UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

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

ENTERGY NUCLEAR OPERATIONS, INC.	)	
	)	Docket Nos. 50-247-LR and 50-286-LR
(Indian Point Nuclear Generating Units 2 and 3)	)	

CLI-09-06

MEMORANDUM AND ORDER

Before us today is Entergy Nuclear Operations, Inc.'s (Entergy) petition for interlocutory review[1] of the Atomic Safety and Licensing Board's December 18, 2008 Memorandum and Order[2] denying reconsideration of its July 31, 2008 decision[3] to admit for litigation Consolidated Contention Riverkeeper EC-3/Clearwater EC-1 ("Consolidated Contention"). In that contention, two intervenors (Riverkeeper, Inc. and Hudson River Sloop Clearwater, Inc.) assert that Entergy's license renewal application[4] fails to assess adequately the significance of new information concerning the potential environmental impacts of radionuclide leaks from the spent

[1] *Entergy's Petition for Interlocutory Review of Atomic Safety and Licensing Board Decision Admitting Consolidated Riverkeeper EC-3/Clearwater EC-1* (Jan. 7, 2009) (Petition for Interlocutory Review).

[2] Memorandum and Order (Authorizing Interested Governmental Entities to Participate in this Proceeding) (Dec. 18, 2008) (unpublished) (December 18th Decision).

[3] LBP-08-13, 68 NRC ___ (July 31, 2008) (slip op.).

[4] On April 23, 2007, Entergy filed an application to renew the operating licenses for Indian Point Units 2 and 3 for an additional twenty-year period.

fuel pools at the Indian Point facility.[5] Riverkeeper, Inc. filed an Answer opposing Entergy's petition,[6] and the NRC Staff filed an Answer supporting the petition.[7] Entergy subsequently filed a Reply to Riverkeeper's Answer.[8] We deny the petition.

I. BACKGROUND

Entergy claims that its Petition for Interlocutory Review satisfies both of the two independent interlocutory review standards set forth in 10 C.F.R. § 2.341(f)(2)(i) and (ii) because the litigation of the Consolidated Contention will both (i) cause Entergy immediate and serious irreparable harm, and (ii) affect the basic structure of this proceeding in a pervasive and unusual manner. Regarding the first criterion, Entergy asserts that the contention will be expensive and time-consuming to litigate and will consequently delay the resolution of the proceeding. According to Entergy, if the Board's admissibility ruling stands, then Entergy would be required to research and identify thousands of documents relevant to the Consolidated Contention (at least three times as many documents as must be disclosed for any other contention),[9] and if the Board grants a still pending motion to apply Subpart G procedures, then

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[5] The Consolidated Contention is a combination of Riverkeeper, Inc.'s Contention EC-3 and Hudson River Sloop Clearwater, Inc.'s Contention EC-1. *See* LBP-08-13, 68 NRC at ___ (July 31, 2008) (slip op. at 187-88, 192, 228); December 18th Decision at 12-16.

[6] *Riverkeeper, Inc.'s Answer in Opposition to Entergy's Petition for Interlocutory Review of the Atomic Safety and Licensing Board Decision Admitting Consolidated Contention Riverkeeper EC-3/Clearwater EC-1* (Jan. 20, 2009).

[7] *NRC Staff's Answer in Support of Entergy's Petition for Interlocutory Review of Atomic Safety and Licensing Board's Decision Admitting Consolidated Contention Riverkeeper EC-3/Clearwater EC-1* (Jan. 21, 2009) (Staff Answer).

[8] *Entergy's Reply to Riverkeeper's Answer Opposing Interlocutory Appeal of Licensing Board Admission of Consolidated Contention* (Jan. 26, 2009).

[9] Petition for Interlocutory Review at 2, 14 & n.58.

Entergy could also be subject to depositions, interrogatories and other discovery obligations.[10] Regarding the second criterion, Entergy contends that the Board's imposition of "duplicative or unnecessary litigation steps" fundamentally affects the proceeding's basic structure.[11]

In the alternative, Entergy requests that, if its petition for interlocutory review is denied, we nonetheless exercise our discretion to review the admission of the Consolidated Contention as an exercise of our inherent supervisory authority over adjudications.[12]

II. DISCUSSION

The Commission may, in its discretion, grant interlocutory review at the request of a party. Pursuant to 10 C.F.R. § 2.341(f)(2), the petition for interlocutory review will be granted only if the party demonstrates that the issue for which the party seeks interlocutory review:

> (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
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> (ii) Affects the basic structure of the proceeding in a pervasive or unusual manner.[13]

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[10] *Id.* at 2, 13-14. In a separate decision, the Board deferred ruling upon a motion by three intervenors to apply the procedural rules found in 10 C.F.R. pt. 2, subpart G. Memorandum and Order (Addressing Requests that the Proceeding be Conducted Pursuant to Subpart G) (Dec. 18, 2008) (unpublished). The Board directed the parties to begin mandatory discovery as outlined in 10 C.F.R. § 2.336. However, pending our ruling today, the Licensing Board granted the parties an extension of time to certify completion of initial and supplemental mandatory disclosures on the Consolidated Contention. Order (Granting Consent Motion Regarding Mandatory Disclosures) (Jan. 30, 2009) (unpublished).

[11] Petition for Interlocutory Review at 13.

[12] *Id.* at 2, 14-16.

[13] Outside the context of petitions for interlocutory review, the Commission may also take interlocutory review of questions or rulings that a licensing board either refers or certifies to the Commission under 10 C.F.R. §§ 2.319(l) or 2.323(f), respectively. *See* 10 C.F.R. § 2.341(f)(1). There has been no referral or certification here.

As we have repeatedly indicated, we grant such petitions only under "extraordinary circumstances."[14]

A. Petition for Interlocutory Review

Entergy seeks to distinguish two different lines of Commission precedent that cut against its petition for interlocutory review. First, our decisions have held repeatedly that increased litigation delay and expense do not justify interlocutory review of an admissibility decision.[15] Second, absent highly unusual circumstances, we consistently have declined to conduct interlocutory review of contention admissibility decisions.[16] In support of its view that interlocutory review nonetheless is appropriate here, Entergy points to two examples where the

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[14] *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-06-24, 64 NRC 111, 119 & n.44 (2006); *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-01-1, 53 NRC 1, 5 (2001); *Safety Light Corp.* (Bloomsburg Site Decontamination), CLI-92-9, 35 NRC 156, 158 (1994).

[15] *Exelon Generation Co., LLC* (Early Site Permit for the Clinton ESP Site), CLI-04-31, 60 NRC 461, 466 (2004), quoting *Cleveland Electric Illuminating Co.* (Perry Nuclear Power Plant, Units 1 and 2), ALAB-675, 15 NRC 1105, 1114 (1982). *See also Sequoyah Fuels Corp.* (Gore, Oklahoma Site), CLI-94-11, 40 NRC 55, 61 (1994):

> It is well established in Commission jurisprudence that the mere commitment of resources to a hearing that may later prove to have been unnecessary does not constitute sufficient grounds for an interlocutory review of a Licensing Board order. . . . Nor may a party obtain interlocutory review merely by asserting potential delay and increased expense attributable to an allegedly erroneous ruling by the Licensing Board.

[16] *See*, *e.g.*, *Louisiana Energy Services, L.P.* (National Enrichment Facility), CLI-05-21, 62 NRC 538, 539 (2005) ("'[R]outine ruling[s] on contention admissibility' are usually not occasions to exercise our authority to step into ongoing Licensing Board proceedings and undertake interlocutory review" (quoting Clinton, CLI-04-31, 60 NRC at 466)); *Sacramento Municipal Utility District* (Rancho Seco Nuclear Generating Station), CLI-94-2, 39 NRC 91, 93-94 (1994) ("The mere expansion of issues 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").

Commission or the now defunct Atomic Safety and Licensing Appeal Board indicated it might, under appropriate circumstances, still conduct an interlocutory review despite these two lines of precedent.[17] Neither example pertains here.

1. *"Immediate and Serious Irreparable Impact"*

In support of its argument that admission of the Consolidated Contention would cause "immediate and serious irreparable harm," Entergy relies on a 1973 Appeal Board decision (*Zion*) for the proposition that interlocutory review of a Licensing Board decision may be warranted where that decision threatens to impose "truly exceptional delay or expense."[18] There, the Appeal Board dismissed a licensing board referral of an order quashing a subpoena. The Appeal Board concluded that the referral had failed to satisfy the standards applicable to such referrals – including whether prompt appellate review "is necessary to prevent detriment to the public interest or unusual delay or expense."[19] The phrase that Entergy stresses – "truly exceptional delay or expense" – nowhere appeared in our procedural rules at that time (nor

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[17] Petition for Interlocutory Review at 4-6.

[18] *Id.* at 5, quoting *Commonwealth Edison Co.* (Zion Station, Units 1 and 2), ALAB-116, 6 AEC 258, 259 (1973).

[19] *Zion*, ALAB-116, 6 AEC at 258, quoting 10 C.F.R. § 2.730(f) (1973) (rescinded). When we abolished the Appeal Board in 1991 and established a new appellate structure for reviewing presiding officers' decisions, we "codified in 10 C.F.R. § 2.786(g) the existing standard governing interlocutory review pursuant to 10 C.F.R. § 2.718(i) and 2.730(f)." *Safety Light*, CLI-92-9, 35 NRC at 158. In 2004, the Commission again revised its rules of practice, retaining this provision in the context of referrals and certifications to the Commission. 10 C.F.R. § 2.323(f)(1) (2008) (providing that the presiding officer may refer a ruling to the Commission if, in the presiding officer's judgment, "prompt decision is necessary to prevent detriment to the public interest *or unusual delay or expense*," or if the ruling involves a novel issue that "merits Commission review at the earliest opportunity"). This standard does not apply, however, to litigants' petitions for interlocutory review. Those are governed by section 2.341(f)(2). We consider *Zion* here in the context of Entergy's assertion of "immediate and serious irreparable impact" pursuant to 10 C.F.R. § 2.341(f)(2)(i). Petition for Interlocutory Review at 13.

does it appear in today's regulations). In our view, the Appeal Board simply was paraphrasing the applicable regulatory standard for referrals ("unusual delay or expense"). The decision contains no indication that the Appeal Board was attempting to supplant the interlocutory review standard.

Our boards have mentioned the phrase "truly exceptional delay or expense" in only four other published NRC adjudicatory decisions during the 36 years after *Zion* first used it.[20] None of these four decisions suggested that even "truly exceptional" expenses would meet the "irreparable impact" standard governing Entergy's petition for interlocutory review. Indeed, in each, the Licensing or Appeal Board followed the example of *Zion*, and *rejected* the argument that the particular delay or expense at issue was "truly exceptional." This uniform refusal to grant interlocutory review, even where a litigant claims "truly exceptional delay or expense," is consistent with the overwhelming weight of authority supporting the proposition that "[t]he added delay and expense occasioned by the admission of [a] contention – even if erroneous – … does not alone ... warrant interlocutory review."[21]

Three years ago, we rejected a motion for stay that was, in substance, quite similar to Entergy's petition. The NRC Staff "expresse[d] concern that the Board's legal interpretation of the term ['circulated drafts'] will drastically expand the number of documents all parties must

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[20] *Cleveland Electric Illuminating Co.* (Perry Nuclear Power Plant, Unites 1 and 2), ALAB-805, 21 NRC 596, 600 & n.16 (1985) (intervenor's inability to pay a $15,000 witness fee); *Duke Power Co.* (Catawba Nuclear Station, Units 1 and 2), ALAB-768, 19 NRC 988, 992 & n.14 (1984); *Commonwealth Edison Co.* (Zion Station, Units 1 and 2), ALAB-185, 7 AEC 240, 241 n.3 (1974); *Allied General Nuclear Services* (Barnwell Nuclear Fuel Plant), LBP-74-41, 7 AEC 1015, 1020 & n.11 (1974).

[21] *Clinton*, CLI-04-31, 60 NRC at 466, quoting *Perry*, ALAB-675, 15 NRC at 1114.

place on the [High-Level Waste Licensing Support Network], including the NRC Staff." [22] Based on that concern, the Staff claimed irreparable harm because, without a stay of the Board's order, the Staff said it would "have to review its files to consider whether documents meet the PAPO Board's test for 'circulated drafts.'"[23] We denied the Staff's motion and reiterated our longstanding view that "litigation expense, even substantial and unrecoupable cost, does not constitute irreparable injury."[24]

Indeed, we have found *no instance* in this agency's jurisprudence where either we or our boards have ruled that expenses of any kind constituted "irreparable injury." This issue arises most frequently in situations where, as here, a movant for a stay or interlocutory review claims "irreparable injury" based on excessive or unnecessary litigation expenses. We have uniformly rejected such arguments.[25]

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[22] *United States Department of Energy* (High-Level Waste Repository), CLI-05-27, 62 NRC 715, 718 (2005).

[23] *Id.*

[24] *Id. See also Kerr McGee Chemical Corp.* (West Chicago Rare Earths Facility), LBP-85-3, 21 NRC 244, 257 (1985). In *Kerr McGee*, the licensing board rejected a motion for referral to the Appeal Board, in which the Staff had argued that the unrecoverable expense it would incur in supplementing the record (as required by the Board) would constitute "immediate and irreparable harm." The supplementation at issue involved preparation of either a supplemental or a revised environmental impact statement and also a Staff position paper approving or disapproving Kerr McGee's regulatory proposal. *Id.* at 254-55.

[25] In addition to the cases already cited, *see Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Facility), CLI-02-11, 55 NRC 260, 263 (2002) (stay); *Sequoyah Fuels Corp.* (Gore, Oklahoma Site), CLI-94-9, 40 NRC 1, 6 (1994) (stay); *Metropolitan Edison Co.* (Three Mile Island Nuclear Station, Unit 1), CLI-84-17, 20 NRC 801, 804 (1984) (stay); *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), ALAB-737, 18 NRC 168, 176 (1983) (interlocutory review); *Cleveland Electric Illuminating Co.* (Perry Nuclear Power Plant, Units 1 and 2), ALAB-706, 16 NRC 1754, 1758 n.7 (1982) (interlocutory review); *Pennsylvania Power and Light Co.* (Susquehanna Steam Electric Station, Units 1 and 2), ALAB-641, 13 NRC 550, 552-53 (1981) (interlocutory review); *Allied General Nuclear Services* (Barnwell Nuclear Fuel Plant Separations Facility), ALAB-296, 2 NRC 671, 684 (1975) (stay); *Pacific Gas & Electric Co.* (continued ...)

Even were we inclined to depart from our longstanding policy, we do not find that Entergy has shown "unusual delay or expense" sufficient to demonstrate irreparable injury. In our view, Entergy has not provided the requisite factual support for its claim that it would be irreparably impacted by a "truly exceptional delay or expense."[26] Nor, as we observed above, do we see anything unusual in a litigant being required to "research, identify and disclose . . . thousands of documents" relevant to a contention,[27] or in Entergy and its employees potentially being required to undergo depositions, answer interrogatories and incur other discovery obligations.[28] Indeed, the potential for litigation expense and delay to which Entergy refers is just the kind of burden that licensees and applicants voluntarily assume when filing applications with the Commission.[29] And to the extent Entergy may be subject to unreasonable or

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(Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), LBP-02-15, 56 NRC 42, 49 (2002) (stay); *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), LBP-87-29, 26 NRC 302, 312 (1987) (interlocutory review). *See generally Consumers Power Co.* (Midland Plant, Units 1 and 2), ALAB-395, 5 NRC 772, 779 (1977) (stay; Appeal Board referred generally to irreparable financial injury despite movant's failure to plead it).

[26] A party seeking to demonstrate irreparable injury must provide factual substantiation for that claim. *See*, *e.g.*, *International Uranium (USA) Corp.* (White Mesa Uranium Mill), CLI-02-10, 55 NRC 251, 259 (2002); *Sequoyah Fuels*, CLI-94-9, 40 NRC at 7.

[27] Petition for Interlocutory Review at 14. Nor do we discern any particular significance in Entergy's assertion that the number of those documents is at least three times the number that must be disclosed regarding any other contention. *Id.* at 2, 14 & n.58.

[28] *Id.* at 2, 13-14. The Board's decision regarding the use of Subpart G procedures has not been appealed, and we take no position on the ruling here.

[29] *See Pa'ina Hawaii LLC*, CLI-06-18, 64 NRC 1, 5 (2006) ("extra expense[, . . .] work [and . . .] procedural delays . . . are normal accoutrements of any hearing process involving NEPA [and l]icense applicants at the NRC assume the risk of imposition of these additional burdens" (footnotes and internal quotation marks omitted)); *Connecticut Yankee Atomic Power Co.* (Haddam Neck Plant), CLI-01-25, 54 NRC 368, 374 (2001) ("We have . . . rejected the argument that a mere increase in the burden of litigation constitutes 'serious and irreparable' (continued ...)

burdensome discovery requests in the future, it is free to seek relief from the Board, which has ample authority to "prevent or modify unreasonable discovery demands."[30]

2. *Effect on the "basic structure of the proceeding"*

Entergy next asserts that one of our decisions in *Private Fuel Storage* authorizes interlocutory review of a Licensing Board decision "mandating duplicative or unnecessary litigating steps"[31] and thereby "fundamentally alter[ing] the nature of the proceeding."[32]

The circumstances underlying that decision differ starkly from those here. In *Private Fuel Storage*, we addressed a situation in which the appointment of a second licensing board would have delayed the rulings on the admissibility of the nine contentions assigned to the new board.[33] We ruled that delay would ensue because the new board would initially be unfamiliar with the adjudicatory record regarding those contentions and would also be unable to combine any of its nine contentions with any of the remaining eighty contentions that the first licensing board had already addressed.[34] Moreover, the appointment of a second board in *Private Fuel Storage* would have required that the new board and all litigants prepare for and participate in a

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harm"); *Consolidated Edison Co.* (Indian Point, Units 1 and 2), CLI-01-8, 53 NRC 225, 229 (2001) ("litigation inevitably results in the parties' loss of both time and money").

[30] *Sequoyah Fuels*, CLI-94-9, 40 NRC at 7.

[31] Petition for Interlocutory Review at 4-5, 13, quoting *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Facility), CLI-98-7, 47 NRC 307, 310 (1998).

[32] *Id.* at 4.

[33] The contentions in question had been considered, but not ruled upon, by the original board. *Private Fuel Storage*, CLI-98-7, 47 NRC at 311-12.

[34] *Id.*

second pre-hearing conference[35] – a truly duplicative litigation step not present here. We are instead faced merely with litigation efforts that *Entergy* considers unnecessary because they relate to a contention Entergy believes was improperly admitted. This does not "affect the basic structure of this proceeding" at all – much less in "a pervasive and unusual manner."[36]

Indeed, were we to permit litigants to successfully invoke interlocutory review based merely on an assertion that the licensing board erred in admitting (or excluding) a contention, we would be opening the floodgates to a potential deluge of interlocutory appeals from any number of participants who lose admissibility rulings.[37] This would eviscerate our longstanding policy disfavoring interlocutory appeals.[38]

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[35] *Id.* at 312.

[36] 10 C.F.R. § 2.341(f)(2)(ii).

[37] *Rancho Seco*, CLI-94-2, 39 NRC at 93-94. We do not refer here to situations in which a board denies a petition to intervene in its entirety or grants a petition to intervene that, according to an opposing litigant, should have been denied in its entirety. In those limited situations, the losing litigant has a right to Commission review under 10 C.F.R. § 2.311(b) or (c).

[38] *See*, *e.g.*, *Entergy Nuclear Operations Inc.* (Pilgrim Nuclear Power Station), CLI-07-2, 65 NRC 10, 12 (2007) ("the Commission generally disfavor[s] interlocutory, piecemeal appeals" (footnote and internal quotation marks omitted)); *Entergy Nuclear Vermont Yankee, LLC* (Vermont Yankee Nuclear Power Station), CLI-07-1, 65 NRC 1, 3 (2007) ("Our rules set a high bar for interlocutory review petitions"); *Oyster Creek*, CLI-06-24, 64 NRC at 119 (referring to "the Commission's longstanding general policy disfavor[ing] interlocutory review").

This rationale is equally dispositive of the Staff's argument that "[t]he Board's decision to admit the Consolidated Contention adversely affects this . . . proceeding in a pervasive and unusual manner, in that it would allow a party to attack the Commission's regulations adopting the GEIS [Generic Environmental Impact Statement for License Renewal Applications] [and] 10 C.F.R. § 51.53(c)(3)(i)." Staff Answer at 5-6. *See also id.* at 11. Even assuming that the Board's ruling is legal error (a matter on which we express no opinion), that fact would still be insufficient to justify interlocutory review. As we held in *Private Fuel Storage*, "[t]he possibility that an interlocutory ruling may be wrong does not in itself justify interlocutory review." *Private Fuel Storage*, CLI-01-1, 53 NRC at 5, citing *Sequoyah Fuels*, CLI-94-11, 40 NRC at 61. We further indicated in the same *Private Fuel Storage* decision that "[i]ncorrect interlocutory rulings may be reviewed, if necessary, on appeals from partial initial decisions or other final appealable (continued ...)

B. Request that the Commission Take Review *Sua Sponte*

Entergy requests that, even if we deny its petition, we nonetheless exercise our inherent supervisory authority over this proceeding to conduct interlocutory review. In essence, this constitutes a request that we consider the admissibility issue *sua sponte* (that is, on our own motion). As we explained in *Shearon Harris*, this kind of request is improper:

> [T]he Commission itself may exercise its discretion to review a licensing board's interlocutory order if the *Commission* wants to address a novel or important issue . . . . However, the Commission's decision to do so in any particular proceeding stems from its inherent supervisory authority over adjudications and *in no way implies that parties have a right to seek interlocutory review on that same ground*.[39]

Indeed, if we permitted such requests, there would be no limit to the arguments parties could present via interlocutory appeal – a result fundamentally at odds with the Commission's expressed intent to limit such appeals. And in any event, we conclude here that the Board's routine ruling on contention admissibility provides no occasion for us to invoke our inherent supervisory authority.[40]

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orders." *Private Fuel Storage*, CLI-01-1, 53 NRC at 5, citing *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-00-2, 51 NRC 77, 80 (2000).

[39] *Carolina Power & Light Co.* (Shearon Harris Nuclear Power Plant), CLI-00-11, 51 NRC 297, 299 (2000) (first emphasis in original; second emphasis added).

[40] *Clinton*, CLI-04-31, 60 NRC at 466 (internal quotation marks omitted).

III. CONCLUSION

For the reasons set forth above, Entergy's petition for interlocutory review is *denied*.

IT IS SO ORDERED.

For the Commission

(**NRC SEAL)**

/RA/

Annette L. Vietti-Cook
Secretary of the Commission

Dated at Rockville, Maryland,
this 5th day of March, 2009.