

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Allison M. Macfarlane, Chairman
Kristine L. Svinicki
George Apostolakis
William D. Magwood, IV
William C. Ostendorff

In the Matter of)

NEXTERA ENERGY SEABROOK, LLC)

(Seabrook Station, Unit 1))

) Docket No. 50-443-LR
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CLI-13-03

MEMORANDUM AND ORDER

Friends of the Coast and New England Coalition (collectively, Friends/NEC) seek review of the Licensing Board's denial of their motion for leave to file a new contention regarding concrete degradation.¹ For the reasons set forth below, we deny, without prejudice, Friends/NEC's petition for interlocutory review.

I. BACKGROUND

In October 2010, Friends/NEC requested a hearing concerning NextEra Energy Seabrook, LLC's (NextEra) application to renew the operating license for Seabrook Station,

¹ *New England Coalition and Friends of the Coast's Notice of Appeal of ASLBP No. 10-906-02-LR-BD01 to NextEra Energy Seabrook, LLC* (Nov. 19, 2012); *Brief in Support of the New England Coalition and Friends of the Coast Appeal of ASLBP No. 10-906-02-LR-BD01 (Denying Motion for Leave to File New Contention)* (Nov. 19, 2012) (Petition).

Unit 1, submitting four proposed contentions.² The Board granted Friends/NEC's hearing request and admitted limited versions of three contentions.³ On appeal, we affirmed in part and reversed in part the Board's ruling.⁴ Our decision left portions of one Friends/NEC contention for litigation, Contention 4B/4D, an environmental contention concerning various aspects of the severe accident mitigation alternatives analysis.⁵ Contention 4B/4D remains pending before the Board.

In the fall of 2010, NextEra discovered cracks in safety-related concrete structures at Seabrook that were caused when alkalis and silica in the concrete combined with water to form an expanding gel.⁶ The contention now before us challenges the adequacy of NextEra's program for monitoring the effects of this "alkali-silica reaction."⁷ NextEra submitted the

² *Friends of the Coast and New England Coalition Petition for Leave to Intervene, Request for Hearing, and Admission of Contentions* (dated Oct. 20, 2010; filed Oct. 21, 2010).

³ LBP-11-2, 73 NRC 28, 79 (2011).

⁴ CLI-12-5, 75 NRC __ (Mar. 8, 2012) (slip op.). Beyond Nuclear, the Seacoast Anti-Pollution League, and the New Hampshire Sierra Club (collectively, Beyond Nuclear) jointly filed a request for hearing with one proposed contention, which the Board granted. LBP-11-2, 73 NRC at 79. We reversed the Board's ruling with regard to Beyond Nuclear's hearing request. See CLI-12-5, 75 NRC at __ (slip op. at 55), *petition for review denied, Beyond Nuclear v. NRC*, 704 F.3d 12 (1st Cir. 2013).

⁵ CLI-12-5, 75 NRC at __ (slip op. at 33, 36) (declining to disturb the Board's admission of subparts 4B and 4D of Contention 4).

⁶ See *NextEra's Answer Opposing Admission of Contention Concerning Alkali-Silica Reaction* (Sept. 21, 2012), at 2.

⁷ See *Friends of the Coast and New England Coalition's Motion for Leave to File a New Contention Concerning NextEra Energy Seabrook's Amendment of its Aging Management Program for Safety-Related Concrete Structures* (Aug. 27, 2012) (corrected Sept. 19, 2012; supplemented Sept. 21, 2012).

program as a supplement to its license renewal application on May 16, 2012.⁸

The Board rejected the new contention on timeliness grounds, finding that it should have been filed at least two months before Friends/NEC submitted it on August 27, 2012.⁹

Friends/NEC ask us to reverse the Board's decision and admit the contention, asserting that it was timely filed and that it raises a genuine dispute with NextEra's license renewal application.¹⁰

For their part, NextEra and the Staff argue, and we agree, that Friends/NEC's appeal does not meet the standards for interlocutory review and must await the end of the case.¹¹

⁸ See SBK-L-12101, Seabrook Station, NextEra Energy Seabrook License Renewal Application, Structures Monitoring Program Supplement-Alkali-Silica Reaction (ASR) Monitoring (May 16, 2012) (ADAMS accession no. ML12142A323). NextEra developed its May 16, 2012 supplement to augment its proposed license renewal Structures Monitoring Program. *Id.* at 1. The Staff has issued several requests for additional information as it reviews NextEra's plans to manage the effects of alkali-silica reaction cracking during the twenty-year license renewal period. *NRC Staff's Answer to Intervenor's Motion for Leave to File New Contention Concerning Safety-Related Concrete Structures* (Sept. 21, 2012), at 3-7 (Staff Answer to Motion). As a separate matter, the Staff is reviewing the extent of cracking to determine its impact on the safety of current operations. *NRC Staff's Answer to Intervenor's Supplement to Motion for Leave to File a New Contention Concerning Safety-Related Concrete Structures* (Oct. 16, 2012), at 4-6 (Staff Answer to Motion Supplement).

⁹ See Memorandum and Order (Denying Motion for Leave to File New Contention) (Nov. 8, 2012), at 3-6 (unpublished).

¹⁰ See Petition at 6. Friends/NEC further request us to issue a "clarifying opinion providing concise workable definitions" of "sufficient basis," "material dispute," and "new information" as they are used in NRC regulations and case law. *Id.* Because we deny the petition for interlocutory review without prejudice, we need not address Friends/NEC's request at this time.

¹¹ *NextEra's Answer Opposing New England Coalition and Friends of the Coast's Notice of Appeal* (Dec. 14, 2012), at 1 (NextEra Answer to Petition); *NRC Staff Answer to FOTC/NEC Appeal* (Dec. 14, 2012), at 1 (Staff Answer to Petition). NextEra and the Staff alternatively assert that Friends/NEC have not shown that the Board erred or abused its discretion in rejecting the contention. NextEra Answer to Petition at 1; Staff Answer to Petition at 1. We do not reach those arguments today.

II. DISCUSSION

Friends/NEC's petition is styled as a 10 C.F.R. § 2.311 notice of appeal and supporting brief. Appeals of contention admissibility rulings under section 2.311, however, are available in two limited circumstances—(1) upon the denial of a petition to intervene and/or request for hearing, on the question of whether it should have been granted; or (2) upon the grant of a petition to intervene and/or request for hearing, on the question of whether it should have been wholly denied.¹² Friends/NEC's request for hearing was granted, and they currently have an admitted contention pending before the Board. Consequently, their appeal does not lie under section 2.311, but rather under section 2.341(f)(2), which governs petitions for interlocutory review, including board rulings on new contentions.¹³ We therefore construe Friends/NEC's appeal as a petition for interlocutory review under section 2.341(f)(2).

Because they appealed under section 2.311, Friends/NEC did not address the standards for interlocutory review under section 2.341(f)(2). Even if they had addressed these standards, the record does not indicate that interlocutory review is warranted under the circumstances presented here. Interlocutory review under this section is discretionary, and we will grant it only upon a showing that the issue for which 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

¹² 10 C.F.R. § 2.311(c), (d)(1); *South Texas Project Nuclear Operating Co.* (South Texas Project, Units 3 and 4), CLI-10-16, 71 NRC 486, 489 (2010).

¹³ See *South Texas*, CLI-10-16, 71 NRC at 490.

- (ii) Affects the basic structure of the proceeding in a pervasive or unusual manner.¹⁴

These criteria, as well as Commission precedent, reflect disfavor of piecemeal review of licensing board rulings during ongoing proceedings.¹⁵ We will address such rulings after a licensing board has issued a final decision in a case, barring “extraordinary circumstances.”¹⁶ As a general matter, we do not consider contention admissibility decisions to be extraordinary, particularly where, as here, the petitioner has been admitted as a party and has other contentions pending.¹⁷ Friends/NEC will have an opportunity to challenge the Board’s ruling on their new contention, as well as any other interlocutory Board decisions, at the end of the case, and we find nothing to suggest that waiting until that time will threaten Friends/NEC with immediate and serious irreparable impact or affect the basic structure of the proceeding in a pervasive or unusual manner.¹⁸

¹⁴ 10 C.F.R. § 2.341(f)(2).

¹⁵ Compare 10 C.F.R. § 2.311(a), (c), (d), with 10 C.F.R. § 2.341(a), (b). See also *Strata Energy, Inc.* (Ross In Situ Uranium Recovery Project), CLI-12-12, 75 NRC __, __ (May 11, 2012) (slip op. at 3); *Exelon Generation Co., LLC* (Early Site Permit for the Clinton ESP Site), CLI-04-31, 60 NRC 461, 465-66 (2004); Final Rule, Amendments to Adjudicatory Process Rules and Related Requirements, 77 Fed. Reg. 46,562, 46,565 (Aug. 3, 2012); Final Rule, Changes to Adjudicatory Process, 69 Fed. Reg. 2182, 2187, 2225 (Jan. 14, 2004).

¹⁶ See, e.g., *Entergy Nuclear Operations, Inc.* (Indian Point, Units 2 and 3), CLI-10-30, 72 NRC 564, 568-69 (2010); *South Texas*, CLI-10-16, 71 NRC at 489-90.

¹⁷ *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-00-2, 51 NRC 77, 80 (2000). See also *Crow Butte Resources, Inc.* (In Situ Leach Facility, Crawford, Nebraska), CLI-09-9, 69 NRC 331, 365 (2009); *Clinton*, CLI-04-31, 60 NRC at 466-67.

¹⁸ Friends/NEC’s perceived harm is not of a kind that cannot be addressed later on appeal. Cf. *Duke Energy Corp.* (Catawba Nuclear Station, Units 1 and 2), CLI-04-6, 59 NRC 62, 71 (2004) (“Review at the end of the case would be meaningless because the Commission cannot later, on appeal from a final Board decision, rectify an erroneous disclosure order. A bell cannot (continued. . .)

That said, we do not diminish the seriousness with which the agency is reviewing the effect of alkali-silica reaction on concrete structures, particularly at Seabrook. The Staff has recognized that this “is an important issue at Seabrook, one which the Staff continues to thoroughly review.”¹⁹ Through its oversight of Seabrook’s ongoing operations, the Staff is working to ensure that the plant can operate safely now and through the end of its original operating license term.²⁰ And through its review of NextEra’s license renewal application, the Staff is working to determine whether the effects of aging, including those related to alkali-silica reaction, can be managed safely if NextEra’s operating license for Seabrook is renewed.²¹

(. . .continued)

be unrun. ‘Because the adverse impact of that release would occur *now*, the alleged harm is immediate.’” (quoting *Georgia Power Co. (Vogtle Electric Generating Plant, Units 1 and 2)*, CLI-94-5, 39 NRC 190, 193 (1994)) (emphasis in original)); *Duke Cogema Stone & Webster (Savannah River Mixed Oxide Fuel Fabrication Facility)*, CLI-02-7, 55 NRC 205, 213-14 (2002) (“We typically turn down petitions to review interlocutory board orders summarily, without engaging in extensive merits discussion. Here, though, . . . [the] petition questions the very structure of our announced two-step licensing process. We find this question suitable for our consideration.”).

¹⁹ Staff Answer to Petition at 2. See also Staff Answer to Motion at 2. In addition, the Staff has issued an information notice to alert other applicants and licensees to the possibility of concrete degradation from alkali-silica reaction. See generally NRC Information Notice 2011-20: Concrete Degradation by Alkali-Silica Reaction (Nov. 18, 2011) (ML112241029).

²⁰ See Staff Answer to Motion Supplement at 4-6.

²¹ See Staff Answer to Motion at 3-7.

III. CONCLUSION

For the reasons set forth above, we *deny* the petition for interlocutory review without prejudice. Friends/NEC may challenge the Board's rejection of their new contention at the end of the case.

IT IS SO ORDERED.

For the Commission

NRC SEAL

/RA/

Annette L. Vietti-Cook
Secretary of the Commission

Dated at Rockville, Maryland,
this 20th day of February, 2013.