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July 11, 2001

Mark Langer, Clerk
U.S. Court of Appeals
For the District of Columbia Circuit
3rd and Constitution Avenues N.W.
Washington, D.C. 20001

SUBJECT: *Orange County v. NRC, No. 01-1073*

Dear Mr. Langer,

On behalf of Orange County, North Carolina, I am enclosing the original and four copies of a Motion to Reactivate and Consolidate and Unopposed Request to File Out of Time. This motion is related to *Orange County v. NRC,* No. 01-1246, also pending in this Court. Copies have been served on the parties.

Sincerely,

Diane Curran

Encl: As Stated
Cc. w/Encl.: Service list

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

ORANGE COUNTY, NORTH CAROLINA, Petitioner, v. UNITED STATES NUCLEAR REGULATORY COMMISSION and the UNITED STATES OF AMERICA, Respondents	)	No. 01-1073

MOTION TO REACTIVATE AND CONSOLIDATE
AND
UNOPPOSED REQUEST TO FILE OUT OF TIME

Petitioner, the Board of Commissioners of Orange County, North Carolina ("Orange County") hereby moves to reactivate this appeal, now held in abeyance, and to consolidate it with *Orange County v. NRC,* No. 01-1246, also on appeal in this Court. Consolidation and joint briefing would conserve judicial resources and achieve far greater efficiency than separate briefing, because both cases stem from the same administrative proceeding and concern the same set of facts. Moreover, the outcome of one case is dependent upon the resolution of the other.

Factual Background

This appeal and the appeal in No. 01-1246 both concern an administrative adjudication before the NRC regarding a proposed amendment to the operating license for the Shearon Harris nuclear power plant. The amendment was requested by the plant's owner, Carolina Power & Light Company ("CP&L") in late 1998.[1] In 1999, Orange County sought and obtained a hearing before the NRC's Atomic Safety and Licensing Board ("ASLB") on the proposed license amendment.

On December 21, 2000, while the administrative adjudication was still pending before the ASLB, the NRC issued a final order granting the license amendment, under the "No Significant Hazards" exception to the Atomic Energy Act's prior hearing requirement.[2] Orange County filed a petition for review of the No Significant Hazards Determination in the instant case, on the grounds that the NRC had violated its regulations and the Administrative Procedure Act by issuing the license before the conclusion of the hearing.

Subsequently, on March 1, 2001, the ASLB issued a decision in the administrative adjudication, which ruled for CP&L and terminated the administrative proceeding. LBP-

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1 CP&L has been admitted to both the instant appeal and No. 1246 as an intervenor.

2 United States Nuclear Regulatory Commission, Carolina Power & Light Company, Docket No. 50-400, Notice of Issuance of Amendment to Facility Operating License and Final Determination of No Significant Hazards Consideration (hereinafter "NSHC Order").

01-09, Memorandum and Order (Denying Request for Evidentiary Hearing and Terminating Proceeding) (hereinafter "LBP-01-09").[3]

On March 22, 2001, Orange County filed an unopposed motion to hold the instant appeal, No. 01-1073, in abeyance pending completion of the NRC's administrative review of LBP-01-09. As the County explained, while No. 01-1073 might be mooted if the NRC Commissioners were to affirm LBP-01-09 and Orange County decided not to appeal it, there are circumstances in which No. 01-1073 would not be moot. In particular, if the Court reverses LBP-01-09 and remands the case to the agency for further evidentiary proceedings, the No Significant Hazards Determination will operate to permit implementation of the license amendment, even while it is being contested on the merits in a remanded proceeding. Under such circumstances, Orange County maintains that the No Significant Hazards Determination would have to be reversed in order to ensure that the license amendment was not issued unless and until the evidentiary hearing were resolved in CP&L's favor.

In an order dated April 22, 2001, the Court granted the County's motion to hold in abeyance. The Court also ordered Orange County to file a status report at 120-day intervals, and directed the parties to file motions to govern future proceedings within 30 days of the completion of the agency proceedings.

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[3] LBP-01-09 subsequently was rendered final by CLI-01-011, in which the NRC Commissioners denied Orange County's administrative petition for review of LBP-01-09. CLI-01-11, Memorandum and Order (May 10, 2001).

On May 31, 2001, Orange County filed a Petition for Review of LBP-01-09. That appeal is *Orange County v. NRC,* No. 01-1246. The County subsequently filed a stay motion and request to expedite the case, which was denied by order dated June 29, 2001. The parties are now awaiting the issuance of a briefing schedule from the Court.

Orange County seeks to consolidate No. 01-1073 with No. 01-1246 and brief all of the issues in both cases under the briefing schedule that the Court issues for No. 01-1246.

Argument

Although there is a "dearth of guidance" regarding consolidation in the Federal Courts of Appeals, the court's interpretation of F.R.C.P. 42 is "analogous and relevant." *United States v.Tippet,* 975 F.2d 713, 716 (10th Cir. 1992). Consolidation has been ruled appropriate where cases share common facts and the outcome of one case is dependent on the other. *Santucci v. Pignatello*, 188 F.2d 643, 644 (D.C. Cir. 1951). In addition, consolidation is permitted "as a matter of convenience and economy in administration." *In Re Vitamins Antitrust Litigation,* 94 F. Supp. 2d 26, 43 (D.D.C. 2000), *citing Johnson v. Manhattan Ry.,* 289 U.S. 479, 496-97, 77 L. Ed. 1331, 53 S. Ct. 721 (1933).

Consolidation is appropriate here, for several reasons. First, consolidation of the appeals will lead to greater efficiency in the briefing and decisionmaking process, because the agency decisions on appeal in Nos. 01-1073 and 01-1246 were made in the course of the same NRC licensing proceeding and because they relate to the same set of facts. The No Significant Hazards Determination, on appeal in No. 01-1073, allowed CP&L to go

ahead with implementation of its requested license amendment before completion of the NRC's evidentiary hearing on the merits of the amendment.[4] LBP-01-09, on appeal in No. 01-1246, resolved the merits of issues disputed in the evidentiary proceeding in favor of CP&L, and terminated the proceeding. Moreover, both of these decisions were based on the same set of facts about CP&L's proposal to alter the operation and design of the Harris nuclear plant. Thus, although Nos. 01-1073 and 01-1246 concern different legal standards, greater efficiency can be achieved by addressing these cases at the same time.

In addition, consolidation is appropriate here because the outcome of one case will affect the other. As discussed above, if the NRC's evidentiary proceeding is remanded to the agency in No. 01-1246, then the validity of the No Significant Hazards Determination challenged in No. 01-1073 will immediately become a contested issue between the parties.

Moreover, consolidation of this case is unlikely to prejudice any party. The issues raised in No. 01-1073 can be addressed in the same brief that is submitted in No. 01-1246, and therefore will have no effect on the calendaring of this case. In addition, consolidation will not affect the filing of the record, because counsel for the NRC has agreed to include the few additional record documents that are pertinent only to No. 01-1073 in the Certified Index of the Record for No. 01-1246 that is due on July 16. The only possible change to the calendaring of No. 01-1246 would occur in the event that one

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[4] The No Significant Hazards Determination became final and appealable to the U.S. Court of Appeals upon issuance. *See* 42 U.S.C. 42 U.S.C. § 2239(a)(2)(A), 42 U.S.C. § 2239(b), and 10 C.F.R. § 50.92(c).

of the parties moves to dismiss No. 01-1073 once it is reactivated and consolidated with No. 01-1246. The deadline for dispositive motions in No. 01-1246 is now July 16, 2001. Orange County would not object to an extension of the schedule for filing such a motion. Such an extension would not prejudice any party other than Orange County.

Orange County also requests leave to file this motion out of time. In the course of preparing a stay motion in No. 01-1246 in the beginning of June, counsel for Orange County inadvertently overlooked the requirement in the Court's April 22 order to file any procedural motion governing No. 01-1073 within thirty days of May 10, 2001, when the agency proceeding was completed. Counsel for Orange County apologizes for this oversight. In any event, the oversight does not appear to have prejudiced any party. Counsel is authorized to state that neither the government nor CP&L opposes this request to file out of time.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

ORANGE COUNTY, NORTH CAROLINA, Petitioner, v. UNITED STATES NUCLEAR REGULATORY COMMISSION and the UNITED STATES OF AMERICA, Respondents	)	No. 01-1073

CERTIFICATE OF SERVICE

I certify that on July 11, 2001, copies of the foregoing Motion to Reactivate and Consolidate and Unopposed Request for Leave to File Out of Time were served on the following by hand delivery:

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