed a similar situation in *Citizens Awareness Network v. NRC,* 59 F.3d 284 (1st Cir 1995), when the Commission unilaterally changed its policy on decommissioning. The Court found that a change to agency policy providing substantive guidance on our regulations required compliance with the notice and comment requirements of AEA. I believe that the majority here is also adopting a change in policy which provides substantive guidance on the application of our regulations. Further, the new policy is not consistent with the AEA or our regulations. Therefore, it was improper to do so without providing notice and an opportunity

for public comment.

Even more troubling is the fact that the Commission changed this policy without any justification. The majority does not cite any new facts, information or changed circumstances that call for a change in our policy concerning CPs. Instead, the majority attempts to minimize the need for CPs by claiming that the "legally required" procedures and reviews are "unnecessary." The majority then tries to minimize the potential consequences of this policy shift by claiming that "reinstatement" will only occur in rare circumstances. That conclusion is far from certain. Up until now, utilities have not terminated permits and thereafter sought reinstatement because it is not permitted under our regulations. Following this shift in policy, however, they will have every incentive to do so and avoid the expense and burden of compliance with our regulations. While this would certainly be more expedient for the impacted utilities, abandoning our regulatory confines makes our job of ensuring public health and safety that much more difficult.

This shortcoming is not cured by allowing the parties to this proceeding to file briefs on this subject. The majority's decision to reverse our longstanding policy was not informed by public input. Rather, it was decided in response to a letter received from TVA. Based on the Commission's response to only a letter, the Staff issued an order allowing reinstatement of the CP. Per the Commission's direction, the Staff offered a hearing on the issue of "good cause" for reinstatement – a limited and narrow hearing at best and one that will not address the broader policy change underlying the decision to allow reinstatement of TVA's CP. Our request for briefs from only the parties in this hearing on the underlying broad policy decision, which applies to all CP holders, is no more than a belated pretense of public involvement. The majority decision is simply a reiteration of the policy decision the Commission had already decided

without public comment or adjudicatory protections.

Lastly, I am troubled that, under this new "reinstatement" policy the public is denied any opportunity to raise safety or environmental issues regarding construction of the Bellefonte reactors. This is because the opportunity for hearing has been limited to the question of whether TVA has good cause for obtaining reinstatement of the CPs. By restricting the hearing notice to this limited issue, we foreclose any hearing on the fundamental safety and environmental issues concerning the decision of whether TVA should be granted a CP.

This limited hearing opportunity cannot be reconciled with the AEA which requires hearings – including a mandatory hearing – on the decision of whether to grant a CP. The fact that a hearing is required before a CP is issued recognizes that construction of a power reactor, which has significant environmental implications, should not be undertaken without a full vetting of the application. Our regulations provide sufficient flexibility to prevent unnecessary duplication by permitting TVA to incorporate information from the original CP application (10 C.F.R. § 50.32) and to obtain exemptions (10 C.F.R. § 50.12). And the staff may rely on its analysis of TVA's original CP application as appropriate. However, to the extent that TVA's CP must be reviewed anew in light of changes to the original application, new circumstances and new requirements, the public should be offered the opportunity to participate in a hearing and a mandatory hearing must be conducted.

In addition, this limited hearing opportunity cannot be reconciled with our commitment to openness and transparency. Hearings serve an important function in our process by ensuring that our regulatory decisions are thoroughly vetted and transparent. Denying the public an opportunity to raise safety or environmental issues on such an important regulatory decision is not defensible as a legal or policy matter. A hearing opportunity after construction is completed,

but before operation is authorized, denies the public a meaningful opportunity to participate in the important issue of siting before substantial irretrievable resources are invested and the significant environmental disruption of construction occurs. Put simply, a hearing after construction cannot substitute for a hearing before construction is authorized.

I believe that the majority opinion establishes a troubling precedent in allowing utilities and the agency to avoid statutory and regulatory requirements on safety, the environment and public participation. When we ignore these fundamental tenets of our regulatory process we compromise our duty to public health and safety and our commitment to transparency and openness. Therefore, I dissent from the majority opinion.