IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PARENTS CONCERNED ABOUT INDIAN POINT Petitioner, v. U.S. NUCLEAR REGULATORY COMMISSION and the UNITED STATES OF AMERICA Respondents.	)	No. 02-4243

RESPONDENTS' MOTION TO DISMISS

The U.S. Nuclear Regulatory Commission ("Commission" or "NRC") and the United States of America, the respondents in this case, move to dismiss the petition for review because: (1) this Court lacks jurisdiction over the challenged Commission Order under the Hobbs Act, 28 U.S.C. §2341, et seq.; and (2) this Court has held that an organization cannot represent itself without the assistance of counsel, and the petitioner, Parents Concerned About Indian Point ("Parents Concerned"), is not represented by counsel.

I. Background.

This lawsuit attempts to revive a special NRC proceeding that took place in 1982-83, and resulted in a Commission decision in 1985. That proceeding arose out of the agency's review of operations at the three nuclear power reactors at the Indian Point site, located in Westchester County, New York. See generally Consolidated Edison Co. of N.Y. (Indian Point, Units 2 and 3), LBP-83-68, 18 NRC 811, 831-44 (1983) ("LBP-83-68"); Consolidated Edison of N.Y. (Indian Point, Units 2 and 3), CLI-85-6, 21 NRC 1043, 1049 (1985) ("CLI-85-6").[1]

[1]The "LBP" heading designates decisions by the Commission's Atomic Safety and Licensing Board Panel ("Licensing Board") while "CLI" designates decisions by the Commission itself. At the time, the Indian Point units were operated Consolidated Edison of New York (Units 1 and 2) and the Power Authority of New York (Unit 3). The current licensee of both Unit 2 and Unit 3, the two units still operating at the site, is Entergy Nuclear Operations, Inc .

In September 1979, the NRC received a petition asking that it suspend operations at all three Indian Point plants.[2] The NRC's Director of the Office of Nuclear Reactor Regulation issued a "Director's Decision" that granted the petition in part. The Director revoked the operating license for Indian Point Unit 1 and ordered Consolidated Edison to prepare and submit a decommissioning plan for that facility, on the grounds that the facility had been shut down for 5 years, its exemptions from various NRC regulations had expired, and the licensee, Consolidated Edison, had no plans to bring the facility into compliance with those requirements. Consolidated Edison Co. of N.Y. (Indian Point, Units 1, 2, and 3), DD-80-5, 11 NRC 351, 353-55 (1980). However, the Director denied the request to suspend operations at Indian Point Unit 2 and Unit 3. See 11 NRC at 355-70.

After reviewing the Director's Decision, the Commission issued an unpublished order that, inter alia, established a Special Panel of the Atomic Safety and Licensing Board to hold hearings to consider the risk of continued operations at the Indian Point site. The Commission directed the Special Panel to address specific questions (as later revised), provided special procedures to be used by the Panel, and ultimately named the administrative judges to preside at the hearing. See Consolidated Edison Co. of N.Y. (Indian Point, Units 2 and 3), CLI-81-1, 13 NRC 1, 4-8 (1981); Consolidated Edison Co. of N.Y. (Indian Point, Units 2 and 3), CLI-81-23, 14 NRC 610, 613 (1981).

The Special Panel of the Licensing Board held hearings and took evidence during 1982 and early 1983. Among the issues it considered were emergency planning and evacuation at the Indian Point site. However, the Special Panel was not authorized to suspend or amend the

---

[2]The petition was filed under 10 C.F.R. §2.206, which allows members of the public to petition the Commission to "institute a proceeding . . . to modify, revoke, or suspend a license or for any other action as may be proper." Id. The petitions are referred to the Director of the appropriate NRC Staff Office who issues a "Director's Decision," which is published in the NRC issuances and designated by the prefix "DD."

Indian Point licenses or to take any other action, such as authorizing an enforcement action. On October 24, 1983, the Special Panel issued a Memorandum Decision that included both answers to the Commission's questions and "findings, conclusions, and recommendations . . .." LBP-83-68, 18 NRC at 812. The Special Panel concluded that "with the implementation of certain safety improvements . . . Indian Point Units 2 and 3 may operate with reasonable assurance that the public health and safety will be protected." LBP-83-68, 18 NRC at 811. The Commission reviewed the Special Panel's answers to its questions and other information contained in the Special Panel's decision and found that "neither shutdown of Indian Point Unit 2 or Unit 3, nor imposition of additional remedial actions beyond those implemented voluntarily by the Licensees, is warranted at this time." CLI-85-6, 21 NRC at 1049. That decision ended the proceeding that the Commission had initiated when it created the Special Panel.

II. The NRC Decision Below.

On February 13, 2002, the petitioner, Parents Concerned, filed with the Commission a "Motion to Reopen Closed Record Hearings Held in White Plains, New York, during 1982 and 1983." See Exhibit 1. The request alleged that the risk of terrorism demonstrated in the attacks on September 11, 2001, "had materially changed the probability of a direct attack on the plants." Id. The request then asked the Commission for "issuance of an order reopening the hearings as to the adequacy of the Indian Point Evacuation Plan." Id. Attached was an affidavit from an individual describing her fears of living near Indian Point after the events of September 11.

The NRC interpreted Parents Concerned's submission as a request to "reopen" the proceeding before the Special Panel of the Licensing Board, a proceeding that had closed almost two decades ago. The Commission denied the request because the 1983 Memorandum Decision, LBP-83-68, and subsequent Commission decision, CLI-85-6, had completed the

Special Panel's mission. "[O]nce the Commission has taken an action that closes a proceeding and the time for judicial review has expired, petitions to reopen a proceeding will not be entertained." See Letter from Annette Vietti-Cook, Secretary of the Commission, to Juliana FreeHand, Parents Concerned (March 28, 2002) (citation omitted).[3] See Exhibit 2. The Commission then pointed out that "[t]o allow for the reopening of a 20-year-old closed proceeding would destroy the presumption of finality that must attend the results of any agency's action." Id.

The Commission pointed out that Parents Concerned was not without a remedy.

> [I]f you believe that the Indian Point emergency evacuation plan need to be altered because of your concerns, you may file a petition for action with the NRC Staff under 10 C.F.R. §2.206. The Staff may take any number of actions, including initiating a formal proceeding. If the Staff does initiate a proceeding, you may then move to intervene in that proceeding.

Id. In effect, the Commission found that because the 1982-83 proceeding had already been closed and the time for judicial review had expired, there was no "proceeding" to reopen. Instead, the Commission invited Parents Concerned to request the initiation of an entirely new proceeding pursuant to 10 C.F.R. §2.206.

Parents Concerned did not accept the Commission's invitation. Instead, on April 29, 2002, the petitioner filed a "Motion for Reconsideration" of the March 28 denial. See Exhibit 3. First, the Motion asserted that Parents Concerned had been involved in the proceedings before the special panel. Second, the Motion for Reconsideration argued that the special panel's proceedings should be reopened because "the question of deliberate suicide terrorism backed by a worldwide network of moral and financial support was not considered" in the 1983 hearings. Motion for Reconsideration at 2. The Motion contained attachments that supported

---

[3]In the March 28 letter, the Commission stated that Parents Concerned was not a party to the proceeding. However, we have since discovered that the petitioner did participate in the proceeding before the Special Panel. See LBP-83-68, 18 NRC at 825.

the petitioner's statement that it participated in the special panel's proceedings, an "interim report" prepared by a New York state legislator, and numerous press clippings related to the Special Panel's proceedings in 1982-83 and various disputes that arose during those hearings.

The Commission denied the Motion for Reconsideration. "[O]nce the Commission has taken an action that closes a proceeding and the time for judicial review has expired, the proceeding is at an end and petitions to reopen the proceeding will not be entertained. There is no basis to 'reconsider' that basic fact . . .." Letter from Annette Vietti-Cook, Secretary of the Commission, to Parents Concerned (June 4, 2002). See Exhibit 4. This action followed.

The NRC decision for review before this Court is the Commission's letter of June 4, 2002, denying petitioner's request for "reconsideration" of the March 28, 2002 decision.

III. Argument.

A. The March 28 Decision Denying Reopening Of The Special Panel Proceedings Is Not At Issue In This Case, But Even If It Were, It Was Plainly Correct.

Parents Concerned's petition does not challenge the March 28 decision not to reopen the 1982-83 Special Panel proceedings that led to the 1985 Commission decision, but only the June 4 reconsideration decision. Thus, the March 28 decision is beyond the jurisdiction of this Court. A party cannot attack a decision that it does not mention in its petition for review. See City of Benton v. NRC, 136 F.3d 824 (D.C. Cir. 1998). See also FRAP 15(a)(2)(C). Moreover, we are not aware of any authority for the proposition that a party can obtain automatic review of the merits of an earlier decision simply by filing a Motion for Reconsideration of the decision and then appealing a denial of that Motion without challenging the original decision. Cf. I.C.C. v. Brotherhood of Locomotive Engineers, 482 U.S. 270, 278 (1987).

Even if the March 28 decision were properly at issue before this Court, it was clearly correct. The Supreme Court has consistently noted that allowing excessive motions to reopen could destroy the concept of administrative finality.

> The reasons why motions to reopen are disfavored . . . are comparable to those that apply to petitions for rehearing, and to motions for new trials on the basis of newly discovered evidence. There is a strong public interest in bringing litigation to a close as promptly as is consistent with the interest on giving the adversaries a fair chance to develop and present their respective cases.

INS v. Abudu, 485 U.S. 94, 107 (1988)(footnotes collecting cases omitted). "If upon the coming down of the order the litigants might demand rehearings as a matter of law because some new circumstance has arisen, some new trend has been observed, or some new fact discovered, there would be little hope that the administrative process could ever be consummated in an order that would not be subject to reopening." ICC v. Jersey City, 322 U.S. 503, 514-15 (1944).

There is an obvious logical underpinning to this position. Once a proceeding has ended, the parties must be able to rely on the results of the decision in shaping their actions. Quite simply, if any party to a proceeding could come back 20 years in the future and mandate the reopening of a proceeding, there would never be the presumption of finality that must accompany the decisions of every tribunal, whether it be an administrative agency or a court.

In this case, the Special Panel completed its work and forwarded its recommendations to the Commission in 1983. The Commission issued a decision on those recommendations in 1985. The Commission could not reasonably have been expected to reopen a proceeding that it had closed 17 years ago.

As the Commission pointed out in its March 28 letter, the petitioner could request a new proceeding, based upon "new" information, pursuant to 10 C.F.R. §2.206. Under that section, any "person" may ask the Commission to "institute a proceeding . . . to modify, revoke, or suspend a license or for any other action as may be proper." Id. But to date Parents Concerned has failed to take this step.

B. This Court Lacks Jurisdiction Over the Commission's June 4 Decision Denying Reconsideration.

The NRC's June 4 decision is not reviewable under the Hobbs Act because Parents Concerned's April 29 Motion for Reconsideration did not present any new arguments to the Commission that were not presented in the February 13 Motion to Reopen. Both pleadings argued that the Commission should reopen the 1982-83 Special Panel proceedings to consider whether the events of September 11, 2001, demonstrated any infirmity in the Indian Point evacuation plans. But because Parents Concerned presented no new argument to the Commission in the Motion for Reconsideration, this Court lacks jurisdiction over the June 4 decision under applicable Supreme Court precedent.

This Court has jurisdiction over NRC orders only to the extent that jurisdiction is conferred by the Hobbs Act. See 28 U.S.C. §2342(4); Florida Power & Light Co. v. Lorion, 470 U.S. 729 (1985). But the Supreme Court has also held that an agency decision not to reconsider a previous decision is not a reviewable order under the Hobbs Act unless the Motion for Reconsideration contained new or different material that was not included in the original request. See I.C.C. v. Brotherhood of Locomotive Engineers, 482 U.S. at 279-280. "[W]here a party petitions an agency for reconsideration on the ground of 'material error,' i.e., on the same record that was before the agency when it rendered its original decision, 'an order that merely denies rehearing of . . . [the prior] order is not itself reviewable." Id. at 280, quoting Microwave Communications Inc. v. FCC, 515 F.2d 385 387 n.7 (D.C. Cir. 1974) (additional citations omitted). The Supreme Court compared those decisions to decisions not to grant rehearing or rehearing en banc, and pointed out that "no one supposes that [such a] denial, as opposed to the panel opinion, is an appealable action . . .." 482 U.S. at 280.

In its February 13 Motion to Reopen, Parents Concerned requested the NRC to reopen the 1982-83 proceedings before the Special Panel, citing the tragic events of September 11,

2001 as grounds for that action. After the Commission denied that request on March 28, the petitioner filed a second motion on April 29 that asked the Commission to reconsider the "prior order," but did not raise any arguments not contained in the original request. Instead, the petitioner reiterated its assertion that the events of September 11 demonstrated the need for a re-evaluation of the Indian Point emergency evacuation plans. True, the petitioner did include more information (quantitatively) supporting its claim in the Reconsideration request; but it did not include a different kind of material. Instead, the material submitted in the second request simply repeated the claims submitted in the first request.[4] Thus, the Reconsideration request raises "precisely the same substance that could have been brought . . . by an appeal from the original order," and is, therefore, not reviewable. I.C.C. v. Brotherhood of Locomotive Engineers, 482 U.S. at 279. See also Friends of Sierra Railroad, Inc., v. I.C.C., 881 F.2d 663, 667 (9th Cir. 1989) ("newly raised evidence is not the same as new evidence")(emphasis in original).

In short, the petitioner alleged (in effect) a "material error" in the March 28 decision and asked the Commission to "reconsider" that decision based upon essentially the same argument that it rejected when it denied the first Motion. The Commission summarily denied the second Motion on June 4. That denial is not reviewable in this Court under the Hobbs Act, as the Supreme Court has held in Brotherhood of Locomotive Engineers.

Moreover, this Court does not have jurisdiction over the reconsideration denial because that decision is not a "final order . . . made reviewable by section 2239 of Title 42 [the Atomic Energy Act]." That section, 42 U.S.C. §2239(b), makes reviewable only specified types of actions, none of which were at issue in the June 4 decision. Section 2239(b) makes reviewable

---

[4]Parents Concerned did submit material demonstrating that it had participated in the 1982-83 proceedings before the Special Panel. However, it did not submit a different argument why the Commission should reopen those proceedings. The NRC has recognized that Parents Concerned was a party to the Special Panel proceedings. See Note 3, supra.

decisions in the types of licensing proceedings listed in section 2239(a), but none of those actions, i.e., "the granting, suspending, revoking, or amending" of any license or permit, was at issue in the reconsideration decision. And in fact, none of those actions were even at issue in the Special Panel's 1983 proceedings, which were established to provide the Commission with information about matters at Indian Point -- not to license the plant or to take any enforcement action against it. See CLI-86-5, 21 NRC at 1047. The Commission's reconsideration decision of June 4 takes none of the actions included in section 2239; thus, that decision is not issued under the Hobbs Act and this Court lacks jurisdiction over it. See Honicker v. NRC, 590 F.2d 1207, 1209 (D.C. Cir. 1978), cert. denied, 441 U.S. 906 (1979) ("[p]etitioner points to no statutory or regulatory authority, and apparently there is none, giving her a right to file an emergency petition for direct and immediate action by the Commission.").[5]

C. The Petitioner Must Appear In This Court Through Counsel.

This Court has held that a corporate party (including a partnership or association) may not represent itself under 28 U.S.C. §1654, but must appear in federal court through counsel. See Eagle Associates v. Bank of Montreal, 926 F.2d 1305 (2d Cir. 1991). In that case, this Court joined the long list of courts that have held that corporate entities cannot appear in court through lay persons. See 926 F.3d at 1308 (collecting cases). Moreover, this Court quoted with approval Judge (now Justice) Souter's opinion for the New Hampshire Supreme Court holding that a lay person cannot represent an unincorporated association. See 926 F.2d at 1309, citing State of New Hampshire v. Settle, 129 N.H. 171, 178, 523 A.2d 124, 129 (1987). In addition, citing this Court's Eagle Associates decision among many other cases, the U.S. Supreme Court has pointed out that "the lower courts have uniformly held that 28 U.S.C. §1654,

---

[5]NRC rules do permit reconsideration motions as a general matter in the agency's administrative proceedings. See, e.g., 10 C.F.R. §2.771. But when, as here, the underlying proceeding does not fall within section 2239 there is no basis for judicial review in this Court.

providing that 'parties may plead and conduct their cases personally or by counsel,' does not allow corporations, partnerships, or associations to appear in federal court otherwise than through a licensed attorney." Rowland v. Calif. Men's Colony, 506 U.S. 194, 202-03 (1995)

Here, the petitioner Parents Concerned appears to be an unincorporated association unrepresented by counsel. We advised Parents Concerned of this problem shortly after it filed suit. See Exhibit 5. Because Parents is an artificial entity, not unlike a corporate party, it has many of the attributes that the Eagle Associates Court found required the representation by counsel. This Court should either require petitioner to obtain counsel or dismiss the petition for review.

IV. Summary.

This Court should dismiss the petition for review both for lack of jurisdiction and, if petitioner has not retained counsel, for failure to obtain counsel. Dismissing this case will not leave Parents Concerned without a remedy. As we noted above and as the Commission noted in its March 28 letter, the petitioner may ask the agency to institute a new proceeding or for other regulatory relief under 10 C.F.R. §2.206. The Commission stands ready to consider any Section 2.206 request that Parents Concerned submits.

CONCLUSION

For the foregoing reasons, this Court should dismiss the petition for review.

Respectfully submitted,

GREER GOLDMAN
Attorney
Appellate Section
Environmental and Natural
Resources Division
U.S. Department of Justice
P.O. Box 23795
Washington, D.C. 20026-3975

JOHN F. CORDES
Solicitor

E. LEO SLAGGIE
Deputy Solicitor

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

Dated: August 14, 2002.