IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BENNETT BROWN, ROBERT SCHULTES, M.D., PAMELA MACKEY TAYLOR, and IOWA PHYSICIANS FOR SOCIAL RESPONSIBILITY,	)	No. 11-1441
Petitioners,	)	
vs.	)	
NUCLEAR REGULATORY COMMISSION and UNITED STATES OF AMERICA,	)	PETITION FOR REHEARING EN BANC
Respondents.	)	

Come now the Petitioners and in support of this Petition for Rehearing En Banc, state to the Court as follows:

STATEMENT JUSTIFYING REHEARING EN BANC

The panel decision in this case relied upon and misapplied decisions from other circuits in interpreting the time limit for filing an appeal under the Hobbs Act, 28 U.S.C. § 2344. There is no prior opinion of this Court addressing the issue raised in this case.

Because the determination of when an order is "entered" for purposes of establishing the date for triggering the time to appeal under the Hobbs Act will likely come before this Court in the future, this is a question of exceptional importance that should be clarified by an en banc decision of this Court.

PROCEDURAL HISTORY

FPL Energy Duane Arnold, now NextEra Energy Duane Arnold, filed an application for renewal of the license to operate the Duane Arnold Energy Center, a nuclear power plant in Palo, Iowa. Notice of the filing of this application was published in the Federal Register on November 17, 2008. This notice is Document 2 in the administrative record.

On February 17, 2009, notice was published in the Federal Register that the application for license renewal was accepted by the NRC and that interested persons may file a request for hearing and petition to intervene. That notice is Document 3 in the administrative record. On March 24, 2009, a notice of intent to prepare an environmental impact statement and conduct a scoping process was published in the Federal Register. This notice is Document 4 in the administrative record. The notice also states that an environmental impact statement would be prepared at a later date. Pursuant to the above notice, a scoping meeting was held on April 22, 2009. At that meeting Petitioner, Bennett Brown, spoke and made comments. A transcript of his comments is Document 5 in the administrative record.

Then, on February 10, 2010, notice was published in the Federal Register of the availability of the draft

environmental impact statement for the Duane Arnold license renewal. That notice is Document 7 in the administrative record. Pursuant to that notice, Petitioners, Robert Schultes and Pamela Mackey Taylor, submitted written comments. The United States Environmental Protection Agency also submitted written comments. Those comments are Documents 9, 10 and 11 in the administrative record.

Finally, on December 29, 2011, notice was published in the Federal Register that the Duane Arnold license was renewed and that this notice was also the record of decision on the final environmental impact statement. That notice is Document 16 in the administrative record.

Petitioners appealed to this Court and the panel sustained a motion to dismiss, on the basis that the petition was not timely filed.

THE PETITION FOR REVIEW WAS TIMELY FILED

Respondents contended that the Petition for Review herein was not timely filed. They contended that the Duane Arnold license renewal was issued on December 16 and that the Petitioners had 60 days from that date, pursuant to 28 U.S.C. § 2344, to file their Petition.

Section 2344 states that a petition for review must be filed within 60 days after the "entry" of the final agency order sought to be reviewed. The Respondents' argument was

that December 16, 2010, was the date of the entry of the final agency order. Section 2344 also states that "[o]n entry of a final order . . . the agency shall promptly give notice thereof by service or publication in accordance with its rules." (emphasis added). Finally, § 2344 requires that a petitioner seeking judicial review must attach to the petition copies of the "order, report, or decision of the agency," assuming the petitioner has received copies thereof pursuant to the earlier requirement in the statute that the agency must promptly serve copies thereof.

For participants in the agency proceedings who were parties in a formal adjudicatory hearing proceeding before the agency, it may be reasonable to say that the date the order is signed is the date of entry, because the statute requires that the parties be served with notice promptly. But when a party participates by making comments, that party does not receive notice until the order is published in the Federal Register.

The discussion in Mesa Airlines v. United States, 951 F.2d 1186 (10th Cir. 1991), is instructive. Although the facts in Mesa are distinguishable from this case, the court did consider when an agency order is entered. The Mesa court said that in a case where there is not an official docket, entry of the order is effected when the order is

made public, citing Chem-Haulers, Inc. v. United States, 536 F.2d 610 (5th Cir. 1976)(an order of the ICC was entered only when it was "final, complete, and a matter of public record."), and City of Gallup v. FERC, 702 F.2d 1116 (D.C. Cir. 1983)(A decision becomes a final decision when it is both complete and passes out of the control of the authority by being released to the interested parties or to the public in decisional form without any immediate intention of recall or reconsideration.).

In Chem-Haulers, a case relied upon by the Respondents and referred to in Mesa, the Interstate Commerce Commission "decision was not served on Chem-Haulers, or the public generally, until February 18, 1975, at which time a formal final order was released." Chem-Haulers, 536 F.2d at 613. The court, in attempting to interpret the meaning of "entry" in § 2344, found that the legislative history of the statute was ambiguous. So, without firm guidance in the statute or legislative history clarifying when an order is entered, the Chem-Haulers court looked to various cases interpreting agency actions.

The court quoted from the case of Statler Distributors v. Alexander, 148 F.2d 74 (1st Cir. 1945):

> Without undertaking to give a comprehensive interpretation of the statutory phrase, "entry of such order," it suffices for this case to hold that the

> order of denial has at least been entered, . . . , when it has been signed and placed in [the agency's] files as a completed act, and a copy of the order, forwarded to the applicant by registered mail pursuant to § 4(f), has actually been received by the applicant. (emphasis added).

Chem-Haulers at 616.

The Chem-Haulers court then noted that Federal Communications Commission orders are final when public notice is given of the orders. This has been interpreted to mean publication in the Federal Register. Although this interpretation is based on a specific FCC rule that says the order is entered when published in the Federal Register, it certainly demonstrates that fixing the Federal Register publication as the date of entry is reasonable and appropriate.

The Chem-Haulers court then concluded that the time period for petitioning for review of an agency order pursuant to § 2344 "should run from the time when the order appealed from is final, complete, and a matter of public record." Chem-Haulers, 536 F.2d at 616. In supporting that conclusion, the court said:

> Before the appealing party has access to the Commission's order (assuming it has learned of the contents of the minute record reflecting the bare Commission decision) it has not the means to assess the legal basis for appeal. Title 28, U.S.C., Section 2344, requires the party petitioning for review to state the "grounds on which relief is sought" as well

> as to attach a copy of the "order, report, or decision" of the agency to the petition for review.

Id.

In this case, the petitioners did not receive notice of, nor a copy of, the final order of the NRC regarding the record of decision on the final supplemental environmental impact statement, nor did they receive a copy of the final EIS. See affidavits of Bennett Brown, Robert Schultes, and Pamela Mackey Taylor, hereto attached. They had no way of knowing the contents of the final order until it appeared in the Federal Register on December 29, 2010. The Respondents contended in their Reply that because the Petitioners' names appeared on the copy list for the Final EIS, we are to presume that they received it, even with no proof to support that. The fact is that the Petitioners' sworn affidavits prove the contrary.

It is significant that the NRC's failure to provide the commenters with a copy of the final EIS, which might have put them on notice that a final order was imminent, violated Council on Environmental Quality regulations, 40 C.F.R. § 1502.19, and the NRC's own regulations, 10 C.F.R. § 51.93, which require an agency to distribute a copy of the final EIS to each commenter on the draft EIS. Although there was apparently a press release and subsequent news

articles, neither the press release nor the news articles gave the complete substance of the order, especially in terms of the record of decision on the final supplemental environmental impact statement. There was a web page regarding the Duane Arnold relicensing (no longer available) when Petitioners filed this case, but that page had no access to the documents contained in Exhibit 1 attached to the Respondents' Motion to Dismiss. The Respondents admitted in their Reply, buried in a footnote, that the renewed license was not on the website until December 30, 2010, one day after it was published in the Federal Register. Thus, the final order in this case was not "final, complete, and a matter of public record," see Chem-Haulers, supra, until it was published in the Federal Register on December 29, 2010.

The Respondents also claimed that a response by undersigned counsel to a news reporter shows that Petitioners had actual notice of the decision. But counsel had not seen the order and simply commented that at the appropriate time, legal action might be undertaken. Counsel only indicated that he had seen the comments submitted by the Environmental Protection Agency, but he had not seen the order or even the press release. The fact is that it was only upon being told by a news reporter that the

license had been renewed and then accessing the final EIS from the Internet, that counsel was able to even know that EPA had commented. Also, as noted previously, counsel could not even go to the Duane Arnold relicensing web site and find the order. This is not the type of notice referred to in the cases cited above that would constitute entry of the order.

The Respondents relied heavily on the decision in Energy Probe v. NRC, 872 F.2d 436 (D.C. Cir. 1989). But that case is factually distinguishable from the case here. In Energy Probe, the petitioners were participants in a formal agency adjudicatory proceeding. The agency denied the petitioners' request to suspend a nuclear power plant's operating license. At that time, an agency officer informed the petitioners that the ruling would become final 25 days after the date of issuance, unless the agency granted discretionary review. The agency denied further review and that decision was served on the petitioners. One of the petitioners did not receive the decision until 13 days after it was served because the petitioner had relocated its office and had not notified the agency of its new address. So, as in some of the cases cited previously, this was a situation where notice of the contents of the agency decision was specifically served promptly on the parties.

When, as in this case, the parties are not served with such notice, and in fact, have no way to obtain the agency decision until it is published in the Federal Register, the order is "final, complete, and a matter of public record" when published in the Federal Register.

In their Reply, at p. 5, the Respondents admitted that they gave notice, essentially promptly serving notice as discussed in Chem-Haulers and Energy Probe, by publication in the Federal Register. That is exactly what the Petitioners have said. The order in this case was not entered until it was published in the Federal Register on December 29, 2010.

The Intervenors argued that even if the date of the Federal Register publication of the NRC order is the date that triggers the 60-day notice, the Petitioners still had 47 days to file a petition for judicial review before the date the Respondents and Intervenors claim was the deadline. The argument is based on language in Energy Probe, 872 F.2d at 438, that is essentially dicta, noting that even though notice of the order was promptly served, the delay in one of the parties receiving it did not significantly prejudice that party because there were still 47 days to file a petition for review after the notice was served. But the facts of that case were that the

petitioners were parties in a formal adjudicative proceeding, the final order was directly and promptly served on them, one petitioner received timely notice, the only reason one petitioner did not receive timely notice was because it had changed addresses, and in any event both petitioners were represented by the same attorney. So the language seized upon by the Intervenors was based on the specific facts in the Energy Probe case and was essentially dicta. Most significantly, § 2344 clearly establishes a 60-day time period, not a 47-day time period. The Intervenors are improperly attempting to amend the statute.

The common thread running though all of the above-cited cases is that an agency order is entered when interested parties are served with notice and have knowledge of the contents of the order. In a case where the parties participate in the agency proceeding by commenting, the only notice and knowledge of the contents of the order they receive is publication of the order in the Federal Register. That is the date when the order is entered. Respondents admit that the Petition for Review herein was filed within 60 days of that date. Therefore, the Petition for Review was timely filed.

The panel opinion in this case did not discuss any of this analysis of what the term "entry" means in the Hobbs

Act, nor how the term should be interpreted in a situation where the petitioner did not participate in a formal adjudicatory proceeding or some other proceeding where a specific formal service of the administrative decision would have been served on them. And that is the important issue in this case.

The panel opinion cited Energy Probe, Chem-Haulers, and Mesa Airlines, without discussing the analysis set out above. There was no discussion about when an agency decision is served and made public when the petitioners in the case were not parties in an adjudicatory proceeding and were not directly served with notice and a copy of the agency order. The context of the Petitioners' participation in this case is crucial to the determination of when the agency order was entered, and thus, when the time period started for the 60-day period to appeal. This factual context has not been addressed by this Court, nor by any other court as near as Petitioners' counsel can determine. That is why this is a question of exceptional importance that should be clarified by an en banc decision of this Court.

The panel opinion also stated, at p. 3, "[T]he order was final and complete, and became a matter of public record, by being signed and served to DEAC's owners without

intent to recall or reconsider." But this statement misses the point in two respects. First, the order was not a matter of public record when it was signed and served on DEAC's owners. It was known only to the owners. By the Respondents' own admission in their Reply, the order was nowhere on the NRC website until December 30, 2010, one day after it was published in the Federal Register. The important point is that notice to the plant owners is not notice to the public or even to any participants who are not served directly with a notice.

Second, as indicated above, notice to the plant owners is not the extent of the notice that was referred to in Energy Probe, Chem-Haulers, and Mesa Airlines. Those cases clearly state that the notice that constitutes entry of the order is notice to all participants who would be subject to the 60-day appeal time period under the Hobbs Act, not just the plant owners.

The only opinion from this Court cited by the panel, USDA v. Kelly, 38 F.3d 999 (8th Cir. 1994), is inapplicable to the facts in this case. It was based on a specific statute not at issue in this case, which set the appeal time from the "date of such order," not the entry of the order. Most importantly, the Kellys were parties in an adjudicatory proceeding and the agency order was

specifically served on them. So the opinion in Kelly does not address the situation where the agency order is not served on the petitioners.

Finally, the panel opinion, at p. 3, criticized the Petitioners for pointing to an FCC regulation that makes Federal Register publication the entry of an agency order. But the Petitioners made clear in their Response to Motion to Dismiss, at p. 8, that they were not saying the FCC rule was determinative; only that is demonstrates the reasonableness and appropriateness of using the Federal Register publication as the date of entry of the order.

More importantly, it was the opinion in Chem-Haulers, relied upon heavily by the Respondents and the panel, that referred to the FCC rules. The Chem-Haulers court noted that entry of certain FCC orders "are 'computed from the date upon which public notice is given of the orders . . . ." Chem-Haulers, 536 F.2d 610, 616 (5th Cir. 1976). The Chem-Haulers court went on to say:

> While neither judicial procedure nor statutes dealing solely with agencies other than the I.C.C. are dispositive of the issue before us, the rules, statutes, and cases we have considered are illustrative of, and consistent with, the contentions expressed by petitioner and the I.C.C. in the instant case: that the time period should run from the time when the order appealed is final, complete, and a matter of public record. (emphasis added).

Id. So the panel opinion in this case needs to be corrected and clarified.

CONCLUSION

The Respondents in this case want to limit participation in nuclear licensing cases to only those who formally intervene early in the process. They want this to apply even to participants who comment on an EIS that is not even available when the time for intervention has expired and even when the agency invites people to participate in commenting on the EIS long after the time for intervention. And it must be emphasized that this case is about challenging the EIS, not about challenging the relicensing per se.

The cases cited above make clear that all participants in the agency process must be allowed a fair opportunity to appeal in the time period required by the Hobbs Act. They must have notice of and access to the agency order. Because neither this Court, nor apparently any other court, has addressed this issue in the factual context presented by this case, this Court should grant en banc review.

/s/ *Wallace L. Taylor*

WALLACE L. TAYLOR AT0007714
Attorney at Law
118 3rd Ave. S.E., Suite 326
Cedar Rapids, Iowa 52401
319-366-2428; (Fax) 319-366-3886
e-mail: wtaylorlaw@aol.com

ATTTORNEY FOR PETITIONERS

CERTIFICATE OF SERVICE

I hereby certify that on August 19, 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. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

/s/ *Wallace L. Taylor*