

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

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NRC STAFF'S ANSWER TO PETITION FOR INTERVENTION AND  
REQUEST FOR HEARING, AND RESPONSE TO JOINT INTERVENORS' SUPPLEMENTAL  
BASIS TO CONTENTION 5 – LACK OF GOOD CAUSE, AND JOINT PETITIONERS'  
SUPPLEMENTAL BASIS FOR PREVIOUSLY SUBMITTED CONTENTION 6 – TVA HAS NOT  
AND CANNOT MEET THE NRC'S QUALITY ASSURANCE AND QUALITY CONTROL  
REQUIREMENTS

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INTRODUCTION

Pursuant to 10 C.F.R. § 2.309(h)(1), the staff of the Nuclear Regulatory Commission (“NRC” or “NRC Staff”) answers the “Petition for Intervention and Request for Hearing” (“Petition”) filed on May 8, 2009 by the Blue Ridge Environmental Defense League (“BREDL”) and its chapter Bellefonte Efficiency and Sustainability Team (“BEST”) and the Southern Alliance for Clean Energy (“SACE”) (collectively, “Petitioners”), the “Joint Intervenors’ Supplemental Basis for Previously Submitted Contention 5 – Lack of Good Cause” filed on July 9, 2009 (“Supplemental Basis Contention 5”), and the “Joint Petitioners Supplemental Basis For Previously Submitted Contention 6 – TVA Has Not and Cannot Meet The NRC’s Quality Assurance and Quality Control Requirements” (“Supplemental Basis Contention 6”). Although the NRC Staff does not oppose the standing of BREDL and SACE, the Staff does oppose BEST’s standing because BEST has not satisfied the standing requirements under 10 C.F.R. § 2.309(h)(2). Further, the Petitioners should not be admitted as parties because they have not satisfied the contention admissibility criteria of 10 C.F.R. § 2.309(f)(1)(i)-(vi). Finally, Petitioners’ Supplemental Basis Contentions 5 and 6 should be denied because the Petitioners fail to satisfy the late-filed criteria of 10 C.F.R. § 2.309(c), 10 C.F.R. § 2.309(f)(1) and 10 C.F.R. § 2.309(f)(2). For the reasons discussed herein, the Petition and the Supplemental Basis petitions should be

denied.

### BACKGROUND

The U.S. Atomic Energy Commission (“AEC”)(in part, predecessor to the NRC) issued construction permit (CP) Nos. CPPR-122 and CPPR-123 to the Tennessee Valley Authority (TVA) on December 24, 1974. See Public Legacy Library<sup>1</sup> (PLL) Accession Nos. 066333 and 066334. The CPs authorized construction of the Bellefonte Nuclear Plant (BLN) Units 1 and 2 at TVA’s site in Jackson County, Alabama. On March 4, 2003, the NRC issued an order amending CP Nos. CPPR-122 and CPPR-123. See “Tennessee Valley Authority (Bellefonte Nuclear Plant, Units 1 and 2) Order” at 68 Fed. Reg. 11,415 (March 10, 2003). Specifically, this order extended the latest date for completion of construction to October 1, 2011 for BLN Unit 1, and October 1, 2014 for BLN Unit 2.

On April 6, 2006, TVA submitted a request to withdraw the CPs, and the NRC approved the request on September 14, 2006. See Letter from Glenn W. Morris to NRC. ADAMS<sup>2</sup> Accession No. ML061000538. The reasons provided in TVA’s request to withdraw were primarily a reduction in forecasted load growth. See Letter from Glenn W. Morris to James E. Dyer dated December 12, 2005. ADAMS Accession No. ML060120054. Subsequently, in a letter dated August 26, 2008, as supplemented on September 25, 2008 and November 24, 2008, TVA requested that these CPs be reinstated. See Letter from Ashok S. Bhatnagar to Eric J. Leeds (August 26, 2008) (hereinafter referred to as “Application”). ADAMS Accession No. ML082410087. In their request, TVA explained “a change in the power generation economics”

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<sup>1</sup> The Public Legacy Library contains archives of NRC documents and can be accessed in the NRC’s Public Document Room (PDR) in person at NRC Headquarters, One White Flint, First Floor at F21 or by phoning 301-415-3548.

<sup>2</sup> The Agencywide Documents Access and Management System (ADAMS) is the NRC information system that can be accessed via the NRC public website located at <http://www.nrc.gov/reading-rm/adams.html>.

as the primary reason for seeking reinstatement of the CPs. *Id.* at 5.

On December 12, 2008, the NRC Staff submitted a request to the Office of the Secretary to “obtain Commission authorization for the recommendation to go forward with the review” on TVA’s reinstatement request. COMSECY-08-0041, “Staff Recommendation Related to Reinstatement of the Construction Permits for Bellefonte Nuclear Plant Units 1 and 2” (Dec. 12, 2008). The Commission issued this authorization on February 18, 2009 in SRM-COMSECY-08-0041. ADAMS Accession No. ML090490838.

On March 3, 2009, the NRC Staff published an environmental assessment which determined that reinstating the CPs would not have a significant impact on the environment. See Tennessee Valley Authority; Bellefonte Nuclear Plant Units 1 and 2, Environmental Assessment and Finding of No Significant Impact, 74 Fed. Reg. 9,308 (March 3, 2009)<sup>3</sup> (“Staff EA”). On March 9, 2009, the NRC Staff issued an Order that reinstated CPPR-122 and CPPR-123 and placed both facilities in a “terminated plant status” under Section III.B of the Commission’s Policy Statement on Deferred Plants. See Tennessee Valley Authority (Bellefonte Nuclear Plant Units 1 and 2) Order, 74 Fed. Reg. 10,969 (March 13, 2009) (“Order”). The Order provided members of the public and interested parties sixty days from the date of publication to request a hearing to determine whether good cause exists for reinstatement of the CPs. *Id.* Attached to the Order was the NRC Staff safety evaluation report documenting the basis for reinstatement of the CPs.

On May 8, 2009, Petitioners filed a petition for intervention and request for a hearing asserting nine contentions that challenged the reinstatement of TVA's CPs and the

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<sup>3</sup> The Staff EA is dated February 24, 2009 but was published in the Federal Register on March 3, 2009.

environmental assessment. On May 20, 2009, the Commission issued an order requesting briefs from TVA, the Staff, and the Petitioners on Contentions 1 and 2.<sup>4</sup> See *Tennessee Valley Authority* (Bellefonte Nuclear Power Plant, Units 1 and 2)(unpublished)(May 20, 2009)(slip op. at 1) (“May 20, 2009 Order”). The Commission also ordered that the remaining contentions, and the NRC Staff’s and TVA’s answers to the Petition, be held in abeyance pending a decision by the Commission on Contentions 1 and 2. *Id.* at 2. On July 15, 2009, the Petitioners filed Supplemental Basis Contention 5, supplementing their basis for Proposed Contention 5. In response to Supplemental Basis Contention 5, TVA filed “Tennessee Valley Authority’s Motion to Strike Petitioners’ Supplemental Basis for Proposed Contention 5” (ADAMS Accession No. ML091980276) on July 17, 2009.

On January 7, 2010, the Commission issued a decision denying admissibility of Contentions 1 and 2 finding that the NRC Staff does have the authority to reinstate voluntarily surrendered construction permits. *Bellefonte*, CLI-10-06, 71 NRC \_\_ (slip op. at 1).

The Commission ordered that Supplemental Basis Contention 5, TVA’s Motion, the issue of standing, and Contentions 3 through 9 be referred to the Atomic Safety and Licensing Board (“Board”) for adjudication under 10 C.F.R. Part 2. *Id.* at 19. On January 11, 2010, Petitioners filed Supplemental Basis Contention 6. On January 14, 2010, TVA filed “Tennessee Valley Authority’s Motion to Strike Petitioners’ Supplemental Basis for Proposed Contention 6” (ADAMS Accession No. ML100140677). Pursuant to the Commission’s Order, on January 15, 2010, the Board was established with the scope of the hearing request to be “limited to whether good cause exists for the reinstatement of the [construction permits]”. Order (Establishment of

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<sup>4</sup> Contentions 1 and 2 presented dispositive questions on whether the NRC Staff had the authority to reinstate TVA’s CPs for Bellefonte Units 1 and 2.

Atomic Safety and Licensing Board) (Jan. 15, 2010) (unpublished) at 1 (*quoting* 74 Fed. Reg. 10,969 (March 13, 2009) and *citing Bellefonte*, CLI-10-06, 71 NRC at \_\_\_ (slip op. at 6-7, 19). The same day, the established Board ordered that TVA and the NRC Staff file their respective answers to the Joint Petitioners May 8, 2009 petition, as well as any responses to the Joint Petitioners supplemental bases filings of July 7, 2009 and January 11, 2010 no later than January 29, 2010. Memorandum and Order (Initial Prehearing Order) (Jan. 15, 2010) (unpublished) at 3.

## DISCUSSION

### I. LEGAL STANDARDS

#### A. Standing to Intervene

An organization may establish standing to intervene based on organizational standing (showing that its own organizational interests could be adversely affected by the proceeding), or representational standing (based on the standing of its members). Where an organization seeks to establish “representational standing,” it must satisfy three criteria: 1) demonstrate that at least one of its members may be affected by the proceeding, 2) identify that member by name and address, and 3) demonstrate that the member “has authorized the organization to represent him or her and to request a hearing on his or her behalf.” *See, e.g., Consumers Energy Co.* (Palisades Nuclear Power Plant), CLI-07-18, 65 NRC 399, 409 (2007); *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), LBP-06-07, 63 NRC 188, 195 (2006), citing *GPU Nuclear, Inc.* (Oyster Creek Nuclear Generating Station), CLI-00-6, 51 NRC 193, 202 (2000). For an organization to establish representational standing, the organization must satisfy three criteria: 1) the member seeking representation must qualify for standing in his or her own right, 2) the interests that the organization seeks to protect must be germane to its own purpose, and 3) neither the asserted claim nor the requested relief must require an individual member to participate in the organization’s legal action. *Palisades*, CLI-07-18, 65 NRC at 409;

*Hydro Resources, Inc.* (Private Fuel Storage), CLI-99-1, 49 NRC 318, 323 (citing *Hunt v. Wash. State Apple Advertising Comm'n*, 432 US 333, 343 (1977)).

B. Legal Requirements for Contentions

The legal requirements governing the admissibility of contentions are provided in 10 C.F.R. § 2.309(f)(1)(i)-(vi). Specifically, an admissible contention must: (i) provide a specific statement of the legal or factual issue sought to be raised; (ii) provide a brief explanation of the basis for the contention; (iii) demonstrate that the issue raised is within the scope of the proceeding; (iv) demonstrate that the issue raised is material to the findings the NRC must make to support the action that is involved in the proceeding; (v) provide a concise statement of the alleged facts or expert opinions, including references to specific sources and documents that support the petitioner's position and upon which the petitioner intends to rely at the hearing; and (vi) provide sufficient information to show that a genuine dispute exists with regard to a material issue of law or fact, including references to specific portions of the application that the petitioner disputes, or in the case when the application is alleged to be deficient, the identification of such deficiencies and supporting reasons for this belief. With respect to NEPA contentions, 10 C.F.R. § 2.309(f)(2) provides that contentions should be based "on the applicant's environmental report."

The Commission has recently explained that the purpose of the contention rule is to, "focus litigation on concrete issues and result in a clearer and more focused record for decision." Changes to Adjudicatory Process, 69 Fed. Reg. 2182, 2202 (Jan. 14, 2004).<sup>5</sup> The Commission has emphasized that the rules on contention admissibility are "strict by design."

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<sup>5</sup> See also *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 553-54 (1978); *BPI v. AEC*, 502 F.2d 424, 428 (D.C. Cir. 1974); *Phila. Elec. Co.* (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-216, 8 AEC 13, 20 (1974).

*Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-01-24, 54 NRC 349, 358 (2001), *pet. for reconsideration denied*, CLI-02-01, 55 NRC 1 (2002). In contrast with federal court pleadings, "mere 'notice pleading' does not suffice" when judging the admissibility of a contention. *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-06-24, 64 NRC 111, 119 (2006). Finally, failure to comply with any of the § 2.309(f)(1) requirements is grounds for the dismissal of a contention. 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).

C. Legal Requirements for Late-Filed Contentions/ Basis

Three regulations govern the admissibility of late-filed petitions/contentions in an adjudicatory proceeding. *Entergy Nuclear Vermont Yankee, LLC and Entergy Nuclear Operations, Inc.* (Vermont Yankee Nuclear Power Station), LBP-06-14, 63 NRC 568, 572-76 (2006). First, a late-filed petition/contention may be admitted as a timely new contention if it meets the requirements of 10 C.F.R. § 2.309(f)(2). Under this provision, a contention filed after the initial filing period may be admitted with leave of the presiding officer only upon a showing that:

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

10 C.F.R. § 2.309(f)(2).

Second, a contention that does not qualify as a new contention under 10 C.F.R. § 2.309(f)(2) may be admissible under the provision governing nontimely petitions/contentions, 10 C.F.R. § 2.309(c). *AmerGen Energy Co.* (Oyster Creek Nuclear Generating Station),

LBP-06-22, 64 NRC 229, 234-35 (2006). Nontimely filings may only be entertained following a determination by the Presiding Officer that a balancing of the following eight factors, all of which must be addressed in the petitioner's filing, weigh in favor of admission:

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

10 C.F.R. § 2.309(c)(1).

With respect to new non-timely contentions, the first factor, whether good cause exists for the failure to file on time, is entitled to the most weight. *State of New Jersey* (Department of Law and Public Safety), CLI-93-25, 38 NRC 289, 296 (1993). Where no showing of good cause for the lateness is tendered, "petitioner's demonstration on the other factors must be particularly strong." *Texas Utilities Electric Co.* (Comanche Peak Steam Electric Station, Units 1 & 2), CLI-92-12, 36 NRC 62, 73 (1992) (quoting *Duke Power Co.* (Perkins Nuclear Station, Units 1, 2 & 3), ALAB-431, 6 NRC 460, 462 (1977)). Two factors--availability of other means to protect the petitioner's interest and the ability of other parties to represent the petitioners' interests—are less important than the other factors, and are therefore entitled to less weight. *Cf. Comanche*

*Peak*, CLI-92-12, 36 NRC at 74. With respect to the potential contribution to the development of a sound record, petitioners are to provide “a real clue about what they would say to support the contention beyond the minimal information they provide for admitting a contention”. *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-98-7, 47 NRC 142, 208-209 (1998). As the Commission has recognized, the requirements governing late-filed contentions and untimely filings, set forth in 10 C.F.R. §§ 2.309(c)(2) and 2.309(f)(2), “are stringent.” *AmerGen Energy Co. LLC* (License Renewal for Oyster Creek Nuclear Generating Station), CLI-09-07, 69 NRC 235, 260 (2009). Further, each of the factors set forth in the regulations is required to be addressed in a requestor’s nontimely filing. *Id.* at 31-32.

Finally, in addition to fulfilling the requirements of either 10 C.F.R. § 2.309(f)(2) or § 2.309(c)(1), a petitioner must show that the petition meets the contention admissibility requirements of 10 C.F.R. § 2.309(f)(1).

D. Good Cause Scope of Proceeding

In this particular proceeding, the scope of the hearing request is limited to whether good cause exists for the reinstatement of the construction permits. *See Bellefonte*, CLI-10-06, 71 NRC at \_\_\_ (slip op. at 6-7, 19); 74 Fed. Reg. 10,969 (providing that any request for a hearing is limited to whether good cause exists for the reinstatement of the CPs); Order (Establishment of Atomic Safety and Licensing Board) (Jan. 15, 2010) (unpublished) at 1.

In their decision to deny admissibility of Contentions 1 and 2, the Commission found that the NRC has broad discretion to reinstate the construction permits. In doing so, the Commission recognized that the “statutory silence [of the AEA] leaves NRC room to allow reinstatement if reasonable.” *Bellefonte*, CLI-10-06, 71 NRC at \_\_\_ (slip op. at 12). The Commission did not address the issue of “good cause”, as the question was not before them.

Prior NRC decisions are instructive in discussing “good cause” regarding a permit holder’s asserted reasons as the key component in determining whether good cause exists to

extend the expiration dates of construction permits. For example, the Commission wrote:

The Commission addressed the proper standard for raising contentions in a construction permit extension proceeding in *Washington Public Power Supply System* (WPPSS Nuclear Project Nos. 1 & 2), CLI-82-29, 16 NRC 1221 (1982), holding that, under Section 185 of the Atomic Energy Act and 10 C.F.R. § 50.55, the scope of a construction permit extension proceeding is limited to direct challenges to the permit holder's asserted reasons that show "good cause" justification for the delay. 16 NRC at 1229. To be admissible, 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.* at 1230.

The WPPSS decision has been refined by the Atomic Safety and Licensing Appeal Board into a two-pronged test for determining whether a contention is within the scope of a construction permit extension proceeding: 'First, the construction delays at issue have to be traceable to the applicant. Second, the delays must be "dilatatory." If both prongs are met, the delay is without "good cause." *Washington Public Power Supply System* (WPPSS Nuclear Project No. 2), ALAB-722, 17 NRC 546, 551 (1983). 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. *Id.* at 553.

*Public Service Company of New Hampshire, et. al.* (Seabrook Station, Unit 2), CLI-84-6, 19 NRC 975,978 (1984); see also *Texas Utilities Electric Co., et al.* (Comanche Peak Steam Electric Station, Unit 1) CLI-86-15, 24 NRC 397, 400-401 (discussing and quoting *Seabrook*, CLI-84-6, 19 NRC at 978).

Significantly, in *Seabrook*, the Commission found that failure by petitioners to address the application is a sufficient reason to reject requests to intervene:

Under this standard, [Petitioner's] contentions present no adequate basis for relief. [Petitioner's] allegations do not attack the sufficiency of applicants asserted reasons for the delay. Rather, they raise questions about the need for power, cost of completion and financial consequences to both the utility and to the ratepayers. These questions are far beyond the scope of a construction permit extension proceeding, which is confined to the factual basis asserted for the delay.

*Id.* at 978-79 (1984).

As *Seabrook* demonstrates, unless a petitioner addresses the reasons put forth for "good cause" their contention will be dismissed. See e.g. *Washington Public Power Supply System* (WPPSS Nuclear Project Nos. 1 & 2), ALAB-772, 17 NRC 546, 553 (1983)(finding that it was unnecessary for the Appeal Board to define the issues that relate to good cause in WPPSS, because the petitioners never claimed that the applicant's delays in constructing WPPSS 2 were intentional and lacking a valid purpose).

Other Commission decisions such as *Comanche Peak* state that "good cause" for a construction permit extension can be shown by focusing on the permittee's current and future needed actions, e.g. to correct safety issues, and the time required to complete those actions. *Comanche Peak*, CLI-86-15, 24 NRC at 401.

## II. STANDING OF BEST

BREDL and SACE each assert representational standing to intervene in this proceeding by demonstrating that members have authorized the organization to represent them.<sup>6</sup> Although the NRC Staff does not challenge BREDL and SACE's standing,<sup>7</sup> BEST has not demonstrated their representational or organizational standing. None of BREDL's Declarations even mentions BEST; not one Declarant states that he or she is a member of BEST, nor does any BREDL Declarant authorize BEST to represent him or her in this proceeding. Accordingly, the Petition does not establish BEST's standing under the standards enunciated in *Palisades*, and BEST

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<sup>6</sup> BEST does not assert representative or organizational standing in the Petition, and does not substantially appear in the text of the Petition.

<sup>7</sup> See *Northern Pub. Serv. Co.* (Bailey Generating Station, Nuclear 1), ALAB-619, 12 NRC 558, 564-65 (1980) ("This being so, it scarcely can be gainsaid that that outcome comes within the sphere of the cognizable interest of those persons who, because they reside near the facility site, had the requisite standing to intervene in the construction permit proceeding (and will have similar standing with regard to any eventual operating license proceeding).").

should not be admitted as a party in this proceeding.

III. PETITIONERS' PROPOSED CONTENTIONS

A. Contention 3: The Environmental Assessment Violated NEPA. Petition at 14.

Contention 3 does not state a basis in support of the contention.

NRC Staff Response

The scope of the hearing request is limited to whether good cause exists for the reinstatement of the construction permits. *See Bellefonte*, CLI-10-06, 71 NRC at \_\_\_ (slip op. at 6-7, 19); 74 Fed. Reg. 10,969 (providing that any request for a hearing is limited to whether good cause exists for the reinstatement of the CPs); Order (Establishment of Atomic Safety and Licensing Board) (Jan. 15, 2010) (unpublished) at 1. Because Contention 3 relates to the Staff's actions instead of good cause, it is outside the scope of this proceeding. *See Id.* Further, the Staff opposes admission of Contention 3 for failing to address the pleading requirements of 10 C.F.R. § 2.309(f)(1)(ii-vi); *see also North Atlantic Energy Service Corp.* (Seabrook Station, Unit 1), CLI-99-6, 49 NRC 201, 219 (1999) (notice pleading not sufficient).

B. Contention 3a: The Environmental Assessment Was Illegally Prepared After the Commission's Decision Was Made. Petition at 14.

Petitioners allege that the Staff's EA dated February 24, 2009 was prepared "weeks after the Commissioners voted to reinstate the Bellefonte CPs." *Id.* Petitioners provide various court decisions that generally stand for the idea that an agency's duties under NEPA must be satisfied prior to agency action. *Id.* at 14-15.

NRC Staff Response

First, Contention 3a challenges NRC Staff's actions with regard to preparing the environmental assessment instead of the TVA's good cause justification. Therefore, it is outside the scope of this proceeding. *Bellefonte*, CLI-10-06, 71 NRC at \_\_\_ (slip op. at 6-7, 19).

Second, Petitioners have not presented a genuine dispute on a material issue of law or fact. 10 C.F.R. §§ 2.309(f)(1)(i) - (vi). Contrary to the contention, the NRC Staff reinstated TVA's CPs after preparation and publication of the Staff's EA. See 74 Fed. Reg. 10,969 (March 13, 2009) (Publishing the March 9, 2009, Order of the Director of the Office of Nuclear Reactor Regulation that reinstated the construction permits, and discussing previous publication of the Staff's EA).

The Commissioners voted to approve or disapprove the recommendation from the NRC Staff on how to address TVA's request, not on the request itself, as Petitioners claim. See VR-COMSECY-08-0041 "Staff Recommendation Related to Reinstatement of the Construction Permits for Bellefonte Nuclear Plant Units 1 and 2." (February 18, 2009) (ADAMS Accession No. ML090500374)<sup>8</sup>. The Commissioners gave the NRC Staff guidance on what to do upon completion of the Staff's review, but left the decision to the NRC Staff on whether to grant or deny TVA's request after the NRC Staff performed its review. See *e.g.*, VR-COMSECY-08-0041 at 2 (unnumbered) (Commissioner Klein: "[I]f the request is found acceptable, the staff should issue an order reinstating the construction permits. . . ."). Though a commissioner used very direct language disapproving TVA's request (*Id.* at 4), the Commission, nonetheless, expected the NRC Staff to fully perform its duty by conducting a review of TVA's request prior to rendering its decision. *Id.* at 2.

The administrative record shows that the Staff's NEPA duties were discharged appropriately prior to agency action. Petitioners fail to meet the contention admissibility

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<sup>8</sup> The members of the Commission signed their votes on different days: Commissioner Svinicki on December 22, 2008; Commissioner Lyons on January 7, 2009; Chairman (now Commissioner) Klein on January 9, 2009, and Commissioner (and current Chairman) Jaczko on January 27, 2009. *Id.*

requirements, therefore Contention 3a is inadmissible.

Finally, Petitioners fail to identify a dispute with the TVA's environmental information or base their contention on the available documents as required in 10 C.F.R. § 2.309(f)(2). Essentially, Petitioners ignore the available environmental documents from TVA. In July of 2008, TVA performed an EA for the construction permit reinstatement. TVA's EA was discussed in TVA's August 2008 Application and subsequently supplied to the NRC in September 2008.<sup>9</sup> The NRC Staff asked questions regarding the EA, and TVA responded to the Staff's environmental RAIs by providing additional environmental information in November 2008.<sup>10</sup> Because Petitioners fail to dispute the applicant's environmental information or identify any contradictions between the applicant's conclusions and the Staff's EA, Contention 3a is inadmissible. 10 C.F.R. § 2.309(f)(1)(vi); *see also* 10 C.F.R. § 2.309(f)(2).

C. Contention 3b: NRC Failed to Do an Environmental Impact Statement.  
Petition at 15.

In support of Contention 3b, Petitioners state that NEPA requires a full environmental impact statement ("EIS"), not simply an environmental assessment, for major federal actions. *Id.* (*citing to* 10 C.F.R. § 51.20(b)(2)). Petitioners further state that regulations require the Commission to develop an EIS before approving a license to operate and construct a power plant.<sup>11</sup> *Id.* at 16-17 (*citing to* 10 C.F.R. § 51.20). Petitioners note that there are activities

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<sup>9</sup> See Letter from Jack A. Bailey, Vice President, Nuclear Generation Development, to U.S. NRC, dated September 25, 2008, enclosing Final Environmental Assessment, "Activities at Bellefonte Nuclear Plant Related to Future Site Use, Jackson County, Alabama" (July 2008). ADAMS Accession No. ML082730756.

<sup>10</sup> See Letter from Jack A. Bailey, Vice President, Nuclear Generation Development, to U.S. NRC, dated November 28, 2008, enclosing response to three NRC requests for additional information. ADAMS Accession No. ML083360045.

<sup>11</sup> Petitioners' claims that "none of the usual applicant-generated materials are available" and that (continued. . .)

underway for the Bellefonte Units 1 and 2 (the CPs) and a combined construction and operating license ("COL") for Bellefonte Units 3 and 4, and state that the reinstatement of the CP 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." Petition at 16. Petitioners state that the construction of Units 1, 2, 3 and 4 at Bellefonte is now reasonably foreseeable and therefore must be included in the NRC's environmental documents. Petition at 18 (*citing and quoting* Memorandum and Order (Ruling on Request to Admit New Contention), *Tennessee Valley Authority* (Bellefonte Nuclear Power Plant Units 3 and 4), (Unpublished) (October 14, 2008) (slip op. at 12 n.7)).

NRC Staff Response

The Petitioners fail to identify applicable legal support for their contention, fail to identify an error or omission with the CP reinstatement request for Units 1 and 2, and fail to identify a genuine dispute on material issue of law or fact. 10 C.F.R. § 2.309(f)(1)(vi). Also, Petitioners fail to meet contention admissibility requirements by failing to frame their NEPA contention based on the applicant's environmental information. See 10 C.F.R. § 2.309(f)(2).

As an initial matter, and as noted in the Staff EA, the AEC Staff previously issued a Final Environmental Statement (former title for the AEC's "EIS") in June 1974 for BLN Units 1 and 2. 74 Fed. Reg. at 9,308. The NRC Staff prepared an EA, wherein the Staff considered both information in the original 1974 Final Environmental Statement and new updated information. *Id.* The Staff's EA states "[t]his EA summarizes the radiological and nonradiological impacts to

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(. . .continued)

Petitioners "cannot be expected to present any discrete disagreement with the positions taken by TVA, as those positions have not been revealed". See Petition at 12. Petitioners, however, fail to provide additional information to substantiate their claim.

the environment that may result from the proposed reinstatement of the CPs.” *Id.* The Staff’s EA considered that “Units 1 and 2 are partially-completed existing facilities.” *Id.* Unless Petitioners can identify an applicable legal requirement that the NRC Staff is required to perform an EIS in relation to the request for reinstatement of the CPs, Contention 3b is not a genuine dispute on a material issue of law or fact.<sup>12</sup> 10 C.F.R. § 2.309(f)(1)(vi). The Staff provides an explanation below discounting the regulatory authority they claim applies to the reinstatement of the CPs.

Contention 3b generally fails to set forth the supporting bases and merely lists and discusses various non-applicable environmental legal authority and cases with no discussion of how they relate or apply to the environmental information analyzed in TVA’s EA. See Petition at 15-17; 10 C.F.R. § 2.309(f)(1)(vi).

For instance, Petitioners allege that “[r]egulatory actions which require a full environmental impact statement (“EIS”), not simply an environmental assessment, include major federal actions.” See 10 C.F.R. § 51.20(b)(2). However, 10 C.F.R. § 51.20(b)(2) relates to issuance of an EIS or supplement for a full power operating license. Petitioners claim “[f]ederal regulations require the Commission to develop an environmental impact statement before approving a license to operate and construct a power plant.” Petition at 16-17 (citing 10 C.F.R.

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<sup>12</sup> “Environmental Assessment” (EA) and “Environmental Impact Statement” (EIS) are separately defined in 10 C.F.R. § 51.14. Environmental Assessment is a concise public document that briefly provides sufficient evidence and analysis for determining whether to prepare an environmental impact statement or a finding of no significant impact; and aids the Commission’s compliance with NEPA when no EIS is necessary; facilitates preparation of an EIS when one is necessary. An environmental impact statement is prepared for an action determined to be a major Federal action significantly affecting the quality of the human environment. See *also* 10 C.F.R. § 51.20. It is a far more detailed written statement than an EA as required by section 102(2)(C) of NEPA. See *also* *Anderson v. Evans*, 371 F.3d 475, 488 (9th Cir. 2004)(citations omitted)(“Before deciding whether to complete an EIS government agencies may prepare a less formal EA which ‘briefly provides sufficient evidence and analysis for determining whether to prepare an environmental impact statement or a finding of no significant impact.’”)

§§ 51.20 and 51.20(b))<sup>13</sup>. However, 10 C.F.R. §§ 51.20 and 51.20(b)(1) are inapplicable because the request for reinstatement of the CPs is not on the prescribed list of actions requiring an EIS. 10 C.F.R. § 51.20(b). The NRC has acted consistently with NEPA practice.<sup>14</sup> See, e.g., *Winter v. Natural Resources Defense Council, Inc.*, 129 S.Ct. 365, 372 (2008) ("An agency is not required to prepare a full EIS if it determines-based on a shorter environmental assessment (EA)-that the proposed action will not have a significant impact on the environment.").

Petitioners have not put forward any argument challenging TVA's EA or the NRC Staff's

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<sup>13</sup> Relevant to a construction permit, the Commission's regulations provide,

(a) Licensing and regulatory actions requiring an environmental impact statement shall meet at least one of the following criteria:

(1) The proposed action is a major Federal action significantly affecting the quality of the human environment.

(2) The proposed action involves a matter which the Commission, in the exercise of its discretion, has determined should be covered by an environmental impact statement.

(b) The following types of actions require an environmental impact statement or a supplement to an environmental impact statement:

(1) Issuance of a limited work authorization or a permit to construct a nuclear power reactor, testing facility, or fuel reprocessing plant under part 50 of this chapter, or issuance of an early site permit under part 52 of this chapter.

10 C.F.R. § 51.20.

<sup>14</sup> Based on EAs performed in response to prior construction permit extension requests and operating license extension "recapture" requests, the NRC Staff has performed EAs and concluded, through the EA, that no EIS was required. See e.g. Tennessee Valley Authority; Bellefonte Nuclear Plant, Units 1 and 2; Environmental Assessment and Finding of No Significant Impact [in consideration of extending construction permit expiration dates], 68 Fed. Reg. 11,415 (Jan 24, 2003) (subsequent order at 68 Fed. Reg. 11,415); see also *Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), LBP-93-1, 37 NRC 5, 36 (1993) (noting that EISs had not been prepared in any prior recapture actions).

conclusions that an EIS was not required.<sup>15</sup> And, Petitioners fail to provide any discussion about any differences between the Staff's EA and TVA's EA. The regulations only allow Petitioners to file contentions based upon the Staff's environmental documents where there are data or conclusions in the NRC Staff's EA that differ significantly from TVA's. See 10 C.F.R. § 2.309(f)(2)(ii). Petitioners have not met these requirements.

For a Board to accept a contention asserting that an EIS is required, the Petitioners would have to show, based upon substantial and significant information that the Staff was incorrect and an EIS is required. See *Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), LPB-93-1, 37 NRC 5, 36 (1993) (In an operating license lifetime recapture proceeding, holding that where the Staff had not yet prepared an EA, when the EA is prepared, petitioners could challenge the EA's conclusion that no EIS was required based upon "substantial and significant information").

Finally, to the extent that Petitioners allege a failure to address cumulative impact concerns with the Bellefonte Units 3 and 4 Combined Construction and Operating License proceeding ("COL"), the Staff notes that Petitioners have already separately presented their concern to the appropriate Board, which ruled the contention inadmissible.<sup>16</sup> And, the Staff's EA

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<sup>15</sup> For example, the EA documents the NRC Staff's finding on archeological resources thusly: "Based on the information provided in the 1974 FES, and TVA's subsequent responses to the NRC staff's RAIs in letters dated August 26, 2002, and November 24, 2008, the NRC staff finds that the potential impacts of reinstating the CPs and completing construction of BLN Units 1 and 2 would have no adverse effect on historic and archaeological resources." 74 Fed. Reg. at 9,309.

<sup>16</sup> Separately, Petitioners proffered a contention regarding NEPA, the Unit 3 and 4 ER, segmentation, and consideration of Units 1 and 2 in light of TVA's request for reinstatement. See Petitioners' filing dated September 11, 2008, "Petitioners' Late-Filed Contention Regarding Tennessee Valley Authority's Failure to Comply with the National Environmental Policy Act" filed in Docket Nos. 52-014 and 52-015. The Board ruled the contention to be inadmissible. *Tennessee Valley Authority* (Bellefonte Nuclear Power Plant Units 3 and 4)(unpublished) (October 14, 2008) (slip op.) In making its ruling, the Board rejected Petitioners' segmentation argument. *Id.* at \_\_ (slip op. at 11).

for Units 1 and 2 considered cumulative impacts with regard to potential construction of Units 1 and 2 at the site and includes information related to the COL application for Units 3 and 4. 74 Fed Reg. at 9313-9314. The NRC Staff states that “[i]f 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.” *Id.* at 9,314.

Based on the foregoing arguments, Contention 3b is inadmissible.

D. Contention 4: Plant Site Geologic Issues Are Not Adequately Addressed. Petition at 18.

Petitioners assert that geologic stability criteria must be met before a construction permit may be re-instated. Petition at 18. Petitioners state that failure to account for the criteria could result in health and safety risks, reactor shutdowns, and cost for replacement power. *Id.* Petitioners state that within 50 miles of the site a large earthquake occurred in 2003, numerous small earthquakes have occurred in the same area, and that an earthquake of magnitude 5.0 could damage the Bellefonte plant. *Id.* at 20.

Petitioners conclude that "the reinstatement of construction permits for Units 1 and 2 at the same site as Units 3 and 4 lacks the requisite and relevant material information about geology and seismicity at the proposed Bellefonte site." *Id.*

#### NRC Staff Response

The scope of the hearing request is limited to whether good cause exists for the reinstatement of the construction permits. *Bellefonte*, CLI-10-06, 71 NRC at \_\_ (slip op. at 6-7, 19). Contention 4 is not related to good cause to reinstate the permits, and is outside the scope of the proceeding. See *also* 10 C.F.R. § 2.309(f)(1)(iii). In addition, Petitioners fail to identify an omission of required information from TVA's request to reinstate the construction permits. 10 C.F.R. § 2.309(f)(1)(vi).

Petitioner's discussion of 10 C.F.R. § 100.23(d)(4) does not satisfy 2.309(f)(1)(vi)

because Petitioners fail to explain or provide the legal basis of why 10 C.F.R. Part 100 information is required to be re-submitted for the reinstatement of the unexpired CPs.

Petitioners fail to 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. 10 C.F.R. § 2.309(f)(1)(iv). Relative to the construction permits, the siting criteria of 10 C.F.R. Part 100 were already considered.<sup>17</sup> Indeed, the permits state that the Atomic Energy Commission (AEC) found:

[T]here is reasonable assurance that (i) such safety questions will be satisfactorily resolved at or before the latest date stated in the application for completion of construction of the proposed facility and (ii) taking into consideration the site criteria contained in 10 C.F.R. Part 100, the proposed facility can be constructed and operated at the proposed location without undue risk to the health and safety of the public;

CPPR-122 at ¶1.E; CPPR-123 at ¶ 1.E.

Commission case law has long recognized the principle that construction permit proceedings are not unbridled inquiries, and that arguments that can be heard at the operating license (OL) review application stage are not appropriate for a CP proceeding. See *WPPSS*, CLI-82-29, 16 NRC at 1227 (1982).

Petitioners' allegation that information on earthquakes (e.g. the 2003 earthquake) was omitted, see Petition at 20, is not admissible, because this type of contention is an argument that can be heard at the OL review stage. New information, (i.e. the information Petitioners allege is missing) developed since the issuance of CPPR-122 and CPPR-123 must be supplied and updated by TVA in an operating license application, but not for the existing CPs.

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<sup>17</sup> Pursuant to 10 C.F.R. § 50.34(a)(1), an application for a construction permit must include a preliminary safety analysis report (PSAR), which addresses the Part 100 criteria.

Specifically, the regulations require in part:

At or about the time of completion of the construction or modification of the facility, the applicant will file any additional information needed to bring the original application for license up to date, and will file an application for an operating license or an amendment to an application for a license to construct and operate the facility for the issuance of an operating license, as appropriate, as specified in § 50.30(d) of this part.

10 C.F.R. § 50.55(d).

Final safety analysis report [FSAR]. Each application for an operating license shall include a final safety analysis report. The final safety analysis report shall include information that describes the facility, presents the design bases and the limits on its operation, and presents a safety analysis of the structures, systems, and components and of the facility as a whole, and shall include the following:

(1) All current information, such as the results of environmental and meteorological monitoring programs, which has been developed since issuance of the construction permit, relating to site evaluation factors identified in part 100 of this chapter.

10 C.F.R. § 50.34(b).

Thus, new information on site suitability (e.g. consideration of the 2003 earthquake) may be material to an operating license application (see 10 C.F.R. §§ 50.34(b) & 50.55(d)), but Petitioners have not shown why it is material to the construction permits reinstatement request. Petitioners have not provided any legal basis for their unsupported conclusory assertion that "[c]riteria for geologic criteria in NRC regulations must be met before a construction permit may be re-instated." Petition at 18.

Because this contention is outside the scope of the proceeding, is not material to NRC's findings, and fails to raise a genuine dispute on a material issue of law or facts, Contention 4 is inadmissible.

E. Contention 5: Lack of Good Cause for Reinstatement

Petitioners assert, without citation to legal authority, that "[g]ood cause for re-instatement

relies upon sound financial predictions and estimates of capital and operating costs." Petition at 20.

Petitioners then discuss and dispute the contents of the Environmental Report for Bellefonte Units 3 and 4 (Unit 3 and 4 ER), which they assert uses incorrect obsolete energy cost data (*Id.* at 20-22), and fails to consider financial market uncertainty (*Id.* at 22-23).

After the discussions about the Unit 3 and 4 ER, Petitioners conclude that it is "likely or very likely" that Units 1 and 2 would become economically obsolete again before going on-line, and that the alleged errors in the Units 3 and 4 ER along with petitioner's belief that the Units 1 and 2 would be economically obsolete go against good cause for reinstatement. Petition at 25.

#### NRC Staff Response

Contention 5 and the asserted bases fail to meet the contention admissibility criteria of 10 C.F.R. § 2.309(f)(1)(iii-vi) and fail to demonstrate that TVA's reasons for reinstating the CPs does not satisfy good cause.

Although sound estimates of TVA's capital and operating costs are important, these are not assertions to sufficiently dispute "good cause" under current NRC case law. See *WPPSS*, CLI-82-29, 16 NRC at 1229 (discussing good cause for construction permit extensions). TVA put forth reasons sufficient to sustain a finding of good cause. Petitioners, however, have not challenged those reasons or presented information that suggests that TVA misrepresented the information. 10 C.F.R. § 2.309(f)(1)(vi). The allegedly "incorrect information" cited by Petitioners is in the Unit 3 and 4 ER. Petitioners have not shown that TVA relied on the Unit 3 and 4 ER to support its request for reinstatement, or how that information contradicts the reasons provided in TVA's request.<sup>18</sup> *C.f. Seabrook*, CLI-84-6, 19 NRC at 978-79.

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<sup>18</sup> TVA's July 2008 EA incorporates by reference Bellefonte Nuclear Plant Units 3 and 4 (continued. . .)

Simply put, Petitioners did not satisfy the admissibility criteria because they fail to show a dispute with TVA's request. The Staff notes that Petitioners have not referenced, let alone disputed, any portion of the Unit 1 and 2 CP reinstatement request. 10 C.F.R. § 2.309(f)(1)(vi).

Because Petitioners have failed to meet the contention admissibility requirements and failed to challenge TVA's good cause, the contention is inadmissible.

F. Supplemental Basis for Contention 5

On July 15, 2009, Petitioners supplemented the bases for Contention 5. Joint Intervenors' Supplemental Basis For Previously Submitted Contention 5 – Lack Of Good Cause (July 15, 2009). The Contention 5 Supplemental Basis asserted that because TVA announced it was updating its Integrated Resource Plan,<sup>19</sup> and that plan included a projection for a need for power, both TVA and the NRC must wait until the plan is finalized before either can determine if BLN Units 1 and 2 are favorable energy sources, as existing projections must be revised. *Id.* at 1-2. Petitioners provide no citations to regulations or other authority to support Petitioners' proposal that no action can be taken on the CP reinstatement until TVA completes its update to its integrated resource plan.

NRC Staff Response

Contention 5 as supported by Supplemental Basis for Contention 5 is inadmissible,

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(. . .continued)

Combined Operating License Application Part 3, Environmental Report, October 2007 (TVA 2007). July 2008 EA at 2. The Unit 3 and 4 ER is briefly mentioned in the August 26, 2008 reinstatement request, but it is not relied upon in the request. Instead, the August 26 request documents a commitment that TVA will provide additional information about Units 1 and 2 as a potential power generating alternative in Revision 1 to the COLA Environmental Report which was scheduled to be submitted to the NRC in October 2008. Application at 7.

<sup>19</sup> Notice of Intent, Tennessee Valley Authority, Environmental Impact Statement; Integrated Resource Plan, 74 Fed. Reg. 28,322 (June 15, 2009).

inasmuch as the proffered information falls short of the requirements of 10 C.F.R. § 2.309(f)(1) or the late-filed criteria of 10 C.F.R. § 2.309(c). Petitioners make no effort to address the late filing criteria of 10 C.F.R. § 2.309(c). That alone is grounds for dismissal under the Commission's regulations. See *Oyster Creek*, CLI-09-07, 69 NRC at 280 and cases cited therein. Petitioners also cannot meet the contention admissibility requirements of 10 C.F.R. § 2.309(f)(1)(v). In particular, they have not provided facts or expert opinion to support their contention. Instead, they rely on the notice by TVA, arguing that TVA relied on outdated studies to support TVA's belief that there is a need for power for Units 1 and 2. Contention 5 Supplemental Basis at 2. But TVA does not state that its former projections were wrong, either low or high. Thus, Petitioners provide neither facts nor experts to support Petitioners' assertion that TVA cannot now project its need for power, and thus cannot request construction permit reinstatement.

Under 10 C.F.R. § 2.309(f)(1)(vi), Petitioners are required to identify specific portions of the application they dispute and provide the supporting reasons. However, in Supplemental Basis 5, Petitioners fail to reference TVA's construction permit reinstatement request. Petitioners captioned the supplement as related to "good cause" but failed to explain how the Notice of Intent disputed TVA's asserted good cause.

The Notice of Intent was published well after the Staff's decision to reinstate the construction permits, thus was not material to the Staff's decision under 10 C.F.R. § 2.309(f)(1)(iv). The Petitioners do not attempt to explain the materiality of the Notice of Intent.

In sum, the Supplemental Basis for Contention 5 fails to support the admissibility of proffered Contention 5 because it does not satisfy all of the late-filed factors nor does it meet the contention admissibility requirements of 10 C.F.R. § 2.309(f)(1)(v), (vi).

- G. Contention 6: The re-instatement was improper because TVA has not and cannot meet the NRC's Quality Assurance and Quality Control requirements. Petition at 25.

Petitioners allege that because TVA partially dismantled Units 1 and 2, TVA cannot determine the state of the plants, and cannot comply with the regulations. Petition at 28. Petitioners state that Units 1 and 2 have not been maintained, and have been cannibalized. *Id.* Petitioners state that during the period when there were no CPs, TVA did not implement "Federal requirements," did not conduct activities in accordance with NRC-approved programs, and were not inspected by the NRC. *Id.* at 26.

Petitioners quote NRC employee Joseph Williams, who expressed his non-concurring opinion that, prior to re-instatement of the construction permits, NRC must evaluate the current state of the plant, and develop an inspection program. *Id.* at 27 (*citing* "COMSECY 08-0041, Enclosure 2: Non-concurrence by Joseph Williams Regarding Staff Approach, Tennessee Valley Authority Request to Reinstate Construction Permits, Bellefonte Nuclear Plant, Units 1 and 2, 11/20/08" at 6).

#### NRC Staff Response

Contention 6 is outside the scope of the "good cause" proceeding as Petitioners do not relate the bases of Contention 6 to the issue of "good cause." Further, Petitioners fail to demonstrate that the issue raised in the contention is material to the findings the NRC must make to support reinstatement of the CPs, and fail to raise a genuine dispute on a material issue of law or fact. 10 C.F.R. § 2.309(f)(1)(iv), (vi).

The proffered contention asserts that TVA historically failed to meet the NRC's quality assurance requirements, and cannot meet them in the future. Petition at 25. Petitioners, however, fail to explain how or why past alleged non-compliance with regulations, even if true, would preclude TVA's present request to reinstate the CPs. For example, Petitioners' do not support their allegation that a commitment by TVA to enter problems into a CAP does not

comply with 10 C.F.R. § 50.55(e). See Petition at 27-28 (quoting J. Williams). To the contrary, under 10 C.F.R. § 50.55(e)(6), TVA would be required to report information "to the extent known," and include "the corrective action which has been, is being, or will be taken."

Petitioners do not support or explain their argument that documenting problems in a CAP fails to comply with 10 C.F.R. § 50.55(e).

Petitioners fail to show how disassembly of the Units and subsequent entry of the disassembled parts into a CAP is a compliance issue material to the NRC's findings for reinstating the CPs. TVA is subject to these requirements as a construction permit holder, which generally only binds TVA *after* TVA has a construction permit. See *e.g.*, 10 C.F.R. § 50.55(e)(4)(i) (describes actions required of a holder of a facility construction permit subject to this part).

Petitioners provide no specific examples of equipment, environment, degradation, or documents to show the alleged past failure by TVA to satisfy quality assurance requirements. These arguments do not meet contention admissibility requirements under 10 C.F.R. § 2.309(f)(1)(iv).

Petitioner BREDL's Declarant Arnold Gundersen describes his concern that a lack of continuous recordkeeping require TVA to dismantle and reconstruct significant portions of the plants. Gundersen Affidavit at 8-9. He cites the Zimmer plant as having historical QA problems that made the permit holder cease construction of a nuclear plant. *Id.* at 8-9. Petitioners have not explained, however, why TVA must determine what portions of the construction may be kept, and what portions must be rejected due to inadequate quality assurance and QC (Petition at 27-28) before TVA may request reinstatement of its construction permit. Petitioners fail to understand that a construction permit is a license to construct even when no construction has been undertaken. Should TVA decide to resume construction, TVA will do so entirely at its own risk, and the remaining work can be halted at any time if evidence warranting that action

becomes available to the NRC. See *Texas Utilities Electric Co. (Comanche Peak)*, CLI-86-4, 23 NRC 113, 122 (1986).

Furthermore, under the Commission's rules and case law, a concern over QA records is the type of concern that can be heard upon application for an operating license, thus is not within the scope of a construction permit proceeding. See *WPPSS*, CLI-82-29, 16 NRC at 1227.<sup>20</sup>

Contrary to Petitioners' claims, the Commission has previously recognized that detection and correction of construction defects constitutes good cause for extending the completion date of a plant, and is consistent with the Commission's efforts to protect the public health and safety. *Id.*; *WPPSS*, CLI-82-29, 16 NRC at 1230-31 (holding to be inadmissible a contention alleging that delays in construction were due to violations of NRC regulations).<sup>21</sup> Petitioners raise no logical arguments regarding why the Commission's decisions should not apply in this instance.

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<sup>20</sup> "In both *Cook* and *Bailey*, the Appeal Board noted 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 (6 AEC at 420; 12 NRC at 573), an observation in which we wholeheartedly concur. Moreover, if properly read, the *Cook* and *Bailey* decisions stand for two principles that are totally consistent with that proposition: (1) A contention cannot be litigated in a construction permit extension proceeding when an operating license proceeding is pending in which the issue can be raised; and (2) prior to the operating license proceeding, a contention having nothing whatsoever to do with the causes of delay or the permit holder's justifications for an extension cannot be litigated in a construction permit proceeding. As such, the result in both those cases-dismissal of the contentions in question as outside the scope of the extension proceeding-was correct." *WPPSS*, CLI-82-29, 16 NRC at 1227-1228.

<sup>21</sup> The Commission has stated that if a permit holder were to construct portions of a facility in violation of NRC regulations, when those violations are detected and corrections ordered or voluntarily undertaken, there is likely to be some delay in the construction caused by the revisions. Nonetheless, such delay, as with delay caused by design changes, must give ["good cause"] for an extension. To consider it otherwise could discourage permit holders from disclosing and correcting improper construction for fear that corrections would cause delays that would result in a refusal to extend a construction permit, a result obviously inconsistent with the Commission's efforts to ensure the protection of the public health and safety. *WPPSS*, CLI-82-29, 16 NRC at 1230-31.

Regarding NRC Staff procedures, Petitioners assert that an NRC inspection program must be developed before re-instatement of the CPs. Petition at 27. Petitioners, however, do not explain the relevance or materiality of new NRC Staff procedures to the request for reinstatement. The NRC has used existing procedures to inspect the construction of more than 100 commercial power plants. The NRC has an existing inspection procedure that it has been routinely using to perform annual inspections at Units 1 and 2. See Application at 3-4. TVA's request for reinstatement stated that deferral activities would resume under TVA's already existing Nuclear Quality Assurance Plan. Application at 6-7. The inspection procedure used in the most recent inspections is Inspection Procedure (IP) 92050 "Review of Quality Assurance for Extended Construction Delay" (available at <http://www.nrc.gov/reading-rm/doc-collections/insp-manual/inspection-procedure/index.html> last visited May 19, 2009).<sup>22</sup> The Petitioners do not explain why the NRC's existing IP 92050 would no longer be effective.

The Board should note that the focus of a hearing on a proposed licensing action is the adequacy of the application to support the licensing action. See *Dominion Nuclear Connecticut, Inc.* (Millstone Power Station, Unit 3) CLI-08-17, 68 NRC 231, 237 (2008)(citing see *Pa'ina Hawaii, LLC*, CLI-08-3, 67 NRC 151, 168 n.73 (2008)). A contention must be framed against

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<sup>22</sup> The objectives of IP 92050 are to determine if:

- NRC
- a. Quality assurance policies, plans, instructions, and procedures for extended construction delay activities have been established.
  - b. Extended construction delay activities are being accomplished in accordance with requirements and licensee commitments.
  - c. Quality records reflect work accomplishment consistent with NRC requirements and licensee commitments.
  - d. Licensee has an adequate work force with facilities available to support limited activity.

IP 92050 at 1.

the application, not the adequacy of the NRC's procedures and documents. See 10 C.F.R. § 2.309(f)(1).

Finally, Petitioners' allegation that "reinstatement of TVA's Bellefonte Units 1 and 2 Construction Permits without an entirely new Construction Permit process constitutes a grave risk to public safety" is recycled from arguments by the Petitioners in Contentions 1 and 2 which were rejected by the Commission. See *Bellefonte*, CLI-10-06, 71 NRC at \_\_ (slip op. at 1). Moreover, such an allegation is not within the scope of the good cause proceeding.

Based on the foregoing arguments, Contention 6 is inadmissible.

H. Supplemental Basis for Contention 6.

On January 11th, 2010, Petitioners submitted a supplemental basis for Contention 6. Petitioners summarize information from a letter by TVA transmitting a report that discusses the failure, on August 17, 2009, of the "Unit 1 Reactor Building Containment Vertical Tendon V9 coupling." Letter from Tennessee Valley Authority to NRC, "Tennessee Valley Authority (TVA) - Bellefonte Nuclear Plant (BLN) Units 1 (CPPR-122) and 2 (CPPR-123) - Containment Vertical Tendon Coupling Failure - First Interim Report," enclosing "10 C.F.R. 50.55(E) Interim Report Bellefonte Nuclear Plant (BLN) Containment Vertical Tendon Coupling Failure," (Dec. 10, 2009). ADAMS Accession No. ML093480158.<sup>23</sup>

Petitioners allege the failure of the Unit 1 tendon coupling was the result of TVA failing to adhere to its construction permit conditions. *Id.* at 4. Petitioners conclude that further problems may occur if the Commission were to allow the plant to be completed. *Id.* at 5.

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<sup>23</sup> In its letter and report, TVA did not identify any failures associated with Unit 2, but indicated that it will investigate both Unit 1 and Unit 2 when it determines the extent of condition. *Id.* at E-1 - E-2. Petitioners provide no examples of failures that occurred on Unit 2.

NRC Staff Response

The scope of the hearing request is limited to whether good cause exists for the reinstatement of the construction permits. See *Bellefonte*, CLI-10-06, 71 NRC at \_\_\_ (slip op. at 6-7, 19). Therefore, this contention is beyond the scope of this proceeding. See also 10 C.F.R. 2.309(f)(1)(iii).

Petitioners make no effort to address the late filing criteria of 10 C.F.R. § 2.309(c), which is grounds for dismissal under the Commission's regulations. See *Oyster Creek*, CLI-09-07, 69 NRC at 280. Petitioners do not relate the supplemental bases of Contention 6 to the issue of "good cause"; and it is therefore inadmissible under 10 C.F.R. § 2.309(f)(1). For example, the supplemental information regards a mechanical failure, not a licensing or permitting action, and is outside the scope of the proceeding, thus fails under 10 C.F.R. § 2.309(f)(1)(iii). The supplement discusses an event that occurred on August 17, 2009, well after both TVA's request for reinstatement and after the Staff's March 2009 decision on the request. Accordingly, the event itself was immaterial both to the applicant and to the Staff, and fails to provide support to Contention 6 under the NRC's contention admissibility rules. 10 C.F.R. § 2.309(f)(1)(iii) (requiring a demonstration that the issue is within the scope of the proceeding); 10 C.F.R. § 2.309(f)(1)(iv) (requiring a demonstration that the issue is material to the findings the NRC must make).

TVA's interim report dated December 10 states that the cause of the failure is unknown, and that further analysis is in progress. Interim Report at E-1. Petitioners provide no additional information on the cause of the failure. Petitioners do not explain how this event was caused by a failure to meet quality assurance requirements. The Petitioners do not show how the causes of the failure and alleged non-compliance with the construction permits are material to the findings the staff must make to find good cause to reinstate the permits, thus Contention 6 remains unsupported under 10 C.F.R. § 2.309(f)(1)(iv). Petitioners allude that the failure of the

tendon coupling was caused by inadequate quality assurance (Supplemental Basis Contention 6 at 4), but provide no factual information or expert opinions to support their position. The information submitted by TVA and cited by Petitioners provides no factual information determining the cause of the failure. Thus, the supplemental basis fails under 10 C.F.R. § 2.309(f)(1)(v). Last, in its supplemental basis, Petitioners fail to meet 10 C.F.R. § 2.309(f)(1)(vi) by failing to point to specific sections on the application they dispute, or failing to allege an omission of information required by law.

In Commission proceedings, "the purpose of the bases of a contention are 'to put the other parties on notice as to what issues they will have to defend against or oppose.'" *Southern Nuclear Operating Company* (Early Site Permit for Vogtle ESP Site), LPB-08-2, 67 NRC 54, 78 (quoting Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-899, 28 NRC 93, 97 (1988)). Because Petitioners do not put forward any information based on the documents in the request for reinstatement, the supplemental basis should be rejected.

- I. Contention 7: The BLN Units 1 and 2 cannot satisfy NRC safety, environmental and other requirements that have been imposed or upgraded since 1974. Petition at 29.

Petitioners assert arguments similar to contentions 4 and 6 that the mechanical, containment, piping and other physical features are more than 30 years old and do not meet safety criteria. Petition at 29. They also argue that other requirements must be met such as 10 C.F.R. Part 100 and 10 C.F.R. § 100.2. Specifically, Petitioners aver that there are issues related to other developments that could affect operation such as the incident at Surry and Indian Point nuclear power plants that prompted the NRC to issue bulletins to licensed nuclear plants. Petition at 30. They rely in part on the Gundersen Affidavit and the opinion of NRC employee, Joseph Williams. Petition at 29, 30.

#### NRC Staff Response

Contention 7 is inadmissible because it falls outside the scope of this proceeding. 10

C.F.R. § 2.309(f)(1)(iii). Petitioners' concerns about the age of equipment on site, 10 C.F.R. Part 100 compliance, and lack of current data and information related to site suitability such as hydrological radionuclide transport, demographic changes, meteorology, geologic and seismic information are not issues for consideration that are within the scope of good cause. See Order at 5; 10 C.F.R. § 2.309(f)(1)(iii). And, Petitioners have not identified any regulatory requirement or other information that would require that the request for reinstatement address these issues prior to reinstatement of the CPs. Petitioners' concerns about operational issues, which they say developed at other nuclear plants such as Surry and Indian Point, are also outside the scope of these proceedings.

Mr. Gundersen's Affidavit addressing quality assurance compliance with 10 C.F.R. Part 50 as a condition precedent to reinstatement is unsupported. Quality assurance is a requirement that would only bind TVA after reinstatement of its CPs. See 10 C.F.R. § 50.55(e)(4)(i) (describing actions required of a "holder of a facility construction permit subject to this part"). Because the NRC Staff reinstated TVA's CPs, a new QA plan was not required, as TVA's QA plan was already included in its PSAR. Any concerns of Petitioners related to preservation, maintenance and documentation requirements will be addressed in accordance with the Commission's policy on deferred plants as stated in the Order. See Commission Policy Statement of Deferred Plants, 52 Fed. Reg. 38,077, 38,078 (October 14, 1987).

Regarding Petitioners' assertion that the NRC Staff is required to consider terrorism under 10 C.F.R. Part 51, the Commission's current policy requires that terrorism be considered only for applications for proposed projects within the jurisdiction of the United States Court of Appeals for the Ninth Circuit. The Commission has consistently held that the NRC has no legal duty to consider the environmental impacts of terrorism at NRC licensed facilities in other circuits. *Nuclear Mgmt. Co., LLC* (Palisades Nuclear Plant), CLI-07-09, 65 NRC 139, 141 (2007). As the Commission explained regarding *San Luis Obispo Mothers For Peace vs. NRC*,

449 F. 3d 1016 (9th Cir. 2006) (“Mothers for Peace”)<sup>24</sup>, “...[t]he NRC is not obliged to adhere, in all of its proceedings, to the first court of appeals decision to address a controversial question.” *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-07-08, 65 NRC 124, 128-29 (2007). The proposal relates to reinstatement of the CPs of the Units 1 and 2 located in Alabama, which falls within the jurisdiction of the Sixth Circuit. Based on the Commission’s clear directives in these decisions, the asserted bases are outside the scope of good cause.

Further, as the Staff argued in response to Petitioners’ previous propositions, an environmental impact statement is not required and fails to state a genuine dispute on a material issue of fact or law. 10 C.F.R. § 2.309(f)(1)(vi). And, the unsupported opinion of Joseph Williams, an NRC employee, asserting that that 10 C.F.R. § 51.20(b)(1) requires an EIS is contrary to the regulations that list actions that require an EIS. Moreover, the contention should first focus on TVA’s environmental submission.

Because the Petitioners fail to show good cause and meet the requirements of 10 C.F.R. § 2.309(f)(1) (iii) and (vi), the contention is inadmissible.

J. Contention 8: Bellefonte Units 1 and 2 Do Not Meet Operating Life Requirements. Petition at 31.

Petitioners recycle similar arguments from contentions 6 and 7 related to aging equipment and the need to examine these issues according to 10 C.F.R. § 50.49(e)(5). They claim that “should construction of the existing Units be completed, Systems, Structures and Components of Bellefonte Units 1 and 2 will be 80 to 90 years old at the end of the first operating license.” Petition at 31-32. They forecast that critical research and development

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<sup>24</sup> *Mothers for Peace* held that the NRC must consider the environmental impacts of a terrorist attack against an independent spent fuel storage installation (ISFSI) at the Diablo Canyon Nuclear Power Plant.

information on aging equipment and an aging management plan is lacking, rendering the CP application incomplete. Petition at 33. Based on 10 C.F.R. § 50.49(e)(5), they conclude that a new safety analysis must be performed for Units 1 and 2. They rely on the Gundersen Affidavit to support their claim. See Petition at 32

NRC Staff Response

Petitioners' contention is inadmissible because the contention falls outside the scope of the proceeding. See 10 C.F.R. § 2.309(f)(1)(iii). 10 C.F.R. § 50.49 (e)(5) applies to holders of operating licenses and an applicant of an operating license. Therefore, the contention is inadmissible.

- K. Contention 9: Impacts on Aquatic Resources including Fish and Mussels of the Tennessee River. Petition at 32.

Petitioners set forth sub-contentions and bases and rely solely on the Young Affidavit to support Contentions 9-9e. In their opening argument, they claim that “[b]efore NRC reinstates the Bellefonte CPs, additional data must be collected and modeling must be performed 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.” Petition at 33.

NRC Staff Response

Petitioners' contention is not admissible because the environmental impacts of the operation of Units 1 and 2 are not an issue that falls within the scope of this proceeding, and it fails to state a genuine dispute on a material issue of law or fact. 10 C.F.R. §§ 2.309(f)(1)(iii), (vi). The impacts evaluated in this proceeding relate to potential radiological and

nonradiological impacts to the environment from reinstatement of the CPs.<sup>25</sup> 74 Fed Reg. at 9,309. The Young Affidavit adds no support because the affidavit raises the need for additional data to evaluate operational issues associated with Units 1 and 2 in conjunction with Units 3 and 4. See Young Affidavit at 2-6. The affidavit identifies no other information disputing TVA's EA or RAI responses that would lead to a conclusion that additional data and modeling are required from TVA. See Young Affidavit at 2-6. Because the contention falls outside the scope of the proceeding and fails to state a genuine dispute on a material issue of fact or law, Contention 9 is not admissible.

- L. 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. Petition at 33.

Petitioners assert that the "[i]mpacts on aquatic resources including fish and benthic invertebrates...from the proposed Units should be substantiated and may be large." Petition at 33. In this regard, they also claim that no evaluation of cumulative impacts of Units 1 and 2 combined with the proposed Units 3 & 4 has been conducted. See Petition at 33.

#### NRC Staff Response

The contention is outside the scope of this proceeding and fails to identify a genuine dispute on a material issue of fact or law because the impacts of operating Units 1 and 2 is not at issue. 10 C.F.R. § 2.309(f)(1)(iii), 10 C.F.R. § 2.309(f)(1)(vi). The contention also fails to discuss any differences between the Staff's EA and TVA's EA. The regulations only allow Petitioners to file contentions based upon the Staff's environmental documents where there are data or conclusions in the NRC Staff's EA that differ significantly from TVA's. See 10 C.F.R. §

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<sup>25</sup> The Staff EA states in several places that construction activities will not involve operation of BLN Units 1 and 2. *E.g.*, 74 Fed. Reg. at 9,313.

2.309(f)(2). In this case, Petitioners rely solely on the Young Affidavit which challenges the Staff's finding of no significant impact using the Units 3 and 4 ER with no discussion on how the Units 3 and 4 ER differs from the TVA EA and RAI responses.

The Young Affidavit and Petitioners' discussion at page 34-35 of the Petition analyze the impacts of the operation of Units 1, 2, 3, and 4 as well as other facilities located along the Tennessee River. See Young Affidavit at 2-3. Dr. Young states "[t]he impacts on aquatic resources from operating the four reactors may be large. Proper scientific study and analysis is warranted." Young Affidavit at 3. And, Section 14 of the Young Affidavit discusses the "potential impacts to increased water intake and increased thermal discharge on fish and mussels in the vicinity of the BLN, Town Creek...", which are more appropriately addressed during the review of a license application to operate.

Though Petitioners and Dr. Young aver that the affidavit relates to the "impacts of resumption of construction of Units 1 & 2", there is no analysis of the impacts of construction of Units 1 and 2 based on TVA's EA or RAI responses. See Petition at 33; Young Affidavit at 2-5. TVA's RAI response of November 24, 2008 (ADAMS Accession No. ML083360045) supplementing their environmental assessment evaluated the impacts to aquatic resources on pages 5-8 that could result from potential construction activities. But, Petitioners have neither challenged TVA's RAI response nor identified a legal requirement that additional data be included in TVA's EA.

Impacts considered, including cumulative impacts, were included in subsequent RAI responses of September 25, 2008 (ADAMS Accession No. ML082730756) and November 24, 2008. Petitioners have not presented information based on TVA's EA or RAI responses to dispute the conclusions. Because the contention fails to meet the criteria in 10 C.F.R. § 2.309(f)(1)(iii) and (vi), Contention 9a is inadmissible.

- M. Contention 9b: Tennessee Valley Authority's analysis for Units 3 and 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. Petition at 33.

Petitioners rely on the Young Affidavit to assert that "there will be impacts to the upper-Tennessee River aquatic resources because those reservoirs will bear the burden of downstream water withdrawal." Petition at 34. They also claim that upstream management may also affect BLN operations" and large manmade impoundments located within 100 river miles of the BLN site can significantly affect or be affected by BLN plant operations. See Petition at 34. Finally, they conclude that "TVA's overall conclusion, '[o]perations 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...and therefore erroneous." Petition at 34. Based on these conclusions, an evaluation of cumulative impacts of Units 1 and 2 combined with the proposed Units 3 & 4 must be conducted. See Petition at 33.

#### NRC Staff Response

Contention 9b is outside the scope of this proceeding, fails to identify a genuine dispute on a material issue of fact or law and fails to identify information in TVA's EA in support of the contention. 10 C.F.R. §§ 2.309(f)(1)(i),(vi), and (f)(2). This contention and supporting bases discuss the adequacy of the environmental analysis submitted in TVA's COL for Units 3 and 4, which is outside the scope of the request for reinstatement. Aquatic resources were evaluated in TVA's RAI response of November 24, 2008 supplementing TVA's EA. Neither Petitioners' discussion nor the Young Affidavit identifies contradictions between TVA's EA and RAI responses or the Staff's EA and the COL for Units 3 and 4. Their discussions seem to only focus on the potential environmental impacts of operating Units 1, 2, 3, and 4, which is outside the scope of this proceeding. See Young Affidavit at 5. The only environmental information identified is the environmental report for Units 3 and 4; no other information is referenced. For

the reasons explained, the contention is inadmissible.

- N. Contention 9c: Tennessee Valley Authority's analysis does not adequately address potential impacts to increased water intake and increased thermal discharges on fish and mussels in the vicinity of BLN, Town Creek, nor in Gunterville Reservoir. Petition at 35.

Petitioners again recycle an earlier argument in Contention 3a that because 10 C.F.R. § 51.20(b)(1) requires an environmental impact statement, the Staff EA does not satisfy 10 C.F.R. Part 51. Petition at 35. In this regard, they set forth two arguments without attribution to any regulatory requirement. First, they claim that a CP rises to the "potential of an early site permit" but carries "the likelihood that a power plant will be built", which they say justifies the requirement of an EIS. See Petition at 35. Second, because the Staff's EA-FONSI relies in part on TVA's ER for Units 3 and 4, which addresses entrainment and impingement, data is needed to examine the impacts on fish and mussels. See Petition at 35-36.

#### NRC Staff Response

Petitioners' contention falls outside the scope of the proceeding and fails to identify a genuine dispute with the application on a material issue of fact or law. 10 C.F.R. §§ 2.309(f)(1)(iii), (vi). As the Staff has previously argued in the answer to the Petition, Petitioners' claim that an environmental impact statement is required before the CPs can be reinstated is not adequately supported. Any assertion by Petitioners that a CP is akin to an early site permit to discredit the Staff's EA is erroneous and unsupported by any authority cited by the Petitioners.

Further, Petitioners only other claims, that the "BLN Unit 1 and 2 EA-FONSI relies in part on TVA's Environmental Report for BLN Units 3 and 4..." and that the "ER's conclusion regarding potential impacts of entrainment and impingement as a consequence of increasing water intake is not based on actual data, but rather improper assumptions" misrepresents the Staff's EA and raises issues related to the impacts of operation, not construction. Petition at 35.

The Staff's EA explicitly states that it relied on the environmental report related to Units 3 and 4 to develop additional site details related to impacts of construction such as historic and archaeological resources. 74 Fed. Reg. at 9,309. And, Petitioners concerns related to impingement and entrainment as discussed in the environmental report for Units 3 and 4 relate to operating nuclear reactors. Petition at 35, 36; Young Affidavit at 6-9.

Petitioners provide no support explaining how impingement and entrainment relate to impacts associated with reinstatement of unexpired Units 1 and 2 CPs or identify contradictions or inadequacies in the TVA EA or RAI responses submitted for Units 1 and 2. In fact, Petitioners' dispute appears to be with TVA's ER for Units 3 and 4, which is outside the scope of this proceeding. Because the contention fails to meet the criteria of 10 C.F.R. § 2.309(f)(1)(iii) and (vi), the contention is inadmissible.

- O. Contention 9d: TVA's Conclusion Regarding Potential Impacts of Increased Thermal and Chemical Discharge is Not Supported by Evidence. Petition at 36.

Petitioners cite the environmental report submitted for the COL for the Units 3 and 4 to support their claim that TVA provides no evidence in the form of scientific study or field observation as justification that "given the plume's small size within the reservoir, any impacts to drifting organisms is small." Petition at 36. They further discuss and cite the environmental report for Units 3 and 4 to support the allegation that no data or discussion on "temporal or spatial composition of fish of any life history stage in this immediate area" exists. *Id.* Petitioners also raised concerns that "TVA failed to state whether the molluskicide is harmful to freshwater mussels...". *Id.*

#### NRC Staff Response

The contention fails to state a claim based on the environmental information submitted in the TVA's EA and is outside the scope of this proceeding. 10 C.F.R. § 2.309(f)(1)(iii), 10 C.F.R. § 2.309(f)(2). Petitioners rely on environmental information related to Units 3 and 4, but fail to

explain how it contradicts information related to potential impacts identified in TVA's EA or RAI responses. For example, the allegation that no data or discussion on temporal or partial composition of fish relates to potential discharges and water intake structures at Units 3 and 4, issues associated with the operation of Units 3 and 4, are outside the scope of this proceeding.

Petitioners' claim that TVA provides no data on overall drift community and that "discharge pipes total 120 ft. in length and are near mid-channel" also relates to operation of nuclear reactors, which is outside the scope of this proceeding. Further, their allegation that TVA failed to disclose the harm to fresh water mussels if a molluskicide is used as a water treatment lacks any analysis contradicting the impacts identified in TVA's EA and RAI responses. Petitioners cite no environmental information provided in TVA's EA or RAI responses for the Units 1 and 2. 10 C.F.R. § 2.309(f)(2). Therefore, the contention is inadmissible.

- P. 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. Petition at 37.

In their final argument, Petitioners reference TVA's environmental report related to Units 3 and 4 that discusses species of fish identified by the TVA near the Bellefonte site. Petition at 37. They claim TVA's conclusions regarding the aquatic resources health and status ratings are erroneous, misinterpreted, and biased in support of the unsubstantiated conclusions of impacts to aquatic resources from operation of BLN." Petition at 37. Further, sampling at BLN is warranted to evaluate impacts from construction and operation of additional nuclear reactors. Petition at 37-38.

#### NRC Staff Response

This contention is outside the scope of the proceeding, fails to state a genuine dispute

on a material issue of law or fact, and fails to state a claim based on the environmental information submitted. 10 C.F.R. §§ 2.309(f)(1)(iii), (vi), and 2.309(f)(2). Petitioners' contention relates to the operation of Units 3 and 4, which is outside the scope of the proceeding. Though Petitioners and the Young Affidavit claim that additional sampling is needed to evaluate impacts from construction, their discussion is solely focused on the impact of Units 3 and 4. There is no analysis related to construction impacts of Units 1 and 2 based on TVA's EA or RAI response in the Young Affidavit or Petition. See Young Affidavit at 9-10. This is evident from the exclusive references to discussions in the Units 3 and 4 ER regarding operation of Units 3 and 4. Aquatic resources were evaluated in TVA's RAI response of November 24, 2008 supplementing their EA. Petitioners have not identified any information that would require that this information be supplemented or a legal requirement that additional information be considered in the TVA's EA. For the reasons asserted above, the contention is inadmissible.

IV. Subpart G Request

Petitioners requested a hearing using the hearing and cross examination procedures provided by 10 C.F.R. Part 2, Subpart G. Petition at 1. Petitioners indicated that they would later address the requirements of 10 C.F.R. § 2.310(d). *Id.* Nonetheless, because Petitioners initiated their "request," the Staff submits the following response.

Section 2.1200 provides that the provisions of Subpart L govern all but a select few proceedings. See 10 C.F.R. § 2.1200 ("The provisions of this subpart . . . govern *all* adjudicatory proceedings . . . except for proceedings on the licensing of the construction and operation of a uranium enrichment facility, proceedings on an initial application for construction authorization for a high-level radioactive waste geologic repository at a geologic repository operations area noticed under §§ 2.101(f)(8) or 2.105(a)(5), proceedings on an initial application for a license to receive and possess high-level radioactive waste at a geologic repository operations area, proceedings on enforcement matters unless all parties otherwise agree and

request the application of Subpart L procedures, and proceedings for the direct or indirect transfer of control of an NRC license when the transfer requires prior approval of the NRC under the Commission's regulations, governing statutes, or pursuant to a license condition.”).

Because this proceeding is not one of those specifically enumerated in § 2.1200, and because Petitioners have not proffered any evidence in support of the request, their request for a Subpart G hearing should be denied.

#### CONCLUSION

BEST has not satisfied the Commission's requirements for standing in an NRC proceeding. None of Petitioners' proposed contentions meet the contention admissibility criteria in 10 C.F.R. Part 2 nor have Petitioners sufficiently challenged TVA's good cause. Also, Petitioners' Supplemental Basis Contentions 5 and 6 should be denied for failing to meet the late-filed contention admissibility requirements. And, Petitioners' request for subpart G proceedings does not satisfy the criteria of 10 C.F.R. § 2.310(d). Based on the foregoing, the Petition and Supplemental Basis Contentions 5 and 6 should be denied.

#### **Signed (electronically) by**

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UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY LICENSING BOARD

TENNESSEE VALLEY AUTHORITY ) Docket Nos. 50-438-CP & 50-439-CP  
)  
(Bellefonte Nuclear Power Plant )  
Units 1 and 2) )

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "NRC STAFF'S ANSWER TO PETITION FOR INTERVENTION AND REQUEST FOR HEARING, AND RESPONSE TO JOINT INTERVENORS' SUPPLEMENTAL BASIS TO CONTENTION 5 – LACK OF GOOD CAUSE, AND JOINT PETITIONERS' SUPPLEMENTAL BASIS FOR PREVIOUSLY SUBMITTED CONTENTION 6 – TVA HAS NOT AND CANNOT MEET THE NRC'S QUALITY ASSURANCE AND QUALITY CONTROL REQUIREMENTS" dated January 29, 2010, have been served upon the following by the Electronic Information Exchange, this 29th day of January, 2010:

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