ORAL ARGUMENT NOT YET SCHEDULED

No. 03-1181

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

PUBLIC CITIZEN, INC., and SAN LUIS OBISPO MOTHERS FOR PEACE,

Petitioners,

v.

UNITED STATES NUCLEAR REGULATORY COMMISSION,

Respondent.

On Petition for Review of an Order of the
United States Nuclear Regulatory Commission

BRIEF FOR PETITIONERS

Scott L. Nelson
Amanda Frost
Public Citizen Litigation Group
1600 20th Street, N.W.
Washington, D.C. 20009
(202) 588-1000

Attorneys for Petitioners

March 12, 2004

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PETITIONERS' CERTIFICATE OF COUNSEL AS TO PARTIES, RULINGS, AND RELATED CASES UNDER LOCAL RULE 28(a)(1)

Pursuant to Rule 28(a)(1) of this Court (and Federal Rule of Appellate Procedure 26.1), counsel for petitioners certify as follows:

A. Parties

The parties in this Court are Public Citizen, Inc., and San Luis Obispo Mothers for Peace, petitioners, and the United States Nuclear Regulatory Commission, respondent.

(1) Public Citizen, Inc., is a non-profit corporation engaged in advocacy efforts on a range of issues including both openness in government and safety issues

involving the nuclear energy industry. Public Citizen, Inc., has no parent company and no subsidiaries or affiliates that have issued shares to the public. No publicly held company has an ownership interest in it.

(2) San Luis Obispo Mothers for Peace is a non-profit corporation concerned with the dangers posed by nuclear power generally and, in particular, the Diablo Canyon Nuclear Plant. San Luis Obispo Mothers for Peace has no parent company and no subsidiaries or affiliates that have issued shares to the public. No publicly held company has an ownership interest in it.

B. Orders Under Review

The orders under review are the Nuclear Regulatory Commission's "Order Modifying Licenses," No. EA-03-086, and two other "Orders Modifying Licenses," Nos. EA 03-087 (Docket Nos. 70-27 and 70-143, License Nos. SNM-42 and SNM-124), all dated April 29, 2003. Order EA 03-086 was published at 68 Fed. Reg. 24,517 on May 7, 2003. Orders EA 03-087 were published at 68 Fed. Reg. 26,675 and 68 Fed. Reg. 26,676 on May 16, 2003. The orders revise the "design basis threat" set forth in 10 C.F.R. § 73.1, which describes the types of terrorist threats against which nuclear power plants and certain other facilities must maintain effective security measures.

C. Related Cases

This case has not previously been before this Court or any other court. Counsel are aware of one pending matter raising somewhat related issues: *San Luis Obispo Mothers for Peace, et al., v. Nuclear Regulatory Commission*, No. 03-74628 (9th Cir.), which involves a challenge to the NRC's denial of a petition to order interim security upgrades at the Diablo Canyon nuclear plant before licensing an independent spent fuel storage installation at that location. The NRC's denial of the petition was based in part on its assertion that security matters were more appropriately the subject of a rulemaking proceeding (even though, in the orders at issue in this case, the NRC addressed security issues without rulemaking procedures). The Ninth Circuit case thus implicates issues related to those presented in this case, though it does not directly involve the validity of the orders at issue here. Briefing in that case is proceeding on roughly the same schedule as in this case.

Respectfully submitted,

Scott L. Nelson
Amanda Frost
Public Citizen Litigation Group
1600 20th Street, N.W.
Washington, D.C. 20009
(202) 588-1000

Attorneys for Petitioners

TABLE OF CONTENTS

3. Declaration of Thomas Wasmund

TABLE OF AUTHORITIES

Page(s)

Cases:

[1] Authorities upon which we chiefly rely are marked with asterisks.

Statutes and Regulations:

Administrative and Other Materials:

GLOSSARY

APA	The Administrative Procedure Act.
DBT	The "design basis threat," a regulatory standard defining threats of sabotage and terrorist activities against which licensed nuclear facilities are required to take adequate protective measures. The design basis threat was formerly set forth in 10 C.F.R. § 73.1, but that definition of the standard has been "superseded" by the orders at issue in this case with a new, secret standard.
NRC	The United States Nuclear Regulatory Commission.

JURISDICTIONAL STATEMENT

This is a petition for review under the Hobbs Act, 28 U.S.C. Chapter 158, of orders of the United States Nuclear Regulatory Commission ("NRC") that purport to establish a new rule (and supersede an existing rule) setting forth the "design basis threat" standard, which defines the threats of terrorism and sabotage against which licensed nuclear facilities must be protected. The orders, which were issued without notice and opportunity for public comment, replace a regulation published at 10 C.F.R. § 73.1 with a new, secret standard that is not available to the public. The orders are dated April 29, 2003, but were published in the Federal Register on May 7 and 16, 2003.[2] To ensure satisfaction of the requirements of 28 U.S.C. § 2344, petitioners filed their petition for review on June 30, 2003, within 60 days after the earliest of these dates. (The 60th day after April 29, 2003, was Saturday, June 28. June 30 was the first Monday thereafter, and was thus

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[2] *In re All Operating Power Reactor Licensees*, Order Modifying Licenses (Effective Immediately), No. EA-03-086 (NRC April 29, 2003), 68 Fed. Reg. 24,517 (May 7, 2003); *In re BWX Technologies*, Order Modifying License (Effective Immediately), No. EA 03-087 (NRC April 29, 2003), 68 Fed. Reg. 26,675 (May 16, 2003); *In re Nuclear Fuel Services, Inc.*, Order Modifying License (Effective Immediately), No. EA 03-087 (NRC April 29, 2003), 68 Fed. Reg. 26,676 (May 16, 2003). The orders (not including the secret attachments that set forth the revised design basis threat) are reproduced in the Joint Appendix at J.A. 1-14, 15-21, and 22-29, respectively.

the final day of the 60-day period under Federal Rule of Appellate Procedure 26(a)(3).)

This Court's jurisdiction rests on interlocking provisions of the Atomic Energy Act and the Hobbs Act — specifically, 42 U.S.C. § 2239(b)(1), and 28 U.S.C. §§ 2342 and 2344. Section 2239(b)(1) provides that final orders of the NRC "entered in any proceeding of the kind specified in subsection (a) of this section" "shall be subject to judicial review in the manner prescribed in chapter 158 of Title 28 and chapter 7 of Title 5." Subsection (a) of § 2239, in turn, includes proceedings "for the issuance or modification of rules and regulations dealing with the activities of licensees," such as the rule at issue in this matter.

The Hobbs Act, for its part, grants the federal courts of appeals jurisdiction over, among other things, "all final orders of the [Nuclear Regulatory] Commission made reviewable by section 2239 of title 42." 28 U.S.C. § 2342(4). The Hobbs Act further provides that such jurisdiction is invoked when a "party aggrieved" by a reviewable final order files a petition for review within 60 days after the entry of the order by the agency. 28 U.S.C. § 2344.

Petitioners, Public Citizen, Inc., and San Luis Obispo Mothers for Peace, as representatives of the interests of their members (*see Hunt v.*

Washington State Apple Advertising Comm'n, 432 U.S. 333, 343 (1977)) are "parties aggrieved" by the orders at issue and have suffered injury-in-fact sufficient to give rise to Article III standing as a result of the NRC's issuance of the orders.[3] As set forth in the declarations included in the Standing Addendum to this brief, both petitioners are membership organizations whose organizational missions include educating the public about potential dangers posed by nuclear energy facilities and protecting their members from those potential dangers by participating in agency rulemaking and licensing proceedings involving nuclear safety issues. Both petitioners have members who live in close proximity to nuclear facilities licensed by the NRC and who may be exposed to hazardous releases of radiation should those facilities suffer containment breaches resulting from terrorist attacks.[4]

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[3] The statutory phrase "party aggrieved" imposes not only an injury requirement (*i.e.*, the petitioning party must be "aggrieved"), but also a special procedural requirement: In general, the petitioner must have been a "party" to the agency proceedings. The NRC contested petitioners' satisfaction of the latter requirement by filing a motion to dismiss, which the motions panel referred to the merits panel. Because the motions panel directed the parties to address the "party" issue fully in their briefs, it is discussed in the Argument section below.

[4] With respect to proximity, the NRC has long recognized that persons living within 50 miles of a nuclear power plant will suffer injury in fact in the event of a major accident resulting in a significant release of radioactive materials (such as could occur in a terrorist attack on a plant). *See In re Duke Energy Corp. (Oconee Nuclear Station, Units 1, 2, and 3)*, LBP-98-33, 48 N.R.C. 381 (NRC Atomic Safety & Licensing Board 1998); *In re Detroit*

Petitioners' members have been injured as a result of the NRC's issuance, without the notice-and-comment rulemaking that petitioners contend was required by law, of a new, secret rule governing the extent to which licensees of nuclear facilities are obligated to be prepared to defend against terrorist attacks. As this Court has held, "[a] violation of the procedural requirements of a statute is sufficient to grant a plaintiff standing to sue, so long as the procedural requirement was 'designed to protect some threatened concrete interest' of the plaintiff." *City of Waukesha v. EPA*, 320 F.3d 228, 234 (D.C. Cir. 2003) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 573 n.8 (1992)).

Here, the NRC's violation of the procedural rights of petitioners and their members in the rulemaking process provides petitioners with both Article III and prudential standing because the action taken in derogation of those procedural rights threatens a "concrete interest" — the health and safety of petitioners' members — that the Atomic Energy Act and the procedures for rulemaking under it were designed to protect. More stringent standards for nuclear plant safety would in fact reduce the risks faced by petitioners' members who live near those plants. *See Louisiana*

Edison Company (Enrico Fermi Atomic Power Plant, Unit 2), LBP-79-1, 9 NRC 73, 78 (NRC Atomic Safety & Licensing Board 1979).

Environmental Action Network v. EPA, 172 F.3d 65, 68 (D.C. Cir. 1999).[5] Nor can there be any doubt that health and safety concerns fall within the "zone of interests" protected by the Atomic Energy Act and the procedural rights that it, together with the Administrative Procedure Act ("APA"), confers on petitioners and their members to participate in agency proceedings. *Reytblatt v. NRC*, 105 F.3d 715, 721-22 (D.C. Cir. 1997). Accordingly, petitioners have standing to raise a procedural challenge to the NRC's action on behalf of their members. *See*, *e.g.*, *Kelley v. Selin*, 42 F.3d 1501, 1509-10 (6th Cir. 1995) (persons living near nuclear facility have standing to raise procedural challenge to NRC action affecting safe operation

[5] Of course, petitioners need not establish that if they were to succeed on their procedural challenge and the NRC were required to engage in proper rulemaking procedures, a more stringent standard would in fact result. As this Court has made clear:

> A plaintiff who alleges a deprivation of a procedural protection to which he is entitled never has to prove that if he had received the procedure the substantive result would have been altered. All that is necessary is to show that the procedural step was connected to the substantive result. In *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 573 n.7 (1992), the Supreme Court explained that an individual living next to a federally licensed dam "has standing to challenge the licensing agency's failure to prepare an environmental impact statement, even though he cannot establish with any certainty that the statement will cause the license to be withheld or altered." … If a party claiming the deprivation of a right to notice-and-comment rulemaking under the APA had to show that its comment would have altered the agency's rule, section 553 would be a dead letter.

Sugar Cane Growers Cooperative of Florida v. Veneman, 289 F.3d 89, 94-95 (D.C. Cir. 2002).

of facility).

In addition, petitioners have standing in their own right as a result of the "informational injury" they have suffered as a result of the NRC's action. Had the NRC proceeded properly, in accordance with the APA's notice-and-comment rulemaking procedures, petitioners, by participating in that process, would have received information concerning the NRC's proposed and final rules, as well as a statement of the reasons therefor — information of significant importance to petitioners in light of their organizational interest in nuclear safety issues. The denial of the information that would have been afforded them in a lawful proceeding is in itself an injury sufficient to support Article III standing. *See Cummock v. Gore*, 180 F.3d 282, 290 (D.C. Cir. 1999); *Reytblatt*, 105 F.3d at 721-22; *Oil, Chemical & Atomic Workers Union v. Pena*, 18 F. Supp. 2d 6, 21 (D.D.C. 1998), *aff'd*, 214 F.3d 1379 (D.C. Cir. 2000).

APPLICABLE STATUTES AND REGULATIONS

Applicable statutes and regulations are set forth in the Addendum.

STATEMENT OF ISSUES

1. Whether the NRC violated the APA, the Atomic Energy Act, and its own regulations by issuing a substantive rule — and superseding an existing rule published in the Code of Federal Regulations — without

complying with the requirements for notice and comment rulemaking set forth in 5 U.S.C. § 553(b), 42 U.S.C. § 2239(a), and 10 C.F.R. § 2.804.

2. Whether the Hobbs Act's requirement that a petition for review be filed by a "party" (28 U.S.C. § 2344) bars this Court from hearing a challenge to a rule promulgated without notice or opportunity for public comment brought by persons who, because of the absence of notice and opportunity for public comment, did not participate in rulemaking proceedings before the agency.

STATEMENT OF THE CASE

A. Nature and Course of the Proceedings

This is a petition for review of NRC orders that revise the design basis threat standard for licensed nuclear facilities — a standard that imposes binding requirements on all licensees and was, until the issuance of the challenged orders, set forth in a published regulation. The NRC issued the orders without prior published notice or opportunity for public comment, and petitioners challenged the agency's complete failure to comply with the APA's notice-and-comment rulemaking provisions by filing this timely petition for review.

The NRC moved to dismiss the petition for review on the ground that the petitioners were not "parties aggrieved" within the meaning of the Hobbs

Act, 28 U.S.C. § 2344, because they had not participated in rulemaking proceedings before the agency. Respondents opposed the motion, arguing that this Court's decision in *NRDC v. NRC*, 666 F.2d 595 (D.C. Cir. 1981), held that such participation is not necessary to establish "party" status in a Hobbs Act challenge when an agency has completely bypassed notice-and-comment rulemaking procedures. On December 19, 2003, the motions panel (Judges Henderson, Randolph, and Tatel) issued an order referring the motion to the merits panel and directing that the parties address the Hobbs Act issue in their merits briefs.

B. Relevant Facts

For many years, the NRC's published regulations have defined the threats against which nuclear power facilities must protect themselves through the establishment of physical security plans. The relevant regulation, 10 C.F.R. § 73.1, first promulgated in 1979, specifies "design basis threats" of "radiological sabotage" and "theft of special nuclear materials" that operators of licensed facilities must be prepared to counter. The regulation, for example, provides that a licensed facility must have plans to withstand a "determined violent external assault" by "several persons" who possess "military training," have "inside assistance," are armed with "hand-held automatic weapons," carry "incapacitating agents and

explosives," and use a "four-wheel drive land vehicle" for transport. 10 C.F.R. § 73.1(a)(1)(i). The "design basis threat" in the regulation also requires, among other things, that security plans deal with the threat of a "four-wheel drive land vehicle bomb." *Id.* § 73.1(a)(1)(iii).

Following the attacks of September 11, 2001, the security of nuclear facilities has become an issue of intense public interest and scrutiny. The NRC responded by reevaluating security needs at those facilities, but in a way that foreclosed effective public participation in the regulatory process. Thus, on April 29, 2003, without prior notice or opportunity for public comment, the NRC issued three "orders" announcing that, on the basis of its internal review of security measures and its consultations with other government agencies and nuclear industry representatives, it had "determined that a revision is needed to the Design Basis Threat (DBT) specified in 10 C.F.R. § 73.1." J.A. 2. The orders, applicable to all nuclear power plants and to two fuel fabrication facilities, continued as follows (*id.*)[6]:

> Therefore, the Commission is imposing a revised DBT, as set forth in Attachment 2 [1] of this Order, on all operating power reactor licensees. The revised DBT, which supercedes [sic] the DBT specified in 10 C.F.R. § 73.1, provides the Commission

[6] The language quoted is from the order applicable to all licensed nuclear power plants. Separate orders containing substantially the same language were issued for each of the fuel fabrication facilities. *See* J.A. 16, 23-24.

> with reasonable assurance that the public health and safety and common defense and security continue to be adequately protected in the current threat environment. The requirements of this Order remain in effect until the Commission determines otherwise. To address the DBT set forth in Attachment 2 of this Order, all licensees must revise their physical security plans, safeguards contingency plans, and guard training and qualification plans that are required by 10 C.F.R. §§ 50.34(c), 50.34(d), and 73.55(b)(4)(ii), respectively.
>
> [1] Attachment 2 contains safeguards information and will not be released to the public.

That the NRC deliberately bypassed notice-and-comment procedures in revising and superseding the design basis threat regulation is confirmed by a speech delivered by Commissioner Edward McGaffigan, Jr., at the Regulatory Information Conference in Washington, D.C., on April 17, 2003, less than two weeks before the orders were issued. The Commissioner told his audience that the NRC "need[ed] to revise the DBT" and would "soon do this by Order." Remarks by Commissioner Edward McGaffigan, Jr., U.S. NRC, April 17, 2003 (http://www.nrc.gov/reading-rm/doc-collections/commission/speeches/2003/s-03-012.html). The Commissioner explained that the NRC had sought comment on the design basis threat revision only from "cleared industry representatives" and that it had no intention of engaging in notice-and-comment rulemaking (*id.*):

> I hear a great deal of comment about using a rulemaking process rather than Orders to effect these changes. Frankly, aside from fatigue [the subject of a separate order], I do not believe that any conforming rulemaking activity that subsequently follows these Orders will go into any detail on any of these matters. The details belong in safeguards information documents. To be binding, they need to be in the form of Orders. In my view, the 10 CFR 73.1 description of the design basis threat for radiological sabotage in the future should consist of about one line that says the details are issued by Order.

The orders issued only days later by the NRC followed exactly the approach outlined by Commissioner McGaffigan in his remarks, replacing the NRC's existing, lawfully promulgated regulations with a new, secret standard that became effective immediately without any rulemaking proceedings.

Although the standard promulgated by the orders went into effect immediately and across-the-board, the orders did state that licensees, as well as other affected persons who could meet the NRC's standards for intervening in enforcement proceedings under 10 C.F.R. § 2.714(d), could request a hearing pursuant to 10 C.F.R. § 2.202. J.A. 6-7, 20, 27-28.[7] The orders' reference to possible "hearings," however, in no way provided petitioners even with an after-the-fact opportunity to participate in the NRC's rulemaking process by providing comments on the new rule, since

[7] On January 14, 2004, the NRC substantially revised its 10 C.F.R. Part 2 hearing procedures. References in this brief to 10 C.F.R. 2.202 and 2.714(d) are to the versions in effect at the time the challenged orders were issued in April 2003.

the substance of the standard was concealed, rendering meaningful comment impossible. Moreover, 10 C.F.R. § 2.202 has nothing to do with rulemaking: It sets forth the adjudicatory procedures used in enforcement proceedings, such as proceedings to modify, suspend, or revoke licenses. [8] And the standard for "intervening" in such a proceeding under 10 C.F.R. § 2.714(d), which the orders stated anyone requesting a "hearing" must meet, is totally different from the entitlement to participate in (or standing to seek judicial review of) a rulemaking. *See, e.g., Bellotti v. NRC*, 725 F.2d 1380 (D.C. Cir. 1983) (upholding limits on intervention in NRC enforcement proceedings).

SUMMARY OF ARGUMENT

In promulgating its revised design basis threat standard without notice and an opportunity for comment by interested persons such as the petitioners, the NRC violated the APA, the Atomic Energy Act, and its own regulations, and the resulting rule must be held unlawful under 5 U.S.C. § 706(2)(D) as agency action taken "without observance of procedure required by law." Section 4 of the APA provides that when an agency issues

[8] Thus, the orders provided that if a hearing were requested by "a person other than the licensee," the request would have to be served on "the licensee," J.A. 6, making clear that the only hearings contemplated by the orders were ones involving challenges to the orders' application to individual licensed facilities, not generic challenges to the lawfulness of the NRC's issuance of the rule.

a substantive rule that imposes binding obligations on the agency or a private person or entity, it must comply with the requirement of notice-and-comment rulemaking. *See* 5 U.S.C. § 553; *see, e.g., Sprint Corp. v. FCC*, 315 F.3d 369 (D.C. Cir. 2003). Both the Atomic Energy Act and the NRC's regulations impose similar requirements. *See* 42 U.S.C. § 2239(a); 10 C.F.R. § 2.804; *Union of Concerned Scientists v. NRC*, 711 F.2d 370, 380-81 (D.C. Cir. 1983).

Here, the NRC's action constituted the issuance of a rule subject to these requirements both because it imposed binding requirements on private entities subject to NRC's authority, *see, e.g., Sprint Corp.*, 315 F.3d at 373, and because it amended or repealed an existing legislative rule. *See, e.g., id.* at 374. The NRC's utter failure to comply with the procedural requirements applicable to the issuance of such a rule compels the conclusion that the agency's action was unlawful, and that the matter must be remanded to the agency to conduct a rulemaking in accordance with the requirements of the APA, the Atomic Energy Act, and its own regulations. *See, e.g., Sugar Cane Growers*, 289 F.3d at 95-98.

In its motion to dismiss this petition, the agency erroneously asserted that the Hobbs Act bars petitioners from challenging its unlawful promulgation of the revised design basis threat standard because they were

not "parties" to proceedings before the agency within the meaning of 28 U.S.C. § 2344. But the whole point of petitioners' challenge is that the agency took a final action without any proceedings to which petitioners and others like them had the opportunity to become "parties." As this Court held in *NRDC v. NRC*, "To bar a petition for direct review because the petitioner was not a party to proceedings in which, by definition, it could not join would be to exalt literalism over common sense." 666 F.2d at 601-02 n.42. Indeed, *NRDC* not only permits petitioners to bring their procedural challenge to the NRC's final action without any further proceedings before the agency, it *requires* them to do so by holding that any petition filed more than 60 days after issuance of the challenged rule would be untimely. *Id.* at 601-03. In other words, for petitioners' Hobbs Act challenge, it is now or never. Thus, even if the NRC were correct in asserting that it offered petitioners a meaningful opportunity to become parties to proceedings *after the issuance of its orders* (which in fact the agency did *not* do), that would be irrelevant to whether they may obtain judicial review now.

In short, petitioners' Hobbs Act petition is proper, and in light of the clear illegality of the NRC's bypass of proper rulemaking proceedings, the petition must be granted.

ARGUMENT

I.
IN REVISING THE "DESIGN BASIS THREAT," THE NRC ENGAGED IN RULEMAKING WITHOUT COMPLIANCE WITH PROCEDURES REQUIRED BY LAW.

This Court has long required agencies to adhere strictly to the requirement that "[u]nder the APA, agency rules may be issued only after the familiar notice-and-comment procedures enumerated in the statute are completed." *Community Nutrition Institute v. Young*, 818 F.2d 943, 945 (D.C. Cir. 1987) (citing 5 U.S.C. § 553; footnote omitted). The plain terms of the APA, together with a long line of this Court's decisions construing it, make clear that in revising the design basis threat, the NRC issued a rule. The NRC's failure to follow the rulemaking procedures prescribed by the APA, the Atomic Energy Act, and the agency's own regulations renders the resulting rule unlawful. [9]

A. The APA, the Atomic Energy Act, and the NRC's Own Regulations Require Notice-and-Comment Procedures for the Promulgation of Substantive Rules.

Section 4 of the APA, 5 U.S.C. § 553, provides that, to promulgate a rule, an agency must publish a rulemaking notice that sets forth the "time,

[9] This procedural challenge to the NRC's issuance of rules without notice and comment raises questions of law subject to de novo review.

place, and nature of public rule making proceedings," refers to the "legal authority" for the proposed rule, and describes the "terms or substance of the proposed rule" or the "subjects and issues involved." 5 U.S.C. § 553(b). Thereafter, the "agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments," shall consider "the relevant matter presented," and shall "incorporate in the rules adopted a concise general statement of their basis and purpose." 5 U.S.C. § 553(c). These requirements apply to all "rules" except for "interpretative rules, general statements of policy, or rules of agency organization, procedure and practice," unless "the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest." 5 U.S.C. § 553(b)(A) & (B).

The requirements of § 553(b) are echoed almost verbatim in the NRC's own regulations, which provide that whenever the NRC "proposes to adopt, amend, or repeal a regulation," it will follow notice and comment procedures unless one of the § 553(b) exceptions is applicable. 10 C.F.R. § 2.804. Similarly, the Atomic Energy Act itself, in requiring a "hearing" before the agency may promulgate "rules and regulations dealing with the

activities of licensees," 42 U.S.C. § 2239(a), has been held by this Court to embody the requirement of notice-and-comment rulemaking — a requirement that, unlike the requirements of 5 U.S.C. § 553, is not subject to a "good cause" exception, reflecting the great importance placed by the Atomic Energy Act on public participation in matters relating to atomic power. *Union of Concerned Scientists v. NRC*, 711 F.2d at 380-81.[10]

B. The NRC Orders Revising the Design Basis Threat Promulgated a Substantive, or "Legislative," Rule.

1. The Design Basis Threat Standard Imposes Binding Requirements on Private Entities.

Under the APA, a "rule" is "the whole or part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy." 5 U.S.C. § 551(4). The design basis threat standard easily meets this definition: It is a statement of general applicability to licensed nuclear facilities, and it is designed both to "implement" and "prescribe" both "law" and "policy." In short, it tells

[10] The NRC has in the past asserted that *Union of Concerned Scientists*' holding that the Atomic Energy Act does not permit exceptions to notice-and-comment rulemaking should be limited only "to rulemakings which specifically amend reactor licenses." 50 Fed. Reg. 13006, 13008 (April 2, 1985) (order issuing final rule amending 10 C.F.R. § 2.804 to permit exceptions similar to those in 5 U.S.C. § 553(b)). Even if the NRC's position were correct, this rulemaking would fit precisely into that category, since the orders in question purport to "modify" licenses of all existing power plants and fuel fabrication facilities.

regulated entities what they are required to do on pain of sanctions imposed through enforcement proceedings.

This Court's decisions leave no room for doubt that the design basis threat is not only a rule, but also a substantive or "legislative" rule (as opposed to an "interpretative" rule), and thus is subject to all of the procedural requirements set forth in 5 U.S.C. § 553. The most essential characteristic of substantive or legislative rules is that they "grant rights, impose obligations, or produce other significant effects on private interests." *Batterton v. Marshall*, 648 F.2d 694, 701-02 (D.C. Cir. 1980). Put another way, legislative rules are "presently binding norms," *Community Nutrition Institute v. Young*, 818 F.2d at 947, that are "directly aimed at and enforceable against" private entities, *CropLife America v. EPA*, 329 F.3d 876, 881 (D.C. Cir. 2003), that create "new rights or duties," *Orengo Caraballo v. Reich*, 11 F.3d 186, 195 (D.C. Cir. 1993), and that "bin[d] private parties or the agency itself with the 'force of law.'" *General Electric Co. v. EPA*, 290 F.3d 377, 382 (D.C. Cir. 2002). In sum, "an agency's imposition of *requirements* that 'affect subsequent [agency] acts' and have a 'future effect' on a party before the agency triggers the APA notice requirement." *Sprint Corp. v. FCC*, 315 F.3d at 373 (emphasis added; citation omitted).

This Court's "cases likewise make clear that an agency pronouncement will be considered binding as a practical matter if it … appears on its face to be binding …." *General Electric*, 290 F.3d at 383. Though the specific features of its "face" are hidden from view because the new standard has not been disclosed to the public, the revised design basis threat nonetheless "appears on its face to be binding." This Court has held that when the NRC imposes a requirement on all licensees, it has engaged in "rulemaking." *Union of Concerned Scientists v. NRC*, 711 F.2d at 380, 382. The orders promulgating the new standard do just that: They provide that all licensed nuclear facilities are subject to the new standard (unless they obtain a facility-specific modification) and that the standard is enforceable against licensees in NRC administrative proceedings. J.A. 2-5. "This clear and unequivocal language … creates a '"binding norm"' that is '"finally determinative of the issues or rights to which it is addressed."'" *CropLife America*, 329 F.3d at 881 (quoting *Chamber of Commerce v. Department of Labor*, 174 F.3d 206, 212 (D.C. Cir. 1999) (quoting *Pacific Gas & Elec. v. FPC*, 506 F.2d 33, 38 (D.C. Cir. 1974))). Such a binding requirement is a rule.

2. The Orders Revising the Design Basis Threat Amend or Repeal an Existing Legislative Rule.

If there were any doubt that the new design basis threat is a legislative rule, the fact that the orders promulgating it expressly "supersede" a longstanding, published regulation of the NRC lay it to rest. The APA expressly defines "rule making" to include "amending, or repealing a rule," 5 U.S.C. § 551(5), and this Court has repeatedly emphasized that the APA means what it says: "'Rulemaking,' as defined in the APA, includes not only the agency's formulation, but also its modification, of a rule." *Air Transport Ass'n of America v. FAA*, 291 F.3d 49, 55 (D.C. Cir. 2002); *accord Paralyzed Veterans of America v. DC Arena L.P.*, 117 F.3d 579, 586 (D.C. Cir. 1997) ("Under the APA, agencies are obliged to engage in notice and comment before formulating regulations, which applies as well to '*repeals*' or '*amendments*.'"); *see also Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1028 (D.C. Cir. 2000) (agency cannot amend rule without notice and comment); *American Mining Congress v. MSHA*, 995 F.2d 1106, 1112 (D.C. Cir. 1995) (same).

That the orders promulgating the new design basis threat amend a published regulation is evident on their face. The orders expressly state that they "revise" the design basis threat set forth at 10 C.F.R. § 73.1, and that

"[t]he revised DBT … supercedes [sic] the DBT specified in 10 C.F.R. § 73.1." As this Court has explained, such an amendment of a regulation can only be effected through rulemaking:

> It is a maxim of administrative law that: "If a second rule repudiates or is irreconcilable with [a prior legislative rule], the second rule must be an amendment of the first; and, of course, an amendment to a legislative rule must itself be legislative."

National Family Planning & Reproductive Health Ass'n v. Sullivan, 979 F.2d 227, 235 (D.C. Cir. 1992) (citation omitted; alteration by the Court); *accord Sprint Corp. v. FCC*, 315 F.3d at 374.

Here, despite having issued a new substantive rule and superseded an existing one, the agency ignored the rulemaking process called for by the APA, the Atomic Energy Act, and its own regulations, with the result that "interested parties" (5 U.S.C. § 553(c)) such as petitioners were completely deprived of notice and an opportunity to comment on the proposed rule. Nor did the agency attempt to excuse itself from compliance with notice-and-comment procedures under 5 U.S.C. § 553(b)(B) or 10 C.F.R. § 2.804(d)(2). Such a determination would have required an express finding, *within the text of its orders promulgating the rule*, that such procedures were not practicable or were contrary to the public interest. No such determination

appears in the NRC orders.[11] *See Sugar Cane Growers*, 289 F.3d at 95 n. 5 (noting that "good cause" exception is unavailable in litigation if not asserted by agency at time of rulemaking); *see also United States v. Picciotto*, 875 F.2d 345, 348 (D.C. Cir. 1989) ("To come within [the § 553(b)(B)] exemption, the agency must incorporate, in the rule issued, a statement explaining why it found good cause to omit [notice-and-comment] procedures …."). And in any event, while the APA rulemaking provisions and the NRC's regulations contain a good cause exception to the notice-and-comment requirement, this Court, as noted above, has held that the Atomic Energy Act does not. *Union of Concerned Scientists v. NRC*, 711 F.2d at 380-81.

Even if the law permitted an exception, and the agency had attempted to invoke it, there is nothing about the nuclear plant security that renders proper rulemaking proceedings regarding it impracticable or contrary to the public interest. The steps that should be taken to protect nuclear installations against terrorist attacks are a matter of great public concern and a legitimate

[11] The orders state only that the NRC has found that the public interest requires that the new rule be made effective immediately, J.A. 3, which corresponds roughly to the type of finding required by 5 U.S.C. § 553(d) to bypass the normal requirement that a final rule be effective no earlier than 30 days after publication; but it does not amount to, or even come close to, a finding that affording interested persons prior notice and opportunity to comment would have been impracticable or contrary to the public interest, as required to invoke the exception set forth in 5 U.S.C. § 553(b)(B).

subject for public discussion and debate, even — or perhaps especially — when such discussion may lead to the revelation of flaws in security procedures that require a remedy for the protection of the public. *See, e.g.,* United States General Accounting Office, *NUCLEAR REGULATORY COMMISSION: Oversight of Security at Commercial Nuclear Power Plants Needs to Be Strengthened*, GAO-03-752 (Sept. 2003) (reporting that in simulated attacks on nuclear power plants, defenders failed to defeat attackers 54% of the time except when plants artificially increased levels of security above those called for by their security plans); *cf.* National Public Radio, *Protecting the Nation's Nuclear Materials*, Morning Edition (Feb. 26-27, 2004) (www.npr.org/features/feature.php?wfId=1701249) (reporting that mock terrorism drills at DOE nuclear facilities resulted in "terrorist" successes 20% of the time). Indeed, in 1994, the NRC itself engaged in full notice-and-comment rulemaking, without any suggestion that there was anything inappropriate about public comment on nuclear plant security, when it revised the design basis threat to include the requirement that licensees take measures to protect nuclear reactors against "malevolent use of vehicles" — more commonly known as car or truck bombs. *See* 59 Fed. Reg. 38889 (Aug. 1, 1994) (notice of final rule); 58 Fed. Reg. 58804 (Nov. 4, 1993) (notice of proposed rule).

Here, by contrast, the NRC attempted an end run around the rulemaking process. Permitting such open disregard of rulemaking procedures prescribed by law would render Section 4 of the APA virtually a dead letter. Accordingly, the Court has held that such "an utter failure to comply with notice and comment" is not only unlawful, but also "cannot be considered harmless if there is any uncertainty at all as to the effect of that failure." *Sugar Cane Growers*, 289 F.3d at 96. Here, where the terms of the new rule have not even been made public, it cannot possibly be said that there is no "uncertainty" about whether compliance with the APA's requirements would have had some effect on the terms of the rule ultimately promulgated. The NRC's promulgation of the revised design basis threat rule therefore cannot be upheld by this Court. [12]

As this Court has made clear, the requirements of the APA are not mere technicalities; they play a critical role in enhancing the quality of agency decisionmaking and checking the arbitrary exercise of administrative

[12] We note, however, that an agency's unlawful promulgation of a rule does not in all circumstances require that the rule be vacated. *See Sugar Cane Growers*, 289 F.3d at 97-98. Given that the new rule is (we are told) more protective than the prior standard — and that no one is arguing that a *less* protective rule should be adopted — the revised design basis threat may be left in place pending compliance by the NRC, on remand, with the provisions of 5 U.S.C. § 553. *See id.* (citing cases that remanded rather than vacated improperly promulgated rule); *see, e.g., Allied-Signal, Inc. v. NRC*, 988 F.2d 146, 150-51 (D.C. Cir. 1993) (remanding rather than vacating where vacatur would have "disruptive consequences").

discretion. The Court has therefore been firm in its refusal to countenance agency efforts to sidestep or bypass notice-and-comment rulemaking. The Court's comments in one such recent case are equally applicable here:

> Here the government would have us virtually repeal section 553's requirements: if the government could skip those procedures, engage in informal consultation, and then be protected from judicial review … section 553 obviously would be eviscerated. The government could avoid the necessity of publishing a notice of a proposed rule and perhaps, most important, would not be obliged to set forth a statement of the basis and purpose of the rule, which needs to take account of the major comments — and often is a major focus of judicial review.

Sugar Cane Growers, 289 F.3d at 96-97. As in *Sugar Cane Growers*, the agency's "utter failure" (*id.* at 96) to comply with APA requirements demands a remedy.

II.
REVIEW IS NOT BARRED BY THE HOBBS ACT'S "PARTY" REQUIREMENT.

A. This Court's Decision in *NRDC v. NRC* Holds That the Hobbs Act Does Not Foreclose Review Where an Agency Promulgates a Rule Without Notice and Comment.

The NRC's motion to dismiss, which the motions panel has referred to the merits panel, contends that even if petitioners are correct that the agency acted unlawfully in promulgating its new design basis threat without proper rulemaking proceedings, petitioners may not bring a Hobbs Act challenge to

the unlawful rule because they were not "parties" to the (nonexistent) agency proceedings that led to the issuance of the rule. The NRC's position is contrary to the most relevant precedent of this Court: *NRDC v. NRC*, 666 F.2d 595, which directly rejected the argument that the Hobbs Act's "party" requirement forecloses persons similarly situated to petitioners here from challenging an NRC rule promulgated without notice and comment. [13]

Petitioners and the NRC are in agreement that this Court has jurisdiction over petitioners' challenge to the NRC's unlawful rulemaking under the Hobbs Act or not at all. *See* 42 U.S.C. 2239(b); 28 U.S.C. § 2342(4). Also beyond dispute is that review under the Hobbs Act is available only to a "party aggrieved," 28 U.S.C. § 2344, which ordinarily requires that the petitioner have participated in the proceedings leading to the agency order of which review is sought. *See Simmons v. ICC*, 716 F.2d 40, 42 (D.C. Cir. 1983) (citing cases). In the context of notice-and-comment rulemaking, the "party aggrieved" requirement generally means that a petitioner seeking to challenge an agency's issuance of a final rule must have submitted comments on the agency's proposed rule. *Id.*

But what if, without following the notice-and-comment procedure required by 5 U.S.C. § 553, an agency issues an edict that is in fact a

[13] The issues raised by the NRC's reliance on the Hobbs Act's "party" requirement are exclusively legal and are subject to de novo determination.

binding, substantive rule (whether or not so denominated)? Such rulemaking is clearly unlawful, *see*, *e.g.*, *CropLife America v. EPA*, 329 F.3d at 881-83, but, by its nature, it does not involve proceedings to which the petitioner could become a party by submitting comments. Does the Hobbs Act's "party" requirement have the perverse effect of foreclosing a challenge when the agency has failed altogether to conduct a proper rulemaking proceeding?

This Court addressed precisely that question in *NRDC v. NRC*, and squarely rejected the suggestion that the "party" requirement bars review in such circumstances:

> In this case, … since the amendments were promulgated without notice and comment, there were no underlying proceedings in which the [petitioner] could join to obtain party status. To bar a petition for direct review because the petitioner was not a party to proceedings in which, by definition, it could not join would be to exalt literalism over common sense. We have refused to follow this course in the past, see *Pacific Gas & Electric Co. v. FPC*, 506 F.2d 33, 45-46 (D.C. Cir. 1974), and we decline to follow it now. Indeed, to bar direct review in such circumstances would create a dangerous precedent, for it would grant agencies the power to remove their regulations from direct review by simply promulgating them without notice and comment.

Id. at 601-02 n. 42.

The same principle applies here. Petitioners' claim is that the NRC's revision of the design basis threat for nuclear reactors and fuel fabrication facilities was, on its face, an amendment of the NRC's regulations governing

the security of nuclear facilities, issued without notice and comment as required by the APA, 5 U.S.C. § 553, the Atomic Energy Act, 42 U.S.C. § 2239(a), and the NRC's own regulations, 10 C.F.R. § 2.804. Petitioners had no opportunity to become parties to any proceedings before the NRC issued its orders implementing the new standards, which were final actions with immediate effect. Under such circumstances, *NRDC v. NRC* permits petitioners to go forward immediately with their Hobbs Act procedural challenge to the NRC's unlawful rulemaking.

Indeed, the *NRDC* decision *required* petitioners to bring their procedural challenge immediately on pain of irrevocably waiving it if they did not. This consequence follows from the *NRDC* court's holding that in circumstances such as those present here a petitioner's time for seeking Hobbs Act review runs from the date of issuance of the unlawful rule. It follows that a petitioner who, instead of seeking judicial review within that time, seeks relief from the agency first will be *jurisdictionally barred* from later seeking judicial review of the agency's failure to follow proper procedures in promulgating the rule. *Id.* at 601-03. This Court has repeatedly reaffirmed that holding. *E.g., JEM Broadcasting Co., Inc. v. FCC*, 22 F.3d 320, 324 (D.C. Cir. 1994); *Public Citizen v. NRC*, 901 F.2d 147, 152 (D.C. Cir. 1990).

NRDC thus holds not only that petitioners' challenge to the NRC's procedurally defective rulemaking satisfies the "party aggrieved" standard, but also that their time for bringing that challenge started running when the agency took its final action in issuing the new rule, and that their opportunity to raise their procedural challenge would have been lost had they not done so within 60 days of the issuance of the rule.

In its motion to dismiss, the NRC sought to distinguish *NRDC v. NRC* by asserting that in this case the NRC supposedly did offer petitioners a chance to become "parties" — *after* its issuance of the new rule — by affording them the opportunity to request a "hearing." Only by making such a request, the NRC asserted, could the petitioners have become "parties" entitled to challenge its already completed procedural violations. The NRC's argument, however, fails to distinguish *NRDC*.

What the NRC's argument overlooks is that in *NRDC*, too, the agency offered the petitioners a post-hoc opportunity to "participate" by inviting comments *after* it had issued the challenged rule. The NRDC accepted that invitation and submitted comments, raising its claim that the rule was unlawful because it had not been properly promulgated. *See* 666 F.2d at 600-01. Nonetheless, this Court held that by the time the NRC responded to, and rejected, those comments, it was *too late* for the NRDC to go forward in

court with the procedural challenge. And the premise for this ruling was that the NRDC did not *need* to do anything further to make itself a "party aggrieved" once the NRC issued a rule without proper notice and comment. *Id.* at 601. Thus, by taking part in further agency proceedings before the NRC, it forever lost its opportunity to raise its procedural challenge. In short, *NRDC* held that in circumstances such as those here, becoming a "party" to subsequent agency proceedings is not only *unnecessary* for Hobbs Act review of a challenge to procedurally defective rulemaking, but is in fact *fatal* to such review.

While acknowledging that *NRDC* so held with respect to NRC rulemaking, the NRC argued in support of its motion to dismiss that the challenged action here did not involve the promulgation of rules, but only the issuance of "licensing orders," to which, the NRC asserted, *NRDC*'s holding is inapplicable. Reply to Pet. Opp. to Mot. to Dismiss at 2, 4, 6. But this Court has made clear that agency labels are not dispositive in matters of rulemaking: What matters is not what an agency *calls* its action, but what the effect of the action is. *Appalachian Power Co. v. EPA*, 208 F.3d at 1024. As Judge Silberman once put it, "If it walks like a rule, and quacks like a rule … it is a rule." *Tozzi v. Department of Health & Human Services*, 271 F.3d 301, 313 (D.C. Cir. 2001) (Silberman, J., concurring).

As detailed above, the effects of the NRC's revision of the design basis threat standard clearly are those of a rule, and this Court has long held that NRC actions that impose across-the-board requirements on licensees are rulemakings. *Union of Concerned Scientists*, 711 F.2d at 380, 382. Indeed, it is nothing short of disingenuous for the NRC to deny that it has engaged in rulemaking when its orders expressly "supersede" a duly promulgated regulation — a classic example of the type of action that can *only* be accomplished through rulemaking. *Sprint Corp. v. FCC*, 315 F.3d at 374. If, as the NRC has conceded, the rule of *NRDC* continues to apply to rulemaking proceedings, there can be no doubt that it is fully applicable here. Thus, recognition that what the NRC has really done is issue a rule is fatal not only to the validity of its orders, but also to the agency's effort to evade review of its unlawful action through reliance on the Hobbs Act's "party" requirement.

B. Petitioners Were Not Required to Seek to Invoke an Inapplicable, After-the-Fact "Hearing" Procedure.

In any event, the "hearing" opportunity that the NRC now relies on (unlike the comment opportunity offered in *NRDC*) was not even intended for challenges such as those presented by the petitioners, and in no way offered petitioners a genuine opportunity to become "parties" to the

rulemaking proceeding. As this Court explained in *Gage v. AEC*, 479 F.2d 1214, 1218-21 (D.C. Cir. 1973), the Hobbs Act's "party" requirement, as applied to the rulemaking process, is designed to require persons challenging a rule to have participated in the "appropriate and available administrative procedure" through which they are afforded the opportunity of commenting on the rule proposed by the agency, so that in any judicial review of the rule's propriety there would be a "developed record" on the rulemaking alternatives considered by the agency. *Id.* at 1218, 1220. The NRC, however, afforded petitioners no such opportunity, for even had they requested a "hearing," petitioners would have been unable to provide any meaningful comments on the NRC rule, since they had been denied any notice of its terms or of the alternatives under consideration by the agency. In short, the NRC orders' reference to the possibility of a "hearing" in no way offered petitioners (or anyone else) an opportunity to participate in its *rulemaking* proceeding.

Instead, the NRC's orders referred only to the possibility of a hearing under 10 C.F.R. § 2.202. The hearing procedure set forth in that rule is applicable to adjudications in enforcement proceedings involving licensees (or other persons entitled to intervene in such proceedings), and it does not, and is not intended to, provide an opportunity for the general public to

comment on a rulemaking. Indeed, the agency itself has elsewhere stated that "the adjudicatory (hearing) process in 10 C.F.R. part 2, subpart G" — which governs hearings requested under § 2.202 — is "associated with licensing and enforcement actions" — not rulemaking. 69 Fed. Reg. 2182 (Jan. 14, 2004).[14] The agency does not use these adjudicatory enforcement procedures in promulgating rules, but instead issues rules principally through notice-and-comment proceedings under 5 U.S.C. § 553, *see Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 742 & n.10 (1985); 10 C.F.R. §§ 2.804, 2.805.

Moreover, the challenged orders expressly required any non-licensee that might request a hearing under § 2.202 to satisfy the criteria of 10 C.F.R. § 2.714(d), which set forth the requirements for intervention in NRC enforcement proceedings. Those requirements are much more restrictive

[14] 10 C.F.R. § 2.202, the hearing provision cited in the challenged orders, is contained in a subpart entitled "Procedure for Imposing Requirements by Order, or for Modification, Suspension, or Revocation of a License, or for Imposing Civil Penalties." 10 C.F.R. Part 2 Subpart B. Section 2.202 applies to a "proceeding to modify, suspend, or revoke a license or to take such other action as may be proper." *Id.* § 2.202(a). It provides for service on licensees or others subject to NRC jurisdiction of "an order" that will "[a]llege the violations with which the licensee or other person subject to the Commission's jurisdiction is charged, or the potentially hazardous conditions or other facts deemed to be sufficient ground for the proposed action," *id.* § 2.202(a)(1), and it then requires the licensee or other person subject to the Commission's jurisdiction to file an "answer under oath or affirmation" that shall "specifically admit or deny each allegation or charge made in the order" and "set forth the matters of fact or law on which the licensee or other person relies." *Id.* § 2.202(b).

than the entitlement to participate in an NRC rulemaking (and the criteria determining whether a party has standing to seek judicial review of a rulemaking). In particular, when the NRC, in an enforcement proceeding, "amends a license to require additional or better safety measures" a non-licensee may not, under the NRC's intervention rules, intervene "to litigate the need for still more safety measures." *See, e.g., Bellotti v. NRC*, 725 F.2d at 1383. Thus, the language in the orders on which the NRC relies cannot reasonably be understood as affording a hearing opportunity to petitioners, who object on procedural grounds to the NRC's unlawful issuance of a substantive rule in violation of the APA. Petitioners were not required to make futile attempts to intervene in enforcement proceedings in order to satisfy the Hobbs Act's "party" requirement with respect to the NRC's issuance of a rule. *See Pacific Gas & Electric Co. v. FPC*, 506 F.2d 33, 46 (D.C. Cir. 1974).

Despite the holding of *NRDC* and the obvious inapplicability of the "hearing" procedure mentioned in the NRC orders to petitioners' claims, the NRC's motion to dismiss suggested that reliance on the Hobbs Act's "party" requirement to bar petitioners' claims would serve the purpose, similar to that of an "issue exhaustion" requirement, of ensuring that the agency had an opportunity to consider the issue petitioners raise. But the Hobbs Act

requires only that there be a final order and a "party aggrieved" by it; it does not require petitioners to exhaust any further procedures or to present specific issues to the agency in any particular way. [15] Thus, if, as *NRDC* holds, the "party aggrieved" requirement is satisfied here, nothing more is required by the Hobbs Act. In any event, there can be no doubt that, as Commissioner McGaffigan's remarks (*supra* at 10) reflect, the NRC made a considered decision not to engage in notice-and-comment rulemaking here, and when an agency has considered an issue, no further "issue exhaustion" is needed. *See, e.g., Washington Ass'n for Television & Children v. FCC*, 712 F.2d 677, 682 (D.C. Cir. 1983).

Finally, the NRC's motion to dismiss asserted that "Petitioners have other means to pursue their concerns before the NRC," and may, for example, "request the NRC to issue, amend, or rescind any regulation." Mot. to Dismiss, at 5. Indeed, the NRC suggested, petitioners "could potentially obtain the very relief requested in the instant petition," and even

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[15] *See New England Coalition on Nuclear Pollution v. NRC*, 582 F.2d 87, 99 (1st Cir. 1978) (Hobbs Act does not require exhaustion of additional procedures once final order is issued by NRC); *see also Sims v. Apfel*, 530 U.S. 103, 106-10 (2000) (courts should not "reflexively" impose "issue exhaustion" requirements where they are not imposed by statute); *Darby v. Cisneros*, 509 U.S. 137, 143-54 (1993) (aggrieved persons need not exhaust additional remedies to obtain APA review of final agency action unless such exhaustion is required by law); *ICC v. Brotherhood of Locomotive Engineers*, 482 U.S. 270, 277 (1987) (final order is immediately reviewable under Hobbs Act).

if they did not, "[d]enial of a petition for rulemaking by the NRC would be judicially reviewable as a final NRC order under the Hobbs Act." *Id.* at 6.

That is true as far as it goes — but it only goes so far. What the NRC's argument overlooks (once again) is the holding of *NRDC v. NRC*, which is that if petitioners limited themselves to the course of action the NRC describes, *they would waive their right to obtain judicial review of the procedural invalidity of the April 29 orders*. *NRDC*, 666 F.2d at 602. There would remain, of course, the possibility of review of the *substantive* validity of an order denying a new petition for rulemaking — that is, review of whether the denial of the petition was itself somehow arbitrary and capricious, an abuse of discretion, or contrary to law (*see, e.g., Public Citizen v. NRC*, 901 F.2d at 152; *NRDC*, 666 F.2d at 602-03). But the remedies available when an agency disregards the APA's *procedural* rulemaking requirements would be wholly lost to petitioners. It was precisely to avail themselves of those remedies that they brought this proceeding in exactly the way this Court's precedents told them to bring it.

CONCLUSION

In *Appalachian Power Co. v. EPA*, 208 F.3d at 1020, this Court decried agency practices through which "[l]aw is made, without notice and comment, without public participation, and without publication in the

Federal Register." A more apt description of what has occurred in this case is hard to imagine. Accordingly, and for all the reasons set forth above, this Court should grant the petition for review, declare the NRC orders purporting to revise the design basis threat regulation unlawful, and remand the matter to the agency for rulemaking proceedings consistent with the requirements of the APA.

Respectfully submitted,

Scott L. Nelson
Amanda Frost
Public Citizen Litigation Group
1600 20th Street, N.W.
Washington, D.C. 20009
(202) 588-1000

March 12, 2004

Attorneys for Petitioners

RULE 32(a)(7)(C) CERTIFICATE

I hereby certify that the foregoing Brief for Appellant complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B). The Brief is composed in a 14-point proportional typeface, Times New Roman. As calculated by my word processing software (Microsoft Word) the Brief (not including those parts excluded under the Federal Rules of Appellate Procedure and the local rules of this Court) contains 8,686 words.

Scott L. Nelson

STATUTORY AND REGULATORY ADDENDUM

TABLE OF CONTENTS

1. Section 4 of the Administrative Procedure Act, 5 U.S.C. § 553, provides:

§ 553. Rule making

(a) This section applies, according to the provisions thereof, except to the extent that there is involved—

(1) a military or foreign affairs function of the United States; or

(2) a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.

(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include--

(1) a statement of the time, place, and nature of public rule making proceedings;

(2) reference to the legal authority under which the rule is proposed; and

(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

Except when notice or hearing is required by statute, this subsection does not apply--

(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or

(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

(d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except--

(1) a substantive rule which grants or recognizes an exemption or relieves a restriction;

(2) interpretative rules and statements of policy; or

(3) as otherwise provided by the agency for good cause found and published with the rule.

(e) Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.

2. The relevant provisions of the Hobbs Act, 28 U.S.C. §§ 2342 and 2344, provide in pertinent part:

§ 2342. Jurisdiction of court of appeals

The court of appeals (other than the United States Court of Appeals for the Federal Circuit) has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of —

* * *

(4) all final orders of the Atomic Energy Commission made reviewable by section 2239 of title 42 ….

§ 2344. Review of orders; time; notice; contents of petition; service

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.

3. The relevant provision of the Atomic Energy Act, 42 U.S.C. § 2239, provides in pertinent part:

§ 2239. Hearings and judicial review

(a)(1)(A) In any proceeding under this chapter, for the granting, suspending, revoking, or amending of any license or construction permit, or application to transfer control, and in any proceeding for the issuance or modification of rules and regulations dealing with the activities of licensees, and in any proceeding for the payment of compensation, an award or royalties under sections [FN1] 2183, 2187, 2236(c) or 2238 of this title, the Commission shall grant a hearing upon the request of any person whose interest may be affected by the proceeding, and shall admit any such person as a party to such proceeding. …

* * *

(b) The following Commission actions shall be subject to judicial review in the manner prescribed in chapter 158 of Title 28 and chapter 7 of Title 5:

(1) Any final order entered in any proceeding of the kind specified in subsection (a) of this section.

4. Title 10 C.F.R. § 2.804 provides:

§ 2.804 Notice of proposed rulemaking.

(a) Except as provided by paragraph (d) of this section, when the Commission proposes to adopt, amend, or repeal a regulation, it will cause to be published in the Federal Register a notice of proposed rulemaking, unless all persons subject to the notice are named and either are personally served or otherwise have actual notice in accordance with law.

(b) The notice will include:

(1) Either the terms or substance of the proposed rule, or a specification of the subjects and issues involved;

(2) The manner and time within which interested members of the public may comment, and a statement that copies of comments may be examined will be made available at the NRC Web site, http://www.nrc.gov;

(3) The authority under which the regulation is proposed;

(4) The time, place, and nature of the public hearing, if any;

(5) If a hearing is to be held, designation of the presiding officer and any special directions for the conduct of the hearing; and

(6) Such explanatory statement as the Commission may consider appropriate.

(c) The publication or service of notice will be made not less than fifteen (15) days prior to the time fixed for hearing, if any, unless the Commission for good cause stated in the notice provides otherwise.

(d) The notice and comment provisions contained in paragraphs (a), (b), and (c) of this section will not be required to be applied —

(1) To interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or

(2) When the Commission for good cause finds that notice and public comment are impracticable, unnecessary, or contrary to the public interest, and are not

required by statute. This finding, and the reasons therefor, will be incorporated into any rule issued without notice and comment for good cause.

(e) The Commission shall provide for a 30-day post-promulgation comment period for —

(1) Any rule adopted without notice and comment under the good cause exception on paragraph (d)(2) of this section where the basis is that notice and comment is "impracticable" or "contrary to the public interest."

(2) Any interpretative rule, or general statement of policy adopted without notice and comment under paragraph (d)(1) of this section, except for those cases for which the Commission finds that such procedures would serve no public interest, or would be so burdensome as to outweigh any foreseeable gain.

(f) For any post-promulgation comments received under paragraph (e) of this section, the Commission shall publish a statement in the Federal Register containing an evaluation of the significant comments and any revisions of the rule or policy statement made as a result of the comments and their evaluation.

5. Title 10 C.F.R. § 73.1 (superseded by the orders under review)

provides in pertinent part:

(a) Purpose. This part prescribes requirements for the establishment and maintenance of a physical protection system which will have capabilities for the protection of special nuclear material at fixed sites and in transit and of plants in which special nuclear material is used. The following design basis threats, where referenced in ensuing sections of this part, shall be used to design safeguards systems to protect against acts of radiological sabotage and to prevent the theft of special nuclear material. Licensees subject to the provisions of § 72.182, § 72.212, § 73.20, § 73.50, and § 73.60 are exempt from § 73.1(a)(1)(i)(E) and § 73.1(a)(1)(iii).

(1) Radiological sabotage.

(i) A determined violent external assault, attack by stealth, or deceptive actions, of several persons with the following attributes, assistance and equipment:

(A) Well-trained (including military training and skills) and dedicated individuals,

(B) Inside assistance which may include a knowledgeable individual who attempts to participate in a passive role (e.g., provide information), an active role (e.g., facilitate entrance and exit, disable alarms and communications, participate in violent attack), or both,

(C) Suitable weapons, up to and including hand-held automatic weapons, equipped with silencers and having effective long range accuracy,

(D) Hand-carried equipment, including incapacitating agents and explosives for use as tools of entry or for otherwise destroying reactor, facility, transporter, or container integrity or features of the safeguards system, and

(E) A four-wheel drive land vehicle used for transporting personnel and their hand-carried equipment to the proximity of vital areas, and

(ii) An internal threat of an insider, including an employee (in any position), and

(iii) A four-wheel drive land vehicle bomb.

(2) Theft or diversion of formula quantities of strategic special nuclear material.

(i) A determined, violent, external assault, attack by stealth, or deceptive actions by a small group with the following attributes, assistance, and equipment:

(A) Well-trained (including military training and skills) and dedicated individuals;

(B) Inside assistance that may include a knowledgeable individual who attempts to participate in a passive role (e.g., provide information), an active role (e.g., facilitate entrance and exit, disable alarms and communications, participate in violent attack), or both;

(C) Suitable weapons, up to and including hand-held automatic weapons, equipped with silencers and having effective long-range accuracy;

(D) Hand-carried equipment, including incapacitating agents and explosives for use as tools of entry or for otherwise destroying reactor, facility, transporter, or container integrity or features of the safe-guards system;

(E) Land vehicles used for transporting personnel and their hand-carried equipment; and

(F) the ability to operate as two or more teams.

(ii) An individual, including an employee (in any position), and

(iii) A conspiracy between individuals in any position who may have:

(A) Access to and detailed knowledge of nuclear power plants or the facilities referred to in § 73.20(a), or

(B) Items that could facilitate theft of special nuclear material (e.g., small tools, substitute material, false documents, etc.), or both.

(b) Scope.

(1) This part prescribes requirements for:

(i) The physical protection of production and utilization facilities licensed pursuant to Part 50 of this chapter,

(ii) The physical protection of plants in which activities licensed pursuant to Part 70 of this chapter are conducted, and

(iii) The physical protection of special nuclear material by any person who, pursuant to the regulations in Part 61 or 70 of this chapter, possesses or uses at any site or contiguous sites subject to the control by the licensee, formula quantities of strategic special nuclear material or special nuclear material of moderate strategic significance or special nuclear material of low strategic significance.

(2) This part prescribes requirements for the physical protection of special nuclear material in transportation by any person who is licensed pursuant to the regulations in parts 70 and 110 of this chapter who imports, exports, transports, delivers to a carrier for transport in a single shipment, or takes delivery of a single shipment free on board (F.O.B.) where it is delivered to a carrier, formula quantities of strategic special nuclear material, special nuclear material of moderate strategic significance or special nuclear material of low strategic significance.

(3) This part also applies to shipments by air of special nuclear material in quantities exceeding: (i) 20 grams or 20 curies, whichever is less, of plutonium or uranium-233, or (ii) 350 grams of uranium-235 (contained in uranium enriched to 20 percent or more in the U-235 isotope).

(4) Special nuclear material subject to this part may also be protected pursuant to security procedures prescribed by the Commission or another Government agency for the protection of classified materials. The provisions and requirements of this part are in addition to, and not in substitution for, any such security procedures. Compliance with the requirements of this part does not relieve any licensee from any requirement or obligation to protect special nuclear material pursuant to security procedures prescribed by the Commission or other Government agency for the protection of classified materials.

(5) This part also applies to the shipment of irradiated reactor fuel in quantities that in a single shipment both exceed 100 grams in net weight of irradiated fuel, exclusive of cladding or other structural or packaging material, and have a total radiation dose in excess of 100 rems per hour at a distance of 3 feet from any

accessible surface without intervening shielding.

(6) This part prescribes requirements for the physical protection of spent nuclear fuel and high-level radioactive waste stored in either an independent spent fuel storage installation (ISFSI) or a monitored retrievable storage (MRS) installation licensed under part 72 of this chapter, or stored at the geologic repository operations area licensed under part 60 or part 63 of this chapter.

(7) This part prescribes requirements for the protection of Safeguards Information in the hands of any person, whether or not a licensee of the Commission, who produces, receives, or acquires Safeguards Information.

(8) This part prescribes requirements for advance notice of export and import shipments of special nuclear material, including irradiated reactor fuel.

(9) As provided in part 76 of this chapter, the regulations of this part establish procedures and criteria for physical security for the issuance of a certificate of compliance or the approval of a compliance plan.

STANDING ADDENDUM

TABLE OF CONTENTS