No. _____

IN THE

Supreme Court of the United States

CONNECTICUT COALITION AGAINST MILLSTONE,
Petitioner,

—v.—

UNITED STATES NUCLEAR REGULATORY COMMISSION,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

When a petition for review of agency action under the Hobbs Act, 28 U.S.C. § 2344, is filed within 60 days of the agency's final decision, can it be dismissed as untimely because it was not filed within 60 days of an earlier, nonfinal interlocutory order in the agency proceeding?

PARTIES TO THE PROCEEDINGS

Connecticut Coalition Against Millstone

U.S. Nuclear Regulatory Commission

United States of America

Dominion Nuclear Connecticut, Inc.

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The Connecticut Coalition Against Millstone, Petitioner, by undersigned counsel, requests that this Court issue a writ of *certiorari* to the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals for the Second Circuit (App. 1a) is unreported. The opinions of the U.S. Nuclear Regulatory Commission (App. 3a) are reported at 56 N.R.C. 213 (CLI-02-22) and 56 N.R.C. 367 (CLI-02-27).

JURISDICTION

The decision of the Court of Appeals for the Second Circuit was filed on June 11, 2003. The Court of Appeals denied petitioner's Petition for Rehearing *En Banc* on September 10, 2003.

This Court has jurisdiction under 28 U.S.C. § 1257.

Subject matter jurisdiction for the Court of Appeals for the Second Circuit was invoked under 28 U.S.C. § 2342.

STATUTORY PROVISIONS INVOLVED

28 U.S.C. §2344

On the entry of a final order reviewable under this chapter [28 USCS §§ 2341 et seq.], 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. The action shall be against the United States. The petition shall contain a concise statement of—

(1) the nature of the proceedings as to which review is sought;

(2) the facts on which venue is based;

(3) the grounds on which relief is sought; and

(4) the relief prayed.

The petitioner shall attach to the petition, as exhibits, copies of the order, report, or decision of the agency. The clerk shall serve a true copy of the petition on the agency and on the Attorney General by registered mail, with request for a return receipt.

FRAP Rule 15(a)

(a) Petition for Review; Joint Petition.

(1) Review of an agency order is commenced by filing, within the time prescribed by law, a petition for review with the clerk of a court of appeals authorized to review the agency order. If their interests make joinder practicable, two or more persons may join in a petition to the same court to review the same order.

(2) The petition must:

(A) name each party seeking review either in the caption or the body of the petition—using such terms as "et al.," "petitioners," or "respondents" does not effectively name the parties;

(B) name the agency as a respondent (even though not named in the petition, the United States is a respondent if required by statute); and

(C) specify the order or part thereof to be reviewed.

(3) Form 3 in the Appendix of Forms is a suggested form of a petition for review.

(4) In this rule "agency" includes an agency, board, commission, or officer; "petition for review" includes a petition to enjoin, suspend, modify, or otherwise review, or a notice of appeal, whichever form is indicated by the applicable statute.

STATEMENT OF THE CASE

A longstanding canon of administrative law holds that parties must await the final outcome of the administrative proceedings before mounting a judicial challenge. Interlocutory challenges to administrative rulings are not allowed. *See*, e.g., 2 Am. Jur.2d Administrative Law §§ 487-504 ("Requirement of Final Agency Action").

This requirement is embodied in the Uniform Administrative Procedure Act, 5 U.S.C. § 551 et seq., which generally limits judicial review to "final agency action," as well as in the Hobbs Act, which grants the courts of appeals jurisdiction to review the particular types of actions at issue here. Specifically, 28 U.S.C. § 2344 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.

Because the Court's Order is contrary to a fundamental canon of administrative law, the applicable statutes and the decisions of other circuits, this petition should be granted in order to secure and maintain uniformity of this Court's decisions in this area of administrative law.

Factual and Procedural Background

The Millstone Nuclear Power Station is a three-unit nuclear power plant operated by Dominion Nuclear Connecticut, Inc. and located near New London, Connecti-

cut. In March 1999, Millstone's former owner, Northeast Nuclear Energy Company ("Northeast"), submitted an application to the respondent, the U.S. Nuclear Regulatory Commission ("the Commission"), to amend its federal license to double the storage capacity of its Unit 3 spent fuel pool.[1]

The petitioner, Connecticut Coalition Against Millstone ("the coalition"), together with the Long Island Coalition Against Millstone[2] (collectively, "the coalitions"), filed a petition to intervene and request for hearing on the license amendment application and submitted eleven proposed "contentions" or claims to contest the application pursuant to 10 C.F.R. § 2.714. 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 proposed to prevent "criticality" accidents 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 agreed-upon license condition, rejected the other two admitted contentions (Contentions 4 and 6) and "terminated" the pro-

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[1] Northeast sold the Millstone facility to Dominion Nuclear Connecticut, Inc. on March 31, 2001. Northeast is no longer a party to these proceedings. Dominion Nuclear Connecticut, Inc. is an intervening party. 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.

ceeding. *See* LBP-00-26, 52 NRC 181 (Oct. 26, 2000) 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 had earlier 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 of petitioner's contentions, the Commission staff made a finding that the license amendment involved no significant hazards considerations and then the Commission issued the license amendment permitting doubling of the storage capacity of the Millstone Unit 3 spent fuel pool. See 65 Fed. Reg. 75736 (Dec. 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.)

While Commission review of the two rejected contentions was proceeding, the coalitions filed a Motion to

Reopen Contention 4 which eventually led to the Commission decision at issue in this case. The Motion to Reopen was based upon Northeast's report to the Commission that it was unable to account for two spent fuel rods from the Millstone Unit 1 spent fuel pool. According to Northeast, the highly radioactive spent fuel rods had been unaccounted for since 1980. Northeast Utilities had withheld this fact during discovery proceedings in the present action, notwithstanding the coalitions' request that it disclose all incidents of fuel mishandling at the Millstone Nuclear Power Station, a request to which it did not object.

The coalitions argued that this information raised the 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). The Licensing Board reopened the proceedings with regard to Contention 4 and conducted a hearing with written submissions and oral argument. Ultimately, the Licensing Board denied the coalitions' request for an evidentiary hearing on the newly-disclosed administrative controls issue. *See* LBP-02-16, 56 NRC 83 (Aug. 8, 2002). On November 21, 2002, the Commission affirmed the Licensing Board decision in an order numbered CLI-02-22, the decision under review in this case.

However, as the Commission acknowledged in its Motion to Dismiss, CLI-02-22 was not the "final" decision in the Millstone administrative proceeding. On November 1, 2002, while the Licensing Board was reviewing the administrative controls issue in the "reopened" proceeding, the coalitions submitted a new contention under the Commission's rules for "late-filed" contentions. The new contention alleged that in light of

the attacks of September 11, 2001, the National Environmental Policy Act required the Commission to prepare an Environmental Impact Statement discussing the risks and consequences of terrorism affecting the Millstone spent fuel pool and specifically weighing the risks of a possible terrorist attack against the alternatives to spent fuel pool expansion such as dry cask storage. Ultimately, the Commission rejected the contention in a decision issued on December 18, 2002, CLI-02-27.

As the Commission pointed out in its Motion to Dismiss:

> That decision [CLI-02-27] was the last order in the Millstone Unit 3 spent fuel pool expansion proceeding. Prior to CLI-22027, 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's Motion to Dismiss at page 5.

On February 18, 2003, 60 days after issuance of CLI-02-27, the Connecticut Coalition Against Millstone filed its Petition for Review challenging the Commission's decision in CLI-02-22, the decision finally rejecting Contention 4.[3] On February 27, 2003, pursuant to F.R.Civ.P. 15(a), CCAM filed a "Pre-Argument Statement" with the Court in which the Coalition restated that it sought review of CLI-02-22.[4] The statement identifies CLI-0202 as the order to be appealed and further identifies the order from which relief is sought as follows:

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[3] The Petition for Review appears in the Appendix hereto at 17a.

[4] The Preargument Statement, Form C-A, appears in the Appendix hereto at 19a.

"Final order terminating proceedings and denying an evidentiary hearing."

The coalition did not petition for review of the specific issues decided in 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 Commission moved to dismiss the petition as untimely filed more than 60 days after the decision it challenged and as failing to challenge a "final" agency action. The Commission asserted that the petitioner was constrained from petitioning for review of CLI-02-22 without also petitioning for review of CLI-02-27, the last order issued in the case. The petitioner filed a timely objection to the motion, in which it argued that it properly petitioned for review of CLI-02-22 by awaiting issuance of the last order in the adjudicatory proceedings and appealing within 60 days of such date. The petitioner further asserted that since it did not intend to appeal the Commission's decision in CLI-02-27, concerning the environmental-terrorism contention, it was not required to name that order in its Rule 15(a) preargument form. The Intervenor submitted a statement in support of dismissal. On July 10, 2003, the appellate panel conducted oral argument on the motion.

The Court of Appeals for the Second Circuit granted the Commission's motion to dismiss on June 11, 2003. The decision (App. 1a) 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 Court of Appeals denied the petitioner's Petition for Hearing *En Banc* on September 10, 2003.

REASONS FOR GRANTING WRIT

I. The Court of Appeals Decision Is in Conflict With Decisions of Three Other Circuits Which Have Considered This Issue.

The Court of Appeals decision at issue is in conflict with decisions of three other courts of appeal which have considered the appealability of interlocutory decisions in administrative proceedings—namely the Third, the Sixth and the District of Columbia Circuits. These circuits have held that an appeal of an interlocutory decision must await final adjudication in the administrative proceedings. These holdings conflict with the Second Circuit decision in the instant case, in which it granted the Commission's motion to dismiss based on untimely appeal of an interlocutory order. This petition should be granted in order to secure and maintain uniformity in this area of administrative law.

The Hobbs Act, 28 U.S.C. § 2341 et seq., gives this Court jurisdiction over "all final orders of the [Nuclear Regulatory Commission] made reviewable by Section 2239 of title 42." 28 U.S.C. 2342(2). Section 2239(b)(1) of Title 42 provides for judicial review of "[a]ny final order entered in any proceeding of a kind specified in" Section 2239(a). Section 2239(a), in turn, provides authority for the Commission to issue orders in "any proceeding under [the Atomic Energy Act] for the granting, suspending, revoking or amending of any license . . ."

The Hobbs Act also provides that "[a]ny party aggrieved by the final order may, within 60 days of its entry, file a petition to review in the court of appeals where venue lies." 28 U.S.C. § 2344. A petitioning party must thereafter "designate the . . . order or part thereof to be reviewed." Fed. R. App. P. 15(a).

The time limit of the Hobbs Act serves the important purpose of imparting finality into the administrative process, thereby conserving administrative resources and protecting reliance interest of those being regulated who conform conduct to regulations. *Natural Resources Defense Council v. Nuclear Regulatory Commission*, 666 F.2d 595 (D.C. Cir. 1981)

The maxim that a party must await a final decision in administrative proceeding before seeking judicial review recognizes that "administrative agencies have an inherent authority to reconsider a prior determination which is not final and should be permitted to complete deliberation in the case before a right to judicial intervention ripens." 2 Am. Jur.2d Administrative Law § 498.

The coalition filed its Petition for Review on February 18, 2003, or the 60th day after the Commission issued its final order in the proceedings terminating the proceedings on December 18, 2002. The parties do not dispute that the Petition for Review was filed within 60 days of the Commission's issuance of CLI-02-27.

The coalition properly designated CLI-02-22 in its Petition for Review as the order of which it sought review. In addition, the coalition properly designated CLI-02-22 in its Rule 15(a) preargument form.

The Commission argued in its Motion to Dismiss that the petition to be timely had to have been filed within 60 days of November 21, 2002, the date the Commission issued its decision in CLI-02-22. In effect, the Commission argued that the Coalition should have taken an appeal from an interlocutory order without awaiting a final decision in the administrative proceedings. This argument urged a result in direct conflict with the long-standing canon of administrative law limiting review to final agency actions and with the controlling statute.

In accepting the Commission's view, the Second Circuit's ruling conflicts directly with decisions of the Courts of Appeals for the Third, Sixth and D.C. Circuits which have all ruled that a 28 U.S.C. § 2344 appeal must await a final decision.

As the D.C. Circuit has explained, a final decision is one that "imposes an obligation, denies a right, or fixes some legal relationship, usually at the consummation of an administrative proceeding. *Honicker v. NRC*, 590 F.2d 1207, 1209 (D.C. Cir. 1978), cert. denied, 441 U.S. 906 (1979). Accord: *Dickinson v. Zech*, 846 F.2d 369, 371 (6th Cir. 1988). A court of appeals has jurisdiction over a petition for review only if the commission's decision constituted a "final order." *State of Alaska v. Federal Energy Regulatory Commission*, 980 F.2d 761, 763 (D.C. Circuit 1992) (A party may challenge any order after the commission has reached a decision "definitively imposing an obligation, denying a right, or fixing a legal relationship." *Id.*)

In the context of Nuclear Regulatory Commission decisions, courts have held that a "final" decision is one that concludes a license or license amendment proceeding. *See Honiker v. NRC*, supra. ("[a] Court will not review interlocutory orders of the Commission until it can review the agency's action on the license application.") "In a licensing proceeding, it is the order granting or denying the license that is ordinarily the final order." *City of Benton v. NRC*, 136 F.3d 824, 825 (D.C. Cir. 1998) (*per curiam*). And *see Natural Resources Defense Council v. NRC*, 680 F.2d 810, 815 (D.C. Cir. 1982) ("Strictly interpreted, then, a final order in the adjudicatory proceedings in this case would be a decision on the license amendments challenged by NRDC."); *Thermal Ecology Must Be Preserved v. AEC*, 433 F.2d 524 (D.C. Cir. 1970) (*per curiam*) (A court will not

review interlocutory orders of the Commission until it can review the agency's action on the license application.)

The Third Circuit similarly held in *Citizens for a Safe Environment v. AEC*, 489 F.2d 1018, 1021 (3rd Cir. 1974), that finality in Commission licensing proceedings awaits an order granting or denying a license. ("Viewed in this light a final order in a licensing proceeding [under 42 U.S.C.] § 2239(a) would be an order granting or denying a license.") In *Dickinson v. Zech*, supra, the Sixth Circuit adopted the D.C. Circuit's reasoning as expressed in *Honiker v. NRC* and *Natural Resources Defense Council v. NRC* to hold that "[t]he denial of petitioner's request for emergency relief by the NRC in this case does not represent the end of that agency's analysis of the issues involved" because the NRC contemplated issuing a final decision.

As the D.C. Circuit noted in *Thermal Ecology*, an aggrieved party generally obtains review of interlocutory decisions in a Commission licensing proceeding by challenging the final order granting or denying the contested application. 433 F.2d at 526. In this case, the Commission had already issued the requested license amendment authorizing the expansion of the spent fuel capacity at Millstone Unit 3 on December 4, 2000, nearly two years before it issued its decision in CLI-02-22 on November 21, 2003. Nevertheless, CLI-02-22 did not become finalized and ripe for appeal until the Commission issued its final order in the case in CLI-02-27 on December 18, 2002. The Millstone application did not receive "final" Commission approval until the issuance of CLI-02-27 on December 18, 2002. Thus, CLI-02-22 can only be characterized as an interim or interlocutory Commission order, not a "final" order. CLI-02-22, an interlocutory order, did not become final until the adjudicatory pro-

ceedings were finally terminated by issuance of CLI-02-27. Thus, the petitioner properly awaited final adjudication of the proceedings to file its Petition for Review within 60 days of CLI-02-27.

With the Commission's issuance of CLI-02-27 on December 18, 2002, the last decision in the case, the administrative proceeding was finally brought to its "consummation." See *Honiker v. NRC*, *supra*. Accordingly, the Petition for Review should not have been dismissed as untimely filed pursuant to 28 U.S.C. § 2344.

The Commission further raised the issue in its Motion to Dismiss that the Petition for Review was fatally flawed, and such failure deprived the Court of Appeals of jurisdiction, because the preargument statement required by F.R.Civ.P. 15(a) should have designated the final decision, CLI-02-27, as an order being appealed, in addition to the order the petitioner did designate, CLI-02-22.

However, in ordering the Petition for Review dismissed, the Court of Appeals apparently did not rely on the Commission's argument that the petitioner's Rule 15(a) filing was flawed; its brief decision cited only 28 U.S.C. § 2344, not Rule 15(a).

Nevertheless, even if the dismissal were predicated on a Rule 15(a) deficiency, dismissal was not justified. The petitioner properly specified the agency order to be reviewed, CLI-02-22, both in the Petition for Review and in the Rule 15(a) form. Thus, this case is easily distinguishable from *City of Benton v. Nuclear Regulatory Commission*, 136 F.3d 824 (D.C. Cir. 1998), the authority primarily relied upon by the Commission to support its Rule 15(a) argument. In *City of Benton*, the petitioner admittedly designated the wrong order in its filing papers. Id. 136 F.3d at 825. In the instant case, the petitioner made no mistake that it intended to appeal the

order in CLI-02-22 and not CLI-02-27. Moreover, the D.C. Circuit decided four years after issuing its decision in C*ity of Benton,* in *Sinclair Broadcasting Group, Inc., v. FCC*, 284 F.3d 148, (D.C. Cir. 2002), that developments in this area of the law in the D.C. Circuit, including *Brookens v. White*, 795 F.2d 178 (D.C. Cir. 1986) (*per curiam*), as well as the Supreme Court decision in *Smith v. Barry*, 502 U.S. 244, 248 (1992), have demonstrated an increasingly flexible judicial approach to petitioners' and appellants'compliance with Rule 15(a) in administrative appeals and its counterpart in civil appeals, Rule 3(c)(1)(B). The evolving standard favors assuming jurisdiction as long as the petitioner's "intent [to appeal specific orders] was fairly inferable [so that] the agency received adequate notice." *See Entravision Holdings, LLC v. Federal Communications Commission*, 202 F.3d 311, 313 (D.C. Cir. 2000)("A mistaken or inexact specification of the order to be reviewed will not be fatal to the petition, however, if the petitioner's intent to seek review of a specific order can be fairly inferred from the petition for review or from other contemporaneous filings, and the respondent was not misled by the mistake."); *Martin v. F.E.R.C.,* 199 F.3d 1370, 1372-73 (D.C. Cir. 2000); *City of Oconto Falls v. Federal Energy Regulatory Commission*, 204 F.3d 1154, 1160 (D.C. Cir. 2000). And *see Castillo-Rodriguez v. Immigration and Naturalization Service*, 929 F.2d 181, 183-184 (5th Cir. 1991). In this case, where the petitioner designated CLI-02-22 in its Petition for Review and its Rule 15(a) form, the Commission did not and could not plausibly argue that it did not understand that the petitioner intended to appeal from CLI-02-22 and not from CLI-02-27. Under *Sinclair*, it is clear that petitioner's intent to appeal CLI-02-22 was more than "fairly inferable" and that the Commission received more than "adequate notice."

The Petition for Review should not have been dismissed as untimely filed pursuant to 28 U.S.C. § 2344. Review is warranted to correct the Second Circuit's holding to the contrary and to promote uniformity on this issue of law within the circuits.

2. A Supreme Court review will promote uniformity

The Second Circuit decision promotes uncertainty as to when a party must petition for review of a decision in an administrative proceeding. In this case, had the petitioner petitioned for view within 60 days of issuance of CLI-02-22, it risked dismissal on ground of prematurity for failure to await the final adjudicatory order in the case, consistent with the holdings of the Third, Sixth and D.C. Circuits. *See*, e.g., *Western Union Tel. Co. v. FCC*, 773 F.2d 375 (1985) (premature petition for review dismissed, citing dismissals of other premature petitions at 378).

The Second Circuit ruling, if allowed to stand, will "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. Parties should not feel compelled to file unnecessary "protective" appeals out of uncertainty. See *Outland v. CAB*, 284 F.2d 224, 227-228 (D.C. Cir. 1960). Review is warranted to correct the Second Circuit's holding and to promote uniformity on this issue of law within the circuits, to avoid unnecessary confusion in administrative agency operations and to avoid crowding the federal dockets with unnecessary appeals.

CONCLUSION

The petitioner timely appealed the order dismissing Contention 4, CLI-01-22, within 60 days of the Commission's final ruling in the case which granted the license amendment, consistent with 28 U.S.C. § 2344. The Petition for Review should not have been dismissed for failure to conform with 28 U.S.C. § 2344. Dismissal under these circumstances conflicts with decisions of the Third, Sixth and District of Columbia circuits and thereby promotes confusion and lack of uniformity on this point within the circuits. Therefore, in order to correct the decision below, and thereby promote uniformity on this issue of law, this petition for a writ of *certiorari* should be granted.

Respectfully submitted,

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