

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

Before Administrative Judges:

Michael M. Gibson, Chairman  
Dr. Gary S. Arnold  
Dr. Randall J. Charbeneau

In the Matter of

NUCLEAR INNOVATION NORTH AMERICA  
LLC

(South Texas Project Units 3 and 4)

Docket Nos. 52-12-COL and 52-13-COL

ASLBP No. 09-885-08-COL-BD01

May 5, 2011

MEMORANDUM AND ORDER

(Denying Motion for Continuance of Evidentiary Hearing)

On April 22, 2011, Intervenors moved to continue the evidentiary hearing and related deadlines, including prehearing filings of which the first is due May 9, 2011.<sup>1</sup> Both Applicant and Staff oppose the motion, although only Applicant filed an answer in opposition.<sup>2</sup>

In support of its motion, Intervenors argue that because the Commission extended the time in which it may take sua sponte review of this Board's decision in LBP-11-07,<sup>3</sup> Intervenors cannot be certain if the Commission will review the decision, much less when the Commission might issue a ruling. According to Intervenors, time and resources associated with preparing for

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<sup>1</sup> Intervenors' Motion to Continue Evidentiary Hearing (Apr. 22, 2011) at 1 (Motion). The Board and parties previously agreed to a schedule for evidentiary filings, beginning with written statements due by May 9, 2011, and culminating with an evidentiary hearing on August 17–19, 2011. Tr. at 1239-40.

<sup>2</sup> Nuclear Innovation North America LLC's Answer to Intervenors' Motion to Continue Evidentiary Hearing (May 2, 2011) at 1.

<sup>3</sup> Commission Order (Apr. 15, 2011) at 1 (unpublished).

an approaching August 17-19, 2011 hearing may be wasted if the Commission rules inadmissible one of the two remaining contentions.<sup>4</sup>

Intervenors styled their motion as a motion for continuance, common in federal and state court for postponing a hearing or trial until a later day.<sup>5</sup> Typically, such motions are filed in response to some unforeseeable event, such as the absence of a party,<sup>6</sup> counsel,<sup>7</sup> witness or evidence,<sup>8</sup> or unfair surprise and prejudice caused by an opposing party.<sup>9</sup> Although the Commission's rules of procedure do not expressly contemplate such motions, Boards have entertained them.<sup>10</sup>

However, where, as here, a party seeks to postpone indefinitely an evidentiary hearing as well as all prehearing filings, the moving party must address and justify the stay according to the four equitable criteria of 10 C.F.R. § 2.342(e).<sup>11</sup> They are (1) whether the moving party has

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<sup>4</sup> Motion at 2-3.

<sup>5</sup> See, e.g., Aruba Bonaire Curacao Trust Co. Ltd. v. Comm'r of Internal Revenue, 777 F.2d 38, 43 (D.C. Cir. 1985); Fontenot v. Upjohn Co., 780 F.2d 1190, 1194 (5th Cir. 1986); General Motors Corp. v. Gayle, 951 S.W.2d 469, 476 (Tex. 1997).

<sup>6</sup> Harvey v. Andrist, 754 F.2d 569, 572 (5th Cir. 1985).

<sup>7</sup> Smith-Weik Mach. Corp. v. Murdock Mach. & Eng'g Co., 423 F.2d 842, 844-45 (5th Cir. 1970).

<sup>8</sup> Indus., Invs. and Agencies (Bahamas), Ltd. v. Panelfab Intern. Corp., 529 F.2d 1203, 1213 (5th Cir. 1976).

<sup>9</sup> Conway v. Chem. Leaman Tank Lines, Inc., 687 F.2d 108, 112 (5th Cir. 1982).

<sup>10</sup> Cleveland Elec. Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-841, 24 NRC 64, 76 n.37 (1986); South Carolina Elec. and Gas Co. (Virgil C. Summer Nuclear Station, Unit 1), ALAB-642, 13 NRC 881, 888 n.6 (1981); Perry, LBP-82-13, 15 NRC 527, 527 (1982); Wisconsin Elec. Power Co. (Point Beach Nuclear Plant, Units 1 and 2), LBP-82-10, 15 NRC 341, 345-46 (1982).

<sup>11</sup> Although section 2.342 expressly speaks to "stays of decisions," we adopt the Commission's guidance that "the section 2.342(e) standards simply restate commonplace principles of equity universally followed when judicial (or quasi-judicial) bodies consider stays or other forms of temporary injunctive relief." Shieldalloy Metallurgical Corp. (License Amendment Request for Decommissioning of the Newfield, New Jersey Site), CLI-10-08, 71 NRC \_\_, \_\_ n.25 (slip op. at 7 n.25) (Jan. 7, 2010) (quoting Entergy Nuclear Vermont Yankee, LLC, and Entergy Nuclear Operations, Inc. (Vermont Yankee Nuclear Power Station), CLI-06-08, 63 NRC 235, 237 n.4 (2006)).

made a strong showing that it is likely to prevail on the merits; (2) whether the party will be irreparably injured unless a stay is granted; (3) whether the granting of a stay would harm other parties; and (4) where the public interest lies.<sup>12</sup>

Intervenors' motion addresses only one of these equitable criteria, irreparable injury, and even then only indirectly. Intervenors claim that because the Staff has filed a petition for review with the Commission to overturn this Board's admission of contention CL-2, Intervenors' resources will be wasted preparing to adjudicate their contention if the Commission ultimately deems the contention inadmissible.<sup>13</sup>

The law is clear that litigation expenses associated with preparing for a hearing are precisely the type of resource expenditure that petitioners are expected to undertake when they intervene in the NRC hearing process.<sup>14</sup> Longstanding Commission precedent dictates that "litigation expenses, even substantial unrecoupable cost[s] do[] not constitute irreparable injury" justifying a stay.<sup>15</sup> Accordingly, Intervenors motion is denied.

It is so ORDERED.

FOR THE ATOMIC SAFETY  
AND LICENSING BOARD

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Michael M. Gibson, Chairman  
ADMINISTRATIVE JUDGE

Rockville, Maryland  
May 5, 2011

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<sup>12</sup> 10 C.F.R. § 2.342(e).

<sup>13</sup> Motion at 2-3.

<sup>14</sup> See, e.g., Entergy Nuclear Operations, Inc. (Indian Point, Units 2 and 3), CLI-09-06, 69 NRC 128, 136 (2009).

<sup>15</sup> Id. at 135.

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

In the Matter of )  
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NUCLEAR INNOVATION NORTH AMERICA LLC ) Docket Nos. 52-012-COL and 52-013-COL  
(NINA) )  
)  
(South Texas Project Units 3 and 4) )  
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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing MEMORANDUM AND ORDER (DENYING MOTION FOR CONTINUANCE OF EVIDENTIARY HEARING) have been served upon the following persons by the Electronic Information Exchange.

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Docket Nos. 52-012-COL and 52-013-COL  
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[Original signed by Nancy Greathead]  
Office of the Secretary of the Commission

Dated at Rockville, Maryland  
this 5<sup>th</sup> day of May 2011