UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of	)	
	)	Docket No. 50-391
TENNESSEE VALLEY AUTHORITY	)	
	)	July 26, 2010
(Watts Bar Nuclear Plant Unit 2)	)	

TENNESSEE VALLEY AUTHORITY'S ANSWER OPPOSING SOUTHERN ALLIANCE FOR CLEAN ENERGY'S PETITION FOR INTERLOCUTORY REVIEW OF LBP-10-12

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In accordance with 10 C.F.R. § 2.341(b)(3), Tennessee Valley Authority ("TVA"), Applicant in the above-captioned proceeding, submits this timely Answer opposing the Petition for Interlocutory Review of LBP-10-12 ("Petition") filed by Southern Alliance for Clean Energy ("SACE") on July 14, 2010.

The common—yet flawed—theme running through SACE's original Waiver Request[1] and the instant request for interlocutory review of the Atomic Safety and Licensing Board's ("Board") rejection of that Waiver Request is that the Commission's long-standing regulations excluding need for power and energy alternatives from consideration in operating license ("OL") proceedings are "premised on a fundamental and indispensable assumption: that at the time of the operating license proceeding, construction of the proposed reactor has been finished."[2] This argument is flatly contradicted by the Commission's regulations, practice, policy, and

[1] 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) ("Waiver Request").

[2] Petition at 11; Waiver Request at 8.

jurisprudence. The Board, therefore, correctly rejected the original Waiver Petition and the instant Petition must be rejected as well.

Specifically, the Board properly applied the Commission's regulations and precedent in evaluating—and rejecting—the factual and legal bases for SACE's Waiver Request. Further, the current under-construction status of Watts Bar Nuclear Plant, Unit 2 ("WBN Unit 2"), as it relates to the OL proceeding, is not unique to this proceeding and is fully anticipated by the Commission's rules. Accordingly, the Commission should deny the Petition because SACE not only fails to show the requisite extraordinary circumstances that might warrant interlocutory review, but also fails to show any factual or legal errors in the Board's decision that warrant reversal of LBP-10-12.[3]

I. BACKGROUND AND SUMMARY OF THE DECISION BELOW

The NRC issued a construction permit ("CP") for WBN Unit 2 in 1973.[4] Following TVA's request on May 8, 2008, the NRC extended the CP to March 31, 2013.[5] The NRC granted this request on July 7, 2008, and published notice of its Order in the *Federal Register* on July 11, 2008, providing an opportunity for hearing.[6] No request for hearing was filed.[7] In March 2009, TVA submitted an update to its WBN Unit 2 OL application under 10 C.F.R. Part 50, including an updated Final Supplemental Environmental Impact Statement.[8]

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3 *Tenn. Valley Auth.* (Watts Bar Unit 2), LBP-10-12, 71 NRC __, slip op. (June 29, 2010) ("LBP-10-12").

4 *See* Watts Bar Nuclear Plant; Notice of Issuance of Construction Permits, 38 Fed. Reg. 3001 (Jan. 31, 1973).

5 *See* In the Matter of Tennessee Valley Authority (Watts Bar Nuclear Plant, Unit 2); Order, 73 Fed. Reg. 39,995 (July 11, 2008).

6 *See id*. at 39,995-96.

7 *See* SECY-09-0012, Status of Reactivation of Construction and Licensing Activities for the Watts Bar Nuclear Plant Unit 2, at 4 (Jan. 15, 2009), *available at* ADAMS Accession. No. ML083100090.

8 Letter from M. Bajestani, TVA, to NRC, "Watts Bar Nuclear Plant (WBN) Unit 2 – Operating License Application Update" (Mar. 4, 2009), *available at* ADAMS Accession No. ML090700378; Final Supplemental Environmental Impact Statement, Completion and Operation of Watts Bar Nuclear Plant Unit 2, Rhea County, Tennessee (June 2007), *available at* ADAMS Accession. No. ML080510469 ("2007 FSEIS").

The Commission subsequently published the Hearing Notice for this proceeding on May 1, 2009, requiring that all requests for hearing and proposed contentions be filed within 60 days (i.e., by June 30, 2009).[9] On July 13, 2009, SACE (along with several other petitioners that are not parties to this proceeding) filed a Petition to Intervene and Request for Hearing ("Petition to Intervene"). The Petition to Intervene included seven proposed contentions, including Proposed Contention 4, which alleged that TVA's discussion of the need for power and energy alternatives was inadequate.[10] Despite the acknowledged prohibition on consideration of need for power and energy alternatives issues in OL proceedings,[11] SACE claimed that such issues were nonetheless within the scope of this proceeding because one of the stated purposes of TVA's 2007 FSEIS was to update TVA's 1972 Final Environmental Statement for construction of the plant.[12] Recognizing that this contention was barred by NRC regulations, however, SACE also stated that if the Board were to reject this contention, then it would file a 10 C.F.R. § 2.335(b) waiver petition.[13]

On November 19, 2009, the Board granted SACE's Petition to Intervene and admitted two contentions.[14] The Board, however, determined that Proposed Contention 4 was inadmissible under 10 C.F.R. § 51.53(b), because TVA need not include "any discussion of the need for power or of alternative energy sources in its application for an operating license, [as] a

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9 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, 74 Fed. Reg. 20,350, 20,351 (May 1, 2009). Subsequently, SACE requested and received a two-week extension of time, giving it until July 14, 2009, to file a request for hearing. *See* Commission Order (June 24, 2009) (unpublished).

10 *See Tenn. Valley Auth.* (Watts Bar Unit 2), LBP-09-26, 70 NRC __, slip op. at 38-39 (Nov. 19, 2009) ("LBP-09-26").

11 *See* 10 C.F.R. §§ 51.53(b), 51.95(b), 51.106(c); *see also* Petition to Intervene at 16 n.4.

12 TVA's Final Environmental Statement, Watts Bar Nuclear Plant Units 1 and 2 (Nov. 1972), *available at* http://www.tva.gov/environment/reports/wattsbar2/related/nov_1972.pdf.

13 Petition to Intervene at 16 n.4.

14 LBP-09-26, at 2-3.

challenge to the adequacy of TVA's discussion of these issues is not within the scope of this proceeding at this point."[15] Because the Board rejected the contention on this basis, LBP-09-26 did not address TVA's further arguments that Proposed Contention 4 was immaterial, insufficiently supported, failed to raise a genuine dispute, and was therefore inadmissible under 10 C.F.R. § 2.309(f)(1)(iv), (v), and (vi).[16] Although the Board observed that "the Commission might well decide that a full discussion of the need for power and of alternative energy sources should be incorporated into the final environmental impact statement,"[17] it held that "absent an adequately supported request to waive the application of this rule pursuant to 10 C.F.R. § 2.335, the Board is bound by Section 51.53(b)."[18]

On February 4, 2010, seven months after its Petition to Intervene was filed and more than two months after the Board found Proposed Contention 4 inadmissible, SACE filed a Waiver Request, arguing, for the first time, that the application of Sections 51.53(b) and 51.95(b) would not serve the purpose for which those regulations were adopted.[19] TVA and the Staff both opposed the Waiver Request.

TVA argued that the waiver petition should be denied not only because it was untimely, but also because SACE failed to make a *prima facie* showing of sufficient "special circumstances" to warrant certifying the issue to the Commission.[20] Specifically, TVA argued that, under the governing case law, SACE had failed to show either that WBN Unit 2 is not needed to meet increased energy demand, displace older and less economical generation

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15 *Id*. at 44.

16 *See id*. at 39-40, 43-44.

17 *Id.* (citing 10 C.F.R. § 51.95(b)).

18 *Id*.

19 *See* Waiver Request at 1-2.

20 *See* LBP-10-12, at 8-10 (summarizing TVA's response); Tennessee Valley Authority's Response in Opposition to Petition for Waiver of 10 C.F.R. §§ 51.53(b) and 51.95(b) (Mar. 1, 2010) ("TVA's Response").

capacity, reduce air emissions and provide fuel diversity and operation flexibility, or that an environmentally and economically preferable alternative energy source exists.[21] The Staff similarly opposed the Waiver Request as failing to make the requisite *prima facie* showing of special circumstances.[22]

The Board agreed with TVA and the NRC Staff and rejected SACE's Waiver Request. Relying upon the binding precedent in the Appeal Board's *Shearon Harris* decision,[23] the Board concluded that SACE failed to demonstrate that WBN Unit 2 would not be needed: (1) to meet increased energy demand, or (2) to replace older, less economical capacity; and failed to demonstrate that viable alternatives to the completed nuclear plant are likely to exist which could tip the NEPA cost-benefit balance against issuance of the OL.[24] In particular, the Board ruled that SACE failed to carry its burden, under *Shearon Harris*, of demonstrating that *all* of TVA's fossil fueled baseload capacity that is less efficient than WBN Unit 2 is accounted for in SACE's analysis.[25]

Importantly, the Board reached this conclusion in large part through a detailed analysis of the Declaration of Dr. Arjun Makhijani, which accompanied the Waiver Request.[26] The Board found that Dr. Makhijani provided little, if any, useful information on the environmental impacts

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21 *See* TVA's Response at 2 (*citing Carolina Power & Light Co.* (Shearon Harris Nuclear Power Plant), ALAB-837, 23 NRC 525, 546-48 (1986)).

22 *See* LBP-10-12, at 10 (summarizing the Staff's response); 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 (Feb. 26, 2010).

23 ALAB-837, 23 NRC at 546-48.

24 *See* LBP-10-12, at 5, 15-17 (*citing Duquesne Light Co.* (Beaver Valley Power Station, Unit 2), LBP-84-6, 19 NRC 393, 401 (1984); *Shearon Harris*, ALAB-837, 23 NRC at 546-48).

25 *See* LBP-10-12, at 15-17.

26 *See* Waiver Request, Ex. 1, Declaration of Dr. Arjun Makhijani in Support of Southern Alliance for Clean Energy'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) ("Makhijani Declaration").

of the operation of WBN Unit 2 in comparison to the financial costs and environmental impacts of continued operation of TVA's other baseload assets.[27] It also found that Dr. Makhijani did not demonstrate that alternative energy sources would be environmentally and economically preferable.[28] Further, the Board found illogical SACE's claim that the delay in completion of WBN Unit 2 indicated that it was more economical for TVA to continue to rely on other sources of energy: "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."[29] The Board then found the rest of the Makhijani Declaration to be "no more than unsupported conclusions."[30]

SACE next filed the instant Petition for interlocutory review of the Board's decision, claiming that: (1) the Board erred in following the *Shearon Harris* decision; (2) the decision below violated NEPA by failing to consider the purportedly new and significant information in the Makhijani Declaration; (3) its appeal raises "major questions of law, policy and discretion"; and (4) by addressing need for power and alternatives in the FSEIS and RAIs, TVA and the Staff have demonstrated that the Commission's rule should be waived.[31] SACE asserts that interlocutory review is appropriate because its waiver request "may" become moot by the end of this proceeding, when construction of WBN Unit 2 is complete.[32] In seeking interlocutory review, however, SACE does not specify, anywhere in its Petition, whether it is relying on 10 C.F.R. § 2.341(f)(2)(i) or (ii) to allege either immediate and serious irreparable harm or pervasive effect.

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27 *See* LBP-10-12, at 15-16.

28 *Id*.

29 *Id*. at 17.

30 *Id*.

31 *See* Petition, at 15, 16, 17, 19.

32 *Id.* at 5, 20.

SACE also suggests that if the Commission were to resolve the Petition in its favor, then the result would be the admission of Proposed Contention 4.[33] As explained *supra*, however, Proposed Contention 4 is inadmissible for numerous reasons unrelated to the Commission's prohibition on need for power and energy alternatives contentions in OL proceedings.[34] Therefore, even if the Commission were to grant SACE's requests for interlocutory review *and* waiver of the Commission's rules, the remedy would be to remand the issue to the Board to determine the admissibility of Proposed Contention 4 under 10 C.F.R. § 2.309(f)(1).[35]

II. LEGAL STANDARDS

A. Consideration of Need for Power and Alternative Energy in Operating License Proceedings

Pursuant to 10 C.F.R. §§ 51.53(b), 51.95(b), and 51.106(c), the NRC reviews need for power and alternative energy sources in Part 50 power reactor licensing proceedings at the CP stage, not at the OL stage. The history of these regulations is described in the Board's decision and summarized *infra*.[36]

When the Commission proposed these rules in 1981, its fundamental basis was that, under NEPA, "the need for the power to be generated by a proposed nuclear power plant and alternative energy sources for the generation of the power . . . are *considered and resolved in the construction permit proceeding*."[37] As the Board in this proceeding properly explained, that analysis takes place at the CP stage "because prior to construction, little environmental

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33 *See* Petition at 20.

34 *See* LBP-09-26, at 39-40 (explaining TVA's further arguments).

35 *See South Carolina Elec. & Gas. Co., et al.* (Virgil C. Summer Nuclear Station, Units 2 & 3), CLI-10-01, 71 NRC __, slip op. at 26-27 (Jan. 7, 2010) (finding an error of law and remanding the matter to the Board for evaluation of the admissibility of the contention).

36 *See* LBP-10-12, at 4-5.

37 Proposed Rule, Need for Power and Alternative Energy Issues in Operating License Proceedings, 46 Fed. Reg. 39,440, 39,440 (Aug. 3, 1981) ("Proposed Rule") (emphasis added).

disturbance would have occurred and real alternatives, including the no action alternative, existed."[38] The proposed rule was also grounded upon the Commission's determination that "[i]n all cases to date, *and in all foreseeable future cases*, there will be some benefit [from plant operation] in terms of either meeting increased energy needs or replacing older less economical generating capacity."[39]

In the final rule, the Commission fully considered comments on studies claiming that "conservation plus other energy forms usually result in lower cost than operation of a nuclear plant."[40] The Commission, however, rejected these studies and concluded that "even if an alternative is shown to be marginally environmentally superior in comparison to operation of a nuclear facility [the NEPA cost-benefit balance is unlikely to change] because of the economic advantage which operation of nuclear power plants has over available fossil generating plants."[41] As an Appeal Board later explained, the regulations reflect "the Commission's belief that, as a general matter, no useful purpose is served by considering need for power and alternative energy sources at the operating license stage."[42] Reopening such previously-resolved matters would only result in "needless litigation."[43]

SACE erroneously asserts that the Commission's premise for this rulemaking was that construction of a plant would be completed prior to the OL stage, and therefore the rule

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38 LBP-10-12 at 4 (*citing* 46 Fed. Reg. at 39,440).

39 Proposed Rule, 46 Fed. Reg. at 39,441 (emphasis added).

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

41 *Id*. at 12,940.

42 *Commonwealth Edison Co.* (Byron Nuclear Power Station, Units 1 & 2), ALAB-793, 20 NRC 1591, 1615 (1984).

43 *Shearon Harris*, ALAB-837, 23 NRC at 547.

presumably does not apply to the partially-constructed WBN Unit 2.[44] In support, SACE quotes selectively from a passage in the underlying regulatory history which states:

> At the time of the operating license decision, construction related environmental impacts have already occurred at the site and the construction costs have been incurred by the licensee. The facility is essentially completely constructed and ready to operate when the Commission's Atomic Safety and Licensing Board *renders its decision* on the operating license application.
>
> . . . . Experience shows that completed plants are in fact used to their maximum availability [to either meet increased energy needs or replace older less economical capacity]. Such facilities are not abandoned in favor of some other means of generating electricity.[45]

Contrary to SACE's misreading of the regulatory history, this passage merely recognizes that the facility is expected to be "completed" at the time of the operating license "*decision*," not—as SACE asserts—at the start of the OL proceeding.[46]

Therefore, contrary to SACE's assertions, nothing in the regulatory history suggests that the regulations in 10 C.F.R. §§ 51.53(b), 51.95(b), and 51.106(c) are based on any expectation that the construction of a plant would be completed at the *commencement* of an OL proceeding. In fact, during the 1980s the Commission, as a matter of policy, commenced operating license proceedings "well before construction [was] complete so that facilities eligible for operation would not be unnecessarily idled."[47] The Commission's 1981 Statement of Policy, issued only three months prior to the proposed rule on need for power, expressed concern that if OL proceedings were not "*concluded prior to the completion of construction*, the cost of such delays

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44 *See* Petition at 2, 15-16.

45 Proposed Rule, 46 Fed. Reg. at 39,441 (*partially quoted in* Petition at 2) (emphasis added).

46 *Id*. (emphasis added).

47 *Carolina Power & Light Co.* (Shearon Harris Nuclear Power Plant, Units 1 & 2), LBP-82-119A, 16 NRC 2069, 2111 (1982) (*citing Statement of Policy on Conduct of Licensing Proceedings*, CLI-81-8, 13 NRC 452 (1981) ("1981 Statement of Policy")).

could reach billions of dollars."[48] Moreover, in practice, OL proceedings routinely commenced prior to completion of construction and continued in parallel with construction activities.[49] In this respect, WBN Unit 2 is not unique or even unusual in comparison to prior OL proceedings under 10 C.F.R. Part 50.

In sum, the Commission has concluded that there is no need to revisit the environmental analysis of the fundamental need for a plant once construction has begun.

B. Criteria for Waiver of a Regulation Under 10 C.F.R. § 2.335

1. *General Criteria*

Commission regulations are not subject to direct attack in adjudicatory proceedings, but the Commission may waive a rule under 10 C.F.R. § 2.335 on the sole ground that special circumstances exist such that the application of the rule would not serve the purpose for which it was adopted.[50] A waiver request must be supported by an affidavit which makes a *prima facie* showing of four elements: (1) the applicable regulation 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 is necessary to address a significant safety (or environmental) issue.[51] If the proponent of waiver makes the requisite *prima facie* showing, then a Licensing Board may certify the waiver petition

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48 CLI-81-8, 13 NRC at 453 (emphasis added).

49 *See, e.g.*, NUREG-1087, Final Environmental Statement related to the operation of Vogtle Electric Generating Plant, Units 1 and 2, at 1-1 to 1-2 (Mar. 1985), *available at* ADAMS Accession No. ML073170375 (construction of Unit 1 only 76% complete in February 1985, while Unit 2 only 45% complete in February 1985); NUREG-0564, Final Environmental Statement related to the operation of Susquehanna Steam Electric Station, Units 1 and 2, at 1-1 (June 1981), *available at* ADAMS Accession No. ML080150291 (construction of Unit 1 91% complete in February 1981, while Unit 2 only 70% complete in February 1981).

50 10 C.F.R. § 2.335(b); *Pub. Serv. Co. of N.H.* (Seabrook Station, Units 1 & 2), ALAB-895, 28 NRC 7, 16 (1988), *aff'd*, CLI-88-10, 28 NRC 573, 597, *recons. denied*, CLI-89-3, 29 NRC 234 (1989) (citation omitted).

51 *See* LBP-10-12, at 3; *Dominion Nuclear Conn., Inc.* (Millstone Nuclear Power Station, Units 2 & 3), CLI-05-24, 62 NRC 551, 559-60 (2005).

to the Commission. But the standards set an "*extremely high*" bar for obtaining a waiver[52] "to ensure that duly promulgated regulations are not lightly discarded."[53]

2. *NRC Precedent on Need for Power and Energy Alternative Waiver Requests*

In promulgating the rule that excludes consideration of need for power in OL proceedings, the Commission acknowledged that, in "very unusual cases, such as where it appears that an alternative exists that is clearly and substantially environmentally superior" then the rule might be waived.[54] The Commission also stated that this is a much stricter standard than previous requirements.[55] To obtain a waiver of the rule, a petitioner bears the burden of making a *prima facie* evidentiary showing that the proposed facility would not be needed to meet increased energy needs, or to replace older, less economical capacity.[56] In other words, to makes its *prima facie* showing, "the petition [for waiver] must establish that *all* of the applicants' fossil fuel baseload generation that is less efficient than [the facility under consideration] has been accounted for."[57] The petitioner must then further show that there are viable alternatives which could tip the NEPA balance against issuance of the operating license.[58]

C. Interlocutory Review Under 10 C.F.R. § 2.341(f)(2)

In general, an appeal from the denial of a waiver request is interlocutory in nature.[59] Under Section 2.341(f)(2), interlocutory review may be granted at the Commission's discretion,

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52 *Pub. Serv. Co. of N.H.* (Seabrook Station, Units 1 & 2), CLI-89-20, 30 NRC 231, 245 (1989) (emphasis added).

53 *Seabrook*, ALAB-895, 28 NRC at 16.

54 Final Rule, 47 Fed. Reg. at 12,941.

55 *Id*.

56 *See Shearon Harris*, ALAB-837, 23 NRC at 547.

57 LBP-10-12, at 15 (*quoting Shearon Harris*, ALAB-837, 23 NRC at 548).

58 *See Beaver Valley*, LBP-84-6, 19 NRC at 401; *Ga. Power Co.* (Vogtle Elec. Generating Plant, Units 1 & 2), LBP-84-35, 20 NRC 887, 893-94 (1984).

59 *Entergy Nuclear Operations, Inc.* (Indian Point Nuclear Generating Units 2 & 3), CLI-08-27, 68 NRC 655, 656 (2008).

only if the ruling in question: (i) "[t]hreatens the party adversely affected by it with immediate and serious irreparable impact which, as a practical matter, could not be alleviated through a petition for review of the presiding officer's final decision"; or (ii) "[a]ffects the basic structure of the proceeding in a pervasive and unusual manner." This is a high bar, because the Commission strongly disfavors piecemeal interference with ongoing proceedings.[60] As the Commission has repeatedly stated and recently reiterated, it "grant[s] such petitions only in 'extraordinary circumstances.'"[61]

D. Standard of Review Under 10 C.F.R. § 2.341(b)(4)

If, under its discretion, the Commission considers a petition for interlocutory review, then the following standard of review is set by 10 C.F.R. § 2.341(b)(4): (i) whether a finding of material fact is clearly erroneous; (ii) whether a necessary legal conclusion is without governing precedent or is a departure from or contrary to established law; (iii) whether a substantial and important question of law, policy, and discretion has been raised; (iv) whether there has been a prejudicial procedural error; or (v) any other consideration which the Commission may deem to be in the public interest.[62]

The Commission gives "substantial deference" to Board rulings on contention admissibility, and will affirm them if "the appellant 'points to no error of law or abuse of discretion.'"[63] Given the Commission's delegation to the Board of the initial screening of

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60 *See Entergy Nuclear Generation Co.* (Pilgrim Nuclear Power Station), CLI-07-2, 65 NRC 10, 12 (2007); *Entergy Nuclear Operations, Inc.* (Indian Point Nuclear Generating Units 2 & 3), CLI-09-6, 69 NRC 128, 137 n.38 (2009).

61 *Indian Point*, CLI-09-6, 69 NRC at 133.

62 10 C.F.R. § 2.341(b)(4)(i)-(v).

63 *AmerGen Energy Co., LLC* (License Renewal for Oyster Creek Nuclear Generating Station), CLI-09-7, 69 NRC 235, 259-60 (2009).

petitions under Section 2.335, this standard should also govern review of the denial of such a petition.[64]

III. INTERLOCUTORY REVIEW IS NOT WARRANTED BECAUSE SACE DOES NOT SHOW IMMEDIATE AND SERIOUS IRREPARABLE HARM OR PERVASIVE EFFECT

As a general matter, the denial of a waiver petition proffered by an already-admitted party does not cause immediate and serious irreparable harm or pervasively affect the structure of the proceeding.[65] Specific to this case, SACE's only apparent argument supporting interlocutory review is the speculative complaint that its argument regarding need for power and energy alternatives "*may*" be moot by the end of the WBN Unit 2 OL proceeding when construction is complete.[66] As noted in Section I, however, SACE does not specify whether, or indeed how, its mootness theory supports a finding of immediate and serious irreparable harm or pervasive effect under either 10 C.F.R. § 2.341(f)(2)(i) or (ii). Because SACE makes no attempt to bridge the gap between its speculation about future mootness and either of the specific legal criteria governing interlocutory review, its request should be denied as a threshold matter of law.[67]

Moreover, as explained in Section II.A., the current status of WBN Unit 2—i.e., a substantially-constructed plant where future operation is the subject of an ongoing OL proceeding—is recognized, anticipated, and addressed by the Commission's regulatory

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64 *See* 10 C.F.R. § 2.335(d) (delegating the initial determination regarding a petition for waiver to the presiding officer and indicating that the petition should be certified to the Commission only if the petition makes a *prima facie* showing).

65 *See La. Energy Servs.* (Claiborne Enrichment Ctr.), CLI-95-7, 41 NRC 383, 384 (1995) ("allowing immediate Commission review would contradict the waiver rule itself, which provides for immediate certification to the Commission only when the Board finds a prima facie case in favor of a waiver").

66 *See* Petition at 5, 20 (emphasis added).

67 *See South Tex. Project Nuclear Operating Co.* (South Texas Project, Units 3 & 4), CLI-10-16, 71 NRC __, slip op. at 6 (June 17, 2010) (denying a request for interlocutory review because "Intervenors have not addressed either of the section 2.341(f)(2) factors to show that interlocutory review is warranted.").

framework. In fact, resolution of need for power and alternative energy issues upon issuance of a CP, followed by the completion of construction activities during the course of the OL proceeding, is *precisely* the path envisioned by the Commission's Part 50 regulatory framework. Therefore, SACE is no different from any other petitioner that has sought in prior OL proceedings to waive the rules excluding need for power and alternative energy issues.

In addition, SACE points to no legal support for its theory that its Waiver Request will become moot when construction is actually completed. In fact, regardless of when such arguments are made, the standards for obtaining a waiver of 10 C.F.R. §§ 51.53(b), 51.95(b), and 51.106(c) in an OL proceeding require a showing that the *completed* facility would not be needed to meet increased energy needs or replace older, less economical capacity.[68] Further, appeals of Licensing Board decisions denying petitions to waive these same rules have been reviewed on their merits at the conclusion of OL proceedings, and these appeals have not been dismissed as moot.[69] Therefore, SACE cannot demonstrate any immediate and serious irreparable harm or pervasive effect on this proceeding.

Interlocutory review is therefore inappropriate under Section 2.341(f)(2).

IV. THE BOARD'S DECISION WAS LEGALLY AND FACTUALLY CORRECT

As explained in Section III, SACE has not shown that there are any extraordinary circumstances that would warrant Commission review. Nevertheless, even if the Commission were to choose to take review, the Board's decision should be upheld.

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[68] *Shearon Harris*, ALAB-837, 23 NRC at 547 ("In contrast to the situation at the construction permit stage where these issues are considered before construction of the plant is *authorized*, the Commission *generically* concluded that, once the plant is completed, economics of nuclear power are such that no viable alternatives are likely to tip the NEPA cost-benefit balance against issuance of an operating license.") (emphasis added).

[69] *See id*. at 547-48; *Byron*, ALAB-793, 20 NRC at 1614-16.

A. The Board Was Correct in Rejecting SACE's Waiver Request on Factual Grounds

As explained in Section I, the Board's decision rests fundamentally on its factual finding that SACE failed to make the required *prima facie* case under Section 2.335. In particular, the Board held that SACE failed to show that WBN Unit 2 would not be needed to meet increased energy needs or to replace older, less economical generating capacity.[70] SACE also failed to show that there are viable alternatives to the completed plant which would tip the NEPA cost benefit analysis.[71] The Board reached these rulings based on an extensive review and consideration of Dr. Makhijani's Declaration. Such factual findings by the Board should be afforded considerable deference.

Under *Shearon Harris*, SACE is required to show that WBN Unit 2 "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."[72] It failed to do so. As the Board found, Dr. Makhijani's Declaration did not show that *all* of TVA's fossil baseload assets that are less efficient than WBN Unit 2 are accounted for in his energy alternatives analysis.[73] He also did not compare the environmental impacts and financial costs of operating TVA's "fifty-nine coal-fired generating units or twenty-nine hydroelectric dams" against the impacts and costs of WBN Unit 2.[74] Further, his assertion that "TVA has overestimated its 2012 and 2014 peak loads by thousands of megawatts"[75] falls far short of the required showing, particularly given that WBN Unit 2 will operate for many decades beyond these dates and given the uncertainty inherent in all long-range

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70 *See* LBP-10-12, at 15-17.

71 *See id*.

72 *Id*. at 15; *Shearon Harris*, ALAB-837, 23 NRC at 547.

73 *See* LBP-10-12, at 15-17; *Shearon Harris*, ALAB-837, 23 NRC at 547-48.

74 LBP-10-12, at 16.

75 Makhijani Declaration ¶ 22 (*cited in* Petition at 16).

energy forecasts.[76] In sum, the Board found SACE's expert declaration to be woefully lacking in necessary facts and evidence.

In its Petition for review, SACE attempts to discredit the Board's findings by resurrecting a variety of general claims from its Waiver Request. It does not, however, demonstrate that the Board's factual findings are clearly erroneous, i.e., "not even plausible in light of the record viewed in its entirety."[77] For example, SACE points to alleged "steep declines in the regional economy,"[78] an alleged "pattern of chronic delays and escalating costs in nuclear power plant construction" by TVA,[79] and the conclusory statement that "it is not a foregone conclusion that operation of Watts Bar Unit 2 would be preferable to other energy alternatives."[80] The Board, however, found that these and other aspects of the Makhijani Declaration amounted to little more than a collection of "unsupported conclusions."[81] Because of these failures, the Board correctly determined that SACE failed to demonstrate the existence of special circumstances such that the application of the Commission's rules barring consideration of need for power and alternative energy in OL proceedings would not serve the purposes for which they were adopted.[82]

As explained *supra*, these types of evidentiary conclusions by the trier of fact are entitled to a deferential standard of review. Because SACE has not demonstrated that the Board's factual findings are clearly erroneous, the Board's ruling should be upheld.

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76 *See Carolina Power & Light Co.* (Shearon Harris Nuclear Power Plant, Units 1, 2, 3 & 4), CLI-79-5, 9 NRC 607, 609-10 (1979) ("every prediction has associated uncertainty and . . . long-range forecasts of this type are especially uncertain").

77 *See Oyster Creek*, CLI-09-7, 69 NRC at 259.

78 Petition at 8.

79 *Id*.

80 *Id*. at 12.

81 *See* LBP-10-12, at 17.

82 *See* 10 C.F.R. § 2.335.

B. SACE Fails to Identify Any Error of Law

SACE alleges four errors of law in the Board's denial of its Waiver Request, none of which have merit.

1. *SACE Misinterprets the Commission's Rulemaking*

a. The regulations that exclude consideration of need for power and alternative energy sources specifically account for and assume that construction will continue during the operating license proceeding.

First, SACE argues that the Commission's analysis in its 1982 rulemaking does not apply to WBN Unit 2 because construction of the plant is "significantly incomplete at the operating license stage."[83] SACE appears to assert that to preserve the intent of the rules barring consideration of need for power or energy alternatives in an OL proceeding, TVA must "complete[ ] its investment in Watts Bar Unit 2" (i.e., apparently complete the construction of it) before the commencement of the OL proceeding.[84]

SACE is mistaken. Nothing in the regulatory history discussed in Section II.A supports this interpretation. On the contrary, when the Commission promulgated its rules excluding need for power at the OL stage, it fully expected that plants would be partially constructed at the commencement of the OL proceeding, and would be completed by the time the OL is issued.[85] The current status of WBN Unit 2 construction, therefore, is far from unique and, in fact, is fully consistent with earlier OL proceedings.[86] The Commission's rules recognize that by the OL

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83 Petition at 15.

84 *Id*. at 16.

85 *See* 1981 Statement of Policy, CLI-81-8, 13 NRC at 452-53 (recognizing that utilities with CPs continued building plants while OL proceedings were ongoing).

86 *See* discussion *supra* p. 10 and note 49.

stage, construction (through to completion) has already been authorized and its environmental impacts considered.[87]

b. SACE misinterprets the Shearon Harris decision.

Building on its misinterpretation of the applicable regulations, SACE attempts to distinguish *Shearon Harris* on the same flawed premise, claiming that it "concerned a reactor for which construction was already substantially complete."[88] Contrary to SACE's assertion, the *Shearon Harris* decision provides no evidence or discussion of the status of construction of the plant at the time, on the page cited by SACE or otherwise. Further, there is no evidence that the Appeal Board considered the actual status of construction activities at the Shearon Harris plant as a basis for its decision.

In fact, the record of the *Shearon Harris* proceeding indicates that Unit 1 was about 84% complete and Unit 2 was about 4% complete as of October 1983, more than three years after the commencement of the OL proceeding.[89] The Appeal Board analyzed the waiver petition in that proceeding based on the *assumption* of a completed plant, because as explained *supra*, (a) the *Shearon Harris* OL applicants held a CP, authorizing completion of construction; and (b) the rules contemplate that construction will be completed by the time the OL is issued. SACE identifies no reason to depart from this approach for WBN Unit 2. *Shearon Harris* therefore remains the controlling case, and the Board correctly rejected SACE's petition, based in part on this binding precedent.

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87 *See, e..g., Pub. Serv. Co. of N.H.* (Seabrook Station, Units 1 & 2), LBP-82-106, 16 NRC 1649, 1665 (1982) (holding that "the appropriate economic analysis required by NEPA in this operating license proceeding is a comparison only of . . . operating costs . . . because the decision of this licensing board concerns only whether Seabrook will or will not be permitted to operate"—"[c]onstruction has already been approved, and the Board must consider construction costs to be 'sunk' costs and irrelevant to future operation").

88 Petition at 15 (*citing Shearon Harris*, ALAB-837, 23 NRC at 547); *see also* Petition at 2.

89 *See* NUREG-0972, Final Environmental Statement related to the operation of Shearon Harris Nuclear Plant, Units 1 and 2, at v-vi (Oct. 1983), *available at* ADAMS Accession No. ML071340292.

Based on its misinterpretation of the rules, their history, and the associated case law, SACE then improperly attempts to shift the burden to TVA by claiming, for example, that "TVA has not provided sufficient information to show that the energy produced by Watts Bar 2 is needed."[90] But that is not TVA's burden in the OL proceeding. For NRC licensing purposes, the need for this project and its environmental impacts in comparison to alternatives were resolved when the NRC authorized construction. It is SACE's burden to show that special circumstances exist such that the Commission's rule should not be applied in this proceeding. As the Board explained, SACE's unsupported conclusions do not carry its burden.

2. *Application of the Commission's Rules Would Not Violate NEPA*

Second, SACE claims that by following the *Shearon Harris* decision and the regulations, the Board violated its duty under NEPA to consider new and significant information.[91] In support, SACE points to the alleged "wide array" of new information in its Waiver Request that, according to SACE, would "significantly affect the outcome of the environmental analysis for Watts Bar Units 2."[92]

Contrary to SACE's claims, there is no violation of NEPA. While NRC is required to consider new and significant information that "paint[s] a seriously different picture of the environmental landscape,"[93] the waiver process specifically accounts for such information.[94] In promulgating the rules on consideration of need for power and energy alternatives in OL

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90 Petition at 6, 12.

91 *See id*. at 16.

92 *Id*. at 17.

93 *Private Fuel Storage, LLC* (Indep. Spent Fuel Storage Installation), CLI-06-3, 63 NRC 19, 28 (2006) (internal quotation marks omitted); *see also Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 374 (1989) (federal agencies must consider "significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts").

94 *Cf. Fla. Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 & 4), CLI-01-17, 54 NRC 3, 12 (2001) (noting that petitioners in an adjudicatory proceeding who seek to challenge generic environmental findings through allegedly new and significant information should seek a waiver of the rule).

proceedings, the Commission specified—consistent with its obligations under NEPA—that it would consider waiving the rules upon a showing of "unexpected and significant adverse environmental impacts."[95] Based on these standards, SACE had the opportunity to demonstrate the existence of new and significant information under 10 C.F.R. § 2.335. The Board properly found that SACE failed to do so when it proffered the Makhijani Declaration, which is devoid of new information and facts, and instead is rife with speculation and "unsupported conclusions."[96] Thus, the application of the Commission's regulations in this proceeding does not violate NEPA.

3. *There Is No Question of Law, Policy, or Discretion*

SACE next relies on dicta in the Board's decisions to infer that the Commission may be interested in taking review because of the passage of time between the issuance of the CP for WBN Unit 2 and the current proceeding.[97] SACE then reiterates its previous claims regarding the allegedly new and significant information in the Makhijani Declaration.[98]

The Board, however, followed the Commission's regulations and jurisprudence in its evaluation of Dr. Makhijani's assertions when it found that that they did not demonstrate the requisite special circumstances. As explained *supra*, SACE has identified no error of law in LBP-10-12, so there is no major issue for the Commission to review.

Moreover, as explained in Section IV.A, SACE did not meet its burden of showing that developments over the past forty years somehow tip the NEPA cost-benefit balance against issuance of the OL. Importantly, the Board's decision not to certify this issue to the Commission was primarily based on its judgments regarding the factual deficiencies in the Makhijani

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95 Proposed Rule, 46 Fed. Reg. at 39,441.

96 LBP-10-12, at 17.

97 *See* Petition at 18 (quoting LBP-10-12, at 17; LBP-09-26, at 44).

98 Petition at 18.

Declaration. The Board did not "ignore"[99] the significance of Dr. Makhijani's claims regarding allegedly new and significant information, it rejected them.[100]

4. *Actions By TVA and the Staff Do Not Waive the Commission's Rule*

Finally, SACE claims that the NRC Staff and TVA have both "demonstrated" that the NRC's need for power review during the construction permit proceeding is "obsolete" because TVA's 2007 FSEIS addresses this issue, as did a Staff request for additional information ("RAI"), which TVA answered in part.[101] As the Board explained, however, the NRC Staff is bound by and its actions cannot waive the Commission's rules.[102] Likewise, the applicant is bound by the Commission's rules, absent a waiver.[103] Just as a petitioner "must do more than rest on [the] mere existence of RAIs as a basis for their contention,"[104] SACE must do more than simply point to an RAI to establish special circumstances.

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99 *Id*.

100 *See* LBP-10-12, at 14-17.

101 Petition at 19; *see also id*. at 9.

102 LBP-10-12, at 17 n. 78 ("Just as applicants and intervenors are bound by the regulations, so is the NRC Staff.").

103 10 C.F.R. § 2.335.

104 *Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2 & 3), CLI-99-11, 49 NRC 328, 336-37 (1999) (internal quotation marks omitted).

V. CONCLUSION

For the foregoing reasons, SACE's Petition for interlocutory review should be denied.

Respectfully submitted,

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Dated in Washington, D.C.
this 26th day of July 2010

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of	)	
	)	Docket No. 50-391-OL
TENNESSEE VALLEY AUTHORITY	)	
	)	July 26, 2010
(Watts Bar Nuclear Plant Unit 2)	)	

CERTIFICATE OF SERVICE

I hereby certify that, on July 26, 2010, a copy of "Tennessee Valley Authority's Answer Opposing Southern Alliance for Clean Energy's Petition for Interlocutory Review of LBP-10-12" was served by the Electronic Information Exchange on the following recipients:

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