UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Commission

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

TENNESSEE VALLEY AUTHORITY'S ANSWER OPPOSING SOUTHERN ALLIANCE FOR CLEAN ENERGY'S MOTION TO REOPEN THE RECORD

Pursuant to 10 C.F.R. § 2.323(c), the Tennessee Valley Authority ("TVA") respectfully submits its answer in opposition to "Southern Alliance for Clean Energy's Motion to Reopen the Record" ("Motion"), dated February 5, 2015. In its Motion, the Southern Alliance for Clean Energy ("SACE") requests to reopen the record in the Watts Bar Unit 2 operating license proceeding for the purpose of litigating a new, late-filed contention. Motion at 1. SACE claims that TVA has failed to comply with 10 C.F.R. § 50.34(b)(4), because TVA has submitted "pertinent" information to the NRC in an Expedited Seismic Evaluation Process Report ("ESEP") concerning earthquake risk and this information should be "submitted in an amendment to the [Final Safety Analysis Report (FSAR)]." Motion at 4.

For the reasons set forth below, SACE has not satisfied the Commission's strict standards for reopening the adjudicatory record in this proceeding. Contrary to the requirements of 10 C.F.R. § 2.326, SACE's Motion does not raise a significant safety issue and fails to demonstrate that the issues raised by SACE would be likely to result in a materially different outcome in the proceeding. SACE also fails to submit a supporting affidavit sufficient to satisfy the requirements of § 2.326(b). Finally, the Motion is untimely

because it fails to demonstrate that the ESEP provides new and materially different information as required by 10 C.F.R. § 2.309(c). Accordingly, the Motion should be rejected.

ARGUMENT

I. Background

In July 2009, SACE, the Tennessee Environmental Council, the Sierra Club, We the People, and BREDL filed a request for a hearing and petition to intervene in the NRC adjudicatory proceeding for TVA's application for an operating license for Watts Bar Unit 2. In November 2009, the Atomic Safety and Licensing Board ("ASLB") granted SACE's request for hearing, admitted two of SACE's seven contentions, and denied the request for hearing submitted on behalf of the other four petitioners. The ASLB subsequently dismissed one contention.

In July 2012, SACE petitioned for the admission of a new, late-filed contention regarding waste confidence. That contention was held in abeyance pursuant to the Commission's order in *Calvert Cliffs Nuclear Project, LLC* (Calvert Cliffs Nuclear Power Plant, Unit 3), *et al.*, CLI-12-16, 76 NRC 63 (2012). In July 2013, SACE filed a motion to withdraw its only other contention. The ASLB granted the motion. On August 23, 2014, the Commission ordered the ASLB to reject the proposed contention regarding waste confidence. *Calvert Cliffs Nuclear Project, LLC* (Calvert Cliffs Nuclear Power Plant, Unit 3), *et al.*, CLI-14-08, 80 NRC __ (Aug. 26, 2014) (slip op.). On September 9, 2014, the ASLB issued an order rejecting the contention held in abeyance and terminating the proceeding. *Tennessee Valley Authority* (Watts Bar Unit 2), LBP-14-13, 80 NRC __ (Sep. 9, 2012) (slip op.).

II. Applicable Legal Standards

A. Legal Standards Governing Reopening the Record

Given the need for finality in the hearing process, the Commission considers reopening the record for any reason to be an "extraordinary" action. *Entergy Nuclear Vt. Yankee, LLC & Entergy Nuclear Operations, Inc.* (Vt. Yankee Nuclear Power Station), CLI-11-2, 73 NRC 333, 338 (2011) (citing Final Rule, Criteria for Reopening Records in Formal Licensing Proceedings, 51 Fed. Reg. 19,535, 19,538 (May 30, 1986)). The Commission therefore imposes "a 'deliberately heavy' burden upon an intervenor who seeks to supplement the evidentiary record after it has been closed . . . ." *Vt. Yankee*, CLI-11-2, 73 NRC at 338 (quoting *AmerGen Energy Co. LLC* (Oyster Creek Nuclear Generating Station), CLI-08-28, 68 NRC 658, 674 (2008)). Otherwise, "'there would be little hope' of completing administrative proceedings if each newly arising allegation required an agency to reopen its hearings." *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-05-12, 61 NRC 345, 350 n.18 (2005) (quoting *Vt. Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 555 (1978)). The Commission "likewise frown[s] on intervenors seeking to introduce a new contention later than the deadline established by [NRC] regulations, and [] accordingly hold[s] them to a higher standard for the admission of such contentions." *Vt. Yankee*, CLI-11-2, 73 NRC at 338.

This elevated burden is reflected in 10 C.F.R. § 2.326(a), which requires that a party show that its motion (1) was timely filed, (2) concerns a significant safety issue or environmental matter, and (3) demonstrates that a materially different result would be, or would have been likely, had the newly proffered evidence been considered initially. Further, under NRC rules,

> [t]he motion must be accompanied by affidavits that set forth the factual and/or technical bases for the movant's claim that the criteria of paragraph (a) of this section have been satisfied. Affidavits must be given by competent individuals with knowledge of the facts alleged, or by experts in the disciplines appropriate to the issues raised. Evidence contained in affidavits must meet the admissibility standards of this subpart. Each of the criteria must be separately addressed, with a specific explanation of why it has been met.

10 C.F.R. § 2.326(b). *See also Entergy Nuclear Generation Co*. (Pilgrim Nuclear Power Station), CLI-12-15, 75 NRC 704, 713 (2012).

Under § 2.326, it is not the applicant's nor the NRC Staff's burden to defeat the motion to reopen. Instead, it is petitioner's burden, through its motion to reopen and in its accompanying affidavit, to demonstrate that the motion should be granted. *See Oyster Creek*, CLI-08-28, 68 NRC at 674. "All of the factors in section [10 C.F.R.] 2.326 must be met in order for a motion to reopen to be granted." *Entergy Nuclear Generation Co.* (Pilgrim Nuclear Power Station), CLI-12-3, 75 NRC 132, 143 (2012).

"Bare assertions and speculation . . . do not supply the requisite support." *Id.* (citing *Oyster Creek*, CLI-08-28, 68 NRC at 674). Evidence contained in the § 2.326(b) affidavits must meet the admissibility standards in 10 C.F.R. § 2.337—it must be relevant, material, and reliable. *Entergy Nuclear Generation Co.* (Pilgrim Nuclear Power Station), CLI- 12-6, 75 NRC 352, 367 (2012), *aff'd sub nom.*, *Mass. v. NRC*, 708 F.3d 63 (1st Cir. 2013); *Pilgrim*, CLI-12-3, 75 NRC at 138-39. Further, to justify reopening the record, "the moving papers must be strong enough, in the light of any opposing filings, to avoid summary disposition." *Private Fuel Storage*, CLI-05-12, 61 NRC at 350 (internal quotations omitted). A motion to reopen that relates to a contention not previously in controversy, as is the case here, must also satisfy the standards governing non-timely contentions in 10 C.F.R. § 2.309(c). 10 C.F.R. § 2.326(d); *Pilgrim*, CLI-12-3, 75 NRC at 140. These standards are addressed in Part II.B, *infra*.

B. Legal Standards Governing Non-Timely Contentions

Pursuant to the Hearing Notice[1] and 10 C.F.R. § 2.309(b)(3), the deadline for timely petitions to intervene in this proceeding expired nearly six years ago. Therefore, in addition to the requirements of § 2.326(a) through (c), the Motion must satisfy the requirements governing admission of non-timely contentions in § 2.309(c). *See* § 2.326(d). SACE bears the burden of successfully addressing the "stringent" non-timely criteria. A new or amended contention "will not be entertained absent a determination by the presiding officer" that the moving party has demonstrated good cause. 10 C.F.R. § 2.309(c) (emphasis added). In order to demonstrate good cause, the moving party must meet each of the requirements of 10 C.F.R. § 2.309(c)(i) – (iii), which provide that a petitioner may submit a new or amended contention only with leave of the presiding officer upon a showing of good cause by satisfying three factors:

> (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.

See also Powertech USA, Inc. (Dewey–Burdock in Situ Uranium Recovery Facility), LBP-13-9, 78 NRC ___, ___ (July 22, 2013) (slip op. at 9); *Southern California Edison Co.* (San Onofre Nuclear Generation Station, Units 2 and 3), LBP-12-25, 76 NRC 540, 543 n.13 (2012).

[1] 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).

III. SACE's Motion Fails to Satisfy the Requirements for Reopening the Record

A. The Motion Is Not Supported by a Sufficient Affidavit

SACE's Motion must be denied because it is not supported by an affidavit that sets forth "the factual and/or technical bases for the movant's claim that the criteria of [§ 2.326(a)] have been satisfied," as required by § 2.326(b).

SACE's Motion provides three affidavits regarding standing and one from legal counsel for SACE. *See* Motion at 5. None provides the factual or technical bases for SACE's claim as required by § 2.326(b). Moreover, the affidavits do not address any of the requirements of § 2.326(a). In this regard, the Declaration by SACE's legal counsel states that "[t]he factual statements in [the Motion] are, to [] the best of my knowledge, true and correct representations of statements made by TVA and the NRC Staff in correspondence and reports." This statement simply claims that the factual statements are true and does not provide the affidavit support required by § 2.326(b); it does not address any of the criteria of § 2.326(a), much less provide "a specific explanation of why [§ 2.326(a)] has been met."

The affidavits also are not given "by competent individuals with knowledge of the facts alleged, or by experts in the disciplines appropriate to the issues raised." 10 C.F.R. § 2.326(b). None of the standing affiants claims any such knowledge or expertise, and there is no indication to the contrary. SACE's legal counsel claims that she is "familiar with the documents" discussed in the Motion. However, she claims no expertise or special knowledge with respect to the technical issues regarding seismic hazards and the ESEP that are the subject of the proposed contention. Indeed, if all § 2.326(b) required was legal counsel to assert familiarity with the relevant documents, then the affidavit requirement would be meaningless.

In summary, there is no indication that any affiant is a competent individual that has knowledge of the facts relating to the technical claim, as required by 10 C.F.R. § 2.326(b).

See also Pilgrim, CLI-12-6, 75 NRC at 367. These affidavits also do not address SACE's claim and contain no analysis or discussion of SACE's claim. The failure to meet this mandatory affidavit requirement is by itself sufficient grounds to reject the Motion. *Tex. Utils. Elec. Co.* (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-92-12, 36 NRC 62, 76 (1992).

B. The Motion Does Not Concern a Significant Safety Issue

SACE fails to satisfy its heavy burden to demonstrate that its Motion concerns a significant safety issue, as required by 10 C.F.R. § 2.326(a)(2). Indeed, SACE does not identify any safety issue stemming from TVA's alleged failure to comply with the requirements of 10 C.F.R. § 50.34(b)(4). Rather, SACE claims, with no apparent justification, that its Motion and the accompanying contention raise a significant safety issue "[a]s a matter of law." Motion at 2. Although SACE refers to the NRC regulations governing preliminary and final safety analysis reports, and even quotes at length from these regulations, the Motion contains no substantive discussion regarding the significance of the alleged safety issue.

Indeed, the only text that provides any description at all about this purported significant safety issue is SACE's conclusory claim: "TVA has made representations to the NRC regarding the ability of SSCs to withstand a better-understood and more-severe earthquake risk than TVA designed WBN2 to withstand when the reactor was built. Essentially, TVA has updated its analysis under §§ 50.34(a)(4) and 50.34(b)(4), but sent it to the NRC outside the licensing process." Motion at 4. These claims, however, amount to nothing more than bare assertions and speculation, which the Commission has held are insufficient to raise a significant safety issue. *See AmerGen Energy Company* (Oyster Creek Nuclear Generating Station), CLI-09-7, 69 NRC 235, 287 (2009).

SACE's failure to identify a significant safety issue is particularly deficient given the context of the earthquake risk raised in the Motion and proposed contention. The initial post-Fukushima 50.54(f) request from the NRC that led TVA to consider further seismic considerations stated that "[t]he NRC [has] concluded that continued plant operation and the continuation of license activities did not pose an imminent risk to public health and safety."[2] The Staff has determined that additional action, if any is required, will occur following completion of its seismic review; in other words, the Staff, as approved by the Commission, has determined that a significant safety issue *does not exist at this time*. SACE has not disputed this conclusion, but merely claims the potential need to conduct further evaluation. Although SACE also references the ESEP, it again fails to challenge information in the ESEP, and simply relies upon arguments regarding the need for further evaluation. This does not constitute a significant safety issue to support reopening the record of this proceeding.

C. SACE's Motion Fails to Show that a Materially Different Result Would Be Likely

Contrary to the 10 C.F.R. § 2.326(a)(3) requirement, SACE does not demonstrate that a materially different result in the outcome of this proceeding would be likely if the proffered evidence were considered. Indeed, the Motion contemplates, without supporting analysis, nothing more than the *possibility* that the NRC Staff could take some additional action: "As a result of reviewing the information [contained in the ESEP], the NRC may require that more information be submitted, and/or that TVA make changes to the [Structures, Systems, and Components] to ensure their safe operation." Motion at 4 (emphasis added). This speculative statement does not come close to demonstrating that a "materially different *result*" is "*likely*"—in

[2] Request for Information Pursuant to Title 10 of the Code of Federal Regulations 50.54(f) Regarding Recommendations 2.1, 2.3, and 9.3, of the Near-Term Task Force Review of Insights from the Fukushima Dai-ichi Accident, at 1 (Mar. 12, 2012).

other words, that SACE is likely to prevail on the merits resulting in some material difference in the operating license proceeding for Watts Bar Unit 2. In this regard, SACE does not identify any actual change that is mandated by the ESEP, such as a change to the plant design; instead, SACE only speculates that something else "may" be required.

To meet the reopening standards, the movant must "demonstrate a likelihood of *prevailing*." *Pilgrim*, CLI-12-15, 75 NRC at 719 (emphasis in original). Technical analysis and details are required to support reopening a proceeding. *Oyster Creek*, CLI-08-28, 68 NRC at 674. "The evidence must be sufficiently compelling to suggest a likelihood of materially affecting the ultimate results in the proceeding." *Pilgrim*, CLI- 12-10, 75 NRC at 499. SACE's unsupported and speculative claim does not meet the moving party's heavy burden to reopen the record. *See Oyster Creek*, CLI-09-7, 69 NRC at 290–91.

Furthermore, TVA is separately preparing its answer to SACE's proposed contention that accompanied the Motion, which alleges that the ESEP has rendered TVA out of compliance with 10 C.F.R. § 50.34(b)(4). As TVA will demonstrate in its response, the proposed contention is not admissible. Specifically, the proposed contention is not adequately supported, contrary to 10 C.F.R. § 2.309(f)(1)(v), and does not demonstrate a genuine dispute on a material issue of law or fact with the Watts Bar Unit 2 operating license application, contrary to 10 C.F.R. § 2.309(f)(1)(vi). Thus, because the proposed contention itself should be rejected, SACE cannot show that a materially different result would be or would have been likely here. The response to the proposed contention will provide further support for rejection of the request to reopen the record here.

IV. SACE's Motion Does Not Satisfy the Requirements for a Non-Timely Contention

SACE states that "the information on which the contention is based – the contents of the ESEP – was not available until January 6, 2015" and "the information in the ESEP is materially different than previously available information because it is not in TVA's FSAR." *Id.* SACE provides no additional information or discussion to support its claim. As such, SACE has not met its burden. Indeed, taken to its logical end, SACE's argument amounts to the proposition that all information in the ESEP that is not in the FSAR is materially different, which is of course not the case.

SACE further ignores the significant amount of pre-existing public information on the topic of post-Fukushima seismic hazards. For example, almost a year ago, TVA submitted a seismic hazard and screening report in response to the 50.54(f) letter on seismic issues.[3] Appendix 4 of that report provides detailed information about the seismic hazards related to Watts Bar Unit 2. SACE has not explained how the information contained in the ESEP differs from that which has been available for nearly a year or why the ESEP would change any analysis or conclusions with respect to Watts Bar Unit 2.

In summary, SACE has failed to support its claim that the ESEP contains new information that is "materially different," and therefore fails to satisfy the requirement in § 2.309(c) that the Motion be timely filed. Therefore, the Motion should be rejected.

[3] Tennessee Valley Authority's Seismic Hazard and Screening Report (CEUS Sites), Response to NRC Request for Information Pursuant to 10 CFR 50.54(f) Regarding Recommendation 2.1 of the Near-Term Task Force Review of Insights from the Fukushima Dai-ichi Accident (Mar. 31, 2014).

CONCLUSION

As explained above, SACE's Motion does not raise a significant safety issue and does not demonstrate that a materially different result is likely to result. The Motion also fails to demonstrate good cause for admission of a non-timely contention as required by 10 C.F.R. §§ 2.309(c) and 2.326(d), and it does not meet the strict pleading requirements of § 2.326(a)–(c). For these reasons, SACE's Motion should be denied.

Respectfully submitted,

/signed (electronically) by Scott A. Vance/

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CERTIFICATE OF SERVICE

I certify that, on February 17, 2015, a copy of "Tennessee Valley Authority's Answer Opposing Southern Alliance for Clean Energy's Motion to Reopen the Record" was served electronically through the E-Filing system on the participants in the above-captioned proceeding.

/signed electronically by/
Christopher C. Chandler