UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of	)	
	)	Docket No. 50-391-OL
TENNESSEE VALLEY AUTHORITY	)	
	)	December 14, 2009
(Watts Bar Nuclear Plant Unit 2)	)	

TENNESSEE VALLEY AUTHORITY'S BRIEF IN OPPOSITION TO SIERRA CLUB, ET AL. APPEAL FROM LBP-09-26

I. INTRODUCTION

In accordance with 10 C.F.R. § 2.311(b), Tennessee Valley Authority ("TVA") submits this Brief in Opposition to the Notice of Appeal and Brief on Appeal ("Appeal") filed by the Sierra Club, Blue Ridge Environmental Defense League, Tennessee Environmental Counsel, and We the People, Inc. (collectively, "Petitioners"), regarding the November 19, 2009 Order issued by the Atomic Safety and Licensing Board ("Board") ("Order" or "LBP-09-26").[1] Unlike the other participant in this proceeding, Southern Alliance for Clean Energy ("SACE"), Petitioners did not seek and were not granted an extension of the June 30, 2009 deadline for filing petitions to intervene.[2] Nonetheless, on July 13, 2009, Petitioners and SACE filed a joint Petition to

[1] Notice of Appeal of LBP-09-26 by Sierra Club, Blue Mountain Environmental Defense League, Tennessee Environmental Council, and We the People, Inc. (Dec. 3, 2009); Brief on Appeal of LBP-26-09 [sic] by Sierra Club, Blue Mountain Environmental Defense League, Tennessee Environmental Council, and We the People, Inc. (Dec. 3, 2009) ("Appeal"). Although the Appeal and certain other pleadings refer to the Blue *Mountain* Environmental Defense League, the Petition to Intervene and Request for Hearing (July 13, 2009) ("Petition to Intervene") and Board Order refer to the Blue *Ridge* Environmental Defense League. TVA assumes that this difference is due to a typographical error.

[2] *See* 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 to Sensitive

Intervene and Request for Hearing. More than a *month* later—and only after TVA and NRC Staff raised the lateness issue—Petitioners asked the Board to accept their untimely filing, explaining that the failure to seek an extension of the June 30th deadline was due to their own indecision regarding intervention, coupled with inattention of counsel.[3] The Board denied Petitioners' request, and Petitioners appealed the Board decision, asking the Commission to find that the Board abused its discretion, describing the Board's Order as "irrational," "unfair," "illogical," and not following "common sense."[4]

As discussed more fully below, the Board properly denied Petitioners' request because they did not submit a timely Petition to Intervene and failed to provide adequate justification to allow the Board to consider their non-timely filing pursuant to the 10 C.F.R. § 2.309(c)(1) factors. Accordingly, the Commission should affirm the Board's decision and find that failure to meet a deadline due to indecision or inattention is not an adequate basis for missing an acknowledged, published filing deadline.

II. PROCEDURAL HISTORY

The Commission published the Hearing Notice for this operating license proceeding in the *Federal Register* on May 1, 2009, setting a clear, firm deadline of June 30, 2009 for filing any request for hearing and petition to intervene.[5] On June 16, 2009, SACE filed a "Request for Extension of Time to Submit Hearing Request/Petition to Intervene," seeking a two-week

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Unclassified Non-Safeguards Information and Safeguards Information for Contention Preparation, 74 Fed. Reg. 20,350, 20,350-51 (May 1, 2009) ("Hearing Notice").

[3] Motion to Permit Late Addition of Co-Petitioners to Southern Alliance for Clean Energy's Petition to Intervene and Admit Them as Intervenors at 1-3 (Aug. 14, 2009) ("Motion to Permit Late Addition of Petitioners").

[4] Appeal at 5-8.

[5] Hearing Notice, 74 Fed. Reg. at 20,350-51. In order to ensure adequate notice, NRC's Hearing Notice also specifically provided that ". . . the notice of the application will be published once each week for 4 consecutive weeks in the Federal Register ," but that "the 60-day period will only begin upon the date of the first publication of the notice." Hearing Notice at 20,351.

extension of time ("SACE's Request for Extension of Time").[6] Importantly, SACE's Request for Extension of Time made no mention of Petitioners and explicitly applied only to SACE. TVA timely filed its response to SACE's Request for Extension of Time, wherein it agreed to SACE's request and noted that it had offered to provide SACE with any requested information and documents in a timely manner.[7] TVA did not agree to any request for extension for any parties other than SACE. On June 24, 2009, the Secretary of the Commission granted SACE until July 14th to file a request for hearing and petition to intervene.[8] This Order applied specifically to SACE and did not impact the filing deadline for any other potential parties. On July 13, 2009, SACE, joined by Petitioners, filed a Petition to Intervene and Request for Hearing. The Petition to Intervene contained no discussion of the fact that the filing was not timely with respect to the Petitioners.

On August 7, 2009, TVA and the NRC Staff filed Answers to the Petition to Intervene, arguing that Petitioners should not be admitted as parties to this proceeding because their filing was impermissibly late.[9] In their Reply, Petitioners candidly acknowledged that the Secretary's June 24th Order granted only SACE an extension and, thus, the Petition to Intervene was untimely with respect to the Petitioners.[10] Petitioners also concurrently filed a Motion to Permit Late Addition of Petitioners. In this Motion, Petitioners—for the first time and thirty-two days late—claimed to satisfy the late-filing factors in 10 C.F.R. § 2.309(c)(1). On August 21, 2009,

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6 SACE cited difficulties in accessing certain documents SACE needed to prepare its contentions and also scheduling conflicts of two of SACE's experts. *See* SACE's Request for Extension of Time at 1-2.

7 *See* Response of the Tennessee Valley Authority to Request for Extension of Time to Submit Hearing Request/Petition to Intervene by Southern Alliance for Clean Energy (June 18, 2009).

8 Order (June 24, 2009) (unpublished) ("June 24th Order").

9 *See* Tennessee Valley Authority's Answer Opposing the Southern Alliance for Clean Energy, *et al*., Petition to Intervene and Request for Hearing at 2, 16-18 (Aug. 7, 2009); NRC Staff's Answer to Petition to Intervene and Request for Hearing at 13 (Aug. 7, 2009).

10 Petitioners' Reply to NRC Staff's and Tennessee Valley Authority's Answers to Petition to Intervene and Request for Hearing at 2 (Aug. 14, 2009) ("Reply").

TVA and the NRC Staff filed responses to the Motion to Permit Late Addition of Petitioners explaining that the Motion itself was untimely and that, in any event, Petitioners failed to carry their burden of showing that the late-filing factors in Section 2.309(c)(1) weighed in their favor.[11]

In its November 19th Order, the Board granted SACE's timely Petition to Intervene, but denied Petitioners' belated request, finding that Petitioners' filing was not timely and failed to provide adequate justification.[12] On December 3, 2009, Petitioners appealed LBP-09-26 to the Commission. TVA hereby opposes Petitioners' Appeal.

III. STANDARD OF REVIEW

"An order denying a petition to intervene, and/or request for hearing . . . is appealable by the requestor/petitioner on the question as to whether the request and/or petition should have been granted."[13] In ruling on such an appeal, however, the Commission gives "substantial deference" to Board determinations on threshold issues.[14] Thus, a Board's decision ruling on a non-timely petition will be reversed only if there was an abuse of discretion or error of law.[15]

Abuse of discretion is a "high standard of review."[16] A petitioner has a "heavy burden" on appeal to establish that reversal of a Board decision is warranted.[17] Furthermore, consistent with this standard, "[t]he appellant bears the responsibility of clearly identifying the errors in the

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11 Tennessee Valley Authority's 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 (Aug. 21, 2009); NRC Staff's Response in Opposition to Motion to Permit Late Addition of Co-Petitioners (Aug. 21, 2009).

12 *Tenn. Valley Authority* (Watts Bar Nuclear Plant), LBP-09-26, 70 NRC __, slip op. at 2-3, 6-9, 63 (Nov. 19, 2009).

13 10 C.F.R. § 2.311(c).

14 *AmerGen Energy Co., LLC* (License Renewal for Oyster Creek Nuclear Generating Station), CLI-06-24, 64 NRC 111, 121 (2006).

15 *Private Fuel Storage, LLC* (Independent Spent Fuel Storage Installation), CLI-00-21, 52 NRC 261, 265 (2000).

16 *Andrew Siemaszko*, CLI-06-16, 63 NRC 708, 718 (2006).

17 *Pub. Serv. Co. of N.H.* (Seabrook Station, Units 1 & 2), ALAB-918, 29 NRC 473, 482 (1989).

decision below and ensuring that its brief contains sufficient information and cogent argument to alert the other parties and the Commission to the precise nature of and support for the appellant's claims."[18]

In performing its appellate review role, the Commission will not consider new arguments that were never presented to the Board.[19] Raising new issues on appeal is especially inappropriate when "the issue and the factual averments underlying it could have been—but were not—timely put before the Licensing Board."[20]

IV. PETITIONERS HAVE IDENTIFIED NO ERROR OF LAW OR ABUSE OF DISCRETION IN THE BOARD'S ORDER

As an initial matter, Petitioners concede that their Petition to Intervene was untimely and, thus, may not be considered unless it satisfies the eight-factor balancing test for non-timely filings set forth in 10 C.F.R. § 2.309(c)(1).[21] The burden is on a petitioner to demonstrate that a balancing of these factors weighs in its favor.[22] Importantly, the eight factors in Section 2.309(c)(1) are not of equal importance—absence of good cause (factor one) is the "first

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[18] *Dominion Nuclear Power Conn. Inc.* (Millstone Nuclear Power Station, Units 2 & 3), CLI-04-36, 60 NRC 631, 639 n.25 (2004) (quoting *Advanced Med. Sys., Inc.* (One Factory Row, Geneva, Ohio 44041), CLI-94-6, 39 NRC 285, 297 (1994)).

[19] *USEC, Inc.* (American Centrifuge Plant), CLI-06-10, 63 NRC 451, 458 (2006); *Millstone*, CLI-04-36, 60 NRC at 640.

[20] *P.R. Elec. Power Auth.* (Northern Coast Nuclear Plant, Unit 1), ALAB-648, 14 NRC 34, 37 (1981).

[21] *See* Reply at 2 ("Petitioners agree that . . . their request to participate in this proceeding is untimely."). The eight factors in Section 2.309(c)(1) are: (1) good cause, if any, for the failure to file on time; (2) the nature of the requestor's/petitioner's right under the Act to be made a party to the proceeding; (3) the nature and extent of the requestor's/petitioner's property, financial or other interest in the proceeding; (4) the possible effect of any order that may be entered in the proceeding on the requestor's/petitioner's interest; (5) the availability of other means whereby the requestor's/petitioner's interest will be protected; (6) the extent to which the requestor's/petitioner's interests will be represented by existing parties; (7) the extent to which the requestor's/petitioner's participation will broaden the issues or delay the proceeding; and (8) the extent to which the requestor's/petitioner's participation may reasonably be expected to assist in developing a sound record.

[22] *Tex. Utils. Elec. Co.* (Comanche Peak Steam Electric Station, Units 1 & 2), CLI-88-12, 28 NRC 605, 609 (1988), *aff'd sub nom. Citizens for Fair Util. Regulation v. NRC*, 898 F.2d 51 (5th Cir. 1990). In fact, the Commission has summarily rejected petitions that fail to address the non-timely filing factors. *See, e.g.*, *Fla. Power & Light Co.* (Calvert Cliffs Nuclear Plant, Units 1 & 2), CLI-06-21, 64 NRC 30, 33-34 (2006).

and principal test."[23] Absent a favorable showing on the good cause factor, a petitioner must show a "compelling case" on the remaining factors.[24] Of the remaining factors, the potential for broadening or delaying the proceeding (factor seven) and the petitioner's ability to assist in developing a sound record (factor eight), are the most important factors.[25] To make a compelling showing on factor eight, a petitioner must provide specific details regarding the issues it plans to cover and the witnesses and testimony it plans on presenting.[26] As explained more fully below, Petitioners fail to demonstrate any abuse of discretion or legal error in the Board's decision.

A. The Board Did Not Abuse its Discretion in Finding Petitioners Failed to Demonstrate Good Cause for Their Failure to File on Time

The Board properly found that Petitioners failed to demonstrate good cause. As the Board explained, "Petitioners candidly state that they did not join SACE in seeking an extension because at the time the extension was requested they had not yet decided whether to join SACE in the Petition to Intervene. Such indecision does not constitute good cause for failure to file a timely petition."[27] On appeal, Petitioners generally claim that the Board's decision was "irrational," "unfair," "illogical," and does not follow "common sense" simply because, if SACE had good cause for its two-week extension, then Petitioners also must have good cause for a two-week extension.[28]

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23 *State of New Jersey* (Dep't of Law & Pub. Safety's Requests Dated Oct. 8, 1993), CLI-93-25, 38 NRC 289, 295 (1993) (citing *Duke Power Co*. (Catawba Nuclear Station, Units 1 & 2), CLI–83–19, 17 NRC 1041, 1048 (1983)).

24 *Id.* at 296; *see also Tex. Utils. Elec. Co.* (Comanche Peak Steam Electric Station, Units 1 & 2), CLI-92-12, 36 NRC 62, 73 (1992) (holding that when "no good excuse is tendered for the tardiness, the petitioner's demonstration on the other factors must be particularly strong") (citation and internal punctuations omitted).

25 *Commonwealth Edison Co.* (Braidwood Nuclear Power Station, Units 1 & 2), CLI-86-8, 23 NRC 241, 246-48 (1986).

26 *Comanche Peak*, CLI-88-12, 28 NRC at 611 (quoting *Miss. Power & Light Co.* (Grand Gulf Nuclear Station, Units 1 & 2), ALAB-704, 16 NRC 1725, 1730 (1982)).

27 *Watts Bar*, LBP-09-26, slip op. at 8.

28 Appeal at 5-8.

As demonstrated by their reasoning, Petitioners still have not come to grips with the fact that, unlike SACE, they did *not* seek and were *not* granted an extension of time to file their Petition to Intervene. Although Petitioners do not indicate when they decided to join SACE in its Petition to Intervene, *thirty-two days* passed between the filing of the Petition to Intervene and Petitioners' first attempt to address the late-filing factors. Given this prolonged period of inaction by Petitioners, the Board properly focused its good cause analysis on why Petitioners did not join in SACE's extension request or, at a minimum, submit a timely Motion to Permit Late Addition of Petitioners.[29] Petitioners' only explanation for this delay was that they "had not yet decided to join SACE in the Petition to Intervene" and then their "counsel overlooked this requirement."[30] Thus, the Board decision was proper because ambivalence regarding intervention, coupled with the acknowledged error of experienced counsel, does not constitute good cause.[31] Accordingly, there is no abuse of discretion in the Board finding an absence of good cause.

B. The Board Committed No Legal Error in Requiring That Petitioners Make a Compelling Showing on the Remaining Factors and Did Not Abuse Its Discretion in Finding That Petitioners Failed to Make Such a Showing

Given that the Board properly concluded that Petitioners failed to establish good cause, the Board appropriately required that Petitioners make a compelling showing on the remaining

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[29] *See, e.g.*, *New Jersey*, CLI-93-25, 38 NRC at 295 (explaining that in addressing the good cause factor, a petitioner must explain not only why it failed to file within the time required, but also why it did not file as soon thereafter as possible).

[30] Motion to Permit Late Addition of Petitioners at 2.

[31] *See Calvert Cliffs*, CLI-06-21, 64 NRC at 33 ("[w]e cannot agree that [the petitioner's] failure to read carefully the governing procedural regulations constitutes good cause for accepting its late-filed petition") (quoting *N. Atl. Energy Serv. Corp.* (Seabrook Station, Unit 1), CLI-99-6, 49 NRC 201, 223 (1999)); *Kan. Gas & Elec. Co.* (Wolf Creek Generating Station, Unit No. 1), ALAB-279, 1 NRC 559, 576-77 (1975) (observing that the Commission has given licensing boards "leeway" in evaluating intervention petitions drafted by *pro se* petitioners or "counsel new to the field," but declining to do so because the "petition bears the imprimatur of experienced counsel" who could be expected to file a petition "with the clarity and specificity demanded by the Commission's regulations").

Section 2.309(c)(1) factors. As the Board explained, under the governing Commission case law, when a petitioner fails to make a showing of good cause, the "petitioner's demonstration on the other factors must be 'compelling.'"[32] The Board then properly evaluated and weighed those factors, noting that several factors weighed in Petitioners' favor, but that on balance, Petitioners' showing on the other Section 2.309(c)(1) factors was not so compelling to warrant consideration of Petitioners' non-timely filing.[33] Specifically, the Board noted that the standing-related factors (factors two to four) and the potential for broadening or delaying the proceeding (factor seven), weighed in Petitioners' favor.[34] The Board, however, found Petitioners' arguments that SACE might not protect Petitioners' interests if SACE withdrew from the proceeding (factor six), and that Petitioners could make a significant contribution to record (factor eight), were largely unsubstantiated.[35]

On appeal, Petitioners agree that the "compelling showing" standard is applicable when good cause is not established.[36] They claim, however, that the Board committed legal error by requiring a compelling showing on the remaining Section 2.309(c)(1) factors after they established good cause.[37] This circular argument is nothing more than a rehash of Petitioners' challenge to the Board's finding that good cause was absent. As discussed in Section IV.A above, the Board justifiably found that Petitioners failed to demonstrate good cause and, therefore, the Board correctly required a compelling showing on the remaining factors.

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32 *Watts Bar*, LBP-09-26, slip op. at 6 (quoting *Dominion Nuclear Conn. Inc.* (Millstone Nuclear Power Station, Units 2 & 3), CLI-05-24, 62 NRC 551, 565 (2005)).

33 *Watts Bar*, LBP-09-26, slip op. at 8.

34 *Id.* .

35 *Id.* at 8-9.

36 Appeal at 7.

37 *Id.* .

Petitioners next challenge the Board's conclusions on factors six and eight. With respect to the sixth factor (extent to which petitioner's interests will be represented by existing parties), the Board refused to give significant weight to Petitioners' hypothetical scenario involving SACE's possible, future withdrawal from the proceeding, finding the claim "speculative."[38] On appeal, Petitioners claim the Board's conclusion lacks a reasonable basis, but point to no facts or evidence to support this hypothetical.[39] This argument also ignores controlling Commission case law holding that the weight given to this factor is only slight and insufficient to satisfy the compelling showing standard.[40] Accordingly, the Board did not abuse its discretion in not giving significant weight to Petitioners' bare, unsupported hypothetical regarding the *potential* withdrawal of SACE from the proceeding.[41]

With regard to the eighth factor (ability to assist in developing a sound record), the Board found that Petitioners failed to "explain how their knowledge of these facts is superior to, or even different from, that of SACE or why, if they are not admitted as parties, they could not, nevertheless, provide such services to SACE."[42] On appeal, Petitioners simply assert that the Board "disregarded" Petitioners' "special knowledge" about local economic and environmental

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38 *Watts Bar*, LBP-09-26, slip op. at 8-9.

39 Appeal at 8.

40 *Comanche Peak*, CLI-92-12, 36 NRC at 74. *See also Westinghouse Elec. Corp.* (Nuclear Fuel Export License for Czech Republic—Temelin Nuclear Power Plants), CLI-94-7, 39 NRC 322, 329 (1994) (explaining that "excusing untimeliness for every petitioner who meets only this factor would effectively negate any standards for untimely intervention in cases . . . where no one else has requested a hearing, since a late-filing petitioner could always maintain that there will be no hearing to protect its interest").

41 Petitioners' original argument on this factor consisted of the following statement: "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." Motion to Permit Late Addition of Petitioners at 3. In their Appeal, Petitioners attempt to expand on this argument by stating that, "[g]iven 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." Appeal at 8. Although this argument was never presented to the Board and thus, need not be considered by the Commission, *see USEC*, CLI-06-10, 63 NRC at 458, such assertions are generally applicable to any proceeding and do not satisfy Petitioners' burden to make a compelling showing.

42 *Watts Bar*, LBP-09-26, slip op. at 9.

issues, but again provide no facts or evidence to support or establish any such "special knowledge."[43] In fact, it appears that the experts in this proceeding were retained by SACE before Petitioners even decided to join the petition.[44] Under Commission case law, to make a compelling case on this factor, Petitioners were required to "set out with as much particularity as possible the precise issues it plans to cover, identify its prospective witnesses, and summarize their proposed testimony" in order to demonstrate their "special expertise."[45] Beyond vague assertions, Petitioners did not identify *any* specific issues they planned to address and did not list *any* additional witness they might call.[46] Again, given the complete absence of specific and detailed information regarding Petitioners' "special knowledge," the Board did not abuse its discretion in not giving significant weight to this factor.

V. CONCLUSION

For the foregoing reasons, the Commission should reject Petitioners' Appeal and affirm the Board's Order.

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43 Appeal at 8.

44 *See* SACE's Request for Extension of Time at 2, 5-6 (referring to "*SACE's* expert consultants, Drs. Shawn Young and Arjun Makhijani") (emphasis added).

45 *Comanche Peak*, CLI-88-12, 28 NRC at 611 (quoting *Grand Gulf*,, ALAB-704, 16 NRC at 1730).

46 *See* Motion to Permit Late Addition of Petitioners at 4.

Respectfully submitted,

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Dated in Washington, D.C.
this 14th day of December 2009

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CERTIFICATE OF SERVICE

I hereby certify that, on December 14, 2009, a copy of "Tennessee Valley Authority's Brief in Opposition to Sierra Club, Et al. Appeal from LBP-09-26," was served by the Electronic Information Exchange on the following recipients:

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