September 10, 2009

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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| 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 FOR LEAVE TO AMEND CONTENTION 7 REGARDING TVA AQUATIC STUDY

## INTRODUCTION

The staff of the U.S. Nuclear Regulatory Commission ("Staff") hereby responds to the "Petitioners' Motion for Leave to Amend Contention 7 Regarding TVA Aquatic Study." ("Motion") 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, "Petitioners")[1] on September 3, 2009. Through this Motion, the Petitioners seek to amend the basis of proposed Contention 7 by addressing a 1998 TVA study entitled "Aquatic Environmental Conditions in the Vicinity of Watts Bar Nuclear Plant During Two Years of Operation, 1996-97" ("1998 Aquatic Study"). Motion at 1. As explained below, the Petitioners' Motion does not satisfy the Commission's standards for late-filed amendments under 10 C.F.R. § 2.309(f)(2) because this study was previously available to the Petitioners.[2] The Motion, therefore, should be denied.

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[1] The Staff continues to oppose the late intervention of the Sierra Club, BREDL, TEC, and WTP for the reasons stated in its Response in Opposition to Motion to Permit Late Addition of Co-Petitioners, filed on August 21, 2009.

[2] An amended contention is subject to the requirements of 10 C.F.R. § 2.309(f), which creates two distinct preconditions for admissibility. First, an amended contention must satisfy the late-filing (continued. . .)

## DISCUSSION

### I. Legal Standards for Amended Contentions

10 C.F.R. § 2.309(f)(2) provides the legal standard for whether leave should be granted to allow a petitioner to amend a previously-filed contention. *Amergen Energy Co., LLC* (License Renewal for Oyster Creek Nuclear Generating Station), CLI-09-07, slip op. at 32 (April 1, 2009). Incorporated into 10 C.F.R. § 2.309(f)(2) are two distinct circumstances that authorize a petitioner to amend a contention. The relevant circumstance in this case requires the petitioner to make the following showing:

> (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).[3]

Section 2.309(f)(2), therefore, requires the Petitioners to show that the part of the application now being challenged was *not previously available*. The phrase *not previously available* indicates that this rule was designed to ensure that petitioners are able to challenge

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(. . .continued)

standards found in Section 2.309(f)(2). Assuming those standards are met, the amended contention must *also* satisfy the generic Section 2.309(f)(1) contention admissibility standards. In this pleading, the Staff only addresses Section 2.309(f)(2)'s late-filing standards. The Staff, however, will address the contention admissibility criteria set forth in Section 2.309(f)(1) if the Board grants the Petitioners' leave to amend Proposed Contention 7. Under Section 2.309(h)(1), that response is due within 25 days of September 3, 2009.

[3] The other Section 2.309(f)(2) basis for amending a contention is triggered 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. *Id.* (emphasis added). This part of Section 2.309(f)(2), therefore, is only applicable when a petitioner is faced with data in the Staff's environmental record that differ from the applicant's environmental report. Since the Petitioners are not challenging a Staff report, this basis is inapplicable to their motion.

documents that were generated after the docketing date. Indeed, *not previously available* imposes a stricter test than the other Section 2.309(f)(2) basis for amending a contention—*i.e.* significant differences—because it creates a temporal element. Petitioners cannot just show that the 1998 Aquatic Study is significantly different from TVA's 2007 Final Supplemental Environmental Impact Statement ("2007 FSEIS")[4], which is the standard when dealing with Staff environmental documents. Instead, Petitioners need to show that the 1998 Aquatic Study was *not available* at the time they had access to TVA's 2007 FSEIS.

This is consistent with the principle that a petitioner has an "ironclad obligation" to inspect publicly available documents prior to drafting a contention. *See Duke Power Co.* (Catawba Nuclear Station, Units 1 and 2), ALAB–687, 16 NRC 460, 468 (1982), *vacated in part on other grounds*, CLI-83-19, 17 NRC 1041 (1983) ("an intervention petitioner has an ironclad obligation to examine the publicly available documentary material pertaining to the facility in question with sufficient care to enable it to uncover any information that could serve as the foundation for a specific contention."); *see also Duke Power Co.* (Catawba Nuclear Station, Units 1 and 2), LBP-04-4, 59 NRC 129, 146 (2004) (same). In fact, the previously available language in Section 2.309(f)(2) reinforces a petitioner's "ironclad obligation" because it prohibits amending a contention based on old information that was reasonably accessible. As the Commission recently explained, "a petitioner must show that the information on which the new contention is based was not *reasonably available to the public*, not merely that the *petitioner* recently found out about it." *Dominion Nuclear Conn., Inc.* (Millstone Power Station, Unit 3), CLI-09-05, slip op at 6 (March 5, 2009) (emphasis in the original).

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[4] 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 to 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.

II. Petitioners Fail to Satisfy 10 C.F.R. § 2.309(f)(2)

Petitioners argue that "the FSEIS gave no indication that TVA relied on the Aquatic Study to evaluate the environmental impacts of WBN2 on aquatic organisms." Motion at 2. But Petitioners acknowledge that the 1998 Aquatic Study was listed in the references section of the 2007 FSEIS.[5] *Id.* The 1998 Aquatic Study, therefore, was previously available to the Petitioners in the sense that it existed in the public domain prior to the filing of their petition. But as the recent *Millstone* case makes clear, the term "previously available" should be infused with a reasonableness gloss. *Dominion Nuclear Conn*, CLI-09-05, slip op at 6 ("a petitioner must show that the information on which the new contention is based was not *reasonably available to the public*[.]" (emphasis in the original)).

Here, the 1998 Aquatic Study was reasonably known and identified to the Petitioners by virtue of its very title. Petitioners mistakenly say that the 1998 Aquatic Study was only included under the abbreviated title "TVA 1998b." Motion at 2. In fact, the full title of the document—Aquatic Environmental Conditions in the Vicinity of Watts Bar Nuclear Plant During Two Years of Operation—appears in the references section. 2007 FSEIS at 123. Since this is the only document listed in the references section that contains the word *aquatic*, Petitioners should not be surprised that its contents are relevant to a contention labeled "Inadequate Consideration of *Aquatic* Impacts." Indeed, the title of this 1998 Aquatic Study demonstrates its relevancy to Petitioners' Proposed Contention 7 because it is likely that a report named "Aquatic Environmental Conditions" sheds some light on "Aquatic Impacts." Moreover, Petitioners

[5] Petitioners also acknowledge that the body of the 2007 FSEIS contained two references to the 1998 Aquatic Study. Motion at 2; *see also* 2007 FSEIS at 35, 57. Notably, one of those references is in the section explaining the impacts on aquatic animals, which should have put Petitioners on notice that the document may contain useful information. 2007 FSEIS at 57.

acknowledge that TVA readily provided them with other documents. Motion at 2. The fact that Petitioners failed to ask for the one document labeled "Aquatic Environmental Conditions" is contrary to their "ironclad obligation" to inspect all reasonably available. The Petitioners, therefore, have not made the required showing under Section 2.309(f)(2), and their motion should be denied.

## CONCLUSION

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

***Signed (electronically) by***

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "NRC STAFF'S RESPONSE IN OPPOSITION TO MOTION FOR LEAVE TO AMEND CONTENTION 7 REGARDING TVA AQUATIC STUDY," dated September 10, 2009, have been served upon the following by the Electronic Information Exchange, this 10th day of September, 2009:

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Signed: September 10, 2009