

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of
Tennessee Valley Authority
Bellefonte Nuclear Power Plant
Units 1 and 2
Permits CPPR-122 and CPPR-123

June 3, 2009

Docket Nos. 50-438 and 50-439

**BRIEF OF THE BLUE RIDGE ENVIRONMENTAL DEFENSE LEAGUE,
ITS CHAPTER BELLEFONTE EFFICIENCY AND SUSTAINABILITY TEAM
AND THE SOUTHERN ALLIANCE FOR CLEAN ENERGY
REGARDING NRC'S STATUTORY AUTHORITY TO REINSTATE
CONSTRUCTION PERMITS AT BELLEFONTE**

Pursuant to the order issued May 20, 2009 by the Nuclear Regulatory Commission, the Blue Ridge Environmental Defense League with its chapter Bellefonte Efficiency and Sustainability Team ("BREDL") and the Southern Alliance for Clean Energy ("SACE") (collectively, "Petitioners") hereby submit their brief regarding the Commission's statutory authority to reinstate construction permits for Bellefonte Units 1 and 2.

In short, the law does not authorize the NRC to reinstate a construction permit that has been terminated. Therefore, the Commission should vacate its decision and void TVA's construction permits for Bellefonte Units 1 and 2.

I. FACTUAL BACKGROUND

Thirty-six years ago, on May 14, 1973, the Tennessee Valley Authority ("TVA") applied to the NRC for a permit to construct Bellefonte Units 1 and 2. The Atomic

Safety & Licensing Board (“ASLB”) issued its favorable decision the next year, and the NRC issued the construction permits (“CPs”) the following day.

In 1988 TVA halted its construction of the reactors and placed them in “deferred” status pursuant to the Commission’s 1987 “Policy Statement on Deferred Plants.” 52 Fed. Reg. 38,077 Oct. 14, 1987. “Deferred” status imposed certain maintenance, inspection and reporting responsibilities on TVA – with which it presumptively complied for 17 years. But in 2005 TVA renounced its intent ever to resume construction of the plant – and thus to pay for maintaining it in “deferred” status. Its request for termination of the CPs was granted by the NRC in 2006.¹ But TVA changed its mind last summer, when it sought “reinstatement” of the CPs. That request was granted by the Commission earlier this year.

Today the reactors remain partially constructed, though the extent to which they have been deconstructed is unknown, except perhaps to TVA. Corrosion of the structures, systems and components continues apace, exacerbated to an unknown extent by unanticipated flooding of the facility. The quality assurance program was abandoned permanently and irremediably. Because neither the public nor the NRC staff had a right to observe or inspect the facility during the years following the NRC’s 2006 approval of TVA’s request to terminate the CPs, the two reactors are essentially informational black holes. There is no way of assessing the status of the plant at present. Indeed, there was no way for the Petitioners knowledgeably to frame contentions before the licensing board.

¹ Letter to TVA from Director of Division of Operating Reactor Licensing, Office of Nuclear Reactor Regulation, September 14, 2008.

Virtually from the time that TVA revealed its intent to resume construction of the two reactors, Petitioners Blue Ridge Environmental Defense League *et al.* questioned the legality of the proposed “reinstatement.” On September 8, 2008, Petitioners sought to file a new contention in the ongoing COL proceeding regarding proposed Bellefonte Units 3 and 4, pointing out that any NEPA analysis must encompass the environmental impacts of the two parallel proceedings, as they are inextricably linked. On March 30th of this year, BREDL filed suit in the U.S. Court of Appeals for the D.C. Circuit, arguing, among other things, that the Commission’s decision to reinstate the CPs was illegal for failure to afford Petitioners and other members of the public an advance opportunity for a hearing. On May 8th of this year, Petitioners sought to intervene in this post-decision hearing, again arguing (by way of contentions 1 and 2) that the Commission’s decision to reinstate the CPs for Units 1 and 2 violated § 189 of the Atomic Energy Act (“AEA”). This brief, in response to the Commission’s order of May 20, 2009, elaborates upon those arguments.²

II. ARGUMENT - Under the AEA, the Reinstatement of a Terminated Construction Permit is the “Granting” of a Construction Permit

The Atomic Energy Act grants to the Commission the power to take certain steps with regard to construction permits and operating licenses. For example, § 185(a), 42 U.S.C. § 2245(a) authorizes **granting** of such permits and licenses. Section 186, 42 U.S.C. § 2246, authorizes their **revocation**, and § 187, 42 U.S.C. § 2247, authorizes their

² Petitioners note that the Commission’s May 20 Order seeks briefing only on the Atomic Energy Act issues raised in the Petition to Intervene (Contentions 1 and 2), rather than the NEPA issues raised in Contention 3. Petitioners have limited the scope of this brief accordingly. However, Petitioners reserve the right to advance their NEPA arguments at every possible opportunity, as they have done from the beginning of this matter.

modification. However, nothing in the Act authorizes “**reinstatement**” of forfeited permits or licenses. Research reveals no evidence, in the Act or elsewhere, of congressional intent to authorize the Commission to “reinststate,” “restore,” “revive,” “resuscitate,” or otherwise breathe new life into a permit that previously has been voided by Commission action. The text of the Act prescribes only one way in which the Commission may authorize a party to construct a nuclear power plant where that party currently possesses no such authority – by “granting” that party a permit. The “reinstatement” of a permit is, in effect, the “granting” of a permit and must be so treated for legal purposes.

This point is not merely semantic – it goes to the heart of the Commission’s legal obligation in this proceeding. Of the spectrum of permitting actions that the Commission is statutorily empowered to take, the most substantive actions have attached to them a public hearing requirement. Section 189(a) provides that:

in any proceeding under this chapter, for the **granting, suspending, revoking, or modification** of any license or construction permit, or application to **transfer control**, and in any proceeding for the **issuance or modification of rules** and regulations dealing with the activities of licensees, and in any proceeding for the **payment of compensation, an award or royalties** under Sections 2183, 2187, 2236(c) or 2238 of this title, the Commission shall grant a hearing upon the request of any person whose interest may **[**68]** be affected by the proceeding, and shall admit any such person as a party to such proceeding.³

In a case like this one, where there is a dispute as to whether § 189 hearing rights attach to the Commission’s action, it must be determined whether the permitting action falls within or without the § 189 list. The Commission cannot exclude an action from the

³ Atomic Energy Act of 1954 § 189(a), 42 U.S.C. § 2239(a) (emphases added)

ambit of § 189's hearing requirement merely by attaching to it a creative label (*e.g.*, “reinstatement”) that is found nowhere in the text of the statute.

This was made clear by the First Circuit Court of Appeals in *Citizens Awareness Network v. NRC*, 59 F.3d 284 (1st Cir. 1995), where petitioners situated much like the Petitioners here argued that an NRC decision allowing removal of reactor component parts fell within the scope of the § 189 list of actions that require hearings because it was, in reality, a license “amendment.” The NRC Staff countered that because it referred to the proposed action not as a “license amendment” but as a “component removal plan” – an action not specifically denominated in § 189 – hearing rights did not attach. The court rejected this linguistic slight-of-hand summarily:

The Commission elevates labels over substance. It would have us determine that a "proceeding" specifically aimed at excusing a licensee from filing a petition to amend its license is not the functional equivalent of a proceeding to allow a de facto "amendment" to its license. As this construct would eviscerate the very procedural protections Congress envisioned in its enactment of section 189a, we decline to permit the Commission to do by indirection what it is prohibited from doing directly. *Id.* at 295.

The overarching lesson of *Citizens Awareness Network* is that “it is the substance of the NRC action that determines entitlement to a section 189a hearing, not the particular label the NRC chooses to assign to its action.”⁴ If the NRC’s label for the action does not fit, an apt label must be found within the text of the statute.

An objective look at the Commission’s “reinstatement” of the Bellefonte CPs demonstrates that it was the functional equivalent of the “granting” of two new permits. This is clarified by first looking at the 2006 termination of the CPs. In the 17 years leading up to its request to terminate the CPs, TVA evidently went to great length and

⁴ *Id.* (citations omitted)

expense to comply with the maintenance, QA, and reporting requirements of the Policy on Deferred Plants. Undoubtedly this cost TVA millions of dollars. When it abandoned all plans to complete the plant in 2005 and sought termination of the CPs, TVA made a trade – it eliminated its multi-million dollar compliance costs in exchange for its right ever to complete construction of the plant. It surrendered this right knowingly and irreversibly, based on a business judgment.

Therefore, when TVA sought reinstatement of the CPs in 2008, it was no longer a permittee. It had forfeited its right, at any point in the future, to resume construction of the plant. It enjoyed no rights under the AEA, and was subject to no legal restraints. Similarly, the NRC had no legal relationship with the facility as it had affirmatively terminated its jurisdiction. TVA could have dynamited the facility without risk of sanction from the NRC.

Some of the reported cases involved NRC permittees or licensees to whom the NRC had granted certain privileges (e.g., authority to restart a problematic plant⁵, lifting of a license suspension⁶); in each case the court determined that a hearing was or was not required under § 189(a), based generally on the court's assessment of the significance of the permit or license alteration at issue. The instant case is entirely different. Prior to the disputed NRC "reinstatement" order below, **there was no permit or license in existence.** There was thus no permit or license to suspend, condition, amend or reinstate. TVA's legal right to undertake further construction of the plant was no greater than BREDL's.

⁵ *Commonwealth of Mass. v. NRC*, 878 F.2d 1516 (1st Cir. 1989)

⁶ *San Luis Obispo Mothers for Peace v. NRC*, 751 F.2d 1287 (D.C. Cir. 1984)

III. CONCLUSION

The Atomic Energy Act does not authorize the NRC to “reinstate” a construction permit that has been terminated. The so-called “reinstatement” of the CPs at issue here was, in fact and law, the “granting” of new CPs. Therefore, the Commission should vacate its decision and void TVA’s permits.

If the Commission disagrees with Petitioners and concludes that it had proper authority under the Act to reinstate TVA’s CPs, it was nevertheless required under § 189 to grant Petitioners an opportunity for a hearing in advance of the decision to reinstate. This legal error can only be remedied by vacating the reinstatement order, complying fully with § 189's hearing requirements, and then revisiting anew the decision regarding TVA’s request.

Respectfully submitted,

A handwritten signature in black ink that reads "Louis A. Zeller". The signature is written in a cursive style and is followed by a horizontal line.

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CERTIFICATE OF SERVICE

I hereby certify that copies of the BRIEF OF THE BLUE RIDGE ENVIRONMENTAL DEFENSE LEAGUE, ITS CHAPTER BELLEFONTE EFFICIENCY AND SUSTAINABILITY TEAM AND THE SOUTHERN ALLIANCE FOR CLEAN ENERGY REGARDING NRC'S STATUTORY AUTHORITY TO REINSTATE CONSTRUCTION PERMITS AT BELLEFONTE was served on the following persons via Electronic Information Exchange this 3rd day of June, 2009.

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Signed this day June 3, 2009 in Glendale Springs, NC

A handwritten signature in black ink that reads "Louis A. Zeller". The signature is written in a cursive style and is followed by a horizontal line.

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