

December 3, 2009

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
BEFORE THE COMMISSION**

)	
In the Matter of)	
)	
Tennessee Valley Authority)	Docket No. 50-391
)	
(Watts Bar Unit 2))	
)	

**BRIEF ON APPEAL OF LBP-26-09 BY SIERRA CLUB,
BLUE MOUNTAIN ENVIRONMENTAL DEFENSE LEAGUE,
TENNESSEE ENVIRONMENTAL COUNCIL, AND WE THE PEOPLE, INC.**

I. INTRODUCTION

Pursuant to 10 C.F.R. § 2.311(a) and the Secretary’s Order of November 24, 2009, the Sierra Club, Blue Mountain Environmental Defense League, Tennessee Environmental Council, and We the People, Inc. (collectively “Appellants”) hereby appeal LBP-09-26, in which the Atomic Safety and Licensing Board (“ASLB”) refused to admit them to this proceeding as intervenors. *Tennessee Valley Authority* (Watts Bar Unit 2), LBP-09-26, __ NRC __ (November 19, 2009). The ASLB abused its discretion by irrationally interpreting the “good cause” standard of 10 C.F.R. § 2.309(c)(1)(i) and by giving the other factors in 10 C.F.R. §§ 2.309(c)(1)(ii)-(viii) undue weight. Therefore the Commission should reverse LBP-09-26’s ruling with respect to Appellants and remand it to the ASLB for a determination of Appellants’ standing to participate as intervenors in this proceeding.

II. FACTUAL BACKGROUND

On May 1, 2009, the U.S. Nuclear Commission (“NRC” or “Commission”) published a notice of opportunity to petition to intervene and request a hearing on the Tennessee Valley

Authority's ("TVA's") application to operate the Watts Bar Unit 2 nuclear power plant. 74 Fed. Reg. 20,350 (May 1, 2009). Under the schedule established in the Federal Register notice, petitions to intervene and hearing requests were due on June 30, 2009.

On June 16, 2009, two weeks before the hearing request deadline, Southern Alliance for Clean Energy ("SACE") submitted a request for a two-week extension of the deadline. Southern Alliance for Clean Energy's Request for Extension of Time to Submit Hearing Request/Petition to Intervene ("Extension Request"). SACE argued that an extension was needed to compensate for significant defects in the hearing notice, including failure to identify important environmental decision-making documents relevant to the Watts Bar Unit 2 license application. *Id.* at 2-5. In addition, SACE requested the additional two weeks so that two of its experts, who had conflicting obligations during the month of June, could gather and review all of the relevant documents and prepare contentions. *Id.* at 5-6. The Secretary granted the Extension Request in an Order dated June 24, 2009 ("Extension Order").

At the time of SACE's Extension Request, SACE was the only organization that had sought representation from undersigned counsel in the Watts Bar Unit 2 licensing hearing. After the Extension Request was filed, the Appellant organizations asked to be included in the hearing request that SACE was planning to submit. However, undersigned counsel inadvertently overlooked the need to request the Secretary to include Appellants within the scope of her Extension Order.

On July 13, 2009, as permitted by the Extension Order, SACE filed a Petition to Intervene and Hearing Request in this proceeding ("Petition to Intervene"), proposing seven contentions for admission to the case. SACE was joined in the Petition to Intervene by Appellants. In responding to the Petition to Intervene, both TVA and the NRC Staff pointed out

that Appellants constituted late petitioners and had not met the requirements for late-filing. Therefore, on August 14, 2009, SACE and the Appellants filed a motion requesting that the Appellants be granted late admission to the case along with SACE. Motion to Permit Late Addition of Co-Petitioners to Southern Alliance for Clean Energy's Petition to Intervene and Admit Them as Intervenors. ("Motion for Late Addition"). SACE and the Appellants (designated "Co-Petitioners" in the Motion) addressed the late-intervention standard as follows:

First, as to the requirement for a showing of "good cause . . . for the failure to file on time," 10 C.F.R. § 2.309(c)(i), Co-Petitioners assert that their failure to file a petition to intervene by the June 30, 2009, deadline posted in the Federal Register was justified, for all the reasons stated in SACE's June 16, 2009, motion to the Secretary for an extension of the deadline (*ie.*, that the hearing notice, the NRC's website for the WBN2 licensing proceeding, and the NRC's collection of WBN 2-related documents on ADAMS each contained significant deficiencies that required SACE and its Co-Petitioners additional time to review and respond to; and that two of the expert consultants relied on by SACE and its Co-Petitioners for support of their contentions had scheduling conflicts). By granting SACE's motion, the Secretary implicitly approved these reasons as adequate to justify the Co-Petitioners' failure to meet the June 30, 2009 deadline for petitions to intervene.

Co-Petitioners did not join SACE in seeking a two-week extension of the June 30 deadline, because at that time they had not yet decided to join SACE in the Petition to Intervene. Subsequently, when the Co-Petitioners decided to join SACE in petitioning to intervene, counsel should have requested the Secretary to expand the scope of her June 24, 2009, Order to include the Co-Petitioners; however, due to the significant pressures of preparing the Petition to Intervene, counsel overlooked this requirement. As discussed below, counsel's administrative error has had no effect on the length or breadth of this proceeding, and therefore Co-Petitioners should not be penalized for it.

Second, as to the requirements for showing the "nature of the requestor's/petitioner's right under the [Atomic Energy] Act to be made a party to the proceeding;" the "nature and extent of the requestor's/petitioner's property, financial or other interest in the proceeding;" and the "possible effect of any order that may be entered in the proceeding on the requestor's/petitioner's interest," 10 C.F.R. § 2.309(c)(ii)-(iv), Co-Petitioners re-assert each of the reasons given in the Petition to Intervene as to why these groups have standing to participate in the proceeding. Petition to Intervene at 4-5. Co-Petitioners note that neither the Staff nor TVA opposed representational standing of any of the Co-Petitioners. Staff Answer at 10-12; TVA Answer at 8.

Third, as to the “availability of other means whereby the requestor’s/petitioner’s interest will be protected,” 10 C.F.R. § 2.309(c)(v), Co-Petitioners will have no other means of protecting their interests if they are not permitted to intervene because the filing of admissible contentions is the only method under NRC regulations whereby an intervenor may participate in a licensing proceeding. *See generally* 10 C.F.R. § 2.309.

Fourth, as to the “extent to which the requestor’s/petitioner’s interests will be represented by existing parties,” 10 C.F.R. § 2.309(c)(vi), SACE is the only intervenor presently admitted in this proceeding. If 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 in this proceeding to represent the interests of the Co-Petitioners.

Fifth, as to the “extent to which the requestor’s/petitioner’s participation will broaden the issues or delay the proceeding,” 10 C.F.R. § 2.309(c)(vii), because Co-Petitioners seek only to join a Petition to Intervene that has already been submitted, their participation cannot be expected to have any effect on the breadth or length of the proceeding.

Sixth, as to 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)(viii), Co-Petitioners have demonstrated their ability to assist in developing a sound record by co-sponsoring four contentions that are supported by expert declarations; and by submitting other contentions that are supported by both factual and legal bases. Co-Petitioners plan to coordinate with SACE on the development of testimony and legal briefs regarding their admitted contentions. In this respect, Co-Petitioners, which are environmental and civic groups in the vicinity of the Watts Bar Unit 2 nuclear power plant, expect to contribute their knowledge of local environmental and economic conditions to the development of the Petitioners’ case on Contentions 4 (Inadequate Discussion of Need for Power and Energy Alternatives) and 7 (Inadequate Consideration of Aquatic Impacts).

Id. at 2-4.

On November 19, 2009, in LBP-09-26, the ASLB ruled on the Petition to Intervene and Motion for Late Admission. The ASLB found that SACE had standing and admitted two contentions. *Id.*, slip op. at 4, 21, 61. Although TVA and the NRC Staff had not opposed Appellants’ standing, the ASLB did not rule on Appellants’ standing because it concluded that a balancing of the criteria in 10 C.F.R. § 2.309(c)(1)(i)-(viii) did not justify Appellants’ late admission as intervenors. *Id.*, slip op. at 4,

7-9.

With respect to the all-important “good cause” standard in 10 C.F.R. § 2.309(c)(1), the ASLB found that Appellants’ “indecision” at the time the Extension Request was submitted did not constitute “good cause” for a late intervention. *Id.*, slip op. at 8. In the Board’s view, none of the other factors were compelling enough to warrant a grant of intervention. *Id.* In particular, the ASLB found that two other factors – the existence of SACE as another party to protect Appellants’ interests and Appellants’ failure to provide adequate information about their ability to contribute to the development of a sound record – weighed against admitting Appellants to the case. *Id.*, slip op. at 8-9.

III. ARGUMENT

A. Standard of Review

The standard for review of an ASLB’s decision weighing the eight late-filing standards in 10 C.F.R. § 2.309(c)(1) is abuse of discretion. *Houston Lighting and Power Co.* (South Texas Project, Units 1 and 2), ALAB-549, 9 NRC 644, 648 (1979) (“*Houston Power and Light*”). In considering whether an abuse of discretion occurred, fairness – *i.e.*, “the public interest in the timely and orderly conduct of our proceedings” -- is “the key policy consideration.” *Id.*

B. The ASLB’s Ruling on the Issue of Good Cause is Irrational and Unfair.

In balancing the factors listed in 10 C.F.R. §§ 2.309(c)(1)(i)-(viii), the most important factor is the first: whether the petitioner had “good cause” for filing late. *Dominion Nuclear Connecticut, Inc.*, (Millstone Nuclear Power Station, Units 2 and 3), CLI-05-24, 62 NRC 551, 564 (2005) (“*Dominion Nuclear Connecticut*”); *State of New Jersey* (Department of Law and Public Safety’s Requests Dated October 8, 1993), CLI-93-25, 38 NRC 289, 296 (1993) (“*State of New Jersey*”).

Here, the ASLB’s application of the good cause criterion constitutes an abuse of discretion because it fails to reflect “consideration of the relevant factors” and because it shows a “clear error of judgment.” *Citizens to Protect Overton Park v. Volpe*, 401 U.S. 402, 416 (1983). As the ASLB acknowledged, SACE “presented a credible case for an extension of time” in its Extension Motion. LBP-09-26, slip op. at 8. It is inescapable that if SACE had good cause for a two-week extension then so did Appellants, because the very same factors that justified SACE’s extension request also applied to Appellants: like SACE, Appellants were hampered in their review of TVA’s license application by the NRC’s defective hearing notice; and together with SACE, Appellants relied for their technical review of TVA’s license application on two experts who had scheduling conflicts during the month of June. Thus, it is rational to conclude that Appellants were justified in taking the same additional two weeks that had been granted to SACE to submit a hearing request.¹

In ruling against Appellants on the good cause factor, the ASLB cited only one reason: at the time SACE filed its Extension Request, Appellants had not yet decided whether to join SACE in its petition to intervene. LBP-26-09, slip op. at 8. According to the ASLB, “[s]uch indecision does not constitute good cause for failure to file a timely petition.” *Id.* The Board’s reasoning is illogical, however, because the factors relied on in SACE’s Extension Request were precisely the kinds of factors that would delay Appellants’ ability to decide whether to join in SACE’s petition to intervene: the hearing notice’s failure to identify or provide the location of

¹ The only factor which distinguishes Appellants’ circumstances from SACE’s is that due to an oversight by counsel, Appellants did not request permission to intervene two weeks late until after the original and extended deadlines had passed and Appellants had joined in SACE’s Petition to Intervene. The ASLB did not address that issue in LBP-09-26. In any case, Appellants respectfully submit that counsel’s mistake – which was corrected within a week of its discovery and also within the period for initial, responsive and reply pleadings on petitions to intervene in this proceeding -- is not directly relevant to the question of whether Appellants had good cause to seek to intervene two weeks late.

relevant licensing documents, and the unavailability of experts to analyze those licensing documents during the month of June. In any event, it is not at all apparent how Appellants' subjective state of mind on June 16 is relevant to the issue of good cause. What is relevant is that (a) the Secretary's Extension Order established the existence of good reason to delay past June 16 and even past June 30 in deciding whether to seek to intervene and (b) Appellants did decide to intervene in time to meet the deadline that had been extended for SACE. The Board's reasoning simply does not follow "common sense." *State of New Jersey*, 38 NRC at 295.

The Board's reasoning is also inconsistent with the overarching policy underlying the late-intervention standard, of ensuring fairness in the hearing process. *Houston Power and Light*, 9 NRC at 648. The ASLB conceded that the Appellants have the same rights under the Atomic Energy Act to be made parties to this proceeding, and that their participation would not broaden or delay the proceeding. LBP-09-26, slip op. at 8. The ASLB made no effort to explain – nor is it apparent – how it would be unfair to TVA or the NRC Staff to grant a two-week extension to the Appellants in order to allow their coordinated participation with SACE in a single intervention petition on the same set of timely-filed contentions. Under the circumstances, to completely exclude Appellants from this proceeding would indeed be arbitrary and unfair.

C. The ASLB Did Not Correctly Balance the Criteria in 10 C.F.R. § 2.309(c)(1).

As the Commission ruled in *Dominion Nuclear Connecticut*, when good cause for late intervention is not demonstrated, it is appropriate to require a "compelling showing" on the other seven criteria. 62 NRC at 565. But where good cause has been established, neither Commission case law nor its regulations contain such a requirement. Thus, by requiring a "compelling showing" with respect to factors (ii)-(viii) (LBP-09-26, slip op. at 8), the ASLB legally erred.

In any event, the ASLB's conclusions that two of those factors weighed against Appellant's admission to the case was irrational. First, the ASLB rejected Petitioners' argument that if SACE withdrew from the proceeding, Appellants would have no other party to protect their interests. *Id.*, slip op. at 8-9. According to the ASLB, SACE's withdrawal is only a "possibility" that is "far to speculative to carry much weight in the Board's decision," given the amount of time and resources that SACE clearly put into its Petition to Intervene. *Id.*, slip op. at 9. As discussed above, Appellants should not be required to make a showing on this point that is compelling, but merely reasonable. Given the significant demands of any NRC licensing proceeding, and given the length of a typical operating license case, it is not unreasonable to anticipate circumstances in which an intervenor would be forced to drop out of a case for lack of resources. The general fortunes of SACE, unrelated to the licensing proceeding, could also change over such a lengthy period of time and affect SACE's ability to continue to participate in this case. Thus, the Board's declaration that the potential for SACE to withdraw from the proceeding is "speculative" lacks a reasonable basis.

The ASLB also concluded that Appellants had not shown an ability to contribute to the record, because their assertion that they will contribute their knowledge of local environmental and economic conditions is unsupported. LBP-09-26, slip op. at 9. Again, the ASLB gave this factor an inappropriate degree of weight in light of the fact that Appellants have demonstrated good cause for intervening late. In any case, the ASLB disregarded Appellants' statement that their special knowledge of economic and environmental issues stems from the fact that they are located "in the vicinity of the Watts Bar Unit 2 nuclear plant." Motion for Late Addition at 4.

More importantly, the ASLB disregarded Appellants' statement that they had demonstrated their ability to assist in developing a sound record "by co-sponsoring four

contentions that are supported by expert declarations; and by submitting other contentions that are supported by both factual and legal bases.” Motion for Late Addition at 4. In fact, the ASLB agreed that the contentions co-sponsored by the Appellants were “professional, and well-supported.” LBP-09-26, slip op. at 9. Thus, the ASLB’s conclusion that Appellants failed to show they would contribute to the development of a sound record is contradicted by the ASLB’s own assessment of the quality of the contentions that were co-sponsored by Appellants.²

III. CONCLUSION

For the foregoing reasons, the Commission should reverse LBP-26-09’s ruling with respect to the admission of Appellants to this proceeding.

Respectfully submitted,

Electronically signed by

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² While Appellants fully co-sponsored the contentions submitted on July 14, 2009, pursuant to 10 C.F.R. § 2.309(f)(3) they intend to designate SACE as the lead intervenor on the contentions that were admitted.