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	)	
(Watts Bar, Unit 2)	)	

TENNESSEE VALLEY AUTHORITY'S ANSWER OPPOSING SOUTHERN ALLIANCE FOR CLEAN ENERGY'S MOTION FOR LEAVE TO FILE A NEW CONTENTION

Pursuant to 10 C.F.R. § 2.309(i) and the Atomic Safety and Licensing Board's ("ASLB's") February 26, 2015 Order, the Tennessee Valley Authority ("TVA") respectfully submits its answer in opposition to "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)" ("New Contention Motion"), dated February 5, 2015, and served on the parties on February 6, 2015.[1] In its New Contention Motion, the Southern Alliance for Clean Energy ("SACE") requests to admit a new, late-filed contention. New Contention Motion at 1. SACE claims that TVA's Final Safety Analysis Report ("FSAR") for Watts Bar Unit 2 ("WBN2") is deficient under 10 C.F.R. § 50.34(b)(4) because it does not include the information provided in TVA's December 30, 2014 Expedited Seismic Evaluation Process ("ESEP") Report for WBN2. *Id*.

For the reasons set forth below, the New Contention Motion should be rejected in its entirety. First, the New Contention Motion is untimely because it fails to demonstrate that the ESEP Report provides new and materially different information as required by 10 C.F.R. § 2.309(c). Additionally, SACE has failed to proffer an admissible contention as required by 10

1 Pursuant to the ASLB's direction, TVA files its Answer on the 25th day following service of the New Contention Motion on February 6, 2015. Memorandum and Order (Granting Unopposed Motion to Permit Correction of Filing) (Feb. 26, 2015) (unpublished).

C.F.R. § 2.309(f). Specifically, the proposed contention is outside the scope of this proceeding, does not raise an issue material to the operating license proceeding, lacks factual and technical support, and does not raise a genuine issue of material fact or law.

ARGUMENT

I. Background

A. Operating License Proceeding

In July 2009, SACE (and other intervenors not involved herein) filed a request for a hearing and petition to intervene in the NRC administrative process reviewing TVA's application for an operating license for WBN2. In November 2009, the 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 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 this motion, leaving only the proposed waste confidence contention. 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.).

SACE filed its "Motion to Reopen the Record" ("Motion to Reopen") in this proceeding on February 5, 2015, and its New Contention Motion on February 6, 2015.[2] TVA filed its answer opposing SACE's Motion to Reopen on February 17, 2015.

SACE's proposed new contention asserts that "TVA's [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 [ESEP] for Watts Bar Nuclear Plant (ML14365A072)." New Contention Motion at 1.

As bases for the proposed contention, SACE claims first that the ESEP "is intended to show that WBN2 can operate safely despite the fact that the seismic risk to WBN2 is now known to be greater than the safe shutdown earthquake (SSE) to which the reactor was designed." *Id.* at 2. In particular, SACE cites a list of generic seismic design practices included in the ESEP Report that describe, in narrative terms, the conservative practices used in designing nuclear plants, including WBN2. *Id.* at 3. SACE also notes that the scope of the components reviewed in the ESEP Report is limited to "those required to support core cooling, reactor coolant inventory and subcriticality, and containment integrity functions." *Id.* SACE then attempts to tie these pieces together by arguing that 10 C.F.R. § 50.34(b)(4) requires an FSAR to be updated with "pertinent" information relating to structures, systems, and components (SSCs), and that the information contained in the ESEP Report is "pertinent." *Id.* at 3–4. SACE admits that the NRC has determined to review the information provided in the ESEP Report "as part of its post-Fukushima deliberations" and that this review is taking place "outside the scope of this operating

2 *See* footnote 1, *supra*. SACE has filed sundry other motions and petitions on this docket pertaining to the NRC's Continued Storage Rule. Because they are before the Commission and do not relate to this contention, this portion of the procedural background has been omitted. The Commission also recently rejected some of these requests related to the Continued Storage Rule. *See DTE Elec. Co.* (Fermi Nuclear Power Plant, Unit 3), CLI-15-4, 81 NRC __ (Feb. 26, 2015) (slip op.).

license proceeding." *Id.* at 4–5. SACE argues, however, that the NRC has "not made a commitment to judge the information against the reasonable assurance standard for reactor licensing," but "against [a] standard of whether operation of the reactor would pose an 'imminent risk to public health and safety.'" *Id.*

B. Post-Fukushima Seismic Reviews

Following the 2011 accident at the Fukushima Dai-ichi nuclear power plant in Japan, the NRC formed the Japan Lessons-Learned Near-Term Task Force ("NTTF"). The purpose of the NTTF was "to determine what lessons the NRC can learn from the accident and to identify recommendations to enhance reactor safety in the United States."[3] The NRC Staff's proposed approach to addressing the NTTF recommendations was discussed in two memoranda ("SRMs") approved by the Commission, SECY-11-0124, "Recommended Actions to Be Taken Without Delay From the Near-Term Task Force Report," and SECY-11-0137, "Prioritization of Recommended Actions to Be Taken in Response to Fukushima Lessons Learned."

These memoranda describe the approach to be taken regarding NTTF Recommendation 2.1 and other NTTF recommendations; Recommendation 2.1 specifically addresses reevaluation of seismic hazards based on current requirements and guidance.[4] The SRMs also describe the regulatory process to be used in conducting the seismic reevaluations, which included an NRC Staff request for information pursuant to 10 C.F.R. § 50.54(f), resulting in licensee submission of a plant-specific seismic hazard reevaluation to the NRC Staff. These submissions are then to be

3 Letter from William M. Dean, NRC, to Diane Curran, Legal Counsel for SACE (Nov. 21, 2014), at 1 ("Dean Letter").

4 SECY-11-0124, "Recommended Actions to be Taken Without Delay From the Near-Term Task Force Report" (Sept. 9, 2011); SECY-11-0137, "Prioritization of Recommended Actions to be Taken in Response to Fukushima Lessons Learned" (Oct. 3, 2011). NTTF Recommendation 2.1 recommends the NRC "Order licensees to reevaluate the seismic and flooding hazards at their sites against current NRC requirements and guidance, and if necessary, update the design basis and [structures, systems, and components] important to safety to protect against the updated hazards." *See* SECY-11-0124, Enclosure at 1.

analyzed by the Staff in order to develop what "appropriate regulatory action" should be taken, if any, based on the reevaluations.[5] Importantly, the 50.54 Letter explains that "[t]he evaluations associated with the requested information in this letter do not revise the design basis of the plant." *See* 50.54(f) Letter at 4 (emphasis added).

The Staff issued its § 50.54(f) request for information to TVA on March 12, 2012.[6] As it relates to NTTF Recommendation 2.1, the 50.54(f) Letter specifies the information required as part of each site's seismic hazard and risk evaluations and establishes a timetable for responding. *See generally* 50.54(f) Letter, Enclosure 1. Licensees meeting certain screening criteria were required to perform additional analysis. *See id.*, Enclosure 1, Attachment 1, p.2.

TVA submitted its seismic hazard reevaluation and screening on March 31, 2014.[7] The report was prepared in accordance with guidance developed by the Electric Power Research Institute ("EPRI") and endorsed by the NRC Staff.[8] *See id.*, Enclosure 4, p.E4-3. Based on the results of TVA's screening evaluation, TVA determined that the re-evaluated seismic hazard for WBN Units 1 and 2 exceeds the seismic design basis at certain points of the ground motion

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5 *See generally id.*

6 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 (March 12, 2012) (ML12053A340) ("50.54(f) letter"). The § 50.54(f) Letter also notes that the seismic hazard recommendation will be implemented in two phases. The first phase consists of the letter itself and licensee reevaluations performed pursuant to the letter, including risk evaluations "if necessary." *See id.*, Enclosure 1, p.4. The second phase consists of a determination, "[i]f necessary, and based upon the results of Phase 1," of whether additional actions are necessary to protect against the updated hazards. *See id.*

7 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 (Mar. 31, 2014) (ML14098A478).

8 The original EPRI guidance is found in 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); the NRC Staff's endorsement is in 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).

response spectrum.[9] Therefore, WBN Units 1 and 2, along with 68 other reactors, "screened in" for a further seismic risk evaluation, as discussed in the NRC Staff's screening and prioritization results letter. *See* Screening and Prioritization Results Regarding Information Pursuant to Title 10 of the *Code of Federal Regulations* 50.54(f) Regarding Seismic Hazard Re-evaluations for Recommendation 2.1 of the Near-Term Task Force Review of Insights form the Fukushima Dai-ichi Accident (May 9, 2014) (ML14111A147) ("2014 Results Letter").[10] The Staff has indicated that the interim analyses provided pursuant to the 50.54(f) Letter are not to be taken as final; rather, the determination regarding the need, if any, for additional regulatory actions will be made following the completion of the risk evaluations as described in the 2014 Results Letter. *See generally* 2014 Results Letter.

The NRC subsequently endorsed an interim approach, the Expedited Seismic Evaluation Process ("ESEP"), intended to provide additional margin and expedite safety enhancements, if necessary, while the detailed seismic risk evaluations continue.[11] The 2014 Results Letter states that licensees whose plants screen in for a seismic risk evaluation should submit their ESEP reports no later than December 31, 2014. *See id.* at 5. The NRC Staff stated that the ESEP reports "will either confirm that a plant has sufficient margin to continue with a longer-term evaluation [the seismic risk assessment] without any modifications, or confirm the need to

9 WBN Units 1 and 2 are located on the same site and the seismic evaluations apply to both units. *See generally* 50.54 Letter.

10 Of the units listed in Enclosure 2 to the 2014 Results Letter, 49 units—including WBN Units 1 and 2—screened in and 21 other units screened in "conditionally."

11 The industry proposed this alternative approach based on EPRI-developed guidance, found in EPRI, Draft Report 3002000704, *Seismic Evaluation Guidance: Augmented Approach for the Resolution of Fukushima Near-Term Task Force Recommendation 2.1 – Seismic* (April, 2013) (ML13102A142); the Staff endorsed the approach in 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 (May 7, 2013) (ML13106A331) ("Expedited Approach Endorsement Letter").

enhance the seismic capacity to assure they can withstand the re-evaluated hazard." *See id*., Enclosure 1.

TVA submitted its ESEP Report, which forms the alleged basis for the proposed new contention, on December 30, 2014. TVA's ESEP Report "provides an important demonstration of Seismic Margin" based on a review of a subset of plant equipment that can be relied upon to protect the reactor following beyond design basis events, and it did not identify any required modifications or additional required actions based on the evaluation. *See* ESEP Report at 23, 24. Accordingly, TVA intends to submit its complete seismic risk evaluation before the end of June 2017, in compliance with the timetable approved by the NRC Staff in the Expedited Approach Endorsement Letter. *See* ESEP Report at 23; *see also* Expedited Approach Endorsement Letter, at 4.

During the course of this ongoing review process, the NRC Staff has reiterated its initial determination that "continued plant operation and the continuation of licensing activities [do] not pose an imminent risk to public health and safety." *See* 50.54(f) Letter at 1. The seismic hazard re-evaluations have not altered this conclusion; in the 2014 Results Letter, the NRC Staff confirmed that "plants can continue to operate while additional evaluations are conducted." 2014 Results Letter at 2; *see also* Dean Letter at 2.[12]

12 The Dean Letter summarizes the entire NTTF review process, and repeats the conclusions, made elsewhere, that "[t]he NRC will not issue an operating licensing for [WBN2] until there is a reasonable assurance that [TVA] can operate the facility safely and meet all applicable requirements," Dean Letter at 1, and that the NRC "also concluded that continued plant operation and licensing activities, including the review of the [WBN2] operating license application, can continue because these actions do not pose an imminent risk to public health and safety." *Id.* at 2.

II. Applicable Legal Standards Governing Contention Admissibility

A. Legal Standards Governing Non-Timely Contentions

Pursuant to the Hearing Notice[13] 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 contention admissibility requirements in § 2.309(f)(1), the New Contention Motion must satisfy the requirements governing admission of non-timely contentions in § 2.309(c). 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).

13 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).

B. Legal Standards Governing Contention Admissibility

A new contention must meet the admissibility requirements set forth in 10 C.F.R. § 2.309(f)(1)(i)–(vi).[14] The Commission has repeatedly reiterated that its rules on contention admissibility are "strict." *FirstEnergy Nuclear Operating Co.* (Davis-Besse Nuclear Power Station, Unit 1), CLI-12-08, 75 NRC 393, 416 (2012); *see also Dominion Nuclear Conn., Inc.* (Millstone Nuclear Power Station, Units 2 & 3), CLI-01-24, 54 NRC 349, 358 (2001), *pet. for reconsideration denied*, CLI-02-01, 55 NRC 1 (2002) (characterizing the contention admissibility rules as "strict by design"). "[T]he NRC in 1989 revised its rules to prevent the admission of 'poorly defined or supported contentions,' or those 'based on little more than speculation.' The agency deliberately raised the contention-admissibility standards to relieve the hearing delays that such contentions had caused in the past." *Davis-Besse*, CLI-12-08, 75 NRC at 396 (quoting *Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 334 (1999)). "The initial burden of showing whether the contention meets our admissibility standards" lies with the petitioner. *Progress Energy Carolinas, Inc.* (Shearon Harris, Units 2 and 3), CLI-09-08, slip op. at 9 (May 18, 2009).

A petitioner bears the burden to present the factual information or expert opinions necessary to support its contention adequately, and failure to do so requires the Board to reject the contention. *Yankee Atomic Elec. Co.* (Yankee Nuclear Power Station), CLI-96-7, 43 NRC 235, 262 (1996). *See* 10 C.F.R. § 2.309(f)(1)(v). The petitioner must explain the significance of any factual information upon which it relies. *See Fansteel, Inc.* (Muskogee, Okla., Site), CLI-

[14] Specifically, each contention must (i) provide a specific statement of the legal or factual issue sought to be raised; (ii) provide a brief explanation of the basis for the contention; (iii) demonstrate that the issue raised is within the scope of the proceeding; (iv) demonstrate that the issue raised is material to the findings the NRC must make to support the action that is involved in the proceeding; (v) provide a concise statement of the alleged facts or expert opinions, including references to specific sources and documents that support the petitioner's position and upon which the petitioner intends to rely; and (vi) provide sufficient information to show that a genuine dispute exists with regard to a material issue of law or fact. 10 C.F.R. § 2.309(f)(1)(i)–(vi).

03-13, 58 NRC 195, 204-05 (2003) (rejecting a contention for which petitioner relied on a brief reference to applicant's "Disclosure Statement and Reorganization" without explaining how that document undermined the applicant's assurance of funding). With respect to factual information or expert opinion, "the Board is not to accept uncritically the assertion that a document or other factual information or an expert opinion supplies the basis for a contention." *Private Fuel Storage, L.L.C.* (Indep. Spent Fuel Storage Installation), LBP-98-7, 47 NRC 142, 181, *aff'd* CLI-98-13, 48 NRC 26 (1998) ("PFS").

In addition, "an expert opinion that merely states a conclusion (e.g., the application is 'deficient,' 'inadequate,' or 'wrong') without providing *a reasoned basis or explanation* for that conclusion is inadequate because it deprives the Board of the ability to make the necessary, reflective assessment of the opinion." *USEC, Inc.* (Am. Centrifuge Plant), CLI-06-10, 63 NRC 451, 472 (2006) (emphasis added) (*quoting PFS*, LBP-98-7, 47 NRC at 181). A petitioner's imprecise reading of a document also cannot be the basis for a litigable contention. *See Ga. Inst. of Tech.* (Ga. Tech Research Reactor, Atlanta, Ga.), LBP-95-6, 41 NRC 281, 300, *aff'd*, CLI-95-12, 42 NRC 111 (1995).

The Commission has stated that the petitioner must "read the pertinent portions of the license application . . . state the applicant's position and the petitioner's opposing view," and explain why it disagrees with the applicant. *See Dominion Nuclear Conn., Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-01-24, 54 NRC 349, 358 (2001). A contention that does not directly controvert a position taken by the applicant in the application is subject to dismissal. *See Tex. Utils. Elec. Co.* (Comanche Peak Steam Electric Station, Unit 2), LBP-92-37, 36 NRC 370, 384 (1992), *vacating as moot*, CLI-93-10, 37 NRC 192 (1993). Further, an allegation that some aspect of a license application is "inadequate" or "unacceptable" does not

establish a genuine dispute unless it is supported by facts and a reasoned statement of why the application is unacceptable in some material respect. *See Fla. Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 & 4), LBP-90-16, 31 NRC 509, 521, 521 n.12 (1990).

A petitioner must demonstrate "that the issue raised in the contention is within the scope of the proceeding." 10 C.F.R. § 2.309(f)(1)(iii). Any contention that represents a challenge to the basic structure of the NRC regulatory process "must be rejected by a Licensing Board as outside the scope of its proceeding." *Nuclear Management Co., LLC*, (Monticello Nuclear Generation Station), LBP-05-31, 62 NRC 735, 750–51 (2005) (citing *Pub. Serv. Co. of New Hampshire* (Seabrook Station, Units 1 and 2), LBP-82-76, 16 NRC 1029, 1035 (1982)). The Commission has "well-established regulatory processes by which to impose any new requirements or other enhancements that may be needed following completion of regulatory actions associated with" the 2011 Fukushima accident. *Pilgrim*, CLI-12-06, 75 NRC at 375–76 (2012); *see also Union Elec. Co. d/b/a Ameren Missouri* (Callaway Plant, Unit 2), CLI-11-05, 74 NRC 141 (2011).

A petitioner must demonstrate "that the issue raised in the contention is material to the findings the NRC must make to support the action that is involved in the proceeding." 10 C.F.R. § 2.309(f)(1)(iv). As the Commission has observed, "[t]he dispute at issue is 'material' if its resolution would 'make a difference in the outcome of the licensing proceeding.'" *Oconee*, CLI-99-11, 49 NRC at 333-34 (*citing* Rules of Practice for Domestic Licensing Proceedings – Procedural Changes in the Hearing Process, 54 Fed. Reg. at 33,172). The contention must be one that, if proven, would entitle the petitioner to relief. *See Duke Energy Corp.* (McGuire Nuclear Station, Units 1 & 2; Catawba Nuclear Station, Units 1 & 2), CLI-02-26, 56 NRC 358, 363 n.10 (2002) (stating that an issue is material "only if it would entitle petitioner to relief").

Additionally, contentions alleging an error or omission in an application must establish some significant link between the claimed deficiency and protection of the health and safety of the public or the environment. *Dominion Nuclear Conn., Inc.* (Millstone Nuclear Power Station, Units 2 & 3), LBP-04-15, 60 NRC 81, 89, *aff'd*, CLI-04-36, 60 NRC 631 (2004) (stating that a contention that alleges a deficiency or error in the application must show that the deficiency or error has "some independent health and safety significance").

Section 2.309(f)(1)(vi) requires that the proposed contention "include references to specific portions of the application (including applicant's environmental report and safety report) that the petitioner disputes and the supporting reasons for each dispute." The Commission has ruled that "general assertions, without some effort to show why the assertions undercut findings or analyses in the [application], fail to satisfy the requirements of Section 2.309(f)(1)(vi)." *South Carolina Elec. & Gas Co.* (Virgil C. Summer Nuclear Station, Units 2 & 3), CLI-10-1, 71 NRC 1, 22 (2010). To raise a genuine dispute admissible under Section 2.309(f)(1)(vi), a petitioner must "read the pertinent portions of the license application, . . . state the applicant's position and the petitioner's opposing view," and explain why it disagrees with the applicant. Rules of Practice for Domestic Licensing Proceedings – Procedural Changes in the Hearing Process, 54 Fed. Reg. at 33,170; *see also Millstone*, CLI-01-24, 54 NRC at 358.

III. SACE's Proposed New Contention Fails to Satisfy the 10 C.F.R. § 2.309(c) Requirements for a Non-Timely Contention

As TVA explained in its February 17, 2015 response to the Motion to Reopen, at 10, the New Contention does not satisfy the 10 C.F.R. § 2.309(c) requirements for a non-timely contention.

In particular, SACE states that "the information on which the contention is based – i.e., 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." New Contention Motion at 6. 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 Report 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.[15] Appendix 4 of that report provides detailed information about the seismic hazards related to WBN2. SACE has not explained how the information contained in the ESEP Report differs from that which has been available to SACE for nearly a year or why the ESEP Report would change any analysis or conclusions with respect to WBN2.

In summary, SACE has failed to support its claim that the ESEP Report contains new information that is "materially different," and therefore fails to satisfy the requirement in § 2.309(c) that the New Contention Motion be timely filed. Therefore, the New Contention Motion should be rejected. This failure provides an independent basis for rejecting the New Contention Motion.

IV. SACE's Proposed New Contention Fails to Satisfy the 10 C.F.R. § 2.309(f) Contention Requirements

In addition to being untimely, the New Contention Motion also does not satisfy the Commission's contention admissibility requirements. This failure provides a separate and independent basis for rejecting the New Contention Motion.

[15] 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).

A. The Contention Is Outside the Scope of this Proceeding

SACE acknowledges that the report forming the basis for its proposed new contention was submitted by TVA to the NRC as a part of NRC's regulatory framework for addressing Fukushima NTTF recommendations. New Contention Motion at 2, 4. SACE also admits that the NRC's review of the NTTF "will take place outside the scope of this operating license proceeding." *Id.* at 4–5. As discussed above, the Commission has approved the Staff's proposed approach to implementing the NTTF recommendations, and the Staff has indicated that the need for additional regulatory action will be determined upon conclusion of its ongoing assessments. *See, e.g.*, Dean Letter at 1–2; *see generally* 2014 Results Letter.

The ESEP Report, on which rests SACE's entire contention, is only part of a series of analyses requested by the NRC to determine seismic risk significance. *See* ESEP Report at 23 ("The intent of the ESEP [Report] is to perform an interim action in response to the NRC's 50.54(f) letter . . . . [A] more detailed seismic risk assessment . . . is to be performed in accordance with EPRI 1025287.") (emphasis added); *see generally* 2014 Results Letter at 6 (noting that the Staff has not made a final determination regarding "the adequacy of any plant's calculated hazard"). As such, the ESEP Report represents only interim action, not final, and it does not identify any modifications to the plant nor changes to the plant's design basis that would impact the FSAR. Indeed, one purpose of the complete seismic re-analysis is to determine whether there will be any impact to the FSAR, so to require an FSAR update at this stage would circumvent the NTTF review process.

Only once the seismic risk reevaluation process and the NRC Staff analysis is complete will it be possible for the Staff to determine whether any additional actions, including changes to the design basis, are necessary. If a determination is made that additional actions are necessary,

TVA would be required at that time to implement these actions *whether or not* an operating license has been issued. If a license amendment is needed, then SACE would be able to challenge the actions at that time through a hearing request; if no license amendment is needed, then SACE could submit a petition for action under 10 C.F.R. § 2.206. Those are the appropriate forums for this issue; not this operating license proceeding.

B. The Proposed Contention Fails to Raise a Material Issue

SACE has failed to demonstrate that this proposed contention is material to the NRC's findings necessary to issue the operating license. The New Contention Motion provides only (1) a recitation of statutory and regulatory provisions and (2) the circular and reflexive argument that the contention (that is, the FSAR does not include certain information) is material because it asserts that the FSAR does not include that information. New Contention Motion at 5–6. SACE asserts that the missing information is "necessary for the NRC's safety findings," but nowhere offers an explanation of *why* the information is necessary.

Furthermore, as noted above, a contention alleging an omission in the application—such as this one does—must establish not only that the deficiency exists, but that it is significant. *See id.* SACE fails to show what significance, if any, attaches to the statutory and regulatory sections listed, or what impact the information would have on the determination the NRC must make here. SACE has not made the required showing of safety significance to support materiality. Additionally, SACE cannot demonstrate materiality for the reasons discussed in Section IV.B, *supra*. In fact, the ESEP Report itself refers to the demonstration of "Seismic Margin" and does not identify any modifications to the plant as the result of the evaluation. *See* ESEP Report at 23-24. SACE has not identified, much less challenged, that information.

Because SACE has failed to show that its proposed contention is material to the findings the NRC must make to issue the operating license, the contention must be rejected.

C. Contentions Must Be Supported by Adequate Factual Information or Expert Opinion

As noted above, Section 2.309(f)(1)(v) requires that a contention contain "alleged facts or expert opinions which support the requestor's/petitioner's position on the issue." The Commission has stated that a contention "will be ruled inadmissible if the petitioner 'has offered no tangible information, no experts, no substantive affidavits,' but instead only 'bare assertions and speculation.'" *Fansteel*, CLI-03-13, 58 NRC at 203.

SACE states that the facts supporting its contention are the same as the basis provided elsewhere in its pleading, New Contention Motion at 6, and as summarized in Section I.A, *supra*. SACE claims that the contention "relies entirely on factual statements made by TVA." *Id.* SACE seems to misunderstand its obligations under 10 C.F.R. § 2.309(f)(1)(v). Merely confirming that certain "facts" exist does not in any way meet SACE's obligation to provide "alleged facts or expert opinions" to support its position that there is a deficiency in the information required for the NRC to make a reasonable assurance determination in this proceeding. SACE's assertion does not support its burden under the regulations and SACE makes no attempt to demonstrate how the statements quoted from the ESEP Report have any significance in supporting the proffered contention. In this regard, the Commission has stated:

> [I]t is not up to the boards to search through pleadings or other materials to uncover arguments and support never advanced by the petitioners themselves; boards may not simply "infer" unarticulated bases of contentions. It is a "contention's proponent, not the licensing board," that "is responsible for formulating the contention and providing the necessary information to satisfy the basis requirement for the admission of contentions."

USEC, CLI-06-10, 63 NRC at 457 (citations omitted).

Indeed, as discussed in Sections I.B and IV.A, *supra*, SACE appears to misunderstand fundamentally the purpose and conclusions of the ESEP Report. SACE claims that the purpose of the report is to show that WBN2 can operate safely "despite the fact that the seismic risk to WBN2 is now known to be greater than the safe shutdown earthquake (SSE) to which the reactor was designed." New Contention Motion at 2. The ESEP Report does not, however, conclude that the seismic risk is "known to be greater." In fact, the ESEP Report concludes that TVA's initial analysis demonstrates that adequate seismic margin exists "following beyond design basis seismic events." *See* ESEP Report at 23; *see also* 50.54(f) Letter; 2014 Results Letter. As discussed elsewhere, the Staff makes clear that the ESEP Report is not a final evaluation itself, but is part of a longer, ongoing review and analysis by the Staff. 2014 Results Letter at 6. Accordingly, the evaluation of seismic risks at WBN is ongoing, and there are no changes to the design basis seismic risk that need to be reflected in the FSAR. In the end, SACE's misreading of the document cannot form the basis for a litigable contention. *See Ga. Inst. Research Reactor*, 41 NRC at 300.

Furthermore, SACE has not provided any sufficient basis for why the information in the ESEP Report is "pertinent" under 10 C.F.R. § 50.34(b)(4). Instead, SACE makes only conclusory statements. In this regard, although it is not always necessary to have expert support for a proposed contention, the absence of such support is obvious and not without adverse consequences in considering the admissibility of the highly technical seismic issues present in the ESEP Report that is the subject of the proposed contention.[16]

[16] In *U.S. Department of Energy*, the licensing boards stated, "The objective of the section 2.309(f)(1)(v) and (vi) requirements is to ensure that Boards admit only those contentions that have been demonstrated to have sufficient substance to warrant further consideration on the merits. One method of demonstrating that a particular contention is worthy of admission is, of course, the furnishing of a reasoned opinion of a qualified expert." *U.S. Dep't of Energy* (High-Level Waste Repository), LBP-09-06, 69 NRC 367, 408-09 (2009).

For these reasons, SACE has failed to meet this prong of the Commission's admissibility requirements and the contention must be rejected.

E. The Proposed Contention Fails to Raise a Genuine Dispute of Material Law or Fact

SACE's proposed new contention fails to raise a genuine dispute on a material issue of fact or law. First, SACE provides no statement or discussion of why the application is unacceptable. Indeed, SACE does not discuss the seismic information in the application, much less identify any specific section and explain why it is incorrect, given information provided in the ESEP Report. Rather, SACE claims, without support, that "the NRC lacks a sufficient factual basis for making a decision to issue an operating license for WBN2." New Contention Motion at 6.

Additionally, SACE essentially claims that the ESEP Report's very existence necessitates an update to the FSAR. That is incorrect. As discussed in Sections I.B and IV.B, *supra*, TVA provided the ESEP Report as part of the Staff's ongoing review of the Fukushima NTTF's seismic recommendation. *See* ESEP Report at 6. The Staff has indicated, in no uncertain terms, that the interim analyses provided pursuant to the 50.54(f) Letter—such as TVA's ESEP Report—are not to be taken as final; rather, the determination regarding the need, if any, for additional regulatory actions will be made following the completion of the risk evaluations as described in the 2014 Results Letter. *See generally* 2014 Results Letter. As noted in Section I.B, the risk evaluation for WBN is due in June 2017, and the Staff's analysis is to be completed sometime after that. In the interim, the NRC has determined that plants will continue to operate safely. Significantly, the 50.54(f) Letter itself clarifies the purpose for which these re-evaluations are to be used: "The evaluations associated with the requested information in this letter do not

revise the design basis of the plant." *See* 50.54(f) Letter at 4 (emphasis added). Thus, SACE has not met its burden to show that the ESEP Report raises a genuine dispute with the application.

Because SACE's proposed new contention does not satisfy the "material dispute" component of the contention admissibility requirements, it must be rejected.

CONCLUSION

As explained above, SACE fails to propose a new contention that is timely under § 2.309(c) or admissible under § 2.309(f). Therefore, the New Contention Motion should be denied.

Respectfully submitted,

/signed (electronically) by Scott A. Vance/

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March 3, 2015

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	)	
(Watts Bar, Unit 2)	)	

CERTIFICATE OF SERVICE

I certify that, on March 3, 2015, a copy of "Tennessee Valley Authority's Answer Opposing Southern Alliance for Clean Energy's Motion for Leave to File a New Contention" was served electronically through the E-Filing system on the participants in the above-captioned proceeding.

/signed electronically by/
Christopher C. Chandler