

03-4372

In the
United States Court of Appeals
For the Second Circuit

CONNECTICUT COALITION AGAINST MILLSTONE
Petitioner,

v.

UNITED STATES NUCLEAR REGULATORY COMMISSION,
Respondent

DOMINION NUCLEAR CONNECTICUT, INC.,
Intervenor

On Petition for Review from the U.S. Nuclear Regulatory
Commission

PETITION FOR REHEARING
EN BANC

Connecticut Coalition Against Millstone, Petitioner
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Introductory Statement

A longstanding canon of administrative law requires that parties await the final outcome of the administrative proceedings before mounting a judicial challenge. Interlocutory challenges to administrative rulings are not allowed.

This requirement is embodied in 28 U.S.C. §2344, which provides that an appeal from an agency decision, by means of a petition for review, must be filed within 60 days of issuance of a final agency decision.

In this matter, the Court of Appeals has ruled contrary to this important precept by granting a motion to dismiss a Petition for Review – which was filed timely within 60 days of issuance of the administrative agency's final decision terminating the proceedings – because the appeal was not filed within 60 days of issuance of an interlocutory order.

This decision therefore is contrary to controlling decisions of other Courts of Appeal which have considered this issue. See, e.g., Thermal Ecology Must Be Preserved v. The Atomic Energy Commission, 433 F.2d 524 (D.C. Cir. 1970), and Castillo-Rodriguez v. INS, 929 F.2d 181, 183 (5th Cir. 1991). It does not appear that the Court of Appeals for the Second Circuit has heretofore decided this issue.

Because the Court's Order is contrary to this fundamental canon of administrative law, and because it is in conflict with the statute and such authoritative decisions, this petition should be granted in order to secure and maintain uniformity of this Court's decisions in the area of administrative law.

1. Factual Background

This matter derives from proceedings before the Respondent, U.S. Nuclear Regulatory Commission ("Commission") on an application by Northeast Nuclear Energy Company, the former owner and operator of the Millstone Nuclear Power Station in Waterford, Connecticut, submitted on March 19, 1999 to amend its federal license to double the storage capacity of its Unit 3 spent fuel pool.¹

The petitioner, Connecticut Coalition Against Millstone ("Coalition"), together with the Long Island Coalition Against Millstone² (collectively, "coalitions"), filed a request for hearing on the license amendment application and submitted eleven proposed "contentions" or claims to contest the application. The Commission referred the application and the hearing request to the Commission's Atomic Safety and Licensing Board, which, after a hearing, admitted both organizations as intervenors and admitted three contentions to be litigated. See LBP-00-02, 51 NRC 25 (Feb. 9, 2000). The three contentions, numbered 4, 5 and 6 in the coalitions' submission, all dealt with the means by which the licensee would prevent criticality accidents – that is, spontaneous nuclear reactions - in the spent fuel pool with double the number of spent fuel rods previously allowed.

Following written submission and oral argument, the Licensing Board issued a Memorandum and Order that resolved Contention 5 by adopting an agree-upon license condition, rejected the other two admitted contentions (Contentions 4 and 6) and terminated the proceeding. See LBP-00-26, 52 NRC 181 (Oct. 26, 2000)

¹ Northeast Utilities sold the Millstone facility to Dominion Nuclear Connecticut, Inc. on March 31, 2001. Dominion Nuclear Connecticut, Inc. is an intervening party in these proceedings. It supported the Commission's motion to dismiss the Coalition's Petition for Review.

² The Long Island Coalition Against Millstone is not participating in these appellate proceedings.

The coalitions immediately sought Commission review of the Licensing Board's rejection of Contentions 4 and 6.

Under the Atomic Energy Act, the Commission may issue a license amendment on an immediately effective basis, subject to the possibility of its being withdrawn in a subsequent administrative hearing, if the Commission makes a finding that the amendment involves "no significant hazards considerations." See 42 U.S.C. §2239(a). See also 10 C.F.R. §50.91 and 50.92. The Commission issued a proposed finding of no significant hazards considerations when it announced the application for the license amendment and the opportunity for members of the public to request a hearing. See 64 Fed. Reg. 48672 (Sept. 7, 1999). On November 28, 2000, after the Licensing Board had "terminated" the proceeding but during the Commission's review, the Commission staff made a finding that the license amendment involved no significant hazards considerations and then issued the license amendment permitting doubling of the storage capacity of the Millstone Unit 3 spent fuel pool. See 65 Fed. Reg. 75736 (Dev. 4, 2000)

As the Commission explained in its Motion to Dismiss:

Thus, the Millstone operators were immediately able to implement the amendment, *subject to the possibility that the Commission might grant the [coalitions'] petition for review, reverse the Licensing Board and revoke the amendment.*

Commission's Motion to Dismiss at page 3. (Emphasis added.)

CCAM filed a "Pre-Argument Statement" with the Court in which the Coalition restated that it sought review of CLI-02-22.

The Coalition did not petition for review of CLI-02-27, nor did it intend to appeal from, the Commission's decision rejecting the late-filed terrorism contention.

On April 14, 2003, the NRC moved to dismiss the Petition for Review as untimely filed more than 60 days after the decision it challenges and as failing to challenge a "final" agency action. The Coalition filed a timely objection to the motion. The Intervenor submitted a statement in support of dismissal. On June 10, 2003, the appellate panel conducted oral argument on the motion.

2. The Appellate Panel Order

On June 11, 2003, the panel issued an order ("the Order")⁴ granting the Commission's Motion to Dismiss.

The Order states in its entirety as follows:

Respondent moves to dismiss the petition for review. Upon due consideration, it is ORDERED that the motion is granted. See 28 U.S.C. §2344.

The petitioner, Connecticut Coalition Against Millstone, submits the present petition for rehearing *en banc* requesting that the Court of Appeals vacate and reverse the Order dismissing the Petition for Review.

3. Argument

The Coalition timely petitioned for review; the appellate panel's ruling to the contrary is clearly erroneous under the facts and the controlling law.

⁴ A copy of the Order is annexed hereto.

proceedings. This argument urges a result in direct conflict with the longstanding canon of administrative law, and the controlling statute.

Piecemeal appeals from interlocutory decisions in administrative proceedings are not allowed. The federal courts "would, in the judgment of Congress, be clogged if there were interlocutory appeals to the courts. The denial of interlocutory appeals goes on the assumption that appeals from final orders are realistic and effective." Thermal Ecology Must Be Preserved v. The Atomic Energy Commission, 433 F.2d 524, 526 (D.C. Cir. 1970)

The Commission argued on the one hand that the Petition for Review should have been filed, if at all, within 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 Order of the Appeals Court panel concludes without factual or legal analysis the petition was not filed in compliance with §2344.

Had the petition been filed within 60 days of November 21, 2002, but prior to issuance of the December 18, 2002 decision, the decision it considers the "final order" in the case, the Commission would have moved to dismiss it as premature, according to its own motion.

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 60 days of November 21, 2002 but prior to issuance of CLI-02-27, the 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 and 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 interpretation of the statute led it to conclude that the Commission had to challenge the terrorism decision in order to challenge the Contention 4 decision, even if a challenge to the terrorism contention would be *pro forma* and presumably even if such a challenge were to lack actual merit. Yet, the Commission's motion is devoid of legal authority 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. Similarly, this Court's Order is devoid of factual or legal support for this novel concept.

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 understood that the appeal was from the decision in CLI-02-22. The Petition for Review clearly states that review is sought of the decision in CLI-02-22 only. Thus, this case is easily distinguishable from the case of City

of Benton v. NRC, 136 F.3d 824 (D.C. Cir. 1998)(*per curiam*). principally relied upon by the Commission.

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 Regulation. However, it developed that that was not the order that the petitioners had really 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 within 60 days of the Commission's final order terminating the entire administrative proceedings.

City of Benton is further distinguishable from the 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 Licensing Board decisions and terminated the proceedings. In its motion to dismiss, the Commission agrees that the 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.⁶

The Commission's argument was that the decision in CLUI-02-22 had to be appealed if at all within 60 days of November 21, 2002; at the same time, the Commission argued that if the CLI-02-22 decision had been appealed prior to issuance of the Commission's final order in the case issued December 18, 2002, the appeal would have been subject to dismissal as premature.

The Court of Appeals has endorsed the Commission's nonsensical, self-contradictory argument. The Order insulates the federal agency's administrative decisionmaking from review. Yet the Court of Appeals panel Order did not point to any statute or case law or legislative history to establish any Congressional intent or judicial construction supporting this departure from the canon of administrative law that interlocutory orders of administrative agencies cannot be appealed until the administrative proceedings have been completed.

The Court of Appeals Order "make[s] unclear the point at which agency orders become final and thus add[s] 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, 227-28 (D.C. Cir. 1960)(Parties should not feel compelled to file unnecessary "protective" orders out of uncertainty.)

For the foregoing reasons, the Coalition requests that the Court of Appeals grant the petition, reverse and vacate the Order of the panel and order this petition restored to the appellate docket for further proceedings.

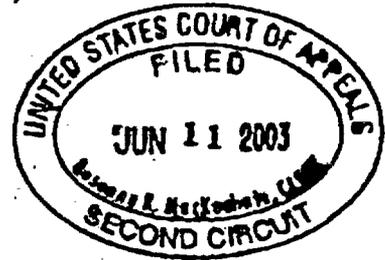
⁶ Commission Motion to Dismiss at page 3.

United States Court of Appeals
FOR THE
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 11 day of June two thousand and three,

Present:

Hon. Roger J. Miner,
Hon. José A. Cabranes,
*Circuit Judges.**



Connecticut Coalition Against Millstone,
Petitioner,

v.

03-4372

United States Nuclear Regulatory Commission Respondent,
Respondent,

and

Dominion Nuclear Connecticut, Inc.,
Intervener.

Respondent moves to dismiss the petition for review. Upon due consideration, it is ORDERED that the motion is granted. See 28 U.S.C. § 2344.

FOR THE COURT:
Roseann B. MacKechnie, Clerk

By: *Roseann B. MacKechnie*

* The Honorable Christopher F. Droney, of the United States District Court for the District of Connecticut, sitting by designation, has recused himself. Accordingly, the matter is decided by the remaining panel members. See 2D Cir. R. 0.14(b).

**THE PETITIONER
CONNECTICUT COALITION AGAINST
MILLSTONE**

By:



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CERTIFICATION

This is to certify that a copy of the foregoing was mailed on July 28, 2003 to the following via U.S. Mail, postage pre-paid:

Charles E. Mullins, Esq.
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A handwritten signature in cursive script, appearing to read "Harry Burton", is written over a horizontal line.