

**UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION**

**BEFORE THE ATOMIC SAFETY AND LICENSING BOARD**

|   |   |                               |
|---|---|-------------------------------|
| In the Matter of                                | ) |                               |
|   | ) |                               |
| TENNESSEE VALLEY AUTHORITY                      | ) | Docket Nos. 50-438 and 50-439 |
|   | ) |                               |
| (Bellefonte Nuclear Power Plant, Units 1 and 2) | ) | January 14, 2010              |
|   | ) |                               |

**TENNESSEE VALLEY AUTHORITY’S MOTION TO STRIKE  
PETITIONERS’ SUPPLEMENTAL BASIS FOR PROPOSED CONTENTION 6**

**I. INTRODUCTION**

On January 11, 2010, joint petitioners, the Blue Ridge Environmental Defense League (“BREDL”), Bellefonte Efficiency and Sustainability Team, and Southern Alliance for Clean Energy (“Petitioners”), filed a “new and supplemental basis” for their Proposed Contention 6.<sup>1</sup> For the reasons discussed below and, in accordance with 10 C.F.R. § 2.323(a), Tennessee Valley Authority (“TVA”) requests that the Atomic Safety and Licensing Board (“Board”) strike Petitioners’ Supplemental Basis. Petitioners’ filing is deficient on its face because it (1) does not seek leave of the Board to file the Supplemental Basis, as required by 10 C.F.R. § 2.309(f)(2); and (2) contains only superficial assertions of compliance with the late-filing criteria contained in 10 C.F.R. § 2.309(f)(2)(i)-(iii).

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<sup>1</sup> Joint Petitioners’ Supplemental Basis for Previously Submitted Contention 6—TVA Has Not and Cannot Meet the NRC’s Quality Assurance and Quality Control Requirements (Jan. 11, 2010) (“Petitioners’ Supplemental Basis”).

## II. BACKGROUND

This subject of this proceeding is TVA's August 26, 2008 request to reinstate the construction permits ("CPs") for the Bellefonte Nuclear Plant ("BLN") Units 1 and 2.<sup>2</sup> On March 13, 2009, the NRC published in the *Federal Register* an Order reinstating the CPs for BLN Units 1 and 2 in a "terminated plant" status.<sup>3</sup> The Reinstatement Order authorized the submittal of requests for hearing on the limited issue of "whether good cause exists for the reinstatement of the CPs."<sup>4</sup>

On May 8, 2009, the Petitioners timely filed a joint request for hearing and petition to intervene that included, among other contentions, Proposed Contention 6.<sup>5</sup> That contention, as originally pled, alleges that the NRC's March 2009 reinstatement of the CPs for BLN Units 1 and 2 "was improper because TVA has not and cannot meet the NRC's Quality Assurance and Quality Control requirements."<sup>6</sup>

By Order dated May 20, 2009, the Commission directed the Petitioners, TVA, and NRC Staff to submit briefs "addressing the question whether the NRC possesses the statutory authority to reinstate the withdrawn construction permits."<sup>7</sup> Citing Proposed Contentions 1 and 2 as the basis for this request, the Commission explicitly directed that "[t]he *remainder* of Petitioners' proposed contentions will be *held in abeyance*, pending the Commission's ruling on the

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<sup>2</sup> Letter from Ashok S. Bhatnagar, TVA, to Eric J. Leeds, NRC (Aug. 26, 2008), *available at* ADAMS Accession No. ML082410087.

<sup>3</sup> Tenn. Valley Auth. (Bellefonte Nuclear Plant Units 1 and 2); Order, 74 Fed. Reg. 10,969 (Mar. 13, 2009) ("Reinstatement Order").

<sup>4</sup> *Id.*

<sup>5</sup> Petition for Intervention and Request for Hearing by the Blue Ridge Environmental Defense League, Its Chapter Bellefonte Efficiency and Sustainability Team, and the Southern Alliance for Clean Energy at 20-25 (May 8, 2009).

<sup>6</sup> *Id.* at 1, 25-28.

<sup>7</sup> *Tenn. Valley Auth.* (Bellefonte Nuclear Power Plant, Units 1 and 2), Nos. 50-438 & 50-439, Commission Order at 1 (unpublished) (May 20, 2009).

threshold ‘authority’ issue.”<sup>8</sup> Petitioners, TVA, and the NRC Staff filed their initial and responsive briefs on June 3 and June 10, 2009, respectively.

Thereafter, on July 15, Petitioners filed a “new and supplemental basis” for Proposed Contention 5, which TVA moved to strike on July 17, 2009.<sup>9</sup> Petitioners’ filed a reply opposing TVA’s still-pending motion to strike on July 27, 2009.<sup>10</sup>

On January 7, 2010, after considering the participants’ briefs on the threshold legal issue noted above, the Commission ruled that it has the legal authority to reinstate the BLN CPs.<sup>11</sup> Accordingly, the Commission denied Contentions 1 and 2 and referred “the remainder of the petition to intervene and request for hearing, including Petitioners’ July 15, 2009, supplemental filing to the Atomic Safety and Licensing Board Panel for further proceedings.”<sup>12</sup> The Commission again reiterated that, beyond standing, the Board is charged with deciding, “whether there is ‘good cause’ for reinstatement” of the CPs.<sup>13</sup>

On January 11, 2010, Petitioners filed the instant Supplemental Basis regarding Proposed Contention 6. Petitioners therein ask the presiding officer to “make a part of the record in this proceeding” a December 1, 2009 TVA letter notifying the NRC of a containment vertical tendon coupling failure that TVA discovered on August 24, 2009.<sup>14</sup> Petitioners allege that “[t]he failure

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<sup>8</sup> *Id.* at 2 (emphasis added).

<sup>9</sup> *See* Joint Intervenors’ Supplemental Basis for Previously Submitted Contention 5 – Lack of Good Cause (July 15, 2009); Tennessee Valley Authority’s Motion to Strike Petitioners’ Supplemental Basis for Proposed Contention 5 (July 17, 2009).

<sup>10</sup> *See* Petitioners’ Opposition to Tennessee Valley Authority’s Motion to Strike Petitioners’ Supplemental Basis for Proposed Contention 5 (July 27, 2009).

<sup>11</sup> *See Tenn. Valley Auth.* (Bellefonte Nuclear Power Plant, Units 1 and 2), CLI-10-06, 70 NRC \_\_\_\_, slip op. (Jan. 7, 2010).

<sup>12</sup> *Id.* at 19.

<sup>13</sup> *Id.* at 19.

<sup>14</sup> Petitioners’ Supplemental Basis at 3, 6.

of the nuclear reactor containment tendon mirrors the failure of TVA to adhere to a construction permit conditions which require the permit holder to implement quality assurance criteria.”<sup>15</sup>

### III. ARGUMENT

#### A. **Petitioners’ Filing is Defective Because Petitioners Did Not Seek Leave from the Board to File the Supplemental Basis, as Required by 10 C.F.R. § 2.309(f)(2)**

Petitioners’ Supplemental Basis, on its face, fails to comply, with the NRC’s Rules of Practice. Pursuant to 10 C.F.R. § 2.309(f)(2), once the deadline for filing an initial intervention petition has passed, a petitioner may amend or supplement contentions

*only with leave of the presiding officer* 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.<sup>16</sup>

As the Commission has held, “[n]ew bases for a contention cannot be introduced in a reply brief, or any other time after the date the original contentions are due, unless the petitioner meets the late-filing criteria set forth in 10 C.F.R. §§ 2.309(c), (f)(2).”<sup>17</sup>

Petitioners, however, failed to request leave of the presiding officer to submit their “new and supplemental basis.” Moreover, as with Petitioners’ Supplemental Basis for Proposed Contention 5, they have yet again failed to consult with counsel of record for TVA as called for by 10 C.F.R. § 2.323(b). Accordingly, Petitioners’ January 11, 2010 filing, including the

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<sup>15</sup> *Id.* at 4.

<sup>16</sup> 10 C.F.R. § 2.309(f)(2) (emphasis added). *See also Fla. Power & Light Co.* (Turkey Point Nuclear Plant, Units 3 and 4 (License Amendment Request), LBP-08-18, 68 NRC \_\_\_, slip op. at 10 (Oct. 14, 2008) (expressly noting that “the Petitioners failed to request leave of the presiding officer to file its amended contentions”); *Progress Energy Fla., Inc.* (Combined License Application for Levy County Nuclear Power Plant, Units 1 and 2), LBP-09-10, 70 NRC \_\_\_, slip op. at 95 (July 8, 2009) (“This regulation [§ 2.309(f)(2)], which was added in 2004, provides that new contentions may be filed after the initial docketing, *with leave of the presiding officer.*”) (emphasis added).

<sup>17</sup> *Nuclear Mgmt. Co., LLC* (Palisades Nuclear Plant), CLI-06-17, 63 NRC 727, 732 (2006). (emphasis added.)

supporting documents appended thereto, is facially deficient—indeed, unauthorized—and should be stricken in its entirety.

**B. Petitioners’ Supplemental Basis Improperly Seeks to Augment the Factual Bases Originally Proffered in Support of Contention Proposed Contention 6**

Equally fatal to Petitioners’ latest filing , nominally filed pursuant to Section 2.309(f)(2), is the fact that it fails to demonstrate compliance with the contention timeliness and admissibility criteria of 10 C.F.R. § 2.309. Rather, in a superficial effort to show compliance with 10 C.F.R. § 2.309(f)(2), for example, Petitioners merely aver that “the information upon which the contention is based is materially different than information that was previously available.”<sup>18</sup> They provide no supporting explanation for this conclusory statement. To the contrary, the factual predicate for the contention clearly remains the same; *i.e.*, that TVA allegedly cannot comply with NRC quality assurance requirements due to a “lapse” in preservation and maintenance activities associated with temporary CP withdrawal.<sup>19</sup> In this regard, Petitioners also fail to explain how the cited tendon coupling failure event, or TVA’s Nuclear Quality Assurance Plan, is material to TVA’s “asserted reasons that show good cause justification for the reinstatement of the CPs.”<sup>20</sup>

More fundamentally, notwithstanding the status of this proceeding, the NRC’s hearing rules do not provide petitioners with a rolling and limitless opportunity to augment the factual bases for already-proffered contentions:

*Allowing contentions to be added, amended, or supplemented at any time would defeat the purpose of the specific contention requirements . . . by permitting the intervenor to initially file vague, unsupported, and generalized allegations and simply recast, support, or cure them*

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<sup>18</sup> Petitioners’ Supplemental Basis at 5.

<sup>19</sup> Or, in Petitioners’ sardonic and more colloquial terms, “rust never sleeps.” Petition at 4 (citing “Rust Never Sleeps” by Neil Young and Crazy Horse).

<sup>20</sup> Reinstatement Order, 74 Fed. Reg. at 10,970.

later. . . . Under our contention rule, Intervenors are not being asked to prove their case, or to provide an exhaustive list of possible bases, *but simply to provide sufficient alleged factual or legal bases to support the contention, and to do so at the outset.*<sup>21</sup>

Yet, despite longstanding precedent on this point, Petitioners have again overlooked the posture of this proceeding and persist in their attempts to bootstrap the initial petition with impermissible submittals.

In view of the foregoing principles, and the Board's undisputed authority to take appropriate action "to control the prehearing and hearing process,"<sup>22</sup> TVA requests that the Board strike Petitioners' Supplemental Basis as procedurally deficient on its face. Petitioners' perfunctory claim of compliance with 10 C.F.R. § 2.309(f)(2) does not sanction its now repeated attempts to bolster the factual bases for previously-proposed contentions.

#### IV. CONCLUSION

For the above reasons, Petitioners' Supplemental Basis concerning Proposed Contention 6 should be stricken in its entirety.

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<sup>21</sup> *La. Energy Servs., L.P.* (National Enrichment Facility), CLI-04-35, 60 NRC 619, 622-23 (2004) (internal quotation marks and citations omitted; emphasis added).

<sup>22</sup> 10 C.F.R. § 2.319 (also stating that the presiding officer has the authority to "[r]estric[t] irrelevant, immaterial, unreliable, duplicative or cumulative evidence and/or arguments").

**CERTIFICATION**

In accordance with 10 C.F.R. §2.323(b), on January 14, 2010, counsel of record for TVA discussed this motion with Petitioners' designated representative, Mr. Louis Zeller of BREDL, in an attempt to resolve this issue. The parties were unable to reach agreement on an acceptable means of resolving the matters raised in this Motion. Counsel for TVA also consulted with counsel for the NRC Staff on January 14, 2010.

Respectfully submitted,

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Dated in Washington, D.C.  
this 14th day of January 2010

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**CERTIFICATE OF SERVICE**

I hereby certify that, on January 14, 2010, a copy of “Tennessee Valley Authority’s Motion to Strike Petitioners’ Supplemental Basis for Proposed Contention 6,” dated January 14, 2010, was filed electronically with the Electronic Information Exchange.

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