

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

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In the Matter of )

SOUTH TEXAS PROJECT NUCLEAR )  
OPERATING COMPANY )

(South Texas Project, Units 3 and 4) )

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Docket Nos. 52-012-COL  
52-013-COL

CLI-10-16

**MEMORANDUM AND ORDER**

Today we address Intervenors' appeal of a Board ruling<sup>1</sup> that rejected seven late-filed contentions, and treat it as a petition for interlocutory review.<sup>2</sup> For the reasons set forth below, because Intervenors' petition has demonstrated no grounds for interlocutory review, their appeal must await the final merits decision in this matter.<sup>3</sup>

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<sup>1</sup> LBP-10-2, 71 NRC \_\_ (Jan. 29, 2010) (slip op.) (non-public version). A public version of the decision is available at ADAMS accession number ML100470855.

<sup>2</sup> *Notice of Appeal* (Feb. 9, 2010); *Brief in Support of Intervenors' Appeal of Atomic Safety and Licensing Board's Order of January 29, 2010* (Feb. 9, 2010) (Intervenors' Appeal) (non-public). Intervenors are the Sustainable Energy and Economic Development (SEED) Coalition, the South Texas Association for Responsible Energy, and Public Citizen.

<sup>3</sup> The NRC Staff's appeal of the Board's ruling in LBP-10-2, concerning an access determination involving a document containing sensitive unclassified non-safeguards information (SUNSI), will be addressed in a separate memorandum and order.

## I. BACKGROUND

This matter involves the combined license (COL) application of South Texas Project Nuclear Operating Company (STPNOC) to construct and operate two new units on its South Texas site, located in Matagorda County, Texas. Following publication of a notice of hearing and opportunity to petition for leave to intervene on STPNOC's COL application,<sup>4</sup> Intervenors filed a timely petition to intervene and request for hearing on STPNOC's COL application, submitting twenty-eight proposed contentions.<sup>5</sup> The Board found that Intervenors had demonstrated standing and had submitted five admissible contentions. Accordingly, they were admitted as parties to the proceeding.<sup>6</sup>

Shortly after briefing was completed, but before the Board ruled on the intervention petition, STPNOC notified the Board that it had submitted to the Staff, as a supplement to the COL application, a "Mitigative Strategies Report" containing a description and plan for implementation of mitigative strategies in accordance with 10 C.F.R. §§ 50.54(hh)(2) and 52.80(d).<sup>7</sup> At STPNOC's request, the Staff has withheld the Mitigative Strategies Report from

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<sup>4</sup> South Texas Project Nuclear Operating Company Application for the South Texas Project Units 3 and 4; Notice of Order, Hearing, and Opportunity to Petition for Leave to Intervene, 74 Fed. Reg. 7934 (Feb. 20, 2009).

<sup>5</sup> *Petition for Intervention and Request for Hearing* (Apr. 21, 2009).

<sup>6</sup> The five admitted contentions are Contentions 8, 9, 14, 16, and 21. See LBP-09-21, 70 NRC \_\_ (Aug. 27, 2009) (slip op.) (admitting Intervenors as parties to the proceeding and ruling on nineteen of twenty-eight proposed contentions); LBP-09-25, 70 NRC \_\_ (Sept. 29, 2009) (slip op.) (ruling on the remaining nine contentions).

<sup>7</sup> Letter from Steven P. Frantz, counsel for STPNOC, to Licensing Board (May 27, 2009) at 1 (ADAMS accession no. ML091470724). See also Letter from Scott Head, Manager, Regulatory Affairs, STPNOC, to U.S. NRC (May 26, 2009) at 1 (ML091470723) (stating that the Mitigative Strategies Report will be incorporated into the COL application as Part 11) (Mitigative Strategies (continued . . .))

the public because it contains security-related SUNSI.<sup>8</sup>

In accordance with the terms of a protective order issued by the Board, intervenors submitted seven new contentions challenging the completeness of the information contained in the Mitigative Strategies Report.<sup>9</sup> After a prehearing conference on the new contentions, portions of which were closed to the public under the protective order, the Board ruled that all seven new contentions were inadmissible.<sup>10</sup>

Intervenors thereafter filed the instant appeal challenging the Board's rulings on three of those contentions – Contentions MS-1, MS-3, and MS-6.<sup>11</sup> STPNOC and the NRC Staff oppose the appeal.<sup>12</sup> As discussed below, intervenors' appeal is premature.

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( . . . continued)

Report Cover Letter). One contention in the initial petition asserted that the application was deficient and incomplete for failing to include the information required by sections 50.54(hh)(2) and 52.80(d), which concern strategies for mitigating loss of large areas of the plant in the event of explosions or fire. The Board found that this contention was inadmissible on the grounds that it became moot with STPNOC's submission of the Mitigative Strategies Report. See LBP-09-21, 70 NRC \_\_ (slip op. at 11).

<sup>8</sup> Mitigative Strategies Report Cover Letter at 1. STPNOC prepared the report using NEI-06-12, B.5.b Phase 2 & 3 Submittal Guideline, Rev. 2 (Dec. 2006) (NEI-06-12), which also has been withheld from public disclosure as containing security-related SUNSI.

<sup>9</sup> *Intervenors' Contentions Regarding Applicant's Submittal Under 10 C.F.R. § 52.80 and 10 C.F.R. § 50.54(hh)(2) and Request for Subpart G Hearing* (Aug. 14, 2009) (non-public).

<sup>10</sup> LBP-10-2, 71 NRC \_\_ (slip op. at 33) (non-public version).

<sup>11</sup> Intervenors' Appeal at 5 n.11.

<sup>12</sup> *STP Nuclear Operating Company's Brief Opposing Intervenors' Appeal of LBP-10-02* (Feb. 19, 2010) (non-public); *NRC Staff's Brief in Opposition to Intervenors' Appeal of LBP-10-02* (Feb. 19, 2010) (non-public). Intervenors also have filed a reply to STPNOC's and the Staff's opposition briefs. *Intervenors Consolidated Reply to Applicant's and Staff's Responses to the Appeal of the ASLB's Order of January 29, 2010* (Feb. 24, 2010) (non-public) (Intervenors' Reply).

## II. DISCUSSION

Section 2.311 of our rules of practice permits an appeal as of right from a board's ruling on an intervention petition in two limited circumstances: (1) upon the denial of a petition to intervene and/or request for hearing, on the question as to whether it should have been granted; or (2) upon the granting of a petition to intervene and/or request for hearing, on the question as to whether it should have been wholly denied.<sup>13</sup> Other requests for review generally are governed by section 2.341, which provides for interlocutory review, at our discretion, only upon a showing that the issue for which interlocutory review is sought:

- (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.<sup>14</sup>

That interlocutory review only will be granted under extraordinary circumstances reflects our disfavor of piecemeal appeals during ongoing licensing board proceedings.<sup>15</sup>

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<sup>13</sup> See 10 C.F.R. § 2.311(c), (d)(1). An appeal of an order selecting a hearing procedure also is governed by section 2.311, "on the question as to whether the selection of the particular hearing procedures was in clear contravention of the criteria set forth in § 2.310." 10 C.F.R. § 2.311(e). The Board's selection of a hearing procedure is not at issue here.

<sup>14</sup> 10 C.F.R. § 2.341(a)(1), (f)(2). See also CLI-09-18, 70 NRC \_\_ (Sept. 23, 2009) (slip op. at 4-5) (explaining in this proceeding that "challenges to Board rulings on late-filed contentions normally fall under our rules for interlocutory review").

<sup>15</sup> See, e.g., *Crow Butte Resources, Inc.* (In Situ Leach Facility, Crawford, Nebraska), CLI-09-9, 69 NRC 331, 365 & n.178 (2009); *Entergy Nuclear Operations, Inc.* (Indian Point, Units 2 and 3), CLI-09-6, 69 NRC 128, 137 (2009).

Arguing that they are entitled to an appeal as of right, Intervenors characterize their new contentions as “not inherently linked to the[ir] Petition for Intervention.”<sup>16</sup> In Intervenors’ view, the Board treated these contentions as “a separate stand-alone petition for intervention and request for hearing,” and thus “specified that the decision was subject to appeal under 10 C.F.R. § 2.311.”<sup>17</sup> Intervenors assert that an appeal under section 2.311 is appropriate because “there are no fires and explosions contentions now pending before the Board.”<sup>18</sup>

Intervenors’ appeal does not fall within the circumstances permitted for appeals as of right. The Board has granted their petition to intervene with five contentions admitted for hearing; the question on appeal is whether the Board erred in rejecting three of Intervenors’ newly-proffered contentions. Under longstanding Commission precedent, once a petition to intervene and request for hearing has been granted and contentions are admitted for hearing, appeals of Board rulings on new or amended contentions are treated under section 2.341(f)(2), regardless of the subject matter of those contentions.<sup>19</sup> Contrary to Intervenors’ assertions, it would be illogical to construe Intervenors’ new contentions as a stand-alone intervention petition when they already have intervened and a contested hearing has been granted. Intervenors’ appeal is properly treated as a petition for interlocutory review under section 2.341(f)(2).

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<sup>16</sup> Intervenors’ Reply at 2.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> See *Crow Butte*, CLI-09-9, 69 NRC at 365; *Entergy Nuclear Generation Co. and Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), CLI-07-2, 65 NRC 10, 11-12 (2007); *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-06-24, 64 NRC 111, 125-26 (2006); *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-01-1, 53 NRC 1, 4-7 (2001).

To be sure, the Board correctly stated that its ruling was subject to appeal under 10 C.F.R. § 2.311, consistent with our ruling in CLI-09-18.<sup>20</sup> In CLI-09-18, we held that, in the unusual circumstances presented by this case, no appeal lay under section 2.311 until the Board acted on all contentions then pending – which included those raised in Intervenors’ intervention petition and the seven new contentions that were filed in advance of the Board’s ruling on the intervention petition.<sup>21</sup> The Board’s decision in LBP-10-2 ruled on the last of these pending contentions. As such, the *decision* is subject to appeal under section 2.311. But because Intervenors’ intervention petition was granted, their contention admissibility appeal does not fall into either of the circumstances envisioned by section 2.311.

We decline to exercise our discretion to grant interlocutory review of the Board’s rulings on the admissibility of Contentions MS-1, MS-3, and MS-6. Intervenors have not addressed either of the section 2.341(f)(2) factors to show that interlocutory review is warranted. In any event, it does not appear that a convincing case could be made for interlocutory review. The focus of Intervenors’ appeal is its assertion that the Board erred in finding these contentions to be inadmissible. But as we recently reiterated in the *Crow Butte* license renewal proceeding, “the rejection or admission of a contention, where the Petitioner has been admitted as a party and has other contentions pending, neither constitutes serious and irreparable impact, nor affects the basic structure of the proceeding in a pervasive and unusual manner.”<sup>22</sup> Intervenors will have the opportunity to file a petition for review of the Board’s contention admissibility

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<sup>20</sup> LBP-10-2, 71 NRC \_\_ (slip op. at 33).

<sup>21</sup> See CLI-09-18, 70 NRC \_\_ (slip op. at 5).

<sup>22</sup> *Crow Butte*, CLI-09-9, 69 NRC at 365 (quoting *Entergy Nuclear Operations, Inc.* (Indian Point, Units 2 and 3), CLI-08-7, 67 NRC 187, 192 (2008)) (internal quotation marks omitted).

rulings following the issuance of the Board's final dispositive decision in this matter.<sup>23</sup> At this time, their appeal is not ripe.

### III. CONCLUSION

For the reasons set forth above, we *deny* Intervenors' request for interlocutory review without prejudice to their ability to file a petition for review of the Board's contention admissibility rulings following the issuance of the Board's final dispositive decision in this matter.

IT IS SO ORDERED.<sup>24</sup>

For the Commission

[NRC SEAL]

/RA/

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Annette L. Vietti-Cook  
Secretary of the Commission

Dated at Rockville, Maryland,  
this 17<sup>th</sup> day of June, 2010

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<sup>23</sup> See 10 C.F.R. § 2.341(a), (b); *Crow Butte*, CLI-09-9, 69 NRC at 365 & n.180.

<sup>24</sup> Commissioner Magwood did not participate in this matter.

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing COMMISSION MEMORANDUM AND ORDER (CLI-10-16) have been served upon the following persons by the Electronic Information Exchange.

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Dated at Rockville, Maryland  
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