



NRC \_\_\_ (Oct. 31, 2013) (Exhibit 1). That decision does not rule upon all of the NRDC's contentions in the proceeding below and, if accepted for review, would result in piecemeal litigation, one of the primary scenarios that the "final order" requirement of the Hobbs Act is designed to prevent.

Pursuant to the Hobbs Act's jurisdictional provision, 28 U.S.C. § 2342(4), the agency must issue a "final order" before the Court may exercise jurisdiction. Once a final order issues, a 60-day window opens for filing petitions for review. Petitions to review an interlocutory order rather than a final order, as in this case, are incurably premature and must be dismissed for lack of jurisdiction. This Court has repeatedly held that the "final order" in an NRC licensing proceeding is the order granting or denying the license.

Here, NRDC is a participant in a proceeding on the application by Exelon Generation Company, LLC ("Exelon") seeking a 20-year renewal of the operating licenses for Limerick Generating Station, Units 1 and 2 ("Limerick"). Under established principles set forth in numerous decisions by this Court, the "final order" would be an NRC order granting or denying license renewal, which has not yet been issued.

NRDC has a firmly established right under the Hobbs Act to seek judicial review of a final NRC order in the license renewal proceeding for Limerick. However, premature, interlocutory review in this Court is not necessary to protect

NRDC's right ultimately to seek review of the interlocutory order described in its petition, or any other issue, once a final order has been issued. Accordingly, NRDC's petition must be dismissed.

## **BACKGROUND**

### **I. NRDC's admission to the Limerick licensing proceeding.**

On June 22, 2011, Exelon, the Limerick plants' owner and operator, applied for renewal of the Limerick operating licenses for an additional 20 years. On November 22, 2011, NRDC petitioned to intervene in the license renewal proceeding, proposing four "contentions"<sup>1</sup> relating to the National Environmental Policy Act, 42 U.S.C. § 4321 *et seq.* ("NEPA"). Three of those contentions related to "severe accident mitigation alternatives" and the fourth proposed consideration of the "no action" alternative.<sup>2</sup>

The presiding Atomic Safety and Licensing Board ("Licensing Board" or "Board") granted NRDC's request for a hearing and petition to intervene and admitted a narrowed version of one NRDC contention claiming that that Exelon's

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<sup>1</sup> Any interested person may participate in an NRC proceeding upon a showing of standing and submission of at least one contention that meets NRC admissibility requirements for specificity and basis. 10 C.F.R. § 2.309(a), (f); *New Jersey Env'tl. Fed. v. NRC*, 645 F.3d 220, 228-29 (3d Cir. 2011). A contention is a "specific statement of the issue of law or fact to be raised or controverted" that is material to the proceeding and supported by alleged facts or expert opinion. 10 C.F.R. § 2.309(f)(1).

<sup>2</sup> See *Exelon Generation Co., LLC* (Limerick Generating Station, Units 1 and 2), LBP-12-8, 75 NRC 539, 545 (2012) (Exhibit 2).

Environmental Report<sup>3</sup> failed to include new and significant information regarding severe accident mitigation alternatives.<sup>4</sup> The Board denied NRDC's contention relating to the no action alternative.<sup>5</sup>

The NRC Staff and Exelon appealed the Licensing Board's admission of the severe-accident-mitigation-alternatives contention to the Commission, arguing that NRDC's contention impermissibly challenged the Commission's rules governing analysis of this subject. In CLI-12-19, a decision issued April 4, 2012, the Commission concluded that the NRC rule governing such analyses at 10 C.F.R. § 51.53(c)(3)(ii)(L) did not require Exelon to include in its Environmental Report consideration of site-specific mitigation alternatives during license renewal because the NRC had previously considered severe accident mitigation design alternatives before issuing the Limerick Units 1 and 2 operating licenses for an initial 40-year term.<sup>6</sup> The Commission followed guiding precedent in two earlier

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<sup>3</sup> Under 10 C.F.R. § 51.45, each applicant for a license must prepare an Environmental Report that tracks each of the subjects the NRC is required by NEPA to address in its Environmental Assessment or Environmental Impact Statement for the licensed activity. The requirements for an Environmental Report submitted by a license renewal applicant are stated in 10 C.F.R. § 51.53(c).

<sup>4</sup> *See Limerick*, LBP-12-8, 75 NRC at 570-71.

<sup>5</sup> *Id.* at 569-70.

<sup>6</sup> *Exelon Generation Co., LLC (Limerick Generating Station, Units 1 and 2)*, CLI-12-19, 76 NRC 377, 386 (2012)(Exhibit 3).

license renewal cases that applied the same “new and significant information” test to severe accident mitigation alternatives, holding that the issue “has been resolved by rule” and noting that “Limerick is specifically named in the Statements of Considerations [of the rule] as a plant for which [severe accident mitigation alternatives] ‘need not be reconsidered . . . for license renewal.’”<sup>7</sup>

Because the environmental issue had been resolved by rule, the Commission reasoned that the contention that the Board had admitted, “reduced to its simplest terms, amount[ed] to a challenge” to 10 C.F.R. § 51.53(c)(3)(ii)(L).<sup>8</sup> Although NRC regulations specifically preclude a participant to an adjudicatory proceeding from challenging a regulation in a hearing, the same regulation permits a party to seek a waiver of the regulation.<sup>9</sup> The Commission explained that “the proper procedural avenue for NRDC to raise its concerns is to seek a waiver of the relevant provision in section 51.53(c)(3)(ii)(L).”<sup>10</sup> Accordingly, the Commission found that the Board erred in admitting the contention relating to analysis of severe accident mitigation alternatives in the absence of a waiver, reversed the Board's

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<sup>7</sup> *Id.* at 386 & n.53 (citing Final Rule: “Environmental Review for Renewal of Nuclear Power Plant Operating Licenses,” 61 Fed. Reg. 28,467, 28,481 (June 5, 1996)).

<sup>8</sup> *Id.* at 386.

<sup>9</sup> *See* 10 C.F.R. § 2.335.

<sup>10</sup> *Limerick*, CLI-12-19, 76 NRC at 386.

decision granting NRDC's intervention petition, and remanded to the Board for the limited purpose of considering such a waiver petition.<sup>11</sup>

On remand, NRDC sought the waiver contemplated by the Commission's ruling. Although the Board found that NRDC's waiver petition did not meet the waiver standard, it referred its ruling to the Commission because it found that NRDC's waiver petition presented a novel legal issue worthy of the Commission's attention.<sup>12</sup> In CLI-13-07, the subject of NRDC's petition for review, the Commission affirmed the Board's denial of NRDC's waiver petition on grounds other than those stated by the Board but agreed that NRDC had not met the deliberately "stringent" waiver standard.<sup>13</sup>

In particular, the Commission found that that NRDC's waiver petition did not meet NRC's waiver standard because NRDC did not demonstrate that its claims were unique to Limerick. Instead, the Commission held, its waiver petition "amount[ed] to a general claim that could apply to any license renewal applicant for whom [severe accident mitigation alternatives] already were considered."<sup>14</sup>

The waiver sought by NRDC would "swallow the rule," the Commission

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<sup>11</sup> *Id.* at 389.

<sup>12</sup> *Exelon Generation Co., LLC (Limerick Generating Station, Units 1 and 2), LBP-13-1, 77 NRC 57 (2013) (Exhibit 4).*

<sup>13</sup> *Limerick, CLI-13-07, 78 NRC \_\_\_\_ (slip op. at 8).*

<sup>14</sup> *Id.* at 18.

concluded, because “NRDC offers little to show how the information it provides sets Limerick apart from other plants undergoing license renewal.”<sup>15</sup> Nonetheless, the Commission directed its Staff “to review the significance of any new [severe accident mitigation alternatives]-related information in its environmental review of Exelon’s license renewal application, including the information presented in NRDC’s waiver petition, and to discuss its review in the final supplemental EIS.”<sup>16</sup>

## **II. NRDC’s new “Waste Confidence” contention.**

On July 9, 2012, after NRDC was admitted to the proceeding, but before the Commission ruled that NRDC’s proposed contention relating to severe accident mitigation alternatives impermissibly challenged NRC regulations, NRDC moved the Licensing Board to admit a new contention based on this Court’s remand to the NRC in *New York v. NRDC*, 681 F.3d 471 (D.C. Cir. 2012). That decision invalidated the NRC’s Waste Confidence Decision Update and Rule, which analyzed under NEPA the environmental impacts of storing spent nuclear fuel after the licensed life of nuclear power reactors that had generated the spent fuel.

Specifically, NRDC’s proposed contention asserted that Exelon’s Environmental

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<sup>15</sup> *Id.* at 20.

<sup>16</sup> *Id.* at 23. The Commission must issue a final supplemental EIS prior to renewing the Limerick operating license. *See* 10 C.F.R. § 51.94 (final EIS, “together with any comments and any supplement, will accompany the application . . . through, and be considered in, the Commission’s decisionmaking process”). Preparation of the Final Supplemental EIS for Limerick remains ongoing.

Report did not address the environmental impacts of continued storage of reactor spent fuel after expiration of the Limerick licenses and, in particular, the impacts of potential spent fuel pool leakage and fires as well as impacts that might occur if a spent fuel repository does not become available.<sup>17</sup>

The admissibility of NRDC’s proposed Waste Confidence contention has not yet been decided. In its August 8, 2012 decision in *Calvert Cliffs*, the Commission directed that Waste Confidence contentions, like NRDC’s, be held in abeyance in all affected licensing proceedings, pending agency compliance with the remand in *New York v. NRDC*: “[A]s an exercise of our inherent supervisory authority over adjudications, we direct that these [Waste Confidence] contentions – and any related contentions that may be filed in the near term – be held in abeyance pending our further order.”<sup>18</sup> In accordance with the Commission’s order in *Calvert Cliffs*, the Board ordered in *Limerick* that NRDC’s newly proposed Waste Confidence contention be held in abeyance pending further Commission instructions.<sup>19</sup>

To comply with the Court’s remand in *New York v. NRDC*, the Commission determined that it would prepare a Generic Environmental Impact Statement

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<sup>17</sup> *Limerick*, LBP-13-1, 77 NRC at 69 n.46.

<sup>18</sup> *Calvert Cliffs 3 Nuclear Project, LLC* (Calvert Cliffs Nuclear Power Plant, Unit 3), CLI-12-16, 76 NRC 63, 68-69 (2012).

<sup>19</sup> *See Limerick*, LBP-13-1, 77 NRC at 69 n.46.

(Generic EIS) analyzing the environmental impacts of continued storage of reactor spent fuel after the licensed life of nuclear power reactors.<sup>20</sup> At this point, the NRC has received comments on the draft Generic EIS, and the agency anticipates publication of the Final Generic EIS this fall. Thus, a decision on the admissibility of NRDC's proposed Waste Confidence contention remains in abeyance, pending completion of this NEPA process. A final decision on Exelon's application for Limerick license renewal cannot be issued until that contention has been resolved.

## **ARGUMENT**

### **I. NRDC's petition for review is incurably premature.**

#### **A. Under the Hobbs Act, only a final order granting or denying a license may be reviewed.**

Under the Hobbs Act, this Court's jurisdiction is limited to review of "final orders." 28 U.S.C. § 2342(4); 42 U.S.C. § 2239(a)(1)(A), (b). When an agency issues a final order, a 60-day "window" commences during which petitions for review must be filed. *See Public Citizen v. NRC*, 845 F.2d 1105, 1109 (D.C. Cir. 1988). Review petitions filed before this 60-day window must be dismissed for lack of jurisdiction. *Id.*

"Courts exercising jurisdiction under [the Hobbs Act] have narrowly construed the term 'final order.'" *NRDC v. NRC*, 680 F.2d 810, 815 (D.C. Cir.

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<sup>20</sup> *See generally* Waste Confidence – Continued Storage of Spent Nuclear Fuel; Proposed Rule, 78 Fed. Reg. 56,776 (Sept. 13, 2013).

1982). For an agency order to be deemed final, “the action must mark the consummation of the agency’s decisionmaking process – it must not be of a merely tentative or interlocutory nature,” and “the action must be one by which rights or obligations have been determined, or from which legal consequences will flow.” *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997) (quotation marks and citation omitted).

Applying these principles to NRC licensing proceedings, this Court has repeatedly held that “it is the *order granting or denying the license* that is ordinarily the final order.” *City of Benton v. NRC*, 136 F.3d 824, 825 (D.C. Cir. 1998) (emphasis added); see *Massachusetts v. NRC*, 924 F.2d 311, 322 (D.C. Cir. 1991); *NRDC*, 680 F.2d at 815-16; see also *Ohio Citizens for Responsible Energy, Inc. v. NRC*, 803 F.2d 258, 260 (6th Cir. 1986); *Ecology Action v. AEC*, 492 F.2d 998, 1000-01 (2d Cir. 1974). As this Court has explained, permitting judicial review of non-final orders “would make unclear the point at which agency orders become final,” *City of Benton*, 136 F.3d at 826, and would “disrupt the orderly process of adjudication,” *Alaska v. FERC*, 980 F.2d 761, 765 (D.C. Cir. 1992).

This Court has recognized that it makes practical sense to interpret the term “final order” narrowly. If the agency proceeding is not yet complete when judicial review is sought, it would be imprudent for the reviewing court nonetheless to take up the case. Unforeseen future developments in the ongoing agency proceeding

could render the dispute before the court “moot or insignificant,” resulting in “a waste of judicial time and effort.” *See Alaska*, 980 F.2d at 764; *see also Consolidated Edison Co. of New York, Inc. v. FERC*, 2004 WL 764494 (D.C. Cir. 2004) (unpublished). In addition, interlocutory judicial review can often result in delaying the final outcome of the proceeding below and thereby “needlessly intrude” on its conduct. *Alaska*, 980 F.2d at 764. Thus, reviewing courts require that agency proceedings be complete before the court undertakes its review.

Because the Hobbs Act creates a jurisdictional 60-day “window” for seeking court of appeals review only after a “final order” is issued, this Court must dismiss NRDC’s petition for review. The Commission has not yet made a final decision on whether to grant the 20-year license renewal requested for the Limerick reactors, and hence there is no “final order” for NRDC to appeal. This renders NRDC’s petition for review incurably premature under the Hobbs Act and requires dismissal.

NRDC’s right to seek review of a final NRC licensing order, however, is protected. Once an order granting or denying the renewed licenses is issued, NRDC may challenge any or all of the Commission’s interlocutory orders, including (1) its waiver denial in CLI-13-07; (2) its ultimate disposition of NRDC’s proposed Waste Confidence contention; (3) the Board’s rejection of NRDC’s contention on the “no action” alternative (after Commission review);

(4) denial of any other late contention. *E.g.*, *City of Benton v. NRC*, 136 F.3d at 86 (interlocutory antitrust finding reviewable upon issuance of license); *Alaska*, 980 F.2d at 763 (petition for review to challenge grant of partial summary disposition as well as “any past or future Commission ruling” in the proceeding would be proper after a final FERC order).

**B. Judicial review of an interlocutory agency decision is permitted under the Hobbs Act only where, unlike here, the right to participate in a hearing has been denied altogether.**

As described above, where, as here, a putative Hobbs Act petitioner has been admitted as a party to an agency proceeding, that party must await the final agency order before seeking judicial review of any and all interlocutory agency orders, like the Commission’s waiver denial here in CLI-13-07. *See Alaska*, 980 F.2d at 763; *NRDC*, 680 F.2d at 816; *Thermal Ecology*, 433 F.2d at 525. This rule does not apply, however, where the NRC has denied altogether a request for a hearing and intervention by refusing to admit *any* of a petitioner’s proposed contentions. In that circumstance, complete denial of a hearing petitioner’s contentions, and hence its right to intervene and participate in the requested hearing, has always resulted in a right to seek review immediately. *See Alaska*, 980 F.2d at 763.

The reason for allowing immediate judicial review of a hearing petition denial is that, having failed to achieve formal “party” status in the litigation by having any of its contentions admitted, a putative intervenor cannot later seek

review of the agency's final decision on the merits. *Alaska*, 980 F.2d at 763 (citing *Brotherhood of R.R. Trainmen v. Baltimore & Ohio R.R.*, 331 U.S. 519, 524 (1947)); see also *Thermal Ecology Must be Preserved v. AEC*, 433 F.2d, 524, 525 (D.C. Cir. 1970). This is so because, under the Hobbs Act, only a “party aggrieved” by an agency order may challenge it in the court of appeals. 28 U.S.C. § 2342(4) (emphasis added). Allowing judicial review in the case of intervention petition denials preserves the right of review that would otherwise be lost. *Alaska*, 980 F.2d at 763.

Here, however, the NRC has not yet determined whether NRDC's proposed Waste Confidence contention will be admitted and, hence, whether NRDC's petition for intervention as a party will be granted. Accordingly, those cases allowing immediate judicial review of the NRC's denial of intervention are not applicable here. As noted, the Commission reversed the Board's grant of intervention based on one of three NRDC contentions relating to severe accident mitigation alternatives analysis,<sup>21</sup> but the Commission's order did not reach the question of whether to admit NRDC's Waste Confidence contention, which remains in abeyance.

If review of NRC's waiver denial decision were allowed here, NRDC's pending Waste Confidence contention would not be resolved. But NRDC cannot

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<sup>21</sup> *Limerick*, CLI-12-19, 76 NRC at 389.

contend that it has been denied the right to participate as a party, and that it is entitled to seek judicial review prior to a final decision, until this determination is made. Additionally, other issues *could* arise in the hearing that would bear upon NRDC's participation in the proceeding. For example, parties often offer late-filed contentions (like NRDC's Waste Confidence contention here)<sup>22</sup> or even move to reopen the record after the Licensing Board has issued its Initial Decision.<sup>23</sup> Further, once the Board has issued its Initial Decision on the Limerick license renewal application, NRDC may also seek Commission review of the Board's denial of its contention on the "no action" alternative, and may likewise seek Commission review if its proposed Waste Confidence contention is denied.<sup>24</sup> Thus, many issues could arise before issuance of a final licensing order requiring further Licensing Board action and Commission review, including newly proposed contentions when the NRC Staff issues its Final Supplemental EIS for Limerick. Piecemeal review of these issues would fly in the face of the Hobbs Act requirement of finality.

To be sure, one court has allowed interlocutory review more broadly for an entity already a party to the hearing, but only if *all* of that party's contentions have

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<sup>22</sup> See 10 C.F.R. § 2.309(c); *New Jersey Env'tl.*, 645 F.3d at 229.

<sup>23</sup> See 10 C.F.R. § 2.326; *New Jersey Env'tl.*, 645 F.3d at 232-33.

<sup>24</sup> See 10 C.F.R. § 2.341(b)(1). Under this provision, Commission review must precede judicial review.

been decided against it on the merits, thus ending that party's participation in the hearing altogether. In *Environmental Law & Policy Center v. NRC*, 470 F.3d 676 (7th Cir. 2006), the Seventh Circuit held that, even absent a final licensing order, the court has jurisdiction to review summary judgment against an NRC intervenor that "concluded the intervention," *id.* at 681, and thus "terminated the contested portion" of the proceeding.<sup>25</sup> *Id.* at 680. That court reasoned that, having "terminated" the intervenor's participation in the agency proceeding, NRC's interlocutory order had "determined" the intervenor's rights. *Id.* at 681.

But *Environmental Law & Policy Center* is easily distinguished. First, unlike the Seventh Circuit, this Court has not expanded Hobbs Act judicial review beyond an order denying admission of all contentions and thus denying party status to a putative intervenor. Second, the Seventh Circuit rule applies only if the agency order decides *all* the party's contentions against it, thus *terminating* not just the party's participation in the hearing, but the hearing itself. Here, by contrast, NRDC has proposed a new Waste Confidence contention that has yet to be decided. It also has a "no action" alternative contention for which review by the Commission is possible. Thus, NRDC's participation in the *Limerick* proceeding is far from "terminated" or "concluded." 470 F.3d at 681. In short, even applying

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<sup>25</sup> A licensing proceeding can be "contested," *i.e.*, a request for hearing and petition for intervention are granted, or "uncontested," *i.e.*, the NRC Staff reviews the application against regulatory criteria in the absence of a hearing. *See* 10 C.F.R. § 2.4.

*Environmental Law & Policy Center* rather than this Court’s own precedent, NRDC’s petition for review must be dismissed for lack of jurisdiction.

## **II. NRDC’s claims are not ripe for review.**

The current posture of this case also renders this dispute unripe, which independently counsels against the Court’s review at this time. Ripeness is a justiciability doctrine that draws upon Article III limitations on judicial power as well as prudential reasons for refusing to exercise jurisdiction prematurely. *See In re Aiken County*, 645 F.3d 428, 433 (D.C. Cir. 2011). Under the constraints of Article III, “federal courts may exercise power only in the last resort, and as a necessity.” *Id.* at 433. Prudentially, the doctrine enables the courts to avoid “entangling themselves in abstract disagreements over administrative policies.” *Id.* at 434. This serves “to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties.” *Id.* at 433 (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 148–49 (1967)).

The risk of an abstract disagreement is quite real here. Though rejecting NRDC’s waiver petition in CLI-13-07, the Commission has referred it “to the Staff as additional comments on the Limerick draft supplemental EIS for the Staff’s

consideration and response.”<sup>26</sup> It remains to be seen how the NRC Staff will respond to NRDC’s concerns in its review outside the hearing process; NRDC’s concerns might be resolved by NRC Staff actions without further litigation.<sup>27</sup> Likewise, NRC has not yet published its final Waste Confidence Generic EIS, a prerequisite to deciding pending Waste Confidence contentions. The Generic EIS might similarly resolve NRDC’s Waste Confidence concerns to its satisfaction.

As this Court recently reiterated, “a claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all.” *Aiken County*, 645 F.3d at 434 (internal quotation marks omitted). This has led the Court to observe: “We have noted that it is sometimes true that if we do not decide a case prematurely, we may never need to decide it.” *Id.* Whatever the outcome, NRDC can safely await final agency action to seek judicial review.

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<sup>26</sup> *Limerick*, CLI-13-07, 78 NRC \_\_\_\_, slip op. at 22. As the Commission noted, NRDC has commented on the draft Supplemental EIS for Limerick license renewal, as parties routinely comment on a draft EIS, even absent party status in the hearing. *Id.* at 16 n.68. All such comments will be considered in preparing the Final Supplemental EIS. *Id.* at 22 n.96.

<sup>27</sup> This will not be known until the NRC Staff completes its review of the Environmental Report and publishes the Final Supplemental EIS. *See* 10 C.F.R. § 51.95(c). At that point, NRDC can see how the NRC Staff has taken its concerns into consideration.

## CONCLUSION

The finality provisions of the Hobbs Act compel dismissal of NRDC's petition for review for lack of jurisdiction. Yet, NRDC loses no judicial review rights by awaiting a final licensing decision. Once the NRC decides whether to issue renewed operating licenses for Limerick, NRDC may then petition for review challenging that decision or any interlocutory NRC orders, including the waiver denial in CLI-13-07. With a final NRC license renewal decision on Limerick still some time away, the doctrine of ripeness likewise counsels in favor dismissal. Accordingly, the Federal Respondents respectfully request that the Court dismiss the petition for review.

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