UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Gregory B. Jaczko, Chairman
Dale E. Klein
Kristine L. Svinicki

In the Matter of	)	
	)	
TENNESSEE VALLEY AUTHORITY	)	Docket No. 50-391-OL
	)	
(Watts Bar Nuclear Plant, Unit 2)	)	
	)	
	)	
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CLI-10-12

MEMORANDUM AND ORDER

This proceeding concerns the application of the Tennessee Valley Authority (TVA) for a license under 10 C.F.R. Part 50 to operate a second nuclear reactor (Watts Bar Unit 2) at the Watts Bar Nuclear Plant site in Rhea County, Tennessee. The Sierra Club, Blue Ridge Environmental Defense League, Tennessee Environmental Council, and We the People, Inc. (collectively, Petitioners) filed a notice of appeal, and supporting brief, of the Atomic Safety and Licensing Board's ruling denying their late-filed intervention request.[1] TVA and the NRC Staff oppose the appeal.[2]

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[1] *Notice of Appeal of LBP-09-26 by Sierra Club, Blue [Ridge] Environmental Defense League, Tennessee Environmental Council, and We the People, Inc.; Brief on Appeal of LBP-[09-26] by Sierra Club, Blue [Ridge] Environmental Defense League, Tennessee Environmental Council, and We the People, Inc.* (Dec. 3, 2009) (Petitioners' Appeal).

[2] *Tennessee Valley Authority's Brief in Opposition to Sierra Club, et al. Appeal from LBP-09-26* (Dec. 14, 2009) (TVA Opposition); *NRC Staff's Brief in Opposition to Sierra Club, Blue Ridge* (continued ...)

For the reasons set forth below, we affirm the Board's ruling.

I. BACKGROUND

On March 4, 2009, TVA submitted an update to its original operating license application for Watts Bar Unit 2. Shortly thereafter, the NRC Staff published a notice of opportunity for hearing in the *Federal Register*.[3] As set forth in the notice, requests for hearing and petitions to intervene were due on or before June 30, 2009.[4] The Southern Alliance for Clean Energy (SACE) requested, and received, a two-week extension of time to file a request for hearing and petition to intervene.[5] The SACE extension request did not mention any other prospective petitioners.[6]

SACE and Petitioners jointly filed a petition to intervene and request for hearing on July 13, 2009.[7] In their answers, the Staff and TVA argued that the request for hearing was timely filed only with respect to SACE.[8] Concurrent with the reply jointly filed by Petitioners and SACE,

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(… continued)
Environmental Defense League, Tennessee Environmental Council, and We the People, Inc.'s Appeal of LBP-09-26 (Dec. 14, 2009) (NRC Staff Opposition).

[3] Tennessee Valley Authority; 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 Unclassified Non-Safeguards Information and Safeguards Information for Contention Preparation, 74 Fed. Reg. 20,350 (May 1, 2009).

[4] *Id.*

[5] Order (June 24, 2009) (unpublished).

[6] *See generally Southern Alliance for Clean Energy's Request for Extension of Time to Submit Hearing Request/Petition to Intervene* (June 16, 2009).

[7] *Petition to Intervene and Request for Hearing* (July 13, 2009).

[8] *NRC Staff's Answer to Petition to Intervene and Request for Hearing* (Aug. 7, 2009) at 12-13; *Tennessee Valley Authority's Answer Opposing the Southern Alliance for Clean Energy, et al. Petition to Intervene and Request for Hearing* (Aug. 7, 2009) at 16-17.

Petitioners filed a motion to permit late intervention.[9] In their motion, they conceded that the request for hearing was timely only with respect to SACE, but argued that they had satisfied the criteria in 10 C.F.R. § 2.309(c)(1) for non-timely filings.[10] The Board denied Petitioners' motion for late intervention, as well as the larger request for hearing as to Petitioners, finding the failure to make a timely decision to join SACE in the petition to intervene to be inadequate justification for late filing.[11] The Board granted the request for hearing with respect to SACE, finding that it alone had demonstrated standing and submitted two admissible contentions.[12] Petitioners' timely appeal followed.

II. DISCUSSION

Our rules of practice provide for an automatic right to appeal a Board decision wholly denying a petition to intervene.[13] We will defer to the Board's rulings on threshold issues absent an error of law or abuse of discretion.[14] In ruling on a non-timely petition, boards are to consider eight factors that will excuse the tardiness of the petition if, on balance, they weigh in favor of the petitioner:

(i) Good cause, if any, for the failure to file on time;

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[9] *Motion to Permit Late Addition of Co-Petitioners to Southern Alliance for Clean Energy's Petition to Intervene and Admit them as Intervenors* (Aug. 14, 2009) (Motion for Late Intervention).

[10] *Id.* at 2.

[11] LBP-09-26, 70 NRC __ (Nov. 19, 2009) (slip op. at 8).

[12] *Id.* (slip op. at 2-3).

[13] *See* 10 C.F.R. § 2.311(c).

[14] *See Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-00-21, 52 NRC 261 (2000). *See also Mississippi Power & Light Co.* (Grand Gulf Nuclear Station, Units 1 and 2), ALAB-704, 16 NRC 1725, 1730 (1982).

(ii) The nature of the requestor's/petitioner's right under the [Atomic Energy Act of 1954, as amended (AEA)] to be made a party to the proceeding;

(iii) The nature and extent of the requestor's/petitioner's property, financial or other interest in the proceeding;

(iv) The possible effect of any order that may be entered in the proceeding on the requestor's/petitioner's interest;

(v) The availability of other means whereby the requestor's/petitioner's interest will be protected;

(vi) The extent to which the requestor's/petitioner's interests will be represented by existing parties;

(vii) The extent to which the requestor's/petitioner's participation will broaden the issues or delay the proceeding; and

(viii) The extent to which the requestor's/petitioner's participation may reasonably be expected to assist in developing a sound record.[15]

The first factor – good cause – is accorded the greatest weight.[16] Absent a showing of good cause, a non-timely petition will not be excused unless the petitioner makes a compelling showing on the remaining factors.[17] A petitioner's showing must be highly persuasive; it would be a rare case where we would excuse a non-timely petition absent good cause.[18]

With respect to good cause, Petitioners assert, both in their motion to permit late intervention and on appeal,[19] that they have made a sufficient showing because the reasons

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[15] 10 C.F.R. § 2.309(c)(1).

[16] *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-05-24, 62 NRC 551, 564 (2005).

[17] *Id.* at 565.

[18] *See id.* at 564-65 (distinguishing *Nuclear Fuel Services, Inc.* (West Valley Reprocessing Plant), CLI-75-4, 1 NRC 273 (1975)).

[19] Petitioners' Appeal at 6-7; Motion for Late Intervention at 2-3.

that merited SACE an extension of time – "the hearing notice's failure to identify or provide the location of relevant licensing documents, and the unavailability of experts to analyze those licensing documents during the month of June" – apply equally to them.[20] They explain that at the time SACE requested an extension of the deadline to file intervention petitions they had not yet decided whether they would seek to intervene. According to Petitioners, when they did decide to join in SACE's petition, their counsel inadvertently overlooked the need to request an extension of time on their behalf. Presented with this explanation, the Board determined that Petitioners' untimely filing was caused by their uncertainty over whether to seek intervention, and reasoned that "such indecision does not constitute good cause for failure to file a timely petition."[21]

Petitioners argue that the Board's reasoning with respect to good cause was illogical and unfair because it focused on Petitioners' reason for not joining in SACE's extension request – the fact that they had not decided whether to intervene – instead of the reasons cited in SACE's extension request. In Petitioners' view, the Board should have considered whether their indecision was justified by the same reasons SACE cited for seeking an extension of time.[22] Petitioners insist that the only difference between their circumstances and those of SACE is that their counsel mistakenly failed to request an extension of the deadline.[23] According to Petitioners, it would be "arbitrary and unfair" to exclude them from the proceeding.[24]

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[20] Petitioners' Appeal at 6-7.

[21] LBP-09-26, 70 NRC __ (slip op. at 8).

[22] Petitioners' Appeal at 6.

[23] *Id.* at 6 n.1.

[24] *Id.* at 7.

We find no error or abuse of discretion in the Board's ruling that Petitioners failed to establish good cause. The Board properly focused on whether Petitioners had good cause for not complying with the established deadline or seeking an extension of the deadline. By acknowledging that they had not yet decided whether or not to intervene, Petitioners also acknowledged that they were aware of the deadline and of SACE's extension request. On appeal, Petitioners point out that, in focusing on the fact that Petitioners were unable to decide whether to seek intervention, the Board made no mention of their attorney's error.[25] Even though the Board apparently did not take it into account, Petitioners argue that their attorney's error, in any event, is "not directly relevant to the question of whether [they] had good cause to seek to intervene two weeks late."[26] In our view, any error by counsel does not change the result here. Petitioners do not clarify when they decided to seek intervention. They do not claim that they decided to join in SACE's petition prior to the filing deadline in the notice of opportunity for hearing – in such a case, a failure to file a timely extension request might be attributable to counsel.[27] Assuming Petitioners decided to join in SACE's petition some time after the filing deadline, they would have had to address their tardiness in any event, regardless of whether any additional delay was introduced by their counsel's asserted oversight. At bottom,

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[25] *Id.* at 6 n.1.

[26] *Id.*

[27] Petitioners state only that they decided to intervene "in time to meet the deadline that had been extended for SACE." *Id.* at 7.

Petitioners failed to demonstrate good cause for their late filing. Consequently, we find that the Board did not err in making that determination.[28]

Given its reasonable determination regarding good cause, we find that the Board did not err or abuse its discretion in requiring Petitioners to make the requisite "compelling" showing on the remaining late-filing factors. We also find, as discussed below, that the Board did not err in determining that Petitioners failed to make this showing.

In its analysis of the remaining factors, the Board found that four of them weighed in Petitioners' favor. In an apparent reference to the three factors relating to a petitioner's standing, the Board determined that "[Petitioners] have the same rights under the [AEA] to be made a party to this proceeding, and the same interests in this proceeding" as SACE.[29] The Board's determination that SACE had demonstrated standing apparently was the basis for the Board's conclusion that these factors weighed in Petitioners' favor.[30] The Board also found that one additional factor weighed in Petitioners' favor because "admitting [them] as parties will not broaden or delay the proceeding."[31] The Board nevertheless concluded that "these factors are

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[28] *See Florida Power & Light Co., et al.* (Calvert Cliffs Nuclear Power Plant, Units 1 and 2; Calvert Cliffs Independent Spent Fuel Storage Installation; Nine Mile Point Nuclear Station, Units 1 and 2; R.E. Ginna Nuclear Power Plant; Turkey Point Nuclear Generating Plant, Units 3 and 4; St. Lucie Nuclear Power Plant, Units 1 and 2; Seabrook Station; Duane Arnold Energy Center), CLI-06-21, 64 NRC 30, 33 (2006) (finding that petitioner's tardiness due to its belated realization that it could present its arguments before the NRC did not constitute good cause); *North Atlantic Energy Service Corp.* (Seabrook Station, Unit 1), CLI-99-6, 47 NRC 201, 223 (1999) (finding that petitioner's failure "to read carefully the governing procedural regulations" did not constitute good cause).

[29] LBP-09-26, 70 NRC __ (slip op. at 8). *See* 10 C.F.R. § 2.309(c)(1)(ii), (iii), (iv).

[30] *See* LBP-09-26, 70 NRC __ (slip op. at 4).

[31] *Id.* (slip op. at 8). *See* 10 C.F.R. § 2.309(c)(1)(vii).

insufficient absent a demonstration of good cause for . . . late filing, to justify . . . admitting them as parties to this proceeding."[32]

In particular, the Board found that Petitioners had not shown that the sixth factor – whether Petitioners' interests will be represented by existing parties – and the eighth factor – whether Petitioners reasonably may be expected to assist in developing a sound record, weighed in their favor.[33] Concerning the sixth factor, the Board reasoned that Petitioners' interests will be represented by their co-petitioner, SACE, which was admitted as a party to the proceeding. In their motion, Petitioners claimed that there is a risk that SACE might withdraw from the proceeding, and consequently their interests will not be adequately represented. The Board rejected this argument as "far too speculative to carry much weight in the Board's decision."[34]

Regarding the eighth factor, Petitioners asserted in their motion that they had shown how they would 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."[35] Petitioners also stated that they plan to coordinate with SACE and contribute their knowledge of local environmental and economic conditions for two of the contentions proffered in the joint petition.[36] The Board concluded that these statements were insufficient to show how Petitioners would assist in the development of a sound record. As the

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[32] LBP-09-26, 70 NRC __ (slip op. at 8).

[33] *Id. See* 10 C.F.R. § 2.309(c)(1)(vi), (viii).

[34] LBP-09-26, 70 NRC __ (slip op. at 9).

[35] Motion for Late Intervention at 4.

[36] *Id.*

basis for its conclusion, the Board pointed to Petitioners' failure to "explain how their knowledge . . . is superior to, or even different from, that of SACE or why, if they are not admitted as parties, they could not, nevertheless, provide [assistance] to SACE."[37] Thus, the Board concluded overall that Petitioners' showing on the remaining factors was not so compelling as to overcome their lack of good cause.[38]

On appeal, Petitioners challenge the Board's rulings on the sixth and eighth factors.[39] First, with respect to the sixth factor, Petitioners assert that the Board's rejection of their argument that SACE might withdraw from the proceeding "lacks a reasonable basis."[40] This is because, Petitioners posit, "it is not unreasonable to anticipate circumstances in which an intervenor would be forced to drop out of a case for lack of resources" "[g]iven the significant demands of any NRC licensing proceeding [and] the length of a typical operating license case."[41] But Petitioners would have the Board hypothesize with regard to SACE's "general fortunes" and "ability to continue to participate" based on mere generalizations about NRC licensing proceedings.[42] Without any facts or particularized information offered in support of their assertion, we cannot find that the Board erred in declining to guess whether SACE will, at

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[37] LBP-09-26, 70 NRC __ (slip op. at 9).

[38] *See id.* (slip op. at 8).

[39] The Board's determination on the other factors is not at issue. *See generally* Petitioners' Appeal.

[40] Petitioners' Appeal at 8.

[41] *Id.*

[42] *See id.*

some unknown future time, withdraw from the proceeding. Therefore, we do not disturb the Board's ruling on this factor.

Second, Petitioners reiterate that they have demonstrated the ability to assist in the development of a sound record because they assisted in the preparation of the petition and because they plan to coordinate with SACE during the proceeding.[43] They argue that in finding that they had not provided sufficient support, the Board "disregarded [their] statement that [they have] special knowledge of economic and environmental issues stem[ming] from the fact that [they] are located 'in the vicinity of the Watts Bar Unit 2 nuclear plant.'"[44] Furthermore, the Board contradicted itself, Petitioners assert, by concluding that Petitioners failed to show how they would contribute to a sound record when the Board noted that the petition was "professional, and well-supported."[45]

Under longstanding Commission precedent, a petitioner must provide more than vague assertions that it will be able to assist in developing the record.[46] For example, in *Comanche Peak*, we found a petitioner's vague statements that it would rely on its experts and documents from various sources to be insufficient.[47] Citing an earlier decision, we explained that "'[w]hen a petitioner addresses this . . . criterion it should set out with as much particularity as possible the

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[43] *Id.*

[44] *Id.* at 8 (quoting Motion for Late Intervention at 4).

[45] *Id.* at 9.

[46] *See, e.g.*, *Texas Utilities Electric Co.* (Comanche Peak Steam Electric Station, Unit 2), CLI-93-4, 37 NRC 156, 166 (1993). *See also Texas Utilities Electric Co.* (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-88-12, 28 NRC 605, 611 (1988); *Grand Gulf*, ALAB-704, 16 NRC at 1730.

[47] *See Comanche Peak*, CLI-93-4, 37 NRC at 166.

precise issues it plans to cover, identify its prospective witnesses, and summarize their proposed testimony.'"[48] Here, Petitioners merely offer their proximity to the location of the proposed reactor and their assistance in the preparation of the intervention petition to support their claim that they will be able to assist in developing a sound record. Given this limited information, we decline to second-guess the Board's conclusion that it could not discern "how [Petitioners'] knowledge . . . is superior to, or even different from, that of SACE, and why, if they are not admitted as parties, they could not, nevertheless, provide [assistance] to SACE."[49] Although the Board acknowledged that the petition was "professional, and well-supported," Petitioners' assertion that they co-sponsored and submitted contentions apparently did not enable the Board to distinguish between SACE's contribution to the petition and that of Petitioners. Petitioners have not demonstrated that the Board clearly erred in making this ruling.

Having found that Petitioners had not established good cause and had not made a compelling showing on two of the remaining seven factors, we find that the Board did not err or abuse its discretion when it determined that the four factors it weighed in Petitioners' favor did not tip the balance toward excusing their late filing.[50] Further, we find that the Board's decision

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[48] *Id.* (quoting *Comanche Peak*, CLI-88-12, 28 NRC at 611) (alteration and omission in original).

[49] LBP-09-26, 70 NRC __ (slip op. at 9). Even if they are not participating as parties, we see nothing to prevent Petitioners from providing assistance to SACE, as they state they plan to do.

[50] Although the Board did not specifically address it, we observe that the factor pertaining to other means by which Petitioners may protect their interests also weighs against Petitioners. *See* 10 C.F.R. § 2.309(c)(1)(v). Petitioners have the option of filing a request for Commission action under 10 C.F.R. § 2.206. *See Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-05-24, 62 NRC 551, 565-66 (2005). In addition, Petitioners have the opportunity to participate, as appropriate, as *amici curiae*. *See generally* 10 C.F.R. § 2.315(d). *Cf. Andrew Siemaszko*, CLI-06-16, 63 NRC 708, 722, 724 (2006) (identifying the ability to participate as *amici curiae* as one of the means to participate in an adjudicatory proceeding).

is not, as Petitioners claim, inconsistent with fundamental notions of fairness in the hearing process.[51] Fundamentally, fairness requires that all participants in NRC adjudicatory proceedings abide by our procedural rules, especially those who, as here, are cognizant of those rules and represented by counsel.[52] As we said in our Statement of Policy on Conduct of Licensing Proceedings, "[f]airness to all involved in NRC's adjudicatory procedures requires that every participant fulfill the obligations imposed by and in accordance with applicable law and Commission regulations."[53]

In conclusion, we find that Petitioners point to no error of law or abuse of discretion in the Board's determination that Petitioners had not justified sufficiently their late filing.[54]

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[51] *See* Petitioners' Appeal at 5, 7.

[52] *See Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-98-21, 48 NRC 185, 201 (1998); *Georgia Power Co.* (Vogtle Electric Generating Plant), CLI-92-3, 35 NRC 63, 66 (1992). *See also Metropolitan Edison Co.* (Three Mile Island Nuclear Station, Unit 1), ALAB-772, 19 NRC 1193, 1247 (1984).

[53] CLI-81-8, 46 Fed. Reg. 28,533, 28,534 (May 27, 1981).

[54] Because we affirm the Board's ruling on Petitioners' motion, we need not reach the issue of whether Petitioners' motion was timely filed in accordance with 10 C.F.R. § 2.323(a), nor need we address the assertion that Petitioners failed to file a notice of appearance. *See, e.g.*, TVA Opposition at 3 (regarding the timeliness issue); NRC Staff Opposition at 11 n.11 (regarding the notice of appearance requirement).

III. CONCLUSION

For the reasons articulated by the Board and set forth above, we *affirm* the Board's decision denying Petitioners' motion to permit late intervention, as well as their request for hearing.

IT IS SO ORDERED.

For the Commission

(NRC SEAL) **/RA/**

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Annette L. Vietti-Cook
Secretary of the Commission

Dated at Rockville, Maryland,
this 26th day of March, 2010.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of	)	
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TENNESSEE VALLEY AUTHORITY	)	Docket Nos. 50-391-OL
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(Watts Bar Nuclear Power Plant - Unit 2)	)	
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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing COMMISSION MEMORANDUM AND ORDER (CLI-10-12) have been served upon the following persons by the Electronic Information Exchange.

U.S. Nuclear Regulatory Commission
Atomic Safety and Licensing Board Panel
Mail Stop: T-3F23
Washington, DC 20555-0001

Lawrence G. McDade, Chair
Administrative Judge
E-mail: lgm1@nrc.gov

Paul B. Abramson
Administrative Judge
E-mail: paul.abramson@nrc.gov

Gary S. Arnold
Administrative Judge
E-mail: gxa1@nrc.gov

Wen Bu, Law Clerk
E-mail: wxb3@nrc.gov

U.S. Nuclear Regulatory Commission
Office of the General Counsel
Mail Stop: O-15D21
Washington, DC 20555-0001

Edward Williamson, Esq.
E-mail: elw2@nrc.gov
David Roth, Esq.
E-mail: david.roth@nrc.gov
Andrea Jones, Esq.
E-mail: axj4@nrc.gov
Brian Newell, Paralegal
E-mail: bpn1@nrc.gov

OGC Mail Center
E-mail: OGCMailCenter@nrc.gov

U.S. Nuclear Regulatory Commission
Office of Commission Appellate Adjudication
Mail Stop: O-16C1
Washington, DC 20555-0001

OCAA Mail Center
E-mail: ocaamail@nrc.gov

U.S. Nuclear Regulatory Commission
Office of the Secretary of the Commission
Mail Stop: O-16C1
Washington, DC 20555-0001

Hearing Docket
E-mail: hearingdocket@nrc.gov

Morgan, Lewis & Bockius, LLP
Counsel for Tennessee Valley Authority
1111 Pennsylvania Ave., N.W.
Washington, DC 20004

Kathryn M. Sutton, Esq.
E-mail: ksutton@morganlewis.com
Paul M. Bessette, Esq.
E-mail: pbessette@morganlewis.com
Raphael P. Kuyler, Esq.
rkuyler@morganlewis.com
Esther Park, Esq.
esther.park@morganlewis.com
Jonathan M. Rund, Esq.
jrund@morganlewis.com
Mary L. Freeze, Legal Secretary
E-mail: mfreeze@morganlewis.com

Tennessee Valley Authority
Office of the General Counsel
400 W. Summit Hill Drive, WT 6A-K
Knoxville, TN 37902

Edward J. Vigluicci, Esq.
E-mail: ejvigluicci@tva.gov
Maureen H. Dunn, Esq.
E-mail: mhdunn@tva.gov
Harriet A. Cooper, Esq.
E-mail: hacooper@tva.gov
Christopher Chandler, Esq.
E-mail: ccchandler0@tva.gov

Matthew Fraser, Esq.
Diane Curran, Esq.
Southern Alliance for Clean Energy
(SACE)
Harmon, Curran, Spielberg & Eisenberg, LLP
1726 M Street N.W., Suite 600
Washington, DC 20036
E-mail: dcurran@harmoncurran.com
E-mail: mfraser@harmoncurran.com

[Original signed by Nancy Greathead]

Office of the Secretary of the Commission

Dated at Rockville, Maryland
this 26th day of March 2010