UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	
	)	Docket Nos. 50-438-CP and 50-439-CP
TENNESSEE VALLEY AUTHORITY	)	
	)	January 29, 2010
(Bellefonte Nuclear Plant, Units 1 and 2)	)	

ANSWER OF TENNESSEE VALLEY AUTHORITY OPPOSING THE PETITION FOR INTERVENTION AND REQUEST FOR HEARING BY THE BLUE RIDGE ENVIRONMENTAL DEFENSE LEAGUE ET AL.

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I. INTRODUCTION

In accordance with the Atomic Safety and Licensing Board's ("Board") Initial Prehearing Order of January 15, 2010,[1] and 10 C.F.R. § 2.309(h), Tennessee Valley Authority ("TVA"), applicant in the captioned matter, hereby timely files its Answer to the "Petition to Intervene and Request for Hearing" ("Petition") jointly filed by the Blue Ridge Environmental Defense League (with its Bellefonte Efficiency and Sustainability Team chapter ("BEST")) (together referred to as "BREDL"), and Southern Alliance for Clean Energy ("SACE") (collectively, "Petitioners") on May 8, 2009. The Petition responds to the U.S. Nuclear Regulatory Commission ("NRC" or "Commission") Order, issued on March 9, 2009,[2] which provided an opportunity to request a hearing in connection with the Commission's reinstatement of Construction Permit ("CP") Nos. CPPR-122 and CPPR-123, and placement of TVA's partially-constructed Bellefonte

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1 *Tenn. Valley Auth.* (Bellefonte Nuclear Plant, Units 1 and 2), Nos. 50-438-CP & 50-439-CP, Licensing Board Memorandum and Order (Initial Prehearing Order) (Jan. 15, 2010) (unpublished).

2 *Tenn. Valley Auth.* (Bellefonte Nuclear Plant, Units 1 and 2); Order, 74 Fed. Reg. 10,969 (March 13, 2009) ("March 2009 Order").

Nuclear Plant ("BLN") Units 1 and 2 into "terminated plant" status. As demonstrated below, the Petition should be denied in its entirety because Petitioners have failed to establish standing to intervene and/or to proffer an admissible contention, as required by 10 C.F.R. § 2.309(d) and § 2.309(f)(1).

II. BACKGROUND

A. Chronology of Events Leading to Reinstatement of the CPs

On December 24, 1974, the U.S. Atomic Energy Commission, predecessor to the NRC, issued CPPR-122 and CPPR-123, thereby authorizing TVA to construct BLN Units 1 and 2, respectively. As required, each CP included the latest date for completion of construction for each Unit;[3] the latest completion date for Unit 1 was December 1, 1979, and for Unit 2 was September 1, 1980. TVA began construction of BLN Units 1 and 2, and, as authorized by extensions of the CPs, continued construction until 1988.

In 1988, due to numerous economic and regulatory factors, TVA decided to defer completion of BLN Units 1 and 2, and lay them up until construction could be resumed.[4] On October 31, 1988, the NRC agreed with TVA's layup approach, finding it consistent with the NRC's Policy Statement on Deferred Plants ("Policy Statement").[5] Although actual construction activities were halted, the CPs remained effective, and allowed the maintenance and preservation of equipment in accordance with the Commission's Policy Statement.[6]

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3 10 C.F.R. § 50.55(a).

4 TVA made significant progress constructing the Units, with the Final Safety Analysis Report ("FSAR") progressing through Amendment 29.

5 Final Policy Statement, Commission Policy Statement on Deferred Plants, 52 Fed. Reg. 38,077 (Oct. 14, 1987).

6 *See id.* at 38,078.

Throughout the years and in response to TVA's requests, the latest completion dates specified in the CPs were extended by the NRC on the basis of "good cause" shown by TVA.[7] For example, on April 19, 1994, TVA filed a request pursuant to 10 C.F.R. § 50.55(b) for extensions of the completion dates for BLN Units 1 and 2.[8] As "good cause" for the request, TVA cited the delay in construction activities resulting from a lower-than-expected load forecast, as well as the delay resulting from TVA's comprehensive Integrated Resource Plan ("IRP") and associated Programmatic Environmental Impact Statement ("PEIS"), entitled *Energy Vision 2020*, to consider the lowest-cost options for providing an adequate supply of electricity to its customers.[9] The NRC found that these delays constituted "good cause" for extending the BLN Units 1 and 2 completion dates to October 1, 2001, and October 1, 2004, respectively.[10]

On July 11, 2001, TVA filed another request pursuant to 10 C.F.R. § 50.55(b) for extensions of the expiration dates of CP Nos. CPPR-122 and CPPR-123.[11] On March 4, 2003, the NRC issued an Order amending CPPR-122 and CPPR-123, thereby extending the latest completion dates to October 1, 2011, and October 1, 2014, respectively.[12] The NRC again concluded that TVA had demonstrated "good cause" for the delays:

> In the current July 11, 2001, TVA request for extending the Bellefonte construction permit expiration dates, TVA stated that the extension of the Bellefonte construction permits will help TVA to maintain a full scope of competitive energy production choices. TVA's integrated resource plan, Energy Vision 2020, identified the

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7 *See* 10 C.F.R. § 50.55(b).

8 *See Tenn. Valley Auth.* (Bellefonte Nuclear Plant, Units 1 and 2), Order, 59 Fed. Reg. 34,874 (July 7, 1994).

9 *Id. See also Energy Vision 2020—An Integrated Resource Plan and Programmatic Environmental Impact Statement* (Dec. 1995), *available at* http://www.tva.gov/environment/reports/energyvision2020/index.htm.

10 59 Fed. Reg. at 34,874-75.

11 *See* Letter from Mark J. Burzynski, TVA, to NRC, Attn: Document Control Desk (July 11, 2001), *available at* ADAMS Accession No. ML011980443.

12 *Tenn. Valley Auth.* (Bellefonte Nuclear Plant, Units 1 and 2); Order, 68 Fed. Reg. 11,415, 11,416 (Mar. 10, 2003).

> need for a flexible range of options and alternatives to meet, among other things, the Tennessee Valley region's new baseload power supply needs through the year 2020. Recent record-breaking energy demands in the Tennessee Valley have reinforced TVA's obligation to provide ample safe, economic, reliable, and environmentally responsible sources of electric power. Fulfilling this responsibility, TVA seeks to maintain a robust and flexible range of generating options. These uncertainties, and the delay due to the extended construction inactivity at the site, provide good cause for extending the construction permits for Bellefonte Nuclear Plant, Units 1 and 2.[13]

During this period, the NRC continued regular reviews of TVA's layup program and inspections of BLN Units 1 and 2.

On April 6, 2006, TVA advised the NRC that the TVA Board of Directors had approved the cancellation of construction of the deferred BLN Units and, therefore, requested that the CPs be withdrawn.[14] In its request, TVA stated that it had ceased equipment lay-up activities and associated inspections as of October 5, 2005; that there was no nuclear fuel located at the site; that it did not remove any safeguards information from the site; and that it would maintain compliance with all appropriate federal, state, and local environmental regulations.[15] The NRC granted TVA's request on September 14, 2006.[16]

On August 26, 2008, TVA asked the NRC to reinstate CPPR-122 and CPPR-123 in order to "(1) return the units to deferred status and resume preservation and maintenance activities as appropriate under the Deferred Plant Policy and (2) determine, with a relative degree of

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13 *Id.* at 11,415-16.

14 *See* Letter from Glenn W. Morris, TVA, to the NRC Document Control Desk (Apr. 6, 2006), *available at* ADAMS Accession No. ML061000538.

15 *Id.* at 1 & Encl. 1.

16 *See* Letter from Catherine Haney, NRC, to Karl W. Singer, TVA (Sept. 14, 2006), *available at* ADAMS Accession No. ML061810505.

certainty, whether completion of construction and operation of the units is a viable option."[17] TVA sought reinstatement of the CPs as a "preliminary step" to assess "whether [BLN] Units 1 and 2 should again be regarded as a potential base load generating option."[18] In demonstrating good cause for this action, TVA's Reinstatement Request cited the favorable change in power-generation economics since 2005; possible effects of constraints on the availability of the worldwide supply of components necessary for new generation development since TVA withdrew the CPs; and the potential for a significantly lower cost per installed kilowatt, as well as a shorter schedule for the start of major safety-related construction, given the advanced stage of completion of many major BLN Unit 1 and 2 structures, systems and components ("SSCs").[19]

In response to TVA's Reinstatement Request, the NRC Staff recommended that the Commission authorize the Staff to reinstate TVA's CPs for BLN Units 1 and 2.[20] On February 18, 2009, the Commission authorized the Staff to issue an Order reinstating the construction permits and placed BLN Units 1 and 2 in "terminated" status under the Policy Statement, rather than in the "deferred" status sought by TVA.[21] The Commission also directed

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17 Letter from Ashok S. Bhatnagar, TVA, to Eric J. Leeds, NRC (Aug. 26, 2008) ("Reinstatement Request") at 1, *available at* ADAMS Accession No. ML082410087.

18 *Id.*

19 *Id.*

20 *See* COMSECY-08-0041, Staff Recommendation Related to Reinstatement of the Construction Permits for Bellefonte Nuclear Plant Units 1 and 2 (Dec. 12, 2008), *available at* ADAMS Accession No. ML083230895 ("COMSECY-08-0041"). Note that the CPs for BLN Units 1 and 2 were issued in accordance with 10 C.F.R. Part 50. For that reason, the Staff and Commissioners noted that "[t]he CP only constitutes an authorization to proceed with construction and does not constitute final Commission approval of the safety of any design feature or specification. . . . If TVA decides to complete construction and reactivate its OL application, the Commission may choose to direct the staff . . . to offer another opportunity for hearing on the OL application." *Id.* at 2; *see also id.*, Encl. 1 at 6-8, 11. Thus, unlike the licensing process associated with the issuance of a combined license under 10 C.F.R. Part 52, a separate opportunity to request a hearing will be provided in the event TVA ultimately decides to pursue operating licenses for these Units. *See also Bellefonte*, CLI-10-06, slip op. at 14.

21 *See* February 18, 2009 Staff Requirements Memorandum ("SRM") to R.W. Borchardt, *available at* ADAMS Accession No. ML090490838 ("February 18, 2009 SRM").

the Staff to offer the opportunity for a hearing on whether TVA had established "good cause" for reinstatement.[22]

On February 24, 2009, the NRC issued an Environmental Assessment ("EA") and Finding of No Significant Impact ("FONSI"), in compliance with the National Environmental Policy Act ("NEPA") and 10 C.F.R. Part 51.[23] In its EA-FONSI, the NRC Staff found that there was no "significant impact associated with the reinstatement of the BLN Units 1 and 2 CPs and the return of the facility to a terminated plant status."[24] After making this determination, the Staff, by its March 2009 Order, granted TVA's request to reinstate the CPs and placed the Units in "terminated" plant status.

B. Relevant Developments Occurring After CP Reinstatement

1. Transition of BLN Units 1 and 2 from Terminated to Deferred Plant Status

On August 10, 2009, TVA requested that the NRC Staff authorize the transition of BLN Units 1 and 2 from "terminated" to "deferred" status, consistent with the terms of the Commission's March 2009 Order.[25] In response, the NRC Staff issued a formal plan to assess the transition of BLN Units 1 and 2 from "terminated" to "deferred" status.[26] In late October 2009, the Staff conducted an inspection at BLN Units 1 and 2 to identify the status of applicable

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22 *Id.* ("The Staff should publish a notice of opportunity for hearing in association with reinstatement of the Bellefonte construction permits with the scope of the hearing limited to whether good cause exists for the reinstatement.").

23 *See* Letter from L. Raghaven, NRC, to Ashok S. Bhatnagar (Feb. 24, 2009), Encl., Environmental Assessment and Finding of No Significant Impact ("EA-FONSI"). The EA and FONSI were published in the *Federal Register*, at 74 Fed. Reg. 9,308, on March 3, 2009. Hereinafter, citations to the EA-FONSI are to the *Federal Register* version of that document.

24 EA-FONSI, 74 Fed. Reg. at 9,308.

25 *See* Letter from Ashok S. Bhatnagar, TVA, to NRC, Attn. Document Control Desk (Aug. 10, 2009), *available at* ADAMS Accession No. ML092230594. *See also* Letter from Kathryn M. Sutton, Morgan, Lewis & Bockius, to Chairman G. Jaczko, NRC (Aug. 11, 2009), *available at* ADAMS Accession No. ML092230731.

26 Bellefonte Nuclear Plants Units 1 and 2–Staff Plan for Assessment of Transition to Deferred Plant Status (Oct. 5, 2009), *available* at ADAMS Accession Nos. ML092590273 (memorandum) and ML092740149 (enclosure).

program areas specified in Section III.A of the Policy Statement, including implementation of TVA's quality assurance program. On December 2, 2009, the Staff published its associated Inspection Report, in which it concluded that "TVA has established the necessary programs to support transition to deferred status."[27] The Staff approved TVA's request to place BLN Units 1 and 2 in "deferred" status on January 14, 2010.[28]

2. TVA Resource-Planning Actions and Related Environmental Reviews

In a parallel, independent action, TVA, on June 15, 2009, announced its intent to develop a new comprehensive IRP and PEIS entitled *Integrated Resource Plan: TVA's Environmental and Energy Future* ("New IRP/PEIS").[29] This new plan, which will update and replace TVA's *Energy Vision 2020*, will "evaluate TVA's portfolio of resource options for achieving a sustainable future and meeting the future electrical energy and resource stewardship needs of the Tennessee Valley."[30] The June 15, 2009, New IRP/PEIS notice sought public comments on the scope of the New IRP/PEIS, which is scheduled to be complete in early 2011.[31]

In addition, in November 2009, TVA issued a draft supplemental EIS ("DSEIS") that supplements the original 1974 *Final Environmental Statement* for BLN Units 1 and 2 and

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27 *See* Bellefonte Nuclear Plant Units 1 (CPPR-122) and 2 (CPPR-123)–Transition to Deferred Status–NRC Inspection Report 05000438/2009601 and 05000439/2009601 (Dec. 2, 2009) ("NRC Inspection Report"), *available at* ADAMS Accession No. ML0933700083.

28 *See* Letter from Eric J. Leeds, NRC, to Ashok S. Bhatnagar, TVA (Jan. 14, 2010) ("Deferred Plant Status Approval Letter") and Letter from Jeremy M. Suttenberg, NRC, to Atomic Safety and Licensing Board (Jan. 19, 2010), *available at* ADAMS Accession No. ML100191836; *see also* NRC News Release No. 10-012, "NRC Moves Unfinished Bellefonte Reactors to Deferred Status" (Jan. 14. 2010).

29 Notice of Intent, Environmental Impact Statement; Integrated Resource Plan, 74 Fed. Reg. 28,322 (June 15, 2009).

30 *Id.* at 28,322.

31 The Petitioners submitted comments regarding the New IRP/PEIS in separate correspondence dated August 14, 2009.

updates TVA's need for power analysis.[32] The DSEIS evaluates the potential environmental impacts of a possible decision by TVA to "complete or construct and operate a single 1,100 to 1,200 MW nuclear generating unit at the BLN site."[33] The DSEIS states that "TVA must make a decision on a single nuclear unit at BLN before the new IRP is completed, as provided for in 40 CFR §1506.1(2)(c)."[34] It further explains that, while TVA's new IRP is not scheduled to be completed until early 2011, "[g]iven the long lead time for bringing a nuclear plant online, completing the SEIS for BLN while simultaneously developing the new IRP will help ensure that a new generating unit could be built in time . . . ."[35]

C. Procedural Posture and Scope of the Proceeding

Pursuant to the Commission's SRM, on March 9, 2009, the Staff issued the Order and accompanying notice of opportunity for hearing, which was published in *Federal Register* on March 13, 2009.[36] The March 2009 Order states that "[a]ny person adversely affected by this Order may request a hearing on this Order within 60 days of its issuance, and *the request for hearing is limited to whether good cause exists for the reinstatement of the CPs*."[37] The

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[32] *Draft Supplemental Environmental Impact Statement, Single Nuclear Unit at the Bellefonte Site, Jackson County, Alabama, TVA* (Nov. 2009) at 1-2 ("TVA DSEIS"), *available at* ADAMS Accession No. ML093230803.

[33] *Id.* at S-1.

[34] *Id.* at 19.

[35] *Id.* at 2. The DSEIS "tiers from TVA's Energy Vision 2020 Integrated Resource Plan," which, as noted above, is being updated via the New IRP/PEIS. *Id.* at 1. It warrants emphasis that TVA is preparing the New IRP/PEIS and DSEIS to meet obligations that exist independent of the NRC licensing process for BLN Units 1 and 2. The 1992 National Energy Policy Act directed TVA to implement a least-cost energy planning process for the addition of new energy resources to its power system. It also requires TVA to provide distributors of TVA power an opportunity to participate in the planning process. In response to this directive, TVA began its IRP process in February 1994. Although TVA prepares project-specific environmental reviews for proposed energy resource decisions, TVA committed to employing a public IRP process and decided to use the EIS process to obtain public input on the IRP itself. *Energy Vision 2020*, which TVA is presently updating, is the result of this commitment and process. *See* Record of Decision, Integrated Resource Plan, 61 Fed. Reg. 7572, 7573 (Feb. 28, 1996).

[36] March 2009 Order, 74 Fed. Reg. at 10,969.

[37] *Id.* (emphasis added).

Commission ordered reinstatement of the CPs and placement of BLN Units 1 and 2 in "terminated plant" status pursuant to Section 161.b of the AEA and 10 C.F.R. § 50.55(b).[38] Accordingly, "good cause" defines the scope of a proceeding regarding an action undertaken pursuant to Section 50.55(b) and is the "focal point of any consideration of the scope of the contentions that can be admitted at such a proceeding."[39] Thus, the Commission directed any petitioners to present "*direct* challenges" to TVA's "*good cause* justification" for reinstatement of the CPs.[40]

On May 8, 2009, BREDL and SACE timely filed their Petition. Subsequently, by Order dated May 20, 2009, the Commission directed the Petitioners, TVA, and Staff to submit briefs "addressing the question whether the NRC possesses the statutory authority to reinstate the withdrawn construction permits."[41] Citing Proposed Contentions 1 and 2 as the basis for this request, the Commission ordered that "[t]he remainder of Petitioners' proposed contentions will be held in abeyance, pending the Commission's ruling on the threshold 'authority' issue."[42] The participants filed their initial and responsive briefs on June 3 and June 10, 2009, respectively.

Thereafter, on July 15, 2009, Petitioners filed a "new and supplemental basis" for Proposed Contention 5, which TVA moved to strike as procedurally unauthorized on July 17, 2009.[43] Petitioners' filed a reply opposing TVA's motion to strike on July 27, 2009.[44]

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38 *Id.* at 10,970.

39 *Wash. Pub. Power Supply Sys.* (WPPSS Nuclear Project Nos. 1 & 2), CLI-82-29, 16 NRC 1221, 1225-26 (1982).

40 March 2009 Order, 74 Fed. Reg. at 10,970 (emphasis added).

41 *See Tenn. Valley Auth.* (Bellefonte Nuclear Power Plant, Units 1 and 2), Commission Order, Nos. 50-438-CP & 50-439-CP (May 20, 2009) at 1 (unpublished) ("May 20 Order").

42 *Id.* at 2.

43 *See* Joint Intervenors' Supplemental Basis for Previously Submitted Contention 5—Lack of Good Cause (July 15, 2009) ("July 2009 Supplemental Basis"), *available at* ADAMS Accession No. ML091960678; Tennessee Valley Authority's Motion to Strike Petitioners' Supplemental Basis for Proposed Contention 5 (July 17, 2009), *available at* ADAMS Accession No. ML091980276.

On January 7, 2010, the Commission ruled that it has the legal authority to reinstate the CPs and, accordingly, denied admission of Proposed Contentions 1 and 2.[45] The Commission 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."[46] The Commission reiterated that the Board is charged with deciding the Petitioners' standing and "whether there is 'good cause' for reinstatement" of the CPs.[47]

Shortly thereafter, on January 11, 2010, Petitioners filed a second supplemental basis, this time in alleged support of Proposed Contention 6.[48] TVA moved to strike Petitioners' second supplemental basis, on grounds that it failed to comply with the NRC's Rules of Practice.[49] On January 25, 2010, Petitioners filed their answer opposing TVA's Motion to Strike.[50]

TVA's Motions to Strike Petitioners' supplemental bases for Proposed Contentions 5 and 6 are pending before the Board, which issued its Initial Prehearing Order on January 15, 2010.

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44 *See* Petitioners' Opposition to Tennessee Valley Authority's Motion to Strike Petitioners' Supplemental Basis for Proposed Contention 5 (July 27, 2009), *available at* ADAMS Accession No. ML09280607.

45 *See Tenn. Valley Auth.* (Bellefonte Nuclear Power Plant, Units 1 and 2), CLI-10-06, 71 NRC __, slip op. (Jan. 7, 2010). As the Commission noted, BREDL also raised the same contention in a petition for review filed in the U.S. Court of Appeals for the D.C. Circuit on March 30, 2009. That proceeding, which included two contentions regarding the threshold authority issue, is being held in abeyance at the request of NRC, BREDL, and TVA. *See Blue Ridge Envtl. Def. League v. NRC*, No. 09-1112, Order Granting Motion to Hold Case in Abeyance (DC Cir. June 11, 2009).

46 CLI-10-06, slip op. at 19.

47 *Id.*

48 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) ("January 2010 Supplemental Basis"), *available at* ADAMS Accession No. ML100110577.

49 *See* Tennessee Valley Authority's Motion to Strike Petitioners' Supplemental Basis for Proposed Contention 6 (Jan. 14, 2010) ("January 2010 TVA Motion to Strike"), *available at* ADAMS Accession No. ML100140677.

50 *See* Joint Petitioners Answer to Tennessee Valley Authority's Motion to Strike Supplemental Basis for Contention 6 (Jan. 25, 2010), *available at* ADAMS Accession No. ML100252225. In light of the January 24, 2010 deadline set by the Licensing Board in its Initial Prehearing Order, Petitioners' Answer was not timely filed. *See* Initial Prehearing Order at 3, n.2. For this and other reasons discussed more fully below, Petitioners' Answer should be stricken.

In accordance with the latter, TVA hereby files its Answer to the Petition, as well as to Petitioners' July 2009 and January 2010 Supplemental Bases.

III. ANALYSIS OF PETITIONERS' STANDING

A. Legal Standards and NRC Precedent

1. Traditional Standing Principles

Under 10 C.F.R. § 2.309(d)(1), a petitioner must provide specified information to support a claim of standing. Judicial concepts of standing are generally followed in NRC proceedings.[51] Thus, to demonstrate standing, a petitioner must show: (1) an actual or threatened, concrete and particularized injury that is (2) fairly traceable to the challenged action and (3) likely to be redressed by a favorable decision.[52] These three criteria are referred to as injury-in-fact, causation, and redressability, respectively.

First, a petitioner's injury-in-fact showing "requires more than an injury to a cognizable interest. It requires that the party seeking [to participate] be himself among the injured."[53] The injury must be "concrete and particularized, not conjectural or hypothetical."[54] Additionally, the alleged "injury in fact" must lie within "the zone of interests" protected by the statutes governing the proceeding—either the AEA or NEPA.[55] Second, a petitioner must establish that the injuries alleged are fairly traceable to the proposed action—in this case, the reinstatement of the CPs for

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[51] *See Nuclear Mgmt. Co., LLC* (Monticello Nuclear Generating Plant), CLI-06-6, 63 NRC 161, 163 (2006); *Calvert Cliffs Nuclear 3 Project, LLC and UniStar Nuclear Project, LLC* (Combined License Application for Calvert Cliffs, Unit 3), CLI-09-20, 70 NRC __, slip op. at 4-5 (Oct. 13, 2009); *Detroit Edison Co.* (Fermi Nuclear Power Plant, Unit 3), CLI-09-22, 70 NRC __, slip op. at 2-3 (Nov. 17, 2009).

[52] *See Yankee Atomic Elec. Co.* (Yankee Nuclear Power Station), CLI-96-1, 43 NRC 1, 6 (1996).

[53] *Sierra Club v. Morton*, 405 U.S. 727, 734-35 (1972).

[54] *Sequoyah Fuels Corp*. (Gore, Oklahoma Site), CLI-94-12, 40 NRC 64, 72 (1994) (citations omitted) (internal quotation marks omitted).

[55] *Quivira Mining Co.* (Ambrosia Lake Facility, Grants, N.M.), CLI-98-11, 48 NRC 1, 8 (1998), *aff'd sub nom. Envirocare of Ut., Inc. v. NRC*, 194 F.3d 72 (D.C. Cir. 1999).

BLN Units 1 and 2.[56] Although a petitioner is not required to show that the injury flows directly from the challenged action, it must nonetheless show that the "chain of causation is plausible."[57] Finally, each petitioner is required to show that "its actual or threatened injuries can be cured by some action of the tribunal."[58] In other words, "it must be likely, as opposed to merely speculative that the injury will be redressed by a favorable decision."[59]

2. Standing Based on Geographic Proximity

Under NRC case law, a petitioner may, in some instances, be presumed to have satisfied the judicial standards for standing based on his or her geographic proximity to a facility or source of radioactivity.[60] "For construction permit and operating license proceedings, the Commission generally has recognized a presumption in favor of standing for those persons who have frequent contacts with the area near a nuclear power plant."[61] In particular, "Commission case law has established a 'proximity presumption,' whereby an individual may satisfy . . . standing requirements by demonstrating that his or her residence or activities are within the geographical area that might be affected by an accidental release of fission products, and in proceedings involving nuclear power plants this area has been defined as being within a 50-mile radius of such a plant."[62] Thus, "the common thread in the [NRC] decisions applying the 50-mile

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56 *See Sequoyah Fuels*, CLI-94-12, 40 NRC at 75.

57 *Id.*

58 *Sequoyah Fuels Corp*. (Gore, Oklahoma Site Decommissioning), CLI-01-2, 53 NRC 9, 14 (2001).

59 *Sequoyah Fuels*, CLI-94-l2, 40 NRC at 76 (*quoting Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) (internal quotation marks omitted)).

60 *Exelon Generation Company*, LLC (Peach Bottom Atomic Power Station, Units 2 and 3), CLI-05-26, 62 NRC 577, 580 (2005).

61 *Cleveland Elec. Illuminating Co.* (Perry Nuclear Power Plant, Unit 1), CLI-93-21, 38 NRC 87, 95 (1993) (citing *Va. Elec. & Power Co.* (North Anna Power Station, Units 1 and 2), ALAB-522, 9 NRC 54, 56 (1979)).

62 *PPL Susquehanna LLC* (Susquehanna Steam Electric Station, Units 1 & 2), LBP-07-4, 65 NRC 281, 294 (2007) (citations omitted). *Accord Duke Energy Carolinas, LLC* (William States Lee III Nuclear Station), LBP-08-17, 68 NRC __, slip op. at 5-7 (Sept. 22, 2008); *St. Lucie*, CLI-89-21, 30 NRC at 329 (citations omitted); *Calvert Cliffs*, CLI-09-20, slip op. at 4-8.

presumption is a recognition of the potential effects at significant distances from the facility of the accidental release of fissionable materials."[63]

There are exceptions to the proximity-based standing rule. In *St. Lucie*, the Commission held that a more stringent standard applies to proceedings involving approvals lacking a "clear potential for offsite consequences."[64] For example, "[i]n an operating license amendment proceeding, a petitioner cannot base his or her standing simply upon a residence or visits near the plant, unless the proposed action quite obviously entails an increased potential for offsite consequences."[65] In such cases, "it is incumbent upon the petitioner to provide some 'plausible chain of causation,' some scenario suggesting how the license amendments would result in a distinct new harm or threat in order to establish standing."[66] Since the *St. Lucie* decision, the Commission and its Licensing Boards have applied the test for determining the applicability of the proximity presumption, or otherwise indicated its applicability, in a variety of contexts, including not only other reactor operating license amendment proceedings, but also in reactor decommissioning proceedings, non-power research reactor license proceedings, reactor license transfer proceedings, and materials licensing proceedings.[67]

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63 *Calvert Cliffs*, CLI-09-20, slip op. at 7 (internal quotation marks and citations omitted).

64 *St. Lucie*, CLI-89-21, 30 NRC 325, 329-30 (finding that the petitioner did not qualify for proximity standing in a proceeding where the licensee sought an exemption from a worker-protection requirement, and failed to allege an injury in fact). *See also Fla. Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-01-6, 53 NRC 138, 148 (2001) (finding that the proximity presumption applied in a reactor license renewal because the "the reactor core and spent fuel in the fuel pools of the Turkey Point reactors" were a "significant" source of radioactivity with "obvious potential for offsite consequences").

65 *Calvert Cliffs Nuclear 3 Project, LLC and UniStar Nuclear Project, LLC* (Combined License Application for Calvert Cliffs, Unit 3), LBP-09-04, 69 NRC __, slip op. at 6 n.20 (Mar. 24, 2009), *aff'd*, CLI-09-20, slip op. at 18.

66 *Id.* (quoting *Commonwealth Edison Co.* (Zion Nuclear Power Station, Units 1 and 2), CLI-99-4, 49 NRC 185, 191 (1999)).

67 *See*, *e.g.*, *Commonwealth Edison Co.* (Zion Nuclear Power Station, Units 1 & 2), LBP-98-27, 48 NRC 271, 274-77 (1998), *aff'd*, CLI-99-4, 49 NRC 185 (1999) (finding that a petitioner cannot base his or her standing simply upon residence or visits near the plant, unless the challenged license amendments present an obvious potential for offsite consequences); *Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-96-7, 43 NRC 235, 247-48 (1996) (noting that the proximity presumption does not automatically apply in a reactor

Given that the Commission has not previously reinstated voluntarily-surrendered CPs, this proceeding is *sui generis*.[68] As such, neither the Commission nor its adjudicatory boards have explicitly considered whether the proximity presumption should apply in a CP reinstatement proceeding. A few NRC adjudicatory boards have, though, considered the question of the applicability of the proximity presumption in the context of CP extension proceedings. In the *Bailly* CP extension proceeding, for example, the Board concluded that certain petitioners residing near the reactor site had standing to challenge the permittee's assertion of good cause for the CP extension.[69] Although the Board "did not view the granting of the extension to be the equivalent of the issuance of a construction permit," it concluded that:

> [T]hose persons who would have standing to intervene in new construction permit hearings, which would be required if good cause could not be shown for the extension, would have standing to intervene in this proceeding to show that no good cause existed and, consequently, new construction permit hearings would be required to complete construction.[70]

Nonetheless, the Board denied certain petitions to intervene because the proposed contentions raised only site suitability issues that were outside the scope of the proceeding.[71]

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decommissioning proceeding); *Ga. Inst. of Tech*. (Georgia Tech Research Reactor, Atlanta, Georgia), CLI-95-12, 42 NRC 111, 116-17 (1995) (affirming the Board's finding of proximity-based standing because members of the organizational petitioner lived and regularly drove within ½ mile of the reactor," and there were "accident scenarios in which noble gases could be dispersed beyond the reactor site"); *Consumers Energy Co.* (Big Rock Point Independent Spent Fuel Storage Installation), CLI-07-19, 65 NRC 423, 426 (2007) (stating that in license transfer cases, the Commission "determine[s] on a case-by-case basis whether the proximity presumption should apply, considering the 'obvious potential for offsite [radiological] consequences,' or lack thereof, from the application at issue, and specifically 'taking into account the nature of the proposed action and the significance of the radioactive source'") (citation omitted); *Nuclear Fuel Servs., Inc.* (Erwin, Tennessee), CLI-04-13, 59 NRC 244, 248 (2004) (holding that in a materials licensing case, proximity alone does not suffice to show standing; the petitioner must also satisfy the injury-in-fact component).

68 *See Bellefonte*, CLI-10-6, slip op. at 1 (stating that this proceeding involves "an issue of first impression").

69 *N. Ind. Pub. Serv. Co.* (Bailly Generating Station, Nuclear 1), LBP-80-22, 12 NRC 191 (1980), *aff'd*, ALAB-619, 12 NRC 558 (1980), *reconsid. denied*, LBP-81-6, 13 NRC 253 (1981).

70 *Id.* at 195.

71 *Id.* at 211-212.

Two of the petitioners thus appealed. An Atomic Safety and Licensing Appeal Board affirmed the Licensing Board's standing and contention admissibility rulings.[72] With regard to standing, the Appeal Board similarly concluded that, because the petitioners resided near the facility site, they had the requisite standing to intervene in an initial CP or operating license proceeding and, therefore, had standing to intervene in the CP extension proceeding.[73] Thus, the Appeal Board required no direct showing of injury in fact.[74] The Appeal Board agreed, however, that the petitioners' site suitability concerns were outside the scope of the CP extension proceeding and, therefore, affirmed denial of the petitions for lack of an admissible contention.[75]

3. Standing of Organizations

An organization that wishes to intervene in a proceeding may do so either in its own right (by demonstrating injury to its organizational interests), or in a representative capacity (by demonstrating harm to the interests of its members).[76] To intervene in a proceeding of its own right, an organization must allege—just as an individual petitioner must—that it will suffer an immediate or threatened injury to its organizational interests that can be fairly traced to the proposed action and be redressed by a favorable decision.[77] General environmental or public policy interests are insufficient to confer organizational standing.[78]

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72 *Bailly*, ALAB-619, 12 NRC at 573.

73 *Id.* at 564-65.

74 *Accord Tex. Utils. Elec. Co.* (Comanche Peak Steam Electric Station, Unit 2), LBP-92-37, 36 NRC 370, 374 (1980), *decision vacated, appeal dismissed*, CLI-93-10, 37 NRC 192 (1993), *stay denied*, CLI-93-11, 37 NRC 251 (1993) (citing the *Bailly* Appeal Board's ruling in ALAB-619 and finding that certain petitioners had standing to intervene in a CP extension proceeding because they lived within 50 miles of the reactor).

75 *Bailly*, ALAB-619, 12 NRC at 574.

76 *Yankee Atomic Elec. Co.* (Yankee Nuclear Power Station), CLI-98-21, 48 NRC 185, 195 (1998) (*citing Ga. Tech*., CLI-95-12, 42 NRC at 115).

77 *See Ga. Tech*, CLI-95-12, 42 NRC at 115.

78 *See Sierra Club*, 405 U.S. at 730, 741 (holding that a "special interest in the conservation and the sound maintenance of the national parks, game refuges, and forests of the country" is insufficient to provide organizational standing to a petitioner).

To establish representational standing, an organization must: (1) show that at least one of its members *has standing in his or her own right* (*i.e.*, by demonstrating geographic proximity in cases where the presumption applies, or by demonstrating injury-in-fact within the zone of protected interests, causation, and redressability); (2) identify that member by name and address; and (3) show, "preferably by affidavit," that the organization is authorized by that member to request a hearing on behalf of the member.[79] In addition, the interests that the organization seeks to protect must be germane to its own purpose, and neither the petitioner's contentions nor the requested relief must require an individual member to participate in the proceeding.[80] Where the affidavit of the member is devoid of any statement that he or she wants and has authorized the organization to represent his or her interests, the presiding officer should not infer such authorization.[81] Indeed, the Commission has held that "[t]he failure both to identify the member(s) [that the petitioners] purport to represent and to provide proof of authorization therefore precludes [the petitioners] from qualifying as intervenors."[82]

B. <u>BREDL, But Not SACE, Has Demonstrated Representational Standing</u>

BREDL and SACE each claim standing based on representation of their members' interests, and state that those members "have presumptive standing by virtue of their proximity to the two new nuclear plants that may be constructed on the site,"[83] and do not assert standing in their own right. BREDL lists a total of 86 individuals as their members (including several

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79 *Consumers Energy Co.* (Palisades Nuclear Power Plant), CLI-07-18, 65 NRC 399, 408-10 (2007); *see also N. States Power Co.* (Monticello Nuclear Generating Plant, Prairie Island Nuclear Generating Plant, Units 1 & 2; Prairie Island Independent Spent Fuel Storage Installation), CLI-00-14, 52 NRC 37, 47 (2000); *GPU Nuclear Inc*. (Oyster Creek Nuclear Generating Station), CLI-00-6, 51 NRC 193, 202 (2000); *PPL Bell Bend, LLC* (Bell Bend Nuclear Power Plant), LBP-09-18, 70 NRC __, slip op. at 6 (Aug. 10, 2009) (citing *Vt. Yankee Nuclear Power Corp.* (Vermont Yankee Nuclear Power Station), CLI-00-20, 52 NRC 151, 163 (2000)).

80 *Palisades*, CLI-07-18, 65 NRC at 409.

81 *Duquesne Light Co.* (Beaver Valley Power Station, Unit 2), LBP-84-6, 19 NRC 393, 411 (1984).

82 *Consumers Energy*, CLI-07-18, 65 NRC at 410.

83 *See* Petition at 7.

members of BEST), but attach declarations from each of these individuals authorizing *only BREDL* to represent them in this proceeding.[84] These individuals state that they reside within 50 miles of the site of BLN Units 1 and 2.

SACE, in turn, lists three individuals as members, and attaches declarations from those persons authorizing SACE to represent them in this proceeding. Only two of the three SACE members reside within 50 miles of the site of BLN Units 1 and 2. The third SACE member lives 84 miles from the site.

1. BREDL Has Demonstrated Representational Standing

As noted above, BREDL submitted 86 declarations to support its claim of standing. All of the declarants assert that they live within 50 miles of proposed BLN Units 1 and 2 and authorize BREDL to represent them in this proceeding. TVA has no reason to dispute the validity of these assertions. Based on the declarations, and in view of the Appeal Board's application of the proximity presumption in the *Bailly* CP extension proceeding (*see* discussion of ALAB-619, *supra*), TVA does not oppose the representational standing of BREDL.

2. SACE Has Not Demonstrated Representational Standing

SACE has failed to demonstrate representational standing because no one has entered his or her appearance on behalf of SACE.[85] Thus, the three SACE declarants have not identified any individual authorized to appear before this Board on their behalf, contrary to 10 C.F.R. § 2.314(b) and the Board's Initial Prehearing Order.[86] And, although the Petition implies that

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84 Although Petitioners state that these 86 individuals are represented by both BREDL and BEST, none of the 86 individuals states that he or she is a member of BEST, or expressly authorizes BEST to represent him or her in this proceeding. Moreover, although BEST is referred to in a number of places in the Petition, standing is asserted only by BREDL and SACE. *See* Petition at 1 and 4. Thus, BEST is not further addressed as a separate entity herein.

85 Mr. Louis A. Zeller, who represents BREDL, has entered his appearance on behalf of BREDL only.

86 10 C.F.R. § 2.314(b) states, in relevant part, that "[a]ny person appearing in a representative capacity shall file with the Commission a written notice of appearance," and that this notice "must state . . . the basis of his or her

Sara Barczak has electronically signed the Petition, she has not entered her appearance on behalf of SACE or provided any evidence that she is the authorized representative of SACE. Pursuant to the Board's Initial Prehearing Order, the deadline for doing so was January 22, 2010.[87] Accordingly, SACE also has failed to demonstrate that it has representational standing.[88]

IV. PETITIONERS HAVE FAILED TO PROFFER AN ADMISSIBLE CONTENTION

A. Standards Governing Admission of Proposed Contentions

In order to become a party in an adjudicatory proceeding, a petitioner must submit at least one admissible contention. 10 C.F.R. § 2.309(a). The six basic requirements for an admissible contention are set forth in 10 C.F.R. § 2.309(f)(1)(i)-(vi), and can be summarized as follows:

> (i) Specificity: Provide a specific statement of the issue of law or fact to be raised or controverted;
>
> (ii) Brief Explanation: Provide a brief explanation of the basis for the contention;
>
> (iii) Within Scope: Demonstrate that the issue raised in the contention is within the scope of the proceeding;
>
> (iv) Materiality: 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) Concise Statement of Alleged Facts or Expert Opinion: 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

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authority to act on behalf of the party." *See also* Initial Prehearing Order at 3 (stating that "each counsel or representative for each participant shall file a notice of appearance complying with the requirements of 10 C.F.R. § 2.314(b)").

87 Initial Prehearing Order at 3.

88 *See Ga. Power Co.* (Vogtle Elec. Generating Plant, Units 1 & 2), LBP-90-29, 32 NRC 89, 92 (1990) (finding that a "group must also demonstrate that it has authorized the particular representative appearing before us . . . to represent the group's interest"); *see also N. States Power Co.* (Prairie Island Nuclear Generating Plant, Units 1 & 2), LBP-08-26, slip op. at 8 (Dec. 5, 2008) (ruling that an attorney's Notice of Appearance can meet the requirements of Section 2.314(b)).

the requestor/petitioner intends to rely to support its position on the issue; and

(vi) Genuine Dispute: 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.[89]

The purpose of Section 2.309(f)(1) is to "focus litigation on concrete issues and result in a clearer and more focused record for decision."[90] The Commission has stated that "the hearing process [is only intended for] issues that [are] 'appropriate for, and susceptible to, resolution in an NRC hearing.'"[91] "While a board may view a petitioner's supporting information in a light favorable to the petitioner . . . the petitioner (not the board) [is required] to supply all of the required elements for a valid intervention petition."[92] The rules on contention admissibility are "strict by design."[93] Further, absent a waiver, contentions challenging applicable statutory requirements or NRC regulations are not admissible.[94] Failure to comply with any of these requirements is grounds for not admitting a contention.[95]

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89 10 C.F.R. § 2.309(f)(1)(i)-(vi).

90 Final Rule, Changes to Adjudicatory Process, 69 Fed. Reg. 2182, 2202 (Jan. 14, 2004).

91 *Id.*

92 *Amergen Energy Co.* (Oyster Creek Generating Station), CLI-09-7, 69 NRC 235, 260 (2009).

93 *See*, *e.g.*, *Dominion Nuclear Conn., Inc.* (Millstone Nuclear Power Station, Unit 2), CLI-03-14, 58 NRC 207, 213 (2003).

94 10 C.F.R. § 2.335(a).

95 *Dominion Nuclear Conn., Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-04-36, 60 NRC 631, 636 (2004).

B. Standards Governing the Admission of Amended or New Contentions

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

> [O]nly 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.[96]

Therefore, "[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)."[97] Specifically, if a petitioner cannot satisfy the requirements of Section 2.309(f)(2), then a contention is considered "nontimely," and the intervenor must demonstrate that it satisfies the eight-factor balancing test in Section 2.309(c)(1)(i)-(viii).[98] The first factor identified in that regulation, whether "good cause" exists for the failure to file on time, is entitled to the most weight.[99] Without good cause, a "petitioner's demonstration on the other factors must be particularly strong."[100]

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96 10 C.F.R. § 2.309(f)(2).

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

98 10 C.F.R. § 2.309(f)(2) (emphasis added). In addition to the late-filing criteria, any proposed new or amended contention must meet the substantive admissibility criteria set forth in Section 2.309(f)(1). Failure to comply with any one of the six admissibility criteria is grounds for the dismissal of a proposed new or amended contention. *See* Changes to Adjudicatory Process, 69 Fed. Reg. at 2221; *see also Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-99-10, 49 NRC 318, 325 (1999).

99 *See State of New Jersey* (Department of Law & Public Safety's Requests Dated Oct. 8, 1993), CLI-93-25, 38 NRC 289, 296 (1993).

100 *Tex. Utils. Elec. Co.* (Comanche Peak Steam Elec. 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)).

C. The "Good Cause" Standard

In a proceedings like this one, initiated as a result of an NRC action taken pursuant to 10 C.F.R. § 50.55(b), a contention must challenge the applicant's assertions of "good cause."[101] The Commission has identified a two-prong test for determining whether a contention is within the scope of a CP extension proceeding:

> First, the construction delays at issue have to be traceable to the applicant. Second, the delays must be dilatory. If both prongs are met, the delay is without good cause. In other words, the proponent of the contention must articulate some basis to show that the applicant is responsible for the delay and has acted intentionally and without a valid business purpose.[102]

In this regard, when reviewing an applicant's stated reasons for good cause, the Board "should not substitute its judgment for that of the applicant in selecting one among a number of reasonable business alternatives."[103] A valid business purpose for an applicant's action may include "lower [or, as in this case, greater] expected demand for power or financial circumstances, whether of limited or indefinite duration …."[104] Thus, an applicant's prudent

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101 *See*, *e.g.*, *Wash. Pub. Power Supply Sys.* (WPPSS Nuclear Project No. 2), ALAB-722, 17 NRC 546, 549-50 (1983) (stating that in a CP extension proceeding, a contention must challenge the basis for action taken as not constituting good cause and otherwise meet the Commission's pleading requirements); *WPPSS Nuclear Project Nos. 1 & 2*, CLI-82-29, 16 NRC at 1229) (stating that under Section 185 of the AEA and 10 C.F.R. § 50.55 "the scope of a [CP] extension proceeding is limited to direct challenges to the permit holder's asserted reasons that show 'good cause' justification for the delay.").

102 *Pub. Serv. Co. of N.H.* (Seabrook Station, Unit 2), CLI-84-6, 19 NRC 975, 978 (1984) (quoting *WPSSS*, ALAB-722, 17 NRC at 551, 553) (internal quotation marks omitted). This two-prong test for determining the admissibility of a contention in a construction permit extension proceeding reflected a refinement of the earlier standard requiring that a contention must "either challenge applicants' reason for delay or show that other reasons, not constituting good cause, are the principal basis for the delay." *Id.* (citing *WPPSS*, CLI-82-29, 16 NRC at 1230).

103 *Wash. Pub. Power Supply Sys.* (WPPSS Nuclear Project No. 1), ALAB-771, 19 NRC 1183, 1190-91 (1984) (finding a petitioner's contention that the "applicant's action is imprudent given other available alternatives" to present "no facts appropriate for hearing").

104 *See id.* at 1190 (finding that, in a CP extension proceeding, delays in construction that are "genuinely and primarily attributable to lower expected demand for power or financial circumstances, whether of limited or indefinite duration, represents a valid business purpose . . .").

decision to reconsider potential completion of a nuclear plant in response to an increased demand for power clearly reflects a valid business purpose—not dilatory conduct.

Consistent with this legal precedent, the Commission expressly limited the scope of this proceeding to "direct challenges to [TVA's] asserted reasons that show good cause justification for the reinstatement of the CPs."[105] As a result, this "good cause" proceeding does not permit the "relitigation of health, safety, or environmental questions" that were resolved at the time of CP issuance.[106] Measured against the foregoing principles, Petitioners' proposed contentions are patently and fatally deficient and must be rejected.

D. None of Petitioners' Remaining Proposed Contentions Meets the Admissibility Criteria of 10 C.F.R. § 2.309

In Proposed Contentions 1 and 2, Petitioners argued that the NRC has no legal authority to reinstate the CPs for BLN Units 1 and 2. In light of the Commission's full, substantive resolution and denial of Proposed Contentions 1 and 2 in CLI-10-06, TVA does not further address these matters here.[107] As shown below, Proposed Contentions 3 through 9 fail to satisfy the admissibility requirements in 10 C.F.R. § 2.309 and, therefore, also must be denied.

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[105] March 2009 Order, 74 Fed. Reg. at 10,070. The Commission's authority to define the scope of its adjudicatory proceedings is well-established and not in dispute. As the D.C. Circuit noted:

> We have no doubt that, as a general matter, such authority must reside in the Commission. To read the statute [the Atomic Energy Act of 1954, as amended] very broadly so that any proceeding necessarily implicates all issues that might be raised concerning the facility in question would deluge the Commission with intervenors and expand many proceedings into virtually interminable, free-ranging investigations ... [into] any issue any intervenor might raise.

See Bellotti v. NRC, 725 F.2d 1380, 1381 (D.C. Cir. 1983), *aff'g Boston Edison Co.* (Pilgrim Nuclear Power Station), CLI-82-16, 16 NRC 44 (1982).

[106] *WPPSS Nuclear Project No. 1*, ALAB-771, 19 NRC at 1189 (quoting *WPPSS Nuclear Project Nos. 1 & 2.*, CLI-82-29, 16 NRC at 1228); *see also WPPSS Nuclear Project Nos. 1 & 2*, CLI-82-29, 16 NRC at 1227 (concurring in the Appeal Board's statement that "the purpose of a construction permit extension proceeding is not to engage in an unbridled inquiry into the safety and environmental aspects of reactor construction and operation . . .").

[107] *See Bellefonte*, CLI-10-06, slip op. at 19-20 (denying Proposed Contentions 1 and 2 and referring Proposed Contentions 3 through 9 to the Board).

Petitioners do not challenge, with the requisite specificity and support, TVA's asserted reasons for seeking reinstatement of the CPs.[108] Nor do they show that other reasons, not constituting good cause, form the principal basis for TVA's Reinstatement Request. In short, Proposed Contentions 3 through 9 are inadmissible because they: (1) erroneously assume that the instant action involves the issuance of new CPs, or authorizes TVA to operate BLN Units 1 and 2; (2) have no bearing on the question of whether good cause for CP reinstatement has been shown; (3) fail to include a sufficient basis; and/or (4) otherwise fail to raise a genuine material dispute within the scope of the proceeding warranting adjudication.[109]

1. Proposed Contention 3: The Environmental Assessment Violated NEPA

Proposed Contention 3 consists of two subparts, both of which are inadmissible under 10 C.F.R. § 2.309(f)(1) for the reasons explained below.

a. Proposed Contention 3a is Inadmissible Because It Raises An Issue That is Outside Scope and Lacks An Adequate Basis

Proposed Contention 3a alleges that the NRC violated NEPA because it purportedly authorized reinstatement of the BLN Unit 1 and 2 CPs before it completed an environmental assessment. This is not a substantive complaint that seeks to challenge the basis for TVA's request that the CPs be reinstated, but a procedural one. According to Petitioners, the Staff

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[108] Notably, Proposed Contention 5 is the *only* proposed contention in which Petitioners expressly allege (albeit without sufficient basis) a lack of good cause for reinstatement of the CPs. *See* Petition 20, 25.

[109] Petitioners seek to rationalize the fatal defects in their proposed contentions by stating that they "cannot be expected to present any discrete disagreement with the positions taken by TVA, as those positions have not been revealed." Petition at 12. In particular, they claim that "none of the usual applicant-generated materials are available" to them. Id. Petitioners' assertions are patently unfounded and do not cure the deficiencies in their contentions. TVA submitted its Reinstatement Request on August 26, 2008, setting forth with specificity its asserted reasons for seeking reinstatement of the CPs. The NRC's ADAMS database indicates that TVA's Reinstatement Request was made available to the public in September 2008, some eight months before their Petition was filed. In fact, BREDL and SACE plainly were aware of the Reinstatement Request as early as September 11, 2008, when they filed "Petitioners' Late-Filed Contention Regarding Tennessee Valley Authority's Failure To Comply With The National Environmental Policy Act" in the BLN Units 3 & 4 COL proceeding. That filing cites TVA's Reinstatement Request as the basis for a late-filed contention. Further, Petitioners never attempted to contact TVA or its counsel to request copies of allegedly unavailable documents related to this proceeding, which TVA counsel has had no difficulty retrieving from ADAMS.

published its EA "weeks after the Commissioners voted to reinstate the Bellefonte CPs."[110] Petitioners claim that "[n]umerous courts have invalidated agency attempts to rely on post-approval environmental studies to discharge their NEPA responsibilities."[111]

As a threshold matter, Proposed Contention 3a falls squarely outside the scope of this proceeding, contrary to 10 C.F.R. § 2.309(f)(1)(iii). Nowhere do Petitioners even attempt to assert a lack of "good cause" for the challenged action. Proposed Contention 3a, rather, represents a misplaced and groundless challenge to the timing of the Staff's EA.

In this regard, Proposed Contention 3a has no basis in fact, contrary to 10 C.F.R. § 2.309(f)(1)(v). Indeed, the contention reflects Petitioners' mischaracterization of the pertinent facts. As set forth above, the NRC did not authorize reinstatement of the CPs before discharging its obligations under NEPA. The Staff issued its EA on February 24, 2009, and published that document in the *Federal Register* on March 3, 2009.[112] The Order reinstating the CPs was issued on March 9, 2009, and published in the *Federal Register* on March 13, 2009.[113] Thus, the Staff complied fully with NEPA and 10 C.F.R. Part 51 by completing and publishing the EA before reinstatement of the CPs. Petitioners' allegation of "*post hoc* compliance" with NEPA is simply without factual basis.[114]

Petitioners' ancillary allegation that the Commission authorized reinstatement of the CPs weeks before the Staff issued its EA also is incorrect. Petitioners allude to the Commission's

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110 Petition at 14.

111 *Id.*

112 EA-FONSI, 74 Fed. Reg. at 9308.

113 March 2009 Order, 74 Fed. Reg. at 10,970.

114 Petition at 14-15 (quoting *Protect Key West v. Cheney*, 795 F. Supp. 1552, 1561-62 (S. D. Fl. 1992)).

approval of COMSECY-08-0041, as reflected in the Commission's SRM dated February 18, 2009.[115] Dated December 12, 2008, COMSECY-08-0041 explains:

> [T]he staff will evaluate TVA's request for reinstatement to determine whether it is supported by good cause, considering the totality of the circumstances. *If the staff finds the request acceptable*, it will prepare an order granting the request, with conditions, *an environmental assessment*, and a supporting safety evaluation.[116]

The SRM authorized the Staff to "issue an Order reinstating the [CPs] for [BLN] Units 1 and 2, placing the facility in terminated plant status," but *subsequent* to completion of the Staff's full review and acceptance of TVA's Reinstatement Request.[117]

In accordance with COMSECY-08-0041 and the Commission's SRM, the Staff, as noted above, issued an EA on February 24, 2009, to document its environmental review—about two weeks *before* the Staff's actual reinstatement of the CPs on March 9, 2009. Petitioners' claim that the NRC failed to timely comply with its NEPA obligations is thus contrary to fact. The numerous federal court decisions cited by Petitioners are inapposite, as they all involved distinguishable factual circumstances in which federal agencies sought to "rely on post-approval environmental studies."[118] The NRC has not done so here.

For the foregoing reasons, Contention 3a necessarily fails to raise a genuine dispute on a material issue of law or fact, contrary to 10 C.F.R. § 2.309(f)(1)(vi). The contention in no way seeks to challenge TVA's "good cause justification" for reinstatement of the CPs. Additionally, even if the timing of the Staff's EA were at issue in this proceeding, the facts indisputably belie Petitioners' allegation of dilatory agency compliance with NEPA.

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115 *See* February 18, 2009 SRM.

116 COMSECY-08-0041, at 1 (emphasis added).

117 February 18, 2009 SRM, at 1.

118 Petition at 14.

b. Proposed Contention 3b is Inadmissible Because It Raises Issues That Are Outside Scope, Lacks Adequate Support, and Fails to Establish a Genuine Material Dispute

Proposed Contention 3b asserts that NEPA requires the NRC to prepare an EIS (as opposed to an EA) for the proposed action.[119] Petitioners argue that an EIS is necessary because "licensing and permit processes [sic] underway for construction of [BLN] Units 1 and 2 (the CPs) and a [COL] for [BLN] Units 3 and 4."[120] They further contend that the "NRC's reinstatement of the CP [sic] on the same site as the COL raises the issues of omission of cumulative impacts and segmentation of NEPA, both of which are prohibited by law."[121] Interwoven with these claims are Petitioners' generalized assertions that NEPA requires consideration of "new and significant information" and a "rigorous exploration of alternatives."[122]

First, Proposed Contention 3b is inadmissible because it lacks a nexus to TVA's good cause justification for the reinstatement of the CPs. Accordingly, it must be rejected as outside the scope of the proceeding, contrary to 10 C.F.R. § 2.309(f)(1)(iii).

In addition, Petitioners' claim that the Staff should have prepared an EIS instead of an EA finds no support in law or fact, and fails to raise a genuine material dispute, contrary to 10 C.F.R. § 2.309(f)(1)(v) and (vi). These fatal flaws in the contention lead to these conclusions, each of which is fully explained below: (1) an EIS is not required for the challenged action (*i.e.*, reinstatement of the CPs); (2) the NRC Staff's EA does not need to address cumulative impacts of building and operating BLN Units 1, 2, 3 and 4; and (3) the NRC has not illegally

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119 *Id.* at 15-18.

120 *Id.* at 15.

121 *Id.* at 16.

122 *Id.*

"segmented" its NEPA reviews of TVA's Reinstatement Request and TVA's COL application for BLN Units 3 and 4.

(i) *An EIS is Not Required for the Proposed Action*

As a threshold matter, Proposed Contention 3b rests on a factually incorrect premise; *i.e.*, that there are ongoing "licensing and permit processes" for actual construction of BLN Units 1 and 2. The NRC's reinstatement of the Unit 1 and 2 CPs in "terminated" status, and its subsequent placement of those CPs in "deferred" status, do not now, for the first time, authorize TVA to engage in the construction of the Units. Moreover, Petitioners point to nothing that might otherwise suggest that activities under the reinstated CPs go beyond those reviewed and evaluated by the NRC in connection with issuance of the original CPs in 1974. The purpose of the requested NRC actions is to allow TVA to further assess the *viability* of completing plant construction and, thereafter, possibly obtain operating licenses for the Units. Contrary to Petitioners' belief, no licensing process regarding the actual construction of Units 1 and 2 is underway. Therefore, no associated EIS is required.

Furthermore, NRC regulations address when an EA alone is sufficient, and when an EIS is necessary.[123] Reinstatement of a CP is *not* one of the specific agency actions listed in 10 C.F.R. § 51.20 as "requir[ing] an environmental impact statement."[124] Nor does it fall into one of the "categorical exclusions" identified in Section 51.22, for which an EA or an EIS is not required.[125] Rather, in this instance, the proposed action required the preparation of an EA, so that the NRC could evaluate the *potential* need for an EIS.[126]

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123 *See* 10 C.F.R. §§ 51.20, 51.21.

124 *Id.* § 51.20.

125 *Id.* § 51.22.

126 *See* 10 C.F.R. § 51.31(a) ("Upon completion of an environmental assessment for proposed actions . . ., the appropriate NRC staff director will determine whether to prepare an environmental impact statement or a

In this regard, an EA is a "concise" document prepared by an agency to summarize sufficient evidence and analysis for determining whether to prepare either an EIS or a finding of no significant impact ("FONSI").[127] An EA must include "brief discussions of the need for the proposal, of alternatives as required by section 102(2)(E), of the environmental impacts of the proposed action and alternatives, and a listing of agencies and persons consulted."[128] After completing an EA, the agency must decide that the proposed action either requires preparation of a full EIS, or warrants a FONSI.[129]

Here, the Staff prepared the EA-FONSI concerning the reinstatement of the CPs for BLN Units 1 and 2, in full compliance of NEPA, the Council on Environmental Quality ("CEQ") regulations, and the NRC's own requirements. After identifying the nature of the proposed action, the EA-FONSI specifies the purpose of the proposed action: "Reinstatement of the CPs for BLN Units 1 and 2 and the return to a terminated plant status *may* subsequently enable TVA to complete construction of BLN Units 1 and 2."[130] The EA-FONSI then briefly describes and summarizes the Staff's analysis of the potential radiological and nonradiological impacts to the

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finding of no significant impact on the proposed action."). Thus, the EA constitutes the basic agency record necessary for a determination that an EIS is not necessary, based on a "finding of no significant impact."

127 40 C.F.R. § 1508.9; 10 C.F.R. § 51.14.

128 40 C.F.R. § 1508.9(b).

129 40 C.F.R. § 1501.4; 10 C.F.R. § 51.31.

130 *Id.* at 9308-09 (emphasis added).

environment that may result from the reinstatement of the CPs.[131] It also discusses cumulative impacts and alternatives to the proposed action.[132]

On the basis of the EA, the Staff concluded that the reinstatement of the CPs for Units 1 and 2 "will not have a significant effect on the quality of the human environment."[133] Therefore, the Staff determined that an EIS is not necessary. Importantly, "neither the statute [NEPA] nor [NRC] regulations require the Staff to prepare an EIS if the federal action's effect on the environment is not 'significant.'"[134]

In short, Petitioners present no valid, cognizable challenges to (1) the Staff's decision to prepare an EA, (2) the substantive content of the EA, or (3) the conclusion of the Staff's assessment (*i.e.*, that there no significant environmental impacts requiring further assessment in an EIS). In this regard, Petitioners make no attempt to identify specific deficiencies in the Staff's assessment of the impacts to the environment that may result from the reinstatement of the CPs, or the Staff's consideration of alternatives. Accordingly, Petitioners' claim that the NRC improperly failed to prepare an EIS has no basis in law or fact and fails to raise a litigable dispute on a material issue of law or fact, contrary to 10 C.F.R. § 2.309(f)(1)(v) and (vi).

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131 *Id.* at 9309-14. The EA-FONSI concludes that reinstatement of the CPs for Units 1 and 2 would not result in a significant change in nonradiological impacts in the areas of land use, water use, waste discharges, terrestrial and aquatic biota, transmission facility operation, social and economic factors, and environmental justice related to resumption of construction operations at the power plants. *See id.* at 9309-13. It further states that "[n]o other nonradiological impacts were identified or would be expected." *Id.* at 9312. The EA-FONSI also concludes that, because neither reinstatement of the CPs nor any potential future construction activities would involve the use or release of radioactive material, there would be no adverse radiological impacts. *Id.* at 9313.

132 *See id.* at 9313-14. The Staff considered four possibilities for the reinstatement of the CPs and construction: (1) both Units 1 and 2 (*i.e.*, the proposed action, which bound possibilities); (2) Unit 1 only; (3) Unit 2 only; and (4) neither Unit 1 nor Unit 2. *See id.*

133 EA-FONSI, 74 Fed. Reg. at 9314.

134 *Curators of the Univ. of Mo.*, CLI-95-1, 41 NRC 71, 124 (1995).

(ii) *The EA Does Not Need to Address Cumulative Impacts of Building and Operating BLN Units 1, 2, 3, and 4*

Given the current status of BLN Units 1 and 2, Petitioners are incorrect in next claiming that the NRC Staff must assess the "cumulative impacts" of building four BLN Units.[135] At this juncture, TVA has not made a final decision to complete construction of BLN Units 1 and 2, nor has the NRC authorized it to do so. At TVA's request, the NRC reinstated the CPs to allow TVA to "determine, with a relative degree of certainty, whether the completion of the construction and operation of the units is a viable option."[136] Although the NRC has since placed Units 1 and 2 in "deferred" status,[137] TVA cannot resume reactor construction until certain other regulatory actions are taken, consistent with the Commission's March 2009 Order and Policy Statement.[138]

The Commission, moreover, has articulated the specific test to be used in determining whether an application (and the Staff's associated environmental review document) needs to consider the cumulative impacts of a future project.[139] In *McGuire*, the Commission ruled that an application must consider the cumulative impacts of a future project *only* if there is a

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135 Petition at 16-18.

136 Safety Evaluation by the Office of Nuclear Reactor Regulation Relating to the Request for Reinstatement of Construction Permit Nos. CPPR-122 AND CPPR-123, Bellefonte Nuclear Plant, Units 1 and 2, Docket Nos. 50-438 and 50-439, at 4 (Mar. 9, 2009), *available at* ADAMS Accession No. ML090620052 ("NRC Safety Evaluation"). TVA's viability assessment includes, among other things, consideration of the licensing process that will apply to Units 1 and 2, and whether the current engineering and design features of the Units are adequate to support a completion decision. Reinstatement Request at 5, 7.

137 *See* Deferred Status Approval Letter at 1, 5-6.

138 *See* Policy Statement, 52 Fed. Reg. at 38,079 (requiring, among other things, that a plant in a deferred status provide the NRC with a 120-day notification before resuming construction, together with a significant amount of substantive information regarding the plant); Deferred Plant Status Approval Letter at 4.

139 *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-14, 55 NRC 278, 294-97 (2002). The NRC has also adopted the CEQ regulations that define "cumulative impact" to include "reasonably foreseeable future actions." 40 C.F.R. § 1508.7; *see also* 10 C.F.R. § 51.14(b) (indicating that the NRC will use the definitions in 40 C.F.R. § 1508.7).

"proposal"[140] for the other project *and* if there is "interdependence"[141] between the application and the other project.[142] Specifically, "to bring NEPA into play, a possible future action must at least constitute a 'proposal' pending before the agency (*i.e.*, ripeness), and must be in some way interrelated with the action that the agency is actively considering (*i.e.*, nexus)."[143] Thus, the agency "need not delve into the possible effects of a hypothetical project."[144]

Following this precedent, the Board in the BLN Units 3 and 4 COL proceeding rejected essentially the same argument by BREDL and SACE (intervenors in that proceeding), finding that TVA's request to reinstate the CPs for Units 1 and 2 "does not constitute a 'proposal' that is interdependent with the Bellefonte Unit 3 and 4 COL application that is before the agency."[145] The Board thus found no "'proposal' of the type that would trigger a NEPA cumulative impact analysis regarding the operation of Units 1 and 2 in the NEPA analysis for proposed Units 3 and 4," thereby rendering the late-filed contention inadmissible. Although the *Bellefonte* COL Board acknowledged the prospect of CP reinstatement for Units 1 and 2, it also recognized that any

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[140] For a discussion of what constitutes a "proposal," *see Kleppe v. Sierra Club*, 427 U.S. 390, 410 & n.20 (1976) (holding that a programmatic EIS is required only when an agency makes a precise "proposal" for an action and not when an action is only planned or contemplated); *Nat'l Wildlife Fed'n v. FERC*, 912 F.2d 1471, 1478 (D.C. Cir. 1990) (holding that an EIS "need only focus on the impact of the particular proposal at issue and other pending or recently approved proposals that might be connected to or act cumulatively with the proposal at issue").

[141] For a discussion of what constitutes "interdependence," *see Webb v. Gorsuch*, 699 F.2d 157, 161 (4th Cir. 1983) (holding that the EPA did not need to consider the impact of future planned mines because the operation of the mines then under consideration by the EPA "did not represent a practical commitment to the others").

[142] *See also Soc'y Hill Towers Owners' Ass'n v. Rendell*, 210 F.3d 168, 182 (3d Cir. 2000) (holding that a court must also "consider the likelihood that a given project will be constructed along with the interdependence of other projects. The more certain it is that a given project will be completed, the more reasonable it is to require a[n] . . . applicant to consider the cumulative impact of that project.").

[143] *McGuire*, CLI-02-14, 55 NRC at 295. In *McGuire,* the Commission ruled that a power reactor license renewal application need not consider the environmental impacts of using mixed-oxide ("MOX") fuel during the period of extended operation. The Commission found that the license renewal applicant had not specifically proposed to use MOX fuel (*e.g.*, through a license amendment application), and that the plants could operate throughout the license renewal term without MOX fuel. *McGuire*, CLI-02-14, 55 NRC at 295-297.

[144] *Id.* (quoting *Nat'l Wildlife Fed'n*, 912 F.2d at 1478).

[145] *Tenn. Valley Auth.* (Bellefonte Nuclear Power Plant Units 3 and 4), Nos. 52-014-COL and 52-015-COL, Licensing Board Memorandum and Order (Ruling on Request to Admit New Contention) at 10-12 (Oct. 14, 2008) (quoting *McGuire*, CLI-02-14, 55 NRC at 294) ("October 2008 Bellefonte Board Ruling").

cumulative impacts that might result from the construction and operation of all four BLN Units (1, 2, 3, and 4) would be contingent upon a *future* decision by TVA to *resume actual construction* of Units 1 and 2.[146]

With regard to this proceeding, there is no "proposal" before the NRC to complete construction of BLN Units 1 and 2, much less a proposal to construct Units 1, 2, 3, and 4 together. This action is limited to the NRC's reinstatement of the CPs for Units 1 and 2, *so that TVA may proceed to determine whether* construction and operation of Units 1 and 2 is even viable.[147] The Commission has emphasized that "proposals" are "concrete or reasonably certain projects, not projects that are 'merely contemplated.'"[148] TVA has not made a final decision to either complete construction of BLN Units 1 and 2, or to construct Units 3 and 4;[149] therefore,

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[146] As the *Bellefonte* Units 3 and 4 COL Board noted:

> [I]f TVA is able to have the Units 1 and 2 construction permits reinstated *and later reaches a determination to continue with the construction of those facilities*, that *may* well present a different situation relative to the need for TVA and/or the staff to assess the impacts of that construction relative to Units 3 and 4, as well as the need to consider the impacts of the construction and operation of Units 3 and 4 in the context of any additional licensing action regarding Units 1 and 2.

Id. at 12 n.7 (emphasis added).

[147] TVA has stated that "[t]he entire purpose for reinstating the Construction Permits for Units 1 and 2 would be to assist TVA in determining whether these units should once again constitute a viable, or in terms of NEPA requirements, whether they should represent a 'reasonable' power generating alternative." Reinstatement Request at 7.

[148] *McGuire*, CLI-02-14, 55 NRC at 295. In this regard, the Commission has clearly distinguished between a deferred plant and a plant that is under active construction. *See* Policy Statement, 52 Fed. Reg. at 38,078.

[149] TVA's Reinstatement Request makes this fact crystal clear:

> It is important to understand that in making the subject request for reinstatement of the Construction Permits, TVA is in no way indicating any preference or prejudgment in favor of completing the existing Bellefonte units. Should NRC reinstate the Construction Permits, any future decision to resume Unit 1 and 2 construction and completion activities *would require approval by the TVA Board*. TVA's Board would take into account the full range of engineering, construction, environmental, and regulatory/licensing considerations associated with such a project, including the associated cost and need for power considerations.

Reinstatement Request at 7 (emphasis added).

neither project is yet "sufficiently concrete" to warrant cumulative impact analysis.[150] TVA's Reinstatement Request is not a "proposal" that would impact its COL application and mandate the type of cumulative impacts analysis sought by Petitioners.[151]

Additionally, when the "interdependence" test is applied to the facts of this case, the proposed contention again fails. Namely, "an agency must consider the impact of other proposed projects 'only if the projects are so interdependent that it would be unwise or irrational to complete one without the other.'"[152] This is not the case here. Reinstatement of the CPs for BLN Units 1 and 2 is not contingent upon TVA's obtaining COLs for Units 3 and 4 (and vice versa). Construction of BLN Units 1 and 2 began decades ago, long before Units 3 and 4 were even contemplated. Therefore, the two projects clearly have independent utility and are not interdependent. The Staff's EA is explicit on this point:

> At this juncture, the TVA request that the NRC reinstate the CPs for BLN Units 1 and 2 does not constitute a "proposal" that is interdependent with the BLN Units 3 and 4 COL application that is before the agency. The TVA request to reinstate the CP for BLN Units 1 and 2 fails to constitute a "proposal" of the type that would trigger a NEPA cumulative impact analysis regarding Units 1 and 2 in the National Environmental Policy Act (NEPA) analysis for proposed BLN Units 3 and 4. *If construction activities resume for BLN Units 1 and 2*, TVA would need to assess the BLN Units 1 and 2 construction impacts relative to BLN Units 3 and 4.[153]

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150 *See Soc'y Hill Towers Owners' Ass'n*, 210 F.3d at 182 (finding that there was no proposal because planning documents were not "sufficiently concrete" and because the action was not likely to be completed).

151 Intervenors' reliance on *Ocean Advocates* is misplaced. In that case, the court disagreed with the Corps' analysis that an increase in the number of crude oil tankers would result from "market forces" instead of a dock addition. *See Ocean Advocates v. U.S. Army Corps of Engineers*, 361 F.3d 1108, 1128-29 (2004), *as amended*, 402 F.3d 846 (2005). In particular, the court found that the application for a dock extension, "along with the existing and proposed projects," could lead to cumulatively significant environmental impacts. *Ocean Advocates*, 361 F.3d at 1129. That case is distinguishable from the instant action involving BLN Units 1 and 2, which does not involve either ongoing construction of the Units or a final TVA decision to build the Units in the future.

152 *McGuire*, CLI-02-14, 55 NRC at 297 (quoting *Webb*, 699 F.2d at 161). *See also Soc'y Hill Towers Owners' Ass'n*, 210 F.3d at 180-82 (finding that two actions were not interrelated because the success of one was not tied to the completion of the other action).

153 EA-FONSI, 74 Fed. Reg. at 9314 (emphasis added).

Thus, there clearly is no basis for Petitioners' claim that TVA or the Staff here must prepare a "cumulative impacts" analysis encompassing four BLN Units.

TVA's November 2009 DSEIS, which assesses the potential impacts of building a *single* unit at the BLN site in the larger framework of TVA's system-wide resource planning effort, does not alter the conclusion that Proposed Contention 3b is inadmissible. As stated therein, "TVA may choose to complete and operate one of the partially constructed Babcock & Wilcox (B&W) pressurized light water reactors, or construct and operate a new Westinghouse AP1000 pressurized light water reactor (AP1000)."[154] The DSEIS, which is based on a need-for-power forecast through 2019, reflects TVA's present determination that adding a single nuclear unit at the BLN site would most effectively help TVA achieve its goals of meeting future capacity and generation needs while using existing assets and reducing carbon emissions.[155]

Importantly, the DSEIS explains that its purpose is to help TVA make an informed decision "whether to approve and fund the completion or construction and operation of a single nuclear unit at the BLN site."[156] In this regard, the DSEIS explicitly notes that the NRC's reinstatement of the BLN CPs allows TVA only to "resume preservation and maintenance activities, and determine whether the completion of construction and operation of BLN 1&2 would be a viable option"[157] As such, TVA has not made a final decision to complete either BLN Unit 1 or 2. The DSEIS, moreover, considers the possibility of building a single B&W unit or a single AP1000 unit (as opposed to building two or four Units), or dong nothing, further underscoring the complete lack of "interdependence" between TVA's Reinstatement Request

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154 TVA DSEIS, Abstract at 1.

155 *Id.* at 15.

156 *Id.* at 2.

157 *Id.* at 4.

and Units 3 and 4 COL application. Contrary to Petitioners' assumption, TVA has not proposed building four Units at the BLN site. Accordingly, there remains no legal or factual basis for Petitioners' claim that the instant action (CP reinstatement) requires a cumulative impacts analysis for all four BLN Units.

(iii) *The NRC Has Not Illegally "Segmented" its NEPA Reviews of TVA's Reinstatement Request and the COL Application for Proposed BLN Units 3 and 4*

Also lacking merit is Petitioners' next claim that the NRC has improperly "segmented" its NEPA reviews of TVA's Reinstatement Request and COL application. Impermissible segmentation occurs when an agency segregates some portion of a "major federal action" to avoid proper NEPA review of the entire project. "The hallmark of improper segmentation is the existence of two proposed actions where the proposed component action has little or no independent utility, and its completion may force the larger or related project to go forward notwithstanding the environmental consequences."[158]

There is no improper segmentation in this case. The two actions in question are subject to *separate* applications and *separate* proceedings. TVA's Reinstatement Request—made solely to assess the viability of completing BLN Units 1 and 2—is separate and distinct from its COL application for Units 3 and 4. Each of these actions has "independent utility, as fully explained above." TVA has not proposed to construct all four BLN Units together, as part of an integrated plan, as the recent TVA DSEIS makes perfectly clear. Either project may proceed, or not proceed, independent of the other. Thus, there is no basis for Petitioners' claim that the

[158] *Anglers of the Au Sable v. U.S. Forest Serv.*, 402 F.Supp.2d 826, 836 (E.D. Mich. 2005) (citations omitted). *See also Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, and 3), LBP-98-33, 48 NRC 381, 390 (1998) (*citing City of Rochester v. United States Postal Serv.*, 541 F.2d 967, 972 (2d Cir. 1976)) (stating that "segmentation" under NEPA "occurs when environmental review of the total effects of a project is thwarted because portions of the project are dealt with separately").

exclusion of BLN Units 3 and 4 in this proceeding constitutes illegal "segmentation" under NEPA.

Applying these legal principles, the Board in the BLN Units 3 and 4 COL proceeding rejected BREDL's and SACE's indistinguishable segmentation argument as being "without substance."[159] There, the Board noted that TVA's COL application "is completely different from the TVA request to reinstate a construction permit for Bellefonte Units 1 and 2."[160] As such, it found no "genuine dispute as to a material issue of law or fact."[161] This Board should do the same here.

2. Proposed Contention 4: Plant Site Geologic Issues Are Not Adequately Addressed

In Proposed Contention 4, Petitioners allege that "geologic criteria in NRC regulations must be met *before* a construction permit may be re-instated," as "[t]hese criteria are necessary to prevent the construction of nuclear reactors on unstable ground."[162] They refer to the geologic and seismic criteria found in 10 C.F.R § 100.23, which "detail the requirements for determining whether a proposed site is acceptable for a nuclear power plant."[163] They then assert that the NRC's reinstatement of the CPs "lacks the requisite and relevant material information about geology and seismicity at the proposed Bellefonte site."[164] Finally, Petitioners contend that TVA must take into account more recent seismic data.[165]

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159 October 2008 Bellefonte Board Ruling at 11.

160 *Id.*

161 *Id.*

162 Petition at 18 (emphasis added).

163 *Id.* at 19.

164 *Id.* at 20.

165 *Id.* at 19-20.

Contrary to 10 C.F.R. § 2.309(f)(1)(iii), Proposed Contention 4 clearly falls far outside the limited scope of this "good cause" proceeding by seeking to challenge TVA's compliance with the NRC's geologic and seismic siting criteria. The contention has nothing whatsoever to do with "[TVA's] asserted reasons that show good cause justification for the reinstatement of the CPs."[166] Indeed, the NRC evaluated TVA's compliance with the siting criteria at the time of initial CP issuance, and found that "the site is suitable from a geologic and seismic standpoint."[167] Petitioners improperly seek to revisit plant siting issues related to the initial licensing of the facility, but unrelated to TVA's demonstration of good cause for reinstatement of the CPs. "[T]he purpose of [this] proceeding is not to engage in an unbridled inquiry into the safety and environmental aspects of reactor construction and operation."[168] As the Commission made quite clear in its January 7 decision regarding its statutory authority to reinstate the CPs, the instant matter does not entail the issuance of new CPs.[169]

Proposed Contention 4 is inadmissible for the further reason that it fails to present "a concrete and genuine dispute appropriate for litigation, contrary to 10 C.F.R. § 2.309(f)(1)(iv) and (vi). Petitioners again incorrectly assume that the reinstatement of the CPs authorizes anew the construction of the reactors.[170] Even if reactivated, a CP only constitutes an authorization to

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166 March 2009 Order, 74 Fed. Reg. at 10,970. Contention 4 thus contravenes the March 2009 Order and 10 C.F.R. § 2.309(f)(1)(iii) by raising site suitability and safety issues that are not cognizable in this proceeding.

167 *See*, *e.g.*, *Tenn. Valley Auth.* (Bellefonte Nuclear Plant Units 1 and 2), LBP-74-66, 8 AEC 472, 498 (1974).

168 *WPPSS Nuclear Project Nos. 1 & 2*, CLI-82-29, 16 NRC at 1221, 1227 (citations omitted). To the extent that Petitioners contend that their purported basis for this contention presents a current health and safety issue warranting NRC action, they could seek appropriate action pursuant to 10 C.F.R. § 2.206. *See id.* at 1228 ("This, of course, does not mean that those who wish to raise health, safety, or environmental concerns before the agency have no remedy prior to the operating licensing proceeding. This opportunity is afforded to all persons under 10 C.F.R. § 2.206, which allows any person to seek the institution of a show-cause proceeding under 10 C.F.R. § 2.202.")

169 *See Bellefonte*, CLI-10-06, slip op. at 14.

170 *See* March 2009 Order, 74 Fed. Reg. at 10,970; NRC Safety Evaluation at 8. As such, there is no legal basis for Petitioners' claim that reinstatement of the CPs requires a (new) showing of compliance with "geologic

resume construction;[171] it does not constitute NRC approval of the safety of any plant design feature.[172] The Commission will not issue a license authorizing operation of BLN Unit 1 or Unit 2 until: (1) TVA has submitted (by amendment to its OL application) the complete FSAR; and (2) the Commission has approved the final plant designs.[173] These requirements and procedures ensure that BLN Units 1 and 2, if completed and licensed to operate, comply with all applicable NRC requirements, including those implemented to ensure safe operation of the plants during credible seismic events. Further, the Commission recently noted, in CLI-10-06, that should TVA "apply for an operating license, there will be a future hearing opportunity on that application."[174]

Finally, even putting aside its lack of materiality, Proposed Contention 4 fails to present any sufficiently particularized and supported challenges.[175] Petitioners provide no support, in the form of documentation or expert opinion, for their claim that "[a]n earthquake with a magnitude of 5.0 could cause serious damage to the Bellefonte plant."[176] Petitioners refer to the occurrence of a magnitude 4.6 earthquake in 2003 near Fort Payne, Alabama and "numerous small earthquakes" in that area since 2003.[177] They do not, however, explain why or how the

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criteria in NRC regulations." The SER makes clear that the NRC Staff's original site suitability findings are "unaffected by reinstatement of the CPs." *See* NRC Safety Evaluation at 5 (Section 3.3.1.2, 'Consideration of Safe Operation at the Proposed Location"); Deferred Plant Status Approval Letter at 2 ("TVA has not determined a date for reactivating the construction of BLN Units 1 and 2. However, TVA indicated that, should it decide to reactivate construction, it would submit a letter 120 days before resuming construction and provide the required information in accordance with the Commission's Policy Statement.").

171 NRC Safety Evaluation at 8.

172 *Id. See also* COMSECY-08-0041 at 2 (stating that a CP only "constitutes an authorization to proceed with construction and does not constitute final Commission approval of the safety of any design feature or specification").

173 NRC Safety Evaluation at 6.

174 *Bellefonte*, CLI-10-06, slip op. at 14.

175 *See Duke Power Co.* (Catawba Nuclear Station, Units 1 & 2), ALAB-687, 16 NRC 460, 468 (1982), *vacated in part on other grounds*, CLI-83-19, 17 NRC 1041 (1983) (noting that the NRC's Rules of Practice do not permit the filing of a "vague, unparticularized contention").

176 Petition at 20.

177 *Id.*

occurrence of these events precludes TVA's compliance with NRC seismic siting or design requirements. Such vague, unsubstantiated allegations do not suffice under 10 C.F.R. § 2.309(f)(1)(v) and (vi). For these reasons, Proposed Contention 4 clearly is inadmissible.

3. Proposed Contention 5: Lack of Good Cause for Reinstatement

In Proposed Contention 5, Petitioners claim that TVA lacks good cause to reinstate the CPs for BLN Units 1 and 2, focusing almost exclusively on TVA's comparison of costs of alternative energy sources in its "Environmental Report [ER] for BLN Units 3 and 4."[178] They claim the BLN Units 3 and 4 ER "fails to provide reasonably up-to-date and accurate information regarding the costs of nuclear power, the costs of alternative energy sources, and the financial risks posed by the election of nuclear power as an energy source."[179] Rather than challenging TVA's specific assertions of "good cause" for reinstatement of the Unit 1 and 2 CPs, Petitioners contend that the BLN Units 3 and 4 ER is defective because: "TVA's energy cost data are seriously obsolete,"[180] "[t]he costs of renewable energy sources were not properly evaluated by TVA,"[181] and "TVA's [ER] did not consider several financial risk factors."[182] In addition, Petitioners claim that "there are clear alternatives available in the form of power plants that have much shorter lead times and that can be built more modularly [than nuclear power plants],"[183] and that "[i]n such an economic and technological environment, it is likely or very

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178 *Id.*

179 *Id.* at 21 (emphasis added). Notably, the Petition contains numerous references to Chapter 9 ("Alternatives to the Proposed Action") and Section 10.4 ("Benefit-Cost Balance") of the ER for BLN Units 3 and 4. *See* Bellefonte Nuclear Plant Units 3 & 4 COL Application, Part 3, Applicant's Environmental Report –Combined License Stage, available at http://www.nrc.gov/reactors/new-reactors/col/bellefonte.html.

180 Petition at 21.

181 *Id.* at 22.

182 *Id.*

183 *Id.* at 23.

likely that [BLN] 1 and 2 would become economically obsolete, again, before they come on line."[184]

a. Proposed Contention 5 Is Inadmissible Because It Raises Issues That Are Outside Scope, Lacks Adequate Support, and Fails to Raise a Genuine Dispute

Proposed Contention 5 is outside the scope of this proceeding insofar as it constitutes as unabashed challenge to the ER submitted by TVA in *another proceeding* (*i.e.*, the COL proceeding for BLN Units 3 and 4). Petitioners seek to directly challenge the financial data and cost analyses for nuclear power plants and alternative energy sources contained in the BLN Units 3 and 4 ER.[185] At the same time, they completely ignore TVA's stated reasons for seeking reinstatement of the CPs for BLN Units 1 and 2—to determine "whether Bellefonte Units 1 and 2 should again be regarded as a potential base load generating option."[186] Consequently, Petitioners again flout the Commission's March 2009 Order by failing to squarely challenge, or otherwise controvert, TVA's "good cause" justification for the reinstatement of the CPs.[187]

Beyond their disagreement with the cost analyses contained in TVA's ER for BLN Units 3 and 4 (which, without explanation, Petitioners' suggest "weigh against good cause for reinstatement of the BLN CPs"),[188] Petitioners identify no discrete deficiency in TVA's assertions of good cause for the Reinstatement Request. Notably, Petitioners do not dispute TVA's asserted need to examine potential additional "base load generating options" in view of

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184 *Id.* at 25.

185 *See id.* at 20-25 (alleging that the ER "for BLN Units 3 and 4 dismissed alternative energy sources such as wind and solar on the ground that they cost much more than nuclear power").

186 Reinstatement Request at 5 (emphasis added).

187 March 2009 Order, 74 Fed. Reg. at 10,970.

188 Petition at 25.

increased demand for electrical power.[189] Instead, Petitioners principally take aim at cost information and analyses discussed in the BLN Units 3 and 4 COL application. Petitioners' criticisms of that information in no way undermines TVA's decision to seek reinstatement of the CPs for Units 1 and 2, the principal purpose which is to assess whether Units 1 and 2 even "represent a viable generating alternative."[190] Thus, while "financial predictions and estimates of capital and operating costs" may influence TVA's ultimate decision on completion of BLN Units 1 and 2, they are not, as Petitioners claim, germane to TVA's "good cause" justification here.[191]

Proposed Contention 5, in fact, merely repackages a contention proffered by two of the Petitioners in the BLN Units 3 and 4 COL proceeding, which involves a materially different regulatory action (*i.e.*, initial NRC authorization to build and operate two new nuclear units). Nonetheless, most of the arguments presented in Proposed Contention 5 are identical to those set forth in Proposed Contention 16 (NEPA-N) of Petitioners' Petition to Intervene in the pending COL proceeding for BLN Units 3 and 4.[192] Such a blatant "back-door" challenge to a separate

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189 Reinstatement Request at 5.

190 *Id.* at 7.

191 Petition at 20.

192 *See* Petition for Intervention and Request for Hearing by the Bellefonte Efficiency and Sustainability Team, The Blue Ridge Environmental Defense League and the Southern Alliance for Clean Energy in Docket Nos. 52-014 and 52-015, at 84-92 (June 6, 2008) ("June 2008 Intervention Petition"). In the proceeding on TVA's BLN Units 3 and 4 COL application, the Board admitted Proposed Contention 16 (NEPA-N) only to the extent that it challenges "the estimated electrical generation costs of the proposed new nuclear power plant[s]." *Tenn. Valley Auth.* (Bellefonte Nuclear Power Plant, Units 3 and 4), LBP-08-16, 68 NRC __, slip op. at 67 & App. A. (Sept. 12, 2008). Further proceedings on that contention are pending. Significantly, the same Board denied the admission of Proposed Contention 16 insofar as Petitioners' "conclusory claims regarding the ER evaluation of renewable energy costs . . . fail to establish a genuine dispute with the ER section 9.2.2 discussion of the cost of wind and solar electrical generation as alternatives to nuclear generation of electricity or with the viability of either of those renewable options as a stand-alone source for the baseload power that would be generated by the proposed Bellefonte facilities." *Id.* at 68. The Board further stated that "[t]he same is true relative to [Petitioners'] assertions regarding the financial risks associated with nuclear power generation, which seemingly are an attempt to challenge the financial forecasting found in the ER." *Id. See also id.* at 44-55 (denying Petitioners' Proposed Contention 11 (NEPA-E), which alleged that TVA's COL ER "power demand forecast fails to justify need for new nuclear reactors").

NRC application—one not at issue here—is inappropriate.[193] For these reasons, Proposed Contention 5 is inadmissible and must be dismissed, pursuant to 10 C.F.R. § 2.309(f)(1)(iii).

Proposed Contention 5 simply lacks a sound legal basis, further contrary to 10 C.F.R. § 2.309(f)(1)(vi). Petitioners, in effect, suggest that detailed capital and operating cost estimates for BLN Units 1 and 2 are a prerequisite to the establishment of "good cause" for reinstating the CPs. As noted above, while detailed cost analyses may factor into a future TVA decision on whether to complete Units 1 and 2, Petitioners do not show that such analyses are *now* necessary or material to establishing "good cause" for CP reinstatement. Nor do they cite any authority requiring such a demonstration by TVA here.

In fact, the opposite is true. As TVA explained, reinstatement of the CPs is a necessary precursor to its more detailed viability assessment to determine "whether [BLN] Units 1 and 2 should again be regarded as a potential base load generating option."[194] Furthermore, the central premise of Petitioners' contention runs counter to the legal principle, established in prior "good cause" proceedings (involving the most closely analogous regulatory process—CP extension requests), that NRC adjudicatory boards do not sit "to superintend utility management when it makes business judgments."[195] The presiding tribunal, in other words, "should not substitute its judgment for that of the applicant in selecting one among a number of reasonable business

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193 *See Tex. Utils. Elec. Co.* (Comanche Peak Steam Electric Station, Unit 2), CLI-93-10, 37 NRC 192, 204 (1993) (stating that a construction permit extension proceeding is "not an avenue to challenge a pending operating license"); *see also Citizens Ass'n for Sound Energy v. NRC*, 821 F.2d 725,729 (D.C. Cir. 1987) (finding that evidence petitioner wanted to present was relevant to the quality of ongoing construction and thus, "more appropriately being presented by [petitioner] in the ongoing proceedings to determine whether [the applicant] should be granted an operating license").

194 Reinstatement Request at 5.

195 *See WPPSS Nuclear Project No. 1*, ALAB-771, 19 NRC at 1190-91 (affirming the Licensing Board's conclusion "that it should not substitute its judgment for that of the applicant in selecting one among a number of reasonable business alternatives," and finding petitioner's contention that "applicant's action is imprudent given other available alternatives" to present "no facts appropriate for hearing").

alternatives."[196] Similar to the prior CP extension requests discussed above, the instant Reinstatement Request is intended to allow TVA "to maintain a robust and flexible range of generating options," so that it can better meet its obligation "to provide ample safe, economic, reliable, and environmentally responsible sources of electric power."[197]

Petitioners here seek to advance arguments (uncritically lifted from the BLN Units 3 and 4 COL proceeding) that solar and wind power should be "preferred to nuclear."[198] They, in essence, believe that TVA's decision to pursue nuclear energy is misguided and somehow indicative of a lack of good cause for TVA's Reinstatement Request. Such a difference of opinion does not satisfy the requirement for a sound legal basis or suffice to establish a genuine material dispute with TVA, as required by 10 C.F.R. § 2.309(f)(v) and (vi).

b. Petitioners' July 2009 Supplemental Basis Fails to Support Admission of Proposed Contention 5

Petitioners' July 2009 Supplemental Basis alleges that TVA's June 15, 2009 notice of intent to prepare its New IRP/PEIS "is an acknowledgement by TVA that the existing [economic] projections must be revised."[199] TVA moved to strike the July 2009 Supplemental Basis on July 17, 2009, and does not waive its arguments in support of that Motion. Nonetheless, for the reasons below, TVA submits that July 2009 Supplemental Basis does not support admission of Proposed Contention 5 because it lacks adequate support and fails to establish a genuine material dispute, contrary to 10 C.F.R. § 2.309(f)(1)(v) and (vi).

In their July 2009 Supplemental Basis, Petitioners do not explain how detailed need-for-power projections previously prepared by TVA, even if now "outdated," are relevant to TVA's

196 *Id.* at 1190.

197 68 Fed. Reg. at 11,416.

198 Petition at 22.

199 July 2009 Supplemental Basis at 2. Petitioners' July 2009 Supplemental Basis seeks to "place in the record" a June 15, 2009 *Federal Register* notice announcing that TVA is studying its IRP and preparing a related PEIS.

good cause justification for the reinstatement of the Unit 1 and 2 CPs. Furthermore, they do not explain how TVA's preparation of the New IRP/PEIS, to provide a "comprehensive study of its energy, resource, and sustainability choices," suggests a lack of good cause for reinstatement of the CPs. Indeed, the IRP process underscores TVA's need to determine, for purposes of meeting future electrical energy needs, available supply- and demand-side energy resources, including additional nuclear generation.

Arguably, the July 2009 Supplemental Basis, which was submitted two months after the Petition, also fails to meet 10 C.F.R. § 2.309(f)(2)(ii), which requires that "information upon which the amended or new contention is based is materially different than information previously available." Although the June 15, 2009 *Federal Register* notice cited by Petitioners was not available until after they filed their Petition, Petitioners do not adequately explain why the notice constitutes information that is materially different, with regard to the question of good cause, from information cited in the Petition. TVA's announced intent to prepare the New IRP/PEIS in no way modifies the factual predicate for Petitioners' Proposed Contention 5, which is that TVA's Reinstatement Request lacks "good cause" because it allegedly relies on "seriously obsolete" energy cost information.[200] Petitioners again argue, without citing any legal authority, that TVA must prepare new, detailed economic analyses to demonstrate good cause for CP reinstatement.

In summary, Proposed Contention 5, even as supplemented, fails to controvert any of the specific economic and commercial factors cited by TVA as providing good cause for its

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[200] *Cf. Private Fuel Storage, LLC* (Independent Spent Fuel Storage Installation), LBP-98-7, 47 NRC 142, 208 (1998) (citing *Duke Power Co.* (Catawba Nuclear Station, Units 1 and 2), CLI-83-19, 17 NRC 1041, 1043, 1045 (1983)); *Yankee Atomic Elec. Co.* (Yankee Nuclear Power Station), LBP-96-15, 44 NRC 8, 26 (1996); *Phila. Elec. Co.* (Limerick Generating Station, Units 1 and 2), LBP-83-39, 18 NRC 67, 69 (1983)) (ruling that the intervenor's reliance on newly-disclosed proprietary materials was not "necessary" or "integral" to the development of its late-filed contention, such that delay in filing was not justified).

Reinstatement Request, including recent changes in power-generation economics and material procurement concerns. Furthermore, Proposed Contention 5 fails to show that TVA's Reinstatement Request is rooted in other considerations not identified by TVA and which do not constitute good cause for reinstatement of the CPs. In this regard, Petitioners do not show that TVA has acted without a "valid business purpose."[201] To the contrary, TVA's identified need to re-assess the viability of BLN Units 1 and 2 as potential baseload generating options—the impetus for its Reinstatement Request—clearly reflects a valid business purpose.

4. Proposed Contention 6: The Reinstatement Was Improper Because TVA Had Not and Cannot Meet the NRC's Quality Assurance and Quality Control ("QA/QC") Requirements

Proposed Contention 6 alleges that TVA's withdrawal of the BLN CPs in 2006 resulted in an irremediable noncompliance with the NRC's QA/QC requirements in 10 C.F.R. Part 50.[202] Petitioners and their proffered expert, Arnold Gundersen, principally contend that the NRC improperly reinstated the Unit 1 and Unit 2 CPs because: (1) both Units were partially dismantled and "cannibalized" when significant pieces of equipment were sold off for scrap; (2) a member of the NRC Staff and an NRC Commissioner disagreed with the decision to reinstate the Unit 1 and 2 CPs and wrote dissenting opinions;[203] (3) the NRC performed no inspections during the three years following the termination of the BLN CPs; and (4) TVA did not follow

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201 *Seabrook*, CLI-84-6, 19 NRC at 978.

202 Petition at 25-28.

203 *See* COMSECY-08-0041, Attachment 2, Non-Concurrence by Joseph Williams Regarding Staff Approach, Tennessee Valley Authority Request to Reinstate Construction Permits, Bellefonte Nuclear Plant, Units 1 and 2 (Nov. 20, 2008); Commission Voting Record, Commissioner Jaczko's Vote on COMSECY-08-0041, Staff Recommendation Related To Reinstatement of the Construction Permits for Bellefonte Nuclear Plant Units 1 and 2 (Jan. 27, 2009).

acceptable QA procedures, federal regulations, or industry protocol for more than three years.[204] Petitioners postulate that reinstatement of the CPs poses a "grave risk to public safety."[205]

a. Proposed Contention 6 is Inadmissible Because It Raises Issues That Are Outside Scope, Fails to Raise a Material Issue, Fails to Establish a Genuine Material Dispute, and Lacks Adequate Factual Support

Proposed Contention 6 is inadmissible for multiple, independent reasons. As a threshold matter, it falls outside the scope of this "good cause" proceeding, contrary to 10 C.F.R. § 2.309(f)(1)(iii), because it seeks to contest TVA's ability to meet NRC QA/QC requirements in view of the temporary withdrawal of the Units 1 and 2 CPs. This issue is fundamentally a regulatory compliance concern that is not litigable in this forum, because it has no nexus to "the economic, material procurement, and electrical generation considerations" cited by TVA as "good cause" for its Reinstatement Request.[206] Discovering and developing an understanding of the material condition of the Units is a fundamental element of ultimately assessing the viability of the plant. For the same reason, Proposed Contention 6 fails to raise an issue that is material to the Staff's decision to reinstate the CPs, contrary to 10 C.F.R. § 2.309(f)(iii). Given Petitioners' complete failure to even assert a lack of good cause for reinstatement of the CPs, Proposed Contention 6 also does not establish a genuine material dispute with TVA, contrary to 10 C.F.R. § 2.309(f)(1)(vi).

Beyond these deficiencies, Proposed Contention 6 also lacks adequate factual support. Indeed, it reflects Petitioners' fundamental misunderstanding of the regulatory framework created by the Commission's Policy Statement, which does not permit reactivation of

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204 Petition at 28; Declaration of Arnold Gundersen Supporting Blue Ridge Environmental Defense League's Contentions at 4("Gundersen Decl.").

205 Petition at 28; Gundersen Decl. at 9.

206 *See* NRC Safety Evaluation at 6-7; *see also* Reinstatement Request at 5-7.

construction until the CP holder has an adequate QA program in place.[207] As an initial matter, the fact that an NRC Staff member (Mr. Joseph Williams) and a Commissioner (Chairman Jaczko) expressed objections to the regulatory approach set forth in COMSECY-08-0041 or the March 2009 Order does not, in and of itself, give rise to an admissible contention. Differing professional and/or dissenting opinions by members of the Staff and Commission are not aberrations—they are part of the agency's deliberative decision-making process. Here, a majority of the Staff and a majority of the Commission fully addressed the differing and dissenting views, and ultimately approved the procedures used to review TVA's Reinstatement Request. Those procedures, or the decisional process underlying them, are not at issue in this proceeding. Thus, this argument lends no support to Petitioners' proposed contention.

Furthermore, in approving TVA's Reinstatement Request (and also in later placing BLN Units 1 and 2 into "deferred" status), the Staff explicitly recognized and addressed the other three principal concerns cited by Petitioners and Mr. Gundersen in his declaration; *i.e.*, the dismantlement or removal of certain plant equipment, the temporary lapse in QA programs following CP withdrawal, and the hiatus in NRC inspections. As the NRC's Safety Evaluation explains:

> TVA suspended preservation and maintenance activities after the NRC withdrew the CPs and conducted some investment recovery activities such as the removal of steam generator tubing, certain sections of the reactor coolant piping, various storage tanks, and a number of the original construction storage buildings. In its August 26, 2008, letter, TVA stated that upon reinstatement of the CPs, it will carry out its nuclear quality assurance plan as the plan relates to a deferred plant. Equipment not subject to preventive maintenance under a layup program would be entered into the TVA corrective action program and prohibited from being placed in service without further evaluation or without full restoration or

[207] *See* Policy Statement, 52 Fed. Reg. at 38,078-79 (discussing the various QA requirements applicable to a plant in "deferred" status).

> replacement. Systems and components (equipment) that may have been affected during investment recovery activities would also be entered into the TVA corrective action program and prohibited from being placed in service without a full evaluation or without restoration or replacement as well.[208]

Importantly, the Staff also stated that "these activities *are not material to reinstatement* of the CPs but *will be subject to NRC inspection, review, and approval* during the OL review stage."[209]

In its Reinstatement Request, TVA accordingly committed to reinstitute its Nuclear Quality Assurance ("NQAP") Plan, as that plan relates to a "deferred" plant, upon reinstatement of the CPs.[210] TVA implemented this commitment on March 13, 2009, following reinstatement of the CPs, by submitting Revision 20 of its NQAP pursuant to Section 50.55(f)(3).[211] The revised NQAP describes the methods and establishes the administrative control requirements necessary to comply with 10 C.F.R. Part 50, Appendix B requirements, the Commission's Policy Statement, and the Unit 1 and Units 2 CPs, as reinstated in accordance with the NRC's Order dated March 9, 2009.[212] The revised NQAP addresses the temporary cessation of preventive maintenance on selected plant equipment following the withdrawal of the CPs and the potential impact of resource recovery activities.[213]

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208 NRC Safety Evaluation at 6. As noted previously, the Staff has since placed BLN Units 1 and 2 into "deferred" plant status. Section III.A.7 of the NRC's Policy Statement on Deferred Plants addresses the specific actions that the NRC Staff must take to determine "[t]he acceptability of structures, systems, and components important to safety (10 C.F.R. Part 50, Appendix A, General Design Criterion 1) upon reactivation from deferred status." Policy Statement, 52 Fed. Reg. at 38,079. *See also* Deferred Plant Status Approval Letter at 4 (noting that "TVA has established procedural controls to ensure maintenance activities performed while in a terminated or deferred plant status do not advance construction of the plants").

209 NRC Safety Evaluation at 6 (emphasis added).

210 Reinstatement Request at 6.

211 *See* March 13, 2009 Letter from Michael A. Purcell, TVA, to the U.S. NRC, Encl. 1, TVA Nuclear Quality Assurance Plan, TVA-NQA-PLN89-A, Revision 20, App. G, Quality Assurance Programs for Bellefonte Units 1 and 2, to ("Bellefonte NQAP"), *available at* ADAMS Accession No. ML090760973. On September 28, 2009, TVA submitted Revision 21 of the BLN NQAP (*available at* ADAMS Accession No. ML090760973).

212 *See* BLN NQAP, at 1.

213 *See id.* at 5 (section entitled "Deferred Plant Equipment Policy").

In transmitting its December 2009 Inspection Report to TVA, the Staff emphasized the need to verify TVA's compliance with NRC QA requirements before placing the Units into "deferred" status:

> The purpose of the inspection was to identify the status of the applicable program areas, specified in Section III.A, "Deferred Plant", of the Commission Policy Statement on Deferred Plants (52 FR 38077), currently established at the Bellefonte Nuclear Plant. *Primarily, the NRC recognized the need to address the lapse in Quality Assurance (QA) oversight and investment recovery consequences that occurred in the period from withdrawal of the site's Construction Permits until when the QA program was reestablished.* Specific actions were taken to evaluate if [TVA] had properly implemented the NRC-approved QA program, adequately addressed the status and quality of currently installed and stored equipment, and established associated processes and controls necessary to comply with regulatory requirements associated with your construction permits.[214]

The Inspection Report concluded that "TVA has established the necessary programs to support transition to deferred status," an action formally approved by the Staff on January 14, 2010.[215]

Thus, even if Petitioners' and Mr. Gundersen's allegations regarding TVA's inability to comply with NRC QA requirements are deemed to be within the scope of this "good cause" proceeding, they clearly have no sound factual basis, contrary to 10 C.F.R. § 2.309(f)(v).

b. Petitioners' January 2010 Supplemental Basis Also Fails to Support Admission of Proposed Contention 6

In their January 2010 Supplemental Basis, Petitioners ask the presiding officer to make "a part of the record in this proceeding" a December 2009 letter in which TVA notified the NRC of a containment vertical tendon coupling failure that TVA discovered on August 24, 2009.[216] Petitioners allege that "[t]he failure of the nuclear reactor containment tendon mirrors the failure

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214 Letter from Robert C. Haag, NRC, to Ashok S. Bhatnagar, TVA, at 1 (Dec. 2, 2009), *available at* ADAMS Accession No. ML093370083 (emphasis added).

215 NRC Inspection Report at 1; Deferred Plant Status Approval Letter at 1, 6.

216 January 2010 Supplemental Basis at 3, 6.

of TVA to adhere to construction permit conditions which require the permit holder to implement quality assurance criteria."[217] TVA moved to strike the January 2010 Supplemental Basis on January 14, 2010, and does not waive its prior arguments here.

Nonetheless, the January 2010 Supplemental Basis suffers from the same fatal defects as the contention it seeks to augment and, therefore, is inadmissible under 10 C.F.R. § 2.309(f)(1). Specifically, the tendon coupling failure and alleged QA deficiencies cited by Petitioners in their January 2010 Supplemental Basis are neither within the narrow scope of this "good cause" proceeding nor material to the NRC findings supporting reinstatement of the CPs, contrary to Section 2.309(f)(1)(iii) and (iv).[218] The adequacy of TVA's NQAP is not at issue in this proceeding on whether TVA has established "good cause" for seeking reinstatement of its CPs. Thus, the tendon failure event cited by Petitioners, even *assuming* that it evidenced some sort of flaw in TVA's NQAP—which it does not—does not give rise to a material genuine dispute, contrary to 10 C.F.R. § 2.309(f)(1)(vi).[219]

Similar to Petitioners' prior supplemental filing, Petitioners' January 2010 Supplemental Basis—another late-filed submittal—does not meet 10 C.F.R. § 2.309(f)(2)(ii). In short, the January 2010 Supplemental Basis does not present any information that is materially different regarding the question of good cause, from information previously available to the Petitioners when they formulated their contention. Petitioners, without any apparent technical basis, hold out the recent failure of a tendon coupling as purported evidence of deficiencies in the NQAP for

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217 *Id.* at 4.

218 10 C.F.R. § 2.309(f)(1)(iii), (iv).

219 *Id.* § 2.309(f)(1)(vi). Indeed, if anything, the December 10, 2009 letter cited by Petitioners underscores TVA's efforts, through the NQAP, to identify, report, and assess the impact of equipment age on its continued suitability for use. Notably, the NRC Inspection Report issued on December 2, 2009 specifically mentions the August 2009 failed tendon coupling and notes that TVA had "properly implemented [its] procedural guidance" on reportability. NRC Inspection Report at 2. To the extent that Petitioners contend that their purported basis for this contention presents a current health and safety issue warranting NRC action, their proper recourse is to seek appropriate action pursuant to 10 C.F.R. § 2.206.

BLN Units 1 and 2. In this regard, the asserted factual predicate for Proposed Contention 6 remains unchanged; *i.e.*, that the temporary cessation of certain maintenance and QA activities after TVA's 2006 withdrawal of the CPs somehow precludes TVA compliance with NRC QA requirements. As such, the January 2010 Supplemental Basis also should be rejected for failing to comply fully with Section 2.309(f)(2).[220]

5. Proposed Contention 7: The BLN Units 1 and 2 Cannot Satisfy NRC Safety, Environmental, and Other Requirements That Have Been Imposed or Upgraded Since 1974

Proposed Contention 7 alleges that, "because of new data and past errors, a completely new environmental impact and safety review must be conducted prior to the issuance of a new or reinstated construction permit at Bellefonte."[221] Petitioners, citing Mr. Gundersen's declaration, assert that "[t]he mechanical equipment, containment, piping and other physical features are more than 30-years old and the design is 40-years old; the plants do not meet current safety criteria."[222] They claim that data collected for the 1974 CPs no longer meet the reactor siting criteria in Part 100, with regard to site geology, seismology, meteorology, and hydrology.[223] Petitioners also allege that "other developments" have occurred since the CPs were issued "affect safe operation" and should apply to Units 1 and 2.[224]

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220 As noted above, Petitioners' Answer to TVA's Motion to Strike was filed outside the time specified in the Licensing Board's Jan. 15, 2010 Initial Prehearing Order, at 3 n.2, and, therefore, should be stricken.

221 Petition at 31.

222 *Id.* at 29.

223 *Id.* at 29-30.

224 *Id.* at 30-31. For example, Petitioners cite the purported occurrence of thousands of earthquakes in the New Madrid earthquake zone since 1974; issuance of NRC Bulletin 87-01 asking licensees to monitor the pipe wall thickness in high-energy piping systems for flow-accelerated corrosion; publication of NRC Generic Letter 87-12 concerning the potential loss of residual heat removal while the reactor coolant system is partially filled; and issuance of the Ninth Circuit's 2006 decision holding that the NRC cannot categorically exclude consideration of the impacts of terrorist attacks under NEPA. *Id.*

Like its predecessors, Proposed Contention 7 is inadmissible because it is outside the scope of the proceeding, which concerns only whether TVA has shown "good cause" for the reinstatement of the CPs."[225] Petitioners improperly seek to revisit plant siting issues related to the initial granting of the CPs, and to contest TVA's ability to comply with new NRC requirements that may have arisen since issuance of those permits. Such issues, however, are not litigable here, in accordance with 10 C.F.R. § 2.309(f)(1)(iii).

Proposed Contention 7 also fails to raise any issue that is material to the Staff's findings in this proceeding or appropriate for hearing.[226] Petitioners' argument that the NRC must prepare "completely new" environmental and safety assessments is without basis and does not support admission of the contention.[227] This "good cause" proceeding on TVA's Reinstatement Request is not a vehicle for re-evaluating the Staff's original environmental and safety reviews of TVA's initial CP application.[228]

As the Staff noted, the findings and conclusions of the NRC and the Advisory Committee on Reactor Safeguards "are unaffected by reinstatement of the CPs."[229] TVA has proposed no changes to the location or design of the facility as described in the PSAR and FSAR. Thus, "the NRC determination as to whether the proposed facility can be constructed and operated at the proposed location without undue risk to the health and safety of the public would remain valid if the NRC reinstates the CPs."[230]

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225 *See* March 2009 Order, 74 Fed. Reg. at 10,970; 10 C.F.R. § 2.309(f)(1)(iii).

226 10 C.F.R. § 2.309(f)(v), (vi).

227 Petition at 31.

228 *Cf. WPPSS Nuclear Project No. 1*, ALAB-771, 19 NRC at 1188 n.14 ("[T]he fact that an intervenor seeks to raise in [a CP reinstatement] case issues previously decided in the original permit proceeding . . . [does not] transform the application into one for an initial permit or to reopen the original proceeding.").

229 NRC Safety Evaluation at 5.

230 *Id.*

As the Staff further noted, "[a] CP constitutes only an authorization to proceed with construction and does not constitute the Commission's approval of the safety of any design feature."[231] Thus, the NRC will not issue a license authorizing operation of the facility until it has found that the final design provides reasonable assurance that the health and safety of the public will not be endangered by operation of the facility, in accordance with the OL and NRC regulations.[232] As the Commission noted in CLI-10-06: "Reinstatement does not allow a licensee to conduct any activities that were not sanctioned by its original construction permits and all regulatory requirements for an operating license would have to be met before constructed plants could begin operating."[233]

Thus, any issues affecting, or related to, "safe operation" of the Units, including any potential new data regarding site geology, seismology, meteorology, or hydrology, would be addressed before OL issuance.[234] Such issues are not cognizable in this proceeding on whether there is "good cause" for reinstatement of the BLN CPs.

From an environmental perspective, reinstatement of the CPs in "terminated" or "deferred" plant status does not authorize any work that is not already permitted by the original

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231 *Id.* at 7.

232 *Id.*

233 *Bellefonte*, CLI-10-06, slip op. at 15 (citing COMSECY-08-0041).

234 In COMSECY-08-0041, the Staff indicated that it "intends to follow the precedent that has been established for Watts Bar Nuclear Plant Unit 2 construction and operating license review reactivation." Therefore, "[i]f TVA decides to complete construction and reactivate its OL application, the Commission may choose to direct the staff, as was done for Watts Bar Unit 2, to offer another opportunity for hearing on the OL application. Under 10 C.F.R. Part 2 and 50, interested persons would, thus, have the opportunity to raise contentions in an OL application hearing." COMSECY-08-0041 at 2,11. *See also Bellefonte*, CLI-10-06, slip op. at 15-16 ("Nor does reinstatement—in any way—affect the right of interested members of the public to raise safety, security, and environmental issues in connection with any future operating license application."). As previously noted, to the extent that Petitioners believe there are health and safety issues currently warranting Commission action, the appropriate recourse is through a request under 10 C.F.R. § 2.206, not through this adjudication.

CPs.[235] The environmental impacts of building Units 1 and 2, which already have largely occurred, were considered by the NRC in its original FEIS for the BLN Units 1 and 2 CP application.[236] Accordingly, in its February 2009 EA, the Staff determined that CP reinstatement would not have significant environmental impacts, and that a new or supplemental EIS is unnecessary. If TVA decides to resume the OL review process, then any necessary revisions to TVA's environmental review document(s), to support eventual plant operation, would be made at that time.

Petitioners' claims of "new" data and developments, including new NRC requirements, likewise fail to establish the existence of a genuine material dispute fit for adjudication in this "good cause" proceeding. If TVA ultimately seeks to reactivate construction of BLN Unit 1 or Unit 2, then it would be required to demonstrate compliance with Section III.A of the Commission's Policy Statement.[237] Section III.A.5 of the Policy Statement specifically addresses the applicability of new regulatory requirements:

> Deferred plants of custom or standard design will be considered in the same manner as plants still under construction with respect to applicability of *new regulations, guidance, and policies*. Proposed plant-specific backfits of new regulatory staff positions promulgated while a plant is deferred will be considered in accordance with the Commission backfit criteria. Other modifications to previously accepted staff positions will be implemented either through rulemaking or generic issue resolution, which themselves are subject to the backfit rule. Regulations that have integral update provisions built into them will be applied to deferred plants, as they are to other plants under construction, without the use of the backfit rule. Provisions in other policy statements that are applicable to plants under construction also will have to be implemented.[238]

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235 EA-FONSI, 74 Fed. Reg. at 9,308-09; COMSECY-08-0041, Encl. 1 at 8 ("Also, the proposed CP reinstatement will not allow any work to be performed that is not already allowed by the original CPs.").

236 *See* EA-FONSI, 74 Fed. Reg. at 9,309-14.

237 March 2009 Order, 74 Fed. Reg. at 10,970-71.

238 Policy Statement, 52 Fed. Reg. at 38,079 (emphasis added).

TVA, to the extent described above, will be required to comply with new regulations (to the extent applicable to Units 1 and 2) or seek an exemption, if it decides to resume construction of one or both Units.[239] Section III.A.6 of the Policy Statement requires TVA to notify the NRC in writing at least 120 days before plant construction is expected to resume.[240] Among other things, this notification must identify "any new regulatory requirements applicable to the plant that have become effective since plant construction was deferred, together with a description of the licensee's proposed plans for compliance with these requirements or a commitment to submit such plans by a specified date."[241] This and other information, such as the security and other required plans, operating procedures, technical specifications, and the facility design, will be evaluated during the review of the OL application, *if and when* TVA proceeds to complete construction of the facility.[242]

6. Proposed Contention 8: Bellefonte Units 1 and 2 Do Not Meet Operating Life Requirements

Proposed Contention 8 repeats the claim that "TVA must conduct a completely new safety analysis prior to the issuance or reinstatement of construction permits for Bellefonte Units 1 and 2."[243] This time, however, Petitioners allege that TVA has not provided "critical research and information on its aging equipment" or an "aging management plan to deal with reliability and safety issues of advanced age end-of-installed life SSCs."[244] In support, Petitioners cite 10 C.F.R. § 50.49, concerning environmental qualification of safety-related electric equipment,

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239 COMSECY-08-0041, Encl. 1 at 10.

240 Policy Statement, 52 Fed. Reg. at 38,079.

241 *Id.* The letter also must include, as applicable, a discussion of the bases for all substantive site and design changes made since submittal of the last FSAR revisions, including any necessary amendment to the OL application (*i.e.*, revised FSAR). *Id.*

242 COMSECY-08-0041, Encl. 1 at 12.

243 Petition at 32.

244 *Id.*

and state that such SSCs "will be 80 to 90 years old at the end of a first operating license and 105 years old if TVA were to be granted a license extension."[245]

Proposed Contention 8 further evidences Petitioners' recurring failure to abide by the clear terms of the March 2009 Order, which is explicit that a "request for a hearing is limited to whether good cause exists for the reinstatement of the CPs."[246] The subject of this proposed contention—the "advanced age end-of-installed life SSCs"—has no nexus to TVA's good cause justification for reinstatement of the CPs.[247] Accordingly, the contention must be rejected as outside scope, pursuant to 10 C.F.R. § 2.309(f)(1)(iii).

Proposed Contention 8 also fails to raise any issue that is material to the Staff's findings in this proceeding, contrary to 10 C.F.R. § 2.309(f)(1)(iv). By logical extension, it thus also fails to establish the existence of a genuine material dispute.[248] Section 3.3.3 of the Staff's Safety Evaluation summarizes the specific finding made by the Staff in this proceeding:

> [T]he NRC staff finds that reinstatement of the CPs will not affect the health and safety of the public. A CP constitutes only an authorization to proceed with construction and does not constitute the Commission's approval of the safety of any design feature. The CPs are subject to the limitation that the Commission will not issue a license authorizing operation of the facility until the NRC has found that the final design provides reasonable assurance that the health and safety of the public will not be endangered by operation of the facility in accordance with the requirements of the license and the regulations. *On the basis of the economic, material procurement, and electrical generation considerations provided by TVA, the staff finds that TVA has shown good cause for reinstatement of the CPs.*[249]

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245 *Id.*

246 March 2009 Order, 74 Fed. Reg. at 10,969.

247 Petition at 32.

248 10 C.F.R. § 2.309(f)(1)(vi).

249 NRC Safety Evaluation at 7 (emphasis added).

Proposed Contention 8 fails to show a lack of good cause for the reinstatement of the CPs. The concern raised by Petitioners, the alleged "advanced age end-of-installed life SSCs," is unquestionably a post-construction safety issue not subject to NRC review and findings in this CP reinstatement proceeding. As the Safety Evaluation makes clear, "the NRC Staff will review the detailed design information and resolution of any safety issues during the OL application review," if and when TVA seeks and receives NRC authorization to complete the Units.[250] As Petitioners appear to concede, the completion of BLN Units 1 and 2, the feasibility of which TVA is evaluating, is not certain or imminent at this juncture.[251] Proposed Contention 8 thus fails to raise a material issue or establish a genuine material dispute, contrary to 10 C.F.R. § 2.309(f)(1)(vi).

Clearly, issues concerning the age or as-found condition of SSCs at Units 1 and 2—while not litigable in this proceeding—would, to the extent necessary and appropriate, be evaluated by TVA and NRC through applicable regulatory and licensing processes upon any reactivation of construction. For example, TVA's NQAP addresses the issue of equipment age.[252] The NQAP makes clear that TVA procedural controls prohibit "deferred equipment"—including any age-degraded or "outdated or obsolete" equipment—"from being used in nuclear safety related applications without further evaluation and having been fully restored or replaced.[253] But again, the adequacy of the NQAP is not cognizable here.

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250 *Id.* at 6.

251 *See* Petition at 31-32 (stating that "*should* construction of the existing units be completed") (emphasis added). Indeed, the *sole* purpose of reinstating the CPs is to allow TVA to assess the commercial, technical, and regulatory feasibility of completing the units.

252 *See* BLN NQAP, App. G at 119 (section entitled "Plant Equipment Policy").

253 *Id.* The "Plant Equipment Policy" contained in the BLN NQAP states in full that:

> An important factor in considering the viability of construction reactivation and completion includes *the impact of equipment age on its continued suitability for use*. Considerations regarding *age degradation due to design life*, *outdated or*

Finally, Section III.A.7 of the Policy Statement describes the principal criteria or bases upon which the NRC Staff evaluates the acceptability of equipment upon reactivation of a plant from deferred status.[254] These include (1) reviews of the approved preservation and maintenance program, as implemented, to determine whether any SSCs require special NRC attention during reactivation; (2) verification that any design changes, modifications, and required corrective actions have been implemented and documented in accordance with established quality control requirements; and (3) verification that the results of any licensee or NRC baseline inspections that indicate that quality and performance requirements have not been significantly reduced below those originally specified in the FSAR.[255]

Additionally, in accordance with 10 C.F.R. Part 50 and/or licensing basis commitments in the PSAR or FSAR, TVA would need to comply with the design requirements specified in NRC-approved industry codes and standards (including those governing environmental qualification of electrical equipment important to safety).[256] As noted in COMSECY-08-0041, "[t]his includes TVA submittal of its plans for restoration of systems and equipment that were affected by the

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> *obsolete equipment*, design improvements, any impact associated with resource recovery activities, and economic feasibility to replace rather than preserve equipment indefinitely under a lay-up program must be taken into account given the age of certain existing equipment. For these reasons, in August 2003 TVA submitted and in May 2004 the NRC approved a change to the NQAP that allowed preventive maintenance to be terminated on selected equipment and to allow that equipment to be entered into the corrective action program as "deferred equipment." *TVA procedure controls prohibited and will continue to prohibit "deferred equipment" from being used in nuclear safety related applications without further evaluation and having been fully restored or replaced.*
>
> Structures, systems or components that have been affected in the course of resource recovery activities will likewise be entered in to the corrective action program and prohibited from being returned to service without evaluation and having been restored or replaced.

Id. (emphasis added).

254 Policy Statement, 52 Fed. Reg. at 38,079.

255 *Id.*

256 *See* COMSECY-08-0041, Encl. 1 at 12.

suspension of preservation and maintenance activities."[257] As a result, if TVA decides to resume construction and the Staff resumes its review of the OL, then "the as-built condition" of the plant would be subject to the NRC "inspection for compliance with licensing basis requirements."[258]

The foregoing considerations underscore Petitioners' complete failure to raise a genuine dispute on a material issue of law or fact. Issues related to the aging of previous-installed plant equipment are not material to the NRC's finding of "good cause" for reinstatement of the CPs. Moreover, such issues would be the subject of future NRC technical reviews that are contingent upon TVA's (as yet unmade) decision to reactivate construction and seek NRC operating licenses for BLN Units 1 and 2.

7. Proposed Contention 9: Impacts on Aquatic Resources Including Fish and Mussels of the Tennessee River

Proposed Contention 9 asserts that before the CPs for BLN Units 1 and 2 are reinstated, TVA must collect "additional data" and perform "modeling" to "properly evaluate potential effects of operating Units 1 & 2 and cumulative impacts of Units 1 & 2 in conjunction with the proposed addition of Units 3 & 4 at Bellefonte Nuclear Plant on aquatic resources of the Tennessee River."[259] Petitioners argue that additional data and modeling are needed because the NRC's Safety Evaluation discusses environmental considerations relating to reinstatement of the CPs in only one paragraph, and the EA-FONSI for reinstatement of the CPs "gives a cursory treatment of the impacts on aquatic resources and threatened and endangered species."[260] Proposed Contention 9 contains five subparts, each of which is restated below.

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257 *Id.*

258 *Id.*

259 Petition at 33.

260 *Id.*

- Proposed Contention 9a: "No data was provided as rationale for a 'finding of no significant impact' nor have recent studies been conducted to evaluate the impacts of resumption of construction and operation of Units 1 & 2 on aquatic resources."[261]

- Proposed Contention 9b: "[TVA's] analysis for Units 3 & 4 does not adequately address potential impacts of operating two, or four, additional nuclear reactor units on fish and mussels throughout the Tennessee River basin."[262]

- Proposed Contention 9c: "[TVA's] analysis does not adequately address potential impacts to increased water intake and increased thermal discharge on fish and mussels in the vicinity of BLN, Town Creek, nor in Guntersville Reservoir."[263]

- Proposed Contention 9d: "TVA's conclusion regarding potential impacts of increased thermal and chemical discharge is not supported by evidence."[264]

- Proposed Contention 9e: "TVA uses its own biased rating systems to justify the lack of data in concluding that impacts of BLN operation will be small or non-existent. TVA's aquatic resources health and status ratings should not be used to evaluate potential impacts on aquatic resources in the Tennessee River from operating BLN."[265]

Notwithstanding its multiple subparts, the core of Proposed Contention 9 resides in Petitioners' claims that "the impacts of *resumption of construction and operation* of Units 1 & 2 on aquatic resources . . . should be substantiated and may be large," and that an evaluation of the "cumulative impacts of Units 1 & 2 combined with the proposed Units 3 & 4" is necessary.[266] Petitioners further assert that the EA-FONSI issued for BLN Units 1 and 2 "relies in part on TVA's [ER] for BLN Units 3 and 4," and state that the conclusion regarding potential impacts of

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261 *Id.*

262 *Id.*

263 *Id.* at 35.

264 *Id.* at 36. More specifically, Petitioners, relying on the Declaration of Shawn Young ("Young Decl."), argue that TVA's ER for BLN 3 and 4 provided "no data on overall drift community," provided "no data on temporal or spatial composition of fish of any life history stage in this immediate area," and "failed to state whether the molluskicide is harmful to freshwater mussels . . . nor . . . disclose what concentration will be present in the discharge plume(s)." *Id.* at 36-37.

265 *Id.* at 37. Contention 9e also argues that "[s]ampling at BLN is absolutely warranted and would be considered standard practice to evaluate impacts from *construction and operation* of additional nuclear reactors." *Id.* at 37-38 (emphasis added).

266 *Id.* at 33 (emphasis added).

entrainment and impingement contained in TVA's *ER for BLN Units 3 and 4* is based on "improper assumptions" that are "vague summations and generalities."[267] Petitioners conclude that the purported inadequacy of TVA's ER for BLN Units 3 and 4 demonstrate that "actual field studies for BLN Units 1 and 2 are necessary and warranted."[268]

a. Proposed Contention 9 Is Inadmissible Because It Raises Issues That Are Outside Scope

Proposed Contention 9, including each of its subparts, falls outside the scope of this proceeding, because Petitioners, in large measure, challenge TVA's analysis and conclusions in TVA's ER for proposed BLN Units 3 and 4—the subject of an entirely separate and distinct proceeding.[269] Additionally, even where Petitioners actually assert challenges to the EA-FONSI for BLN Units 1 and 2, those challenges erroneously assume that the reinstatement of the CPs for BLN Units 1 and 2 (1) permits construction and operation of Units 1 and 2,[270] and (2) is similar to the issuance of an early site permit ("ESP") (thus allegedly requiring preparation of an EIS).[271] Petitioners do not challenge TVA's assertions of "good cause" for reinstatement of the CPs or

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267 *Id.* at 35-36 (emphasis added).

268 *Id.* at 36.

269 *See* 10 C.F.R. § 2.309(f)(1)(iii). Indeed, Petitioners' supporting arguments focus almost entirely on alleged deficiencies in TVA's ER for *BLN Units 3 and 4*, largely to the exclusion of any mention of Units 1 and 2. It warrants mention that the Board presiding over the Bellefonte Units 3 and 4 COL proceeding admitted Proposed Contention 8 (NEPA-B), which alleges that "the ER does not adequately address the adverse impacts of operating two additional nuclear reactors on the fishery and aquatic resources of the Tennessee River basin, Guntersville Reservoir, and the vicinity of Bellefonte Nuclear Plant." *Bellefonte*, LBP-08-16, slip op. at 36-40 & App. A. Further proceedings on that admitted contention are pending.

270 *See* Petition at 33 (stating that TVA failed to "evaluate the impacts of *resumption of construction and operation* of Units 1 & 2 on aquatic resources") (emphasis added); *id.* at 37-38 (arguing that sampling fish species in the Guntersville reservoir is "absolutely warranted and would be considered standard practice to evaluate impacts from *construction and operation* of additional nuclear reactors) (emphasis added); *see also* Young Decl. ¶ 5 (asserting that information relating to the impacts on aquatic resources provided for contentions concerning BLN Units 3 and 4 "is wholly relevant to Units 1 & 2 also, especially given the four units *will be operated* simultaneously in the same vicinity") (emphasis added).

271 *See* Petition at 35 (stating, without any supporting legal references, that "reinstatement of a CP, regardless of TVA's stated intentions, rises to at least the potential of an early site permit which also carries a margin of uncertainty as to whether the applicant will actually build a power station . . . [t]herefore, the BLN EA-FONSI . . . does not meet the requirements of NEPA under 10 CFR 51").

otherwise assert a lack of good cause for this action. Therefore, this proposed contention, including each of its subparts, falls outside the scope of this proceeding, contrary to 10 C.F.R. § 2.309(f)(1)(iii), and should be dismissed.[272]

Proposed Contention 9 also attempts, impermissibly, to inject into this limited-scope proceeding environmental issues that are fundamentally unrelated to TVA's "good cause" justification for reinstatement of the Unit 1 and Unit 2 CPs. Petitioners opine that additional data and analysis should be provided to "evaluate potential effects of *operating* Units 1 & 2 and cumulative impacts of Units 1 & 2 in conjunction with the proposed addition of Units 3 & 4 . . . on aquatic resources of the Tennessee River."[273] This proceeding, however, does not involve any "inquiry into the safety and environmental aspects of reactor construction and operation."[274] Likewise, it is not a forum for re-litigating health, safety, or environmental questions resolved at the time of CP issuance.[275] Therefore, Petitioners' unveiled attempts to litigate environmental questions relating to the impact of the *operation* of BLN Units 1 and 2 cannot be countenanced by this Board. They clearly are outside scope.

Notably, a majority of the arguments contained in Proposed Contention 9, and its subparts, closely resemble arguments set forth in support of another contention (Contention 8/NEPA-B) submitted by Petitioners and admitted by the Board in the COL proceeding for BLN

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272 *See Seabrook*, CLI-84-6, 19 NRC at 978 (citing *WPPSS Nuclear Project Nos. 1 & 2*, CLI-82-29, 16 NRC at 1230) (finding, in the context of a hearing on a CP extension request, that in order for a contention to be admissible, it must "either challenge applicants' reason for delay or show that other reasons, not constituting good cause, are the principal basis for the delay"); *see also* March 2009 Order, 74 Fed. Reg. at 10,969.

273 Petition at 33 (emphasis added).

274 *WPPSS Nuclear Project Nos. 1 & 2*, CLI-82-29, 16 NRC at 1227.

275 *See WPPSS Nuclear Project No. 1*, ALAB-771, 19 NRC at 1189 (quoting *WPPSS Nuclear Project Nos. 1 & 2*, CLI-82-29, 16 NRC at 1228) (finding that CP permit extension proceedings "are not intended to permit 'periodic relitigation of health, safety, or environmental questions" in the time period between granting of a CP and authorization to operate).

Units 3 and 4.[276] For example, Petitioners assert in Contention 9b that a statement in TVA's ER for BLN Units 3 and 4 "acknowledge that there will be impacts to the upper-Tennessee River aquatic resources because those reservoirs will bear the burden of downstream water withdrawal."[277] In the pending COL proceeding, Petitioners similarly asserted that "[t]he ER acknowledges upstream management may also affect BLN operations . . . [and that there will be] significant effects on downstream aquatic resources."[278] Additionally, Petitioners make an almost identical statement about TVA's "overall conclusion" in Proposed Contention 9b of this proceeding and Contention 8 of the COL proceeding.[279] This additional "back-door" challenge (*see also* Contention 5, *supra*) to a separate NRC license application, not at issue in this proceeding, is improper. Thus, Proposed Contention 9 and its subparts should be dismissed as contrary to 10 C.F.R. § 2.309(f)(1)(iii).

b. Proposed Contention 9 Also Is Inadmissible Because It Lacks Adequate Legal and Factual Support

Proposed Contention 9 also is inadmissible because it lacks a basis in law, contrary to 10 C.F.R. § 2.309(f)(1)(v). Petitioners maintain that an EIS should be prepared for this action pursuant to 10 C.F.R. § 51.20(b)(1), because reinstatement of a CP "rises to at least the potential of an early site permit."[280] In particular, Petitioners suggest that reinstatement of a CP is like an

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276 *See Bellefonte*, LBP-08-16, slip op. at 36; June 2008 Intervention Petition at 39-45. As noted above, proceedings on Contention 8 (NEPA-B) are pending.

277 Petition at 34.

278 June 2008 Intervention Petition at 41.

279 *Compare* Petition at 34 (stating "TVA's overall conclusion, 'Operations of these dams are not expected to have a direct effect on water quality in the vicinity of the BLN,' is inconsistent with its statements *infra* and therefore *erroneous*") (emphasis in original) (citing TVA's ER for BLN Units 3 and 4 at 2.3.3.4.3 p. 2.3-48) *with* June 2008 Intervention Petition at 41 (stating that "TVA's overall conclusion that, 'Operations of these dams are not expected to have a direct effect on water quality in the vicinity of the BLN," is inconsistent with statements acknowledged in the ER as summarized above and is therefore erroneous") (citing TVA's ER for BLN Units 3 and 4 at 2.3.3.4.3. (p.2.3-48)).

280 *Id.* at 35.

ESP because both of these actions "carr[y] a margin of uncertainty as to whether the applicant will actually build a power station."[281] Petitioners, however, do not provide any legal basis to support their *ipse dixit* assertion that reinstatement of a CP is similar to the issuance of an early site permit, for purposes of requiring an environmental impact statement,[282] and thus, Proposed Contention 9 is inadmissible. In CLI-10-06, the Commission clearly dispelled any notion that reinstatement of the CPs here entailed the issuance of a new license.[283]

Furthermore, Petitioners' challenge to the conclusions of TVA's analysis of potential impacts of entrainment and impingement in the ER for BLN Units 3 and 4 lacks a factual basis. Contrary to Petitioners' claim, the EA-FONSI supporting reinstatement of the BLN Unit 1 and 2 CPs was not based TVA's ER for Units 3 and 4 in regard to this analysis.[284] Although the EA-FONSI refers to TVA's ER for BLN Units 3 and 4 as providing further site details in its analysis of "Historic and Archaeological Resources,"[285] the analysis of impacts on aquatic resources of the reinstatement of CPs makes no reference to TVA's ER for BLN Units 3 and 4.[286] Petitioners' argument in this regard is simply a pretext for mounting yet another collateral attack on the ER and COL application for proposed BLN Units 3 and 4.[287]

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281 *Id.*

282 In fact, an ESP is considered to be "a partial construction permit." 10 C.F.R. § 52.1(a); *see System Energy Resources, Inc.* (Early Site Permit for Grand Gulf ESP Site), LBP-07-01, 65 NRC 27, 35 (2007) (stating that "NRC regulations define ESPs as 'partial construction permits' . . . ."). Therefore, the requirement in 10 C.F.R. § 51.20(b)(1) that "*issuance* of an early site permit under part 52 of this chapter" (emphasis added), necessitates an EIS does not provide a legal basis for Petitioners' assertion that *reinstatement* of a CP—fully reviewed in an earlier EIS—also requires an environment impact statement.

283 *Bellefonte*, CLI-10-06, slip op. at 14.

284 *See* Petition at 35.

285 *See* EA-FONSI,, 74 Fed. Reg. at 9,309.

286 *See id.* at 9312.

287 *See Comanche Peak*, CLI-93-10, 37 NRC at 204 (stating that a construction permit extension proceeding is "not an avenue to challenge a pending operating license"); *see also Citizens Ass'n for Sound Energy*, 821 F.2d at 729 (finding that evidence petitioner wanted to present was relevant to the quality of ongoing construction and thus, "more appropriately being presented by [petitioner] in the ongoing proceedings to determine whether [the applicant] should be granted an operating license").

c. Proposed Contention 9 Is Further Inadmissible Because It Does Not Raise a Material Issue or Establish a Genuine Material Dispute

Finally, in view of the above, Proposed Contention 9 fails to raise an issue that is material to the Staff's findings in support of CP reinstatement, and to show that a genuine dispute exists with TVA/Staff on a material issue of law or fact, contrary to 10 C.F.R. § 2.309(f)(1)(iv) and (vi). Petitioners make not even a colorable attempt to dispute TVA's "good cause" justification for requesting reinstatement of the CPs, or to assert that there are other, *legally cognizable* reasons militating against that discrete and limited NRC action. Therefore, Proposed Contention 9 is subject to dismissal on these additional grounds.

V. SELECTION OF HEARING PROCEDURES

TVA opposes Petitioners' request for the application of 10 C.F.R. Part 2, Subpart G discovery/hearing procedures in this case. Subpart L procedures—the "default" hearing procedures for Part 50 proceedings—should be used in the event that the Board grants a hearing on the reinstatement of the BLN CPs. Petitioners provide no information to support a different conclusion.

NRC regulations require the Licensing Board designated to rule on the Petition to "determine and identify the specific hearing procedures to be used for the proceeding" pursuant to 10 C.F.R. §§ 2.310 (a)-(h).[288] The regulations provide that "proceedings for the grant, renewal, licensee-initiated amendment, or termination of licenses or permits subject to [10 C.F.R. Part 50] may be conducted under the procedures of subpart L of this part."[289] The formal procedures of Subpart G generally are reserved for enforcement proceedings, proceedings related to the licensing of uranium enrichment facilities, and the licensing of the high-level waste repository.

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[288] 10 C.F.R. § 2.310.

[289] *Id.* § 2.310(a).

The regulations permit the presiding officer to use the procedures in Subpart G in certain limited circumstances.[290] A petitioner requesting the application of Subpart G procedures bears the burden of demonstrating "by reference to the contention and the bases provided and the specific procedures in subpart G of this part, that resolution of the contention necessitates resolution of material issues of fact which may be best determined through the use of the identified procedures."[291] Specifically, the petitioner must show that the subject contention: (1) involves an issue of material fact concerning the occurrence of a past activity, and where the credibility of an *eyewitness* may reasonably be expected to be at issue; or (2) involves an issue where the motive or intent of a party or *eyewitness* is material to the resolution of the contested matter.[292]

Petitioners assert, without explanation, that they "are entitled to a full adjudicatory hearing with all the rights of discovery and cross-examination provided by Subpart G." Furthermore, Petitioners state that they will address the criteria of 10 C.F.R. § 2.310(d) "at a later date."[293] Given Petitioners' failure to discharge their burden under 10 C.F.R. § 2.310(d), any hearing that might result from their Petition should be governed by the procedures of Subpart L.

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290 *Id.* § 2.310(d).

291 *Id.* § 2.309(g).

292 *Id.* § 2.310(d).

293 Petition at 1.

VI. CONCLUSION

For all of the above reasons, the Petition should be denied in its entirety. As demonstrated above, Petitioners have failed to establish standing to intervene and/or to proffer an admissible contention, as required by 10 C.F.R. § 2.309(d) and § 2.309(f)(1).

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Dated in Washington, D.C.
this 29th day of January 2010

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	
	)	Docket Nos. 50-438 and 50-439
TENNESSEE VALLEY AUTHORITY	)	
	)	
(Bellefonte Nuclear Plant, Units 1 and 2)	)	January 29, 2010

CERTIFICATE OF SERVICE

I hereby certify that, on January 29, 2010, a copy of the "Answer of Tennessee Valley Authority Opposing the Petition for Intervention and Request for Hearing by the Blue Ridge Environmental Defense League Et Al.," dated January 29, 2010, was served upon the following persons by the NRC's Electronic Information Exchange ("EIE") system, with additional service by e-mail on persons marked with an asterisk (*).

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