

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

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

CLI-10-29

MEMORANDUM AND ORDER

The Southern Alliance for Clean Energy (SACE) requests interlocutory review of the Atomic Safety and Licensing Board's ruling denying its petition to waive 10 C.F.R. §§ 51.53(b), 51.95(b), and 51.106(c).¹ SACE seeks a waiver of these regulations in order to allow it to litigate a proposed contention challenging the Tennessee Valley Authority's (TVA) assessment of the need for power and alternative energy sources in its operating license application.² We decline to take review because SACE's appeal does not satisfy our interlocutory review standards.

¹ *Southern Alliance for Clean Energy's Petition for Interlocutory Review of LBP-10-12 (Denying SACE's Waiver Petition)* (July 14, 2010) (Petition for Interlocutory Review); LBP-10-12, 71 NRC ___ (June 29, 2010) (slip op.).

² TVA and the NRC Staff oppose interlocutory review. *Tennessee Valley Authority's Answer Opposing Southern Alliance for Clean Energy's Petition for Interlocutory Review of LBP-10-12* (July 26, 2010); *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)* (July 26, 2010).

I. BACKGROUND

This proceeding concerns TVA's application for an operating license for Watts Bar Nuclear Plant, Unit 2. The Commission issued construction permits (CP) to TVA for Units 1 and 2 in 1973.³ In 1976, TVA applied for operating licenses for both units. In the mid-1980s, TVA suspended construction of Unit 2, and the Staff suspended its review of the operating license application for that unit. Unit 2 has since been in deferred plant status.⁴ In the meantime, TVA has requested and received extensions of the CP completion date for Unit 2, which is now March 31, 2013.⁵

Early last year, TVA submitted an update to the operating license application for Unit 2.⁶ With its updated application, TVA submitted a "Final Supplemental Environmental Impact Statement for the Completion and Operation of [Watts Bar] Unit 2" (FSEIS). The Staff also

³ See Tennessee Valley Authority; Notice of Receipt of Update to Application for Facility Operating License and Notice of Opportunity for Hearing for the Watts Bar Nuclear Plant, Unit 2 and Order Imposing Procedures for Access to Sensitive Unclassified Non-Safeguards Information and Safeguards Information for Contention Preparation, 74 Fed. Reg. 20,350, 20,350 (May 1, 2009); In the Matter of Tennessee Valley Authority (Watts Bar Nuclear Plant, Unit 2); Order, 73 Fed. Reg. 39,995, 39,995 (July 11, 2008).

⁴ See Letter from Mark J. Burzynski, Manager, Nuclear Licensing, Tennessee Valley Authority, to Samuel J. Collins, Director, Nuclear Reactor Regulation, U.S. NRC (July 14, 2000) (ADAMS accession number ML003754798). See *generally* Commission Policy Statement on Deferred Plants, 52 Fed. Reg. 38,077 (Oct. 14, 1987).

⁵ See 73 Fed. Reg. at 39,995. TVA has represented that it expects to complete construction of Unit 2 prior to April 1, 2012. See Letter from William R. McCollum, Jr., Chief Operating Officer, Tennessee Valley Authority, to U.S. NRC (Aug. 3, 2007) at 2 (ML072190047). See *also* 74 Fed. Reg. at 20,350.

⁶ 74 Fed. Reg. at 20,350. The Staff states that it intends to use this information to supplement the Final Environmental Statement (FES) that was issued in 1978 in support of its review of the original operating license application for both units. Tennessee Valley Authority, Watts Bar Nuclear Station, Unit 2; Notice of Intent To Prepare a Supplement to the Operating License Final Environmental Statement and Conduct Scoping Process, 74 Fed. Reg. 46,799, 46,799 (Sept. 11, 2009). See *also* 74 Fed. Reg. at 20,350.

provided a notice of opportunity to request a hearing on TVA's operating license application.⁷ SACE, along with four other petitioners, submitted a request for hearing.⁸ The Board granted SACE's hearing request, admitting two contentions.⁹

In its hearing request, SACE submitted proposed Contention 4, asserting that TVA's FSEIS has not provided an adequate discussion of need for power and alternative energy sources.¹⁰ Although acknowledging that 10 C.F.R. §§ 51.53(b) and 51.95(b) preclude further review of need for power and alternative energy sources once a CP has been issued, SACE claimed that these regulations do not apply because "TVA has stated that the purpose of the FSEIS . . . is not just to support TVA's operating license, but to update TVA's 1972 EIS for construction of the plant."¹¹ According to SACE, "it is appropriate to revisit the question of need and alternatives" because "Watts Bar Unit 2 is sixty percent complete, with significant expenditures and modifications still to be made."¹² SACE noted, however, that if the Board determined that sections 51.53(b) or 51.95(b) barred admission of the contention, SACE would submit a waiver petition.¹³

⁷ 74 Fed. Reg. at 20,350.

⁸ *Petition to Intervene and Request for Hearing* (July 13, 2009) (Hearing Request).

⁹ LBP-09-26, 70 NRC __ (Nov. 19, 2009) (slip op. at 3, 63). The Board denied the hearing request as to the other petitioners. Thereafter, the Board dismissed one of the two admitted contentions as moot; one contention remains at issue in this proceeding. See Order (Granting TVA's Unopposed Motion to Dismiss SACE Contention 1) (June 2, 2010) (unpublished).

¹⁰ Hearing Request at 16-21.

¹¹ *Id.* at 16 n.4.

¹² *Id.* at 17.

¹³ *Id.* at 16 n.4.

The Board found Contention 4 to be inadmissible as outside the scope of the proceeding. The Board reasoned that it was bound to follow section 51.53(b), and “[s]ince [under that section] TVA was . . . not obligated to include any discussion of the need for power or of alternative energy sources in its application for an operating license, a challenge to the adequacy of TVA’s discussion of these issues is not within the scope of this proceeding at this point.”¹⁴

Thereafter, SACE petitioned for a waiver of sections 51.53(b) and 51.95(b), attaching the Declaration of Dr. Arjun Makhijani in support.¹⁵ SACE asserted that a waiver is justified under 10 C.F.R. § 2.335(b) because there are special circumstances in this proceeding such that the application of sections 51.53(b) and 51.95(b) would not serve the purpose for which they were adopted.¹⁶ SACE later filed a motion to amend its waiver petition to add 10 C.F.R. § 51.106(c), which prohibits a presiding officer in an operating license proceeding from admitting contentions concerning need for power or alternative energy sources.¹⁷ TVA and the NRC Staff opposed both the waiver petition and the subsequent motion to amend.¹⁸

¹⁴ LBP-09-26, 70 NRC __ (slip op. at 44).

¹⁵ *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 Petition); *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).

¹⁶ Waiver Petition at 2.

¹⁷ *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)* (Mar. 10, 2010) at 2.

¹⁸ *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); Tennessee (continued ...)

The Board denied SACE's waiver petition, finding that SACE had not shown that a waiver was justified under section 2.335(b).¹⁹ The Board found that SACE had supplied "little, if any, useful information," and that the Makhijani Declaration consisted of "no more than unsupported conclusions."²⁰ Because it concluded that SACE had not made a prima facie case for waiver, the Board declined to certify the matter to the Commission, and found that section 2.335(c) prohibited it from considering the matter further.²¹ SACE's timely petition for interlocutory review followed.

II. DISCUSSION

We previously have held that licensing board decisions denying a petition for waiver are interlocutory and not immediately reviewable.²² Such decisions generally are "not appealable until the board has issued a final decision resolving the case," unless a party seeking review

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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). SACE sought leave to reply to TVA and the Staff's answers to the waiver petition, which also was opposed by TVA and the Staff. *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)* (Mar. 8, 2010); *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* (Mar. 8, 2010); *Tennessee Valley Authority's Answer in Opposition to Motion for Leave to Reply and Motion for Leave to Amend Waiver Petition* (Mar. 15, 2010); *NRC Staff's Answer to SACE Reply Motion and Motion to Amend* (Mar. 17, 2010).

¹⁹ LBP-10-12, 71 NRC __ (slip op. at 17).

²⁰ *Id.* (slip op. at 16-17).

²¹ *Id.* (slip op. at 17-18). See generally 10 C.F.R. § 2.335(c).

²² See *Louisiana Energy Services* (Claiborne Enrichment Center), CLI-95-7, 41 NRC 383, 384 (1995).

shows that one of the grounds for interlocutory review has been met.²³ Section 2.341(f)(2) of our rules of practice governs petitions for interlocutory review. This section requires a showing that the issue for which the party seeks 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.²⁴

It is within our discretion to grant interlocutory review.²⁵ Because we disfavor piecemeal appeals, however, we will grant interlocutory review only in extraordinary circumstances.²⁶ SACE has not presented a case of extraordinary circumstances.

SACE spends the bulk of its petition addressing the general grounds for review under 10 C.F.R. § 2.341(b)(4).²⁷ SACE, however, has failed first to establish that it has met one of the grounds required for *interlocutory* review under 10 C.F.R. § 2.341(f)(2).²⁸ SACE devotes a

²³ *Entergy Nuclear Operations, Inc.* (Indian Point, Units 2 and 3), CLI-08-27, 68 NRC 655, 656 (2008).

²⁴ 10 C.F.R. § 2.341(f)(2).

²⁵ *Id.*

²⁶ See, e.g., *LES*, CLI-95-7, 41 NRC at 384; *Entergy Nuclear Operations, Inc.* (Indian Point, Units 2 and 3), CLI-09-6, 69 NRC 128, 132, 137 (2009).

²⁷ See *generally* Petition for Interlocutory Review at 2-19.

²⁸ Cf. *Oncology Services Corp.*, CLI-93-13, 37 NRC 419, 421 (1993) (stating that “[t]he Commission may consider the criteria listed in section 2.786(b)(4) when reviewing interlocutory matters on the merits, but when determining whether to undertake such review the standards in section 2.786(g) control [the] determination,” citing prior versions of subsections 2.341(b)(4) and 2.341(f)(2), respectively).

single paragraph to its argument that it meets the interlocutory review standard.²⁹ According to SACE, interlocutory review is warranted because waiting until the Board's issuance of a final decision could render the issues of need for power and alternative energy sources moot.³⁰ SACE relies on the incomplete construction status of Unit 2 to support its waiver petition, and speculates that construction of Unit 2 might be substantially complete, or the money needed to complete Unit 2 already spent, by the time the Board issues its final decision resolving the case.³¹

SACE's argument falls short of showing that it will be adversely affected by an immediate and serious irreparable impact that could not be alleviated through a petition for review after the Board's issuance of a final decision. SACE articulates a concern that its arguments regarding need for power and alternative energy sources "may" be moot by the end of this operating license proceeding. But SACE provides no factual or legal support for this argument.

Imminent mootness of an issue has been cause for taking interlocutory review in other proceedings. In those proceedings, however, the very issue sought to be reviewed would have become moot by the time the board issued a final decision.³² In such cases, the issue must be

²⁹ See Petition for Interlocutory Review at 5, 20.

³⁰ *Id.*

³¹ *Id.* See also *id.* at 3, 8, 11, 15-16 (citing Waiver Petition and Makhijani Declaration).

³² See *David Geisen*, CLI-06-19, 64 NRC 9, 11 (2006) ("The question whether to hold an NRC enforcement proceeding in abeyance pending a related criminal prosecution is generally suitable for interlocutory Commission review because, unlike most interlocutory questions, the abeyance issue cannot await the end of the proceeding (it becomes moot)."); *Duke Energy Corp.* (Catawba Nuclear Station, Units 1 and 2), CLI-04-6, 59 NRC 62, 71 (2004) ("Review at the end of the case would be meaningless because the Commission cannot later, on appeal from a final Board decision, rectify an erroneous disclosure order. A bell cannot be unring. (continued ...)

reviewed now, or not at all. Here, in contrast, SACE's "mootness" concern stems from the factual circumstances relied on its waiver petition. The issue at the heart of the waiver petition (which is, ultimately, the issue for which SACE seeks interlocutory review) – whether the supplement to the FES should include a discussion of need for power and alternative sources of energy – is capable of review later, after the Board has completed its proceeding. Whether construction of Unit 2 has advanced – or is even completed – at the end of this adjudicatory proceeding has no bearing on the legal issues associated with SACE's waiver petition. We assume administrative regularity in the regulatory process, and review of the operating license application takes place independently of that associated with plant construction.³³ There is no reason to assume that completion of construction would in any way force the Commission's hand in making adjudicatory decisions on operating license issues, including NEPA issues, at the appropriate time. To find otherwise would eviscerate our two-step construction permit/operating license review process.

In any event, our experience with this very issue in another operating license proceeding where review was deferred until the end of the case demonstrates that SACE will not be

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'Because the adverse impact of that release would occur now, the alleged harm is immediate.'" (quoting *Georgia Power Co. (Vogtle Electric Generating Plant, Units 1 and 2)*, CLI-94-5, 39 NRC 190, 193 (1994))). See also *Kansas Gas and Electric Co. (Wolf Creek Nuclear Generating Station, Unit 1)*, ALAB-327, 3 NRC 408, 411, 413 (1976) (certifying a matter involving a board decision directing unrestricted disclosure of a document the applicant claimed to be proprietary because "[u]nlike most interlocutory discovery orders, the one here involved must be reviewed now or not at all").

³³ See *Power Reactor Dev. Co. v. International Union of Electrical Workers*, 367 U.S. 396, 415-16 (1961); *Citizens Ass'n for Sound Energy v. NRC*, 821 F.2d 725, 730 (D.C. Cir. 1987); *Porter County Chapter of the Izaak Walton League of Am., Inc. v. NRC*, 606 F.2d 1363, 1370 (D.C. Cir. 1979). See also *Rockford League of Women Voters v. NRC*, 679 F.2d 1218, 1222-23 (7th Cir. 1982).

irreparably injured.³⁴ At the close of the *Shearon Harris* operating license proceeding, the Appeal Board reviewed the licensing board's earlier, interlocutory denial of a petition to waive the very same NEPA regulations at issue here, without suggesting that the waiver issue was moot.³⁵

SACE's argument also falls short of showing that the denial of the waiver petition "affects the basic structure of the proceeding in a pervasive or unusual manner." Although SACE did not address expressly this provision of our rules, we find that the basic structure of the proceeding remains unchanged.

We therefore deny SACE's request for interlocutory review, without prejudice to SACE's ability to file a petition for review raising the waiver question after issuance of the Board's final decision in this matter. Our decision to decline review at this time should not be interpreted as a determination on the merits of either SACE's waiver petition or the Board's decision in LBP-10-12.³⁶

One other matter bears mention. The Board has twice suggested, given the passage of time between the construction permit proceeding and this reinvigorated operating license

³⁴ See, e.g., *Carolina Power and Light Co.* (Shearon Harris Nuclear Power Plant), ALAB-837, 23 NRC 525, 546-48 (1986); *Commonwealth Edison Co.* (Byron Nuclear Power Station, Units 1 and 2), ALAB-793, 20 NRC 1591, 1614-16 (1984).

³⁵ See generally *Shearon Harris*, ALAB-837, 23 NRC at 546-48 & n.70 (reviewing LBP-84-29B, 20 NRC 389 (1984) (denying waiver petition without explanation), and LBP-85-5, 21 NRC 410 (1985) (setting forth the licensing board's reasoning for the denial)). Construction of Harris Unit 1 continued during the operating license proceeding. See NUREG-0972, Final Environmental Statement Related to the Operation of Shearon Harris Nuclear Power Plant, Units 1 and 2 (Oct. 1983) at v-vi, 1-1, A-4 (ML071340292).

³⁶ Cf. *Baltimore Gas and Electric Co.* (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), CLI-98-24, 48 NRC 325, 343 n.3 (1998) (explaining that unreviewed board rulings have no precedential effect).

proceeding, that we may wish to consider further the question whether the Staff's NEPA analysis in this case should address the need for power and alternative energy sources.³⁷ The Board's suggestion is not without force. The purpose of the regulatory provisions at issue here was to avoid unnecessary consideration of these issues, recognizing that they are not likely to alter the cost-benefit balance.³⁸ Nevertheless, we recognize our obligation under NEPA to supplement our environmental review documents if there is new and significant information relevant to these matters.³⁹ Therefore, we expect the Staff to take the requisite "hard look" at new information on the need for power and alternative sources of energy. If the Staff concludes the legal threshold for new and significant information has been met, we authorize the Staff to supplement the FES in this instance.⁴⁰

³⁷ See LBP-10-12, 71 NRC __ (slip op. at 17); LBP-09-26, 70 NRC __ (slip op. at 44).

³⁸ See Final Rule, Need for Power and Alternative Energy Issues in Operating License Proceedings, 47 Fed. Reg. 12,940, 12,941 (Mar. 26, 1982).

³⁹ See *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 373-74 (1989).

⁴⁰ See 10 C.F.R. § 51.95(b).

III. CONCLUSION

For the reasons set forth above, we *deny* SACE's petition for interlocutory review of the Board's ruling in LBP-10-12, without prejudice.

IT IS SO ORDERED.

For the Commission

[SEAL]

/RA/

Annette L. Vietti-Cook
Secretary of the Commission

Dated at Rockville, Maryland,
this 30th day of November, 2010.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing COMMISSION MEMORANDUM AND ORDER (CLI-10-29) have been served upon the following persons by the Electronic Information Exchange.

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Docket No. 50-391-OL
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[Original signed by Evangeline S. Ngbea]
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Dated at Rockville, Maryland
this 30th day of November 2010