

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

ORANGE COUNTY, NORTH CAROLINA)
) Petitioner,)
))
) v.) No. 01-1073)
))
UNITED STATES NUCLEAR REGULATORY)
COMMISSION and the UNITED STATES)
OF AMERICA)
) Respondents,)
))
and CAROLINA POWER & LIGHT COMPANY)
))
) Intervenor-Respondent.)
_____)

**CAROLINA POWER & LIGHT COMPANY'S MOTION
TO DISMISS AND OPPOSITION TO ORANGE COUNTY'S
MOTION TO REACTIVATE AND CONSOLIDATE**

Carolina Power & Light Company ("CP&L") submits its motion to dismiss and opposition to the Petitioner Board of Commissioners of Orange County's ("BCOC") motion to reactivate and consolidate the above captioned matter with a subsequently filed petition for review.¹ BCOC moves the Court to revive a moot action regarding a technical judgment of the Nuclear Regulatory Commission ("NRC" or "Commission") Staff² and consolidate it with a pending appeal challenging the Commissioner's interpretation of the legal process requirements contained in the controlling statutes.³ As a threshold matter, CP&L shows a lack of jurisdiction by this Court over a decision by the NRC Staff which is not today a final decision of the Commission. In any event, the Court should deny BCOC's motions because there is no present live case or

¹ Orange County's Motion to Reactivate and Consolidate and Unopposed Request to File Out of Time, Docket No. 01-1037 (July 11, 2001) ("BCOC Consolidation Motion").

² Petition for Review (Feb. 16, 2001), Docket No. 01-1073 ("BCOC Petition No. 01-1073").

³ Petition for Review (May 31, 2001), Docket No. 01-1246 ("BCOC Petition No. 01-1246").

controversy in the case held in abeyance and consolidation would serve only to burden the Court with highly technical issues unnecessary to decide the legal process issues raised in the subsequent petition for review.

I. INTRODUCTION AND SUMMARY

BCOC returns to this Court after filing two separate petitions for review of certain aspects of the two years of administrative litigation and appeals before the NRC regarding CP&L's license amendment request to expand its onsite storage of spent nuclear fuel at its Shearon Harris Nuclear Power Plant ("Harris Plant," or "Harris") in North Carolina. The need to expand spent fuel storage at Harris results from the failure of the U.S. Department of Energy ("DOE") to begin taking delivery of spent fuel in 1998, as required by the contract between DOE and CP&L, and by the Nuclear Waste Policy Act of 1982, as amended ("NWPA"), 42 U.S.C. § 10101, et seq.⁴ BCOG was granted intervention in opposing CP&L's license amendment request.

BCOC initially petitioned this Court to review the technical bases of a Notice of Issuance of an Amendment and Final Determination of No Significant Hazards Consideration prepared by the NRC Staff.⁵ As permitted by the Atomic Energy Act,⁶ the NRC Staff issued the license amendment prior to a final decision by the cognizant Atomic Safety and Licensing Board ("Licensing Board" or "Board"). Approximately a month later, BCOG moved the Court to hold the matter "in abeyance" because the Licensing Board had ruled in favor of issuing the contested li-

⁴ See Northern States Power Co. v. US, 224 F.3d 1361 (Fed. Cir. 2000) (plaintiff utilities could sue DOE for failing "to begin performance at all by the statutory and contractual deadline of January 31, 1998"); Indiana Michigan Power Co. v. DOE, 88 F.3d 1272 (D.C. Cir. 1996) (DOE had an obligation to begin disposing of spent nuclear fuel "no later than January 31, 1998").

⁵ U.S. NRC, 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 (Dec. 21, 2000) ("NSHC Determination").

⁶ Atomic Energy Act of 1954, as amended, 42 U.S.C. § 2011 et seq. ("AEA").

cense amendment “and terminated the administrative proceeding.” BCOC Abeyance Motion⁷ at 2. BCOC sought “to hold this appeal in abeyance in order to await the outcome of a separate NRC proceeding, which may render moot the issues that are under review by the Court.” *Id.* at 1. Subsequently, in a second petition for review, BCOC challenged the legal bases for the expansion of onsite spent fuel storage at Harris and the expedited NRC licensing process. See BCOC Petition No. 01-1274.

Rather than reactivate the instant case “held in abeyance” and consolidate it with the petition for review of the NRC’s final order, the Court should dismiss this case for want of jurisdiction. In any event, this case has been rendered moot by the outcome of subsequent proceedings. Indeed, the Commission’s decision supporting issuance of the license amendment appears to reduce, if not completely eliminate, the need for any adjudication of the issues raised here by BCOC. Further, the Court should deny BCOC’s motion to consolidate this action with No. 01-1246 because the cases are substantially unrelated and consolidation offers no convenience or economy in administration to the Court.

II. FACTUAL BACKGROUND

This proceeding stems from CP&L’s December 23, 1998, application for a license amendment to place spent fuel pools C and D in service at CP&L’s Harris Nuclear Plant.⁸ CP&L invoked 10 C.F.R. Part 2, Subpart K, expedited adjudicatory procedures after the appointed Licensing Board granted BCOC’s petition to intervene and admitted two technical contentions proffered by BCOC.⁹ In a Memorandum and Order dated May 5, 2000, following an

⁷ Unopposed Motion to Hold in Abeyance (Mar. 22, 2001).

⁸ Shearon Harris Nuclear Power Plant Docket No. 50-400/License No. NPF-63 Request For License Amendment Spent Fuel Storage (Dec. 23, 1998) (“License Amendment Application”).

⁹ Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant), LBP-99-25, 50 NRC 25, 40 (1999).

opportunity to conduct discovery, written submissions, and an oral hearing, the Board ruled that BCOC had failed to show that there was any genuine and substantial dispute of fact or law that required an evidentiary hearing.¹⁰

The Board admitted a late-filed environmental contention on August 7, 2000, whereby “BCOC challenge[d] the Staff’s [environmental assessment] conclusion that the proposed CP&L license amendment to use spent fuel pools C and D does not require a complete [environmental impact statement (“EIS”)].”¹¹ The NRC Staff issued a final NSHC Determination and the Harris spent fuel pool expansion license amendment on December 21, 2000, just days short of two years after the license amendment application was filed.¹² On February 22, 2001, BCOC filed with this Court a Petition to Review (Case No. 01-1073) the NRC Staff’s actions.

On March 1, 2001, after additional opportunity for discovery, written submissions, and oral hearing, the Licensing Board issued its decision regarding BCOC’s environmental contention, finding that: (1) BCOC failed to show that there was a genuine and substantial dispute of fact or law that could only be resolved satisfactorily by an evidentiary hearing, and (2) the NRC Staff met its burden by demonstrating that BCOC’s postulated seven-step, beyond-design-basis accident scenario was remote and speculative and did not warrant the preparation of an EIS.¹³ The Board also authorized the requested license amendment and dismissed the proceeding because there were “no remaining disputed issues of fact or law requiring resolution in an adjudi-

¹⁰ Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant), LBP-00-12, 51 NRC 247, 249 (2000). This decision is not being appealed.

¹¹ Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant), LBP-00-19, 52 NRC 85, 94 (2000).

¹² 65 Fed. Reg. 82,405 (2000).

¹³ Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant), LBP-01-09, 53 NRC 239, 239, 242 (Mar. 1, 2001).

catory hearing.”¹⁴ On March 16, 2001, BCOC filed with the Commission a Petition for Review and a Request for Emergency Stay of the Licensing Board decisions.¹⁵ In light of the adverse Licensing Board decision, BCOC filed with this Court on March 22, 2001, an Unopposed Motion to Hold In Abeyance Case No. 01-1073.

On May 10, 2001, the Commission denied the petition for review and the request for a stay.¹⁶ BCOC filed with this Court a Petition for Review (Case No. 01-1246) of the Commission’s decision on May 31, 2001, and a Motion For Stay and Expedition on June 1, 2001. CP&L and the NRC opposed both actions and on June 29, 2001, this Court denied the Motion for Stay and Expedition. BCOC filed the instant Motion for Reactivation and Consolidation on July 11, 2001.

III. ARGUMENT

This Court does not today have jurisdiction over BCOC’s petition for review of the NRC Staff’s NSHC Determination. Even assuming, *arguendo*, that jurisdiction exists, BCOC has failed to show why reactivation and consolidation of this case with BCOC’s subsequent challenge to the Commission’s legal interpretation of the AEA, National Environmental Policy Act, and Administrative Procedures Act offers any benefits to the parties or the Court. Contrary to BCOC’s unsupported assertion that consolidation “is appropriate here,” CP&L shows that the effort to revive, brief, and review the unrelated, but technically complex, issues involved in a case that has been rendered moot by subsequent events, would unnecessarily dilute the parties’ focus

¹⁴ Id. at 271.

¹⁵ Orange County’s Petition For Review of LBP-00-12, LBP-00-19, and LBP-01-09 (Mar. 16, 2001) (“BCOC’s NRC Petition”); Orange County’s Request for Emergency Stay of LBP-01-09 (Mar. 16, 2001).

¹⁶ Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant), CLI-01-11, 53 NRC ____ (May 10, 2001).

in briefing the central issues and burden the Court with information immaterial to resolution of the actual case and controversy before it.

A. The Petition Does Not Challenge a Final Order of the Commission.

The NRC Staff's NSHC Determination is not a final decision of the Commission. The jurisdiction of this Court is limited to review of "final orders" of the Commission.¹⁷ 28 U.S.C. § 2342(4). In "a licensing proceeding, it is the order granting or denying the license that is ordinarily the final" decision. City of Benton v. NRC, 136 F.3d 824, 825 (D.C. Cir. 1998); see also Commonwealth of Massachusetts v. NRC, 924 F.2d 311, 322-23 (D.C. Cir. 1991) ("NRC order is final if it disposes of all issues as to all the parties" and "consummates the agency's decision-making process"); Union of Concerned Scientists v. NRC, 880 F.2d 552, 560 (D.C. Cir. 1989) (jurisdiction lacking to review procedures not established by final order). The NRC may issue and make immediately effective any amendment to an operating license upon a determination that "such amendment involves no significant hazards consideration, notwithstanding the pendency before the Commission of a request for a hearing." AEA § 189(a)(2)(A); 10 C.F.R. § 50.92(c). Further, the Staff's "determination is final" and not subject to Commission review or hearing. 10 C.F.R. § 50.58(b)(6). However, an initial decision by a Licensing Board directing amendment of an operating license "shall be effective immediately upon issuance," subject to review by the Commission. 10 C.F.R. § 2.764(a). The initial decision will "constitute the final action of the Commission forty (40) days after" issuance unless the Commission takes review. 10 C.F.R. § 2.760(a). If reviewed, a decision becomes a "final decision" of the Commission when rendered pursuant to 10 C.F.R. § 2.770.

¹⁷ The text of the statute continues to read "final orders of the Atomic Energy Commission," although the NRC was created in 1974 and replaced the Atomic Energy Commission in licensing commercial nuclear facilities. See Energy Reorganization Act of 1974, 42 U.S.C. § 5801 et seq.

On December 21, 2000, the NRC Staff, pursuant to the AEA and in accordance with Commission regulations, issued the Harris license amendment and a final NSHC Determination. NSHC Determination at 3. On March 1, 2001, the Licensing Board issued its decision favoring issuance of the Harris license amendment and terminated the administrative proceeding. Shearon Harris, LBP-01-09, 53 NRC 239. The Commission reviewed the Licensing Board's initial decision and issued a final decision on May 10, 2001. Shearon Harris, CLI-01-11, 53 NRC _____. Even assuming, *arguendo*, that the NRC Staff's NSHC Determination could have been construed as a final decision of the Commission on December 21, 2000, the Commission's May 10, 2001, decision, entitled "Memorandum and Order," now must be considered the "final decision" mandated by 28 U.S.C. § 2342(4) to confer jurisdiction upon this Court.

Finally, merely asserting possible future jurisdiction from a sequence of events that could "unwind" the Commission and Licensing Board decisions is not sufficient to confer present jurisdiction. A claim that rests "upon contingent future events that may not occur as anticipated, or indeed may not occur at all" is not ripe for review. New York State Elec. & Gas v. FERC, 177 F.3d 1037, 1040 (D.C. Cir. 1999) (citing Texas v. US, 523 U.S. 269, ____ (1998)). BCOC itself admits that only "[u]nder certain circumstances" will its appeal of the NRC Staff's NSHC Determination ever become ripe for adjudication. BCOC Abeyance Motion at 3. The "certain circumstances" include this Court initially determining that the Licensing Board and the Commission committed legal error.¹⁸ On remand to the Commission, it would have to vacate the Licensing Board's decision, yet still leave the license amendment in place. In addition, this Court would also have to determine that the decision to issue the license amendment was so infirm that the health and safety of the public was at risk and suspension of that decision was necessary. Fi-

¹⁸ This Court has already determined that BCOC failed to show it was likely to prevail on the merits. Order (Jun. 29, 2001).

nally, this Court would have to decide it could not grant appropriate relief in Case No. 01-1246. Only then could merits adjudication of the NRC Staff's NSHC Determination involve a matter that was an actual case or controversy and involved a final decision.

CP&L submits, therefore, that the Court lacks jurisdiction in this matter and should dismiss the case on that ground.

B. The Instant Case is Moot.

The question of jurisdiction aside, this case has simply been rendered moot by subsequent decisions. The immediately effective initial decision and the Commission's final decision removed all regulatory significance from the NRC Staff's NSHC Determination. In moving this Court to hold this case in abeyance, BCOC noted that the Licensing Board had ruled in favor of issuance of the Harris license amendment and stated it needed to "await the outcome of a separate NRC proceeding, which may render moot the issues that are under review by the Court" before proceeding. BCOC Abeyance Motion at 1 (emphasis added). The result of that separate NRC Proceeding – BCOC's Appeal to the Commission – affirmed the Licensing Board decision. See CLI-01-11. In addition, this Court denied BCOC's motion for a stay of CLI-01-11, finding that BCOC "had not demonstrated the requisite likelihood of success on the merits." Order (Jun. 29, 2001).

The Licensing Board, the Commission, and this Court have all ruled against BCOC – removing whatever basis existed for "awaiting" future decisions to ripen its claims. Thus, the case law subsequent to placing this matter in abeyance provides absolutely no basis for reactivating the case. To the contrary, using BCOC's own reasoning for placing the case in abeyance, reactivation should await "the reversal of LBP-01-09 and resumption of the administrative adjudication." BCOC Abeyance Motion at 2.

C. The Cases Are Substantively Unrelated and Consolidation Offers No Convenience or Economy in Administration.

The two cases that BCOC seeks to consolidate involve unrelated legal arguments and require completely different analyses, despite a common origin and governing statute. The NRC Staff's NSHC Determination is largely based on technical analyses and expert judgment regarding complex engineering design decisions. In this case, the NRC Staff also had to evaluate nearly two years worth of information and analyses provided by outside experts resulting from the associated litigation. Review of the issues raised by BCOC necessarily requires scrutiny of the underlying technical analyses and associated agency decisionmaking.

Indeed, BCOC, in an unsuccessful attempt to convince the Commission to stay the NRC Staff's NSHC Determination, demanded just such a detailed review of technical bases for the Staff's conclusion. BCOC moved the Commission to review the determination "because it fails to satisfy the NRC's criteria in 10 C.F.R. § 50.92." BCOC NSHC Petition¹⁹ at 1. BCOC claimed that the "NSH Determination is utterly inadequate," *id.* at 9, because, *inter alia*, "the Staff has not demonstrated that the probability of a fuel handling accident would not increase significantly," *id.* at 10, "ignored extensive evidence presented by [BCOC] regarding a credible accident scenario," *id.* at 12, and because of "its failure to address factors that are fundamentally relevant to its determination," *id.* at 14. Even accepting, *arguendo*, that there is a legal basis for BCOC's challenge to the Staff's technical conclusions, BCOC's action is clearly aimed at the *technical underpinnings* of the decision.

In contrast, BCOC's Statement of Issues to be Raised regarding No. 01-1264 identifies purely legal process issues. BCOC asserts that the Licensing Board and the Commission failed to comply with applicable *statutory* requirements. Statement of Issues to be Raised, No. 01-1246

¹⁹ Orange County's Petition for Review and Request for Immediate Suspension and Stay of the NRC Staff's No Significant Hazards Determination and Issuance of License Amendment for Harris Spent Fuel Pool Expansion (Dec. 22, 2000) ("BCOC NSHC Petition").

(Jun. 21, 2001) at 1. These issues do not involve the NRC Staff, the adequacy of its technical analyses, or review of its expert judgments. There is simply no overlap between the issues in the two cases.

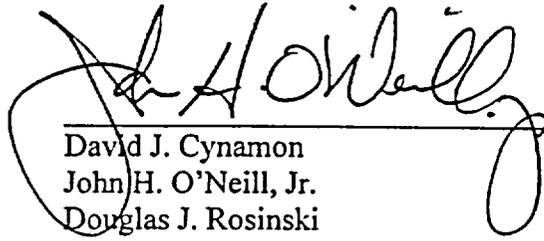
Consolidating these two cases, with their unrelated issues, would not result in any reduced burden, convenience, or judicial economy. Consolidation would also force the parties to dilute the discussion of the complex legal and regulatory matters encompassing over two years of litigation and a number of administrative decisions and rulings in order to address the NRC Staff's highly-technical engineering judgments. At best, the parties would likely require significantly expanded briefs and additional time to prepare them. CP&L suggests that, notwithstanding BCOC's conclusory assertions to the contrary, consolidation would not aid the Court in deciding the actual "controversy" before it and, indeed, it would likely increase the burden on the Court.

In summary, CP&L shows a lack of jurisdiction for the Court to hear the instant case. Even if jurisdiction were to exist, reactivation is not warranted because intervening decisions did not meet BCOC's own criteria for reactivating the case. Finally, CP&L identifies the fundamental incompatibility between the issues raised in the two cases and the deleterious effect of consolidation on adjudication of the key legal issues.

IV. CONCLUSION

For all the foregoing reasons, CP&L submits that the its Motion to dismiss should be granted and BCOC's Motion to Reactivate and Consolidate should be denied.

Respectfully submitted,



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Dated: July 23, 2001

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No. 01-1073

CERTIFICATE OF SERVICE

I hereby certify that true copies of the foregoing Carolina Power & Light Company's Opposition to Orange County's Motion to Reactivate and Consolidate were served upon the following by hand delivery or United States mail, first class, postage prepaid, on this 23rd day of July, 2001:

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