

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

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

No. 01-1073

FEDERAL RESPONDENTS' OPPOSITION
TO PETITIONER'S MOTION TO REACTIVATE AND CONSOLIDATE
AND
MOTION TO DISMISS OR, ALTERNATIVELY, TO CONTINUE IN ABEYANCE

The Federal Respondents, the U.S. Nuclear Regulatory Commission ("NRC" or "the Commission") and the United States of America, oppose the reactivation of this case and its consolidation with Case No. 01-1246. The two cases are not inextricably linked. For example, while both cases arise in the general context of the same NRC licensing action, they raise different legal issues and rest on different factual records.

In addition, pursuant to Rule 27(a)(3)(B) of the Federal Rules of Appellate Procedure, the Federal Respondents move to dismiss this case or, in the alternative, to continue to hold it in abeyance pending resolution of Case No. 01-1246. This case challenges an NRC Staff action -- a finding of "no significant hazards considerations" -- and is not yet ripe for judicial review because (1) the challenged action becomes significant only upon contingent future events that may not occur; and (2) the Commission has indicated that it may reconsider the Staff's finding. See Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant), CLI-01-07, 53 NRC 113 ("CLI-01-07") (attached).

I. Factual Background.

Both cases arise in the context of a request by the Carolina Power & Light Company ("CP&L") for a license amendment to the operating license for the Shearon Harris Nuclear Power Plant, which is located in central North Carolina. In late 1998, CP&L requested the amendment to expand the spent fuel storage capacity at Shearon Harris, and Orange County sought and obtained a hearing before the NRC's Atomic Safety and Licensing Board ("Licensing Board") in 1999 to challenge CP&L's request. While the hearing was ongoing, the NRC Staff issued the requested amendment on an "immediately effective basis." The NRC is authorized to take this action under Section 189a of the Atomic Energy Act ("AEA") of 1954, as amended, 42 U.S.C. § 2239(a)(1)(A), which provides that the agency may issue immediately effective amendments to reactor operating licenses before holding a hearing if the amendment involves no significant hazards considerations ("NSHC")¹ The Commission then holds a hearing -- if one has been requested -- to determine if the amendment will continue in effect.

In this case, the Staff's issuance of the amendment allowed CP&L to complete some necessary construction and to store additional spent fuel pending the outcome of the hearing. Orange County filed a petition with the Commission, asking that the Commissioners overrule the NRC Staff and revoke the NSHC finding. The Commission denied the petition, pointing out that NRC regulations explicitly prohibit such requests. See CLI-01-07, 53 NRC at 118 (2001); see generally 10 C.F.R. § 50.58(b)(6). However, the Commission directed the Staff to respond to several specified requests for information so that the Commission could determine whether to exercise its inherent supervisory authority to revoke the Staff's decision. See CLI-01-07, 53

¹A proposed amendment involves "no significant hazards considerations" if "operation of the facility in accordance with the proposed amendment would not: (1) Involve a significant increase in the probability or consequences of an accident previously evaluated; or (2) Create the possibility of a new or different kind of accident from any accident previously evaluated; or (3) Involve a significant reduction in a margin of safety." See 10 C.F.R. §50.92(c).

NRC at 118-19. In addition, the Commission stayed a portion of the amendment, ordering CP&L not to store any spent fuel under the amendment until either the Commission issued a decision on whether to invoke its supervisory authority or the Licensing Board issued a merits decision approving the requested amendment. See CLI-01-07, 53 NRC at 119.

Orange County filed a petition for review of the Staff's decision in this Court, which is this case, No. 01-1073. Meanwhile, the NRC Staff filed answers to the questions raised by the Commission. That matter is still pending before the Commission as described below.

On March 1, 2001, the Licensing Board issued a final merits decision approving the amendment and terminating the administrative proceeding.² See Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant) LBP-01-09, 53 NRC 239 (2001) ("LBP-01-09").³ This decision dealt with Orange County's challenge to the NRC Staff's decision not to issue an Environmental Impact Statement ("EIS") addressing a particular accident scenario that Orange County claimed could occur if the NRC issued the amendment.

The Licensing Board held that Orange County had "failed to show there is a genuine and substantial dispute of fact or law that can only be satisfactorily resolved by a further evidentiary hearing[.]" 53 NRC at 242. The Licensing Board found that the NRC Staff had demonstrated that the accident scenario proposed by Orange County was "remote and speculative;" accordingly, the NRC Staff did not have to issue an EIS addressing that scenario. Id. The Licensing Board had already dismissed two technical challenges raised by Orange County in an earlier phase of the proceeding. See Carolina Power & Light Co. (Shearon Harris

²We use the term "merits" in the sense that the Licensing Board found that based upon the presentations of the parties, there was no need for further administrative proceedings under NRC regulations. The Board made no technical "merits" findings as that phrase normally implies.

³Decisions of the Licensing Board are designated by an "LBP" prefix while decisions of the Commission are designated by a "CLI" prefix.

Nuclear Power Plant), LBP-00-12, 51 NRC 247 (2000). Accordingly, the Licensing Board approved issuance of the amendment. The Licensing Board's approval is the subject of the petition for review in Case No. 01-1246.

Orange County asked the Commission to review the Licensing Board's merits decisions, alleging myriad flaws in the proceedings. The Commission denied review, holding that Orange County had failed to demonstrate any Licensing Board error warranting review. See Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant), CLI-01-11, 53 NRC 370 (2001) ("CLI-01-11") (attached). In passing, the Commission noted that it had previously asked the Staff to respond to specified questions on the NSHC finding, but found that because the Licensing Board had issued a merits decision approving the license, the Commission need not resolve those questions at this time. See CLI-01-11, 53 NRC at 381, n.1.

Before this Court, Orange County moved to stay the effectiveness of the Licensing Board's decision approving issuance of the amendment and further asked this Court to expedite judicial review proceedings. This Court denied that request, finding that Orange County "has not demonstrated the requisite likelihood of success on the merits or irreparable injury to warrant either a stay or expedition." See Order of June 29, 2001 in Docket 01-1246. Orange County now moves to re-activate this case and to consolidate it with Case No. 01-1246.

II. Argument.

A. Consolidation is Not Warranted In This Case.

Orange County notes that consolidation "has been ruled appropriate where cases share common facts and the outcome of one case is dependent on the other." Motion to Consolidate at 4, citing Santucci v. Pignatello, 188 F.2d 643, 644 (D.C. Cir. 1951). However, that is not the situation in the two cases here.

The NRC Staff issued the NSHC finding, the agency action challenged in this case (No. 01-1073), based on its technical analysis of the appropriate factors in 10 C.F.R. § 50.92(c). Those factors are whether the proposed amendment: (1) involves a significant increase in the probability or the consequences of an accident previously evaluated; (2) creates the possibility of a new or different kind of accident from any accident previously evaluated; or (3) involves a significant reduction in a margin of safety. The Staff reviewed CP&L's application in light of these technical guidelines and concluded that the answer to each question was "no." Thus, in this case this Court would be reviewing the Staff's application of its technical guidelines to the CP&L application for the amendment to the Shearon Harris license.

In contrast, the issue before the Licensing Board (and the Commission) in the decisions challenged in No. 01-1246 was whether, under 10 C.F.R. Part 2, Subpart K, Orange County had raised a question of fact or law that could only be resolved in an extensive adjudicatory proceeding. Thus, in No. 01-1246 the Court will be reviewing the NRC's application and interpretation of its adjudicatory regulations in Part 2, Subpart K of the Rules of Practice, as well as various NRC safety and environmental rules, but not the technical criteria which enabled the NRC Staff to issue the amendment prior to the conclusion of the hearing. The two cases simply do not raise the same legal or factual questions.

Moreover, the outcomes in the two cases do not depend on each other. A decision in No. 01-1246 will not determine the result in No. 01-1073. Instead, if this Court needs to decide No. 01-1073 at all, it will review the Staff's decision in light of the applicable technical criteria in section 50.92 of the NRC's regulations. The two cases are independent and stand alone.

Furthermore, the two cases rest upon different administrative records. The materials upon which the NRC Staff made its NSHC finding are different from those considered by the Licensing Board in reaching its decisions that no further adjudicatory hearing was necessary.

For example, in the present case, No. 01-1073, the administrative record is very short, consisting mainly of (1) CP&L's application; (2) the Federal Register Notice announcing a proposed finding that the amendment involved no significant hazards considerations; (3) Orange County's comments on the Federal Register Notice; and (4) the Staff's safety analysis report and its decision. In contrast, the record in No. 01-1246 is a full-scale adjudicatory record that includes not only extensive and detailed evidentiary submissions by expert consultants from all three parties on both safety and environmental issues, but legal analyses of the NRC's regulatory framework under Part 2, Appendix K, by the three parties as well. It also includes a series of Licensing Board decisions on the various merits issues and an ultimate Commission decision declining review.

It is true that under the NRC's docketing system, all of the documents at issue in both cases are listed in the same Certified Index because the documents were compiled as part of the same licensing action.⁴ But in reviewing the NRC Staff's NSHC action, which is the subject of this case, the Court will look at a significantly smaller and completely different record than the one it will review in No. 01-1246. To intermingle the two cases in the same court of appeals briefs might prove confusing and misleading.

B. The Decision Challenged In No. 01-1073 is Not Ripe For Review.

In the instant case, No. 01-1073, Orange County challenges a NSHC finding by the NRC Staff that, at least in practical terms, is not yet complete because there is a reasonable possibility that the Commission may either rescind the challenged decision or modify the reasons given in its support. Thus, this case is not ripe for judicial review. "A claim is unripe for review when it rests 'upon contingent events that may not occur as anticipated, or indeed may

⁴Orange County correctly notes that the NRC agreed to include all documents from both cases in the Certified Index filed for No. 01-1246. Motion at 5. Through inadvertence, the NRC failed to list three (3) documents related to the Staff's decision in the Certified Index. The NRC will file a Supplemental Index if this Court grants the Motion to Consolidate.

not occur at all.” 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). “When completion of an agency’s processes may obviate the need for judicial review, it is a good sign that an intermediate agency decision is not final.” DRG Funding Corp. v. HUD, 76 F.3d 1212, 1215 (D.C. Cir. 1996).

It is true that the Commission summarily denied Orange County’s petition for review of the Staff’s NSHC finding on the grounds that the petition was expressly prohibited by NRC regulations. CLI-01-07, 53 NRC at 118. But the Commission noted that it had “inherent authority to exercise its discretionary supervisory authority to stay the Staff’s actions or rescind the license amendment,” issued an interim partial stay of the Staff’s decision, and directed the Staff to respond to specified questions so that it could determine whether to take “further action” under its inherent supervisory authority. See 53 NRC at 118-19.

The Staff’s response was still pending before the Commission when the Licensing Board issued its final decision approving issuance of the amendment. Because the Licensing Board found that the amendment should be issued under the normal provisions of the Atomic Energy Act, the Commission saw no need to expend the time and resources necessary to determine whether the Staff’s NSHC finding had been appropriate and if not, what action should have been taken. See CLI-01-11, 53 NRC at 381, n.1.

The Staff’s NSHC finding will regain significance only if this Court reverses the NRC Licensing Board’s decision that further adjudicatory proceedings are not required and remands the case to the agency with directions to conduct further proceedings under the Atomic Energy Act. In that event, and only in that event, will CP&L need to rely on the authority of the NSHC finding to continue to store additional spent fuel. But, even in that event, this Court has already found that the storage of spent fuel under the amendment does not rise to the level of

“irreparable injury.” See Order of June 29 in Docket No. 01-1246. Thus, there is no need for immediate judicial action on the NSHC case (No. 01-1073).

If this Court vacates the Licensing Board’s decision, the Commission will at that point resume its deliberations to determine whether to rescind the Staff’s action. Obviously, if the Commission rescinds the Staff action, it will moot this case. In the alternative, the Commission may also affirm the Staff action, but may offer a different rationale for it, creating a different record for judicial review from that now existing. None of this will be necessary, of course, if this Court upholds the Licensing Board decisions under review in No. 01-1246. All parties agree that this case will then clearly become moot because CP&L will not need to rely on the Staff action challenged in this case.

Principles of judicial economy and efficiency dictate that this Court should decide only those questions that it needs to decide and the parties should be compelled to brief and argue only those cases that need to be decided. Here, this Court must decide Case No. 01-1246, because that case challenges the agency’s “merits” decision. However, this Court may never need to decide Case No. 01-1073 because it challenges only a threshold procedural decision (immediate effectiveness) that will only become significant for judicial review only if this Court reverses the Licensing Board’s approval of the license amendment, *i.e.*, a “contingent event that may not occur as anticipated, or ... may not occur at all.” New York Electric & Gas Corp. v. FERC, supra. Thus, this case, No. 01-1073, is not ripe for judicial review at this time.

Moreover, it is not at all clear that this Court will need to reach No. 01-1073, even if this Court decides No. 01-1246 in Orange County’s favor. In that event, the Commission will then determine whether to take further action regarding the Staff’s NSHC finding. There may very well be a different Commission decision, and a different record, for review by this Court, because the Commission may modify the NRC Staff decision or affirm it on different grounds.

In short, "completion of the agency's processes may obviate the need for judicial review," indicating that the "intermediate agency decision [before this Court] is not final." DRG Funding Corp. v. HUD, supra. Thus, this Court may find it appropriate to dismiss the present case (No. 01-1073) to await fresh Commission action in the event that the NSHC finding becomes relevant to CP&L's authority to store additional spent fuel under the Shearon Harris license.

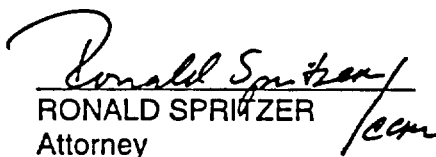
If this Court dismisses No. 01-1073 now, Orange County will have to file a fresh petition for review if the NRC Staff's NSHC finding again becomes ripe for review. Hence, this Court might choose to continue to hold No. 01-1073 in abeyance. Dismissal, though, is legally the correct result, because Orange County filed its petition for judicial review prematurely, before the Commission completed its deliberations on the merits of the NSHC finding. See International Telecard Ass'n v. FCC, 166 F.3d 387, 388 (D.C. Cir. 1999).

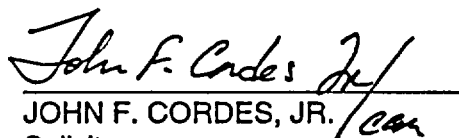
In summary, this Court should dismiss the petition for review in this case outright or, in the alternative, continue to hold it in abeyance pending resolution of Case No. 01-1246. Neither result will prejudice Orange County's ability to challenge the NRC Staff's immediate effectiveness decision should that decision become ripe.

CONCLUSION

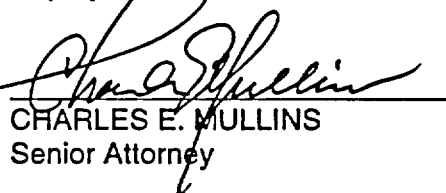
For the foregoing reasons, this Court should not re-activate this case, No. 01-1073, and consolidate it with No. 01-1246. Instead, it should dismiss No. 01-1073 as premature or, in the alternative, continue to hold it in abeyance and proceed with consideration of No. 01-1246.

Respectfully submitted,


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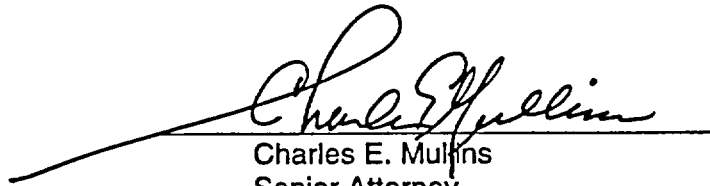
No. 01-1073.

I hereby certify under penalty of perjury that the FEDERAL RESPONDENTS' OPPOSITION TO PETITIONER'S MOTION TO REACTIVATE AND CONSOLIDATE AND MOTION TO DISMISS OR, ALTERNATIVELY, TO CONTINUE IN ABEYANCE was served by placing the same in the United States Mail, postage prepaid, addressed to:

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