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, and CAROLINA POWER & LIGHT COMPANY Intervenor-Respondent.	)	No. 01-1073

CAROLINA POWER & LIGHT COMPANY'S REPLY TO ORANGE COUNTY'S OPPOSITION TO MOTIONS TO DISMISS

Carolina Power & Light Company ("CP&L") submits its reply to Petitioner Board of Commissioners of Orange County's ("BCOC") response to the Nuclear Regulatory Commission ("NRC") and CP&L motions to dismiss Case No. 01-1073. BCOC's Response: (1) concedes that this case is contingent on the result in Case No. 01-1246; and (2) fails to identify any case where a No Significant Hazards Consideration ("NSHC") Determination was reviewed by a court after issuance of a "final order" following completion of an agency hearing. BCOC has provided no substantive reason why the Court should not grant CP&L's motion to dismiss this case.

I. ARGUMENT

BCOC effectively concedes that this Court does not today have jurisdiction over BCOC's petition for review of the NRC Staff's NSHC Determination because it is contingent on the outcome in Case No. 01-1246. Moreover, to whatever extent that the NSHC Determination could be construed as a "final order" reviewable by this Court, the cases relied upon by BCOC clearly establish that the only reviewable issue is the "immediately effective" feature. Here BCOC

challenges the technical basis for the NSHC Determination, not the immediate effectiveness of the decision. BCOC has not identified a single case supporting its position that the *substance* of an NSHC Determination is reviewable *after* completion of the proceedings required by the Atomic Energy Act ("AEA") and issuance of a related final order. Indeed, the case law is completely to the contrary and supports CP&L's position.

A. BCOC Concedes That the Instant Case is Contingent on the Outcome of Case No. 01-1246

BCOC has conceded the dispositive issue. "CP&L is correct that the need to resolve this appeal depends on a decision by this Court to reverse the ASLB's decision on the merits." BCOC Response at 10. Indeed, BCOC's responsive argument is replete with this concession. See, e.g., id. ("If the Court remands the merits case for a hearing"); Id. at 11 ("if the Court reverses the ASLB's decision on the merits and remands the case to the agency"); Id. at 12 ("if the NRC's evidentiary proceeding is remanded for further hearing, then the validity of the [NSHC] Determination immediately will become a contested issue"); Id. at 13 ("If this case is held in abeyance and the Court reverses the merits decision in No. 01-1246 and remands it to the agency, Orange County will be required to take a number of actions"). As discussed in CP&L's motion, the law is clear that claims that rest "upon contingent future events that may not occur as anticipated, or indeed may not occur at all" are not ripe for review. New York State Elec. & Gas v. FERC, 177 F.3d 1037, 1040 (D.C. Cir. 1999). CP&L submits that this Court should dismiss the instant case based on BCOC's concession of contingency.

B. The Cited Cases Do Not Support BCOC's Position

BCOC's attempt to conjure up legal support for its position fails miserably upon even cursory analysis of the cited case law. BCOC implies that CP&L's citation to City of Benton v. NRC, 136 F.2d 824, 825 (D.C. Cir. 1998), substantively misrepresented the holding in that case as it applies to this matter. BCOC Response at 4. To the contrary, the "immediate effect" of the NSHC Determination is not at issue here: "the primary issue raised in this appeal is . . . whether

a decision by the ASLB precluded, as a matter of law, the issuance of a [NSHC] Determination." Id. at 8. Further, BCOC's "central argument" is that the ASLB's decision to admit an environmental contention "precluded the issuance" of the NSHC as a matter of law. Id. These statements make it clear that BCOC is challenging the basis for the NSHC Determination, not the immediate effectiveness of the decision. Thus, the "crucial distinction" trumpeted by BCOC, id. at 4, is completely inapplicable to this case.

The NSHC Determination "immediate effectiveness" feature is, however, crucial in invoking the jurisdiction of this Court to hear the instant case. It is the "immediate effectiveness" feature, which is "akin to a district court's grant or denial of a preliminary injunction," that "is final for purposes of judicial review; it changes rights and obligations immediately rather than postponing legal effect until the administrative process is over." Shoreham-Wading River Cent. School Dist. v. NRC, 931 F.2d 102, 105 (D.C. Cir. 1991) (citing Commonwealth of Massachusetts v. NRC, 924 F.2d 311, 322 (D.C. Cir. 1991)). In Commonwealth of Massachusetts the Court was asked to review an NRC order making immediately effective a licensing board's authorizing full power operation of the Seabrook plant while the appeal of the decision proceeded. The Court reasoned:

> The only 'final agency action' at issue here is an order allowing the plant to operate at full power pending the Commission's further review of the licensing issues. This order is not a 'final decision' by the Commission pursuant to 10 C.F.R. § 2.770. [5 U.S.C. §] 704 authorizes us to review only those preliminary, intermediate, or procedural rulings that relate to the final agency action presently before the court. Accordingly, we will consider the NRC's full power rulings only to the extent necessary to review the Commission's exercise of discretion in allowing immediate effectiveness.

924 F.2d at 322 (emphasis added). The NSHC Determination was similarly a "preliminary" or "intermediate" decision that was superseded by the Licensing Board's order issued upon com-

pletion of the administrative proceeding[1] and the time to challenge any aspect of the decision has long passed. BCOC may find this result "absurd,"[2] but it is clearly the law.

Indeed, every case cited by BCOC involved proceedings where a licensing hearing had not yet resulted in a decision or final order. Of particular note, the court in San Luis Obispo Mothers for Peace v. NRC, 799 F.2d 1268 (9th Cir. 1986), a case on which BCOC has based its arguments at every level in this proceeding, stayed implementation of the subject license amendment only "until hearings have been held in compliance [with] the requirements of the [AEA]." Id. at 1271; see also City of Benton, 136 F.3d at 826 (petition for review of non-final interlocutory order denied because it failed to correctly designate the subsequently-issued final order); Center for Nuclear Responsibility v. NRC, 586 F.Supp. 579, 580 (D.C.D.C. 1984) ("issue before this Court" is whether to "require the NRC to hold prior public hearings on the issuance" of the license amendments); Shoreham-Wading River, 931 F.2d at 105 (agency review of Confirmatory Order not complete). This is simply not the situation presented to this Court. These cases, therefore, contain no support for BCOC's position in the instant matter.

---

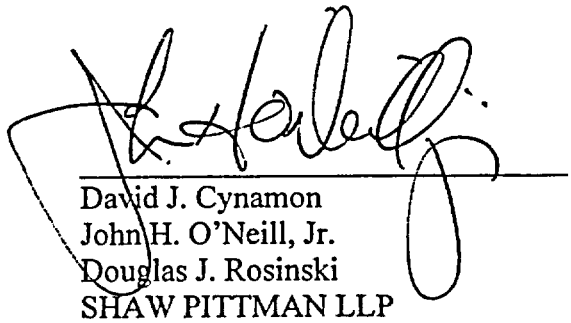
[1] The Commission reached the same conclusion in determining that the March 1, 2001, Licensing Board decision approving the Harris license amendment "renders the NSHC question inconsequential for this adjudication." Carolina Power & Light Company (Shearon Harris Nuclear Power Plant), CLI-01-11, 53 NRC 370, 381, n.1 (2001) (emphasis added).

[2] See BCOC Response at 6 ("to suggest that the merits proceeding somehow swallowed up the [NSHC] Determination and rendered it non-final is absurd").

II. CONCLUSION

CP&L submits that its Motion to Dismiss should be granted and BCOC's Motion to Re-activate and Consolidate should be denied.

Respectfully submitted,



David J. Cynamon
John H. O'Neill, Jr.
Douglas J. Rosinski
SHAW PITTMAN LLP
2300 N Street, N.W.
Washington, D.C. 20037
(202) 663-8000
Counsel For CAROLINA POWER & LIGHT COMPANY

Of Counsel:
Steven Carr
Legal Department
Progress Energy Service Company
411 Fayetteville Street Mall
P.O. Box 1551 – CPB 17B2
Raleigh, N.C. 27602-1551
(919) 546-4161

Dated: August 13, 2001

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, and CAROLINA POWER & LIGHT COMPANY Intervenor-Respondent.	)	No. 01-1073

CERTIFICATE OF SERVICE

I hereby certify that true copies of the foregoing Carolina Power & Light Company's Reply to Orange County's Opposition to Motions to Dismiss were served upon the following by United States mail, first class, postage prepaid, on this 13th day of August, 2001:

John F. Cordes, Jr., Esq.
Solicitor
Charles E. Mullins, Esq.
Office of General Counsel
U.S. Nuclear Regulatory Commission
11555 Rockville Pike
Rockville, MD 20852-2738

John Ashcroft, Esq.
Attorney General of the United States
U.S. Department of Justice
950 Pennsylvania Avenue
Washington, D.C. 20530

Diane Curran, Esq.
Harmon, Curran, Spielberg & Eisenberg, L.L.P.
1726 M Street, N.W.
Suite 600
Washington, D.C. 20036

Office of the Secretary
United States Nuclear Regulatory Commission
Washington, D.C. 20555-0001

Douglas J. Rosinski