

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of)
)
TENNESSEE VALLEY AUTHORITY) Docket Nos. 50-259-LA
) 50-260-LA
(Browns Ferry Nuclear Plant Units 1, 2, and 3) 50-296-LA

TENNESSEE VALLEY AUTHORITY'S ANSWER OPPOSING
BELLEFONTE EFFICIENCY & SUSTAINABILITY TEAM/
MOTHERS AGAINST TENNESSEE RIVER RADIATION
PETITION FOR REVIEW OF LBP-16-11

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**TENNESSEE VALLEY AUTHORITY’S ANSWER OPPOSING
BEST/MATRR’S
PETITION FOR REVIEW OF LBP-16-11**

Pursuant to 10 C.F.R. § 2.311(b), the Tennessee Valley Authority (“TVA”) respectfully submits its answer in opposition to the “Appeal of the Bellefonte Efficiency & Sustainability Team/Mothers Against Tennessee River Radiation “(BEST/MATRR”) Regarding the Atomic Safety and Licensing Board’s Denial of BEST/MATRR’s Hearing Request and Petition to Intervene Regarding Tennessee Valley Authority’s License Amendment Request for Extended Power Uprates for Browns Ferry Nuclear Plant Unit 1, 2, and 3.” filed November 25, 2016 (“Petition”). In its Petition, BEST/MATRR seeks review of the Atomic Safety and Licensing Board (“Board”) decision LBP-16-11,¹ in which the Board denied BEST/MATRR’S Petition to Intervene and stay request. Petition at 1.

The proposed contention was a direct attack on a Commission regulation, alleging that the Baker-Just Equation (required under Section 1.A.5 of Appendix K to 10 C.F.R Part 50 for modeling zirconium oxidation during loss of coolant accidents) is non-conservative. Petition at 4; *see generally*, BEST/MATRR Petition to Intervene. Because BEST/MATRR does not identify any substantial question of law or policy warranting review, or any valid error of fact or law in the Board’s decision, the Commission should deny the Petition.

¹ *Tennessee Valley Authority* (Browns Ferry Nuclear Plant Units 1, 2, 3), LBP-16-11, ___ NRC ___ (Nov. 2, 2016) (slip op.).

I. BACKGROUND

The history of this proceeding is set forth in TVA’s earlier pleadings and in the Atomic Safety and Licensing Board’s decision. *See Tennessee Valley Authority* (Browns Ferry Nuclear Plant Units 1, 2, 3), LBP-16-11, 81 NRC ____ (Nov. 2, 2016) (slip op. at 1–4 & 6–7) (rejecting petition to intervene based on failure to request a waiver and impossibility of demonstrating “special circumstances” necessary to obtain a waiver).

BEST/MATRR based its original contention on three similar challenges to the adequacy of the Baker–Just equation, which is required to be used under Section 1.A.5 of Appendix K to 10 C.F.R Part 50 for modeling zirconium oxidation during loss of coolant accidents. *See id.* at ____ (slip op. at 2–3).

The Board held that these contentions were inadmissible for three reasons:

1. BEST/MATRR failed to petition for a waiver, and, even if it had, its challenge was “a generic attack on a regulation of general applicability, not a challenge to its application in any unique circumstance”;
2. there is a pending rulemaking petition on the same issues raised by BEST/MATRR; and
3. BEST/MATRR does not allege that the modeling for the Browns Ferry Nuclear Power Plant (“BFN”) was not performed in accordance with the regulatory requirements.

See id. at ____ (slip op. at 5–8).

In its Petition for Review, BEST/MATRR has not addressed any of the bases for the Board’s decision. Instead, BEST/MATRR argues that the NRC is in violation of the Administrative Procedure Act (“APA”) because NRC staff have been:

1. “reviewing rulemaking petition PRM-50-93 for more than seven years;” and
2. “otherwise engaged in bad faith behavior or improper behavior in its review of PRM-50-93.”

See Petition at 5–6 & 7–9. These allegations are irrelevant to the contention admissibility issue decided by the Board, were first raised in BEST/MATRR’S Reply in the underlying action, and a cause of action under the APA cannot be reviewed in this proceeding. .

Therefore, BEST/MATRR’s Petition to Review should be denied.

II. LEGAL STANDARDS

A. Standard of Review

A petition for review is granted only at the discretion of the Commission upon a showing that the petitioner has raised a substantial question as to whether

- (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) the Commission deems any other consideration to be in the public interest.

See 10 C.F.R. §§ 2.311(b) & 2.341(b); *DTE Elec. Co.* (Fermi Nuclear Power Plant, Unit 3), CLI-14-10, 80 NRC 157, 162–63 (2014). Interlocutory appeals of contention admissibility rulings are available under section 2.311 upon the denial of a petition to intervene and/or request for hearing on the question of whether it should have been granted. *NextEra Energy Seabrook, L.L.C.* (Seabrook Station, Unit 1), CLI-13-3, 77 NRC 51, 54 (2013). “[T]he standard for review of contention admissibility determinations is the same, whether an appeal lies under section 2.311 or 2.341.” *Luminant Generation Co., L.L.C.* (Comanche Peak Nuclear Power Plant, Units 3, 4),

CLI-12-07, 75 NRC 379, 386 (2012). The Commission gives substantial deference to its boards' determinations on threshold issues and "will not sustain an appeal that fails to show a board committed clear error or abuse of discretion." *Southern Nuclear Operating Co.* (Vogtle Electric Generating Plant, Units 3, 4), CLI-11-8, 74 NRC 214, 220 (2011).

B. Legal Standards Governing Contention Admissibility

A contention must meet the admissibility requirements set forth in 10 C.F.R. § 2.309(f)(1). Specifically, each contention must (i) provide a specific statement of the legal or factual issue sought to be raised; (ii) provide a brief explanation of the basis for the contention; (iii) demonstrate that the issue raised is within the scope of the proceeding; (iv) demonstrate that the issue raised 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, including references to specific sources and documents that support the petitioner's position and upon which the petitioner intends to rely; and (vi) provide sufficient information to show that a genuine dispute exists with regard to a material issue of law or fact. *See* 10 C.F.R. § 2.309(f)(1).

The Commission's rules on contention admissibility are "strict." *FirstEnergy Nuclear Operating Co.* (Davis-Besse Nuclear Power Station, Unit 1), CLI-12-08, 75 NRC 393, 416 (2012). The Commission has stated that the petitioner must "read the pertinent portions of the license application . . . state the applicant's position and the petitioner's opposing view," and explain why it disagrees with the applicant. *See Dominion Nuclear Conn., Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-01-24, 54 NRC 349, 358 (2001). In order to raise a genuine dispute with an applicant's analysis, a petitioner must make at least a "minimal demonstration" that the "analysis fails to meet a statutory or regulatory requirement." *See Entergy Nuclear Operations, Inc.* (Indian Point Nuclear Generating Units 2 & 3), LBP-08-13,

68 NRC 43, 187 (2008).

An intervenor must either allege with particularity that an applicant is not complying with a specified regulation, or allege with particularity the existence and detail of a substantial safety issue on which the regulations are silent. In the absence of a “regulatory gap,” the failure to allege a violation of the regulations or an attempt to advocate stricter requirements than those imposed by the regulations will result in a rejection of the contention, the latter as an impermissible collateral attack on the Commission's rules. *See Public Service Co. of New Hampshire* (Seabrook Station, Units 1 & 2), LBP-82-106, 16 NRC 1649, 1656 (1982); *PPL Susquehanna, L.L.C.* (Susquehanna Steam Electric Station, Units 1 & 2), LBP-07-10, 66 NRC 1, 22 (2007).

A contention challenging the validity of an NRC regulation is generally inadmissible. *See* 10 C.F.R. § 2.335(a). *See also Exelon Gen. Co., L.L.C.* (Limerick Generating Station, Units 1 and 2), CLI-13-07, 78 NRC 199, 206 (2013). Section 2.335(b) provides a limited exception to this prohibition, provided that a petitioner meets the four-part *Millstone* test. A § 2.335 waiver request must demonstrate that:

- (i) the rule’s strict application would not serve the purposes for which it was adopted;
- (ii) special circumstances exist that were not considered, either explicitly or by necessary implication, in the rulemaking proceeding leading to the rule sought to be waived;
- (iii) those circumstances are unique to the facility rather than common to a large class of facilities; and
- (iv) waiver of the regulation is necessary to reach a significant safety problem.

Limerick, CLI-13-07, 78 NRC at 207–08. This standard is “stringent by design”; waiver can only be obtained if all four factors are met. *Id.* at 207.

III. THE COMMISSION SHOULD DENY BEST/MATRR's PETITION

BEST/MATRR has failed to identify any clear error of fact, error of law, procedural error, or abuse of discretion by the Board. Instead of addressing the merits of the Board's order, BEST/MATRR essentially re-filed its reply to the Petition to Intervene. These arguments, based on the Administrative Procedure Act ("APA"), were not raised in the original Petition to Intervene and such a cause of action cannot be reviewed in this proceeding.. Therefore, BEST/MATRR has failed to provide any basis for the Commission to overturn the Board's decision.

A. **BEST/MATRR Fails to Identify any Error or Abuse of Discretion on the Part of the Board**

The Petition does not challenge the merits of the Board's decision to deny BEST/MATRR's Petition to Intervene. *See generally*, Petition at 3–11. The Board gave three independent bases for denying the Petition to Intervene. *See Tennessee Valley Authority* (Browns Ferry Nuclear Plant Units 1, 2, 3), LBP-16-11, at 5–7. First, BEST/MATRR failed to request a waiver for its challenge of a regulatory requirement. *See id.* at 5–6. Second, there was a pending rulemaking petition raising the same allegation that the Baker-Just equation is non-conservative. *Id.* at 6; Petition for Rulemaking by Mark Leyse, PRM-50-93 (Nov. 17, 2009) (Adams Accession No. ML093290250). Third, BEST/MATRR failed to demonstrate a genuine dispute because it did not allege any error in TVA's licensing amendment request. *Tennessee Valley Authority* (Browns Ferry Nuclear Plant Units 1, 2, 3), LBP-16-11, at 6–7.

In its Petition, BEST/MATRR does not argue that it requested a waiver that would allow it to challenge an NRC regulation in this proceeding. It does not argue that the contentions differed from the subject matter of the rulemaking in PRM-50-93. It does not argue that there is any flaw in the performance of the extended power uprate modeling used by TVA, as required

by regulations, nor does it contend there is any error in TVA's license amendment request. In short, BEST/MATRR has failed to identify any error or abuse of discretion on the part of the Board.

B. BEST/MATRR's Arguments Based on "Bad Faith" of NRC Staff and the Administrative Procedure Act cannot be litigated in this proceeding and have no basis in legal authority.

Instead of challenging the substance of the board's decision, BEST/MATRR has refiled a stay request previously made in its reply to the Petition to Intervene. This request is based on the NRC's purported "bad faith" and failure to adhere to requirements of the APA. *See* Petition at 2-12. The APA gives jurisdiction to federal courts to review some final agency actions under specific circumstances. *See generally*, 5 U.S.C. Chapters 5 & 7. However, there is no legal basis for the Commission to rule on a challenge brought under the APA. *See* 5 U.S.C. § 702 ("A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to **judicial review** thereof.") (emphasis added).

Similarly, BEST/MATRR has not cited to any legal authority that allows a collateral attack on a pending rulemaking petition based on the "bad faith" of the NRC staff. "All parties are obligated, in their filings before ... the Commission, to ensure that their arguments and assertions are supported by appropriate and accurate references to legal authority... [f]ailure to do so may result in appropriate sanctions, including striking a matter from the record or, in extreme circumstances, dismissal of the party." 10 C.F.R. § 2.323(d). Therefore, BEST/MATRR'S stay request is not reviewable and its Petition for Review should be denied.

In fact, the NRC's contention admissibility requirements are intended to prevent this type of confused procedural process, and, for efficiency reasons, the Commission may choose to

address generic regulatory issues in rulemaking rather than individual licensing proceedings. *Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, & 3), CLI-99-11, 49 NRC 328, 344-45 (1999); *Nat'l Enrichment Facility*, CLI-04-25, 60 NRC at 225. Contentions challenging NRC regulations or determinations made by the NRC during the rulemaking process are inadmissible, and Licensing Boards should not accept in individual licensing cases any contentions which are or are about to become the subject of general rulemaking. *Oconee Nuclear Station*, CLI-99-11, 49 NRC 344; *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-04-4, 59 NRC 31, 38-39 (2004).

In *Duke Energy Corp.*, the Commission chose to address high-level waste disposal in general in a rulemaking petition, rather than in the specific licensing application at issue. *Oconee Nuclear Station*, 49 NRC at 345. The Commission stated that waste disposal “is a national problem of essentially the same degree of complexity and uncertainty for every renewal application and it would not be useful to have a repetitive reconsideration of the matter.” *Id.* Similarly, the Commission has already chosen rulemaking as the preferred method for consideration of the use of the Baker-Just equation. To revisit the issue in individual licensing applications when a Petition for Rulemaking is already pending would be inefficient and could potentially create unintended ambiguities.

BEST/MATRR’s “bad faith” and APA arguments are also not reviewable because they are unrelated to its original Petition to Intervene and constitute entirely new arguments in this proceeding. *Louisiana Energy Services, L.P.* (Nat’l Enrichment Facility), CLI-04-25, 60 NRC 223, 225 (2004). In *Louisiana Energy Services*, the Commission affirmed the Board’s finding that the petitioners’ “reply briefs constituted a late attempt to reinvigorate thinly supported contentions by presenting entirely new arguments in the reply briefs.” *Id.* at 224.

The Commission explained:

our contention admissibility and timeliness requirements “demand a level of discipline and preparedness on the part of petitioners,” who must examine the publicly available material and set forth their claims and the support for their claims at the outset. The Petitioners' reply brief should be “narrowly focused on the legal or logical arguments presented in the applicant/licensee or NRC staff answer,” a point the Board itself emphasized in this proceeding. As we face an increasing adjudicatory docket, the need for parties to adhere to our pleading standards and for the Board to enforce those standards are paramount. There simply would be “no end to NRC licensing proceedings if petitioners could disregard our timeliness requirements” and add new bases or new issues that “simply did not occur to [them] at the outset.”

Id. at 225 (internal citations omitted). Similarly, BEST/MATRR’s “bad faith” and APA arguments are unrelated to its original Petition to Intervene and constitute entirely new arguments in this proceeding. BEST/MATRR failed to adhere to the timeliness requirements when making these new arguments, and did not request an extension or show good cause for the late filing at the time of its reply to the Petition to Intervene. *See* 10 C.F.R. § 2.309(c) & (f)(2).

CONCLUSION

Based on the foregoing, BEST/MATRR does not identify any clear error or abuse of discretion by the Board in its order denying the Petition to Intervene, and its other arguments based on “bad faith” and the APA lack any legal basis. Therefore, the Petition should be denied.

Respectfully submitted,

/signed (electronically) by Ryan C. Dreke/
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CERTIFICATE OF SERVICE

I certify that, on December 20, 2016, a copy of “Tennessee Valley Authority’s Answer Opposing Bellefonte Efficiency & Sustainability Team/Mothers Against Tennessee River Radiation Petition for Review of LBP-16-11” was served electronically through the E-Filing system on the participants in the above-captioned proceeding.

/signed electronically by/
Ryan C. Dreke