

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of	)	
	)	
EXELON GENERATION COMPANY, LLC.	)	Docket No. 52-007-ESP
	)	
(Early Site Permit for Clinton ESP Site)	)	ASLBP No. 04-821-01-ESP
	)	

NRC STAFF'S ANSWER TO INTERVENORS'  
PETITION FOR INTERLOCUTORY REVIEW OF LICENSING BOARD  
REJECTION OF ENERGY EFFICIENCY ALTERNATIVES CONTENTION

INTRODUCTION

Pursuant to 10 C.F.R. § 2.311(a) and 10 C.F.R. § 2.341(b)(3), the staff of the Nuclear Regulatory Commission ("Staff") hereby responds to the August 23, 2004, "Petition for Interlocutory Review" ("Petition") submitted by the Blue Ridge Environmental Defense League, Nuclear Information and Resource Service, Nuclear Energy Information Service, Public Citizen and Environmental Law and Policy Center ("Intervenors"). For the reasons set forth herein, the Staff submits that the Intervenors' Petition for Interlocutory Review should be denied on the grounds that the Commission's criteria for interlocutory review of rulings on requests for hearings and petitions to intervene have not been met.

BACKGROUND

On December 12, 2003, the Commission published a notice announcing the opportunity to petition to intervene in a hearing on an application for an Early Site Permit ("ESP") submitted by Exelon Generation Company, LLC ("Exelon"). Intervenors timely sought to intervene in the hearings on January 12, 2004.<sup>1</sup>

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<sup>1</sup> Subsequent to submission of the intervention petitions, Exelon sought to apply the (continued...)

Subsequently, an Atomic Safety and Licensing Board (“Board”) was established to preside in this proceeding. See Establishment of Atomic Safety and Licensing Board (March 22, 2004). On May 3, 2004, Intervenors supplemented their initial request for a hearing, as directed by the Commission’s March 2, 2004 Order, by submitting a specification of the contentions which they sought to have litigated in the hearing. The Board held a prehearing conference on June 21-22, 2004, to discuss the various proposed contentions submitted by the Intervenors.

On August 6, 2004, the Board issued a Memorandum and Order (Ruling on Standing and Contentions) which found that the Intervenors had established the requisite standing to intervene in the proceeding and have submitted one admissible contention concerning the ESP application, denoted as Environmental Contention (“EC”) 3.1 - The Clean Energy Alternative Contention. Consequently, the Board admitted the Intervenors as parties to the proceeding. On August 23, 2004, the Intervenors submitted a Petition for Interlocutory Review of the Board’s rejection of portions of EC 3.1.

#### DISCUSSION

##### I. Interlocutory Review of Rulings on Requests for Hearing/Petition to Intervene

Interlocutory review of rulings on requests for hearings and petitions to intervene are authorized in a few, limited circumstances — none of which are present here. An order on a request for hearing or a petition to intervene “may be appealed to the Commission, only in accordance with the provisions of [10 C.F.R. § 2.311], within ten (10) days after the service of the order. No other appeals from rulings on requests for hearings are allowed.” 10 C.F.R. § 2.311(a)

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<sup>1</sup>(...continued)

Commission’s newly revised Rules of Practice at 10 C.F.R. Part 2 (“New Part 2”). See 69 Fed. Reg. 2182 (January 14, 2004). On March 2, 2004, the Commission issued a Memorandum and Order directing that the proceedings be conducted under the New Part 2. See CLI-04-08, 59 NRC 113 (2004).

(emphasis added).<sup>2</sup> There is simply no provision for an appeal by a petitioner of an order granting the hearing request and petition to intervene. As the Commission recently noted, only those orders which are directly concerned with the dispositive grant or denial of status as an intervenor are excepted by 10 C.F.R. § 2.311 from the general prohibition against interlocutory review. *Duke Energy Corp.* (Catawba Nuclear Station, Units 1 and 2), CLI-04-11, 59 NRC 203, 208 (2004); *cf. Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), ALAB-861, 25 NRC 129, 136 (1987).

Nevertheless, the Intervenors here seek to obtain Commission interlocutory review of a decision by the Board admitting EC 3.1 - The Clean Energy Alternative Contention. While the Board found some aspects of the Intervenors' proposed EC 3.1 (including energy efficiency) inadmissible as being outside the scope of the proceeding and as an impermissible challenge to the Commission's regulations, the Board allowed portions of EC 3.1 and admitted the Intervenors as parties to the proceeding. Their hearing request having been granted, Intervenors may not now invoke section 2.311 to obtain interlocutory review of an order which does no more than exclude from consideration in the proceeding certain aspects of the issues which the party has sought to raise. *Gulf States Utilities Co.* (River Bend Station, Units 1 and 2), ALAB-329, 3 NRC 607, 610 (1976). In their petition for interlocutory review, the Intervenors even acknowledge that "the Commission's precedent may foreclose an appeal of the Panel's decision at this time ... where, as here, the Panel has admitted at least one of the Intervenors' proposed contentions." Petition at 3. Since the petition for interlocutory review fails to satisfy the provisions of section 2.311, it should be denied.

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<sup>2</sup> Section 2.311 under New Part 2 continues unchanged the provision in former § 2.714a that limits interlocutory appeal of rulings on requests for hearing and petition to intervene to those that grant or deny a petition to intervene. 69 Fed. Reg. 2223. It also continues the provision that an order granting a petition to intervene and request for hearing is appealable by a party other than the petitioner only on the question as to whether the request and petition should have been wholly denied. 10 C.F.R. § 2.311(c).

II. Interlocutory Review of Decisions and Actions of a Presiding Officer

The Intervenor's invocation of the interlocutory review standards in 10 C.F.R. § 2.341(f)(2) likewise should be rejected outright as an impermissible effort to circumvent the explicit restrictions on interlocutory review of rulings on requests for hearings and petitions to intervene stated in 10 C.F.R. § 2.311. According to section 2.341(a), the provisions for interlocutory review under section 2.341(f) are not available for review of orders granting or denying intervention petitions. Instead, the review of such interlocutory Board orders are governed by section 2.311. Nevertheless, even assuming that section 2.341(f)(2) were applicable, the Intervenor has failed to satisfy the standards set forth there.

The Commission has a longstanding policy disfavoring interlocutory review and will undertake such review only in the most compelling circumstances. *See, e.g., Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), CLI-02-9, 55 NRC 245, 248 (2002); *Sequoyah Fuels Co.* (Gore, Oklahoma Site), CLI-94-11, 40 NRC 55, 59 (1994); *Pac. Gas and Elec. Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-504, 8 NRC 406, 410 (1978). Under 10 C.F.R. § 2.341(f)(2), petitions for interlocutory review will be entertained by the Commission at the request of a party despite the absence of a referral or certification by the presiding officer only if the party demonstrates that the issue for which the party seeks interlocutory 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.

Although the Staff disagrees with the Intervenor's legal and factual conclusions regarding the Board's decision, interlocutory review would still be inappropriate even presuming that all of the Intervenor's assumptions are correct. The mere issuance of important rulings does not, without

more, merit interlocutory review. *Sequoyah Fuels* at 63. Even legal error does not necessarily justify interlocutory review. *Hydro Resources* (P.O. Box 15910, Rio Rancho, NM 87174), CLI-98-8, 47 NRC 314, 320 (1998). The Intervenor's Petition plainly fails to satisfy either of the criteria for interlocutory review.

In their petition for interlocutory review, the Intervenor's first argue that the exclusion of energy efficiency alternatives would have a pervasive effect on the proceeding by inhibiting their ability to fully present Clean Energy Alternatives. Petition at 12. However, the exclusion of energy efficiency alternatives does not alter the basic structure of the proceeding since even a favorable Commission decision upon interlocutory review would not change the respective roles of the parties. The mere expansion of issues rarely, if ever, has been found to affect the basic structure of a proceeding in a pervasive or unusual manner so as to warrant interlocutory review. *Sacramento Municipal Utility District* (Rancho Seco Nuclear Generating Station), CLI-94-2, 39 NRC 91, 93-94 (1994). Furthermore, the basic structure of an adjudication is not changed simply because the rejection of part of a contention results from a licensing board ruling that is important or novel, or may conflict with case law, policy, or Commission regulations. *Id.* at 94. Finally, there is nothing unusual about a party's dissatisfaction with an adverse ruling by the Board. Thus, the Intervenor's failed to satisfy 10 C.F.R. § 2.341(f)(2)(ii).

Next, the Intervenor's argue that the impact of excluding consideration of energy efficiency alternatives cannot, as a practical matter, be alleviated by a petition for review after the Board's initial decision since reversal at that point would require a new analysis of all clean energy alternatives. Petition at 13. The Intervenor's further assert that it would "more desirable" for the Commission to review the decision to exclude energy efficiency now, rather than wait for the initial decision on the merits. *Id.* Desirability simply does not rise to the level of immediate and irreparable impact required by the regulation. It is well established that the commitment of resources to a hearing that may later prove to have been unnecessary does not constitute sufficient

grounds for an interlocutory review of a Licensing Board order. See, e.g., *Sequoyah Fuels* at 61; *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), ALAB-858, 25 NRC 17, 21-22 (1987). Moreover, a party may not obtain interlocutory review by asserting potential delay and increased expenses attributable to an allegedly erroneous ruling by the Board. *Virginia Electric and Power Co.* (North Anna Power Station, Units 1 and 2), ALAB-741, 18 NRC 371, 378 n.11 (1983). In a proceeding on an early site permit which involves little if any irretrievable commitment of resources, it is difficult to even imagine a situation that would result in substantial harm which could not be alleviated by an appeal at the conclusion of the proceeding.

Finally, the Intervenor contend, citing 10 C.F.R. § 2.341(f)(1), that interlocutory review is appropriate because their petition presents a significant and novel legal issue, the resolution of which would materially advance the orderly disposition of the proceeding. Petition at 13. However, section 2.341(f)(1) confines interlocutory review only to questions certified to the Commission by the presiding officer under section 2.319(l) or a ruling referred or issue certified to the Commission under section 2.323(f). Here, the Intervenor did not ask the Board to certify an issue to the Commission for early review and the Board has neither made the requisite findings nor exercised its discretion to refer its ruling to the Commission. Thus, interlocutory review pursuant to section 2.341(f)(1) is inappropriate.

#### CONCLUSION

For the foregoing reasons, the Commission should decline interlocutory review of the Board's decision to accept for litigation EC 3.1 while excluding energy efficiency alternatives.

Respectfully submitted,

**/RA/**

Tyson R. Smith  
Counsel for NRC Staff

Dated at Rockville, Maryland  
this 27<sup>th</sup> day of August, 2004

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CERTIFICATE OF SERVICE

I hereby certify that copies of the "NRC STAFF'S ANSWER TO INTERVENORS' PETITION FOR INTERLOCUTORY REVIEW OF LICENSING BOARD REJECTION OF ENERGY EFFICIENCY ALTERNATIVES CONTENTION" in the above-captioned proceeding have been served on the following through electronic mail and with copies by deposit in the NRC's internal mail system, or through electronic mail with copies by deposit in the U.S. Postal Service as indicated by an asterisk, this 27<sup>th</sup> day of August, 2004:

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