UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Commission

In the Matter of	)	Docket No. 50-391-OL
	)	
TENNESSEE VALLEY AUTHORITY	)	
(Watts Bar, Unit 2)	)	

TENNESSEE VALLEY AUTHORITY'S ANSWER OPPOSING SOUTHERN ALLIANCE FOR CLEAN ENERGY'S MOTION TO REOPEN THE RECORD

Pursuant to 10 C.F.R. §2.309(h)(1) and the U.S. Nuclear Regulatory Commission's ("NRC" or "Commission") order dated October 7, 2014,[1] the Tennessee Valley Authority ("TVA") respectfully submits its answer in opposition to "Southern Alliance for Clean Energy's Motion to Reopen the Record," dated September 29, 2014 ("Motion"). In its Motion, the Southern Alliance for Clean Energy ("SACE") claims that the Commission is required to make so-called "safety findings" in the text of the Continued Storage Rule regarding the permanent disposal of spent fuel in a repository.[2] Motion at 1. SACE seeks to reopen the record for the purpose of litigating its legal claim in this proceeding in the form of a new contention.[3] The Commission found that the new contention was "inextricably linked" with the Petition[4] filed by SACE and others before the Commission and exercised its supervisory authority to review the Petition and the motions filed in this proceeding. *Fermi Unit 3*, CLI-14-09, slip op. at 3.

For the reasons set forth below, SACE has not satisfied the Commission's deliberately strict standards for reopening the adjudicatory record in this proceeding. Contrary to the

[1] *DTE Electric Co.* (Fermi Nuclear Power Plant, Unit 3), et al., CLI-14-09, ___ N.R.C. ___ (Oct. 7, 2014).
[2] Continued Storage of Spent Nuclear Fuel, 79 Fed. Reg. 56,238 (Sept. 19, 2014) ("Continued Storage Rule").
[3] Southern Alliance for Clean Energy's Motion for Leave to File a New Contention Concerning the Absence of Required Waste Confidence Safety Findings, dated September 29, 2014 ("Motion to Admit New Contention").
[4] Petition to Suspend Final Decisions in All Pending Reactor Licensing Proceedings Pending Issuance of Waste Confidence Safety Findings, dated September 29, 2014 ("Petition").

requirements of 10 C.F.R. § 2.336, SACE's Motion is untimely, does not raise a significant safety issue, and fails to demonstrate that the admission of SACE's new contention is likely to result in a materially different outcome in the adjudication. Accordingly, the Motion—like the proposed contention to which it relates—should be rejected.

ARGUMENT

I. Applicable Legal Standards

Given the need for finality in the hearing process, the Commission considers reopening the record for any reason to be an "extraordinary" action. Final Rule, Criteria for Reopening Records in Formal Licensing Proceedings, 51 Fed. Reg. 19,535, 19,538 (May 30, 1986). NRC regulations thus "impose a 'deliberately heavy' burden upon an intervenor who seeks to supplement the evidentiary record after it has been closed." *Entergy Nuclear Vt. Yankee, LLC & Entergy Nuclear Operations, Inc.* (Vt. Yankee Nuclear Power Station), CLI-11-2, 73 N.R.C. 333, 338 (2011) (quoting *AmerGen Energy Co. LLC* (Oyster Creek Nuclear Generating Station), CLI-08-28, 68 N.R.C. 658, 674 (2008)). Otherwise, "'there would be little hope' of completing administrative proceedings if each newly arising allegation required an agency to reopen its hearings." *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-05-12, 61 NRC 345, 350 n.18 (2005) (quoting *Vt. Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 555 (1978)). The Commission "likewise frown[s] on intervenors seeking to introduce a new contention later than the deadline established by [NRC] regulations, and [] accordingly hold[s] them to a higher standard for the admission of such contentions." *Vt. Yankee*, CLI-11-2, 73 N.R.C. at 338.

This elevated burden is reflected in 10 C.F.R. § 2.336(a), which requires that a party show that its motion (1) was timely filed; (2) concerns a significant safety issue or

environmental matter; and (3) demonstrates that a materially different result would be, or would have been likely, had the newly proffered evidence been considered initially. Further, under NRC rules,

> [t]he motion must be accompanied by affidavits that set forth the factual and/or technical bases for the movant's claim that the criteria of paragraph (a) of this section have been satisfied. Affidavits must be given by competent individuals with knowledge of the facts alleged, or by experts in the disciplines appropriate to the issues raised. Evidence contained in affidavits must meet the admissibility standards of this subpart. Each of the criteria must be separately addressed, with a specific explanation of why it has been met. When multiple allegations are involved, the movant must identify with particularity each issue it seeks to litigate and specify the factual and/or technical bases which it believes support the claim that this issue meets the criteria in paragraph (a) of this section.

10 C.F.R. § 2.326(b). *See also Entergy Nuclear Generation Co*. (Pilgrim Nuclear Power Station), CLI-12-15, 75 N.R.C. 704, 713 (2012).

Under Section 2.326, it is not the applicant's or the NRC Staff's burden to defeat the motion to reopen. Instead, it is petitioner'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 N.R.C. at 674. "All of the factors in [10 C.F.R.] section 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 N.R.C. 132, 143 (2012).

"Bare assertions and speculation . . . do not supply the requisite support." *Id.* (citing *Oyster Creek*, CLI-08-28, 68 N.R.C. at 674). Evidence contained in the Section 2.326(b) affidavits must meet the admissibility standards in 10 C.F.R. § 2.337—it must be relevant, material, and reliable. *Entergy Nuclear Generation Co.* (Pilgrim Nuclear Power Station), CLI-12-6, 75 N.R.C. 352, 367 (2012), *aff'd sub nom., Mass. v. NRC*, 708 F.3d 63 (1st Cir. 2013); *Pilgrim*, CLI-12-3, 75 N.R.C. at 138-39. Further, to justify reopening the record, "the moving

papers must be strong enough, in the light of any opposing filings, to avoid summary disposition." *Private Fuel Storage*, CLI-05-12, 61 NRC at 350 (internal quotations omitted).

Where a motion to reopen relates to a contention not previously in controversy, as is the case here, a motion to reopen must also satisfy the timeliness standards in 10 C.F.R. § 2.309(c). 10 C.F.R. § 2.326(d); *Pilgrim*, CLI-12-3, 75 N.R.C. at 140.

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

A. SACE's Motion is Untimely

SACE argues that the Motion is timely because it was filed within ten days after the NRC issued the Continued Storage Rule and the Continued Storage GEIS[5] on September 19, 2014. Motion at 2-3. SACE claims that, until that time, it could not have known that the Continued Storage Rule would exclude what SACE refers to as required "Atomic Energy Act-required safety findings." Motion to Admit New Contention[6] at 17. However, the Motion, the Petition, and Motion to Admit New Contention clearly flow from the U.S. Court of Appeals' decision to vacate "the NRC's relevant safety findings," as purportedly contained in the 2010 WCD Update. Petition at 7 (footnote omitted).

Significantly, the so-called "safety findings" were vacated on June 8, 2012, at which point there were no such findings, according to SACE. If the absence of those putative "safety findings" provides the basis for the new contention, then SACE should have filed a motion for admission of a new contention within ten days of the date of the court's decision vacating the purported "safety findings."[7] Instead, SACE suggests that it appropriately deferred filing of the

[5] Generic Environmental Impact Statement for Continued Storage of Spent Nuclear Fuel, 79 Fed. Reg. 56,263 (Sept. 19, 2014) ("Continued Storage GEIS").
[6] Southern Alliance for Clean Energy's Motion for Leave to File a New Contention Concerning the Absence of Required Waste Confidence Safety Findings, dated September 29, 2014 ("Motion to Admit New Contention").
[7] In fact, SACE did file a *Petition to Suspend Final Decisions in All Pending Reactor Licensing Proceedings Pending Completion of Remanded Waste Confidence Proceedings* (June 18, 2012), within ten days of the decision in *New York* raising other issues and should have raised the alleged "safety finding" issue at that time. Had SACE

contention so that it could await the Commission's final response to the court's remand in *New York*. After the decision in *New York* was issued, the Commission expressly indicated that it had not determined a course of action. *Calvert Cliffs Nuclear Project, LLC* (Calvert Cliffs Nuclear Power Plant, Unit 3), *et al.*, CLI-12-16, 76 NRC 63, 66 (2012) ("Because of the recent court ruling striking down our current waste confidence provisions, we are now considering all available options for resolving the waste confidence issue, which could include generic or site-specific NRC actions, or some combination of both. We have not yet determined a course of action."). SACE had no valid reason to withhold its Motion and other filings—for more than two years–simply to await final Commission action on the remand. *See AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-09-7, 69 N.R.C. 235, 271-72 (2009) ("There simply would be no end to NRC licensing proceedings if petitioners could disregard our timeliness requirements and add new contentions at their convenience during the course of a proceeding . . . ."); *Vt. Yankee*, CLI-11-2, 73 N.R.C. at __ ("This policy underpins our regulatory requirement that motions to reopen be 'timely' filed.") Accordingly, the Motion is not timely.

B. The Motion Does Not Concern a Significant Safety Issue

SACE fails to demonstrate that its Motion addresses a significant safety issue, as required by 10 C.F.R. § 2.326(a)(2). SACE does not actually identify any safety issue stemming from the NRC's alleged failure to make the Atomic Energy Act ("AEA")-based "safety findings" SACE claims are missing. It also provides no argument with respect to any technical or safety issue within the scope of this proceeding. Instead, SACE baldly asserts that the Motion and the Motion to Admit New Contention "address significant issues associated with the storage and

done so, there would have been no need to file the current Motion (because the proceeding was not yet terminated) and the Commission could have addressed that issue at the same time it dealt with the issues raised in the June 18, 2012 petition. SACE sitting on the alleged "safety finding" issue serves only to try to further delay this proceeding.

disposal of spent fuel." Motion at 3. But, as Commission precedent makes clear, such bare assertions and speculation are not sufficient to raise a significant safety issue. *Oyster Creek*, CLI-09-7, 69 N.R.C. at 287.

SACE suggests that the Commission needed to include particular "findings" in the actual text of the rule regarding the safety of permanently disposing of spent fuel in a repository. However, even assuming *arguendo* that the Commission is required to make such findings as part of its NEPA-based continued storage rulemaking (which it is not), SACE identifies no legal requirement that such findings be included in the rule itself. Indeed, in the statement of considerations for the Continued Storage Rule, the Commission explicitly stated that "there is not any legal requirement for the NRC to codify a generic safety conclusion in the rule text." Continued Storage Rule, 79 Fed. Reg. at 56,255.

The Commission further stated that it "decided not to address the feasibility and timing of a repository in the rule text itself," but instead analyz[ed] various time scenarios for repository availability in the GEIS." *Id.* at 56,251. SACE entirely ignores the extensive discussion in Appendix B of the Continued Storage Rule GEIS, which analyzes, among other things, the technical feasibility and availability of a repository for the permanent disposal of spent fuel. Appendix B of the Continued Storage GEIS documents the NRC Staff's conclusions that a geologic repository is technically feasible, and that the time period needed to develop a repository is approximately 25 to 35 years. Continued Storage GEIS, Appendix B at B-32. A motion to reopen does not raise a significant issue if it fails to controvert the assessment addressing its concern. *Oyster Creek*, CLI-09-7, 69 N.R.C. at 288. Here, SACE fails to controvert any aspect of the detailed technical discussion contained in Appendix B of the Continued Storage GEIS.

C. SACE's Motion Fails to Show that a Materially Different Result Would Have Been Likely

SACE's Motion is premised not on a legitimate safety issue or environmental concern, but on an incorrect legal argument: "the NRC must . . . make new generic Waste Confidence [safety] findings or make those findings in every licensing or relicensing proceeding in order to fulfill its statutory obligation under the AEA." Motion at 3. Thus, SACE's citations to the declarations of Dr. Arjun Makhijani and Mark Cooper, attached to the Motion, are intended primarily to support SACE's legal assertion. Motion at 4. As discussed above, Commission regulations require that affidavits supporting a motion to reopen the record be given by competent individuals with knowledge of the facts alleged, or by experts in the disciplines appropriate to the issues raised. 10 C.F.R. § 2.326(b). Neither Dr. Makhijani nor Mr. Cooper has any asserted expertise with respect to the fundamentally legal issues presented in SACE's Motion. Moreover, their declarations are cited as ostensible support for the unsubstantiated asserted possibility that, "if the NRC fully assesses the safety risks and associated costs of spent fuel storage and disposal, its cost-benefit analysis may lead to the materially different decision not to issue an operating license in this proceeding." *Id.* This is not an issue raised in the contention proffered by SACE, and it is irrelevant to the motion to reopen this proceeding to consider that contention. Moreover, there is no new or materially different information in the Cooper and Makhijani declarations, even assuming those declarations spoke to the purely legal claim raised in the contention. Mr. Cooper's conclusions, for example, are based on a declaration he wrote that was submitted in the Continued Storage rulemaking proceeding in December 2013.

In addition, SACE does not demonstrate that a materially different result in the outcome of this proceeding is likely in view of the assertions of Dr. Makhijani and Mr. Cooper. SACE

concedes that Dr. Makhijani's and Mr. Cooper's declarations may affect only a cost-benefit analysis of spent fuel storage and disposal which, in turn, "may" lead to a materially different decision. Motion at 4. Even if this were relevant to the contention, speculation that the declarants' affidavits "may" lead to a different conclusion does not suffice to meet SACE's heavy burden under 10 C.F.R. § 2.336.[8] *Oyster Creek*, CLI-09-7, 69 N.R.C. at 287.

Further, as noted in Section II.B, *supra*, the Commission has approved the Continued Storage Rule and Continued Storage GEIS without including its generic conclusions regarding the technical feasibility and availability of a repository in the text of the rule itself. However, those generic conclusions are included and supported in Appendix B of the Continued Storage GEIS. SACE does not address or dispute the adequacy of those findings, further underscoring its failure to meet its heavy burden here. *Oyster Creek*, CLI-09-7, 69 N.R.C. at 288. SACE has presented no information to suggest that the NRC would have reached or would have been likely to reach materially different conclusions regarding the technical feasibility and availability of a repository.

[8] Both Dr. Makhijani's declaration (Declaration of Dr. Makhijani, Section 7) and Mr. Cooper's declaration (Declaration of Mark Cooper at ¶ 5) also note the speculative nature of their claim and do not demonstrate that a materially different result would be or would have been likely.

CONCLUSION

As explained above, SACE's Motion is untimely, does not raise a significant safety issue, and does not demonstrate that a materially different result is likely to result. SACE's Motion requesting that the Commission reopen the record should, therefore, be denied.

Respectfully submitted,

/signed (electronically) by Scott A. Vance/

October 31, 2014

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CERTIFICATE OF SERVICE

I certify that, on October 31, 2014, a copy of "Tennessee Valley Authority's Answer Opposing Southern Alliance for Clean Energy's Motion to Reopen the Record" was served electronically through the E-Filing system on the participants in the above-captioned proceeding.

/signed electronically by/
Blake J. Nelson