UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NATURAL RESOURCES DEFENSE COUNCIL, INC., Petitioner,	)	
v.	)	
UNITED STATES NUCLEAR REGULATORY COMMISSION and the UNITED STATES OF AMERICA, Respondents,	)	No. 13-1311
and	)	
EXELON GENERATION COMPANY, LLC, Proposed Intervenor.	)	

FEDERAL RESPONDENTS' REPLY IN SUPPORT OF MOTION TO DISMISS FOR LACK OF JURISDICTION

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NRDC's opposition to the our motion to dismiss confirms the fundamental principle underlying our motion— that the Hobbs Act's finality requirement must be "narrowly construed" to permit review only of those orders that represent "the consummation of an administrative process" and that "dispose[] of all of the issues as to all of the parties." *Blue Ridge Envtl. Def. League v. NRC,* 668 F.3d 747, 753 (D.C. Cir. 2012) (internal quotation marks omitted); *Natural Res. Def. Council, Inc. v. NRC*, 680 F.2d 810, 815 (D.C. Cir. 1982). This principle compels the conclusion that no Hobbs Act jurisdiction exists to review the interlocutory order in CLI-13-07, which denied NRDC's severe accident mitigation alternatives contentions but did not dispose of NRDC's remaining contentions.

NRDC fails to bring itself within the ambit of those cases that have permitted review of orders that have denied petitioners' contentions *entirely*, thus excluding them from a licensing proceeding. NRDC's failure rests on the faulty premise underlying its response to our motion—that NRC has issued a "denial" of its "request to participate as a party" in the *Limerick* license renewal proceeding.[1] Indeed, the record makes unmistakably clear that no such "denial" has occurred.

[1] Petitioners' Opposition to Federal [Respondents'] Motion to Dismiss at 1 ("Pet. Opp."). Elsewhere, petitioners similarly err in stating that "the Commission has rejected NRDC's contentions and its intervention request," and that "NRDC has been denied intervention and the right to participate in the Limerick [license renewal] proceeding." *Id.* at 2, 17.

In CLI-13-07, the decision of which NRDC seeks review,[2] the Commission ruled *only* that NRDC was not entitled to a waiver of the NRC regulation barring severe accident mitigation alternatives contentions. It did *not* rule upon any other matter pertinent to NRDC's past or future participation in the proceeding.

As discussed below, the admissibility and merits of NRDC's "Waste Confidence" contention remain undecided, and NRDC still has agency appellate relief available for the denial of its proposed "no action alternative" NEPA contention. At this point, NRDC is simply a potential intervenor in a licensing proceeding whose contentions have been denied in part, but not wholly—a circumstance that has never served as a basis for judicial review. NRDC has provided no authority authorizing judicial review of an NRC order disposing of some, but not all, of a petitioner's contentions, and, for this reason, its petition for review must be dismissed for lack of jurisdiction.

ARGUMENT

I. NRDC has failed to show that it seeks review of a "final order" within the meaning of the Hobbs Act.

This Court has consistently construed the Hobbs Act "narrowly" to encompass, in the main, only those agency orders that constitute the consummation of an administrative proceeding below and that dispose of "all issues as to all parties." *Blue Ridge Environmental Defense League,* 668 F.3d at 753 (internal

[2] *See* Petition for Review (Dec. 24, 2013).

quotation marks omitted). As we explained in our motion to dismiss, the consequence of the finality requirement is that, in most cases, the "final order" is one granting or denying a license.[3]

NRDC argues that it has met the "final order" requirement because of some supposed "decision that it may *not* participate in the proceeding." (Pet. Opp. at 11; emphasis added). But NRDC never identifies which NRC decision actually says that. In fact, the contrary is true. In its order denying NRDC's waiver petition, the presiding Licensing Board plainly stated that the proceeding was not closed, given NRDC's submission of its proposed Waste Confidence contention:

> We note that *our denial of NRDC's waiver petition does not terminate this proceeding*. On July 9, 2012, NRDC filed with the Board a motion to admit a new environmental contention that challenges the failure of Exelon's Environmental Report to address the environmental impacts of spent fuel pool leakage and fires, as well as the environmental impacts that may occur if a spent fuel repository does not become available.[4]

In affirming this decision, the Commission similarly noted that "NRDC's motion to admit a new waste confidence-related contention currently is pending before the Board; the Board is holding that contention in abeyance in accordance with our

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[3] *See generally* Federal Respondents' Motion to Dismiss at 9-11.

[4] *Exelon Generation Co., LLC* (Limerick Generating Station, Units 1 and 2), LBP-13-1, 77 NRC 57, 69 n.46 (2013) (Exhibit 4 to Motion to Dismiss) (emphasis added).

direction."[5] Thus, neither the Board nor the Commission has decided that NRDC cannot participate in the *Limerick* license renewal proceeding. To the contrary, NRDC's future participation in the proceeding hinges on the admission of its proposed Waste Confidence contention.

NRDC concedes on page 12 of its response, as it must, that its Waste Confidence contention is pending. However, this concession dooms its argument for, under NRC procedures, a single admissible contention will support intervention as a party.[6] NRDC has not disavowed its Waste Confidence contention or, for that matter, its proposed "no action alternative" contention, which the Board dismissed but which NRDC can still seek to reinstate on appeal to the Commission. From all appearances, NRDC intends to litigate the Waste Confidence contention vigorously, if admitted under NRC standards.[7] Indeed, though omitted from NRDC's description of the Waste Confidence rulemaking (*see* Pet. Opp. at 9 & n.3), NRDC submitted 100 pages of comments and a supporting expert declaration in response to the draft Generic EIS.

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[5] *Exelon Generation Co., LLC* (Limerick Generating Station, Units 1 and 2), CLI-13-07, 78 NRC __, slip. op. at 2 n.3 (Oct. 31, 2013) (Exhibit 1 to Motion to Dismiss).

[6] *See* 10 C.F.R. § 2.309(a) (person with standing will be granted party status upon proposal of "at least one admissible contention").

[7] *See generally* 10 C.F.R. § 2.309(f)(1).

Nor does any basis exist for NRDC's lament, in connection with its Waste Confidence contention, that "there is no reason to expect on this record that it will ever become" a party to the *Limerick* proceeding. (Pet. Opp. at 13). The Waste Confidence contentions have been held in abeyance in twenty-one licensing or license renewal proceedings. *See generally Calvert Cliffs 3 Nuclear Project, LLC* (Calvert Cliffs Nuclear Power Plant, Unit 3), CLI-12-16, 76 NRC 63, 68-69 (2012). *Limerick* is no different than other cases; all petitioners and their Waste Confidence contentions will be dealt with even-handedly. And in any event, if party status is ultimately denied to NRDC on the basis of its Waste Confidence contention, it can ultimately seek relief in this Court. The likelihood that NRDC will in fact attain party status on an outstanding contention is simply not relevant to the question of whether the order of which NRDC seeks review is "final."

NRDC next claims that it requested, but was denied, "party status based on its [severe accident mitigation alternatives] contentions." (Pet. Opp. at 12). It is true that party status was not granted on the basis of those contentions, but persons seeking intervention and hearing before the NRC achieve party status based upon the admission of *any* contention; no petitioner has the right to demand that its intervention be based on one particular contention over another. As discussed above, NRDC does not dispute that intervention based on its Waste Confidence contention remains a possibility. Moreover, even if the agency were to dismiss

NRDC's Waste Confidence contention, NRDC could still appeal its "no action alternative" contention to the Commission. NRDC would then be in the same position as the petitioners in *Alaska v. FERC*, 980 F.2d 761 (D.C. Cir. 1992), and similar cases in which judicial review is permissible prior to the grant or denial of a license, when each of its contentions has been finally dismissed.

II. No merit exists to NRDC's remaining points.

Seeking to prove that finality has been achieved in the proceeding below, NRDC asserts that the Commission order denying its contentions related to severe accident mitigation alternatives also denied "*all* of NRDC's original set of contentions," including its "no action alternative" contention. (Pet. Opp. 14 n.7). That is incorrect. The NRC Staff and licensee appealed, on an interlocutory basis, admission of the severe accident mitigation alternatives contentions. *See Limerick,* CLI-13-07, slip. op. at 2. NRDC did not seek (and was not required to seek) interlocutory review of the Board's denial of the "no action alternative" contention, and the Commission did not review it. Accordingly, NRDC may seek review of this contention by the Commission when the proceeding concludes. *See* 10 C.F.R. § 2.341(b)(1).

We pointed out on page 14 of our motion that, given the pendency of NRDC's Waste Confidence contention, NRDC might file new or amended (formally known as "late-filed") contentions in the future, the admissibility or

merits of which would also be subject to judicial review upon issuance of a final order. NRDC asserts in response (NRDC Opp. at 13) that the potential for contentions of this type to be filed exists in in *all* cases. But NRDC ignores that its proposed Waste Confidence contention is pending and that NRDC remains a participant in the proceeding. NRDC has already filed one such contention on Waste Confidence, and the potential for other such contentions to be filed is hardly an abstract proposition. That potential is a compelling reason to withhold judicial review until agency action is complete. *See generally Alaska v. FERC*, 980 F.2d at 765 (premature review would "disrupt the orderly process of adjudication").

NRDC relies upon *City of Cleveland v. NRC,* 68 F.3d 1361 (D.C. Cir. 1995), but that case involved a review of NRC statutory power even to convene the proceeding at issue. There, the NRC had imposed antitrust conditions on two nuclear power plants' licenses to ameliorate the competitive advantages of plant ownership. A decade later, the licensees asked the NRC to lift those conditions, and were opposed by the city of Cleveland. The Licensing Board ruled upon what the parties agreed was the "bedrock" legal issue, holding that the NRC has statutory authority to maintain antitrust conditions despite a finding that the cost of electricity from the licensed nuclear power plant is higher than the cost from alternative sources. The Commission declined review, "thereby converting the ruling into final agency action." 68 F.3d at 1365.

On review, this Court observed that the parties below had "formulated *one issue* for the NRC" regarding the licensees' suspension application, unlike the multiplicity of contentions in a licensing hearing. *Id.* (emphasis added). Unlike contentions in NRC proceedings, which the NRC has jurisdiction to entertain, that issue pertained to "the NRC's authority [under antitrust law]" even "to consider suspension requests." *Id.* at 1370 n. 10. Thus, the single issue reviewed by the Court was not one among many diverse contentions, but rather the "bedrock issue" of whether the NRC has authority to maintain earlier imposed license conditions if the original justification no longer exists. That is a far cry from judicial review of an NRC order denying some, but not all, hearing contentions.

As discussed in the federal respondents' opening brief (at page 15), even under the Seventh Circuit's approach in *Environmental Law and Policy Center,* 470 F.3d 676 (7th Cir. 2006), interlocutory appeal by a party may be allowed prior to the grant or denial of a license, but only when *all* of that party's contentions have been decided against it. The key to that holding, which NRDC correctly states but ultimately ignores in attempting to distinguish the case, is that a reviewing court must conclude that the agency decision is one "terminating an intervenor's participation in the proceeding," that is, "the decision was a final determination of the intervenor's participation rights." (NRDC Opp. at 15). Here, however, and unlike *Environmental Law and Policy Center*, NRDC's participation

in the *Limerick* proceeding has not been "terminated"; its party status will be finally determined by disposition of its Waste Confidence contention, Commission review (if any) of its rejected "no action alternative" contention, and whatever other contentions NRDC might raise.

Finally, NRDC offers only one argument specifically disputing our arguments concerning ripeness—that its petition "raises a purely legal argument." (Pet. Opp. at 19). But that is not so. NRDC has sought review of CLI-13-07,[8] the Commission's affirmation of the Board's denial of NRDC's waiver petition. Consideration of a waiver petition is deeply fact-based (particularly where, as here, the underlying issues relate to complex analyses of severe accident mitigation alternatives that rest on many inputs), and judicial review would require this Court to review the Commission's application of the factual record to NRC waiver standards.[9] Accordingly, NRDC's challenge to our ripeness argument fails.[10]

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[8] *See* Petition for Review (Dec. 24, 2013).

[9] *See* CLI-13-07, slip op. at 9. As the Commission explained: "The waiver petitioner must include an affidavit that states 'with particularity' the special circumstances that justify waiver of the rule." *Id.* at 8.

[10] NRDC also contends (NRDC Opp. at 20) that the Court should stay the case if it deems the Petition unripe. We disagree. First, inasmuch as the deficiency is jurisdictional, it is incurable. Second, NRDC fails to explain why a stay would be appropriate, and a stay is not warranted where, as here, the prematurity stems from the possibility that future events will substantially alter the nature of the agency's action.

III. NRC cannot gain review under a "plainly erroneous" standard.

NRDC also asserts that review is warranted because this Court's reversal of the Commission's denial of its severe accident mitigation alternative contentions is "a virtual certainty." (Pet. Opp. at 17). This "exceedingly limited" exception, *NRDC v. NRC,* 680 F.2d 810, 816 n.15 (D.C. Cir. 1982), plainly does not apply here. First, the NRC's carefully stated legal and factual rationale for declining to waive its regulation governing the severe accident mitigation alternatives analysis associated with the *Limerick* license renewal application precludes any such "certainty" of reversal on its face.[11] Second, this Court has recently affirmed the deference owed NRC in determining whether a NEPA contention meets admissibility standards. *See Blue Ridge Envtl. Def. League v. NRC,* 716 F.3d 183 (D.C. Cir. 2013). At least equal deference is owed a decision declining to waive an otherwise applicable regulation, likewise foreclosing any "virtually certain" reversal.[12]

CONCLUSION

For the foregoing reasons and those stated in our motion, the petition should be dismissed for lack of jurisdiction and as not ripe for review.

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[11] *See* CLI-13-07, slip op. at 7-23.

[12] NRDC's claim of "substantial hardship" (NRDC Opp. at 19)–that jurisdictional defenses might be raised to a future, timely petition–is baseless; NRC rules are very clear on the process for NRDC, an experienced NRC hearing litigator, to follow in triggering Hobbs Act review. *See* 10 C.F.R. § 2.341.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 10, 2014, the undersigned counsel for Respondent U.S. Nuclear Regulatory Commission filed the attached Federal Respondents' Reply in Support of Motion to Dismiss for Lack of Jurisdiction with the U.S. Court of Appeals for the District of Columbia Circuit by filing the same with the Court's CM/ECF filing system and by filing four (4) copies with the Court by U.S. Mail, First-Class, postage prepaid. That method is calculated to serve:

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