August 21, 2009

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	
	)	
TENNESSEE VALLEY AUTHORITY	)	Docket No. 50-391-OL
	)	
(Watts Bar Nuclear Plant, Unit 2)	)	

NRC STAFF'S RESPONSE IN OPPOSITION TO MOTION TO PERMIT LATE ADDITION OF CO-PETITIONERS

INTRODUCTION

Pursuant to 10 C.F.R. § 2.323(c), the U.S. Nuclear Regulatory Commission ("Staff") responds to the "Motion To Permit Late Addition Of Co-Petitioners To Southern Alliance For Clean Energy's Petition To Intervene And Admit Them As Intervenors" ("Motion to Add Co-Petitioners") filed by Southern Alliance for Clean Energy ("SACE"), Tennessee Environmental Council ("TEC"), We the People, Inc. ("WTP"), Sierra Club, and Blue Ridge Environmental Defense League ("BREDL") (collectively, "Co-Petitioners")[1] on August 14, 2009. As discussed below, the Staff submits herein that Co-Petitioners' motion fails to satisfy the Commission's standards for late-filing under 10 C.F.R. § 2.309(c)(1) and 10 C.F.R. § 2.309(f) (2). Therefore, the Motion to Add Co-Petitioners should be denied.

BACKGROUND

This proceeding concerns Tennessee Valley Authority's ("TVA") application for the operating license for Watts Bar Nuclear Plant, Unit 2 "(Watts Bar") located near Spring City, Tennessee. On May 1, 2009, a Notice of Opportunity for Hearing on TVA's operating license

[1] SACE's Counsel has not yet filed a Notice of Appearance on behalf of other Co-Petitioners. SACE's counsel filed a notice of appearance as an authorized legal counsel for SACE only. *See* Notice of Appearance by Diane Curran dated June 16, 2009. (ADAMS Accession No. ML091671861)

application ("Hearing Notice") was published in the *Federal Register*.[2] Pursuant to the Hearing Notice, requests for a hearing and petitions to intervene were due by June 30, 2009. *See* 74 Fed. Reg. at 20,351. On June 16, 2009, Southern Alliance For Clean Energy ("SACE") filed the "Southern Alliance For Clean Energy's Request For Extension Of Time To Submit Hearing Request/Petition To Intervene" ("SACE's Request For Extension") (Agency Document Access Management System ["ADAMS"] Accession No. ML091671862). SACE based its request for an extension on their experts' unavailability to examine pertinent documents to assist with formulating potential contentions and the inability to access documents. SACE's Request For Extension at 2-3. SACE's request made no mention or reference to any other petitioners. None of the Co-Petitioners requested additional time to file their petitions.

On June 24, 2009, the Secretary of the Commission extended SACE's filing deadline to July 14, 2009. Order of the Secretary (Granting Southern Alliance For Clean Energy's Request For Extension Of time) ("Order") at 1 (June 24, 2009) (ADAMS Accession No. ML091750643). On July 13, 2009, SACE filed a petition alleging seven environmental contentions. Petition to Intervene and Request For Hearing at 1 (July 13, 2009) ("SACE's Petition") (ADAMS Accession No. ML091950686). Co-Petitioners were included. *Id*. At that time, neither Sierra Club, BREDL, TEC nor WTP offered an explanation as to why Co-Petitioners were unable to meet the Commission's 60-day hearing opportunity deadline of June 30, 2009. Co-Petitioners did not address any of the eight factors under 10 C.F.R. § 2.309(c)(1) supporting their untimely filing until 45 days after their petition was due and 32 days after they filed their petition.

DISCUSSION

I. Legal Standards for Admission of Late-Filed Petitions

Three regulations govern the admissibility of late-filed contentions in an adjudicatory

---

[2] *Tennessee Valley Authority [TVA]; Notice of Receipt of Update to Application for Facility Operating License and Notice of Opportunity for Hearing for the Watts Bar Nuclear Plant, Unit 2 and Order Imposing Procedures for Access*, 74 Fed. Reg. 20,350 (May 1, 2009).

proceeding. *See Entergy Nuclear Vermont Yankee, LLC and Entergy Nuclear Operations, Inc*. (Vermont Yankee Nuclear Power Station), LBP-06-14, 63 NRC 568, 571-72 (2006). All contentions must meet the contention admissibility requirements. Contention admissibility is not at issue in the Motion To Add Co-Petitioners. The Staff addressed the admissibility of SACE's Petition in the "NRC Staff's Answer to Petition To Intervene And Request For A Hearing" ("NRC Staff Answer to Petition") (August 7, 2009) (ADAMS Accession No. ML092190919). This response will address the late-filing factors set forth in 10 C.F.R. § 2.309(c)(1) and 10 C.F.R § 2.309(f)(2).

First, late-filed petitions are subject to the requirements of 10 C.F.R. § 2.309(c)(1) and 10 C.F.R. § 2.309(f)(2). Under 10 C.F.R. § 2.309(f)(2), new or amended contentions may be admitted as timely new contentions after a demonstration 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.

10 C.F.R. § 2.309(f)(2).

Second, a late-filed contention that does not qualify as a timely new contention under 10 C.F.R. § 2.309(f)(2) may be admissible under the provision governing nontimely contentions, 10 C.F.R. § 2.309(c). *See Amergen Energy Co.* (Oyster Creek Nuclear Generating Station), LBP-06-22, 64 NRC 229, 234-35 n.7 (2006). Nontimely filings may only be entertained following a determination by the presiding officer that a balancing of the following eight factors, all of which must be addressed in the petitioner's filing, weigh in favor of admission:

(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.

10 C.F.R. § 2.309(c)(1).

The first factor, whether good cause exists for the failure to file on time, is entitled to the most weight. *See State of New Jersey* (Department of Law and Public Safety), CLI-93-25, 38 NRC 289, 296 (1993)(addressing previous hearing requirements found at 10 C.F.R. § 2.714(c)(1) now 10 C.F.R. § 2.309(c)(1); *See Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 & 3), CLI-05-24, 62 NRC 551, 564 (2005). Where no showing of good cause for lateness is tendered, "petitioner's demonstration on the other factors must be 'compelling'." *See id*. at 565; *See also Texas Utilities Electric Co.* (Comanche Peak Steam Electric Station, Units 1 & 2), CLI-92-12, 36 NRC 62, 73 (1992) (quoting *Duke Power Co.* (Perkins Nuclear Station, Units 1, 2 & 3), ALAB-431, 6 NRC 460, 462 (1977)).

As the Commission has recognized, the requirements governing late-filed contentions and untimely filings, set forth in 10 C.F.R. §§ 2.309 (c)(2) and 2.309((f)(2), "are stringent by design". *See Amergen Energy Co.* (Oyster Creek Nuclear Generating Station), CLI-09-07, 69 NRC at __ (Apr. 1, 2009)(slip op. at 31). Further, each of the factors set forth in the regulations is required to be addressed in a requestor's nontimely filing. *Id*. at 31-32. Because Co-Petitioners fail to demonstrate good cause or that the remaining factors were compelling, the Motion to Add Co-Petitioners should be denied.

II. Co-Petitioners' Late-Filed Petition Should Be Rejected As Late-Filed Without Good Cause Under 10 C.F.R. § 2.309(c)(1).

Because the Motion To Add Co-Petitioners is nontimely, it may only be admitted if, on balance, the eight factors in 10 C.F.R. § 2.309(c)(1) weigh in favor of admission. In their discussion of the late-filed criteria, Co-Petitioners assert that they have good cause for filing late for the reasons stated in SACE's Request For Extension, and that those reasons should be applied here because the Secretary of the Commission previously accepted those reasons as it related to the SACE's Petition. Motion To Add Co-Petitioners at 2[3]. Further examination of their argument, however, reveals that Co-Petitioners intentionally failed to join SACE in seeking a two week extension of the June 30, 2009 deadline, because "they had not yet decided to join SACE in the Petition to Intervene". Motion To Add Co-Petitioners at 2.

Co-Petitioners' own failure to decide whether to join SACE's petition in a timely manner by requesting an extension as SACE did or filing their contentions by June 30, 2009 can not satisfy good cause. Co-Petitioners' belated adoption of the reasons laid out in SACE's Request for Extension do not provide support or explanation for their inexplicable delay of 45 days from the time petitions were due or a 32 day delay from the filing of SACE's Petition. If Co-Petitioners needed an extension of time "for all the reasons stated in SACE's [Request For Extension]", they have not explained what reason precluded them from seeking the necessary extension other than their own indecision.[4] Motion To Add Co-Petitioners at 2.

---

[3] Co-Petitioners state that they were unable to timely file their petition because 1) the hearing notice, the NRC's website for the Watts Bar licensing proceeding, and the NRC's collection of Watts Bar-related documents on ADAMS each contained significant deficiencies that required SACE and its Co-Petitioners additional time to review and respond to, and 2) that two of the expert consultants relied on by SACE and its Co-Petitioners for support of their contentions had scheduling conflicts. Motion To Add Co-Petitioners at 2.

[4] Co-Petitioners assert SACE's counsel error as a reason for their lateness. This assertion, however, is contradicted because "they had yet not decided to join SACE" at the time of SACE's Request For Extension. Motion To Add Co-Petitioners at 2. Also, Co-Petitioners make no mention of the exact date Co-Petitioners decided to join SACE's petition or when they agreed to retain SACE's counsel as their legal representative. The motion's silence on these key facts can only imply that Co-Petitioners' decision to join with SACE occurred very late, presumably after the June 30, 2009, deadline. Moreover,

The Commission's rules regarding the timely filing of petitions are clear. The requirements for admitting late-filed contentions from late parties are stringent. *See Oyster Creek*, 69 NRC at __ (slip op. at 31). Because Co-Petitioners have not established good cause for their untimely filing, Co-Petitioners must present a compelling showing of the other factors set forth in section 2.309(c) (1). Co-Petitioners' arguments on these factors, however, are unpersuasive[5].

Regarding factors five, six, seven and eight, Co-Petitioners argue that "they will have no other means of protecting their interests …". Motion To Add Co-Petitioners at 3. This bare assertion is unsupported. There are other means available to protect the public and Co-Petitioners' interest. Members of the public and Co-Petitioners will have considerable opportunity to comment on the Staff's NEPA process, the Staff's Draft Environmental Impact Statement, and the draft Safety Evaluation Report. Also, Co-Petitioners can participate under the limited appearance provision of 10 C.F.R. § 2.315.

Co-Petitioners state that "[i]f the Co-Petitioners are not admitted, and if for any reason SACE is later forced to withdraw from this proceeding, no other parties will be left to represent the interests of the Co-Petitioners." Motion To Add Co-Petitioners at 3. Co-Petitioners' concern, however, is not relevant and not supported as a justification to be admitted as a party. The Commission has stated that the mere fact that it is likely that no one will represent a petitioner's interest is insufficient to excuse the untimeliness of the request. *Westinghouse Electric Corporation* (Nuclear Fuel Export License for Czech Republic – Temelin Nuclear Power

---

since Co-Petitioners had not decided to join SACE, the assertion that the Secretary of the Commission in granting SACE's extension request implicitly granted it for Co-Petitioners is an unreasonable assumption. Motion To Add Co-Petitioners at 2.

[5] Co-Petitioners address factors two, three and four by reasserting "each of the reasons given in the Petition To Intervene as to why these groups have standing to participate in the proceeding". Motion to Add Co-Petitioners at 3 citing SACE's petition at 4-5. The Staff addressed issues of standing of Co-Petitioners and the admissibility of the contentions in the NRC Staff Answer to Petition. Thus, the Staff reiterates the arguments of the NRC Staff Answer to Petition, herein with regard to factors three, four, and five.

Plants), CLI-94-7, 39 NRC 322, 329 (1994). Put a different way, if all late-filed petitioners were allowed to excuse an untimely petition based on the possibility that a timely petitioner might not succeed at the intervening stage in an NRC proceeding, then all late-filed petitions would be excused, notwithstanding the reasons for untimeliness.

Further, Co-Petitioners' hypothetical regarding the possibility of SACE's withdrawal is unwarranted considering that Co-Petitioners appear to have joined SACE and committed to providing sufficient support and resources to conclude any potential litigation. And Co-Petitioners plan to "coordinate with SACE on the development of the testimony and legal briefs regarding their admitted contentions" demonstrate that their admission as intervenors cannot contribute any further to the development of the record. Motion To Add Co-Petitioners at 4. While Co-Petitioners claim their addition will not create a delay or broaden the proceeding, the lack of delay or broadening of the contentions is simply insufficient to allow an untimely petition without a showing of good cause. *See Gulf States Utilities Co.* (River Bend Station, Units 1 & 2), ALAB-444, 6 NRC 760, 798 (1977)(though an organization may be willing to take the case as it finds it, the fourth factor [now § 2.309(c)(1)(vii)] cannot be dispositive irrespective of conclusions reached on other factors). In short, absent a compelling showing, Co-Petitioners untimely petition should be rejected.

III. Co-Petitioners Fail To Address Any Of The 10 C.F.R. § 2.309(f)(2) Factors.

Co-petitioners' Motion to Add Co-Petitioners does not address any of the section 2.309(f)(2) factors. As such, it cannot be considered timely filed under 10 C.F.R. § 2.309(f)(2). Even had the Motion To Add Co-Petitioners attempted to address these factors, it would have failed. Co-Petitioners did not address their obligations to meet the Commission's hearing requirements. Their belated request to have the Atomic Safety and Licensing Board cure their decision to not join SACE's Request For Extension or to file their contentions in a timely manner should not be excused as Co-Petitioners had complete control over the lateness of their petition.

In sum, Co-Petitioners did not demonstrate that their untimely petition to intervene

should be admitted to this proceeding under either 10 C.F.R. §§ 2.309(c)(1) or 2.309(f)(2). Their failure to decide whether to intervene or join SACE's Petition in a timely manner was completely within their discretion and not good cause. Similarly, Co-Petitioners' failure to have requested or to join SACE's request for an extension to file a timely petition was also within their discretion and does not support good cause. Co-Petitioners' lack of good cause is not overcome by a "compelling" showing that the other seven factors specified in 10 C.F.R. § 2.309(c)(1) favor submission of their late-filed petition. In this instance, it is proper for the Board to weigh heavily against granting Co-Petitioners' Motion To Add Co-Petitioners. For all of the stated reasons, the Staff submits that the Motion To Add Co-Petitioners should be rejected.

IV. The Motion To Add Co-Petitioners Is Untimely Under 10 C.F.R. § 2.323(a).

Section 2.323(a) requires that motions be filed "no later than ten (10) days after the occurrence or circumstance from which the motion arises." Section 2.309(c)(2) mandates that the eight factors set forth in section 2.309(c)(1) be addressed in a nontimely filed petition. Since Co-Petitioners failed to address the eight factors in their late-filed petition of July 13, 2009, the motion herein should have been filed within ten days of their nontimely filing. Their Motion To Add Co-Petitioners is silent on the "circumstance or occurrence" that prompted them to file the motion herein on August 14, 2009. Presumably, the NRC Staff Answer to Petition identifying the flaws in their non-timely petition and objecting to Co-Petitioners as untimely petitioners appears to be the "circumstance or occurrence", on which Petitioners should not be allowed to rely. *See* NRC Staff Answer To Petition at 12-13. Given that the eight factors should have been addressed in their non-timely petition filed on July 13, 2009, the "occurrence or circumstance" arose at the time of filing of the non-timely petition, and the motion herein should have been filed no later than July 24, 2009. Thus, the Motion To Add Co-Petitioners should also be rejected for untimeliness.

CONCLUSION

Based on the foregoing, the Staff submits that the Motion To Add Co-Petitioners is untimely under 10 C.F.R. § 2.323(a), and does not satisfy the standards for late-filing under 10 C.F.R. §§ 2.309(c)(1) and 2.309(f)(2).

Signed (electronically) by

Andrea' Z. Jones, Counsel for NRC Staff
U.S. Nuclear Regulatory Commission
Office of the General Counsel
Mail Stop – O-15D21
Washington, DC 20555
(301) 415-2246
E-mail: andrea.jones@nrc.gov
Signed: August 21, 2009

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	
	)	
TENNESSEE VALLEY AUTHORITY	)	Docket No. 50-391-OL
	)	
(Watts Bar Nuclear Plant, Unit 2)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "NRC STAFF'S RESPONSE IN OPPOSITION TO MOTION TO PERMIT LATE ADDITION OF CO-PETITIONERS", dated August 21, 2009, have been served upon the following by the Electronic Information Exchange, this 21st day of August, 2009:

Administrative Judge
Lawrence G. McDade, Chair
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Mail Stop: T-3 F23
Washington, DC 20555-0001
E-mail: lgm1@nrc.gov

Administrative Judge
Paul B. Abramson
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Mail Stop: T-3 F23
Washington, DC 20555-0001
E-mail: pba@nrc.gov

Administrative Judge
Gary S. Arnold
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Mail Stop: T-3 F23
Washington, DC 20555-0001
E-mail: gxa1@nrc.gov

Kathryn M. Sutton, Esq.
Paul M. Bessette, Esq.
Morgan, Lewis & Bockius, LLP
1111 Pennsylvania Avenue, NW
Washington, D.C. 20004
E-mail: ksutton@morganlewis.com
E-mail: pbessette@morganlewis.com

Office of Commission Appellate Adjudication
U.S. Nuclear Regulatory Commission
Mail Stop: O-16G4
Washington, DC 20555-0001
E-mail: OCAAMAIL.resource@nrc.gov

Office of the Secretary
Attn: Rulemaking and Adjudications Staff
Mail Stop: O-16G4
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
E-mail: Hearing.Docket@nrc.gov

Edward Vigluicci, Esq.
Tennessee Valley Authority
400 West Summit Hill Drive, WT 6A-K
Knoxville, TN 37902
E-mail: ejvigluicci@tva.gov

Diane Curran
for Southern Alliance for Clean Energy (SACE)
Harmon, Curran, Spielberg & Eisenberg, LLP
1726 M Street N.W., Suite 600
Washington, DC 20036
E-mail: dcurran@harmoncurran.com

Signed (electronically) by

Andrea' Z. Jones, Counsel for NRC Staff
U.S. Nuclear Regulatory Commission
Office of the General Counsel
Mail Stop – O-15D21
Washington, DC 20555
(301) 415-2246
E-mail: andrea.jones@nrc.gov
Signed: August 21, 2009