April 14, 2004

Mark J. Langer, Clerk
U. S. Court of Appeals for the
District of Columbia Circuit
E. Barrett Prettyman U.S. Courthouse
333 Constitution Ave., N.W.
Washington, D.C. 20001

RE: *Public Citizen, Inc., and San Luis Obispo Mothers For Peace v. NRC*,
No. 03-1181

Dear Mr. Langer:

Enclosed you will find an original and fourteen copies of the Brief for the Federal Respondents. Please date stamp the enclosed copy of this letter to indicate date of receipt, and return the copy to me in the enclosed envelope, postage pre-paid, at your convenience.

Respectfully submitted,

/ RA /

Jared K. Heck
Attorney
Office of the General Counsel

Enclosures: As stated

cc: service list

ORAL ARGUMENT SCHEDULED FOR SEPTEMBER 10, 2004

No. 03-1181

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

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

v.

U.S. NUCLEAR REGULATORY COMMISSION
and the UNITED STATES OF AMERICA,
Federal Respondents.

ON A PETITION FOR REVIEW OF A FINAL DECISION OF THE
U.S. NUCLEAR REGULATORY COMMISSION

BRIEF FOR THE FEDERAL RESPONDENTS

THOMAS L. SANSONETTI
Assistant Attorney General

JEFFREY BOSSERT CLARK
Deputy Assistant Attorney General

KATHRYN E. KOVACS
Attorney
Appellate Section
Environment and Natural
Resources Division
U.S. Department of Justice
P.O. Box 23795
Washington, D.C. 20026-3795
(202) 514-4010

KAREN D. CYR
General Counsel

JOHN F. CORDES, JR.
Solicitor

E. LEO SLAGGIE
Deputy Solicitor

JARED K. HECK
Attorney
Office of the General Counsel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555
(301) 415-1623

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

PUBLIC CITIZEN, INC. and SAN LUIS OBISPO MOTHERS FOR PEACE,	)	
Petitioners,	)	
v.	)	No. 03-1181
U.S. NUCLEAR REGULATORY COMMISSION and the UNITED STATES OF AMERICA,	)	
Respondents.	)	

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

1. **Parties and Amici**: All parties, intervenors, and amici appearing in this Court are listed in the Brief for Petitioners.

2. **Rulings Under Review**: References to the rulings at issue appear in the Brief for Petitioners. The rulings under review are reproduced in the Joint Appendix at pages 1, 15, and 22.

3. **Related Cases**: In our view, *San Luis Obispo Mothers for Peace, et al., v. NRC*, No. 03-74628 (9th Cir. 2004) is not related to the instant case, nor are there any other related cases.

Respectfully submitted,

/ RA /

_____

Jared K. Heck
Attorney
Office of the General Counsel
U.S. Nuclear Regulatory Commission

April 14, 2004

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GLOSSARY

AEA	The Atomic Energy Act
APA	The Administrative Procedure Act
DBT	Design Basis Threat: a regulatory standard that describes the attributes of a hypothetical adversary that nuclear power reactors and certain nuclear fuel facilities must protect against.
NRC	The United States Nuclear Regulatory Commission

JURISDICTIONAL STATEMENT

Under the Administrative Orders Review Act, commonly known as the Hobbs Act, this Court has jurisdiction over all final orders made reviewable by section 189 of the Atomic Energy Act (AEA), 42 U.S.C. § 2239. *See* 28 U.S.C. § 2342(4). Section 189 provides that all final orders of the Nuclear Regulatory Commission (NRC or Commission) entered in rulemaking proceedings or in adjudicatory proceedings "for the granting, suspending, revoking, or amending of any license" are reviewable under the Hobbs Act. Any "party aggrieved" by such an order may, within 60 days, seek judicial review by filing a petition for review in the Court of Appeals where proper venue lies. *See* 28 U.S.C. § 2344.

Here, the two Petitioners brought a timely Hobbs Act suit. They claim that the NRC has deprived them of notice and an opportunity to comment on NRC security orders that Petitioners consider unlawful amendments to NRC regulations. But as we initially argued in a motion to dismiss, and now reiterate in the body of this brief (below), neither Petitioner is a "party aggrieved" within the meaning of the Hobbs Act.

Petitioners also lack standing. We offer full argument on our jurisdictional points in Argument I below.

ISSUES PRESENTED

6. Whether the Court lacks jurisdiction because Petitioners, who had notice of, but failed to request a hearing on the NRC security orders they now challenge, are not "parties aggrieved" permitted to bring suit under the Hobbs Act.

7. Whether Petitioners lack standing because this Court cannot meaningfully redress Petitioners' alleged loss of the opportunity to comment on NRC security policy where the remedy sought (remand for consideration of public comments) will not result in further public disclosures about the substance of the NRC security orders at issue, and where Petitioners already are free to comment on NRC security policy by petitioning for rulemaking.

8. Whether the NRC abused its discretion by issuing licensing orders imposing heightened security requirements on certain nuclear facilities by "adjudication" rather than "rule making" under the Administrative Procedure Act.

STATEMENT OF THE CASE

A. *Nature of the Case*

Petitioners challenge NRC orders detailing "design basis threats" that the physical protection systems of nuclear power reactors and Category I fuel fabrication facilities[**] must be able to withstand. A "design basis threat," commonly referred to as a "DBT," sets forth the attributes of the hypothetical adversary that these licensees' security plans and systems must be able to protect against.

Petitioners do not challenge the substance of the NRC's DBT orders, which they recognize are "more protective" than the NRC's regulations. Pet. Brief at 23 n. 10; *see* 10 C.F.R. §§ 73.1(a)(1), (2). Petitioners' only concern is with the manner in which the NRC issued its new requirements. Specifically, Petitioners object to the NRC's use of an adjudicatory process (*i.e.*, orders and individualized hearings) rather than a rulemaking process (*i.e.*, notice-and-comment procedures) to impose an enhanced DBT on

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**"Category I" facilities are those facilities that possess at least a "formula quantity" of "strategic special nuclear material." *See* 10 C.F.R. § 70.4. Two Category I facilities exist in the United States, both of which are involved in nuclear fuel fabrication.

power reactors and Category I facilities. Petitioners argue that the DBT orders amount to unlawful "rules."

By imposing additional DBT requirements by orders to individual licensees rather than by notice-and-comment rulemaking, the Commission did not eliminate the public's opportunity to participate in the NRC's regulatory process. The NRC published notice of its DBT orders in the *Federal Register*[***] and offered any person adversely affected the opportunity for an agency hearing on whether the orders should be sustained. (JA 7, 21, 28). The NRC invited members of the public to bring forth "reasons as to why the Order should not have been issued." (JA 6, 20, 27). But Petitioners did not take advantage of this opportunity, instead coming straight to this Court to challenge the NRC's DBT orders.

At the outset of this case we moved to dismiss the petition for review because of Petitioners' procedural default (*i.e.*, their failure to seek an NRC

****See All Power Reactor Licensees, Order Modifying Licenses (Effective Immediately)*, 68 Fed. Reg. 24,517 (May 7, 2003); *In the Matter of BWX Technologies, Lynchburg, VA; Order Modifying License (Effective Immediately)*, 68 Fed. Reg. 26,675 (May 16, 2003); *In the Matter of Nuclear Fuel Services, Inc., Erwin, TN; Order Modifying License (Effective Immediately)*, 68 Fed. Reg. 26,676 (May 16, 2003). These NRC orders are reproduced in the Joint Appendix (JA).

hearing). A motions panel of this Court referred our motion to the merits panel. *See* Order (D.C. Cir., Dec. 19, 2003)**.**

B. *General Statutory and Regulatory Scheme*

The NRC has broad authority under the AEA to license and regulate the operation of commercial nuclear power plants and Category I facilities. *See* AEA §§ 101-103, 161, 182, 186, 42 U.S.C. §§ 2131-2133, 2201, 2232, 2236. Discretion is the hallmark of this authority, for the AEA is "virtually unique in the degree to which broad responsibility is reposed in the administering agency, free of close prescription in its charter as to how it shall proceed in achieving the statutory objectives." *Siegel v. AEC*, 400 F.2d 778, 783 (D.C. Cir. 1968), *cert. denied*, 439 U.S. 1046 (1978).[****]

The Commission's general regulatory authority is set forth in AEA § 161, 42 U.S.C. § 2201. Section 161b authorizes the NRC to establish by

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***********Accord Kelley v. Selin*, 42 F.3d 1501, 1511 (6th Cir. 1995), *cert. denied*, 515 U.S. 1159; *Arnow v. NRC*, 868 F.2d 223, 234 (7th Cir. 1989); *Commonwealth of Massachusetts v. NRC*, 878 F.2d 1516, 1523 (1st Cir. 1989); *Iowa Electric Light and Power Co. v. Local Union 204 of Int'l Brotherhood of Elec. Workers*, 834 F.2d 1424, 1428 (8th Cir. 1987); *Duke Power Co. v. NRC*, 770 F.2d 386, 390 (4th Cir. 1985)*; Westinghouse Electric Corp. v. NRC*, 598 F.2d 759, 771 (3d Cir. 1979); *Public Service Co. of New Hampshire v. NRC*, 582 F.2d 77, 82 (1st Cir. 1978).

regulation or order such standards for the possession and use of nuclear materials "as the Commission may deem necessary or desirable to promote the common defense and security or to protect health or to minimize danger to life or property. . ." 42 U.S.C. § 2201(b). Under AEA § 161i, which applies to nuclear power plant and Category I facility regulation, the Commission may "prescribe such regulations or orders as it may deem necessary" to prevent uses of nuclear materials "inimical to the common defense and security" and to "protect health and to minimize danger to life or property." 42 U.S.C. § 2201(i).

The Commission exercises its licensing and enforcement authority according to the procedures set forth in NRC regulations at 10 C.F.R. Part 2.[*****] Under 10 C.F.R. § 2.202, "the Commission may institute a proceeding to modify, suspend, or revoke a license or to take such other action as may be proper" by serving an order on the licensee or other person subject to the Commission's jurisdiction. The order must offer "the licensee or any

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*****On January 14, 2004, the NRC revised its hearing procedures in 10 C.F.R. Part 2 in ways not relevant here. *See* Final Rule, *Changes to Adjudicatory Process*, 69 Fed. Reg. 2,182 (Jan. 14, 2004). References in this brief to the NRC's Part 2 regulations are to those in effect at the time the DBT orders were issued. *See* 10 C.F.R. Part 2 (2003).

other person adversely affected by the order" an opportunity for a hearing. 10 C.F.R. § 2.202(a)(3). Under 10 C.F.R. § 2.714, "[a]ny person whose interest may be affected" by the proceeding may intervene, provided they meet the requirements for intervention set forth in the rule.

Another statutory provision relevant to this case is AEA § 147, 42 U.S.C. § 2167, which requires the NRC to protect "safeguards information" from public disclosure. "Safeguards information" is a special category of sensitive unclassified information that includes "security measures (including security plans, procedures, and equipment) for the protection of . . . certain plant equipment vital to the safety of production or utilization facilities. . . ".[******] AEA § 147a(3), 42 U.S.C. § 2167(a)(3); *see also* 10 C.F.R. § 73.21 (setting forth NRC rules applicable to safeguards information). Section 147a(3) requires the Commission to protect such information if unauthorized disclosure "could reasonably be expected to have a significant adverse effect on the health and safety of the public or the

******In accordance with AEA §§ 11v and 11cc, the Commission has, by rule, designated commercial nuclear power plants as "utilization facilities" and Category I facilities as "production facilities." *See* 42 U.S.C. §§ 2014(v), (cc); 10 C.F.R. § 50.2.

common defense and security by significantly increasing the likelihood of theft, diversion, or sabotage of. . . such facility." AEA § 147a(3), 42 U.S.C. § 2167(a)(3).

NRC rules require special handling and storage of safeguards information similar to those employed for classified confidential information. *Compare* 10 C.F.R. § 73.21 (safeguards information) *with* 10 C.F.R. § 95.25 (classified information). Unauthorized disclosure of safeguards information may result in the imposition of civil penalties, criminal penalties, or both. *See* AEA §§ 147, 223, 42 U.S.C. §§ 2167, 2273.

C. *NRC Security Requirements Before September 11, 2001*

The NRC promulgated the first physical protection rules for power reactors in 1977, during a time when, according to "intelligence and other relevant information," there were "no known groups in this country having the combination of motivation, skill, and resources to attack either a fuel facility or a nuclear power reactor." Final Rule, *Requirements for the Physical Protection of Nuclear Power Reactors*, 42 Fed. Reg. 10,836 (Feb. 24, 1977). Nevertheless, the NRC early on saw a need to, "in the interest of common defense and security and the public heath and safety. . . identify

measures to be taken for the protection of nuclear power reactors against sabotage." *Id.*

These early rules contained both "detailed requirements," which included the establishment of a physical security organization, access control measures, physical barriers, and intrusion detection systems, *see* 42 Fed. Reg. at 10,836, 10,839, codified at 10 C.F.R. §§ 73.55(b)-(e) (1977), and "general performance requirements," which required licensees to be able to defend against a "determined violent external assault" by "several persons." *See* 10 C.F.R. § 73.55(a) (1977); 42 Fed. Reg. at 10,836, 10,838. These adversaries would have several attributes; they would be "well-trained. . . and dedicated individuals" carrying "suitable weapons, up to and including hand-held automatic weapons, equipped with silencers and having effective long range accuracy," and "hand-carried equipment, including incapacitating agents and explosives for use as tools of entry or otherwise destroying the reactor integrity. . .". 10 C.F.R. § 73.55(a)(1) (1977); 42 Fed. Reg. at 10,838-39.

The adversary attributes promulgated in the NRC's 1977 physical protection rule for power reactors did not appear in the proposed rule, so

they were not initially commented on. *See* Proposed Rule, *Requirements for the Physical Protection of Nuclear Power Reactors*, 39 Fed. Reg. 40,038 (Nov. 13, 1974). But later that year, the Commission proposed virtually identical physical protection requirements for Category I fuel production facilities, including "general performance requirements" that required licensees to "protect against adversaries." *See* Proposed Rule, *Physical Protection of Plants and Materials, Performance Oriented Safeguards Requirements*, 42 Fed. Reg. 34,310 (July 5, 1977). This time, there were "extensive comments" on the rule, including criticisms of the Commission's open-ended adversary attributes. *See* Revised Proposed Rule, *Physical Protection of Plants and Materials*, 43 Fed. Reg. 35,321 (Aug. 9, 1978).

According to commenters, the proposed adversary attributes in the Commission's design basis threats[*******] ("DBTs") were too vague to be meaningfully applied. Some commented that "without bounds the threat could not be used effectively as a general performance requirement since

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*******In this rulemaking, the Commission stopped referring to adversary attributes as "general performance requirements" and began calling them "design basis threats." *See generally* Final Rule, *Physical Protection Upgrade Rule*, 44 Fed. Reg. 68,184 (Nov. 28, 1979).

licensees would not know the bounds to place on their physical protection systems." *Id.* at 35,323. Others commented that "without some limit on the number of conspirators it would be impossible to design a protection system" that would meet the NRC's requirements. *Id.* at 35,321. But the Commission felt that the "specific numbers of adversaries" were not as important as "the capabilities and resources of the adversary. . .". *Id.* at 35,323. In the Commission's view at that time, "additional adversary attributes [were] not necessary" to provide a design basis for adequate physical protection systems. *Id.*

Although the Commission initially declined to precisely define the capabilities of the hypothetical adversary set forth in its physical protection rule, the Commission stated that it would periodically review "the kind and degree of threat and the vulnerabilities to the threat," so that it could "consider changes to meet the changed conditions." 42 Fed. Reg. 10,836. After a vehicle intrusion at the Three Mile Island nuclear power plant and the vehicle bombing of the World Trade Center in 1993, the Commission in 1994 added the use of a land vehicle and a vehicle bomb to the list of adversary attributes. *See* Final Rule, *Protection Against Malevolent Use of*

Vehicles at Nuclear Power Plants, 59 Fed. Reg. 38,899 (Aug. 1, 1994). But, as was the case when the first DBTs were promulgated, the Commission could not include any detailed characteristics about the threat (*e.g.*, bomb size) in publicly-available rulemaking documents, because those details were "exempted from public disclosure as Safeguards Information. . .". Proposed Rule, *Protection Against Malevolent Use of Vehicles at Nuclear Power Plants*, 58 Fed. Reg. 58,804 (Nov. 4, 1993).

Over time, the lack of detailed adversary attributes in the Commission's physical protection regulations created uncertainty about what type of threats licensees were actually expected to defend against. This uncertainty was perhaps most evident in the NRC's Operational Safeguards Response Evaluation (OSRE) program,******** which tested reactor licensees' ability to defend against the DBT in 10 C.F.R. § 73.1(a) by

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********The NRC conducted OSRE exercises from 1987 to 2001 at nuclear power reactors. Today, the OSRE program has been replaced by the NRC's Force-on-Force program, which will test licensees' defensive strategies against the NRC's most recent DBT once every three years. For a fuller description of the Force-on-Force and OSRE programs, see the NRC's public web site at http://www.nrc.gov/what-we-do/safeguards/faq-force-on-force.html#whatisit.

staging simulated attacks against their facilities.[*********] Throughout the OSRE program, the NRC and its licensees disagreed on the specific tactical capabilities of the hypothetical adversary—what kind of weapons and tools it could use, how many explosives it could carry, how many teams it could operate, etc. This in turn presented difficulties in performance testing and raised unanswered questions about the limits of the NRC's regulations.[**********]

D. *NRC Security Requirements After September 11, 2001*

i. *Interim Security Orders*

Immediately after the terrorist attacks on September 11, 2001, the NRC took a number of actions to "strengthen licensees' capabilities and readiness to respond to a potential attack on a nuclear facility." (JA 1). The NRC issued threat advisories to licensees and undertook a "comprehensive

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*********Category I facilities were not required to conduct force-on-force testing of their physical protection programs until 1990, when the NRC promulgated 10 C.F.R. § 73.46.

**********Because Petitioners did not come first to the NRC with their notice-and-comment grievance, the NRC had no opportunity to develop an administrative record explaining the history of the NRC's physical security requirements. Hence in this brief we provide some general background that ordinarily might appear in the administrative record.

review of its safeguards and security programs and requirements." (JA 1-2). By February 25, 2002, the NRC had ordered its power reactor licensees to "implement interim compensatory measures. . . to enhance physical security of licensed operations at these facilities." (JA 2); *see All Operating Power Reactor Licensees; Order Modifying Licenses (Effective Immediately)*, 67 Fed. Reg. 9,792 (March 4, 2002).

The NRC's interim orders required "increased patrols, augmented security forces and capabilities, additional security posts, installation of additional physical barriers, vehicle checks at greater stand-off distances, enhanced coordination with law enforcement and military authorities and more restrictive site access controls for all personnel." *Riverkeeper, Inc. v. Collins*, 359 F.3d 156, 161 (2d Cir. 2004) (quoting *Entergy Nuclear Operations, Inc.* (Indian Point, Units 1, 2, and 3), DD-02-6, 56 NRC 296 (2002)). "All of these measures were to remain in effect until the NRC decided that other measures should take their place or that the threat environment has changed significantly." *Riverkeeper*, 359 F.3d at 161.

ii. *Design Basis Threat Orders*

After issuing its February 25, 2002, interim orders, the NRC continued to analyze "information provided by the intelligence community concerning the nature of the threat" and concluded that "a revision is needed to the Design Basis Threat (DBT) specified in 10 C.F.R. § 73.1." (JA 2, 16, 23). To accomplish this, the Commission issued further orders on April 29, 2003. These orders refine and detail the tactical abilities of the hypothetical adversary that power reactors and Category I fuel facilities must be prepared to defend against. These new orders were said to "supercede[] [*sic*] the DBT specified in 10 C.F.R. § 73.1." (JA 2, 16, 23). They built upon the NRC's earlier interim orders. *See* NRC Press Release No. 03-053, *NRC Approves Changes to the Design Basis Threat and Issues Orders* (April 29, 2003), http://www.nrc.gov/reading-rm/doc-collections/news/2003/03-053.html.

The NRC's April 29, 2003, DBT orders specify detailed, quantitative adversary characteristics that do not appear in any NRC regulation, past or present, in part because such detailed information rises to the level of "safeguards information" that cannot be publicly disclosed. *See* AEA § 147, 42 U.S.C. § 2167; 10 C.F.R. § 73.21 (discussed at pp. 7-8, *supra*). These

details include, *inter alia*, the size of the vehicle bomb, the caliber of guns and ammunition, the kinds of explosive charges, and the number of attackers and teams that the hypothetical adversary can use. The details appear in attachments to the DBT orders. Because the attachments constitute safeguards information, they are not publicly available.[**********] (JA 2).

The public versions of the NRC's DBT orders require individual licensees to revise their facility-specific security plans to meet the NRC's new security requirements. (JA 2-3, 16-17, 23-24). Licensees must submit their revised plans to the NRC for review and approval. The orders also provided an opportunity for licensees to explain, on a case-by-case basis, why the terms of the order should be adjusted to accommodate site-specific characteristics. (JA 4, 18, 25). Finally, the orders offered a hearing

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**********Although we do not reiterate the distinction throughout our brief, it should be noted that the attachments to the DBT orders for Category I facilities are classified confidential national security information, not safeguards information. (JA 16, 23). The difference in designation is due to the nature and quantity of material at Category I facilities, which could be used to make nuclear weapons.

opportunity to "the licensee or any person whose interest is adversely affected. . .". (JA 7, 21, 28).

SUMMARY OF THE ARGUMENT

Petitioners characterize the NRC's DBT orders as "rules," and declare them unlawful for failure to comply with the APA's notice-and-comment requirements. But Petitioners fail to account for the NRC's broad discretion to use *either* rulemaking *or* adjudicatory orders to impose new requirements. The NRC sensibly chose to enhance nuclear security by orders. In any event, this Court lacks jurisdiction to consider Petitioners' notice-and-comment claim. Petitioners never brought that claim to the NRC, and have failed to show demonstrable and redressable harm from the NRC's orders enhancing security.

1. Petitioners cannot now challenge the NRC's DBT orders because Petitioners failed to achieve "party" status before the NRC as required by the Hobbs Act. *See* 28 U.S.C. § 2344. Petitioners never requested a hearing on the NRC's DBT orders, even though the orders solicited hearing

requests. Instead, Petitioners came straight to this Court, thus depriving the NRC of the ability to consider their notice-and-comment grievance. By doing so, Petitioners failed to become a "party" to the NRC proceedings below. Someone not a party to an NRC proceeding reviewable under the Hobbs Act has no right to seek judicial review of the outcome of that proceeding. This Court is therefore without jurisdiction to consider Petitioners' notice-and-comment objection to the NRC's DBT orders.

2. Petitioners also lack standing to challenge the DBT orders. Even if Petitioners were entitled to comment prior to issuance of the NRC's orders, Petitioners have not articulated how this Court could meaningfully redress their alleged loss of that opportunity. Petitioners expressly do not seek to void the NRC's orders—their concern is that the orders do not go far enough in enhancing nuclear security. Simply remanding the matter to the NRC to take public comments would put Petitioners in no better position than they currently stand, because Petitioners are already free to submit their views on how to enhance nuclear security to the agency (*e.g.*, by petitioning for rulemaking). Nor would a remand order result in greater disclosures about the substance and basis of the DBTs, because such

information is safeguards information that by law cannot be publicly disclosed.

3. The NRC's security orders are captioned "Orders Modifying Licenses," and require existing licensees to submit updated security plans designed to protect against a more detailed design basis threat than that contained in NRC regulations. On their face, then, the NRC's orders modifying licenses are a form of "adjudication," not a "rule making" subject to the APA's notice-and-comment process. That the NRC's orders affected a large number of licensees does not transform them into regulations. The APA expressly authorizes agencies to take licensing action by adjudicatory orders, *see* 5 U.S.C. § 551(6) and the NRC's decision to proceed by orders modifying licenses is entitled to deference.

The NRC deliberately chose to proceed by adjudication for a number of sound reasons. First, in the aftermath of September 11, 2001, the NRC needed to act promptly to improve security at power reactors and Category I facilities. Second, the NRC needed to protect sensitive safeguards information (and classified information) from public disclosure, which is not possible under normal rulemaking procedures. Finally, the

NRC needed to maintain flexibility to change its regulatory approach rapidly in a changing threat environment, and to tailor security requirements to site-specific conditions at licensed facilities. Choosing to proceed by adjudication offered a number of advantages in achieving each of these goals, and in so choosing the NRC acted well within its judicially-recognized discretion under the APA to use rules *or* orders to implement new requirements.

Contrary to Petitioners' chief argument, and contrary to any suggestion arising from inartful language in the orders themselves saying that they "supersede" NRC regulations, the NRC's orders do not in fact amend or modify NRC regulations. The effect of the NRC's orders is not to change the fundamental nature or scope of the NRC's existing security regulations, but to add new and detailed security requirements. The orders do not. The new supplemental security requirements can (and should) be read consistently with their regulation-based counterparts, which remain in force. In short, the NRC's new security orders are properly viewed as independent and supplemental requirements not subject to notice-and-comment procedures.

ARGUMENT

STANDARD OF REVIEW

Whether Petitioners have standing and are "parties aggrieved" within the meaning of the Hobbs Act are jurisdictional questions subject to *de novo* review. *See, e.g., Lepre v. DOL*, 275 F.3d 59, 64 (D.C. Cir. 2001). Whether the NRC's DBT orders are properly considered "rule making" or "adjudication" under the APA is a purely legal question also subject to *de novo* review. *See, e.g., Cassell v. FERC*, 154 F.3d 478, 483 n. 4 (D.C. Cir. 1998).

To the extent this petition for review raises a question about the wisdom of the NRC's decision to proceed by adjudication rather than rulemaking, the standard of review is highly deferential, because "an agency undoubtedly enjoys broad discretion to determine its own procedures. . . including whether to act by a generic rulemaking or case-by-case adjudication." *Interstate Natural Gas Ass'n of America v. FERC*, 285 F.3d 18, 57-58 (D.C. Cir. 2002). "[D]eference is particularly appropriate in this case, where 'the breadth and complexity of [an agency's] responsibilities demand that it be given every reasonable opportunity to formulate

methods of regulation appropriate for the solution of its intensely practical difficulties.'" *Wisconsin Gas Co. v. FERC*, 770 F.2d 1144, 1166 (D.C. Cir. 1985) (quoting *Permian Basin Area Rate Cases*, 390 U.S. 747, 790 (1968)).

I. THIS COURT IS WITHOUT JURISDICTION TO ENTERTAIN THE PETITION FOR REVIEW

Petitioners' position on jurisdiction flows from the faulty premise that the NRC acted by rulemaking in this case. But as we show below, the NRC's action in this case was not a rulemaking. *See* pp. 36-41, *infra.* The NRC imposed security requirements directly and individually on its existing licensees, offered them (and others) an opportunity for an individualized hearing pursuant to the Commission's adjudicatory procedures for "licensing and enforcement actions," and captioned its action as an "Order Modifying Licenses." *See id.* At bottom, though, even if (contrary to our view) the NRC's orders amounted to a "rule making," Petitioners lack both standing and the required "party" status to pursue their "rule making" claim in this Court.

A. *The Hobbs Act Bars Judicial Review Because Petitioners Were Not Parties to the Adjudicatory Proceedings Below*

The Hobbs Act governs judicial review of final NRC orders. *See* 28 U.S.C. § 2342(4); 42 U.S.C. §§ 2239(a), (b). Under that Act, only a "party aggrieved" by a final NRC order may file a petition for review in the appropriate court of appeals. *See* 28 U.S.C. § 2344. The "party" requirement of the Hobbs Act is jurisdictional in nature and, like an exhaustion requirement, "acknowledges the commonsense notion of dispute resolution that an agency ought to have an opportunity to correct its own mistakes with respect to the programs it administers before it is haled into federal court." *McCarthy v. Madigan*, 503 U.S. 140, 145 (1992). *See also Rockland County v. NRC*, 709 F.2d 766, 773-74 (2d Cir. 1983), *cert. denied*, 464 U.S. 993 (1983); *Gage v. AEC*, 479 F.2d 1214, 1218 (D.C. Cir. 1973).

Someone not a party to an NRC proceeding reviewable under the Hobbs Act has no right to seek judicial review of the outcome of that proceeding. *See Gage v. AEC*, 479 F.2d at 1218 n. 14; *Easton Utilities Commission v. AEC*, 424 F.2d 847, 853 (D.C. Cir. 1970) (*en banc*). Participation before the agency is a "necessary condition" to satisfying the

Hobbs Act's "party" requirement. *Southern Pacific Transport Co. v. ICC*, 69 F.3d 583, 587 (D.C. Cir. 1995).

In the present case, Petitioners were not "parties" before the NRC because they did not request a hearing in conjunction with the NRC's issuance of the DBT orders, even though the agency expressly offered one. (JA 6-7, 19-20, 27-28). This Court has insisted on party status as a prerequisite to judicial review in NRC cases:

> Petitioner refrained from participating in the appropriate and available administrative procedure, which is the statutorily prescribed prerequisite for this court's jurisdiction to entertain the petition for review of an Atomic Energy Commission order . . . Since petitioners were never parties to the . . . proceedings, this court simply does not have jurisdiction over their claim.

Gage v. AEC, 479 F.2d at 1217-18 (internal citations omitted).

To be sure, in unusual cases where an agency provides a petitioner absolutely no meaningful opportunity to participate in a rulemaking proceeding, this Court has said that it will entertain a petition for review even though the petitioner was not, strictly speaking, a party to those proceedings. *See Natural Resources Defense Council, Inc. v. NRC*, 666 F.2d 595, 601 n. 42 (D.C. Cir. 1981) (hereinafter "*NRDC*"). But Petitioners in this

case cannot avail themselves of this limited exception to the Hobbs Act's party requirement, because the challenged DBT orders were not a rulemaking,[**********] and because the orders expressly provided an opportunity for an adjudicatory hearing under 10 C.F.R. §§ 2.202 and 2.714. The orders state that "the licensee must, and any other person adversely affected by this order may. . . request a hearing on this Order. . .". (JA 6, 19-20, 27). Petitioners simply ignored that opportunity and came straight to this Court.

Petitioners try to excuse their failure to request a hearing by arguing that they had no choice but to seek direct review of the NRC's DBT orders without first seeking "party" status in the proceedings below. Petitioners claim that, had they "[sought] relief from the agency first" by requesting a hearing on the orders they now challenge, they would be "*jurisdictionally barred* from later seeking judicial review of the agency's failure to follow proper procedures. . .". Pet. Brief at 27 (emphasis in original). To support this claim, Petitioners try to analogize the facts of this case with those of *NRDC*. *See* Pet. Brief at 26-28.

***********See* pp. 36-41, *infra*.

Petitioners' analogy is inapposite. In *NRDC*, the petitioner failed to timely petition for review of an NRC rule, thus foreclosing the possibility of judicial review under the Hobbs Act. The present case has nothing to do with timeliness, nor does it involve the promulgation of rules. Here, the Hobbs Act bars the instant petition for review due to Petitioners' failure to achieve (or even attempt) "party" status in the adjudicatory proceedings below.

NRDC is distinguishable from the instant case in another important respect. In *NRDC*, the issue was "whether NRDC may now seek review of the procedure by which the [rule was] promulgated. . . by simply raising its objections in a petition for rulemaking and seeking direct review of the order denying the petition." 666 F.2d at 601-02. The Court held that a petitioner could *not* raise procedural objections to an already-issued final rule in a separate and subsequent proceeding (*i.e.*, a petition for rulemaking). *Id.* at 602. Here, by contrast, Petitioners could have sought a formal adjudicatory hearing (before the DBT orders became final) in the very same proceeding whose procedures they now challenge. In an NRC proceeding conducted concurrently with the issuance of the DBT orders,

Petitioners could have contended that the orders amounted to unlawful regulations and "should not have been issued" (JA 6, 20, 27) without notice-and-comment, but they chose not to. Nothing in *NRDC* justifies departing from the clear statutory language of the Hobbs Act under these circumstances.

Had Petitioners actually requested a hearing on the NRC's orders in this case, the NRC would have issued a final order in response. *See* 10 C.F.R. § 2.770. This order would have been reviewable in this Court under the AEA and the Hobbs Act. *See* AEA § 189, 42 U.S.C. § 2289; 28 U.S.C. § 2344. Those Acts, in combination, expressly grant judicial review of final NRC orders in licensing proceedings. Petitioners' claim that participation in an NRC hearing on the challenged licensing orders would be "*fatal* to [judicial] review" is simply baseless. Pet. Brief at 28 (emphasis in original).

Petitioners' final excuse for failing to request an NRC hearing is that "the 'hearing' opportunity that the NRC now relies on. . . was not even intended for challenges such as those presented by petitioners. . .". Pet. Brief at 30. Petitioners claim that they did not request a hearing because their procedural notice-and-comment objections do not fit within NRC's

legal framework for "adjudicatory enforcement procedures," and because "the requirements for intervention in enforcement proceedings" are "much more restrictive than the entitlement to participate in an NRC rulemaking. . .". Pet. Brief at 32.

That the requirements for participation in an NRC adjudicatory hearing are different from those for participation in rulemaking does not justify Petitioners' circumvention of the NRC's offer of an agency hearing. If the NRC orders had an adverse impact on Petitioners they could and should have sought a hearing before the agency. At a minimum, Petitioners had to *attempt* to take advantage of their hearing opportunity. As already noted, a hearing request would have led to a final NRC order reviewable under the Hobbs Act. But Petitioners made no attempt to participate. They simply ignored the Hobbs Act's "'party' status requirement, and the 'exhaustion' doctrine implicit therein." *Gage*, 479 F.2d at 1218.

Petitioners cite no instance where the NRC has declared procedural grievances out of bounds in agency adjudicatory proceedings.********** On the contrary, in *Cleveland Electric Illuminating Co.* (Perry Nuclear Power Plant, Unit 1), CLI-96-13, 44 NRC 315, 319-20 (1996), the Commission and its hearing board gave full consideration to a procedure-based claim that allowing changes in certain testing and inspection schedules would unlawfully deprive intervenors of their NRC hearing rights in the future. That the Commission considered and responded to this procedural claim belies Petitioners' argument that NRC's adjudicatory hearings "cannot reasonably be understood as affording a hearing opportunity to petitioners[] who object on procedural grounds. . .". Pet. Brief at 32; *see also Edlow International Co.*, CLI-76-6, 3 NRC 563, 580-84 (1976) (considering procedural contentions).

**********Citing *Bellotti v. NRC*, 725 F.2d 1380, 1383 (D.C. Cir. 1983), Petitioners argue that, had they requested a hearing on the NRC's DBT orders, the request would not have been granted because a "non-licensee may not, under the NRC's intervention rules, intervene 'to litigate the need for still more safety measures.'" Pet. Brief at 32. But Petitioners' claim is not one for "more safety measures." It is a claim that the NRC followed the wrong procedures under the APA. *Bellotti* does not bar Petitioners from raising this type of contention in an NRC licensing hearing, even where the NRC is acting to increase security.

As this Court has noted, "procedural objections premised on the APA [are] precisely the sort appropriately raised before [the agency] in the first instance." *Petroleum Communications, Inc. v. FCC*, 22 F.3d 1164, 1170 (D.C. Cir. 1994), (quoting *City of Brookings Mun. Tel. Co. v. FCC*, 822 F.2d 1153, 1163 (D.C. Cir. 1987)). Petitioners had a statutory obligation under the Hobbs Act to present their procedural arguments to the NRC before seeking judicial review. But Petitioners "refrained from participating in the appropriate and available administrative procedure, which is the statutorily prescribed prerequisite for this court's jurisdiction to entertain their petition for review of an [NRC] order." *Gage*, 479 F.2d at 1217. Petitioners therefore failed to achieve "party" status in the proceedings below, and their petition for review must be dismissed.

One final point bears discussion. Were the Court to excuse Petitioners' failure to first come to the NRC with its notice-and-comment grievance, the precedent would threaten to eviscerate the Hobbs Act's party requirement by allowing an exception to swallow the rule. Future petitioners unhappy with the NRC's choice of procedures (*i.e.*, adjudication rather than rulemaking) could come straight to court upon a claim that the

wrong procedures were employed, and that, consequently, no administrative proceedings existed to which the petitioner had to become a party. Under such a scheme, the Court would regularly face cases (like this one) bereft of an on-the-record explanation from the agency of the reasons supporting its choice of procedure. The Court should not allow this result—the better course is to require petitioners with procedural grievances to air them first before the agency, at least where (as here) there is a meaningful opportunity to do so. Petitioners' failure to do so is fatal to their lawsuit.

B. *Petitioners Lack Standing to Bring the Instant Petition for Review*

Not only do Petitioners fail to meet the Hobbs Act's "party" requirement, they also lack standing to challenge the NRC's DBT orders. Petitioners have not shown how this Court can meaningfully redress their alleged injuries, assuming they are cognizable. Petitioners therefore lack standing, and their petition for review should be dismissed on this ground as well.

Three requirements constitute the "irreducible constitutional minimum" of Article III standing. *McConnell v. FCC*, __ U.S. __, 124 S.Ct.

619, 707 (2003). First, a petitioner must "demonstrate an 'injury in fact,' which is 'concrete,' 'distinct and palpable,' and 'actual or imminent.'" *Id.* (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990)). Second, a petitioner must show "a causal connection between the injury and the conduct complained of—the injury has to be 'fairly trace[able] to the challenged action of the defendant, and not. . . th[e] result [of] some third party not before the court.'" *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992) (quoting *Simon v. Eastern Ky. Welfare Rights Organization*, 426 U.S. 26, 41-42 (1976)). Finally, a petitioner must show a "substantial likelihood" that the requested relief will remedy the alleged injury in fact. *McConnell*, 124 S.Ct. at 707.

Here, Petitioners allege two injuries. First, Petitioners claim that, in the event of a terrorist attack on a nuclear power plant, their members might potentially suffer negative health consequences if the enhanced security measures the NRC has recently imposed (together with pre-existing facility design features) fail to prevent a release of radiation to the surrounding environment. *See, e.g.*, Pet. Brief, Standing Addendum at 1-4. Second, Petitioners allege that the NRC's decision not to offer notice-and-

comment procedures when developing its new security requirements caused them an "informational injury" affecting their "organizational interest in nuclear safety issues." Pet. Brief at 6. To redress these injuries, Petitioners request the Court to remand the NRC's DBT orders to the agency so that it can conduct a public rulemaking employing notice-and-comment procedures.

As an initial matter, Petitioners have not identified a member of their organizations who might be injured by the NRC's orders to fuel facilities (so-called "Category I facilities"); they only allege harm related to nuclear power plant operation. *See* Pet. Brief, Standing Addendum. Hence, Petitioners plainly lack standing to challenge the NRC's two "Category I" DBT orders. (JA 15, 22).

With regard to nuclear power plants, Petitioners have not shown that the lack of notice-and-comment procedures in this case is "substantially probable" to cause "the essential injury" complained of—increased radiological health risks stemming from a terrorist attack at a nuclear power plant; nor have Petitioners shown a "demonstrably increased risk" to their health and safety interests. *See Florida Audubon Society v. Bentsen*,

94 F.3d 658, 664-665 (D.C. Cir. 1996); *see also City of Orrville v. FERC*, 147 F.3d 979, 985-986 (D.C. Cir. 1998). Petitioners' standing affidavits do not explain in any detail how the absence of notice-and-comment procedures threaten their health and safety in a tangible way. In short, Petitioners have failed to show an adequate causal link between the NRC's decision to act by licensing orders and an increased likelihood of radiological harm.

More fundamentally, even if Petitioners had articulated an actual injury-in-fact, they have not shown how an order granting the relief they seek will redress their claimed procedural injury. Petitioners do *not* ask the Court to vacate the NRC's DBT orders, which they recognize create a "more protective" regulatory scheme than previously existed. *See* Pet. Brief at 23 n. 10. Petitioners seek remand primarily out of a desire for more information about the basis and substance of the NRC's DBT orders. *See* Pet. Brief at 6, 21, 30. Apparently, Petitioners do not believe the DBT orders go far enough in enhancing nuclear security.

But as explained below, Section 147 of the AEA, 42 U.S.C. § 2167, *prohibits* the NRC from publicly disclosing the sensitive security information Petitioners seek. *See* pp. 41-43, *infra*. On a remand for further

proceedings, therefore, Petitioners would be entitled to no more detail on the NRC's DBT orders than currently exists in publicly available sources. *See generally Public Citizen v. FAA*, 988 F.2d 186 (D.C. Cir. 1993). Thus, remand to the NRC to conduct notice-and-comment rulemaking would not put Petitioners in a better position to comment on NRC security policy than they already stand, nor would it redress their alleged procedural harm.

Petitioners right now are free to submit their views on the proper scope or content of the NRC's security requirements through a petition for rulemaking under 10 C.F.R. § 2.802, or through a petition for enforcement action under 10 C.F.R. § 2.206. Under 10 C.F.R. § 2.802, Petitioners may request the NRC to issue, amend, or rescind any regulation. Through this process, Petitioners could potentially obtain the very relief requested in the instant petition for review– *i.e.*, a rulemaking proceeding to revise the DBT during which the DBT orders challenged in this case would remain in force. *See* Petition for Review at 2. Indeed, one of the Petitioners, the San Luis Obispo Mothers for Peace, has already submitted a petition for rulemaking seeking better protection against radiological sabotage of

nuclear power plants. *See Union of Concerned Scientists and Mothers for Peace; Receipt of Petition for Rulemaking*, 68 Fed. Reg. 35,585 (June 16, 2003).

Denial of a petition for rulemaking by the NRC would be judicially reviewable as a final NRC order under the Hobbs Act. *See Gage v. AEC*, 479 F.2d at 1222 n. 27; *see also, e.g., Doris Day Animal League v. Veneman*, 315 F.3d 297 (D.C. Cir. 2003) (reviewing agency denial of a petition for rulemaking). Were Petitioners to pursue this course, they could have their day in court regarding the wisdom of NRC security policy, which would be judged on a record that includes the Commission's reasons supporting that policy.

II. THE NRC DID NOT ABUSE ITS DISCRETION BY IMPOSING ENHANCED SECURITY REQUIREMENTS BY LICENSING ORDER

Due to Petitioners' failure to request an NRC hearing on the orders they now challenge, they never became "parties" to an NRC proceeding, a jurisdictional prerequisite to a Hobbs Act suit. *See* 28 U.S.C. § 2344. Hence, Petitioners try to characterize the NRC's action as an unlawful rulemaking to stand any chance of moving forward in this Court. But as we show below, Petitioners' effort collapses under the weight of its own incongruity.

ii. *The NRC's Orders Modifying Licenses Were Issued By Adjudication, Not Rulemaking*

A plain reading of the APA and a straightforward examination of the NRC's DBT orders reveal that the NRC's action in this case was "adjudication" and not "rule making." Under the APA, "adjudication" includes any "agency process for the formulation of an order." 5 U.S.C. § 551(7). An "order" includes "the whole or part of a final disposition whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making *but including licensing*." 5 U.S.C. § 551(6) (emphasis added). "Licensing" includes an "agency process respecting the grant, renewal, denial, revocation, suspension, annulment, withdrawal, limitation, amendment[], modification, or conditioning of a license." 5 U.S.C. § 551(9). Thus, the NRC process that culminated in modification of individual licenses by order is, by definition, "adjudication" under the APA.

Here, when the NRC developed and issued an "Order Modifying Licenses," for individual licensees, the agency engaged in "licensing"—a form of "adjudication." (JA 1, 15, 22). The NRC did not follow the notice-

and-comment procedures found in 5 U.S.C. § 553 because they simply do not apply—section 553 "applies solely to rulemaking and is hence inapplicable to NRC licensing hearings." *Union of Concerned Scientists v. NRC*, 920 F.2d 50, 56 (D.C. Cir. 1990). Rather, the NRC followed its normal adjudicatory procedures for licensing and enforcement actions, offering licensees and other interested persons an opportunity for a hearing pursuant to 10 C.F.R. §§ 2.202 and 2.714.********** (JA 6-7, 19-20, 27-28). Under these circumstances, the NRC's characterization of its action as "adjudication" should be accorded "significant deference." *See American Airlines, Inc. v. DOT*, 202 F.3d 788, 797-98 (5th Cir. 2000) (citing *British Caledonian Airways, Ltd. v. Civil Aeronautics Bd.*, 584 F.2d 982, 992 (D.C. Cir. 1978)).

Even so, Petitioners insist that the NRC's DBT orders must be considered rules because they are "presently binding norms" that "grant rights, impose obligations, or produce other significant effects on private

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**********The Commission has broad discretion to use orders to impose conditions on a licensee's continued operation. *See Commonwealth of Massachusetts v. NRC*, 878 F.2d at 1521; *In re Three Mile Island Alert*, 771 F.2d 720, 729 (3d Cir. 1985).

interests" and are of "future effect." Pet. Brief at 17 (internal citations omitted). But virtually all NRC orders modifying a license do this. That does not make them rules. As this Court has frequently held, "the choice whether to proceed by rulemaking or adjudication is primarily one for the agency regardless of whether the decision may affect agency policy and have general prospective application." *Chisholm v. FCC*, 538 F.2d 349, 365 (D.C. Cir. 1976). *Accord Consumer Federation of America v. FCC*, 348 F.3d 1009, 1013 (D.C. Cir. 2003).

Furthermore, it is not unusual for the principles laid down by an agency through adjudication to share rule-like characteristics:

> Adjudicated cases may and do, of course, serve as vehicles for the formulation of agency policies, which are applied and announced therein. They generally provide a guide to action that the agency may be expected to take in future cases. Subject to the qualified role of stare decisis in the administrative process, they may serve as precedents.

NLRB v. Wyman-Gordon Co., 394 U.S. 759, 765-766 (1969) (footnotes and internal citations omitted). "An adjudication can affect a large group of individuals without becoming a rulemaking." *Goodman v. FCC*, 182 F.3d

987, 994 (D.C. Cir. 1999). *See also NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 292 (1974).

To be clear, the NRC's DBT orders apply only to the licensees the orders name. The Commission has held that such enforcement orders do not apply prospectively to applicants for new licenses (as a rule would). *See Duke Energy Corp.* (Catawba Nuclear Station, Units 1 and 2), CLI-04-6, 59 NRC __, 2004 WL 385320 at *2, *4 (NRC) (Feb. 18, 2004). And unlike a rule, the orders remain in effect only "until the Commission determines otherwise. . .". (JA 5, 19, 26). Thus, the NRC's DBT orders do not affect the reliance interests of non-licensees on the stability of NRC regulations, and they lack the kind of prospective legal effect that is fundamentally characteristic of so-called "legislative" rules. *See, e.g., Clark-Cowlitz Joint Operating Agency v. FERC*, 826 F.2d 1074, 1082 (D.C. Cir. 1987) (noting that adjudicatory orders ordinarily apply to the case at hand, whereas rulemaking orders ordinarily have prospective effect only).

The procedures employed by the NRC also belie the notion that the agency engaged in rulemaking. As this Court has held, where an agency follows its own adjudicatory procedures, resulting in the issuance of

licensing orders, the proceedings are an adjudication, not a rulemaking. *See Goodman v. FCC*, 182 F.3d at 993-994. Here, Petitioners concede that the NRC's DBT orders were governed by an adjudicatory hearing process that "'is associated with licensing and enforcement actions'—not rulemaking." Pet. Brief at 31. Petitioners also concede that "[the NRC] does not use these adjudicatory enforcement procedures in promulgating rules. . .". Pet. Brief at 31-32. Simply put, in issuing the DBT orders the NRC took a licensing action pursuant to its own established adjudicatory procedures. That action is properly considered an "adjudication" under the APA. *See Goodman*, 182 F.3d at 993-994.

B. *By Choosing to Issue Orders Modifying Licenses, the NRC Acted Within Its Discretion Under the APA*

The NRC's decision to engage in formal adjudication (with all of its attendant procedures) was entirely within its authority, for an agency's choice whether to proceed by rulemaking or adjudication "is one that lies primarily in the informed discretion of the administrative agency." *SEC v. Chenery Corp.*, 332 U.S. 194, 203 (1947); *see also Interstate Natural Gas Ass'n of America v. FERC*, 285 F.3d at 57-58 ("An agency undoubtedly enjoys broad

discretion to determine its own procedures. . . including whether to act by a generic rulemaking or case-by-case adjudication"). While there may be occasions when an agency's choice of adjudication amounts to an abuse of discretion, *see NLRB v. Bell Aerospace*, 416 U.S. at 294, this is not one of them. The NRC deliberately chose to employ adjudicatory licensing proceedings for sound reasons.

As noted above, the NRC's security orders supplement the existing DBTs in 10 C.F.R. § 73.1 by adding a level of refinement and detail that never existed in any regulation. Such details, if revealed to potential adversaries, would create vulnerabilities at nuclear facilities by tipping an attacker off to the specific weapons, explosives, tactics, and numbers that these facilities are ready to defend against. Thus, the details of the NRC's enhanced DBTs are "safeguards information" that cannot be disclosed in a public notice-and-comment rulemaking process. *See* AEA § 147, 42 U.S.C. § 2167; 10 C.F.R. § 73.21.

Protecting safeguards information in a rulemaking setting presents significant difficulties. As Petitioners suggest (Pet. Brief at 16 n. 8, 21), the NRC could not have employed the APA's "good cause" exception (5 U.S.C.

§ 553(b)(B)) as a means to avoid normal notice-and-comment procedures without raising a substantial legal question under the hearing requirements of AEA § 189, 42 U.S.C. § 2239. *See Union of Concerned Scientists v. NRC*, 711 F.2d 370, 380-81 (D.C. Cir. 1983). To protect safeguards information, the NRC presumably would have had to first undertake a rulemaking to develop entirely new and untested "parallel procedures" prior to notice-and-comment on any proposed new security requirements.********** *See generally* AEA § 181, 42 U.S.C. § 2231. This would have unnecessarily delayed the issuance of new security requirements, given the NRC's option to more quickly proceed through its licensing and enforcement process.

**********In the future, if circumstances warrant, the NRC may amend its regulations to codify some of the new security requirements imposed by order over the past two years. The NRC is currently evaluating options under the AEA and the APA for developing "parallel procedures" to protect safeguards, classified, and other sensitive information in the rulemaking context. *See generally* AEA § 181, 42 U.S.C. § 2231. Congress, too, has considered the issue of how the NRC should protect such information in a rulemaking setting, although legislation on point has not yet been passed. *See* S. 2095, 108th Cong. § 661 (2004) (authorizing the NRC to conduct a DBT rulemaking "in a manner that will fully protect safeguards and classified national security information"); H.R. Conf. Rep. No. 108-375, at 159-161 (2003).

Rather than undertake a potentially lengthy rulemaking, the Commission chose to directly modify power reactor and Category I facility licenses through its existing adjudicatory processes. This approach not only allowed the Commission to act more quickly, but it also limited the risk that safeguards information would be compromised. Existing NRC adjudicatory rules include procedures for the protection of safeguards information in the hearing context. *See*, *e.g.*, 10 C.F.R. § 2.744(e) (setting forth procedures for the use and protection of safeguards information in NRC licensing hearings).

Proceeding by order also preserved a measure of flexibility to further refine the specific adversary attributes of the NRC's enhanced DBTs in response to further changes in the threat environment. As the Supreme Court has said, the need for flexibility is one of the most important reasons for choosing adjudication over rulemaking:

> Some principles must await their own development, while others must be adjusted to meet particular, unforeseeable situations. In performing its important functions in these respects, therefore, an administrative agency must be equipped to act either by general rule or by individual order. To insist upon one form of action to the exclusion of the other is to exalt form over necessity.

Chenery, 332 U.S. at 202. In the realm of nuclear security, where threat analysis remains a dynamic endeavor, the Commission must be able to react swiftly to "unforeseeable situations" that may arise and modify the orders promptly. *See id.* Restricting the Commission to rulemaking mechanisms alone would "exalt form over necessity" and seriously impair short term efforts to protect some of the nation's most critical infrastructure. *See id.*

That the need for flexibility motivated the NRC's decision to proceed by order rather than rule appears on the face of the orders themselves. Each order required individual licensees to "notify the Commission. . . if compliance with any of the requirements [in the order] is unnecessary in their specific circumstances," or if "implementation of any of the requirements would cause the licensee to be in violation of the provisions of any Commission regulation or the facility license." (JA 4, 18, 25). The orders also allowed individual licensees to seek relaxation or modification of the new security requirements upon a showing of "good cause." (JA 5, 19, 27). The NRC included these provisions so that each facility could

revise their "physical security plans, safeguards contingency plans, and guard training and qualification plans" (JA 4, 18, 25) in a manner tailored to the unique features of each site, be they technical, geographic, or demographic.

Such flexibility would not have been possible had the NRC acted by rules rather than orders. Had the NRC acted by rule, every licensee would likely have had to seek exemptions to address site-specific nuances relevant to their security plans. Acting by order allowed the NRC to more efficiently tailor requirements to each licensee's unique facility and site characteristics.

Of course, Petitioners do not argue about the good reasons for the NRC's approach. Instead, Petitioners argue that the NRC unlawfully changed its rules without following notice-and-comment procedures. In support of this argument, Petitioners primarily rely on language in the DBT orders suggesting that they "revise" or "supersede" the DBTs set forth in 10 C.F.R. § 73.1. We turn now to that claim.

C. *The NRC's DBT Orders Do Not Change NRC Regulations*

It is true, as Petitioners stress (Pet. Brief at 19), that agencies cannot amend existing rules outside the notice-and-comment process. *See generally Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1028 (D.C. Cir. 2000). It is also true that the NRC's DBT orders use some inartful language that at first sight might suggest an NRC rulemaking. Statements that the orders "revise" and "supercede[]" [*sic*] the DBTs "specified in 10 C.F.R. § 73.1" (JA 2, 16, 23) arguably sound as if a rulemaking were at hand.

But such statements are not dispositive when characterizing the nature of the NRC's action. As Petitioners acknowledge, the Court must look not to words alone but to the *effect* of the NRC's licensing orders. *See* Pet. Brief at 29 (citing *Appalachian Power Co. v. EPA*, 208 F.3d at 1024). Here, the fundamental effect of those orders is not to alter, relax, or rescind the terms of any regulation—all regulations are left intact—but to require licensees to "revise their physical security plans, safeguards contingency plans, and guard training and qualification plans" to provide greater physical protection against terrorist attack in a manner consistent with the NRC's existing security regulations. (JA 2, 16, 24).

Under the NRC's existing security regulations, licensees' security plans must be capable of defending against "a determined violent external assault, attack by stealth, or deceptive actions, of several persons. . .". 10 C.F.R. § 73.1(a)(1)(i). These persons have several attributes, including "military training and skills," "inside assistance," "hand-held automatic weapons, equipped with silencers," "incapacitating agents and explosives," and a "four-wheel drive land vehicle bomb." 10 C.F.R. § 73.1(a)(1)(i)(A)-(E). Under the DBT orders, licensees must still protect against all of these regulation-based adversary attributes, but the orders provide more details about the kind of guns, ammunition, bombs, and tactics that licensees must be able to protect against. Thus, the DBT orders do not alter the fundamental requirements of the NRC's physical protection regulations; they simply supplement the regulations with additional adversary attributes never before contained in NRC regulations.

Despite any contrary suggestion from language in the DBT orders, then, those orders "revise" or "supersede" existing regulations only in the sense that licensees must look to the detailed requirements of the orders in addition to the regulations when developing updated security plans to

deal with the current threat environment. The "revise-supersede" language, while perhaps inartful, conveys the message that licensees must give prime consideration to the orders' new requirements.

It makes sense for licensees to first look to the DBT orders in revising their security plans, because protection against the kinds of bombs, weapons, and tactics those orders specify is the purpose and object of the NRC's post-9/11 licensing orders. Furthermore, protection against the adversary attributes set forth in the NRC's DBT orders will encompass protection against the more generally described adversary attributes set forth in NRC regulations.**********

**********Although the DBT orders are best understood (in our view) as establishing new and enhanced anti-terrorist security measures, the orders might also be conceptualized as interpreting existing, and broadly phrased, NRC security regulations. If so, no notice-and-comment was required because agencies unquestionably may use adjudicatory orders to "supplement or refine" existing regulations, *City of Orrville v. FERC*, 147 F.3d at 988 n. 11, or "to interpret or apply them," *Verizon Telephone Companies v. FCC*, 269 F.3d 1098, 1108 (D.C. Cir. 2001). Under the APA, agencies may even issue entirely new regulations without notice-and-comment so long as the new regulations are "interpretative" in nature. *See* 5 U.S.C. § 553(b)(3)(A); *see generally Air Transport Ass'n of America v. FAA*, 291 F.3d 49, 55 (D.C. Cir. 2002).

In sum, the NRC's DBT orders and the NRC's security regulations can and should be read consistently. The orders simply supplement existing regulations by requiring licensees to update their security plans to deal with a more well-defined adversary. Further, the revised security plans submitted pursuant to the DBT orders must also meet the requirements of 10 C.F.R. § 73.1(a). Because the orders do not repudiate NRC regulations, and because they are neither irreconcilable nor inconsistent with the regulations, notice-and-comment rulemaking was not required. *See generally Caraballo v. Reich*, 11 F.3d 186, 196 (D.C. Cir. 1993); *American Federation of Government Employees v. FLRA*, 777 F.2d 751, 758 (D.C. Cir. 1985).

CONCLUSION

For the foregoing reasons, the petition for review should be dismissed for lack of jurisdiction or denied for lack of merit.

Respectfully Submitted,

THOMAS L. SANSONETTI
Assistant Attorney General

KAREN D. CYR
General Counsel

JEFFREY BOSSERT CLARK
Deputy Assistant Attorney General

_____/ RA /_____
KATHRYN E. KOVACS
Attorney
Appellate Section
Environment and Natural
Resources Division
U.S. Department of Justice
P.O. Box 23795
Washington, D.C. 20026-3795
(202) 514-2855

_____/ RA /_____
JOHN F. CORDES, JR.
Solicitor

_____/ RA /_____
E. LEO SLAGGIE
Deputy Solicitor

_____/ RA /_____
JARED K. HECK
Attorney
Office of the General Counsel
U.S. Nuclear Regulatory
Commission
Washington, D.C. 20555
(301) 415-1623

Dated: April 14, 2004

CERTIFICATE OF COMPLIANCE UNDER FRAP 32(a)(7)(C)

I hereby certify that the number of words in the Brief for the Federal Respondents, excluding the Table of Contents, Table of Authorities, Glossary and Addendum, is 9,649, as counted by the Corel WORDPERFECT 8 program.

Respectfully submitted,

/ RA /

_____
Jared K. Heck
Attorney

Office of the General Counsel
U.S. Nuclear Regulatory Commission

Dated: April 14, 2004

CERTIFICATE OF SERVICE

I hereby certify that on April 14, 2004, copies of the foregoing Brief for the Federal Respondents were served by mail, postage prepaid, upon the following counsel:

Scott L. Nelson
Amanda Frost
Public Citizen Litigation Group
1600 20th Street, N.W.
Washington, D.C. 20009

/ RA /

Jared K. Heck
Attorney

STATUTORY AND REGULATORY ADDENDUM

Except for the following, all applicable statutes, etc. are contained in the Brief for Petitioners:

iv. Administrative Procedure Act, 5 U.S.C. §§ 551(6), (7), (9) 1.2

v. Atomic Energy Act Section 147a, 42 U.S.C. § 2167(a) 1.3

vi. 10 C.F.R. § 2.202 . . . . . 1.5

vii. 10 C.F.R. § 73.21 . . . . . 1.8

Administrative Procedure Act, 5 U.S.C. § 551. Definitions.

For the purpose of this subchapter–

. . .

(6) "order" means the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making but including licensing;

(7) "adjudication" means agency process for the formulation of an order;

. . .

(9) "licensing" includes agency process respecting the grant, renewal, denial, revocation, suspension, annulment, withdrawal, limitation, amendment, modification, or conditioning of a license;

Atomic Energy Act § 147a, 42 U.S.C. § 2167(a). Safeguards information.

(a) Confidentiality of certain types of information; issuance of regulations and orders; considerations for exercise of Commission's authority; disclosure of routes and quantities of shipment; civil penalties; withholding of information from Congressional committees

In addition to any other authority or requirement regarding protection from disclosure of information, and subject to subsection (b)(3) of section 552 of Title 5, the Commission shall prescribe such regulations, after notice and opportunity for public comment, or issue such orders, as necessary to prohibit the unauthorized disclosure of safeguards information which specifically identifies a licensee's or applicant's detailed--

> (1) control and accounting procedures or security measures (including security plans, procedures, and equipment) for the physical protection of special nuclear material, by whomever possessed, whether in transit or at fixed sites, in quantities determined by the Commission to be significant to the public health and safety or the common defense and security;
>
> (2) security measures (including security plans, procedures, and equipment) for the physical protection of source material or byproduct material, by whomever possessed, whether in transit or at fixed sites, in quantities determined by the Commission to be significant to the public health and safety or the common defense and security; or
>
> (3) security measures (including security plans, procedures, and equipment) for the physical protection of and the location of certain plant equipment vital to the safety of production or utilization facilities involving nuclear materials covered by paragraphs (1) and (2) if the unauthorized disclosure of such information could reasonably be expected to have a significant adverse effect on the health and safety of the public or the common defense and security by significantly increasing the likelihood of theft, diversion, or sabotage of such material or such facility. The Commission shall exercise the authority of this subsection--

(A) so as to apply the minimum restrictions needed to protect the health and safety of the public or the common defense and security, and

(B) upon a determination that the unauthorized disclosure of such information could reasonably be expected to have a significant adverse effect on the health and safety of the public or the common defense and security by significantly increasing the likelihood of theft, diversion, or sabotage of such material or such facility.

Nothing in this chapter shall authorize the Commission to prohibit the public disclosure of information pertaining to the routes and quantities of shipments of source material, by-product material, high level nuclear waste, or irradiated nuclear reactor fuel. Any person, whether or not a licensee of the Commission, who violates any regulation adopted under this section shall be subject to the civil monetary penalties of section 2282 of this title. Nothing in this section shall be construed to authorize the withholding of information from the duly authorized committees of the Congress.

10 C.F.R. § 2.202. Orders.

(a) The Commission may institute a proceeding to modify, suspend, or revoke a license or to take such other action as may be proper by serving on the licensee or other person subject to the jurisdiction of the Commission an order that will:

> (1) Allege 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, and specify the action proposed;
> (2) Provide that the licensee or other person must file a written answer to the order under oath or affirmation within twenty (20) days of its date, or such other time as may be specified in the order;
> (3) Inform the licensee or any other person adversely affected by the order of his or her right, within twenty (20) days of the date of the order, or such other time as may be specified in the order, to demand a hearing on all or part of the order, except in a case where the licensee or other person has consented in writing to the order;
> (4) Specify the issues for hearing; and
> (5) State the effective date of the order; if the Commission finds that the public health, safety, or interest so requires or that the violation or conduct causing the violation is willful, the order may provide, for stated reasons, that the proposed action be immediately effective pending further order.

(b) A licensee or other person to whom the Commission has issued an order under this section must respond to the order by filing a written answer under oath or affirmation. The answer shall specifically admit or deny each allegation or charge made in the order, and shall set forth the matters of fact and law on which the licensee or other person relies, and, if the order is not consented to, the reasons as to why the order should not have been issued. Except as provided in paragraph (d) of this section, the answer may demand a hearing.

(c) If the answer demands a hearing, the Commission will issue an order designating the time and place of hearing.

(1) If the answer demands a hearing with respect to an immediately effective order, the hearing will be conducted expeditiously, giving due consideration to the rights of the parties.

(2) (i) The licensee or other person to whom the Commission has issued an immediately effective order may, in addition to demanding a hearing, at the time the answer is filed or sooner, move the presiding officer to set aside the immediate effectiveness of the order on the ground that the order, including the need for immediate effectiveness, is not based on adequate evidence but on mere suspicion, unfounded allegations, or error. The motion must state with particularity the reasons why the order is not based on adequate evidence and must be accompanied by affidavits or other evidence relied on. The NRC staff shall respond within (5) days of the receipt of the motion. The motion must be decided by the presiding officer expeditiously. During the pendency of the motion or at any other time, the presiding officer may not stay the immediate effectiveness of the order, either on its own motion, or upon motion of the licensee or other person. The presiding officer will uphold the immediate effectiveness of the order if it finds that there is adequate evidence to support immediate effectiveness. An order upholding immediate effectiveness will constitute the final agency action on immediate effectiveness. An order setting aside immediate effectiveness will be referred promptly to the Commission itself and will not be effective pending further order of the Commission.

(ii) The presiding officer may, on motion by the staff or any other party to the proceeding, where good cause exists, delay the hearing on the immediately effective order at any time for such periods as are consistent with the due process rights of the licensee and other affected parties.

(d) An answer may consent to the entry of an order in substantially the form proposed in the order with respect to all or some of the actions proposed in the order. The consent, in the answer or other written document, of the licensee or other person to whom the order has been issued to the entry of an order shall constitute a waiver by the licensee or other person of a hearing, findings of fact and conclusions of law, and of all right to seek Commission and judicial review or to contest the validity of the order in any forum as to those matters which have been consented to or agreed to or on which a hearing has not been requested. An order that has been consented to shall have the same force and effect as an order made after hearing by a presiding officer or the Commission, and shall be effective as provided in the order.

(e) If the order involves the modification of a part 50 license and is a backfit, the requirements of §§ 50.109 of this chapter shall be followed, unless the licensee has consented to the action required.

10 C.F.R. § 73.21 Requirements for the protection of safeguards information.

(a) General performance requirement. Each licensee who (1) possesses a formula quantity of strategic special nuclear material, or (2) is authorized to operate a nuclear power reactor, or (3) transports, or delivers to a carrier for transport, a formula quantity of strategic special nuclear material or more than 100 grams of irradiated reactor fuel, and each person who produces, receives, or acquires Safeguards Information shall ensure that Safeguards Information is protected against unauthorized disclosure. To meet this general performance requirement, licensees and persons subject to this section shall establish and maintain an information protection system that includes the measures specified in paragraphs (b) through (i) of this section. Information protection procedures employed by State and local police forces are deemed to meet these requirements.

(b) Information to be protected. The specific types of information, documents, and reports that shall be protected are as follows:

(1) Physical protection at fixed sites. Information not otherwise classified as Restricted Data or National Security Information relating to the protection of facilities that possess formula quantities of strategic special nuclear material, and power reactors. Specifically:

(i) The composite physical security plan for the nuclear facility or site.
(ii) Site specific drawings, diagrams, sketches, or maps that substantially represent the final design features of the physical protection system.
(iii) Details of alarm system layouts showing location of intrusion detection devices, alarm assessment equipment, alarm system wiring, emergency power sources, and duress alarms.
(iv) Written physical security orders and procedures for members of the security organization, duress codes, and patrol schedules.
(v) Details of the on-site and off-site communications systems

that are used for security purposes.
(vi) Lock combinations and mechanical key design.
(vii) Documents and other matter that contain lists or locations of certain safety-related equipment explicitly identified in the documents as vital for purposes of physical protection, as contained in physical security plans, safeguards contingency plans, or plant specific safeguards analyses for production or utilization facilities.
(viii) The composite safeguards contingency plan for the facility or site.
(ix) Those portions of the facility guard qualification and training plan which disclose features of the physical security system or response procedures.
(x) Response plans to specific threats detailing size, disposition, response times, and armament of responding forces.
(xi) Size, armament, and disposition of on-site reserve forces.
(xii) Size, identity, armament, and arrival times of off-site forces committed to respond to safeguards emergencies.
(xiii) Information required by the Commission pursuant to 10 CFR 73.55 (c) (8) and (9).

(2) Physical protection in transit. Information not otherwise classified as Restricted Data or National Security Information relative to the protection of shipments of formula quantities of strategic special nuclear material and spent fuel. Specifically:

(i) The composite transportation physical security plan.
(ii) Schedules and itineraries for specific shipments. (Routes and quantities for shipments of spent fuel are not withheld from public disclosure. Schedules for spent fuel shipments may be released 10 days after the last shipment of a current series.)
(iii) Details of vehicle immobilization features, intrusion alarm devices, and communication systems.
(iv) Arrangements with and capabilities of local police response forces, and locations of safe havens.

(v) Details regarding limitations of radio-telephone communications.
(vi) Procedures for response to safeguards emergencies.

(3) Inspections, audits and evaluations. Information not otherwise classified as National Security Information or Restricted Data relating to safeguards inspections and reports. Specifically:

(i) Portions of safeguards inspection reports, evaluations, audits, or investigations that contain details of a licensee's or applicant's physical security system or that disclose uncorrected defects, weaknesses, or vulnerabilities in the system. Information regarding defects, weaknesses or vulnerabilities may be released after corrections have been made. Reports of investigations may be released after the investigation has been completed, unless withheld pursuant to other authorities, e.g., the Freedom of Information Act (5 U.S.C. 552).

(4) Correspondence. Portions of correspondence insofar as they contain Safeguards Information specifically defined in paragraphs (b)(1) through (b)(3) of this paragraph.

(c) Access to Safeguards Information.

(1) Except as the Commission may otherwise authorize, no person may have access to Safeguards Information unless the person has an established "need to know" for the information and is:

(i) An employee, agent, or contractor of an applicant, a licensee, the Commission, or the United States Government. However, an individual to be authorized access to Safeguards Information by a nuclear power reactor applicant or licensee must undergo a Federal Bureau of Investigation criminal history check to the extent required by 10 CFR 73.57;

(ii) A member of a duly authorized committee of the Congress;
(iii) The Governor of a State or designated representatives;
(iv) A representative of the International Atomic Energy Agency (IAEA) engaged in activities associated with the U.S./IAEA Safeguards Agreement who has been certified by the NRC;
(v) A member of a state or local law enforcement authority that is responsible for responding to requests for assistance during safeguards emergencies; or
(vi) An individual to whom disclosure is ordered under §§ 2.709(f) of this chapter.

(2) Except as the Commission may otherwise authorize, no person may disclose Safeguards Information to any other person except as set forth in paragraph (c)(1) of this section.

(d) Protection while in use or storage.

(1) While in use, matter containing Safeguards Information shall be under the control of an authorized individual.
(2) While unattended, Safeguards Information shall be stored in a locked security storage container. Knowledge of lock combinations protecting Safeguards Information shall be limited to a minimum number of personnel for operating purposes who have a "need to know" and are otherwise authorized access to Safeguards Information in accordance with the provisions of this section.

(e) Preparation and marking of documents. Each document or other matter that contains Safeguards Information as defined in paragraph (b) in this section shall be marked "Safeguards Information" in a conspicuous manner to indicate the presence of protected information (portion marking is not required for the specific items of information set forth in paragraph §§ 73.21(b) other than guard qualification and training plans and correspondence to and from the NRC). Documents and other matter

containing Safeguards Information in the hands of contractors and agents of licensees that were produced more than one year prior to the effective date of this amendment need not be marked unless they are removed from storage containers for use.

(f) Reproduction and destruction of matter containing Safeguards Information.

(1) Safeguards Information may be reproduced to the minimum extent necessary consistent with need without permission of the originator.
(2) Documents or other matter containing Safeguards Information may be destroyed by any method that assures complete destruction of the Safeguards Information they contain.

(g) External transmission of documents and material.

(1) Documents or other matter containing Safeguards Information, when transmitted outside an authorized place of use or storage, shall be packaged to preclude disclosure of the presence of protected information.
(2) Safeguards Information may be transported by messenger-courier, United States first class, registered, express, or certified mail, or by any individual authorized access pursuant to §§ 73.21(c).
(3) Except under emergency or extraordinary conditions, Safeguards Information shall be transmitted only by protected telecommunications circuits (including facsimile) approved by the NRC. Physical security events required to be reported pursuant to §§ 73.71 are considered to be extraordinary conditions.

(h) Use of automatic data processing (ADP) systems. Safeguards Information may be processed or produced on an ADP system provided that the system is self- contained within the licensee's or his contractor's facility and requires the use of an entry code for access to stored information. Other systems may be used if approved for security by the NRC.

(i) Removal from Safeguards Information category. Documents originally containing Safeguards Information shall be removed from the Safeguards Information category whenever the information no longer meets the criteria contained in this section.