ORAL ARGUMENT NOT YET SCHEDULED

No. 20-1026

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

FRIENDS OF THE EARTH, ET AL.,
Petitioners,

v.

UNITED STATES NUCLEAR REGULATORY COMMISSION and
UNITED STATES OF AMERICA,
Respondents

On Petition for Review of Actions by the
Nuclear Regulatory Commission

RESPONDENTS' REPLY TO PETITIONERS' OPPOSITION TO MOTION TO DISMISS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Judicial Decisions

Statutes

Rules and Regulations

GLOSSARY

AEA	Atomic Energy Act
EIS	Environmental Impact Statement
NEPA	National Environmental Policy Act
NRDC	Natural Resources Defense Council
NRC	Nuclear Regulatory Commission

INTRODUCTION

Respondents have filed a motion to dismiss ("Motion") the Petition for Review, arguing that this Court presently lacks jurisdiction because Petitioners fail to challenge any "final order" under the Hobbs Act. 28 U.S.C. § 2342(4). In their response in opposition to the Motion ("Opposition"), Petitioners assert that (1) the renewed licenses issued by the NRC staff on December 4, 2019, are "final orders" subject to judicial review (notwithstanding the existence of multiple administrative petitions for review relating to those same licenses that Petitioners concede are presently pending before the Commission); and (2) this Court also has jurisdiction under the "immediate effectiveness" doctrine articulated in *Massachusetts v. NRC*, 924 F.2d 311 (D.C. Cir. 1991). As explained below, Petitioners are incorrect on both counts, and the Petition for Review should be dismissed because the renewed licenses are not yet "final" under *Bennett v. Spear*, 520 U.S. 154 (1997).

ARGUMENT

The renewed licenses are not "final orders"

This Court has jurisdiction to review NRC "final orders" in "proceedings" specified in Atomic Energy Act ("AEA") section 189a. 28 U.S.C. § 2344; 42 U.S.C. § 2239(a), (b). Petitioners raise a number of arguments as to why the renewed licenses issued by the NRC staff are "final orders" under the test articulated by the Supreme Court in *Bennett*, but, as explained below, none resolve

Petitioners' fatal flaw—seeking this Court's review of agency action while simultaneously seeking administrative review before the Commission.

I. The renewed licenses do not represent the "consummation" of the NRC's decisionmaking process

A. Petitioners conflate "major federal actions" under NEPA with "final orders" under the Hobbs Act

Bennett's first prong requires that agency action "mark the consummation of the agency's decisionmaking process" and not be "merely tentative or interlocutory" in nature. 520 U.S. at 177-78. Petitioners argue that the agency has "consummated its decisionmaking process" because it did not stay the effectiveness of the renewed licenses pending review. Opposition 9.

In doing so, Petitioners conflate "finality" for purposes of Hobbs Act jurisdiction with the separate requirement in the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4332(2)(C), to prepare an environmental impact statement ("EIS") prior to undertaking a major federal action significantly affecting the environment (which the NRC did before issuing the renewed licenses). *See* Opposition 19 ("Here, the NRC has already taken the major federal action requiring NEPA review . . . and Petitioners' claims are ripe for review."); *id.* at 20 ("[The Commission's] ability to [vacate the licenses] does not alter the fact that the NRC has already taken the action requiring an EIS."). Indeed, "undertaking a major federal action" is not what triggers this Court's jurisdiction—

what is required is a "final order" in a "proceeding" described in AEA § 189a. As discussed at length, Motion 13-15, that "final order" is still forthcoming because Petitioners have filed administrative petitions for review that may yet provide them with relief. The pendency of these administrative petitions fundamentally undermines Petitioners' arguments that the NRC's decisionmaking process has been consummated. While the renewed licenses have been issued, Petitioners' request that the Commission review the sufficiency of the process that led to these renewals is still not resolved.

Practical reasons dictate this result (Motion 11-12). The Court's review may result in "waste of judicial time and effort" if forthcoming Commission action alters or even moots the issues. *State of Alaska v. FERC*, 980 F.2d 761, 764 (D.C. Cir. 1992). Moreover, regardless of the result before the agency, undertaking judicial review prior to agency resolution of the underlying issues may nonetheless deprive the Court of "a useful record for subsequent judicial consideration." *Qwest Corp. v. FCC*, 482 F.3d 471, 475 (D.C. Cir. 2007) (quoting *Woodford v. Ngo,* 548 U.S. 81, 89 (2006)). This Court should enforce the Hobbs Act by requiring Petitioners to await a final order consummating the administrative proceeding.

B. *Darby v. Cisneros* is not applicable

Petitioners rely on *Darby v. Cisneros*, 509 U.S. 137 (1993), to buttress their assertion that the immediate effectiveness of the renewed license renders them

"final" for purposes of the Hobbs Act. Opposition 10-12. But *Darby* holds that federal courts cannot require plaintiffs to exhaust available administrative remedies beyond the statutory requirements for exhaustion in the Administrative Procedure Act, 509 U.S. at 154, and Respondents are not seeking to enforce any exhaustion requirement that Petitioners have foregone. By seeking administrative review of an agency action, any "finality" that even arguably existed has been rendered tentative or interlocutory. *See, e.g.*, *Flat Wireless, LLC v. FCC*, 944 F.3d 927, 933 (D.C. Cir. 2019) (pending request for administrative reconsideration renders agency action nonfinal).[1]

C. Respondents have not taken the "opposite position" in previous Hobbs Act cases

Petitioners incorrectly state that Respondents have previously argued that "the order granting or denying the license" is "ordinarily the final order" in an NRC licensing proceeding. Opposition 7. They cite a quotation taken from a 2014 motion to dismiss filed by Respondents in a different license renewal proceeding ("2014 Motion"). Petitioners thus depict themselves in a jurisdictional Catch-22—either (1) seek review now and face a motion to dismiss for lack of a Commission

[1] *WildEarth Guardians v. Jewell*, 738 F.3d 298 (D.C. Cir. 2013), is likewise inapposite (Opposition 12-13). The petitioners in *WildEarth Guardians* sought judicial review only after the action was "final" under applicable agency regulations, and no pending administrative appeals remained. 738 F.3d at 304. Here, Petitioners have still-pending administrative appeals before the Commission.

final order terminating the proceeding; or (2) seek review later and anticipate the Commission's purported argument that their challenge is untimely because the final order was issued in December 2019, when the renewed licenses were issued. Opposition 8. However, the 2014 Motion clearly reveals that Respondents have maintained a consistent position.

First, the 2014 Motion repeatedly contends—as we do in this case—that a final order *terminating the proceeding* (and not simply issuing the license) is what ordinarily triggers this Court's jurisdiction. *See, e.g.,* 2014 Motion 10 ("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.") (emphasis added); *id.* at 11 ("[R]eviewing courts require that *agency proceedings* become complete before the court undertakes its review. . . . The Commission has not yet made a final decision on whether to grant the [license renewal.]") (emphasis added).

The context in which we raised this argument confirms this conclusion. Respondents filed the 2014 Motion because the petitioner there (NRDC) sought judicial review of an interlocutory Commission order in a license renewal proceeding—specifically, a Commission order denying NRDC's petition to waive an NRC regulation in the licensing proceeding. Respondents sought dismissal on jurisdictional grounds because the order was nonfinal; NRDC had at least one

pending contention in the license renewal proceeding, which was still ongoing at the time judicial review was sought (2014 Motion 13-14).[2] Respondents' position then is consistent with its position now, and Respondents will not oppose jurisdiction if Petitioners timely seek review of a final Commission order concluding the proceeding.

Second, the allegedly contradictory position taken in the 2014 Motion—that the "order granting or denying the license" is "ordinarily the final order"—is a direct quotation from this Court's decision in *City of Benton v. NRC*, 136 F.3d 824 (D.C. Cir. 1998). *City of Benton* did not involve any still-pending agency adjudication at the time the petition for judicial review was submitted. The petitioners there had sought judicial review of an interlocutory NRC staff determination that was antecedent to the final decision to transfer an operating license. *Id.* at 825. In this context, the Court stated that, in an NRC licensing proceeding, "the order granting or denying the license" is "ordinarily the final order"—that is, under the Hobbs Act, petitioners could not challenge antecedent decisions, only the "final order" issuing the licenses. *Id.* *City of Benton* is also

[2] Case No. 13-1311 was eventually dismissed as moot after NRDC filed a subsequent petition for review (Case No. 14-1225) days after the NRC issued a final order denying its request to intervene as a party in the license renewal proceeding. Exhibit 1. There, as here, the licensing proceeding became "final," and consideration of the merits of the petitioners' arguments on the merits was warranted, once the adjudicatory proceeding before the agency terminated.

consistent with the position taken by Respondents here—by seeking administrative review of the NRC staff's decision to issue the renewed licenses, Petitioners have rendered those decisions tentative or antecedent to the NRC's "final" decision in the adjudicatory proceeding.

D. The renewed licenses are expressly subject to Commission adjudicatory review

Petitioners also argue that neither the renewed licenses nor the NRC's Record of Decision are "conditioned on any further action by the Commission," and that the mere "possibility" that the licenses may be modified or rescinded "does not make them any less final." Opposition 10. This is not accurate. First, as explained in Respondents' Motion, *NRC regulations* make renewed licenses subject to subsequent administrative modification or rescission. Motion 15-16 (citing 10 C.F.R. § 54.31(c)). Second, the Record of Decision expressly acknowledged the existence of two pending administrative petitions for review of the Atomic Safety and Licensing Board's decisions in the licensing proceeding. Motion 11. Third, although Petitioners imply that the Commission may never act on their administrative petitions for review,[3] the Commission is obligated by its own regulations to provide Petitioners with a decision. Motion 16 (citing 10

[3] Opposition 1 ("the Commission may (someday?) rule on petitions"); 8 ("some indeterminate point in the future when the Commission might (or might not?) rule").

C.F.R. § 2.341(c)(1)). This is not a situation in which Petitioners must await potential *sua sponte* Commission action or where the "mere possibility" exists that the Commission may reconsider the agency action. Opposition 10 (citing *Nat'l Envtl. Dev. Association's Clean Air Project v. EPA*, 752 F.3d 999 (D.C. Cir. 2014); *Sierra Club v. NRC*, 862 F.2d 222 (9th Cir. 1988)). Petitioners have specifically invoked the adjudicatory authority of the Commission, as the head of the agency, by filing administrative petitions for review. They therefore must await resolution of those petitions before they can seek judicial review of a "final order."

E. This case falls within the Court's finality jurisprudence

Petitioners also suggest that this is a matter of first impression, and that this Court should find that "an action requiring preparation of an EIS under NEPA is reviewable under the Hobbs Act" once that action becomes "effective." Opposition 6. On this point, Petitioners repeatedly cite to *Oglala Sioux Tribe v. NRC*, 896 F.3d 520 (D.C. Cir. 2018), for the proposition that NEPA does not permit an agency to "act first and comply later." Opposition 6, 9. Petitioners also argue that the Commission had an "opportunity" to address their NEPA concerns prior to the staff's issuance of the renewed licenses but failed to do so. Opposition 7 (citing *Vermont Dep't of Pub. Serv. v. U.S.*, 684 F.3d 149, 157 (D.C. Cir. 2012)). But this quote from *Oglala Sioux Tribe* concerns NEPA compliance and has no bearing on Hobbs Act "finality," which is analyzed under the *Bennett* framework.

And Petitioners cannot credibly argue that the Commission has had the "opportunity" to address their NEPA concerns where they have sought judicial review prior to the Commission's resolution of those concerns. In short, Petitioners can seek judicial review of the agency's NEPA compliance once a final adjudicatory order has been issued.

II. The renewed licenses do not have pragmatic "legal consequences" for Petitioners

Petitioners likewise fail to satisfy *Bennett's* second prong—that, when viewed "pragmatically" (Motion 19), the renewed licenses do not determine "legal rights or obligations" or otherwise have "legal consequences" for Petitioners.

A. Jurisdiction is not warranted under the "immediate effectiveness" doctrine

First, Petitioners argue (Opposition 18-20) that this Court has jurisdiction under the "immediate effectiveness doctrine" articulated in *Massachusetts v. NRC*, 924 F.2d 311 (D.C. Cir. 1991), which is "an exception to the Hobbs Act's finality rule." *Blue Ridge Envtl. Defense League v. NRC*, 668 F.3d 747, 757 (D.C. Cir. 2012). In *Massachusetts*, this Court found limited jurisdiction to review a Commission order in a licensing proceeding (notwithstanding the pendency of administrative appeals) because review of the order in question would not "disrupt the orderly process of adjudication within the agency and because significant legal consequences flow[ed] from the Commission's action." 924 F.2d at 322.

Massachusetts predates *Bennett* and can best be viewed today as analogous to *Bennett* "prong two" (i.e., determining that an otherwise interlocutory order resulted in "significant legal consequences"). Petitioners argue that the reasons for asserting jurisdiction in *Massachusetts* "apply with equal or greater force here," Opposition 19, but the opposite is true.

As previously explained (Motion 3, 21), the Turkey Point renewed licenses authorize an extended period of operation for two existing reactor units beginning in 2032 and 2033, respectively. This is significantly different than the circumstances in *Massachusetts*, where the Commission affirmatively lifted a stay that authorized a reactor to begin operating at full power for the first time. Here, Petitioners allege deficiencies in the NRC's environmental analysis of the renewed period of operation beginning over a decade from now. Unlike *Massachusetts*, the effects about which Petitioners complain will not be experienced until long after this litigation is complete.

Second, this Court in *Massachusetts* found that review of the Commission's "immediate effectiveness" determination would not "disrupt the orderly process of adjudication," in part because of the "exceedingly limited" scope of the Court's review—whether the Commission abused its discretion when lifting the stay. *Id*. at 322. Here, Petitioners would have the Court substantively review whether the NRC complied with NEPA when issuing the renewed licenses—the same merits

issue now pending before the Commission. This Court's review at this time thus would "disrupt the orderly process" of the agency's resolution of the Turkey Point adjudicatory proceeding, where this Court and the agency are simultaneously reviewing the same issues.

Petitioners also argue that further delay may "foreclose" the implementation of a "reasonable alternative" to the cooling canal system at Turkey Point—an alternative that the NRC may "select" if Petitioners prevail. Opposition 17-18. But the NRC does not "select" designs of nuclear power plants. The NRC's statutory role in reviewing a license application is to determine whether the facility "will be in accord with the common defense and security and will provide adequate protection to the health and safety of the public." 42 U.S.C. § 2232(a). The NRC also performs environmental review in accordance with NEPA, including identification of reasonable alternatives, but NEPA does not mandate particular results. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989). In any event, Petitioners' assertion that reasonable alternatives may soon be foreclosed is speculative, especially where pending administrative appeals before the Commission may yet provide them with relief that they seek here.

B. The "immediate effectiveness" of the renewed licenses does not have legal consequence for Petitioners

Petitioners argue that because the renewed licenses are immediately effective, the second prong of *Bennett* is satisfied. Opposition 14. Petitioners point to a provision in the renewed licenses that requires certain action by 2024, years before the licenses would have otherwise expired in 2032. But the license condition Petitioners identify concerns piping replacement, intended to improve the overall safety of the Turkey Point facility. Petitioners cannot plausibly allege that the immediate effectiveness of this license condition results in "legal consequences" warranting this Court's immediate review where the license condition in question has no bearing whatsoever on the issues Petitioners seek to raise.

CONCLUSION

This Court should grant Respondents' Motion to dismiss.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH
FEDERAL RULE OF APPELLATE PROCEDURE 27(D)

I certify that this filing complies with the requirements of Fed. R. App. P. 27(d)(1)(E) because it has been prepared in 14-point Times New Roman, a proportionally spaced font.

I further certify that this filing complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(C) because it contains 2,596 words, excluding the parts of the of the filing exempted under Fed. R. App. P. 32(f), according to the count of Microsoft Word.

/s/ Eric V. Michel
ERIC V. MICHEL

Counsel for Respondent United States
Nuclear Regulatory Commission

EXHIBIT 1

Order Dismissing Case No. 13-1311 as moot (Nov. 13, 2014)

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13-1311 **September Term, 2014**

NRC-50-352-LR
NRC-79FR63650
NRC-CLI-13-07

Filed On: November 13, 2014

Natural Resources Defense Council,

Petitioner

v.

U.S. Nuclear Regulatory Commission and
United States of America,

Respondents

Exelon Generation Company, LLC,
Intervenor

No. 14-1225

Natural Resources Defense Council,

Petitioner

v.

U.S. Nuclear Regulatory Commission and
United States of America,

Respondents

BEFORE: Kavanaugh, Circuit Judge, and Edwards and Sentelle, Senior Circuit Judges

O R D E R

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13-1311 **September Term, 2014**

Upon consideration of petitioner's motion to consolidate, and the opposition thereto, it is

ORDERED that the motion be denied. It is

FURTHER ORDERED that case No. 13-1311 be removed from the November 21, 2014 oral argument calendar and be dismissed as moot in light of petitioner's filing of No. 14-1225.

The Clerk is directed to process case No. 14-1225 in the normal course.

The Clerk is directed to transmit to the U.S. Nuclear Regulatory Commission a certified copy of this order in lieu of formal mandate.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Michael C. McGrail
Deputy Clerk