November 6, 2017

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

In the Matter of	)	
	)	Docket No. 52-047-ESP
Tennessee Valley Authority	)	
	)	
Clinch River, Early Site Permit	)	ASLBP No. 17-954-01-ESP-BD01
	)	

TENNESSEE VALLEY AUTHORITY'S ANSWER OPPOSING INTERVENORS' PARTIALLY UNOPPOSED MOTION TO ESTABLISH A SCHEDULE FOR FILING OF NEW OR AMENDED CONTENTIONS REGARDING EMERGENCY PLANNING-RELATED PORTIONS OF TVA'S EARLY SITE PERMIT AND EXEMPTION REQUEST

I. INTRODUCTION

Pursuant to 10 CFR §§ 2.323(c), 2.309(c), and 2.307 the Tennessee Valley Authority ("TVA") respectfully submits this answer opposing the Southern Alliance for Clean Energy and the Tennessee Environmental Council's (collectively, "Intervenors") motion, dated October 26, 2017, to establish a schedule for filing of new or amended contentions regarding emergency planning-related portions of TVA's early site permit and exemption request ("Motion"). Because Intervenors have not shown good cause why they did not check the docket until October 19, 2017 and because the information is materially the same as information already on the docket, the Motion should be denied.

II. FACTUAL BACKGROUND

On May 12, 2016, TVA submitted an application for an early site permit ("ESP") for the

Clinch River Nuclear ("CRN") Site.[1] As relevant to the present Motion, TVA does not seek to finalize a particular emergency planning zone ("EPZ") size in this proceeding, but to use the dose-based approach of the Site Safety Analysis report (SSAR) Section 13.3 methodology at the COL stage, which may result in a less than 10-mile EPZ or a greater than 10-mile EPZ.[2]

Granting the exemptions in Part 6 does not result in the approval of either a site boundary EPZ or a 2-mile EPZ in this proceeding. The final size of the EPZ will be determined, using the Section 13.3 methodology, at the COL stage.[3] If the design-specific analysis at the COL stage does not demonstrate that there is adequate protection of public health and safety using the Section 13.3 methodology, ***neither*** major features emergency plan approved at the ESP stage would be incorporated by reference into the final emergency plan at the COL stage. Under those circumstances, a new emergency plan would accompany the COL application.[4]

On June 12, 2017, Intervenors filed a joint petition to intervene, proposing three contentions.[5] On July 7, 2017, TVA and the Nuclear Regulatory Commission ("NRC") Staff separately, filed answers opposing the Petition.[6]

On July 28, 2017, the NRC Staff issued a RAI to TVA,[7] wherein the NRC requested that

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[1] *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).

[2] Part 6, Section 1.2 at 2 ("The selected EPZ size will be determined based upon the SMR design selected in the preparation of the COLA."). *See also* SSAR, Section 13.3.3.1.4 ("The COLA will apply the methodology in Subsection 13.3.3.1.1 for EPA PAG and Subsection 13.3.3.1.2 for Substantial Reduction in Early Health Effects to the selected SMR reactor technology to determine an acceptable PEP EPZ."); Part 6, Section 1.3 at 3 ("During preparation of a COLA, when TVA has selected a reactor design, the appropriate EPZ will be selected based on the SMR design that conforms to the criteria established in SSAR Section 13.3.").

[3] *See* Note 2, *supra*.

[4] SSAR, Section 13.3.3.1.4 at 13.3-13.

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

[6] *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).

TVA answer a series of questions regarding the exemption requests in Part 6 and asked, *inter alia*, TVA to provide additional information and to demonstrate that "potential reactor facilities that would be encompassed within the surrogate design and PPE," could meet "the proposed accident consequence criteria … at a given EPZ boundary distance ...."[8] The RAI was available on ADAMS on August 4, 2017.

On August 24, 2017, TVA submitted a response to the RAI, within the 30-day time period required by the RAI.[9] The RAI Response clearly states that the analysis is an example: "[t]o demonstrate that the proposed accident consequence technical criteria presented in CRN Site ESPA SSAR Section 13.3 can be met by a design contemplated by the PPE."[10] The RAI Response further states: "[b]ecause the purpose of the analysis is to demonstrate that a vendor technology contemplated by the PPE can meet ESPA SSAR Section 13.3 acceptance criteria, it was performed for a specific technology and ***not the surrogate plant developed in the PPE***."[11] The RAI Response was available on ADAMS on September 11, 2017.

On October 10, 2017, the Board issued an order admitting SACE and TEC as parties to this proceeding, rejecting Contention 1 and admitting SACE Contentions 2 and 3.[12]

On October 19, 2017, counsel for Intervenors "discovered the August 24, 2017 RAI Response on ADAMS,"[13] but had not checked the docket at least between September 11 and

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[7] US NRC Request for Additional Information No. 7, eRAI-8885, ESPA Application Section: Part 6 - Exemptions and Departures, EP Exemptions, dated July 28, 2017 (ADAMS Accession No. ML17209A401) ("RAI").

[8] RAI Request at 4.

[9] Letter from J.W. Shea, TVA, to NRC/Document Control Desk, "Response to Request for Additional Information Related to Emergency Planning Exemption Requests in Support of Early Site Permit Application for Clinch River Nuclear Site" (August 24, 2017) (ADAMS Accession No. ML17237A175) ("RAI Response").

[10] RAI Response at E1-7.

[11] *Id*. (emphasis added).

[12] *See Tennessee Valley Authority* (Clinch River Nuclear Site Early Site Permit Application), LBP-17-08, 85 NRC __, __ (October 10, 2017) ("Order").

[13] Motion at 7.

October 19, 2017 and only did so in order to file a motion for reconsideration of LBP-17-08.[14]

III. LEGAL STANDARDS

When an intervenor seeks to file a new or amended contention after the initial deadline for intervention petitions, the intervenor must demonstrate "good cause" by showing that:

> (i) The information upon which the filing is based was not previously available;
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> (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.[15]

The requirements for demonstrating "good cause" under current 10 C.F.R. § 2.309(c)(1)(i)–(iii) are the same as the requirements for filing "late" contentions previously available under former 10 C.F.R. § 2.309(f)(2)(i)–(iii) (*i.e.*, before the NRC revised Section 2.309 in August 2012).[16] In promulgating 10 C.F.R § 2.309(f)(2) regulations, the Commission stated:

> For all other new or amended contentions the rule makes clear that the criteria in § 2.309(f)(2)(i) through (iii) must be satisfied for admission. Included in these standards is the requirement that it be shown that the new or amended contention has been submitted in a timely fashion based on the availability of the subsequent information. See § 2.302(f)(iii). ***This requires that the new or amended contention be filed promptly after the new information purportedly forming the basis for the new or amended contention becomes available***.[17]

The Commission has reinforced this in its decisions, holding that "good cause for delay" requires the proposed contention to be filed shortly after the information became available.[18] "Several

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[14] *Id.* at 8.

[15] 10 C.F.R. § 2.309(c)(2)(i)-(iii).

[16] *See* Final Rule, Amendments to Adjudicatory Process Rules and Related Requirements, 77 Fed. Reg. 46,562, 46,566, 45,571 (Aug. 3, 2012).

[17] Statement of Considerations, Final Rule, Changes to Adjudicatory Process, 69 Fed. Reg. 2,182, 2,221 (Jan. 14, 2004) (emphasis added).

[18] *See Yankee Atomic Electric Co*. (Yankee Nuclear Power Station), CLI-96-7, 43 NRC 235, 255 (1996).

boards have established a 30-day rule [after receipt of relevant new information] for new contentions."[19] The Commission has held, generally, that it is the responsibility of intervenors to conduct their own diligence with respect to information when it first becomes publicly available.[20] Additionally, the new information must be materially different from the information that was previously available.[21]

IV. ARGUMENT

A. Intervenors Have Not Shown Good Cause for Failure to Timely File a New Contention

Intervenors' Motion cannot establish "good cause" under 10 C.F.R. § 2.309(c)(1) because the extension of time is premised on Intervenors' failure to exercise due diligence. The Commission has held that:

> [O]ur contention admissibility and timeliness rules require a high level of discipline and preparation by petitioners, who must examine the publicly available material and set forth their claims and the support for their claims at the outset.[22]

The same is true throughout the proceeding.[23] The RAI Response was publicly available on September 11, 2017.[24] Intervenors admit that they failed to identify the existence of the RAI Response (and apparently the RAI as well) until October 19, 2017.[25] According to Intervenors, more than 30 days had elapsed between dates on which Intervenors checked the docket. Failure to exercise due diligence does not provide good cause to depart from the generally-accepted time

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[19] *Entergy Nuclear Vermont Yankee, LLC, and Entergy Nuclear Operations, Inc.* (Vermont Yankee Nuclear Power Station), LBP-06-14, 63 NRC 568, 574 (2006).

[20] *See Northern States Power Co.* (Prairie Island Nuclear Generating Plant, Units 1 and 2), CLI-10-27, 72 NRC 481, 496 (2010). *See also* AmerGen Energy Co., LLC (Oyster Creek Nuclear Generating Station), CLI-09-7, 69 NRC 235, 271-72.

[21] 10 C.F.R. § 2.309(c)(ii); *see also Exelon Generation Co.* (Early Site Permit for Clinton ESP Site), LBP-05-19, 62 NRC 134, 160-61 (2005).

[22] *Oyster Creek,* CLI-09-7, 69 N.R.C. at 271-72 (footnotes and internal quotation marks omitted).

[23] *See* Statement of Considerations, Final Rule, Changes to Adjudicatory Process, 69 Fed. Reg. at 2,221.

[24] Moreover, the RAI itself was available on August 4, 2017 and would have put the Intervenors on notice to be aware of a response within 30 days.

[25] Motion at 7.

period of 30 days that has been adopted as a timeliness standard in multiple proceedings.[26] It is also contrary to the Commission's intent in promulgating the timeliness rule, which "requires that the new or amended contention be filed promptly after the new information purportedly forming the basis for the new or amended contention becomes available."[27] Intervenors have failed to exercise due diligence by not checking the docket for at least 38 days (based on the date the RAI Response was available and 76 days from the date the RAI was available) and not filing a new contention within 30 days of when the RAI Response became available.[28]

B. Intervenors Have Not Demonstrated that the Information is Materially Different

Intervenors continue to misunderstand both the exemption requests in the ESPA and the contents of the RAI Response. Intervenors claim that the information in the RAI response is materially different because "[i]n its original ESP application, TVA did not submit any risk analysis to justify a reduction in EPZ size; in fact, this was the reason for the RAI."[29] TVA did not submit the risk analysis as a basis for finalizing a particular EPZ size in this proceeding either. The RAI Response was submitted at the request of the NRC Staff, *inter alia*, to demonstrate that "potential reactor facilities that would be encompassed within the surrogate design and PPE," could meet "the proposed accident consequence criteria … at a given EPZ boundary distance ...."[30] TVA states that the RAI Response is being provided to show that "the proposed accident consequence technical criteria presented in CRN Site ESPA SSAR Section

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[26] *See Vermont Yankee*, LBP-06-14, 63 NRC at 574.

[27] Statement of Considerations, Final Rule, Changes to Adjudicatory Process, 69 Fed. Reg. 2,182, 2,221 (Jan. 14, 2004) (emphasis added).

[28] The *Entergy Nuclear Vermont Yankee, LLC, and Entergy Nuclear Operations, Inc*. (Vermont Yankee Nuclear Power Station), LBP-15-4, 81 NRC 156, 163 (2015), cited by Intervenors is inapposite to these circumstances. There the State of Vermont sent their filing to all parties, but not through the e-filing system due to difficulties with the credentials for the system. In the present Motion, Intervenors simply failed to exercise diligence.

[29] Motion at 8.

[30] RAI at 4.

13.3 can be met by a design contemplated by the PPE …."[31] The RAI Response is an example of the implementation of the methodology in Section 13.3 and not materially different from that methodology; it is not used "to justify a reduction in EPZ size" in this proceeding. Likewise, the RAI Response directly contradicts Intervenors' assertions that TVA is seeking to finalize a particular EPZ size in this proceeding because the RAI Response clearly states that TVA will conduct a new, design-specific analysis at the COL stage.[32]

C. Intervenors' "Circumstances" Do Not Warrant Filing Out of Time

Intervenors provide a list of circumstances that they request the Board to consider.[33] These circumstances do not warrant the relief requested and are based on Intervenors' continued misunderstanding of the exemption requests in the ESPA as well as a misunderstanding or misrepresentation of the RAI Response. Intervenors' first circumstance, their failure to locate the RAI Response until October 19, 2017, was due to Intervenors' own lack of diligence. This militates against Intervenors as the Commission requires intervenors to exercise due diligence as addressed in Section IV.A, *supra*.[34] Intervenors assert that they did not look at the docket:

> for any risk analyses on ADAMS because they reasonably relied on repeated representations by TVA to the effect that TVA did not intend to submit any PRA or other risk analysis to support reduction in the ESP size until the time of the COL proceeding.[35]

This assertion does not warrant a departure from the 30-day time frame for filing new

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[31] RAI Response at E1-7.

[32] *See, e.g.*, RAI Response at E1-2 ("At COLA, the selected SMR design must conform to these criteria."); *id.* at E1-11 ("The COLA will apply the methodology in SSAR Subsection 13.3.3.1.1 for EPA PAG and SSAR Subsection 13.3.3.1.2 for Substantial Reduction in Early Health Effects to the selected SMR reactor technology to determine an acceptable EPZ.").

[33] *See* Motion at 8-10.

[34] It also misunderstands or misrepresents the RAI Response as discussed in Section I.B, *supra*, and TVA's Response Opposing Intervenors' Motion for Leave to File a Motion for Partial Reconsideration of LBP-17-08 (Oct. 27, 2017), whose arguments in Section IV, therein detail Intervenors' misunderstanding and are incorporated herein by reference.

[35] Motion at 9.

contentions. First, TVA has not submitted an analysis for the purpose of finalizing a particular EPZ size in this proceeding as discussed in Section IV.B, *supra*. Second, the RAI Response only discusses PRA analyses because that discussion was needed to respond adequately to the RAI. A design-specific analysis will be conducted at the COL stage. Third, Intervenors have an obligation to act diligently as discussed in Sections III and IV.A, *supra*. Intervenors have other contentions as well, but did not look at the docket at all for at least 38-days. If anyone affiliated with the Intervenors had checked for new submissions of any sort on the docket at any time between September 11, 2017 and October 19, 2017, they would have seen the RAI Response. Intervenors' explanation that the only reason the docket was checked was to prepare a motion for reconsideration underscores Intervenors' lack of diligence as, presumably, the docket would not have been checked at all in the absence of seeking reconsideration.[36] Moreover, the RAI was on the docket as of August 4, 2017, which expressly requested that TVA provide the information that TVA submitted and placed Intervenors on notice that TVA was ***required*** by the RAI to provide that information within 30 days. Apparently, Intervenors did not check the docket between August 4, 2017 and September 11, 2017 either.

Intervenors' assert that the RAI Response had "obvious relevance … to the ASLB's questions," without specifying which questions, if any, Intervenors believe would have been relevant.[37] Intervenors, however, are incorrect as they appear to make the assertion about "relevance" in the mistaken belief that the RAI Response is intended to be used to finalize a particular EPZ size. This belief is not supported by the actual language of the RAI Response, as addressed in this Section and Section IV.B, *supra*. TVA is clear in the RAI Response that it will

[36] The unavailability of Dr. Edwin Lyman has no bearing on good cause for the lateness of any new contentions, because there was no good cause for Intervenors' failure to exercise their required diligence in the first place.

[37] Motion at 9.

conduct a design-specific analysis at the COL stage.[38] Despite the RAI Response's plain language, as well as the ESPA sections that have been extensively quoted,[39] Intervenors' make the audacious and false assertion that TVA has "misled the Board and the parties,"[40] apparently in an attempt to direct attention away from the lack of diligence of the Intervenors in monitoring the docket. Moreover, Intervenors' assertion is further discredited by Intervenors' misreading or misrepresentation of the RAI Response. Intervenors have repeatedly conflated the surrogate design referenced in Section 13.3 with the example analysis in the RAI Response,[41] when the two things are not the same and the RAI Response specifically states that fact. A surrogate plant, as described in the ESPA, Section 1.1 is defined in NEI 10-01, *Industry Guideline for Developing a Plant Parameter Envelope in Support of an Early Site Permit*.[42] TVA expressly states in the RAI Response that it ***is not*** conducting an analysis using the surrogate plant, but using one technology as an example. The "representative analysis" uses information available for the NuScale design;[43] it is not an analysis of the surrogate plant. Nor is TVA seeking to finalize

[38] *See, e.g.*, RAI Response at E1-2 ("At COLA, the selected SMR design must conform to these criteria."); *id.* at E1-11 ("The COLA will apply the methodology in SSAR Subsection 13.3.3.1.1 for EPA PAG and SSAR Subsection 13.3.3.1.2 for Substantial Reduction in Early Health Effects to the selected SMR reactor technology to determine an acceptable EPZ.").

[39] *See* Sections II, IV.A, and IV.B*, supra*.

[40] Motion at 10.

[41] *See, e.g.*, Motion at 4 ("TVA also provided a detailed risk analysis for the surrogate design, including some of the design details for the surrogate design."); *id.* at 7 "TVA in its ESP application and RAI Response, demonstrate[es] that indeed it does seek a reduction in EPZ size in this ESP proceeding, based on a surrogate design."); Intervenors' Motion for Leave to File a Motion for Partial Reconsideration of LBP-17-08 (October 20, 2017) ("Motion for Leave") at 3 ("At the ESP stage, the criteria are now being applied to a 'surrogate' design that envelopes a range of specific designs …."); *id.* at 4 "TVA is in the process of applying the criteria now, in this proceeding, to a 'surrogate' design.") (citations omitted); Intervenors' Motion for Partial Reconsideration of LBP-17-08 (October 20, 2017) ("Motion for Reconsideration") at 3 ("At the ESP stage, the criteria are now being applied to a 'surrogate' design that envelopes a range of specific designs …."); *id.* at 4 ("TVA is in the process of applying the criteria now, in this proceeding, to a 'surrogate' design.") (citations omitted).

[42] "The PPE is used to define what is in effect a 'surrogate plant' that can bound two or more technologies. This surrogate plant is used as an input for the analyses needed to support the development of the ESP application." NEI 10-01, Section 3.4 at 15.

[43] RAI Response at E1-7 ("Because the purpose of the analysis is to demonstrate that a vendor technology contemplated by the PPE can meet ESPA SSAR Section 13.3 acceptance criteria, it was performed for a specific

a particular EPZ size in this proceeding, as discussed in Section IV.B, *supra*. Accordingly, intervenors "circumstances" 3, 4, 6, and 7 are premised on Intervenors' invented assertions, based on misunderstanding or distorting the RAI Response and do not reflect the actual content of any documents on the docket. It also distorts documents not on the docket, such as the Nuclear Energy Institute ("NEI") "press interview"[44] wherein the quoted language by Intervenors merely states that the "[t]he analysis confirms that it is ***possible*** to meet the criteria to justify approval of a site boundary emergency planning zone and warrants NRC proceeding with the exemption request from a 10-mile EPZ."[45] The clear statement is that it is ***possible*** to meet the criteria based on a Section 13.3 and, therefore, the NRC Staff should evaluate TVA's request to replace the deterministic 10-mile plume exposure pathway EPZ with a dose-based EPZ that ensures the protection of public health and safety using the dose-based methodology in Section 13.3 of the Site Safety Analysis Report.[46]

V. CONCLUSION

For the foregoing reasons, the Motion should be denied.

Respectfully submitted,
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technology and not the surrogate plant developed in the PPE.); *id.* ("[A] representative analysis has been performed by one SMR vendor (NuScale).").

[44] *See, e.g.*, Motion at 4-5.

[45] NEI News-Media (Sept. 7, 2017), https://www.nei.org/News¬Media/News/News-Archives/2017/TVA-Demonstrates-Site-Boundary-EPZ-Possible-for-SM (emphasis added). Although the Motion states that the NEI press interview and other documents are attached to the Motion, TVA did not receive any such attachments through the E-filing system.

[46] *See* SSAR, Section 13.3.3 at 13.3-6 – 13.3-14.

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	)	

CERTIFICATE OF SERVICE

I certify that, on November 6, 2017, a copy of the foregoing Tennessee Valley Authority's Answer Opposing Intervenors' Partially Unopposed Motion to Establish a Schedule for Filing of New or Amended Contentions Regarding Emergency Planning-Related Portions of TVA's Early Site Permit and Exemption Request was served electronically through the E-Filing system on the participants in the above-captioned proceeding.

/signed electronically by/
Blake J. Nelson