

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)
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PPL BELL BEND, LLC) Docket No. 52-039
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)
(Bell Bend Nuclear Power Plant))

NRC STAFF'S ANSWER TO "MOTION FOR PERMISSION TO FILE
SUPPLEMENTAL STANDING DECLARATION FOR GENE STILP AND TAXPAYERS AND
RATEPAYERS UNITED (TRU)"

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July 6, 2009

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INTRODUCTION

Pursuant to 10 C.F.R. § 2.323(c), the staff of the U.S. Nuclear Regulatory Commission ("NRC" or "Commission") hereby answers the "Motion For Permission To File Supplemental Standing Declaration For Gene Stilp And Taxpayers And Ratepayers United (TRU)" ("Stilp/ TRU Motion"), dated June 26, 2009. For the reasons set forth below, the NRC staff ("Staff") opposes the Motion.

BACKGROUND

On March 18, 2009, the NRC published a Notice of Hearing regarding the application for a combined license ("COL") for a U.S. Evolutionary Power Reactor ("Application") filed by PPL Bell Bend, LLC ("Applicant"). Combined License Application for the Bell Bend Nuclear Power Plant; Notice of Hearing, Opportunity To Petition for Leave To Intervene, and Associated Order, 74 Fed. Reg. 11,606 (Mar. 18, 2009) ("Notice of Hearing"). In response to the Notice of Hearing, which provided members of the public sixty days from the date of publication to file a petition for leave to intervene in this proceeding, Mr. Stilp and TRU ("Petitioners") timely submitted their "Petition to Intervene in the Radioactive Bell Bend Nuclear Power Plant Combined Construction and License Application by Gene Stilp and Taxpayers and Ratepayers United (TRU)" ("Stilp/TRU Petition"), dated May 18, 2009. On June 12, 2009, the Staff filed the

“NRC Staff Answer to [Stilp/TRU Petition]” (“Staff Answer”). The Applicant answered the Stilp/TRU Petition in the “Applicant’s Answer to Petitions to Intervene,” dated June 12, 2009 (“Applicant Answer”).

The Stilp/TRU Petition separately asserted Mr. Stilp’s standing as an individual and TRU’s standing as an organization representing a member with standing in this proceeding. Stilp/TRU Petition at 2-7. The Staff and the Applicant both opposed Mr. Stilp’s standing as an individual. Staff Answer at 9-10; Applicant Answer at 14-18. While the Staff did not object to TRU’s standing, as established through the representation of the interests of one of its members (Staff Answer at 10-12), the Applicant did oppose TRU’s standing (Applicant Answer at 18-20). Petitioners then filed the Stilp/TRU Motion on June 26, 2009, in order to supply new information regarding standing and to address the Staff’s and the Applicant’s objections to their standing to intervene.¹ Petitioners provide this new information in the “Supplemental Declaration of Standing of Gene Stilp, Pro Se, Individually, and as The Representative For Taxpayers And Ratepayers United (TRU)” (“Stilp Supplemental Declaration”), dated June 26, 2009.

DISCUSSION

As discussed below, a petitioner who seeks consideration of supplemental information with respect to standing after the deadline for filing petitions set forth in the Notice of Hearing must address the late-filing factors of 10 C.F.R. § 2.309(c). Since the Petitioners in this proceeding do not address the late filing factors of § 2.309(c) and a balancing of these factors

¹ In their motion, Petitioners note that Mr. Stilp contacted the undersigned Staff Counsel to notify the Staff that they intended to file this motion, and to seek the Staff’s agreement with its substance, in accordance with 10 C.F.R. § 2.323(b). Stilp/TRU Motion at 4. Staff Counsel informed Mr. Stilp that they would consult with their supervisor before taking a position on the motion and that the Staff could neither agree nor disagree with the motion without more information. Staff Counsel understood Mr. Stilp to suggest that a draft of the motion would be provided for the Staff to consider before filing it, but no draft was provided.

does not weigh in favor of consideration of the Petitioners' supplemental information, the Staff opposes the Petitioners' Motion.

I. Legal Standards for consideration of late-filed information pertaining to standing.

Under the Commission's regulations, "[n]ontimely requests and/or petitions and contentions" will not be entertained unless they meet the requirements of 10 C.F.R. § 2.309(c). *Crow Butte Resources, Inc.* (License Amendment for the North Trend Expansion Project), LBP-08-06, 67 NRC 241, 257 n.40 (2008). Before the 2004 revisions to 10 C.F.R. Part 2, Commission rules permitted a petitioner to supplement his or her petition with respect to standing as a matter of right, without addressing the late-filing standards then codified at § 2.714(a)(1) and without leave of the presiding officer, until fifteen (15) days before the first prehearing conference. See 10 C.F.R. § 2.714(a)(2) (2004).² In changing the requirements for

² Former § 2.714 provided that a petition to intervene must establish the petitioner's standing and identify the subject matter of the proceeding (the "aspect" of the proceeding) as to which petitioner wished to intervene. 10 C.F.R. § 2.714(a)(2) (2004). A petition, however, did not initially need to state contentions, which were due to be submitted fifteen days before the first prehearing conference. 10 C.F.R. § 2.714(b) (2004). As relevant to this discussion, former § 2.714 stated as follows:

(2) The petition shall set forth with particularity the interest of the petitioner in the proceeding, how that interest may be affected by the results of the proceeding, including the reasons why petitioner should be permitted to intervene, with particular reference to the factors in [§ 2.714(d)(1)], and the specific aspect or aspects of the subject matter of the proceeding as to which petitioner wishes to intervene.

(3) . . . A petition may be amended without prior approval of the presiding officer a any time up to fifteen (15) days prior to the holding of the . . . first prehearing conference. After this time a petition may be amended only with approval of the presiding officer, based on a balancing of the factors specified in [§ 2.714(a), regarding late filing.]

(b)(1) Not later than fifteen (15) days prior to the holding of the . . . first prehearing conference, the petitioner shall file a supplement to his or her petition to intervene that must include a list of the contentions which petitioner seeks to have litigated in the hearing.

10 C.F.R. § 2.714(a)(2), (3), (b) (2004). Under former § 2.714(a)(3), a petitioner who filed a timely original petition had the right to amend his or her petition to address standing deficiencies without prior approval of the presiding officer at any time up to 15 days before the first prehearing conference or, if a prehearing conference was not going to be held, at a date established by the Board. See, e.g., *Tennessee Valley* (continued. . .)

intervention in 2004, as now set forth in § 2.309, the Commission extended the time to file petitions in reactor licensing proceedings from 30 to 60 days (*compare* former §§ 2.104(a), 2.105(d) and 2.714(a)(1) *with* § 2.309(b)), required that petitioners propose their contentions in the initial petition (§ 2.309(a), (f)), and eliminated the petitioner's option of supplementing the petition up until 15 days before the first prehearing conference without leave of the presiding officer.³ See *Carolina Power & Light Co.* (Shearon Harris Nuclear Power Plant, Unit 1), LBP-07-11, 66 NRC 41, 56 n.45 (2007).⁴ The late-filing standards of § 2.309 now apply to untimely submissions in support of standing, *i.e.*, those submissions filed after the deadline set in the notice of hearing for the filing of petitions for leave to intervene. *Louisiana Energy Services, L.P.* (National Enrichment Facility), CLI-04-35, 60 NRC 619, 623 (2004); see also 10 C.F.R. § 2.309(d) (listing the information concerning standing that must be included in a request for hearing or petition for leave to intervene).

The Commission has summarized the rationale behind its standards regarding late-filed material as follows: "There simply would be 'no end to NRC licensing proceedings if petitioners could disregard our timeliness requirements' and add new bases or new issues that 'simply did not occur to [them] at the outset.'" *Entergy Nuclear Operations, Inc. and Entergy Nuclear Palisades, LLC* (Palisades Nuclear Plant), *Entergy Nuclear Operations, Inc. and Entergy*

(. . .continued)

Authority (Sequoyah Nuclear Plant, Units 1 & 2; Watts Bar Nuclear Plant, Unit 1), Nos. 50-327-OLA, 50-328-OLA, 50-390-OLA, 2002 WL 264539, at *1 (LBP Feb. 7, 2002) (unpublished Memorandum and Order)). After this deadline, a petition could be amended only if the nontimely filing requirements of former § 2.714(a)(1) (now § 2.309(c)) were met. See 10 C.F.R. §§ 2.714(a)(3), (a)(1)(i)-(v) (2004).

³ Under § 2.309(b), all supplements filed after the due date for petitions set in the notice of hearing are treated similarly to supplements submitted later than 15 days before the first prehearing conference under former § 2.714(a)(3), which were required to meet the late-filing standards of former § 2.714(a)(1), now codified in § 2.309(c).

⁴ This decision is reported in Volume 66, No. 2 of the NRC Issuances on page 41. Please note, however, that Westlaw incorrectly cites this case as reported at "65 NRC 41," not 66 NRC 41.

Nuclear Fitzpatrick, LLC (James A. FitzPatrick Nuclear Power Plant), *Entergy Nuclear Operations, Inc. and Entergy Nuclear Generation Co.* (Pilgrim Nuclear Power Plant), *Entergy Nuclear Operations, Inc. and Entergy Nuclear Vermont Yankee, LLC* (Vermont Yankee Nuclear Power Station), *Entergy Nuclear Operations, Inc.*; *Entergy Nuclear Indian Point 2, LLC*; *Entergy Nuclear Indian Point 3, LLC* (Indian Point, Units 1, 2 and 3); and *Entergy Nuclear Operations, Inc. and Entergy Nuclear Palisades, LLC* (Big Rock Point Plant), CLI-08-19, 68 NRC 251, 262 (2008) (“Palisades”) (quoting *Louisiana Energy Services, L.P.* (National Enrichment Facility), CLI-04-25, 60 NRC 223, 225 (“*LES I*”), *reconsideration denied*, CLI-04-35, 60 NRC 619 (2004) (“*LES II*”). A petitioner may not “claim standing based on vague assertions” and then attempt to correct the defective pleading with fresh details offered for the first time in a reply. *Palisades*, CLI-08-19, 68 NRC at 261-62.

The Commission has determined that “the 60-day period provided under 10 C.F.R. § 2.309(b)(3) for filing hearing requests, petitions, and contentions is ‘more than ample time for a potential requestor/intervenor to review the application, *prepare a filing on standing*, and develop proposed contentions and references to materials in support of the contentions.’” *LES II*, CLI-04-35, 60 NRC at 623 (emphasis added). Sixty days from a notice of hearing is ample time to prepare a filing on standing, but Commission rules allow a late-filed petition “where there is compelling justification.” *LES II*, CLI-04-35, 60 NRC at 623. A petitioner may request consideration of new information in support of standing if the petitioner satisfies the late filing standards of 10 C.F.R. § 2.309(c). See *Crow Butte Resources, Inc.* (North Trend Expansion Area), CLI-09-12, 69 NRC ____, slip op. at 4, 14 (June 25, 2009) (Licensing Board relied on late-filed exhibit to establish standing); *Crow Butte*, LBP-08-06, 67 NRC at 255-260.

Late-filed information in support of standing may be considered only upon the presiding officer’s determination, *inter alia*, that the information should be considered after balancing the

eight factors listed in 10 C.F.R. § 2.309(c), all of which must be addressed in the petitioner's filing.⁵ A petitioner seeking consideration of late-filed information in support of standing bears the burden of showing that a balancing of these factors weighs in favor of such consideration. *Cf. Baltimore Gas & Elec. Co.* (Calvert Cliffs Nuclear Power Plant, Units 1 & 2), CLI-98-25, 48 NRC 325, 347 (1998) ("*Calvert Cliffs*") (ruling on contentions and noting that the Commission has summarily dismissed petitioners who failed to address the factors for a late-filed petition). The first factor, whether good cause exists for the failure to file on time, is entitled to the most weight. *State of New Jersey* (Department of Law and Public Safety), CLI-93-25, 38 NRC 289, 296 (1993). Where no showing of good cause for lateness is tendered, a "petitioner's demonstration on the other factors must be particularly strong." *Texas Utils. Elec. Co.* (Comanche Peak Steam Electric Station, Units 1 & 2), CLI-92-12, 36 NRC 62, 73 (1992) ("*Comanche Peak*") (quoting *Duke Power Co.* (Perkins Nuclear Station, Units 1, 2, & 3), ALAB-431, 6 NRC 460, 462 (1977)). The fifth factor, addressing the availability of other means to protect the petitioner's interest (§ 2.309(c)(1)(v)), and the sixth factor, regarding the ability of

⁵ Section § 2.309(c) requires a balancing of the following factors for late-filed information in support of standing:

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

other parties to represent the petitioner's interest (§ 2.309(c)(1)(vi)), are less important than the other factors, and are therefore entitled to less weight. See *id.* at 74.⁶

II. The Stilp/TRU Motion fails to satisfy the late-filing requirements of § 2.309(c).

The Stilp/TRU Motion is silent with respect to the eight late-filing factors of § 2.309(c). For this reason alone, the Motion should be denied. See *Calvert Cliffs*, CLI-98-25, 48 NRC at 347. Nonetheless, the Staff addresses the eight factors and concludes that, on balance, they weigh against granting the Motion.

A. Petitioners fail to demonstrate good cause for their late filing (§ 2.309(c)(1)(i)).

The Petitioners do not identify anything other than the filing of the Staff Answer and the filing of the Applicant Answer as giving rise to their request. Stilp/TRU Motion at 1-2. The requirements for an individual to demonstrate standing, however, are clear. See Staff Answer at 3-5. The Petitioners appear to be aware of those requirements, inasmuch as they appear to have demonstrated Mr. Adam Helfrich's individual standing, in support of TRU's standing, by

⁶ The Atomic Safety and Licensing Appeal Board ruled that procedural requirements should not be applied inflexibly to preclude participation in NRC proceedings. See *Virginia Electric and Power Co.* (North Anna Power Station, Units 1 and 2), ALAB-146, 6 AEC 631, 633-34 (1973) (quoted in *Shearon Harris*, LBP-07-11, 66 NRC at 54, n.34). Thus, licensing boards have allowed petitioners to cure technical defects with respect to standing, such as failure to properly assert representational standing and deficiencies in affidavits. See *Shearon Harris*, LBP-07-11, 66 NRC at 55 (accepting affidavits for representational standing despite lack of the word "authorize"); *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), LBP-91-1, 33 NRC 15, 29, 40 (1991) (allowing organizational petitioners to cure defects in asserting representational standing). The Commission recently remanded the issue of standing to a licensing board in order to afford the petitioners the opportunity to cure a defect in their submissions in support of their claim of standing, which did not specifically state the proceeding in which they sought to intervene. See *Crow Butte Resources, Inc.* (License Renewal for In Situ Leach Facility, Crawford, Nebraska), CLI-09-09, 69 NRC ___, slip op at 14-15 (May 18, 2009). Since an Appeal Board decision implied that separate affidavits might not be necessary under some circumstances in separate proceedings, and the Commission ruled otherwise in its decision, the Commission afforded the *Crow Butte* petitioners the opportunity to cure the defect. *Id.*, citing *Houston Lighting and Power Co.* (Allens Creek Nuclear Generating Station, Unit 1), ALAB-535, 9 NRC 377, 396 (1979). This proceeding is distinguishable, however, since there is no need to clarify that a petitioner must address the late-filing requirements of § 2.309(c)(1). In this proceeding, Petitioners seek to cure more than technical defects in their affidavits and seek to introduce new factual support for their assertion of standing. Accordingly, these decisions do not support affording the Petitioners the opportunity to cure the defects in their Petition.

addressing them in the “Declaration of Adam Helfrich in Support of [TRU’s] Petition to intervene in Bell Bend Licensing Proceeding,” which was attached to the Stilp/TRU Petition. See Stilp/TRU Petition at 5.

Petitioners do not explain their failure to establish Mr. Stilp’s individual standing at the outset in their petition, as required by § 2.309(d). Indeed, the Staff has not identified any reason to justify Petitioners’ omission of the information relating to standing in the Stilp Supplemental Declaration from the Stilp/TRU Petition or any reason to believe that any of that information is somehow new. The Petitioners may not sit back and withhold information readily available to them and required by NRC regulations, e.g., Mr. Stilp’s address, which is explicitly required by § 2.309(d)(1)(i), and then simply provide the requisite information by way of a motion to supplement their Petition.⁷ There is no good cause for the Petitioners’ late filing, and this is the most heavily weighted factor of § 2.309(c). See *State of New Jersey*, CLI-93-25, 38 NRC at 296.

B. The remaining factors of § 2.309 do not strongly support late filing.

Since the Petitioners make no showing with respect to good cause, the other factors must strongly support consideration of the late-filed information. See *Comanche Peak*, CLI-92-12, 36 NRC at 73. These other factors, however, do not, on balance, support the Motion. The Staff address each of the factors in §§ 2.309(c)(1)(ii) through (viii) in turn below.

⁷ Such an order of procedure, without satisfaction of the late-filing standards, would eviscerate the Commission requirements for petitions in § 2.309. See *LES II*, CLI-04-35, 60 NRC at 623. To allow the Stilp/TRU Motion would be a step back to the pre-2004 rules, which allowed multiple amendments to petitions, and which the Commission abandoned in the 2004 final rule amending Part 2. See 10 C.F.R. § 2.714(a)(2), (3) (2004); Final Rule, “Changes to Adjudicatory Process,” 69 Fed. Reg. 2182, 2197-2200 (Jan. 14, 2004). This Board should not take that step.

Mr. Stilp does not have a right to be made a party to the proceeding under § 2.309(c)(1)(ii), since none of Petitioners' proposed contentions is admissible (see Staff Answer at 15-69), and this factor weighs against considering the late-filed supplemental information. The Stilp Supplemental Declaration presents enough information regarding Mr. Stilp's activities within a 50-mile radius of the plant, particularly at or near the property he identifies, to establish his interest in the proceeding, under § 2.309(c)(1)(iii), and therefore weighs in favor of considering the late-filed information.⁸ Since none of Petitioners' contentions is admissible, it is not clear how an order in the proceeding could affect Mr. Stilp's interest, and this factor (§ 2.309(c)(1)(iv)) does not support consideration of the late-filed information.

In regard to the factor in § 2.309(c)(1)(v), many of the Petitioners' proposed contentions attack Commission regulations (see Staff Answer at 15-69). With respect to the subjects of those proposed contentions, Mr. Stilp may seek relief by filing petitions for rulemaking pursuant to 10 C.F.R. § 2.802 or participating in ongoing Commission rulemakings under 10 C.F.R. § 2.805. Accordingly, he has other means to protect his interests under § 2.309(c)(1)(v), and this factor weighs against consideration of the late-filed information. Similarly, with respect to the factor in § 2.309(c)(1)(vi), the Staff has not objected to TRU's standing in this proceeding, and, since Mr. Stilp is TRU's representative in this proceeding, it is likely TRU will represent his interests. Accordingly, the factor in § 2.309(c)(1)(vi) weighs against consideration of the information. With respect to the factors in § 2.309(c)(1)(vii) and (viii), Mr. Stilp's participation will not broaden the issues in this proceeding, given that TRU has raised the same issues, and conversely his participation will also not assist in the development of the record, since TRU

⁸ The Stilp Supplemental Declaration asserts a variety of matters that appear to have nothing to do with Mr. Stilp's standing. See Stilp Supplemental Declaration at 2, 3, 7 (discussing "business" interests, but which appear to relate to political activities in fighting electric rate increases and nuclear power).

would do exactly what Mr. Stilp would do in this regard (through him as TRU's representative). Therefore, the factors in §§ 2.309(c)(1)(vii) and (viii) balance each other exactly.

As described above, of the eight factors in § 2.309(c)(1), six of them, in §§ 2.309(c)(1) (i), (ii), (iv), (v), (vi), and (viii) weigh against considering the late-filed supplemental information regarding standing, and only two, in §§ 2.309(c)(1)(iii) and (vii), arguably support consideration of that information. These two factors does not appear to outweigh the others or somehow strongly support consideration of the late-filed information, especially in the face of a failure to show good cause for the late filing, as required by *Comanche Peak*. See *Comanche Peak*, CLI-92-12, 36 NRC at 73. Accordingly, Petitioners do not meet the late filing standards of § 2.309(c)(1).

CONCLUSION

For the reasons set forth above, the Stilp/TRU Motion should be denied.

Respectfully submitted,

/Signed (electronically) by/

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Executed in Accord with 10 C.F.R. § 2.304(d)

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Dated at Rockville, Maryland
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CERTIFICATE OF SERVICE

I hereby certify that copies of the NRC STAFF'S ANSWER TO "MOTION FOR PERMISSION TO FILE SUPPLEMENTAL STANDING DECLARATION FOR GENE STILP AND TAXPAYERS AND RATEPAYERS UNITED (TRU)" have been served on the following persons by Electronic Information Exchange on this 6th day of July, 2009:

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Dated at Rockville, Maryland
this 6th day of July, 2009