

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)		Docket Nos. 52-012-COL
NUCLEAR INNOVATION NORTH AMERICA LLC))	52-013-COL
(South Texas Project Units 3 and 4)))	May 2, 2011

**NUCLEAR INNOVATION NORTH AMERICA LLC’S ANSWER TO INTERVENORS’
MOTION TO CONTINUE EVIDENTIARY HEARING**

Pursuant to 10 C.F.R. § 2.323(c), Nuclear Innovation North America LLC (“NINA”) hereby files its Answer opposing Intervenors’ Motion dated April 22, 2011.¹ The Motion requests the Licensing Board (“Board”) to defer the scheduled evidentiary hearing and all hearing-related filings based upon the pendency of the Nuclear Regulatory Commission (“NRC”) Staff’s petition for review by the Commission (“Staff’s Petition for Review”)² of the Board’s denial of the Staff’s motion for summary disposition of Contention CL-2. As demonstrated below, Intervenors have failed to demonstrate any basis that would warrant such relief. Therefore, the Board should deny the Motion and maintain the evidentiary hearing schedule.

I. BACKGROUND

On July 2, 2010, the Board admitted Contention CL-2 in this proceeding.³ Contention CL-2 alleges that NINA’s estimation of replacement power costs in the evaluation of severe

¹ Intervenors’ Motion to Continue Evidentiary Hearing (Apr. 22, 2011) (“Motion”).

² NRC Staff Petition for Review of the Licensing Board’s Decision in LBP-11-07 Denying the NRC Staff Motion for Summary Disposition at 1 (Mar. 15, 2011) (“Staff’s Petition for Review”).

³ *S. Tex. Project Nuclear Operating Co.* (South Texas Project Units 3 & 4), LBP-10-14, 72 NRC ___, slip op. at 24-33 (July 2, 2010).

accident mitigation design alternatives (“SAMDA”) in the STP Units 3 and 4 Environmental Report is erroneous.⁴ The NRC Staff filed its Motion for Summary Disposition of Contention CL-2 on July 22, 2010, asserting that all environmental issues regarding SAMDAs are resolved by the referenced Advanced Boiling Water Reactor design certification rule.⁵

On September 14, 2010, the Applicant also filed a Motion for Summary Disposition of Contention CL-2, arguing that SAMDAs are not cost-effective even after accounting for the factors identified by the Intervenors.⁶ The Intervenors opposed both motions.⁷ The Board issued Order LBP-11-07 on February 28, 2011 and, among other things, denied both motions for summary disposition and admitted Contention DEIS-1-G.⁸

At the prehearing conference on March 8, 2011, the Board and all parties agreed to move forward with an evidentiary hearing on the two admitted contentions. On March 11, 2011 the Board issued a scheduling order that set an evidentiary hearing for August 17 to 19, 2011, along specified dates for intermediate evidentiary filings, the first of which must be filed by the parties on May 9, 2011.⁹

On March 15, 2011 the NRC Staff submitted a Petition for Review to the Commission, arguing that the Board’s decision (LBP-11-07) to deny the Staff’s Motion for Summary

⁴ *Id.* at 30.

⁵ See NRC Staff Motion for Summary Disposition at 13-14 (July 22, 2010).

⁶ STP Nuclear Operating Company’s Motion for Summary Disposition of Contention CL-2 (Sept. 14, 2010).

⁷ Intervenors’ Response to Staff’s Motion for Summary Disposition (Aug. 11, 2010); Intervenors’ Response to Applicant’s Motion for Summary Disposition of Contention CL-2 (Oct. 8, 2010).

⁸ Contention DEIS-1-G concerns the completeness of the need for power analysis in the light of the potential reduction in electricity demand caused by the adoption of energy efficient building codes. See *Nuclear Innovation N. Am. LLC* (South Texas Project Units 3 and 4), LBP-11-07, 73 NRC ___, slip op. at 21-26, 48, 74 (Feb. 28, 2011).

⁹ Memorandum and Order (Establishing Schedule for Evidentiary Hearing) at 2 (Mar. 11, 2011) (unpublished).

Disposition on Contention CL-2 should be reversed.¹⁰ NINA filed an Answer to the Staff's Petition for Review, and agreed that LBP-11-07 should be reversed.¹¹ The Intervenors opposed the Staff's Petition.¹² On April 15, 2011, the Secretary of the Commission issued an Order that extended the time for the Commission to review the Staff's Petition.¹³

II. ARGUMENT

Intervenors' argue that the Board should "continu[e] the evidentiary hearing and related deadlines" on Contention CL-2 and the "need for power issue"¹⁴ until the Commission either denies the NRC Staff's Petition or upholds the Board's ruling.¹⁵ Should any such Commission ruling occur, Intervenors request that the hearing be scheduled "no sooner than 90 days" thereafter.¹⁶ The sole basis for the Intervenors' request is that "spending time and resources on preparation and trial [hearing] may be wasted in the event" the Commission reverses the Board's decision and dismisses Contention CL-2.¹⁷ As the Intervenors acknowledge, "there is no way to know when the Commission will rule."¹⁸

Intervenors do not cite any regulatory authority for filing this Motion. Instead, Intervenors style their request as a motion to continue.¹⁹ As demonstrated below, the Intervenors' Motion should be denied because it is untimely, the Intervenors have failed to meet

¹⁰ Staff's Petition for Review at 1.

¹¹ NINA Answer to NRC Staff Appeal of LBP-11-07, at 2 (Mar. 24, 2011).

¹² Intervenors' Answer in Opposition to NRC Staff's Position for Review of the Licensing Board's Decision in LBP-11-07 Denying NRC Staff Motion for Summary Disposition (Mar. 25, 2011).

¹³ Secretary's Order (Apr. 15, 2011) (unpublished).

¹⁴ Motion at 1, 3. Presumably, the Intervenors are referring to Contention DEIS-1-G.

¹⁵ *Id.* at 3.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.* at 2.

¹⁹ *Id.* at 1, 2.

their burden to demonstrate that deferral is warranted, and delay in the hearings would harm NINA and the public interest in expeditious proceedings.

A. The Motion Is Untimely

10 C.F.R. § 2.323 states that “[a] motion must be made no later than ten (10) days after the occurrence or circumstance from which the motion arises.”²⁰ The only relevant trigger date is the March 15, 2011 filing of the NRC Staff’s Petition for Review, which is the underlying circumstance for the Intervenors’ request to defer the hearing. Filed with the Commission nearly 7 weeks ago, the Staff’s Petition for Review was thus available well before the Intervenors filed the present Motion. For this reason alone, the Motion should be dismissed pursuant to 10 C.F.R. § 2.323(a).

The only intervening event that falls within 10 days is the April 15, 2011 Order issued by the Secretary of the Commission.²¹ Intervenors argue that according to 10 C.F.R. § 2.341(a)(2) the Commission might have ruled on the Staff’s Petition for Review within 40 days (on or before April 24, 2011), but after issuing this Order the date for Commission review is now unknown.²² Intervenors’ reference to Section 2.341(a)(2) is inapposite. That subsection applies when the Commission reviews “the decision or action [by a presiding officer] on its own motion [sua sponte]”; on its face, that subsection does not apply to petitions for review by the Commission. The regulations do not specify any time period for Commission action on a petition for review. Therefore, the Secretary’s Order of April 15 is not relevant to determining the timeliness of the Intervenors’ Motion.²³

²⁰ 10 C.F.R. § 2.323(a).

²¹ See Motion at 2.

²² See *id.*

²³ Furthermore, the Secretary’s Order was neither unusual nor unexpected. Given the routine nature of the Order, the issuance of the Order should not serve to toll the period for the filing of the Motion.

As the Appeal Board stated on another occasion when a party sought to delay an upcoming hearing:

[A] party must lodge promptly any objection it has to a board's scheduling of the [hearing] phase of a proceeding; it cannot wait until testimony is due, and the hearing is imminent, to request that the procedure be changed.²⁴

In summary, the Motion was not filed in a timely manner following the NRC Staff's Petition for Review. Accordingly, the Motion should be denied.

B. Intervenor's Have Not Satisfied Their Burden to Demonstrate that Deferral Is Warranted

The Motion should be rejected for failure to include an adequate basis and justification to defer the evidentiary hearing and related filings. The Intervenor's argue that absent a deferral, the Commission may grant the NRC Staff's Petition for Review, and then may reverse the Board's admissibility ruling on Contention CL-2. Assuming that occurs, the Intervenor's complain that it would have wasted "time and resources on preparation and trial."²⁵

Given the eleventh-hour nature of their Motion, there is little credibility to the Intervenor's claim that they are seeking to prevent waste of time and resources on hearing preparation. The Intervenor's have filed their Motion on the eve of filing initial statements of position and direct pre-filed testimony for both contentions, which are due in one week (May 9, 2011). NINA has essentially completed development of those filings. Presumably, the NRC Staff and Intervenor's filings are at a similar stage of development. As a result, much of the preparatory work for the hearing will have been completed by the time the Board rules on the

²⁴ *Consol. Edison Co. of N.Y.* (Indian Point, Units 1, 2, & 3), ALAB-377, 5 NRC 430, 431 (1977).

²⁵ Motion at 3.

Motion. Accordingly, much of the benefit that the Intervenors seek by filing the Motion will not be realized.

Furthermore, expenses associated with preparing for hearing are the type of burden voluntarily assumed by parties that engage in the NRC hearing process.²⁶ As discussed below, such expense is not a sufficient basis for deferring the hearings, and the Intervenors' Motion does not comply with the relevant regulations governing requests to defer or stay hearings.

There have been a number of cases in which a party has submitted a motion to defer or stay proceedings (including hearings) before a licensing board pending Commission review of board rulings on summary disposition. Such motions have been evaluated under the provisions of 10 C.F.R. § 2.323(g) (formerly 10 C.F.R. § 2.730(g)) or 10 C.F.R. § 2.342 governing requests for stays.²⁷

If Intervenors' Motion is treated as a motion under 10 C.F.R. § 2.323, the motion should be denied in accordance with subparagraph (g) of that section, which states;

Unless otherwise ordered, neither the filing of a motion, the filing of a petition for certification, nor the certification of a question to the Commission stays the proceeding or extends the time for the performance of any act.

²⁶ In a related context, the Commission stated that it is aware of *no instance* in NRC jurisprudence where the Commission or its licensing and appeal boards concluded that expenses associated with litigating an ongoing NRC hearing constituted an "irreparable injury" sufficient to support the granting of a motion to stay a proceeding. *Entergy Nuclear Ops., Inc.* (Indian Point, Units 2 & 3), CLI-09-06, 69 NRC 128, 135 & n.25 (2009).

²⁷ See, e.g., *Sequoyah Fuels Corp.* (Gore, Oklahoma Site), CLI-94-9, 40 NRC 1, 4-5 (1994); *Private Fuel Storage* (Independent Spent Fuel Storage Installation), Memorandum and Order (Denying Motion to Delay Hearing Schedule and Requesting Scheduling Information) at 2 (Mar. 24, 2000) (unpublished) ("March 24, 2000 Order). In addition, the Commission has had occasion to rule on motions to defer hearings based upon other factors, such as ongoing parallel proceedings before other agencies that might moot the NRC hearings, and reviews being undertaken by the NRC that might affect the proceeding. In such cases, the Commission has declined to stay the NRC hearings, ruling that the Commission has a responsibility to go forward with its licensing proceedings. See, e.g., *Private Fuel Storage* (Independent Spent Fuel Storage Installation), CLI-01-26, 54 NRC 376, 381 (2001). In that case, the Commission considered whether moving forward with adjudication would (1) jeopardize public health and safety, (2) provide an obstacle to fair and efficient decisionmaking, and (3) thwart the regulatory review. *Id.* at 380-83.

As the licensing board noted in *Private Fuel Storage* in denying a motion to delay the hearing due to pending Commission review of a ruling on a motion for summary disposition, the “clear import of [the terms of § 2.323(g)], as well as the agency’s general policy, is that stays relating to interlocutory matters are disfavored.”²⁸ The board further rejected the argument that a stay of the hearings was warranted in order to prevent the expenditure of additional resources if the Commission were to reverse the board’s ruling, noting that “this generally is the case with any interlocutory appeal and does not provide the basis for a stay” of the hearings.²⁹

Similarly, the Commission rejected a motion to stay proceedings before a licensing board pending review by the Commission of the board’s ruling on a motion for summary disposition. The Commission treated the motion as a request for a stay under 10 C.F.R. § 2.788 (now 10 C.F.R. § 2.342) and denied the motion, stating:

Interlocutory appeals or petitions to the Commission are not devices for delaying or halting licensing board proceedings. The stringent four-part standard set forth in section 2.788(e) makes it difficult for a party to obtain a stay of any aspect of a Licensing Board proceeding. Therefore, only in unusual cases should the normal discovery and other processes be delayed pending the outcome of an appeal or petition to the Commission. Cf. 10 C.F.R. § 2.730(g) [now 10 C.F.R. § 2.323(g)].³⁰

The Commission went on to consider the four factors for a stay (which are currently embodied in 10 C.F.R. § 2.342(e)). With respect to the second factor pertaining to irreparable injury to the moving party absent a stay, the Commission stated: “As we have previously held, ‘[m]ere

²⁸ *Private Fuel Storage*, March 24, 2000 Order at 2-3.

²⁹ *Id.*

³⁰ *Sequoyah Fuels Corp.*, CLI-94-9, 40 NRC at 6.

litigation expense, even substantial and unrecoupable cost, does not constitute irreparable injury.”³¹

In summary, if Intervenors’ Motion is considered under 10 C.F.R. § 2.323, the Motion fails given the provision in subparagraph (g) of that regulation which disfavors deferral of licensing board proceedings pending Commission review. If the Intervenors’ Motion is considered under 10 C.F.R. § 2.342, the Motion fails because the Intervenors’ litigation expense is not cognizable as an injury and the Intervenors have not addressed the other factors for stay of proceedings.³² Therefore, the Motion should be denied.

C. Deferring The Hearing Would Harm NINA and Be Contrary to the Public Interest

For several reasons, a deferral of the evidentiary hearing would harm NINA. First, any ongoing proceeding creates uncertainty. This uncertainty in turn adversely impacts NINA’s ability to seek investors and financing for the project.

Second, NINA’s attorneys and experts have arranged their schedule to accommodate the Board’s scheduling order. A change in schedule would cause inconvenience to these individuals (and presumably, to the attorneys and witnesses of the NRC Staff and the members of the Board). As the Commission aptly stated in denying a request for stay of proceedings before a licensing board:

The proceedings, which have gone on for over 4 years, are at last nearing completion and further hearings are imminent. If the other parties are forced to reschedule expert and attorney time for some future date, it will cause them great inconvenience. The

³¹ *Id.* The Commission further stated that where a “movant (as here) fails to show irreparable harm, then it must make an overwhelming showing that it is likely to succeed on the merits.” *Id.* at 7.

³² The other three factors in 10 C.F.R. § 2.342(e) are likelihood of success on the merits, harm to the other parties, and the public interest. The likelihood of success on the merits acts against the Intervenors, *i.e.*, if the Intervenors prevail on Commission review, hearings before the Board will be required. Additionally, as discussed in the next section, NINA and the public interest would be harmed if the hearings are deferred.

imminence of the hearings is also a factor in our determination that the public interest will be served if the parties are allowed to wrap up matters they have been litigating for so long.³³

Deferring the STP COL hearing would also be contrary to the public interest. The Commission has a goal of providing “prompt yet fair resolution of contested issues in adjudicatory proceedings.”³⁴ One of the Commission’s principal obligations is to achieve expeditious decisionmaking, which coincides with its “longstanding practice . . . to limit orders delaying proceedings to the duration and scope necessary to promote the Commission’s dual goals of public safety and timely adjudication.”³⁵ Even following the September 11 terrorist attacks, after considering requests to suspend various licensing proceedings pending review of measures to protect against terrorism, the Commission chose *not* to suspend the proceedings.³⁶ In these cases, the Commission emphasized the strong public interest in moving forward with proceedings in an efficient and expeditious manner.³⁷

In this proceeding, the Intervenors’ last minute attempt to defer the hearing and all related filings would not serve the public interest to conclude ongoing litigation.³⁸ After several years of litigation, this proceeding is nearing a conclusion. It would be inconsistent with the public

³³ *Private Fuel Storage* (Independent Spent Fuel Storage Installation), CLI-02-11, 55 NRC 260, 263 (2002).

³⁴ *Private Fuel Storage*, CLI-01-26, 54 NRC at 381 (quoting *Statement of Conduct of Adjudicatory Proceedings*, CLI-98-12, 48 NRC 18, 19 (1998)).

³⁵ *Id.*

³⁶ *See Pac. Gas & Elec. Co.* (Diablo Canyon Plant Independent Spent Fuel Storage Installation), CLI-02-23, 56 NRC 230, 236 (2002); *Private Fuel Storage*, CLI-01-26, 54 NRC at 378; *Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), CLI-01-28, 54 NRC 393, 399-401 (2001); *Duke Energy Corp.* (McGuire Nuclear Power Station, Units 1 & 2; Catawba Nuclear Station, Units 1 & 2), CLI-01-27, 54 NRC 385, 390 (2001).

³⁷ *See Diablo Canyon*, CLI-02-23, 56 NRC at 239; *Private Fuel Storage*, CLI-01-26, 54 NRC at 381, 383; *Savannah River*, CLI-01-28, 54 NRC at 400; *McGuire-Catawba*, CLI-01-27, 54 NRC at 389-90.

³⁸ *See Private Fuel Storage*, CLI-02-11, 55 NRC at 263.

interest to defer the hearings at this late date, especially after the Intervenors agreed with the hearing schedule in March.

III. CONCLUSION

For the foregoing reasons, the Board should deny the Intervenors' Motion in its entirety. NINA urges the Board to maintain the hearing schedule that has been agreed upon by all parties and is reflected in the Board's March 11, 2011 scheduling order.

Respectfully submitted,

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Dated in Washington, D.C.
this 2nd day of May 2011

CERTIFICATION

I certify that I have made a sincere effort to make myself available to listen and respond to the moving party, and to resolve the factual and legal issues raised in the motion, and that my efforts to resolve the issues have been unsuccessful.

Signed (electronically) by Steven P. Frantz

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		May 2, 2011

CERTIFICATE OF SERVICE

I hereby certify that on May 2, 2011, copies of “Nuclear Innovation North America LLC’s Answer to Intervenors’ Motion to Continue Evidentiary Hearing” were served by the Electronic Information Exchange on the following recipients:

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