

**UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

CONNECTICUT COALITION AGAINST MILLSTONE	:	04-3577-AG
	:	
V.	:	
UNITED STATES NUCLEAR REGULATORY COMMISSION ET AL.	:	SEPTEMBER 3, 2004

PETITIONER'S OBJECTION TO MOTION TO DISMISS

The Petitioner, Connecticut Coalition Against Millstone ("Coalition") objects herewith to the Motion to Dismiss this Petition for Review dated August 16, 2004 and filed on behalf of the Government Respondents, the U.S. Nuclear Regulatory Commission ("NRC") and the United States of America. The Motion to Dismiss is supported by the Intervenor, Dominion Nuclear Connecticut, Inc. ("Dominion"), which filed a Response in Support of the Federal Respondents' Motion to Dismiss dated August 26, 2004.

The Respondents seek dismissal of this petition for review for alleged lack of jurisdiction and mootness.

The Motion to Dismiss is meritless and should be denied.

I. FACTUAL BACKGROUND

A. Introduction

The Connecticut Coalition Against Millstone filed a Petition to Intervene and Request for Hearing on February 12, 2004 with the NRC, thereby to challenge an

application by Dominion to extend the operating licenses for the two operating nuclear reactors at the Millstone Nuclear Power Station in Waterford, Connecticut.

On February 13, 2004, revised rules substantially curtailing hearing rights of intervenors in NRC licensing proceedings went into effect. The new rules virtually eliminate discovery and cross-examination of witnesses and were adopted by the NRC in acquiescence to nuclear industry pressure to facilitate the licensing process by diminishing public participation and scrutiny of the nuclear industry.

On February 13, 2004, the NRC dismissed the Petition to Intervene as premature. The NRC determined that a petition to intervene in the proceedings could be filed, and be subject to the "new" rules of procedure, only after the NRC published a notice of opportunity for hearing in the Federal Register.

The Petitioner, in moving to vacate the dismissal, called to the NRC Commissioners' attention a guidance document posted on the NRC website entitled "Applicability of Old and New 10 CFR Part 2 to NRC Proceedings." A copy of this document is annexed hereto. Pursuant to the Fifth Scenario of this NRC document, the Petitioner represents that the NRC was bound to adjudicate its February 12, 2004 Petition to Intervene under the "old" rules.

The Respondents argue in their Motion to Dismiss that the February 12, 2004 Petition to Intervene was premature. The Respondents' Motion to Dismiss fails to address the NRC's guidance document, "Applicability of Old and New 10 CFR Part 2 to NRC Proceedings." The Petitioner argues that the Motion to Dismiss, being without merit, should be denied.

B. Procedural Background

On January 22, 2004, Dominion Nuclear Connecticut, Inc. formally submitted an application to the NRC to obtain relicensing of its Millstone Unit 2 and Millstone Unit 3 nuclear reactors. Millstone Unit 2 is currently licensed to operate until its 40-year license expires in the year 2015. Millstone Unit 3 is currently licensed to operate until its 40-year license expires in the year 2025. The license extension application, if granted, would extend Unit 2's operational life to the year 2035 and Unit 3's operational life to the year 2045. Millstone Unit 1 nuclear reactor was permanently retired prematurely in 1996, having operated since 1970. Submission of the license renewal application ("LRA") followed numerous contacts and private meetings between Dominion and the NRC staff concerning such application.

On February 3, 2004, NRC published "Dominion Nuclear Connecticut, Inc. Notice of Receipt and Availability of Application for Renewal of Millstone [Nuclear] Power Station, Units 2 and 3, Facility Operating License Nos. DPR-65 and NPF-49 for Additional 20-Year Period" in the Federal Register (69 FR 5197) as Docket Nos. 50-336 and 50-423.

By letters dated February 5, 2004, the NRC notified the Waterford (CT) Public Library and the Three Rivers Community College in Norwich (CT) that it was thereupon submitting to each respective facility a copy of the application as it had been filed with the NRC in Docket Nos. 50-336 and 50-423.

On February 6, 2004, Dominion met with NRC staff in Rockville, Maryland to formally discuss the LRA.

On February 6, 2004, the NRC posted on its official website a notice that the NRC would hold a public meeting in Waterford on February 17, 2004 regarding the LRA.

On February 8, 2004 or earlier, the NRC posted notice on its official website of the pendency of the Millstone LRA. The posting included the complete Millstone LRA, consisting of some 3,000 pages.

On February 12, 2004, the Coalition submitted its "Petition to Intervene and Request for Hearing" to the NRC's Office of the Secretary with a copy to the licensee. The Office of the Secretary emailed notice of its acknowledgment of the filing on February 12, 2004.

On February 13, 2004, revisions to 10 CFR Part 2 severely curtailing *inter alia* the right of intervenors in hearing procedures before the NRC became effective. The revisions are the subject of a challenge mounted in the U.S. Court of Appeals for the First Circuit on January 26, 2004 by Citizens Awareness Network, Inc. See Citizens Awareness Network et al. v. NRC, Nos. 04-1145 and 04-1359 (consolidated).

On or before February 16, 2004, the NRC posted on its official website, www.nrc.gov, a chart entitled "Applicability of Old and New 10 CFR Part 2 to NRC Proceedings." Such chart posits various scenarios of potential events occurring with regard to license applications and interventions and it assigns applicability of "old" versus "new" rules. The fifth and ninth scenarios are particularly apt. They posit the following potential events:

Fifth Scenario:

Application submitted and docketed by NRC before February 13, 2004; notice of docketing and opportunity for hearing not published in either Federal Register or NRC Web site; hearing request/intervention petition prepared and submitted before February 13, 2004.

Ninth Scenario:

Application submitted and docketed by NRC before February 13, 2004; notice of docketing and opportunity for hearing published on NRC web site before February 13, 2004, but not in Federal Register; hearing request/intervention petition received after February 13, 2004.

In both scenarios five and nine, case, the NRC has determined that the "old" CFR Regulations apply.

On February 17, 2004, representatives of the NRC, including NRC technical experts and two representatives from the Office of the General Counsel of the NRC, conducted a public meeting regarding the Millstone LRA in Waterford, as scheduled. During such meeting, NRC representatives stated that the NRC was not legally required to conduct a hearing on the application in the absence of a formal request for a hearing. The NRC expended a significant amount of money in preparing for the presentation, including commissioning a large mounted visual depiction of the Millstone Nuclear Power Station, assembling voluminous informational documents and transporting no fewer than seven (7) of its representatives to participate in the presentation.

The contents of the LRA as posted on the NRC website on or before February 8, 2004 remained unchanged in substance during the critical period prior to February 13, 2004.

On March 10, 2004, the NRC Secretary issued a letter of notification of its rejection of the CCAM Petition and returned the Petition to its sender by U.S. Mail. The Petition was resubmitted as originally filed.

On March 12, 2004, the NRC published "Notice of Acceptance for Docketing of the Application and Notice of Opportunity for Hearing Regarding Renewal of Facility Operating License Nos. DPR-65 and NPF-49 for an Additional 20-Year Period" under Docket Nos. 50-336 and 50-423.

On March 22, 2004, CCAM submitted its "Motion to Vacate NRC Secretary Determination of Petition Prematurity and to Accept Petition to Intervene and Request for Hearing as of Date of Filing and to Apply 'Old' CFR Hearing Rules to Said Petition."

The licensee and NRC staff filed objections to such motion.

By order dated May 4, 2004, the NRC Commissioners issued CLI-04-12 whereby it dismissed the Motion to Vacate.

CCAM sought reconsideration of such order. The NRC Commissioners denied the motion on May 18, 2004. This petition for review, dated June 25, 2004, ensued. A copy of the Petition for Review is annexed hereto.

The Petition for Review seeks the following relief: a declaration that the Commission's action was unlawful; an order to convene an evidentiary hearing

pursuant to the applicable provisions of the Code of Federal Regulations in effect on February 12, 2004; and any other appropriate relief.

II. ARGUMENT

A. This Court Possesses Subject Matter Jurisdiction

The Respondents argue that this Court lacks subject matter jurisdiction because the NRC dismissal of CCAM's Petition to Intervene and Request for Hearing dated February 12, 2004 was not a "final order [of the NRC] made reviewable by section 2239 of Title 42[.] 28 U.S.C. §2342(4)."

The Respondents further argue that the NRC dismissal of the Petition to Intervene did not occur in a "proceeding of the kind specified in subsection (a)" of 28 U.S.C. §2239. Subsection (a) provides for hearings "for the granting, suspending, revoking or amending of any license . . ." 42 U.S.C. §2239(a)(1)(A).

Further, the Respondents argue that there was "no proceeding" and, hence, the NRC order does not fall within the review provisions of the Hobbs Act.

The Respondents' argument is pure sophistry.

Significantly, the Respondents utterly fail to address the fact that the NRC posted on its own website a chart to guide prospective parties to relicensing proceedings when petitions for hearing are to be conducted pursuant to NRC rules in effect prior to February 13, 2004 as opposed to NRC rules in effect on and after February 13, 2004. ("Applicability of Old and New 10 CFR Part 2 to NRC Proceedings," a copy of which is annexed hereto.)

The facts of this case fall clearly within the parameters of the Fifth Scenario, which provides as follows:

Application submitted and docketed by NRC before February 13, 2004; notice of docketing and opportunity for hearing not published in either Federal Register or NRC Web site; hearing request/intervention petition prepared and submitted before February 13, 2004.

The NRC dismissed the Petition to Intervene on the grounds that “there is not yet a proceeding in which to can seek to intervene” because the NRC had not yet published a notice of opportunity for a hearing in either the Federal Register. See Motion to Dismiss at pages 6-7. The dismissal relies heavily on the Commissioners’ conclusion that a petition to intervene and request a hearing in a relicensing application need await the NRC’s issuance of a “notice of hearing” or “notice of proposed action.”

Yet, the NRC’s own guidance document directs that a petition to intervene which is filed prior to February 13, 2004, in the absence of or prior to a notice of docketing and opportunity for hearing in either the Federal Register or NRC website, is to be adjudicated under the rules in effect prior to February 13, 2004. The NRC dismissal fails to recognize that the NRC’s Fifth Scenario provides that a petition is deemed by the NRC to have been timely filed as long as the application was docketed prior to February 13, 2004 – as occurred here - even if “notice of docketing and opportunity for hearing [were] not published in either Federal Register or NRC website.”

Thus, in dismissing the Petition to Intervene, the NRC violated its own guidance and policy.

In this case, the NRC docketed the application on February 3, 2004 and published such notice in the Federal Register. 69 FR 5197. As of February 13, 2004, the notice of opportunity for hearing had not yet been published in the Federal Register or the NRC website. Clearly, under the NRC's own guidance and interpretation of the law, the petition was filed timely.

The NRC's rejection of CCAM's argument, namely, that the facts of the present application clearly fall within the parameters of the Fifth Scenario, is clearly contrary to the logic of Scenario 5.

The Order states in pertinent part as follows:

Moreover, in order for Scenario 5 to apply, the NRC Staff must not have published a notice of docketing and opportunity for a hearing. But in this case the Staff did, in fact, publish such a notice; thus, Scenario 5 cannot apply.

Clearly, whether or not such Federal Register notice was published is to be determined **as of February 13, 2004** in order for Scenario 5 to make any sense. The NRC did not "cure" the applicability of Scenario 5 with subsequent Federal Register notice.

Moreover, Scenario 5 assumes that a "proceeding" has commenced once an application has been submitted and docketed by the NRC regardless of whether a notice of docketing and opportunity for hearing had yet been published in the Federal Register or on the NRC website by February 13, 2004. As long as the petition to intervene and request for hearing was submitted prior to February 13, 2004, Scenario 5 dictates the petition was timely filed.

The Order is in error because it utterly disregards the NRC's own published guidance which sets specific parameters pursuant to which CCAM's petition qualifies for full consideration under the "old" CFR rules.

Because the Petition to Intervene was timely filed, the NRC order rejecting it was a final order which terminated the proceedings.

While the decisionmaking of a agency is generally accorded deference by the courts, this axiom does not apply where, as here, the agency is addressing an issue for the first time.

The Respondents' reliance on the decisions in Honicker v. NRC, 590 F.2d 1207 (D.C. Cir. 1978) and Dickenson v. Zech, 846 F.2d 369 (6th Cir. 1988) is misplaced. In both cases, the petitioners challenged the NRC's denial of "emergency relief," a form of relief not contemplated in NRC regulations or statutes. Thus, their requests were determined to be not among the "proceedings" provided for by statute and thus not suitable for judicial review under the Hobbs Act.

Unlike the petitioners in Honicker and Dickenson, the Petitioner herein petitioned to intervene in proceedings made legally available by virtue of Dominion's application for a license renewal, indisputably proceedings which fall within 42 U.S.C. §2239.

The Commission's rejection of the February 12, 2004 Petition to Intervene was a final decision on the petition. It "imposed an obligation" obligating the Petitioner to not proceed on the February 12, 2003 petition under pre-February 13, 2004 rules; it "denie[d] a right," namely the right to have the Petition

adjudicated under the pre-February 13, 2004 rules and it “fix[ed] some legal relationship” which permitted Dominion to avoid the consequences of a challenge to its application under the pre-February 13, 2004 rules. Honicker at 1209.

Therefore, the Petition for Review properly challenges a final decision in licensing proceedings which is subject to judicial review. This Court possesses subject matter jurisdiction.

B. The Petition for Review Is Not Moot

The Respondents argue that because the Petitioner filed a Petition to Intervene in the license renewal proceedings on March 22, 2004, and that proceedings are taking place on the March 22, 2004 Petition to Intervene,¹ that the issues on appeal have become moot. They assert that the Petitioner will be able to raise the issue of whether its March 22, 2004 petition should be adjudicated under the “old” v. “new” rules” **after the NRC’s final decision in the current administrative proceeding**. They argue that in this way, “judicial economy” will be promoted.

The Respondents’ argument is fanciful.

The Respondents would have the U.S. Nuclear Regulatory Commission, its adjudicatory arm (the Atomic Safety and Licensing Board), Dominion, the NRC Staff and the Petitioner go through the motions of an adjudication under “new” hearing rules which eliminate discovery and cross-examination of witnesses, including any and all procedural detours which may arise in the proceedings, only

¹ The Petitioner’s “Motion for Reconsideration and Request for Leave to Amend Petition,” presently pending before the Atomic Safety and Licensing Board Panel, is annexed hereto.

to face the prospect of having the entire administrative record thus developed vacated by a prospective appellate ruling that the NRC should have adjudicated the application under the “old” hearing rules.

Moreover, the NRC’s guidance chart, “Applicability of Old and New 10 CFR Part 2 to NRC Proceedings,” clearly dictates under all scenarios that the March 22, 2004 Petition to Intervene be adjudicated pursuant to the “new” rules. The Petitioner could not plausibly challenge on appeal adjudication of the March 22, 2004 under the “new” rules and thus the issues raised in the present Petition for Review could not be raised – ever – under the Respondents’ approach.

The Respondents’ approach would promote squandering of administrative and judicial resources and ultimately deprive the Petitioner of appellate rights which are available by statute.

The Respondents have not established that the pertinent issues have become moot.

III. Conclusion

The NRC Commissioners erred in dismissing the February 12, 2004 Petition to Intervene. The Petition to Intervene was timely filed in proceedings the NRC had commenced by virtue of accepting and docketing the application prior to February 13, 2004. See “Applicability of Old and New 10 CFR Part 2 to NRC Proceedings,” Fifth Scenario.

The dismissal of the Petition to Intervene was a final judgment terminating the Petitioner’s rights under law.

The Motion to Dismiss should therefore be denied.

CONNECTICUT COALITION AGAINST MILLSTONE
The Petitioner

By: _____

Nancy Burton, Esq.
147 Cross Highway
Redding Ridge CT 06876
Tel. 203-938-3952
Ct5550

**Applicability of Old and New 10 CFR Part 2 to NRC
Proceedings**

The following table associates a variety of potential notice, licensing, and regulatory scenarios with the applicable version of 10 CFR Part 2.

Proceeding status	Old Part 2	New Part 2
Application submitted and docketed before February 13, 2004; notice of docketing and opportunity for hearing published in <i>Federal Register</i> but not on NRC Web site before February 13, 2004; hearing request/intervention petition submitted and granted by NRC before February 13, 2004	•	
Application submitted and docketed before February 13, 2004; notice of docketing and opportunity for hearing published in <i>Federal Register</i> but not on NRC Web site before February 13, 2004; hearing request/intervention petition for intervention submitted before February 13, 2004, but not yet acted upon by NRC on February 13, 2004	•	
Notice of docketing and opportunity for hearing published in <i>Federal Register</i> but not on NRC Web site before February 13, 2004; hearing request/intervention petition submitted after February 13, 2004	•	
Pre-application meetings and correspondence occurring before February 13, 2004, but application submitted on or after February 13, 2004; hearing request/intervention petition submitted after February 13, 2004		•
Application submitted and docketed by NRC before February 13, 2004; notice of docketing and opportunity for hearing <i>not</i> published in either <i>Federal Register</i> or NRC Web site; hearing request/intervention petition prepared and submitted before February 13, 2004	•	
Application submitted and docketed by NRC before February 13, 2004; notice of docketing and opportunity for hearing <i>not</i> published in either <i>Federal Register</i> or NRC Web site; hearing request/intervention petition prepared and submitted on or after February 13, 2004		•
Application submitted and docketed by NRC before February 13, 2004; notice of docketing and opportunity for hearing published in the <i>Federal Register</i> before February 13, 2004, but <i>not</i> on NRC Web site; hearing request/intervention petition received before February 13, 2004	•	
Application submitted and docketed by NRC before February 13, 2004; notice of docketing and opportunity for hearing published in the <i>Federal Register</i> before February 13, 2004, but <i>not</i> on NRC Web site; hearing request/intervention petition received after February 13, 2004	•	
Application submitted and docketed by NRC before February 13, 2004; notice of docketing and opportunity for hearing published on NRC Web site before February 13, 2004, but <i>not</i> in <i>Federal Register</i> ; hearing request/intervention petition received after February 13, 2004	•	
Application submitted and docketed by NRC before February 13, 2004; notice of docketing and opportunity for hearing published on NRC Web site on or after February 13, 2004, but <i>not</i> in <i>Federal Register</i> ; hearing request/intervention petition submitted on or after February 13, 2004		•
Application submitted before February 13, 2004, but docketed by NRC on or after after February 13, 2004; notice of docketing and opportunity for hearing <i>not</i> published in either <i>Federal Register</i> or NRC Web site; hearing request/intervention petition submitted on or after February 13, 2004		•
Application submitted but docketed by NRC on or after February 13, 2004; notice of docketing and opportunity for hearing published in either <i>Federal Register</i> or NRC Web site on or after February 13, 2004; hearing request/intervention petition submitted after February 13, 2004		•
Application submitted and docketed by NRC on or after February 13, 2004; notice of docketing and opportunity for hearing <i>not</i> published in either <i>Federal Register</i> or NRC Web site; hearing request/intervention petition submitted on or after February 13, 2004		•

* Commission may determine and order the application of either the superseded or new Part 2 provisions.

CERTIFICATION

This is to certify that a copy of the foregoing "Petitioner's Objection to Motion to Dismiss" was delivered to the U.S. Postal Service, postage pre-paid, First Class, on September 3, 2004, for service upon the following:

Charles E. Mullins, Esq.
Office of the General Counsel
U.S. Nuclear Regulatory Commission
Washington DC 20555-0001

Andrew Mergen, Esq.

Appellate Section
Environment and Natural Resources Division
U.S. Department of Justice
P.O. Box 23795
Washington DC 20026-3795

David R. Lewis, Esq.
Shaw Pittman LLP
2300 N Street NW
Washington DC 20037-1128

Lillian M. Cuoco, Esq.
Millstone Nuclear Power Station
Building 475/5
Rope Ferry Road
Waterford CT 06385
