

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Stephen G. Burns, Chairman
Kristine L. Svinicki
William C. Ostendorff
Jeff Baran

In the Matter of

TENNESSEE VALLEY AUTHORITY

(Watts Bar Unit 2)

Docket No. 50-391-OL

CLI-15-19

MEMORANDUM AND ORDER

Southern Alliance for Clean Energy (SACE) has filed a petition for review of LBP-15-14, in which the Atomic Safety and Licensing Board denied SACE's motion to reopen the record in this proceeding on the Tennessee Valley Authority's (TVA's) application for an operating license for Watts Bar Unit 2.¹ For the reasons set forth below, we deny the petition for review.

I. BACKGROUND

SACE's motion to reopen the record cites the March 12, 2012, request for information to all power reactor licensees and holders of construction permits in active or deferred status, issued by the Staff pursuant to 10 C.F.R. § 50.54(f). The request for information was issued in response to the agency's evaluation of events leading to the Fukushima Dai-ichi accident of

¹ *Southern Alliance for Clean Energy's Petition for Review of LBP-15-14 Denying Admission of a New Contention Concerning TVA's Failure to Comply with 10 C.F.R. § 50.34(b)(4)* (May 18, 2015) (SACE Petition for Review); see LBP-15-14, 81 NRC __ (Apr. 22, 2015) (slip op.).

March 2011.² Regarding seismic and flooding hazards,³ the request for information described a two-phased approach for hazard evaluation: the Staff first requested that licensees submit to the Staff reevaluations of seismic and flooding hazards at their sites. The letter then stated that the Staff would implement the second phase by determining the need for additional regulatory actions based on the information submitted.⁴

TVA submitted its seismic hazard reevaluation and screening for Watts Bar Nuclear Plant on March 31, 2014.⁵ Based on this submission, the Staff determined that Watts Bar Units 1 and 2 would require additional seismic risk evaluation.⁶ In response, TVA submitted an Expedited Seismic Evaluation Process Report for Watts Bar on December 30, 2014, concluding that no modifications or additional regulatory commitments were necessary.⁷

² Leeds, Eric J., Director, Office of Nuclear Reactor Regulation and Johnson, Michael R., Director, Office of New Reactors, letter to All Power Reactor Licensees and Holders of Construction Permits in Active or Deferred Status (Mar. 12, 2012) (ADAMS accession no. ML12053A340) (Request for Information).

³ See “Proposed Orders and Requests for Information in Response to Lessons Learned from Japan’s March 11, 2011, Great Tohoku Earthquake and Tsunami,” Commission Paper SECY-12-0025 (Feb. 17, 2012) (ML12039A111); Staff Requirements—SECY-12-0025—Proposed Orders and Requests for Information in Response to Lessons Learned from Japan’s March 11, 2011, Great Tohoku Earthquake and Tsunami (Mar. 9, 2012) (ML120690347); see *also* Staff Requirements—SECY-11-0137—Prioritization of Recommended Actions to be Taken in Response to Fukushima Lessons Learned (Dec. 15, 2011) (ML113490055) (SRM-SECY-11-0137).

⁴ Request for Information at 4-5.

⁵ Tennessee Valley Authority, “Tennessee Valley Authority’s Seismic Hazard and Screening Report (CEUS Site), Response to NRC Request for Information Pursuant to 10 CFR 50.54(f) Regarding Recommendation 2.1 of the Near-Term Task Force Review of Insights from the Fukushima Dai-ichi Accident,” (Mar. 31, 2014) (ML14098A478) (TVA Seismic Hazard Report).

⁶ Leeds, Eric J., Director, Office of Nuclear Reactor Regulation, letter to All Power Reactor Licensees and Holders of Construction Permits in Active or Deferred Status (May 9, 2014), at 5 (ML14111A147) (Leeds Letter). Watts Bar and several other plants were “screened in” and directed to complete further seismic evaluations based on a higher re-evaluated seismic hazard.

⁷ Tennessee Valley Authority, “Tennessee Valley Authority’s Watts Bar Nuclear Plant Expedited Seismic Evaluation Process Report (CEUS Sites) Response to NRC Request for Information Pursuant to 10 CFR 50.54(f) Regarding Recommendation 2.1 of the Near-Term Task Force

The Board had terminated this adjudicatory proceeding on September 9, 2014, following resolution of the last contested issue.⁸ On February 5, 2015, SACE filed motions to reopen the record and for leave to file a new contention based on the information contained in TVA's Expedited Seismic Report.⁹ TVA and the NRC Staff opposed both motions.¹⁰ In its proposed new contention, SACE asserted that "TVA's Final Safety Analysis Report ... is deficient under 10 C.F.R. § 50.34(b)(4) because it does not include the information provided in TVA's [December] 30, 2014 Expedited Seismic Evaluation Process ... Report for Watts Bar Nuclear Plant."¹¹

Review of Insights from the Fukushima Dai-ichi Accident," (Dec. 30, 2014) (ML14365A072) (Expedited Seismic Report).

⁸ LBP-14-13, 80 NRC 142 (2014). We have authorized the Director of the Office of Nuclear Reactor Regulation (NRR) to issue the full-power operating license for Watts Bar 2 if the Director of NRR determines "that the applicable findings may be made and that the proceeding is uncontested." Staff Requirements—SECY-15-0068—Watts Bar Nuclear Plant, Unit 2—Review Status and Authority of the Director of the Office of Nuclear Reactor Regulation for Operating License Issuance (May 26, 2015) (ML15146A213). The Staff's work regarding these findings is ongoing.

⁹ *Southern Alliance for Clean Energy's Motion to Reopen the Record* (Feb. 5, 2015; corrected Feb. 6, 2015) (Motion to Reopen); *Southern Alliance for Clean Energy's Motion for Leave to File a New Contention Concerning TVA's Failure to Comply with 10 C.F.R. § 50.34(b)(4)* (Feb. 5, 2015; corrected Feb. 6, 2015) (Motion for Leave to File New Contention).

¹⁰ *NRC Staff's Answer to Southern Alliance for Clean Energy's Motion for Leave to File a New Contention* (Mar. 3, 2015) (Staff's Answer Opposing SACE's Motion for New Contention); *Tennessee Valley Authority's Answer Opposing Southern Alliance for Clean Energy's Motion for Leave to File a New Contention* (Mar. 3, 2015) (TVA's Answer Opposing SACE's Motion for New Contention); *NRC Staff's Answer to Southern Alliance for Clean Energy's Motion to Reopen the Record* (Feb. 18, 2015) (Staff's Answer Opposing SACE's Motion to Reopen); *Tennessee Valley Authority's Answer Opposing Southern Alliance for Clean Energy's Motion to Reopen the Record* (Feb. 17, 2015) (TVA's Answer Opposing SACE's Motion to Reopen).

¹¹ Motion for Leave to File a New Contention at 1.

The Board denied SACE's motion to reopen the record, finding that SACE did not satisfy the requirements for reopening set forth in our rules of practice.¹² SACE has now petitioned for our review of the Board's decision. The NRC Staff and TVA oppose SACE's petition.¹³

II. DISCUSSION

A. Standard of Review

We will grant a petition for review at our discretion, giving due weight to the existence of a substantial question with respect to one or more of 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 we may deem to be in the public interest.¹⁴

SACE argues that the Board's decision raises "important issues of law and policy."¹⁵

As discussed below, we find that SACE has not raised a substantial question that merits review. SACE has not identified any error in the Board's application of our reopening standards to its motion to reopen the record.

¹² LBP-15-14, 81 NRC at ___ (slip op. at 7). In so holding, the Board declined to address the merits of SACE's motion for leave to file a new contention. *Id.*

¹³ *NRC Staff Answer Opposing the Southern Alliance for Clean Energy Petition for Review of Board Decision LBP-15-14* (June 12, 2015) (Staff's Opposition to SACE Petition); *Tennessee Valley Authority's Answer Opposing Southern Alliance for Clean Energy's Petition for Review of LBP-15-14* (June 12, 2015) (TVA's Opposition to SACE Petition).

¹⁴ 10 C.F.R. § 2.341(b)(4).

¹⁵ SACE Petition for Review at 1. Although SACE does not specify the subsection on which it bases its request for review, we presume it intended to rely upon section 2.341(b)(4)(iii).

B. Reopening Standards

Motions to reopen the record in our adjudicatory proceedings are governed by 10 C.F.R.

§ 2.326, which states the following:

- (a) A motion to reopen a closed record to consider additional evidence will not be granted unless the following criteria are satisfied:
 - (1) The motion must be timely. However, an exceptionally grave issue may be considered in the discretion of the presiding officer even if untimely presented;
 - (2) The motion must address a significant safety or environmental issue; and
 - (3) The motion must demonstrate that a materially different result would be or would have been likely had the newly proffered evidence been considered initially.
- (b) The motion must be accompanied by affidavits that set forth the factual and/or technical bases for the movant's claim that the criteria of paragraph (a) of this section have been satisfied. Affidavits must be given by competent individuals with knowledge of the facts alleged, or by experts in the disciplines appropriate to the issues raised. Evidence contained in affidavits must meet the admissibility standards of this subpart. Each of the criteria must be separately addressed, with a specific explanation of why it has been met. When multiple allegations are involved, the movant must identify with particularity each issue it seeks to litigate and specify the factual and/or technical bases which it believes support the claim that this issue meets the criteria in paragraph (a) of this section.

Our case law interpreting section 2.326 makes clear that the regulations place an intentionally heavy burden on parties seeking to reopen the record.¹⁶ The rule reflects the importance of finality in adjudicatory proceedings.¹⁷ As we have noted, “the burden of satisfying the reopening

¹⁶ *Entergy Nuclear Generation Co. and Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), CLI-12-15, 75 NRC 704, 714 (2012) (citing *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-09-7, 69 NRC 235, 287 (2009)).

¹⁷ *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-05-12, 61 NRC 345, 350 n.18 (2005) (citing *Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 554-55 (1978)).

requirements is a heavy one,” and it rests with the party moving to reopen.¹⁸ To this end, “a motion to reopen will not be granted unless the movant satisfies all three of the criteria listed in 10 C.F.R. § 2.326(a) and [the motion] is accompanied by an affidavit that satisfies 10 C.F.R. § 2.326(b).”¹⁹ We have previously explained that “[w]e consider reopening the record for any reason to be ‘an ‘extraordinary’ action.”²⁰ Courts of appeal have consistently upheld our reopening standards, noting that “[a]gencies are permitted to impose requirements or thresholds for parties seeking to reopen a closed record”²¹ and acknowledging that these criteria may be “exacting.”²²

C. Analysis

In examining whether SACE’s motion to reopen the record satisfied the requirements of section 2.326, the Board found that SACE’s motion to reopen was timely filed.²³ But the Board determined that SACE had not fulfilled the remaining requirements of section 2.326(a) because it neither addressed a significant safety or environmental issue nor demonstrated the likelihood

¹⁸ *Oyster Creek*, CLI-09-7, 69 NRC at 287 (citing *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), CLI-90-10, 32 NRC 218, 221 (1990); *Louisiana Power & Light Co.* (Waterford Steam Electric Station, Unit 3), CLI-86-1, 23 NRC 1, 5 (1986)).

¹⁹ *Id.*

²⁰ *Entergy Nuclear Vermont Yankee LLC and Entergy Nuclear Operations, Inc.* (Vermont Yankee Nuclear Power Station), CLI-11-2, 73 NRC 333, 337-38 (2011) (citing Final Rule, Criteria for Reopening Records in Formal Licensing Proceedings, 51 Fed. Reg. 19,535, 19,538 (May 30, 1986)).

²¹ *Mass. v. U.S. Nuclear Regulatory Comm’n*, 708 F.3d 63, 75, n.18 (1st Cir. 2013) (citing *Vt. Yankee*, 435 U.S. at 554-55 (1978)); see also *N.J. Env’tl. Fed’n v. U.S. Nuclear Regulatory Comm’n*, 645 F.3d 220, 233 (3d Cir. 2011) (“We have upheld the motion to reopen standard and deferred to the NRC’s application of its rules, so long as it is reasonable.”); *Oystershell Alliance v. U.S. Nuclear Regulatory Comm’n*, 800 F.2d 1201, 1207 (D.C. Cir. 1986) (“In examining petitioners’ plea to reopen the record, we rely on the same court-sanctioned test applied by the Commission”).

²² *N.J. Env’tl. Fed’n*, 645 F.3d at 234.

²³ LBP-15-14, 81 NRC at ___ (slip op. at 6 n.30); see 10 C.F.R. § 2.326(a)(1).

of a materially different result upon consideration of its proposed new contention.²⁴ Additionally, the Board found that the affidavit that SACE submitted with its motion to reopen the record did not meet the requirements set forth in section 2.326(b).²⁵ As discussed below, SACE has not raised a substantial question with respect to the Board's ruling.

SACE does not argue that the Board erroneously applied the reopening standards to its motion in its petition for review. Instead, SACE focuses its argument on the reopening standards themselves, asserting that "the Board imposed a burden that was greater than what the law required for the contention submitted by SACE."²⁶ SACE argues that the Board should have required it to demonstrate only that the information was pertinent, but it does not explain why it believes the reopening standards are inapplicable to its motion.²⁷ SACE also argues that by requiring it to meet the reopening standards, the Board "erroneously shifted the burden of proof from TVA to SACE."²⁸ But the moving party properly bears the burden of meeting the reopening standards.²⁹

In requiring SACE to meet the reopening standards set forth in section 2.326, the Board complied with our rules of practice and procedure. Section 2.335(a) of our regulations prohibits

²⁴ LBP-15-14, 81 NRC at ___ (slip op. at 6).

²⁵ *Id.* at ___ (slip op. at 7). SACE has not challenged the Board's determination that its affidavit does not comply with section 2.326(b). Because a party must meet all of the section 2.326 requirements to reopen the record, the motion to reopen could have been deemed insufficient for this reason alone.

²⁶ SACE Petition for Review at 6.

²⁷ *Id.* at 5.

²⁸ *Id.* at 7.

²⁹ TVA retains the burden of proof on the question whether the license should be issued, pursuant to 10 C.F.R. § 2.325. See *Oyster Creek*, CLI-09-7, 69 NRC at 269 (citing *Louisiana Power and Light Co.* (Waterford Steam Electric Station, Unit 3), ALAB-732, 17 NRC 1076, 1093 (1983)).

challenges to our rules and regulations in the context of adjudicatory proceedings.³⁰ By arguing that it should have been allowed to meet a lesser standard when moving to reopen the record, SACE impermissibly challenges the reopening standard.

SACE also argues that the Board disregarded its concerns about the Staff's review of TVA's responses to the request for information regarding seismic hazards post-Fukushima. SACE expresses concern that the Staff, in reviewing these responses, will apply an "imminent risk standard," which SACE believes will result in a less rigorous review of the information than would be performed if review of the report were conducted as part of the Staff's review of the Watts Bar 2 operating license application.³¹ In support of this assertion, SACE cites a letter from William M. Dean, Director, Office of Nuclear Reactor Regulation, to SACE's counsel.³² SACE seems to infer from Mr. Dean's letter that "imminent risk" is a standard against which the Staff evaluates updated seismic hazard information from licensees. But taken in context, the phrase "imminent risk" reflects the NRC's determination that, post-Fukushima, continued operation of U.S. nuclear plants and continued licensing activities pose no imminent risk to public health and safety.³³ The letter does not indicate that the Staff would apply an "imminent

³⁰ Section 2.335 permits parties to petition for a waiver or exception from this prohibition. But SACE has not petitioned for a waiver or exception.

³¹ SACE Petition for Review at 7.

³² *Id.* (citing Dean, William M., Director, Office of Nuclear Reactor Regulation, NRC, letter to Ms. Diane Curran, c/o Southern Alliance for Clean Energy (Nov. 21, 2014) (ML14267A466) (Dean Letter) ("However, the NRC also concluded that continued plant operation and licensing activities, including the review of the Watts Bar Unit 2 operating license application, can continue because these actions do not pose an imminent risk to public health and safety."). The Dean Letter was prepared in response to concerns expressed by SACE (similar to those raised in its motion to reopen) to then-Chairman Allison Macfarlane.

³³ *See Union Electric Co. (Callaway Plant, Unit 2), CLI-11-5, 74 NRC 141, 161 (2011)* ("[N]othing we have learned to date [with respect to the Fukushima accident] puts the continued safety of our currently operating regulated facilities ... into question. Similarly, nothing learned to date requires immediate cessation of our review of license applications or proposed reactor designs.").

risk standard” in assessing the seismic hazard information itself. Indeed, the Staff has stated that it will make a “final determination regarding the *adequacy* of any plant’s calculated hazard [.] will continue its review of the submitted seismic hazard reevaluations,”³⁴ and “will determine if safe operation requires additional regulatory action.”³⁵

In its holding on this point, the Board focused on the fact that SACE does not demonstrate the likelihood of a materially different result if the Staff evaluates the Expedited Seismic Report in the context of post-Fukushima actions versus the licensing process.³⁶ It concluded that the benefits of including information found in the Expedited Seismic Report in the Final Safety Analysis Report were speculative and lacked factual support.³⁷ On appeal, SACE does not claim any error in the Board’s analysis of whether SACE had demonstrated that consideration of its proposed contention would likely lead to a materially different result. Therefore, we find that SACE does not raise a substantial question meriting review.

Finally, SACE asserts that the Board’s decision raises the overarching legal and policy question of whether it is permissible for the Staff to issue the Watts Bar 2 operating license before completing its assessment of TVA’s Expedited Seismic Report.³⁸ We have explicitly addressed this point and allow the Staff to issue operating licenses—provided all requisite findings are made—before it completes post-Fukushima regulatory activities.³⁹ Further, we

³⁴ Leeds Letter at 6 (emphasis added).

³⁵ Dean Letter at 2.

³⁶ LBP-15-14, 81 NRC at __ (slip op. at 6).

³⁷ *Id.* at __ (slip op. at 6-7).

³⁸ SACE Petition for Review at 8.

³⁹ *Callaway*, CLI-11-5, 74 NRC at 166 (“Even for the licenses that the NRC issues before completing its review [of hazards like those that damaged the reactors at the Fukushima site], any new Fukushima-driven requirements can be imposed later, if necessary, to protect the

have noted that in general, “[w]e consider suspension of licensing proceedings a ‘drastic’ action that is not warranted absent ‘immediate threats to public health and safety,’ or other compelling reason.”⁴⁰ Specifically in the context of the NRC’s post-Fukushima activities, we observed that “nothing learned to date requires immediate cessation of our review of license applications”⁴¹ SACE has not articulated a reason to revisit these determinations. In sum, SACE does not articulate a substantial question for review. We therefore deny the petition for review.⁴²

Our denial of SACE’s petition for review does not suggest that we take lightly the ongoing review of seismic issues at the Watts Bar site. The Staff is addressing post-Fukushima regulatory seismic activities for all reactor licensees and applicants, including TVA, through a process that we have approved.⁴³ We are confident that the Staff will fully address seismic safety requirements for Watts Bar 2 as part of that review. SACE, and indeed any member of the public, will have the opportunity for additional participation if the Watts Bar 2 licensing basis is updated by amendment after the Staff issues the operating license.⁴⁴

public health and safety.”) (citing *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-01-26, 54 NRC 376, 383-84 (2001)).

⁴⁰ *Id.* at 158 (quoting *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-08-23, 68 NRC 461, 484 (2008)).

⁴¹ *Id.* at 161.

⁴² SACE also requests that we reconsider our direction to the Staff to use the Watts Bar Unit 1 design basis “as the reference basis for the review and licensing of [Watts Bar] Unit 2.” Staff Requirements—SECY-07-0096—Possible Reactivation of Construction and Licensing Activities for the Watts Bar Nuclear Plant Unit 2 (July 25, 2007) (ML072060688); see SACE Petition for Review at 9 n.5. We decline to take this action. “[E]xternal entities [are not] entitled to seek revisions to a Commission direction to the NRC Staff contained in an SRM.” *U.S. Department of Energy* (High-Level Waste Repository), CLI-14-1, 79 NRC 1, 3-4 (2014).

⁴³ See SRM-SECY-11-0137; Staff Requirements—SECY-11-0124—Recommended Actions to be Taken Without Delay from the Near-Term Task Force Report (Oct. 18, 2011) (ML112911571); Dean Letter at 1.

⁴⁴ See Dean Letter at 2 (“If the licensing basis is updated by amendment after the Watts Bar 2 operating license is issued as a result of the NRC’s assessment of seismic ... hazard reevaluations, the public will have an opportunity to comment and request a hearing.”)

Docket No. 50-391-OL

COMMISSION MEMORANDUM AND ORDER (CLI-15-19)

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[Original signed by Brian Newell]
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Dated at Rockville, Maryland
this 24th day of September, 2015