

September 25, 2008

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of )  
 )  
Tennessee Valley Authority ) Docket Nos. 52-014 and 52-015  
 )  
Bellefonte Nuclear Power Plant )  
(Units 3 and 4) )

NRC STAFF ANSWER TO "PETITIONERS' LATE-FILED CONTENTION REGARDING  
TENNESSEE VALLEY AUTHORITY'S FAILURE TO COMPLY WITH THE  
NATIONAL ENVIRONMENTAL POLICY ACT"

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INTRODUCTION

Pursuant to the Atomic Safety and Licensing Board's June 18, 2008 Memorandum and Order, the staff of the Nuclear Regulatory Commission (Staff) hereby answers the "Petitioners' Late-Filed Contention Regarding Tennessee Valley Authority's Failure to Comply with the National Environmental Policy Act" (the Contention) filed on September 11, 2008, by the Blue Ridge Environmental Defense League (BREDL) and its chapter, the Bellefonte Efficiency and Sustainability Team (BEST), and the Southern Alliance for Clean Energy (SACE) (collectively, Petitioners or Intervenors).<sup>1</sup> For the reasons set forth below, the Staff opposes admission of the Contention.

BACKGROUND

On October 30, 2007, the Tennessee Valley Authority (TVA) filed with the NRC an application for a combined license (COL) for Bellefonte Units 3 and 4.<sup>2</sup> On February 8, 2008, the NRC published a notice of hearing on the Bellefonte COL application (Application), which provided members of the public sixty days to file a petition for leave to intervene. See

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<sup>1</sup> In its September 12, 2008 Memorandum and Order, the Licensing Board found that BEST lacked standing to intervene. See *Tennessee Valley Authority* (Bellefonte Units 3 and 4), LBP-08-16, slip op. at 12.

<sup>2</sup> See *Tennessee Valley Authority*; Notice of Receipt and Availability of Application for a Combined License, 72 Fed. Reg. 66,200 (Nov. 27, 2007). The NRC docketed the application on January 18, 2008.

Tennessee Valley Authority; Notice of Hearing and Opportunity to Petition for Leave to Intervene on a Combined License for Bellefonte Units 3 and 4, 73 Fed. Reg. 7611 (Feb. 8, 2008). On April 7, 2008, the Commission issued an order granting a 60-day extension for interested persons to file a petition to intervene. See *Tennessee Valley Authority* (Bellefonte Nuclear Power Plant, Units 3 and 4), unpublished order (April 7, 2008) (Agencywide Documents Access and Management System (ADAMS) Accession No. ML080980595).

On June 6, 2008, Petitioners submitted their "Petition to Intervene and Request for Hearing" (Petition). The Licensing Board held a prehearing conference regarding the admissibility of the proposed contentions on July 30, 2008, in Scottsboro, Alabama.

On August 26, 2008, TVA requested the reinstatement of the construction permits (CPs) for Bellefonte Units 1 and 2, CPPR-122 and CPPR-123.<sup>3</sup> See August 26, 2008 Letter from Ashok S. Bhatnagar, Senior Vice President, Nuclear Generation Development and Construction, "Tennessee Valley Authority (TVA) – Bellefonte Nuclear Plant Units 1 and 2 – Request to Reinstate Construction Permits CPPR-122 (Unit 1) and CPPR-123 (Unit 2)" (Letter). The following day, counsel for TVA forwarded the Letter to the Licensing Board. See August 27, 2008 Letter from Steven P. Frantz, co-counsel for TVA, "Notification of Developments Related to Bellefonte."

On September 11, 2008, Intervenors filed the Contention. On September 12, 2008, the Licensing Board issued a Memorandum and Order, admitting BREDL and SACE, but not BEST, as joint intervenors, and thus a party to this proceeding, and admitting four contentions concerning 1) impacts on aquatic resources, 2) safety and 3) environmental aspects of low-level radioactive waste storage and disposal, and 4) TVA's cost estimates and comparisons. See *Bellefonte Units 3 and 4*, LBP-08-16, 67 NRC \_\_\_, (slip op. at Appendix A).

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See Tennessee Valley Authority; Acceptance for Docketing of an Application for Combined License for Bellefonte Units 3 and 4, 73 Fed. Reg. 4923 (Jan. 28, 2008).

<sup>3</sup> The CPs were issued in 1974; their expiration dates were eventually extended to 2011 and 2014 respectively. They were terminated in 2006 at TVA's request.

## DISCUSSION

### A. Legal Standards Concerning Late-Filed Contentions

Three regulations govern the admissibility of late-filed contentions. First, under § 2.309(f)(2), a contention filed after the initial filing period may be admitted with leave of the presiding officer only upon a showing that:

- (i) the information upon which the amended or new contention is based was not previously available;
- (ii) the information upon which the amended or new contention is based is materially different than information previously available; and
- (iii) the amended or new contention has been submitted in a timely fashion based on the availability of the subsequent information.

10 C.F.R. § 2.309(f)(2).

Second, a late-filed contention may be admitted only upon the presiding officer's determination that the contention should be admitted after balancing the eight factors listed in 10 C.F.R. § 2.309(c), all of which must be addressed in the petitioner's filing.<sup>4</sup> Petitioners seeking the admission of a late-filed contention bear the burden of showing that a balancing of these factors weighs in favor of admittance. See *Baltimore Gas & Elec. Co. (Calvert Cliffs Nuclear Power Plant, Units 1 & 2)*, CLI-98-25, 48 NRC 325, 347 (1998) (noting that the Commission has summarily dismissed petitioners who failed to address the factors for a

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<sup>4</sup> Section § 2.309(c) requires a balancing of the following factors for late-filed contentions:

- (i) Good cause, if any, for the failure to file on time;
- (ii) The nature of the requestor's/petitioner's right under the Act to be made a party to the proceeding;
- (iii) The nature and extent of the requestor's/petitioner's property, financial or other interest in the proceeding;
- (iv) The possible effect of any order that may be entered in the proceeding on the requestor's/petitioner's interest;
- (v) The availability of other means whereby the requestor's/petitioner's interest will be protected;
- (vi) The extent to which the requestor's/petitioner's interests will be represented by existing parties;
- (vii) The extent to which the requestor's/petitioner's participation will broaden the issues or delay the proceeding; and
- (viii) The extent to which the requestor's/petitioner's participation may reasonably be expected to assist in developing a sound record.

late-filed petition). The first factor, whether good cause exists for the failure to file on time, is entitled to the most weight. *State of New Jersey* (Department of Law and Public Safety), CLI-93-25, 83 NRC 289, 296 (1993). Where no showing of good cause for lateness is tendered, “petitioner’s demonstration on the other factors must be particularly strong.” *Texas Utils. Elec. Co.* (Comanche Peak Steam Electric Station, Units 1 & 2), CLI-92-12, 36 NRC 62, 73 (1992) (quoting *Duke Power Co.* (Perkins Nuclear Station, Units 1, 2, & 3), ALAB-431, 6 NRC 460, 462 (1977)). The fifth and sixth factors, the availability of other means to protect the petitioner’s interest, and the ability of other parties to represent the petitioner’s interest, are less important than the other factors, and are therefore entitled to less weight. *See id.* at 74.

Lastly, a petitioner must show that the late-filed contention meets the substantive contention admissibility requirements of § 2.309(f)(1)(i)-(vi). *See Sacramento Mun. Util. Dist.* (Rancho Seco Nuclear Generating Station), CLI-93-12, 37 NRC 355, 362-363 (1993).<sup>5</sup>

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<sup>5</sup> 10 C.F.R. § 2.309(f)(1) requires a proposed contention to:

- (i) Provide a specific statement of the issue of law or fact to be raised or controverted;
- (ii) Provide a brief explanation of the basis for the contention;
- (iii) Demonstrate that the issue raised in the contention is within the scope of the proceeding;
- (iv) Demonstrate that the issue raised in the contention is material to the findings the NRC must make to support the action that is involved in the proceeding;
- (v) Provide a concise statement of the alleged facts or expert opinions which support the requestor’s/petitioner’s position on the issue and on which the petitioner intends to rely at hearing, together with references to the specific sources and documents on which the requestor/petitioner intends to rely to support its position on the issue; and
- (vi) Provide sufficient information to show that a genuine dispute exists with the applicant/licensee on a material issue of law or fact. This information must include references to specific portions of the application (including the applicant’s environmental report and safety report) 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.

Failure to comply with any of the contention requirements may be grounds for dismissing a contention. See *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-99-10, 49 NRC 318, 325 (1999).<sup>6</sup>

B. Intervenors' New Contention

Intervenors' late-filed proposed contention reads:

CONTENTION 20 [NEPA-R]<sup>7</sup>: FAILURE OF TVA TO COMPLY WITH THE NATIONAL ENVIRONMENTAL POLICY ACT. TVA's application for a combined construction and operation license for the Bellefonte site fails to include the potential public safety and environmental impacts of two additional nuclear reactors designated Units 1 and 2. TVA's August 26<sup>th</sup> letter requesting reinstatement of NRC construction permits for Units 1 and 2 is an improper attempt to circumvent the requirements of the National Environmental Policy Act [NEPA].

Contention at 1-2 (footnote omitted). Intervenors go on to explain their concerns as to 1) the failure of the ER to discuss and analyze four nuclear reactors and 2) the failure of the ER to provide critical information for the NRC's environmental impact statement. Contention at 3.

C. Staff Analysis of the Proposed New Contention

Proposed Contention NEPA-R, concerning the need to consider the environmental impacts of Units 1 and 2 in the Environmental Impact Statement for Units 3 and 4, segmentation, and cumulative impacts, is inadmissible for failure to comply with 10 C.F.R. § 2.309(f)(1) and (2).

1. Compliance with Late-Filed Contention Requirements

In its April 7, 2008 Order, the Commission granted a 60-day extension for the filing of petitions to intervene. Thus, in order to be considered timely, proposed contentions were due by June 6, 2008. As the instant contention was filed on September 11, 2008, it must address

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<sup>6</sup> While revised relatively recently (see Final Rule, Changes to Adjudicatory Process, 69 Fed. Reg. 2182 (Jan. 14, 2004)), § 2.309 incorporates the NRC's long-standing late-filed contention requirements. Compare 10 C.F.R. § 2.309(c) and (f)(2) with 10 C.F.R. § 2.714(a)(1)(i)-(v) and (b)(2) (2004).

<sup>7</sup> In response to the Licensing Board's September 12, 2008 Memorandum and Order, the Petitioners re-designated [Proposed] Contention 20 as "NEPA-R" See "Petitioners' Response to the Atomic Safety and Licensing Board's Order Regarding Admission of New Contention," dated September 16, 2008.

and satisfy the Commission's rules for late-filed contentions. *Calvert Cliffs*, CLI-98-25, 48 NRC at 347.

Intervenors do not satisfy the requirements of § 2.309(f)(2). Intervenors do not directly address any of the § 2.309(f)(2) requirements. They have not requested the leave of the Licensing Board to file the Contention, nor do they make any showing that the information upon which the Contention is based was not previously available, that it differs from information previously available, or that the Contention was filed timely once that information became available. Whether or not Intervenors *could* have demonstrated satisfaction of these requirements is immaterial. Section 2.309(f)(2) requires that they *show* that these requirements are satisfied; Intervenors have made no such showing.

Even if found to satisfy § 2.309(f)(2), the Intervenors must still satisfy the late-filed contention requirements in § 2.309(c). As to § 2.309(c)(i), good cause for non-timely filing, Intervenors are correct to note that they could not have timely filed Proposed Contention NEPA-R, for it responds to TVA's August 26, 2008 request for reinstatement of the CPs for Units 1 and 2. As to § 2.309(c)(ii), the nature of Intervenors' right to be made a party to the proceeding, the Licensing Board's September 12, 2008 decision admits BREDL and SACE as a party. As to § 2.309(c)(iii), (iv), (v) and (vi), concerning the Intervenors' interests in this proceeding, as described in the Petition and the Contention, balancing likewise would seem to run in their favor. Concerning § 2.309(c)(vii), admission of the Contention could cause a substantial delay, and would broaden the issues before the Licensing Board. The Intervenors' claim that TVA's request to reinstate the CPs itself broadens issues (Contention at 12) is unsupported, and irrelevant. Section § 2.309(c)(vii) is concerned only with late-filed contentions, not any factors that they may or may not concern. This factor does not weigh in favor of Intervenors. Lastly, as to § 2.309(c)(viii), the Intervenors' participation would not assist in developing a sound record, as no information in the Contention is admissible. The Intervenors' claim that consideration of the Contention is necessary to "develop[] a sound record . . . on Bellefonte Units 1 and 2 and Bellefonte Units 3 and 4" (Contention at 13) misses the point, as the development of a record on

Units 1 and 2 is not within the scope of the Licensing Board's decision on the application for Units 3 and 4. However, Intervenors have, *inter alia*, shown good cause for non-timely filing, the most important of the § 2.309(c) requirements. Therefore, while the Contention remains inadmissible for failure to satisfy § 2.309(f)(2), the § 2.309(c) factors would seem to weigh in favor of consideration of the Contention.

2. Compliance with Contention Requirements in 10 C.F.R. § 2.309(f)(1)

Assuming *arguendo* that the Contention satisfied the late-filed contention requirements above, it would still need to satisfy the contention admissibility requirements of § 2.309(f)(1). See *Rancho Seco Nuclear Generating Station*, 37 NRC at 362-363. Proposed Contention NEPA-R, however, is inadmissible because it is outside the scope of this proceeding. 10 C.F.R. § 2.309(f)(1)(iii).

Intervenors' contention is outside the scope of this proceeding. The matter before the Licensing Board is the COL application for Bellefonte Units 3 and 4, not Units 1 and 2. See *Bellefonte Units 3 and 4*, June 16, 2008 Order: Establishment of Atomic Safety and Licensing Board. "Contentions that are based on projected changes to a license, not currently before the NRC in any proceeding or application, are not sufficient to support admission of a contention. An NRC proceeding considers the application presented to the agency for consideration and not potential future amendments that are a matter of speculation at the time of the ongoing proceeding." *Duke Energy Corp.*, (McGuire Nuclear Station, Units 1 & 2 and Catawba Nuclear Station, Units 1 & 2), CLI-02-14, 55 NRC 278, 294 (2002). In rejecting a contention in the Catawba and McGuire Proceeding, the Commission noted that "...a possible future action must at least constitute a 'proposal' pending before the agency" to be ripe for adjudication. *Id.* at 295. The Commission further reasoned that projects that are merely contemplated, as opposed to reasonably certain or concrete, do not constitute a proposal and thus are not "ripe" for adjudication. *Id.* at 295.

Intervenors' first claim is that the Environmental Report is deficient because it does not contain any discussion of the environmental impacts regarding Units 1 and 2. Contention at 3.

Whether or not TVA will actually complete construction of Units 1 and 2, however, is speculative at this point; thus, the Contention is inadmissible. Intervenor's cite newspaper articles that they claim suggest that four nuclear reactors at the Bellefonte site are "possible," or are an option that is being "evaluate[d]." See Contention at 3. However, at present, the construction and operation of Units 1 and 2 is speculative. See, e.g., Letter at 5-7. While TVA has requested reinstatement of the CPs for Units 1 and 2, it has also stated that, if reinstated, those permits would be returned to a deferred status for the purpose of "establish[ing], with a relative degree of certainty, the regulatory framework and licensing basis that would be used in considering the viability of completing the units." Letter at 7-8. As Co-Counsel for the Applicant notes, if the Applicant proposes to complete construction of Units 1 and 2 or determines that Units 1 and 2 represent a viable or reasonable power generating alternative, the Applicant would have to amend its Application. See August 27, 2008 Letter from Steven Frantz to the Licensing Board (ML082401930). These statements make clear that TVA is merely evaluating completing construction of Units 1 and 2. There is no actual proposal to complete construction; therefore, the Contention is inadmissible.

CONCLUSION

The Contention is inadmissible as a late-filed contention because it does not address the requirements of 10 C.F.R. § 2.309(f)(2). The Contention is also inadmissible because it fails to meet the requirements of 10 C.F.R. § 2.309(f)(1). Therefore, the Intervenor's late-filed contention should not be admitted.

Respectfully submitted,

/signed (electronically) by/

Ann P. Hodgdon  
Counsel for NRC Staff

Dated at Rockville, Maryland  
this 25<sup>th</sup> day of September, 2008



UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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(Units 3 and 4) )

CERTIFICATE OF SERVICE

I hereby certify that copies of the NRC Staff Answer to "Petitioners' Late-Filed Contention Regarding Tennessee Valley Authority's Failure to Comply with the National Environmental Policy Act," dated September 25, 2008, have been served upon the following persons by Electronic Information Exchange this 25th day of September, 2008:

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