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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)
)
TENNESSEE VALLEY AUTHORITY) Docket No. 52-047-ESP
)
(Clinch River Nuclear Site))
)

NRC STAFF ANSWER OPPOSING PETITION TO INTERVENE AND REQUEST FOR
HEARING BY BLUE RIDGE ENVIRONMENTAL DEFENSE LEAGUE

INTRODUCTION

Pursuant to 10 C.F.R. § 2.309(i), the Staff of the Nuclear Regulatory Commission (NRC or Commission) hereby answers the “Hearing Request and Petition to Intervene by Blue Ridge Environmental Defense League,” (the Petition) filed on June 12, 2017, by the Blue Ridge Environmental Defense League (BREDL).¹ While the Staff agrees that BREDL has presented information sufficient to establish standing in this proceeding, BREDL filed the Petition impermissibly late and failed to address the late-filing requirements of 10 C.F.R. § 2.309(c)(1). Furthermore, BREDL failed to submit an admissible contention because BREDL’s contention does not meet the contention admissibility standards under 10 C.F.R. § 2.309(f)(1). Accordingly, as discussed more fully below, the Board should deny BREDL’s petition.

BACKGROUND

On May 12, 2016, the Tennessee Valley Authority (TVA), pursuant to the Atomic Energy Act of 1954, as amended (AEA), and the Commission’s regulations in 10 C.F.R. Part 52, filed an

¹ Hearing Request and Petition to Intervene by Blue Ridge Environmental Defense League (June 12, 2017) (Agencywide Documents Access and Management System (ADAMS) Accession No. ML17163A445) (Petition) and Declaration of Jake Almond (June 12, 2017) (ADAMS Accession No. ML17163A446), which are available together at ADAMS Package Accession No. ML17163A444.

application for an early site permit (ESP) at the Clinch River Nuclear Site in Oak Ridge, Tennessee.²

TVA's application is based on a plant parameter envelope encompassing light-water small modular reactors (SMRs) currently under development in the United States.³ Notably, "TVA has not made a decision to submit a combined license [COL] application or go forward with construction of a new plant."⁴ In its ER, TVA states that "[t]he proposed federal action is the NRC issuance, under the provisions of 10 CFR Part 52, of an ESP to TVA approving the CRN Site as a suitable site for future demonstration of the construction and operation of two or more SMRs."⁵ According to TVA:

[The] ER provides an analysis of the effects on the environment from site preparation, construction, operation, and decommissioning of two or more SMRs at the CRN Site. The proposed action does not include any decision or approval to build the facility. As TVA is not requesting limited work authorization as part of this ESPA, an NRC-issued combined license (COL) is required prior to initiation of construction.⁶

Within the ambit of "Alternatives," TVA's ER addresses three topics: (1) "No-Action Alternative,"⁷ (2) "Alternative Sites,"⁸ and (3) "Alternative Plant Systems."⁹ Significantly, TVA elected not to address energy alternatives, noting that an analysis of energy alternatives "is not

² Letter CNL-16-081 dated May 12, 2016, from J.W. Shea, TVA, to Document Control Desk, NRC, Subject: Application for Early Site Permit for Clinch River Nuclear Site (Letter CNL-16-081) (ADAMS Accession No. ML16139A752). TVA provided its application in parts, including Part 2 - Site Safety Analysis Report (SSAR), and Part 3 - Environmental Report (ER) (ADAMS Package Accession No. ML16144A145).

³ Letter CNL-16-081 at 1.

⁴ *Id.* at 2.

⁵ ER Section 1.1, "The Proposed Action," Rev. 0, at 1-1 (ADAMS Accession No. ML16144A085).

⁶ *Id.*

⁷ ER Section 9.1.

⁸ ER Section 9.3.

⁹ ER Section 9.4

required for an Early Site Permit Application.”¹⁰

On June 23, 2016, the Staff published in the *Federal Register* a notice of receipt and availability of the ESP application.¹¹ The Staff accepted the ESP application for docketing on January 12, 2017.¹² On April 4, 2017, the NRC published a notice of hearing and opportunity to petition for leave to intervene, which provided members of the public 60 days from the date of the publication to file a petition for leave to intervene in this proceeding.¹³ Pursuant to the notice, requests for a hearing and petitions to intervene were due by June 5, 2017.¹⁴ BREDL did not file a motion or request seeking an extension to the filing deadline. On June 12, 2017, BREDL filed its Petition. On June 20, 2017, an Atomic Safety and Licensing Board (Board) was established to preside over this proceeding.¹⁵

In its Petition, BREDL asserts that it has representational standing to intervene in this proceeding on behalf of one BREDL member who has standing through the proximity presumption.¹⁶ BREDL did not discuss the late-filing requirements of 10 C.F.R. 2.309(c). The Petition proposes one contention, which states that the TVA’s ER fails to provide complete and accurate information on alternatives, including the no-build option.¹⁷ The Staff addresses Petitioners’ standing, timeliness, and the contention *seriatim* below.

¹⁰ ER at 9.2-1.

¹¹ Tennessee Valley Authority; Clinch River Nuclear Site, 81 Fed. Reg. 40,929 (June 23, 2016) (Early site permit application; receipt).

¹² Tennessee Valley Authority; Clinch River Nuclear Site, 82 Fed. Reg. 3812 (Jan. 12, 2017) (Early site permit application; acceptance for docketing).

¹³ Tennessee Valley Authority; Clinch River Nuclear Site Early Site Permit Application and Associated Order Imposing Procedures for Access to Sensitive Unclassified Non-Safeguards Information and Safeguards Information, 82 Fed. Reg. 16,436 (Apr. 4, 2017) (Notice of hearing).

¹⁴ *Id.* at 16,437.

¹⁵ Notice, Establishment of Atomic Safety and Licensing Board; Tennessee Valley Authority (Clinch River Nuclear Site), Docket No. 52-047-ESP (June 20, 2017).

¹⁶ Petition at 4.

¹⁷ *Id.* at 6.

DISCUSSION

I. Legal Standards

A. Standing to Intervene

In accordance with Section 189a. of the AEA, which requires that the Commission “grant a hearing upon the request of any person whose interest may be affected by the proceeding[.]” and the Commission’s Rules of Practice:

[a]ny person whose interest may be affected by a proceeding and who desires to participate as a party must file a written request for hearing [or petition for leave to intervene] and a specification of the contentions which the person seeks to have litigated in the hearing.¹⁸

The regulations further provide that the Licensing Board “will grant the [petition] if it determines that the [petitioner] has standing under the provisions of [10 C.F.R. § 2.309(d)] and has proposed at least one admissible contention that meets the requirements of [10 C.F.R. § 2.309(f)].”¹⁹

Under the general standing requirements in 10 C.F.R. § 2.309(d)(1), a request for a hearing or a petition for leave to intervene must state:

- (i) The name, address and telephone number of the requestor or petitioner;
- (ii) The nature of the requestor’s/petitioner’s right under the [AEA] to be made a party to the proceeding;
- (iii) The nature and extent of the requestor’s/petitioner’s property, financial or other interest in the proceeding; and
- (iv) The possible effect of any decision or order that may be issued in the proceeding on the requestor’s/petitioner’s interest.”²⁰

In evaluating whether the petitioner has the requisite “interest” as required by § 2.309(d)(iv), the

¹⁸ Atomic Energy Act of 1954, as amended, 42 U.S.C. § 2239a.(1)(A) (2015); 10 C.F.R. § 2.309(a).

¹⁹ 10 C.F.R. § 2.309(a).

²⁰ 10 C.F.R. § 2.309(d)(1).

Commission uses contemporaneous judicial concepts of standing.²¹ The petitioner must demonstrate a “concrete and particularized injury that is fairly traceable to the challenged action and is likely to be redressed by a favorable decision, where the injury is to an interest arguably within the zone of interests protected by the governing statute.”²² The petitioner has the burden of proving that standing requirements are met, but the hearing request will be evaluated in the petitioner’s favor.²³

In certain cases, the Commission recognizes a “proximity presumption” in which a petitioner may satisfy the standing requirements by demonstrating that his or her residence or activities are within a 50 mile radius of a plant.²⁴ The proximity presumption establishes standing without the need to establish the elements of injury, causation, or redress.²⁵ In addressing standing of three ESP applicants, an Atomic Safety and Licensing Board explained that “in cases involving the possible construction or operation of a nuclear power reactor, proximity to the proposed facility has been considered sufficient to establish the requisite injury-in-fact.”²⁶

If an organization seeks to intervene on behalf of its members, the organization may seek representational standing.²⁷ In doing so, the organization must “identify the member(s)

²¹ See *Fla. Power & Light Co.* (Turkey Point Nuclear Generating Units 3 & 4), CLI-15-25, 82 NRC 389, 394 (2015); *Calvert Cliffs 3 Nuclear Project, LLC, & UniStar Nuclear Operating Servs., LLC* (Calvert Cliffs Nuclear Power Plant, Unit 3), CLI-09-20, 70 NRC 911, 915 (2009).

²² *Calvert Cliffs*, CLI-09-20, 70 NRC at 915 (citing *Cleveland Elec., Illuminating Co.* (Perry Nuclear Power Plant, Unit 1), CLI-93-21, 38 NRC 87, 92 (1993) (internal quotations omitted)); see also *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559-61 (1992) (describing framework for judicial standing).

²³ *Turkey Point*, CLI-15-25, 82 NRC 389, 394; *Commonwealth Edison Co.* (Zion Nuclear Power Station, Units 1 and 2), CLI-00-5, 51 NRC 90, 98 (2000); *Ga. Inst. of Tech.* (Ga. Tech. Research Reactor, Atlanta Georgia), CLI-95-12, 42 NRC 111, 115 (1995).

²⁴ *Calvert Cliffs*, CLI-09-20, 70 at 915-16; *Exelon Generation Co., LLC* (Early Site Permit for Clinton ESP Site), LBP-04-17, 60 NRC 229, 238 (2004).

²⁵ *Fla. Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 & 4), LBP-01-6, 53 NRC 138, 150 (2001).

²⁶ Clinton ESP Site, LBP-04-17, 60 NRC at 238.

²⁷ *Id.*

they purport to represent and . . . provide proof of authorization.”²⁸ Further, “[t]he member seeking representation must qualify for standing in his or her own right; the interests that the representative organization seeks to protect must be germane to its own purpose; and neither the asserted claim nor the requested relief must require an individual member to participate in the organization's legal action.”²⁹

B. Contention Admissibility

Unless otherwise provided by the Commission, the request or petition and the list of contentions must be filed by the time specified in the *Federal Register* notice of agency action.³⁰ The standards governing the admissibility of a contention filed after the initial deadline for filing are set forth in 10 C.F.R. § 2.309(c)(1), which provides that filings after the deadline will not be entertained absent a determination by the presiding officer that a participant has demonstrated good cause by showing that: (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.³¹ A petitioner’s failure to address these late-filing criteria constitutes “reason enough” to reject a proposed new contention.³²

The legal requirements governing the admissibility of contentions are well-established and are currently set forth in 10 C.F.R. § 2.309(f) of the Commission’s Rules of Practice (formerly 10 C.F.R. § 2.714(b)).³³ As set forth in 10 CFR § 2.309(f):

²⁸ *Consumers Energy Co. (Palisades Nuclear Power Plant)*, CLI-07-18, 65 NRC 399, 409 (2007); *Clinton ESP Site*, LBP-04-17, 60 NRC at 238.

²⁹ *Palisades*, CLI-07-18, 65 NRC at 409.

³⁰ 10 CFR § 2.309(b)(3)(i).

³¹ 10 CFR § 2.309(c).

³² *Dominion Nuclear Conn., Inc. (Millstone Power Station, Unit 3)*, CLI-09-5, 69 N.R.C. 115, 126 (2009).

³³ In 2004, the Commission codified the requirements of former § 2.714, together with rules regarding contentions set forth in Commission cases, in 10 C.F.R. § 2.309(f)(1). See Changes to

A request for hearing or petition for leave to intervene must set forth with particularity the contentions sought to be raised. For each contention, the request or petition must:

- i. Provide a specific statement of the issue of law or fact to be raised or controverted[];
- ii. Provide a brief explanation of the basis for the contention;
- iii. Demonstrate that the issue raised in the contention is within the scope of the proceeding;
- iv. 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;
- v. Provide a concise statement of the alleged facts or expert opinions which support the requestor's/petitioner's position on the issue and on which the petitioner intends to rely at hearing, together with references to the specific sources and documents on which the requestor/petitioner intends to rely to support its position on the issue;
- vi. [P]rovide sufficient information to show that a genuine dispute exists with the applicant/licensee on a material issue of law or fact. This information must include references to specific portions of the application (including the applicant's environmental report and safety report) that the petitioner disputes and the supporting reasons for each dispute, or, if the petitioner believes that the application fails to contain information on a relevant matter as required by law, the identification of each failure and the supporting reasons for the petitioner's belief[.]

The purpose of the contention admissibility standards of 10 C.F.R. § 2.309(f)(1) is to “focus litigation on concrete issues and result in a clearer and more focused record for decision.”³⁴ The Commission has held that it (the Commission) “should not have to expend

Adjudicatory Process, 69 Fed. Reg. 2182 (Jan. 14, 2004) (Final rule), *as corrected*, Changes to Adjudicatory Process; Correction, 69 Fed. Reg. 25,997 (May 11, 2004). In the Statements of Consideration for the final rule, the Commission cited several Commission and Atomic Safety and Licensing Appeal Board decisions applying former § 2.714 in support of the codified provisions of § 2.309. See 69 Fed. Reg. at 2202. Accordingly, Commission and Atomic Safety and Licensing Appeal Board decision on former § 2.714 retain their vitality, except to the extent the Commission changed the provisions of § 2.309 as compared to former § 2.714.

³⁴ Changes to Adjudicatory Process, 69 Fed. Reg. at 2202.

resources to support the hearing process unless there is an issue that is appropriate for, and susceptible to, resolution in an NRC hearing.”³⁵ The Commission has emphasized that the rules on contention admissibility are “strict by design.”³⁶ Attempting to meet these requirements by “[m]ere ‘notice pleading’ does not suffice[,]”³⁷ and failure to comply with any of the requirements is grounds for the dismissal of the contention.³⁸ To meet 10 C.F.R. § 2.309(f)(1), “the support for a contention, as reflected in its stated bases and any accompanying affidavits or documentary information, should be set forth with reasonable specificity so as [‘]to put the other parties on notice as to what issues they will have to defend against or oppose.[’]”³⁹ Petitioners “must present sufficient information to show a genuine dispute” and reasonably “indicat[e] that a further inquiry is appropriate.”⁴⁰ Petitioners must also demonstrate that an issue raised in a contention is within the scope of the proceeding,⁴¹ and that the issue is “material,” which the Commission has defined as an issue where “resolution of the dispute would make a difference in the outcome of the licensing proceeding.”⁴² And, a licensing board “may not make factual

³⁵ *Id.*

³⁶ *Dominion Nuclear Conn., Inc.* (Millstone Nuclear Power Station, Units 2 & 3), CLI-01-24, 54 NRC 349, 358 (2001), *petition for reconsideration denied*, CLI-02-01, 55 NRC 1 (2002).

³⁷ *Amergen Energy Co., L.L.C.* (Oyster Creek Nuclear Generating Station), CLI-06-24, 64 NRC 111, 119 (2006).

³⁸ *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-99-10, 49 NRC 318, 325 (1999); *Dominion Nuclear Conn., Inc.* (Millstone Nuclear Power Station, Units 2 & 3), CLI-05-24, 62 NRC 551, 567 (2005).

³⁹ *Southern Nuclear Operating Company* (Early Site Permit for Vogtle ESP Site), LBP 67 NRC 54, 73 (2008) (quoting *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), ALAB-899, 28 NRC 93, 97 (1988)).

⁴⁰ 10 C.F.R. § 2.309(f)(1)(vi); *Ga. Tech.*, CLI-95-12, 42 NRC at 118.

⁴¹ 10 C.F.R. § 2.309(f)(1)(iii); *Nuclear Management Company, LLC* (Palisades Nuclear Plant), LBP-06-10, 63 NRC 314, 338 (2006) (stating requirements of 10 CFR § 2.309(f)(1)(iii) and elaborating that “Contentions are necessarily limited to issues that are germane to the application pending before the Board, and are not cognizable unless they are material to matters that fall within the scope of the proceeding for which the licensing board has been delegated jurisdiction as set forth in the Commission’s notice of opportunity for hearing.” (footnotes omitted)).

⁴² 10 C.F.R. § 2.309(f)(1)(iv); Rules of Practice for Domestic Licensing Proceedings-Procedural Changes in the Hearing Process, 54 Fed. Reg. 33,168, 33,172 (Aug. 11, 1989).

inferences on [a] petitioner's behalf."⁴³

Further, to be admitted, contentions must satisfy the criteria in 10 C.F.R. § 2.309(f)(2), which requires that "[c]ontentions must be based on documents or other information available at the time the petition is to be filed, such as the application, supporting safety analysis report, environmental report or other supporting document filed by an applicant or licensee, or otherwise available to a petitioner."⁴⁴ For issues under the National Environmental Policy Act (NEPA), petitioners are required to file contentions based on the applicant's environmental report.⁴⁵

These rules focus the hearing process on real disputes susceptible to resolution in an adjudicatory proceeding.⁴⁶ Finally, it is well established that the purpose for requiring a would-be intervener to establish the basis of each proposed contention is: (1) to assure that the contention raises a matter appropriate for adjudication in a particular proceeding; (2) to establish a sufficient foundation for the contention to warrant further inquiry into the assertion; and (3) to put other parties sufficiently on notice of the issues so that they will know generally what they will have to defend against or oppose.⁴⁷

II. BREDL Established Representational Standing

The Petition briefly describes BREDL as a regional, non-profit environmental education organization.⁴⁸ The Petition identifies one member who, by declaration attached to the Petition,

⁴³ *Ga. Institute of Technology* (Ga. Tech. Research Reactor, Atlanta, Georgia), LBP-95-6, 41 NRC 281, 305, *vacated in part and remanded on other grounds*, CLI-95-10, 42 NRC 1, and *aff'd in part*, CLI-95-12, 42 NRC 111 (1995) (citing *Ariz. Public Service Co.* (Palo Verde Nuclear Generating Station, Units 1, 2, & 3), CLI-91-12, 34 NRC 149, 155-56 (1991)).

⁴⁴ 10 C.F.R. § 2.309(f)(2).

⁴⁵ *Id.*

⁴⁶ *Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, & 3), CLI-99-11, 49 NRC 328, 334 (1999).

⁴⁷ *Peach Bottom*, ALAB-216, 8 AEC at 20-21; *Ariz. Pub. Serv. Co.* (Palo Verde Nuclear Generating Station, Units 1, 2 and 3), LBP-91-19, 33 NRC 397, 400 (1991), *appeal granted in part* 34 NRC 149 (1991).

⁴⁸ Petition at 2.

authorizes BREDL to represent his interests in this proceeding.⁴⁹ The Petition and the BREDL member's declaration state that the member lives within 50 miles of the Clinch River site, and further state that the member would be adversely affected by an accident at the proposed facility.⁵⁰ As such, the BREDL member qualifies for standing in his own right because he qualifies for the proximity presumption.⁵¹

Therefore, BREDL can establish representational standing—it has shown that it has at least one member with standing who authorizes BREDL to represent his interests,⁵² and the interests that BREDL seeks to protect appear germane to its own purpose.⁵³ Thus, BREDL has provided information in the Petition that appears to meet the requirements for representational standing, as provided in *Palisades*.⁵⁴ For these reasons, the Staff does not oppose representational standing of BREDL.

III. BREDL Filed After the Deadline Without Good Cause

The due date for timely contentions in this proceeding was June 5, 2017.⁵⁵ On May 5, 2017, Southern Alliance for Clean Energy (SACE) and the Tennessee Environmental Council (TEC) submitted a request to the Commission for a one-week extension for filing their intervention petition in this proceeding.⁵⁶ Their request for an extension did not state, or

⁴⁹ *Id.* at 4; Petition at Declaration of Jake Almond.

⁵⁰ Petition at 4; Petition at Declaration of Jake Almond

⁵¹ *Consumers Energy Co. (Palisades Nuclear Power Plant)*, CLI-07-18, 65 NRC 399, 409 (2007); *see* Clinton ESP Site, LBP-04-17, 60 NRC at 238.

⁵² Petition at 4-5; *see* Clinton ESP Site, LBP-04-17, 60 NRC at 238.

⁵³ Petition at 4-5; *Palisades*, CLI-07-18, 65 NRC at 409-10.

⁵⁴ *Id.*

⁵⁵ Tenn. Valley Authority, Docket Nos. 52-047-ESP, Clinch River Nuclear Site, Oak Ridge, Tennessee, 82 Fed. Reg. 16,436, 16,437 (April 4, 2017) (Notice).

⁵⁶ Request by [SACE] and [TEC] for Extension of Time Periods for Submitting Hearing Requests and Reply to Responses (May 5, 2017) (ADAMS Accession No. ML17125A077).

otherwise indicate, that any other party sought an extension.⁵⁷ The Commission's June 2, 2017, Order granted SACE's and TEC's request, and directed the Order only to SACE and TEC.⁵⁸ Therefore, for all potential parties other than SACE and TEC, the original filing deadline remained June 5, 2017, as required by 10 C.F.R. § 2.309(b)(3)(i) and the April 4, 2017 *Federal Register* notice.⁵⁹

Unlike SACE and TEC, BREDL did not request additional time to file its intervention petition and did not file an appearance before the Commission prior to the filing deadline.⁶⁰ BREDL's June 12, 2017, filing was, therefore, impermissibly late. Moreover, BREDL's Petition failed to address the late-filing factors of 10 C.F.R. § 2.309(c), and did not explain why it was unable to meet the June 5, 2017 filing deadline. BREDL's failure to address the Commission's late-filing requirements in 10 C.F.R. § 2.309(c) constitutes "reason enough" to reject BREDL's proposed new contention.⁶¹

BREDL's untimely filing in this proceeding is similar to, and should be treated consistent with, BREDL's untimely filing in the Watts Bar Unit 2 operating license proceeding, which both the Commission and Licensing Board rejected.⁶² There, SACE requested two additional weeks to file its petition to intervene in the Watts Bar Unit 2 proceeding and the Commission granted

⁵⁷ *Id.*

⁵⁸ Order (June 2, 2017) (unpublished Commission order) (ADAMS Accession No. ML17153A326) ("The Southern Alliance for Clean Energy and Tennessee Environmental Council (together, "Petitioners") requested a one-week extension of time to file hearing requests on TVA's application, and they requested a one-week extension of time to file replies to any answers to their hearing requests. ...After reviewing all the pleadings, I am granting petitioners' request.").

⁵⁹ Notice, 82 Fed. Reg. at 16,437.

⁶⁰ Notice of Appearance for Louis A. Zeller, June 8, 2017 (ADAMS Accession No. ML17159A684) (counsel for BREDL entered an appearance three days after the June 5, 2017 filing deadline for timely contentions).

⁶¹ *Millstone*, CLI-09-5, 69 NRC at 126.

⁶² *Tenn. Valley Authority* (Watts Bar Unit 2), LBP-09-26, 70 NRC 939 (2009); *aff'd Tennessee Valley Auth.* (Watts Bar Nuclear Plant, Unit 2), CLI-10-12, 71 NRC 319 (2010).

SACE its requested extension.⁶³ BREDL, among four other petitioners, failed to seek an extension in advance of the filing deadline. There, as here, BREDL filed its petition after the deadline for hearing petitions specified in the *Federal Register* notice for the proceeding, in violation of 10 C.F.R. § 2.309(b)(3)(i), without addressing the late-filing factors in 10 C.F.R. § 2.309(c).⁶⁴ Accordingly, the Board denied BREDL's hearing request and denied party status for BREDL and the other late-filing joint petitioners, and the Commission affirmed the Board decision.⁶⁵ The Board noted, "the [SACE] request for an extension did not state, or otherwise indicate, that any party in addition to SACE was seeking an extension. Likewise, the Commission Order granting the extension was not general in nature but was directed only to SACE."⁶⁶ The Commission explained that, "[a]t bottom, Petitioners [in Watts Bar] failed to demonstrate good cause for their late filing."⁶⁷

Similarly, in the present proceeding, the June 2, 2017, Commission Order was directed only to SACE and TEC, and as such, the BREDL Petition is impermissibly late. Further, because BREDL failed to discuss or attempt to justify the lateness in accordance with 10 C.F.R. § 2.309(c), there is "reason enough" to reject BREDL's proposed new contention.⁶⁸ Accordingly, BREDL's request should be denied.⁶⁹

⁶³ [SACE]'s Request for Extension of Time to Submit Hearing Request/Petition to Intervene (June 16, 2009); Order of the Secretary (Granting [SACE]'s Request for Extension of Time) (June 24, 2009) (ADAMS Accession No. ML091570643).

⁶⁴ *Watts Bar*, LBP-09-26, 70 NRC at 949-51.

⁶⁵ *Id.* at 951; *Watts Bar*, CLI-10-12, 71 NRC 319.

⁶⁶ *Watts Bar*, LBP-09-26, 70 NRC at 949.

⁶⁷ *Watts Bar*, CLI-10-12, 71 NRC at 324.

⁶⁸ Millstone Power Station, CLI-09-05, 69 at 126.

⁶⁹ See *Tennessee Valley Authority* (Watts Bar Unit 2), LBP-09-26, 70 NRC 939 (2009); *Boston Edison Co.* (Pilgrim Nuclear Power Station), ALAB-816, 22 NRC 461 (1985) (affirming denial of an experienced petitioner who filed eight days late and failed to address the late-filing requirements in the previous rule 10 C.F.R. § 2.714(a)).

IV. The Staff Opposes Admission of the Proposed Contention

A. BREDL's Contention Concerns TVA's Discussion of Alternatives

BREDL's proposed contention is: "TVA's Environmental Report Fails to Provide Complete and Accurate Information on Alternatives, Including the No-Build Option."⁷⁰ BREDL identifies the following dispute:

TVA states: "Title 10 of the Code of Federal Regulations 51.50(b)(2) does not require a need for power discussion be included in an early site permit application." ESP Environmental Report, Part 3 Chapter 8, NEED FOR POWER. Nevertheless, in Chapter 1 of the same ER, (ML16144A085), TVA opens the door to the question of need by attempting to justify its site permit on the basis of global warming and energy security. Based on our information and analysis, the no-action alternative is the preferred option.⁷¹

Further, BREDL asserts:

Federal regulations at 10 CFR 51.50(b)(2) require, *inter alia*, that "The environmental report must address all environmental effects of construction and operation necessary to determine whether there is any obviously superior alternative to the site proposed." TVA's Environmental Report fails to adequately address alternatives including the no-action alternative.⁷²

BREDL's basis for its contention is stated as: "[t]he Applicant has not fulfilled its NEPA obligation to provide a detailed, accurate statement, with particularity to the no-build option."⁷³ BREDL states that the issue raised is within the scope of the proceeding because the Commission's regulations require each applicant for an early site permit to submit with its application a separate document, entitled "Applicant's Environmental Report—Early Site Permit Stage," which shall contain certain information.⁷⁴ BREDL states the issue raised is material to

⁷⁰ Petition at 6.

⁷¹ *Id.* at 13.

⁷² *Id.* (providing BREDL's overall conclusion).

⁷³ *Id.* at 7.

⁷⁴ *Id.* at 7-8 (quoting portions of 10 CFR §§ 51.50(b), 51.45(b)(3), 51.51, and 51.52).

the findings the NRC must make, and, to that end, states that the NRC's "[a]cceptance of the no-action criteria is based on 10 CFR 51, Appendix A to subpart A, with respect to the analysis of alternatives, and Regulatory Guide 4.2, Rev. 2, *Preparation of Environmental Reports for Nuclear Power Stations*, with respect no-action alternatives."⁷⁵

Concerning supporting facts, documents, and expert opinions, upon which the intervenor intends to rely, BREDL discusses TVA's Environmental Report, three Executive Orders, and a report by Arjun Makhijani, PhD, for the Institute for Energy and Environmental Research.⁷⁶ According to BREDL, the ER "gives short shrift to alternatives, with summary dismissal of the no-action alternative"⁷⁷ with "[z]ero analysis to justify this dismissal."⁷⁸ BREDL asserts that the discussion of alternatives in the ER is limited.⁷⁹ BREDL argues that TVA will not achieve the goals concerning "Global Warming"⁸⁰ and "Critical Infrastructure"⁸¹ outlined in Executive Order 13514, "Federal Leadership in Environmental, Energy, and Economic Performance,"⁸² Executive Order 13693, "Planning for Federal Sustainability in the Next Decade,"⁸³ or Executive Order 13636, "Improving Critical Infrastructure Cybersecurity."⁸⁴

⁷⁵ *Id.* at 8.

⁷⁶ *Id.* at 8-14.

⁷⁷ *Id.* at 8.

⁷⁸ *Id.* at 9.

⁷⁹ *Id.* at 9 (giving examples of some of the discussions of "Alternative Plant Systems" from Section 9.4 of the ER).

⁸⁰ *Id.* at 9-11.

⁸¹ *Id.* at 12-13.

⁸² Exec. Order No. 13,514, 3 C.F.R. § 13514 (2009-2015), 74 Fed. Reg. 52,117, (Oct. 5, 2009) (revoked by 80 Fed. Reg. 15,871 (March 19, 2015)).

⁸³ Exec. Order No. 13,693, 3 C.F.R. § 13693 (2015), 80 Fed. Reg. 15,871 (March 19, 2015).

⁸⁴ Exec. Order No. 13,636, 3 C.F.R. § 13636 (2013), 78 Fed. Reg. 11,739 (Feb. 12, 2013).

B. BREDL Has Not Provided An In-Scope Basis Showing A Genuine Dispute On A Material Issue Concerning “No-Action Alternative” In Section 9.1 Of The ER.

Concerning the “No-Action Alternative” in the ER,⁸⁵ BREDL argues about: (1) whether usage of a small modular reactor would impact global warming given the federal government’s energy usage trends;⁸⁶ (2) whether an executive order provides TVA with justification for small modular reactors;⁸⁷ and (3) whether small modular reactors could achieve safety goals stated in a cybersecurity executive order.⁸⁸ But none of these arguments show a genuine dispute with the no-action alternative analysis in the ER on a material matter.⁸⁹ Section 9.1, which contains TVA’s no-action alternative analysis, essentially says that the no-action alternative would maintain the *status quo*;⁹⁰ BREDL has not argued otherwise. BREDL’s provided basis does not explain what BREDL believes is wrong with the no-action alternative analysis in the ER.⁹¹ Accordingly, and as discussed further below, these aspects of BREDL’s contention fail to satisfy 10 CFR §§ 2.309(f)(1)(ii) (basis), (iii) (scope), and (vi) (genuine dispute with the application on a material issue).⁹²

⁸⁵ In its analysis of the no-action alternative, TVA described, among other things, how under the no-action alternative, the NRC would not issue an early site permit; TVA would not pursue a demonstration of small modular reactor technology at Clinch River; and the environmental impacts associated with the project would not occur. ER at 9.1-1. Instead, the site would remain relatively unused. ER at 9.1-1.

⁸⁶ Petition at 9-10.

⁸⁷ Petition at 10-11.

⁸⁸ Petition at 12-13.

⁸⁹ *Ga. Tech*, CLI-95-12, 42 NRC at 118 (“An intervenor need not, however, prove its case at the contention stage. ... What is required is a [“]minimal showing[“] that material facts are in dispute, indicating that a further inquiry is appropriate.” (footnotes omitted).

⁹⁰ ER at 9.1-1

⁹¹ Petition at 7; *Amergen Energy Co., L.L.C.* (Oyster Creek Nuclear Generating Station), CLI-06-24, 64 NRC 111, 119 (2006).

⁹² Note, in 2004 in the ESP proceeding for North Anna ESP site, BREDL and other petitioners filed a contention addressing an omission of no-action alternatives in the ER. In that proceeding, the Board admitted the contention, and the parties eventually settled after the applicant revised the ER to include a discussion of the no-action alternative. However, the North Anna ESP proceeding is distinguished from the case at hand because the North Anna ESP ER did not include a no-action

First, regarding trends in federal government energy use, BREDL claims that “[a] modular nuke at Clinch River would not have any impacts here,” and that “the general trend in energy use by the federal government has been downward for the last for decades, and is now in steep decline,” which BREDL attributes to energy-saving tools other than SMRs.⁹³ BREDL fails to explain how its belief that SMRs will not impact energy usage supports its argument that the ER’s no-action alternative analysis did not provide complete and accurate information. BREDL also fails to explain how federal government energy usage falls within the scope of this ESP proceeding.⁹⁴ Thus, this basis does not support the contention, is out of scope, and fails to raise a genuine dispute with the application on a material issue, and therefore does not meet 10 C.F.R. §§ 2.309(f)(1)(ii), (iii), and (vi).

Second, BREDL claims that Executive Order 13636,⁹⁵ replacing Executive Order 13514, “provides TVA with no justification for so-called small modular reactors.”⁹⁶ But, there is no requirement that an applicant must have justification from an executive order to file an application for an ESP, and this claim does not raise a genuine dispute with the application. BREDL’s argument that siting an SMR at the Clinch River Nuclear Site does not advance the

alternative analysis. In contrast, TVA has included a no-action alternatives analysis in its ESP ER. See Contentions of Blue Ridge Environmental Defense League, Nuclear Information and Resource Service, and Public Citizen Regarding Early Site Permit Application for Site of North Anna Nuclear Power Plant (May 3, 2004) (ADAMS Accession No. ML041320393); Joint Motion for Approval of Settlement and Dismissal of Contention EC 3.3.4, *Dominion Nuclear North Anna LLC* (Early Site Permit for North Anna ESP Site) (Dec. 29, 2004) (ADAMS Accession No. ML050050472); *Dominion Nuclear North Anna LLC* (Early Site Permit for North Anna ESP Site), LBP-04-18, 60 NRC 253, 272 (2004); Order (Approving Settlement and Dismissal of Contention EC 3.3.4), *Dominion Nuclear North Anna LLC* (Early Site Permit for North Anna ESP Site) (Jan. 6, 2005) (ADAMS Accession No. ML0501040358).

⁹³ Petition at 10.

⁹⁴ 10 C.F.R. § 51.50(b)(2); see *Palisades*, LBP-06-10, 63 NRC at 338.

⁹⁵ Concerning executive orders, TVA’s no-action analysis noted that if it took no action, then it could not demonstrate the ability of small modular reactors to meet those goals. ER at 9.1-1.

⁹⁶ Petition at 11. TVA describes Executive Order 13514, Federal Leadership in Environmental, Energy, and Economic Performance, as having “directed all Federal Agencies to reduce their greenhouse gas (GHG) emissions by 28% by 2020,” and the subsequent Exec. Order 13636 as having “called for further reduction of Federal facility GHG emissions to 40 percent by 2025, and identified SMRs as one of the ‘alternative energy’ options for meeting clean energy goals.” Application at 3.1.1.

global warming goals in the Executive Order is also outside the scope of this ESP proceeding.⁹⁷ As such, BREDL's basis regarding the lack of justification for SMRs does not support the contention, is out of scope, and does not raise a genuine dispute on a material issue. It should be rejected for failing to meet 10 C.F.R. §§ 2.309(f)(1)(ii), (iii), and (vi).

Finally, BREDL discusses Executive Order 13636, "Improving Critical Infrastructure Cyber Security," and describes purported safety concerns that Dr. Arjun Makhijani raises regarding fewer operating staff in control rooms at SMRs.⁹⁸ BREDL also describes other safety concerns with SMRs, but does not provide reference to specific sources supporting these concerns, as required by 10 C.F.R. 2.309(f)(1)(v).⁹⁹ BREDL does not explain how any of these purported safety concerns support the environmental contention regarding the no-action alternatives analysis, let alone address the cybersecurity issues in Executive Order 13636. Petitioners bear the burden of explaining how the bases and facts they provide support their contention; leaving such matters open to speculation or inference is not permitted under the Commission's rules.¹⁰⁰ For this reason, and because this discussion fails to provide information sufficient to demonstrate a genuine dispute with the application, this portion of the contention is inadmissible pursuant to 10 C.F.R. §§ 2.309(f)(1)(v) and (vi).

C. BREDL Does Not Provide A Meaningful Basis To Support A Genuine Dispute About Alternative Plant Systems In Section 9.4 Of The ER.

In addition to the discussions of the no-action alternative, BREDL briefly faults the

⁹⁷ See *Palisades*, LBP-06-10, 63 NRC at 338.

⁹⁸ Petition at 12.

⁹⁹ *Id.*; 10 C.F.R. 2.309(f)(1)(v); *Luminant Generation Co., LLC* (Comanche Peak Nuclear Power Plant, Units 3 & 4), LBP-09-17, 70 NRC 311, 329 (2009).

¹⁰⁰ *Ga. Inst. of Tech.* (Ga. Tech. Research Reactor, Atlanta, Georgia), LBP-95-6, 41 NRC 281, 305 (1995), vacated in part and remanded on other grounds, CLI-95-10, 42 NRC 1, and aff'd in part, CLI-95-12, 42 NRC 111 (1995) ("[I]t is the petitioner who is obligated to provide the analyses and expert opinion showing why its bases support its contention... [T]he Board may not make factual inferences on [a] petitioner's behalf.") (citing *Ariz. Public Service Co.* (Palo Verde Nuclear Generating Station, Units 1, 2, & 3), CLI-91-12, 34 NRC 149, 155-56 (1991)).

“limited” discussions of “Alternatives” in the ER.¹⁰¹ Although not specified by BREDL, this portion of BREDL’s discussion appears to concern the “Alternative Plant Systems” discussion in Section 9.4 of the ER, which provides a comparison of the various potential environmental impacts of the proposed heat dissipation system and comparable alternatives.¹⁰² However, BREDL does not explain how Section 9.4 of the ER is limited, and does not elaborate or otherwise demonstrate what error or omission it believes TVA made in Chapter 9.4 of the ER. Accordingly, this aspect of BREDL’s basis fails to support the contention and fails to raise a genuine dispute on a material issue reasonably indicating that a further inquiry is appropriate, and thus does not satisfy 10 CFR §§ 2.309(f)(1)(ii) and (vi).¹⁰³

D. BREDL’s Dispute Over Need For Power In Chapter 8 Of The ER Is Out Of Scope. Not Material to Staff’s Findings. And Does Not Raise a Genuine Dispute

BREDL asserts that TVA “open[ed] the door to the question of need [for power] by attempting to justify its site permit on the basis of global warming and energy security.”¹⁰⁴ BREDL and TVA agree that the Commission’s regulations do not require submittal of a discussion of the need for power in an ESP application pursuant to 10 C.F.R. § 51.50(b)(2).¹⁰⁵ TVA opted not to include an analysis of the need for power in the ER for its ESP application.¹⁰⁶ To that end, TVA’s Environmental Report, Chapter 8, “Need for Power,” says TVA will reserve

¹⁰¹ Petition at 9.

¹⁰² *Id.* (“The discussion of Alternatives in ER Chapter 9 is likewise limited solely to various methods of providing thermoelectric cooling such as cooling towers with natural draft, dry, wet natural draft and wet-dry systems, cooling and spray ponds.”); see ER Section 9.4.1.

¹⁰³ *Seabrook*, ALAB-899, 28 NRC at 97 (stating that support for a contention as reflected in its bases should put the other parties on notice as to what issues they will have to defend against or oppose); *Ga. Tech*, CLI-95-12, 42 NRC at 118.

¹⁰⁴ Petition at 13.

¹⁰⁵ See *id.* (citing ER Rev. 0 at 8-1 (stating that 10 CFR 51.50(b)(2) does not require a need for power discussion to be included in an early site permit application).

¹⁰⁶ ESP Application, Part 3, Environmental Report at 9.0-1 and 9.2-1.

that analysis for a future combined license application for the site.¹⁰⁷

BREDL's argument about statements addressing global warming elsewhere in the ER does not overcome the plain language of the ER and the regulation in 10 C.F.R. § 51.50(b)(2): the need for power will be included in the future and is not part of in the instant application. Because TVA's application did not include a discussion of need for power, 10 C.F.R. § 51.75(b) prohibits including an assessment of the need for power in the NRC's environmental impact statement.¹⁰⁸ Therefore, the need for power discussion is not material to the findings the Commission must make to issue an ESP pursuant to 10 C.F.R. § 52.24(a)(8) (NEPA findings must be made).

For the above reasons, BREDL's assertion that "TVA open[ed] the door" to the need for power does not make a difference in the outcome of this proceeding,¹⁰⁹ is not germane to the application,¹¹⁰ and fails to raise a genuine dispute of material fact with the application indicating that a further inquiry is appropriate.¹¹¹ Accordingly, this aspect of BREDL's contention fails to satisfy 10 CFR §§ 2.309(f)(1)(iii), (iv) and (vi).¹¹²

¹⁰⁷ ER, Rev. 0 at 8-1.

¹⁰⁸ 10 C.F.R. § 51.75(b) ("The draft environmental impact statement must not include...need for power... unless these matters are addressed in the [ESP] [ER].").

¹⁰⁹ *Palisades*, LBP-06-10, 63 NRC at 338-39.

¹¹⁰ *See id.* at 338 (stating "Contentions are necessarily limited to issues that are germane to the application pending before the Board[.]").

¹¹¹ *Ga. Tech*, CLI-95-12, 42 NRC at 118.

¹¹² *Cf. Watts Bar*, LBP-09-26, 70 NRC at 977 ("Since TVA was thus not obligated to include any discussion of the need for power or of alternative energy sources in its application for an operating license, a challenge to the adequacy of TVA's discussion of these issues is not within the scope of this proceeding at this point. Accordingly, we cannot admit this contention.").

CONCLUSION

For the reasons set forth above, BREDL's petition should be denied because it is impermissibly late pursuant to 10 C.F.R. § 2.309(c)(1). Additionally, BREDL's contention, which asserts that TVA's Environmental Report fails to adequately address alternatives including the no-action alternative, does not satisfy the contention admissibility standards set forth in 10 C.F.R. § 2.309(f)(1) because (1) BREDL has not provided an in-scope basis showing a genuine dispute on a material issue concerning "No-Action Alternative" in Section 9.1 of the ER; (2) BREDL does not provide a meaningful basis to support a genuine dispute about alternative plant systems in Section 9.4 of the ER; and (3) BREDL's dispute over need for power in Chapter 8 of the ER is out of scope, immaterial to staff's findings, and does not raise a genuine dispute on a material issue. For these reasons, the Petition fails to satisfy 10 C.F.R. §§ 2.309(f)(1)(ii), (iii), (iv), (v), and (vi), and should be denied.

Respectfully submitted,

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/Executed in Accord with 10 CFR 2.304(d)/

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Dated at Rockville, Maryland
This 7th day of July, 2017

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)
)
TENNESSEE VALLEY AUTHORITY) Docket Nos. 52-047-ESP
)
(Clinch River Nuclear Site))
)

CERTIFICATE OF SERVICE

I hereby certify that the foregoing NRC STAFF ANSWER OPPOSING PETITION TO INTERVENE AND REQUEST FOR HEARING BY BLUE RIDGE ENVIRONMENTAL DEFENSE LEAGUE has been filed through the E-Filing System, in the above-captioned proceeding, this 7th day of July, 2017.

Respectfully submitted,

/Signed (electronically) by/

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Dated at Rockville, Maryland
This 7th day of July, 2017