

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Gregory B. Jaczko, Chairman
Dale E. Klein
Kristine L. Svinicki

In the Matter of)

SOUTH TEXAS PROJECT NUCLEAR)
OPERATING COMPANY)

(South Texas Project, Units 3 and 4))

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

CLI-09-18

MEMORANDUM AND ORDER

This matter involves the application of South Texas Project Nuclear Operating Company (STPNOC) for combined licenses (COLs) that would authorize STPNOC to construct and operate two new units on its South Texas site, located in Matagorda County, Texas. On August 27, 2009, the Atomic Safety and Licensing Board in this matter issued a decision on standing and contention admissibility, in which it granted the intervention petition of three organizations – the Sustainable Energy and Economic Development Coalition, the South Texas Association for Responsible Energy, and Public Citizen (together, Intervenors). The Board determined that each of the Intervenors established representational standing to intervene as of right, and it ruled on the admissibility of nineteen of twenty-eight proposed contentions, admitting one.¹ The Board did not address the nine remaining contentions, stating its intent to issue a subsequent

¹ LBP-09-21, 70 NRC __ (Aug. 27, 2009)(slip op.).

order addressing their admissibility.² STPNOC has requested that the Commission extend the deadline to appeal the Board's decision in LBP-09-21, until such time as the Board has ruled on all pending contentions.³ As discussed below, we deny STPNOC's request. Because the Board's decision in LBP-09-21 is not yet ripe for appeal, an extension is not needed.

DISCUSSION

At the conclusion of LBP-09-21, the Board included the following instruction:

This Order is subject to appeal to the Commission in accordance with the provisions of 10 C.F.R. § 2.311. Any petitions for review, meeting applicable requirements set forth in that section, must be filed within ten (10) days of service of this Memorandum and Order.³⁶⁸

³⁶⁸ Appeals relative to this ruling need to be made on a timely basis in accordance with 10 C.F.R. § 2.311. There will be a separate order with the decision on contentions 8-16, and that order will contain separate appeals rights.⁴

Under the Board's instruction, appeals were due September 8, 2009. To permit our studied consideration of STPNOC's extension request, the Secretary tolled the running of the time for STPNOC to file a notice of appeal of LBP-09-21.⁵

At issue is the applicability of 10 C.F.R. § 2.311(d)(1) in the circumstances we find here – where a Board has ruled only partially on an initial petition to intervene. The rule permits an aggrieved litigant to seek interlocutory review of an order granting a petition to intervene, and/or request for hearing, on the question as to “[w]hether the request for hearing or petition to

² *Id.*, slip op. at 2. See generally *Petition for Intervention and Request for Hearing* (Apr. 21, 2009).

³ See *STP Nuclear Operating Company's Unopposed Request for an Extension to Appeal LBP-09-21* (Sept. 2, 2009), at 3 (Extension Request).

⁴ LBP-09-21, 70 NRC __ (slip op. at 61 & n.368).

⁵ See Order (Sept. 4, 2009)(unpublished).

intervene should have been wholly denied.” By its terms, the rule provides an exception to our general policy limiting interlocutory review, and permits an appeal of a Board’s ruling on contention admissibility only in two identified circumstances. One of these occurs when a Board grants a petition to intervene following consideration of the full petition.⁶

We addressed similar factual circumstances in a 2004 *Catawba* decision.⁷ There, we dismissed as premature an appeal of a Licensing Board decision that granted a hearing request, but constituted only a partial ruling on the intervention petition because it left unaddressed a group of proposed contentions. In so doing, we interpreted 10 C.F.R. § 2.714a(c) (now 10 C.F.R. § 2.311(d)(1))⁸ as follows:

[T]o be appealable under section 2.714a(c), the disputed order must dispose of *the entire petition* so that a successful appeal by a nonpetitioner will terminate the proceeding as to the appellee petitioner.⁹

With respect to a license applicant appealing under this section, we clarified: “[T]he applicant must contend that, *after considering all pending contentions*, the Board has

⁶ See *Statement of Policy on Conduct of Adjudicatory Proceedings*, CLI-98-12, 48 NRC 18, 23 (1998)(observing that 10 C.F.R. § 2.714a (now 10 C.F.R. § 2.311) “allows a party to appeal a ruling on contentions *only if* (a) the order wholly denies a petition for leave to intervene (i.e., the order denies the petitioner’s standing or the admission of all of a petitioner’s contentions) or (b) *a party other than the petitioner alleges that a petition for leave to intervene or a request for a hearing should have been wholly denied*”)(emphasis added).

⁷ See *Duke Energy Corp. (Catawba Nuclear Station, Units 1 and 2)*, CLI-04-11, 59 NRC 203 (2004).

⁸ See Final Rule, Changes to Adjudicatory Process, 69 Fed. Reg. 2182, 2218 (Jan. 14, 2004)(“Table 2 – Cross-References Between Old Provisions of Subpart G and New Subpart C”).

⁹ *Catawba*, CLI-04-11, 59 NRC at 207 (emphasis added).

erroneously granted a hearing to the petitioner.”¹⁰

The *Catawba* decision reflects our stance on appeals filed pursuant to 10 C.F.R. § 2.311(d)(1); a necessary prerequisite for an appeal taken pursuant to that section is that the Board rule on “all pending contentions” first. For this reason, STPNOC’s extension request is denied. STPNOC may pursue an appeal of the Board’s decision in LBP-09-21 under section 2.311(d) after the Board has ruled on the balance of Intervenor’s pending contentions.

An additional matter merits special mention. STPNOC’s request encompasses seven supplemental contentions recently filed by Intervenor and currently pending before the Board.¹¹ STPNOC specifically requests that it be permitted to file any section 2.311(d) appeal following the Board’s decision on the last of the *now-pending* contentions, which would include the Board’s decision (or decisions) on Intervenor’s new contentions. As a general matter, contentions filed after the initial petition are not subject to appeal pursuant to section 2.311. Rather, challenges to Board rulings on

¹⁰ *Id.* at 208 (emphasis added) (citing *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), ALAB-861, 25 NRC 129, 136 (1987)). In addition, we cited with approval earlier decisions of the Atomic Safety and Licensing Appeal Board involving attempted appeals of incomplete Licensing Board rulings. See *id.* at 209 & n.15 (citing *Cincinnati Gas and Electric Co.* (Wm. H. Zimmer Nuclear Power Station), ALAB-595, 11 NRC 860, 863 (1980); *Detroit Edison Co.* (Greenwood Energy Center, Units 2 and 3), ALAB-472, 7 NRC 570 (1978)). In those cases, the Appeal Board declined to entertain appeals by license applicants challenging partial Board rulings. In both cases, the Licensing Boards had not yet ruled on proposed contentions.

¹¹ See *Intervenor’s Contentions Regarding Applicant’s Submittal Under 10 C.F.R. § 52.80 and 10 C.F.R. § 50.54(hh)(2)* (Aug. 14, 2009). This filing, which is based on a May 2009 supplement to STPNOC’s COL application, contains protected information, and was filed with the Board pursuant to a protective order governing such information. See Memorandum and Order (Protective Order Governing the Disclosure of Protected Information)(July 1, 2009)(unpublished)(providing for access to the subject material, and setting a schedule for submission of new contentions and responses thereto)(Protective Order).

late-filed contentions normally fall under our rules for interlocutory review.¹² In this case, however, we are presented with an unusual situation. Here, Intervenors filed new contentions based on a supplement to the COL application, in advance of a full Board ruling on the original contentions.¹³ Hence, those new contentions remain pending, along with the original nine contentions that the Board has not yet addressed. In these circumstances, no appeal under section 2.311 lies until the Board acts on all contentions, both the original and the newly-filed ones. This understanding of our appellate jurisdiction under section 2.311 promotes judicial economy and efficiency by permitting the filing of a single appeal, rather than piecemeal challenges, addressing the Board's rulings on all pending contentions.

In short, now that we have clarified how Section 2.311 applies in the unusual setting here, there is no reason to extend the appeal deadline, as STPNOC requests. That deadline has not yet arrived.

¹² See, e.g., *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-06-24, 64 NRC 111 (2006)(regarding appeal of LBP-06-11); *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-01-1, 53 NRC 1 (2001); 10 C.F.R. § 2.341(f).

¹³ See LBP-09-21, 70 NRC ___ (slip op. at 8-11 & n.59). See *generally* Protective Order.

CONCLUSION

For the reasons set forth above, STPNOC's Extension Request is *denied*. Consistent with this opinion, an appeal filed by STPNOC pursuant to 10 C.F.R. § 2.311(d)(1) will be considered timely if it is filed within ten days of the final Board ruling on the admissibility of all contentions that are currently pending in this matter.

IT IS SO ORDERED.

For the Commission

[SEAL]

/RA/

Annette L. Vietti-Cook
Secretary of the Commission

Dated at Rockville, Maryland,
this 23rd day of September, 2009