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)	)	

TENNESSEE VALLEY AUTHORITY'S ANSWER OPPOSING SOUTHERN ALLIANCE FOR CLEAN ENERGY'S PETITION FOR REVIEW OF LBP-15-14

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Pursuant to 10 C.F.R. § 2.341(b)(3), the Tennessee Valley Authority ("TVA") respectfully submits its answer in opposition to "Southern Alliance for Clean Energy's Petition for Review of LBP-15-14 Denying Admission of a New Contention Concerning TVA's Failure to Comply with 10 C.F.R. § 50.34(b)(4)" ("Petition"), filed May 18, 2015. In its Petition, the Southern Alliance for Clean Energy ("SACE") seeks review of the Atomic Safety and Licensing Board ("Board") decision LBP-15-14,[1] in which the Board denied SACE's motion to reopen the record in the Watts Bar Unit 2 ("WBN2") operating license proceeding for the purpose of admitting a new, late-filed contention. Petition at 1. That proposed contention claimed that the WBN2 Final Safety Analysis Report 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. *See* LBP-15-14, 81 NRC at ___ (slip op. at 3).

Because SACE does not identify any substantial question of law or policy warranting review, or any valid error of fact or law in the Board's decision, the Commission should deny the Petition.

[1] *Tennessee Valley Authority* (Watts Bar Nuclear Plant, Unit 2), LBP-15-14, 81 NRC ___ (Apr. 22, 2015) (slip op.).

I. BACKGROUND

The history of this proceeding is set forth in TVA's earlier pleadings and in the Atomic Safety and Licensing Board's decision. *See, e.g.*, *id.* at ___ (slip op. at 1–3) (rejecting motions to reopen the record and admit a new contention in the WBN2 Operating License proceeding).

SACE based its contention on an expedited seismic evaluation process ("ESEP") report TVA submitted to the NRC in December 2014. *See id.* at ___ (slip op. at 3). TVA prepared and submitted the report in response to the NRC's 50.54(f) request for information regarding the Fukushima Near-Term Task Force review of seismic hazards. *See id.* at ___ (slip op. at 4); *see also* Tennessee Valley Authority's Answer Opposing Southern Alliance for Clean Energy's Motion for Leave to File a New Contention at 5 (Mar. 3, 2015). The purpose of the report was to demonstrate seismic safety margin at WBN2, and it did not identify any required modifications or additional required actions for WBN2. *See id.* at 7; *see also* LBP-15-14, 81 NRC at ___ (slip op. at 4).

The Board concluded that SACE failed to meet "at least three" of the requirements for reopening a closed record. First, the Board concluded that SACE had not demonstrated the existence of a significant safety or environmental issue. In reaching this conclusion, the Board acknowledged that the purpose of the underlying report that purportedly gave rise to the contention was to show that there is no such issue, and, because the contention was based "entirely" on TVA's report, "SACE has provided the Board with no grounds on which to reach a different conclusion." *Id.* at ___ (slip op. at 4). Second, the Board determined that SACE's claim that a materially different result would be likely was based on "rank speculation," and SACE provided "no factual support" to justify reopening the record. *Id.* at ___ (slip op. at 6–7). Finally, the Board determined that the affidavit SACE provided, a statement by counsel alleging

an understanding of the legal basis for the contention, did not present any facts to support the existence of a significant safety or environmental issue. *Id.* at ___ (slip op. at 7).

II. LEGAL STANDARDS

A. Standard of Review

A petition for review is granted only at the discretion of the Commission upon a showing that the petitioner has raised a substantial question as to whether

(i) a finding of material fact is clearly erroneous or in conflict with a finding as to the same fact in a different proceeding;

(ii) a necessary legal conclusion is without governing precedent or is a departure from or contrary to established law;

(iii) a substantial and important question of law, policy, or discretion has been raised;

(iv) the conduct of the proceeding involved a prejudicial procedural error; or

(v) the Commission deems any other consideration to be in the public interest.

See 10 C.F.R. § 2.341(b)(4); *DTE Elec. Co.* (Fermi Nuclear Power Plant, Unit 3), CLI-14-10, 80 NRC ___ (Dec. 16, 2014) (slip op. at 5).

The Commission gives substantial deference to its boards' determinations on threshold issues, such as whether a pleading meets the requirements of 10 C.F.R. § 2.326, and "will not sustain an appeal that fails to show a board committed clear error or abuse of discretion." *Southern Nuclear Operating Co.* (Vogtle Electric Generating Plant, Units 3 and 4), CLI-11-8, 74 NRC 214, 220 (2011). "[T]he appellant faces a substantial burden" under the abuse of discretion review standard, and it is insufficient for SACE to argue that the Board could have reached the same conclusion as SACE. *See Andrew Siemaszko*, CLI-06-16, 63 NRC 708, 715 (2006). Finally, the Commission may affirm a Board decision on any ground finding support in the

record, whether or not relied on by the Board. *See, e.g.*, *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-05-1, 61 NRC 160, 166 (2005).

B. Legal Standards Governing Reopening the Record

Given the need for finality in the hearing process, the Commission considers reopening the record for any reason to be an "extraordinary" action. *Entergy Nuclear Vt. Yankee, LLC & Entergy Nuclear Operations, Inc.* (Vt. Yankee Nuclear Power Station), CLI-11-2, 73 NRC 333, 338 (2011) (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)).

To meet this burden, 10 C.F.R. § 2.326(a) states that a motion to reopen *must* (1) be timely, (2) address a significant safety issue or environmental matter, and (3) demonstrate 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). 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). *See* 10 C.F.R. § 2.326(d).

"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).

III. THE COMMISSION SHOULD DENY SACE'S PETITION

The Commission should deny the Petition for the reasons set forth below. First, SACE has failed to identify any clear error of fact, error of law, procedural error, or abuse of discretion by the Board. SACE also introduces—for the first time—a new legal standard against which it believes its motion to reopen the record should have been measured. Finally, SACE relies on a specious burden-shifting argument that runs contrary to controlling Commission precedent and therefore provides no basis for the Commission to overturn the Board's decision.[2]

A. SACE Fails to Identify any Error or Abuse of Discretion on the Part of the Board

The Board denied the motion to reopen the record for three reasons. First, the motion failed to demonstrate the existence of a significant safety or environmental issue. Second, it failed to demonstrate the likelihood of a materially different result in the license proceeding. Third, the proffered affidavit did not satisfy the requirements of 10 C.F.R. § 2.326(b). *See* LBP-15-14, 81 NRC at ___ (slip op. at 6–7). Any one of these reasons would be sufficient to deny reopening the record. *See Pilgrim*, CLI-12-3, 75 NRC at 143 ("All of the factors in [10 C.F.R. §] 2.326 must be met in order for a motion to reopen to be granted."). Thus, in order to reverse the Board's decision, SACE would have to demonstrate that all three of these bases for denying the motion were clearly erroneous or an abuse of the Board's discretion.

Despite having correctly identified the Board's findings that resulted in its denying the motion to reopen the record, *see* Petition at 6, SACE fails to demonstrate—or even to argue—that any one of these bases was clearly erroneous or an abuse of discretion. Instead, in addition

[2] SACE also claims that the Board's decision raises "several important questions of law and policy" that it believes the Commission must review. Petition at 6. Nowhere in the Petition does SACE identify what these questions are *with respect to the Board's denial of SACE's Motion to Reopen*. Rather, SACE appears to argue that because the Board did not admit its proposed contention, the Board's decision raises legal and policy questions. However, as discussed in Section III.A, *infra*, the Board stated explicitly that it did not consider the contention's admissibility because SACE had not satisfied the threshold issue of reopening the record.

to the legally untenable "burden-shifting" argument discussed in Section III.C, *infra*, SACE focuses its pleading on reasserting the substantive merits of its contention. SACE argues that the Board "erroneously ignored the . . . differences in the timing and standards for the Staff's operating license review of WBN2 and its post-Fukushima review," Petition at 7, and further argues that the Board "effectively acquiesced" to the post-Fukushima review process. *Id.* at 8. SACE also rehashes the complaint it made in its new contention motion that the NRC is applying the wrong standard ("imminent risk" versus "reasonable assurance") in reviewing TVA's seismic report. *Id.*; *see also* 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) at 4–5 (Feb. 5, 2015).

None of these points is responsive to the demonstration SACE must make to support its Petition. Rather, SACE appears content to bypass a properly supported discussion of how the Board erred in deciding to keep the record closed, and instead place its contention directly before the Commission. In rearguing the merits of its contention, however, SACE ignores the Board's explicit statement that, "[b]ecause SACE's motion to reopen the record is insufficient, the Board need not address SACE's motion for leave to file a new contention." LBP-15-14, 81 NRC at ___ (slip op. at 7).

As discussed in Section I, *supra*, the Board declined to address the contention's admissibility because it determined that SACE had not satisfied the "threshold" standards for reopening the record:[3] the motion to reopen the record did not demonstrate the existence of a

[3] In addition, although the Board determined that it did not need to address the issue, *id.* at ___ (slip op. at 6 n.29), the Board could have rejected the Motion to Reopen for failing to satisfy 10 C.F.R. § 2.309(c), which is an additional requirement of 10 C.F.R. § 2.326. *See* § 2.326(d). The pleadings filed by TVA and the NRC Staff demonstrate that SACE had failed to show good cause for its non-timely contention. *See* Tennessee Valley Authority's Answer Opposing Southern Alliance for Clean Energy's Motion to Reopen the Record at 10 (Feb. 17, 2015); NRC Staff's Answer to Southern Alliance for Clean Energy's Motion for Leave to File a New Contention at 13–14 (Mar. 3, 2015).

significant safety or environmental issue; it did not demonstrate the likelihood of a materially different result in this proceeding; and the motion to reopen the record did not include an affidavit that satisfied the requirements of 10 C.F.R. § 2.326(b). *See* LBP-15-14, 81 NRC at ___ (slip op. at 6–7). Moreover, SACE's motion to reopen the record provided "no grounds" on which to reach a different conclusion and relied on "rank speculation." *See id.* at ___ (slip op. at 6).

In its Petition, SACE does not identify how any of the Board's findings is erroneous. SACE points to nothing in the record that could provide the support needed to reverse what the Board found lacking on any one—let alone all—of the Board's three findings. In short, SACE has not identified any "clear error or abuse of discretion," and in the absence of such error or abuse the Commission should defer to the Board's ruling and deny the Petition. *See Vogtle*, CLI-11-8, 74 NRC at 220.

B. SACE Improperly Introduces a New Legal Standard for Reopening the Record in its Petition for Review

SACE argues that the Board "imposed a burden that was greater than what the law required for the contention submitted by SACE." Petition at 6. SACE claims that it "should have been required to show that the information was 'pertinent' under 10 CFR § 50.34(b), that the Staff's operating license review was important and more rigorous and timely than the Staff's post-Fukushima review process, and that it could result in changes to TVA's operating license application." *Id.*

Contrary to SACE's claim that the Board demanded more of SACE than the law requires, the Board's order makes clear that the Board demanded exactly what the law requires: In deciding that the motion was insufficient, the Board relied on nothing more or less than the text of the regulation itself. *See* LBP-15-14, 81 NRC at ___ (slip op. at 4–5, 6) (citing the three

criteria of § 2.326(a) and the affidavit requirement of § 2.326(b)). SACE offers no legal authority for its claim that the burden was "greater than what the law required for the contention submitted," Petition at 6, nor does SACE support its insinuation that the standard for reopening the record depends upon the nature of the underlying contention; rather, the new standard SACE proposes appears to have been manufactured from whole cloth. The standards governing reopening the record are clear: The Commission has consistently held that "[a]ll 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), and the requirements of § 2.326 have remained virtually unchanged since their adoption nearly 30 years ago. *Compare* 10 C.F.R. § 2.326 *with* Criteria for Reopening Records in Formal Licensing Proceedings, 51 Fed. Reg. 19,535 (May 30, 1986) (Final Rule).

If SACE were correct, and the regulations governing proceedings merely required a petitioner to demonstrate nothing more than that the information is "pertinent," Petition at 6, it would be impossible to keep a proceeding closed. That the information is "pertinent" is no test at all: The entire record is pertinent, and thus could give rise to endless contentions. The appropriate test—which the Board correctly applied in LBP-15-14—is considerably more stringent than simple pertinence: it requires a petitioner to demonstrate the existence of a significant safety or environmental issue and the likelihood of a materially different result. On this question, SACE is silent.

In its motion to reopen the record, SACE plainly stated that the motion satisfied all of the criteria of § 2.326(a) and (b). *See* Southern Alliance for Clean Energy's Motion to Reopen the Record at 2, 4 (Feb. 5, 2015). That motion did not mention any other standard for reopening the record, and at no time prior to filing its Petition did SACE argue that its motion should be

measured against some lower standard for reopening the record, and it is barred from doing so now. *See* 10 C.F.R. § 2.341(b)(5). Setting to one side the fact that this argument is new on appeal, SACE offers no legal basis for its suggestion that any standard other than that prescribed in 10 C.F.R. § 2.326 is appropriate in this proceeding.

C. SACE's Argument that the Board Has Improperly Shifted the Burden to the Intervenors is Contrary to Commission Regulations and Case Law

SACE states that by requiring SACE to show that the TVA's information was "defective," the Board "erroneously shifted the burden of proof from TVA to SACE," and claims that the Board has saddled SACE with the burden of demonstrating that WBN2 cannot be operated safely. Petition at 6–7.

SACE does not offer any support for its claim that any party other than the moving one should bear the burden of supporting its motion to reopen the record. Contrary to SACE's unsupported assertion, the Board left the burden of proof with the moving party, where it belongs. Section 2.326 and Commission case law are unambiguous:

> [This] interpretation shifts the burden — deliberately heavy and **deliberately placed on the party seeking reopening** — from parties advocating reopening to parties opposed to it. This is the exact opposite of what the rule requires. Under 10 C.F.R. § 2.326, it is not [the applicant's] (or the Staff's) burden to defeat the motion to reopen. **Instead, it is [the movant's] burden**, through its motion to reopen and in its accompanying affidavit . . . , **to demonstrate that the motion should be granted.**

See Oyster Creek, CLI-08-28, 68 NRC at 674 (emphasis added). Among the requirements the moving party must satisfy is the 2.326(b) affidavit that establishes "the factual and/or technical bases for the movant's claim" that 2.326(a) has been met. *See* 10 C.F.R. § 2.326(b).

SACE itself states that TVA's Expedited Seismic Evaluation Report, dated December 30, 2014, forms the entire basis for the proposed new contention. *See* LBP-15-14, 81 NRC at ___

(slip op. at 3–4). As the Board noted in its decision, the purpose of the report is "to demonstrate that there is no significant safety or environmental issue with respect to" WBN2. *Id.* at ___, (slip op. at 6, 7). In order to support the motion to reopen the record and the motion to admit a new contention, therefore, it follows that *SACE*, not TVA or the Staff, must show how "TVA's information is defective."

SACE, however, claims that the Board has improperly required SACE "to show that TVA's information is defective." Petition at 6–7. In other words, SACE apparently believes that it should be relieved of the responsibility for supporting its own motion to reopen the record (and, by extension, its proposed new contention). If SACE does not provide the requisite support—and the Board concluded that it did not—the motion to reopen must fail because it cannot raise a significant safety or environmental issue. Likewise, if SACE fails to offer any support for its motions, as the Board concluded, a materially different result in the proceeding would be impossible.

SACE's argument that the Board has improperly shifted the burden of supporting its motion to reopen the record from TVA to SACE is illogical and runs directly counter to the text of the regulation governing such motions and Commission precedent, and should be rejected.

CONCLUSION

As explained above, SACE does not identify any clear error or abuse of discretion by the Board in its order denying SACE's motion to reopen the record. Moreover, SACE raises spurious legal arguments that lack any legal basis. Therefore, the Petition for Review should be denied.

Respectfully submitted,

/signed (electronically) by Scott A. Vance/
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CERTIFICATE OF SERVICE

I certify that, on June 12, 2015, a copy of "Tennessee Valley Authority's Answer Opposing Southern Alliance for Clean Energy's Petition for Review of LBP-15-14" was served electronically through the E-Filing system on the participants in the above-captioned proceeding.

/signed electronically by/
Christopher C. Chandler