IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

CONNECTICUT COALITION AGAINST MILLSTONE, Petitioner,	)	
v.	)	No. 04-3577-AG
U.S. NUCLEAR REGULATORY COMMISSION and the UNITED STATES OF AMERICA, Respondents,	)	
and DOMINION NUCLEAR CONNECTICUT, Intervenor.	)	

FEDERAL RESPONDENTS' MOTION TO DISMISS

The Connecticut Coalition Against Millstone ("CCAM") opposes renewal of the two Millstone Power Stations' operating licenses. CCAM has now filed this Petition for Review challenging two decisions issued by the Nuclear Regulatory Commission that are related to the Millstone license renewal case. The Commission held that (1) CCAM's first attempt to intervene in a proceeding was premature because there simply was no proceeding in which to intervene at that time; and (2) a subsequent attempt that was timely should be processed under the "new," just-issued version of the Commission's Rules of Practice.

This Court lacks jurisdiction over both decisions challenged here because they are not "final orders [of the NRC] made reviewable by section 2239 of title 42[.]" 28 U.S.C. §2342(4). Therefore, the Petition for Review must be dismissed.

But the real dispute between the CCAM and the NRC - the question whether the agency's "new" or "old" procedural rules apply to the administrative proceeding below - can be reviewed by this Court when it reviews the agency's final decision in the current licensing proceeding, *i.e.*, the decision whether to renew Millstone's operating licenses. That proceeding remains pending before the agency.

I. FACTUAL BACKGROUND.

A. Introduction.

The underlying dispute in this case is which version of the Commission's Rules of Practice should be applied to an administrative proceeding now pending before the agency. The NRC recently issued new Rules of Practice governing administrative proceedings before the agency. CCAM, knowing that Dominion Nuclear Connecticut had filed applications to renew the operating licenses of the two Millstone facilities, and wishing to challenge those applications under the "old" rules of Practice, filed a Petition to Intervene in the license renewal proceeding before that proceeding was initiated by the NRC. The Secretary of the Commission (who acts as the "Clerk of Court" for the agency) returned the Petition to CCAM as "premature." (Exhibit 1).

After the NRC formally announced and commenced the proceeding, CCAM re-filed the original Petition to Intervene. In addition, CCAM argued that the

Secretary should have accepted the earlier filing and asked the Commission to "vacate" the letter rejecting that filing. Finally, CCAM contended that the proceeding should be heard under the "old" version of the Rules of Practice.

The Commission ruled that (1) the Coalition's first attempt to intervene was premature because the proceeding had not yet started, and (2) when the current proceeding started, the "new" Rules of Practice had already taken effect. The Commission then denied the Coalition's Motion for Reconsideration of the initial decision. Because a proceeding has now begun in which CCAM has filed a timely petition to intervene, any controversy over CCAM's earlier premature attempt to intervene is now moot and unreviewable. Furthermore, no final order has been issued in the license renewal proceeding. Thus, the Commission's decision to apply the "new" Rules of Practice can be reviewed when the Commission issues a final decision in the license renewal proceeding now pending before the agency.

B. The NRC's Rules of Practice.

On January 14, 2004, the Nuclear Regulatory Commission published a final rule amending the agency's Rules of Practice. *See* "Final Rule: Changes to Adjudicatory Process," 69 Fed. Reg. 2182 (Jan. 14, 2004).[1] By its terms, the new

[1]The new rule has been challenged in the U.S. Court of Appeals for the First Circuit. *See Citizens Awareness Network, et al., v. NRC*, Nos. 04-1145 and 04-1359 (consolidated).

rule applied to "proceedings noticed on or after the effective date [of the new rule], unless otherwise directed by the Commission." *Id.* The effective date for the new rules was February 13, 2004.

Although the Commission has adopted new Rules of Practice, the process for submission and initial review of an application for renewal of a license has remained virtually unchanged. When a reactor licensee submits a license renewal application, the NRC Staff reviews it to determine whether it addresses the appropriate criteria and contains sufficient information to support the request. 10 C.F.R. §2.101(a)(1)-(2). A copy of the application is either posted on the NRC's web site or made available in the NRC's Public Document Room. 10 C.F.R. §2.101(a)(2). If the application is considered incomplete, the Staff may require the licensee to submit additional information. 10 C.F.R. §2.102(a). If the Staff determines that the application is complete, it "dockets" the application (*i.e.*, it formally accepts the application and assigns a processing number to it) and issues a "Notice of Proposed Action," under 10 C.F.R. §2.105(a)(1). The Rules require that the Notice provide members of the public with at least 30 days in which to request a hearing and to seek to intervene in the proceeding to review the application. 10 C.F.R. §2.105(d). However, under the new Rules, a minimum of

60 days is provided during which a person may ask for a hearing and seek to intervene in the proceeding. 10 C.F.R. §2.309(b)(3)(i).

C. The Administrative Proceeding Below.

The procedural lineage of this lawsuit is rather complex because of the multiple filings by CCAM. But, in order to enable this Court to understand the posture of the NRC administrative proceeding, we will set out below a detailed chronology of CCAM's various filings and the Commission's responses to them.

On January 22, 2004, Dominion Nuclear Connecticut, which holds the license to operate Millstone Units 2 and 3, submitted two Applications, seeking license renewal for each of the two Millstone facilities. On February 3, 2004, the NRC published a "Notice of Receipt and Availability of Application" for public inspection in accordance with 10 C.F.R. §2.101(a)(2). *See* 69 Fed. Reg. 5197 (Exhibit 2). The Notice advised the public of how it could obtain a copy of the Applications and that "[t]he acceptability of the tendered application for docketing, and other matters including the opportunity to request a hearing, will be the subject of subsequent Federal Register Notices." *Id.* The Notice of Receipt did not announce that members of the public could request a hearing on Dominion Nuclear's Application; thus, it was not a "Notice of Proposed Action" under 10 C.F.R. §2.105(a)(1).

On February 12, 2004, CCAM filed a Petition to Intervene and Request for Hearing relating to the tendered Applications, even though the NRC had not yet published a "Notice of Proposed Action" or "Notice of Opportunity for a Hearing." On March 4, 2004, the Secretary of the Commission returned the petition, stating that "[t]he NRC Staff is still reviewing the Application and has not yet docketed it. Accordingly, there is not yet a proceeding in which you can seek to intervene." Letter of March 4, 2004, at 1. (Exhibit 1).

On March 12, 2004, the NRC Staff published a Federal Register Notice announcing that it had accepted the Applications for docketing and that persons who wished to request a hearing and intervene in the proceeding could now do so. *See* "Notice of Acceptance for Docketing of the Applications and Notice of Opportunity for Hearing Regarding Renewal of Facility Operating License Nos. DPR-65 and NPF-49," 69 Fed. Reg. 11897 (Mar. 12, 2004) (Exhibit 3).

On March 22, 2004, CCAM filed a motion to "vacate" the Secretary's letter (of March 4, 2004) and reinstate the petition to intervene and request for hearing as of the original date of submission. CCAM claimed that the original petition (1) had been properly filed, and (2) should be heard under the "old" version of the NRC's Rules of Practice. CCAM also re-submitted its Petition to Intervene.

The Commission promptly issued an Order that treated the re-submitted petition as a response to the March 12, 2004, Federal Register Notice and referred it to the Atomic Safety and Licensing Board for appropriate review and a possible hearing (Exhibit 4). We describe that proceeding more fully below.

The Commission also requested the NRC Staff and Dominion Nuclear to respond to CCAM's Motion to Vacate. After reviewing the responses, the Commission concluded that the original petition was not properly filed and that the Secretary correctly returned the petition as premature. The Commission also concluded that the "new" Rules of Practice would apply to the re-submitted Petition to Intervene. *See Dominion Nuclear Connecticut* (Millstone Nuclear Power Station, Units 2 and 3), CLI-04-12, 59 NRC 237 (2004) ("CLI-04-12") (Exhibit 5).

First, the Commission found that the "Notice of Receipt of Application" issued by the NRC Staff on February 3, 2004, was not a "Notice of Proposed Action." Therefore, that Notice did not initiate a "proceeding" in which a person could intervene. As there was no proceeding, there was nothing in which the Coalition could intervene until the Notice of Opportunity for a Hearing was issued on March 12, 2004. Thus, the Commission held that the Secretary correctly returned the original Petition as "premature." CLI-04-12, 59 NRC at 239-40.

Second, the Commission concluded that the new Rules of Practice should apply to the proceeding instituted to review CCAM's re-submitted Petition. The Commission noted that the new Rules became effective on February 13, 2004, *see* 69 Fed. Reg. at 2182; thus, the "new" Rules of Practice applied to "all proceedings 'noticed' on or after February 13, 2004." CLI-04-12, 59 NRC at 240. Therefore, the Commission held that because the Notice of Proposed Action and Notice of Opportunity for a Hearing was issued on March 12, after February 13 effective date, the new Rules should apply to that proceeding. *Id.* The Commission then reviewed CCAM's arguments against application of the new Rules and found them without merit. CLI-04-12, 59 NRC at 241-42.

The Commission issued CLI-04-12 on May 4, 2004. CCAM promptly moved for reconsideration of that decision, and the Commission denied that motion in an unpublished Order on May 18, 2004 (Exhibit 6). This Petition challenges both CLI-04-12 and the unpublished Order of May 18.

In the meantime, the Licensing Board has reviewed CCAM's Request for Hearing and Petition to Intervene. On June 30, 2004, the Licensing Board held a pre-hearing conference to review CCAM's proposed contentions, *i.e.*, the specific challenges to the proposed license renewal. On July 28, 2004, the Licensing Board issued a Memorandum and Order that dismissed all of CCAM's proposed

contentions and denied its Petition to Intervene. In addition, the Order denied two motions filed by CCAM that sought to stay the Licensing Board's action on the case. *See Dominion Nuclear Connecticut* (Millstone Nuclear Power Station, Units 2 and 3), LBP-04-15, 60 NRC ___ (2004) (Exhibit 7). CCAM has now appealed that decision to the Commission (Exhibit 8).[2] If the Commission affirms the Licensing Board's denial of intervention, CCAM may seek judicial review of that denial, including the Commission's decision to apply the "new" Rules of Practice to this proceeding if that decision impacted the denial of intervention.

II. ARGUMENT.

The Administrative Orders Review Act, commonly known as the Hobbs Act, 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(4) (emphasis added). In this case, the Commission made two decisions in the orders challenged by this Petition for Review: (1) the Commission held that the original petition was premature because there was no proceeding in which CCAM could intervene; and (2) the Commission held that the current proceeding was to be conducted under the new Rules of Practice. The former decision has been mooted

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[2]In addition, CCAM has also filed a Motion for Reconsideration of LBP-04-15 with the Licensing Board.

by the subsequent filing of a timely petition to intervene when the proceeding was initiated; the latter decision is not final. Thus, this Court lacks jurisdiction over either decision under the Hobbs Act.

First, we turn to the Commission's decision that the initial Petition to Intervene was premature (Ex. 5). The Hobbs Act, 28 U.S.C. §2243(4), gives this Court jurisdiction over "final orders . . . made reviewable under [42 U.S.C. §]2239 . . .." That provision provides for judicial review of, *inter alia*, "[a]ny final order entered in any proceeding of the kind specified in subsection (a)." 42 U.S.C. §2239(b)(1). Subsection (a), in turn, provides for hearings "for the granting, suspending, revoking, or amending of any license . . .." 42 U.S.C. §2239(a)(1)(A).

The Commission decision that the Petition to Intervene was premature did not come in a "proceeding of the kind specified in subsection (a)." 42 U.S.C. §2239(b). Instead, it was a decision that there was "no proceeding." Thus, the Commission decision does not fall under the review provisions of the Hobbs Act and this Court lacks jurisdiction over it.

Moreover, the decision is now moot. The result of that decision was that CCAM was not able to challenge the requested license renewal at that time. But CCAM later filed a timely Petition to Intervene in response to the March 12, 2004, Federal Register Notice and now is involved in a proceeding to challenge the

requested license renewal. Thus, the only effect of that decision is that CCAM's challenge to the proposed license renewal is being heard under the "new" Rules of Practice. But, as we point out below, CCAM can challenge that decision after the NRC's final decision in the current administrative proceeding.

Two analogous decisions are *Honicker v. NRC*, 590 F.2d 1207 (D.C. Cir. 1978), *cert. denied*, 441 U.S. 906 (1979), and *Dickenson v. Zech*, 846 F.2d 369 (6th Cir. 1988). In both cases, the petitioners challenged the Commission's denial of "emergency relief," a form of relief not contemplated in NRC regulations or statutes. In each case, the Court of Appeals held that petitioners' "emergency" requests were not among the "proceedings" provided for by statute and thus not suitable for judicial review under 28 U.S.C. §2342(4) and 42 U.S.C. §2239. *See, e.g., Honicker v. NRC*, 590 F.2d at 1209; *Dickenson v. Zech*, 846 F.2d at 371. The same is true of CCAM's premature request for a license renewal hearing. The NRC Secretary's letter regarding that request was simply not a judicially reviewable event.

Moreover, in both *Honicker* and *Dickenson*, the reviewing courts noted that the Commission was continuing to review petitioners' concerns under established regulatory processes. *See Honicker*, 590 F.2d at 1209; *Dickenson*, 846 F.2d at 372. Here, likewise, the Commission referred CCAM's re-submitted Petition to

the Licensing Board for review. Thus, CCAM is now receiving all rights to which it is entitled under 42 U.S.C. §2239.

The second decision in this case - the Commission decision that the re-submitted Petition to Intervene should be heard under the new Rules of Practice (Ex. 5) - is simply not a "final" decision. Instead, that decision is interlocutory and will be reviewable once the Commission issues a final decision in the overall proceeding.

A final decision "imposes an obligation, denies a right, or fixes some legal relationship, usually at the consummation of an administrative process." *Honicker v. NRC*, 590 F.2d at 1209. *Accord*: *Dickenson v. Zech*, 846 F.2d at 371. *See generally Air Espana v. Brien*, 165 F.3d 148, 151-52 (2d Cir. 1999). Requiring finality "serves several functions," including allowing agencies to complete their processes uninterrupted and avoiding "piecemeal review" by the courts. *Id.* at 152.

In the context of NRC decisions, courts have consistently held that a "final" decision is one that completes or ends a proceeding of the type specified in 42 U.S.C. §2239(a), *i.e.*, a decision that concludes a licensing proceeding. *See, e.g.*, *City of Benton v. NRC*, 136 F.3d 824, 825 (D.C. Cir. 1998) (*per curiam*) ("In a license proceeding, it is the order granting or denying the license that is

ordinarily the final order."); *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."); *Citizens for a Safe Environment v. AEC*, 489 F.2d 1018, 1021 (3d Cir. 1974) ("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."); *Thermal Ecology Must Be Preserved v. AEC*, 433 F.2d 524 (D.C. Cir. 1970) (*per curiam*) (A court will not review interlocutory order of the Commission until it can review the agency's action on the license application.).

As the D.C. Circuit noted in *Thermal Ecology*, an "aggrieved party" obtains review of various interlocutory decisions by challenging the final order granting or denying the contested application or an order denying intervention. 433 F.2d at 526. In this case, that would be either a Commission order granting or denying Dominion Nuclear's application for a license amendment for each of the Millstone licensees authorizing an additional 20 years operating time, or a Commission order denying CCAM's Petition to Intervene.

But in this case, there has been no NRC decision granting Dominion Nuclear's requests for license renewal, and no final decision on the Petition to Intervene. Although the Licensing Board issued a decision denying intervention,

CCAM has now appealed that decision to the Commission (in addition to seeking reconsideration by the Licensing Board). Thus, CCAM's re-submitted petition is still pending before the NRC.

If and when the Commission has issued an order affirming the denial of CCAM's Petition to Intervene, or when (if the current proceedings continue before the NRC) the Commission issues an Order resolving all issues in the proceeding, then the respective matters will be ripe for a petition for review in this Court. At that point, this Court can decide all the issues raised by the proceeding, including the particular issue regarding the application of the "new" Rules of Practice raised by CCAM in this case. That approach promotes judicial economy.

III. SUMMARY.

Quite simply, the real dispute in this case is whether the new Rules of Practice apply to the license renewal proceeding before the Licensing Board. In this Petition for Review, CCAM attempts to avoid the "finality" bar against challenging that portion of CLI-04-12 by challenging the decision that the original filing of the petition was premature. But that decision was not issued "in a proceeding of the type specified in" 42 U.S.C. §2239(a) and, in any event, has been mooted by the subsequent filing of a timely Petition and its acceptance by the Commission. The proper course is for CCAM to wait and challenge the decision

to apply the "new" Rules of Practice - its real complaint against the NRC - as part of a challenge to any final decision by the Commission that aggrieves CCAM, either a decision denying the Petition to Intervene or a final order approving the amendments. Because the petition does not challenge a final order as required in the Hobbs Act, it should be dismissed.

CONCLUSION

For the foregoing reasons, this Court should dismiss the petition for review.

Respectfully submitted,

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