UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

LBP-10-07

ATOMIC SAFETY AND LICENSING BOARD PANEL

Before the Licensing Board:

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

In the Matter of	Docket Nos. 50-438-CP and 50-439-CP
TENNESSEE VALLEY AUTHORITY	ASLBP No. 10-896-01-CP-BD01
(Bellefonte Nuclear Plant, Units 1 and 2)	April 2, 2010

MEMORANDUM AND ORDER
(Ruling on Intervention Petition)

On May 8, 2009, the Blue Ridge Environmental Defense League (BREDL), with its Bellefonte Efficiency and Sustainability (BEST) chapter, and the Southern Alliance for Clean Energy (SACE), hereinafter referred to as Joint Petitioners, submitted an intervention petition challenging the August 28, 2008 licensing request of the Tennessee Valley Authority (TVA). In its request, TVA asked that the agency reinstate the 10 C.F.R. Part 50 construction permits (CPs) for Bellefonte Nuclear Plant, Units 1 and 2, two partially completed Babcock and Wilcox pressurized water reactors located on TVA's Bellefonte site approximately seven miles northeast of Scottsboro, Alabama. In conjunction with the Commission's consideration and denial of two potentially dispositive contentions proffered by Joint Petitioners contesting the agency's authority to permit such a CP reinstatement, on January 7, 2010, their petition was referred for consideration by an Atomic Safety and Licensing Board. According to the Commission's referral, that board should determine in the first instance whether Joint Petitioners have standing and have proffered one or more admissible contentions among their

remaining seven issue statements so as to provide the basis for further consideration of their concerns in an adjudicatory hearing. Acting pursuant to that referrral, TVA and the Nuclear Regulatory Commission (NRC) staff, in addition to positing challenges to the standing of petitioners SACE and BEST, have contested the admissibility of the balance of Joint Petitioners' contentions before this Licensing Board.

For the reasons set forth below, we find that, although petitioners BREDL and SACE have established their standing in this proceeding, they have failed to proffer an admissible contention and, accordingly, we dismiss their hearing petition.

I. BACKGROUND

A. Part 50 Licensing Process Associated with Bellefonte Units 1 and 2

Before outlining the pertinent procedural history associated with the Joint Petitioners hearing request, because of the somewhat unusual nature of this proceeding we consider it useful to provide a brief explanation outlining the nature of the Part 50 licensing process that is applicable to Bellefonte Units 1 and 2. In that regard, two aspects of that process are pertinent to this case: (1) the two-step licensing process under which an applicant such as TVA must obtain two separate agency authorizations, a CP and an operating license (OL), before it can begin operating a power reactor unit; and (2) the CP extension process, under which the construction completion date specified in a Part 50 CP can be prolonged to permit the CP holder to finish construction of a facility. Below, we provide pertinent background information on each of these aspects of the Part 50 licensing regime.

1. CP/OL Licensing Process

As it turns out, the Bellefonte facility provides a unique backdrop for an overview of the agency's reactor licensing schemes, both past and present, given that TVA has pending

construction and/or operation authorization proposals for reactor units that are subject to either the long-standing Part 50 CP/OL licensing regimen or the newer 10 C.F.R. Part 52 combined license (COL) process for authorizing the construction and operation of nuclear reactors.

As the licensing board described the COL process in its initial prehearing decision in the currently ongoing Part 52 proceeding regarding Bellefonte Units 3 and 4,[1] which TVA proposes to construct and operate at its existing Bellefonte site utilizing the Westinghouse Electric Corporation AP1000 advanced passive pressurized water reactor certified design,

> an entity may apply for a single COL that authorizes both new reactor construction and operation. Specifically, Subpart C of Part 52 establishes procedures for the issuance of a combined construction permit and conditional operating license for a nuclear power plant and the conduct of the hearing that is afforded for a COL. The COL is "essentially a construction permit which also requires consideration and resolution of many of the issues currently considered at the operating license stage." See Early Site Permits; Standard Design Certifications; and Combined Licenses for Nuclear Power Reactors, 53 Fed. Reg. 32,060, 32,062 (Aug. 23, 1988).

Tennessee Valley Authority (Bellefonte Nuclear Power Plant, Units 3 and 4), LBP-08-16, 68 NRC 361, 374 (2008), rev'd in part, CLI-09-3, 69 NRC 68 (2009), and referred ruling declined, CLI-09-21, 70 NRC __ (Nov. 3, 2009). In contrast, as that board noted in describing the CP/OL process,

> [t]he 10 C.F.R. Part 50 licensing process that was applied to the 104 commercial nuclear power plants currently operating in the United States requires that an applicant first obtain a construction permit for the facility, followed by an operating license. Both licenses are issued separately and, under section 189a of the Atomic Energy Act (AEA) of 1954, as amended, 42 U.S.C. § [2239a], hearing rights accrue separately as to each requested permission.

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[1] Although it has the same administrative judges as members, this Board is a separate entity from the licensing board conducting the COL proceeding for proposed Bellefonte Units 3 and 4.

Id. Further, in the statement of considerations accompanying the initial Part 52 proposed rule, the Commission offered this explanation of the reasons for, as well as the scope of, the two elements of the Part 50 CP/OL process:

> In the early years of the nuclear power industry, there were many first-time nuclear plant applicants, designers, and consultants, and many novel design concepts. Accordingly, the process was structured to allow licensing decisions to be made while design work was still in progress and to focus on case-specific reviews of individual plant and site considerations. Construction permits were commonly issued with the understanding that open safety issues would be addressed and resolved during construction, and that issuance of a construction permit did not constitute Commission approval of any design feature. Consequently, the operating license review was very broad in scope.

53 Fed. Reg. at 32,065. In addition to the broad scope of the OL proceeding, however, it was also a well-established precept regarding the risk that accrues to an applicant under the Part 50 process that

> [w]hen an applicant receives a construction permit . . . , it proceeds at its own risk. Prior to operation, the applicant must satisfy all safety requirements; and if additional research performed or data acquired during construction indicates that any safety requirement cannot be satisfied, the operating license must be denied or appropriately conditioned. . . . [T]his is so regardless of the amount of money which an applicant may have expended during construction.

Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-123, 6 AEC 331, 355 (1973); see also Northern Indiana Pub. Serv. Co. (Bailly Generating Station, Nuclear-1), CLI-79-11, 10 NRC 733, 742-43 (1979) (possession of CP no guarantee that OL will be received; if any aspect of facility fails to pass muster at OL stage, applicant bears risk the plant will not be allowed to operate).

Yet, notwithstanding the use of this Part 50 process to authorize construction and operation of the existing United States power reactor fleet, its two-step procedure was found to be less than ideal, as the Commission explained in the statement of considerations

accompanying the initial proposed Part 52 rulemaking to establish the alternative COL licensing process:

> As presently constituted, the American population of nuclear power reactors consists largely of one-of-a-kind designs. Experience has shown that the highly individualistic character of this population has consumed enormous resources in the processes of design, construction, and safety review. Because, typically, design of a plant was not complete when construction of it began, many safety questions were not resolved until late in the licensing proceeding for that plant. This late resolution of questions introduced great uncertainty into proceedings, because the process of resolution often entailed lengthy safety reviews, construction delays, and backfits.

53 Fed. Reg. at 32,068. Although the Part 50 regime remains a licensing option, apparently these aspects of the process make it unattractive as an authorization mechanism given that all the applications for the seventeen new power reactor units currently pending with the agency have invoked the Part 52 COL process.

2. Construction Permit Extension Process

In addition to this outline of the Part 50 CP/OL licensing procedure, a brief exposition concerning the process associated with extending a CP also provides useful background in this instance. Following (1) a safety and environmental review of a CP application by the staff; (2) a safety review of the application by the Advisory Committee on Reactor Safeguards; (3) an adjudicatory hearing on any safety or environmental challenges to the application raised by any intervening party; and (4) a “mandatory hearing” in which safety and environmental matters not at issue in the contested adjudication are considered by a presiding officer (which could be either the Commission or a three-member Atomic Safety and Licensing Board), assuming all issues are appropriately resolved, the CP would be issued to the applicant. Consistent with AEA section 185a, 42 U.S.C. § 2235(a), the CP specifies a date by which construction of the unit is to be completed. If the CP holder is unable to finish construction by the date specified in

the permit, under 10 C.F.R. § 50.55(b) the CP holder can apply for and obtain an extension of the CP. In doing so, it must provide "good cause" for the extension, a standard that is specified in AEA section 185a and whose application in this proceeding is discussed in more detail in section II.B below. As was the case with the initial CP application, the extension request could be the subject of an adjudicatory hearing challenge by a petitioner.

Additionally, if for some reason a CP holder wishes to discontinue construction activities at a facility but continue to have its Part 50 construction authorization remain effective, it can do so under the terms of a 1987 Commission policy statement. In that issuance, the Commission outlines the maintenance, preservation, and documentation requirements that would apply to a facility in such a "deferred" status. See Commission Policy Statement on Deferred Plants, 52 Fed. Reg. 38,077, 38,078-79 (Oct. 14, 1987). The policy statement also describes the process under which, at the CP holder's request, the facility can be reactivated from deferred status so that construction can begin again, which includes providing 120 days notice to the staff before restarting construction activities. See id. at 38,079. Finally, the policy statement sets forth the process under which a plant could be placed in a terminated status pending the withdrawal of the CP, as well as the procedures and requirements associated with reactivating the facility from terminated status (assuming the CP has not been withdrawn). See id. at 38,079-80.

With this background, we turn to a brief description of the procedural posture of this proceeding as it recently has come before this Board.

B. Bellefonte Units 1 and 2 CP Reinstatement Proceeding

Because the Bellefonte Units 1 and 2 CPs that are the subject of this proceeding were first granted by the Atomic Energy Commission, the NRC's regulatory predecessor, back in December 1974, see [TVA], (Bellefonte Nuclear Plant, Units 1 and 2) Notice of Issuance of

Construction Permits, 39 Fed. Reg. 45,313 (Dec. 31, 1974), those construction authorizations, along with the August 2008 TVA reinstatement request that is the focus of Joint Petitioners' pending May 2009 hearing request, have substantial background associated with them as well. The pertinent historical backdrop was, however, detailed by the Commission in its January 2010 ruling on the first two of Joint Petitioners' nine contentions and need not be restated here. See CLI-10-6, 70 NRC __, __-__ (slip op. at 1-7) (Jan. 7, 2010). For the purpose of this decision regarding the admissibility of the Joint Petitioners hearing request, we need only note that, notwithstanding the 2006 agency approval of a TVA request to withdraw the CPs for Units 1 and 2, in August 2008 TVA filed a request to have the permits for both units reinstated, which it subsequently supplemented with an environmental assessment (EA). See Letter from Ashok S. Bhatnager, TVA Senior Vice President, to NRC Document Control Desk at 1, 5 (Aug. 26, 2008) (ADAMS Accession No. ML082410087) [hereinafter TVA Reinstatement Request]; Letter from Jack A. Bailey, TVA Vice President, to NRC Document Control Desk encl. (Sept. 25, 2008) (TVA EA) (ADAMS Accession No. ML082730756); Letter from Jack A. Bailey, TVA Vice President, to NRC Document Control Desk encl. (Nov. 24, 2008) (TVA response to staff request for additional information regarding EA) (ADAMS Accession No. ML083360045). After generating its own National Environmental Policy Act (NEPA)-related EA and a safety evaluation (SE) regarding the TVA CP reinstatement request, see [TVA]; Bellefonte Nuclear Power Plant, Units 1 and 2, [EA] and Finding of No Significant Impact, 74 Fed. Reg. 9308 (Mar. 3, 2009) [hereinafter Staff EA]; 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 (Mar. 9, 2009) (ADAMS Accession No. ML090620052) [hereinafter Staff SE], the staff approved the TVA request in a March 2009 order that also afforded interested persons a hearing

opportunity to challenge its determination, albeit with the caveat that "any proceeding hereunder is limited to direct challenges to the permit holder's asserted reasons that show good cause justification for the reinstatement of the CPs," In the Matter of [TVA] (Bellefonte Nuclear Plant Units 1 and 2); Order, 74 Fed. Reg. 10,969, 10,970 (Mar. 13, 2009). Thereafter, when Joint Petitioners lodged their hearing request on May 8, 2009, see Petition for Intervention and Request for Hearing by [Joint Petitioners] (May 8, 2009) [hereinafter Intervention Petition], the Commission decided to consider, in the first instance, the question of the agency's authority to grant the requested relief, as framed in Contentions 1 and 2 in Joint Petitioners' hearing request. These contentions were the subject of the January 2010 Commission determination referenced above. We thus pick up the narrative of events beginning with the Commission's January 7 ruling, which referred Joint Petitioners' intervention request to the Atomic Safety and Licensing Board Panel for further consideration. See CLI-10-6, 71 NRC at __ (slip op. at 20).

Acting in response to the Commission's referral, on January 15, 2010, the Licensing Board Panel's Chief Administrative Judge established this Licensing Board to rule on that hearing petition and to preside over any subsequent adjudicatory proceeding. See [TVA]; Establishment of Atomic Safety and Licensing Board, 75 Fed. Reg. 3946 (Jan. 25, 2010). That same date, we issued an initial prehearing order that established a schedule for (1) TVA and staff answers to the Joint Petitioners hearing request, which permitted those participants to provide their views on the previously unaddressed questions of Joint Petitioners' standing and the admissibility of their remaining seven issue statements, including additional basis information subsequently provided by Joint Petitioners relative to their Contentions 5 and 6;[2]

[2] In connection with their Contentions 5 and 6, Joint Petitioners sought to supplement their May 2009 hearing petition in July 2009 and January 2010, respectively. See Joint Intervenors' Supplemental Basis for Previously Submitted Contention 5 - Lack of Good Cause (July 15, 2009) [hereinafter Contention 5 Supplement]; Joint Petitioners' Supplemental Basis for (continued...)

and (2) Joint Petitioners' reply to those TVA and staff answers. See Licensing Board Memorandum and Order (Initial Prehearing Order) (Jan. 15, 2010) at 3 (unpublished). Thereafter, at the Board's prompting, the participants provided, and the Board adopted, a joint report designating March 1, 2010, as the date upon which they would be available to conduct a day-long initial prehearing conference during which the Board would hear oral argument on designated contested matters associated with the Joint Petitioners intervention petition. See Licensing Board Memorandum and Order (Scheduling Initial Prehearing Conference) (Jan. 21, 2010) at 1-3 (unpublished); Licensing Board Memorandum and Order (Scheduling Initial Prehearing Conference) (Feb. 2, 2010) at 1-2 (unpublished).

In accord with the Board-established schedule, on January 29, 2009, both TVA and the staff submitted their answers to the Joint Petitioners hearing request. See Answer of [TVA] Opposing the Petition for Intervention and Request for Hearing by [Joint Petitioners] (Jan. 29, 2010) [hereinafter TVA Answer]; 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 [QA/QC] Requirements (Jan. 29, 2010) [hereinafter Staff Answer]. Subsequently, following an eleven-day delay in submitting their reply filing

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[2](...continued)
Previously Submitted Contention 6 - TVA Has Not and Cannot Meet the NRC's Quality Assurance and Quality Control [(QA/QC)] Requirements (Jan. 11, 2010) [hereinafter Contention 6 Supplement]. Moreover, as to each contention supplement, TVA submitted a motion to strike, to which Joint Petitioners submitted a response. See [TVA] Motion to Strike Petitioners' Supplemental Basis for Proposed Contention 5 (July 17, 2009) [hereinafter Motion to Strike Contention 5 Supplement]; Petitioners' Opposition to [TVA] Motion to Strike Petitioners' Supplemental Basis for Proposed Contention 5 (July 27, 2009) [hereinafter Motion to Strike Contention 5 Supplement Response]; [TVA] Motion to Strike Petitioners' Supplemental Basis for Proposed Contention 6 (Jan. 14, 2010) [hereinafter Motion to Strike Contention 6 Supplemental Basis]; Joint Petitioners' Answer to [TVA] Motion to Strike Supplemental Basis for Contention 6 (Jan. 25, 2010) [hereafter Motion to Strike Contention 6 Supplemental Basis Response].

engendered by their search for counsel to represent them and a nearly-week long February 5-11, 2010 mid-Atlantic region snow event, on February 16, 2010, Joint Petitioners filed their response to the TVA and staff answers. See Petitioners' Reply to NRC Staff's and TVA's Answers in Opposition to Petition for Intervention and Request for Hearing (Feb. 16, 2010) [hereinafter Joint Petitioners Reply]; see also Licensing Board Memorandum and Order (Ruling on Motion for Additional Time; Prehearing Conference Argument Time Allocations; Webstreaming; Written Limited Appearance Statements) (Feb. 18, 2010) at 1-5 (unpublished). Then, on March 1, 2010, the Licensing Board conducted the previously-scheduled initial prehearing conference during which it entertained argument from counsel for the participants regarding the application of the AEA section 185a "good cause" standard and the admissibility of Joint Petitioners' seven remaining contentions. See Tr. at 1-197.

II. ANALYSIS

A. Joint Petitioners' Standing

1. Standards Governing Standing

In determining whether an individual or organization is an "interested person" under section 189a of the Atomic Energy Act (AEA) of 1954, 42 U.S.C. § 2239(a)(1)(A), that has standing "as of right" such that it can be granted party status in a proceeding in accord with 10 C.F.R. § 2.309(d),[3] the Commission applies contemporaneous judicial standing concepts

[3] In pertinent part, section 2.309(d)(1) requires that a hearing request/intervention petition must state (1) the name, address, and telephone number of the requestor/petitioner; (2) the nature of the requestor's/intervenor's right under the AEA to be made a party to the proceeding; (3) the nature and extent of the requestor's/petitioner's property, financial, or other interest in the proceeding; and (4) the possible effect of any decision or order issued in the proceeding on the petitioner's/requestor's interest. Additionally, section 2.309(d)(3) mandates that the presiding officer determine whether, considering these factors, the requestor/petitioner is a person whose interest may be affected by the proceeding in accord with AEA section 189a.

that require a participant to establish that (1) it has suffered or will suffer a distinct and palpable injury that constitutes injury-in-fact within the zones of interests arguably protected by the governing statutes (e.g., the AEA, 42 U.S.C. § 2011 et seq., NEPA, 42 U.S.C. § 4321 et seq.); (2) the injury is fairly traceable to the challenged action; and (3) the injury is likely to be redressed by a favorable decision. See Yankee Atomic Elec. Co. (Yankee Nuclear Power Station), CLI-96-1, 43 NRC 1, 6 (1996). Further, in proceedings involving the possible construction or operation of a nuclear power reactor, including proceedings regarding the extension of a construction permit, proximity to the proposed facility has been considered sufficient to establish standing. See PPL Bell Bend, LLC (Bell Bend Nuclear Power Plant), CLI-10-7, 71 NRC __, __ (slip op. at 6) (Jan. 7, 2010); Calvert Cliffs 3 Nuclear Project, LLC (Combined License Application for Calvert Cliffs, Unit 3), CLI-09-20, 70 NRC __, __ (slip op. at 4-5) (Oct. 13, 2009); Northern Indiana Pub. Serv. Co. (Bailly Generating Station, Nuclear 1), ALAB-619, 12 NRC 558, 564-65 (1980). The proximity presumption applies when an individual or organization, or an individual authorizing an organization to represent his or her interests as the organization seeks to establish its representational standing, resides within fifty miles of the proposed facility or has "frequent contacts" with the area affected by the proposed facility. Calvert Cliffs, CLI-09-20, 70 NRC at __ (slip op. at 4-5); see Bell Bend, CLI-10-7, 71 NRC at __ (slip op. at 6). To establish the requisite proximity, however, a petitioner must clearly indicate where it resides and/or what contact it has with the site. See Florida Power & Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-91-2, 33 NRC 42, 47 (1991) (no standing when petitioner alleged proximity but failed to state his physical address or elaborate on the extent of his activities in the area). Ultimately, it is the petitioner's responsibility to “provide enough detail to allow the Board to distinguish a casual interest from a substantial one.” Bell Bend, CLI-10-7, 71 NRC at __ (slip op. at 7).

We apply these rules and guidelines in evaluating each of Joint Petitioners' standing presentations.

2. Southern Alliance for Clean Energy (SACE)

DISCUSSION: Intervention Petition at 3-7; TVA Answer at 16-18; Staff Answer at 11; Joint Petitioners Reply at 1-2.

RULING: SACE is a not-for-profit organization the members of which oppose reinstatement of the CPs for Bellefonte Units 1 and 2. Attached to Joint Petitioners' hearing request are the affidavits of three SACE members, each of whom states that SACE is authorized to represent his or her interests in this proceeding. The information provided in these affidavits also indicates that two of these members reside within fifty miles of the Bellefonte site, and at least one lives within approximately forty miles of the facility.[4]

Although the staff does not question SACE's standing to participate in this CP reinstatement proceeding, TVA asserts that SACE lacks standing because, notwithstanding the affidavits of the various individuals authorizing SACE to represent his or her interests as an organization, no one entered a timely appearance on behalf of SACE to act as its representative in accordance with 10 C.F.R. § 2.314(b). According to TVA, this result follows from the fact that it was not until February 16, some three weeks after the date established for the entry of notices of appearance in the Board's January 15, 2010 initial prehearing order, that an appearance notice was first submitted by Joint Petitioners' new legal counsel indicating he would be representing SACE in this proceeding.

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[4] Consistent with the jurisdictional nature of standing under the AEA and the Board's independent obligation to make a standing determination regardless of whether there is a challenge to a petitioner's standing, cf. Summers v. Earth Island Inst., 129 S. Ct. 1142, 1152 (2009) (court must make independent assessment of Article III standing claims), and in accord with 10 C.F.R. § 2.337(f), the Google Maps distance measurement tool was used to verify these distances relative to the Bellefonte site using the home addresses given in the affidavits provided in support of the Joint Petitioners hearing request.

We find the asserted health, safety, and environmental interests of the two individuals residing within fifty miles of the Bellefonte facility and their agreement to permit SACE to represent their interests to be sufficient to establish SACE's representational standing to intervene in this CP reinstatement proceeding. Moreover, we do not consider the fact that SACE did not have a designated representative until February 16 negates this finding regarding the organization's standing.

The date for the filing of appearance notices set by the Board in its initial prehearing conference order was established to try to ensure, particularly given the longstanding nature of this proceeding, that each participant had provided current authorized representative contact information to the Board and the other participants. This information identifying the individual or individuals authorized to act on behalf of each participant should provide the means whereby any participant needing to reach another participant's authorized representatives to serve a filing or have a discussion about any litigation-related matters will be able to do so. The failure of an organizational participant to have a representative provide an appearance notice in accord with section 2.314(b) might, as could be the case for any other unresolved procedural deficiency that persists without adequate justification, provide cause for an appropriate sanction for failure properly to prosecute the litigation. Contrary to TVA's suggestion, however, such a failure does not fall into the same category as, for example, the failure under 10 C.F.R. § 2.309(d) to support an intervention petition with affidavits providing necessary information regarding the basis for representational standing, a deficiency directly associated with a petitioner's standing that could interpose a jurisdictional flaw potentially warranting the participant's dismissal from the proceeding.[5]

[5] Certainly, nothing in the agency's rules of practice suggests that a section 2.314(b) appearance notice, or the lack thereof, has the significance attributed to it by

(continued...)

Given that the individual who signed the SACE hearing petition in this proceeding, although not a lawyer, apparently was aware of the process for submitting an appearance notice based on her participation in the Bellefonte COL proceeding, see Notice of Appearance for Sara Barczak (Apr. 2, 2008) (Docket Nos. 52-014-COL & 52-015-COL), it is not clear why she (or some other individual) did not undertake that relatively straightforward action on behalf of SACE in this CP reinstatement case. Nonetheless, SACE (along with the other Joint Petitioners) now has counsel who, in conformity with section 2.314(b), has entered an appearance on its behalf so as to be identified as available to file and receive pleadings and make representations for the organization. In any event, the timing of SACE's designation of a representative provides us with no basis for concluding that the organization lacks standing in accord with 10 C.F.R. § 2.309(d).

3. Blue Ridge Environmental Defense League (BREDL)

DISCUSSION: Intervention Petition at 3-7; TVA Answer at 17; Staff Answer at 11; Joint Petitioners Reply at 1-2.

RULING: BREDL likewise is a not-for-profit organization whose members oppose reinstatement of the CPs for Bellefonte Units 1 and 2. Attached to the Joint Petitioners hearing request are the affidavits of eighty-six BREDL members, each of whom states that BREDL is authorized to represent his or her interests in this proceeding. Per the information provided in these affidavits, at least seventy-seven of these members reside within fifty miles of the Bellefonte site, and at least one lives within five miles of the facility. BREDL's standing is not contested by TVA or the staff. See supra note 4.

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[5](...continued)
TVA. Indeed, exactly when a notice of appearance must be filed (or a notice of withdrawal submitted when an attorney or representative is no longer acting as a participant representative) is not specified in the agency's rules of practice.

We find the asserted health, safety, and environmental interests of each of these seventy-seven individuals residing within fifty miles of the Bellefonte facility and their agreement to permit BREDL to represent their interests sufficient to establish BREDL's representational standing to intervene in this CP reinstatement proceeding.

4. Bellefonte Efficiency and Sustainability Team (BEST)

DISCUSSION: Intervention Petition at 3-7; TVA Answer at 16-17 & n.84; Staff Answer at 11-12; Joint Petitioners Reply at 1-2.

RULING: As TVA noted, while Joint Petitioners in their hearing request mentioned BEST in several places, they explicitly claimed standing only for BREDL and SACE. Previously, BEST had been described as a chapter of BREDL, founded in February 2008, and sharing the same attributes and goals as BREDL, which was categorized as "'a league of community groups called "chapters." BREDL and its chapters are unitary, with a common incorporation, financial structure, board of directors and executive officer.'" Bellefonte COL, LBP-08-16, 68 NRC at 379 (quoting Petition for Intervention and Request for Hearing by [BEST, BREDL, and SACE] (June 6, 2008) at 3 (Docket Nos. 52-014-COL and 52-015-COL)). While TVA contends that BEST's treatment in the petition established that it is not a separate entity from BREDL, the staff asserts that BEST should not be admitted as a party because it has failed to establish either its organizational or representational standing.

BEST has not made any showing of harm to its organizational interests. Moreover, to whatever extent a chapter and its parent organization can have simultaneous representational standing, not one of the affidavits from individuals living in the vicinity of the Bellefonte site that were provided by Joint Petitioners, all of which are in substantially the same form, makes any mention of BEST or states that BEST is authorized to represent the affiant's interests. Nor do we find applicable the line of United States Supreme Court cases cited in the Joint Petitioners

reply brief for the proposition that "if one party's standing has been established, the standing of allied parties is not to be questioned." Joint Petitioners Reply at 2 (citing Clinton v. City of New York, 524 U.S. 417, 431 n.19 (1998); U.S. Dep't of Labor v. Triplett, 494 U.S. 715, 719 (1990); Bd. of Natural Res. v. Brown, 992 F.2d 937, 942 (9th Cir. 1993)). It is well-established in NRC jurisprudence that each intervening participant that wishes to be a party to a proceeding must establish its own standing, see Commonwealth Edison Co. (Dresden Nuclear Power Station, Unit 1), CLI-81-25, 14 NRC 616, 623 (1981), a showing that depends on the particular circumstances associated with that participant rather than the standing of other entities or individuals with whom it may claim to be aligned relative to the substance of the matters at issue in the proceeding.

As was the case previously, because none of the affidavits submitted in support of Joint Petitioners' hearing request in this proceeding indicates BEST represents the interests of the submitter, BEST has failed to establish it has standing. See Bellefonte COL, LBP-08-16, 68 NRC at 379-80 (BREDL chapter BEST lacks standing because none of affidavits supporting standing mentions affiliation with BEST); see also Virginia Elec. and Power Co. (Combined License Application for North Anna Unit 3), LBP-08-15, 68 NRC 294, 304 (2008) (BREDL chapter People's Alliance for Clean Energy (PACE) lacks standing because none of affidavits supporting standing mention affiliation with PACE). Accordingly, to the degree BEST is seeking party status in this proceeding, that request must be denied.

B. Standard Governing CP Reinstatement Proceeding

DISCUSSION: TVA Answer at 21-22; Staff Answer at 10-11; Joint Petitioners Reply at 2-4; Tr. at 15-32.

RULING: For most agency licensing authorizations, the standards that govern what an applicant must show to obtain a favorable determination are well established in NRC

jurisprudence. The TVA request to reinstate the Part 50 CPs for Bellefonte Units 1 and 2 seemingly is not one of those permitting actions, as evidenced by the Commission's early involvement in this proceeding to resolve the question of the agency's authority to entertain and act upon the TVA request. See CLI-10-6, 71 NRC at __-__ (slip op. at 9-20). Moreover, despite the Commission majority declaring in CLI-10-6 that the "good cause" standard associated with AEA section 185a is to be the governing precept for this proceeding, according to Joint Petitioners, the exact parameters of that standard in this sui generis CP reinstatement case are not clear. The application of that standard in this case, Joint Petitioners contend, is not necessarily governed by how that standard has been applied in the previous CP extension proceedings, notwithstanding their resemblance to the proceeding now before us. Below, we explore Joint Petitioners' assertion in more detail in the context of addressing their argument regarding the meaning of "good cause" relative to TVA's CP reinstatement request.

As we noted previously, in its March 2009 order granting the TVA CP reinstatement request, the staff provided a hearing opportunity for anyone adversely affected by the request, declaring that any "request for a hearing is limited to whether good cause exists for the reinstatement of the CPs" and that the scope of the reinstatement order "and any proceeding hereunder is limited to direct challenges to the permit holder's asserted reasons that show good cause justification for the reinstatement of the CPs." 74 Fed. Reg. at 10,969, 10,970. Thereafter, in referring Joint Petitioners' remaining contentions challenging the Bellefonte CP reinstatement to a licensing board, the Commission stated with respect to the scope of review governing the board's consideration of the hearing request that the board should

> decide in the first instance whether petitioners have established standing and have raised admissible contentions and if so, given their claims, whether reinstatement on the particular facts presented here is lawful and proper -- that is, whether there is "good cause" for the reinstatement.

CLI-10-6, 71 NRC at __ (slip op. at 19) (emphasis added). The Commission thus expressly directed the Board to restrict its inquiry in the instant proceeding, including its consideration of contention admissibility matters, in line with the "good cause" standard.

As the Commission also made clear, the "good cause" standard to which it was referring is that which arises under AEA section 185a, "the only statutory provision that addresses construction permits." Id. at __ (slip op. at 9). Specifically, AEA section 185a states that

> [a] construction permit shall state the earliest and latest dates for the completion of the construction or modification. Unless the construction or modification of the facility is completed by the completion date, the construction permit shall expire, and all rights thereunder be forfeited, unless upon good cause shown, the Commission extends the completion date.

42 U.S.C. § 2235(a) (emphasis added). Further, the Commission regulation that implements this good cause standard, 10 C.F.R. § 50.55(b), declares that

> upon good cause shown, the Commission will extend the completion date for a reasonable period of time. The Commission will recognize, among other things, developmental problems attributable to the experimental nature of the facility or fire, flood, explosion, strike, sabotage, domestic violence, enemy action, an act of the elements, and other acts beyond the control of the permit holder, as a basis for extending the completion date.

As AEA section 185 and this regulation adumbrate, up to this point the good cause standard's bailiwick has been the CP extension proceeding. Nonetheless, given the Commission's direction in CLI-10-6 that "good cause" should be the standard that governs our consideration of the TVA CP reinstatement request for Bellefonte Units 1 and 2, a principal task for us here is to determine how that standard should apply in this proceeding.

According to Joint Petitioners, "the Commission cast the Board and the parties into uncharted waters without a rudder" because neither the Commission in its January 2010 ruling nor the AEA or implementing agency regulations provide relevant guidance about applying the good cause standard in a CP reinstatement proceeding such as this one. Joint Petitioners

Reply at 2. Declaring that the good cause standard as it has been employed in the past in CP extension cases "is retrospective in nature, as it addresses the applicant's past negligence or culpability," Joint Petitioners assert that the Board in this CP reinstatement proceeding should take a different tack and apply a "prospective" stance to address whether "the applicant can complete construction of the plant without jeopardizing public safety or the environment." Id. at 4; see also Tr. at 16-21. For their part, both TVA and the staff, citing the Commission's Seabrook CP extension decision, Pub. Serv. Co. of New Hampshire (Seabrook Station, Unit 2), CLI-84-6, 19 NRC 975, 978 (1984), declare that an admissible contention under the good cause standard must allege that a permit holder's reasons for past delay failed to constitute good cause for a CP extension and be supported by a showing that construction delay is traceable to permit holder action that was intentional and without a valid business purpose. See TVA Answer at 21; Staff Answer at 10-11; see also Tr. at 22-29.

Guidance regarding the meaning and scope of the "good cause" standard as the Commission intended it to be applied here seems to us to be provided by an earlier Commission decision regarding the application of "good cause" in the context of a CP extension proceeding. In Washington Pub. Power Supply Sys. (WPPSS Nuclear Project Nos. 1 & 2), CLI-82-29, 16 NRC 1221 (1982), with two hearing petitions regarding a Part 50 CP extension request pending before it prior to referral to a licensing board, the Commission took the opportunity to outline its understanding of the basic parameters under which the AEA section 185a "good cause" standard was to be applied. And in that regard, the Commission noted:

> Although the congressional intent behind section 185 may be somewhat ambiguous, we discern no intent on the part of Congress to require the periodic relitigation of health, safety, or environmental questions in agency adjudications between the time a construction permit is granted and the time the facility is authorized to operate. Rather, interested persons have been legislatively afforded a particular opportunity to raise such issues in the context of a proceeding in which the agency determines

whether an operating license will be granted. 42 U.S.C. § 2239(a). Consistency with the congressionally mandated two-step licensing process suggests a construction of section 185 that limits the scope of litigable issues with regard to the extension of a construction permit.

In line with this interpretation of section 185 is the language of the Commission's regulation implementing section 185. 10 CFR § 50.55(b) speaks in terms of Commission consideration of "developmental problems attributable to the experimental nature of the facility" and "acts beyond the control of the permit holder." Its thrust is clearly that the Commission's inquiry will be into reasons that have contributed to the delay in construction and whether those reasons constitute "good cause" for the extension. This same limitation should apply if an interested person seeks to challenge the request for an extension.

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 license proceeding. This opportunity is afforded all persons under 10 CFR § 2.206, which allows any person to seek the institution of a show cause proceeding under 10 CFR § 2.202. The invocation of this procedure under section 2.206, which does not depend on the fortuity of a delay in the completion of a plant that triggers a permit extension request, requires that the NRC staff give serious consideration to requests for regulatory action concerning a licensed facility so long as the request specifies the action sought and sets forth the facts that constitute the basis of the request. The staff must analyze the technical, legal, and factual basis for the relief requested and respond either by undertaking some regulatory activity or, if it believes no show-cause proceeding or other action is necessary, by advising the requestor in writing with a statement of reasons explaining that determination. . . .

We believe that the most "common sense" approach to the interpretation of section 185 and 10 CFR § 50.55 is that 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. The avenue afforded for the expression of health, safety, and environmental concerns in any pending operating license proceeding, or in the absence of such a proceeding, in a petition under 10 CFR § 2.206 would be exclusive despite the pendency of a construction permit extension request. This does not mean, however, that no challenge can be made to an application for an extension of a construction permit completion date. In seeking an extension, a permit holder must put forth reasons, founded in fact, that explain why the delay

> occurred and those reasons must, as a matter of law, be sufficient to sustain a finding of good cause. Certainly, the factual basis for the reasons for delay asserted are always open to question in that the permit holder cannot invent reasons that did not exist. Moreover, the permit holder cannot misrepresent those reasons upon which it seeks to rely . . . . An intervenor is thus always free to challenge a request for a permit extension by seeking to prove that, on balance, delay was caused by circumstances that do not constitute "good cause."

Id. at 1228-30 (footnote omitted). Utilizing this guidance, the Commission found one of the ten contentions in the hearing petitions before it admissible and sent that issue statement to a licensing board for further consideration. See id. at 1230-31.

From this passage, two Commission-endorsed principles are apparent relative to the "good cause" standard. One is that an AEA section 185-related Part 50 CP proceeding is not to become a substitute for an ongoing or future Part 50 OL proceeding, albeit with section 2.206 providing an avenue for raising safety and environmental concerns regarding a proposed facility pending the OL proceeding. The other is that the "good cause" rationale that must be put forth by the CP holder to justify the relief sought is to be the focus of any intervenor challenge to the CP holder's request. A number of subsequent agency cases, such as the Commission's Seabrook case cited by TVA and the staff and the later Commission decision in Texas Util. Elec. Co. (Comanche Peak Steam Electric Station, Unit 1), CLI-86-15, 24 NRC 397 (1986), have devoted substantial attention to exploring the parameters of the latter precept in the context of making CP extension request contention admissibility determinations.[6] None of these rulings, however, suggests any diminution of the tenet that for Part 50 applications, safety and

[6] Although the Commission in its WPPSS decision pretermitted the question of "the permissible scope for contentions that challenge a staff finding concerning the agency's [NEPA] responsibilities with regard to an extension of a construction completion date," CLI-82-29, 16 NRC at 1230 n.3, in this instance that issue is presented by several of Joint Petitioners' contentions raising questions about the sufficiency of the staff's February 2009 EA regarding the TVA CP reinstatement request.

environmental issues are generally to be adjudicated in the OL proceeding rather than an AEA section 185 "good cause" proceeding regarding the continued viability of a previously-issued CP. Certainly, as is outlined in the discussion in section I.A above, nothing in the Commission's more-recent adoption of the Part 52 COL process suggests that the Commission has identified any basis under the Part 50 rules to back away from the traditional application of that two-step licensing process, notwithstanding its acknowledged tendency to "backload" issues and thereby create substantial scheduling and resource uncertainties.

The general concern Joint Petitioners espouse regarding the potential for a significant squandering of time and resources if, at the OL stage, one or more of the matters they seek to raise in this CP reinstatement proceeding are found to mandate the denial of, or substantial revisions to, the OL license for Unit 1 and/or Unit 2, is not untoward. Nonetheless, in our judgment, it is not a sufficient basis for the Board to deviate from the well-established, Commission-endorsed approach to the application of the "good cause" standard in AEA section 185-related Part 50 CP proceedings as outlined in the Commission's WPPSS decision and subsequent determinations. We thus make our contention admission rulings regarding the scope of this proceeding consistent with this conclusion.

C. Admissibility of Joint Petitioners' Contentions

1. Contention Admissibility Standards

Section 2.309(f) of the Commission's rules of practice specifies the requirements that must be met if a contention is to be deemed admissible. Specifically, a contention must provide (1) a specific statement of the legal or factual issue sought to be raised; (2) a brief explanation of the basis of the contention; (3) 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 hearing; and (4) sufficient information

demonstrating that a genuine dispute exists in 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. See 10 C.F.R. § 2.309(f)(1)(i), (ii), (v), and (vi). In addition, the petitioner must demonstrate that the issue raised in the contention is both "within the scope of the proceeding" and "material to the findings the NRC must make to support the action that is involved in the proceeding." Id. § 2.309(f)(1)(iii)-(iv). Failure to comply with any of these requirements is grounds for dismissing a contention. See Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-99-10, 49 NRC 318, 325 (1999); see also Arizona Pub. Serv. Co. (Palo Verde Nuclear Station, Units 1, 2, and 3), CLI-91-12, 34 NRC 149, 155-56 (1991). NRC case law has further developed these requirements, as is summarized below:

a. Challenges to Statutory Requirements/Regulatory Process/Regulations

An adjudication is not the proper forum for challenging applicable statutory requirements or the basic structure of the agency's regulatory process. See Philadelphia Elec. Co. (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-216, 8 AEC 13, 20, aff'd in part on other grounds, CLI-74-32, 8 AEC 217 (1974). Similarly, a contention that attacks a Commission rule, or which seeks to litigate a matter that is, or clearly is about to become, the subject of a rulemaking, is inadmissible. See 10 C.F.R. § 2.335; Potomac Elec. Power Co. (Douglas Point Nuclear Generating Station, Units 1 and 2), ALAB-218, 8 AEC 79, 85, 89 (1974). This includes contentions that advocate stricter requirements than agency rules impose or that otherwise seek to litigate a generic determination established by a Commission rulemaking.

See Florida Power & Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-01-6, 53 NRC 138, 159 (2001); Pacific Gas & Elec. Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), LBP-93-1, 37 NRC 5, 29-30 (1993); Pub. Serv. Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-82-06, 16 NRC 1649, 1656 (1982); see also Yankee Atomic Elec. Co. (Yankee Nuclear Power Station), CLI-96-7, 43 NRC 235, 251 (1996); Arizona Pub. Serv. Co. (Palo Verde Nuclear Generating Station, Units 1, 2, and 3), LBP-91-19, 33 NRC 397, 410, aff'd in part and rev'd in part on other grounds, CLI-91-12, 34 NRC 149 (1991). By the same token, a contention that simply states the petitioner's views about what regulatory policy should be does not present a litigable issue. See Peach Bottom, ALAB-216, 8 AEC at 20-21 & n.33.

b. Challenges Outside Scope of Proceeding

All proffered contentions must be within the scope of the proceeding as defined by the Commission in its initial hearing notice and order referring the proceeding to the Licensing Board. See 10 C.F.R. § 2.309(f)(1)(iii); Florida Power & Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-00-23, 52 NRC 327, 329 (2000); Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-825, 22 NRC 785, 790-91 (1985). As a consequence, any contention that falls outside the specified scope of the proceeding must be rejected. See Portland Gen. Elec. Co. (Trojan Nuclear Plant), ALAB-534, 9 NRC 287, 289 n.6 (1979).

c. Need for Adequate Factual Information or Expert Opinion

It is the petitioner's obligation to present factual information and/or expert opinion necessary to support its contention. See 10 C.F.R. § 2.309(f)(1)(v); Georgia Inst. of Tech. (Georgia Tech Research Reactor, Atlanta, Georgia), LBP-95-6, 41 NRC 281, 305, vacated in part and remanded on other grounds and aff'd in part, CLI-95-10, 42 NRC 1, and

CLI-95-12, 42 NRC 111 (1995). While a Board may appropriately view a petitioner's supporting information in a light favorable to the petitioner, failure to provide such information regarding a proffered contention requires that the contention be rejected. See Palo Verde, CLI-91-12, 34 NRC at 155. In this connection, neither mere speculation nor bare or conclusory assertions, even by an expert, alleging that a matter should be considered will suffice to allow the admission of a proffered contention. See Fansteel, Inc. (Muskogee, Oklahoma Site), CLI-03-13, 58 NRC 195, 203 (2003). If a petitioner neglects to provide the requisite support for its contentions, it is not within the Board's power to make assumptions of fact that favor the petitioner, nor may the Board supply information that is lacking. See Palo Verde, CLI-91-12, 34 NRC at 155; Duke Cogema Stone & Webster (Savannah River Mixed Oxide Fuel Fabrication Facility), LBP-01-35, 54 NRC 403, 422 (2001); Georgia Tech Research Reactor, LBP-95-6, 41 NRC at 305. Likewise, simply attaching material or documents as a basis for a contention, without setting forth an explanation of that information's significance, is inadequate to support the admission of the contention. See Fansteel, CLI-03-13, 58 NRC at 204-05. Along these lines, any supporting material provided by a petitioner, including those portions of the material that are not relied upon, is subject to Board scrutiny. See Yankee Atomic Elec. Co. (Yankee Nuclear Power Station), LBP-96-2, 43 NRC 61, 90 (1996), rev'd in part on other grounds, CLI-96-7, 43 NRC 235 (1996). Thus, the material provided in support of a contention will be carefully examined by the Board to confirm that on its face it does supply adequate support for the contention. See Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-919, 30 NRC 29, 48 (1989), vacated in part on other grounds and remanded, CLI-90-4, 31 NRC 333 (1990).

d. Materiality

To be admissible, the regulations require that all contentions assert an issue of law or fact that is material to the outcome of a licensing proceeding, meaning that the subject matter of the contention must impact the grant or denial of a pending license application. See 10 C.F.R. § 2.309(f)(1)(iv). This requirement of materiality often dictates that any contention alleging deficiencies or errors in an application also indicate some significant link between the claimed deficiency and either the health and safety of the public or the environment. See Yankee Nuclear, LBP-96-2, 43 NRC at 75-76; see also Pacific Gas & Elec. Co. (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), LBP-02-23, 56 NRC 413, 439-41 (2002), petition for review denied, CLI-03-12, 58 NRC 185, 191 (2003).

e. Insufficient Challenges to the Application

All properly formulated contentions must focus on the license application in question, challenging either specific portions of or alleged omissions from the application (including the Safety Analysis Report and the Environmental Report) so as to establish that a genuine dispute exists with the applicant on a material issue of law or fact. See 10 C.F.R. § 2.309(f)(1)(vi). Any contention that fails directly to controvert the application or that mistakenly asserts the application does not address a relevant issue will be dismissed. See Sacramento Mun. Util. Dist. (Rancho Seco Nuclear Generating Station), LBP-93-23, 38 NRC 200, 247-48 (1993), review declined, CLI-94-2, 39 NRC 91 (1994); Texas Util. Elec. Co. (Comanche Peak Steam Electric Station, Unit 2), LBP-92-37, 36 NRC 370, 384 (1992).

2. Joint Petitioners' Contentions

a. Contention 3: The Environmental Assessment Violated NEPA.

CONTENTION: Contention issue statement/basis language are not separately designated.[7]

DISCUSSION: Intervention Petition at 14-18; TVA Answer at 23-36; Staff Answer at 12-19; Joint Petitioners Reply at 6-7; Tr. at 32-70.

RULING: Inadmissible, in that this contention and its foundational support raise matters that impermissibly challenge the basic structure of the Commission's regulatory program and are either inaccurate or inadequate to establish that the issue raised is material to the proceeding or are insufficient to show that a genuine dispute on a material factual or legal issue exists so as to warrant admission of the contention. See 10 C.F.R. § 2.309(f)(1)(iii), (v), (vi); section II.C.1.a., c., d., e. supra.

As set forth in the Joint Petitioners hearing request, this contention raises two concerns. Initially, Joint Petitioners challenge the staff's February 24, 2009 EA regarding the NEPA-related impacts associated with the CP reinstatement for Bellefonte Units 1 and 2 as being prepared improperly because the EA came after a Commission decision had already been made regarding the reinstatement request. Additionally, they insist that a full environmental impact

[7] In setting forth their contentions, Joint Petitioners did not indicate which part of their discussion was the "specific statement of law or fact to be raised or converted," 10 C.F.R. § 2.309(f)(1)(i), and which was the explanation of the "basis" supporting the contention, id. § 2.309(f)(1)(ii) and/or the "concise statement of the alleged facts or expert opinions" that supports their position on the specified issue, id. § 2.309(f)(1)(v). While this failure to specify the language of the issue framed by their contention and distinguish it from the discussion that provides the supporting foundation for their issue statement might be grounds for dismissing the contentions, we do not rely upon this drafting flaw as a reason for rejecting their issue statements. Nevertheless, this approach to contention formulation is not one they (or other petitioners) should emulate in future proceedings.

statement (EIS), as opposed to an EA,[8] was required in connection with the staff's reinstatement decision given (1) asserted "substantial changes in circumstances" since the Units 1 and 2 CPs were issued in the mid-1970s; and (2) the need to assess cumulative impacts and avoid illegal segmentation relative to reinstating the Units 1 and 2 CPs, which are on the same site that is to be utilized for constructing and operating proposed Units 3 and 4.

With respect to the first segment of this contention alleging that the staff's assessment was done after the Commission had made a reinstatement determination, as is evident from the discussion in the Commission's January 2010 decision regarding the admissibility of Joint Petitioners' Contentions 1 and 2, see CLI-10-6, 71 NRC at __ (slip op. at 9), this claim is based on incorrect information regarding the substance and timing of the staff's March 2009 determination concerning the substantive validity of the TVA CP reinstatement request, which followed a February 2009 Commission supervisory/oversight decision indicating only that the agency had the authority to entertain such a CP reinstatement request.

With regard to Joint Petitioners' assertion concerning the need to prepare an EIS, although agency regulations (in the absence of a categorical exclusion under 10 C.F.R. § 51.22) provide at least a general legal footing for their claim, see 10 C.F.R. § 51.20(b)(14) (EIS required for any agency action that is a major action significantly affecting the environment), we find the necessary support for such an assertion otherwise lacking relative to this CP

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[8] The staff's EA included (1) a description of the plant site and its environs, the proposed action (i.e., CP reinstatement), and the need for that action; and (2) an analysis of the (a) nonradiological impacts (i.e., land use and aesthetic impacts; historic and archaeological resource impacts; impacts from socioeconomic concerns and environmental justice; water, air quality, and aquatic resources impacts; impacts on threatened and endangered aquatic and terrestrial biota and endangered terrestrial species); (b) radiological impacts (i.e., radioactive effluent and solid waste impacts, occupational, public, and accident radiation doses; uranium fuel cycle and transportation impacts); and (c) cumulative impacts associated with CP reinstatement; and (3) discussions of the alternatives to the proposed action and alternative use of resources. See Staff EA, 74 Fed. Reg. at 9308-14.

reinstatement proceeding. As we discuss below, see section II.C.2.b.-g. infra, to the degree they would be cognizable in the licensing process, the specific impacts and alternatives they claim provide significant new information or circumstances that engender the need for a new EIS are, consistent with the agency's longstanding Part 50 CP/OL licensing process, matters to be considered if and when applicant TVA seeks an OL for the units in question. Moreover, we find Joint Petitioners' concern that the EA for reinstating the Units 1 and 2 CPs on the same site as COLs are being sought for Units 3 and 4 omits a necessary assessment of cumulative impacts and constitutes illegal segmentation is, in fact, appropriately addressed in the staff's recognition that, with a decision by TVA to resume construction of Units 1 and 2, the cumulative impacts associated with a four-unit site will have to be assessed. See Staff EA, 74 Fed. Reg. at 9314 (if construction activities resume for Units 1 and 2, TVA would need to assess Units 1 and 2 construction impacts relative to Units 3 and 4).[9]

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

CONTENTION: Contention issue statement/basis language are not separately designated.

DISCUSSION: Intervention Petition at 18-20; TVA Answer at 36-39; Staff Answer at 19-21; Joint Petitioners Reply at 4-6; Tr. at 71-91.

RULING: Inadmissible, in that this contention and its foundational support impermissibly challenge the basic structure of the Commission's regulatory program, raise a matter that is not within the scope of this proceeding, and fail to establish a genuine dispute on a material issue of law or fact. See 10 C.F.R. § 2.309(f)(1)(iii), (vi); section II.C.1.a., b., e. supra.

[9] We note also that this approach is consistent with that outlined by the licensing board in the Units 3 and 4 COL proceeding. See Licensing Board Memorandum and Order (Ruling on Request to Admit New Contention) (Oct. 14, 2008) at 12 n.7 (Docket Nos. 52-014-COL and 52-015-COL) (unpublished).

In this contention, relying in part on arguments found wanting as adequate support for an admissible contention in the Bellefonte Units 3 and 4 COL proceeding, see Bellefonte COL, LBP-08-16, 68 NRC at 390-94, Joint Petitioners seek to challenge the seismic design basis for Units 1 and 2.[10] Notwithstanding Joint Petitioners' overarching concern that no further resources should be expended on the construction of these units until issues such as this one challenging the safety of the units' design have been resolved, we conclude this is a matter that is outside the limited scope of this proceeding as it has nothing to do with either the good cause elements outlined by TVA in its reinstatement request or the staff's EA. Instead, consistent with longstanding agency practice, this is a matter that must abide any Part 50 OL proceeding relating to these units or, if Joint Petitioners wish to utilize that process, could be the subject of a petition for agency action under 10 C.F.R. § 2.206.[11]

c. Contention 5: Lack of Good Cause for Reinstatement.

CONTENTION: Contention issue statement/basis language are not separately designated.

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[10] With this contention, Joint Petitioners claim, among other things, that prior to reinstating the CPs for Units 1 and 2, TVA must (1) submit additional information to satisfy NRC regulatory requirements regarding seismic criteria under 10 C.F.R. § 100.23; (2) because a magnitude 5.0 earthquake occurring at the site could cause serious damage to the Bellefonte facilities, provide more seismic geologic data to enable the Board to make a sound decision concerning the units' seismic design before reinstatement, including data regarding the 2003 occurrence of a 4.6 magnitude earthquake in Fort Payne, Alabama, which is within sixty miles of the Bellefonte site, and numerous smaller earthquakes purported to have taken place recently in the immediate vicinity of the 2003 quake; and (3) explain why a formerly-operating German reactor of the design proposed for Units 1 and 2 was shut down due to plant siting issues. See Intervention Petition at 18-20.

[11] In this regard, we note that petitions submitted under section 2.206 are assessed by the staff in accord with NRC Management Directive 8.11, "Review Process for 10 CFR 2.206 Petitions" and associated Handbook 8.11 (rev. Oct. 25, 2000) (ADAMS Accession No. ML041770328).

DISCUSSION: Intervention Petition at 20-25; Contention 5 Supplement at 1-2; Motion to Strike Contention 5 Supplement at 3-5; Motion to Strike Contention 5 Supplement Response at 1-4; TVA Answer at 39-45; Staff Answer at 21-24; Tr. at 91-123.

RULING: Inadmissible, in that the foundational support for the contention is either inaccurate or inadequate to establish that a genuine dispute on a material factual or legal issue exists so as to warrant admission of the contention. See 10 C.F.R. § 2.309(f)(1)(v), (vi); section II.C.1.d., e. supra.

As "good cause" for reinstatement of the CPs for Units 1 and 2, in its August 2008 request TVA relied upon the need to determine whether the partially-completed units were "a viable option" as a potential electricity generation source, which TVA asserted might well be more likely than in 2005 when TVA had the NRC withdraw the CPs. This could be the case, according to TVA, because of the increased cost per kilowatt hour among generation alternatives, the worldwide decrease in suppliers for new nuclear facilities, and the nearly-completed status of many of the major Unit 1 and 2 structures, systems, and components (SSCs). TVA Reinstatement Request at 1, 5. Noting that TVA's "[g]ood cause for re-instatement relies upon financial predictions and estimates of capital and operation costs," Intervention Petition at 20, with this contention Joint Petitioners seek to raise questions about the financial underpinnings of the TVA CP reinstatement request. In doing so, however, they rely on information that either is (1) not relevant, to the degree they seek to utilize information relating to the costs associated with constructing and operating new Units 3 and 4 rather than cost information applicable to partially constructed Units 1 and 2; or (2) in the case of their supplemental material regarding an ongoing TVA integrated resource plan study,[12] wholly

[12] Although we fail to find anything in the Commission's May 20, 2009 order placing the consideration of Joint Petitioners' contentions three through nine "in abeyance" pending its (continued...)

speculative as to its impact on the financial elements TVA asserts provide "good cause" for its CP reinstatement request. As a consequence, although the general subject matter of this contention had the potential to be within the scope of this proceeding as outlined by the hearing notice, the information provided by Joint Petitioners fails to lend any relevant support to a challenge to the financially-footed "good cause" reasons TVA provided as justification for its request.

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

CONTENTION: Contention issue statement/basis language are not separately designated.

DISCUSSION: Intervention Petition at 25-28; Contention 6 Supplement at 2-5; Motion to Strike Contention 6 Supplement at 4-6; Motion to Strike Contention 6 Supplement Response at 1-2; TVA Answer at 45-51; Staff Answer at 25-31; Tr. at 125-54.

RULING: Inadmissible, in that the support offered for the contention is either inaccurate or inadequate to establish that the issue raised is material to the proceeding or is insufficient to show a genuine dispute on a material factual or legal issue exists so as to warrant admission of the contention. See 10 C.F.R. § 2.309(f)(1)(iv), (v), (vi); section II.C.1.c., d., e. supra.

Putting aside the issue whether this challenge to TVA's ability to resume preservation and maintenance activities at Units 1 and 2 is within the "good cause" scope of this

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[12](...continued)
resolution of their first two contentions, see Commission Order (May 20, 2009) at 2 (unpublished), that would preclude Joint Petitioners from seeking timely to submit additional information regarding their already proffered contentions, because we conclude that the material submitted with Joint Petitioners' July 2009 supplemental basis filing does not support the admissibility of this contention, we need not rule on the question whether Joint Petitioners failed to follow the proper procedural avenue in providing the information such that their supplemental material should, as TVA asserts, be stricken.

proceeding,[13] we find this issue statement to be inadmissible because it lacks adequate support. Initially, we note that this contention is essentially one of omission, i.e., that TVA has not provided sufficient information to demonstrate that it can meet the agency's quality assurance/quality control standards as embodied in the Commission's 1987 deferred plant policy statement and Appendix A to 10 C.F.R. Part 50, so as to provide a basis for bringing the facility back to the deferred status that it was in when the CPs were withdrawn. In the time between the filing of this contention and its referral to this Board, however, as TVA indicated in its answer to Joint Petitioners' hearing request, in seeking to have the units returned to deferred status TVA implemented quality assurance and corrective action programs for Units 1 and 2 that are intended to address the issues associated with the facilities not being maintained in deferred status for several years and having some components removed. See TVA Answer at 6 n.25 (citing Letter from Ashok S. Bhatnager, TVA Senior Vice President, to NRC Document Control Desk at 1, 5 (Aug. 10, 2009) (ADAMS Accession No. ML092230594)) [hereinafter TVA

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[13] While both TVA and the staff assert that the "good cause" for the TVA reinstatement request is limited to TVA's financially-based justifications regarding the apparent viability of the option of completing Units 1 and 2, this is not necessarily apparent given the language of the August 2008 TVA reinstatement request. In its second paragraph, the request indicated that "[a]s explained below, good cause exists to support TVA's request," and declared the reinstatement would (1) allow the units to return to deferred status and resume preservation and maintenance activities consistent with the Commission's deferred plant policy; and (2) allow TVA to determine whether completion of construction and operation of the units is a "viable option." TVA Reinstatement Request at 1. Certainly, if the facilities cannot be returned to deferred status, as Joint Petitioners maintain they cannot given the circumstances here, then the units seemingly are not a viable option. See id. at 5 (whether units are viable depends on assessment that will be made if and when unit CPs are reinstated and units are returned to deferred status). Nonetheless, we need not resolve this scope issue given we find, as we explain above, that the contention lacks adequate foundational support for its cardinal thesis that TVA has not provided any basis for showing it can bring the units back to a status in which they will comply with the Commission's deferred plant policy.

We do note, however, that Joint Petitioners' assertion in the final paragraph of this contention statement that an entirely new construction permit is required is outside the scope of this proceeding and otherwise not litigable for the reasons set forth by the Commission in its decision in CLI-10-6, 71 NRC at __ (slip op. at 20).

Deferral Request]; see also Letter from R. M. Krich, TVA Vice President, to NRC Document Control Desk encl. 2 (Sept. 28, 2009) (TVA Nuclear Quality Assurance Plan (rev. 21)) (ADAMS Accession No. ML0927503500). Although Joint Petitioners did seek to supplement the information they provided initially relative to this contention,[14] TVA documents that supply previously unavailable information central to the focus of this contention have not been referenced or made the subject of any additional analysis by Joint Petitioners in seeking to have this contention admitted. As a consequence, we find this contention essentially has been rendered moot by subsequent events, i.e., the submission of information that, at least facially, addresses Joint Petitioners concern about TVA QA/QC compliance,[15] and thus is inadmissible.

Of course, the degree to which applicable QA/QC requirements have been properly implemented is generally a matter that can be raised in a Part 50 OL proceeding relating to the facility at issue, or, if Joint Petitioners wish to utilize that process, could be the subject of a petition for agency action under 10 C.F.R. § 2.206.

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[14] This January 2010 supplement, which concerned a TVA notice regarding a containment vertical tendon coupling failure and was the subject of a TVA motion to strike as well, provides nothing of substance in support of the contention's thesis that TVA cannot bring the units back into deferred status so as to make the units a viable option. As a consequence, we need not rule on the merits of this TVA motion to strike either. See supra note 12.

[15] We note also that, on the basis of that information and an October 2009 inspection to assess whether TVA had addressed the elements of the Commission's deferred plant policy statement, on January 14, 2010, the staff returned Bellefonte Units 1 and 2 to deferred plant status. See Letter from Eric J. Leeds, NRC Office of Nuclear Reactor Regulation Director, to Ashok S. Bhatnager, TVA Senior Vice President at 5-6 (Jan. 14, 2010) (ADAMS Accession No. ML093420915).

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

CONTENTION: Contention issue statement/basis language are not separately designated.

DISCUSSION: Intervention Petition at 29-31; TVA Answer at 51-55; Staff Answer at 31-33; Tr. at 154-73.

RULING: Inadmissible, in that this contention and its foundational support impermissibly challenge the basic structure of the Commission's regulatory program, raise a matter that is not within the scope of this proceeding, and fail to establish a genuine dispute on a material issue of law or fact. See 10 C.F.R. § 2.309(f)(1)(iii), (vi); section II.C.1.a., b., e. supra.

The thrust of this issue statement is that, because Units 1 and 2 were designed and, to varying degrees, constructed over thirty years ago, the CPs should not be reinstated because they cannot meet current agency criteria associated with the staff's safety, environmental, and other regulatory reviews. As this concern bears no relationship to the good cause elements outlined by TVA in its reinstatement request or to the staff's EA, it is outside the scope of this proceeding. And once again, despite Joint Petitioners' claim the agency should consider this matter now, consistent with the Commission's deferred plant policy outlining the manner in which new regulatory requirements will be considered as applying to a plant under construction, the degree to which such requirements are applicable and have been properly implemented is a matter that generally must abide any Part 50 OL proceeding relating to the unit in question, or, if Joint Petitioners wish to utilize that process, could be the subject of a petition for agency action under 10 C.F.R. § 2.206.

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

CONTENTION: Contention issue statement/basis language are not separately designated.

DISCUSSION: Intervention Petition at 31-32; TVA Answer at 55-59; Staff Answer at 33-34; Tr. at 173-82.

RULING: Inadmissible, in that this contention and its foundational support impermissibly challenge the basic structure of the Commission's regulatory program, raise a matter that is not within the scope of this proceeding, and fail to establish a genuine dispute on a material issue of law or fact. See 10 C.F.R. § 2.309(f)(1)(iii), (vi); section II.C.1.a., b., e. supra.

This contention asserts that if operating authority ultimately were provided for these units, because some SSCs for Bellefonte Units 1 and 2 will be eighty or ninety years old by the end of the units' forty-year operating life, any CP reinstatement must include an analysis of the advanced age of these items. As this concern likewise bears no relationship to the good cause elements outlined by TVA in its reinstatement request or to the staff's EA, it is outside the scope of this proceeding. Moreover, Joint Petitioners' claim that the agency should consider this matter now once again fails to account for the longstanding agency regulatory practice that in the Part 50 licensing context, this is a matter that must abide any OL or life extension proceeding relating to these units or, if Joint Petitioners wish to utilize that process, could be the subject of a petition for agency action under 10 C.F.R. § 2.206.

g. Contention 9: Impacts on Aquatic Resources including Fish and Mussels of the Tennessee River.

CONTENTION: Contention issue statement/basis language are not separately designated.

DISCUSSION: Intervention Petition at 32-38; TVA Answer at 59-65; Staff Answer at 34-41; Tr. at 182-89.

RULING: Inadmissible, in that this contention and its foundational support impermissibly challenge the basic structure of the Commission's regulatory program, raise a matter that is not within the scope of this proceeding, and fail to establish a genuine dispute on a material issue of law or fact. See 10 C.F.R. § 2.309(f)(1)(iii), (vi); section II.C.1.a., b., e. supra.

With this contention, which has five subparts, Joint Petitioners seek to have admitted for litigation various issues associated with the impacts of the operation of Units 1 and 2 and, in some instances, of Units 3 and 4, upon the aquatic environment and resources of the Tennessee River basin.[16] As these various issue statements bear no relationship to the good cause elements outlined by TVA in its reinstatement request or to the staff EA assessing the impacts of reinstating the CPs for Units 1 and 2, the contention is outside the scope of this proceeding. Moreover, Joint Petitioners' claim that the agency should consider these matters now once more fails to account for the longstanding agency practice that in the Part 50 licensing context, these are matters that generally must abide any OL proceeding relating to Units 1 and 2 (assuming they have not been assessed previously as cumulative impacts relative to the

[16] Among the items Joint Petitioners seek to raise in this issue statement are the purported lack of recent studies to evaluate the impacts of Units 1 and 2 operation on aquatic resources; failure to address operating impacts of Units 1 through 4 on Tennessee River basin fish and mussels; inadequate analysis of impacts of increased water intake and thermal/chemical discharges from facility operation on fish and mussels in the vicinity of the Bellefonte facility; and TVA use of purportedly biased aquatic resource health and status ratings relative to the impacts of operation of the Bellefonte units. See Intervention Petition at 32-38.

Units 3 and 4 COL proceeding) or, if Joint Petitioners wish to utilize that process, could be the subject of a petition for agency action under 10 C.F.R. § 2.206.

III. CONCLUSION

For the reasons set forth above, the Board concludes that although petitioners SACE and BREDL (but not petitioner BEST) have established their standing as of right to intervene in this 10 C.F.R. Part 50 CP reinstatement proceeding, they have failed to proffer an admissible contention, so that we must dismiss their hearing petition.

We do so, however, with some trepidation. In this instance, the combination of the AEA section 185a "good cause" standard as applied to this proceeding (and, presumably, the CP extension proceedings for Units 1 and 2 in 2011 and 2014, respectively); the apparent absence of any AEA adjudicatory process applicable to the already-approved TVA request to place the units in deferred status as well as any forthcoming TVA request to resume plant construction, see Tr. at 49-51; and the application of the largely-superseded Part 50 CP/OL reactor licensing process have the overall effect of "backloading" a number of issues of potential significance to the safe and environmentally-responsible operation of Units 1 and 2. Joint Petitioners' contentions certainly suggest several possible areas of concern, one of the most prominent undoubtedly being whether the facilities, which were not subject to the NRC's deferred plant maintenance and preservation requirements for several years and from which various safety-related items such as steam generator tubing and reactor coolant piping have been removed, ultimately can be restored and completed in a manner that is fully consistent with the agency's QA/QC and safety requirements.

Notwithstanding the experience TVA and the agency have gained in dealing with the long-delayed restart of Browns Ferry Unit 2 and the ongoing Part 50 licensing of the

long-deferred Watts Bar Unit 2, the circumstances surrounding Bellefonte Units 1 and 2 strongly suggest the Bellefonte units cannot be treated as "business as usual" facilities. Consequently, it seems apparent that there must be (1) complete transparency on the part of TVA regarding the details of both its planning for, and implementation of, the restoration and completion of Bellefonte Units 1 and 2; and (2) significantly enhanced vigilance on the part of the staff in reviewing and inspecting TVA's QA/QC and restoration/construction efforts associated with those units. Moreover, if one or both of these Bellefonte units move forward to the OL stage, TVA's "off again/on again" approach to their construction, in combination with what is likely to be the span of some four decades between the Units 1 and 2 CP and OL proceedings, has generated a unique set of circumstances such that, to ensure all safety and environmental matters of substance regarding these two units are thoroughly vetted in a public forum, the Commission should consider holding, as a matter of discretion, a "mandatory hearing"-type proceeding regarding these reactors (utilizing whatever procedures it may decide to employ for the upcoming COL proceedings) before allowing the units to begin full-power operation.

For the foregoing reasons, it is this second day of April 2010, ORDERED, that

1. Joint Petitioners' May 8, 2009 hearing petition is denied.

2. In accordance with the provisions of 10 C.F.R. § 2.311, as it rules upon an intervention petition, any appeal to the Commission from this memorandum and order must be taken within ten (10) days after it is served.

THE ATOMIC SAFETY
AND LICENSING BOARD

/RA/
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/RA/
Anthony J. Baratta
ADMINISTRATIVE JUDGE

/RA/
William W. Sager
ADMINISTRATIVE JUDGE

Rockville, Maryland

April 2, 2010

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing MEMORANDUM AND ORDER (RULING ON INTERVENTION PETITION) have been served upon the following persons by the Electronic Information Exchange (EIE) with additional service by email on persons marked with*.

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[Original signed by Nancy Greathead]
Office of the Secretary of the Commission

Dated at Rockville, Maryland
this 2nd day of April 2010