UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of TENNESSEE VALLEY AUTHORITY (Bellefonte Nuclear Plant, Units 1 and 2)	)	Docket Nos. 50-438-CP and 50-439-CP April 30, 2010

TENNESSEE VALLEY AUTHORITY'S ANSWER OPPOSING
PETITIONERS' MOTION FOR ADDITIONAL TIME TO APPEAL LBP-10-07

I. INTRODUCTION

Pursuant to 10 C.F.R. § 2.323(c), Tennessee Valley Authority ("TVA") files this Answer in opposition to the Blue Ridge Environmental Defense League, Bellefonte Efficiency and Sustainability Team ("BEST"), and Southern Alliance for Clean Energy (collectively, "Petitioners") April 20, 2010 Motion for Additional Time in Which to Appeal LBP-10-07.[1] As discussed more fully below, TVA opposes the Motion and urges that it be denied.

II. PROCEDURAL HISTORY

TVA discusses the procedural history of this proceeding in its concurrently filed Brief Opposing the Petitioners' Appeal.[2] In short, on May 8, 2009, Petitioners submitted a Petition for Intervention and Request for Hearing ("Petition") in this proceeding involving the reinstatement of the construction permits for Bellefonte Nuclear Plant, Units 1 and 2. On April 2, 2010, following a prehearing conference on March 1, 2010, the Atomic Safety and Licensing Board ("Board") issued

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1 *See* Motion by Blue Ridge Environmental Defense League, Its Chapter Bellefonte Efficiency and Sustainability Team and the Southern Alliance for Clean Energy for Additional Time in Which to File Appeal of LBP-10-07 (Apr. 20, 2010) ("Motion"). The Board found that BEST had not separately established standing and was not entitled to party status, a ruling not challenged by Petitioners. *See Tenn. Valley Auth.* (Bellefonte Nuclear Plant, Units 1 & 2), LBP-10-07, 71 NRC __, slip op. at 16 (Apr. 2, 2010) ("Order" or "LBP-10-07").

2 *See* Tennessee Valley Authority's Brief in Opposition to Petitioners' Appeal of LBP-10-07 (Apr. 30, 2010).

a Memorandum and Order finding that Petitioners failed to proffer an admissible contention and, thus, denied the Petition.[3] The Board's Order clearly stated that, "[i]n 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."[4] Despite the express terms of both the Board's Order and NRC regulations, the Petitioners failed to timely appeal LBP-10-07. Moreover, Petitioners also failed to promptly request an extension of time in which to appeal the Board's decision. Instead, Petitioners sat idle, waiting 18 days—until April 20, 2010—before filing their Appeal Brief,[5] and the instant Motion requesting leave to file the Appeal Brief out of time. In fact, Petitioners did not even attempt to contact counsel for the other parties about the Motion until April 19th—7 days after the appeal was due.

As discussed fully below, the pending Motion should be denied because the Petitioners fail to demonstrate the existence of "extraordinary and unanticipated circumstances"[6] sufficient to excuse their failure to file an appeal in a timely manner.

III. ARGUMENT

In accordance with 10 C.F.R. § 2.311(c), "[a]n order denying a petition to intervene, and/or request for hearing . . . is appealable by the requestor/petitioner on the question as to whether the request and/or petition should have been granted." However, § 2.311(b) makes clear that such "appeals must be made as specified by the provisions of this section, within ten (10) days after the service of the order." The Board expressly reiterated these regulatory provisions in its April 2, 2010 Order.[7]

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3 LBP-10-07, slip op. at 2.

4 *Id.* at 40.

5 Brief on Appeal of LBP-10-07 by Blue Ridge Environmental Defense League, Its Chapter Bellefonte Efficiency and Sustainability Team and the Southern Alliance for Clean Energy (Apr. 20, 2010) ("Appeal Brief").

6 *See Yankee Atomic Elec. Co.* (Yankee Nuclear Power Station), CLI-98-21, 48 NRC 185, 202 (1998).

7 *See* LBP-10-07, slip op. at 40.

The Commission's "general policy has been to enforce [this deadline] strictly"[8] and to dismiss an untimely appeal absent a showing of good cause for the failure to file on time.[9] Thus, "[w]hile missing a deadline for appeal is not necessarily a jurisdictional bar to further action on an appeal, [the Commission] historically [has] excused a failure to meet appeal deadlines only in '*extraordinary and unanticipated circumstances*.'"[10] No such circumstances are presented to the Commission in this proceeding.

In the Motion, the Petitioners' explanation for failing to timely file an appeal is as follows:

> (1) Petitioner's counsel, not having been involved in NRC licensing proceedings for some 25 years, appeared in this proceeding only a short while ago – February 16, 2010. In that time the Rules of Practice, as well as the Atomic Energy Act itself, have undergone substantial changes. It has required a great deal of time and work on his part to become conversant with the case file as well as the pertinent sources of legal authority;
>
> (2) The undersigned, a sole practitioner of law, has been atypically tied up with other matters to which he was committed before his appearance in this proceeding, including but not limited a brief filed yesterday in the D.C. Circuit Court of Appeals (*Hardin v. Jackson*, No. 09-5365) and an oral argument scheduled for April 22 (Commonwealth of Virginia v. BREDL, Va. Ct. App. Nos. 2221-09-02, 2222-09-02.)[11]

The circumstances cited by Petitioners' counsel simply do not rise to the level of unanticipated, unavoidable, or extraordinary circumstances. In similar cases, the Commission has uniformly rejected petitioners' arguments relating to the lack of familiarity with a proceeding or applicable regulations. For example, in the *Seabrook* proceeding, the Commission explained that:

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[8] *Yankee Atomic*, CLI-98-21, 48 NRC at 202 (*quoting Consumers Power Co.* (Midland Plant, Units 1 & 2), ALAB-684, 16 NRC 162, 165 n.3 (1982).

[9] *See, e.g.*, *Pub. Serv. Co. of N.H.* (Seabrook Station, Unit 1), CLI-91-14, 34 NRC 261, 265-66 (1991) (dismissing appeal because failure to read procedures and be familiar with deadlines does not establish good cause for failing to file timely appeal brief); *Fla. Power & Light Co.* (Turkey Pt. Nuclear Generating Plant, Units 3 & 4), CLI-91-5, 33 NRC 238, 240-41 (1991) (dismissing appeal because petitioner's unfamiliarity with NRC regulations does not provide good cause for late filing).

[10] *Yankee Atomic*, CLI-98-21, 48 NRC at 202 (*quoting Midland*, ALAB-684, 16 NRC at 165 n.3) (emphasis added).

[11] Motion at 1.

> [Petitioner's] failure to follow the applicable procedures is not excused by its averment that it was accustomed to handling other matters differently. We do not think it too much to expect participants in our proceedings to read and otherwise familiarize themselves with the applicable rules of practice. Even in instances involving lay litigants, we expect adherence to deadlines to ensure the orderly administration of the adjudicatory process. Because we do not believe that [petitioner] has shown sufficient cause for its failure to timely file its brief, [petitioner's] appeal from the Licensing Board's decision denying its petition to intervene is dismissed.[12]

Furthermore, Petitioners' reference to the February 16, 2010 notice of appearance of their counsel is simply irrelevant to the Motion.[13] The Board Memorandum and Order that is the subject of Petitioners' Appeal was not issued until April 2, 2010, and plainly notified Petitioners that "any appeal to the Commission . . . must be taken within ten (10) days after it is served."[14] As the Commission emphasized in the *Turkey Point* proceeding, "unfamiliar[ity] with NRC's Rules of Practice is not sufficient excuse for late or incomplete filings, particularly where the order that is being challenged *expressly* advised the petitioner of his appellate rights, *of the time within which those rights had to be exercised*, and of the manner in which an appeal is to be taken."[15]

Moreover, the 10-day timeframe to file such an appeal has been a longstanding part of NRC practice. In fact, the requirement to appeal a Board order denying a petition to intervene within 10 days has been firmly in place for over 30 years.[16] Thus, notwithstanding any other "substantial changes" to the Rules of Practice and the Atomic Energy Act over the last 25 years, *no changes*

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12 *Seabrook*, CLI-91-14, 34 NRC at 266.

13 Motion at 1.

14 LBP-10-07, slip op. at 40.

15 *Turkey Point*, CLI-91-5, 33 NRC at 240-41 (emphasis added).

16 *See* Final Rule, Miscellaneous Amendments, 43 Fed. Reg. 17,798, 17,802 (Apr. 26, 1978) (increasing the appeal period set in former 10 C.F.R. § 2.714a from 5 days to 10 days); *see also* Final Rule, Changes to Adjudicatory Process, 69 Fed. Reg. 2182, 2223 (Jan. 14, 2004) ("Section 2.311 continues unchanged the provision in former § 2.714a that limits interlocutory appeal of rulings on requests for hearing and petitions to intervene to those that grant or deny a petition to intervene."). In fact, it appears that counsel for the Petitioners has complied with this requirement in the past. *See Va. Elec. & Power Co.* (N. Anna Power Station, Units 1 & 2), ALAB-790, 20 NRC 1450, 1450 (1984) (listing Mr. Dougherty as counsel for the appellant).

have occurred to the timeframe for appealing a Board order denying a petition to intervene. But even beyond the longstanding provision set forth in the Commission's regulations and counsel's asserted lack of familiarity with the full background of this proceeding, the Board's Order itself expressly informed the parties of the timeframe in which an appeal must be taken.[17] Additionally, it has long been Commission practice that motions to extend a deadline for an appellate brief should be filed *at least* one day prior to the deadline,[18] not, as here, eight days after the fact.

Similarly, counsel for the Petitioners' reference to his responsibilities in other cases also fails to establish extraordinary and unanticipated circumstances. The Motion indicates that these "other matters" involve cases to which counsel for the Petitioners "was committed *before* his appearance in this proceeding."[19] Thus, rather than constituting extraordinary and unanticipated circumstances, it appears from the Motion that opposing counsel was fully aware of these other obligations well in advance of the filing deadline, and reasonably should have anticipated their possible impacts on his obligations here. The Commission has made clear that "the fact that a party may have personal or other obligations or possess fewer resources than others to devote to the proceeding does not relieve that party of its hearing obligations."[20] As a result, counsel's claim of being "tied up with other matters" does not justify Petitioners' belated Appeal.[21]

Finally, Petitioners' Motion is conspicuously silent with respect to counsel's failure to even attempt to contact counsel for the other parties until April 19th—7 days after the appeal was due. This failure to promptly contact opposing counsel about the need to request an extension of time is directly contrary to Commission policy indicating that "[r]equests for an extension of time . . .

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17 LBP-10-07, slip op. at 40.

18 *See, e.g., La. Power & Light Co.* (Waterford Steam Elec. Station, Unit 3), ALAB-117, 6 AEC 261, 261-62 (1973); *Boston Edison Co.* (Pilgrim Nuclear Station), ALAB-74, 5 AEC 308, 308 (1972).

19 Motion at 1 (emphasis added).

20 Statement of Policy on Conduct of Licensing Proceedings, CLI-81-8, 13 NRC 452, 454 (1981).

21 Motion at 1.

should be received . . . well before the time specified expires."[22] Further, this repeated indifference to filing deadlines is contrary to the Commission's commitment to the expeditious completion of adjudicatory proceedings.[23] As the Commission stated, "applicants for a license are . . . entitled to a prompt resolution of disputes concerning their applications."[24]

IV. CONCLUSION

For the foregoing reasons, Petitioners have failed to demonstrate that there are extraordinary and unanticipated circumstances which might warrant granting additional time. Accordingly, the Motion should be denied and the Commission should dismiss Petitioners' untimely Appeal.[25]

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[22] Statement of Policy on Conduct of Licensing Proceedings, CLI-81-8, 13 NRC at 454-55. Nor is this the first time that Petitioners have let a deadline pass only to later seek leave to file out of time. *See* 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) ("Order on Motion for Additional Time"); Petitioners Motion for Additional Time in Which to (1) File a Notice of Appearance of Counsel and (2) Reply to TVA and NRC Staff Answers to Petition for Intervention (Feb. 16, 2010). In that instance, the Board admonished Petitioners of the need to seek any future extension of time *before* the expiration of the deadline at issue. *See* Order on Motion for Additional Time at 5.

[23] *See, e.g.,* Statement of Policy on Conduct of Adjudicatory Proceedings, CLI-98-12, 48 NRC 18, 24 (1998).

[24] *Id.* at 19.

[25] Even if the Commission were to grant the Motion and accept Petitioners' belated filing, then the Appeal still should be dismissed because the Board properly denied the Petition for the reasons discussed in TVA's concurrently-filed Brief in Opposition to Petitioners' Appeal.

Respectfully submitted,

/signed (electronically) by/

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Dated at Washington, DC
this 30th day of April 2010

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	)	April 30, 2010
(Bellefonte Nuclear Plant, Units 1 and 2)	)	

TENNESSEE VALLEY AUTHORITY'S BRIEF IN OPPOSITION TO PETITIONERS' APPEAL OF LBP-10-07

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TENNESSEE VALLEY AUTHORITY'S BRIEF IN OPPOSITION TO PETITIONERS' APPEAL OF LBP-10-07

I. INTRODUCTION

In accordance with 10 C.F.R. § 2.311(b), Tennessee Valley Authority ("TVA") files this brief opposing the April 20, 2010 Appeal of LBP-10-07 filed by the Blue Ridge Environmental Defense League ("BREDL") (with its Bellefonte Efficiency and Sustainability Team ("BEST") chapter) and the Southern Alliance for Clean Energy ("SACE") (collectively, "Petitioners").[1] In its April 2, 2010 Memorandum and Order, the Atomic Safety and Licensing Board ("Board" or "ASLB") denied Petitioners' May 8, 2009 hearing request, as later supplemented,[2] because

[1] *See Tenn. Valley Auth.* (Bellefonte Nuclear Plant, Units 1 & 2), LBP-10-07, 71 NRC __, slip op. (Apr. 2, 2010) ("LBP-10-07" or "April 2 Memorandum and Order"); Brief on Appeal of LBP-10-07 by Blue Ridge Environmental Defense League, Its Chapter Bellefonte Efficiency and Sustainability Team and the Southern Alliance for Clean Energy (Apr. 20, 2010) ("Appeal Brief"). Inasmuch as the Board did not admit BEST as a party to this proceeding, a ruling not contested in the Appeal, TVA does not separately refer to it herein.

[2] *See* Petition for Intervention and Request for Hearing by the Blue Ridge Environmental Defense League, Its Chapter Bellefonte Efficiency and Sustainability Team and the Southern Alliance for Clean Energy (May 8, 2009) ("Petition"); Joint Intervenors' Supplemental Basis for Previously Submitted Contention 5—Lack of Good Cause (July 15, 2009); Joint Petitioners' Supplemental Basis for Previously Submitted Contention 6—TVA Has Not and Cannot Meet the NRC's Quality Assurance and Quality Control Requirements (Jan. 11, 2010) ("January 2010 Supplemental Basis").

Petitioners' failed to proffer an admissible contention.[3] Petitioners now appeal the Board's dismissal of Proposed Contention 6, in which Petitioners alleged that the Nuclear Regulatory Commission's ("NRC" or Commission") reinstatement of the voluntarily-withdrawn construction permits ("CPs") for Bellefonte ("BLN") Units 1 and 2, as requested by TVA in August 2008, "was improper because TVA has not and cannot meet the NRC's Quality Assurance ["QA"] and Quality Control ["QC"] requirements."[4]

As demonstrated in TVA's concurrently-filed Answer Opposing Petitioners' April 20, 2010 motion for additional time, Petitioners' Appeal Brief should be stricken because it is unjustifiably late.[5] Nevertheless, should the Commission accept Petitioners' Appeal, Petitioners have not established any reversible flaw in the Board's April 2 Memorandum and Order. As fully demonstrated below, the Board properly concluded that Proposed Contention 6 "lacks adequate foundational support" for its allegation that TVA is unable to comply with applicable NRC QA/QC requirements.[6] In so ruling, the Board correctly applied the NRC's contention admissibility rules, including related principles of contention mootness. Specifically, the Board correctly determined that Proposed Contention 6 has been rendered moot by events occurring after its submittal, including TVA's implementation of the revised BLN Nuclear Quality

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3 LBP-10-07, slip op. at 2 & 38 (stating that the May 2009 Petition must be dismissed because Petitioners failed to proffer an admissible contention).

4 Petition at 25. Conspicuously, in both Proposed Contention 6 and their Appeal Brief, Petitioners make no mention of the narrow, Commission-defined scope of this proceeding; *i.e.*, whether TVA has established "good cause" for the reinstatement of the CPs. Specifically, the Commission limited the scope of this proceeding to "direct challenges to [TVA's] asserted reasons that show good cause justification for the reinstatement of the CPs." *Tenn. Valley Auth.* (Bellefonte Nuclear Plant Units 1 and 2); Order, 74 Fed. Reg. 10,969, 10, 970 (Mar. 13, 2009) ("Reinstatement Order").

5 *See* Tennessee Valley Authority's Answer Opposing Petitioners' Motion for Additional Time to Appeal LBP-10-07 (Apr. 30, 2010); s*ee also Pub. Serv. Co. of N.H.* (Seabrook Station, Unit 1), CLI-91-14, 34 NRC 261, 265-66 (1991) (dismissing appeal because failure to read procedures and be familiar with deadlines does not establish good cause for failing to file timely appeal brief); *Fla. Power & Light Co.* (Turkey Pt. Nuclear Generating Plant, Units 3 & 4), CLI-91-5, 33 NRC 238, 240-41 (1991) (dismissing appeal because petitioner's unfamiliarity with NRC regulations does not provide good cause for late filing).

6 LBP-10-07, slip op. at 33 n. 13.

Assurance Plan ("NQAP"), as verified and documented by the NRC Staff in accordance with established NRC inspection procedures and the Commission's Policy Statement on Deferred Plants.[7]

For all of these reasons, the Commission should deny the Appeal and affirm the Board's April 2 Memorandum and Order dismissing Proposed Contention 6 as inadmissible.

II. PROCEDURAL HISTORY

This 10 C.F.R. Part 50 proceeding concerns TVA's August 26, 2008 request to reinstate the BLN Unit 1 and Unit 2 CPs,[8] which TVA voluntarily withdrew in 2006.[9] On March 13, 2009, the NRC published in the *Federal Register* an Order reinstating the CPs for BLN Units 1 and 2 in "terminated plant" status pursuant to Section 161.b of the Atomic Energy Act ("AEA") of 1954, as amended, 42 U.S.C. § 2201.b, and 10 C.F.R. § 50.55(b).[10] The Reinstatement Order stated that "[a]ny person adversely affected by this Order may request a hearing on this Order within 60 days of its issuance, and *the request for a hearing is limited to whether good cause exists for the reinstatement of the CPs*."[11]

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7 *See* Final Policy Statement, Commission Policy Statement on Deferred Plants, 52 Fed. Reg. 38,077 (Oct. 14, 1987) ("Policy Statement on Deferred Plants").

8 *See* Letter from A.S. Bhatnagar, TVA, to E.J. Leeds, NRC (Aug. 26, 2008) ("Reinstatement Request"), *available at* ADAMS Accession No. ML082410087.

9 *See* Letter from Glenn W. Morris, TVA, to the NRC Document Control Desk (Apr. 6, 2006), *available at* ADAMS Accession No. ML061000538 (TVA's request to withdraw its two CPs); Letter from C. Haney, NRC, to K.W. Singer, TVA (Sept. 14, 2006), *available at* ADAMS Accession No. ML061810505 (granting TVA's request to voluntarily withdraw the two CPs).

10 Reinstatement Order, 74 Fed. Reg. at 10,970. On August 10, 2009, TVA requested that the NRC Staff authorize the transition of BLN Units 1 and 2 from "terminated" to "deferred" status, consistent with the terms of the Commission's March 2009 Reinstatement Order. Letter from A.S. Bhatnagar, TVA, to NRC, Attn. Document Control Desk (Aug. 10, 2009) ("Request for Transition to Deferred Status"), *available at* ADAMS Accession No. ML092230594. The Staff approved TVA's request to place BLN Units 1 and 2 in "deferred" status on January 14, 2010. *See* Letter from E.J. Leeds, NRC, to A.S. Bhatnagar, TVA (Jan. 14, 2010), *available at* ADAMS Accession No. ML093420915 ("Deferred Plant Status Approval Letter").

11 Reinstatement Order, 74 Fed. Reg. at 10,969 (emphasis added).

On May 8, 2009, Petitioners filed nine proposed contentions.[12] By Order dated May 20, 2009, the Commission directed the Petitioners, TVA, and Staff to submit briefs "addressing the question whether the NRC possesses the statutory authority to reinstate the withdrawn construction permits."[13] Citing Proposed Contentions 1 and 2 as the basis for this request, the Commission ordered that "[t]he remainder of Petitioners' proposed contentions will be held in abeyance, pending the Commission's ruling on the threshold 'authority' issue."[14]

On January 7, 2010, the Commission ruled that it has the legal authority to reinstate the CPs. Accordingly, the Commission dismissed Proposed Contentions 1 and 2, but referred the remaining seven contentions to the Board.[15] Reiterating that the scope of this proceeding is limited to "whether there is 'good cause' for [CP] reinstatement,"[16] the Commission tasked the ASLB with deciding whether Petitioners' had established standing to intervene and submitted an admissible contention within that scope.[17]

Shortly thereafter, on January 11, 2010, Petitioners filed a supplemental basis in alleged support of Proposed Contention 6.[18] TVA moved to strike that supplemental basis on the ground that it did not comply with the NRC's Rules of Practice.[19] On January 25, 2010, Petitioners filed their answer opposing TVA's Motion to Strike.[20]

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12 Petition at 12-38.

13 *See* Commission Order at 1 (May 20, 2009) (unpublished) ("May 20 Order").

14 *Id.* at 2.

15 *See Tenn. Valley Auth.* (Bellefonte Nuclear Power Plant, Units 1 & 2), CLI-10-06, 71 NRC __, slip op. at 19-20 (Jan. 7, 2010).

16 *Id.* at 19.

17 *Id.*

18 *See* January 2010 Supplemental Basis.

19 *See* Tennessee Valley Authority's Motion to Strike Petitioners' Supplemental Basis for Proposed Contention 6 (Jan. 14, 2010) ("January 2010 TVA Motion to Strike").

20 *See* Joint Petitioners Answer to Tennessee Valley Authority's Motion to Strike Supplemental Basis for Contention 6 (Jan. 25, 2010).

On January 15, 2010, the ASLB issued an Initial Prehearing Order, in which it defined a briefing schedule.[21] Pursuant to that schedule, on January 29, 2009, TVA and the Staff filed their Answers to the Petition.[22] With leave of the Board, Petitioners filed their Reply on February 16, 2010—11 days after the original filing deadline.[23] Thereafter, on March 1, 2010, the Board heard oral argument by counsel on the application of the "good cause" standard and the admissibility of Petitioners' seven remaining contentions.

One month later, on April 2, 2010, the Board issued LBP-10-07, in which it determined that BREDL and SACE (but not BEST) had established standing to intervene in this proceeding. The Board dismissed the Petition, however, because it contained no admissible contentions, contrary to the provisions of 10 C.F.R. § 2.309(f)(1). In its April 2 Memorandum and Order, the Board expressly directed that any appeal of LBP-10-07 be filed within 10 days.[24] Despite that directive, and the unambiguous language of 10 C.F.R. § 2.311(b), Petitioners filed the instant Appeal 18 days later on April 20, 2010. Petitioners seek Commission review of the Board's dismissal of Proposed Contention 6, concerning TVA's compliance with NRC QA/QC requirements. TVA hereby opposes Petitioners' Appeal.

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21 *See* Tennessee Valley Authority; Establishment of Atomic Safety and Licensing Board, 75 Fed. Reg. 3946 (Jan. 25, 2010); Licensing Board Memorandum and Order (Initial Prehearing Order) (Jan. 15, 2010) (unpublished).

22 *See* Answer of Tennessee Valley Authority Opposing the Petition for Intervention and Request for Hearing by [Petitioners] (Jan. 29, 2010) ("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) ("NRC Staff Answer").

23 *See* Petitioners' Reply to NRC Staff's and TVA's Answers in Opposition to Petition for Intervention and Request for Hearing (Feb. 16, 2010) ("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) at 1-5 (Feb. 18, 2010) (unpublished). Petitioners attributed the delay in filing their Reply to their efforts "to secure the services of counsel to represent them henceforth in this proceeding." Petitioners Motion for Additional Time in Which to (1) File a Notice of Appearance of Counsel and (2) Reply to TVA and NRC Staff Answers to Petition for Intervention, at 1 (Feb. 16, 2010).

24 *See* LBP-10-07, slip op. at 40 ("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.").

III. STANDARD OF REVIEW

"An order denying a petition to intervene, and/or request for hearing . . . is appealable by the requestor/petitioner on the question as to whether the request and/or petition should have been granted."[25] In ruling on such an appeal, however, the Commission gives "substantial deference" to Board determinations on standing and contention admissibility.[26] Thus, "the Commission affirms Board rulings on admissibility of contentions if the appellant 'points to no error of law or abuse of discretion.'"[27]

Abuse of discretion is a "high standard of review."[28] A petitioner has a "heavy burden" on appeal to establish that reversal of a Board decision is warranted.[29] Consistent with this standard, "[t]he appellant bears the responsibility of clearly identifying the errors in the decision below and ensuring that its brief contains sufficient information and cogent argument to alert the other parties and the Commission to the precise nature of and support for the appellant's claims."[30] Accordingly, the Commission will reject an appeal where the appellant "has failed . . . to address adequately (if at all) the Board's grounds for refusing to admit" the contention[31] or where the appellant simply repeats claims previously rejected by the Board.[32]

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25 10 C.F.R. § 2.311(c).

26 *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-06-24, 64 NRC 111, 121 (2006); *see also Progress Energy Carolinas, Inc.* (Shearon Harris Nuclear Power Plant, Units 2 & 3), CLI-10-09, 71 NRC __, slip op. at 10, 39 (Mar. 11, 2010).

27 *Dominion Nuclear Conn., Inc.* (Millstone Nuclear Power Stations, Units 2 & 3), CLI-04-36, 60 NRC 631, 637 (2004) (*quoting Private Fuel Storage, L.L.C.* (Indep. Spent Fuel Storage Installation), CLI-00-21, 52 NRC 261, 265 (2000)); *see also Tenn. Valley Auth.*(Watts Bar Nuclear Plant, Unit 2), CLI-10-12, 71 NRC __, slip op. at 3 (Mar. 26, 2010) ("We will defer to the Board's rulings on threshold issues absent an error of law or abuse of discretion.").

28 *Andrew Siemaszko*, CLI-06-16, 63 NRC 708, 718 (2006).

29 *Pub. Serv. Co. of N.H.* (Seabrook Station, Units 1 & 2), ALAB-918, 29 NRC 473, 482 (1989).

30 *Millstone*, CLI-04-36, 60 NRC at 639 n.25 (*quoting Advanced Med. Sys., Inc.* (One Factory Row, Geneva, OH 44041), CLI-94-6, 39 NRC 285, 297 (1994)).

31 *Id.* at 637.

32 *PPL Susquehanna LLC* (Susquehanna Steam Elec. Station, Units 1 & 2), CLI-07-25, 66 NRC 101, 104-06 (2007).

IV. THE BOARD PROPERLY DISMISSED PROPOSED CONTENTION 6 AS MOOT AND LACKING ADEQUATE FOUNDATION

A. Proposed Contention 6 and Petitioners' January 2010 Supplemental Basis

Proposed Contention 6 alleged that TVA's withdrawal of the BLN CPs in 2006 precludes any future TVA compliance with NRC's QA/QC requirements in 10 C.F.R. Part 50.[33] Petitioners and their proffered expert, Arnold Gundersen, principally contended that the NRC improperly reinstated the Unit 1 and Unit 2 CPs because: (1) both Units were partially dismantled and "cannibalized" when significant pieces of equipment were sold off for scrap; (2) a member of the NRC Staff and an NRC Commissioner disagreed with the decision to reinstate the Unit 1 and 2 CPs and wrote dissenting opinions;[34] (3) the NRC performed no inspections during the three years following the termination of the BLN CPs; and (4) TVA did not follow acceptable QA procedures, federal regulations, or industry protocol for more than three years.[35] Petitioners postulated that reinstatement of the CPs poses a "grave risk to public safety."[36]

In their January 2010 Supplemental Basis, Petitioners asked the Board to include in the record a December 2009 letter in which TVA notified the NRC of a containment vertical tendon coupling failure that TVA discovered on August 24, 2009.[37] Petitioners alleged that "[t]he failure of the nuclear reactor containment tendon mirrors the failure of TVA to adhere to construction permit conditions which require the permit holder to implement quality assurance

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33 Petition at 25-28.

34 *See* COMSECY-08-0041, Staff Recommendation Related to Reinstatement of the Construction Permits for Bellefonte Nuclear Plant Units 1 and 2, Encl. 2 (Dec. 12, 2008), *available at* ADAMS Accession No. ML083230895 (Non-Concurrence of Joseph Williams (Nov. 20, 2008)); Commission Voting Record, COMSECY-08-0041, Response Sheet of Comm'r Jaczko (Jan. 27, 2009), *available at* ADAMS Accession No. ML090500374.

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

36 Petition at 28; Gundersen Decl. at 9. As noted above, in both Proposed Contention 6 and their Appeal Brief, Petitioners never expressly allege a lack of "good cause" for reinstatement of the CPs—the sole focus of this limited-scope proceeding per the Commission's March 2009 Reinstatement Order.

37 January 2010 Supplemental Basis at 3, 6.

criteria."[38] Petitioners, however, provided no documentation or expert opinion to substantiate their allegation that the cited tendon failure was the result of, or in any way related to, purported deficiencies in TVA's past or present QA program activities.

Both TVA and the NRC Staff opposed the admission of Proposed Contention 6, as later supplemented by Petitioners, on multiple grounds.[39] In particular, they argued that the proposed contention failed to raise a material issue within the scope of this "good cause" proceeding, failed to raise a genuine dispute on a material factual or legal issue, and lacked an adequate factual basis, contrary to 10 C.F.R. § 2.309(f)(1)(iii), (iv), (v), and (vi).[40] Citing public documents long available to Petitioners, TVA explained that it had reinstituted the BLN NQAP in a manner found acceptable by the NRC Staff—a prerequisite to any reactivation of construction or plant operation.[41] The Staff, for its part, noted that "a concern over QA records is the type of concern that can be heard upon application for an operating license."[42]

B. <u>The Board's Stated Bases for Rejecting Proposed Contention 6</u>

The Board dismissed Proposed Contention 6 because the support offered for the contention (1) is either inaccurate or inadequate to establish that the issue raised is material to the proceeding, and (2) is insufficient to show a genuine dispute on a material factual or legal issue exists so as to warrant admission of the contention.[43] In making this determination, the Board appropriately characterized Proposed Contention 6 as one of omission:

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38 *Id.* at 4.

39 *See* TVA Answer at 45-51; NRC Staff Answer at 25-31.

40 *See* TVA Answer at 45-51; NRC Staff Answer at 25-31.

41 TVA Answer at 48-49.

42 NRC Staff Answer at 27. TVA also noted that, to the extent that Petitioners contend that their purported basis for Proposed Contention 6 presents a current health and safety issue warranting NRC action, their proper recourse is to seek appropriate action pursuant to 10 C.F.R. § 2.206. TVA Answer at 50 n.219.

43 LBP-10-07, slip op. at 32 (*citing* 10 C.F.R. § 2.309(f)(1)(iv), (v), (vi)). Although the Board noted TVA's and the NRC Staff's arguments that Proposed Contention 6 raises issues that are outside the scope of this "good

> [W]e 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.[44]

Based upon its review of the participants' pleadings, docketed materials referenced by TVA and the Staff, and the oral argument, the Board concluded that the contention had been "rendered moot by subsequent events."[45] In particular, the Board cited TVA's submittal and implementation of a revised NQAP "to address the issues associated with the facilities not being maintained in deferred status for several years and having some components removed."[46] It also noted that the Staff had reviewed the revised BLN NQAP and performed an inspection in October 2009 to verify TVA's compliance with the applicable elements of the Policy Statement on Deferred Plants (which include implementation of an NRC-approved QA program).[47]

In dismissing Proposed Contention 6 as moot, the Board correctly observed that Petitioners failed to mention, much less evaluate or challenge these "subsequent events," despite their being "central to the focus of this contention."[48] It also found that Petitioners' January 2010 Supplemental Basis provided "nothing of substance" to support Petitioners' QA-related allegations.[49] Finally, the Board noted that the degree to which QA/QC requirements have been implemented could be the subject of a petition filed pursuant to 10 C.F.R. § 2.206 or a contention

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cause" proceeding, the Board concluded that it "need not resolve this scope issue" given its finding that "the contention lacks adequate foundational support." *Id.* at 33 n.13.

44 *Id.* at 33.

45 *Id.* at 34.

46 *Id.* at 33.

47 *Id.* at 34 n.15.

48 *Id.* at 34.

49 *Id.* at 34 n.14 (stating that the January 2010 Supplemental Basis regarding the containment vertical tendon coupling failure "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").

submitted in any future Part 50 operating license ("OL") hearing relating to the facility in question.[50]

C. Petitioners Have Identified No Error of Law or Abuse of Discretion in the Board's Ruling that Proposed Contention 6 is Inadmissible

On appeal, Petitioners argue that the Board committed reversible error because its dismissal of Proposed Contention 6 "is profoundly inconsistent with the applicable regulations and principles regarding the admissibility of contentions."[51] They further contend that that the ASLB has "established a bar that is virtually unattainable, especially in a case, like this, where the file contains virtually no information."[52] Petitioners then claim that they have met their burden under the Commission's contention admissibility rules by relying on a "detailed and extensive 'non-concurrence'" submitted by an NRC Staff member and submitting the declaration of their proffered expert, Mr. Arnold Gundersen.[53] In so doing, however, they rely on case law pre-dating the Commission's revisions to its Rules of Practice in 2004, and ignore the current, uniform recognition that the contention standards are "strict by design."[54]

As shown below, Petitioners have not met their burden. They fail to point to any error of law or abuse of discretion in the Board's decision finding Proposed Contention 6 inadmissible. Instead, they overlook settled precepts concerning contention admissibility, supplementation, and

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50 *Id.* at 34.

51 Appeal Brief at 6.

52 *Id.* at 7

53 *Id.* at 4-5.

54 *See* Final Rule, Changes to Adjudicatory Process, 69 Fed. Reg. 2182, 2189-90 (Jan. 14, 2004) ("The threshold standard [in 10 C.F.R. § 2.309(f)] is necessary to ensure that hearings cover only genuine and pertinent issues of concern and that the issues are framed and supported concisely enough at the outset to ensure that the proceedings are effective and focused on real, concrete issues."); *Dominion Nuclear Conn., Inc.* (Millstone Nuclear Power Station, Unit 2), CLI-03-14, 58 NRC 207, 213 (2003) (stating that the NRC's contention rule is "strict by design").

mootness; inaccurately describe the record;[55] and repeat prior, unsuccessful arguments. Therefore, the Appeal should be denied and the Board's Memorandum and Order affirmed.

1. The Board's Dismissal of Proposed Contention 6 Is Consistent With the NRC's Contention Admissibility Rules and Controlling Commission Precedent on Contention Mootness

The Board did not err in finding that subsequent TVA submittals had rendered Proposed Contention 6 moot and, therefore, inadmissible. The Board's ruling, in fact, is entirely consistent with controlling Commission precedent on contention mootness. Specifically, the Commission has held that "[w]here a contention alleges the omission of particular information or an issue from an application, and the information is later supplied by the applicant … the contention is moot."[56] To raise specific challenges to the new information, an intervenor must "timely file a new or amended contention that addresses the factors in section [2.309]."[57] A petitioner's obligation in this respect is "ironclad."[58] Without such a requirement, contentions of omission "could readily be transformed—without basis or support—into a broad series of disparate new claims."[59]

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[55] For example, Petitioners' insinuation that TVA "let the two plants sit idle for 17 years before voluntarily withdrawing the CPs in 2005" (Appeal Brief at 4) is simply incorrect. As documented in COMSECY-08-0041, both units were preserved and maintained in accordance with the Commission's Policy Statement on Deferred Plants, and NRC performed periodic inspections verifying the effectiveness of TVA's lay up activities until 2005. *See* COMSECY-08-0041, Encl. 1, at 2, 9 & 11.

[56] *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 & 2; Catawba Nuclear Station, Units 1 & 2), CLI-02-28, 56 NRC 373, 383 (2002) ("*McGuire/Catawba"*).

[57] *Id.*

[58] *Id.* at 386 (*quoting* Final Rule, Rules of Practice for Domestic Licensing Proceedings—Procedural Changes in the Hearing Process, 54 Fed. Reg. 33,168, 33,170 (Aug. 11, 1989) ("Hearing petitioners have an 'ironclad obligation to examine the publicly available documentary material pertaining to the facility in question with sufficient care to enable the petitioner to uncover any information that could serve as the foundation for a specific contention.'")). *See also Duke Energy Corp.* (McGuire Nuclear Station, Units 1 & 2; Catawba Nuclear Station, Units 1 & 2), CLI-03-17, 58 NRC 419, 429 (2003) ("Petitioners have an obligation to examine the application and publicly available information, and to set forth their claims at the earliest possible moment."); *Shaw Areva MOX Services, LLC* (Mixed Oxide Fuel Fabrication Facility), CLI-09-2, 69 NRC 55, 65 n.47 (2009) (same).

[59] *Catawba/McGuire*, CLI-02-28, 56 NRC at 383. As the Commission further explained, this would effectively circumvent the purposes of the rules governing contention admission: (1) providing notice of the issues to be

These principles apply both to proposed and admitted contentions. For example, in the *Oyster Creek* license renewal proceeding, the Board applied the mootness doctrine in rejecting a proposed contention submitted by the intervenors as part of a motion to reopen the record.[60] Citing *McGuire/Catawba*, the Board stated: "As with *all* contentions of omission, if the applicant [or Staff] supplies the missing information—or, as relevant here, . . . performs the omitted analysis—the contention is moot."[61] The Board found that the applicant's docketed response to a Staff request for additional information provided a confirmatory fatigue analysis of the Oyster Creek recirculation nozzle, thereby curing the alleged omission.[62]

Also relevant here, the *Oyster Creek* Board found that "[n]either law nor logic supports [the] assertion that this Board is foreclosed from considering docketed licensing material that has been submitted to the Board and that, on its face, appears to be relevant to the disposition of a pending motion."[63] On appeal, the Commission agreed, finding the intervenors' argument to be "simply incorrect."[64] Citing *McGuire/Catawba*, the Commission concluded that the Board did not err in finding that the applicant's confirmatory analysis submittal rendered the contention moot.[65]

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litigated; (2) ensuring the existence of at least minimal factual and legal foundation for the alleged claims; and (3) ensuring there exists an actual genuine dispute on a material issue of law or fact. *Id.*

60 *See AmerGen Energy Co.*, LLC (Oyster Creek Nuclear Generating Station), LBP-08-12, 68 NRC 5, 21(2008) ("Because AmerGen has cured the omission alleged in Citizens' newly proffered contention, the April 18 motion to reopen the record in order to add a new contention has been rendered moot. And because Citizens' motion is moot and, thus, no longer raises a litigable controversy, it fails, definitionally and functionally, to present a significant safety issue.").

61 *Id.* (emphasis added).

62 *Id.*

63 *Id.* at 20 n.13.

64 *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-08-28, 68 NRC 658, 676 n.72 (2008).

65 *Id.* (*citing McGuire/Catawba*, CLI-02-28, 56 NRC at 383; *Entergy Nuclear Vt. Yankee L.L.C.* (Vt. Yankee Nuclear Power Station), LBP-05-24, 62 NRC 429, 431 (2005)).

In like manner, the Board here correctly concluded that TVA had submitted information that directly "addresses Joint Petitioners' concern about TVA QA/QC compliance."[66] Specifically, the Reinstatement Request evinced TVA's clear intent to reinstitute its NQAP—a commitment which TVA effected on March 13, 2009 through the submittal of BLN NQAP, Revision 20 pursuant to 10 C.F.R. § 50.55(f)(3).[67] The BLN NQAP describes the methods and establishes the administrative control requirements necessary to comply with 10 C.F.R. Part 50, Appendix B requirements, the Policy Statement on Deferred Plants, and the reinstated CPs for BLN Unit 1 and Unit 2.[68] It also specifically addresses the temporary cessation of preventive maintenance on selected plant equipment following the withdrawal of the CPs.[69]

Additionally, TVA discussed the implementation of the revised BLN NQAP in its August 10, 2009 request to place the plants into "deferred" status (the submittal of which was promptly brought to Petitioners' attention through a Board notification served on all participants).[70] TVA's implementation of the BLN NQAP also was subject to a week-long NRC inspection in

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66 LBP-10-07, slip op. at 34.

67 *See* Letter from M.A. Purcell, TVA, to the U.S. NRC, Encl. 1, App. G (March 13, 2009) (TVA-NQA-PLN89-A, Rev. 20, App. G, Quality Assurance Programs for Bellefonte Units 1 and 2), *available at* ADAMS Accession No. ML090760973 ("BLN NQAP"). On September 28, 2009, TVA submitted Revision 21 of the BLN NQAP. Letter from R.M. Krich, TVA, to NRC Document Control Desk, Encl. 2 (Sept. 28, 2009), *available at* ADAMS Accession No. ML0927503500). These filings were made well in advance of Petitioners' February 2010 Reply. Petitioners plainly could have sought to amend their proposed contention after the Commission in accordance with § 2.309(f)(2) or, at a minimum, addressed these filings in their Reply.

68 *See* BLN NQAP at 1.

69 *See id.* at 5. The "Plant Equipment Policy" contained in the BLN NQAP states, in part, that:

> TVA procedure controls prohibited and will continue to prohibit "deferred equipment" from being used in nuclear safety related applications without further evaluation and having been fully restored or replaced.
>
> Structures, systems or components that have been affected in the course of resource recovery activities will likewise be entered in to the corrective action program and prohibited from being returned to service without evaluation and having been restored or replaced.

Id.

70 *See* Letter from K.M. Sutton, Morgan, Lewis & Bockius, to Chairman G. Jaczko, NRC (Aug. 11, 2009), *available at* ADAMS Accession No. ML092230731 (notifying the Board and participants of TVA's submittal of the Request for Transition to Deferred Status on August 10, 2009) ("Sutton Letter").

October 2009, as documented in the NRC Staff's associated December 2, 2009 Inspection Report,[71] and in its January 14, 2010 approval of TVA's request to place the units into deferred status.[72] The NRC's December 2, 2009 Inspection Report and January 14, 2010 Deferred Plant Status Approval Letter, which TVA discussed in its Answer, are publicly-available documents that were accessible to Petitioners well before they filed their February 20, 2010 Reply.[73]

Petitioners, however, never challenged any of the foregoing conclusions or supporting information in an amended or new contention, as required by 10 C.F.R. § 2.309(f)(2), thereby rendering their contention moot. Moreover, while Petitioners sought to supplement the record on January 11, 2010 with information about a reported containment vertical tendon coupling failure, they did not explain the relevance or materiality of that information to TVA's purported noncompliance with NRC QA requirements.[74] Conspicuously, Petitioners also never addressed the new QA-related information in their Reply, despite TVA's explicit reliance on that information. In fact, Petitioners' Reply, which was prepared by counsel,[75] is silent with respect

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71 Letter from R.C. Haag, NRC, to A.S. Bhatnagar, TVA, at 1 (Dec. 2, 2009), Bellefonte Nuclear Plant Units 1 (CPPR-122) and 2 (CPPR-123)–Transition to Deferred Status–NRC Inspection Report 05000438/2009601 and 05000439/2009601, encl. (Dec. 2, 2009) ("NRC Inspection Report"), *available at* ADAMS Accession No. ML093370083.

72 *See* Deferred Plant Status Approval Letter, *available at* ADAMS Accession No. ML093420915. NRC Staff counsel promptly notified the Board and participants of the Staff's issuance of the Deferred Plant Status Approval Letter. *See* Letter from J.M. Suttenberg, NRC, to Atomic Safety and Licensing Board (Jan. 19, 2010), *available at* ADAMS Accession No. ML100191836. *See also* NRC News Release No. 10-012, *NRC Moves Unfinished Bellefonte Reactors to Deferred Status* (Jan. 14. 2010), *available at* ADAMS Accession No. ML100140465.

73 *See* TVA Answer at 6-7 & 47-49.

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

75 Although Petitioners' original contentions were submitted *pro se* (*see* Appeal Brief at 4), their then-designated representative, Mr. Lou Zeller, has participated in numerous and recent NRC licensing proceedings related to license renewal and new reactor licensing. Consequently, he is no doubt sufficiently familiar with the Commission's contention pleading standards, including its current requirements in 10 C.F.R. § 2.309(f). Even

to Proposed Contention 6 and TVA's arguments opposing its admission. Petitioners, therefore, arguably have waived any argument on appeal that the revised BLN NQAP does not address their QA-related concerns.[76] The time to make such an argument has come and gone.

In sum, the Board acted well within its authority and consistent with controlling precedent in concluding that information long-known and available to Petitioners had mooted the QA-related concerns raised in Proposed Contention 6. When, as in this case, an applicant's subsequent submittals squarely address an omission or concern alleged by a petitioner, the contention is moot and "must be disposed of or modified" as a matter of law.[77] The "resolution of the mooted contention requires no more than a finding by the presiding officer that the matter has become moot."[78] Accordingly, Petitioners have provided no reason for the Commission to disturb the Board's well-reasoned dismissal of Proposed Contention 6 on this basis.

2. Petitioners Have Not Explained Their Failure to Proffer a New or Amended Contention Based on the New Information Provided by TVA and NRC Staff

Petitioners' claim that the underlying record "contains virtually no information" on which they could base an admissible contention is specious.[79] TVA's August 2008 Reinstatement Request detailed TVA's asserted reasons for seeking reinstatement of the CPs and described TVA's proposed post-reinstatement activities. TVA's proposal was the subject of detailed NRC Staff and Commission evaluations, as documented in COMSECY-08-0041, the Commission's

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assuming that he is not, arguments related to the *pro se* status of Petitioners also are moot in regard to all of Petitioners' submittals and actions after February 16, 2010, the date Petitioners' counsel submitted his notice of appearance. *See* Notice of Appearance of James B. Dougherty (Feb. 16, 2010).

[76] *See*, *e.g.*, *PFS,* CLI-00-21, 52 NRC at 264 (*citing La. Energy Servs., L.P.* (Claiborne Enrichment Center), CLI-97-2, 45 NRC 3, 4 (1997) (noting that "[n]ew arguments are improper" on appeal)).

[77] *See USEC, Inc.* (American Centrifuge Plant), CLI-06-9, 63 NRC 433, 444 (2006) (*quoting McGuire/Catawba*, CLI-02-28, 56 NRC at 383) (internal quotation marks omitted)).

[78] *Id.* at 444-45. When an alleged omission is cured, dismissal of the mooted contention is appropriate as a matter of law. Even if such action requires some reflective assessment of new factual information by the Board, dismissal of a mooted contention is not conditional upon the filing of a dispositive motion. *See id.*

[79] Appeal Brief at 7.

associated Staff Requirements Memorandum and Voting Records, the March 2009 Reinstatement Order, and the Staff's supporting Safety Evaluation.[80] Thus, when Petitioners submitted Proposed Contention 6 in May 2009, the record contained more than a "few letters" between TVA and the Staff.[81]

Furthermore, the underlying record contains ample information demonstrating TVA's NRC-verified compliance with applicable QA requirements since reinstatement of the CPs. As noted above, the revised BLN NQAP, initially submitted by TVA in March 2009, addressed the temporary cessation of preventive maintenance on selected plant equipment following the voluntary withdrawal of the CPs.[82] The revised BLN NQAP, in turn, facilitated TVA's subsequent request, on August 10, 2009, that BLN Units 1 and 2 be placed in deferred status.[83] In response, the NRC Staff issued a formal plan to assess the transition of BLN Units 1 and 2 from "terminated" to "deferred" status,[84] and performed a related inspection at BLN in October 2009.[85] That inspection focused largely on verifying TVA's compliance with QA requirements before placing Units 1 and 2 into deferred status.[86] Importantly, the Staff concluded that "TVA

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80 *See* COMSECY-08-0041; Staff Requirements Memorandum ("SRM") to R.W. Borchardt (Feb. 18, 2009), *available at* ADAMS Accession No. ML090490838; Reinstatement Order, 74 Fed. Reg. at 10,970-71; Safety Evaluation by the Office of Nuclear Reactor Regulation Relating to the Request for Reinstatement of Construction Permit Nos. CPPR-122 AND CPPR-123, Bellefonte Nuclear Plant, Units 1 and 2, Docket Nos. 50-438 and 50-439, at 4 (Mar. 9, 2009), *available at* ADAMS Accession No. ML090620052 ("NRC Safety Evaluation").

81 Appeal Brief at 6.

82 *See* BLN NQAP Rev. 21, at 5 (section entitled "Plant Equipment Policy").

83 *See* Request for Transition to Deferred Status; *see also* Sutton Letter.

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

85 *See* NRC Inspection Report.

86 *See id.* (transmittal letter). As the NRC Staff noted:

> The purpose of the inspection was to identify the status of the applicable program areas, specified in Section III.A, "Deferred Plant", of the Commission Policy Statement on Deferred Plants (52 FR 38077), currently established at the Bellefonte Nuclear Plant. *Primarily, the NRC recognized the need to address the*

has established the necessary programs to support transition to deferred status," an action formally approved by the Staff on January 14, 2010.[87]

The foregoing clearly dispels Petitioners' claim that the record contains "precious little" and "inconsequential" information.[88] Petitioners made no attempt to challenge or otherwise address the new and dispositive information placed on the docket by TVA and the NRC Staff—despite its being readily available to them. Instead, in their Appeal Brief, Petitioners revert to prior, unsuccessful arguments. In particular, Petitioners replay arguments regarding the filing of a non-concurrence by a "whistleblowing" NRC Staff member.[89] Petitioners' continued reliance on these arguments provides no basis for overturning the Board's ruling here.

As TVA previously explained, Petitioners' citation to a differing professional opinion or non-concurrence by an NRC Staff member does not by itself give rise to a litigable contention.[90] Differing professional views by members of the Staff and Commission are not aberrations—they are an integral part of the agency's deliberative decision-making process. In reinstating the CPs, a majority of both the Staff and the Commission addressed any dissenting views, and approved

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> *lapse in Quality Assurance (QA) oversight and investment recovery consequences that occurred in the period from withdrawal of the site's Construction Permits until when the QA program was reestablished.* Specific actions were taken to evaluate if [TVA] had properly implemented the NRC-approved QA program, adequately addressed the status and quality of currently installed and stored equipment, and established associated processes and controls necessary to comply with regulatory requirements associated with your construction permits.

Id., transmittal letter at 1 (emphasis added).

87 NRC Inspection Report (Executive Summary); *see also* Deferred Plant Status Approval Letter at 1 & 6.

88 Appeal Brief at 1 & 6.

89 *Id.* at 4-6.

90 *See USEC, Inc.* (American Centrifuge Plant), CLI-06-10, 63 NRC 451, 472 (2006) (holding that mere references to articles or documents without "explanation or analysis" does not supply an adequate basis for admitting a contention, and that "conclusory" statements proffered by an alleged expert do not provide "sufficient" support for a contention); *U.S. Dep't of Energy* (High-Level Waste Repository), CLI-09-14, 69 NRC __, slip op. at 9 (June 30, 2010) (stating that generalized assertions, without specific ties to NRC regulatory requirements, do not provide adequate support demonstrating the existence of a genuine dispute of fact or law).

the procedures used to review and approve TVA's Reinstatement Request (and its subsequent request to place Units 1 and 2 into deferred status).[91] In doing so, they considered the very concerns raised by Petitioners and Mr. Gundersen relative to the dismantlement or removal of certain plant equipment, the temporary lapse in QA programs following CP withdrawal, and the hiatus in NRC inspections.[92] The mere fact that Mr. Gundersen repeats and endorses these differing opinions does not sanction admission of the proposed contention.

In sum, Petitioners have identified no clear error or abuse of discretion by the Board. There is clear support in the record for its conclusion that Proposed Contention 6 is moot and "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."[93] For this additional reason, the Commission should affirm the Board's ruling.

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91 *See* COMSECY-08-0041 at 2 & Encl. 2; SRM at 1; Commission Voting Record, COMSECY-08-0041, Response Sheet of Chairman Klein (Jan, 9, 2009), Response Sheet of Comm'r Lyons (Jan. 7, 2009), & Response Sheet of Comm'r Svnicki (Dec. 22, 2008), *available at* ADAMS Accession No. ML090500374; Reinstatement Order, 74 Fed. Reg. at 10,970-71.

92 *See*, *e.g.*, NRC Safety Evaluation at 4.

93 LBP-10-07, slip op. at 33 n.13. TVA submits that the Commission, acting as an appellate body, also may affirm the Board's dismissal of Proposed Contention 6 on an additional, independent ground. *See Private Fuel Storage, L.L.C.* (Indep. Spent Fuel Storage Installation), CLI-05-1, 61 NRC 161, 166 (2005) (*citing Hertz v. Luzenac Am., Inc.*, 370 F.3d 1014, 1017 (10th Cir. 2004); *Carney v. Am. Univ.*, 151 F.3d 1090, 1096 (D.C. Cir. 1998)). Specifically, as TVA and the NRC Staff set forth in their respective Answers to the Petition, the QA-related issues raised by Petitioners, in addition to being moot, fall outside the scope of this good cause proceeding as previously defined by the Commission in CLI-10-06, contrary to 10 C.F.R. § 2.309(f)(1)(iii). *See* CLI-10-06, slip op. at 6-7, 19; Reinstatement Order, 74 Fed. Reg. at 10,969; LBP-10-07, slip op. at 21 (stating 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"). Although the Board did not see a need to rule on this alternative basis advanced by TVA and the Staff, it recognized, relatedly, that "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 in a petition for agency action under § 2.206. LBP-10-07, slip op. at 34. *See also id.* at 21 (stating 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 § 2.206 providing an avenue for raising safety and environmental concerns regarding a proposed facility pending the OL proceeding.").

V. CONCLUSION

For the foregoing reasons, Petitioners have not met their burden on appeal. Therefore, the Commission should reject the Appeal and affirm the Board's Memorandum and Order.

Respectfully submitted,

/signed (electronically) by/

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Dated in Washington, D.C.
this 30th day of April 2010

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of	)	
	)	Docket Nos. 50-438-CP and 50-439-CP
TENNESSEE VALLEY AUTHORITY	)	
	)	
(Bellefonte Nuclear Plant, Units 1 and 2)	)	April 30, 2010

CERTIFICATE OF SERVICE

I hereby certify that, on April 30, 2010, copies of (1) "Tennessee Valley Authority's Brief in Opposition to Petitioners' Appeal of LBP-10-07," dated April 30, 2010, and (2) "Tennessee Valley Authority's Answer Opposing Petitioners' Motion for Additional Time to Appeal LBP-10-07," dated April 30, 2010, were served upon the following persons by the NRC's Electronic Information Exchange ("EIE") system, with additional service by e-mail on persons marked with an asterisk (*).

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