

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Oglala Sioux Tribe and Western)	
Nebraska Resources Council, et al.,)	
Petitioners,)	
v.)	No. 09-2262 and 09-2285
)	(Consolidated)
U.S. Nuclear Regulatory Commission)	
and the United States of America,)	
Respondents.)	
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FEDERAL RESPONDENTS' MOTION TO DISMISS

These consolidated petitions challenge a non-final order issued by the U.S. Nuclear Regulatory Commission ("NRC" or "Commission") in an ongoing administrative proceeding reviewing a license renewal application submitted by Crow Butte Resources, Inc. Crow Butte seeks a 10-year renewal of its license to conduct in situ leach ("ISL") uranium recovery at its Crawford, Nebraska facility. Much like a court order granting partial summary judgment (or partial dismissal), the Commission order rejected some of petitioners' contentions (or claims) but admitted others for consideration by the Atomic Safety and Licensing Board, the NRC's hearing tribunal. That administrative proceeding remains before the Licensing Board and both petitioners are participating in the proceeding.

As discussed below, the Commission order challenged here is not a "final order" within the meaning of the Hobbs Act, 28 U.S.C. § 2342(4); instead, the decision is interlocutory and not subject to immediate judicial review. Thus, this

Court lacks jurisdiction over the petitions for review and they must be dismissed. Dismissal of the petitions will avoid inefficient, piecemeal judicial review of this preliminary Commission decision. Petitioners will have ample opportunity to raise all their arguments when (and if) the Commission issues a final order granting the requested license renewal.

BACKGROUND.

In November, 2007, Crow Butte submitted an application for a 10-year renewal of Source Materials License SUA-1534, which authorizes ISL recovery operations at the Crawford facility. The NRC published a Federal Register Notice providing a notice of opportunity for a hearing. *See* 73 Fed. Reg. 30,426 (May 27, 2008). The Oglala Sioux Tribe (“the Tribe”), the Oglala Delegation of the Great Sioux Nation Treaty Council (“the Delegation Treaty Council”), and several groups and individuals including the Western Nebraska Resources Council who shared the same attorney (“the Consolidated Petitioners”) submitted timely petitions to intervene and requests for hearing. An NRC Licensing Board found that the Tribe and the Consolidated Petitioners had demonstrated standing. *See* LBP-08-24, ___ NRC ___ (Nov. 21, 2008). The Board further admitted for hearing all five of the Tribe’s proposed contentions and three of the Consolidated Petitioner’s original proposed 22 contentions. *Id.* Finally, the Board found that the Delegation Treaty Council had not demonstrated standing as a party, but was

eligible to participate in the proceeding as an “interested local governmental entity” under 10 C.F.R. 2.315(c). *Id.* Subsequently, the Board admitted a late-filed contention submitted by the Consolidated Petitioners. *See* LBP-09-27, ___ NRC ___ (Dec. 10, 2008).

Both the NRC Staff and Crow Butte appealed to the Commission, challenging the Board decisions that the Tribe and the Consolidated Petitioners had standing and admitting some contentions for hearing. The Delegation Treaty Council appealed the decision that it lacked standing as a party. The Consolidated Petitioners appealed the dismissal of eleven of their rejected 19 contentions.

The Commission upheld the Board decisions that the Delegation Treaty Council lacked standing to participate in the proceeding and that the Oglala Nation had standing to participate. *See* CLI-09-09, ___ NRC ___ (May 18, 2009), Slip Op. at 5-11. (Copy attached as Exhibit 1). The Commission found that Western Nebraska and Owe Aku (two of the Consolidated Petitioners) had not yet demonstrated standing due to a technical deficiency in their pleading, but remanded the matter to the Board with directions to allow the petitioners to cure the problem. CLI-09-09, Slip Op. at 11-15. The Commission found that the remaining members of the Consolidated Petitioners had demonstrated standing to participate in the proceeding. CLI-09-09, Slip Op. at 15-18.

The Commission then turned to the admitted contentions. The Commission upheld the Board's decision on contentions in part and reversed it in part; thus, some contentions remained alive for hearing and some did not. Specifically, the Commission upheld the Board's decision to admit the Tribe's Environmental Contentions A, C, and D, but overruled the Board's decision to admit the Tribe's Environmental Contentions B and E, holding that the former was not yet ripe. CLI-09-09, Slip Op. at 18-30.¹ The Commission also upheld the Board's decision to admit Consolidated Petitioners' Technical Contention F, but overruled the Board's decision to admit the Consolidated Petitioners' Environmental Contention E, Miscellaneous Contention K, and the late-filed Safety Contention A, held that Consolidated Petitioners' Miscellaneous Contention G was moot, and directed the Board to grant summary judgment with regard to it. Slip Op. at 31-43.²

¹ The Tribe's admitted contentions deal mainly with the impact of the ISL operations on the water resources in the surrounding area. The Commission rejected contentions that allege that: (1) NRC failed to consult with the Tribe on properties with potential cultural significance; and (2) Crow Butte mis-handled operational waste materials.

² The Consolidated Petitioners' admitted contention challenges Crow Butte's description of the geology and seismology of the area. The Commission rejected Board-admitted contentions that allege that: (1) Crow Butte's application failed to consider the economic value of near-by wetlands in describing the benefits of not renewing the license; (2) Crow Butte is improperly owned by a foreign entity and its application failed to note that fact; and (3) the ISL operations release low levels of arsenic that contaminate the local drinking water.

Finally, the Commission held that Consolidated Petitioners' appeal of its rejected contentions was not yet ripe for appellate review under NRC procedural regulations. Instead, the Commission held that the Consolidated Petitioners could appeal the rejection of those contentions to the Commission at the close of the proceeding on the admitted contentions. Slip Op. at 43-44.

The administrative proceeding is now underway, with the Licensing Board considering the Tribe's Environmental Contentions A, C, and D and the Consolidated Petitioners' Technical Contention F. Rather than awaiting resolution of the administrative proceeding, the Consolidated Petitioners filed a motion with the Board seeking to stay further administrative proceedings on their admitted contentions pending this Court's review of their rejected contentions.³

ARGUMENT.

This Court Must Dismiss the Consolidated Petitions Because They Do Not Challenge A "Final Order" Under the Hobbs Act.

A. Introduction.

Under the Hobbs Act, this Court has jurisdiction to review "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 turn, 42 U.S.C. § 2239(b) provides that "[t]he following Commission actions shall be subject to judicial

³ That motion remains pending at the Board. In a related case involving expansion of the ISL area, the Board denied a stay-of-proceedings motion on June 18, 2009.

review in the manner prescribed in [the Hobbs Act] and [the Administrative Procedure Act]: (1) Any final order entered in any proceeding of the kind specified in subsection (a).” Subsection (a) (*i.e.*, 42 U.S.C. 2239(a)) requires the Commission to hold a hearing in “[a]ny proceeding under this Act, for the granting, suspending, revoking, or amending ... of any license” In short, the Hobbs Act gives this Court jurisdiction over “final” orders in “any proceeding under [the Atomic Energy Act] for the granting, suspending, revoking, or amending ... of any license[,]” such as the present administrative proceeding. The Hobbs Act does not provide for interlocutory appeals.

B. Relevant Case Law Demonstrates That The Order At Issue In This Case Is Not “Final.”

Several courts have analyzed the issue of what is a “final” order for purposes of the Hobbs Act in an NRC proceeding. Every court considering this issue has held that a “final” order in an NRC proceeding is one that ends the proceeding and either grants or denies the issuance of a license, or license amendment, and that all preliminary decisions “merge” into the final decision for purposes of judicial review. *See, e.g., City of Benton v. NRC*, 136 F.3d 824, 825 (D.C. Cir. 1998) (“In a licensing proceeding, it is the order granting or denying the license that is ordinarily the final order”) (citations omitted); *Dickinson v. Zech*, 846 F.2d 369, 371 (6th Cir.1988) (“an order is final only if it ‘imposes an obligation, denies a right, or fixes some legal relationship, usually at the consummation of an

administrative process.”) (citation omitted); *Ohio Citizens for Responsible Energy v. NRC*, 803 F.2d 258, 260-61 (6th Cir. 1986) (“We conclude that in licensing proceedings before the NRC, a final order is the order granting or denying a license.”); *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.”). “An agency’s procedural or evidentiary rulings in the course of a proceeding do not constitute a final order justifying judicial review except in extreme instances where the action is held to constitute an effective deprivation of appellant’s rights.” *Thermal Ecology Must Be Preserved v. AEC*, 433 F.2d 524, 526 (D.C. Cir. 1970) (citations omitted).⁴

The *Thermal Ecology* case is directly on point. As in this case, the Commission had issued a ruling excluding an issue – in *Thermal Ecology*, the issue of thermal pollution – from the issues that could be raised at a hearing before the Licensing Board. The *Thermal Ecology* petitioners sought a stay of further Commission action pending judicial review of their challenge to the ruling excluding their issue. They were unsuccessful. As the D.C. Circuit explained:

⁴ See also *Commonwealth of Massachusetts v. NRC*, 878 F.2d 1516, 1520 (1st Cir. 1989); *Sierra Club v. NRC*, 825 F.2d 1356, 1361-62 (9th Cir. 1987); *Ecology Action v. AEC*, 492 F.2d 998, 1000-02 (2d Cir. 1974); *Citizens For A Safe Environment v. AEC*, 489 F.2d 1018, 1020-23 (3d Cir. 1974).

[T]he availability of relief from the final order granting a certificate is sufficient to preclude the ruling denying admission of evidence from being considered a final order. The possibility that an agency may make an error that is beyond the effective reach of a court is part of the price we pay for the advantages of an administrative process. That process would, in the judgment of Congress, be clogged if there were interlocutory appeals to the courts.

433 F.2d at 426. The court of appeals noted that if it later found (during review of a Commission decision issuing the requested license) that the Commission had erred in its decision to exclude the issue of thermal pollution, that erroneous decision would be grounds for vacating the license. 433 F.2d at 425-26.

**C. Case Law Interpreting 28 U.S.C. 1291 Likewise
Demonstrates That The Challenged Order Is Not “Final.”**

The requirement of a “final order” in the Hobbs Act is essentially the same as the requirement of a “final decision” in the statute governing general appellate jurisdiction in courts of appeals (28 U.S.C. § 1291).

The finality requirement of Section 2343(1) is the counterpart to that of 28 U.S.C. § 1291 ... which governs appeals from final orders of federal District Courts. Both provisions reflect the reasoned policy judgment that the judicial and administrative processes should proceed with a minimum of interruption. To effectuate this common purpose, courts have permitted interlocutory appeals under both statutes only in exceptional cases, a requirement that partakes of similar meanings in both contexts.

Community Broadcasting of Boston, Inc. v. FCC, 546 F.2d 1022, 1024 (D.C. Cir. 1976).⁵ Thus, it is appropriate to look to cases interpreting “final decision” in Section 1291 to resolve a question involving whether a specific administrative order is a “final order” for purposes of the Hobbs Act. *Id.*

Here, the Commission has not issued an order granting the requested license renewal, which would conclude the administrative process. Instead, the Commission order merely rejected some issues for hearing, but accepted others. Thus, the order is analogous to a district court issuing partial summary judgment (or partial dismissal) on one – but not all – of the issues before it. That order would conclude one portion of the case but not the entire case itself. Such orders are interlocutory and are not appealable except under special circumstances as provided in 28 U.S.C. § 1292 or FRCP 549(b). Instead, a party may normally appeal only from a “final decision” of a district court. 28 U.S.C. § 1291.⁶

⁵ The “final order” requirement in 28 U.S.C. § 2342 applies to all agencies whose decisions are subject to review under that section, including both the FCC, Section 2342(1), and the NRC, Section 2342(4).

⁶ One type of preliminary NRC order that is “final” under the Hobbs Act is an order completely dismissing parties from a proceeding and “terminating” their participation, *i.e.*, either finding that they lack standing or that they have failed to submit an admissible contention. *See, e.g., Environmental Law and Policy Center v. NRC*, 470 F.3d 676, 681 (7th Cir. 2006). Such orders are said to be “final as to” those parties who have been denied intervention. *Id.* But here the Commission found that both petitioners had standing and had submitted admissible contentions. Thus, the Commission has not “terminated” petitioners’ participation in this proceeding or denied them intervention.

Moreover, the Hobbs Act has no provision analogous to 28 U.S.C. § 1292(b), under which a trial court may certify a non-final order for review in a court of appeals. It also lacks a provision analogous to Rule 54(b) under which the trial court may enter a “final judgment as to one or more, but fewer than all, claims or parties[.]” If Congress had intended for litigants before Hobbs Act agencies to be able to appeal *claims* that were final before the *case* itself was final, it could easily have created a 54(b)-like procedure (or 1292(b)-like procedure) for agency proceedings. But Congress created no such process. The absence of such a provision indicates that Congress did not intend interlocutory appeals from agency proceedings.

The Supreme Court has said that “[a] ‘final decision’ generally is one that ends the litigation on the merits and leaves nothing for the Court to do but execute the judgment.” *Catlin v. United States*, 324 U.S. 229, 233 (1945). *See also* *Cunningham v. Hamilton County, Ohio*, 527 U.S. 198, 204 (1999) (same). This Court has agreed. “A final decision within the meaning of § 1291 ‘ends the litigation on the merits and leaves nothing for the court to do but execute judgment.’” *Drieser v. Continental Casualty Co.*, 440 F.3d 920, 923 (8th Cir. 2006), quoting *Borntrager v. Cent. States, Southeast & Southwest Areas Pension Fund*, 425 F.3d 1087, 1091 (8th Cir. 2005) (quotations omitted) (citations omitted).

This Court has applied that rationale in a wide range of situations, consistently requiring that an appeal must be filed from the “final” decision in a district court proceeding, not from a preliminary decision. *See, e.g., Miller v. Special Weapons, L.L.C.*, 369 F.3d 1033 (8th Cir. 2004) (decision was not “final” because counterclaim was still pending); *Parke v. First Reliance Standard Life Ins. Co.*, 368 F.3d 999, 1002 n.2 (8th Cir. 2004) (order explicitly reserving the determination of amount of attorney’s fees and pre-judgment interest was not final until court issued order fixing amounts); *Lee v. LB Sales, Inc.*, 177 F.3d 714, 717-18 (8th Cir. 1999) (order awarding sanctions but determining amount was not appealable until entry of order fixing amount). Additionally, this Court has held that a party correctly waited until dismissal of all claims in a case before filing a Motion to Alter or Amend Judgment under Rule 59(e). *Auto Services Company, Inc. v. KPMG, LLP*, 537 F.3d 853, 856 (8th Cir. 2008).

In the instant case, the Commission has issued an order that essentially granted partial summary judgment (or partial dismissal) in the case, *i.e.*, the Commission resolved some but not all of the claims raised by both petitioners. This effectively concluded a *portion* of the case, but not the *entire* case. The Commission’s order is interlocutory because the Commission explicitly allowed at least one claim raised by each petitioner in the administrative hearing to proceed to discovery and consideration by the Licensing Board. As with appeals from

decisions granting partial summary judgment (or partial dismissal) of a case, this Court should await the end of the proceeding before conducting judicial review. At that time, this Court will have the entire case before it and will avoid unnecessary and duplicative piecemeal review of preliminary decisions issued in the course of the NRC's administrative proceeding.

CONCLUSION

For the foregoing reasons, the Commission decision before the Court – CLI-09-09 – is not a “final” decision for purposes of the Hobbs Act and this Court lacks jurisdiction over the consolidated petitions for review in this case. Accordingly, the petitions should be dismissed.

Respectfully submitted

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**CERTIFICATES OF SERVICE
FOR DOCUMENTS FILED USING CM/ECF**

Certificate of Service When Not All Case Participants Are CM/ECF Participants

I hereby certify that on June 25, 2009, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

I further certify that some of the participants in the case are not CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, or have dispatched it to a third-party commercial carrier for delivery within 3 calendar days, to the following non-CM/ECF participants:
Michael T. Gray, U.S. Department of Justice,

s/ Charles E. Mullins