

March 17, 2010

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

NRC STAFF'S ANSWER TO SACE
REPLY MOTION AND MOTION TO AMEND

INTRODUCTION

On February 4, 2010, the Southern Alliance for Clean Energy ("SACE") filed a petition, pursuant to 10 C.F.R. § 2.335(b), requesting waiver ("Waiver Request") of 10 C.F.R. §§ 51.53(b)¹ and 51.95(b)² with respect to Tennessee Valley Authority's ("TVA") application for an operating license for Watts Bar Nuclear Plant Unit 2.

On February 26, 2010, the Staff of the U.S. Nuclear Regulatory Commission ("Staff") filed its response opposing SACE's Waiver Request.³ On March 1, 2010, TVA filed its response

¹ 10 C.F.R. § 51.53(b) governs the content of the supplemental environmental report submitted by the applicant at the operating license stage. It states in part that "[n]o discussion of need for power, or of alternative energy sources, . . . is required in this report." 10 C.F.R. § 51.53(b).

² 10 C.F.R. § 51.95(b) governs the content of the supplement to the final environmental impact statement prepared by NRC Staff in connection with the issuance of an operating license. It states in part that "[u]nless otherwise determined by the Commission, a supplement on the operation of a nuclear power plant will not include a discussion of need for power, or of alternative energy sources, . . ." 10 C.F.R. § 51.95(b).

³ "NRC Staff's Response to Request by Southern Alliance for Clean Energy ("SACE") for Waiver of 10 C.F.R. §§ 51.53(b) and 51.95(b) with Respect to Admission of Contentions Regarding Need for Power and Consideration of Alternative Energy Sources" (February 26, 2010) ("Staff Response").

in opposition to the waiver request.⁴

On March 8, 2010, SACE filed a motion for leave to reply, and a reply, to the Staff Response and the TVA Response.⁵ On March 10, 2010, SACE filed a separate motion for leave to amend its Waiver Request.⁶ On March 15, 2010, TVA answered the motions, opposing them.⁷

Pursuant to 10 C.F.R. § 2.323(c), the Staff hereby files its answers to the motions.

DISCUSSION

I. Reply Motion

A. SACE Argument

SACE states that it wants to reply because it disagrees with the Staff and with TVA, and it wants to address various arguments raised by the other parties. Reply Motion at 1-2. SACE provides no citations or controlling authority on the topic of reply filings for responses to waiver requests.

B. Staff Answer to Reply Motion

If the Commission had intended for such replies, it would have been a simple matter to have expressed it in the rule. But the rules in 10 C.F.R. Part 2 do not provide an opportunity for

⁴ "Tennessee Valley Authority's Response in Opposition to Petitioner for Waiver of 10 C.F.R. §§ 51.53(b) and 51.95(b)" (March 1, 2010) ("TVA Response").

⁵ "Southern Alliance for Clean Energy's Motion for Leave to Reply to Tennessee Valley Authority and NRC Staff Regarding Petition for Waiver of 10 C.F.R. §§ 51.53(b) and 51.95(b)" (March 8, 2010) ("Reply Motion"); "Southern Alliance for Clean Energy's Reply to Tennessee Valley Authority and NRC Staff Regarding Petition for Waiver of 10 C.F.R. §§ 51.53(b) and 51.95(b) with Respect to Admission of Contentions Regarding Need for Power and Consideration of Alternative Energy Sources" (March 8, 2010) ("SACE Waiver Reply").

⁶ "Southern Alliance for Clean Energy's Motion for Leave to Amend Petition for Waiver of 10 C.F.R. §§ 51.53(b) and 51.95(b)" (March 10, 2010) ("Motion to Amend").

⁷ "Tennessee Valley Authority's Answer In Opposition To Motion For Leave To Reply And Motion For Leave To Amend Waiver Petition" (March 15, 2010) ("TVA Answer").

reply to a response submitted for a petition to waive the rules. Under the Commission's rules, the Atomic Safety and Licensing Board ("Board") makes its decision on the basis of the petition, affidavit, and any response. See 10 C.F.R. § 2.335(c). While the rules contemplate that the Commission may direct further proceedings to aid its determination if the Board certifies the matter, no additional filings (e.g. a reply) are allowed before the Board. Compare 10 C.F.R. § 2.335(c) with 10 C.F.R. § 2.335(d) (showing that the presiding officer rules based on the petition, affidavit and any responses, while the Commission rules on those "among other things"). Thus, all waiver requestors are effectively informed in advance that they must make their arguments to the Board in a single filing without a reply. See 10 C.F.R. § 2.335(b). SACE's desire to reply and to introduce new material⁸ effectively reverses the filing order contemplated in 10 C.F.R. § 2.335(b), and further would deny the other parties their procedural right to be able to respond to all the waiver requestor's filings "by counter affidavit or otherwise." See 10 C.F.R. § 2.335(b). Thus, the Reply Motion should be denied.

II. SACE Motion to Amend

A. SACE Argument

In its Motion to Amend, SACE states it failed to include 10 C.F.R. § 51.106(c)⁹ in its original waiver request because SACE had not previously identified the regulation. Motion to Amend at 2. Further, SACE believes that 10 C.F.R. § 51.106(c) would, if not waived, defeat any waiver granted with respect to §§ 51.53(b) and 51.95(b). *Id.* at 1. However, SACE states that amending the waiver request to include 10 C.F.R. § 51.106(c) will not require further briefing

⁸ In the SACE Waiver Reply, SACE for the first time bases its argument on a study from a Dr. Mark Cooper. See SACE Waiver Reply at 5.

⁹ "The presiding officer in an operating license hearing shall not admit contentions proffered by any party concerning need for power or alternative energy sources or alternative sites for the facility for which an operating license is requested." 10 C.F.R. § 51.106(c).

because 10 C.F.R. § 51.106(c) is based on the same rationale as §§ 51.53(b) and 51.95(b). *Id.* at 3 (*citing* Final Rule, Environmental Protection Regulations for Domestic Licensing and Related Regulatory Functions and Related Conforming Amendments, 49 Fed. Reg. 9,352, 9,365 (March 12, 1984); Final Rule, Need for Power and Alternative Energy Issues in Operating License Proceedings, 47 Fed. Reg. 12,940, 12,942-43 (March 26, 1982)).

B. Staff Answer to Motion to Amend

SACE has indicated if its Motion to Amend was granted, no additional petition or affidavit would be forthcoming. Motion to Amend at 3. Under 10 C.F.R. § 2.335(b), SACE must address the provision of a regulation it seeks to waive by affidavit. 10 C.F.R. § 2.335(b). The other parties may then counter by affidavit or otherwise. *Id.* Granting the Motion to Amend bypasses these procedural requirements and denies the other parties their rights to respond. Thus, the Staff opposes granting the Motion to Amend.¹⁰

¹⁰ While opposing the Motion to Amend, the Staff agrees with SACE that 10 C.F.R. § 51.106(c) is related to the Need for Power rulemaking and subsequent 1984 rulemaking (See Motion to Amend at 3). In the only post-rulemaking waiver decision, the Appeal Board, while acknowledging the regulation, did not further discuss the regulation, nor indicate that 10 C.F.R. § 51.106(c) was significant to its analysis of a waiver request submitted after a board found two contentions barred by the regulation. See *Carolina Power and Light Company and North Carolina Eastern Municipal Power Agency* (Shearon Harris Nuclear Power Plant), ALAB-837, 23 NRC 525, 544-548 (1986).

CONCLUSION

For the reasons discussed above, both the Reply Motion and the Motion to Amend should be denied.

Respectively submitted,

/Signed (electronically) by/

David E. Roth
Counsel for the NRC Staff
U.S. Nuclear Regulatory Commission
Mail Stop O15-D21
Washington, DC 20555
(301) 415-2749
E-Mail: David.Roth@nrc.gov
Signed: March 17, 2010

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "NRC STAFF'S ANSWER TO SACE REPLY MOTION AND MOTION TO AMEND" dated March 17, 2010, have been served upon the following by the Electronic Information Exchange, this 17th day of March 2010:

Administrative Judge
Lawrence G. McDade, Chair
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Mail Stop: T-3 F23
Washington, DC 20555-0001
E-mail: lqm1@nrc.gov

Office of Commission Appellate
Adjudication
U.S. Nuclear Regulatory Commission
Mail Stop: O-16G4
Washington, DC 20555-0001
E-mail: OCAAMAIL.resource@nrc.gov

Administrative Judge
Paul B. Abramson
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Mail Stop: T-3 F23
Washington, DC 20555-0001
E-mail: pba@nrc.gov

Office of the Secretary
Attn: Rulemaking and Adjudications Staff
Mail Stop: O-16G4
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
E-mail: Hearing.Docket@nrc.gov

Administrative Judge
Gary S. Arnold
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Mail Stop: T-3 F23
Washington, DC 20555-0001
E-mail: qxa1@nrc.gov

Edward Vigluicci, Esq.
Christopher C. Chandler, Esq.
Scott A. Vance, Esq.
Tennessee Valley Authority
400 West Summit Hill Drive, WT 6A-K
Knoxville, TN 37902
E-mail: ejvigluicci@tva.gov
ccchandler0@tva.gov
savance@tva.gov

Kathryn M. Sutton, Esq.
Paul M. Bessette, Esq.
Morgan, Lewis & Bockius, LLP
1111 Pennsylvania Avenue, NW
Washington, D.C. 20004
E-mail: ksutton@morganlewis.com
E-mail: pbessette@morganlewis.com

Diane Curran
Matthew D. Fraser
for Southern Alliance for Clean Energy
(SACE)
Harmon, Curran, Spielberg & Eisenberg, LLP
1726 M Street N.W., Suite 600
Washington, DC 20036
E-mail: dcurran@harmoncurran.com
E-mail: mfraser@harmoncurran.com

Signed (electronically) by

David E Roth
Counsel for NRC Staff
U.S. Nuclear Regulatory Commission
Office of the General Counsel
Mail Stop O15-D21
Washington, DC 20555
(301) 415-2749
E-mail: David.Roth@nrc.gov
Signed: March 17, 2010