UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD
Before Administrative Judges:
Lawrence G. McDade, Chair
Dr. Paul B. Abramson
Dr. Gary S. Arnold

In the Matter of	)	
	)	Docket No. 50-391-OL
TENNESSEE VALLEY AUTHORITY	)	
	)	September 8, 2009
(Watts Bar Nuclear Plant Unit 2)	)	

TENNESSEE VALLEY AUTHORITY'S RESPONSE IN OPPOSITION TO PETITIONERS' MOTION FOR LEAVE TO AMEND CONTENTION 7 REGARDING TVA AQUATIC STUDY

I. INTRODUCTION

Tennessee Valley Authority ("TVA") hereby files its Response in Opposition to "Petitioners' Motion for Leave to Amend Contention 7 Regarding TVA Aquatic Study" ("Motion for Leave to Amend") filed by Southern Alliance for Clean Energy ("SACE"), Sierra Club, Blue Ridge Environmental Defense League ("BREDL"), Tennessee Environmental Council ("TEC"), and We the People, Inc. ("WTP") (collectively, "Petitioners")[1] on September 3, 2009. Petitioners request leave to amend the basis of proposed Contention 7 in order to address an allegedly previously unavailable 1998 TVA study, "Aquatic Environmental Conditions in the Vicinity of Watts Bar Nuclear Plant During Two Years of Operation, 1996-97"

[1] TVA continues to oppose the intervention of the Sierra Club, BREDL, TEC and WTP in this proceeding for the reasons stated in its Answer Opposing the Southern Alliance for Clean Energy, Et. Al. Petition to Intervene and Request for Hearing, filed on August 7, 2009, and its Answer Opposing the Motion to Permit Late Addition of Co-Petitioners to Southern Alliance for Clean Energy's Petition to Intervene and Admit Them As Intervenors, filed on August 21, 2009.

(June 1998).[2] As explained below, Petitioners have failed to demonstrate that they meet the requirements of 10 C.F.R. § 2.309(f)(2) and thus, their motion should be denied.[3]

II. THE MOTION SHOULD BE DENIED

A. Applicable Legal Standards

10 C.F.R. § 2.309(f)(2) requires that contentions be "based on documents or other information *available* at the time the petition is to be filed, such as the . . . environmental report or other supporting document filed by an applicant or licensee, or *otherwise available to a petitioner.*"[4] Section 2.309(f)(2) permits a petitioner to amend a contention or file new contentions under only two circumstances: (1) when "there are data or conclusions in the NRC draft or final environmental impact statement, environmental assessment, or any supplements relating thereto, that differ significantly from the data or conclusions in the applicant's documents," or (2) "with leave of the presiding officer upon a showing" of three factors.[5] Where, as here, a petitioner seeks to amend its contention based on information other than data or conclusions in environmental documents issued by the U.S. Nuclear Regulatory Commission ("NRC"), it must demonstrate 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

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2 Motion for Leave to Amend at 1.

3 TVA does not address the admissibility of Petitioners' proffered amended Contention 7 in this response. Should the Board grant Petitioners leave to amend Proposed Contention 7, TVA will file a response addressing the admissibility factors of 10 C.F.R. § 2.309(f)(1), as applied to Proposed Amended Contention 7, within 25 days of September 3, 2009, pursuant to Section 2.309(h)(1).

4 Emphasis added.

5 10 C.F.R. § 2.309(f)(2); *see Exelon Generating Co., LLC* (Early Site Permit for Clinton ESP Site), LBP-05-19, 62 NRC 134, 160-61 (2005) (explaining that Section 2.309(f)(2) provides the process for considering the timing of contentions that are based on information not available at the time a petition is filed, in two specific situations).

(iii) The amended or new contention has been submitted in a timely fashion based on the availability of the subsequent information.[6]

Under Section 2.309(f)(2)(i), information that was "not previously available," or "new information," is information that has been made available since the initial deadline for filing petitions to intervene or a request for hearing has passed.[7] Information that is reasonably available before this time is not new information.[8] Additionally, the mere fact that a petitioner is unaware of information that was available prior to the filing of its initial petition for intervention does not make such information new.[9]

B. Petitioners Have Failed to Show They Meet the Criteria of 10 C.F.R. § 2.309(f)(2)

Petitioners contend that TVA's Report, titled, "Aquatic Environmental Conditions in the Vicinity of Watts Bar Nuclear Plant During Two Years of Operation, 1996-1997" ("1998 Aquatic Study") constitutes information that was not previously available under

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6 10 C.F.R. § 2.309(f)(2)(i)-(iii).

7 *See Entergy Nuclear Vt. Yankee, LLC* (Vt. Yankee Nuclear Power Station), LBP-06-14, 63 NRC 568, 580 (2006) (petitioner failed to demonstrate that "any material information . . . first became available" in the Final Safety Evaluation Report, which was issued after the adjudicatory proceeding began, and thus, failed to satisfy the requirements of Section 2.309(f)(2)(i)-(iii)); *Clinton ESP*, LBP-05-19, 62 NRC at 164 & 164 n.99 (finding that the proffered amended contention was based on "'new information' that was 'not previously available'" because it was based on information "not available at the time Intervenors filed their original intervention petitions and contentions"); *cf. AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), LBP-06-16, 63 NRC 391, 397-98, 400-01 (2006) (finding that information in a NRC Staff presentation that was given after the deadline for filing petitions to intervene was not new, and thus that petitioners did not make the required showing under Section 2.309(f)(2)(i), because petitioners previously focused on the same issues in their petition to intervene and relied upon documents, in their original petition, that were over 10 years old and substantially similar to the alleged "new" information).

8 *See AmerGen Energy Co., LLC* (License Renewal for Oyster Creek Nuclear Generating Station), CLI-09-07, slip op. at 25 (April 1, 2009) (affirming Board's finding that petitioner's proposed amended contention was not based on new information because, while petitioner relied on measurements published in a study released after the deadline for filing requests for hearing, petitioner was actually challenging an analysis that dated back to 1991 and a "simple reading" of other publicly available documents would have "informed [petitioner] of the modified factor [in the challenged analysis] long before" the new study was released).

9 *See Dominion Nuclear Conn., Inc.* (Millstone Power Station, Unit 3), CLI-09-05, slip op. at 6 (March 5, 2009) (affirming Board's finding that petitioner failed to demonstrate good cause for its untimely attempt to raise new issues "as the information [petitioner] relied upon was available earlier, and 'is not new information *merely because [petitioner] was not aware of it earlier*'") (emphasis added).

Section 2.309(f)(2)(i), because TVA's Final Supplemental Environmental Impact Statement[10] ("2007 FSEIS") "gave no indication that the TVA relied on the Aquatic Study to evaluate the environmental impacts of WBN2 on aquatic organisms."[11] Acknowledging that the 1998 Aquatic Study was included as a reference in the 2007 FSEIS[12] and cited in two other sections of the 2007 FSEIS,[13] Petitioners, nevertheless, claim that Petitioners and their expert, Dr. Shawn Paul Young, "had no reason to believe that TVA had relied on the Aquatic Study for its evaluation of WBN2's impacts to aquatic organisms."[14] Petitioners argue that since the 2007 FSEIS does not cite to the 1998 Aquatic Study on two particular pages of that report—pages 54-55—the 1998 Aquatic Study constitutes information that was not previously available.[15]

As acknowledged by Petitioners, prior to filing their Petition, TVA willingly and promptly provided copies of all documents requested by SACE. Despite numerous requests for other documents referenced in the 2007 FSEIS, however, SACE did not request a copy of the 1998 Aquatic Study in spite of the arguably obvious content of the report based on its title. In addition to being included as a reference in the 2007 FSEIS under its full title, it is cited in Section 3.1 of the 2007 FSEIS, which discusses water quality, and Section 3.4, which discusses

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10 Final Supplemental Environmental Impact Statement, Completion and Operation of Watts Bar Nuclear Plant Unit 2, Rhea County, Tenn. (June 2007) (encl. to Letter from M. Bajestani, TVA, to U.S. NRC, "Watts Bar Nuclear Plant (WBN) – Unit 2 – Final Supplemental Environmental Impact Statement for the Completion and Operation of Unit 2," (Feb. 15, 2008), *available at* ADAMS Accession No. ML080510469 ("February 15, 2008 Bajestani Letter")). The 2007 FSEIS is also available at http://www.tva.gov/environment/reports/wattsbar2/index.htm.

11 Motion for Leave to Amend at 2.

12 *See id.* (*citing* 2007 FSEIS at 123). Contrary to Petitioners' implied assertion that the 1998 Aquatic Study was listed only under its abbreviated title of "TVA 1998b," it was in fact listed under its full title, "Aquatic Environmental Conditions in the Vicinity of Watts Bar Nuclear Plant During Two Years of Operation." *See* 2007 FSEIS at 123.

13 *See* Motion for Leave to Amend at 2 n.2 (*citing* 2007 FSEIS at 35 & 57).

14 *Id.* at 2.

15 *Id.* Although Petitioners are correct in stating that the 1998 Aquatic Study is not cited on pages 54-55, which discusses aquatic ecology, it is cited a mere two pages later – on page 57 of the 2007 FSEIS, in Section 3.4.1, which discusses the potential for impacts from the proposed action on *aquatic animals* that are listed as threatened or endangered. *See* 2007 FSEIS at 57-59.

threatened and endangered species.[16] In Section 3.4, the 1998 Aquatic Study is cited for the fact that the State of Tennessee "established a mussel sanctuary extending 10 miles from TRM 520 to TRM 529.9 (Appendix C, Table C-7)."[17]

Dr. Young, in his affidavit supporting the original proposed Contention 7, discusses the alleged impacts that a new industrial facility will have on threatened and endangered aquatic species in the Tennessee River Basin and the types of mussel species in the Tennessee River basin that are "at-risk" or under Federal or state protection.[18] Petitioners do not explain their, or Dr. Young's, failure to timely consider the references cited in the 2007 FSEIS' discussion of threatened and endangered aquatic species, and, in particular, the references cited in the discussion of threatened and endangered mussel species. Their failure to consider all relevant sections of the 2007 FSEIS, and its underlying references, does not transform one of those references—here, the 1998 Aquatic Study—into "new" or "not previously available" information.[19] Accordingly, Petitioners have failed to demonstrate that the 1998 Aquatic Study is new or previously unavailable information, as required, to be granted leave to amend their contention pursuant to 10 C.F.R. § 2.309(f)(2), and therefore, their motion should be denied.[20]

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16 *See* 2007 FSEIS at 35, 57.

17 *Id.* at 57.

18 *See* Southern Alliance for Clean Energy, et al. Petition to Intervene and Request for Hearing ("Petition"), Attachment 6 (Young Declaration) at paras III.A.3 (asserting that each new industrial facility added to the Tennessee River environment, "further remove[s] the Tennessee River from any semblance of the natural state which would be necessary to restore or even halt the deterioration of the hundreds of declining, threatened, and endangered aquatic species in the Tennessee River Basin"), III.B.2 (stating that the Tennessee River harbors "47 mussel species considered to be 'at-risk'" and that in the "upper-Tennessee River basin, 30 freshwater mussel species are under Federal protection and 52 mussel species are listed for protection by four states"), & III.C.7-9 (discussing the condition of the native mussel population).

19 *See Oyster Creek*, CLI-09-07, slip op. at 25 (affirming Board's finding that the asserted "new" information that petitioner based its new contention on could have been discovered upon a "simple reading" of other publicly available documents and thus, did not constitute new information); *Dominion Nuclear Conn., Inc.* (Millstone Power Station, Unit 3), CLI-09-05, slip op. at 6 (March 5, 2009) (affirming Board's finding that information "'is not new information *merely because [petitioner] was not aware of it earlier*'") (emphasis added).

20 *See Oyster Creek*, LBP-06-16, 63 NRC 396 n.3 (stating that where the information relied on by petitioners to support its motion for leave to amend or submit new contentions is "neither new nor materially different from

III. CONCLUSION

For the reasons discussed above, the Petitioners' Motion for Leave to Amend Contention 7 Regarding TVA Aquatic Study should be denied.

Respectfully submitted,

Signed (electronically) by Paul M. Bessette

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Dated in Washington, D.C.
this 8th day of September 2009

previously available information," the proposed new or amended contentions are non-timely because they are not submitted "in a timely fashion based on the availability of the . . . information" pursuant to 10 C.F.R. § 2.309(f)(2)(iii)).

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CERTIFICATE OF SERVICE

I hereby certify that, on September 8, 2009, a copy of "Tennessee Valley Authority's Response in Opposition to Petitioners' Motion for Leave to Amend Contention 7 Regarding TVA Aquatic Study," was filed electronically with the Electronic Information Exchange on the following recipients:

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