

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

---

No. 03-1181

---

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

*Petitioners,*

v.

UNITED STATES NUCLEAR REGULATORY COMMISSION and UNITED  
STATES OF AMERICA,

*Respondents.*

---

**PETITIONERS' OPPOSITION TO MOTION TO DISMISS**

**INTRODUCTION**

The NRC's motion to dismiss cites, but otherwise virtually ignores, the one precedent most relevant to the issue posed by the motion: *Natural Resources Defense Council, Inc. v. NRC*, 666 F.2d 595 (D.C. Cir. 1981). There, this Court directly addressed the question whether, as the NRC now argues, a petitioner that challenges the NRC's promulgation of a substantive rule without notice and comment fails to satisfy the Hobbs Act's "party aggrieved" requirement because it was not a party to any proceeding before the agency. The Court 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, in substance (and, indeed, 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 Administrative Procedure Act, 5 U.S.C. § 553, the Atomic Energy Act, 42 U.S.C. § 2239(a), and the Commission's own regulations, 10 C.F.R. §§ 2.800 *et seq.* 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 procedural challenge to the NRC's unlawful rulemaking; indeed, it requires them to do so on pain of irrevocably waiving their procedural challenge if they do not.

## **BACKGROUND**

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 and input into 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." *In re All Power Reactor Licensees*, Order Modifying Licenses (Effective Immediately), at 2, No. EA-03-086 (NRC April 29, 2003) (published at 68 Fed. Reg. 24,517 (May 7, 2003)). The orders, applicable to all nuclear power plants and to two fuel fabrication facilities, continued as follows (*id.*)<sup>1</sup>:

Therefore, the Commission is imposing a revised DBT, as set forth in Attachment 2<sup>1</sup> 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 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.

<sup>1</sup> Attachment 2 contains safeguards information and will not be released to the public.

That the Commission acted deliberately when it revised and superseded a published regulation in an order imposed without notice-and-comment rulemaking

---

<sup>1</sup> 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 *In re BWX Technologies*, Order Modifying License (Effective Immediately), at 2, No. EA 03-087 (NRC April 29, 2003) (published at 68 Fed. Reg. 26,675 (May 16, 2003)); *In re Nuclear Fuel Services, Inc.*, Order Modifying License (Effective Immediately), at 2, No. EA 03-087 (published at 68 Fed. Reg. 26,676 (May 16, 2003)). All three orders are attached to the Petition for Review.

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 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 by the NRC followed exactly the approach outlined by Commissioner McGaffigan in his remarks, replacing the Commission's existing, lawfully promulgated regulations with a new, secret standard that became effective immediately without any rulemaking proceedings. While promulgating a new, immediately effective standard applicable across the board to all covered facilities, the orders did provide that licensees, as well as other affected persons who could

meet the Commission'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, which sets forth the adjudicatory procedures used in enforcement proceedings, such as proceedings to modify, suspend, or revoke licenses. Order, No. EA-03-086, at 6. The orders further provided that if a hearing were requested by "a person other than the licensee," a copy of the hearing request must be served on "the licensee," *id.*, making clear that the hearings contemplated by the orders would involve challenges to the orders' application to particular licensed facilities.

Petitioners filed their petition for review in this Court within 60 days of the Commission's issuance of the orders.

### ARGUMENT

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 binding, substantive rule (whether or not so denominated)? Such rulemaking is clearly unlawful, *see, e.g., CropLife America v. EPA*, 329 F.3d 876, 881-83 (D.C. Cir. 2003), but, by its nature, it does not involve proceedings to which the petitioner could become a party. Thus, this Court held in *NRDC v. NRC* that a petitioner challenging an agency's issuance of a final rule without notice-and-comment proceedings is not barred by the "party aggrieved" rule. 666 F.2d at 601-02 n.42. Indeed, the Court went further: It held that in such circumstances, the petitioner's time for seeking Hobbs Act review runs from the date of issuance of the unlawful rule, and 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 its promulgation of 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 v. NRC* 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 rules, and that their opportunity to raise their procedural challenge would have been lost had they not done so immediately.

The NRC's only argument for the inapplicability of *NRDC v. NRC* is that in this case, the Commission supposedly did offer petitioners a chance to become "parties" (*after* its issuance of the new rules) by affording them the opportunity to request a "hearing." Only by making such a request, the NRC asserts, 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 overlooks is that in *NRDC*, too, it 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 such 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 Commission, 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 *necessary* for Hobbs Act review of a challenge to procedurally defective rulemaking, but is in fact *fatal* to such review.

In any event, the “hearing” opportunity that the Commission now relies on was not even intended for challenges such as those presented by the petitioners. The Commission’s orders refer 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).<sup>2</sup> 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; 10 C.F.R. §§ 2.804, 2.805.<sup>3</sup>

---

<sup>2</sup> 10 C.F.R. § 2.202, the hearing provision cited in the challenged orders, 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.* § 10.202(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). Moreover, the challenged orders require any nonlicensee requesting a hearing under § 2.202 to satisfy the criteria of 10 C.F.R. § 2.714(d), which sets forth the requirements for intervention in NRC adjudicatory proceedings. The requirements for intervention in enforcement proceedings, however, may differ considerably 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) (narrowly construing right to intervene in NRC enforcement proceedings).

<sup>3</sup> NRC rulemaking is also subject to the additional requirement of a “hearing” of some kind under 42 U.S.C. § 2239(a).

Thus, the language in the orders on which the Commission relies cannot reasonably be understood as affording a hearing opportunity to petitioners who object on procedural grounds to the Commission's unlawful issuance of a substantive rule in violation of the APA.

Nonetheless, the Commission suggests that enforcement of 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.<sup>4</sup> 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 reflect, the Commission made a considered decision not to engage in notice-and-comment rulemaking here, and when an agency has considered an issue, no further "issue

---

<sup>4</sup> 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).

exhaustion" is needed. *See, e.g. Washington Assn. for Television & Children v. FCC*, 712 F.2d 677, 682 (D.C. Cir. 1983).

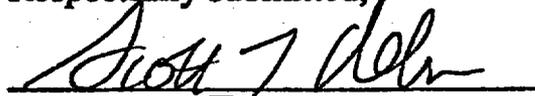
Finally, the Commission contends that "Petitioners have other means to pursue their concerns before the NRC," and may, for example, "request the NRC to issue, amend, or rescind any regulation." *Mot. to Dismiss*, at 5. Indeed, the Commission suggests, petitioners "could potentially obtain the very relief requested in the instant petition," and even 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 overlooks is (once again) the holding of *NRDC v. NRC*, which is that if petitioners limited themselves to the course of action the Commission 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 (*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 is precisely to avail themselves of those remedies that they brought this proceeding in the manner this Court's precedents instruct that such a challenge must be brought.

**CONCLUSION**

For the foregoing reasons, the Federal Respondents' Motion to Dismiss should be denied.

Respectfully submitted,



SCOTT L. NELSON

D.C. Bar No. 413548

AMANDA FROST

D.C. Bar No. 467425

PUBLIC CITIZEN LITIGATION  
GROUP

1600 20th Street, N.W.

Washington, D.C. 20009

(202) 588-1000

*Counsel for Petitioners*

Dated: September 10, 2003