

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

LBP-10-12

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Lawrence G. McDade, Chairman
Dr. Paul B. Abramson
Dr. Gary Arnold

In the Matter of

Docket Nos. 50-391-OL

Tennessee Valley Authority
(Watts Bar Unit 2)

ASLBP No. 09-893-01-OL-BD01

June 29, 2010

MEMORANDUM AND ORDER

(Denial of Petition to Waive 10 C.F.R. §§ 51.53(b), 51.95(b), 51.106(c)
in the Watts Bar Operating License Proceeding)

Pending with the Licensing Board in this proceeding is a request under 10 C.F.R. § 2.335(b) by Intervenor Southern Alliance for Clean Energy (SACE) for a waiver of the application of the provisions of 10 C.F.R. §§ 51.53(b), 51.95(b), and 51.106(c) precluding consideration of the issues of “need for power” and “alternative energy sources” from a Part 50 operating license (OL) proceeding. Both applicant Tennessee Valley Authority (TVA) and the NRC Staff oppose the rule waiver request. For the reasons set forth below, we find that although SACE’s waiver request is timely, it fails to provide the prima facie showing required in such petitions when they concern need for power/alternative energy sources. Accordingly, this Petition will not be referred by this Board to the Commission for its consideration.

I. BACKGROUND REGARDING WATTS BAR UNIT 2 OL PROCEEDING

This proceeding arises from an updated TVA application pursuant to Part 50 for an OL for a second nuclear reactor at the Watts Bar Nuclear Plant (WBN) in Rhea County, Tennessee. On November 19, 2009, this Board granted a Request for Hearing submitted on behalf of SACE

in which it demonstrated its standing and submitted two admissible contentions (SACE Contentions 1 and 7).¹

As noted by SACE in its Petition to Intervene, this proceeding has run an unusual course.² TVA was issued a Part 50 construction permit (CP) for WBN Unit 2 in January 1973 and initially submitted its OL application on June 30, 1976. However, before the OL was issued, but after WBN Unit 2 had been approximately 80 percent completed, TVA suspended construction, albeit while keeping its CP in effect.³ Thereafter, on March 4, 2009, after a more than thirty-year hiatus, TVA submitted an update to its OL application that precipitated this licensing proceeding.⁴ In that update, TVA stated that, pursuant to its existing CP authority, it expects to complete construction on WBN Unit 2 prior to April 1, 2012.⁵

II. RULE WAIVER BACKGROUND

A. Legal Standards Governing NRC Rule Waiver Requests

¹ LBP-09-26, 70 NRC __ (slip op.) (Nov. 19, 2009). Thereafter, the Board dismissed SACE Contention 1 as moot. Licensing Board Order (Granting TVA's Unopposed Motion to Dismiss SACE Contention 1) (June 2, 2010) (unpublished).

² Petition to Intervene and Request for Hearing (July 13, 2009) at 1-2 [hereinafter SACE Petition to Intervene].

³ Id.

⁴ Tennessee Valley Authority; Notice of Receipt of Update to Application for Facility Operating License and Notice of Opportunity for Hearing for the Watts Bar Nuclear Plant, Unit 2 and Order Imposing Procedures for Access to Sensitive Unclassified Non-Safeguards Information and Safeguards Information for Contention Preparation, 74 Fed. Reg. 20,350, 20,350 (May 1, 2009). TVA also recently submitted a Final Supplemental Environmental Impact Statement (FSEIS) for WBN Unit 2, Letter from Masoud Bajestani, Watts Bar Unit 2 Vice President, to NRC (Feb. 15, 2008), Encl., [TVA], [FSEIS], Completion and Operation of Watts Bar Nuclear Plant Unit 2 (June 2007) (ADAMS Accession No. ML0805104690), and a Final Supplemental Environmental Impact Statement -- Severe Accident Management Alternatives, Letter from Masoud Bajestani, Watts Bar Unit 2 Vice President, to NRC (Jan. 27, 2009), Encl. 1, WBN Unit 2 Severe Accident Management Alternatives Analysis (Jan. 21, 2009) (ADAMS Accession No. ML090360589), for WBN Unit 2.

⁵ 74 Fed. Reg. at 20,350.

Before exploring the particulars of the SACE rule waiver Petition now before the Board, to aid in a fuller understanding of the parties' arguments, we provide some background regarding the existing agency caselaw and other precedent governing Section 2.335 waiver requests in general and the Part 51 need for power/alternative energy sources rules that are of particular concern in this instance.

While Commission regulations may not be directly attacked in adjudicatory proceedings, a party may petition for a waiver of the application of a regulation on the sole ground that special circumstances exist such that the application of the regulation would not serve the purpose for which it was adopted.⁶ As was outlined in the Commission's 2005 ruling in Dominion Nuclear Connecticut, Inc. (Millstone Nuclear Power Station, Units 2 and 3),⁷ to justify the waiver of a Commission rule or regulation, a party generally must show that: 1) the regulation's application would not serve its original purpose; 2) special circumstances exist in the instant proceeding that were not considered in the rulemaking; 3) the special circumstances are unique to the instant proceeding; and 4) the waiver would be necessary in order to address a significant safety [or environmental] issue.⁸

Although a Licensing Board is not empowered to grant a waiver, if it concludes that a prima facie showing⁹ has been made, the Board must certify the matter to the Commission for a determination of whether the application of the regulation should be waived or an exception

⁶ 10 C.F.R. § 2.335(b).

⁷ CLI-05-24, 62 NRC 551, 559-60 (2005).

⁸ Id. Millstone dealt specifically with an alleged safety problem, but we believe that the reasoning underlying its holding is also applicable to the raising of an environmental issue.

⁹ Although the term prima facie is not defined in the Commission's regulations, we interpret it to mean a substantial showing. That is, the affidavits supporting the petition must present each element of the case for waiver in a persuasive manner with adequate supporting facts. See Pub. Serv. Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-895, 28 NRC 7, 22 (1988); Pacific Gas & Elec. Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-653, 16 NRC 55, 72 (1981).

granted under the specific circumstances presented.¹⁰ However, to certify a waiver petition the Board must find that the petitioner has met “extremely high standards” showing the existence of “compelling circumstances in which the rationale of [the regulation] is undercut.”¹¹

B. OL Stage Need for Power/Alternative Energy Sources Rule

The regulations at issue were developed from a proposed rule published by the Commission in 1981. That proposal, which was adopted, specified that, given the NRC’s two-step licensing process (CP/OL), the need for power and alternative energy sources would not be considered at the OL stage.¹² This proposed rule placed the need for power analysis at the CP stage because, prior to construction, little environmental disturbance would have occurred and real alternatives, including the no action alternative, existed.¹³

Nonetheless, in promulgating the final rule in 1982, the Commission recognized that “in very unusual cases [at the OL stage], such as where it appears that an alternative exists that is clearly and substantially environmentally superior, the NRC Staff would be obligated under NEPA to address [the need for power and alternatives] in its environmental impact statement.”¹⁴ However, it is clear from these provisions that the petitioner has the burden of demonstrating that there is warrant for the waiver of the rule prohibiting consideration of the need for power and energy alternatives at the OL stage.¹⁵ Moreover, when it published this rule, the

¹⁰ 10 C.F.R. § 2.335(d).

¹¹ Pub. Serv. Co. of New Hampshire (Seabrook Station, Units 1 & 2), CLI-89-20, 30 NRC 231, 245 (1989).

¹² Proposed Rule, Need for Power and Alternative Energy Issues in Operating Licensing Proceedings, 46 Fed. Reg. 39,440 (Aug. 3, 1981).

¹³ Id.

¹⁴ Final Rule, Need for Power and Alternative Energy Issues in Operating License Proceedings, 47 Fed. Reg. 12,940, 12,941 (Mar. 26, 1982).

¹⁵ See Commonwealth Edison Co. (Byron Nuclear Power Station, Units 1 and 2), ALAB-793, 20 NRC 1591, 1614-16 (1984).

Commission expressly stated that the prima facie showing needed to support a waiver request was a “much stricter standard than the current requirements for raising need for power and alternative energy sources in OL proceedings.”¹⁶

Additionally, under the case law governing waiving the application of the “OL stage need for power rule,” to meet its burden to justify certification of its waiver request, SACE must make a prima facie showing that the proposed facility “would not be needed: (1) to meet increased energy needs; (2) to replace older, less economical operating capacity; and (3) that there are viable alternatives . . . likely to exist which could tip the NEPA cost-benefit balance against issuance of the operating license.”¹⁷

III. PARTIES’ RULE WAIVER FILINGS

A. SACE’s Request for Waiver

As noted above, now pending before the Board is a request filed by SACE pursuant to the provisions of 10 C.F.R. § 2.335(b) seeking the waiver of 10 C.F.R. §§ 51.53(b), 51.95(b), and 51.106(c)¹⁸ “to the extent that those regulations bar consideration of the need for power and

¹⁶ 47 Fed. Reg. at 12,941.

¹⁷ Duquesne Light Co. (Beaver Valley Power Station, Unit 2), LBP-84-6, 19 NRC 393, 401 (1984); see also Georgia Power Co. (Vogtle Electric Generating Plant, Units 1 and 2), LBP-84-35, 20 NRC 887, 893-94 (1984).

¹⁸ In its initial pleading, SACE referenced Section 51.53(b), which provides that, at the OL stage, the applicant’s ER need not include a discussion of the need for power or the economic costs and benefits of the proposed action, and Section 51.95(b), which provides that the NRC Staff’s FEIS need not include a discussion of the need for power or alternative energy sources. SACE subsequently expanded its request for waiver to encompass 10 C.F.R. § 51.106(c), which provides that, at the OL stage, Licensing Boards will not admit contentions concerning the need for power or alternative energy sources. [SACE]’s Motion for Leave to Amend Petition for Waiver of 10 C.F.R. §§ 51.53(b) and 51.95(b) (Mar. 10, 2010) [hereinafter SACE Waiver Amendment].

alternative energy sources (including energy efficiency/no action).¹⁹ SACE bases its arguments for a waiver on the criteria articulated by the Commission in its 2005 Millstone decision.²⁰ SACE asserts that it should be granted a waiver because it has shown that 1) the rules' application in this case would not serve their original purpose; 2) special circumstances exist in this case that were not considered in the rulemaking; and 3) the special circumstances are unique to WBN Unit 2.²¹ In addition, relative to the final Millstone factor regarding whether a regulation waiver is necessary to reach a "significant safety problem," SACE argues that because the issues of need for power and energy alternatives arise under NEPA, the appropriate test is not that a waiver address a "significant safety problem," but instead that "new and significant information or changed circumstances [exist] that would affect the outcome of the previous environmental analysis."²²

SACE asserts that the WBN Unit 2 OL proceeding presents special circumstances not considered in the Commission rulemaking and unique to WBN Unit 2 because 1) over thirty years have elapsed since the issuance of the CP, which is a longer period of time than in any prior OL proceeding; 2) construction of WBN Unit 2 is only 60 percent complete and completion would cost an additional \$2.5 billion dollars; and 3) after the issuance of the CP for WBN Unit 2, TVA itself "found it more economical to rely on other sources of energy . . . to the extent of

¹⁹ 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 (Feb. 4, 2010) at 1 [hereinafter SACE Petition for Waiver]. The waiver petition was accompanied by a Declaration by Dr. Arjun Makhijani. Id., Exh. 1, Declaration of Dr. Arjun Makhijani in Support of [SACE]'s Petition for Waiver of or Exception to 10 C.F.R. §§ 51.53(b) and 51.95(b) with Respect to Need for Power and Consideration of Alternative Energy Sources (Feb. 4, 2010) [hereinafter Makhijani Declaration].

²⁰ SACE Petition for Waiver at 2-3 (citing Millstone, CLI-05-24, 62 NRC at 560).

²¹ Id.

²² Id. at 3.

purposely excluding WBN 2 from the energy portfolio that it developed in the mid-1990's.²³ Additionally, SACE asserts that this case presents special circumstances unique to WBN Unit 2 because of "fundamental changes in the regional economy, energy technology, and the administrative and political landscape" that have "significantly undermined the validity of TVA's 1972 prediction of need for WBN Unit 2."²⁴ According to SACE, these changes include "TVA's own post-1972 pattern of chronic delays and escalating costs in nuclear plant construction," TVA's exclusion of WBN Unit 2 as a preferred energy source in its 1995 resource planning, and a decreased cost of purchased power.²⁵ Finally, SACE argues that, because the NRC Staff issued a Request for Additional Information (RAI) to TVA with questions regarding its need for power, it would be contradictory with other agency actions if the Board did not consider that issue.²⁶

SACE further asserts that the purpose of 10 C.F.R. §§ 51.53(b) and 51.95(b) is to avoid "unnecessary duplication" of need for power and energy alternatives analyses where construction of a plant had already been completed so that it would be "extremely unlikely" that any "new information or new developments" would demonstrate an energy alternative that was both environmentally and economically preferable existed.²⁷ SACE argues that the rules' purpose would not be served for WBN Unit 2 because the unit is only 60 percent complete and completion would require an additional \$2.5 billion that might not be justified because TVA has thus far relied on other energy sources.²⁸ SACE also argues that the economic and energy

²³ Id. at 4.

²⁴ Id. at 4-5.

²⁵ Id. at 5.

²⁶ Id.

²⁷ Id. at 6-7.

²⁸ Id. at 8.

situation in TVA's service area has changed significantly so that "it is not a foregone conclusion that operation of WBN Unit 2 would be preferable to other energy alternatives."²⁹

Finally, SACE asserts that the changes in TVA's circumstances since 1972 constitute significant new information that would change the outcome of the environmental analysis for WBN Unit 2 so that the NRC must re-examine TVA's need for power and energy alternatives to WBN Unit 2 in order to fulfill its NEPA obligations.³⁰

B. TVA's Response

In response, TVA asserts that the Waiver Petition should be denied because 1) it is impermissibly late; 2) it does not meet the threshold necessary for the certification of a waiver request; and 3) the waiver would be "purely academic" because SACE did not submit an otherwise admissible contention on the issues of need for power and energy alternatives.³¹

As to timing, TVA asserts that the Petition should have been filed with SACE's proposed contention regarding need for power and energy alternatives and is now impermissibly late because, when it filed its original Petition to Intervene, SACE had all of the information needed to file the Waiver Petition and should have been aware of the need to file one.³² TVA also argues that granting the Waiver Petition now would expand the scope of and delay the proceeding.³³

As for certification, TVA argues that SACE has not met the threshold for certifying a waiver petition to the commission because SACE has not made a prima facie showing that WBN Unit 2 is not needed to meet increased energy demand, displace older and less efficient

²⁹ Id. at 8-9.

³⁰ Id. at 9-10.

³¹ [TVA]'s Response in Opposition to Petition for Waiver of 10 C.F.R. §§ 51.53(b) and 51.95(b) (Mar. 1, 2010) at 1-2 [hereinafter TVA Response].

³² Id. at 15-16.

³³ Id. at 16-17.

units, or “reduce air emissions and provide fuel diversity and operational flexibility” or that an environmentally and economically preferable alternative energy source exists, contrary to NRC caselaw governing waiver of the OL need for power and energy alternatives regulations.³⁴ Specifically, TVA claims that SACE has improperly focused on current economic conditions instead of long-term forecasts in its arguments about future demand and has not provided factual or expert support to show that WBN Unit 2 “is less economical to operate than all of TVA’s fossil fuel baseload generation.”³⁵ Additionally, TVA argues that to demonstrate special circumstances such as those articulated in Millstone that were not considered in the rulemaking, SACE must “demonstrate that an environmentally and economically superior alternative exists” but that SACE has shown neither.³⁶ TVA also argues that the construction status of WBN Unit 2 is not unique among OL applicants, that “the Commission never assumed that construction would be complete while the OL proceeding is still ongoing, years before the scheduled operation start date,”³⁷ and that construction costs are outside the permissible scope of an OL proceeding.³⁸ In addition, TVA asserts that the NRC Staff’s issuance of an RAI is irrelevant to the purpose of 10 C.F.R. §§ 51.53(b) and 51.95(b) and does not establish special circumstances in this case.³⁹

Finally, TVA argues that the Waiver Petition should be rejected because 10 C.F.R. § 51.106(c) bars admission of contentions concerning need for power or energy alternatives,

³⁴ Id. at 2 (citing Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant), ALAB-837, 23 NRC 525, 546-48 (1986)).

³⁵ Id. at 18. See also id. at 20-22 (need to meet increasing energy demand), 22-23 (replacing existing generation), 23-24 (reducing air emissions and providing fuel diversity and operational flexibility).

³⁶ Id. at 18-19; see also id. at 24-27.

³⁷ Id. at 19.

³⁸ Id. at 27.

³⁹ Id. at 20; see also id. at 28-29.

and SACE did not initially seek a waiver from this prohibition.⁴⁰ Therefore, TVA concludes, absent a waiver of that section, SACE is barred from litigating those issues even if the waiver of §§ 51.53(b) and 51.95(b) is granted.⁴¹

C. NRC Staff's Response

In its response, the NRC Staff asserts that the Waiver Petition should be denied because SACE did not make a prima facie showing that this case involves special circumstances that were not considered in the rulemaking.⁴² Like TVA, the NRC Staff maintains that relative to any waiver of the need for power and energy alternatives rules, SACE has not met the test established in earlier OL cases, namely that SACE has not made a prima facie showing that 1) TVA will not need WBN Unit 2 to meet increased energy demand; 2) WBN Unit 2 will not be needed to displace older, less-economical generating capacity; and 3) viable energy alternatives exist that “could tip the NEPA cost-benefit balance against issuance of the operating license.”⁴³ Also, like TVA, the NRC Staff asserts that the mere issuance of an RAI on need for power and energy alternatives does not support SACE’s waiver of the need for power and energy alternatives rules because “the Staff’s RAI simply does not have such power.”⁴⁴ Additionally, the NRC Staff argues that the Waiver Petition should be denied because it does not discuss the purpose or the regulatory history and rulemaking behind 10 C.F.R. § 51.95(b).⁴⁵

⁴⁰ TVA does not discuss, or even note, that Section 51.106(b) is directed only to the Board and not to either the Applicant or any Intervenor.

⁴¹ TVA Response at 30.

⁴² NRC Staff’s Response to Request by [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 (Feb. 26, 2010) at 2 [hereinafter NRC Staff Response].

⁴³ Id. at 8-19.

⁴⁴ Id. at 19-22.

⁴⁵ Id. at 23.

D. SACE's Reply

In its reply, SACE responds to TVA's timeliness argument, TVA's and the NRC Staff's arguments regarding the criteria for a waiver, and TVA's assertion that SACE should have also requested a waiver of 10 C.F.R. § 51.106(c). On the issue of timeliness, SACE points out that NRC has no regulation governing the timing of waiver petitions and asserts that the standard for timeliness should therefore be reasonableness.⁴⁶ Applying that standard, SACE argues that it was reasonable for it not to have filed a waiver petition earlier because 1) it was unclear that a waiver petition was necessary when SACE filed its initial intervention petition because TVA had already discussed need for power and energy alternatives in its FSEIS; 2) until TVA submitted its response to the NRC Staff's RAI, SACE could not ascertain if there were significant safety or environmental issues to justify seeking a waiver; and 3) granting a waiver at this point in the proceeding will not delay the NRC Staff's issuance of a Draft Supplemental Environmental Impact Statement because that document is already being delayed by TVA's failure to respond fully to the RAI.⁴⁷

Regarding the criteria for obtaining a waiver, SACE maintains that its expert, Dr. Makhijani, has shown that there are environmentally and economically preferable alternatives to WBN Unit 2.⁴⁸ In addition, SACE claims that Dr. Makhijani's Declaration demonstrates that WBN Unit 2 will not be needed for future energy demand, that TVA's data and projections in this regard are inadequate "to support a need for power in the future," and that the NRC Staff's criticism that SACE does not project excess capacity "well into the future" ignores the fact that

⁴⁶ [SACE]'s Reply to [TVA] 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 (Mar. 8, 2010) at 1-2 [hereinafter SACE Reply].

⁴⁷ Id. at 1-3.

⁴⁸ Id. at 3.

SACE is using TVA's and the NRC Staff's timeline.⁴⁹ SACE further argues that the Staff's argument that it must show that the proposed plant will not be needed to replace older, less economical generating capacity is based on an assumption – that the plant is essentially complete – that SACE claims is inapplicable in this case because WBN Unit 2 is not complete and will require approximately an additional \$2,100 per kilowatt to complete.⁵⁰ Additionally, SACE argues that, so long as the NRC Staff continues to request and analyze information on need for power for WBN Unit 2, the Commission is in violation of the Atomic Energy Act if it excludes SACE and members of the public from being able to participate in that part of the licensing process.⁵¹

Finally, regarding 10 C.F.R. § 51.106(c), SACE asserts that this provision has no rationale independent of Sections 51.53(b) and 51.95(b) and that SACE's failure to request a waiver of Section 51.106(c) is therefore not a substantive ground for denying the Petition.⁵² Nonetheless, SACE also submitted a motion to amend the Waiver Petition to include 10 C.F.R. § 51.106(c).⁵³

IV. BOARD DECISION

As explained in Section II above, in a Part 50 proceeding the need for power and the availability of alternative energy sources are considered by the Commission as part of its NEPA cost/benefit analysis at the CP stage and are generally not considered at the OL stage. However, due to the lengthy delay between the granting of the CP for WBN Unit 2 in 1973 and this proceeding on the OL in 2010, SACE has asked the Board to certify its request for a waiver

⁴⁹ Id.

⁵⁰ Id. at 4-5.

⁵¹ Id. at 5.

⁵² Id. at 6.

⁵³ SACE Waiver Amendment.

to the Commission. Two procedural and one substantive objections have been interposed by TVA and the NRC Staff to SACE's Petition. We find that the two procedural objections lack merit and dispose of them briefly.

In its February 2010 Petition, SACE sought the waiver of 10 C.F.R. §§ 51.53(b) and 51.95(b) "to the extent that those regulations bar consideration of the need for power and alternative energy sources (including energy efficiency/no action)."⁵⁴ Thereafter, in its reply to the response filed by TVA in opposition to its waiver request,⁵⁵ SACE expanded its request for waiver to expressly encompass 10 C.F.R. § 51.106(c).⁵⁶ We find SACE's failure to initially reference all three regulations implementing the need for power rule at the OL stage to be without consequence. Not only was it clear from SACE's initial Petition exactly what was being requested, but it is unclear why the regulatory provision excluding the consideration of the need for power at the OL stage is repeated in the Commission's regulations three separate times.⁵⁷ Certainly, the parties opposing the waiver were in no way confused or misled about what it was seeking, and allowing SACE to expand its request to include expressly Section 51.106(c) will not expand or delay these proceedings.⁵⁸

Second, we disagree with TVA and the NRC Staff that SACE's Petition for Waiver was not timely. In its initial Petition to Intervene, SACE claimed that TVA had introduced the need for power and the availability of alternatives into this proceeding by incorporating a lengthy,

⁵⁴ SACE Petition for Waiver at 1.

⁵⁵ See TVA Response at 30.

⁵⁶ SACE Reply at 6.

⁵⁷ If the Applicant need not include the need for power or alternative energy sources in its ER (51.53(b)) and the NRC Staff need not include any discussion of the need for power or alternative energy sources in its FEIS (51.95(b)), it seems redundant to expressly prohibit a Board from admitting a contention concerning the need for power or alternative energy sources (51.106(c)).

⁵⁸ We also note that Section 51.106(c) is directed only to the presiding officer, not to the parties.

albeit in SACE’s view inadequate, alternatives discussion in its Supplemental Environmental Impact Statement.⁵⁹ SACE also maintained that the NRC Staff’s RAI to TVA seeking information regarding the need for power suggested that both TVA and the NRC Staff considered the need for power to be material to the agency’s decision on this long delayed OL application.⁶⁰ Thus, it was not unreasonable for SACE to conclude that this issue was within the scope of this proceeding, and it was not until this Board rejected SACE’s need for power contention (SACE Contention 4)⁶¹ that it had reason to file a waiver petition.⁶²

There being no NRC regulation that governs the timing of waiver petitions, we agree with SACE that the appropriate standard for determining whether a waiver petition is timely is reasonableness.⁶³ On that score, we find that SACE has acted with reasonable dispatch under the circumstances presented here to bring its waiver petition before this Board. Accordingly, we find that SACE’s Waiver Petition was timely.

While the procedural challenges to SACE’s Waiver Petition lack merit, the same cannot be said for the substantive challenge because the Commission has limited such waivers to “very unusual cases, such as where it appears that an alternative exists that is clearly and substantially environmentally superior,” in which “the Commission would be obligated under NEPA to address [the need for power and alternatives] in its environmental impact statement.”⁶⁴ As we have previously noted, the burden of proof to obtain a waiver is on the Intervenor.⁶⁵ The

⁵⁹ SACE Petition to Intervene at 2.

⁶⁰ SACE Reply at 2.

⁶¹ LBP-09-26, 70 NRC at __ (slip op. at 44).

⁶² SACE Reply at 2.

⁶³ Id. at 1-2.

⁶⁴ 47 Fed. Reg. at 12,941.

⁶⁵ See Byron, ALAB-793, 20 NRC at 1614-16.

Commission promulgated the OL stage need for power rule based, in part, on its experience that at the time the OL application was submitted the vast majority of the environmental disruption would have already occurred and that an electric utility would use the new nuclear plant to meet increased energy demand or, in the alternative, if there was no increase in demand, to replace older, less economical generation capacity.⁶⁶

Accordingly, to meet its burden of proof, SACE is required to make a prima facie showing that WBN Unit 2 would not be needed (1) to meet increased energy needs or (2) to replace older, less economical generating capacity; and that there are viable alternatives to the completed nuclear plant likely to exist which could tip the NEPA cost-benefit balance against issuance of the operating license.⁶⁷ In Shearon Harris, which is binding precedent for this Board, the Appeal Board held that, in order for intervenors to demonstrate that the purpose of the regulation excluding consideration of alternatives and the need for power from the OL phase would not be served, they must make a prima facie showing that the proposed facility “is not needed to meet increased energy demand and that it need not be used to displace an equivalent amount of older, less economical capacity.”⁶⁸ The Appeal Board went on to state that “the petition [for waiver] must establish that all of the applicant’s fossil fuel baseload generation that is less efficient than [the facility under consideration] has been accounted for” to make its prima facie showing.⁶⁹ SACE has not met this burden in this instance.

In support of its Petition for Waiver, SACE offers the Declaration of Dr. Arjun Makhijani, an electrical engineer who has almost 40 years’ experience in the nuclear industry. That Declaration, however, falls far short of making the prima facie showing that is required. We are

⁶⁶ Shearon Harris, ALAB-837, 23 NRC at 547.

⁶⁷ Beaver Valley, LBP-84-6, 19 NRC at 401.

⁶⁸ Shearon Harris, ALAB-837, 23 NRC at 547.

⁶⁹ Id. at 548.

presented with little, if any, useful information regarding the environmental impact of the proposed action, and we are presented with no information regarding the environmental costs associated with the continued operation of TVA's existing baseload generation facilities.

Dr. Makhijani notes that, according to TVA's website, the projected cost of bringing WBN Unit 2 on line would be \$2.5 billion, which, according to Dr. Makhijani, "shows that a great deal of work remains to be done."⁷⁰ But we are offered no indication what that remaining work might entail, or what the environmental impact of that unspecified work would be. Dr. Makhijani also states that "it is not a foregone conclusion that it would be cost-effective for TVA to finish and operate the plant."⁷¹ In support of this conclusion, Dr. Makhijani states that "TVA continues to have more than enough idle capacity to generate electricity in the absence of Watts Bar [Unit] 2" and that "at all times during 2009 it was cheaper for TVA to purchase power than to operate some of its less efficient generation plants."⁷² But we are offered no information regarding the comparative financial and environmental cost of operating WBN Unit 2 as opposed to the continued operation of the fifty-nine coal-fired generating units or twenty-nine hydroelectric dams now relied upon for baseload power by TVA.⁷³

SACE represents that Dr. Makhijani shows that alternative energy sources are environmentally and economically preferable to WBN Unit 2.⁷⁴ He does not. In support of this claim, SACE points primarily to paragraph 14 of Dr. Makhijani's Declaration in which he represents that "[d]uring the thirty two years that elapsed between TVA's initial operating license

⁷⁰ Makhijani Declaration ¶ 13.

⁷¹ Id. ¶ 12.

⁷² Id. ¶ 15.

⁷³ See NRC Staff Response at 15, 17.

⁷⁴ SACE Reply at 3. (citing Makhijani Declaration ¶¶ 14, 16 & Attach. 2, Arjun Makhijani, Ph.D., Watts Bar Unit 2: Analysis of Need and Alternatives at 4-7 (July 10, 2007) [hereinafter Makhijani Report]).

application for Unit 2 and its renewed application in 2008, TVA obviously found it more economical to rely on other sources of energy" and concludes that this fact fatally undermines any conclusion that the operation of WBN Unit 2 is a necessary and environmentally preferable course of action.⁷⁵ It does not. That it was not necessary to operate a facility in the past simply does not establish that it will be unreasonable to operate it in the future. Likewise, the other paragraphs of Dr. Makhijani's Declaration and the report attached to the Declaration⁷⁶ offer no more than unsupported conclusions, which do not make out a prima facie case for a waiver.

Given the passage of almost four decades since the CP application for WBN Unit 2 was submitted, the Commission may well wish to consider whether the need for power and the availability of alternative energy sources should be factored into the decision to grant or deny the OL.⁷⁷ But, given the language of the applicable regulations and the interpretation of the regulations regarding waiver that are binding on this Board, we have no authority to certify SACE's Petition to the Commission. SACE simply has not made the requisite prima facie showing that would justify certification pursuant to Section 2.335(d).⁷⁸

Accordingly, the February 2009 SACE Petition, as amended, requesting a waiver of the application of the provisions of 10 C.F.R. §§ 51.53(b), 51.95(b), and 51.106(c) is denied in that

⁷⁵ Makhijani Declaration ¶ 14.

⁷⁶ The Makhijani Report is dated July 10, 2007, but this is apparently a typographical error given that, from the content, it appears to have been prepared in 2009.

⁷⁷ Cf. Tennessee Valley Auth. (Bellefonte Nuclear Power Plant, Units 1 and 2), LBP-10-7, 71 NRC __, __ (slip op. at 39) (Apr. 2, 2010) ("off again/on again" approach to construction of long-delayed Bellefonte Units 1 and 2 has generated a unique set of circumstances such that Commission should consider holding a new mandatory hearing prior to allowing full-power operation of units), petition for Commission review pending.

⁷⁸ The NRC Staff's request for additional information referenced by SACE, Waiver Request at 10, had no impact on our decision in this matter. Although SACE suggests that the Staff's request effectively waived the applicability of 10 C.F.R. §§ 51.53(b) and 51.95(b) to this proceeding, there is no authority for that proposition and, in our view, it is illogical. Just as applicants and intervenors are bound by the regulations, so is the NRC Staff. Only the Commission, and then only under specific circumstances, has the authority to waive the application of NRC regulations.

the Board will not refer the Waiver Petition to the Commission or give any further consideration to the matters raised in the Petition.

It is so ORDERED.

THE ATOMIC SAFETY AND
LICENSING BOARD⁷⁹

/RA/

Lawrence G. McDade, Chairman
ADMINISTRATIVE JUDGE

/RA/ *E. Roy Hawkens for*

Dr. Paul B. Abramson
ADMINISTRATIVE JUDGE

/RA/

Dr. Gary Arnold
ADMINISTRATIVE JUDGE

Rockville, Maryland
June 29, 2010

⁷⁹ A copy of this order was sent this date by Internet e-mail to: (1) Counsel for the NRC staff; (2) Counsel for TVA; and (3) Diane Curran as Counsel for SACE.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing MEMORANDUM AND ORDER (DENIAL OF PETITION TO WAIVE 10 C.F.R. §§ 51.53(b), 51.95(b), 51.106(c) IN THE WATTS BAR OPERATING LICENSE PROCEEDING) (LBP-10-12) have been served upon the following persons by the Electronic Information Exchange.

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Docket No. 50-391-OL
MEMORANDUM AND ORDER (DENIAL OF PETITION TO WAIVE 10 C.F.R. §§ 51.53(b),
51.95(b), 51.106(c) (LBP-10-12) IN THE WATTS BAR OPERATING LICENSE PROCEEDING)

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[Original signed by Nancy Greathead]
Office of the Secretary of the Commission

Dated at Rockville, Maryland
this 29th day of June 2010