UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD PANEL

Before the Licensing Board:

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

In the Matter of	Docket Nos. 52-014-COL and 52-015-COL
TENNESSEE VALLEY AUTHORITY	ASLBP No. 08-864-02-COL-BD01
(Bellefonte Nuclear Power Plant Units 3 and 4)	January 26, 2009

MEMORANDUM AND ORDER
(Ruling on Request to Amend Contention NEPA-N)

Before the Licensing Board is the December 15, 2008 motion of intervenors Blue Ridge Environmental Defense League (BREDL) and the Southern Alliance for Clean Energy (SACE) (collectively Joint Intervenors) seeking admission of an amended contention NEPA-N, Environmental Report's Inadequate Cost Estimates and Cost Comparisons. Both applicant Tennessee Valley Authority (TVA) and the NRC staff have filed responses opposing the motion.

For the reasons set forth below, Joint Intervenors motion is denied.

I. BACKGROUND

This proceeding, the history of which is recounted in our prior rulings,[1] concerns the TVA application for a 10 C.F.R. Part 52 combined operating license (COL) to construct and operate two new reactors, Bellefonte Units 3 and 4, at TVA's existing Bellefonte site. For present

[1] See LBP-08-16, 68 NRC __, __-__ (slip op. at 2-7) (Sept. 12, 2008); Licensing Board Memorandum and Order (Ruling on Request to Admit New Contention) (Oct. 14, 2008) at 2-4 (unpublished).

purposes, it suffices to note that in ruling on the admissibility of Joint Intervenors initial proffer of two dozen contentions, we admitted four: NEPA-B, FSAR-D, NEPA-G, and NEPA-N. Contention NEPA-N, which concerns purported inadequate cost estimates and cost comparisons in the TVA environmental report (ER), provides as follows:

> CONTENTION: TVA's cost comparison is inadequate to satisfy the National Environmental Policy Act ("NEPA") or NRC regulations at 10 C.F.R. § 51.45(c) because it fails to provide reasonably up-to-date and accurate information regarding the estimated electrical generation costs of the proposed new nuclear power plant.

LBP-08-16, 68 NRC __, __ (slip op. at Appendix A (unnumbered p. 81)) (Sept. 12, 2008). Contention NEPA-N is based on the magnitude of the difference between the overall construction cost figures for the proposed Bellefonte AP1000 units provided in ER section 10.4.2.1.1 as contrasted with other estimates, in particular that of Florida Power and Light Company provided in connection with new AP1000 units planned at the location of its existing two-unit Turkey Point facility, and the effect of that cost component on the alternatives analysis specified in ER section 9.2.3.3 relative to combined renewable/fossil-fuel baseload generation sources. See id. at 67-69.

On September 22, 2008, TVA filed a motion for clarification regarding, among other items, this admitted contention. In its motion, TVA asked the Board to clarify whether the scope of contention NEPA-N was limited solely to the accuracy of the statement of costs provided in ER section 10.4. See Applicant's Motion for Clarification (Sept. 22, 2008) at 1-4. In ruling on the motion for clarification, the Board denied TVA's request to limit the scope of contention NEPA-N only to the accuracy of the cost figures associated with constructing the proposed Bellefonte units and reaffirmed that the scope of the contention included the effect of those cost figures on the ER section 9.2.3.3 alternatives analysis of combined renewable/fossil-fuel

baseload generation under the National Environmental Policy Act (NEPA). See Licensing Board Memorandum and Order (Ruling on Motion for Clarification) at 3-4 (Oct. 14, 2008) (unpublished).

Subsequently, in response to a Licensing Board's ruling denying the admission of a cost comparison/alternatives analysis contention in the Shearon Harris COL proceeding, on November 10, 2008, TVA filed a motion for reconsideration of this Board's decision relative to the admission of contention NEPA-N. See [TVA] Request for Leave to File and Motion for Reconsideration of the Board's Clarification Order Regarding Contention NEPA-N (Nov. 10, 2008) at 2 (citing Progress Energy Carolinas, Inc. (Shearon Harris Nuclear Power Plant, Units 2 and 3), LBP-08-21, 68 NRC __, __-__ (slip op. at 23-27) (Oct. 30, 2008)). In denying the TVA motion, this Board ruled that the precedent applied in the Shearon Harris proceeding -- which eschewed the need for any further NRC analysis once there was a finding a power generation alternative has impacts equal to or greater than the proposed nuclear facility -- was not controlling given TVA's status as a federal entity for which there is no state public utility commission or other state regulatory agency that will undertake any cost/benefit analysis regarding the efficacy of the TVA application. See Licensing Board Memorandum and Order (Ruling Regarding Motion for Reconsideration) at 4-8 (Dec. 19, 2008) (unpublished) [hereinafter Board Reconsideration Ruling]. In that decision, the Board also noted that "applicant TVA provided an update to its ER to reflect information available in recent publications and public utility commission filings regarding the cost of constructing and operating nuclear power plants, as well as coal- and gas-fired electricity generating power plants." Id. at 8 (citing Letter from Stephen J. Burdick, TVA Co-Counsel, to Licensing Board, unnumbered encl. (Nov. 13, 2008)).

In response to these updated cost figures provided by TVA to the Board and the other parties on November 13, Joint Intervenors filed the pending motion to amend contention

NEPA-N. See Joint Petitioners' Request for Leave to Timely Amend Contention NEPA-N (Dec. 15, 2008) [hereinafter Joint Intervenors Request]. In this regard, they assert contention NEPA-N should be amended to read as follows:

> In Chapter 9 of its [ER], TVA rejects alternative energy supply options, based on cost estimates for energy conservation and alternative energy sources such as wind and solar power. In recent revisions to the [ER], TVA updated those cost estimates. As discussed below and as demonstrated in the supporting declaration of Dr. Arjun Makhijani, TVA's cost estimates for the proposed nuclear plants and for energy alternatives are inaccurate and therefore do not provide an adequate basis for TVA's assertion that alternatives are not cost-effective. Declaration by Dr. Arjun Makhijani Regarding TVA's Revised Cost Estimate for Nuclear and Coal-Fired Generation (December 15, 2008).

Id. at 3-4. TVA objects to Joint Intervenors request to amend contention NEPA-N in toto. See TVA's Answer to Request to Amend Contention NEPA-N (Dec. 24, 2008) [hereinafter TVA Answer]. The staff also claims that the amended contention NEPA-N is inadmissible, but "does not object to the bases of contention NEPA-N being amended to include challenges to new information presented by the Applicant." NRC Staff's Answer to the Joint Intervenors' Request to Timely Amend Contention NEPA-N (Dec. 23, 2008) at 1 [hereinafter Staff Answer].

II. ANALYSIS

Once the deadline for filing an initial intervention petition has passed, a party wishing to submit amended (or new) contentions prior to the staff's draft or final environmental impact statement (EIS) being issued must satisfy the requirements of 10 C.F.R. § 2.309(f)(2) by showing that:

> (i) the information upon which the amended or new contention is based was not previously available;
>
> (ii) the information upon which the amended or new contention is based is materially different than information previously available; and

> (iii) the amended or new contention has been submitted in a timely fashion based on the availability of the subsequent information.

Additionally, both TVA and the staff assert that an amended contention must be evaluated using the applicable late-filing factors set forth in section 2.309(c) and must meet the contention admissibility standards outlined in section 2.309(f)(1). See TVA Answer at 3 & n.6, 8; Staff Answer at 3-4. For their part, Joint Intervenors, who addressed the matters of timeliness and contention admissibility only in their January 2, 2009 reply pleading, assert they (1) meet the availability, materiality, and timeliness standards of section 2.309(f)(2); (2) are not required to address the section 2.309(c) standards because their request was not late-filed; and (3) need not meet the section 2.309(f)(1) standards because their request is not part of an initial hearing request/intervention petition. See Joint Petitioners' Reply to Answers of NRC Staff and TVA Regarding Request to Timely Amend Contention NEPA-N (Jan. 2, 2009) at 1-2 [hereinafter Joint Intervenors Reply].

While we think it apparent in these circumstances that Joint Intervenors have complied with the timeliness/good cause requirements of sections 2.309(f)(2) and 2.309(c)(1)(i) to the extent their request is filed within the Board-established deadline of thirty days from the event that triggers the contention amendment,[2] see Licensing Board Memorandum and Order (Initial Prehearing Order) (June 18, 2008) at 6 n.4 (unpublished) [hereinafter Initial Prehearing Order], we nonetheless find it unnecessary to resolve the issues of the applicability of, and whether

[2] Although applicant TVA apparently relies on the November 5, 2008 date of its transmission of the revised ER cost information to the NRC Control Desk as the trigger date for Joint Intervenors amendment filing, see TVA Answer at 3, in the context of this TVA revision to ER provisions that were specifically cited by the Board relative to the admissibility of contention NEPA-N, we find the appropriate trigger date here to be the November 13 date TVA provided a letter to the Board and the other parties advising of those changes.

Joint Intervenors have satisfied, the additional section 2.309(c)(1), (f)(1) and (2) requirements.[3] We reach this conclusion based on our agreement with the staff that, to the degree the matters Joint Intervenors seek to raise are timely and material, "the current text of the contention is sufficiently broad that it does not have to be amended" to permit consideration of these items. Staff Answer at 6.

In this regard, we observe that some of the information Joint Intervenors seek to introduce via their "amended" contention may go to the matters of the TVA electrical generation cost estimate for its proposed AP1000 units (ER section 10.4.2.1.1) as presented in the original TVA ER and revised in TVA's November 2008 submission. As such, it may affect the cost component of the alternatives analysis in the ER (ER section 9.2.3.3) relative to combined renewable/fossil-fuel baseload generation sources as that information was originally presented and amended. Hence, this information provided by Joint Intervenors would be potentially relevant to the merits of Joint Intervenors contention NEPA-N challenge to the accuracy and sufficiency of the ER. On the other hand, certain of the information sought to be incorporated

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[3] Relative to those standards, however, we note that Joint Intervenors failure until their reply pleading to address any of these standards, for which they bear the burden of proof, is not an acceptable approach and could lead to the summary dismissal of their request. See Baltimore Gas & Electric Co. (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), CLI-98-25, 48 NRC 325, 347 (1998). The same could be the case in the face of a continued refusal to recognize and comply with the Board's requirements regarding page limitations and time-extension requests, both of which (in the absence of an unexpected, last-minute development such as an electrical outage, see Joint Intervernors Reply at 4) should be addressed by timely seeking Board permission prior to filing. See Initial Prehearing Order at 5-6.

In that same vein, while Joint Intervenors apparently maintain they do not need to address the section 2.309(c)(1) factors when submitting new or amended contentions, current uncertainty regarding the validity of that position, see Southern Nuclear Operating Co. (Early Site Permit for Vogtle ESP Site), Memorandum and Order (Ruling on Motion to Admit New Contention) (Oct. 24, 2008) at 10 (unpublished), counsels they would be well served to provide such a showing until that matter is settled. Likewise, they are not likely to be well served by neglecting the section 2.309(f)(1) factors regarding contention admissibility. See id. at 15.

appears not to be susceptible to further consideration in the context of this contention because it goes either to concerns Joint Intervenors could have raised, but did not, in conjunction with their hearing petition, or to matters that the Board in its September 2008 contention admissibility decision previously rejected as inappropriate for consideration under this contention.

At this juncture, however, the Board sees no merit in beginning the process of parsing the validity of the evidentiary presentations that may ultimately be offered in connection with litigating the merits of the facility cost factor encompassed by contention NEPA-N. Moreover, given the status of contention NEPA-N as one for which "the NRC's responsibility to scrutinize that [cost] factor in the absence of a cost/benefit analysis by a state regulatory agency" takes on "added significance," Board Reconsideration Ruling at 7, we believe it appropriate to await the staff's draft environmental impact statement analysis of the matter before entertaining section 2.1205 dispositive motions regarding this issue statement.[4]

III. CONCLUSION

Although denominated as a request to amend contention NEPA-N to interpose additional challenges triggered by a November 2008 TVA ER revision, given the scope of contention

[4] Relative to the other admitted contentions in this proceeding, consistent with the discussion during the November 3, 2008 prehearing conference, the Board will explore the parties' interest in seeking summary disposition regarding contentions FSAR-D and NEPA-G following a Commission determination on the pending Board referred rulings concerning those contentions. See Tr. at 256-57.

NEPA-N, we find Joint Intervenors December 15 motion to be more in the nature of a proffer of additional support for the already admitted contention. As a consequence, we find Joint Intervenors request provides no basis for amending the current contention NEPA-N.

For the foregoing reasons, it is this twenty-sixth day of January 2009, ORDERED, that Joint Intervenors December 15, 2008 request to amend contention NEPA-N is denied.

THE ATOMIC SAFETY
AND LICENSING BOARD[5]

/RA/

G. Paul Bollwerk, III
ADMINISTRATIVE JUDGE

/RA/

Anthony J. Baratta
ADMINISTRATIVE JUDGE

/RA by E. Roy Hawkens for:/

William W. Sager
ADMINISTRATIVE JUDGE

Rockville, Maryland

January 26, 2009

[5] Copies of this memorandum and order were sent this date by Internet e-mail transmission and the agency's E-Filing system to the counsel/representatives for (1) applicant TVA; (2) Joint Intervenors; and (3) the staff.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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(Bellefonte Nuclear Power Plant - Units 3 and 4)	)	
	)	
	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LB MEMORANDUM AND ORDER (RULING ON REQUEST TO AMEND CONTENTION NEPA-N) have been served upon the following persons by the Electronic Information Exchange.

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

Dated at Rockville, Maryland
this 26th day of January 2009