

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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

NRC STAFF'S ANSWER TO
SOUTHERN ALLIANCE FOR CLEAN ENERGY'S MOTION TO REOPEN THE RECORD

Jeremy Wachutka
David Roth

Counsel for the NRC Staff

February 18, 2015

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	ii
INTRODUCTION	1
BACKGROUND	2
I. Watts Bar Nuclear Plant Construction Permits and Operating Licenses	2
II. Relevant Procedural History of the WBN2 Updated OL Application	3
III. SACE’s Motion to Reopen and Motion to File a New Contention	4
IV. The Origin of the WBN ESEP Report - The NRC Response to the Fukushima Accident	5
V. The WBN Seismic Hazard Report	7
VI. The WBN ESEP Report.....	8
DISCUSSION.....	8
I. Legal Standards.....	8
II. SACE’s Motion Should be Denied Because it is Not Timely.....	10
III. SACE’s Motion Should be Denied Because it Does Not Demonstrate that it Addresses a Significant Safety or Environmental Issue	12
IV. SACE’s Motion Should be Denied Because it Does Not Demonstrate that a Materially Different Result Would Be Likely	14
CONCLUSION	17

TABLE OF AUTHORITIES

	<u>Page</u>
<i>United States v. Chemical Foundation, Inc.</i> , 272 U.S. 1 (1926)	16
<u>ADMINISTRATIVE DECISIONS</u>	
<u>Commission:</u>	
<i>AmerGen Energy Co., LLC</i> (Oyster Creek Nuclear Generating Station), CLI-08-28, 68 NRC 658 (2008).....	9-10,11-12
<i>DTE Elec. Co.</i> (Fermi Nuclear Power Plant, Unit 3), CLI-14-07, 80 NRC 1 (2014)	16
<i>N. States Power Co.</i> (Prairie Island Nuclear Generating Plant, Units 1 and 2), CLI-10-27, 72 NRC 481 (2010).....	10
<i>Private Fuel Storage, LLC</i> (Independent Spent Fuel Storage Installation), CLI-05-12, 61 NRC 345 (2005).....	9, 17
<i>S. Nuclear Operating Co.</i> (Vogtle Electric Generating Plant, Units 3 and 4), CLI-11-08, 74 NRC 214 (2011).....	9
<u>Atomic Safety and Licensing Appeal Board:</u>	
<i>Vermont Yankee Nuclear Power Corp.</i> (Vermont Yankee Nuclear Power Station), ALAB-138, 6 AEC 520 (1973).....	10
<u>Atomic Safety and Licensing Board:</u>	
<i>Tennessee Valley Auth.</i> (Watts Bar Unit 2), LBP-14-13, 80 NRC __ (Sept. 9, 2014) (slip op.)	4
<i>Tennessee Valley Auth.</i> (Watts Bar 2), LBP-09-26, 70 NRC 939 (2009)	3
<i>Tennessee Valley Auth.</i> (Watts Bar Nuclear Plant, Units 1 and 2), LBP-72-35, 5 AEC 230 (1972).....	2
<u>REGULATIONS</u>	
10 C.F.R. § 2.306(a)	1
10 C.F.R. § 2.326(a)	9
10 C.F.R. § 2.326(a)(1).....	10, 11
10 C.F.R. § 2.326(a)(2).....	13, 14
10 C.F.R. § 2.326(a)(3).....	14
10 C.F.R. § 2.326(b)	9
10 C.F.R. § 50.34(a)	2, 5
10 C.F.R. § 50.34(b)	2, 5
10 C.F.R. § 50.57.....	5, 16

MISCELLANEOUS

EPRI, Report 1025287, *Seismic Evaluation Guidance, Screening, Prioritization and Implementation Details (SPID) for the Resolution of Fukushima Near-Term Task Force Recommendation 2.1: Seismic* (Nov. 2012) (ADAMS Accession No. ML12333A170).....6

Notice of Issuance of Facility Operating License, 61 Fed. Reg. 5587 (Feb. 13, 1996).....2

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).....3

Order (Granting Motion to Withdraw Contention 7)
(July 17, 2013) (ADAMS Accession No. ML13198A195).....4

Order (Granting TVA's Unopposed Motion to Dismiss SACE Contention 1)
(June 2, 2010) (ADAMS Accession No. ML101530188).....4

Receipt of Application for Facility Operating Licenses; Consideration of Issuance of Facility Operating Licenses and Opportunity for Hearing, 41 Fed. Reg. 56,244 (Dec. 27, 1976).....2

Seismic Evaluation Guidance, 78 Fed. Reg. 13,097 (Feb. 26, 2013).....6

SRM-SECY-07-0096, *Possible Reactivation of Construction and Licensing Activities for the Watts Bar Nuclear Plant Unit 2* (July 25, 2007)3

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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

NRC STAFF'S ANSWER TO
SOUTHERN ALLIANCE FOR CLEAN ENERGY'S MOTION TO REOPEN THE RECORD

INTRODUCTION

The U.S. Nuclear Regulatory Commission (NRC) staff (Staff) files this answer opposing the February 5, 2015 motion by the Southern Alliance for Clean Energy (SACE) to reopen the record (Motion to Reopen).¹ The Commission should deny the motion because SACE has not met the requirements of 10 C.F.R. § 2.326 for reopening a closed record. Specifically, the Motion to Reopen is untimely, unsupported by factual or technical affidavits, fails to address a significant safety or environmental issue, and fails to demonstrate that a materially different result would have been likely had the newly proffered information been considered initially.

¹ Southern Alliance for Clean Energy's Motion to Reopen the Record (Feb. 5, 2015) (available as a single document along with Southern Alliance for Clean Energy's Motion for Leave to File a New Contention Concerning TVA's Failure to Comply with 10 C.F.R. § 50.34(b)(4), Declaration of Sandra L. Kurtz, Declaration of Jeannie V. McKinney, Declaration of Victoria Anne Murchie, and Declaration of Diane Curran at Agencywide Documents Access and Management System (ADAMS) Accession No. ML15037A318).

The Staff is filing its answer to the Motion to Reopen within the time period of 10 C.F.R. § 2.323(c), as extended by the February 17, 2015 closure of the Federal government in Washington, DC. See 10 C.F.R. § 2.306(a). Additionally, however, 10 C.F.R. § 2.326(d) requires that a motion to reopen that relates to a contention not previously in controversy must also satisfy the 10 C.F.R. § 2.309(c) requirements for new or amended contentions filed after the deadline in 10 C.F.R. § 2.309(b). Per 10 C.F.R. § 2.309(i)(1) and consistent with Southern Alliance for Clean Energy's Unopposed Motion to Permit Correction of Filing (Feb. 6, 2015) (ADAMS Accession No. ML15037A549) (the Commission has taken no action on this motion), the Staff will separately file its answer to SACE's new contention within 25 days of its service.

BACKGROUND

I. Watts Bar Nuclear Plant Construction Permits and Operating Licenses

This proceeding concerns an application by the Tennessee Valley Authority (TVA) for an operating license under 10 C.F.R. Part 50 for Watts Bar Nuclear Plant (WBN) Unit 2 (WBN2). Under the Commission's two-step construction permit (CP) and operating license (OL) process in 10 C.F.R. Part 50, each application for a CP shall include a preliminary safety analysis report (PSAR),² and each application for an OL shall include a final safety analysis report (FSAR).³ On January 23, 1973, pursuant to the Initial Decision of the Atomic Safety and Licensing Board (Board),⁴ the Atomic Energy Commission (AEC) issued to TVA construction permit Nos. CPPR-91 and CPPR-92 for construction of WBN Units 1 and 2, respectively.⁵ By application dated September 27, 1976, TVA applied for operating licenses for WBN Units 1 and 2.⁶ Almost twenty years later, on February 7, 1996, the NRC issued Facility Operating License NPF-90 for the operation of WBN Unit 1.⁷ After another decade had passed, TVA re-commenced its efforts to obtain an OL for WBN2 by providing an update to its WBN2 OL application, and, in accordance

² 10 C.F.R. § 50.34(a) lists the minimum information required to be included in a PSAR.

³ 10 C.F.R. § 50.34(b) requires the FSAR to include information that describes the facility, presents the design bases and the limits on its operation, and presents a safety analysis of the structures, systems, and components and of the facility as a whole, as well as additional specified information. TVA has provided a number of amendments to its FSAR during the pendency of its OL application. See, e.g., FSAR Amendment 93 (Apr. 30, 2009) (ADAMS Accession No. ML091400068); FSAR Amendment 112 (May 30, 2014) (ADAMS Accession No. ML14155A256).

⁴ See *Tennessee Valley Auth.* (Watts Bar Nuclear Plant, Units 1 and 2), LBP-72-35, 5 AEC 230 (1972). The Board found, in part, that the design of the engineered safety features and the consequences of postulated accidents had been analyzed by TVA and evaluated by the Staff, and that seismic matters had been properly addressed. *Id.* at 231-232.

⁵ See Letter from AEC to TVA (Jan. 23, 1973) (ADAMS Accession No. ML020780293).

⁶ See Tennessee Valley Authority (Watts Bar Nuclear Plant, Units 1 and 2); Receipt of Application for Facility Operating Licenses; Consideration of Issuance of Facility Operating Licenses and Opportunity for Hearing, 41 Fed. Reg. 56,244, 56,244-56,245 (Dec. 27, 1976).

⁷ See Watts Bar Nuclear Plant, Unit 1, Tennessee Valley Authority; Notice of Issuance of Facility Operating License, 61 Fed. Reg. 5587, 5587 (Feb. 13, 1996).

with the Commission's direction,⁸ the Staff provided a second opportunity to request a hearing on the WBN2 OL application.⁹

II. Relevant Procedural History of the WBN2 Updated OL Application

On July 13, 2009,¹⁰ SACE, Tennessee Environmental Council, We the People, the Sierra Club, and Blue Ridge Environmental Defense League, jointly filed a petition to intervene and request for a hearing.¹¹ The petition included seven proposed contentions.¹² On July 28, 2009, a Board was established to preside over this petition.¹³ In LBP-09-26, the Board granted the petition with respect to SACE only, which the Board determined had standing and had submitted two admissible contentions with proposed contentions 1 and 7.¹⁴ On June 2, 2010,

⁸ Staff Requirements Memorandum (SRM) SECY-07-0096, *Possible Reactivation of Construction and Licensing Activities for the Watts Bar Nuclear Plant Unit 2* (July 25, 2007). This Commission direction also directed the Staff to use the current licensing basis for WBN Unit 1 as the reference basis for the review and licensing of WBN2 and that the Staff should encourage TVA to adopt updated standards for WBN2 where it would not "significantly detract from design and operational consistency between Units 1 and 2." *Id.*

⁹ See 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, 20,351 (May 1, 2009). Setting the deadline for hearing requests at 60 days after the date of publication of this notice.

¹⁰ Before the filing deadline, SACE requested and was granted an extension of the deadline to July 14, 2009. See Order (June 24, 2009) (unpublished Board order) (ADAMS Accession No. ML091750643).

¹¹ Petition to Intervene and Request for Hearing (July 13, 2009) (ADAMS Accession No. ML091950686).

¹² The seven proposed contentions were: (1) "Failure to List and Discuss Compliance With Required Federal Permits, Approvals and Regulations"; (2) "Inadequate SAMA Uncertainty Analysis"; (3) "Inadequate Consideration of Severe Accident Mitigation Alternatives With Respect to AC Backup for Diesel Generators"; (4) "Inadequate Discussion of Need for Power and Energy Alternatives"; (5) "Inadequate Basis for Confidence in Availability of Spent Fuel Repository and Safe Means of Interim Spent Fuel Storage"; (6) "TVA's EIS Fails To Satisfy The Requirements Of NEPA Because It Does Not Contain An Adequate Analysis Of The Environmental Effects Of The Impact Of A Large, Commercial Aircraft Into The Watts Bar Nuclear Plant"; and (7) "Inadequate Consideration of Aquatic Impacts." *Id.* at 6-36. None of these proposed contentions have to do with seismic issues.

¹³ Establishment of Atomic Safety and Licensing Board (July 28, 2009) (ADAMS Accession No. ML092090724).

¹⁴ *Tennessee Valley Auth.* (Watts Bar 2), LBP-09-26, 70 NRC 939, 946 (2009).

the Board granted TVA's unopposed motion to dismiss SACE's Contention 1 as moot.¹⁵ On July 9, 2012, SACE moved for leave to file a new contention concerning the temporary storage and ultimate disposal of nuclear waste.¹⁶ On July 17, 2013, the Board granted SACE's unopposed motion to withdraw Contention 7.¹⁷ Finally, on September 9, 2014, following the Commission's adoption of a revised rule regarding continued storage and consistent with Commission direction, the Board denied SACE's motion for leave to file a new contention regarding continued storage and then terminated the WBN2 proceeding.¹⁸

III. SACE's Motion to Reopen and Motion to File a New Contention

SACE's Motion to Reopen and Motion to File a New Contention¹⁹ proffer the following proposed new contention:

TVA's Final Safety Analysis Report (FSAR) for WBN2 is deficient under 10 C.F.R. § 50.34(b)(4) because it does not include the information provided in TVA's Dec. 30, 2014 Expedited Seismic Evaluation Process ("ESEP") Report for Watts Bar Nuclear Plant (ML14365A072).^[20] Section 50.34(b)(4) requires an FSAR to provide information about the "design and performance of

¹⁵ Order (Granting TVA's Unopposed Motion to Dismiss SACE Contention 1), at 2 (June 2, 2010) (ADAMS Accession No. ML101530188).

¹⁶ Southern Alliance for Clean Energy's Motion for Leave to File a New Contention Concerning Temporary Storage and Ultimate Disposal of Spent Reactor Fuel at Watts Bar Unit 2 (July 9, 2012) (ADAMS Accession No. ML12191A383).

¹⁷ Order (Granting Motion to Withdraw Contention 7), at 1 (July 17, 2013) (ADAMS Accession No. ML13198A195).

¹⁸ See *Tennessee Valley Auth.* (Watts Bar Unit 2), LBP-14-13, 80 NRC ___, ___ (Sept. 9, 2014) (slip op. at 2).

¹⁹ Southern Alliance for Clean Energy's Motion for Leave to File a New Contention Concerning TVA's Failure to Comply with 10 C.F.R. § 50.34(b)(4) (dated Feb. 5, 2015, filed via the NRC's E-Filing System Feb. 6, 2015) (ADAMS Accession No. ML15037A318) (Motion to File a New Contention). Separately, on January 28, 2015, SACE filed with the Commission a "Petition to Supplement Reactor-Specific Environmental Impact Statements to Incorporate by Reference the Generic Environmental Impact Statement for Continued Spent Fuel Storage" (ADAMS Accession No. ML15028A113).

²⁰ See Letter from J. W. Shea, Vice President, Nuclear Licensing, TVA, to NRC, Tennessee Valley Authority's Watts Bar Nuclear Plant Expedited Seismic Evaluation Process 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, at Enclosure (Dec. 30, 2014) (ADAMS Accession No. ML14365A072) (ESEP Report).

structures, systems and components [“SSCs”],” taking into account “any pertinent information developed since the submittal of the preliminary safety analysis report.” The purpose of the information is to allow an assessment of “the risk to public health and safety resulting from operation of the facility.” 10 C.F.R. § 50.34(a). The information developed by TVA and presented in the ESEP Report is “pertinent” to the NRC’s review of whether the design and performance of SSCs meets the “reasonable assurance” standard in NRC regulations and the Atomic Energy Act, as set forth by 10 C.F.R. §§ 50.57(a)(2), (a)(3), and (a)(6).^[21]

In essence, SACE asserts that the WBN Expedited Seismic Evaluation Process (ESEP) Report is pertinent to the NRC’s review of the risk to public health and safety and to the question of whether there is reasonable assurance that WBN2 will operate safely and that, therefore, pursuant to 10 C.F.R. § 50.34(b)(4) and 10 C.F.R. § 50.57(a), its information must be included in the WBN2 FSAR.²²

IV. The Origin of the WBN ESEP Report - The NRC Response to the Fukushima Accident

On March 11, 2011, the Great Tohoku Earthquake and subsequent tsunami resulted in an accident at the Fukushima Dai-ichi nuclear power plant in Japan. The NRC conducted a Near-Term Task Force (NTTF) review of this accident and, as one result of this review, issued a request for information pursuant to 10 C.F.R. § 50.54(f) to all U.S. nuclear power reactor licensees and holders of construction permits in active or deferred status, including TVA for WBN (the Fukushima 50.54(f) Letter).²³

As related to NTTF recommendation 2.1, the Fukushima 50.54(f) Letter directed addressees to reevaluate the seismic hazards at their sites by developing a risk-informed performance-based ground motion response spectrum (GMRS) for the site and comparing it to

²¹ Motion to File a New Contention at 1-2.

²² Motion to File a New Contention at 4.

²³ Letter from the NRC to All Power Reactor Licensees and Holders of Construction Permits in Active or Deferred Status, 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 (Mar. 12, 2012) (ADAMS Accession No. ML12053A340) (The Fukushima 50.54(f) Letter).

the facility's safe shutdown earthquake (SSE) at that site.²⁴ This reevaluation was to be submitted to the NRC as part of a seismic hazard report.²⁵ If the seismic hazard report found that the facility's SSE was greater than or equal to the GMRS at all frequencies between 1 and 10 Hz and at the peak ground acceleration (PGA) anchor point, then addressees could terminate the reevaluation.²⁶ If not, then addressees were required to (1) submit to the NRC an ESEP report and (2) commence either a seismic probabilistic risk assessment (SPRA) or a seismic margin assessment (SMA).²⁷ The purpose of the ESEP report was to address the reevaluated hazard where it exceeded the current design basis.²⁸ Guidance regarding this seismic hazard reevaluation process, including the suggested outline of a seismic hazard report, was provided in EPRI Report 102528,²⁹ which was subsequently endorsed by the NRC.³⁰ Additionally, EPRI Report 3002000704 provided guidance for the content of any required ESEP report³¹ and the NRC endorsed this guidance as well.³² Furthermore, the industry developed a

²⁴ *Id.* at Enclosure 1, pp.1, 5.

²⁵ *Id.* at Enclosure 1, Attachment 1, p.1.

²⁶ *Id.* at Enclosure 1, Attachment 1, p.2.

²⁷ *See id.* at Enclosure 1, p.6.

²⁸ *Id.* at Enclosure 1, p.6 ("Addressees are requested to submit, along with the hazard evaluation, an interim evaluation and actions planned or taken to address the reevaluated hazard where it exceeds the current design basis.").

²⁹ EPRI, Report 1025287, *Seismic Evaluation Guidance, Screening, Prioritization and Implementation Details (SPID) for the Resolution of Fukushima Near-Term Task Force Recommendation 2.1: Seismic* (Nov. 2012) (ADAMS Accession No. ML12333A170) (EPRI 1025287). All of the documents related to the seismic reevaluations directed by the NRC can be found on the NRC public (Last updated Jan. 9, 2015), *available at* <http://www.nrc.gov/reactors/operating/ops-experience/japan-dashboard/seismic-reevaluations.html>.

³⁰ *See* Electric Power Research Institute; Seismic Evaluation Guidance, 78 Fed. Reg. 13,097 (Feb. 26, 2013); Letter from NRC to Joseph E. Pollock, Executive Director, Nuclear Energy Institute, Endorsement of Electric Power Research Institute Final Draft Report 1025287, "Seismic Evaluation Guidance" (Feb. 15, 2013) (ADAMS Accession No. ML12319A074).

³¹ EPRI, Draft Report 3002000704, *Seismic Evaluation Guidance: Augmented Approach for the Resolution of Fukushima Near-Term Task Force Recommendation 2.1 – Seismic* (April, 2013) (ADAMS Accession No. ML13102A142) (EPRI 3002000704).

template for ESEP reports with NRC input.³³ Finally, upon its ultimate receipt of the reevaluated seismic hazard report as well any required SPRA or SMA, as appropriate, “the NRC staff will determine whether additional regulatory actions are necessary (e.g., update the design basis and [systems, structures, and components (SSCs)] important to safety) to protect against the updated hazards.”³⁴

V. The WBN Seismic Hazard Report

On March 31, 2014, TVA submitted to the NRC its seismic hazard report for WBN consistent with the NRC-endorsed guidance in EPRI 1025287.³⁵ The report detailed TVA’s development of a GMRS for WBN.³⁶ The report then compared this GMRS to the WBN SSE and stated that, “[i]n the 1 to 10 Hz part of the response spectrum, the GMRS exceeds the SSE.”³⁷

³² Letter from NRC to Joseph E. Pollock, Executive Director, Nuclear Energy Institute, Electric Power Research Institute Final Draft Report XXXXXX, “Seismic Evaluation Guidance: Augmented Approach for the Resolution of Fukushima Near-Term Task Force Recommendation 2.1: Seismic,” as an Acceptable Alternative to the March 12, 2012, Information Request for Seismic Reevaluations, at 3-4 (May 7, 2013) (ADAMS Accession No. ML13106A331).

³³ See, e.g., Expedited Seismic Evaluation Process (ESEP) Report, Example Sections 1, 2, 3, and 8 (Aug. 10, 2014) (ADAMS Accession No. ML14231A074). A public meeting was held on these templates on August 13, 2014. See Summary of August 13, 2014, Category 2 Public Meeting with the Nuclear Energy Institute to Discuss the Expedited Seismic Evaluation Process Submittal Template Associated with Near-Term Task Force Recommendation 2.1 “Seismic” (Oct. 1, 2014) (ADAMS Accession No. ML14267A414).

³⁴ The Fukushima 50.54(f) Letter at Enclosure 1, p.1.

³⁵ Letter from J. W. Shea, Vice President, Nuclear Licensing, TVA, to NRC, 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, at attachment 4, E4-3 (Mar. 31, 2014, made publicly-available on Apr. 17, 2014) (ADAMS Accession No. ML14098A478) (WBN Seismic Hazard Reevaluation Report).

³⁶ *Id.* at E4-6.

³⁷ *Id.* at E4-31.

VI. The WBN ESEP Report

Later, on December 30, 2014, TVA submitted to the NRC its ESEP Report for WBN consistent with the NRC-endorsed guidance in EPRI 3002000704.³⁸ The ESEP Report repeated the findings of TVA's hazard report that the reevaluated GMRS exceeds the WBN SSE.³⁹ The ESEP Report concluded that there currently is seismic margin for the protection of the WBN reactor cores without plant modifications despite the finding that the GMRS exceeds the SSE and despite the fact that the seismic risk evaluation for WBN is not yet completed.⁴⁰

DISCUSSION

SACE's Motion to Reopen should be denied because it is untimely. Specifically, SACE argues that the WBN ESEP Report demonstrates that there is a "more-severe earthquake risk than TVA designed WBN2 to withstand"⁴¹ but this same information was previously publicly available as part of the WBN seismic hazard report. SACE's Motion to Reopen should also be denied because SACE does not demonstrate that the motion addresses a significant safety issue and that a materially different result would have occurred or been likely if the information in the ESEP Report had been considered in the first instance. Finally, SACE's Motion to Reopen should be denied because its assertions are not supported by the affidavit of a competent expert providing the factual and/or technical bases for the assertions.⁴²

I. Legal Standards

Pursuant to 10 C.F.R. § 2.326(a), a motion to reopen a closed record will not be granted unless all of the following criteria are met:

³⁸ See ESEP Report.

³⁹ *Id.* at 11-13.

⁴⁰ *Id.* at 23-24.

⁴¹ Motion to Reopen at 4.

⁴² Significantly, the proposed new contention accompanying the Motion to Reopen presents no factual disputes because it "relies entirely on factual statements made by TVA." Motion to File a New Contention at 6.

- (1) The motion must be timely. However, an exceptionally grave issue may be considered in the discretion of the presiding officer even if untimely presented;
- (2) The motion must address a significant safety or environmental issue; and
- (3) The motion must demonstrate that a materially different result would be or would have been likely had the newly proffered evidence been considered initially.

Additionally, pursuant to 10 C.F.R. § 2.326(b), a motion to reopen must be accompanied by affidavits that:

set forth the factual and/or technical bases for the movant's claim that the criteria of [10 C.F.R. § 2.326(a)] 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.

Thus, “the standard for admitting a new contention after the record is closed is higher than for an ordinary late-filed contention.”⁴³

It is the movant’s burden, “through its motion to reopen and in its accompanying affidavit . . . , to demonstrate that the motion should be granted” and this burden is “deliberately heavy and deliberately placed on the party seeking reopening”⁴⁴ Furthermore, “the moving papers must be strong enough, in the light of any opposing filings, to avoid summary disposition.”⁴⁵ Therefore, “[b]are assertions and speculation . . . do not supply the requisite

⁴³ *S. Nuclear Operating Co.* (Vogtle Electric Generating Plant, Units 3 and 4), CLI-11-08, 74 NRC 214, 222-23 (2011) (quoting *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-05-12, 61 NRC 345, 350 (2005)).

⁴⁴ *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-08-28, 68 NRC 658, 674 (2008). See also *id* at 675 (“[A] Board is to decide the motion to reopen on the information before it and has no authority to engage in discovery in order to supplement the pleadings before it. Simply put, the burden of satisfying the reopening requirements is on the movant . . .”).

⁴⁵ *Private Fuel Storage*, CLI-05-12, 61 NRC at 350 (quoting *Vermont Yankee Nuclear Power Corp.* (Vermont Yankee Nuclear Power Station), ALAB-138, 6 AEC 520, 523 (1973)).

support” which must, instead, include “technical details and analysis”⁴⁶ sufficient to demonstrate a genuine unresolved issue of fact.⁴⁷

II. SACE’s Motion Should be Denied Because it is Not Timely

The Commission should deny SACE’s Motion to Reopen because, contrary to 10 C.F.R. § 2.326(a)(1), it is neither timely nor does SACE argue that it falls within the regulation’s exception for an “exceptionally grave issue.”⁴⁸

The Commission has made clear that a petitioner has an “iron-clad obligation to examine the publicly available documentary material . . . with sufficient care to enable it to uncover any information that could serve as the foundation for a specific contention.”⁴⁹ Thus, petitioners may not delay filing a contention until a document becomes available that collects, summarizes, and places into context the facts supporting the contention, because doing so “would turn on its head the regulatory requirement that new contentions be based on information . . . not previously available.”⁵⁰

In this instance, SACE faults TVA for allegedly omitting from the WBN2 FSAR information in the ESEP Report “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

⁴⁶ *Oyster Creek*, CLI-08-28, 68 NRC at 674.

⁴⁷ *Vermont Yankee Nuclear Power Corp.* (Vermont Yankee Nuclear Power Station), ALAB-138, 6 AEC 520, 523 (1973) (“[E]ven though a matter is timely raised and involves significant safety considerations, no reopening of the evidentiary hearing will be required if the affidavits submitted in response to the motion demonstrate that there is no genuine unresolved issue of fact, *i.e.*, if the undisputed facts establish that the apparently significant safety issue does not exist, has been resolved, or for some other reason will have no effect upon the outcome of the licensing proceeding.”).

⁴⁸ 10 C.F.R. § 2.326(a)(1). The regulation provides that an untimely motion to reopen may be considered in the discretion of the presiding officer if it presents an “exceptionally grave issue.” *Id.*

⁴⁹ *N. States Power Co.* (Prairie Island Nuclear Generating Plant, Units 1 and 2), CLI-10-27, 72 NRC 481, 496 (2010).

⁵⁰ *Id.* (internal quotations and emphasis omitted).

built.”⁵¹ However, information regarding the potential existence of a more-severe earthquake risk than that for which WBN2 was designed to withstand was publicly available long before the January 6, 2015 availability of the ESEP Report. For example, a March 31, 2014 letter from TVA to the NRC, which was made publicly-available on April 17, 2014, included a “Seismic Hazards and Screening Report for Tennessee Valley Authority’s Watts Bar Nuclear Plant.”⁵² This is the WBN seismic hazard report that was required by the Fukushima 50.54(f) Letter as explained by the NRC-endorsed guidance in EPRI 1025287.⁵³ This seismic hazard report detailed the development of a GMRS for WBN and included the finding that, “[i]n the 1 to 10 Hz part of the response spectrum, the GMRS exceeds the SSE.”⁵⁴ This is the exact information regarding “a better-understood and more-severe earthquake risk than TVA designed WBN2 to withstand when the reactor was built”⁵⁵ that SACE claims that the WBN2 FSAR is lacking. Therefore, SACE’s claim that the timeliness of its Motion to Reopen regarding the alleged omission of this seismic information should be dated from the ESEP Report fails; instead, the public availability of the WBN seismic hazard report as of April 17, 2014, or almost ten months before SACE’s February 5, 2015 filing of its Motion to Reopen, demonstrates that SACE could have made this same omission argument earlier than it is now making it. Consequently, SACE’s Motion to Reopen does not meet the timeliness requirement of 10 C.F.R. § 2.326(a)(1) and should be denied.⁵⁶

⁵¹ Motion to Reopen at 4.

⁵² See WBN Seismic Hazard Reevaluation Report.

⁵³ *Id.* at E4-3; the Fukushima 50.54(f) Letter at 6-7 and at Attachment 1, pp.1-2.

⁵⁴ WBN Seismic Hazard Reevaluation Report at E4-6, E4-31.

⁵⁵ Motion to Reopen at 4.

⁵⁶ While the untimeliness of a motion to reopen may be excused if it presents an “exceptionally grave issue,” 10 C.F.R. § 2.326(a)(1), SACE has not claimed, let alone demonstrated, that its Motion to Reopen presents an exceptionally grave issue. Because of SACE’s failure to make this argument and because SACE bears the burden of demonstrating that the Commission’s reopening standards are

III. SACE's Motion Should be Denied Because it Does Not Demonstrate that it Addresses a Significant Safety or Environmental Issue

The thrust of SACE's Motion to Reopen is that certain information provided in TVA's WBN ESEP Report should be summarized in the FSAR that is used in the operating license application for WBN2. However, SACE does not demonstrate how the location of this information presents a significant safety or environmental issue. Therefore, the Commission should also deny SACE's Motion to Reopen because it does not demonstrate that it addresses a significant safety or environmental issue as is required by 10 C.F.R. § 2.326(a)(2).

In *Oyster Creek*, CLI-08-28, the Commission clarified the extent of pleading required to satisfy the "significance" prong of its reopening standard.⁵⁷ *Oyster Creek* involved an appeal from a Board decision denying a motion to reopen, in part, for its failure to provide the factual evidence or expert testimony required by 10 C.F.R. § 2.326(b) in support of its significance argument.⁵⁸ In their appeal, the proponents of the motion to reopen argued that the Board had set the significance bar too high and that the significance requirement could be satisfied by a "mere showing" that a possible violation of regulatory safety standards could occur.⁵⁹ The Commission rejected this argument and found that the plain language of 10 C.F.R. § 2.326 requires motions to reopen to be accompanied by "affidavits of qualified experts presenting the factual and/or technical bases for the claim that there is a significant safety issue, together with evidence"⁶⁰

Contrary to the "deliberately heavy" burden placed on SACE to demonstrate through affidavits of qualified experts the factual and/or technical bases for its argument that the record

satisfied, *Oyster Creek*, CLI-08-28, 68 NRC at 674-75, SACE's Motion to Reopen should not be found to satisfy the "exceptionally grave issue" exception to 10 C.F.R. § 2.326(a)(1).

⁵⁷ *Oyster Creek*, CLI-08-28, 68 NRC at 670.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

in this proceeding should be reopened because of a significant safety or environmental issue,⁶¹ SACE only provides bare assertions and no expert testimony as to why these assertions are significant to safety or the environment. In its Motion to Reopen, SACE asserts that its proposed new contention is both a contention of omission and a contention of adequacy. That is, SACE asserts that the WBN2 FSAR suffers from the omission of the information contained in the WBN ESEP Report and that, without this information, the FSAR is inadequate.⁶² In particular, SACE alleges that the FSAR is inadequate because it does not discuss the ability of the WBN2 SSCs to withstand “a better-understood and more-severe earthquake risk than TVA designed WBN2 to withstand.”⁶³

However, SACE does not provide an affidavit of a qualified expert to explain how this omission, and the resultant alleged inadequacy of the WBN2 FSAR, gives rise a significant safety or environmental issue as is required by 10 C.F.R. § 2.326(b) and the Commission’s case law. Instead, SACE provides an affidavit of its counsel, Ms. Curran, in an attempt to support its argument that the regulations require the inclusion of this information.⁶⁴ But this submission misses the point of the significance requirement of 10 C.F.R. § 2.326(a)(2) because it does not explain how or why the alleged omission of the information in the ESEP Report from the WBN2 FSAR would create a “significant safety or environmental issue.”

By failing to provide the testimony of a qualified expert that discusses the safety or environmental significance of its Motion to Reopen, SACE cannot satisfy 10 C.F.R. §§ 2.326(a)(2) and 2.326(b).

⁶¹ See *id.* at 674.

⁶² See Motion to Reopen at 2-3; Motion to File a New Contention at 5 (“The contention is within the scope of the proceeding because it challenges the adequacy of TVA’s FSAR to comply with NRC safety regulations.”).

⁶³ Motion to Reopen at 4.

⁶⁴ See Declaration of Diane Curran in Support of Southern Alliance for Clean Energy’s Motion to Reopen the Record (Feb. 5, 2015) (Curran Declaration).

Moreover, as conceded by SACE, SACE's Motion to Reopen and Motion to File a New Contention rely entirely on the technical statements in TVA's WBN ESEP Report.⁶⁵ However, the technical statements in the ESEP Report do not support SACE's bare assertion that its proposed new contention addresses a significant safety or environmental issue. On the contrary, the entire purpose of TVA's WBN ESEP Report is to demonstrate that there is no significant safety or environmental issue with respect to the continued operation of WBN, without modifications, during the interim period between the development of the seismic hazard report and the development of a final SPRA for WBN.⁶⁶

By not contesting TVA's finding of no significant safety or environmental impact with its own expert testimony, SACE cannot satisfy the significance requirement of 10 C.F.R. § 2.326(a)(2). Therefore, SACE's Motion to Reopen should be denied.

IV. SACE's Motion Should be Denied Because it Does Not Demonstrate that a Materially Different Result Would Be Likely

Finally, the Commission should deny SACE's Motion to Reopen because it does not demonstrate that "a materially different result would be or would have been likely had the newly proffered evidence been considered initially" as is required by 10 C.F.R. § 2.326(a)(3).

SACE's entire argument for a materially different result is:

Consideration of this Motion and the accompanying Contention would likely produce a materially different result in this proceeding. If SACE prevails on its Contention, TVA will be required to provide the NRC Staff with information that is relevant to its licensing determination under the Atomic Energy Act and NRC regulations of whether WBN2 can be operated safely during an earthquake. As a result of reviewing the information, the NRC may require that more information be submitted, and/or that TVA make changes to the SSCs to ensure their safe operation. Thus, members of the public will have the benefit of a more thorough and adequate NRC

⁶⁵ See Motion to File a New Contention at 6 ("This contention relies entirely on factual statements made by TVA."); Curran Declaration (attempting to qualify Ms. Curran as an expert at understanding the Commission's regulations and "the plain meaning of licensee submittals" but not as a technical expert).

⁶⁶ See ESEP Report at 23-24.

licensing review of the WBN2 FSAR against NRC safety standards.^[67]

The information to which this claim refers is “the information in the ESEP [Report]”⁶⁸ which is already in the possession of SACE, TVA, and the NRC.⁶⁹ Accordingly, the NRC and TVA can review the information and may use it in support of any licensing determinations and operational considerations. To this end, TVA has already acted on this information by determining that WBN remains safe without modifications and by commencing the performance of a seismic risk evaluation for WBN.⁷⁰ However, SACE does not contest the information in the ESEP Report, but instead SACE “relies entirely on [the] factual statements made by TVA.”⁷¹ In light of this lack of disputed facts, SACE does not show how a materially different result would occur if the adjudicatory record was reopened.

Further, as for any NRC action with respect to this information, the Staff has stated that, once it has collected all of the necessary information it “will determine whether additional regulatory actions are necessary (e.g., update the design basis and SSCs important to safety) to protect against the updated hazards.”⁷² Also, the Commission has repeatedly stated with respect to its Fukushima activities that, if the NRC determines that changes to its current rules are warranted, then, at that time, the Commission can determine whether an individual licensing review or adjudication should be held in abeyance pending the outcome of any relevant

⁶⁷ Motion to Reopen at 4.

⁶⁸ *Id.* at 5.

⁶⁹ See Letter from J. W. Shea, Vice President, Nuclear Licensing, TVA, to NRC, Tennessee Valley Authority’s Watts Bar Nuclear Plant Expedited Seismic Evaluation Process 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 (Dec. 30, 2014) (ADAMS Accession No. ML14365A072) (Letter transmitting the WBN ESEP Report to the NRC).

⁷⁰ ESEP Report at 23-24.

⁷¹ Motion to File a New Contention at 6.

⁷² The Fukushima 50.54(f) Letter at Enclosure 1, p.1

rulemaking.⁷³ The WBN ESEP Report is known to the NRC and is part of the NRC's ongoing Fukushima reevaluation. Once this process is complete, then its results will be applied to all applicants and licensees, including WBN2, as applicable. Therefore, everything that SACE states that it seeks to accomplish with its Motion to Reopen and Motion to File a New Contention has already been accomplished or is in progress and, thus, there would not have been a materially different result had the newly proffered evidence of the ESEP Report been considered initially.

With respect to SACE's argument that information in the ESEP Report should be in the WBN2 FSAR to ensure that the NRC uses the correct standard for issuing an operating license (*i.e.*, the "reasonable assurance" standard in 10 C.F.R. § 50.57(a)(3)),⁷⁴ absent strong and concrete evidence otherwise, adjudicatory bodies presume that government agencies and their employees will do their jobs honestly and properly.⁷⁵ SACE's Motion to Reopen does not present evidence that the Commission will use the wrong standards in its future licensing decision and, thereby, does not show how a different result would be forthcoming if the Motion to Reopen was granted.

Finally, SACE's argument regarding a materially different result does not satisfy 10 C.F.R. § 2.326(b) because the factual and/or technical bases for it are not set forth in an affidavit of a qualified expert. Instead, SACE's Motion to Reopen is accompanied by the affidavit of its counsel, Ms. Curran, which states that "[t]he factual statements in SACE's Motion to Reopen the Record and Motion for Leave to File a New Contention are, to be best of my knowledge, true and correct representations of statements made by TVA and the NRC Staff in

⁷³ *DTE Elec. Co.* (Fermi Nuclear Power Plant, Unit 3), CLI-14-07, 80 NRC 1, 9 (2014) (quoting *Union Elec. Co. d/b/a Ameren Missouri* (Callaway Plant, Unit 2), CLI-11-05, 74 NRC 141, 174 (2011)).

⁷⁴ Motion to Reopen at 4-5.

⁷⁵ *United States v. Chemical Foundation, Inc.*, 272 U.S. 1, 14-15 (1926).

correspondence and reports.”⁷⁶ Combined with SACE’s statement that it “relies entirely on [the] factual statements made by TVA,”⁷⁷ it appears that the factual and/or technical bases for SACE’s 10 C.F.R. § 2.326(a)(3) argument are those statements made in the WBN ESEP Report. This actually weighs against SACE’s argument that there will be a materially different result because the WBN ESEP Report itself explicitly concludes that, contrary to SACE’s assertion that TVA may have to make changes to the WBN2 SSCs to ensure their safe operation, “no necessary planned modifications are identified” as a result of the Report.⁷⁸ Thus SACE cannot satisfy the materially-different requirement of 10 C.F.R. § 2.326(a)(3), as amplified by 10 C.F.R. § 2.326(b), and its Motion to Reopen should be denied.⁷⁹

CONCLUSION

As demonstrated above, SACE’s Motion to Reopen is untimely, it fails to demonstrate that it addresses a significant safety or environmental issue, and it fails to demonstrate that a materially different result would be or would have been likely had the ESEP Report been considered initially. Therefore, SACE’s Motion to Reopen should be denied.

Respectfully submitted,

/Signed (electronically) by/

Jeremy Wachutka
Counsel for the NRC Staff
U.S. Nuclear Regulatory Commission
Office of the General Counsel
Mail Stop O15-D21
Washington, DC 20555
Telephone: (301) 415-1571
E-mail: Jeremy.Wachutka@nrc.gov

⁷⁶ Curran Declaration.

⁷⁷ Motion to File a New Contention at 6.

⁷⁸ ESEP Report at 23.

⁷⁹ *See also Private Fuel Storage*, CLI-05-12, 61 NRC at 355 (agreeing with a Board’s decision not to reopen a case because “[t]he new contention is much too thinly supported to conclude that taking it to hearing would ‘likely’ cause a different result within the meaning of our reopening rule”).

Executed in Accord with 10 CFR 2.304(d)

David Roth
Counsel for the NRC Staff
U.S. Nuclear Regulatory Commission
Office of the General Counsel
Mail Stop O15-D21
Washington, DC 20555
Telephone: (301) 415-2749
E-mail: David.Roth@nrc.gov

Dated at Rockville, Maryland
this 18th day of February, 2015

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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

CERTIFICATE OF SERVICE

Pursuant to 10 C.F.R. § 2.305, I hereby certify that copies of the foregoing "NRC STAFF'S ANSWER TO SOUTHERN ALLIANCE FOR CLEAN ENERGY'S MOTION TO REOPEN THE RECORD," dated February 18, 2015, have been filed through the Electronic Information Exchange, the NRC's E-Filing System, in the above-captioned proceeding, this 18th day of February, 2015.

/Signed (electronically) by/

Jeremy Wachutka
Counsel for the NRC Staff
U.S. Nuclear Regulatory Commission
Office of the General Counsel
Mail Stop O15-D21
Washington, DC 20555
Telephone: (301) 415-1571
E-mail: Jeremy.Wachutka@nrc.gov

Dated at Rockville, Maryland
this 18th day of February, 2015