October 30, 2017

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'S ANSWER IN OPPOSITION TO THE SOUTHERN ALLIANCE FOR CLEAN ENERGY & TENNESSEE ENVIRONMENTAL COUNCIL JOINT MOTION FOR LEAVE TO FILE AND MOTION FOR PARTIAL RECONSIDERATION OF LBP-17-08

INTRODUCTION

Pursuant to 10 C.F.R. § 2.323(e), the staff of the United States Nuclear Regulatory Commission (Staff) files this answer to the Southern Alliance for Clean Energy's (SACE) and the Tennessee Environmental Council's (TEC) (collectively Joint Intervenors) motions.[1] The Staff opposes the Joint Intervenors' motions because the Joint Intervenors have failed to identify any error in LBP-17-08, much less a clear and material error that renders the decision invalid, or that the Atomic Safety and Licensing Board's (Board) ruling could not have reasonably been anticipated. Because the Joint Intervenors have not met the requirements in 10 C.F.R. § 2.323(e), both motions should be denied.

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, submitted an application for an early site permit (ESP) for the Clinch River Nuclear Site in Oak Ridge,

[1] *See* [Joint Intervenors] Motion For Leave To File (October 20, 2017) (Motion For Leave To File)., and Motion For Partial Reconsideration of LBP-17-08 (October 20, 2017) (Motion for Partial Reconsideration) (collectively Joint Intervenors' motions).

Tennessee.[2] The application is based on a plant parameter envelope that was developed based on four 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]

On June 12, 2017, Joint Intervenors timely filed a joint petition including three proposed contentions, through which they sought to intervene in this proceeding.[6] They proposed three contentions, which related to: (1) TVA's application for an exemption from the NRC emergency planning requirements with respect to establishing a ten-mile emergency planning zone, (2) TVA's failure to address the environmental impacts of accidents involving ignition of spent fuel in the spent fuel storage pools at the proposed facility, and (3) TVA's inclusion of energy alternatives in its Environmental Report.[7] On July 7, 2017, TVA and the Staff separately, filed replies opposing the Joint Intervenors' petition.[8]

On October 10, 2017, the Board issued an order that: admitted SACE and TEC as parties to this proceeding; rejected Contention 1, finding that it was not within the scope of this proceeding and

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[2] *See* 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).

[3] Clinch River Nuclear Site, Early Site Permit Application, Rev. 0 (Application), Part 2, Site Safety Analysis Report (SSAR), Chapter 2 at 2.0-1 (ADAMS Accession No. ML16144A037).

[4] Letter CNL-16-081 at 2.

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

[6] *See* Petition to Intervene and Request For Hearing by Southern Alliance for Clean Energy and Tennessee Environmental Council, (Petition) (June 12, 2017).

[7] Petition at 1-2, 5-24.

[8] *See* TVA Answer Opposing Petitions for Intervention and Requests For Hearing by Southern Alliance for Clean Energy and Tennessee Environmental Council and the Blue Ridge Environmental Defense League (July 7, 2017). *See also* NRC Staff Answer to Southern Alliance for Clean Energy and Tennessee Environmental Council's Petition to Intervene and Request for Hearing (July 7, 2017). See Southern Alliance for Clean Energy's and Tennessee Environmental Council's Reply to Opposition to Petition to Intervene and Request for Hearing, (Reply) (July 21, 2017).

that it failed to raise a material factual dispute with the application, contrary to 10 C.F.R. § 2.309(f)(1)(iii) and (vi); and, admitted Contentions 2 and 3.[9] On October 20, 2017, Joint Intervenors filed a Motion for Partial Reconsideration challenging the Board's rejection of Contention 1.

The Joint Intervenors have failed to identify any error in LBP-17-08, much less a clear and material error that renders the decision invalid, or to demonstrate that the Board's ruling could not have reasonably been anticipated. Because, as discussed below, the Joint Intervenors have failed to demonstrate compelling circumstances supporting reconsideration of the Board's rejection of Contention 1, both motions should be denied for failure to meet 10 C.F.R. § 2.323(e).

DISCUSSION

I. Legal Standards

The Joint Intervenors' motions were filed pursuant to 10 C.F.R. § 2.323(e), which provides:

> Motions for Reconsideration may not be filed except upon leave of the presiding officer or the Commission, upon a showing of compelling circumstances, such as the existence of a clear and material error in a decision, which could not have reasonably been anticipated, that renders the decision invalid.

10 C.F.R. § 2.323(e). With the 2004 revision of § 2.323, the NRC intentionally established a higher standard for motions for reconsideration than the then existing standard.[10] Specifically, the revised rule is only intended to permit reconsideration where a "manifest injustice" would occur in the absence of reconsideration.[11] A motion for reconsideration "cannot simply republish" prior arguments but must give the Commission a good reason to change its mind."[12] Nor may a motion for reconsideration include new arguments or evidence unless the party demonstrates that the new material relates to a Board concern that could not have reasonably been anticipated.[13] A properly

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[9] *See* Tennessee Valley Authority (Clinch River Nuclear Site Early Site Permit Application), LBP-17-08, 85 NRC __, __ (October 10, 2017) (Order) (Order at 1, 33 – 34).

[10] *See* Changes to Adjudicatory Process, 69 Fed. Reg. 2182, 2207 (Jan. 14, 2004) (final rule).

[11] *Id*.

[12] *See Louisiana Energy Services, L.P.* (National Enrichment Facility), CLI-04-35, 60 NRC 619, 622 n.13 (2004) (citing *Ahmed v. Ashcroft*, 388 F.3d 247, 249 (7th Cir. 2004)).

[13] Texas Utilities Electric Co. (Comanche Peake Steam Electric Station, Units 1 and 2), LBP-84-10, 19 NRC 509, 517-18 (1984)).

supported motion for reconsideration must identify errors or deficiencies in the presiding officer's determination indicating the questioned ruling overlooked or misapprehended some legal principle or decision that should have controlling effect, or some critical factual information.[14] Finally, motions for reconsideration must establish a clear and material error in the earlier decision and be based on the elaboration of initial arguments, the identification of an overlooked controlling decision, or a factual clarification.[15]

II. Staff's Response Opposing the Motions

Joint Intervenors' motions should be denied as they fail to meet the standards for reconsideration under 10 C.F.R. § 2.323(e). The Board's decision that Contention 1 was not within the scope of this proceeding and failed to raise a material factual dispute and was therefore inadmissible for failure to satisfy 10 C.F.R. 2.309(f)(1)(iii) and(vi) was correct; moreover, the Board's rejection of Contention 1 could easily and reasonably have been anticipated.[16]

Joint Intervenors were provided actual notice that TVA was seeking approval of a methodology by TVA. First, TVA set forth its plan in its application in Chapter 13 of the SSAR.[17] Joint Intervenors had more than 60 days to formulate contentions based on this application. Next, in its Answer to the Joint Intervenors' petition to intervene and hearing request, TVA argued that Joint Intervenors misunderstood the TVA exemption requests and expressly stated that the requests were to use a methodology.[18] Finally, at the hearing, TVA's counsel, after hearing Joint Intervenors' counsel response to the Board's questions, stated that "[p]etitioners are mischaracterizing [TVA's] application and went on to state that the "exemption request is based on 13.3 methodology."[19]

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[14] *See Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-00-31, 52 NRC 340, 342 (2000) (articulating the pre-2004 standard, which was less rigorous standard than the current, "compelling circumstances" standard).

[15] *See Diablo Canyon*, 64 NRC at 400-401 & n.6, *citing Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Unit 2), CLI-03-18, 58 NRC 433, 434 (2003).

[16] *See* Order at 21.

[17] *See* SSAR, Rev.0 at 13.3-14.

[18] *See* TVA Answer at 10 – 15.

[19] *See* Hearing Transcripts, Oral Argument In the Matter of Tennessee Valley Authority (CRNS), at 98-99 (Transcript)

The Joint Intervenors could also have reasonably anticipated the Board's ruling based on the Staff's pleadings. The Staff, in its Answer to Joint Intervenors' petition, asserted that Contention 1 fails to satisfy 10 C.F.R. § 2.309(f)(1)(iii), (iv), and (vi) because the specific claims it raises are neither within the scope of this review nor material to any decision on the Applicant's exemption requests, and therefore do not constitute a genuine dispute with the ESP application.[20]

Joint Intervenors demonstrated that they understood these arguments. Joint Intervenors acknowledged and rejected TVA arguments in their reply to TVA's Answer.[21] Joint Intervenors had another opportunity to respond at the oral argument on contention admissibility when TVA stated that the "exemption request is based on 13.3 methodology," but Joint Intervenors did not directly respond.[22] Given the discussion of the nature of TVA's request as discussed in TVA's Application, TVA's Answer, Joint Intervenors' Reply, and in statements made by TVA at the oral argument on contention admissibility in response to the Board's questions on Contention 1, it is clear that Joint Intervenors could have, and should have, reasonably anticipated a decision based on TVA's position.

With respect to the Board's findings regarding the TVA's exemption requests and the methodology TVA requested NRC approval of, Joint Intervenors failed to make a showing of compelling circumstances or to identify a clear and material error in LBP-17-08. Joint Intervenors' assertion that the Board's finding that SSAR Chapter 13 clarifies that the only purpose of TVA's exemption requests is to use an "alternative methodology" for determining EPZ size at the COL stage, overlooks critical language in SSAR Chapter 13 contradicting that conclusion.[23] Joint Intervenors' arguments that SSAR Chapter 13 shows that TVA is seeking approval of substantially-

(Sept. 12, 2017).

[20] Staff Answer at 19.

[21] *See* Joint Intervenors' Reply at 2-4.

[22] See Transcript at 97-99.

[23] Motion for Partial Reconsideration at 5.

reduced EPZ sizes as a "major feature" of the proposed SMR's Emergency Plan,[24] and that the Board "*overlooked key language in SSAR Chapter 13,*"[25] fail because the record demonstrates that the Board understood the application, the issues, and the arguments, and its ruling was entirely foreseeable. As the Board correctly held, the Joint Intervenors misunderstood the application and failed to submit a contention that adequately challenged it.

The Board specifically and accurately addressed Chapter 13 of TVA's ESP application.[26] Contrary to the Joint Intervenors' assertions that the Board's findings are contradicted by Chapter 13, the Board properly analyzed Chapter 13 noting that:

> Chapter 13 of the Site Safety Analysis Report sets out the explicit methodology by which TVA proposes to determine the emergency planning zone size at the COL stage. Chapter 13 explains that three possible results of using this methodology are: (1) a site-boundary emergency planning zone; (2) an emergency planning zone having a radius of two miles; or (3) an emergency planning zone with a radius greater than two miles.[27]

The Board concluded that TVA in the ESP application was only requesting permission to use an alternative methodology to select the emergency planning zone size at the COL stage.[28] The Board considered the arguments put forth by the Joint Intervenors and determined that Contention 1 incorrectly assumed that TVA was seeking an absolute reduction in the size of the emergency planning zone during the ESP proceeding.[29] The Board then explained that the two sets of exemptions for site boundary and two-mile emergency planning zones were provided by TVA only as examples of the potential results of the methodology.[30] The Board Order noted that TVA's counsel confirmed the Board's interpretation at oral argument clarifying that the exemption request was not to determine the size of an EPZ at the ESP stage, but rather to establish a methodology for determining the EPZ size at the combined license (COL) stage at some point in the future. Joint

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[24] *Id*.
[25] *Id*. at 5-6.
[26] *See* Order at 18-22.
[27] Order at 19.
[28] *Id.*
[29] Order at 20.
[30] *See* Order at 19-20.

Intervenors' assertion in their Motion for Partial Reconsideration that the Order is contradicted by Chapter 13 is without support. Accordingly, Joint Intervenors, having not identified a clear and material error, or any error, fail to make the required showing of "compelling circumstances" necessary to support a motion for reconsideration.

Joint Intervenors contend that Contention 1, as previously presented and argued before the Board, is admissible because the Board's sole ground for rejecting it was the conclusion that Joint Intervenors misunderstood TVA's ESP application, a conclusion the Joint Intervenors dispute.[31] However, rather than support their arguments related to the Board's conclusion with references to the record, Joint Intervenors merely seek to reargue positions set forth in their petition and reply.[32] Joint Intervenors' arguments for the admission of Contention 1 in their petition, reply, and at the oral argument were rebutted by the Staff; the Staff responded that Contention 1 fails because the specific issue the Joint Intervenors wish to litigate – whether the TVA can show that the time between uncovering of spent fuel and initiation of a zirconium fire in the spent fuel storage pool is ten hours or more - is not within the scope of the ESP application review.[33] TVA responded that as Joint Intervenors both misunderstood and did not discuss the actual exemption request made by TVA – TVA's request to use an alternate methodology – Contention 1 did not meet the admissibility standards.[34] Ultimately the Board, properly denying the admission of Contention 1, found that Joint Intervenors will still have an opportunity to challenge the application of TVA's proposed methodology at the COL stage.[35] The Board has therefore already considered and rejected the arguments the Joint Intervenors raise again in their motions.[36] Such rearguing is not permitted in motions for

[31] *See* Motion for Reconsideration at 6.
[32] *See* Petition at 1, 5-9., see also Reply at 2-5.
[33] Staff Answer at 19-20.
[34] TVA Answer at 10-11.
[35] Order at 21.
[36] See Order at 18-23.

reconsideration.[37]

With regards to Joint Intervenors' assertion that TVA's RAI response contradicts the Board's Decision, Joint Intervenors' concerns with the underlying RAI were not part of the original contention and were not raised at the hearing, nor have Joint Intervenors demonstrated that the RAI response is related to any error by the Board in its Order. TVA's RAI response, as cited by Joint Intervenors in their Motion for Partial Reconsideration, stated that "if the selected SMR design cannot meet these criteria, then the CRN Site Emergency Plan will need to be revised accordingly and submitted with the COLA."[38] Joint Intervenors fail to demonstrate how this information is new or materially different from the application. TVA's RAI response nearly mirrors the ESP application language considered by the Board and reflected in the Order which notes that: "[i]f the dose consequences of the selected technology exceed the [EPA PAG] … a new Emergency Plan will be included in the [COL] for NRC review."[39] A motion for reconsideration should not include new arguments or evidence unless the party demonstrates that the new material relates to a Board concern that could not reasonably have been anticipated.[40] Joint Intervenors have not demonstrated that the Board's ruling on these issues could not reasonably have been anticipated, and their motions should therefore be denied.

The Joint Intervenors have not made any other showing of compelling circumstances supporting reconsideration of LBP-17-08. Pursuant to the Commission regulations, Joint Intervenors will still have an opportunity to submit a new contention based on the RAI if the appropriate standards are satisfied.[41] In proffering a new contention Joint Intervenors would still have the burden of proof.[42] The Order was properly based on the record created by the pleadings and oral argument transcript. Joint Intervenors have failed to point to any of the positions they previously

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[37] *See* Changes to Adjudicatory Process, 69 Fed. Reg. 2182, 2207 (Jan. 14, 2004) (final rule).

[38] Motion for Partial Reconsideration at 8.

[39] Order at 20 quoting ESP Application at SSAR, Rev. 0 at 13.3-13.

[40] Texas Utilities Electric Co. (Comanche Peake Steam Electric Station, Units 1 and 2), LBP-84-10, 19 NRC 509, 517-18 (1984)).

[41] 10 C.F.R. 2.309(c)(1).

[42] 10 C.F.R. 2.325.

raised and demonstrate that the Board in its Order did not consider their arguments. Joint Intervenors merely seek to now reargue the positions set forth in their petition and reply,[43] which the Board has already considered and rejected[44] – and that is not permitted under the Commission's rules.[45]

Finally, Joint Intervenors' asserted that the Board erred in concluding that the Joint Intervenors would not be prejudiced by the dismissal of their contention.[46] Joint Intervenors' assertion is not supported by the record. As the Board noted in the Order, Joint Intervenors will still have an opportunity at the COL stage to "request and obtain a hearing if they have adequate support for their concern."[47] Joint Intervenors have presented no evidence that contradicts the Order – Joint Intervenors merely disagree and reargue their position set forth in their petition[48] – which the Board rejected.[49] For the same reasons previously discussed, rearguing a position is not a proper basis to support a motion for reconsideration.

[43] *See* Petition at 1, 5-9. See also Reply at 2-5.
[44] *See* Order at 18-23.
[45] *See* Changes to Adjudicatory Process, 69 Fed. Reg. 2182, 2207 (Jan. 14, 2004) (final rule).
[46] Motion for Partial Reconsideration at 8-9.
[47] Order at 22.
[48] Petition at 12.
[49] Order at 21.

CONCLUSION

For the reasons set forth above, the Joint Intervenors have failed to make a showing of compelling circumstances that would satisfy 10 C.F.R. § 2.323(e). Accordingly, the Motion For Leave To File and Motion For Partial Reconsideration should be denied.

/Signed (electronically) by/

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Dated at Rockville, Maryland
This 30th day of October, 2017

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
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	)	

CERTIFICATE OF SERVICE

I hereby certify that the foregoing NRC STAFF'S ANSWER IN OPPOSITION TO THE SOUTHERN ALLIANCE FOR CLEAN ENERGY & TENNESSEE ENVIRONMENTAL COUNCIL JOINT MOTION FOR LEAVE TO FILE AND MOTION FOR PARTIAL RECONSIDERATION OF LBP-17-08, has been filed through the E -Filing System, in the above-captioned proceeding, this 30th day of October, 2017.

Respectfully submitted,

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Dated at Rockville, Maryland
This 30th day of October, 2017