IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

CONNECTICUT COALITION AGAINST MILLSTONE, Petitioner	:	03-4372
v.	:	
UNITED STATES OF AMERICA and UNITED STATES OF AMERICA NUCLEAR REGULATORY COMMISSION, Respondents	:	
DOMINION NUCLEAR CONNECTICUT, INC. Intervenor	:	APRIL 22, 2003

PETITONER'S OBJECTION TO MOTION TO DISMISS

The Connecticut Coalition Against Millstone ("Coalition") objects herewith to the Motion to Dismiss filed on behalf of the U.S. Nuclear Regulatory Commission ("Commission").[1]

As a preliminary matter, the motion must be denied because the Respondent-Movants failed to comply with the mandatory requirement of Local Rule 27(a)2(a), which provides as follows:

> All motions must be accompanied by an affidavit containing factual information only. Affidavits containing legal argument will be treated as memoranda of law.

[1] The motion, although dated April 14, 2002, was not mailed until April 15, 2002, according to the postmark appearing on the mailing envelope, a copy of which is annexed hereto.

The Respondent-Movants' motion is not accompanied by an affidavit containing factual information. The requirement of an affidavit is mandatory, as evidenced by the use of the term "must."

With regard to the substance of the motion, the motion is a study in self-contradiction and it is without merit. Therefore, it should be denied.

This matter derives from proceedings before the Commission on an application by Northeast Nuclear Energy Company, the former owner and operator of the Millstone Nuclear Power Station in Waterford, Connecticut, to expand the storage capacity of its Unit 3 spent fuel pool. The current owner, Dominion Nuclear Connecticut, Inc., moved to intervene in this case and intervention was granted without objection.

The Commission proceedings on the license amendment challenge occurred through numerous stages, as set forth in the Commission's motion. On February 18, 2003, the Coalition petitioned this Court to review the decision of the Commission by Memorandum and Order dated November 21, 2002 (CLI-02-22), by which the Commission denied the Coalition's request for an evidentiary hearing on its reopened Contention 4. The order affirmed the August 8, 2002 decision by the Licensing Board denying the petitioner's request for an evidentiary hearing on the reopened contention and **terminating the proceeding.** 56 NRC 213, 218. The Coalition had argued that evidence to be presented at such hearing would as a matter of law compel the Commission's revocation of the requested license amendment.

Although CLI-02-22 terminated the administrative proceeding with regard to Contention 4, the order did not take final effect until the Commission issued its final decision in CLI-02-27 – on the newly-filed terrorism contention – on December 18, 2002. CLI-02-22 did not become appealable until the final termination of the administrative proceeding on December 18, 2002.

Thus, the last order in the proceedings was issued on December 18, 2002 (CLI-02-27 dismissing a contention concerned with acts of terrorism. The Commission's decision in CLI-02-27 lifted the last challenge to approval of the license amendment application.

As the Commission correctly notes in its motion,

> Prior to CLI-02-27, the possibility existed that the Commission could reverse the Licensing Board and deny the requested amendment; thus there was no 'final order' in the proceeding until the issuance of CLI-02-27.

(Commission motion at page 5)[2]

The Coalition's Petition for Review, having been filed on February 18, 2003, was filed within sixty (60) days of the Commission's issuance of its last decision in the proceedings, CLI-02-27, on December 18, 2002.

The Coalition's Petition for Review was therefore timely filed.

The controlling statute, 28 U.S.C. §2344, provides in pertinent part as follows:

[2] The Commission repeats its refrain at page 8: "It was not until the Commission issued CLI-02-27 on December 18, 2002 resolving that separate issue that there was a "final" order in the license amendment proceeding."

The Commission again repeats the refrain on page 8: "But the Millstone application did not receive 'final' Commission approval until the issuance of CLI-02-27 on December 18, 2002."

On the entry of a final order reviewable under this chapter, the agency shall promptly give notice thereof by service or publication in accordance with its rules. Any party aggrieved by the final order may, within 60 days after its entry, file a petition to review the order in the court of appeals wherein venue lies.

CLI-02-22 did not become "reviewable" pursuant to 28 U.S.C. §2344 until CLI-02-27, the last decision in the case, was issued on December 18, 2002.

The Commission argues on the one hand that the Petition for Review should have been filed, if at all, within sixty (60) days of November 21, 2002, when CLI-02-22 was issued. However, the Commission's argument is self-contradictory because the Commission also argues that an appeal from the CLI-02-22 decision would have been premature prior to issuance of the decision in CLI-02-27, which it contends is the "final decision" which terminated the proceedings and whose issuance on December 18, 2002 triggered the statutory clock of 28 U.S.C. §2344.

The Commission characterizes CLI-02-22 as "merely one more interlocutory decision resolving one of Connecticut Coalition's myriad challenges. The final decision, which Connecticut Coalition has not challenged, is CLI-02-27."

The Commission then concludes that the Coalition has not challenged a "final decision."

The circuitry of the Commission's logic is that CLI-02-22, being assertedly interlocutory, could not have been challenged by a Petition for Review until the proceedings had been finalized by the final decision, which occurred in CLI-02-

27. The subject matter of CLI-02-27 is utterly separate and distinct – being confined to issues of terrorism – from the entire remainder of the proceedings, which concerned the issue of substituting administrative for physical controls as a barrier to spontaneous criticality in the spent fuel pool. Doubtless, had the Coalition filed its Petition for Review within sixty (60) days of November 21, 2002, the Commission would have moved to dismiss the Petition as premature, as not deriving from a "final decision."

Although the Coalition is aggrieved by CLI-02-27, the Coalition chose not to mount a challenge to this Court as to the particular issues decided in that Memorandum and Order.

Nevertheless, the Coalition could not have known until after CLI-02-27 was issued whether or not it would choose to appeal from a decision on the newly filed terrorism contention for the obvious reason that the decision had not yet been issued, nor could it have been known when it would be issued, nor could it have been known whether the Commission would remand the matter to the ASLB for further proceedings which might potentially implicate Contention 4 issues, thereby further protracting the appeal period vis-à-vis CLI-02-02.

Under the Commission's faulty "they-can't-have-it-either-way" reasoning, parties to federal administrative proceedings are well advised to crowd the dockets of the federal courts with appeals from all orders as an administrative case is proceeding as a precautionary measure and not await the final outcome as 28 U.S.C. §2344 requires.

As the Commission's own recitation of the procedural history of the license amendment proceedings makes clear, the administrative proceedings followed a fluid course, with numerous forays from the Atomic Safety and Licensing Board Panel to the Commission and vice versa. Each foray presented numerous if not indeed unlimited possibilities for modifications to past rulings as the proceedings developed and new evidence was brought forth.[3]

The administrative proceeding was finally brought to its "consummation" with the Commission's issuance of CLI-02-27 on December 18, 2002, the last

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[3] The Commission states that "The Motion to Reopen [Contention 4 that eventually led to the Commission decision at issue in this case] was based upon the discovery that two fuel rods had been missing from the Millstone Unit 1 spent fuel pool since approximately 1980. This information, according to the Connecticut Coalition, raised a question whether the licensee had sufficient administrative controls to keep track of the spent fuel rods that would be stored at Millstone Unit 3. The Commission referred the Motion to Reopen to the Licensing Board for further proceedings. See CLI-00-25, 52 NRC 355 (Dec. 21, 2000)."

In its motion to dismiss, the Commission has simplified the facts considerably. The Commission has omitted to state in its recitation of the sequence of events that the administrative proceedings also involve the issue of whether Northeast Nuclear Energy Company withheld its knowledge about the "missing" spent fuel rods from the Commission, the ASLB panel and the Coalition during discovery proceedings when it was obligated to report each instance of fuel handling "mishap" at the Millstone Nuclear Power Station. The proceedings were stayed while the Commission's investigatory arm carried out an investigation. That investigation generated pertinent evidence. One issue to be raised on appeal to this Court is whether the licensee's asserted withholding of pertinent discovery information tainted the administrative proceedings and provided legal cause for the Commission to reverse the Licensing Board's decision not to conduct an evidentiary hearing on reopened Contention 4. It is one of the Coalition's claims on appeal that the Commission erred and acted arbitrarily and capriciously in rejecting as irrelevant and improper the evidence of the licensee's recent and ongoing misconduct respecting the "missing" spent fuel rods. The Commission's decision in CLI-02-22 permitted the licensee to substitute administrative controls – tasking plant personnel with additional and more complex procedures to protect against spontaneous criticality during fuel handling - for physical controls, namely, adequate spacing between stored spent fuel assemblies and other physical controls. However, this decision did not take final effect until CLI-02-27

decision in the case. See Honicker v. NRC, 590 F.2d 1207, 1209 (D.C. Cir. 1978), *cert. den.*, 441 U.S. 906 (1979) and cases cited by the Commission at page 7 of its motion.

The very cases cited by the Commission support the Coalition's timely filing. For example, the Commission relies on the case of Thermal Ecology Must Be Preserved v. AEC, 433 F.2d 524 (D.C. Cir. 1970)(*per curiam*) for its proposition that "[a] Court will not review interlocutory orders of the Commission until it can review the agency's action on the license application." Thus, the Commission argues that, had the Coalition filed its petition for review within sixty (60) days of November 21, 2002, this Court would have been bound to dismiss it as premature under the authority of Thermal Ecology. (The Commission in this case issued the license amendment on November 28, 2000, two years before issuing the decisions in CLI-02-22 or CLI-02-27. Under Thermal Ecology, it could be argued that neither CLI-02-22 nor CLI-02-27 could have been appealed except within 60 days following the Commission's issuance of the license amendment, or two years *before* the decisions were issued.)

The Commission's faulty logic led it to conclude that the Coalition had to challenge the terrorism decision in order to challenge the Contention 4 decision, even if a challenge to the terrorism decision would be *pro forma* and presumably even if such a challenge were to lack actual merit.[4] However, the Commission

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was issued on December 18, 2002 and the proceedings on the intervention petition terminated.

[4] The Commission's argument is set forth as follows: "Quite simply, the proper course of action would have been for Connecticut Coalition to have challenged both CLI-02-27 and CLI-02-22, perhaps specifying that it was challenging CLI-02-

fails 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.

The Coalition intended to appeal from the Commission's final decision terminating the proceedings on Contention 4 as issued in CLI-02-22. The Commission correctly understands that the appeal is from the decision in CLI-02-22. Thus, this case is easily distinguishable from City of Benton v. NRC, 136 F.3d 824 (D.C. Cir. 1998)(*per curiam*).

In City of Benton, the petitioners did not appeal from the Commission's final decision. They appealed from a preliminary decision by the NRC staff, per the Director of the Office of Nuclear Reactor Regulation, but it developed that that was not the order that the petitioners intended to challenge. The Court of Appeals for the District of Columbia Circuit held that the petitioners should have appealed, if at all, from the Commission's decision to issue license amendments because the Commission did not conclusively determine all issues until such ultimate decision. Id. at 825. In the present case, there is no question but that the Coalition has appealed from the order it intends to challenge on appeal.

City of Benton is further distinguishable from this case. In City of Benton, the Director's order was not one given "immediate effect" and hence presumably the "final order." Id at 825-26. In this case, the Commission's decision to issue a license amendment occurred on November 28, 2000, *two years before the Commission had completed its review* of the Coalition's motions addressed to

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27 only as a prerequisite to challenging CLI-02-22 (if it did not want to challenge CLI-02-27 specifically."

Licensing Board decisions and terminated the proceedings. In its motion to dismiss, the Commission agrees that finality of these proceedings would not occur, and orders would not be appealable, while the possibility remained that the Commission might grant a petition for review, reverse the Licensing Board or revoke the amendment.[5]

The Commission urges upon this Court adoption of its non-sensical and self-contradictory argument: that the decision in CLI-02-22 had to be appealed if at all within 60 days of November 21, 2002, but if it had been so appealed it would have been subject to dismissal as premature and interlocutory.

Clearly, adopting such an argument would insulate the federal agency from judicial review. Yet, the Commission has not pointed to any statute or case law or legislative history to establish any Congressional intent or judicial construction supporting its extreme position.

The Commission's misguided misinterpretation of the law, if adopted, would only "make unclear the point at which agency orders become final and thus add unnecessary confusion to the agency's operation and the court's review of agency determinations." City of Benton, Id. at 826. And see Outland v. CAB, 284 F.2d 224, 227-228 (D.C. Cir. 1960). (Parties should not feel compelled to file unnecessary "protective" orders out of uncertainty.)

For all the above-stated reasons, the motion to dismiss should be rejected.

Should this Court determine that in this case Fed. R. App. P. 15(a) requires submission of CLI-02-27, notwithstanding the Petitioner's intent not to pursue an

[5] Motion to Dismiss at 3.

appeal of CLI-02-27, the Petitioner urges upon the Court its application of Fed. R. App. 2 (Suspension of Rules") to permit a proper amendment.

Respectfully submitted,
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THE PETITIONER

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing "Petitioner's Objection to Motion to Dismiss" has been served on the following via U.S. Mail, postage pre-paid, on April 22, 2003:

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