

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

ORANGE COUNTY, NORTH CAROLINA)
)
 Petitioner,)
)
 v.)
)
 U.S. NUCLEAR REGULATORY COMMISSION)
 and the UNITED STATES OF AMERICA,)
)
 Respondents, and)
)
 CAROLINA LIGHT & POWER COMPANY,)
)
 Intervenor-Respondent)
)

No. 01-1073.

FEDERAL RESPONDENTS' REPLY
TO PETITIONER'S RESPONSE TO FEDERAL RESPONDENTS'
MOTION TO DISMISS OR, ALTERNATIVELY TO CONTINUE IN ABEYANCE

I. Introduction.

The Federal Respondents, the U.S. Nuclear Regulatory Commission (“NRC” or “Commission”) and the United States of America, have asked this Court to dismiss this petition for review, which challenges an NRC Staff decision that a reactor license amendment involves “no significant hazards considerations.” Alternatively, we asked this Court to continue to hold this case in abeyance pending resolution of another case, No. 01-1246, involving the same parties but which challenges a different NRC decision issued on the basis of a different factual record. Orange County, North Carolina, petitioner in both cases, originally asked this Court to consolidate the two cases. We responded in opposition and, in addition, moved to dismiss this case or, alternatively, to continue to hold it in abeyance on the ground that this case is not ripe for review. We now reply to Orange County’s Opposition to our Motion to Dismiss.

II. Background.

The factual background of this matter is set out in our Response to Petitioner's Motion to Consolidate and Motion to Dismiss or, alternatively, Continue In Abeyance ("Motion to Dismiss), and we will not repeat it at any length. Suffice it to say that the Carolina Power & Light Company ("CP&L") asked the NRC for a license amendment that would enable the Shearon Harris Nuclear Power Plant, a nuclear facility owned and operated by CP&L, to store additional spent fuel at the facility. The NRC Staff published a Federal Register Notice that announced the request, informed the public how to seek a hearing on the request, advised the public that the Staff proposed to issue a finding that the amendment involved "no significant hazards considerations" ("NSHC"), and provided the public with an opportunity to comment on the proposed finding. See 64 Fed. Reg. 2237 (Jan. 13, 1999); see generally 10 C.F.R. §50.92. The Atomic Energy Act ("AEA") of 1954, as amended, allows the NRC to issue amendments on an "immediately effective" basis if the agency makes such a finding, even if a hearing has been requested. See 42 U.S.C. §2239(a)(1)(A). The amendment is subject to modification or revocation by the administrative hearing.

Orange County filed a timely request for a hearing on the proposed amendment, which was referred to the NRC's Atomic Safety and Licensing Board ("Licensing Board") for an administrative hearing. Orange County also filed comments with the NRC Staff opposing the proposed NSHC finding. While the hearing was underway, the NRC Staff reviewed Orange County's comments, made a NSHC finding, and issued the amendment. The Commission denied Orange County's petition for review of the Staff NSHC finding as barred by NRC rules. Nevertheless, the Commission directed the Staff to respond to several specific technical questions, and stayed the NSHC determination in the meantime, in order to determine "whether the Staff's NSHC determination requires further action by the Commission under its

discretionary powers.” See Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant) CLI-01-07, 53 NRC 113, 119 (2001) (“CLI-01-07”). Orange County filed this lawsuit, No. 01-1073, to challenge the Staff’s NSHC finding.

Shortly thereafter, the Licensing Board rejected Orange County’s final merits claims, terminated the hearing, and authorized the NRC Staff to issue the amendment under normal provisions of the AEA and the Commission’s regulations. Orange County unsuccessfully sought Commission review of the Licensing Board decision. See Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant), CLI-01-11, 53 NRC 370 (2001) (“CLI-01-11”). Because the Licensing Board decision superseded the Staff’s NSHC finding, it became the authority for CP&L’s authority to store additional spent fuel at the Shearon Harris facility. Orange County filed a petition for judicial review of the Licensing Board’s decision, which this Court has docketed as No. 01-1246.

III. Argument.

The sequence of decisions to be made by this Court may illuminate our argument that this case is not ripe for decision and that this Court should withhold review the Staff NSHC decision at this time. This Court will first review the “merits” decision by the Licensing Board to determine whether further hearings should be conducted or if the Board correctly ruled that no further proceedings were necessary. That case is No. 01-1246. Only if this Court determines that the Licensing Board erred in dismissing the proceeding, vacates the Licensing Board decision, and remands the case for further hearings will this Court then need to consider the NSHC issues at stake in this case, No 01-1073. If this Court upholds the Licensing Board’s decision, that ruling will end the matter and all parties agree that the NSHC issues will become moot. Therefore, this Court will not even reach the point of considering the NRC Staff’s NSHC decision if (in No. 01-1246) it does not order a resumption of the Licensing Board hearing.

Moreover, the Commission itself could in the meantime alter or reconsider the NRC Staff's NSHC determination -- about which the Commission has raised questions that it has not had occasion to answer.

In short, the need for this Court to decide this case, No. 01-1073, depends upon a "future contingent event[] that may not occur as anticipated, or indeed may not occur at all," *i.e.*, a judicial decision in Case No. 01-1246 that the NRC Licensing Board erred in dismissing the administrative hearing and a Commission decision to endorse or let stand the Staff's NSHC finding. *See New York State Electric & Gas Corp. v. FERC*, 177 F.3d 1037, 1040 (D.C. Cir. 1999), *quoting Texas v. United States*, 523 U.S. 296, 300 (1998).¹

Orange County correctly states in its response that whether a case is ripe for decision "depends on 'the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration.'" *Burlington Northern R. Co. v. Surface Transportation Board*, 75 F.3d 685, 691 (D.C. Cir. 1996), *quoting Abbott Laboratories v. Gardner*, 387 U.S. 136, 149 (1967). *See Orange County Response* at 7. But as we demonstrate below, contrary to Orange County's position this case does not meet either prong of the test.

A. The NSHC Issue Is Not "Fit" For Judicial Review.

Orange County argues that the agency's position has "crystallized" on the NSHC question. But in actuality the NRC position is tentative. The NRC Staff issued a NSHC finding, but the Commission has raised questions about it -- which are not yet resolved. As noted in our Motion to Dismiss, the Commission directed a series of significant technical questions to the Staff about its NSHC finding and the supporting rationale. Motion to Dismiss at 7; *see* CLI-01-

¹*See also Pfizer Inc. v. Shalala*, 182 F.3d 975, 978 (D.C. Cir. 1999), *quoting Ohio Forestry Ass'n v. Sierra Club*, 523 U.S. 726, 736 (1998) ("The critical fact remains that the FDA may never approve Mylan's application Therefore, 'depending on the agency's future actions ... [judicial] review now may turn out to have been unnecessary'"). *See generally Northern Indiana Public Service Co. v. FERC*, 954 F.2d 736, 738-40 (D.C. Cir. 1992); *Public Citizen Health Research Group v. Commissioner, FDA*, 740 F.2d 21, 28-34 (D.C. Cir. 1984).

07, 53 NRC at 118-19. And as we also noted in the Motion to Dismiss, the NRC Staff responded to the list. Motion to Dismiss at 7; see CLI-01-11, 53 NRC at 381, n.1. The Commission was in the process of reviewing those answers when the Licensing Board approved issuance of the amendment in a normal fashion. Accordingly, the Commission found that the Staff's NSHC finding had become "inconsequential," i.e., that it was "irrelevant" or "of no importance," to the case before it. CLI-01-11, 53 NRC at 381, n.1.² In essence, the Staff's NSHC finding had been supplanted by the Licensing Board's decision as the authority for the issuance of the amendment. Thus, the Commission quite logically saw no need to expend its resources to determine whether the Staff's NSHC finding was both correct and correctly supported. Instead, the Commission focused its scarce resources on other actions which were more pressing and more relevant to other ongoing disputes.

However, if this Court determines in Case No. 01-1246 that the Licensing Board erred in dismissing Orange County's hearing and vacates that decision, then the Staff's NSHC finding will become the sole authority for CP&L to store the additional spent fuel at the site pending completion of a renewed hearing. If and when that event occurs, the Commission will resume its review of the Staff's answers and determine whether (1) to rescind the NSHC finding and order CP&L to cease reliance on the license; (2) to affirm the Staff's NSHC finding but for different reasons; or (3) to announce that it will take no action in the matter. In two of these three cases, there will be a new Commission decision; in all three cases the Commission's decision will be based upon a new administrative record, i.e., the previous record of the Staff's initial finding and the Commission's questions, the Staff's answers, and the Commission's new decision.

²Orange County alleges that "Commission explicitly announced that it was dropping further consideration of whether to undertake review " of the NSHC finding. Response at 9. However, Orange County ignores the decision's plain language and the clear implication that the decision was based on the issue's lack of relevance.

This Court has held that when deciding if a claim is ripe for review, it “must determine ... whether the agency action is sufficiently final or definitive so that we would have no interest in postponing review until the issues are more concrete.” Midwestern Gas Transmission v. FERC, 589 F.2d 603, 618 (D.C. Cir. 1978). Here, this Court has two obvious interests in postponing judicial review of the NSHC finding. First, a decision in the companion case may well moot the need for consideration of this case. Second, as we indicated in our Motion to Dismiss, the Commission has clearly indicated that has not completed its own consideration of the Staff’s NSHC finding. See Motion to Dismiss at 7-8. Given those interests, this Court should withhold judicial review of the NSHC finding pending a decision in the companion case and subsequent Commission review, if necessary.

In its Response, Orange County alleges that “[t]here is nothing in the record to suggest that the Commission intends to revisit the issue.” Response at 9. We disagree. A review of the Commission’s comments in CLI-01-07 clearly indicates that the Commission had identified questions about the NSHC finding that needed answers. So there is, indeed, “something in the record” showing the tentative nature of the NSHC determination. Moreover, after consultation with the Commission, the undersigned attorneys are authorized to represent to this Court that the Commission, i.e., their client, will take the action specified in these pleadings. Attorneys, of course, speak for their clients in matters pending before a court.³

In addition, Orange County contends that it is “mere speculation that the decision might change in the future,” and argues that the possibility of a future change in the law does not justify this Court withholding review. See Response at 9, citing Appalachian Power Co. v. EPA,

³This Court has recognized the ability of attorneys to commit their client, at least in oral argument, on several occasions. See, e.g., Borg-Warner Protective Services, Inc. v. EEOC, 245 F.3d 831, 839 (D.C. Cir. 2001) (Williams, J. concurring); National Small Shipments Traffic Conference, Inc. v. ICC, 725 F.2d 1442, 1455 (D.C. Cir. 1984). Commitments made in written pleadings should be even more authoritative.

208 F.3d 1015 (D.C. Cir. 2000). However, as we have stated above, the Commission will, in fact, resume its review of the Staff's answers to the questions posed in CLI-01-07 if this Court orders a resumption of the NRC hearing. This is a commitment, not "mere speculation."

Moreover, Appalachian Power is inapposite to this situation. In that case, the EPA had issued formal guidance that was binding on both state agencies and companies which sought the permits those agencies issued. Thus, that guidance had a "direct and immediate impact" on the regulated parties. 208 F.3d at 1022-23. See generally Abbott Laboratories v. Gardner, 387 U.S. at 152 ("the impact of the regulations upon the petitioners is sufficiently direct and immediate as to render the issue appropriate for judicial review at this stage."). But, as we see below, the NSHC finding does not have a "direct and immediate impact" on Orange County.

B. Withholding Review Does Not "Impose A Hardship" On Petitioner.

Orange County will not suffer any hardship if this Court withholds review of the Staff's NSHC finding at this time. CP&L currently does not rely on the Staff's NSHC finding for authority to store additional spent fuel at the Shearon Harris site because the requested license amendment has received final Commission approval. Accordingly, the Staff's NSHC finding has no "direct and immediate impact" on Orange County -- in fact, it has no impact at all at this time -- and will continue to have no direct impact unless and until this Court vacates the Licensing Board decision at issue in No. 01-1246. Because the Staff's finding does not have a "direct and immediate impact," Orange County can hardly claim that it will suffer a hardship if this Court withholds review at this time.

Furthermore, even if this Court (in No. 01-1246) upholds Orange County's position that the hearing process should resume, and remands the case to the agency for further proceedings, Orange County cannot claim any immediate "hardship." This Court has already found that Orange County will not suffer any irreparable injury during temporary storage of the additional spent fuel during the litigation of this matter when it denied Orange County's Request

for a Stay. See Order of June 29, 2001, in Docket No. 01-1246. If after the conclusion of that litigation the factual situation at Shearon Harris has changed so that Orange County can show irreparable injury while the NSHC finding is being considered, Orange County will be free to seek injunctive relief from this Court. In any event, allowing a short additional time for the agency to review its own internal rulings is unlikely to prejudice Orange County if it becomes necessary for the Commission to resume deliberations on the NSHC finding. Orange County may renew its judicial challenge to the Staff's NSHC finding if the Commission lets it stand.

CONCLUSION

For the foregoing reasons, this Court should withhold judicial review of this case, No. 01-1073, at this time and either dismiss the case or, alternatively, continue it in abeyance pending resolution of No. 01-1246.

Respectfully submitted,

/RA/

RONALD SPRITZER
Attorney
Appellate Section
Environment and Natural
Resources Division
U.S. Department of Justice
Washington, D.C. 20530

JOHN F. CORDES, JR.
Solicitor

/RA/

E. LEO SLAGGIE
Deputy Solicitor

/RA/

CHARLES E. MULLINS
Senior Attorney

LEONOR TOMERO
Law Clerk

Office of the General Counsel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555
(301) 415-1606

August 13, 2001.