

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BLUE RIDGE ENVIRONMENTAL DEFENSE)
 LEAGUE,)
)
 Petitioner)
)
 v.)
)
 U.S. NUCLEAR REGULATORY COMMISSION)
 and UNITED STATES OF AMERICA,)
)
 Respondents)
)
 TENNESSEE VALLEY AUTHORITY,)
)
 Intervenor.)

No. 10-1058

**RESPONDENTS’ REPLY TO PETITIONER’S OPPOSITION TO
RESPONDENTS’ MOTION TO DISMISS PETITION FOR REVIEW**

Our Motion to Dismiss established that this case must be dismissed for lack of jurisdiction. BREDL’s petition for review challenges a Commission adjudicatory decision that is, on its face, interlocutory. The challenged Commission decision, issued on January 7, 2010, resolved just one of BREDL’s claims — its claim that NRC lacks legal authority to reinstate a withdrawn construction permit. The Commission expressly did not decide several of BREDL’s other claims. BREDL’s lawsuit, then, is premature.

Hobbs Act jurisdiction attaches only when an agency action is “final.” See 28 U.S.C. § 2342. The Commission’s interlocutory January 7th ruling is not immediately appealable because other, potentially dispositive, issues remain before the agency. Once NRC enters an order that ends BREDL’s administrative challenge, and resolves all of BREDL’s claims, then BREDL (if aggrieved) will satisfy the Hobbs Act’s jurisdictional threshold. But BREDL cannot in the meantime bring piecemeal appeals in this Court. See, e.g., *Toca Producers v. FERC*, 411 F.3d 262, 266 (D.C. Cir. 2005) (“Staying our hand until the conclusion of the ongoing administrative proceeding [avoids] a ‘piecemeal, duplicative, tactical and unnecessary appeal[.]’ ” (internal citations omitted)).

BREDL attempts to escape this settled principle by implying that the challenged January 7th ruling is distinct and separate from BREDL’s other claims in the still-pending NRC adjudication. Opposition at 7-8. BREDL also points to cases purportedly holding that interlocutory judicial review in NRC cases is permissible. *Id.* at 8-11. Neither argument saves BREDL in this case.

1. BREDL first attempts to distinguish between the Commission’s January 7th “legal authority” ruling, which BREDL

wants to appeal now, and the “subsequent skirmishing over technical questions” still pending at NRC. Opposition at 7-8. Both the challenged Commission ruling, however, and the still-pending “technical questions” arose from BREDL’s *own* hearing petition before NRC. Try as it may, BREDL cannot disentangle its petition for review from NRC’s administrative proceeding. To recap, BREDL submitted nine “contentions” to NRC arguing that reinstatement was unlawful and improper. The January 7th ruling extinguished just two of the nine contentions. As for the remaining seven, the Commission ruling specifically referred them to NRC’s Licensing Board to decide “whether reinstatement on the particular facts presented here is lawful and proper.” CLI-10-06 at 19.

BREDL, therefore, confuses the issue when it labels its remaining administrative claims mere “technical questions” or (as BREDL also says) “vestigial remnants.” Opposition at 8. Seven out of nine contentions are not “vestigial,” but rather the bulk of BREDL’s hearing petition. One of those contentions, in fact, is identical to an issue BREDL wants to raise in this Court.¹ And

¹ *Compare* Petition for Intervention, Contention 3b at 15 (“NRC failed to do an environmental impact statement,”), *with* Petitioner’s

each one of the contentions, if sustained on the merits, would defeat the construction-permit reinstatement. Litigating such matters hardly amounts, as BREDL would have it, to “skirmishing over technical questions.” Opposition at 8.

This Court’s decision in *City of Benton v. NRC*, 136 F.3d 824 (D.C. Cir. 1998), is instructive, indeed decisive, despite BREDL’s dismissive footnote claiming that NRC’s Motion to Dismiss “mischaracterized” the case. Opposition at 9 n.9. In *City of Benton*, NRC considered both the safety and antitrust implications of a proposed license amendment. *Id.* at 825. The antitrust review was completed on May 30, 1995, and the safety issues were resolved when NRC issued the actual license amendment on June 8, 1995. *Id.* The petitioners in *City of Benton*, though, named only the May 30th order in their petition. This proved fatal. This Court concluded that the antitrust order was interlocutory, and not reviewable, because it was not a final order ending the proceeding. *Id.*

BREDL’s suggestion, therefore, that this Court dismissed the *City of Benton* lawsuit simply because the petition for review had

Statement of Issues (“STB [sic] did not prepare an environmental impact statement.”).

“named the wrong order” (Opposition at 9 n.9) tells only half the story. BREDL fails to follow up — the full story is that the petitioner named the wrong order, *and that order was interlocutory*. That is ultimately why this Court lacked jurisdiction in *City of Benton*. And that is why this Court lacks jurisdiction here. Like the antitrust decision in *City of Benton*, the Commission’s January 7th ruling resolved only *part* of the administrative proceeding. The rest is still pending before the agency, which renders BREDL’s petition for review “incurably premature” under the Hobbs Act. *See, e.g., TeleSTAR, Inc. v. FCC*, 888 F.2d 132 (D.C. Cir. 1989).

2. Recognizing that its petition for review names an interlocutory order, BREDL argues that various court decisions show that NRC decisions can be reviewed before the proceeding ends. BREDL points chiefly to *Massachusetts v. NRC*, 924 F.2d 311 (D.C. Cir. 1991), which, BREDL says, supports its view that “NRC orders that are given ‘immediate effect’ constitute an exception to the [finality] rule.” Opposition at 9.

But BREDL misconstrues *Massachusetts*. In that case, NRC’s Licensing Board authorized a full-power license for the proposed Seabrook power plant. *Massachusetts*, 924 F.2d at 318. Under a

special procedure, the Commission then allowed for “immediate effectiveness” of the Licensing Board’s decision.² *Id.* at 319. This Court viewed the Commission’s “immediate effectiveness” ruling as a final agency order, even though there were pending administrative appeals on other matters. The Court found that “significant legal consequences” — *i.e.*, the authorization of a full power license — attached to the Commission’s “immediate effectiveness” ruling. *Id.* at 322.

As this Court explained in a subsequent opinion, the order at issue in *Massachusetts* was “akin to a district court’s grant or denial of a preliminary injunction.” *Shoreham-Wading River Cent. Sch. Dist. v. NRC*, 931 F.2d 102, 105 (D.C. Cir. 1991). This is why this Court’s review in *Massachusetts* was “exceedingly limited.”

² *Massachusetts* arose under a regulatory scheme (no longer in effect) quite different from the one governing this case. Under that special scheme, the Commission would “upon receipt of the Licensing Board decision authorizing issuance of an operating license . . . review the matter on its own motion to determine whether to stay the effectiveness of the decision.” See the former 10 C.F.R. § 2.764 (f)(2) (1988). Here, by contrast, nothing in NRC’s rules suggests that a Commission adjudicatory ruling on two of BREDL’s nine contentions equates to final order declaring TVA’s Bellefonte construction permits valid and effective. Unlike the § 2.764 process, which was distinct from any pending adjudicatory challenges, the Commission’s January 7th ruling was just one decision in an ongoing NRC adjudication.

Massachusetts, 924 F.2d at 322.

The Commission's January 7th ruling resolving part of BREDL's hearing petition is not akin to an "immediate effectiveness" order because the Commission's ruling did not alter BREDL or TVA's legal status — no legal consequences flowed from the ruling. After the Commission's order in *Massachusetts*, the license applicant started to operate Seabrook. But here the Commission's January 7th ruling resolving a portion of the adjudication did not grant TVA any legal rights it lacked on January 6th. And BREDL, for its part, is still litigating its seven remaining contentions before NRC, any one of which could scuttle the reinstatement.

All that the Commission's January 7th ruling accomplished was a *narrowing* of the legal issues before NRC. Agencies — and district courts — narrow legal issues all the time. But this does not make the Commission ruling a "final order." This Court has stated that the "final order" requirement in the Hobbs Act is functionally the same as the "final decision" requirement in the statute governing general appellate jurisdiction. *Cnty. Broad. of Boston, Inc. v. FCC*, 546 F.2d 1022, 1024 (D.C. Cir. 1976). In that regard, the Commission's January 7th ruling on the legal authority issue is

analogous to a district court's partial summary judgment decision. Like a partial summary judgment decision, the Commission's ruling resolved some, but not all, of BREDL's claims, and thus is not immediately reviewable. *Compare, e.g., Citizens for Responsibility and Ethics in Washington v. DHS*, 532 F.3d 860, 862 (D.C. Cir. 2008) ("as a general rule, we lack jurisdiction to hear an appeal of a district court's denial of summary judgment, partial or otherwise[.]") (internal citations and quotations omitted)).

BREDL's view of *Massachusetts*, therefore, proves too much. *All* interlocutory NRC orders have "immediate effect" in the sense of disposing of one issue or another. If this Court accepts BREDL's overbroad reading of *Massachusetts*, then the losing party could seek piecemeal appellate review every time the NRC issues a ruling. That would "disrupt the orderly process of adjudication." *Port of Boston Marine Terminal Ass'n v. Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 71 (1970). Only in special cases (as in *Massachusetts*), where an agency order causes immediate, on-the-ground effects that cannot be remedied later, can a petitioner resort to the courts before an ongoing agency adjudication is over. The Commission's January 7th ruling is not such an order.

Another case BREDL relies upon — *Seacoast Anti-Pollution League v. NRC*, 690 F.2d 1025 (D.C. Cir. 1982) — is likewise inapplicable. In that case, this Court reviewed a final NRC order that denied a hearing altogether. *Id.* at 1028. Here, in contrast, NRC offered an opportunity for intervention and a hearing. And BREDL took advantage of that opportunity when it submitted its hearing request. BREDL’s reliance on *Seacoast*, therefore, is misplaced. If the Commission ultimately denies BREDL’s currently-pending appeal of the Licensing Board decision denying BREDL a hearing, then BREDL can rely on *Seacoast* to seek review in this Court.

3. We have established that the Commission’s January 7th ruling is interlocutory and not “final” for purposes of the Hobbs Act. BREDL, though, seems to conflate the Commission’s January 7th adjudicatory ruling with NRC’s non-adjudicatory decision, more than a year ago, to reinstate TVA’s permits. *See* Opposition at 7 (“NRC in fact reinstated the permits long ago[.]”). The Commission’s January 7th decision, however, did not reinstate the permits. And that is the agency decision before this Court on this petition for review.

To the extent BREDL is trying in this lawsuit to challenge the underlying reinstatement itself, this Court's decisions prohibit parties from simultaneously litigating the same issue at two forums. When an "order under attack is undergoing further agency review . . . agency action is not final." *Shoreham-Wading River Cent. School Dist. v. NRC*, 931 F.2d 102, 105 (D.C. Cir. 1991). NRC's non-adjudicatory decision to reinstate TVA's permits is still undergoing agency review, at BREDL's behest. BREDL must await the outcome of the agency litigation it initiated before bringing its grievances to this Court.³

CONCLUSION

For the foregoing reasons, and for the reasons we gave in our Motion to Dismiss, this Court should dismiss BREDL's petition for review for lack of jurisdiction.

³ BREDL suggests that they need emergency relief because the plants "may be approaching full completion now." Opposition at 12. BREDL's concerns are misplaced. TVA's permits are both held in "deferred" status, and TVA has not re-commenced construction. Cf. Commission Policy Statement on Deferred Plants, 52 Fed. Reg. 38077 (Oct. 14, 1987).

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CERTIFICATE OF SERVICE

I hereby certify that on May 20, 2010, a copy of the foregoing Respondents' Reply to Petitioner's Opposition to Respondents' Motion to Dismiss Petition for Review was filed with the Clerk of the Court and served upon the following participants in the case through the CM/ECF System:

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