

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

Before Administrative Judges:

Paul S. Ryerson, Chairman
Dr. Gary S. Arnold
Dr. Richard E. Wardwell

In the Matter of

TENNESSEE VALLEY AUTHORITY

(Watts Bar Unit 2)

Docket No. 50-391-OL

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

April 22, 2015

MEMORANDUM AND ORDER
(Denying Motion to Reopen)

Before the Board are motions to reopen the record¹ and for leave to file a new contention² submitted by the Southern Alliance for Clean Energy (SACE). Because SACE has failed to satisfy the stringent requirements the Commission has established for reopening a closed record, we deny the first motion and need not reach the second.

I. BACKGROUND

This proceeding concerns the application of the Tennessee Valley Authority (TVA) for a license to operate a second reactor unit at the Watts Bar Nuclear Generating Station in Rhea County, Tennessee. The background is set forth in more detail in earlier Licensing Board orders.³

¹ Southern Alliance for Clean Energy's Motion to Reopen the Record (Feb. 5, 2015) [hereinafter SACE Motion to Reopen].

² 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) [hereinafter SACE Motion for Leave to File].

³ See, e.g., LBP-09-26, 70 NRC 939, 945-46 (2009); Licensing Board Order (Granting

On July 15, 2013, SACE submitted an unopposed motion to withdraw voluntarily its only remaining admitted contention, asserting that “we think our resources would not be well-utilized by continuing with a hearing before the ASLB” on the questions that were still at issue.⁴ Although the Board granted SACE’s motion,⁵ it did not immediately terminate the proceeding at that time because SACE had previously moved for leave to file a new contention concerning storage and disposal of spent nuclear fuel.⁶ Instead, at the Commission’s direction,⁷ the Board held that motion in abeyance pending further order of the Commission.⁸

On August 26, 2014, in light of its adoption of a revised rule regarding the environmental impacts associated with storage of spent nuclear fuel, the Commission directed all affected Licensing Boards to reject proffered contentions on this issue.⁹ Accordingly, SACE’s then-pending motion for leave to file a new contention was denied, and the adjudicatory proceeding concerning TVA’s application for an operating license for a second nuclear reactor at the Watts Bar Nuclear Plant was terminated.¹⁰ Thereafter, on September 29, 2014, SACE filed a motion

TVA’s Unopposed Motion to Dismiss SACE Contention 1) (June 2, 2010) at 1 (unpublished).

⁴ Southern Alliance for Clean Energy’s Unopposed Motion to Withdraw Contention 7 (July 15, 2013) at 2.

⁵ See Licensing Board Order (Granting Motion to Withdraw Contention 7) (July 17, 2013) (unpublished).

⁶ Southern Alliance for Clean Energy’s Motion for Leave to File a New Contention Concerning Temporary Storage and Ultimate Disposal of Spent Reactor Fuel at Watts Bar Unit 2 (July 9, 2012).

⁷ Calvert Cliffs Nuclear Project, LLC (Calvert Cliffs Nuclear Power Plant, Unit 3), et al., CLI-12-16, 76 NRC 63, 68-69 (2012).

⁸ See Licensing Board Order (Holding Waste Confidence Contention in Abeyance) (Aug. 9, 2012) (unpublished).

⁹ CLI-14-08, 80 NRC 71, 80 (2014).

¹⁰ See LBP-14-13, 80 NRC __, __ (Sept. 9, 2014).

to reopen this proceeding regarding spent nuclear fuel,¹¹ which was denied by the Commission on February 26, 2015.¹²

On February 5, 2015, SACE filed its second motion to reopen the record and an associated motion for leave to file a different new contention—the motions now before this Board.¹³ TVA and the NRC Staff oppose both motions.¹⁴

II. DISCUSSION

A. SACE's Motion to Reopen and Proffered Contention

SACE seeks to reopen this adjudicatory proceeding to proffer the following contention:

TVA's Final Safety Analysis Report (FSAR) . . . is deficient under 10 C.F.R. § 50.34(b)(4) because it does not include the information provided in TVA's Dec. 30, 2014 Expedited Seismic Evaluation Process ("ESEP") Report for Watts Bar Nuclear Plant.¹⁵

The essence of SACE's contention is that the ESEP Report—which TVA submitted to the NRC at the NRC's request and which purports to demonstrate the continued safety of the Watts Bar facility—must also be placed in a second document submitted to the agency (*i.e.*, the FSAR) because section 50.34(b)(4) requires the FSAR to provide certain information about the reactor's "design and performance of structures, systems and components," taking into account

¹¹ Southern Alliance for Clean Energy's Motion to Reopen the Record (Sept. 29, 2014).

¹² CLI-15-04, 81 NRC __ (Feb. 26, 2015).

¹³ See Order of the Secretary (Referring Motions to Reopen and Associated Pleadings to the Atomic Safety and Licensing Board) (Feb. 18, 2015); Establishment of Atomic Safety and Licensing Board, 80 Fed. Reg. 10,727, 10,727 (Feb. 27, 2015).

¹⁴ Tennessee Valley Authority's Answer Opposing Southern Alliance for Clean Energy's Motion to Reopen the Record (Feb. 17, 2015); NRC Staff's Answer to Southern Alliance for Clean Energy's Motion to Reopen the Record (Feb. 18, 2015); Tennessee Valley Authority's Answer Opposing Southern Alliance for Clean Energy's Motion for Leave to File a New Contention (Mar. 3, 2015); NRC Staff's Answer to Southern Alliance for Clean Energy's Motion for Leave to File a New Contention (Mar. 3, 2015) [hereinafter NRC Staff Answer]. SACE submitted a reply in support of its motion for leave to file a new contention on March 10, 2015. Southern Alliance for Clean Energy's Reply to Oppositions to Motion for Leave to File a New Contention Concerning TVA's Failure to Comply with 10 C.F.R. § 50.34(b)(4) (Mar. 10, 2015).

¹⁵ SACE Motion for Leave to File at 1.

“any pertinent information developed since the submittal of the preliminary safety analysis report.”¹⁶ According to SACE, “[w]hile the NRC has stated that it will review the information in the ESEP as part of its post-Fukushima deliberations, that review will take place outside the scope of this operating license proceeding.”¹⁷ SACE contends that “TVA has updated its analysis under . . . 50.34(b)(4), but sent it to the NRC outside the licensing process.”¹⁸ As a result, SACE asserts, the information in the ESEP Report might be reviewed by the NRC under a less stringent safety standard.¹⁹

SACE acknowledges that “TVA submitted the ESEP Report in response to a request for information by the NRC in the aftermath of the Fukushima accident.”²⁰ As SACE also acknowledges, “[t]he ESEP Report is intended to show that [the proposed second reactor at the Watts Bar Nuclear Plant] can operate safely despite the fact that the seismic risk to [the reactor] is now known to be greater than the safe shutdown earthquake (SSE) to which the reactor was designed.”²¹ SACE admits that its proposed contention “relies entirely on factual statements made by TVA.”²²

B. Legal Standards

The applicable requirements to reopen a case are set forth in 10 C.F.R. § 2.326. Pursuant to 10 C.F.R. § 2.326(a), a motion to reopen must (1) be timely;²³ (2) address a

¹⁶ Id.

¹⁷ SACE Motion for Leave to File at 4-5.

¹⁸ SACE Motion to Reopen at 4.

¹⁹ See SACE Motion for Leave to File at 4-5.

²⁰ Id. at 2.

²¹ Id.

²² Id. at 6.

²³ The rule allows a discretionary exception if the motion presents “an exceptionally grave issue.” 10 C.F.R. § 2.326(a)(1).

significant safety or environmental issue; and (3) demonstrate that a materially different result would be or would have been likely had the newly proffered evidence been considered initially. Pursuant to 10 C.F.R. § 2.326(b), a motion to reopen must also 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.” Among other things, such affidavits “must be given by competent individuals with knowledge of the facts alleged, or by experts in the disciplines appropriate to the issues raised.”²⁴

Given the need for finality in adjudications, the Commission has described reopening the record as an “extraordinary” action.²⁵ The Commission’s rules therefore impose “a ‘deliberately heavy’ burden upon an intervenor who seeks to supplement the evidentiary record after it has been closed.”²⁶ Otherwise, the Commission has cautioned, “‘there would be little hope’ of completing administrative proceedings if each newly arising allegation required an agency to reopen its hearings.”²⁷ Moreover, the Commission has clarified that this heavy barrier to reopen applies whenever an adjudication has been closed and not merely after a case has been terminated following a full evidentiary hearing on the merits.²⁸

²⁴ Section 2.326(b) further specifies: “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.”

²⁵ Entergy Nuclear Vt. Yankee, LLC & Entergy Nuclear Operations, Inc. (Vt. Yankee Nuclear Power Station), CLI-11-02, 73 NRC 333, 338 (2011) (citing Final Rule, Criteria for Reopening Records in Formal Licensing Proceedings, 51 Fed. Reg. 19,535, 19,538 (May 30, 1986)).

²⁶ Id. (quoting AmerGen Energy Co. LLC (Oyster Creek Nuclear Generating Station), CLI-08-28, 68 NRC 658, 674 (2008)).

²⁷ Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-05-12, 61 NRC 345, 350 n.18 (2005) (quoting Vt. Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519, 555 (1978)).

²⁸ See Virginia Elec. & Power Co. (N. Anna Power Station, Unit 3), 75 N.R.C. 692, 692

C. Board Ruling

A motion to reopen must satisfy all the above requirements.²⁹ SACE's motion fails at least three of them.³⁰

First, SACE does not demonstrate how the location of the information provided in TVA's ESEP Report presents a significant safety or environmental issue. Regardless of its location within the NRC's files, the purpose of the ESEP Report is to demonstrate that there is no significant safety or environmental issue with respect to the continued operation of the Watts Bar facility at this time. As SACE concedes that its proffered contention relies entirely on the ESEP Report itself,³¹ SACE has provided the Board with no grounds on which to reach a different conclusion.

Second, SACE fails to show that consideration of its proffered contention would likely produce a materially different result in this proceeding. Quite apart from the fact that the information in the ESEP Report is already in the possession of SACE, TVA and the NRC, the benefits SACE claims will result from mandating inclusion of that information in the FSAR are rank speculation. SACE postulates that, upon reviewing the information in that format, the NRC "may" require that more information be submitted and/or that TVA make unspecified changes to

(2012); Entergy Nuclear Generation Co. (Pilgrim Nuclear Power Station), CLI-12-3, 75 NRC 132, 140-41 (2012); Luminant Generation Co., LLC (Comanche Peak Nuclear Power Plant, Units 3 and 4), CLI-11-9, 74 NRC 233, 236 (2011); Southern Nuclear Operating Co. (Vogtle Electric Generating Plant, Units 3 and 4), CLI-11-8, 74 NRC 214, 217 n.1 (2011).

²⁹ Additionally, although we need not address it, Section 2.326(d) imposes a further requirement for a motion to reopen that relates to a contention not previously in controversy: that is, satisfying the Section 2.309(c) requirements for new or amended contentions filed after the original hearing petition deadline.

³⁰ Both TVA and the NRC Staff also challenge the timeliness of SACE's motions, asserting that relevant information concerning post-Fukushima seismic hazards was available long before TVA submitted the ESEP Report. TVA Answer at 1, 12-13; NRC Staff Answer at 6. Because SACE submitted its motions within 30 days of the date on which the ESEP Report was posted on the NRC's public document system, however, the Board does not find SACE's motion to be untimely.

³¹ SACE Motion for Leave to File at 6.

the facility and that “members of the public will have the benefit of a more thorough and adequate NRC licensing review.”³² But SACE provides no factual support for these speculative benefits, much less sufficient support to justify reopening the record of this closed proceeding.

Third, SACE fails to provide an affidavit to demonstrate the existence of a significant safety or environmental issue, as required by 10 C.F.R. § 2.326(b). The affidavit of SACE’s counsel provides no support for the proposition that duplicating in the FSAR information that is already in the ESEP Report—which concludes that the Watts Bar facility can continue to operate safely—will somehow identify significant safety issues. Even assuming for the sake of argument that counsel possesses appropriate qualifications and expertise, she makes no effort in her affidavit (and SACE makes none in its pleadings) to demonstrate how the ESEP Report presents any underlying facts that might support a different conclusion.

Because SACE’s motion to reopen the record is insufficient, the Board need not address SACE’s motion for leave to file a new contention.³³

III. ORDER

For the reasons stated, SACE’s motion to reopen the record is denied and the Board does not address the sufficiency of the motion to admit a new contention that accompanied SACE’s motion.

³² Id. at 4.

³³ As the Staff observes, “because the Board should deny SACE’s Motion to Reopen, it need not separately address whether SACE’s subsequent Motion to File a New Contention satisfies the applicable Commission requirement.” NRC Staff Answer at 7.

This adjudicatory proceeding remains terminated. In accordance with 10 C.F.R. § 2.341, any petition for review of this Memorandum and Order must be filed within twenty-five (25) days after it is served.

It is so ORDERED.

THE ATOMIC SAFETY
AND LICENSING BOARD

/RA/

Paul S. Ryerson, Chairman
ADMINISTRATIVE JUDGE

/RA/

Dr. Gary Arnold
ADMINISTRATIVE JUDGE

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Dr. Richard E. Wardwell
ADMINISTRATIVE JUDGE

Rockville, Maryland
April 22, 2015

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing **MEMORANDUM AND ORDER (Denying Motion to Reopen) (LBP-15-15)** have been served upon the following persons by the Electronic Information Exchange.

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Docket No. 50-391-OL

MEMORANDUM AND ORDER (Denying Motion to Reopen) (LBP-15-15)

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[Original signed by Herald M. Speiser ____]
Office of the Secretary of the Commission

Dated at Rockville, Maryland
this 22nd day of April, 2015