

April 29, 2003

Roseann B. MacKechnie, Clerk
United States Court of Appeals
for the Second Circuit
United States Court House
40 Foley Square
New York, New York 10007

Attention: Michael Adragna, Deputy Clerk

RE: Connecticut Coalition Against Millstone v. NRC, Case No. 03-4372.

Dear Ms. MacKechnie:

This letter transmits the original and four copies of the Federal Respondents' Reply to Objection to Motion to Dismiss and a Certificate of Service. Please file-stamp the extra copy of this letter to indicated date of filing and return it to me in the enclosed pre-paid envelope.

Respectfully,

/RA/

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Enclosure: Motion to Dismiss.

cc: Nancy Burton, Esq.
David Repka, Esq.
Kathryn E. Kovacs, Esq. (US DOJ).

affidavit containing factual information. The requirement of an affidavit is mandatory”

Objection at 2.

Local Rule 27(a)(1)(C)(viii), entitled “Required attachments to motion,” does provide for “a. An affidavit (containing only statements of fact, not legal argument)[.]” But the only material facts relevant to the Motion to Dismiss were (1) the date on which Connecticut Coalition filed the Petition for Review and (2) whether the Petition challenged CLI-02-27. Those facts are self-evident from the face of the Petition. Any other “background” facts stated in the Motion were based on citations to published Commission orders. Thus, the Federal Respondents saw -- and still see -- no need to submit an affidavit containing any “statements of fact.”

II. The Petition For Review Does Not Challenge a “Final” Order.

The Hobbs Act gives this Court jurisdiction over petitions to review “all final orders of the [Nuclear Regulatory Commission] made reviewable by section 2239 of title 42[.]” 28 U.S.C. §2342(4) (emphasis added). Thus, this Court’s jurisdiction is limited to petitions that challenge “final” orders, as numerous judicial decisions -- some cited in the Motion to Dismiss -- have so held. See, e.g., City of Benton v. NRC, 136 F.3d 824, 825 (D.C. Cir. 1998) (per curiam); Natural Resources Defense Council v. NRC, 680 F.2d 810, 815 (D.C. Cir. 1982); Thermal Ecology Must Be Preserved v. AEC, 433 F.2d 524 (D.C. Cir. 1970) (per curiam).

The Supreme Court has emphasized the importance of enforcing jurisdictional requirements. “Judicial review provisions . . . are jurisdictional in nature and must be construed with strict fidelity to their terms.” Stone v. INS, 514 U.S. 386, 405 (1995). Such provisions must be read “with precision.” Id., quoting Cheng Fan Kwok v. INS, 392 U.S. 206, 212 (1968). See also Slinger Drainage, Inc. v. EPA, 237 F.3d 681, 682-83 (D.C. Cir. 2001). “The rules of jurisdiction, which occasionally may appear technical and counterintuitive, are to be

ungrudgingly obeyed." Beers v. North American Van Lines, Inc., 836 F.2d 910, 913 (5th Cir. 1988).

The Petition for Review filed in this case challenges the NRC decision designated as CLI-02-22, which was issued on November 21, 2002, and was not a final order because it did not end the administrative proceeding. In fact, Connecticut Coalition not only admits that CLI-02-22 was "assertedly interlocutory," Objection at 4, but concedes that a different order, CLI-02-27, which was issued on December 18, 2002, was the "final" order in the NRC's administrative proceeding, i.e., the Order which ended the proceeding and effectively granted the license amendment at issue in that proceeding. See Objection at 3 ("The Commission's decision in CLI-02-27 lifted the last challenge to approval of the license amendment application.") and n.2. But contrary to the Hobbs Act's clear and unambiguous mandate that only "final" Commission orders are reviewable, Connecticut Coalition failed to challenge CLI-02-27 in its Petition for Review.

Connecticut Coalition now argues that it was not required to specify CLI-02-27 in its petition for review because it sought to challenge only the issues decided in CLI-02-22, not the issues resolved in CLI-02-27. The Coalition's logic appears to be: (1) CLI-02-22 "terminated the proceeding with regard to Contention 4," Objection at 3; (2) "The subject matter of CLI-02-27 is utterly separate and distinct" from the issues resolved in CLI-02-22; Objection at 5; therefore, (3) because the Coalition decided not to challenge the issues resolved in CLI-02-27, they did not have to challenge that decision in their Petition for Review. In fact, Connecticut Coalition claims that any challenge CLI-02-27 would be "pro forma" and that the NRC has "fail[ed] to cite to a decision that stands for the proposition that a party must appeal from a decision it agrees with in order to be able to appeal from a decision with which it does not." Objection at 7-8.

Connecticut Coalition misstates both the law and the NRC's position. It's true that the law does not require a petitioner "to appeal from a decision it agrees with." But in this case, as Connecticut Coalition concedes, Objection at 3, it was CLI-02-27 that authorized final issuance of the amendment and ended the challenge to the amendment application. It was the final order. The Coalition can hardly claim to "agree with" the decision issuing the amendment.

Moreover, both the Hobbs Act and controlling case law make clear that petitions must challenge "final" orders. See 28 U.S.C. §§2342(4); 2344. The instant petition does not do so; it never alludes to CLI-02-27. Instead, the petition challenges CLI-02-22, an intermediate or interlocutory decision. It is true that CLI-02-22 completed all litigation on a separate and discrete group of issues. See Objection at 2. But that does not make CLI-02-22 a "final" order for purposes of the Hobbs Act.

Contrary to Connecticut Coalition's claim, the NRC is not advocating that petitioners "crowd the dockets of the federal courts with appeals from all orders . . . as a precautionary measure and not await the final outcome as [the Hobbs Act] requires." Objection at 5. As the Respondents noted in the Motion to Dismiss, Connecticut Coalition correctly waited until after the Commission issued CLI-02-27 to file its petition. See Motion to Dismiss at 9. But having waited for the "final outcome" as required by law, Connecticut Coalition then failed to name that final decision in its petition for review. Instead, the petition for review, on its face, challenges only CLI-02-22, an intermediate or interlocutory decision.

As we pointed out in the Motion to Dismiss, case law has long held that "it is the order granting or denying the license that is ordinarily the final order." City of Benton v. NRC, 136 F.3d at 825. See Motion to Dismiss at 7 citing cases. In essence, the preliminary or intermediate decisions "merge" into the final decision, but it is the final decision that triggers the right to judicial review. It is axiomatic that a petition to review a "final" decision in a proceeding

carries with it the right to challenge interlocutory rulings leading up to and including the “final” decision. See, e.g., Thermal Ecology v. AEC, 433 F.2d at 525-26.¹ Connecticut Coalition ignores this principle.

As we explained in the Motion to Dismiss, this case is indistinguishable from City of Benton v. NRC, in which the D.C. Circuit held that a petition for review that was filed within the 60-day period after the agency’s final decision but which did not name the “final” decision was barred by the Hobbs Act. 136 F.3d at 825-26; Motion to Dismiss at 9-10. “Whichever order [petitioner] intended to ask the court to review, it named the wrong order in its petition. Fed. R. App. P. 15(a) requires that [the] petition be dismissed for failing properly to designate the order to be challenged.” 136 F.3d at 826.² Accord Gottesman v. INS, 33 F.3d 383, 388 (4th Cir. 1994) (“By failing to designate the INS order in his petition, Gottesman has deprived this court of any jurisdiction which it may have had to review that order.”).

The D.C. Circuit has recently noted that the law in this area “has evolved,” Sinclair Broadcast Group v. FCC, 284 F.3d 148, 156 (D.C. Cir. 2002), and has allowed challenges to decisions that were not cited in petitions for review if other timely-filed submissions (e.g., docketing statements) identify the proper decision. But the Court has repeatedly reaffirmed the validity of City of Benton. See Sinclair Broadcast Group, 284 F.3d at 156; Small Business in Telecommunications v. FCC, 251 F.3d 1015, 1021 (D.C. Cir. 2001). Unfortunately for

¹ See also Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction 3d, §3949.4 (“But a notice of appeal that names the final judgment is sufficient to support review of all earlier orders that merge in the final judgment under the general rule that appeal from a final judgment supports review of all earlier interlocutory orders.”)(Footnote containing citations omitted).

²The Fifth Circuit takes a different approach from that taken by the D.C. Circuit. See Castillo-Rogriguez v. INS, 929 F.2d 181, 183 (5th Cir. 1991). But as City of Benton points out, the Fifth Circuit’s approach “add[s] unnecessary confusion to the agency’s operation and the court’s review of agency determinations.” 136 F.3d at 826. We consider the Fifth Circuit’s approach to be contrary to the express language of the Hobbs Act and the Federal Rules of Appellate Procedure.

Connecticut Coalition, none of the ways that the Court has recognized to allow additional decisions to be included within a petition for review is present in this case -- i.e., Connecticut Coalition never made clear to this Court (until filing its "Objection" to our Motion) any intent to challenge the Commission's final decision in CLI-02-27.

Connecticut Coalition attempts to distinguish City of Benton by arguing that the "preliminary decision" challenged in that case "was not the order that the petitioners intended to challenge[,]” Objection at 8, while in this case the petition for review cites the correct order to be challenged. In effect, the Coalition argues that the deciding factor in the City of Benton analysis was that the petitioner in that case simply challenged "the wrong decision.” But that argument misreads City of Benton. The reason the petitioner's omission was fatal in that case was not because they challenged the "wrong decision,” but because the petition named a non-final order. Quite simply, in both City of Benton and in this case the petitioner failed to designate the "final" order issued by the agency. That failure is fatal to the petitioner's case.

Connecticut Coalition also argues that City of Benton is distinguishable because the preliminary order challenged there "was not one given 'immediate effect' and hence presumably the 'final order.’” Objection at 8 (citation omitted). But as the Coalition admits elsewhere, CLI-02-22, the preliminary decision challenged here, also "was not one given 'immediate effect.’” As did the petitioner in City of Benton, Connecticut Coalition did not challenge a final order in its petition for review.

Finally, Connecticut Coalition asks that it be allowed to amend its petition if the Court concludes that it has not satisfied the Hobbs Act's jurisdictional requirements. Objection at 9. However, we are unaware of any authority for a party to "amend" its petition to correct a fatal mistake. If a party could amend its petition for review at any time after the 60-day jurisdictional deadline, that would create havoc in preparing responsive pleadings.

III. The Petition For Review Is Untimely.

While the NRC agrees that a petition for review filed before the issuance of CLI-02-27 would be impermissibly premature, see Western Union Telegraph v. FCC, 773 F.2d 375 (D.C. Cir. 1985), and that the petition for review in this case would have been timely if it had named CLI-02-27 as one of the decisions to be challenged, we do not agree that the petition for review, as currently presented, is timely filed. Simply put, the Hobbs Act requires that a petition for review must both challenge a “final” decision and be filed within 60 days of that “final” decision. 28 U.S.C. §§2342(4), 2344.

Here, the Commission’s decision in CLI-02-22 was issued on November 21, 2002. The petition for review was filed on February 18, 2003, more than 60 days later. If Connecticut Coalition now argues that CLI-02-22 is a “final” decision for purposes of the Hobbs Act, which it must do in order to satisfy the jurisdictional statute, see Section II, supra, then the petition is clearly untimely because it was filed more than 60 days after the “final” decision it seeks to challenge. 28 U.S.C. §2344; Natural Resources Defense Council v. NRC, 666 F.2d 595, 601-02 (D.C. Cir. 1981); New York v. United States, 568 F.2d 887, 892 (2d Cir. 1977).

IV. Summary.

Lacking a legally sound response to the Motion to Dismiss, Connecticut Coalition’s first and last resort is to disparage the NRC’s jurisdictional argument; “self-contradictory,” “they-can’t-have-it-either-way,” and “non-sensical” are simply a few of the terms used. See Objection at 4, 5, and 9. Even if these colorful exaggerations were true, a fair reply might be that jurisdiction is indeed a highly technical part of the law. A litigant who relies on intuition rather than a close reading of the relevant statutes risks becoming a victim of jurisdictional technicalities from which a court has no power of rescue.

In this case, the Connecticut Coalition has failed to follow the express mandate of the Hobbs Act and Federal Rules of Appellate Procedure and designate a “final” order as the order challenged in its Petition for Review. That flaw is fatal, as we have demonstrated above. In response, Connecticut Coalition has failed to justify its failure to follow the statute’s mandate and has relied instead on simply disparaging the NRC’s arguments without demonstrating any analytical weaknesses in them.

CONCLUSION

For the foregoing reasons, the petition for review should be dismissed.

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