

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD PANEL

Before the Licensing Board:

G. Paul Bollwerk, III, Chairman
Dr. Anthony J. Baratta
Dr. William W. Sager

In the Matter of

TENNESSEE VALLEY AUTHORITY

(Bellefonte Nuclear Power Plant Units 3 and 4)

Docket Nos. 52-014-COL and 52-015-COL

ASLBP No. 08-864-02-COL-BD01

December 19, 2008

MEMORANDUM AND ORDER
(Ruling Regarding Motion for Reconsideration)

By motion dated November 10, 2008, applicant Tennessee Valley Authority (TVA) seeks reconsideration of the Licensing Board's October 14, 2008 decision ruling on a September 22, 2008 TVA motion. In its previous motion, TVA sought clarification regarding the appropriate limits of Joint Intervenors¹ challenge posed by admitted contention NEPA-N, which concerns a potential discrepancy in the cost estimate for the two proposed Bellefonte units as outlined in the environmental report (ER) that accompanied the pending TVA combined operating license (COL) application. In ruling on the September 22 clarification motion, the Board indicated that the possible magnitude of the difference -- vis a vis other publicly available cost figures for similar AP1000 units -- in the TVA cost figures for its new facilities warranted further consideration relative to ER section 10.4.2.1.1, regarding the cost-benefit analysis of construction, and ER section 9.2.3.3, relating to combined alternative sources of baseload

¹ Joint Intervenors include the Southern Alliance for Clean Energy (SACE) and the Blue Ridge Environmental Defense League (BREDL).

generation. See Licensing Board Memorandum and Order (Ruling on Motion for Clarification) at 3-4 (unpublished) (Oct. 14, 2008) [hereinafter Clarification Order]. TVA now asks the Board to reconsider its October 14 order as it pertains to the consideration of baseload generation alternatives under ER section 9.2.3.3 in light of a recent decision by the Licensing Board in the Shearon Harris COL proceeding. See [TVA] Request for Leave to File and Motion for Reconsideration of the Board's Clarification Order Regarding Contention NEPA-N (Nov. 10, 2008) at 2 (citing Progress Energy Carolinas, Inc. (Shearon Harris Nuclear Power Plant, Units 2 and 3), LBP-08-21, 68 NRC __, __-__ (slip op. at 23-27) (Oct. 30, 2008)) [hereinafter Reconsideration Motion].

For the reasons given below, the TVA reconsideration motion is denied.

I. BACKGROUND

In our September 12, 2008 decision ruling on the admissibility of the twenty-four contentions proffered by Joint Intervenors in their June 2008 hearing petition, one of the four contentions admitted by the Board was NEPA-N, the text of which is set forth in appendix A of that decision. See LBP-08-16, 68 NRC __, __ (slip op. at unnumbered p. 81) (Sept. 12, 2008). In admitting that contention, the Board noted, among other things, that the potential magnitude of the difference between the TVA construction cost figures for its proposed two new Bellefonte units and other publicly available figures for the construction of facilities using the AP1000 certified design has the potential materially to affect the cost component of the baseload generation alternatives analysis in ER section 9.2.3.3. See id. at __ (slip op. at 68-69). In a September 22, 2008 motion, TVA requested clarification regarding contention NEPA-N. See [TVA] Motion for Clarification (Sept. 22, 2008) at 3-4 [hereinafter Clarification Motion]. Specifically, TVA asked whether, because the combined alternatives analysis in ER

section 9.2.3.3 concludes that the environmental impacts of the combined alternatives considered are equivalent or greater than the new nuclear units, “Contention NEPA-N is limited to the estimate of the cost of Bellefonte in Section 10.4 of the Environmental Report.” Id. at 4. The Board issued a determination on October 14 reaffirming that “the possible magnitude of the difference warrants further consideration in the context of [contention NEPA-N].” See Clarification Order at 3.

On November 10, 2008, TVA filed the motion for reconsideration currently before the Board. See Reconsideration Motion at 1. The NRC staff filed a response on November 20 contending that TVA’s motion should be granted. See NRC Staff’s Response to the Applicant’s Motion for Reconsideration of the Board’s Clarification Order Regarding Contention NEPA-N (Nov. 20, 2008) at 4 [hereinafter Staff Response]. On November 24, Joint Intervenors filed an answer opposing the Reconsideration Motion. See Intervenor’s Answer Opposing TVA’s Motion for Reconsideration (Nov. 24, 2008) at 2-3.

II. ANALYSIS

A. Standards Governing Reconsideration

Section 2.323 of the Commission’s rules of practice specifies the requirements that must be met in framing a motion for reconsideration. As a threshold matter, a motion for reconsideration must be filed within ten days of the action for which reconsideration is requested. See 10 C.F.R. § 2.323(e). Further, a motion may not be filed without leave from the Board and only (1) “upon a showing of compelling circumstances, such as the existence of a clear and material error in a decision”; (2) “which could not have reasonably been anticipated”; and (3) “that renders the decision invalid.” Id. In the 2004 amendments to its rules of practice, the Commission outlined what a “compelling circumstance” must be, stating:

This standard, which is a higher standard than the existing case law, is intended to permit reconsideration only where manifest injustice would occur in the absence of reconsideration, and the claim could not have been raised earlier. In the Commission's view, reconsideration should be an extraordinary action and should not be used as an opportunity to reargue facts and rationales which were (or should have been) discussed earlier.

Changes to Adjudicatory Process, 69 Fed. Reg. 2182, 2207 (Jan. 14, 2004).

Consequently, the party submitting a petition for reconsideration must demonstrate that the presiding officer has committed "clear" error and must do so in the context of a new argument the party previously was not able to make. See Consumers Energy Company, Nuclear Management Company, LLC, Entergy Nuclear Palisades, LLC, and Entergy Nuclear Operations, Inc. (Palisades Nuclear Power Plant), CLI-07-22, 65 NRC 525, 527 (2007) (applying section 2.345(a)(2), which incorporates by reference, through section 2.341(d), the section 2.323(e) standard). Thus, in ruling upon a reconsideration request, the Commission has stated that it does "not lightly revisit our own already-issued and well-considered decisions" and does so "only if the party seeking reconsideration brings decisive new information to our attention or demonstrates a fundamental Commission misunderstanding of a key point." Louisiana Energy Services, L.P. (National Enrichment Facility), CLI-04-35, 60 NRC 619, 622 (2004).

B. Discussion

Initially, it is not apparent that a subsequent decision by the Licensing Board in the Shearon Harris COL proceeding taking what on its face appears to be a different approach on an issue from that utilized by this Board provides an appropriate "trigger" for the TVA motion. Although a ruling by another board in factually and/or legally similar circumstances deserves close scrutiny by other boards, a licensing board generally is not required to follow the decision of another licensing board in a different case. Certainly, a licensing board order that was not

upheld on appeal is not entitled to any stare decisis effect. See Florida Power & Light Co. (St. Lucie Nuclear Power Plant, Unit 1), ALAB-893, 27 NRC 627, 629 n.5 (1988) (unappealed denial of intervention petition not entitled to stare decisis effect because never appealed); see also Arizona Public Service Co. (Palo Verde Nuclear Generating Station, Units 1, 2 and 3), ALAB-713, 17 NRC 83, 85 (1983); Duke Power Co. (Cherokee Nuclear Station, Units 1, 2, and 3), ALAB-482, 7 NRC 979, 981 n.4 (1978) (“in passing judgment on questions of law in a nonadversary context, the possibility is enhanced that some important consideration will be overlooked by us. It is for this reason that we do not give stare decisis effect to licensing board conclusions on legal issues not brought to us by way of an appeal.”). Accordingly, the mere fact that a licensing board issues a decision that reaches a different result from another licensing board in similar circumstance seemingly is not, in and of itself, a basis for seeking reconsideration before either licensing board. That is particularly so where, as here, the central precept posited before this Board as the basis for reconsideration -- purported binding agency precedent excusing the agency’s need to consider the cost estimates for the proposed nuclear units in the absence of an environmentally preferable alternative -- was previously raised. See Applicant’s Answer Opposing Petition to Intervene (July 1, 2008) at 85 & n.373 (citing Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-458, 7 NRC 155, 162 (1978)).

Even putting aside this concern over whether the Shearon Harris decision provides an appropriate reconsideration trigger, the Board is unable to agree with the TVA and staff positions that reconsideration is compelled in this instance by the controlling nature of the precedent at issue. TVA and the staff both argue that the Board should reconsider its clarification order and narrow contention NEPA-N to include only an analysis of the costs to construct each reactor under ER section 10.4.2.1.1, thereby excluding any cost/benefit analysis of alternative renewable/fossil-fuel baseload generation under TVA ER section 9.2.3.3. As was

indicated above, the principal basis for this assertion is the Shearon Harris Board's holding that under existing agency precedent embodied in the Appeal Board's Midland decision, an environmental report alternatives analysis that finds no environmentally preferable alternative to the planned nuclear unit does not require the agency to perform a cost/benefit analysis. See Reconsideration Motion at 6 (citing Shearon Harris, LBP-08-21, 68 NRC at __ (slip op. at 25)); Staff Response at 3-4 (same). In this regard, TVA and the staff assert that the facts in Shearon Harris are indistinguishable from those before the Board in the current proceeding and so compel an identical result. See Reconsideration Motion at 5; Staff Response at 4.

Given the existing Midland precedent, if it indeed were true that the factual circumstances associated with this proceeding and the Shearon Harris case were not distinguishable, this TVA and staff argument might well be a compelling reason to revisit and revise our clarification ruling. See South Carolina Electric & Gas Co. (Virgil C. Summer Nuclear Station, Unit 1), ALAB-170, 17 NRC 25, 28 (1983) ("licensing boards are bound to comply with appeal board directives, whether they agree with them or not."). As it turns out, however, that is not the case.

In its Midland ruling, the Appeal Board concluded that once it has been established there is a need for power and no environmentally preferable alternative to nuclear generation, the question of the weight to be given to cost in the selection of a baseload source "is a question for the utility and the State regulatory agencies, the true experts in this area," Midland, ALAB-458, 7 NRC at 168. Given that the Shearon Harris application is subject to such state regulatory review, see Progress Energy Carolinas, Inc., Shearon Harris Nuclear Power Plant Units 2 and 3, COL Application, Part 3, [ER] § 8.0, at 8-1 (rev. 0 Feb. 2008) (ADAMS Accession No. ML080600912) (facility need for power assessments submitted to both North and South Carolina public utility commissions), the Midland precedent appears controlling in that case.

Unlike the Shearon Harris applicant, however, TVA is a federal entity for which there is no state public utility commission or other state regulatory agency that will undertake any cost/benefit analysis regarding the efficacy of the TVA application. As we explain below, that factual distinction leads to a different result here.

In our contention admission decision, we found that, having failed to make a showing there was some specific deficiency in the TVA need for power analysis, Joint Intervenors general claim that TVA's "unregulated" status required additional NRC scrutiny of that TVA analysis was insufficient to support an admissible contention. See LBP-08-16, 68 NRC at __ (slip op. at 56-57). In contrast, relative to contention NEPA-N, we found Joint Intervenors provided sufficient information to place the magnitude of the facility "cost" factor in significant question. See id. at __ (slip op. at 67-68). Moreover, this was in an instance in which, by reason of TVA's own ER showing, see [TVA], Bellefonte Nuclear Plant Units 3 & 4, COL Application, Part 3, [ER] at 9.2-47 (rev. 0 Oct. 2007) (ADAMS Accession No. ML073110872) (Table 9.2-6), a comparative analysis of the environmental impacts of nuclear generation and a natural gas/renewable combination generation alternative suggests they could be relatively equal. As a consequence, the "cost" factor takes on added significance, as does the NRC's responsibility to scrutinize that factor in the absence of a cost/benefit analysis by a state regulatory agency.

Accordingly, as we indicated in our contention admission decision and our ruling on the TVA clarification motion, in litigating the merits of contention NEPA-N, the scope of the contention includes (1) whether, under ER section 10.4.2.1.1, the analysis of the costs to construct each proposed Bellefonte reactor fails to provide reasonably up-to-date and accurate information regarding the estimated electrical generation costs of the proposed new nuclear power plant, as well as (2) the affect of the cost figures provided for section 10.4.2.1.1 upon the

cost component of the alternatives analysis outlined in ER section 9.2.3.3 relative to combined renewable/fossil-fuel baseload generation sources.²

Finally, in making this ruling we note that shortly after submitting its reconsideration motion, applicant TVA provided an update to its ER to reflect information available in recent publications and public utility commission filings regarding the cost of constructing and operating nuclear power plants, as well as coal- and gas-fired electricity generating power plants. See Letter from Stephen J. Burdick, TVA Co-Counsel, to Licensing Board, unnumbered encl. (Nov. 13, 2008). Joint Intervenors responded with a motion seeking to amend contention NEPA-N relative to that TVA information. See Joint [Intervenors] Request for Leave to Timely Amend Contention NEPA-N (Dec. 15, 2008) at 3-4. Although the Board and the parties briefly discussed the prospect of further near-term litigation on this matter, including a possible pre-draft environmental impact statement summary disposition motion, during a November 3, 2008 prehearing conference, see Tr. at 256-58, with these submissions the Board will forego

² In making this ruling, we note that Joint Intervenors response to the TVA reconsideration motion was untimely (by four days) without a request for leave to file out of time. Although we would be justified in rejecting their filing, we see no need to do so here given its contents would not impact the result we conclude is appropriate in this instance based on our consideration of the TVA and staff submissions.

setting any additional schedules pending the resolution of Joint Intervenors pending contention NEPA-N amendment request.

It is so ORDERED.

THE ATOMIC SAFETY
AND LICENSING BOARD³

/RA/

G. Paul Bollwerk, III
CHAIRMAN

/RA/

Anthony J. Baratta
ADMINISTRATIVE JUDGE

/RA/

William W. Sager
ADMINISTRATIVE JUDGE

Rockville, Maryland

December 19, 2008

³ Copies of this memorandum and order were sent this date by Internet e-mail transmission to counsel/representatives for (1) applicant TVA; (2) Joint Intervenors; and (3) the staff.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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TENNESSEE VALLEY AUTHORITY) Docket Nos. 52-014-COL and 52-015-COL
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Units 3 and 4))
)

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LB MEMORANDUM AND ORDER (RULING REGARDING MOTION FOR RECONSIDERATION), issued December 19, 2008, have been served upon the following persons by the Electronic Information Exchange.

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Docket Nos. 52-014-COL and 52-015-COL
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[Original signed by Linda D. Lewis]
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Dated at Rockville, Maryland
this 19th day of December 2008