RAS 4229

April 3, 2002
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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	
	)	
TENNESSEE VALLEY AUTHORITY	)	Docket Nos. 50-327 and 50-328
	)	Docket No. 50-390
(Sequoyah Nuclear Plant, Units 1 and 2)	)	(Consolidated)
	)	
(Watts Bar Nuclear Plant, Unit 1)	)	

NRC STAFF'S ANSWER TO CONTENTIONS FILED BY WE THE PEOPLE, INC. TENNESSEE

INTRODUCTION

The staff of the Nuclear Regulatory Commission (Staff) hereby submits its answer to the contentions filed by We The People, Inc. Tennessee (WTP).[1] For the reasons set forth below, the Staff submits that WTP has failed to file any admissible contentions under the standards for admission of contentions in 10 C.F.R. § 2.714(b) with respect to either of the relevant nuclear facilities discussed herein.

BACKGROUND

Tennessee Valley Authority (TVA) is the licensee for the Sequoyah Nuclear Plant, Units 1 and 2 (Sequoyah), and the Watts Bar Nuclear Plant, Unit 1 (WB). By applications dated August 20, 2001 (for WB), and September 21, 2001 (for Sequoyah), TVA requested license amendments that would allow TVA to insert up to a certain number of tritium producing burnable absorber rods (TPBARs) into the reactor cores. The proposed amendments are related to an agreement between TVA and the U.S. Department of Energy (DOE) under which TVA will provide certain irradiation

[1]Contentions Of We The People (Mar. 6, 2002) (served on March 7, 2002).

services to DOE. DOE plans to transport the irradiated TPBARs to its Savannah River site in South Carolina for defense purposes, but the transportation activities by DOE are not the responsibility of TVA and are not the subject of the pending amendment requests. On December 17, 2001, the Staff published in the *Federal Register* two separate notices of the amendment requests and of an opportunity for a hearing. 66 Fed. Reg. 65,000 (2001) and 66 Fed. Reg. 65,005 (2001). Pursuant to the notices, WTP filed hearing requests and petitions for leave to intervene with respect to both facilities. By an order dated January 28, 2002, issued by the Chief Administrative Judge, the two proceedings were consolidated. Subsequently, WTP amended its requests and petitions in accordance with the Memorandum and Order (Feb. 7, 2002) issued by the Atomic Safety and Licensing Board (Board), and has now filed its contentions.

DISCUSSION

I. Legal Standards for the Admission of Contentions

To gain admission to a proceeding as a party, a petitioner for intervention, in addition to establishing standing and raising an aspect within the scope of the proceeding, must submit at least one valid contention that meets the requirements of 10 C.F.R. § 2.714(b). *Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 333 (1999); *Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-96-7, 43 NRC 235, 248 (1996). For a contention to be admitted, it must meet the standards set forth in 10 C.F.R. § 2.714(b)(2), which provides that each contention must consist of "a specific statement of the issue of law or fact to be raised or controverted" and must be accompanied by:

> (i) A brief explanation of the bases of the contention;
>
> (ii) A concise statement of the alleged facts or expert opinion which supports the contention . . . together with references to those specific sources and documents of which the petitioner is aware and on which the petitioner intends to rely to establish those facts or expert opinion;
>
> (iii) Sufficient information . . . to show that a genuine dispute

> exists with the applicant on a material issue of law or fact. This showing must include references to the specific portions of the application . . . that the petitioner disputes and the supporting reasons for each dispute, or, if the petitioner believes that the application fails to contain information on a relevant matter as required by law, the identification of each failure and the supporting reasons for the petitioner's belief. On issues arising under the National Environmental Policy Act, the petitioner shall file contentions based on the applicant's environmental report. The petitioner can amend those contentions or file new contentions if there are data or conclusions in the NRC draft or final environmental impact statement, environmental assessment, or any supplements relating thereto, that differ significantly from the data or conclusions in the applicant's document.

10 C.F.R. § 2.714(b)(2). The failure of a contention to comply with any one of these requirements is grounds for dismissing the contention. 10 C.F.R. § 2.714(d)(2)(i); *Arizona Public Service Co.* (Palo Verde Nuclear Generating Station, Units 1, 2, and 3), CLI-91-12, 34 NRC 149, 155-56 (1991); *see* Rules of Practice for Domestic Licensing Proceedings -- Procedural Changes in the Hearing Process, 54 Fed. Reg. 33,168 (1989). A contention must also be dismissed where the "contention, if proven, would be of no consequence . . . because it would not entitle [the] petitioner to relief." 10 C.F.R. § 2.714(d)(2)(ii).

Pursuant to section 2.714(b)(2), a petitioner must provide a "clear statement as to the basis for the contentions and the submission of . . . supporting information and references to specific documents and sources that establish the validity of the contention." *Palo Verde*, CLI-91-12, 34 NRC at 155-56. The purpose of the basis requirement of section 2.714(b)(2) is (1) to assure that at the pleading stage the hearing process is not improperly invoked, (2) to assure that the contention raises a matter appropriate for adjudication in a particular proceeding; and (3) to put other parties sufficiently on notice of the issues so that they will know generally what they will have to defend or oppose. *Philadelphia Electric Co.* (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-216, 8 AEC 13, 20-21 (1974). Further, the petitioner has the obligation to formulate the contention and provide the information necessary to satisfy the basis requirement of 10 C.F.R.

§ 2.714(b)(2). *Florida Power & Light* (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-00-23, 52 NRC 327, 329 (2000); *see also Statement of Policy on Conduct of Adjudicatory Proceedings*, CLI-98-12, 48 NRC 18, 22 (1998).

Moreover, Licensing Boards are delegates of the Commission and, as such, they may "exercise only those powers which the Commission has given [them]." *Public Service Co. of Indiana* (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-316, 3 NRC 167, 170 (1976). It is well established under Commission precedent that a contention is not cognizable unless it is material to a matter that falls within the scope of the proceeding for which the Licensing Board has been delegated jurisdiction as set forth in the Commission's Notice of Opportunity for Hearing. *Marble Hill,* ALAB-316, 3 NRC at 170-71; *see also Commonwealth Edison Co.* (Zion Station, Units 1 and 2), ALAB-616, 12 NRC 419, 426 (1980).

II. Analysis of Proffered Contentions

Contention No. 1

> The following constitute unresolved safety issues per 10 C.F.R. § 50.59 and would cause members of WTP harm by denying them access to clean water for drinking and recreation. The evaluation of increased tritium releases from the reactors during normal operations and during abnormal operations, i.e., operations with cracked tritium rods, using computer models substituting for available actual data or case studies, has not been adequate. Also, the increased tritium releases of millions of curies from a reactor meltdown that would occur after an attack on the containment by terrorist piloted aircraft would be catastrophic, rendering the Tennessee River unusable for recreation and drinking water.

(WTP does not appear to have provided a basis or bases for the foregoing contention.)

Staff's Response

The Staff was unable to identify in WTP's submittal an explanation by WTP of a basis or bases for Contention No. 1, any statement of alleged facts or expert opinion that supports the contention, any references to sources or documents on which WTP intends to rely to establish such facts or expert opinion, or any references to the specific portions of the application(s) that WTP

disputes and the supporting reasons for each dispute. As discussed earlier, all of the foregoing is required by the Commission's regulations at 10 C.F.R. § 2.714(b)(2) governing contentions, and the failure to comply with any one of these requirements is grounds for dismissal of the contention. Also, the contention attempts to introduce an event specifically triggered by an act of terrorism, i.e., an attack on the containment by a terrorist aircraft, that is outside the scope of these license amendment proceedings. *See* 10 C.F.R. § 50.13.

Concerning WTP's assertion that the evaluation of tritium releases, using computer models as substitutes for "available" actual data or case studies, has been inadequate, WTP has not identified the "available" data or described its reliability, cited to anything in the Commission's regulations that would require TVA to use this "actual data" or the unspecified "case studies," or pointed to any part of the applications that shows whether TVA did or did not use such data or studies. Even if there were reliable "actual data" that involved some type of actual measurements, the Commission's regulations still allow the use of other methods to determine the doses expected to result from implementation of a given amendment. For example, 10 C.F.R. § 20.1302 allows licensees to show that operations will not threaten the health and safety of individuals in unrestricted areas by demonstrating "by measurement or calculation that the total effective dose equivalent to the individual likely to receive the highest dose . . . does not exceed the annual dose limit" contained in section 20.1301. 10 C.F.R. § 20.1302(b)(1) (emphasis added). Similarly, Appendix I to 10 C.F.R. Part 50 notes that conformity with the criteria therein can be demonstrated with the use of models; there is no requirement to use only available data or case studies. *See* 10 C.F.R. Part 50, Appendix I, Sec. III.A.1.[2]

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[2]To the extent WTP is alleging that the use of computer models *per se* is an inadequate method of determining the risk of radiation exposure, that contention would constitute an impermissible attack on the Commission's regulations that provide otherwise, as discussed above. *See* 10 C.F.R. § 2.758. In addition, to the extent WTP is questioning the acceptability of doses that are within regulatory limits, however the doses are calculated by TVA, WTP would also be

(continued...)

Given WTP's failure to comply with the requirements of 10 C.F.R. § 2.714(b)(2), as first discussed above, and the contention's premise of a terrorist attack, which brings that part of the contention outside the scope of these proceedings, Contention No. 1 proffered by WTP should not be admitted.

Contention No. 2

> The addition of a nuclear weapons related role for the subject facilities will increase the likelihood of sabotage-induced accidents that will result in massive releases of radioactivity causing harm to the health and economic well-being of members of WTP. The physical protection measures contained in 10 C.F.R. Part 73 are inadequate.

The bases provided by WTP for this contention include the following. The NRC Staff has been directed by the Chairman to conduct a "top to bottom review" of physical protection measures. WTP asserts that "it is widely believed" that the potential for terrorist attacks on nuclear power plants "is far greater than previously believed," and that "detailed information on power plant layout and vulnerabilities" possibly was obtained by terrorists prior to September 11, 2001. Congress is considering enhanced security requirements at nuclear power plants, while the NRC has "also taken action to face up to the terrorist threat through new security orders promulgated to all plant operators." The WB and Sequoyah facilities' attractiveness as terrorist targets "will be greatly enhanced" if they become "key facilities of the U.S. Nuclear Weapons Complex." Also, the movement of tritium produced at the facilities to the recovery facility "increases the likelihood that terrorists will be able to obtain the materials necessary to carry out 'dirty bomb' attacks." The WB and Sequoyah facilities are of a type called "ice condensers" characterized by "exceptionally poor performance of the containment systems in preventing release of radioactivity in the event of key categories of core melt accident[s]." WTP attaches several exhibits in support of Contention No. 2

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[2](...continued)
impermissibly attacking the Commission's regulations. *Id.*

including a June 2000 internal NRC memorandum regarding the "direct containment heating issue" (DCH) for ice condenser plants (which appears to indicate that any vulnerability to early containment failure compared to large dry containments is not due to DCH, and that while ice condenser plants were determined to be vulnerable to station blackout sequences, the "weighted probability of early containment failure . . . was generally within the goal for containment performance"), and a 1978 internal NRC memorandum concerning the structuring of safeguards for licensed material and facilities that do not rely on advance intelligence information. Also attached is a media article on the current administration's policy on the use of nuclear weapons.

Staff's Response

In Contention No. 2, WTP is introducing the possibility of an accident that would result from sabotage by terrorists. Under 10 C.F.R. § 50.13, an applicant for a license amendment is not required to provide for measures for the specific purpose of protection against the effects of sabotage directed against the facility by an enemy of the United States. Thus, given the contention's premise, and the provisions of 10 C.F.R. § 50.13, Contention No. 2 is not admissible. Furthermore, WTP appears to be attempting to challenge the Commission's regulations in 10 C.F.R. Part 73. Under 10 C.F.R. § 2.758, regulations of the Commission are not subject to attack in adjudicatory proceedings, except under certain circumstances. Those circumstances require at a minimum that a party to the proceeding must submit an affidavit that, *inter alia*, "shall set forth with particularity the special circumstances alleged to justify" waiving the regulation identified. In general regard to WTP's contentions, WTP has submitted an affidavit by Dr. Kenneth Bergeron. However, he states therein that "the technical facts presented" in WTP's contentions are true and correct, and that "the conclusions drawn from those facts regarding subjects within [his] fields of expertise are based on [his] best professional judgment" (emphasis added). It is not readily apparent from Dr. Bergeron's resume that Dr. Bergeron has any stated expertise in evaluating any increase in the likelihood of "sabotage-induced accidents" stemming from terrorist

actions as a result of the granting of the requested amendments. The "facts" that WTP has proffered to support Contention No. 2 concerning the purported increase in the likelihood of accidents resulting from terrorism would not appear to be "technical facts," e.g., the NRC Staff's conducting a "top to bottom review" of physical protection measures, the "widely believed" potential for terrorist attacks on nuclear power plants, information on power plants "possibly" being obtained by terrorists, Congress' consideration of enhanced security requirements at nuclear power plants, etc. While Dr. Bergeron's affidavit would appear to be relevant to or supportive of certain technical facts put forth such as the performance of ice condenser containment systems in the event of certain core melt accidents, such facts relate to Contention No. 2 only insofar as it is first established that the likelihood of accidents caused by terrorists will increase. Accordingly, WTP's challenge to the Commission's regulations at 10 C.F.R. Part 73 does not meet the requirements of 10 C.F.R. § 2.758, in that there is no affidavit tendered that establishes special circumstances to justify waiver of the regulations. The Staff also notes that WTP's attempt to introduce into these proceedings any aspects regarding the transportation of tritium to the DOE recovery site is also impermissible since transportation issues are outside the scope of the license amendments requested. Finally, WTP has not referred to specific portions of the applications that it disputes, as required by 10 C.F.R. § 2.714(b)(2), or otherwise satisfied the requirements of that section.

In consideration of the above, Contention No. 2 should not be admitted.

Contention No. 3

> The proposed plant changes will reduce numerous safety margins, but the NRC may allow them because the benefits to the licensee (and presumably its customer base) outweigh the small decrease in safety these erosions of margin represent. This is the traditional balancing that guides much of NRC regulatory decisionmaking. However, there are zero benefits of these plant changes to the licensee within the scope of the licensed activity. In the absence of any benefit to the licensee, allowing the proposed erosion of safety margin and the resulting degradation in the level of protection afforded to WTP is not justified.

WTP's bases for the preceding contention include the following. The DOE is working with TVA

"under the terms of the Economy Act," which implies that TVA must supply irradiation services "at cost;" therefore, "there can be no financial benefit to TVA's ratepayers." WTP also asserts that the NRC does not have the authority to approve the amendments, which WTP argues in its Contention No. 6, *infra.* Further, there is no need for a new tritium supply until 2016 based on Strategic Arms Reduction Treaties, or until 2029 based on the current administration's cuts in the U.S. nuclear arsenal. WTP attaches as an exhibit an executive summary of DOE's "Final Programmatic Environmental Impact Statement for Tritium Supply and Recycling," DOE/EIS-0161 (Oct. 1995), which states, among other things, that "projections require that new tritium be available by approximately 2011."

Staff's Response

This contention is not valid in the Staff's view because WTP has provided no basis for the essence of its contention, i.e., that the proposed amendments, which WTP asserts may involve a "small decrease" in safety, may not be granted without the type of "justification" or benefits suggested, and even if it is proven that there are no financial benefits to the licensee as a result of the amendments, or that DOE tritium needs will not materialize until 2011 or later, that proof would not entitle WTP to relief.[3]

In deciding whether to grant an application, the NRC considers information necessary to enable it to find that there will be adequate protection of the public health and safety. Section 182 of the Atomic Energy Act of 1954, as amended (AEA), 42 U.S.C. § 2232. Section 182 does not require an applicant to provide information regarding a "benefit" to the applicant (such as profits to TVA) or anyone else (such as satisfying DOE needs) when submitting an application. Furthermore, the NRC has long held that benefit (and cost) considerations play no part in making

[3]As noted above, one of WTP's bases for Contention No. 3, that the NRC does not have the authority to approve the amendments, is the focus of Contention No. 6. The Staff's response to this issue is provided in its answer to Contention No. 6, *infra.*

the adequate protection findings required under the AEA. *Maine Yankee Atomic Power Co.* (Maine Yankee Atomic Power Station), ALAB-161, 6 AEC 1003, *cited in Union of Concerned Scientists v. NRC*, 824 F. 2d 108 (D.C. Cir. 1987), and *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), ALAB-623, 12 NRC 670 (1980). WTP has not provided a basis for the proposition that when considering adequate protection of public health and safety, "benefits" must "justify" the granting of the applications, and, since the law is clear that "benefits" (of a non-safety nature) are not considered in making adequate protection findings under the AEA, any eventual showing of their existence or lack of existence would be of no import, and thus would not entitle WTP to relief, i.e, denial of the amendments.[4]

In view of the above, Contention No. 3 should not be admitted.

Contention No. 4

> The NRC's license amendment review process has, to date, been hurried, limited, and too narrowly focused, and as a result it does not provide adequate assurance that the health and well-being of local citizens will not be adversely affected if the proposed plant changes are made.

WTP's bases for this contention are as follows. Ice condenser containments, used at WB and Sequoyah, have a higher failure probability for "many severe accident sequences." A risk-informed analysis is necessary for the subject license amendments. The initial proposed no significant hazards consideration determination was prepared prior to the completion of an ongoing agency review of physical protection measures following the September 11 attacks. No effort appears to have been expended by TVA or the DOE to evaluate what improvements in physical security would be required to compensate for the increased risk of terrorist attack that WTP is asserting in its Contention No. 2.

WTP also asserts that during the comment period noticed in the *Federal Register*, the public

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[4]Of course, neither of the proposed license amendments will be approved by the Staff unless the appropriate findings applicable to such licensing actions under the Atomic Energy Act and the Commission's regulations are made. *See, e.g.,* 10 C.F.R. § 50.57.

was not able to access certain documents due to the NRC's restrictions imposed on its internet web site, and thus was unable to conduct a reasonable review of the license amendment applications or the proposed no significant hazards consideration determination. Further, WTP notes that the public is unable to access "older" documents through the Agencywide Document Access and Management System (ADAMS), and that there have been problems accessing recent documents. WTP points out that, in particular, a TVA handout dated October 2, 2001, from a public meeting, and a document dated October 29, 2001, containing TVA's responses to a Staff request for additional information, were not made available until February 11 and 12, 2002, respectively, and that these documents directly bear on the subject license amendment requests; meanwhile, no changes were made to the public comment or hearing opportunity dates.

Staff's Response

WTP is trying to raise as an issue that the NRC license amendment review process, to date, has not taken into account certain analyses allegedly necessary to the process, such as a risk-informed analysis or an analysis of an ongoing agency review of physical protection measures. WTP is also asserting that the public's access to relevant documents has been hindered, thus precluding the public from conducting a reasonable review of the applications or the proposed no significant hazards consideration determination.[5]

The NRC's license amendment review process clearly has not been completed. A challenge to what the process will or will not include is certainly premature and speculative. More importantly, WTP has not demonstrated that such a challenge constitutes or involves "a genuine dispute . . . with the applicant on a material issue of law or fact." *See* 10 C.F.R. § 2.714(b)(2)(iii) (emphasis added). It is well-established that contentions "must challenge the adequacy of the

[5]To the extent WTP is attempting to challenge the Staff's proposed no significant hazards consideration determination, such is prohibited, and thus cannot be the subject of a valid contention. *See* 10 C.F.R. § 50.58(b)(6).

application, not the adequacy of the Staff's review." *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-01-12, 53 NRC 459, 472 (2001); *Baltimore Gas & Electric Co.* (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), 48 NRC 325, 349 (1998).

As required by the Commission's regulations governing contentions, WTP has not identified portions of the applications, which have long been available to the public, that WTP disputes. Even assuming the documents specifically identified by WTP as having been made "recently" available to the public through ADAMS are material to formulating certain contentions, it is unclear why having over three weeks to review such documents prior to the date contentions were due somehow itself can become a valid contention.

In sum, Contention No. 4 challenges an uncompleted NRC review process rather than a material issue of fact or law concerning the applicant's amendment requests, does not meet the requirements of 10 C.F.R. § 2.714(b)(2), and therefore should not be admitted.

Contention No. 5

> TVA does not provide a "safety conscious" work environment for plant employees to raise safety concerns without fear of retaliation.

WTP's bases for the preceding contention include the following. WTP asserts that adding a second mission (to produce tritium, in addition to producing electricity) is "likely to have the effect of making the maintenance of an adequate safety culture more difficult," but that TVA has "not offered to develop compensatory programs to balance the resulting degradation to safety." Adding the second mission "and another customer (the Department of Energy)" will "likely have the effect" of reducing top management's commitment to safety. Also, the classified nature of some aspects of tritium production introduces "an institutional problem" of tension between the need to protect classified information and the need to protect the public, which means that it will be "highly likely" that the chances of "dangerous reactor accidents" will increase. In addition, WTP cites two examples of recent complaints by TVA employees of harassment and intimidation for raising safety

issues, and cites to examples of security guards going to "external sources" (CNN) "to seek remedies for their concerns." WTP states that concerns about the safety culture at the TVA facilities "are amplified because the three plants in question are at the margin of acceptability with respect to their ability to cope with severe reactor accidents." WTP lists a number of issues regarding the ice condenser and hydrogen control systems, and the reliability of the emergency diesel generators which are necessary to prevent a large early release when there is a loss of offsite power. In support of Contention No. 5, WTP has attached two newspaper articles concerning two whistleblower matters.

Staff's Response

The gist of Contention No. 5 seems to be that TVA's "safety culture" or commitment to safety may not be maintained or will be reduced by reason of the granting of the amendments, due to the addition of a "second mission" (tritium production) and the need to protect classified information[6] and material, which will "compromise" the need to protect the public and the environment. According to WTP, the amendments' impact on TVA's safety culture is particularly of concern given the reactors are allegedly already at the "margin of acceptability."

WTP's contention appears to be premised on speculation as to whether there will be any reduction in TVA's commitment to safety at all (e.g., WTP states that the amendments are "likely to have the effect" of making it difficult to maintain an adequate safety culture, or will "likely have the effect" of reducing management's commitment to safety). Moreover, Contention No. 5 is vague in terms of what impact WTP is claiming the alleged difficulty in maintaining an adequate safety culture or "likely" reduction in TVA's safety culture will have. Thus, WTP has not provided a statement of facts or expert opinion supporting the contention, or information "to show that a genuine dispute exists with the applicant on a material issue of law or fact." *See* 10 C.F.R.

[6]The Staff is unaware of any classified information that would be handled by TVA at either of the facilities involved in connection with the irradiation of TPBARs.

§ 2.714(b)(2). Furthermore, as was discussed earlier, a contention must be dismissed where, even if proven, it would not entitle the petitioner to relief. Such is the case here. Assuming for the sake of argument that granting the amendments would "likely" have the effect of reducing TVA's "commitment to safety" to some unspecified degree, that alone would not mean the amendments could not be granted, particularly since there is no indication that any existing regulatory requirement, licensing requirement, or inspection process designed to ensure safe operations would be weakened, suspended, or rendered ineffective, or that the NRC could not issue appropriate orders if indeed there was a reduction in TVA's commitment to safety that became of concern.[7]

In view of the foregoing, Contention No. 5 fails to meet the requirements of 10 C.F.R. § 2.714(b)(2) and should not be admitted.

Contention No. 6

> TVA is requesting changes to the licenses that exceed the original scope of the licenses. The requests are asking the NRC to license activities that are beyond the authority Congress has granted the NRC. If the NRC were to grant the requests, it would be operating outside the scope of U.S. law, and consequently members of WTP would be denied the protection of their health and welfare.

The bases listed by WTP for this contention are several statutory provisions, including 42 U.S.C. § 2133 and 42 U.S.C. § 7272, certain U.S. treaties, and unidentified sections of the Code of Federal Regulations. In citing 42 U.S.C. § 2133, WTP claims that the NRC is authorized to issue licenses to persons for "industrial or commercial purposes" and not "defense nuclear activities." WTP refers to 42 U.S.C. § 7272 to support its argument that the NRC is prohibited from expending

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[7]The Commission has recently stated that there are "strict limits on 'management' and 'character' contentions." *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-01-24, 54 NRC 349, 366 (2001). In *Millstone,* the Commission opined that "[w]e cannot allow admission of contentions premised on a general fear that a licensee cannot be trusted to follow regulations of any kind." *Id.* at 366. It is difficult to see how WTP's Contention No. 5 is premised on anything more than a "general fear" that TVA will somehow begin to disregard regulations designed to ensure adequate protection of public health or safety simply as a result of granting the proposed license amendments.

funds for the purpose of regulating DOE defense activities, and cites the "Nuclear Non-Proliferation Treaty, the Nuclear Suppliers Group, and various bilateral agreements" to support an argument that tritium production is a "defense nuclear activity that lies outside the NRC's authority to regulate," since "tritium and the means of its production" are subject to "the export control provisions" of the foregoing treaties or agreements. WTP attached several exhibits in connection with its Contention No. 6, including excerpts from a General Accounting Office Report, RCED-00-24, a document entitled "The Nonproliferation Implications of Alternative Tritium Production Technologies Under Consideration by The Department of Energy -- *Summary of Conclusions of DOE Review and Results of Interagency Evaluation,*" an article by Dr. Kenneth Bergeron, and a trade press article describing DOE's decision to avail itself of the TVA reactors' capability to produce tritium.

Staff's Response

As a general matter, in normal power reactor operations, tritium is produced in small quantities as a byproduct material. The NRC, when issuing operating licenses, thus routinely authorizes licensees to produce tritium by expressly authorizing licensees to possess byproduct materials produced by operation of the facility. Here, depending upon how the proposed TVA license amendments are characterized (that is, are they actions that are ancillary to primary commercially licensed activity, or are they actions to license defense activities), and in light of 42 U.S.C. § 2133, 42 U.S.C. § 7272, or the other authorities cited by WTP, various arguments can be articulated that the NRC is or is not authorized to review the amendments.

Conspicuously absent from WTP's contention, however, is a key statutory provision. In 1999 Congress passed the National Defense Authorization Act for Fiscal Year 2000, Pub. L. No. 106-65, 113 Stat. 512 (1999) (Authorization Act). It provides, in relevant part, that the DOE "shall produce new tritium to meet . . . requirements . . . at the Tennessee Valley Authority Watts Bar or Sequoyah nuclear power plants . . . ." Authorization Act, section 3134, 113 Stat. 927. In the Staff's view, this provision, together with its legislative history, remove any doubt concerning the NRC's

authority to act upon TVA's pending license amendment requests, notwithstanding those authorities and documents cited by WTP in its bases for Contention No. 6.

In House Report No. 106-162 (May 24, 1999) concerning the Authorization Act, it is noted in the discussion relating to "Procedures for Meeting Tritium Production Requirements" that the NRC "will have to issue amended licenses" for the WB and Sequoyah facilities," that the NRC licensing process is "often very lengthy," and that, therefore, the DOE should "initiate the licensing process promptly." H.R. Rep. No. 106-162 at 492-93. Certainly, if statutes such as 42 U.S.C. § 7272 precluded the NRC from even considering the TVA license amendment requests, Congress would not have wasted its time passing the Authorization Act, or would have taken steps to amend any authorities to the contrary, which it did not.

In light of the Authorization Act and its legislative history, it is conclusive that the NRC is not barred from reviewing the subject TVA license amendment requests.[8] Thus, WTP has failed to make a showing of a "genuine dispute" here, as required by 10 C.F.R. § 2.714(b)(2)(iii). Accordingly, Contention No. 6 should not be admitted.

[8]To the extent that WTP's contention is deemed to be a challenge to the NRC Staff's review, that is not an appropriate focus for a contention, as the Staff noted earlier in its response to Contention No. 4. *See supra* p. 11-12.

CONCLUSION

In consideration of the foregoing, WTP has failed to proffer any admissible contentions. Therefore, WTP should not be admitted as a party to these proceedings.[9]

Respectfully submitted,

/RA/
Steven R. Hom
Counsel for NRC Staff

Dated at Rockville, Maryland
this 3rd day of April 2002

[9]The Staff takes this opportunity to also state that Blue Ridge Environmental Defense League likewise should not be admitted as a party to these proceedings, in light of its failure to submit any contentions whatsoever.

UNITED STATES OF AMERICA
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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S ANSWER TO CONTENTIONS FILED BY WE THE PEOPLE, INC. TENNESSEE" in the above-captioned consolidated proceedings have been served on the following with listed E-mail addresses or facsimile numbers by E-mail or facsimile transmission, respectively, and on all of the following by deposit in the United States mail, first class, or as indicated by an asterisk, by deposit in the Nuclear Regulatory Commission's internal mail system, or as indicated by a double asterisk, by overnight mail, this 3rd day of April 2002.

Atomic Safety and Licensing Board Panel*
Mail Stop: T-3F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555

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