

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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

NRC STAFF'S RESPONSE TO PETITIONERS' MOTION FOR ADDITIONAL TIME IN
WHICH TO FILE APPEAL OF LBP-10-07 AND BRIEF IN OPPOSITION TO APPEAL

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTRODUCTION 1

STATEMENT OF THE CASE 2

ISSUES PRESENTED 4

ARGUMENT 5

 I. The Commission Should Not Permit the Petitioners to File Their Appeal
 Out of Time Because They Have Not Demonstrated Good Cause 5

 II. Legal Standards for Review of a Board Decision to Deny a Petition to
 Intervene 8

 III. Legal Standards for the Admission of Contentions 8

 IV. The Licensing Board Correctly Found Contention 6 Inadmissible 11

CONCLUSION 17

TABLE OF AUTHORITIES

Judicial Decisions

Blue Ridge Environmental Defense League v. U.S. Nuclear Regulatory Commission and United States of America, No. 09-1112 (D.C. Cir. filed March 30, 2009)..... 7 n. 12

Commission

Tennessee Valley Authority (Bellefonte Nuclear Plants Units 1 and 2), CLI-10-06, 71 NRC __ (Jan. 7, 2010) (slip op.) 3, 13

Statement of Policy on Conduct of Adjudicatory Proceedings, CLI-98-12, 48 NRC 18 (1998)..... 6 n. 10

Baltimore Gas & Electric Company (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), CLI 98-25, 48 NRC 325 (1998) 6 n. 10

Tennessee Valley Authority (Watts Bar Nuclear Plant, Unit 2), CLI-10-12, 71 NRC __, (Mar. 26, 2010)(slip op.)..... 8, 13

PPL Susquehanna, LLC (Susquehanna Steam Electric Station), CLI-07-25, 66 NRC 101 (2007)..... 8

AmerGen Energy Company, LLC (Oyster Creek Nuclear Generating Station), CLI-06-24, 64 NRC 111 (2006)..... 9

USEC Inc. (American Centrifuge Plant), CLI-06-09, 63 NRC 433 (2006)..... 9

Dominion Nuclear Conn., Inc. (Millstone Nuclear Power Stations, Units 2 and 3), CLI-04-36, 60 NRC 631 (2004)..... 9

Advanced Med. Sys., Inc. (One Factory Row, Geneva, Ohio 44041), CLI-94-6, 39 NRC 285 (1994)..... 9

Duke Energy Corp. (Oconee Nuclear Station, Units 1, 2 and 3), CLI-99-11, 49 NRC 328 (1999)..... 10

Dominion Nuclear Connecticut, Inc. (Millstone Nuclear Power Station, Units 2 & 3), CLI-01-24, 54 NRC 349 (2001)..... 9, 10

Private Fuel Storage, LLC (Independent Spent Fuel Storage Installation), CLI-99-10, 49 NRC 318 (1999)..... 10

Fansteel, Inc. (Muskogee, Oklahoma Site), CLI-03-13, 58 NRC 195 (2003)..... 11

Progress Energy Florida, Inc. (Combined License Application, Levy County Nuclear Plant, Units 1 and 2), CLI-10-02, 71 NRC __ (January 7, 2010) (slip op.)..... 16

Shaw Areva MOX Services, LLC (Mixed Oxide Fuel Fabrication Facility), CLI-09-02, 65 NRC 55 (2009)..... 16

Atomic Safety and Licensing Board

Tennessee Valley Authority (Bellefonte Nuclear Plants Units 1 and 2), Memorandum and Order (Initial Prehearing Order) (unpublished)(ADAMS Accession No. ML100150678).....3 n. 7

Duke Energy Corporation (McGuire Nuclear Station, Units 1 and 2, Catawba Nuclear Station, Units 1 and 2) LBP-02-4, 55 NRC 49 (2002)..... 8 n. 15

Southern Nuclear Operating Company (Early Site Permit for Vogtle ESP Site), LBP-07-3, 65 NRC 237 (2007)..... 11

Regulations

10 C.F.R. Part 2.....3
10 C.F.R. § 2.206 12
10 C.F.R. § 2.3076
10 C.F.R. § 2.309 *passim*
10 C.F.R. § 2.311 1, 4, 6
10 C.F.R. § 2.334 7, 7 n. 14

Miscellaneous

74 Fed. Reg. 10,969 ("Mar. 13, 2009 Order").2

Letter from TVA to NRC, Tennessee Valley Authority (TVA) - Bellefonte Nuclear Plant Units 1 and 2 - Request to Reinstate Construction Permits CPPR-122 (Unit 1) and CPPR-123 (Unit 2) (Aug. 26, 2008). (ADAMS Accession No. ML082410087) 2 n. 1

39 Fed. Reg. 45,313 (Dec. 31, 1974 "Notice of Issuance of Construction Permits") 2 n. 1

Bellefonte, Units 1 and 2, Request to Reinstate Construction Permits CPPR-122 and CPPR-123 (Sept. 25, 2008) (ADAMS Accession No. ML082730756) 2 n. 2

Bellefonte Nuclear Plant, Units 1 and 2 - Response to Request for Additional Information Regarding Environmental Assessment for Reinstatement of Construction Permits (Nov. 24, 2008) (ADAMS Accession No. ML083360045) 2 n. 2

Letter from Glenn W. Morris to NRC (April 6, 2006) (ADAMS Accession No. ML061000538)	2 n. 3
Commission Policy Statement on Deferred Plants, 52 Fed. Reg. 38,077 (Oct. 14, 1987)....	2 n. 4
<i>Tennessee Valley Authority</i> (Bellefonte Nuclear Power Plant, Units 1 and 2) (unpublished)(May 20, 2009)(ADAMS Accession No. ML091400780)	3 n. 5
Joint Intervenors' Supplemental Basis for Previously Submitted Contention 5 – Lack of Good Cause (July 9, 2009) (ADAMS Accession No. ML091960678)	3 n. 6
Tennessee Valley Authority's Motion to Strike Petitioners' Supplemental Basis for Proposed Contention 5" (July 17, 2009) (ADAMS Accession No. ML091980276).....	3 n. 6
Joint Intervenors' Supplemental Basis For Previously Submitted Contention 6, (Jan. 11, 2010) (ADAMS Accession No. ML100110577).....	3 n. 6
Tennessee Valley Authority's Motion to Strike Petitioners' Supplemental Basis for Proposed Contention 6" (Jan. 14, 2010)(ADAMS Accession No. ML100140677)	3 n. 6
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 ("NRC Staff Answer") (ADAMS Accession No. ML100291040).....	4 n. 8, 11, 12
Petitioners' Motion for Additional Time In Which To 1) File A Notice Of Appearance of Counsel And 2) Reply to TVA and Staff Answers To the Petition for Intervention" (ADAMS Accession No. ML100470492)	6 n. 11
Memorandum and Order (Ruling on Motion for Additional Time; Prehearing Conference Argument Time Allocations; Webstreaming; Written Limited Appearance Statements) (Feb. 18, 2010)(ADAMS Accession No. ML100491794)	6 n. 11
Changes to Adjudicatory Process [Final Rule], 69 Fed. Reg. 2182 (Jan. 14, 2004).....	10
Letter from Ashok S. Bhatnagar, Senior Vice President, Nuclear Generation Development and Construction, TVA, to USNRC, "Tennessee Valley Authority (TVA) - Bellefonte Nuclear Plant Units 1 And 2 - Request To Reinstate Construction Permits CPPR-122 (Unit 1) And CPPR-123 (Unit 2)" (August 26, 2008) ("Application")	2, 15
March 13, 2009 Letter from Michael A. Purcell, Senior Licensing Manager, Nuclear Power Group, TVA, to US NRC, Subject: "Browns Ferry Nuclear Plant (BFN) Units 1, 2 And 3, Sequoyah Nuclear Plant (SQN) Units 1 And 2, Watts Bar Nuclear Plant (WBN) Unit 1 And 2, And Bellefonte Nuclear Plant (BLN) Units 1 And 2 - TVA's Nuclear Quality Assurance (NQA) Plan (TVA-NQA-PLN89-A)"; Enclosure 1, Nuclear Quality Assurance	

Plan, Revision 20; Enclosure 2, Description of Changes. (ADAMS Accession No. ML090760973)..... 15 n. 20

Answer of Tennessee Valley Authority Opposing the Petition for Intervention and Request for Hearing by the Blue Ridge Environmental Defense League Et. Al., (January 29, 2010)(ADAMS Accession No. ML100290859)..... 15 n. 20

Tennessee Valley Authority (TVA) Nuclear Quality Assurance Program, Revision 23, issued December 14, 2009. (ADAMS Accession No. ML100210972)..... 14 n. 21

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INTRODUCTION

Pursuant to 10 C.F.R. § 2.311(b), the staff of the Nuclear Regulatory Commission ("NRC Staff") submits its response and brief in opposition to the 1) Motion by Blue Ridge Environmental Defense League ("BREDL"), its Chapter Belleville Efficiency and Sustainability Team ("BEST") and The Southern Alliance For Clean Energy ("SACE") (hereinafter "Petitioners") for Additional Time In Which To File Appeal of LBP-10-07 ("Motion for Additional Time"), and 2) Brief on Appeal of LBP-10-07 submitted by Petitioners on April 20, 2010. The Motion for Additional Time requests leave of the Commission to file the Petitioners' Brief on Appeal of LBP-10-07 out of time. Motion For Additional Time at 1. For the reasons discussed herein, the Petitioners' Motion for Additional Time should be denied for lack of good cause for the submittal of an untimely appeal of the Atomic Safety and Licensing Board's ("Board") decision in *Tennessee Valley Authority (Belleville Nuclear Plant Units 1 and 2), LBP-10-07*, 71 NRC __ (April 2, 2010) (slip op.) ("LBP-10-07").

Alternatively, if the Commission decides to grant Petitioners' Motion for Additional Time, the NRC Staff submits this Brief in Opposition to Petitioners' appeal of

LBP-10-07. In this decision, the Board properly concluded that the Petitioners' Contention 6 has not met the criteria set forth in 10 C.F.R. §§ 2.309(f)(1)(iv),(v), and (vi). The Board committed no error of law or abuse of discretion in ruling that Contention 6 was inadmissible. Therefore, the Board's decision, LBP-10-07, should be upheld.

STATEMENT OF THE CASE

This proceeding concerns Tennessee Valley Authority's ("TVA") request to reinstate voluntarily-surrendered construction permit (CP) Nos. CPPR-122 and CPPR-123¹ submitted to the NRC Staff on August 26, 2008 ("Application").² The CPs had been previously withdrawn in 2006.³ By order dated March 9, 2009, the NRC Staff 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 Plants⁴. 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

¹ Letter from Ashok S. Bhatnagar, Senior Vice President, Nuclear Generation Development and Construction, TVA, to USNRC, "Tennessee Valley Authority (TVA) - Bellefonte Nuclear Plant Units 1 And 2 - Request To Reinstate Construction Permits CPPR-122 (Unit 1) And CPPR-123 (Unit 2)" (August 26, 2008) ("Application") (ADAMS Accession No. ML082410087); see *also* Public Legacy Library Accession Nos. 066333 and 066334; 39 Fed. Reg. 45,313 (Dec. 31, 1974).

² TVA submitted supplemental information in response to NRC Staff requests for additional information on September 25, 2008 and November 24, 2008. (ADAMS Accession Nos. ML082730756 and ML083360045).

³ 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 Accession No. ML061000538).

⁴ Commission Policy Statement on Deferred Plants, 52 Fed. Reg. 38,077, 38,079 (Oct. 14, 1987).

determine whether good cause exists for reinstatement of the CPs.

On May 8, 2009, Petitioners filed a timely petition for intervention and request for a hearing ("Petition") asserting nine contentions that challenged the reinstatement of TVA's CPs. On May 20, 2009, the Commission issued an order requesting briefs from the TVA, the Staff, and the Petitioners on Contentions 1 and 2.⁵

On January 7, 2010, the Commission entered a Memorandum and Order affirming the NRC Staff's authority to reinstate TVA's voluntarily-surrendered construction permits and denied admissibility of Contentions 1 and 2. *See Tennessee Valley Authority* (Bellefonte Nuclear Plants Units 1 and 2), CLI-10-06, 71 NRC ___ (Jan. 7, 2010)(slip op. at 1). The Commission ordered that the issue of standing, and admissibility of Contentions 3 through 9 be referred to the Board for adjudication under 10 C.F.R. Part 2. *Id.* at 19.⁶ In accordance with the Board's order⁷, the NRC Staff and

⁵ In the order, the Commission decided to address Contentions 1 and 2 because these contentions presented dispositive questions on whether the NRC Staff had the authority to reinstate TVA's CPs for Bellefonte Units 1 and 2. The Commission placed the remaining contentions 3 through 9 in abeyance and postponed submittal of answers to the Petition by the NRC Staff and the TVA, pending a decision on Contentions 1 and 2. *See Tennessee Valley Authority* (Bellefonte Nuclear Power Plant, Units 1 and 2)(unpublished)(May 20, 2009)(slip op. at 1-2).(ADAMS Accession No. ML091400780).

⁶ The Commission ordered "Joint Intervenors' Supplemental Basis for Previously Submitted Contention 5 – Lack of Good Cause" filed on July 9, 2009 (ADAMS Accession No. ML091960678), and "Tennessee Valley Authority's Motion to Strike Petitioners' Supplemental Basis for Proposed Contention 5" filed on July 17, 2009 (ADAMS Accession No. ML091980276) be referred to the Board. Subsequently, "Joint Intervenors' Supplemental Basis For Previously Submitted Contention 6" was filed on January 11, 2010 (ADAMS Accession No. ML100110577). On January 14, 2010, TVA filed "Tennessee Valley Authority's Motion to Strike Petitioners' Supplemental Basis for Proposed Contention 6" (ADAMS Accession No. ML100140677). The NRC Staff did not object to TVA's motions to strike.

⁷ *See Tennessee Valley Authority* (Bellefonte Nuclear Plants Units 1 and 2), Memorandum and Order (Initial Prehearing Order)(unpublished)(Jan. 15, 2010) at 3. (ADAMS Accession No. ML100150678).

the TVA filed answers to the Petition on January 29, 2010.⁸

On April 2, 2010, the Board issued LBP-10-07, which held, *inter alia*, that although BREDL and SACE successfully established standing to intervene in the Part 50 reinstatement proceeding, no admissible contentions were proffered and denied the petition to intervene in its entirety. See LBP-10-07 at 38. The Board further found that BEST did not satisfy the standing requirements under 10 C.F.R. § 2.309(d) and denied BEST's petition for intervention. *Id.* at 38. The Board ordered that any appeal be taken within ten (10) days of service of LBP-10-07, in accordance with the provisions set forth in 10 C.F.R. § 2.311. See LBP-10-07 at 40. As a result, the deadline to appeal the Board's denial of the Petition was April 12, 2010. On April 20, 2010, Petitioners filed a motion for additional time to appeal LBP-10-07 and a brief in support of an appeal of LBP-10-07, which are the subject of the proceeding before the Commission. The appeal was filed eight days after the deadline set for submission of a timely appeal and focused solely on the admissibility of Contention 6.

ISSUES PRESENTED

The issues presented are: 1) whether the Petitioners have demonstrated good cause to file a late appeal; and 2) whether the Board's rejection of Contention 6, which resulted in the denial of the petition to intervene and a request for hearing, is an error of law or abuse of discretion.⁹

⁸ See 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 ("NRC Staff Answer"). (ADAMS Accession No. ML100291040).

⁹ The Petitioners have not appealed the good cause scope of the proceeding, standing, or (continued. . .)

ARGUMENT

I. The Commission Should Not Permit the Petitioners to File Their Appeal Out of Time Because They Have Not Demonstrated Good Cause

Petitioners waited eight days after the deadline to timely appeal to seek leave to file a late appeal. In support of the Motion for Additional Time, Petitioners' counsel asserts that it was his error in submitting an untimely appeal based on two developments since his initial appearance in the proceeding before the Board on February 16, 2010. Motion For Additional Time at 1. Petitioners' counsel states that because he has not been involved in NRC licensing proceedings in 25 years, he has had to devote 1) "a great deal of time and work on his part to become conversant with the case files as well as the pertinent sources of legal authority" and 2) that he was "tied up with other matters to which he committed before his appearance in this proceeding...". See Motion For Additional Time at 1. Based on these assertions, Petitioners request leave to file the appeal of LBP-10-07, beyond the deadline of April 12, 2010.

As a preliminary matter, Petitioners' Motion for Additional Time and Appeal Brief should be dismissed with regard to BEST. The Board denied BEST the right to intervene in the proceeding because BEST did not demonstrate standing as required under 10 C.F.R. § 2.309(d). See LBP-10-07 at 38. BEST has not disputed the Board's decision regarding BEST's lack of standing in their Motion For Additional Time or asserted any standing errors in their Appeal Brief. Therefore, the NRC Staff respectfully

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Contentions 3-5 and 7-9 in their Appeal Brief.

requests that the Commission deny the Motion for Additional Time and the untimely appeal of LBP-10-07 as they relate to BEST.

Turning to the merits of the Motion for Additional Time filed by Petitioners, under 10 C.F.R. § 2.307(a), the Commission will grant an extension of time only upon a showing of good cause. The test for “good cause” under Commission policy and decisions require that Petitioners demonstrate “unavoidable and extreme circumstances”.¹⁰ In other words, requests for extensions of time should not be available for routine or avoidable circumstances.

In the situation presented in this proceeding, counsel’s lack of knowledge regarding NRC proceedings and related case files and prior commitments do not meet the Section 2.307(a) good cause requirements in that the Petitioners have not demonstrated extreme and unavoidable circumstances. The Board’s decision, LBP-10-07, explicitly sets forth the prescribed time to appeal and the applicable Commission regulation, 10 C.F.R. § 2.311. See LBP-10-07 at 40. Absent from Petitioners’ motion are any details, for example, regarding last- minute personal or professional developments, efforts to rearrange other work and their priority, or any explanation as to why a motion for additional time to appeal LBP-10-07 prior to the deadline was not undertaken.¹¹ In addition, given counsel’s supposed known deadlines in other matters, it

¹⁰ See Statement of Policy on Conduct of Adjudicatory Proceedings, CLI-98-12, 48 NRC 18, 21 (1998); see also *Baltimore Gas & Electric Company* (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), CLI 98-25, 48 NRC 325, 342 (1998) (“[w]e believe our construction of ‘good cause’ to require a showing of ‘unavoidable and extreme circumstances’ constitutes a reasonable means of avoiding delay”).

¹¹ The Staff notes that the Board previously admonished Petitioners in a similar occurrence after they filed a motion for additional time to submit an untimely reply brief. See Petitioners’ Motion for Additional Time In Which To 1) File A Notice Of Appearance of Counsel And 2) Reply to TVA and Staff Answers To the Petition for Intervention” (ADAMS Accession No. (continued. . .)

is unclear why counsel failed to notify the Board, the Commission, TVA or NRC Staff of scheduling conflicts. As Petitioners' counsel argues, counsel has represented Petitioners in this proceeding since February 16, 2010; and counsel is and has been involved in a parallel federal court of appeals proceeding associated with this specific CP reinstatement action.¹² As such, Petitioners' counsel, in zealously representing Petitioners before the court, would have kept track of the developments in the related CP reinstatement proceedings before the NRC.

Even if considered under the good cause standard contained in 10 C.F.R. § 2.334(b), the Petitioners' motion should be denied.¹³ Petitioners have not exercised due diligence to adhere to the deadline because they neither attempted to file a timely appeal nor requested additional time to appeal prior to April 12, 2010; the request is not the result of unavoidable circumstances as already demonstrated, and the NRC Staff did not consent to an extension of time to appeal LBP-10-07¹⁴. Under the Commission's

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ML100470492). Before the Board granted their motion, the Board stated that "the Board is frank to state that Joint Petitioners have not done much to help themselves in terms of meeting this [good cause] standard. Clearly, the better approach would have been to advise the Board prior to the February 5 deadline, via a timely motion to extend the reply date...". In doing so, the Board took note of the explicit representation by Petitioners' counsel "that future Board deadlines will be met" and one of the petitioners' previous experience as "pro se" petitioners in other NRC proceedings. See February 18, Order at 4-5.

¹² See *Blue Ridge Environmental Defense League v. U.S. Nuclear Regulatory Commission and United States of America*, No. 09-1112 (D.C. Cir. filed March 30, 2009)

¹³ The Board applied the 10 C.F.R. § 2.334(b) good cause standard in the Board's February 18, 2010 Memorandum and Order (Ruling on Motion for Additional Time; Prehearing Conference Argument Time Allocations; Webstreaming; Written Limited Appearance Statements)(ADAMS Accession No. ML100491794)("February 18 Order") that ruled on Petitioners' prior late filing of their Reply. See February 18 Order at 5.

¹⁴ 10 C.F.R. § 2.334(b) states that "[i]n making a good cause determination, the presiding officer or the Commission should take into account the following factors, among other things: 1) (continued. . .)

Rules of Practice, petitioners and attorneys alike are required to adhere to Commission filing deadlines. Thus, even if Petitioners were acting *pro se* on appeal, Petitioners would still be expected to comply with the Commission's rules, and the reasons provided in the motion do not excuse Petitioners.¹⁵

When presented with these limited post hoc assertions, and in the context that Petitioners' counsel had expressly informed the Board that future proceeding deadlines would be met, Petitioners' belated motion does not demonstrate good cause and the motion should be denied.

II. Legal Standards for Review of a Board Decision To Deny a Petition to Intervene

Because the Board's decision in LBP-10-07 wholly denied the petition to intervene and request for hearing, the Commission's review is conducted pursuant to 10 C.F.R. § 2.311(c), in accordance with the legal standards set forth in Commission decisions. The Commission has established that the Commission will give deference to the Boards' determinations and will ordinarily affirm Board decisions on issues of admissibility of contentions where the appeal fails to point to an error of law or abuse of discretion. See *e.g. Tennessee Valley Authority* (Watts Bar, Unit 2), CLI-10-12, 71 NRC at ___ (Mar. 26, 2010)(slip op. at 3); *PPL Susquehanna, LLC* (Susquehanna Steam

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Whether the requesting party has exercised due diligence to adhere to the schedule; 2) Whether the requested change is the result of unavoidable circumstances; and 3) Whether the other parties have agreed to the change and the overall effect of the change on the schedule of the case."

¹⁵ See *e.g. Duke Energy Corporation* (McGuire Nuclear Station, Units 1 and 2, Catawba Nuclear Station, Units 1 and 2) LBP-02-4, 55 NRC 49, 64 n.4 (2002)(while *pro se* petitioners are not held to same high standards as lawyers in Commission proceedings, petitioners are still expected to comply with the Commission's basic procedural rules such as filing deadlines).

Electric Station), CLI-07-25, 66 NRC 101, 104 (2007); *AmerGen Energy Company, LLC* (Oyster Creek Nuclear Generating Station), CLI-06-24, 64 NRC 111, 121 (2006) *citing USEC Inc.* (American Centrifuge Plant), CLI-06-09, 63 NRC 433, 439 n.32 (2006).

On appeal, it is not sufficient merely to reiterate that the contention admissibility standards of 10 C.F.R. § 2.309(f)(1)(v) and (vi) were satisfied because the contention is supported by expert testimony that articulates a genuine dispute of material fact. See *U.S. Department of Energy* (High Level Waste Repository), CLI-09-14, 69 NRC 580, 585 (2009)(In affirming the Board, the Commission cited as examples generalized assertions and failure to discuss how regulations were not satisfied to be insufficient to challenge the application.).

Consistent with the Commission's standard of review, "[t]he appellant bears the responsibility of clearly identifying the errors in the decision [...] and ensuring that its brief contains sufficient information and [...] argument to alert the other parties and the Commission to the precise nature of and support for the [A]ppellants' claims." See *Dominion Nuclear Conn., Inc.* (Millstone Nuclear Power Stations, Units 2 and 3), CLI-04-36, 60 NRC 631, 639 at n. 25 (2004) (*quoting Advanced Med. Sys., Inc.* (One Factory Row, Geneva, Ohio 44041), CLI-94-6, 39 NRC 285, 297 (1994)). The Commission applied this principle in Millstone to reject on appeal "general arguments" that failed to "come to grips with the Board's reasons for rejecting" the contention. See *Millstone*, CLI-04-36, 60 NRC at 639.

III. Legal Standards for the Admission of Contentions

To gain admission to an adjudicatory proceeding as a party, a petitioner for intervention, in addition to establishing standing, must proffer at least one contention that satisfies the admissibility requirements of 10 C.F.R. § 2.309(f)(1). See 10 C.F.R. §

2.309(a). *See also Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2 and 3), CLI-99-11, 49 NRC 328, 333 (1999). For a contention to be admissible, the petitioner must satisfy the following six requirements:

- (i) Provide a specific statement of the issue of law or fact to be raised or controverted;
- (ii) Provide a brief explanation of the basis for the contention;
- (ii) Demonstrate that the issue raised in the contention is within the scope of the proceeding;
- (iv) Demonstrate that the issue raised in the contention is material to the findings the NRC must make to support the action that is involved in the proceeding;
- (v) Provide a concise statement of the alleged facts or expert opinions which support the requestor's/petitioner's position on the issue and on which the petitioner intends to rely at hearing, together with references to the specific sources and documents on which the requestor/petitioner intends to rely to support its position on the issue; [and]
- (vi) Provide sufficient information to show that a genuine dispute exists with the licensee on a material issue of law or fact. This information must include references to specific portions of the application (including the applicant's environmental report and safety report) that the Petitioner disputes and the supporting reasons for each dispute, or, if the Petitioner believes that the application fails to contain information on a relevant matter as required by law, the identification of each failure and the supporting reasons for the Petitioner's belief.

10 C.F.R. § 2.309(f)(1)(i)-(vi). These contention requirements are "strict by design."

See Dominion Nuclear Connecticut, Inc. (Millstone Nuclear Power Station, Units 2 & 3), CLI-01-24, 54 NRC 349, 358 (2001). A contention that fails to comply with any of these requirements will not be admitted for litigation. *See Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-99-10, 49 NRC 318, 325 (1999); "Changes to Adjudicatory Process [Final Rule]", 69 Fed. Reg. 2182, 2221 (Jan. 14, 2004).

The petitioner must do more than submit bald or conclusory allegations of a dispute with the applicant. See *Millstone*, CLI-01-24, 54 NRC at 358. There must be a specific factual and legal basis supporting the contention. *Id.* at 359. To satisfy 10 C.F.R. § 2.309(f)(1)(v), it is the petitioner's obligation to present factual information and/or expert opinion necessary to support its contention. See *Southern Nuclear Operating Company* (Early Site Permit for Vogtle ESP Site), LBP-07-3, 65 NRC 237, 253 (2007). A contention will not be admitted if it is based solely on unsupported assertions and speculation. See *Fansteel, Inc.* (Muskogee, Oklahoma Site), CLI-03-13, 58 NRC 195, 203 (2003). 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." See 10 C.F.R. §§ 2.309(f)(1)(iii), (iv). To meet 10 C.F.R. § 2.309(f)(1)(vi), the contention must establish that a genuine dispute exists with the applicant on a material issue of law or fact. See *Vogtle*, LBP-07-3, 65 NRC at 254.

IV. The Licensing Board Correctly Found Contention 6 Inadmissible

In the Petitioners' Appeal Brief, they challenge denial of the Petition based on the inadmissibility of Contention 6, which reads as follows:

The reinstatement was improper because TVA has not and cannot meet the NRC's Quality Assurance and Quality Control requirements.

Petition at 25.

The Board found that Contention 6 was inadmissible because the support offered was inaccurate or inadequate to establish that the issue was material to the reinstatement proceedings, or was insufficient to show a genuine dispute on a material fact. *Bellefonte*, LPB-10-07, 71 NRC at ___ (slip op. at 32).

As an initial matter, the Petitioners incorrectly assert that the Board concluded

that the submission of a revised Quality Assurance (QA) program had resolved the Petitioner's concerns. Petitioners' Appeal Brief at 6-7. However, at this stage in the proceeding, the Board's role was not to resolve the Petitioners' generalized QA concerns. See LBP-10-07 at 1-2 (stating Board's task of determining if proffered contentions provide the basis for further consideration). Rather, the Board correctly found that a concern with meeting Quality Assurance and Quality Control (QA/QC) was a matter that appropriately fell under an operating license proceeding.¹⁶ *Id.* at 34. The Board also correctly observed that a concern with QA/QC could be made through a request to modify, suspend, or revoke a license, or other action as may be proper, under 10 C.F.R. § 2.206. *Id.*

Contention 6 may be divided into two parts: a historical failure to meet QA requirements and a future inability to meet QA requirements. Regarding Petitioners' claim that TVA had historically failed to meet QA requirements, that concern did not constitute a genuine dispute on a material issue necessary for a finding regarding the CP reinstatement. Accordingly, that part of the contention was properly held as inadmissible. LBP-10-07 at 32.¹⁷

¹⁶ The Board found it unnecessary to decide if TVA's ability to meet QA/QC requirements was, as the NRC Staff and TVA had argued, outside the scope of the reinstatement proceeding. *Id.* at 32-33 & 33 n.13. The Board wrote:

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.

Id. at 33 n.13.

¹⁷ See also NRC Staff Answer at 25-31.

Regarding Petitioners' assertion that the TVA cannot meet the QA requirements, the Board observed that between the filing of this contention and its referral to the Board, TVA implemented its QA and QC programs for Bellefonte Units 1 and 2. LBP-10-07 at 33. The Board analyzed Contention 6 as a contention of omission but found it was rendered moot by subsequent information (e.g. the submission of Revision 21 of TVA's Quality Assurance Plan). *Id.* at 33-34. In their analysis, the Board noted that, although Petitioners supplemented Contention 6, Petitioners did not reference new information (i.e. the submission of Revision 21 of TVA's Quality Assurance Plan) central to the focus of this contention. *Id.* at 34. The Board's analysis was well reasoned, logical, and did not constitute error of law or abuse of discretion.¹⁸ The Commission will give deference to a Board's determinations and will affirm Board decisions on issues of admissibility of contentions where the appeal fails to point to an error of law or abuse of discretion. See e.g. *Watts Bar*, CLI-10-12, 71 NRC at ___ (slip op. at 3).

In their appeal, Petitioners attempt to further allege errors of law and abuses of discretion committed by the Board in LBP-10-07. They allege that the Board erred in dismissing Contention 6 because Petitioners provided the support of an NRC Staff member and an expert who asserted that the TVA would not be able to demonstrate compliance with quality assurance. Petitioners' Appeal Brief at 6. These arguments, however, were properly rejected by the Board. The Board considered the NRC Staff's

¹⁸ The Board followed the Commission direction regarding the NRC's authority and scope of the proceeding when the Board ruled that Petitioners' assertion that a new permit was needed was outside the scope of the proceeding. See *id.* at 33 n.13 ("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).")

answer, for example, demonstrating that the Petitioners did not show how entering problems with equipment into a CAP after reinstatement of the CPs was an issue material to the NRC Staff's findings for reinstating the CPs.¹⁹ LBP-10-07 at 34. There was no error committed by the Board, and recounting arguments without pointing to how the Board committed an error of law or abused their discretion in rejecting those arguments, is insufficient to support reversal of LBP-10-07. Petitioners' Appeal Brief at 6.

The Commission has stated that it is insufficient to sustain an appeal by merely resting that the proffered contention was supported by an expert. *See U.S. Department of Energy (High Level Waste Repository), CLI-09-14, 69 NRC 580, 585, (2009)*. Because Petitioners fail to show that the Board's decision constitutes an error of law or abuse of discretion, their arguments should be disregarded and their appeal should be denied.

Petitioners put forward throughout their Appeal Brief that there was little information to craft a proper contention. Petitioners' Appeal Brief at 6. This claim, however, does not show any error of law or abuse of discretion by the Board. *See e.g., id.* at 3. In fact, the argument is inconsistent with the facts.

For example, available information that could be used to craft a proper quality assurance contention is found directly in the Application. The August 26, 2008 application for reinstatement itself made clear what TVA's plans were for Quality Assurance, stating,

Upon reinstatement of the permits, a deferred plant

¹⁹ See NRC Staff Answer at 25-29.

equipment plan, as described in Appendix F of Revisions 13 through 16 of TVA's Nuclear Quality Assurance Plan, would be reinstated for Bellefonte Units 1 and 2.

Application at 6. Thus, from the very beginning of this matter, Petitioners were alerted that TVA was going to use its Nuclear Quality Assurance Plan, and even pointed out which Appendix and Revisions TVA intended to apply. See *id.*²⁰

Another example where the Petitioners could have crafted a proper contention is identified in the Board's decision. The Board noted an additional revision of the QA plan, citing as an example of new information, "central to the focus of this contention" and ignored by Petitioners, Revision 21 of the TVA QA Plan submitted September 28, 2009.²¹ *Bellefonte*, LPB-10-07, 71 NRC at ___ (slip op. at 34). The Board reasonably observed that, although Petitioners' dispute was with the QA plans, the Petitioners did not address and dispute TVA's new information regarding QA. When the Board applied the new information to the claims by Petitioners that the "TVA cannot meet NRC's Quality Assurance and Quality Control requirements" in Contention 6, the Board properly concluded that the contention had been essentially mooted. See *id.* at 34. The

²⁰ On March 13, 2009, just after reinstatement, Revision 20 of the TVA Quality Assurance Plan was applied to Bellefonte. See March 13, 2009, letter from Michael A. Purcell, Senior Licensing Manager, Nuclear Power Group, TVA, to US NRC, Subject: "Browns Ferry Nuclear Plant (BFN) Units 1, 2 And 3, Sequoyah Nuclear Plant (SQN) Units 1 And 2, Watts Bar Nuclear Plant (WBN) Unit 1 And 2, And Bellefonte Nuclear Plant (BLN) Units 1 And 2 - TVA's Nuclear Quality Assurance (NQA) Plan (TVA-NQA-PLN89-A)"; Enclosure 1, Nuclear Quality Assurance Plan, Revision 20; Enclosure 2, Description of Changes. (ADAMS Accession No. ML090760973); See also Answer of Tennessee Valley Authority Opposing the Petition for Intervention and Request for Hearing by the Blue Ridge Environmental Defense League Et. Al., (January 29, 2010)(ADAMS Accession No. ML100290859)(describing same).

²¹ As noted by the Staff during oral arguments, TVA submitted an updated QA program on January 15, 2010. Tr. at 144, 148. The January 15, 2010 submission transmitted Tennessee Valley Authority (TVA) Nuclear Quality Assurance Program (previously referred to as the Nuclear Quality Assurance Plan), Revision 23, issued December 14, 2009. (ADAMS Accession No. ML100210972).

Board found that TVA's QA plan was relevant to, and facially addressed, a claim about QA/QC compliance. See *id.* at 34. This is consistent with NRC case law, and the Petitioners have not provided any supporting case law to demonstrate otherwise. Cf. *Progress Energy Florida, Inc.* (Combined License Application, Levy County Nuclear Plant, Units 1 and 2), CLI-10-02, 71 NRC ___ (January 7, 2010) (slip op. at 11-12 n.44) (Discussing a previous decision on "contentions of omission" and "contentions of inadequacy" and noting that where a contention complained of missing information, and the information was then supplied, the contention must be modified to attack the adequacy of the supplied information, or dismissed as moot.)

Furthermore, Petitioners' assertion that the Board based their decision on the failure of Petitioners to address inadequacies in TVA's re-instituted corrective action plan does not identify an error of law or abuse of discretion. Petitioners' Appeal Brief at 5. As proffered Contention 6 is a contention of omission, as the Board appropriately found, a petitioner must provide specific references to specific portions of the application they dispute, or to an omission of required information. Petitioners' Appeal Brief at 3 (quoting 10 C.F.R. § 2.309(f)(1)(vi)). Thus, the Commission has long held that petitioners have an "ironclad obligation" to search, regularly and diligently, publicly available NRC or applicant documents for information relevant to proffered contentions. See e.g. *Shaw Areva MOX Services, LLC* (Mixed Oxide Fuel Fabrication Facility), CLI-09-02, 65 NRC 55, 66 n. 47 (2009). The Petitioners did not meet that obligation in spite of the fact that TVA identified clearly in their Application the Nuclear Quality Assurance Plan they were going to use if the NRC Staff reinstated their CPs.

In noting that the Petitioners failed to address the QA plans and programs, the Board correctly applied the Commission's rules and case law. The Petitioners' Appeal

Brief did not show how the Board erred in its determinations on whether Petitioners met their obligation in the form of a QA contention. Nowhere in the record did Petitioners cite to, discuss, and dispute the QA plans; nowhere does the record show the Petitioners met their ironclad obligation to search for publicly available documents relevant to the proffered contentions. Thus, the Board's ruling should not be reversed.

CONCLUSION

For the foregoing reasons, the Staff submits that the Petitioners have not sufficiently demonstrated good cause to support their Motion For Additional Time or identified any legal errors or abuse of discretion in denying admission of Contention 6 and the petition to intervene and request for hearing. Therefore, Petitioners' motion and appeal of LBP-10-07 should be denied.

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "NRC STAFF'S RESPONSE TO PETITIONERS' MOTION FOR ADDITIONAL TIME IN WHICH TO FILE APPEAL OF LBP-10-07 AND BRIEF IN OPPOSITION TO APPEAL" dated April 29, 2010, have been served upon the following by the Electronic Information Exchange, this 29th day of April, 2010:

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