UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	
	)	Docket No. 50-391-OL
TENNESSEE VALLEY AUTHORITY	)	
	)	March 15, 2010
(Watts Bar Nuclear Plant Unit 2)	)	

TENNESSEE VALLEY AUTHORITY'S ANSWER IN OPPOSITION TO MOTION FOR LEAVE TO REPLY AND MOTION FOR LEAVE TO AMEND WAIVER PETITION

I. INTRODUCTION

Pursuant to 10 C.F.R. § 2.323(c), Tennessee Valley Authority ("TVA") files this Answer opposing Southern Alliance for Clean Energy's ("SACE's") March 8, 2010 "Motion for Leave to Reply to Tennessee Valley Authority and NRC Staff Regarding Petition for Waiver of 10 C.F.R. §§ 51.53(b) and 51.95(b)" ("Motion for Leave to Reply")[1] and March 10, 2010 "Motion for Leave to Amend Petition for Waiver of 10 C.F.R. §§ 51.53(b) and 51.95(b)" ("Motion for Leave to Amend" or "Waiver Petition Amendment"). As explained below, the Motions should be denied because SACE's Reply and proposed Waiver Petition Amendment are unauthorized, meritless, and impermissibly attempt to introduce new factual support not contained in SACE's original "Petition for Waiver of 10 C.F.R. §§ 51.53(b) and 51.95(b) with Respect to Admission of Contentions Regarding Need for Power and Consideration of Alternative Energy Sources" ("Waiver Petition") filed on February 4, 2010.

[1] Southern Alliance for Clean Energy's Reply to Tennessee Valley Authority and NRC Staff Regarding Petition for Waiver of 10 C.F.R. §§ 51.53(b) and 51.95(b) with Respect to Admission of Contentions Regarding Need for Power and Consideration of Alternative Energy Sources (Mar. 8, 2010) ("Reply") was included with the Motion for Leave to Reply.

II. BACKGROUND

More than eight months ago, SACE first submitted Proposed Contention 4, which alleged that TVA's discussion of the need for power and energy alternatives was inadequate.[2] On November 19, 2009, the Board rejected Proposed Contention 4 because 10 C.F.R. § 51.53(b) states that TVA is not required to include "any discussion of the need for power or of alternative energy sources in its application for an operating license."[3] On February 4, 2010, SACE filed its Waiver Petition. As authorized by NRC regulations, TVA and NRC Staff filed separate Responses in opposition to the Waiver Petition.[4]

Although NRC regulations do not contemplate such filings, SACE now requests leave to Reply and to amend its Waiver Petition.[5] Specifically, SACE wishes to reply to the arguments that its Waiver Petition is untimely, fails to satisfy NRC's standard for issuance of a waiver, and is deficient for not seeking a waiver of 10 C.F.R. § 51.106(c).[6] SACE argues that its Reply will help "ensure that the record of its waiver petition is complete."[7] Also, although SACE appears to suggest a waiver of Section 51.106(c) is unnecessary for the Board to admit a contention on need for power or energy alternatives, SACE seeks to amend its Waiver Petition to now reference this regulation.[8]

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2 Petition to Intervene and Request for Hearing at 16 (July 13, 2009) ("Petition to Intervene").

3 *Tenn. Valley Auth.* (Watts Bar Unit 2), LBP-09-26, 70 NRC __, slip op. at 44 (Nov. 19, 2009).

4 Tennessee Valley Authority's Response in Opposition to Petition for Waiver of 10 C.F.R. §§ 51.53(b) and 51.95(b) (Mar. 1, 2010); NRC Staff's Response to Request by Southern Alliance for Clean Energy ("SACE") for Waiver of 10 C.F.R. §§ 51.53(b) and 51.95(b) with Respect to Admission of Contentions Regarding Need for Power and Consideration of Alternative Energy Sources (Feb. 26, 2010).

5 Motion for Leave to Reply at 1; Motion for Leave to Amend at 1.

6 Motion for Leave to Reply at 1.

7 *Id*.

8 Motion for Leave to Amend at 2-3.

As discussed below, the Board should reject SACE's Motions because the Reply and proposed Waiver Petition Amendment are unauthorized, meritless, and impermissibly attempt to introduce new factual support, contrary to NRC's well-established procedural framework for waiver requests.

III. ARGUMENT

As an initial matter, SACE's Reply and Waiver Petition Amendment are unauthorized pleadings. Waiver petitions are governed by 10 C.F.R. § 2.335. When a waiver petition is filed, the only response authorized by the regulation is that "[a]ny other party may file a response by counter affidavit or otherwise."[9] Replies to these responses are not contemplated by the Commission's regulations. Similarly, amendments to a waiver petition are also not authorized. In contrast, pursuant to 10 C.F.R. § 2.309, replies to petitions to intervene and amendments to contentions are expressly authorized by the regulations.[10] NRC regulations also establish that a party that files a motion "has no right to reply" except as permitted by the Board upon a demonstration of "compelling circumstances, such as where the moving party demonstrates that it could not reasonably have anticipated the arguments to which it seeks leave to reply."[11] This distinction demonstrates that when the Commission intends to permit a reply or an amended pleading, it explicitly authorizes such filings. The Commission has not done so with respect waiver petitions submitted pursuant to Section 2.335.

Furthermore, to the extent SACE is entitled to submit a Reply or Waiver Petition Amendment, SACE should, at a minimum, have to establish compelling circumstances or good cause. As noted above, NRC regulations prohibit a reply to an answer to a motion unless there

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[9] 10 C.F.R. § 2.335(b).

[10] *See* 10 C.F.R. § 2.309(f)(2), (h)(2).

[11] 10 C.F.R. § 2.323(c).

are "compelling circumstances, such as where the moving party demonstrates that it could not reasonably have anticipated the arguments to which it seeks leave to reply."[12] Here, SACE fails to allege any "compelling circumstances" that might justify a reply in this case. To the contrary, SACE could have reasonably anticipated all of the arguments for which it seeks leave to reply. A review of relevant NRC regulations and case law would have alerted SACE to the need to address the timeliness of its waiver petition, the proper standards for issuance of a waiver, and the requirement to request a waiver of 10 C.F.R. § 51.106(c). Having failed to anticipate these most basic arguments, SACE cannot justify what is essentially a "second bite at the apple"—and an obvious attempt to simply have the last word.

SACE also improperly attempts to introduce new supporting information in its Reply. Specifically, the Reply cites—for the first time—a 2009 study on the costs of nuclear power.[13] Although none of the support or arguments in the Reply cure the underlying deficiencies in the Waiver Petition, Commission case law makes clear that if an original pleading "did not cite adequate documentary support, a petitioner cannot remediate the deficiency by introducing in the reply documents that were available to it" earlier in the proceeding.[14] Therefore, the impermissible scope of the Reply provides an additional reason for the Board to deny SACE's Motion for Leave to Reply.

SACE also fails to provide adequate justification for its proposed Waiver Petition Amendment. Despite the rather lengthy period available to prepare its Waiver Petition, SACE candidly admits that it neglected to request a waiver of Section 51.106(c) because it was

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[12] 10 C.F.R. § 2.323(c).

[13] *See* Reply at 5 n.3 (citing Mark Cooper, The Economics of Nuclear Reactors: Renaissance or Relapse? (June 2009)). Furthermore, to the extent SACE (Reply at 4) suggests that TVA was required to provide documentation regarding the current status of construction of Watts Bar Unit 2, TVA was merely pointing out what is commonly known—construction is ongoing and has progressed beyond the 60% cited by SACE.

[14] *Nuclear Mgmt. Co., LLC* (Palisades Nuclear Plant), CLI-06-17, 63 NRC 727, 732 (2006).

"unaware" of this regulation.[15] In somewhat analogous situations, the Commission has held that a petitioner's "failure to read carefully the governing procedural regulations" cannot provide good cause pursuant to Section 2.309(c)(1).[16] Similarly, here, SACE's failure to read the Commission's regulations is an insufficient basis to accept its Motion for Leave to Amend the Waiver Petition.

IV. CONCLUSION

For the foregoing reasons, the Motion for Leave to Reply and the Motion for Leave to Amend should be denied.

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[15] Motion for Leave to Amend at 2.

[16] *See Fla. Power & Light Co.* (Calvert Cliffs Nuclear Plant, Units 1 & 2), CLI-06-21, 64 NRC 30, 33 (2006) (quoting *N. Atl. Energy Serv. Corp*. (Seabrook Station, Unit 1), CLI-99-6, 49 NRC 201, 223 (1999)); *see also 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"). Although by its own terms, Section 2.309(c)(1) (formerly 10 C.F.R. § 2.714(a)(1)) applies to "Nontimely requests and/or petitions and contentions," the Commission has made clear that it also applies to amended contentions as well. *See, e.g.*, *Sacramento Mun. Util. Dist.* (Rancho Seco Nuclear Generating Station), CLI-93-12, 37 NRC 355, 362 (1993). Because the regulations do not contemplate the filing of amendments to waiver petitions, it would seem logical to also require, at a minimum, a good cause showing for SACE's Waiver Petition Amendment.

Respectfully submitted,

Signed (electronically) by Paul M. Bessette

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Dated in Washington, D.C.
this 15th day of March 2010

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CERTIFICATE OF SERVICE

I hereby certify that, on March 15, 2010, a copy of "Tennessee Valley Authority's Answer in Opposition to Motion for Leave to Reply and Motion for Leave to Amend Waiver Petition" was served by the Electronic Information Exchange on the following recipients:

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