No. 11-1441

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Bennett Brown, et al.	)
	)
Petitioners,	)
	)
Nuclear Regulatory Commission and United States of America	)
	)
Respondents,	)
	)
and	)
	)
Central Iowa Power Cooperative, et al.	)
	)
Intervenors.	)

Response of NextEra Energy Duane Arnold, LLC, Central Iowa Power Cooperative, and Corn Belt Power Cooperative In Support of Federal Respondents' Motion to Dismiss

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Pursuant to F.R.A.P. 27(a)(3), Intervenors NextEra Energy Duane Arnold, LLC ("NextEra"), Central Iowa Power Cooperative ("CIPCO"), and Corn Belt Power Cooperative ("Corn Belt") hereby file this Response in Support of the Federal Respondents Motion to Dismiss ("Motion") the instant petition for review. The Court lacks jurisdiction over the petition because Petitioners: (1) failed to file their petition within 60 days after entry of the NRC's final order; and (2) failed to

exhaust their administrative remedies and are not a "party aggrieved." Accordingly, the petition for review should be dismissed.

I. BACKGROUND

On September 30, 2008, FPL Energy Duane Arnold, LLC (now, NextEra), on behalf of itself, CIPCO, and Corn Belt, applied to the NRC to renew the operating license for the Duane Arnold Energy Center ("DAEC") for a twenty-year period. Over the next two years, the NRC's technical staff performed an in-depth safety review of the operating license renewal application under authority granted by the agency's organic statute, the Atomic Energy Act, 42 U.S.C. § 2011, *et seq.* The NRC also performed an environmental review of the application under the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321, *et seq.*, which is the subject of the petition for review. NRC regulations governing the environmental review of reactor license renewal applications are found in 10 C.F.R. Part 51.

The NRC has generically evaluated the environmental impacts of license renewal that are common to all or many reactor licensees in a single document – NUREG-1437, "Generic Environmental Impact Statement for License Renewal of Nuclear Plants" (the "GEIS"). It codified the findings related to these generic impacts in Appendix B to 10 C.F.R. Part 51, "Environmental Effect of Renewing the Operating License of a Nuclear Power Plant." Reactor license renewal

applicants must provide an Environmental Report addressing the plant-specific environmental impacts associated with license renewal, together with any new and significant information on any of the generically resolved issues. *See* 10 C.F.R. § 51.53(c).

Upon the filing of a license renewal application with an Environmental Report, the NRC initiates a public scoping process. *See* 10 C.F.R. § 51.28. As part of this scoping process for the DAEC license renewal application, the NRC held public scoping meetings in Hiawatha, Iowa on April 22, 2009. Mr. Bennett Brown, one of the petitioners in this case, addressed the NRC at one of those meetings. The NRC then prepared a plant-specific Supplemental Environmental Impact Statement ("SEIS"). *See* 10 C.F.R. §§ 51.71, 51.95(c). The NRC issued the draft SEIS in February 2010 and accepted public comments. *See* 75 Fed. Reg. 6,737 (Feb. 10, 2010). Dr. Robert Schultes and the Iowa Chapter of the Sierra Club were among those who commented on the draft EIS.[1] In October 2010, the NRC issued a final SEIS, which included the transcribed comments of Mr. Brown, together with the letters of Dr. Schultes and the Sierra Club, and the NRC's responses thereto. 75 Fed. Reg. 64,748 (Oct. 20, 2010).

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[1] There is no indication in the record that the Iowa Physicians for Social Responsibility ("IPSR") commented on the draft SEIS. Further, while Pamela Mackey Taylor signed comments in her capacity as representative of the Iowa Chapter of the Sierra Club, she did not participate on her own behalf. The Iowa Chapter of the Sierra Club is not an identified Petitioner before this Court.

Having resolved all safety and environmental matters required to be addressed, the NRC issued a renewed operating license for DAEC to NextEra on December 16, 2010. While not noticed in the *Federal Register* until December 29 (*see* 75 Fed. Reg. 82,091 (Dec. 29, 2010)), the NRC publicly announced the occasion on December 16 by issuing a press release, which was made available on its website, www.nrc.gov.

In addition to, and separate from, the NEPA scoping process and public commenting period, the NRC also provides an opportunity for a hearing on the license renewal applications. This opportunity extends to environmental issues raised under NEPA. 10 C.F.R. § 2.309(f)(2). Section 2.309(a) explains that "any person whose interest may be affected by a proceeding and who desires to participate as a party must file a written request for hearing and a specification of the contentions which the person seeks to have litigated." To be admitted as a party, that person must demonstrate standing, and propound an admissible contention. *Id.*

The NRC published the Notice of Opportunity for Hearing on the DAEC license renewal application in the *Federal Register* on February 17, 2009. 74 Fed. Reg. 7,489 (Feb. 17, 2009). The NRC received no requests for hearing.

II. ARGUMENT

A. The Petition for Review is Untimely

Under the Administrative Orders Review Act ("the Hobbs Act"), petitions for review of a final agency order must be filed within 60 days of the date of "entry" of that order. 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). The renewed license for DAEC was issued on December 16, 2010, at which time the license was signed by the Director of the NRC's Office of Nuclear Reactor Regulation and served upon NextEra, CIPCO, and Corn Belt. This is demonstrated in Exhibit 1 to the Federal Respondents' Motion, which contains both the renewed license and the NRC's transmittal letter. Both are dated December 16, 2010. Petitioners filed their petition for review on February 28, 2011, 74 days later. Their petition is untimely.

The 60-day time limit for filing a petition for review under the Hobbs Act is jurisdictional. *Natural Resources Defense Council v. NRC*, 666 F.2d 595, 602 (D.C. Cir. 1981). *See also B. J. McAdams, Inc. v. ICC*, 551 F.2d 1112, 1114 (8th Cir. 1977). Because the petition for review was not timely filed, this Court does not have jurisdiction to review the NRC's order issuing the renewed license. And the Court may not enlarge the time prescribed by law for filing a petition for review.

See F.R.A.P. 26(b). *See also Nebraska State Legislative Bd., United Transp. Union v. Slater*, 245 F.3d 656, 658 (8th Cir. 2001).

Petitioners may have assumed that the petition for review was due to be filed 60 days after the NRC's December 29, 2010 *Federal Register* Notice. But on this point the Hobbs Act is clear and unambiguous. It is the entry of the order and not the notice of that entry that triggers the clock for filing a petition for review:

> On the entry of a final order reviewable under this chapter, the agency shall promptly give notice thereof by service or publication in accordance with its rules. Any party aggrieved by the final order may, within 60 days after its entry, file a petition to review the order in the court of appeals wherein venue lies.

28 U.S.C. § 2344. The Hobbs Act requires notice, but in the very next sentence unequivocally links the filing deadline not to the receipt of that notice, but to the entry of the order. *Id.*

Moreover, the fact that the publication of the *Federal Register* Notice occurred after the NRC's action to issue the renewed license had no impact on the ability of Petitioners to file a timely petition for review. Assuming, *arguendo*, that Petitioners were not made aware of the issuance of the renewed license until the December 29, 2010 Notice, they still had sufficient time (47 days) to file a petition for review by the February 14, 2011 deadline. *See Energy Probe*, 872 F.2d at 438 (Delay in receipt of notice of entry of order did not significantly prejudice petitioner's ability to timely file for review because "it still had forty-seven days

from that date to file a timely petition for review"). In any event, as the Federal Respondents pointed out, local news articles dated December 16, 2010 quote Petitioners' counsel discussing the entry of the order and plans to seek judicial review. *See* Motion Exhibits 3 and 4. Accordingly, any claim that the period of time for filing a petition for review should not begin to run until the publication of the *Federal Register* Notice "is all the more unpersuasive." *Energy Probe*, 872 F.2d at 438.

Because the petition for review was not filed within 60 days of the NRC's entry of the order, this Court does not have jurisdiction under the governing statute to entertain the merits of Petitioners' claims. The petition for review should be dismissed.

B. Petitioners Failed to Exhaust Their Administrative Remedies

Further, the Petition for Review should be dismissed because Petitioners failed to exhaust their available administrative remedies. *See Sharps v. U.S. Forest Service*, 28 F.3d 851, 853-54 (8th Cir. 1994). *See also United States v. Bisson*, 839 F.2d 418, 419 (8th Cir. 1988). Federal courts "have long required a litigant seeking review of agency action to exhaust available administrative remedies prior to seeking judicial review." *Sharps*, 28 F.3d 851, 853-54 (citing *McKart v. United States*, 395 U.S. 185 (1969)).

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)." *Massachusetts v. United States*, 522 F.3d 115, 132 (1st Cir. 2008) (quoting *Woodford v. Ngo*, 548 U.S. 81, 90 (2006). Here, Petitioners chose either to comment on NextEra's Environmental Report at a public environmental scoping meeting (Petitioner Bennett Brown) or comment in writing on the draft SEIS (Petitioner Robert Schultes and Pamela Mackey Taylor on behalf of the Sierra Club of Iowa), but the Petitioners chose not to avail themselves of the opportunity afforded by the NRC to request a hearing on the DAEC license renewal application.[2] The exhaustion doctrine discourages this type of "disregard of [the agency's] procedures." *Woodford*, 548 U.S. at 89 (citing *McCarthy v. Madigan*, 503 U.S. 140, 145 (1992)). Because Petitioners ignored the NRC's hearing process, they did not exhaust their administrative remedies.

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[2] This Court has held that a member of an organization cannot acquire "party aggrieved" status under the Hobbs Act by virtue of the organization's participation before the agency. *Packard Elevator v. I.C.C.*, 808 F.2d 654, 656 (8th Cir. 1986). Accordingly, even if the Court would have allowed the Sierra Club of Iowa to petition for review, the Sierra Club's status cannot be imputed to Ms. Taylor. The converse is also true. Dr. Schultes may be a member of the IPSR. Regardless, his comments on the draft SEIS were made in his personal capacity, and made no mention of that organization. Even if the Court determines that Dr. Schultes is a "party aggrieved" by virtue of his comment on the draft SEIS, the same cannot be said for the IPSR.

Exhaustion is not achieved by pursuit of only one of two available administrative opportunities. In *Massachusetts*, the Commonwealth sought judicial review of the Commission's decisions denying its petition to intervene in two separate NRC reactor license renewal proceedings. 522 F.3d at 123-26. Massachusetts sought to participate in the hearings so that it would be permitted to request a stay of the license renewal proceedings pending the NRC's resolution of its related generic rulemaking petition. *Id.* at 125-26 (citing 10 C.F.R. § 2.802(d)). The Commission's decision explained that, while Massachusetts had not been admitted as a "party" under the NRC's adjudicatory rules, it could still participate in the hearings as an "interested state," and utilize that status to request a stay of the proceedings. *Id.* (citing 10 C.F.R. § 2.315(c)). Massachusetts declined to request interested state status, leading the First Circuit to conclude that it had failed to exhaust its administrative remedies. *Id.* at 132. Unlike Massachusetts, Petitioners here did not even request a hearing on the license renewal application. The mere submission of comments as part of the environmental review process cannot exhaust available administrative remedies when the agency's hearing procedures are not also invoked.

Exhaustion "gives an agency an opportunity to correct its own mistakes with respect to the programs it administers before it is haled into federal court."

Woodford, 548 U.S. at 89.[3] Comments on the NRC's draft environmental impact statements are carefully considered by the NRC Staff, but are not raised to the level of the Commission, which has delegated the authority to issue renewed licenses (other than those subject to administrative litigation) to its Staff. Nor are those comments subject to review by the legal and technical judges of the NRC's Atomic Safety and Licensing Board ("ASLB"), which presides over the NRC's evidentiary hearings. If the NRC Staff errs in its disposition of an environmental issue, the agency has procedures in place to allow the ASLB and the Commission an opportunity to correct the mistake and potentially avoid the need for judicial review. But in order to afford the ASLB and the Commission an opportunity to formally consider their concerns, a member of the public must follow available agency procedures and request a hearing under 10 C.F.R. § 2.309.

As the Federal Respondents explained, the judicial doctrine of exhaustion is closely linked to the Hobbs Act's jurisdictional requirement that only a *party* aggrieved may petition for review of a final order. Motion at 10 (citing 28 U.S.C.

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[3] Exhaustion of the available administrative avenues may also "produce a useful record for subsequent judicial consideration." *Woodford*, 548 U.S. at 89 (citing *McCarthy*, 503 U.S. at 145). The creation of a thorough administrative record is of particular importance in cases brought under the Hobbs Act, which grants exclusive jurisdiction to the Courts of Appeals. *See* 28 U.S.C. § 2342. By vesting jurisdiction with the Court of Appeals, the Hobbs Act reflects an assumption that petitions for review will arise out of structured proceedings in which Petitioners participated. *See Simmons v. ICC*, 716 F.2d 40, 43 (D.C.Cir.1983). Such structured proceedings would create a well-developed hearing record upon which this Court could rely.

§ 2344). Indeed, the exhaustion doctrine is "implicit" in the party status requirement. *Gage v. AEC*, 479 F.2d 1214, 1218 (D.C. Cir. 1973). Courts have read the term "party" narrowly, holding that "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).

The Eighth Circuit reached the same conclusion regarding the similar aggrieved party requirement in the Bank Holding Company Act. *First National Bank of St. Charles v. Board of Governors*, 509 F.2d 1004, 1008 (8th Cir. 1975) (citing *Gage v. AEC*, 479 F.2d at 1218). *See also North American Sav. Ass'n v. Federal Home Loan Bank Bd.* 755 F.2d 122, 125 (8th Cir. 1985) ("courts have narrowly construed the term 'parties aggrieved' and have refused to entertain appeals from petitioners who chose not to participate in administrative proceedings where they could have done so").

Courts do not necessarily equate the regulatory definition of a "party" in an agency proceeding with the party status required for judicial review. *See Clark & Reid*, 804 F.2d at 6. Petitioners therefore need not necessarily be considered a "party" to an NRC hearing under 10 C.F.R. § 2.309(a) to invoke Hobbs Act jurisdiction as a "party aggrieved." *Massachusetts*, 522 F.3d at 131. However, given that the doctrine of exhaustion is "implicit" in the party status requirement (*Gage*, 479 F.2d at 1218), where the opportunity to become a party to an NRC

hearing is made available and that avenue is not exhausted, a petitioner cannot be said to have gained party status merely by commenting as part of the NEPA process. By not requesting a hearing to address their concerns when the opportunity was presented, Petitioners failed to "directly and actually participate[ ] in the administrative proceeding." *Clark & Reid Co.*, 804 F.2d at 5. As a result, Petitioners are not a "party aggrieved by the final order" who may properly invoke the jurisdiction of this Court.

III. CONCLUSION

For the reasons set forth above, this Court lacks jurisdiction to entertain the petition for review. The Federal Respondents' Motion to Dismiss the petition should be granted.

Dated: April 18, 2011

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 18, 2011, 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. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

s/ Steven C. Hamrick