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 MOTIONS TO REOPEN THE RECORD AND ADMIT A NEW CONTENTION

Pursuant to 10 C.F.R. §§ 2.309(i) and 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 to Reopen") and "Southern Alliance for Clean Energy's Hearing Request and Petition to Intervene in Operating License Proceeding for Watts Bar Unit 2 Nuclear Power Plant" ("New Contention Motion"), filed April 21, 2015.[1]

In its Motion to Reopen, the Southern Alliance for Clean Energy ("SACE") requests to reopen the record in the Watts Bar Unit 2 ("WBN2") operating license proceeding for the purpose of admitting a new, late-filed contention. Motion to Reopen at 1. SACE claims that the Final Environmental Statement ("FES") for WBN2 does not provide an adequate legal basis for issuing the operating license because "it relies for its evaluation of the environmental impacts of spent fuel storage and disposal on the Continued Storage of Spent Nuclear Fuel Rule and the Generic Environmental Impact Statement for Continued Storage of Spent Nuclear Fuel [("GEIS")]." *Id.* (citations omitted). In its New Contention Motion, SACE seeks

[1] Although the Motion to Reopen is dated April 15, 2015, and the New Contention Motion is dated April 22, 2015, SACE served both motions on the parties on April 21, 2015. Accordingly, the latter date is used in this Answer.

to admit a "placeholder" contention, challenging the reliance of the WBN2 FES on the Continued Storage Rule and GEIS; SACE states that it does not intend to litigate the contention and expects that it will be denied for challenging a generic subject matter. New Contention Motion at 1–2.

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 to Reopen does not raise a significant safety or environmental 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 include a supporting affidavit, as required by § 2.326(b). Finally, the Motion to Reopen is untimely because it fails to satisfy the timeliness requirements for new, late-filed contentions in 10 C.F.R. § 2.309(c). Accordingly, the Motion to Reopen should be rejected.

The proposed contention also fails to meet the standards required by the Commission's regulations. It is outside the scope of this proceeding, lacks sufficient factual or expert support, and does not demonstrate that a genuine dispute exists with the applicant on a material issue of fact or law. In addition, the proposed contention is an impermissible challenge to the application of a Commission regulation under 10 C.F.R. § 2.335. Because SACE has failed to proffer an admissible contention as required by 10 C.F.R. § 2.309(f), the New Contention Motion likewise should be rejected.

ARGUMENT

I. Background

This is SACE's third challenge on this docket to the Continued Storage Rule.[2] The

[2] The Commission rejected the earlier petitions. *See DTE Electric Co.* (Fermi Nuclear Power Plant, Unit 3), CLI-15-10, 81 NRC ___ (Apr. 23, 2015) (slip op.) (rejecting petition to compel the Staff to supplement site-specific

background of this proceeding and the history of the Continued Storage Rule are set forth in TVA's earlier pleadings and in recent Commission and Atomic Safety and Licensing Board decisions. *See, e.g.*, *DTE Electric Co.* (Fermi Nuclear Power Plant, Unit 3), CLI-15-10, 81 NRC ___ (Apr. 23, 2015) (slip op. at 2–3) (rejecting a petition on multiple dockets to require the NRC Staff to supplement site-specific environmental impact statements); *Tennessee Valley Authority* (Watts Bar Nuclear Plant, Unit 2), LBP-15-14, 81 NRC ___ (Apr. 22, 2015) (slip op. at 1–3) (rejecting motions to reopen the record and admit a new contention in the WBN2 Operating License proceeding).

The Commission also recently rejected two motions to reopen and contentions that were virtually identical to SACE's Motion to Reopen and proposed new contention.[3] In doing so, the Commission concluded that the proposed contentions impermissibly challenged an NRC regulation and failed to demonstrate a genuine dispute with the applicant, the motions to reopen did not raise a significant environmental issue and had not demonstrated that a materially different result would be likely if the contention had been considered initially, and a placeholder contention is not necessary to ensure that the challenges are considered.[4]

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 &*

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environmental impact statements); *DTE Electric Co.* (Fermi Nuclear Power Plant, Unit 3), CLI-15-4, 81 NRC ___ (Feb. 26, 2015) (slip op.) (rejecting petition to suspend final licensing decisions and admit a new contention regarding continued spent fuel storage).

[3] The recently rejected contentions were also "placeholder" contentions and were substantially similar to SACE's proposed contention; the statement of the contention in this proceeding is functionally identical to each of the recently rejected contentions. *See Union Electric Co.* (Callaway Nuclear Power Plant, Unit 1), CLI-15-11, 81 NRC ___ (Apr. 23, 2015) (slip op.); *DTE Electric Co.* (Fermi Nuclear Power Plant, Unit 3), CLI-15-12, 81 NRC ___ (Ap. 23, 2015) (slip op.).

[4] *See Callaway*, CLI-15-11, slip op. at 4–6; *Fermi*, CLI-15-12, slip op. at 4–5.

Entergy Nuclear Operations, Inc. (Vt. Yankee Nuclear Power Station), CLI-11-2, 73 NRC 333, 338 (2011) (citation omitted). The Commission therefore imposes "a 'deliberately heavy' burden upon an intervenor who seeks to supplement the evidentiary record after it has been closed . . . ." *Id.* at 338 (quoting *AmerGen Energy Co. LLC* (Oyster Creek Nuclear Generating Station), CLI-08-28, 68 NRC 658, 674 (2008)). 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." *Id.*

To meet this burden, 10 C.F.R. § 2.326(a) requires a party to 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." 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, the petitioner bears the 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 [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).

B. Legal Standards Governing Non-Timely Contentions

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. Pursuant to the Hearing Notice[5] 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, 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)(1)(i)–(iii).[6] *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).

C. 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).[7] The Commission has repeatedly reiterated that its rules on contention admissibility are "strict." *FirstEnergy Nuclear Operating Co.* (Davis-Besse Nuclear Power

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[5] 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).

[6] The petitioner must demonstrate each of the following: (i) The information upon which the filing is based was not previously available; (ii) The information upon which the filing is based is materially different from information previously available; and (iii) The filing has been submitted in a timely fashion based on the availability of the subsequent information. 10 C.F.R. § 2.309(c)(i)–(iii).

[7] 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).

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"). "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, 69 NRC 317, 325 (2009).

Challenges to Commission rules and regulations are not permitted in adjudicatory proceedings, except in very limited circumstances. *See* 10 C.F.R. § 2.335(a); *see also Exelon Generation Company, LLC* (Limerick Generating Station), CLI-12-19, 76 NRC 377, 380 (2012).

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

A. The Motion to Reopen Is Not Supported by an Affidavit

SACE's Motion to Reopen must be denied because it is not supported by an affidavit as required by § 2.326(b). SACE, by its own admission, "has not submitted affidavits." Motion to Reopen at 4. This is because, according to SACE, "the bases for this motion are purely legal." *Id.* SACE has not cited any legal authority supporting this purported exemption from the affidavit requirement; the regulation, on its face, contains no exemptions. The purpose of the affidavit is to support "the factual and/or technical bases for the movant's claim that the criteria of [2.326(a)] have been satisfied," and SACE's claim that the bases for the Motion to Reopen are "legal" does not negate this requirement. Indeed, as the Commission has recently reiterated, "Litigants seeking to reopen a record must 'comply fully with [section] 2.326(b).'" *Pilgrim*, CLI-12-3, 75 NRC at 145 n.86 (quoting *Southern Nuclear Operating Co.* (Vogtle Electric Generating Plant, Units 3 and 4), CLI-11-8, 74 NRC 214, 222 (2011)) (emphasis added).

In short, SACE acknowledges that it has not submitted the affidavit required by 10 C.F.R. § 2.326(b), and provides no justification for its claim that its Motion is somehow excused from the requirement in this instance. The failure to meet this mandatory affidavit requirement is by itself sufficient grounds to reject the Motion. *See, e.g., Tex. Utils. Elec. Co.* (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-92-12, 36 NRC 62, 76 (1992).

B. The Motion is Untimely

SACE states that "the motion to reopen and the attached contention are timely because they do not depend at all on past information." Motion to Reopen at 3. SACE's attempt to demonstrate timeliness by asserting that the contention is based on information that is not yet in existence is untenable.

The proposed new contention argues that the WBN2 FES is inadequate because it relies on the Continued Storage Rule and the Continued Storage GEIS. *See* New Contention Motion at 7. The Continued Storage Rule, which by operation of law incorporates the GEIS into existing NRC NEPA documents such as the WBN2 FES, was published in the *Federal Register* more than seven months ago.[8] *See DTE Electric Company* (Fermi Nuclear Power Plant, Unit 3), CLI-15-10, 81 NRC ___ (Apr. 23, 2015) (slip op. at 1–2). Additionally, SACE itself signaled its intention to submit this "placeholder" contention more than three months ago, in its January 28, 2015 petition to the Commission regarding this very issue. *See id.*, slip op. at 5 (denying petition to supplement site-specific environmental impact statements). Yet somehow, in spite of these manifold opportunities to submit its contention earlier, SACE has waited until now, and offers no more support for its claim of timeliness than that it is not based on "past information." Accordingly, the Motion should be denied. *See AmerGen Energy Co.,*

[8] *See* "Continued Storage of Spent Nuclear Fuel," 79 Fed. Reg. 56238 (Sept. 19, 2014). The text of the rule has actually been public for even longer. *See* Staff Requirements—SECY-14-0072—Final Rule, Continued Storage of Spent Nuclear Fuel (RIN 3150-AJ20) (Aug. 26, 2014) (ML14237A092).

LLC (Oyster Creek Nuclear Generating Station), CLI-09-7, 69 NRC 235, 271–72 (2009) ("There simply would be no end to NRC licensing proceedings if petitioners could disregard our timeliness requirements and add new contentions at their convenience . . . .").

C. The Motion Does Not Concern a Significant Issue

SACE fails to satisfy its heavy burden to demonstrate that its Motion concerns a significant safety or environmental issue, as required by 10 C.F.R. § 2.326(a)(2). SACE claims that the WBN2 FES is "not supported by an adequate analysis of the environmental impacts of spent fuel storage and disposal," because it believes the Continued Storage Rule and GEIS are inadequate. Motion to Reopen at 4. SACE does not elaborate on its claim of significance, and fails to identify how the FES is "seriously deficient." *Id.*

This claim amounts to nothing more than speculation, which the Commission has held is insufficient to raise a significant safety or environmental issue. *See Oyster Creek*, CLI-09-7, 69 NRC at 287.

Furthermore, as discussed below in Section V, the proposed contention is not admissible. As the Commission ruled in *Callaway* on a similar contention and motion to reopen, "[b]ecause [the petitioner] has not submitted an admissible contention, it necessarily has not satisfied our reopening standards because it has not raised a significant environmental issue . . . ." *Callaway*, CLI-15-11, slip op. at 4 n.17. A similar conclusion applies here.

D. 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. Rather, SACE speculates that it is "reasonably likely" that a series of events, each contingent on the last, would likely produce a different result here. Motion to

Reopen at 4.

To meet the reopening standards, the movant must "demonstrate a likelihood of *prevailing*." *Pilgrim*, CLI-12-15, 75 NRC at 719 (emphasis in original). "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 demonstrate likelihood and fails to meet the moving party's heavy burden to reopen the record. *See Oyster Creek*, CLI-09-7, 69 NRC at 290–91.

As TVA discusses in Section V, *infra*, the proposed contention is not admissible, in part because it challenges the adequacy of a Commission rule despite the regulation prohibiting such challenges. *See* 10 C.F.R. § 2.335(a). Because the proposed contention itself is facially defective, and SACE cannot show that a materially different result would be or would have been likely here, the Motion should be denied. *See Callaway*, CLI-15-11, slip op. at 4 n.17 ("Because [the petitioner] has not submitted an admissible contention, it necessarily has not satisfied our reopening standards because it . . . has not demonstrated that a materially different result would be likely if the contention had been considered initially.").

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

SACE's Motion to Reopen fails to satisfy the requirements of 2.309(c) for non-timely contentions. SACE reiterates its illogical claim that the motion is timely because the motion and accompanying contention "are based on information that does not yet exist." Motion to Reopen at 5. However, at no point does SACE even attempt to show that the information on which the new contention is based was not previously available, that it is materially different than information previously available, and that it is now timely based on the availability of the subsequent information. Indeed, as discussed in Section III.B, *supra*, the root of the contention

is the Continued Storage Rule, which has been public for many months. Because SACE has completely failed to address, let alone satisfy, the requirements of §§ 2.326(d) and 2.309(c), the Motion to Reopen must be denied.

V. SACE Has Not Proffered an Admissible Contention

The new contention does not satisfy the Commission's contention admissibility requirements and is an impermissible challenge to 10 C.F.R. § 51.23(b).

SACE states in its New Contention Motion that the "sole purpose" of this contention is to challenge the adequacy of the Continued Storage Rule and GEIS. *See* New Contention Motion at 2. SACE continues with an admission that "the subject matter of the contention is generic." *Id.* The statement of the contention confirms this: Of the seven problems SACE alleges to exist within the Continued Storage Rule and GEIS, not one of them is specific to the WBN2 FES. *Id.* at 7–8. Finally, SACE notes that its proposed contention "is not accompanied by" the waiver required to permit a challenge to generic issues in individual license proceedings. *Id.* at 2 n.3. Thus, SACE freely acknowledges—and, indeed, anticipates—that the contention is inadmissible and should be denied pursuant to 10 C.F.R. § 2.335(a).

Rejection of the contention on these grounds is consistent with the Commission's holding in *Callaway* in which it concluded that "the proposed contention is not admissible under our rules of practice because it impermissibly challenges an agency regulation and is therefore outside the scope of this individual licensing proceeding." *Callaway*, CLI-15-11, slip op. at 4; *see also Fermi*, CLI-15-12, slip op. at 4 ("a contention that challenges an agency regulation does not raise an issue appropriately within the scope of this individual licensing proceeding and is not admissible absent a waiver").

In addition to this admitted failure, SACE's proposed new contention does not satisfy the § 2.309(f) requirements for contention admissibility. As already noted, SACE acknowledges that the contention is "generic," and it therefore cannot be within the scope of the proceeding or raise a genuine dispute on a material issue of fact or law. *See Callaway*, CLI-15-11, slip op. at 4; *see also Fermi*, CLI-15-12, slip op. at 4. Moreover, SACE addresses the individual admissibility requirements with no support or analysis for each claim that the requirements have been met. *See* New Contention Motion at 8–9. The only support SACE seemingly provides is in its incorporation by reference, apparently without limitation, of its "[c]omments and attachments" submitted to the NRC for the Continued Storage GEIS. *See* New Contention Motion at 7, 8, 9. However, the Commission has made it clear that "a petitioner may not simply incorporate massive documents by reference as the basis for or a statement of his contentions." *Public Serv. Co. of New Hampshire* (Seabrook Station, Units 1 and 2), CLI-89-3, 29 NRC 234, 240–41 (1989).

SACE has failed completely to satisfy any of the requirements for contention admissibility, let alone all of them. For this reason, and because the proposed contention violates § 2.335(a), the proposed contention must be rejected and the New Contention Motion denied.

CONCLUSION

As explained above, SACE's Motion to Reopen is untimely, does not raise a significant safety or environmental issue, and does not demonstrate that a materially different result is likely to result. The Motion to Reopen 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). Additionally, SACE's proposed contention

does not satisfy the admissibility requirements of § 2.309(f)(1) and violates § 2.335(a) by challenging a Commission regulation without a waiver. For these reasons, SACE's Motion to Reopen and New Contention Motion should be denied.

Respectfully submitted,

/signed (electronically) by Scott A. Vance/

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CERTIFICATE OF SERVICE

I certify that, on May 1, 2015, a copy of "Tennessee Valley Authority's Answer Opposing Southern Alliance for Clean Energy's Motions to Reopen the Record and Admit 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