

RESPONSE SHEET

TO: Annette Vietti-Cook, Secretary
FROM: COMMISSIONER JACZKO
SUBJECT: COMSECY-08-0041 – STAFF RECOMMENDATION
RELATED TO REINSTATEMENT OF THE
CONSTRUCTION PERMITS FOR BELLEFONTE
NUCLEAR PLANT UNITS 1 AND 2

Approved _____ Disapproved X Abstain _____

Not Participating _____

COMMENTS: Below _____ Attached X None _____



SIGNATURE

1/27/09

DATE

Entered on "STARS" Yes X No _____

**Commissioner Jaczko's Vote on COMSECY-08-0041
Staff Recommendation Related To Reinstatement of the Construction Permits for
Bellefonte Nuclear Plant Units 1 and 2**

I disapprove of TVA's request to reinstate its construction permits for the Bellefonte Nuclear Plant (BLN) Units 1 and 2.

Currently, TVA does not hold a license for Bellefonte Units 1 or 2. This is a fact; an inconvenient fact, but a fact nonetheless. TVA asked for a withdrawal of the construction permits (CPs) in a letter dated April 6, 2006, and was granted the withdrawal of those permits on September 14, 2006. Since the date of withdrawal, valid CPs for Bellefonte Units 1 and 2 thus ceased to exist. Thus, TVA was not subject to any jurisdiction or authority of the NRC for Bellefonte Units 1 and 2. Even TVA itself acknowledges that it is no longer in possession of a valid CP by its very request for the NRC to give them CPs. There is an obvious and easily applied litmus test for this situation, could TVA do any NRC-related activities at the site today; does TVA have any obligations to the NRC related to the site today; and could the NRC require TVA to do anything at the site today or enforce against them if they do not? The answer to each of these questions is clearly "no" and thus, today TVA clearly does not hold any permits for these units.

But while no one is denying the existence of this fact, we appear to want to deny the consequences of it. Without permits, TVA is required by the Atomic Energy Act and by the NRC's implementing regulations to apply for a construction permit and to submit an application that satisfies Part 50 or Part 52 requirements. To say otherwise – to say that a withdrawal does not matter - is saying that not having a permit for over two years is the same as having had a permit for those two years. Certainly, a regulatory agency should, at a minimum, defend its regulations and the need for them. Instead, "reinstating" a non-existent CP clearly does the opposite.

Moreover, there is an inherent danger in ignoring this obvious fact. Licenses exist for a purpose. We use them to fulfill our statutory mandate of protecting the public health and safety. Granting, granting subject to conditions, or denying licenses is one of our most fundamental regulatory purposes. Yet, rather than recognize that the withdrawn CPs at some point held value, we are now diminishing the value of all CPs.

In order to ensure the public health and safety is protected, the agency established a review process for CP applications embodied in Part 50 of the agency's regulations. Those regulations, developed through a formal public rulemaking process, established the regulatory process the agency determined was necessary to ensure public health and safety; and it is upon those regulations that TVA is now required to rely. Regardless of what TVA chooses to call its request, for NRC purposes, its request is an application; and it is an application that fails to meet our regulatory requirements for construction permit applications. The appropriate response to TVA, therefore, should have been for the agency to reject the request because it failed to meet the necessary regulatory requirements. When interested members of the public request a hearing, we reject any request that does not satisfy our Part 2 standards that govern hearings. I expect potential licensees to be held to those same standards.

TVA's request would have us contemplate a novel and ad hoc process that follows neither the Commission's Policy Statement on Deferred Plants (52 Fed. Reg. 38,077, Oct. 14, 1987) nor the agency's regulations. The Policy Statement establishes a policy for utilities with CPs that

allows them to continue to maintain their permits, but to delay or terminate construction activities. The Policy Statement provides a framework for plants with CPs in a deferred or terminated status to seek reactivation of their CP. But these facilities continue to have permits. The Policy Statement clearly defines a terminated plant as, "a nuclear power plant at which the licensee has announced that construction has been permanently stopped, **but which still has a valid CP.**"

During their consideration of the Policy Statement, the Commission considered this to be an important point. In their approval of the Policy Statement, the Commission specifically revised the policy to ensure the Commission maintained appropriate oversight of a CP holder that requested terminated status until the license was withdrawn, even if that meant extending the CP expiration date. Specifically, for plant termination the Policy states, "A licensee should inform the Director of NRR when a plant is placed in terminated status. In the event that withdrawal of a CP is sought, the permit holder should provide notice to the NRC staff sufficiently far in advance of the expiration of the CP to permit the staff to determine appropriate terms and conditions. If necessary, a brief extension of the CP may be ordered by the staff to accommodate these determinations. Until withdrawal of the CP is authorized, a permit holder must adhere to the Commission's regulations and the terms of the CP and should submit suitable plans for the termination of site activities, including redress, as provided for under 10 CFR 51.41, for staff approval." (52 Fed. Reg. 38,079)

Thus, the policy contemplates an end for the license when there is no longer a need for continued NRC oversight, just as it retains the need for continuing NRC oversight when there is no end. The policy clearly contemplates continued NRC oversight where a license is placed in deferred or terminated status because the policy makes clear that CP holders in either a deferred or terminated status continue to hold valid construction permits. Under the policy statement, a holder of a CP can request its permit be placed in deferred status and a valid CP with continuing obligations that NRC can both require and enforce. A CP holder can move from a deferred status to a terminated status, which again retains the validity of the CP and places continuing obligations on the holder of the permit that NRC can both require and enforce. The next step, should a permit holder choose to continue down the path, is that of a withdrawal of a CP. Once a CP is withdrawn, no valid CP exists and there are no continuing NRC obligations or continuing NRC authority for NRC enforcement.

Even if somehow this non-existent CP could be recreated to a valid CP in a deferred or terminated status, TVA could not reactivate under the Policy. The Policy provides that a licensee of a terminated CP that plans to maintain the option of plant reactivation should "[d]evelop and implement a preservation and maintenance program for structures, systems, and components important to safety, as well as documentation substantially in accordance with section III.A.3 of this policy statement." (52 Fed. Reg. 38,080). Section III.A.3, in turn, is the section that provides guidance on the "Maintenance, Preservation and Documentation of Equipment" for Deferred Plants. Thus, for the purposes of reinstatement, there is no difference between a deferred and terminated plant. In fact, the policy statement specifically states, "If these provisions are implemented throughout the period of termination, a terminated plant may be reactivated under the same provisions as a deferred plant." *Id.*

The Policy Statement clearly places emphasis upon the need for a CP, even a terminated CP, to have a quality assurance (QA) program that is of a continuing nature throughout the period of termination. It does not provide nor does it suggest that an after-the-fact review of QA records can be an adequate substitute for an ongoing quality assurance program. Quality assurance has been recognized as a fundamental aspect of the agency's public health and safety regime.

When TVA withdrew its construction permit, it no longer had an ongoing quality assurance program that is required pursuant to Part 50 Appendix A, Criterion 1, and Appendix B. Without such a program, there are many unanswered questions, which TVA would need to address if it were to resume construction: which systems and equipment needed maintenance or preservation; what are the effects of environmental stresses since the withdrawal; how effective will a future quality assurance program be in uncovering inadequate construction and maintenance practices, and other factors such as corrosion, cleanliness and deterioration in hindsight. In background information to the Commission for its consideration of the Draft Deferred Policy Statement, the staff expected that not only should the quality assurance program for an extended construction delay be similar to that for active construction, but also additional surveillance would be expected.

In the original safety evaluation report reviewing the construction permit application, the staff reported its conclusion that TVA's approach for Bellefonte's quality assurance program was acceptable. However, during the period since the NRC withdrew the construction permit upon TVA's request, TVA has allowed the site to degrade. During its abandonment of the plants, the NRC ceased inspection activity and thus, the extent of ongoing quality assurance activities – if any – is unknown.

To briefly recap history, in 2004, the NRC approved TVA's request to reduce its commitment to the quality assurance program. In return, TVA acknowledged that for equipment that it removed from lay-up, ceased maintenance, preservation and documentation, or abandoned, that it may require replacement prior to reactivation in accordance with the Policy Statement. However, an important factor of this agreement was that the QA program would continue. NRC inspection reports document that TVA's deferred maintenance declined from about 19,000 activities in 2002, to about 4,500-5,500 activities in 2005, just prior to TVA withdrawing their construction permit. We also know that when TVA withdrew their permit, they informed us that as of October 1, 2005, all lay-up activities and associated inspections had ceased, and no quality-related activities were on going at Bellefonte. Thus, when TVA decided to discontinue lay-up and quality assurance activities without first obtaining agency approval, they no longer adhered to the Commission's regulations and terms for their construction permits.

Therefore, the certification and pedigree of any QA system have been lost. Although records may remain, the NRC can no longer be assured of the quality of the equipment since the QA program was halted. The potential that undocumented work activities, introduction of unapproved chemicals, corrosion and other unknown degradation may have occurred calls into question the integrity and reliability of safety related structures, systems and components. It is not a trivial matter to merely resume a quality assurance program and preventative maintenance activities. With Bellefonte, the QA program has become invalidated. The most direct way to restore the program is to vet the QA program through the Part 50 Construction Permit process or the Part 52 COL process to be able to have a more formal and transparent consideration of these issues.

There are also other substantive differences between the manner in which a CP review pursuant to Part 50 or Part 52, and a "reinstatement" review as outlined by the staff, would operate. First, the burden seems to shift from the applicant to the NRC staff. If TVA were required to submit a CP application pursuant to Part 50, it would then rely upon section 50.12 to request exemptions from regulatory requirements it would now be required to comply with that were not required in 1974. The exemption request is a burden clearly placed upon the applicant to demonstrate. On the other hand, if the reinstatement proceeds as TVA envisions, it would

have to identify the regulations that have been promulgated in the interim, and if the staff wanted to impose any of these regulations on the applicant, it is the staff that would have to justify that such requirement meets the backfit test.

The staff's argument seems to be that it can ensure all the safety issues are resolved whether the applicant is required to come in with a CP application pursuant to Part 50 or Part 52, or whether it follows the reinstatement process. While I am very confident in our staff's abilities, I am not convinced that we can be certain that all safety issues will in fact be addressed without the broad and wholesale review required by Part 50 or Part 52. I am also confused as to why we would choose an un-established option that shifts the burden to the staff over an established option that keeps the burden, appropriately, upon the applicant. If the resolution of all safety issues is truly equal under either scenario, then there is no rationale for pursuing the path that inappropriately shifts this burden.

I think it is reasonable to argue that Parts 50 or 52 could accommodate the nuances presented by this application. Both the Part 50 and Part 52 processes offer flexibilities that include allowing the applicant to incorporate by reference any material from the original application that continues to be valid (see sections 50.32 and 52.8(b)), and allowing the applicant to request exemptions for any regulation it now might have to meet that it was not required to meet when it had a CP (see sections 50.12, 51.6, and 52.7). I understand the appropriateness of allowing an applicant to pursue an easier process where one is available. But, here, there is no other process and establishing another process just for this case would essentially render a Commission statement that a valid CP does not have any meaning or utility.

Moreover, following TVA's requested path sets a precedent that may have many unintended and unanticipated consequences. Conceivably, this action could essentially argue for reinstatement of every other withdrawn license, as there is nothing that clearly distinguishes Bellefonte from any of these other instances. Thus, taking this action opens up an entire line of questions that we are simply not prepared to answer.

It is also obvious that the NRC's requirements concerning deferment and terminated status are far from onerous. The Commission allows licensees to extend its CPs basically indefinitely with relatively minor effort, and yet TVA declined that option. We set the bar basically on the ground and now TVA is asking the NRC to lift them over it. By requesting reinstatement, TVA is asking the Commission to allow licensees to choose when they want to comply with the rules, and when they do not; and is asking the NRC to provide TVA regulatory stability while sacrificing it for others. It was not a significant burden on TVA to continue to request extensions and continue quality assurance activities in accordance with the deferred plant policy statement.

Finally, because I believe that the Commission does not have the authority to raise a forfeited permit from the ashes, and that thus, any "reinstatement" of this permit is essentially granting new CPs, I also believe that the agency is required to hold a hearing on the CPs, including a mandatory portion; and that the agency is required to undertake an Environmental Impact Statement (EIS) as opposed to an EA.


The Atomic Energy Act is clear in its requirement that the granting of a CP include an opportunity for a hearing and a mandatory portion of the hearing. See AEA Sec. 189.a.(1)(A). Limiting an adjudicatory hearing on reinstatement to only a hearing on determining "good cause" is also shortsighted. All of us, including TVA, would benefit from a complete vetting of this situation which we all acknowledge has no precedent. That vetting simply cannot be complete without a hearing that allows for the issues necessary to capture the singularity of this

request. Even if we were to assume there was statutory authority allowing us to handle this application differently, to rely upon the fact that an original CP hearing was held in 1974 is not only extremely weak, but that hearing could in no way capture the nuances presented by the current request.

With respect to the environmental impact statement, the staff proposes performing an environmental assessment instead. But section 51.20(b)(1) of the agency's regulations requires an EIS for issuance of a CP. In addition to the regulatory requirement, there are other reasons to require an EIS here, as well. Although the staff performed an EA the last time the NRC extended the latest date for completion of construction of these CPs, that EA did not address the need for power or alternative energy sources, and the discussion of these topics in the 1974 FES is hopelessly stale. Moreover, these topics need not be addressed in the EIS for the operating licenses, pursuant to Section 51.53(b). A new EIS is the obvious and most direct way for the agency to ensure that the letter and spirit of NEPA is followed.

Ultimately, this is an issue of TVA's creation and one TVA must now fix, not the NRC staff. TVA voluntarily made a business decision to end its CP. Simply wishing it had not done so should not make it so. The agency has established processes that are more than capable of handling the flexibility that may be necessary in reviewing this request and those processes were established with a purpose. There is a path forward for TVA should they choose to comply with agency regulations.

I want to commend the staff for presenting the Commission their position on reviewing TVA's request for reinstatement. I have no doubt the staff would do an excellent job of reviewing TVA's plans. I also want to commend Joe Williams, the NRC staff reviewer who non-concurred on this staff paper. I am a strong supporter of the non-concurrence program for the reason demonstrated in this instance – the Commission is always best served when the healthy debate surrounding the staff's decision-making is relayed to the Commission transparently. It not only saves the Commission time in recreating similar discussions, but it also informs the Commission, and the public, of just how seriously the NRC staff takes its public health and safety responsibility.



Gregory B. Jaczko 1/27/09
Date