April 24, 2003

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Connecticut Coalition Against Millstone, Petitioner,	
v.	
U.S. Nuclear Regulatory Commission, Respondent,	No. 03-4372
and	
Dominion Nuclear Connecticut, Inc., Intervenor.	

INTERVENOR'S RESPONSE IN SUPPORT OF FEDERAL RESPONDENTS' MOTION TO DISMISS

On April 14, 2003, the federal Respondents in this matter — the United States of America and the U.S. Nuclear Regulatory Commission ("NRC" or "Commission") — filed a Motion to Dismiss ("Motion to Dismiss"). In accordance with Rule 27(a)(3) of the Federal Rules of Appellate Procedure, Intervenor Dominion Nuclear Connecticut, Inc. ("DNC") herein responds. DNC supports the Motion to Dismiss.

On February 18, 2003, Petitioner Connecticut Coalition Against Millstone ("CCAM") filed a "Petition for Review" specifically challenging a decision of the NRC issued on November 21, 2002. The challenged NRC decision was an order issued by the Commission in an administrative proceeding on a proposed license amendment to allow an increase in the storage capacity of the spent fuel pool at DNC's Millstone Power Station, Unit 3.[1] CCAM later augmented its Petition for Review in this Court by means of a "Pre-Argument Statement," filed on February 27, 2003, to additionally challenge a decision of the Commission in a completely different NRC administrative licensing proceeding, on a completely different regulatory approval, issued many months earlier, on January 30, 2002.[2]

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1 *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Unit 3), CLI-02-22, 56 NRC 213 (2002). For clarity, this order was issued in what will be referred to here as the "spent fuel pool case." As explained by the NRC, consistent with the Atomic Energy Act, 42 U.S.C. § 2239.a, and the NRC's finding that the amendment involved "no significant hazards consideration," the NRC previously issued the requested license amendment on November 28, 2000. *See* Fed. Reg. 75736 (Dec. 4, 2000). The administrative licensing proceeding continued after that time. After a proceeding conducted in accordance with NRC's hearing procedures in 10 C.F.R. Part 2, Subpart K, the Commission in the November 21, 2002 decision upheld an administrative board decision that no further evidentiary hearings were required on certain issues raised in the proceeding by CCAM.

2 *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-02-01, 55 NRC 1 (2002). This decision was the final decision (denying reconsideration of an earlier decision) in an administrative proceeding on an NRC license amendment related to administrative controls

The Petition for Review was not timely filed, in accordance with the Hobbs Act, 28 U.S.C. § 2342, within 60 days of the issuance of either of the two NRC decisions challenged in the Pre-Argument Statement. The 60-day period specified in 28 U.S.C. § 2342 is jurisdictional, and therefore the Petition for Review on its face must be dismissed. *N.Y. v. U.S.*, 568 F.2d 887, 892 (2d Cir. 1977) ("It is common ground that a petition to review a final order of the [Interstate Commerce] Commission must be filed within sixty days of the entry of the order, 28 U.S.C. § 2344 (1970), and the timeliness requirement is jurisdictional."); *see also Natural Res. Def. Council v. Nuclear Regulatory Comm'n*, 666 F.2d 595, 602 (D.C. Cir. 1981).

As anticipated by the Respondents in the Motion to Dismiss, the Petitioner might attempt to argue timeliness with respect to the NRC's decision of November 21, 2002, based on the fact that the petition was filed within 60 days after a *later* NRC decision in the same administrative proceeding. (No such argument exists for the NRC's decision of January 30, 2002, because that order was issued in a different, now-resolved case.) The later decision in the spent fuel pool case — addressing issues completely different from those addressed in the

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required for certain radiological monitoring equipment at both Units 2 and 3 of the Millstone Power Station. No petition for review under the Hobbs Act was ever filed. The January 30, 2002 decision was *not* issued in the spent fuel pool case.

November 21 decision — was issued on December 18, 2002.[3] This later decision was the final order issued by the Commission in the spent fuel pool case. This final order, however, was not cited in either the original Petition for Review or the subsequent Pre-Argument Statement. Therefore, there has never been a proper, timely petition for review of the December 18, 2002 final order in the spent fuel pool case.

As discussed in the Motion to Dismiss, the decision of the Court of Appeals for the D.C. Circuit in *City of Benton v. NRC,* 136 F.3d 824 (D.C. Cir. 1998) *(per curium)* is directly applicable to the current circumstances with respect to the Petitioner's appeal of the November 21, 2002 order. Since the Petitioner is appealing what is presumptively an interlocutory order of the Commission in the spent fuel pool case (the November 21, 2002 order), an appeal to this Court properly would be by petition for review within 60 days of the final order in that case (the December 18, 2002 order).[4] No appeal of the final order was made, in

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[3] *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Unit 3), CLI-02-27, 56 NRC 367 (2002). This later decision addressed a narrow issue in the spent fuel pool case regarding the scope of the environmental analysis required with respect to the proposed license amendment under the National Environmental Policy Act.

[4] *See City of Benton,* 136 F.3d at 825 *(citing Massachusetts v. NRC,* 924 F.2d 311, 322 (D.C. Cir.), *cert denied,* 502 U.S. 899 (1991) and *Natural Resources Defense Council, Inc. v. NRC,* 680 F.2d 810, 815 and n. 11 (D.C. Cir. 1982)). There appears to be no disagreement that the November 21, 2002 order was interlocutory — notwithstanding that it assuredly terminated

either of the two filings to this Court. The NRC's final order in the spent fuel pool case was never listed as a challenged decision. As stated by the Court in *City of Benton*: "Because [the petitioner] designated a non-final interlocutory order in its petition for review and failed to designate in a timely fashion the order intended to be reviewed, its petition is dismissed for lack of jurisdiction." *City of Benton,* 136 F.3d at 826. The Court reached this result even where — as is apparently the case here — the petitioner sought review of the issues raised by the earlier order, rather than the issues addressed in the final order in the case.

It does not appear that the issue raised or the position adopted in *City of Benton* has been addressed by this Court. However, a result consistent with *City of Benton* would seem to be compelled by the jurisdictional requirements of the Hobbs Act and Rule 15(a) of the Federal Rules of Appellate Procedure. In *City of Benton,* the DC Circuit specifically applied the jurisdictional requirement of Rule 15(a), notwithstanding an argument that this would lead to dismissal based on "technical arguments" related to pleading requirements. The D.C. Circuit rejected such reasoning by the 5th Circuit in *Castillo-Rodriguez v. INS,* 929 F.2d 181, 183

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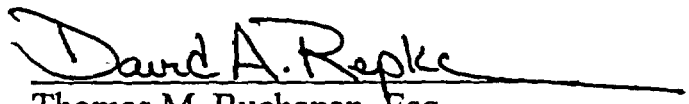
the NRC proceeding on certain issues. If, however, the November 21, 2002 order were considered to be a final, reviewable order (for example, if it was treated as an exception, as contemplated under *Massachusetts v. NRC,* 924 F.2d at 322, to the general rule that agency action becomes final for review with the final order in the case), the Petition for Review is untimely on its face since it was filed beyond 60 days after the NRC's November 21, 2002 order.

(5th Cir. 1991). It suggested that its holding facilitates the administrative process by clarifying the requirements related to the proper time and procedure for seeking review of agency actions. *City of Benton,* 136 F.3d at 826. Similar perspectives would apply here.

Accordingly, the Motion to Dismiss should be granted.

Respectfully submitted,



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Dated in Washington, District of Columbia
this 24th day of April 2003

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FOR THE SECOND CIRCUIT

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CERTIFICATE OF SERVICE

I hereby certify that copies of "INTERVENOR'S RESPONSE IN SUPPORT OF FEDERAL RESPONDENTS' MOTION TO DISMISS" in the captioned proceeding have been served as shown below by United States mail, first class, this 24th day of April 2003, on the following:

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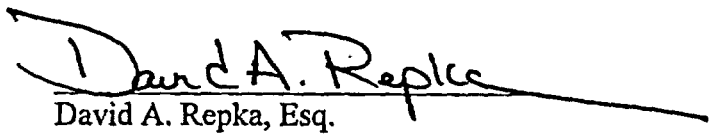

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