UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED 11/10/04

COMMISSIONERS

SERVED 11/10/04

Nils J. Diaz, Chairman
Edward McGaffigan, Jr.
Jeffrey S. Merrifield

In the Matter of	)	
EXELON GENERATION COMPANY, LLC	)	Docket No. 52-007-ESP
(Early Site Permit for the Clinton ESP Site)	)	

CLI-04-31

MEMORANDUM AND ORDER

Intervenors in this early site permit proceeding seek interlocutory review of a Licensing Board order excluding "energy efficiency" issues from the "clean energy alternatives" contention that the Board admitted for litigation.[1] Intervenors claim that the Board's decision is inconsistent with NEPA's requirement that the Commission and Exelon "rigorously explore and objectively evaluate" all reasonable alternatives to Exelon's proposed new Clinton 2 nuclear power plant. They also assert that the Board reached clearly erroneous factual conclusions regarding Exelon's and its affiliates' collective ability to implement energy efficiency efforts.[2] Although intervenors seek interlocutory review under 10 C.F.R. § 2.341(f), they appear to appeal alternatively under 10 C.F.R. § 2.311 as well.[3]

[1] LBP-04-17, 60 NRC ___ (Aug. 6, 2004).

[2] Intervenors' Petition for Interlocutory Review, dated Aug. 23, 2004, at 1-2.

[3] *Id.* at 13-14. *But see* Intervenors' Reply Brief, dated Sept. 7, 2004, at 2 (Section "2.341(a) specifically provides that where, as here, a party is not appealing under Section

(continued...)

Intervenors claim that we should waive our usual objections to interlocutory review and consider their appeal because we would thereby avoid unnecessary delay and the waste of the NRC's and the parties' resources.[4] Although intervenors do not expressly say so, they appear to raise this as a claim of "immediate and serious irreparable impact" under 10 C.F.R. § 2.341(f)(2)(i). Intervenors also maintain, citing 10 C.F.R. § 2.341(f)(2)(ii), that the Board's ruling will have "a pervasive effect" on the proceeding, given the interrelated nature of the excluded "energy efficiency" issue and the admitted "renewable energy alternatives" issue.[5] And they assert that the impact of the issue's exclusion cannot "as a practical matter ... be alleviated" by a petition for review after the Board's final decision[6] because reversal at that point would require a separate new analysis of all clean energy alternatives.[7]

In addition, invoking 10 C.F.R. § 2.341(f)(1), intervenors argue that their petition presents a "significant and novel legal issue" whose resolution would materially advance the orderly disposition of this proceeding.[8] That issue, say intervenors, is "whether NEPA requires the consideration of reasonable alternatives such as energy efficiency in situations where the project applicant is operating in a partially deregulated electric services market."[9]

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[3](...continued)
2.311, review of a Board decision should proceed under Section 2.341").

[4] Petition for Interlocutory Review at 2.

[5] *Id.* at 12-13.

[6] *See* 10 C.F.R. § 2.341(f)(2)(i).

[7] Petition for Interlocutory Review at 13.

[8] *Id.*

[9] *Id.* at 13-14.

Section 2.341(f) is unhelpful to intervenors. It is part of our new Part 2, but "essentially restates" our prior interlocutory appeal practice.[10] We continue to disfavor such appeals,[11] largely due to our general unwillingness to engage in "piecemeal interference in ongoing Licensing Board proceedings."[12] Thus, our new section 2.341(f) authorizes petitions for interlocutory review in three circumstances only: (1) where the Board decision works "immediate and serious irreparable impact;" (2) where it "affects the basic structure of the proceeding in a pervasive or unusual manner;" or (3) where the Board refers a ruling, or certifies a question, that "raises significant and novel legal or policy issues."[13] In addition, "we sometimes take interlocutory review as an exercise of our inherent supervisory authority over agency adjudicatory proceedings."[14] But here the Board's routine ruling on contention admissibility provides no occasion for us to invoke our "inherent supervisory authority." And intervenors' petition for review plainly does not satisfy section 2.341(f)'s interlocutory review standards.

Additional potential costs associated with delaying Commission consideration of intervenors' NEPA argument until after a final Board decision do not amount to a "serious irreparable impact" warranting immediate Commission review. Such costs are no different in

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[10] *See* Final Rule, "Changes to Adjudicatory Process," 69 Fed. Reg. 2181, 2225 (Jan. 14, 2004).

[11] *See*, *e.g.*, *Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), CLI-02-9, 55 NRC 245, 248 (2002).

[12] *Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), CLI-02-7, 55 NRC 205, 213 (2002).

[13] *See* 10 C.F.R. § 2.341(f)(1), (2).

[14] *Duke Energy Corp.* (Catawaba Nuclear Station, Units 1 and 2), CLI-04-21, 60 NRC 21, 26-27 (2004). *See also Hydro Res., Inc.* (2929 Coors Road Suite 101, Albuquerque, NM 87120), CLI-99-1, 49 NRC 1, 2 (1999); *North Atlantic Energy Serv. Corp.* (Seabrook Station, Unit 1), CLI-98-18 , 48 NRC 129, 130 (1998); *Statement of Policy on Conduct of Adjudicatory Proceedings*, CLI-98-12, 48 NRC 18, 20 (1998).

kind from the financial burdens (*i.e.*, monetary "impact") that in past cases we repeatedly have found insufficient to justify immediate review of interlocutory Board rulings on contention admissibility.[15] The possibility that later appellate review will result in a reversal, and the prospect of extra litigating costs, are inevitable byproducts of our doctrine disfavoring interlocutory, piecemeal appeals:

> We have noted ... the obvious fact that once the hearing is held, the time and money expended in the trial of an issue cannot be recouped by any appellate action.... The same is true, however, any time a contention is admitted over a party's objections and the hearing proceeds. The added delay and expense occasioned by the admission of [a] contention – even if erroneous – ... does not alone distinguish this case so as to warrant interlocutory review.[16]

While the Appeal Board made this comment in connection with an effort to appeal a Board decision admitting a contention, the same rationale covers attempted interlocutory appeals of contention denials.[17] Interlocutory rulings on contentions, we have said, ordinarily must "abide the end of the case" before undergoing appellate review.[18]

As for the other ground for interlocutory review under section 2.341(f)(2) -- permitting appeals concerning a proceeding's "basic structure" -- the "mere expansion of issues [such as intervenors seek here] rarely, if ever, has been found to affect the basic structure of a proceeding in a pervasive or unusual manner so as to warrant interlocutory review."[19] Claims

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[15] *See*, *e.g.*, *Connecticut Yankee Atomic Power Co.* (Haddam Neck Plant), CLI-01-25, 54 NRC 368, 374 & n.13 (2001), and cited cases; *Virginia Elec. & Power Co.* (North Anna Power Station, Units 1 and 2), ALAB-741, 18 NRC 371, 378 n.11 (1983).

[16] *Cleveland Elec. Illuminating Co.* (Perry Nuclear Power Plant, Units 1 and 2), ALAB-675, 15 NRC 1105, 1114 (1982) (citation, brackets and internal quotation marks omitted).

[17] *See*, *e.g.*, *Private Fuel Storage, LLC* (Independent Spent Fuel Storage Installation), CLI-00-2, 51 NRC 77, 80 (2000) (internal quotation marks omitted).

[18] *Id.*

[19] *Sacramento Mun. Util. Dist.* (Rancho Seco Nuclear Generating Station), CLI-94-2, 39 NRC 91, 93-94 (1994).

that a Board has wrongly rejected a contention, or portions of a contention, are commonplace; such claims cannot be said to affect a proceeding's "basic structure" within the meaning of section 2.341(f). Our "basic structure" standard comprehends disputes over the very nature of the hearing in a particular proceeding -- for example, whether a licensing hearing should proceed in one step or in two[20] -- not to routine arguments over admitting particular contentions. Under longstanding NRC jurisprudence, mere potential legal error does not justify review.[21] Indeed, we have declined interlocutory review even where we concluded that "aspects of the Licensing Board's decision ... appear highly questionable."[22]

Nor, without a good deal more, does the significance or novelty of a Board ruling render it suitable for interlocutory review.[23] Section 2.341(f)(1) does not say that the significance or novelty of issues independently justifies discretionary interlocutory Commission review. Rather, the provision says that the Commission will consider such issues when the *Board* refers one of its rulings, or certifies an issue, as warranting immediate Commission attention. Here, the Board has issued no referral or certification. In considering whether to take up issues in cases at an interlocutory stage, we give weight to the Board's view.[24]

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[20] *See Savannah River Mixed Oxide Fuel Fabrication Facility*, CLI-02-7, 55 NRC at 214 & n.15.

[21] *See Hydro Resources, Inc.* (P.O. Box 15910, Rio Rancho, NM 87174), CLI-98-8, 47 NRC 314, 320 & n.4 (1998).

[22] *Georgia Power Co.* (Vogtle Elec. Generating Plant, Units 1 and 2), CLI-94-15, 40 NRC 319, 321 (1994). *See also id.* at 321 ("we do not sit simply to correct erroneous interlocutory licensing board rulings").

[23] *See*, *e.g.*, *Hydro Resources*, CLI-98-8, 47 NRC at 320 (acknowledging the "significan[ce]" of certain rulings by the Licensing Board, but nonetheless concluding that "the mere issuance of an important ruling does not, without more, merit interlocutory review").

[24] *See Private Fuel Storage, LLC*, CLI-00-13, 52 NRC 23, 28-29 (2000).

Finally, intervenors' desultory reference to section 2.311 is unavailing. That provision does allow interlocutory appeals as of right, but in three situations only: (1) where a petitioner for intervention challenges a Board decision "denying" a petition to intervene in its entirety;[25] (2) where a party argues that, rather than granting a petition to intervene, the Board should have "wholly denied" it;[26] and (3) where a party claims that the Board's selection of the appropriate hearing procedure was in "clear contravention" of Commission rules.[27] None of these three scenarios describes the procedural posture of the instant case. Petitioners' intervention request was granted, not denied; no one claims that the petition should have been "wholly denied;" and there is no current dispute over the Board's selection of the hearing procedure.

For all the reasons set forth above, we deny petitioners' request for interlocutory appeal. We express no view on the merits of petitioners' claim that the Board incorrectly excluded their "energy efficiency" issues.

IT IS SO ORDERED.

For the Commission

/RA/

Annette L. Vietti-Cook
Secretary of the Commission

Dated at Rockville, MD
this 10th day November, 2004.

[25] 10 C.F.R. § 2.711(b).

[26] 10 C.F.R. § 2.711(c).

[27] 10 C.F.R. § 2.711(d).