



than the “new” ones. As we show below, this Court should grant the Motion to Dismiss.

BACKGROUND:

In this case, CCAM sought a hearing to challenge the requested license renewal. But instead of waiting for the NRC to announce the docketing of the License Application and issue a formal “Notice of Opportunity for a Hearing,” CCAM seized upon the issuance of the Federal Register Notice announcing the “receipt” of the Application to file its initial Petition to Intervene and Request for Hearing. In taking this action, CCAM ignored explicit language in the Notice of Receipt that stated “[t]he acceptability of the tendered application for docketing, and other matters including an opportunity to request a hearing, will be the subject of subsequent Federal Register notices.” 69 Fed. Reg. 5197 (Feb. 3, 2004).

CCAM challenges two decisions by the NRC: a decision not to vacate a letter issued March 4, 2004, by the Commission holding that CCAM’s first Petition to Intervene (dated February 12, 2004) was “premature,” and a decision that the second Petition to Intervene (submitted March 22, 2004), was timely and should be heard under the recently adopted “new” Rules of Practice. Those two decisions are expressed in a Commission Order known as CLI-04-12, dated May 4, 2004 (Exhibit 5 to the Motion to Dismiss), and the unpublished Order of May

18, 2004 (Exhibit 6 to the Motion to Dismiss), which are the two orders specified in the Petition for Review. The Petition for Review does not challenge the Letter of March 4, 2004.

ARGUMENT:

In its Objection, CCAM spends a great deal of time arguing the merits of the Petition for Review, *i.e.*, that the Commission's decision not to vacate the March 4 Letter and reinstate the original petition was wrong. Specifically, CCAM claims that the original Petition to Intervene was timely under the fifth and ninth scenarios published on the Commission's website in an effort to guide the public as to which set of rules would apply during the transition period. *See* Objection at 4-5 and 7-10. We have attached a copy of the guidance provided to the public by the NRC, which is cited by CCAM, as Exhibit 1 to this Reply. Both the fifth and ninth scenarios relied on by CCAM require the License Application to have been "submitted before February 13, 2004 *and docketed* by the NRC before February 13, 2004[.]" before the old Rules of Practice were to have been applied to a newly initiated proceeding. Exhibit 1 (emphasis added).<sup>1</sup>

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<sup>1</sup>This guidance is identical to the guidance stated in the Exhibit to the Petitioner's Objection for each of the two specified scenarios ("Application submitted and docketed by the NRC before February 13, 2004.").

CCAM claims that “the NRC docketed the application on February 3, 2004[,]” Objection at 9. However, CCAM misunderstands the NRC’s procedures. The License Application was not “docketed” until March 12, 2004, after it had been reviewed by the NRC Staff. CCAM apparently confuses the Federal Register Notice announcing “receipt” of the Application, 69 Fed. Reg. 5197 (Feb. 3, 2004) (Exhibit 2 to the Motion to Dismiss), with the Federal Register Notice announcing the “docketing” of the Application, 69 Fed. Reg. 11897 (Mar. 12, 2004) (Exhibit 3 to the Motion to Dismiss). In fact, the February 3 Federal Register Notice clearly advises the public that the Application has not yet been docketed because it states that “[t]he acceptability of the tendered application *for docketing* . . . will be the subject of subsequent Federal Register notices.” 69 Fed. Reg. at 5197 (emphasis added). Thus, because the Application had not been “docketed” on February 13, 2004, the NRC was clearly correct when it found that there was no proceeding in existence in which CCAM could intervene on February 12, 2004, when it filed its first Petition to Intervene and Request for Hearing.

The real dispute between CCAM and the NRC is over which version of the NRC’s Rules of Practice are to apply in the proceeding now before the agency. The Commission ruled that the proceeding was to be conducted under the new Rules of Practice because the proceeding was noticed, *i.e.*, a Notice of Docketing

and Opportunity for a Hearing was published March 12, 2004, one month after the effective date of February 13, 2004, for the new Rules. *See generally* CLI-04-12. Thus, the issue of whether the old Rules of Practice should - or should not - have been applied to the current proceeding is fully preserved for appellate review.<sup>2</sup>

It is beyond debate that CCAM can obtain review of the Commission's decision that the current proceeding should be held under the new Rules of Practice, if and when it challenges the final decision in that proceeding.<sup>3</sup> *See, e.g., Natural Resources Defense Council v. NRC*, 680 F.2d 810, 815-16 (D.C. Cir. 1982); *Thermal Ecology Must Be Preserved v. AEC*, 433 F.2d 524, 525 (D.C. Cir. 1970). Until then, the Commission's procedural ruling that the new Rules apply is not a final decision and this Court only has jurisdiction over final agency actions under 28 U.S.C. §2342(4). *See, e.g., County of Rockland v. NRC*, 709 F.2d 766, 775 (2d Cir.), *cert. denied*, 464 U.S. 993 (1983). Thus, this Court lacks jurisdiction over that portion of the Commission's Order in CLI-04-12.

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<sup>2</sup>CCAM objects to completing the current proceeding under the new Rules. Objection at 11-12. But we note that the Petitioners have not asked this Court to stay the current proceedings before the NRC.

<sup>3</sup>That assumes, of course, that CCAM can demonstrate that there would have been a different result in the proceeding had it been conducted under the "old" Rules. Many of the Commission's Rules of Practice did not change and CCAM would have to demonstrate that it suffered some prejudice in the current proceeding under the new Rules.

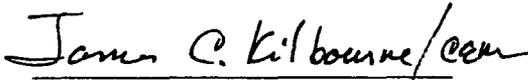
In summary, CCAM has filed a petition to review a decision that is not “in a proceeding” with regard to its first claim, *i.e.*, that its original petition of February 12, 2004 was timely filed, and not final with regard to the second claim, *i.e.*, that the proceeding now pending before the Commission should be heard under the Commission’s old Rules of Practice.

CONCLUSION

For the foregoing reasons, the Court should dismiss the Petition for Review.

Respectfully submitted,

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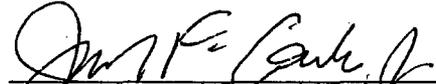


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Dated: September 10, 2004.

**EXHIBIT 1**

## APPLICABILITY OF OLD AND NEW PART 2 TO NRC PROCEEDINGS\*

Proceeding status	Old Part 2	New Part 2
1. Application submitted and docketed before February 13, 2004; notice of docketing and opportunity for hearing published in Federal Register but not on NRC Website before February 13, 2004; hearing request/intervention petition submitted and granted by NRC before February 13, 2004	●	
2. Application submitted and docketed before February 13, 2004; notice of docketing and opportunity for hearing published in Federal Register but not on NRC Website 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	●	
3. Notice of docketing and opportunity for hearing published in Federal Register but not on NRC Website before February 13, 2004; hearing request/intervention petition submitted after February 13, 2004	●	
4. 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		●
5. Application submitted before February 13, 2004 and docketed by NRC before February 13, 2004; notice of docketing and opportunity for hearing <i>not</i> published in either Federal Register or NRC Website; hearing request/intervention petition prepared and submitted before February 13, 2004	●	
6. Application submitted before February 13, 2004 and docketed by NRC before February 13, 2004; notice of docketing and opportunity for hearing <i>not</i> published in either Federal Register or NRC Website; hearing request/intervention petition prepared and submitted on or after February 13, 2004		●
7. Application submitted before February 13, 2004 and docketed by NRC before February 13, 2004; notice of docketing and opportunity for hearing published in the Federal Register before February 13, 2004 but <i>not</i> on NRC Website; hearing request/intervention petition received before February 13, 2004	●	
8. Application submitted before February 13, 2004 and docketed by NRC before February 13, 2004; notice of docketing and opportunity for hearing published in the Federal Register before February 13, 2004 but <i>not</i> on NRC Website; hearing request/intervention petition received after February 13, 2004	●	
9. Application submitted before February 13, 2004 and docketed by NRC before February 13, 2004; notice of docketing and opportunity for hearing published on NRC Website before February 13, 2004 but not in Federal Register; hearing request/intervention petition received after February 13, 2004	●	

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

## APPLICABILITY OF OLD AND NEW PART 2 TO NRC PROCEEDINGS *(continued)\**

Proceeding status	Old Part 2	New Part 2
10. Application submitted before February 13, 2004 and docketed by NRC before February 13, 2004; notice of docketing and opportunity for hearing published on NRC Website on or after February 13, 2004 but <i>not</i> in Federal Register; hearing request/intervention petition submitted on or after February 13, 2004		●
11. Application submitted before February 13, 2004 but docketed by NRC after February 13, 2004; notice of docketing and opportunity for hearing <i>not</i> published in either Federal Register or NRC Website; hearing request/intervention petition submitted on or after February 13, 2004		●
12. Application submitted before February 13, 2004, but docketed by NRC on or after February 13, 2004; notice of docketing and opportunity for hearing published in either Federal Register or NRC Website on or after February 13, 2004; hearing request/intervention petition submitted after February 13, 2004		●
13. Application submitted and docketed by NRC after February 13, 2004; notice of docketing and opportunity for hearing <i>not</i> published in either Federal Register or NRC Website; hearing request/intervention petition submitted on or after February 13, 2004		●

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

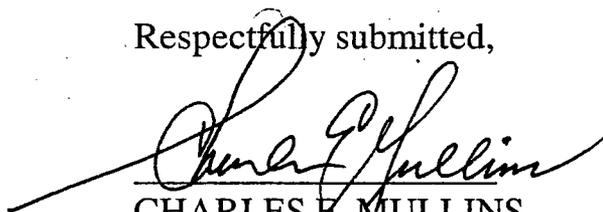
## CERTIFICATE OF SERVICE

I hereby declare under penalty of perjury that I have mailed two copies of the "Federal Respondents' Reply to Petitioner's Objection to Respondents' Motion to Dismiss," by U.S. Mail, postage prepaid, to the following counsel:

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Dated: September 10, 2004.