IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BENNETT BROWN, et al. Petitioners, v. U.S. NUCLEAR REGULATORY COMMISSION, et al. Respondents,	)	Case No. 11-1441

FEDERAL RESPONDENTS' MOTION TO DISMISS

Pursuant to Rule 27 of the Federal Rules of Appellate Procedure, the U.S. Nuclear Regulatory Commission ("NRC") and the United States of America move to dismiss the instant petition for review. As shown below, this Court lacks jurisdiction over the petition because Petitioners (1) failed to file their petition within 60 days after "entry" of the NRC decision challenged, and (2) failed to exhaust their administrative remedies.

I. Factual Background.

On September 30, 2008, FPL Energy Duane Arnold, now NextEra Energy Duane Arnold ("NextEra"), which holds the license to operate a nuclear power plant known as the Duane Arnold Energy Center, filed a License Renewal Application seeking to renew the Duane Arnold license for an additional 20 years.

The original license was due to expire on February 21, 2014. Pursuant to NRC regulations, the Application included an Environmental Report. *See* 10 C.F.R. § 54.23. Subsequently, the NRC issued a *Federal Register* Notice announcing the submission. 73 Fed. Reg. 67,895 (Nov. 17, 2008).

After reviewing the Application, the NRC accepted it for docketing and announced that any person whose interest was affected by the application could file a request for hearing and petition to intervene in the proceeding to review the application. 74 Fed. Reg. 7,489 (Feb. 17, 2009). The deadline to file a petition to intervene and a request for a hearing was April 20, 2009. No person or group submitted a petition to intervene or request for hearing.

For power reactor license renewal applications, the NRC has a two-step process to comply with the provisions of the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321, *et seq*. In May 1996, the NRC published NUREG-1437, Generic Environmental Impact Statement ("GEIS") for License Renewal of Nuclear Plants. The license renewal GEIS identified and assessed environmental impacts expected to be generic for all plants. For some issues, additional plant-specific review is required. Thus, for each license renewal application, the NRC publishes a Supplemental Environmental Impact Statement ("SEIS") addressing plant-specific issues. Here, the NRC announced that it intended to prepare a SEIS

related to the Duane Arnold Application and to provide the public an opportunity to participate in the environmental scoping process. 74 Fed. Reg. 12,399 (Mar. 24, 2009). As part of that process, the NRC held two public scoping meetings at Hiawatha, Iowa on April 22, 2009. At one of those meetings, Mr. Bennett Brown, a petitioner here, submitted comments on NextEra's Environmental Report.

After review of the Environmental Report and other materials, including Mr. Brown's comments, the NRC issued a Draft SEIS for public comment. 75 Fed. Reg. 6,737 (Feb. 10, 2010). Several individuals and organizations, including Dr. Robert Schultes and the Sierra Club, Iowa Chapter – petitioners here – submitted comments on the Draft SEIS during the public comment period. After reviewing the comments, the NRC issued a Final SEIS. 75 Fed. Reg. 64,748 (Oct. 20, 2010).[1] Two months later, on December 16, 2010, the NRC issued the renewed operating license, extending the Duane Arnold license for an additional 20 years. The NRC announced the decision on its public website and to various media outlets. The NRC later published a Notice in the *Federal Register* announcing the decision. 75 Fed. Reg. 82,091 (Dec. 29, 2010).

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[1] The NRC issued other reports in conjunction with the license renewal, including, for example, a Safety Evaluation Report.

II. NRC Administrative Proceedings.

NRC regulations provide that any member of the public whose interest is affected by the proposed action may request to intervene in the proceeding and participate as a party. *See generally* 10 C.F.R. § 2.309(a). A prospective participant must demonstrate standing, § 2.309(d), and propose at least one admissible contention (*i.e.*, claim or dispute), § 2.309(f). With regard to NEPA issues, § 2.309(f)(2) provides that petitioners "shall file contentions" challenging the applicant's Environmental Report.

> On issues arising under [NEPA], the petitioner shall file contentions based on the applicant's environmental report. The petitioner may amend those contentions or file new contentions if there are data or conclusions in the NRC draft or final environmental impact statement, environmental assessment, or any supplements relating thereto, that differ significantly from the data or conclusions in the applicant's documents.

Id. License-renewal applicants must file an Environmental Report concurrently with the Application. *See* 10 C.F.R. § 54.23. Finally, § 2.309(c) and § 2.309(f) provide directions for submitting a new or amended contention after the time for filing an initial intervention petition has expired, following (for example) issuance of an NRC environmental document.

NEPA issues are raised and litigated routinely and repeatedly in NRC adjudicatory hearings.[2] Often, NEPA-based NRC adjudicatory decisions are challenged in court. A recent example of Federal litigation involving contentions challenging portions of an SEIS in a license renewal proceeding is *New Jersey Dep't of Environmental Protection v. NRC*, 561 F.3d 132, 135 (3d Cir. 2009).[3]

The NRC's regulations in 10 C.F.R. Part 51 describe the requirements of an applicant's Environmental Report. For example, 10 C.F.R. § 51.45 provides the general requirements of all Environmental Reports:

> The environmental report shall contain a description of the proposed action, a statement of its purposes, a description of the environment affected, and discuss [*inter alia*] the following considerations: (1) The impact of the proposed action on the environment. Impacts shall be discussed in proportion to their significance; (2) Any adverse environmental impacts that cannot be avoided should the proposal be implemented; (3) Alternatives to

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[2] See, e.g., *Entergy Nuclear Operations, Inc.* (Indian Point Nuclear Generating Units 1 and 2), CLI-10-30, 72 NRC ___; 2010 WL 491307 (2010); *Progressive Energy Carolina* (Shearon Harris Nuclear Power Plant), CLI-10-09, 71 NRC __, 2010 WL 942151 (2010).

[3] A partial list of recent Federal court cases litigating the NRC resolution of adjudicatory *contentions* challenging the agency's NEPA compliance includes: *San Luis Obispo Mothers for Peace v. NRC*, ___ F.3d ___, 2011 WL 505021 (9th Cir. Feb. 15, 2011) *Morris v. NRC*, 598 F.3d 677 (10th Cir. 2010); *Nuclear Information and Resource Service v. NRC*, 509 F.3d 562, 568 (D.C. Cir. 2007); *Environmental Law and Policy Center v. NRC*, 470 F.3d 676, 678 (7th Cir. 2006).

the proposed action ....

10 C.F.R. § 51.45(b). NRC regulations also provide additional requirements for an Environmental Report associated with license renewal. *See* 10 C.F.R. § 51.53(c).

III. The Hobbs Act.

This petition is filed under the Hobbs Act, 28 U.S.C. § 2341, *et seq.*, which provides that "[a]ny *party* aggrieved by the final order may, *within 60 days, after its entry*, file a petition to review the order ...." 28 U.S.C. § 2344 (emphasis added). In NRC cases both the party requirement and the 60-day filing period have been declared jurisdictional. *E.g., National Resources Defense Council v. NRC*, 666 F.2d 595, 602 (D.C. Cir. 1981) (60-day filing period); *Gage v. AEC*, 479 F.2d 1214 (D.C. Cir. 1973) (party requirement). This Court has reached the same result, albeit in a non-NRC Hobbs Act cases. *See Nebraska State Legislative Bd., United Trans. Union v. Slater*, 245 F.3d 656, 658 (8th Cir. 2001) (60-day deadline); *Packard Elevator v. ICC*, 808 F.2d 654, 655-56 (8th Cir. 1986)(party requirement).

ARGUMENT.

A. The Petition for Review is Untimely.

First, this Court lacks jurisdiction over the Petition for Review because it is untimely. The NRC made its final decision on the application by issuing the license renewal on December 16, 2010. The Hobbs Act states that petitions for

review of a final agency order must be filed within sixty days after its "entry." 28 U.S.C. 2344. "[T]he date of 'entry,' which starts the running of the sixty-day period, is the date on which the order is signed, the Commission's seal is affixed, and the order is served." *Energy Probe v. NRC*, 872 F.2d 436, 437 (D.C. Cir. 1989). *See also Chem.-Haulers, Inc. v. United States*, 536 F.2d 610, 614-15 (5th Cir. 1976).

Here, the NRC issued the renewed license on December 16, 2010. On that day the Director of the NRC's Office of Nuclear Reactor Regulation signed the renewed license, another official signed the *Federal Register* Notice, and the project manager transmitted the package, including the renewed license, to NextEra. A copy of that package is attached as Exhibit 1. In addition, December 16th is the date when the NRC posted the announcement and the license on the NRC public website. The renewed license was effective immediately; it was not dependent on the publication of a *Federal Register* Notice.

Moreover, Petitioners had actual notice of the decision. As noted above, on December 16th, the NRC Office of Public Affairs posted a press release on the NRC public website announcing issuance of the renewed license. A copy of the press release is attached as Exhibit 2. In addition, December 16th is the date when several Iowa news organizations posted stories on their webpages announcing

issuance of the renewed license. For example, Exhibit 3 is an article from the website of the Gazette, a Cedar Rapids, Iowa newspaper, and Exhibit 4 is an article from the website of KCRG-TV, a Cedar Rapids, Iowa television station. Both articles quote Mr. Wallace Taylor, opposing counsel in this lawsuit, and the person who filed comments on behalf the Sierra Club of Iowa, about the issuance of the renewed license. Thus, not only was the license issued on December 16, 2010, but Petitioners also had actual notice of that action and were aware that the decision was final and effective immediately.

In sum, December 16 is the date, to paraphrase the *Energy Probe* decision, that the "order [was] signed, the Commission's seal [was] affixed, and the order [was] served." Thus, December 16 is the date of "entry" of the order. But Petitioners did not file this action until February 28, 2011, which was 74 days after the NRC issued the renewed license challenged by the Petition. Thus, the petition for review is untimely and this Court lacks jurisdiction over it.

Petitioners appear to base the timing of their petition for review on the *Federal Register* Notice issued on December 29, 2010. But that Notice was not the issuance date or the effective date of the renewed license; in fact, the Notice itself states that the License was signed on December 16th. Instead, the December 29th Notice (which was also signed on December 16th) fulfilled two ministerial

functions: the first was a formalistic announcement of the decision; the second was a formal statement that the Final SEIS (issued on October 20, 2010, two months previously) was the agency's "record of decision" with regard to NEPA issues. In fact, the December 29th Notice is included in Exhibit 1. Thus, the December 29th Notice had no functional meaning with regard to the effectiveness of the license renewal itself, which was issued in final form on December 16th. Under the Hobbs Act, which measures the 60-day judicial review period from an order's "entry," Petitioners had no basis for considering the later *Federal Register* Notice as the starting line.

In sum, Petitioners did not file their petition for review within the statutorily-mandated 60-day period to challenge issuance of the renewed license. Thus, this Court lacks jurisdiction over the petition for review and it must be dismissed.

B. Petitioners Failed To Exhaust Their Administrative Remedies.

In addition to failing to file their petition for review with the statutorily-mandated time, Petitioners failed to exhaust available administrative remedies, a requirement that this Court has enforced in a wide variety of contexts. *See, e.g., Tyler v. University of Arkansas Bd. of Trustees*, 628 F.3d 980, 989 (8th Cir. 2011); *Camishi v. Holder*, 616 F.3d 883, 886 (8th Cir. 2010); *Taylor v. Barnhardt*, 399 F.3d 891, 896 (8th Cir. 2005). The exhaustion requirement covers NEPA claims.

See Sharps v. U.S. Forest Service, 28 F.3d 851, 853-54 (8th Cir. 1994). Thus, this Court also lacks jurisdiction over the petition for review for that independent reason as well.

The exhaustion requirement is directly tied to the Hobbs Act requirement that limits challenges to agency actions to "a *party* aggrieved by the final order[.]" 28 U.S.C. § 2344, *supra* (emphasis added). "The word 'party' has been defined narrowly for the purposes of the [Hobbs Act]; it applies only to those who directly and actually participated in the administrative proceedings." *Clark & Reid Co. v. United States*, 804 F.2d 3, 5 (1st Cir. 1986). "[T]he test asks whether the would-be petitioner 'directly and actually participated in the administrative proceedings.'" *Massachusetts v. United States*, 522 F.3d 115, 131 (1st Cir. 2008) (noting that Massachusetts would be a party in an NRC proceeding for Hobbs Act purposes if it participated according to available procedures) (citation omitted).

> The administrative exhaustion requirement gives agencies "a fair and full opportunity" to adjudicate claims presented to them by requiring that litigants use "all steps that the agency holds out, and do[ ] so *properly* (so that the agency addresses the issues on the merits).

Id. at 132, (quoting *Woodford v. Ngo*, 548 U.S. 81, 90 (2006) (internal quotations omitted) (emphasis in original)).

In addition, the exhaustion requirement serves important prudential and judicial-administration purposes. First, it protects against inappropriate judicial

interference with administrative agencies' authority and "gives an agency an opportunity to correct its own mistakes with respect to the programs it administers before it is haled into federal court, and it discourages disregard of [the agency's] procedures." *Woodford v. Ngo*, 548 U.S. at 89 (internal quotation marks and citations omitted). Second, the doctrine conserves judicial resources.

> [E]xhaustion promotes efficiency. Claims generally can be resolved much more quickly and economically in proceedings before an agency than in litigation in federal court. In some cases, claims are settled at the administrative level, and in others, the proceedings before the agency convince the losing party not to pursue the matter in federal court.

Id. "'And even where a controversy survives administrative review, exhaustion of the administrative procedure may produce a useful record for subsequent judicial consideration.'" *Id.* (quoting *McCarthy v. Madigan*, 503 U.S. 140, 145 (1992)). "[A]s a general rule ... courts should not topple over administrative decisions unless the administrative body not only has erred, *but has erred against objection made at the time appropriate under its practice*." *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37 (1952) (emphasis added).

In this case, Petitioners did not "use all the steps the agency holds out." *Woodford v. Ngo*, 548 U.S. at 90. Unlike some other Federal agencies, which limit public participation in the NEPA process to submitting comments on agency

documents such as a draft EA or EIS, the NRC offers the public an opportunity to challenge the agency's compliance with NEPA in an adjudicatory hearing. Indeed, NRC rules specify that petitioners "shall file" NEPA contentions at the earliest possible state of an adjudication. *See* 10 C.F.R. § 2.309(f)(2). Thus, to "use all the steps the agency holds out" regarding the agency's NEPA obligations, Petitioners were required to challenge NextEra's Environmental Report, submitted as part of the License Renewal Application, in an NRC adjudicatory proceeding. As we noted above, *see* Notes 2 and 3, *supra*, and associated text, NEPA contentions are frequently litigated before the agency and only subsequently in Federal court.

But Petitioners did not seek a hearing based on NextEra's Environmental Report, as provided by the NRC's Rules of Practice. *See* 10 C.F.R. 2.309(f)(2). Instead, Petitioner Bennett Brown merely *commented* on NextEra's Environmental Report while the remaining Petitioners ignored the Environmental Report altogether and waited until the NRC Staff issued its Draft SEIS to submit comments challenging that document.[4]

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[4] The Final SEIS contains responses by the NRC to the comments of all Petitioners. *See* NUREG-1437, Supplement 42, at A2-A7 (response to comments by Bennett Brown); A10-A13 (response to comments by Dr. Robert Schultes); A19-A23 (response to comments by Sierra Club of Iowa).

That omission was not necessarily fatal to obtaining an NRC hearing because, as provided in Section 2.309(f)(2), Petitioners could have submitted new or amended contentions challenging a portion of the Draft SEIS that was either new or materially different from the Environmental Report. Likewise, Petitioners could have submitted new or amended contentions challenging new or changed portions of the Final SEIS. But again, Petitioners failed to avail themselves of the procedural processes contained in the NRC's regulations.

Quite simply, Petitioners completely ignored the NRC's adjudicatory process. Instead of "using the steps the agency holds out," Petitioners merely filed comments (either to the Environmental Report or the Draft SEIS) and then waited until long after the NRC issued the renewed license before filing the instant petition for review. But that approach is legally insufficient when dealing with the NRC, which has detailed, mandatory administrative procedures for adjudicating environmental disputes. Bypassing the established NRC process for pursuing NEPA grievances prevents Petitioners from bringing their grievances to this Court.

Moreover, had Petitioners followed the procedures established by the NRC, they may have prevailed on some of their concerns – or at least have been better informed as to the NRC's reasons for taking a specified position, leading them not to challenge the agency decision at all – as noted by the Supreme Court in

Woodford v. Ngo, *supra*. And the Atomic Safety and Licensing Board (an independent NRC adjudicatory tribunal) – and the Commission itself on administrative appeal – would have had a chance to address Petitioners' concerns, giving the agency a chance to correct any errors committed by the NRC staff during the licensing process, an important goal of the exhaustion requirement. *E.g.*, *Sharps v. U.S. Forest Service*, 28 F.3d at 854. Finally, assuming *arguendo* Petitioners were dissatisfied with the resolution of their concerns at the end of the adjudicatory process, the administrative adjudicatory process would provide this Court a much more detailed record to review than the one currently before it.

In sum, given the availability of the NRC's hearing process to deal with Petitioner's concerns, there has been no "objection made at the time appropriate under [the NRC's] practice." *L.A. Tucker Truck Lines*, *supra*. Petitioners have not "directly and actually participated in the administrative proceedings," *Massachusetts v. United States*, *supra*, because they did not "use all steps that the agency holds out," and did not "do so properly (so that the agency addresses the issues on the merits)." *Woodford v. Ngo*, *supra*. Thus, none of the Petitioners can be considered a "party aggrieved" for purposes of the Hobbs Act because they did not exhaust their administrative remedies and this Court lacks jurisdiction over the petition for review. *Sharps v. U.S. Forest Service*, *supra*.

CONCLUSION

For the foregoing reasons, this Court lacks jurisdiction over the petition for review and it must be dismissed.

Respectfully submitted,

IGNACIO S. MORENO
Assistant Attorney General

__s/Allen M. Braebender/cem__
ALLEN M. BRAEBENDER
Attorney, U.S. Department of Justice
Environment and Natural Resources
Division, Appellate Section
P.O. Box 23795 L'Enfant Plaza Station
Washington, D.C. 20026-3795
(202) 514-5316

JOHN F. CORDES, JR.
Solicitor

___s/Charles E. Mullins__
CHARLES E. MULLINS
Senior Attorney
Office of the General Counsel
U.S. Nuclear Regulatory
Commission
11555 Rockville Pike
Rockville, Maryland 20532
(301) 415-1618

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