

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION  
ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

G. Paul Bollwerk, III, Chairman  
Dr. Anthony J. Baratta  
Dr. William W. Sager

In the Matter of

TENNESSEE VALLEY AUTHORITY

(Bellefonte Nuclear Power Plant Units 3 and 4)

Docket Nos. 52-014-COL and 52-15-COL

ASLBP No. 08-864-02-COL-BD01

April 29, 2009

MEMORANDUM AND ORDER  
(Ruling on Request to Admit New Contention)

Before the Licensing Board for resolution is a March 9, 2009 motion submitted by Joint Intervenors<sup>1</sup> seeking the admission of a new contention in this proceeding concerning the 10 C.F.R. Part 52 application of the Tennessee Valley Authority (TVA) for a combined license (COL) for two new nuclear units at the existing Bellefonte nuclear facility site.<sup>2</sup> This new contention, designated by Joint Intervenors as NEPA-S, challenges the Commission's authority to issue a COL to TVA in light of the alleged National Environmental Policy Act (NEPA)-related deficiencies associated with a proposed update to the Commission's 1999 waste confidence decision and an attendant proposed revision to the agency's waste confidence rule, 10 C.F.R. § 51.23.<sup>3</sup>

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<sup>1</sup> Joint Intervenors are the Southern Alliance for Clean Energy (SACE) and the Blue Ridge Environmental Defense League (BREDL). A third group, BREDL's Bellefonte Efficiency and Sustainability Team chapter, failed to make the requisite showing to establish its standing, and so was not admitted as a party to this proceeding. See LBP-08-16, 68 NRC \_\_, \_\_ (slip op. at 10) (Sept. 12, 2008).

<sup>2</sup> See Joint Intervenors' New Contention NEPA-S (Mar. 9, 2009) [hereinafter Motion].

<sup>3</sup> See Waste Confidence Decision Update, 73 Fed. Reg. 59,551 (Oct. 9, 2008);

(continued...)

For the reasons discussed below, we find that Joint Intervenors contention NEPA-S is inadmissible.

## I. BACKGROUND

On October 30, 2007, TVA applied under Part 52 for a COL for two new reactors, Bellefonte 3 and 4. Subsequent to the Commission's issuance of a February 2008 hearing opportunity notice,<sup>4</sup> this adjudicatory proceeding was instituted pursuant to the submission by Joint Intervenors of their June 6, 2008 hearing petition.<sup>5</sup> Thereafter, in a September 2008 decision, the Board granted that hearing request, admitting four of the contentions Joint Intervenors submitted for litigation.<sup>6</sup>

The proposed contention now before the Board does not relate to any of these previously admitted issue statements. Rather, it raises a new matter regarding an old subject, i.e., the degree to which the Commission has confidence that high-level radioactive waste produced by nuclear power plants can be safely stored onsite past the expiration of existing facility licenses until offsite disposal or storage is available. Previously, prompted by (1) a 1979

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<sup>3</sup>(...continued)

Consideration of Environmental Impacts of Temporary Storage of Spent Fuel After Cessation of Reactor Operation, 73 Fed. Reg. 59,547 (Oct. 9, 2008). In their contention, Joint Intervenors also point to alleged NEPA-related deficiencies in the NRC's findings in Table S-3, 10 C.F.R. § 51.51.

<sup>4</sup> See [TVA]; 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).

<sup>5</sup> See Petition for Intervention and Request for Hearing by [Bellefonte Efficiency and Sustainability Team, BREDL, and SACE] (June 6, 2008).

<sup>6</sup> See LBP-08-16, 68 NRC at \_\_\_ (slip op. at 1-2). Subsequently, the Commission reversed the Board's decision as to the admission of two of those contentions, leaving only two issue statements for litigation by the admitted parties. See CLI-09-03, 69 NRC \_\_, \_\_ (slip op. at 1) (Feb. 17, 2009).

judicial case remand that raised the question whether an offsite storage or disposal solution would be available for the spent nuclear fuel (SNF) produced at two reactor facilities at the expiration of the licenses for those facilities or, if not, whether the SNF could be stored at those reactor sites until an offsite solution was available; and (2) Commission statements in a 1977 rulemaking petition denial that it intended to reassess periodically its finding of reasonable assurance that methods of safe, permanent disposal of high-level radioactive waste (HLW) would be available when they were needed and that it would not continue to license reactors if it did not have reasonable confidence that HLW could be disposed of safely, in 1984 and again in 1990 and 1999, the Commission conducted so-called waste confidence proceedings.<sup>7</sup> In those proceedings, the Commission made or updated several findings that were the basis for a generic determination, embodied in the existing 10 C.F.R. § 51.23, that for at least thirty years beyond the expiration of reactor operating licenses, no significant environmental impact would result from SNF storage in reactor storage pools or independent spent fuel storage installations (ISFSIs) located at reactor or away-from-reactor sites.<sup>8</sup>

More recently, noting relative to the new COL proceedings (such as this one) that it anticipated the issue of waste confidence might be raised, on October 9, 2008, the Commission issued a proposed update to several of its waste confidence findings, with an accompanying proposed revision to section 51.23. Under the proposed revision, section 51.23 would embody a Commission determination that, if necessary, SNF generated in any reactor can be stored safely and without significant environmental impacts beyond the reactor's licensed operating life (which may include the term of a revised or renewed license) at the reactor's spent fuel storage

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<sup>7</sup> See 73 Fed. Reg. at 59,552-53.

<sup>8</sup> See id.

basin or at either onsite or offsite ISFSIs until a disposal facility can reasonably be expected to be available.<sup>9</sup>

Joint Intervenors and parties intervening in other COL proceedings before other Licensing Boards have submitted responsive comments in connection with the Commission's most recent proposed waste confidence decision and rulemaking, questioning the basis for the Commission's proposed revised findings and section 51.23 determination.<sup>10</sup> Relative to this COL proceeding, while asserting that NEPA-S is "based on" these comments, Joint Intervenors have stated they "do not seek to litigate [those comments] in this individual proceeding," but nonetheless argue contention NEPA-S should be "admitted and held in abeyance . . . to avoid the necessity of a premature judicial appeal if this case should conclude before the NRC has completed the rulemaking proceeding."<sup>11</sup>

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<sup>9</sup> See id. at 59,553.

<sup>10</sup> See Motion app. A (Comments by Texans for a Sound Energy Policy, Alliance for Nuclear Responsibility, Beyond Nuclear, [BREDL], C-10 Research and Education Foundation, Don't Waste Michigan, Environmental Coalition on Nuclear Power, Friends of the Earth, Friends of the Coast Opposing Nuclear Pollution, Grandmothers, Mothers and More for Energy Safety, New England Coalition, Nuclear Information and Resource Service, Nuclear Free Vermont by 2012, Nuclear Watch South, Pilgrim Watch, Public Citizen, San Luis Obispo Mothers for Peace, the Snake River Alliance, [SACE], and the Sustainable Energy and [Economic] Development Coalition Regarding NRC's Proposed Waste Confidence Decision Update And Proposed Rule Regarding Consideration of Environmental Impacts of Temporary Storage of Spent Fuel after Cessation of Reactor Operations (Feb. 6, 2009)) [hereinafter Comments].

<sup>11</sup> Motion at 1, 3.

In March 23, 2009 responsive filings, both applicant TVA and the NRC staff have stated their opposition to the admission of contention NEPA-S.<sup>12</sup> Joint Intervenors did not file a reply to these responses.<sup>13</sup>

## II. ANALYSIS

### A. Applying the Standards Governing Admission of New Contentions to NEPA-S

The language of 10 C.F.R. § 2.309(f)(2) suggests that in an instance, such as this one, in which a petitioner that has submitted a timely hearing petition later seeks admission of a new environmental contention before the staff's draft or final environmental impact statement (EIS) has been issued, the new contention must comply with the timeliness standards of 10 C.F.R. § 2.309(f)(2). Under section 2.309(f)(2), for the new contention to be admissible it must be shown by the sponsoring party 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.<sup>14</sup>

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<sup>12</sup> TVA's Answer to Late-Filed Contention NEPA-S (Mar. 23, 2009) [hereinafter TVA Answer]; NRC Staff Answer to Joint Intervenors' New Contention NEPA-S (Mar. 23, 2009) [hereinafter Staff Answer].

<sup>13</sup> In accord with the Board's November 10, 2008 scheduling order, Joint Petitioners had seven days from March 23, 2009, in which to file a reply to the TVA and staff responses to their new contention admission motion. See Licensing Board Memorandum and Order (Prehearing Conference and Status of General Schedule) (Nov. 10, 2008) at 3 (unpublished) [hereinafter General Schedule Status Order].

<sup>14</sup> 10 C.F.R. § 2.309(f)(2).

In this instance, Joint Intervenors assert initially that “the information on which the contention is based, i.e., the legal and technical analyses of the [waste confidence decision] and the [waste confidence rule], were not available to [them] until February 6, 2009, when the [February 6, 2009] Comments were finalized, presented to [them] for concurrence, and submitted to the NRC.”<sup>15</sup> Joint Intervenors also argue that the information upon which contention NEPA-S is based is materially different from information that was previously available because “[n]one of the information presented in this contention has previously been integrated into a single document that presented a comprehensive and integrated analysis of the [waste confidence decision] and the [waste confidence rule].”<sup>16</sup> And third, Joint Intervenors argue that NEPA-S was submitted in a timely fashion “based on the availability of the information contained in the [February 6, 2009] Comments.”<sup>17</sup>

In considering the question of the adequacy of a showing proffered in support of the admissibility of a new contention under the section 2.309(f)(2) precepts, a central element is a determination whether the information provided in support of the contention was, in fact, the appropriate “trigger” for the contention to the degree the information was not previously available/materially different from information that was available and was timely submitted once it became available. In this instance, Joint Intervenors have asserted that the appropriate “trigger” for contention NEPA-S is the February 9, 2009 comments they and other organizations submitted in response to the Commission’s October 9, 2008 proposed waste confidence decision and rulemaking. We cannot agree.

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<sup>15</sup> Motion at 10.

<sup>16</sup> Id.

<sup>17</sup> Id.

By any reasonable measure, the appropriate “trigger” for the challenge Joint Intervenors have labeled as contention NEPA-S was the Commission’s October 9, 2008 proposed waste confidence decision and rulemaking that they seek to contest via that issue statement.<sup>18</sup> As stated by Joint Intervenors, the comments merely provided “legal and technical analyses” of the information already presented in these two Commission documents.<sup>19</sup> As a consequence, to comply with the Board’s direction regarding the timely submission of new contentions, Joint Intervenors were required to file any new contentions based on the information contained in the October 9, 2008 Commission waste confidence documents thirty days after that information became publicly available.<sup>20</sup> Therefore, contention NEPA-S, which was filed on March 9, 2009, or more than 150 days after the October 9, 2008 Federal Register publication of the Commission’s proposed waste confidence decision and rulemaking, was not submitted in a timely fashion in accordance with section 2.309(f)(2)(iii).<sup>21</sup>

In addition to this “trigger” component, however, is the related timing question of the degree to which, under section 2.309(f)(2)(i) and (ii), the information upon which the amended

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<sup>18</sup> See Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-00-14, 51 NRC 301, 309 n.2 (2000).

<sup>19</sup> Motion at 10.

<sup>20</sup> See Licensing Board Memorandum and Order (Initial Prehearing Order) (June 18, 2008) at 6 n.4 (unpublished) [hereinafter Initial Prehearing Order]; see also General Schedule Status Order at 3.

<sup>21</sup> To the degree Joint Intervenors considered the particular information contained in the February 6, 2009 comments they and other organizations submitted vital to their preparation of a new contention challenging the Commission’s proposed waste confidence decision and rulemaking in this proceeding, in accord with the requirements set forth in the Board’s initial prehearing order, see Initial Prehearing Order at 6, they could have filed a motion for an extension of time to prepare and submit that contention, an approach that would not be wholly unfamiliar to them in this proceeding, see Supplemental Motion to Suspend Hearing Notice or, in the Alternative, Request for an Extension of Time to Submit Hearing Request and Contentions and Request for Expedited Consideration (Apr. 2, 2008).

or new contention is based (a) was “not previously available,” and (b) is “materially different from information previously available.” On the latter point, notwithstanding Joint Intervenors assertion that “[n]one of the information presented in this contention has previously been integrated into a single document that presented a comprehensive and integrated analysis,”<sup>22</sup> it seems apparent that the comments/analysis upon which Joint Intervenors rely is essentially an amalgam of information previously submitted in other forums and contexts that primarily focuses on the purported impacts of spent-fuel pool fires. To whatever degree the information as it is now packaged may be pertinent and persuasive as waste confidence decision/rulemaking comments, its status as “materially different” for the purpose of interposing timely a new contention in this proceeding is problematic. So too, we are unwilling to credit Joint Petitioners assertion that this previously available, albeit now repackaged, information was not in fact “available” to them within the meaning of section 2.309(f)(2)(i), until the “[c]omments were finalized, presented to Joint Intervenors for concurrence, and submitted to the NRC.”<sup>23</sup> As a general rule, information is “available” to provide the basis for a new contention when it is reasonably accessible in the public domain. In this instance, because Joint Intervenors have not pointed to anything that could be considered the basis for contention NEPA-S that only became available after the Commission’s October 9, 2008 proposed waste confidence decision and rulemaking, we are unable to conclude Joint Intervenors have made a sufficient showing under section 2.309(f)(2)(i).

As a consequence, we find that Joint Intervenors have failed to make a showing regarding contention NEPA-S that meets the section 2.309(f)(2) standards for the admission of a new contention.

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<sup>22</sup> Motion at 10

<sup>23</sup> Id.

Further, given that the contention was filed after passage of the date for submitting hearing petitions in this proceeding and was, as we have determined, “untimely” (as well as to avoid the uncertainty that seemingly exists relative to the extent of the standards governing the admission of post-hearing petition contentions<sup>24</sup>), we also look to see if, consistent with the provisions of 10 C.F.R. § 2.309(c)(1) governing the admissibility of “nontimely” submissions,<sup>25</sup> Joint Intervenors have demonstrated that the new contention satisfies the balancing test of section 2.309(c)(1). In pertinent part, section 2.309(c)(1) sets forth five factors to be weighed in determining the admission of a new, “nontimely” contention:

(i) Good cause, if any, for the failure to file on time;

\* \* \* \* \*

(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.<sup>26</sup>

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<sup>24</sup> See Southern Nuclear Operating Co. (Vogtle Electric Generating Plant, Units 3 and 4), LBP-09-03, 69 NRC \_\_, \_\_ & n.12 (slip op. at 19 & n.12) (Mar. 5, 2009); see also Licensing Board Memorandum and Order (Ruling on Request to Admit New Contention) (Oct. 14, 2008) at 5 (unpublished) [hereinafter New Contention Ruling].

<sup>25</sup> As we have noted previously, see New Contention Ruling at 5-6 n.6, the other three standards in section 2.309(c)(1) -- nature of requestor's right to be a party, nature and extent of requestor's interest in the proceeding, and possible effect of the proceeding on the requestor's interest -- are matters that go to the standing of a petitioner. Compare 10 C.F.R. § 2.309(c)(1)(ii)-(iv) with id. § 2.309(d)(1)(ii)-(iv). In this instance, the Board already has determined that Joint Intervenors BREDL and SACE have standing in this proceeding. See LBP-08-16, 68 NRC at \_\_ (slip op. at 8-9).

<sup>26</sup> 10 C.F.R. § 2.309(c)(1)(i), (iv)-(viii). As both applicant TVA and the staff point out, see (continued...)

For the same reasons we outlined above regarding the timeliness of their submission in connection with section 2.309(f)(2), see supra p. 7, Joint Intervenors failed to demonstrate relative to the first and most important factor in the section 2.309(c)(1) balance,<sup>27</sup> i.e., the “good cause” element in section 2.309(c)(1)(i), that they had good cause for not filing contention NEPA-S within thirty days after the information contained in the waste confidence decision and the waste confidence rule was issued. With regard to the “availability of other means” factor in section 2.309(c)(1)(v), as is reflected by the discussion regarding contention admissibility in section II.B below, the availability of an ongoing rulemaking proceeding in which the matter a petitioner wishes to raise is squarely at issue makes this factor one that weighs against contention admission in this instance. This, however, is balanced by the “sound record development” factor of section 2.309(c)(1)(viii), given that the February 2009 comments, while perhaps not packaged properly,<sup>28</sup> do appear to provide at least some meaningful record development assistance relative to a contention challenging the Commission’s proposed waste confidence decision and the associated waste confidence rule. So too, the “other parties” factor

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<sup>26</sup>(...continued)

TVA Answer at 2 n.5; Staff Answer at 6, Joint Intervenors did not evaluate the applicable factors under section 2.309(c)(1) in their motion to admit a new contention NEPA-S. Assuming these factors apply, this could provide an alternative basis for denying their request to admit contention NEPA-S.

Also in this regard, TVA asserts that Joint Intervenors motion exceeds the ten-page limit on motions established by the Board. See TVA Answer at 2 n.6. For the benefit of all the parties, the Board notes that the signature page of a pleading is counted against that ten-page limit.

<sup>27</sup> See Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-00-2, 51 NRC 77, 79 (2000).

<sup>28</sup> See Texas Utils. Elec. Co. (Comanche Peak Steam Electric Station, Unit 2), CLI-93-4, 37 NRC 156, 165-66 (1993) (in addressing this criterion, intervenor should identify its prospective witnesses and summarize the proposed testimony of those witnesses).

in section 2.309(c)(1)(vi) weighs in favor of contention admission, since there are no other parties to this proceeding that will represent the interests of Joint Intervenors in this proceeding.<sup>29</sup> Moreover, as we noted previously in this proceeding,<sup>30</sup> at this juncture we give some, albeit it not much, negative weight to the section 2.309(c)(1)(vii) “broaden/delay the proceeding” factor in light of the fact that this proceeding started recently and is not likely to go to hearing on admitted issues for many months as we await the issuance of the staff’s environmental and safety documents.

In the end, although the negative and positive weight to be assigned to the other section 2.309(c)(1) factors causes them to essentially cancel each other out, the importance and weight afforded the remaining, critical “good cause” element leads us to conclude that the overall balance supports the denial of the admission of the new contention NEPA-S.

B. Applying Commission Standards Governing Challenges to Rulemaking to NEPA-S

Having concluded that new contention NEPA-S fails the admissions criteria of section 2.309(c)(1) and (f)(2), to ensure the Commission has the benefits of a thorough analysis of all relevant aspects of this new issue statement’s admissibility in the event of any future appeal, we nonetheless consider as well whether it meets the substantive admission requirements of section 2.309(f)(1).

As set forth in Joint Intervenors March 9 request, the new issue statement they seek to have accepted for litigation provides as follows:

Neither the Proposed Waste Confidence Decision nor the Proposed Spent Fuel Storage Rule satisfies the requirements of NEPA or the Atomic Energy Act. Therefore they fail to provide

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<sup>29</sup> See Florida Power & Light Co. (Turkey Point Nuclear Generating Units 3 and 4), LBP-79-21, 10 NRC 183, 195 (1979).

<sup>30</sup> See New Contention Ruling at 6-7.

adequate support for the Applicant's Environmental Report or for an Environmental Impact Statement in this particular licensing case. The deficiencies in the Waste Confidence Rule also fatally undermine the adequacy of the NRC's findings in Table S-3 of 10 C.F.R. § 51.51 to satisfy NEPA. Unless and until the NRC remedies the deficiencies in the Waste Confidence Rule, Table S-3, and the Proposed Spent Fuel Storage Rule, the NRC has no lawful basis to issue a license for the proposed Bellefonte nuclear power plant.<sup>31</sup>

As its language makes clear, this contention is a direct challenge to the adequacy of the proposed Commission waste confidence decision and the associated rulemaking. As we have indicated previously,<sup>32</sup> whether as a matter outside the scope of the proceeding or otherwise, a contention that attacks a Commission rule, or that seeks to litigate a matter that is, or clearly is about to become, the subject of a rulemaking, is inadmissible. This includes contentions that advocate stricter requirements than agency rules impose or that otherwise seek to litigate a generic determination established by a Commission rulemaking. By the same token, a challenge footed in the petitioner's views about what regulatory policy should be does not present a litigable issue. Given that the proposed update to the Commission's waste confidence decision and the proposed revision of the waste confidence rule are the subjects of an ongoing Commission policy review and an associated rulemaking, we find that NEPA-S does not present a matter appropriate for adjudication before this Licensing Board.

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<sup>31</sup> Motion at 4.

<sup>32</sup> See LBP-08-16, 68 NRC at \_\_ (slip op. at 15-16) (citing Yankee Atomic Elec. Co. (Yankee Nuclear Power Station), CLI-96-7, 43 NRC 235, 251 (1996); Florida Power & Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-01-6, 53 NRC 138, 159 (2001); Pac. Gas & Elec. Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), LBP-93-1, 37 NRC 5, 29-30 (1993); Pub. Serv. Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-82-106, 16 NRC 1649, 1656 (1982)); see also id. at 70-72.

Finally, notwithstanding the assertions of Joint Intervenors to the contrary,<sup>33</sup> because we are unable to find that our ruling on this matter “raises significant and novel legal or policy issues,” the resolution of which “would materially advance the orderly disposition of the proceeding,”<sup>34</sup> we decline to refer this contention admission ruling to the Commission.

#### IV. CONCLUSION

For the reasons set forth above, we find that new contention NEPA-S submitted by Joint Intervenors is inadmissible for litigation in this proceeding in that it (1) fails to meet the timeliness standards of 10 C.F.R. § 2.309(c)(1), (f)(2); and (2) presents an impermissible attack

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<sup>33</sup> See Motion at 3-4.

<sup>34</sup> 10 C.F.R. § 2.341(f)(1).

on a proposed Commission rule so as to be precluded under 10 C.F.R. § 2.309(f)(1).  
Additionally, we conclude that this contention admission ruling fails to meet the prerequisites for referral to the Commission in accord with 10 C.F.R. § 2.341(f)(1).

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For the foregoing reasons, it is this twenty-ninth day of April 2009, ORDERED, that the requests of Joint Intervenors in their March 9, 2009 submission for the admission of new contention NEPA-S and for Commission referral of a negative ruling on their new contention admission proposal are denied.

THE ATOMIC SAFETY  
AND LICENSING BOARD<sup>35</sup>

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G. Paul Bollwerk, III  
ADMINISTRATIVE JUDGE

*/RA/*

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Anthony J. Baratta  
ADMINISTRATIVE JUDGE

*/RA/*

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William W. Sager  
ADMINISTRATIVE JUDGE

Rockville, Maryland

April 29, 2009

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<sup>35</sup> Copies of this memorandum and order were sent this date by the agency's E-Filing system to the counsel/representatives for (1) applicant TVA; (2) Joint Intervenors; and (3) the staff.

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

In the Matter of )  
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TENNESSEE VALLEY AUTHORITY ) Docket Nos. 52-014-COL and 52-015-COL  
)  
(Bellefonte Nuclear Power Plant - )  
Units 3 and 4) )  
)

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing MEMORANDUM AND ORDER (RULING ON REQUEST TO ADMIT NEW CONTENTION) have been served upon the following persons by the Electronic Information Exchange.

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Docket Nos. 52-014-COL and 52-015-COL  
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[Original signed by Nancy Greathead]  
Office of the Secretary of the Commission

Dated at Rockville, Maryland  
this 29<sup>th</sup> day of April 2009