

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

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

In the Matter of

TENNESSEE VALLEY AUTHORITY

(Watts Bar Unit 2)

Docket No. 50-391-OL

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

March 30, 2012

MEMORANDUM AND ORDER

(Denying SACE's Motion to Admit a New Contention Regarding
NRC's Near-Term Task Force on Fukushima)

Before the Board is a motion for leave to file a new contention, submitted by Intervenor Southern Alliance for Clean Energy (SACE), which alleges that the Tennessee Valley Authority's (TVA) Final Supplemental Environmental Impact Statement (FSEIS) regarding its application for an operating license for the Watts Bar Unit 2 reactor "fails to address the extraordinary environmental and safety implications of the findings and recommendations raised by the" July 2011 report by the NRC's Near-Term Task Force on the Fukushima Dai-ichi Accident.¹ For the reasons described below, we deny admission of SACE's proposed new contention.

I. BACKGROUND

Following the earthquake and tsunami of March 11, 2011, that disabled multiple reactors at the Fukushima Dai-ichi Nuclear Power Plant in Japan, the NRC Chairman called for the

¹ Motion to Admit New Contention Regarding the Safety and Environmental Implications of the NRC Task Force Report on the Fukushima Dai-ichi Accident (Aug. 11, 2011) at 1 [hereinafter SACE Motion]; Contention Regarding NEPA Requirement to Address Safety and Environmental Implications of the Fukushima Task Force Report (Aug. 11, 2011) at 4 [hereinafter New Contention].

formation of an agency task force to review the agency's processes and regulations for potential improvements.² On July 12, 2011, the NRC's Near-Term Task Force on Fukushima issued a report entitled "Recommendations for Enhancing Reactor Safety in the 21st Century, the Near-Term Task Force Review of Insights from the Fukushima Dai-ichi Accident."³

SACE moved for leave to file a new contention on August 11, 2011.⁴ On September 6, 2011, TVA and the NRC Staff filed answers in opposition.⁵ SACE filed its reply on September 13, 2011,⁶ and, pursuant to permission granted by the Board,⁷ TVA filed a surreply on September 20, 2011.⁸

² See NRC Actions Following the Events in Japan, COMGBJ-11-0002 at 1 (Mar. 21, 2011) (ADAMS Accession No. ML110800456).

³ U.S. Nuclear Regulatory Commission, Recommendations for Enhancing Reactor Safety in the 21st Century, the Near-Term Task Force Review of Insights from the Fukushima Dai-ichi Accident (July 12, 2011) (ADAMS Accession No. ML111861807) [hereinafter Task Force Report].

⁴ See SACE Motion. SACE included with its Motion a petition for rulemaking and a request to suspend the licensing decision pending that rulemaking. Rulemaking Petition to Rescind Prohibition Against Consideration of Environmental Impacts of Severe Reactor and Spent Fuel Pool Accidents and Request to Suspend Licensing Decision (Aug. 11, 2011). The Commission denied SACE's suspension request pending the agency's consideration of its rulemaking petition. See Union Elec. Co. d/b/a Ameren Missouri (Callaway Plant, Unit 2) et al., CLI-11-05, 74 NRC __, __ (slip op. at 38-41) (Sept. 9, 2011).

⁵ See [TVA]'s Answer in Opposition to Proposed Contention Regarding Fukushima Task Force Report (Sept. 6, 2011) [hereinafter TVA Answer]; NRC Staff's Answer in Opposition to Motion and Contention Regarding NEPA Requirement to Address Safety and Environmental Implications of the Fukushima Task Force Report (Sept. 6, 2011) [hereinafter NRC Staff Answer].

⁶ [SACE]'s Reply to Oppositions to Admission of New Contention (Sept. 13, 2011) [hereinafter SACE Reply]; Reply Memorandum Regarding Timeliness and Admissibility of New Contentions Seeking Consideration of Environmental Implications of Fukushima Task Force Report in Individual Reactor Licensing Proceedings (Sept. 13, 2011) [hereinafter Reply Memorandum].

⁷ See Licensing Board Order (Granting TVA's Request to File a Surreply) (Sept. 20, 2011) at 1 (unpublished).

⁸ [TVA]'s Surreply to the Reply of [SACE] (Sept. 20, 2011) [hereinafter TVA Surreply].

II. PARTIES' POSITIONS

SACE's proposed contention calls for "significant re-evaluation and revision [of the NRC's current regulatory framework] in order to expand or upgrade the design basis for reactor safety as recommended by the Task Force Report."⁹ SACE argues that the "FSEIS must be supplemented in light of the Task Force Findings that certain accidents formerly classified as severe should be incorporated into the design basis" and that "the values assigned to the cost-benefit analysis for Watts Bar Unit 2, as described in TVA's SAMA [severe accident mitigation alternatives] analysis, must be re-evaluated in light of the Task Force's conclusion that the value of SAMAs is so high that they should be elected as a matter of course."¹⁰ SACE represents that revising the Watts Bar SAMA analysis to incorporate the recommendations of the Task Force Report would yield a larger number of required SAMAs and would impact the overall cost-benefit analysis for TVA's application.¹¹ SACE also maintains that the FSEIS should address the Task Force Report's analysis of impacts from flooding and earthquakes and the Task Force's suggested measures to mitigate these impacts.¹² SACE concedes "that some issues raised by the Task Force Report may be appropriate for generic rather than case-specific resolution," but asserts that both generic and site-specific resolution of these issues at Watts Bar must be completed before the license is granted.¹³ SACE provides support for its

⁹ New Contention at 8.

¹⁰ Id. at 13-14 (capitalizations omitted).

¹¹ Id. at 14.

¹² Id. at 15-16.

¹³ Id. at 20.

contention in the declaration of Dr. Arjun Makhijani.¹⁴ Dr. Makhijani, however, makes no specific reference to Watts Bar Unit 2 in his declaration.

As to timeliness, SACE asserts that the new contention is timely filed pursuant to 10 C.F.R. § 2.309(f)(2) because it arose from information in the Task Force Report, which was released in July 2011, and contains information that was not publically available prior to its issuance.¹⁵

TVA responds that the proposed new contention should be rejected because it is untimely, does not meet the requirements for nontimely filings, and does not satisfy the requirements for contention admissibility set out in 10 C.F.R. § 2.309(f)(1). TVA argues that the Task Force Report is not a source of new information sufficient to support a timely new contention and that there have been no relevant changes to TVA's application or the information available about the construction or operation of Watts Bar Unit 2 since the Fukushima accident.¹⁶ According to TVA, SACE lacks good cause to propose the contention and the proposed contention does not meet the remaining balancing factors in the Section 2.309(c)(1) test.¹⁷ TVA states that the proposed contention challenges existing regulations or issues that may well become the subject of rulemaking and raises issues that are neither significant nor material to NRC's review under the National Environmental Policy Act (NEPA).¹⁸ TVA also argues that SACE misinterprets the Task Force Report's description of the adequacy of the

¹⁴ Id., Declaration of Arjun Makhijani Regarding Safety and Environmental Significance of NRC Task Force Report Regarding Lessons Learned from Fukushima Daiichi Nuclear Power Station Accident (Aug. 8, 2011).

¹⁵ Motion at 2-4. In the alternative, SACE claims that its motion and contention meet the nontimely filing requirements of 10 C.F.R. § 2.309(c). Id. at 4-8.

¹⁶ TVA Answer at 11-12.

¹⁷ Id. at 12-15.

¹⁸ Id. at 17-22.

NRC's current regulatory framework and fails to raise any specific challenges to the sufficiency of the FSEIS as issued.¹⁹

The NRC Staff also opposes admission of the proposed contention. The Staff argues that the proposed contention is outside the scope of this proceeding because the issues raised are generic ones to be addressed by the Commission.²⁰ The Staff characterizes the proposed contention as an impermissible challenge to current environmental regulations (10 C.F.R. §§ 51.106(c) and 51.53(b)) and current safety regulations.²¹ Additionally, the Staff asserts SACE's claims are not material to its review of TVA's license application because the proposed contention focuses on environmental issues while the Task Force Report exclusively concentrated on safety issues.²² The NRC Staff argues that the proposed contention does not challenge any specific portions of the FSEIS and that the contention's arguments relating to severe accidents, SAMAs, and need for power are immaterial to the agency's licensing decision in this proceeding and do not raise genuine disputes with the FSEIS itself.²³ Finally, the NRC Staff describes the contention as lacking an adequate factual basis and as not being timely raised.²⁴

SACE replies that its proposed contention does raise a specific challenge to TVA's FSEIS for Watts Bar Unit 2 because the contention expressly alleges that the document does not "address the significant environmental implications of the findings and recommendations

¹⁹ Id. at 23-26.

²⁰ NRC Staff Answer at 16-18.

²¹ Id. at 18-20.

²² Id. at 20-23.

²³ Id. at 20-26, 36-38.

²⁴ Id. at 26-36, 38-43.

raised by the NRC's Fukushima Task Force Report."²⁵ SACE claims that the proposed contention "specifically identifies the language in the FSEIS in which the environmental impacts of the proposed reactor are described as insignificant."²⁶

TVA's surreply states that SACE misreads the Commission's ruling in CLI-11-05, which, TVA argues, held that the Task Force Report does not provide "new and significant information that is relevant to any generic or site-specific analysis of environmental impacts under NEPA and 10 C.F.R. Part 51."²⁷ TVA also interprets CLI-11-05 as holding that any request to undertake supplemental NEPA review at this time is premature while the NRC continues to evaluate the accident and its implications for U.S. nuclear facilities.²⁸

III. ANALYSIS

A. Legal Standards

1. Contention Admissibility

To be admissible, a contention must satisfy the six criteria of 10 C.F.R. § 2.309(f)(1)(i)-(vi). Specifically, each contention must:

- (i) Provide a specific statement of the issue of law or fact to be raised or controverted . . . ;
- (ii) Provide a brief explanation of the basis for the contention;
- (iii) Demonstrate that the issue raised in the contention is within the scope of the proceeding;
- (iv) Demonstrate that the issue raised in the contention is material to the findings the NRC must make to support the action that is involved in the proceeding;
- (v) Provide a concise statement of the alleged facts or expert opinions which support the requestor's/petitioner's position on the issue and on which the petitioner intends to rely at hearing, together with references to the specific

²⁵ SACE Reply at 2.

²⁶ Id. (citing Motion at 12).

²⁷ TVA Surreply at 3.

²⁸ Id.

sources and documents on which the requestor/petitioner intends to rely to support its position on the issue;

(vi) [P]rovide sufficient information to show that a genuine dispute exists with the applicant/licensee on a material issue of law or fact. This information must include references to specific portions of the application (including the applicant's environmental report and safety report) that the petitioner disputes and the supporting reasons for each dispute, or, if the petitioner believes that the application fails to contain information on a relevant matter as required by law, the identification of each failure and the supporting reasons for the petitioner's belief²⁹

NRC regulations permit licensing boards to admit new contentions that challenge the environmental review documents if those contentions are supported with "data or conclusions" that "differ significantly from the data or conclusions in the applicant's documents."³⁰ Otherwise, new contentions are permitted only with leave of the Board "upon a showing that:

(i) The information upon which the amended contention or new contention is based was not previously available;

(ii) The information upon which the amended or new contention is based is materially different than previously available; and

(iii) The amended or new contention has been submitted in a timely fashion based on the availability of the subsequent information.³¹

Our May 26, 2010 Scheduling Order states that we will deem timely, pursuant to 10 C.F.R. § 2.309(f)(2)(iii), any proffered new contention "if it is filed within thirty (30) days of the date when the new and material information on which it is based first becomes available."³²

2. Commission Decisions

In CLI-11-05, the Commission declared that:

²⁹ 10 C.F.R. § 2.309(f)(1)(i)-(vi). And, as is particularly relevant here, the Commission has stated that "bare assertions are insufficient to demonstrate a genuine dispute on a material issue of law or fact under our general contention admissibility requirements in section 2.309(f)(1)(vi)." Entergy Nuclear Generation Co. and Entergy Nuclear Operations, Inc. (Pilgrim Nuclear Power Station), CLI-12-03, 75 NRC __, __ (Feb. 22, 2012) (slip op. at 23-24).

³⁰ 10 C.F.R. § 2.309(f)(2).

³¹ Id. § 2.309(f)(2)(i)-(iii).

³² Licensing Board Scheduling Order (May 26, 2010) at 5 (unpublished).

Although the Task Force completed its review and provided its recommendations . . . , the agency continues to evaluate the [Fukushima] accident and its implications for U.S. facilities [W]e do not know today the full implications of the Japan events for U.S. facilities. Therefore, any generic NEPA duty—if one were appropriate at all—does not accrue now.³³

The Commission established that “[i]f . . . new and significant information comes to light that requires consideration as part of the ongoing preparation of application-specific NEPA documents, the agency will assess the significance of that information, as appropriate.”³⁴ The Commission stated, however, that “given the current state of information available to us,” such information does not “present a seriously different picture of the environmental impact of the proposed project from what was previously envisioned” such that it would trigger at least a generic NEPA review.³⁵ Moreover, because the Commission directed the Staff to institute a longer-term review of the implications of events at Fukushima on U.S. facilities and “the NRC may implement changes to its regulations and regulatory processes,” the Commission regarded any requests for added safety review from SACE and the other intervenors to have, “in essence, been granted.”³⁶

In CLI-12-07, the Commission denied review of a licensing board memorandum and order that ruled inadmissible a contention filed in several other reactor licensing proceedings that, in all important respects, is identical to the one offered by SACE in this proceeding.³⁷ There, the Commission summarized the petitioners’ position as alleging that “the environmental review documents in each of the captioned matters fail to satisfy NEPA because they do not account for the new and significant environmental implications stemming from the findings and

³³ Callaway, CLI-11-05, 74 NRC at __ (slip op. at 30).

³⁴ Id. at __ (slip op. at 30-31).

³⁵ Id. at __ (slip op. at 31) (citing Hydro Resources, Inc. (2929 Coors Road, Suite 101, Albuquerque, NM 87120), CLI-99-22, 50 NRC 3, 14 (1999) (internal quotation omitted)).

³⁶ Id. at __ (slip op. at 31-32).

³⁷ See Luminant Generation Co. (Comanche Peak Nuclear Power Plant, Units 3 and 4) et al., CLI-12-07, 75 NRC __ (Mar. 16, 2012).

recommendations included in the Near-Term Report.”³⁸ The petitioners had asserted that “application-specific NEPA analyses must consider ‘new and significant’ information arising from the Fukushima accident” and had “attempt[ed] to distinguish CLI-11-05 by claiming that our holding there rested on a finding that sufficient information was not yet available to conduct a generic analysis.”³⁹ The Commission noted that “Petitioners have not identified environmental effects from the Fukushima Dai-ichi events that can be concretely evaluated at this time, or identified specific new information challenging the site-specific environmental assessments in the captioned matters”, and “therefore decline[d] to disturb the Board’s conclusion that nothing in Petitioners’ contention overcomes the prematurity concerns we outlined in CLI-11-05.”⁴⁰

The Commission explained that “reference to the Task Force Report recommendations alone, without facts or expert opinion that explain their significance for the unique characteristics of the sites or reactors that are the subject of the petitions, does not provide sufficient support for the common contention.”⁴¹ Accordingly, because the petitioners “did not relate their contention to any unique characteristics of the particular site at issue,” the contention was not adequately supported by alleged fact or expert opinion and did not raise issues material to the NRC’s reviews of the license applications.⁴² The Commission observed that “an application-

³⁸ Id. at __ (slip op. at 3).

³⁹ Id. at __ (slip op. at 9) (emphasis in original).

⁴⁰ Id.

⁴¹ Id. at __ (slip op. at 13). More specifically, SACE has not pointed to concrete information that is material to the findings the NRC must make to support the captioned proposed actions. See id. at __ (slip op. at 10-11). Indeed, the Commission recently held that even if the information presented in the contention is truly new, the contention is inadmissible where petitioner has failed to demonstrate the significance of that information to the environmental review in the case at hand. See Pilgrim, CLI-12-03, 75 NRC __, __ (slip op. at 9 n.42).

⁴² Comanche Peak, CLI-12-07, 75 NRC at __ (slip op. at 9). See also id. at __, __ (slip op. at 11, 13). Indeed the Commission there observed that “[t]he contention presumes, without support, that the Near-Term Report raised ‘new and significant’ environmental implications that have not been addressed in previous environmental reports (or Staff environmental reviews) prepared for the referenced applications,” and observed that, as is the case here, the

specific NEPA review represents a ‘snapshot’ in time. NEPA requires that we conduct our environmental review with the best information available today. It does not require that we wait until inchoate information matures into something that later might affect our review.”⁴³ The Commission did not say that no contention based on the Fukushima accident could be admissible: “[a]s tangible Fukushima lessons emerge—whether from inside or outside the NRC—Fukushima-related contentions in individual adjudications may become more plausible, except insofar as the NRC is taking generic steps to address them.”⁴⁴

B. Board Decision

The Commission’s ruling in CLI-12-07 controls this case. SACE’s proposed contention raises the same issue as the common contention that was rejected by the Commission—the alleged failure to comply with NEPA in the wake of the Task Force recommendations. Like the petitioners in those proceedings, SACE has not offered any material in support of its contention that ties the recommendations of the Task Force Report to any site-specific circumstances of the Watts Bar facility. Although SACE demands reconsideration of “any conclusions in the FSEIS for Watts Bar Unit 2 which is based on the assumption that compliance with NRC safety regulations is sufficient to ensure that environmental impacts of accidents are acceptable,” it does not identify any such conclusions in the FSEIS or explain how they are flawed.⁴⁵ Further, Dr. Makhijani’s supporting declaration makes no mention of Watts Bar Unit 2. Although SACE claims that its contention “specifically challenges the failure of the FSEIS to address the

declaration of Dr. Makhijani failed to make any connection to the site-specific circumstances of the plant at issue. Id. at 12 & n.40. Again this is precisely the circumstance of the present contention.

⁴³ Id. at 14.

⁴⁴ Id. at ___ (slip op. at 11) (emphasis added).

⁴⁵ New Contention at 12.

significant environmental implications” of the Task Force Report,⁴⁶ this charge is not specific at all, but rather seeks “the generic type of NEPA review that [the Commission] declared premature in CLI-11-05.”⁴⁷

As the Commission succinctly stated the requirement in CLI-12-07, “[w]e expect Petitioners to identify information that was not considered in the environmental review for the application at issue and explain, with asserted facts or expert opinion, how it presents a ‘seriously different picture of the environmental impact of the proposed project from what was previously envisioned.’”⁴⁸ Because SACE has not connected the Task Force recommendations to Watts Bar Unit 2, it has not put forward “new and significant information” that is relevant to the NRC’s site-specific NEPA review of TVA’s application. As a result, the contention fails to raise a genuine dispute with the application, lacks factual and expert support, and is not material to the NRC’s review.⁴⁹

We note that, since the filing of SACE’s contention, the agency has taken steps to move forward with implementing the lessons learned from Fukushima. On October 18, 2011, the Commission issued a Staff Requirements Memorandum directing the NRC Staff to implement recommendations from the Task Force Report.⁵⁰ On March 12, 2012, in light of the recommendations, the NRC issued a series of orders to power reactor licensees designed to strengthen their ability to withstand beyond design basis events and improve their spent fuel

⁴⁶ SACE Reply at 2.

⁴⁷ Comanche Peak, CLI-12-07, 75 NRC at __ (slip op. at 9).

⁴⁸ Id. at 13 (citing Callaway, CLI-11-05, 74 NRC at __ (slip op. at 31)).

⁴⁹ 10 C.F.R. §§ 2.309(f)(1)(iv)-(vi).

⁵⁰ Staff Requirements – SECY-11-0124 – Recommended Actions to be Taken Without Delay from the Near-Term Task Force Report at 1 (Oct. 18, 2011) (unanimous approval) (SRM/SECY-11-0124; ADAMS Accession No. ML112911571).

pool instrumentation and containment vents.⁵¹ On March 20, 2012, the NRC published an Advanced Notice of Proposed Rulemaking to revise its station blackout rule.⁵² But to the extent that these actions impose (or will eventually impose) requirements on licensees, they are examples of the generic steps the NRC is taking to respond to Fukushima and which the Commission has now ruled cannot be the basis for a contention in an individual licensing proceeding.⁵³ Consequently, they do not remove the prematurity that is fatal to the proposed contention.⁵⁴

⁵¹ See Order Modifying Licenses with Regard to Requirements for Mitigation Strategies for Beyond Design-Basis External Events (Effective Immediately), EA-12-049 at 1 (Mar. 12, 2012) (ADAMS Accession No. ML12054A735); Order Modifying Licenses with Regard to Reliable Hardened Containment Vents (Effective Immediately), EA-12-050 at 1 (Mar. 12, 2012) (ADAMS Accession No. ML12054A694); Order Modifying Licenses with Reliable Spent Fuel Pool Instrumentation (Effective Immediately), EA-12-051 at 1 (Mar. 12, 2012) (ADAMS Accession No. ML12054A679).

⁵² Station Blackout, 77 Fed. Reg. 16175 (Mar. 20, 2012).

⁵³ See Comanche Peak, CLI-12-07, 75 NRC at ___ (slip op. at 11).

⁵⁴ See Florida Power and Light Co. (Turkey Point Units 6 and 7), LBP-11-33, 74 NRC ___, ___ (slip op. at 9-10) (Nov. 21, 2011).

IV. CONCLUSION

For the foregoing reasons, we deny SACE's motion to admit a new contention.

It is so ORDERED.

THE ATOMIC SAFETY
AND LICENSING BOARD⁵⁵

/RA/

Lawrence G. McDade, Chairman
ADMINISTRATIVE JUDGE

/RA/

Dr. Paul B. Abramson
ADMINISTRATIVE JUDGE

/RA/

Dr. Gary Arnold
ADMINISTRATIVE JUDGE

Rockville, Maryland
March 30, 2012

⁵⁵ Copies of this Memorandum and Order were sent this date by the agency's E-Filing system to: (1) Counsel for the NRC Staff; (2) Counsel for TVA; and (3) Counsel for SACE.

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NUCLEAR REGULATORY COMMISSION

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)
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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing **MEMORANDUM AND ORDER (Denying SACE's Motion to Admit a New Contention Regarding NRC's Near-Term Task Force on Fukushima)** 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 Nancy Greathead]
Office of the Secretary of the Commission

Dated at Rockville, Maryland
this 30th day of March 2012