

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Oglala Sioux Tribe and Western)	
Nebraska Resources Council, et al.,)	
Petitioners,)	
v.)	
)	
U.S. Nuclear Regulatory Commission)	
and the United States of America,)	No. 09-2262 and 09-2285
Respondents,)	(Consolidated)
)	
and)	
)	
Crow Butte Resources, Inc.,)	
Intervenor.)	
_____)	

**INTERVENOR’S RESPONSE TO
FEDERAL RESPONDENTS’ MOTION TO DISMISS**

Pursuant to Rule 27 of the Federal Rules of Appellate Procedure, Intervenor Crow Butte Resources, Inc. (“Crow Butte”) hereby files a response to the Federal Respondents’ motion to dismiss dated June 25, 2009. That motion requested that this Court dismiss for lack of jurisdiction the Petitions for Review filed by Joe American Horse Sr., Beatrice Long Visitor Holy Dance, Loretta Afraid of Bear Cook, Thomas Kanatakeniate Cook, Owe Aku - Bring Back the Way, The Afraid of Bear/Cook Tiwahe, The American Horse Tiospaye, Western Nebraska Resources Council and Debra White Plume (collectively, “Consolidated Petitioners”), and the Oglala Sioux Tribe (“the Tribe”) on May 29, 2009.

Crow Butte supports the Federal Respondents' motion to dismiss. The Hobbs Act gives this Court jurisdiction to review "final orders" of the Nuclear Regulatory Commission. 28 U.S.C. § 2342(4). The Commission's order in this case was not a final order of the agency since the administrative licensing proceeding on Crow Butte's application for license renewal is ongoing and the NRC has not yet issued (or denied) a renewed license. Consequently, Crow Butte agrees with the Federal Respondents' conclusion that the appeals are premature. The Petitions for Review must be dismissed for lack of jurisdiction.

BACKGROUND

The Petitioners seek review of an order of the U.S. Nuclear Regulatory Commission ("NRC" or "Commission"). The Commission's Memorandum and Order was issued May 18, 2009, in the Matter of Crow Butte Resources, Inc. (License Renewal for In Situ Leach Facility, Crawford, Nebraska), CLI-09-09, __ NRC __ (2009).

The Commission's May 18, 2009 order affirmed, in part, and reversed, in part, two decisions by the NRC Atomic Safety and Licensing Board ("Board") in the license renewal proceeding. *See* LBP-08-24, __ NRC __ (Nov. 21, 2008); LBP-08-27, __ NRC __ (Dec. 10, 2008). In LBP-08-24, the Board found that the Tribe and the Consolidated Petitioners had standing to intervene in the administrative process. Further, the Board admitted for hearing all five of the

Tribe's proposed contentions and three of the Consolidated Petitioners' proposed contentions. In LBP-08-27, the Board admitted one additional "late-filed" contention submitted by Consolidated Petitioners.

The Commission in CLI-09-09 affirmed the Board's decision with respect to standing of the Tribe and Consolidated Petitioners, subject to the latter's correction of technical deficiencies in their initial standing declaration. The Commission also upheld the Board's decision to admit the Tribe's Environmental Contentions A, C, and D and Consolidated Petitioners' Technical Contention F. However, the Commission reversed the Board's decision to admit the Tribe's Environmental Contentions B and E. CLI-09-09, Slip Op. at 18-30. The Commission also reversed the Board's decision to admit the Consolidated Petitioners' Environmental Contention E, Miscellaneous Contention K, and the late-filed Safety Contention A. The Commission also found that Consolidated Petitioners' Miscellaneous Contention G was moot and directed the Board to grant summary judgment accordingly. Slip Op. at 31-43. As a result of the Commission's decision, a hearing will be held on the admitted contentions.¹ Despite the fact that the merits phase of the administrative hearing has yet to take place, the Tribe and Consolidated Petitioners filed the present Petition for Review in this Court.

¹ Given the NRC Staff's current schedule for completing its review of the application and the hearing-related deadlines set forth in the NRC's Rules of Practice in 10 C.F.R. Part 2, the hearing will likely be held in mid-2010.

ARGUMENT

A. This Court Has Jurisdiction to Review Only Final Agency Orders

Jurisdiction to review final orders of the NRC in agency licensing proceedings resides in this Court under provisions of the Hobbs Act, 28 U.S.C. § 2342(4), and the Atomic Energy Act, 42 U.S.C. § 2239(b). The Hobbs Act gives the United States Courts of Appeals “exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of . . . all final orders of the [Nuclear Regulatory Commission] made reviewable by Section 2239 of title 42.” 28 U.S.C. § 2342(4). Under 42 U.S.C. § 2239, final orders include “[a]ny final order entered in any proceeding” for granting or amending a license.

The purpose behind the “final order” requirement of the Hobbs Act is to ensure that a party who seeks judicial review of agency action has exhausted all administrative remedies before doing so. *See West v. Bergland*, 611 F.2d 710, 715 (8th Cir. 1979) (“Normally, a litigant is not entitled to a judicial hearing on the merits of his claim until he has exhausted available administrative remedies.”). This requirement is intended to avoid unnecessary litigation before the courts and ensures that an agency is not denied an opportunity to apply its expertise or to correct any mistakes that may have been made in preliminary actions. *See, e.g., Federal Trade Comm’n. v. Standard Oil Co. of California*, 449 U.S. 232, 242 (1980).

B. The Commission's May 18, 2009 Order Was Not A Final Order

Contrary to Petitioners assertions in their Petitions for Review, the Commission order was not a final, reviewable order of the agency. It is well settled that the "final order" in a licensing proceeding is an order granting or denying a license. See *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."); *NRDC v. NRC*, 680 F.2d 810, 815 (D.C. Cir. 1982); *Citizens for a Safe Environment v. AEC*, 489 F.2d 1018, 1021 (3d Cir. 1974); *Thermal Ecology Must Be Preserved v. AEC*, 433 F.2d 524, 525 (D.C. Cir. 1970); *Ecology Action v. AEC*, 492 F.2d 998, 1001 (2d Cir. 1974). The Commission's May 18, 2009 order in this case simply limited the number and scope of issues to be litigated in the administrative proceeding. In that order, the Commission did not decide whether to grant or deny the license request. Accordingly, the Commission decision is plainly not a "final order" under the above decisions.²

² As a matter of agency practice, the Commission takes a similar approach with respect to interlocutory review. Under 10 C.F.R. § 2.311, which governed Crow Butte's and the NRC Staff's appeals of LBP-08-24 and LBP-08-27, a party may appeal a ruling on contention admissibility only if (a) the order wholly denies a petition for leave to intervene (that is, the order denies the petitioner's standing or the admission of all of a petitioner's contentions), or (b) a party other than the petitioner alleges that a petition for leave to intervene or a request for hearing should have been wholly denied. Further, as the Commission pointed out in CLI-09-09, NRC cases are clear that "the rejection or admission of a contention, where

Nor does the May 18th Commission order constitute an immediately appealable collateral order. To qualify as a collateral order, a decision must conclusively determine a disputed question, it must resolve an important question completely separate from the merits of the case, and it must be effectively unreviewable on appeal from a final judgment. *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978). Because petitioners can raise their claims on appeal from the order entered by the Commission issuing a renewed license (if indeed the Commission decides to grant the license), the Commission's May 18th order does not satisfy the third requirement noted above and is therefore not immediately reviewable in the court of appeals. *See Stringfellow v. Concerned Neighbors in Action*, 480 U.S. 370, 377-378 (1987) (district court order placing restrictions on an intervenor's participation in the case is not an appealable collateral order); *see also Ecology Action*, 492 F.2d at 1001 ("an order excluding evidence would normally be the archetype of a non-final order, since any error would be inconsequential if the proponent prevails and can be corrected on review of the final order if he loses"); *Thermal Ecology*, 433 F.2d at 525-526 (NRC order

the Petitioner has been admitted as a party and has other contentions pending, neither constitutes serious and irreparable impact, nor affects the 'basic structure of the proceeding in a pervasive and unusual manner'" such that interlocutory review is warranted. CLI-09-09, Slip Op. at 44 (internal citations omitted). However, as the Commission pointed out, Petitioners will have the opportunity to appeal the Board's contention admissibility rulings at the end of the case pursuant to 10 C.F.R. § 2.341(b). *Id.*

denying an intervenor the opportunity to introduce certain evidence at a licensing hearing is not final).

At bottom, there is no basis for this Court to exert jurisdiction over the pending NRC administrative proceeding at this time. Prior cases clearly establish that appeals of non-final decisions of the Commission should be dismissed. The same result is warranted in the instant case.

CONCLUSION

The Commission's decision in CLI-09-09 is not a "final order" for purposes of judicial review under the Hobbs Act. The administrative hearing on Crow Butte's license renewal application is ongoing. Petitioners' appeals of CLI-09-09 must wait until the Commission issues a final order (*e.g.*, a decision granting or denying the requested licensing action). Accordingly, this Court should dismiss the Petitions for Review for lack of jurisdiction.

Respectfully submitted,

/s/ Tyson R. Smith

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CROW BUTTE RESOURCES, INC.

Dated in San Francisco, California
this 8th day of July 2009

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CERTIFICATE OF SERVICE

I hereby certify that on July 8, 2009, I electronically filed the foregoing "INTERVENOR'S RESPONSE TO FEDERAL RESPONDENTS' MOTION TO DISMISS" with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the appellate CM/ECF system. All participants in the case are registered CM/ECF users and will be served by the appellate ECF system.

Respectfully submitted,

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