UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Gregory B. Jaczko, Chairman
Kristine L. Svinicki
George Apostolakis
William D. Magwood, IV
William C. Ostendorff

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

CLI-10-26

MEMORANDUM AND ORDER

On April 2, 2010, the Board issued a Memorandum and Order denying the joint petition to intervene and request for hearing of the Southern Alliance for Clean Energy (SACE), the Blue Ridge Environmental Defense League (BREDL), and BREDL's Bellefonte Efficiency and Sustainability Team chapter (BEST) (collectively, Petitioners).[1] Our procedural regulations provide that, to be accorded intervenor status and a hearing, a petitioner must demonstrate standing and proffer at least one admissible contention.[2] The Board concluded that while SACE and BREDL had demonstrated standing, they had not submitted an admissible contention.[3] The Board also concluded that BEST had not satisfied the requirements for standing.[4] Our

[1] LBP-10-7, 71 NRC ___ (Apr. 2, 2010) (slip op.).

[2] 10 C.F.R. § 2.309(a), (d), (f).

[3] LBP-10-7, 71 NRC __ (slip op. at 2).

[4] *Id.* at __ (slip op. at 15-16).

rules accorded petitioners ten days (until April 12, 2010) to appeal LBP-10-7[5] – a deadline to which the Board specifically directed their attention.[6]

Petitioners missed the deadline, belatedly filing their appeal on April 20, 2010.[7] On appeal, Petitioners argue that the Board erred in refusing to consider their Contention 6, in which Petitioners had argued that the applicant, Tennessee Valley Authority (TVA) both did not and cannot satisfy the NRC's quality assurance (QA) standards.[8] In an equally belated "Motion . . . for Additional Time in Which to File Appeal of LBP-10-07," they seek to excuse the tardiness of their appeal on grounds of (i) their counsel's new arrival to the case, (ii) the lengthy time it took him to become conversant with the case file and relevant authorities, and (iii) his need to attend to other legal matters at the time.[9]

In the interest of efficient case management and prompt resolution of adjudications,[10] we generally have enforced the ten-day deadline for appeals strictly, excusing it only in

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[5] 10 C.F.R. § 2.311(b), (c) (providing the petitioner an opportunity an appeal as of right with respect to an order denying a petition to intervene and/or request for hearing, as to the question whether the request and/or petition should have been granted, and requiring that such appeals may be made within ten days after the service of the order).

[6] LBP-10-7, 70 NRC __ (slip op. at 40).

[7] *Brief on Appeal of LBP-10-07 by Blue Ridge Environmental Defense League, its Chapter Bellefonte Efficiency and Sustainability Team and the Southern Alliance for Clean Energy* (Apr. 20, 2010) (Appeal Brief).

[8] *See id.* at 2, 4-7.

[9] *Motion by Blue Ridge Environmental Defense League, its Chapter Bellefonte Efficiency and Sustainability Team and the Southern Alliance for Clean Energy for Additional Time in Which to File Appeal of LBP-10-07* (Apr. 20, 2010), at 1. Petitioners' counsel joined the case on February 16, 2010. In addition, Petitioners direct our attention to their counsel's obligations to submit an appellate brief in *Hardin v. Jackson*, No. 09-5365 (D.C. Cir), due April 19, 2010, and to participate in an appellate oral argument in *Virginia v. BREDL*, Nos. 2221-09-02, 2222-09-02 (Va. Ct. App.) on April 22, 2010.

[10] *Statement of Policy on Conduct of Adjudicatory Proceedings*, CLI-98-12, 48 NRC 18, 18-20 (1998).

"unavoidable and extreme circumstances."[11] We see no such circumstances here. As we held in *Turkey Point*, "unfamiliar[ity] with NRC's Rules of Practice is not sufficient excuse for late . . . filings, particularly where the order that is being challenged expressly advised the petitioner of his appellate rights [and] of the time within which those rights had to be exercised . . . ."[12]

Moreover, Petitioners' argument that their counsel was busy working on other legal matters disregards our longstanding policy that "the fact that a party may have . . . other obligations . . . does not relieve that party of its hearing obligations."[13] Petitioners' counsel was aware both of the Board's likely issuance of a decision in early April[14] and of his two other cited obligations[15] well in advance of the appeal deadline in the case now before us,[16] so he could have filed with us a timely motion for extension of time based upon them. He did not. Nor, contrary to our practice, did he offer an explanation for the tardiness of the motion for extension of time.[17]

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[11] *Id.* at 21. *See also Baltimore Gas & Electric Co.* (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), CLI-98-25, 48 NRC 325, 342 (1998); *Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-98-21, 48 NRC 185, 202 (1998) ("extraordinary and unanticipated circumstances" (citation omitted)).

[12] *Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4). CLI-91-5, 33 NRC 238, 240 (1991).

[13] *Statement of Policy on Conduct of Licensing Proceedings*, CLI-81-8, 13 NRC 452, 454 (1981).

[14] Transcript of Pre-Hearing Conference at 196 (Mar. 1, 2010).

[15] S*ee* note 9, *supra.*

[16] The appellate brief and oral argument to which petitioners direct our attention were scheduled on March 3 and March 19, 2010, respectively – 40 and 24 days in advance of the April 12, 2010 deadline for an appeal of LBP-10-7. *See Hardin v. Jackson*, No. 09-5365 (D.C. Cir. Mar. 3, 2010); Scheduling Notice of Oral Arguments (Va. Ct. App. Mar. 19, 2010).

[17] *See Kansas Gas & Electric Co.* (Wolf Creek Generating Station, Unit No. 1), ALAB-424, 6 NRC 122, 125 (1977):

> In the event of some eleventh hour unforeseen development, a party may tender a document belatedly. The tender must, however, be accompanied . . . by a motion for leave to file out-of-time which satisfactorily explains not only the

Regarding this last point, we disfavor motions for extensions of time that are themselves filed out-of-time, such as the one at issue here. Indeed, we generally expect parties to file motions for extensions of time so that they are "received by the [NRC] well before the time specified expires."[18]

Even had Petitioners filed a timely appeal, the outcome would still be the same. We do not believe the Board committed an abuse of discretion in its ruling on Contention 6. TVA's submittal of additional QA information rendered the contention moot and therefore inadmissible as originally submitted. And although Petitioners could have revised the contention by addressing the new QA information, they chose not to do so.

Moreover, Contention 6 appears to be grounded in two misconceptions on the part of Petitioners. First, they appear to believe that the NRC's reinstatement of the construction permits allows TVA to restart construction on the two units immediately.[19] This is incorrect. Reinstatement of the construction permits did not authorize construction of the reactors; rather,

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> reason for the lateness, but also why a motion for an extension of time could not have been seasonably submitted. This is so irrespective of the extent of the lateness.

[18] *Statement of Policy*, CLI-81-8, 13 NRC at 455. This is a routine – and reasonable – expectation frequently articulated by our licensing boards. *See, e.g.*, *Entergy Nuclear Vermont Yankee, L.L.C. and Entergy Nuclear Operations, Inc.* (Vermont Yankee Nuclear Power Station), Initial Scheduling Order (Nov. 17, 2006) (unpublished), at 9 (directing that a motion for extension of time should be filed "as soon as the movant knows or should have known" of the basis for the motion, and in any event no later than the day preceding the applicable deadline, and providing that motions filed after the applicable deadline will be "summarily denied" in the absence of "extraordinary circumstances."); *Northern States Power Co.* (Prairie Island Nuclear Generating Plant, Units 1 and 2), Memorandum and Order (Prehearing Conference Call Summary and Initial Scheduling Order) (Feb. 18, 2009) (unpublished), at 6 (same); *Southern Nuclear Operating Co.* (Vogtle Electric Generating Plant, Units 3 and 4), Memorandum and Order (Initial Prehearing Order) (Dec. 2, 2008) (unpublished) at 6 (requiring motions for extensions of time to be submitted at least three business days before the due date of the submission for which an extension is sought).

[19] *See, e.g*., Petition to Intervene at 3, 7.

the effect of the reinstatement was to place the facility in a terminated plant status.[20] Second, Petitioners appear to believe that TVA is claiming that it already has satisfied NRC's QA requirements.[21] However, the record is clear that TVA has not fully implemented a QA plan.[22]

For these reasons, we *deny* Petitioners' motion for extension of time and *dismiss* their appeal.[23]

[20] *See* Tennessee Valley Authority (Bellefonte Nuclear Plant Units 1 and 2); Order, 74 Fed. Reg. 10,969, 10,969 (Mar. 13, 2009). *See generally* Commission Policy Statement on Deferred Plants, 52 Fed. Reg. 38,077 (Oct. 14, 1987).

[21] *See* Appeal Brief at 6-7.

[22] *See* Tr. at 143, 147-48. It is worth noting that Petitioners' concerns may be raised in other contexts. For example, proper implementation of QA requirements is a matter that may be raised in a subsequent Part 50 operating license proceeding or in a petition for agency action under 10 C.F.R. § 2.206.

[23]The scope of the hearing offered in this proceeding is not at issue in the instant appeal, and, therefore, we need not revisit the previously-stated rationale for reinstating these construction permits. *See Tennessee Valley Authority* (Bellefonte Nuclear Plant, Units 1 and 2), CLI-10-6 (Jan. 7, 2010) (slip op.) (Jaczko, G., dissenting). However, we take the opportunity to emphasize the agency's commitment to openness and transparency. 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)). Finally, before we render any decision on an application for authority to operate these units, an opportunity for hearing on that application will be issued and the necessary safety and environmental reviews will be conducted. Therefore, we expect the decision process related to the operation of Bellefonte Units 1 and 2 to also be performed in an open and transparent manner.

IT IS SO ORDERED.

For the Commission

[SEAL]

/RA/

Annette L. Vietti-Cook
Secretary of the Commission

Dated at Rockville, Maryland,
this 29th day of September, 2010.

Chairman Gregory B. Jaczko, respectfully concurring in part and dissenting in part:

I concur with the majority that the Board did not commit clear error or abuse its discretion in finding that the contention challenging TVA's ability to satisfy NRC's Quality Assurance and Quality Control (QA) requirements was not adequately supported. Because of this determination, the Board did not reach the question of whether the contention raised an issue within the limited scope of the proceeding. I disagree with the scope of the hearing offered in this proceeding and therefore provide these additional comments.

The crux of my disagreement stems from the Commission's decision to reinstate TVA's Construction Permit (CP) after it had been terminated at TVA's request. As I said when TVA's request first came to the Commission, and in my earlier dissent, I believe that reinstatement contradicts the clear meaning of the Atomic Energy Act, which requires forfeiture of all CP rights upon termination. As implemented by our regulations, guidance and procedures, and under longstanding Commission policy, if a utility changes its mind, a new CP application must be filed and a new permit granted. Once terminated, a CP cannot simply be resurrected.

In addition to these legal objections, there are important policy reasons not to permit reinstatement of abandoned CPs. Utilities can avoid the expense and burden of complying with our regulations while construction is deferred by abandoning CP's, knowing that they can be reinstated at will. But, by doing so, the NRC loses assurance that the site is properly maintained. For example, the Bellefonte site was no longer required to maintain a QA program beginning in 2006, when the CP was terminated, until 2008, when TVA obtained reinstatement of its CP. Without the pedigree and certification of an ongoing QA program subject to NRC inspections during that time, there is the potential for significant but unknown degradation of existing structures, components or systems.

Therefore, I believe we should adhere to our longstanding policy of requiring utilities to remain under NRC oversight during the time construction activities are deferred if they are to be resumed under the same CP. If utilities choose to abandon a CP, they should be treated like any new applicant, and be subject to our application requirements, including opportunity for the public to raise any safety or environmental issues in a contested hearing. Instead, with reinstatement of the terminated CP, the opportunity for hearing was limited to "direct challenges to the permit holder's asserted reasons that show good cause justification for the reinstatement." This limited hearing opportunity does not allow the public to raise critical safety and environmental concerns with the construction of the proposed nuclear reactors in our adjudicatory process. I continue to believe that this limited hearing opportunity cannot be reconciled with our commitment to openness and transparency.

Hearings serve an important function in our licensing process by ensuring that our regulatory decisions are thoroughly vetted and transparent. The public interest is best served by a new hearing opportunity now that more than 40 years have elapsed since the Bellefonte CPs were originally issued. The hearing opportunity for the original CPs, issued over four decades ago, is hardly an adequate substitute for the opportunity to participate in our hearing process on the decision of whether a CP may be reissued. Similarly, the fact that a hearing opportunity will be offered after construction is completed, but before operation is authorized, is not a substitute for a hearing at the CP stage. By that time, when substantial resources have been invested and the environmental disruption of construction has occurred, it is too late to raise important issues relating to the location of the facility.