

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of)	
)	Docket No. 50-391-OL
Tennessee Valley Authority)	
)	ASLBP No. 07-893-01-OL-BD01
(Watts Bar Unit 2))	

NRC STAFF'S ANSWER OPPOSING SOUTHERN ALLIANCE FOR CLEAN ENERGY'S
PETITION FOR REVIEW OF BOARD ORDER LBP-10-12 (DENYING PETITION TO
WAIVE NEED FOR POWER RULE AND ALTERNATIVE ENERGY RULES)

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INTRODUCTION

Pursuant to 10 C.F.R. § 2.341(f)(2), the staff of the Nuclear Regulatory Commission ("Staff") hereby files its answer opposing Southern Alliance for Clean Energy's ("SACE's") petition for review¹ of the Atomic Safety and Licensing Board ("Board") decision in the operating license proceeding for Watts Bar Unit 2,² which, *inter alia*, denied SACE's request dated February 4, 2010 ("Waiver Request") to waive the Commission's rules regarding consideration of need for power and consideration of alternative energy sources in an operating license proceeding.³

As discussed below, SACE's Petition does not meet the requirements for interlocutory review under 10 C.F.R. § 2.341(f)(2). Accordingly, the Commission should not undertake a review of the Board's decision.

¹ "Southern Alliance for Clean Energy's Petition for Interlocutory Review of LBP-10-12 (Denying SACE's Waiver Petition)" (July 14, 2010) ("Petition").

² *Tennessee Valley Authority* (Watts Bar Unit 2), LBP-10-12, 71 NRC __ (June 29, 2010) (slip op.).

³ SACE's request included: "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," (February 4, 2010), "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 (February 3, 2010) ("Makhijani Declaration"); Dr. Makhijani's Curriculum Vita, a report prepared by Dr. Makhijani titled :Watts Bar Unit 2: Analysis of Need and Alternatives" (July 10, 2007); the originally-filed "Declaration by Dr. Arjun Makhijani in Support of Petitioners' Contentions" (July 11, 2009) and a portions of the previously-filed "Petition to Intervene and Request for Hearing" (July 13, 2009).

STATEMENT OF THE CASE

This proceeding involves the operating license application for Watts Bar Unit 2, a partially-complete facility located near Spring City, Tennessee. On May 1, 2009, the Commission published a Notice of Opportunity for Hearing on the operating license application of Tennessee Valley Authority ("TVA") for the Watts Bar Nuclear Plant, Unit 2.⁴ On July 13, 2009, SACE (joined by other petitioners⁵) filed a petition alleging seven contentions, including a contention regarding the need for power and energy alternatives.⁶ Following additional filings, the Board admitted petitioner SACE as a party along with two of SACE's contentions, however the Board denied proffered Contention 4, which alleged an inadequate discussion of need for power and energy alternatives.⁷ The Board noted that a waiver request pursuant to 10 C.F.R. § 2.335 was required for proffered Contention 4.⁸

Subsequently, on February 4, 2010, SACE filed a petition, pursuant to 10 C.F.R. § 2.335(b), requesting waiver of 10 C.F.R. §§ 51.53(b)⁹ and 51.95(b)¹⁰ with respect to TVA's

⁴ Tennessee Valley Authority [TVA]; 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, 74 Fed. Reg. 20,350 (May 1, 2009) ("Notice").

⁵ The joint petitioners were not admitted by the Board and the Commission affirmed the Board's decision. See Tennessee Valley Authority (Watts Bar Nuclear Plant, Unit 2), CLI-10-12, 71 NRC __ (March 26, 2010) (slip op.).

⁶ Petition to Intervene and Request for Hearing (July 13, 2009)(ADAMS Accession No. ML091950686)("Petition").

⁷ Tennessee Valley Authority (Watts Bar Nuclear Plant, Unit 2), LBP-09-26, 70 NRC __, (Nov. 19, 2009)(slip op. at 38-44).

⁸ *Id.* at 44.

⁹ 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).

¹⁰ 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).

application for an operating license for Watts Bar Nuclear Plant Unit 2. On February 26, 2010, the Staff filed its response opposing SACE's Waiver Petition.¹¹ On March 1, 2010, TVA filed its response in opposition to the Waiver Petition.¹² On March 8, 2010, SACE filed a motion for leave to reply, and a reply, to the Staff Response and the TVA Response.¹³ On March 10, 2010, SACE filed a separate motion for leave to amend its Waiver Request.¹⁴ On March 15, 2010, TVA answered the motions, opposing them.¹⁵ On March 17, 2010, the Staff filed its answers to the motions.¹⁶

On June 29, 2010, the Board issued LBP-10-12 denying the petition to waive 10 C.F.R. §§ 51.53(b), 51.95(b), and 51.106(c) in the Watts Bar operating licensing proceeding.

On July 14, 2010, SACE filed its Petition with the Commission requesting interlocutory review of LBP-10-12 pursuant to 10 C.F.R. §§ 2.341(b) and 2.341(f)(2). The Staff hereby responds to the Petition.

SUMMARY OF THE BOARD'S RULING IN LBP-10-12

The Board is not empowered to grant a waiver of the regulations. *Watts Bar*, LPB-10-12, 71 NRC ___, (slip op. at 3). If the Board concludes that a requestor has made a *prima facie*

¹¹ "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").

¹² "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").

¹³ "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").

¹⁴ "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").

¹⁵ "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").

¹⁶ "NRC Staff's Answer to SACE Reply Motion and Motion to Amend" (March 17, 2010) ("Staff's Motion Answer").

showing that the regulations need to be waived, 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 granted for the specific circumstances presented. *Id.* at 3-4. However, the Board unanimously found that SACE failed to make the *prima facie* showing required to waive regulations otherwise precluding consideration of the issues of "need for power" and "alternative energy sources" from the Watts Bar Unit 2 proceeding for an operating license under 10 C.F.R. Part 50. *Id.* at 1.

The Board reviewed and followed the Commission's rules on what is needed for a waiver -- a *prima facie* or substantial showing by the waiver requestor that the circumstances support a waiver. *Id.* at 2-4. The Board correctly discussed the rulemaking and what is needed to waive the rules controlling the topics of need for power and energy alternatives. *Id.* at 4-5. On this topic, the Board observed that the Commission, in its rulemaking, expressly stated that the *prima facie* showing needed to support a waiver request was a much stricter standard than the previous requirements for raising need for power and alternative energy sources in operating license ("OL") proceedings. *Id.* The Board articulated the three-part test that a waiver requestor must make by a *prima facie* showing for a successful waiver:

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 [National Environmental Policy Act ("NEPA"), 42 U.S.C. 4321 *et seq.*] cost-benefit balance against issuance of the operating license."

Id. at 5 (quoting *Duquesne Light Co.* (Beaver Valley Power Station, Unit 2), LBP-84-6, 19 NRC 393, 401 (1984)).

The Board carefully considered the arguments of SACE, TVA, and the Staff. *Id.* at 5-12. The Board found in favor of SACE on two procedural issues (specificity in its waiver and timing). *Id.* at 13-14. However, the Board found that SACE had not meet a substantive, non-procedural

challenge to its waiver petition, in that SACE failed to meet its burden of proof with respect to the three items that must be shown for a successful waiver. *Id.* at 14-15.

Citing to an Appeal Board decision in the *Shearon Harris* operating licensing proceeding, the Board wrote need for power rule was based on the Commission's experience that by the time of the operating license application, the vast majority of the environmental disruption would have already occurred¹⁷ and that a utility would use the new nuclear plant to meet increased energy demand, or, in the alternative, if there was not an increased demand for energy, to replace older less-economical generating capacity. *Id.* at 15 (citing *Carolina Power and Light Co. and North Carolina Eastern Municipal Power Agency/Carolina Power & Light Co.* (Shearon Harris Nuclear Power Plant), ALAB-837, 23 NRC 525, 547 (1986)). Thus, the Board found that that in order for SACE to meet its burden, SACE must make a *prima facie* showing that Watts Bar Unit 2 is not needed to meet increased energy demand, and that Watts Bar Unit 2 will not displace an equivalent amount of older, less-economical capacity. *See id.* at 15. To make the *prima facie* showing, SACE's petition must account for the potentially less-efficient fossil fuel baseload units; the Board found that SACE did not meet this burden. *See id.*

The Board observed that SACE provided little useful information regarding the environmental costs associated with operation of TVA's existing baseload facilities. *Id.* at 15-16. Further the Board found that although SACE alleged a dollar cost to complete the unit, SACE provided no indication of the additional environmental impact of the work remaining to complete Watts Bar Unit 2. *Id.* at 16. The Board wrote that SACE offered no information regarding the comparative financial¹⁸ and environmental cost of operating Watts Bar Nuclear ("WBN") Unit 2 as opposed to the continued operation of the fifty-nine coal-fired generating units or twenty-nine

¹⁷ As will be discussed below, SACE states that the Shearon Harris case and the Commission's regulations complete cannot be applied to Watts Bar Unit 2 because, as of 2007, Watts Bar Unit 2 was 60% done whereas Shearon Harris was substantially complete. Petition at 2-3.

¹⁸ SACE acknowledged that TVA currently has less-efficient generating plants such that TVA purchases power instead of using its less-economical capacity. *See* LBP-10-12 (slip op at 16) (quoting Makhijani Declaration ¶ 15).

hydroelectric dams now relied upon for baseload power by TVA. *Id.* at 15. Where SACE claimed that it was not economical or environmentally preferable in the past to complete Watts Bar Unit 2, therefore it will not be in the future, the Board found SACE's logic unsupportable *Id.* at 16-17.

Finally, the Board rejected SACE's argument that the Staff's Request for Additional Information ("RAI") provided a waiver of the rules. *Id.* at 17 n.78. The Board found no authority for such a proposition and considered the argument to be illogical, stating that the RAI did not enter into the Board's determination that SACE had failed to make the required *prima facie* showing. *Id.*

STATEMENT OF THE ISSUE

The issue presented is whether SACE's petition for interlocutory review demonstrates that LBP-10-12 threatens SACE with immediate irreparable impact that could not be addressed through a review of the final decision in Watts Bar Unit 2, or that LBP-10-12 affects the basic structure of the proceeding in a pervasive or unusual manner. See 10 C.F.R. § 2.341(f)(2).

DISCUSSION

I. Applicable Legal Standards

A. Commission Review of Board Rulings

The Commission's rules do not specifically provide for Commission review of a Board's determination on a rule waiver request. See 10 C.F.R. § 2.335. As a general matter, a Board's ruling denying a waiver request is interlocutory in nature and, therefore, is not appealable until the Board has issued a final decision resolving the case. *Entergy Nuclear Operations, Inc.* (Indian Point Nuclear Generating Units 2 and 3) CLI-08-27, 68 NRC 655, 657 (2008) (citing *Louisiana Energy Services* (Claiborne Enrichment Center) CLI-95-7, 41 NRC 383, 384 (1995) (denying review of Board order that denied waiver of regulations in 10 C.F.R. Part 61)). The Commission has a longstanding policy which disfavors interlocutory review, and will grant review only in extraordinary circumstances. See, e.g., *AmerGen Energy Co., LLC* (Oyster

Creek Nuclear Generating Station), CLI-06-24, 64 NRC 111, 119 (2006). Legal error alone is insufficient to justify interlocutory review, *Entergy Nuclear Operations, Inc.* (Indian Point, Units 2 and 3), CLI-09-6, 68 NRC 128, 137 n.38 (2009), as incorrect interlocutory rulings may be reviewed on appeal from initial decisions or other final orders. See, e.g., *Private Fuel Storage, LLC* (Independent Spent Fuel Storage Installation), CLI-00-2, 51 NRC 77, 79-80 (2000) (“PFS”).

In cases where an appeal does not lie,¹⁹ the Commission has the discretion to grant interlocutory review in limited circumstances. Where interlocutory review is requested by a party, as SACE has now done, 10 C.F.R. § 2.341(f)(2) applies:

(2) The Commission may, in its discretion, grant interlocutory review at the request of a party despite the absence of a referral or certification by the presiding officer. . . . [I]nterlocutory review will be granted only if the party demonstrates that the issue for which the party seeks interlocutory review:

(i) Threatens 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) Affects the basic structure of the proceeding in a pervasive or unusual manner.

10 C.F.R. § 2.341(f)(2).²⁰ It is well-settled that a party who seeks interlocutory review by the Commission must meet the "irreparable impact or "pervasive or unusual" criteria. See, e.g. *South Texas Project Nuclear Operating Company* (South Texas Project, Units 3 and 4), CLI-10-16, 71 NRC __ (June 17, 2010) (slip op. at 4); see also *Sequoyah Fuels Corp.* (Gore, Oklahoma Site Decommissioning), CLI-01-2, 53 NRC 9, 18-19 (2001); *LES*, CLI-95-7, 41 NRC at 384. A Commission decision to undertake interlocutory review is based upon the criteria of § 2.341(f),

¹⁹ An appeal lies where an intervention petition has been wholly denied or where another party claims an intervention petition should have been wholly denied. See 10 C.F.R. § 2.311(b) and (c).

²⁰ Interlocutory review is also available under 10 C.F.R. § 2.341(f)(1) where a question was certified to the Commission under § 2.319(l), or a ruling referred or issue certified to the Commission under § 2.323(f), and the Commission will review the issue if the certification or referral raises significant and novel legal or policy issues, and resolution of the issues would materially advance the orderly disposition of the proceeding. 10 C.F.R. § 2.341(f)(1).

not the standards of § 2.341(b)(4)²¹ (errors by the board or important policy issues). *Oncology Services Corporation* (Suspension Order), CLI-93-13, 37 NRC 419, 421 (1993) (citing former regulations at 10 C.F.R. §§ 2.786(g) and 2.786(b)(4)).

The Commission's "basic structure" standard comprehends disputes over the very nature of the hearing in a particular proceeding (e.g. whether a licensing hearing should proceed in one step or in two), and not to routine arguments over admitting particular contentions. *Exelon Generation Co., LLC* (Early Site Permit for the Clinton ESP Site), CLI-04-31, 60 NRC 461, 467 (2004). Routine procedural decisions provide no basis for interlocutory review. For instance, the admission or denial of a contention, where the intervenor has other contentions pending in the proceeding, is a routine ruling not subject to immediate appellate review. See e.g. *PFS*, CLI-00-2, 51 NRC at 80 (2000). Likewise, the Commission has rejected the argument that a mere increase in the burden of litigation has a "pervasive effect" on the structure of the litigation or constitutes "serious and irreparable" harm:

The basic structure of an ongoing adjudication is not changed simply because the admission of a contention results from a licensing board ruling that is important or novel, or may conflict with case law, policy, or Commission regulations. Similarly, the mere fact that additional issues must be litigated does not alter the basic structure of the proceedings in a pervasive or unusual way so as to justify interlocutory review of a licensing board decision.

²¹ 10 C.F.R. § 2.341(b)(4) states:

The petition for review [of a full or partial initial decision or other decision or action for which a petition for review is authorized] may be granted in the discretion of the Commission, giving due weight to the existence of a substantial question with respect to the following considerations:

- (i) A finding of material fact is clearly erroneous or in conflict with a finding as to the same fact in a different proceeding;
- (ii) A necessary legal conclusion is without governing precedent or is a departure from or contrary to established law;
- (iii) A substantial and important question of law, policy, or discretion has been raised;
- (iv) The conduct of the proceeding involved a prejudicial procedural error; or
- (v) Any other consideration which the Commission may deem to be in the public interest.

Connecticut Yankee Atomic Power Co. (Haddam Neck Plant), CLI-01-25, 54 NRC 368, 373-4 (2001) (footnotes and internal quotations omitted). Potential delay and increased expenses are insufficient reasons for interlocutory review, *Sequoyah Fuels Corp. & General Atomics* (Gore, Oklahoma Site), CLI-94-11, 40 NRC 55, 61 (1994), unless such delay and expense are “truly exceptional.” *Duke Power Co. et al.* (Catawba Nuclear Station, Units 1 and 2), ALAB-768, 19 NRC 988, 992 (1984).

By contrast, immediate review would be appropriate where there is “the potential difficulty of unscrambling and remedying the impact of an improper disclosure in a lengthy, complex, and contentious proceeding, which spanned years of litigation, and has generated a massive record.” *Georgia Power Co. et al.* (Vogtle Electric Generating Plant, Units 1 and 2), CLI-95-15, 42 NRC 181, 184 (1995). The Commission has also viewed the creation of a second Board as worthy of an interlocutory review:

The decision to create a second board is not unheard of in our practice, but it is certainly an unusual event, particularly where, as here, the Chief Judge reassigns to a second board threshold admissibility questions that already are ripe for decision by the initial Board. We agree with PFS and the NRC Staff that a ruling of this sort “affects the basic structure of the proceeding,” by arguably mandating duplicative or unnecessary litigating steps, and therefore is reviewable now.

Private Fuel Storage, LLC. (Independent Spent Fuel Storage Facility), CLI-98-7, 47 NRC 307, 310 (1998). The Commission has generally not considered jurisdictional issues as having a pervasive or unusual effect upon the proceeding that mandates interlocutory review. *Sequoyah*, CLI-94-11, 40 NRC at 63.

B. Waiver Requests under 10 C.F.R. § 2.335

The legal requirements governing waiver requests are set forth in 10 C.F.R. § 2.335. The rule allows only one reason for a waiver: “special circumstances with respect to the subject matter of the particular proceeding are such that the application of the rule or regulation (or a provision of it) would not serve the purposes for which the rule or regulation was adopted.”

10 C.F.R. § 2.335(b). If, upon review of the waiver petition, associated responses and affidavits, the Board determines that the petitioning party has not made a *prima facie* showing that the application of the rule would not serve the purpose of the rule, then no further consideration of the matter will be permitted. 10 C.F.R. § 2.335(c). If, on the other hand, the Board determines that a *prima facie* showing has been made that applying the regulations would not serve the underlying purpose of the rules, the Board will certify the matter to the Commission without ruling on the petition. 10 C.F.R. § 2.335(d). Upon certification, the Commission will determine if a waiver should be made and direct further proceedings as it deems appropriate. *Id.*

To make a *prima facie* showing required for a successful waiver of the rules, the requestor must provide information that reflects a "persuasive evidentiary showing that application of the rule to the exceptional facts of this case would not serve the purposes for which the rule was adopted." *Carolina Power & Light Company and North Carolina Eastern Municipal Power Agency* (Shearon Harris Nuclear Power Plant, Units 1 and 2), LBP-82-119A, 16 NRC 2069, 2080 (1982).

C. Need for Power and Alternative Energy Issues in Operating License Proceedings

The Commission's final rule removing the need for power and energy alternatives from consideration during an operating license proceeding, published in 1982, gave clear guidance, which, as discussed below, Boards consistently follow:

[T]he purpose of these amendments is to avoid unnecessary consideration of issues that are not likely to tilt the cost-benefit balance by effectively eliminating need for power and alternative energy source issues from consideration at the operating license stage. In accordance with the Commission's NEPA responsibilities, the need for power and alternative energy sources are resolved in the construction permit proceeding. The Commission stated its tentative conclusion that while there is no diminution of the importance of these issues at the construction permit stage, the situation is such that at the time of the operating license proceeding [1] the plant would be needed to either meet increased energy needs or [2] replace older less economical generating capacity and [3] that no viable alternatives to the

completed nuclear plant are likely to exist which could tip the NEPA cost-benefit balance against issuance of the operating license. Past experience has shown this to be the case. In addition, this conclusion is unlikely to change even if an alternative is shown to be marginally environmentally superior in comparison to operation of a nuclear facility because of the economic advantage which operation of nuclear power plants has over available fossil generating plants. An exception to the rule would be made if, in a particular case, special circumstances are shown in accordance with [10 C.F.R. § 2.335].

Final Rule, Need for Power and Alternative Energy Issues in Operating License Proceedings, 47 Fed. Reg. 12,940 (March 26, 1982)²² (emphasis added). The Commission stated that the *prima facie* showing required to support a waiver request is a "much stricter standard than the current requirements for raising need for power and alternative energy sources in operating license proceedings." *Id.* at 12,941. The Commission addressed the interplay between time passage, new technology, changes in power demand, and alternative energy sources, and repeated that even in the light of such changes, the waiver request still must make a *prima facie* showing of special circumstances. *Id.* Finally, regarding the content of the Staff's Environmental Impact Statement ("EIS"), the final rule included a conforming change to 10 C.F.R. Part 51²³ to make clear that the Commission's EIS at the OL stage would generally not include need for power or alternative energy. *Id.* at 12,941.

²² The Staff's brief in response to SACE's waiver included an more extensive summary of the history of the need for power rule and associated case law involving need for power and alternative energy in operating license proceedings. See Staff Response at 4-12. The full rulemaking history is unnecessary for purposes of the instant petition for review, as SACE did not dispute the history (see e.g. Petition at 9-10 summarizing history), but instead only disputed the applicability of the requirements and cases to Watts Bar Unit 2 due to the stage of construction of Watts Bar Unit 2.

²³ The rule was codified at 10 C.F.R. § 51.23(e). See 47 Fed. Reg. at 12943. Through subsequent rulemaking, the equivalent regulation was relocated to 10 C.F.R. § 51.95(a). See Final Rule, Requirements for Licensee Actions Regarding the Disposition of Spent Fuel Upon Expiration of Reactor Operating Licenses, 49 Fed. Reg. 34668, 34694 (August 31, 1984). The rule was renumbered one more time to 10 C.F.R. § 51.95(b) through additional rulemaking. See Final Rule, Environmental Review for Renewal of Nuclear Power Plant Operating Licenses, 61 Fed. Reg. 28467, 28489 (June 5, 1996). With regard to need for power and alternative energy, the subsequent rulemakings were not directed toward these issues, and did not affect the discussions in the 1981-82 rulemaking.

D. Three-Part Test for Waiver Requests for Need for Power and Alternative Energy

The case law governing waivers of need for power and alternative energy rules is well established and applicable. Shortly after the rule changed in the early 1980s, a Board carefully considered the Commission's rulemaking and found a three-part test needed in order for the waiver requestor to make the *prima facie* showing of special circumstances a petitioner in *Beaver Valley* would have to establish that Beaver Valley Unit 2 would not be needed: (1) to meet increased energy needs; (2) to replace older, less economical generating capacity; and (3) 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. *Beaver Valley*, LBP-84-6, 19 NRC at 401. All three elements were needed for a successful waiver; failing to establish one element is fatal to the waiver. *Id.* Cursory and general comments and speculation are insufficient to show the existence of viable alternatives that tip the NEPA cost-benefit balance against issuance of the operating license. *Id.* at 402. Attacking matters already considered by the Commission in formulating the regulation, or assumptions made by the Commission during the rulemaking, are insufficient for a successful waiver. *See id.* (noting such claims are more appropriately made through requests to amend or rescind a regulation, instead of a request for a waiver).

Later in 1984, another Board, rejecting a waiver request, agreed with the three-part test and provided additional guidance on what a successful waiver request would need to show. *See Georgia Power Company, et al.* (Vogtle Electric Generating Plant, Units 1 and 2), LBP-84-35, 20 NRC 887 (1984). For element (1), meeting increased energy needs, the *Vogtle* Board noted that petitioner failed to provide any probative information regarding the applicants' electrical energy requirements and production capacity, and if the plant will meet the needs. *Id.* at 893. For element (2), replacing older capacity, the Board found that the petitioner had not sustained its burden of proof, and made no showing that the plant would not be used to replace older plants. *Id.* Last, for element (3), regarding viable alternatives, the Board *rejected*

conservation as a viable alternative, finding that a viable alternative power source must be capable of serving the consumers in an equivalent manner that the power from the Vogtle Plant could be used, and the consumers must be able to utilize the power from the substitute source in whatever varied ways they see fit. *Id.* at 894.²⁴

Also in 1984, the Atomic Safety and Licensing Appeal Board considered an appeal from a Board's need for power waiver decision in Byron, and provided the same three factors of need for power to meet demand or replace older plants, and no cost-beneficial alternative exists. See *Commonwealth Edison Company* (Byron Nuclear Power Station, Units 1 and 2) ALAB-793, 20 NRC 1591, 1614-16 (1984). The Appeal Board provided additional guidance on the issues of "fairness" to the requestor and what to do if the constructed plant looks to be excess capacity or, in hindsight, a poor choice. On the former, the Appeal Board described the requestor's burden thusly:

Stated otherwise, the laying by intervenors of a proper foundation for their waiver or exemption request necessitated a substantial concrete demonstration that, notwithstanding the enormous economic investment in Byron, the NEPA cost-benefit balance might now tip in the direction of abandoning this essentially completed facility. For, assuredly, that proposition is far from self-evident. There may well be room for legitimate doubt regarding whether warrant exists to undertake the erection of a particular nuclear facility—i.e., whether the need for the electricity that the facility would generate is sufficient to justify assuming the environmental and other costs associated with its construction and operation. Thus, as the Commission pointed out, need for power and alternative energy sources issues remain of importance at the construction permit stage. But it is difficult to perceive many sets of circumstances that might lead one to a reasoned conclusion that the environmental costs of operating an already built facility would exceed the benefit to be derived from utilization of the electric power that the facility is capable of producing. Accordingly, *it does not seem unfair to expect a threshold particularization on the part of a party claiming the presence of such circumstances and, therefore, an entitlement to litigate whether NEPA requires that the facility be mothballed or dismantled.* Once again, such particularization was absent here.

²⁴ Nonetheless, the Board in Vogtle considered, for the sake of argument, conservation as an alternative, but rejected the petitioner's proffered unsupported conclusions. *Vogtle*, LBP-84-35, 20 NRC at 894.

Id. at 1615-1616 (footnote omitted) (emphasis added). The Appeal Board indicated that it would reject the concept of automatically abandoning a plant that may provide excess capacity, and that it would also reject not using an already-constructed nuclear plant on the basis that a different plant (e.g. a coal plant) appears retrospectively preferable. *Id.* at 1615 n. 106.

II. SACE's Petition for Interlocutory Review

SACE Presents five arguments as to why SACE believes the Board was wrong: 1) the Board used an inapplicable case (i.e. Shearon Harris); 2) the Board violated NEPA; 3) major questions of law, policy, and discretion are involved; 4) TVA and the Staff demonstrate that need for power is an issue; and 5) TVA's analysis of need for power is insufficient. Petition at 2-5. SACE states that it meets the standards for interlocutory review under 10 C.F.R. § 2.341(f)(2)²⁵ because "[o]nce construction is completed, the issues of need for power and cost-effectiveness of energy alternatives may well be considered moot." Petition at 20. SACE does not further explain why its concerns with Watts Bar may become moot. SACE does not directly address the factors of 10 C.F.R. § 2.341(f)(2).

Each issue or concern is addressed below. None demonstrate the need for interlocutory review.

A. SACE Has Not Been Threatened with Immediate and Serious Irreparable Impact

SACE's does show any "immediate and serious irreparable impact" under 10 C.F.R. § 2.341(f)(2)(i). SACE presents no discussion on this topic.

In fact, SACE suffers no irreparable impact that as a practical matter, could not be alleviated through a petition for review of the presiding officer's final decision. SACE continues to be a party to the proceeding, and continues to have at least one contention before the Board. The Board's order did not require SACE to take any action or even expend any resources. The

²⁵ In several places SACE asserts that its seeks review pursuant to 10 C.F.R. § 2.341(b) in addition to 10 C.F.R. § 2.341(f)(2). See Petition at 1 & 5. However, the standards in 10 C.F.R. § 2.341(f) must be met to attain interlocutory review. See *Oncology Services*, CLI-93-13, 37 NRC at 421 (1993).

Board's pre-hearing decisions on the waiver request associated with Contention 4 did not eliminate a hearing nor remove SACE as a party, thus the decisions do not dispose of the a major segment of the case nor terminate a party's rights to participate. SACE admits that it can petition the Commission to review LBP-10-12 in the future after the Board's final decision. Petition at 20. Although SACE believes its dispute with the need for power or energy alternatives may become moot when the plant is finished, SACE does not further explain its reasoning behind what will become moot and how SACE will be harmed. See *Id.* SACE cited to no cases regarding mootness and interlocutory appeals.

The Commission has found future mootness, where the mootness was not speculative but was guaranteed to occur by the passage of time, to be sufficient for interlocutory review in an enforcement proceeding. *David Geisen* (IA-05-52), CLI 07-06, 65 NRC 112 (2007) (The issue was whether or not to hold a proceeding in abeyance). However, possible mootness is insufficient for interlocutory review. C.f. United States Department of Energy Project Management Corporation *Tennessee Valley Authority* (Clinch River Breeder Reactor Plant), ALAB-688, 16 NRC 471, 474-475 (1982) and cases cited therein (discussing reasons Appeal Board was not inclined to undertake interlocutory review issues even while acknowledging that some issues may be moot when review of entire final decision is done).

SACE provides no discussion that shows how SACE's speculation that its dispute with need for power or energy alternatives may become moot is synonymous with immediate serious irreparable impact that cannot be addressed through review of the boards final order - i.e. SACE does not show how speculative mootness meets 10 C.F.R. § 2.341(f)(2)(i). Thus, there is no irreparable harm caused by the Board's order, and interlocutory review is not warranted under 10 C.F.R. § 2.341(f)(2)(i).

B. SACE Has Not Shown Any Affects On The Basic Structure Of The Proceeding In A Pervasive Or Unusual Manner

SACE makes no showing that the basic structure of the proceeding is affected in a pervasive or unusual manner under 10 C.F.R. § 2.341(f)(2)(ii), and SACE presents no arguments on the topic.

No direct change to the proceeding occurred from the disputed order. The Board did not require additional discovery, briefing, scheduling, etc.. The Board's order did not change the scope of the proceeding, split the hearing, or make any changes to the structure.

The indirect effect of the Board's order is that Contention 4, which was already ruled inadmissible, will continue to be inadmissible. The Commission routinely holds that an order which excluded a contention while admitting others does not have an effect on the basic structure of the proceeding. *See e.g. Indian Point*, CLI-09-6, 68 NRC at 137 ("Indeed, were we to permit litigants to successfully invoke interlocutory review based merely on an assertion that the licensing board erred in admitting (or excluding) a contention, we would be opening the floodgates to a potential deluge of interlocutory appeals from any number of participants who lose admissibility rulings. This would eviscerate our longstanding policy disfavoring interlocutory appeals." (footnotes omitted)).

In sum, the structure of the proceeding was not altered by the order, thus interlocutory review is not warranted under 10 C.F.R. § 2.341(f)(2)(ii). SACE has presented no information that shows otherwise.

III. SACE Has Not Shown Error in LBP-10-12.

If the Commission nonetheless elects to review LBP-10-12 notwithstanding that 10 C.F.R. § 2.341(f)(2)(i) & (ii) are not met, the Commission will find no errors in the Board's order.

A. The Board Correctly Applied Shearon Harris

SACE states it was error for the Board to rely upon *Shearon Harris*, ALAB-837, 23 NRC 525 (1986), for the proposition that SACE needs to show that Watts Bar Unit 2 would not be

used to displace an equivalent amount of older, less-economical capacity, because SACE believed the Shearon Harris involved a "substantially complete" facility whereas Watts Bar Unit 2 is "significantly incomplete."²⁶ Petition at 15. SACE states that the case and regulations used by the Board presume the construction and building costs are complete, whereas billions of dollars are needed to finish Watts Bar Unit 2. See Petition 15.

First, SACE had already presented its concerns over completion of Watts Bar Unit 2 to the Board, but the Board found that SACE offered no indication about what work remained, or what the environmental impact of the work would be. LPB-10-12 (slip op. at 16). Further, the Board found that SACE 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. *Id.* at 16. Thus, the Board properly ruled that the absence of any meaningful information was insufficient to make a *prima facie* case for a waiver. See *id.* at 16-17.

Regarding SACE's specific concern over using Shearon Harris, the decisions in Shearon Harris addressed more than just a single reactor that was "substantially complete." Shearon Harris originally involved construction permit applications for four reactors,²⁷ and subsequently operating license applications for two units.²⁸ The Shearon Harris Board did not defer its

²⁶ SACE states that in 2007 Watts Bar Unit 2 was 60% complete. Petition at 3. SACE does not provide a current 2010 estimate of the percentage complete. Significantly, at the Watts Bar site, there is already a completed running licensed reactor -- Watts Bar Unit 1. Obviously, the environment of the site has already been environmentally disturbed by the completion and operation of Unit 1. SACE failed to discuss and analyze the additional incremental impact of Unit 2's completion. See LBP-10-12 (slip op. at 16).

²⁷ Shearon Harris was planned as four units. See e.g. 37 Fed. Reg. 20344 (September 29, 1972) (Notice of hearing on application for construction permits for Shearon Harris Nuclear power Plant, Units 1, 2, 3, and 4).

²⁸ In 1982, ten years after the construction permit notice, when the application for facility operating licenses was noticed in the Federal Register, Units 3 and 4 were by then cancelled, and the subsequent operating license proceedings involved Units 1 and 2. See "Carolina Power & Light Co. and North Carolina Municipal Power Agency No. 3 (Shearon Harris Nuclear Power Plant, Units 1 and 2); Receipt of Application for Facility Operating Licenses; Availability of Applicants' Environmental Report;

decisions, some of which addressed waiver of need for power and alternative energy rules, based upon Unit 2 not being substantially complete. See e.g. Carolina Power and Light Company and North Carolina Eastern Municipal Power Agency (Shearon Harris Nuclear Power Plant, Units 1 and 2), LBP-81-119A, 16 NRC 2069, 2111-1112 (1982) (denying motion to defer hearings on Unit 2 until there is reasonable assurance that the facility will be substantially completed). In Shearon Harris, the Board's order, which addressed both Shearon Harris Unit 1 and the incomplete Shearon Harris Unit 2, was on-point for waiver of need for power or energy alternatives:

We conclude this general discussion with a few comments about impermissible attacks on Commission rules and petitions for waiver of a rule. The Commission adheres to the fundamental principle of administrative law that its rules are not subject to collateral attack in adjudicatory proceedings. We are rejecting (or the Intervenor have withdrawn) numerous proposed contentions which amount to attacks on the rules, notably in the areas of need for power, alternative energy sources, and financial qualifications.

Intervenor are authorized to file a petition for a waiver of a rule, pursuant to 10 CFR 2.758. However, the procedural requirements of that provision must be complied with. It is not enough merely to allege the existence of "special circumstances." Such circumstances must be set forth "with particularity." In addition, as we read the regulation, the petition should be supported by proof (in affidavit or other appropriate form) sufficient for the Licensing Board to determine whether the petitioning party has made a "*prima facie* showing" for waiver. Intervenor should be aware that as a practical matter, in most cases, a petition for waiver of a rule under section 2.758 will involve a substantial investment in time and effort.

Shearon Harris, LBP-82-119A, 16 NRC at 2073 (1982).²⁹

Consideration of Issuance of Facility Operating Licenses; and Opportunity for Hearing," 47 Fed. Reg. 3898 (January 27, 1982). Later, Unit 2 was also cancelled.

²⁹ Other rulings related to need for power in Shearon Harris are similarly not restricted to facilities being substantially completed. See e.g. Carolina Power & Light Company and North Carolina Eastern Municipal Power Agency (Shearon Harris Nuclear Power Plant, Units 1 and 2), LBP-83-27A, 17 NRC 971, 971-976 (1983) (concluding without discussing percentage the plant is constructed, that comparative cost savings contentions- i.e., contentions that directly implicate need for power projections and comparisons to coal—are barred by 10 CFR § 51.53(c), and such comparative cost savings may not be counted as a benefit in the Staff's NEPA cost/benefit analysis).

In 1983, the petitioners in Shearon Harris, submitted a request for waiver for both Units 1 and Units 2, and in 1984 the Board announced its intent to deny the waiver. *Carolina Power & Light Company and North Carolina Eastern Municipal Power Agency* (Shearon Harris Nuclear Power Plant, Units 1 and 2), LBP-84-29B, 20 NRC 389, 424 (1984) (stating that the Board would provide its reasoning later). In 1985, the Board issued a partial initial decision which, *inter alia*, provided the reasoning on how the petitioner failed to make a prima facie case for waiving the need for power rules. *Carolina Power & Light Company And North Carolina Eastern Municipal Power Agency* (Shearon Harris Nuclear Power Plant³⁰), LBP-85-5, 21 NRC 410, 432-437 (1985) (noting the waiver petition in particular failed to show that Shearon Harris would not be used to displace existing coal plants), *aff'd* ALAB-837, 23 NRC 525 (1986) (affirming first partial initial decision, and affirming early licensing board rulings rejecting certain contentions and denying intervenor's petition for waiver of need for power and alternative energy rules).

Relative to need for power and energy alternatives, the appeal concerned alleged errors regarding showings of replacing existing fossil generation, and the Board's treatment of conservation; the Appeal Board applied the familiar waiver test derived from the Commission's rulemaking. See ALAB-837, 23 NRC at 547-548 (1986). In consideration of conservation, the Appeal Board stated that the waiver must show that "after applying the conservation-based alternative, there no longer remains an amount of fossil fuel baseload generation equal to that of the capacity of Shearon Harris that is less efficient than the nuclear plant." *Id.* at 547-548. It is not sufficient merely to show that the proposed alternative will displace an amount of fossil fuel generated baseload equivalent to that produced by nuclear plant. *Id.* at 548. The Appeal Board did not give any indication that its holding could only apply to a unit that is "substantially

³⁰ Between the time the Board announced its decision in LBP-84-29B and the time the Board published its partial initial decision in LBP-85-5, Unit 2 had by then been cancelled. LBP-85-5, 21 NRC at 411 n.1 (1985). Thus the LBP-85-5 and subsequent cases are captioned "Shearon Harris Nuclear Power Plant" instead of "Shearon Harris Nuclear Power Plant, Units 1 and 2".

complete" or that its ruling on the appeal was otherwise restricted in its general applicability to any OL proceeding. See *Id.* at 548-548.

SACE offers no citation to case law to support the idea that the Shearon Harris decision, which included decisions addressing the substantially-incomplete Unit 2 as well as the eventually-completed Unit 1, were somehow limited to only substantially-completed units.

SACE would have the Board apply a different unspecified waiver test because Watts Bar Unit 2 is not yet complete. But, as discussed above, the *prima facie* showing for a waiver covers plants at all stages of completion. Thus, in light of the background of the Shearon Harris decisions, there is no support for SACE's claim that the case is inapposite and cannot be applied because the reactor is not complete.

B. The Board Did Not Violate NEPA

SACE asserts that LPB-10-12 violated NEPA. Petition at 16-17. Specifically, SACE asserts that the Board disregarded new information, wrongly applied *Shearon Harris*, and exceeded its authority under NEPA. *Id.* at 17.

The Board did not violate NEPA. The NEPA duties fall to the Staff, and, after publication of the Staff's NEPA document (which has not occurred), the Board may be called upon to rule upon how or if the Staff's documents comply with NEPA. However, at present there is not a cause-effect link between the Board's conclusion that SACE failed to make a *prima facie* showing sufficient to submit the inquiry to the Commission and any alleged NEPA violation by the Board.

SACE cites to a recent Commission decision in *Pa'ina Hawaii* as support for the claim that the Board's decision on SACE's failure to show a *prima facie* case raises a substantial NEPA question. Petition at 17 (citing *Pa'ina Hawaii, L.L.C. (Materials License Application)*, CLI-10-18, 72 NRC __, __ (July 8, 2010) (slip op. at 20). However, *Pa'ina Hawaii* is not persuasive here. *Pa'ina Hawaii* in part regarded questions on the Board's ruling on the contents and adequacy of the Staff's Environmental Assessment, a NEPA document. See *id.* at 25-38.

SACE does not elaborate how *Pa'ina Hawaii* shows the Board erred on SACE's waiver request. At this point in the Watts Bar proceeding, the Staff has not completed its NEPA documents, and the Board has not been called upon to rule on the adequacy of those future documents. Thus, the *Pa'ina Hawaii* case is unrelated and does not demonstrate an error by the Board in Watts Bar.

SACE claims that the Board violated *Marsh v. Oregon Natural Resource Council*, 490 U.S. 360 (1989). Petition at 16 (citing "489[sic] U.S. 360, 367 (1989)). Like *Pa'ina Hawaii*, *Marsh* does not demonstrate that the waiver ruling violated NEPA because *Marsh* involved the sufficiency of final NEPA documents, not interlocutory reviews of waiver requests.

Thus, SACE fails to demonstrate how the Board violated NEPA.

C. There are no Major Questions of Law, Policy or Discretion that Warrant Commission Review

SACE notes that the Board opined that the Watts Bar Unit 2 plant has been under construction for a long time, and that the Commission might wish to consider at this point the issues of need for power and alternative energy sources. Petition at 18. SACE asserts the ruling raises major questions that warrant review, and that the Board ignored the significance of information provided by SACE. *Id.*

The Board's ruling simply did not involve any major question on law or policy. The requirements for petitioning for a rule waiver are well settled. The specific subtopic of rule waivers for need for power and energy alternatives in reactor operating license proceedings is settled and clear from the Commission's rulemaking. There is not a split or disagreement among licensing boards over what the rules mean. Instead, the topic has produced a number of consistent decisions about what is required to make the prima facie showing. See e.g. *Beaver Valley*, LBP-84-6, 19 NRC at 401; *Vogtle*, LBP-84-35, 20 NRC at 893-894; *Byron*, ALAB-793, 20 NRC at 1614-16 (1984); and *Shearon Harris*, ALAB-837, 23 NRC at 546-548 (1986).

If the Board found a question, the Board could have requested guidance, for example using 10 C.F.R. § 2.341(f)(1) to refer the ruling to the Commission on the basis that it raises significant and novel legal or policy issues, and the resolution of those issues would materially advance the orderly disposition of the proceeding. However, the Board did not find it necessary to make such a referral, but instead followed previous decisions.

SACE has not demonstrated that the Board's ruling produced a major question requiring review from the Commission. SACE does not clearly specify the allegedly unsettled question or policy that, if resolved, would advance the proceeding. Thus, there is no controversy for the Commission to settle, and no impediment for the Board to continue its adjudication on Watts Bar Unit 2 on the remaining contention.

D. No Error with the Board's Ruling on the Significance of the Staff's RAI

SACE re-argues its claim that TVA and the Staff show the need for power is at issue because TVA provided such information in TVA's NEPA document, and the Staff issued a Request for Additional Information (RAI) on need for power. Petition at 19. The Staff's Response to SACE's original request for waiver addressed the affect of the RAI, noting that the RAI simply does not have the authority to trump the Commission's waiver authority under the existing rules, nor as does the RAI serve as a substitute for the required *prima facie* showing needed to waive the rules. See NRC Staff Response at 19-23.³¹

On this topic, the Board stated that the Staff's RAI had no impact upon the Board's decision over whether or not SACE made the required *prima facie* showing sufficient to wave the rules. LBP-10-12 (slip op. at 17 n.78). Further, the Board correctly stated that the Staff must also comply with the Commission's rules, and that the rules are not altered by an RAI. *Id.*

³¹ The Staff also briefed the Board on how the situation at hand in *Watts Bar Unit 2* was distinguishable from *Southern Nuclear Operating Co.* (Vogtle Electric Generating Plant, Units 3 and 4), CLI-09-16, 70 NRC ___, (July 31, 2009) (slip op.) (declining to disturb the Board's contention admissibility decision in light of the Staff's RAI and an open-ended regulation). See *id.* at 20-23. In particular, the Staff noted that the burden of proof in *Vogtle* was the lower contention admissibility standard, instead of the much stricter *prima facie* showing for a waiver. *Id.* at 21.

SACE fails to provide any authority to the contrary that would demonstrate that the Board erred in its treatment of the RAI.

E. Requests For Admission Of Contention 4 Do Not Show Error.

In several places, SACE made brief statements requesting that Contention 4 be admitted by the Commission. *E.g.* Petition at 5 & 20. However, these statements are insufficient to demonstrate any error in LBP-10-12. Indeed, any arguments about Contention 4 are either late, if viewed as an appeal against the Board's original contention admissibility order (*Shearon Harris*, LBP-09-26, 70 NRC ____ (slip op.) (Nov. 19, 2009)), or in the alternative, SACE's request is premature and before the wrong body, inasmuch as SACE must first receive from the Commission a waiver of the need for power and energy alternatives rules before requesting the Board (not the Commission) to admit Contention 4 based upon a successful waiver. Either way, SACE has not shown why the Commission should admit Contention 4 as part of the review of LPB-10-12.

CONCLUSION

SACE has not met the standards for interlocutory review, in that it has not demonstrated that the Board's decision threatens SACE adversely 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 affects the basic structure of the proceeding in a pervasive or unusual manner.

Accordingly, the SACE has failed to demonstrate why the Commission should now review of LPB-10-12. Furthermore, should the Commission take up the appeal, the Commission should affirm the Board's order, inasmuch as SACE has now shown that the Board erred in its ruling.

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Dated at Rockville, Maryland

this 26th day of July.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of)	
)	
TENNESSEE VALLEY AUTHORITY)	Docket No. 50-391-OL
)	
(Watts Bar Unit 2))	ASLBP No. 07-893-01-OL-BD01

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "NRC STAFF'S ANSWER OPPOSING SOUTHERN ALLIANCE FOR CLEAN ENERGY'S PETITION FOR REVIEW OF BOARD ORDER LBP-10-12 (DENYING PETITION TO WAIVE NEED FOR POWER RULE AND ALTERNATIVE ENERGY RULES)," have been served upon the following by the Electronic Information Exchange, this 26th day of July, 2010:

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