UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D.C. 20555-0001

OFFICE OF THE
GENERAL COUNSEL

July 2, 2008

Catherine O'Hagan Wolfe, Clerk
United States Court of Appeals
for the Second Circuit
United States Court House
40 Foley Square
New York, New York 10007

BY OVERNIGHT DELIVERY

Attn: Maria Rodriguez

Re: *Brodsky v. U.S. Nuclear Regulatory Commission*, No. 08-1454-ag

Dear Ms. Wolfe,

Enclosed for filing please find an original and four copies of Respondents' Response to State of New York's Motion for Leave to File an Amicus Memorandum of Law.

Thank you for your kind assistance.

Yours truly,

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cc: All Counsel

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

RICHARD L. BRODSKY, et al.,	
Petitioners,	
v.	**Respondents' Response to State of New York's Amicus Motion and Brief**
U.S. NUCLEAR REGULATORY COMMISSION	
and	
UNITED STATES OF AMERICA,	**Docket No. 08- 1454-AG**
Respondents.	

Respondents' Response to State of New York's Motion for Leave to File an Amicus Memorandum of Law

New York's belated amicus brief[1] brings little new to the table. The Attorney General's claim that a general six-year statute of limitations applies to

[1] FRAP 27 does not provide for an amicus brief opposing a motion to dismiss, but, assuming FRAP 29 applies by analogy, New York should have filed its amicus papers when petitioners filed their opposition to our Motion to Dismiss on May 28th[th]. We point out, moreover, that New York is a party to the ongoing license renewal case pending before the NRC (Amicus Br. 2, note 1), where it seeks to shut down the Indian Point plants, and proposed a contention in a *November 2007* filing that replicates petitioners' claim here. Obviously, New York's belated entry into the case raises concerns of fairness.

this lawsuit rather than the Hobb's Act 60-day review period is built on the faulty premise that the "final agency action" here – the NRC's grant of an exemption – "is not made reviewable by the agency's enabling statute" and thus lies outside the Hobbs Act. Amicus Br. 13. In other words, the Attorney General argues that if a right to a hearing exists under Section 189 of the Atomic Energy Act, 42 U.S.C. § 2239, then review exists under the Hobbs Act, but not otherwise for non-hearing cases. This, however, is plainly wrong.

For over twenty years, ever since *Florida Power & Light Co. v. Lorion,* 470 U.S. 729 (1985), it has been well settled that the Hobbs Act, including its sixty-day appeal window, governs "review of *all* final [NRC] orders in licensing proceedings whether or not a hearing before the Commission occurred *or could have occurred.*" *Id.* at 737 (emphasis added). It does not matter whether the final order emanates from "full-blown Commission licensing proceedings" or "summary proceedings" – review lies in the Court of Appeals under the Hobbs Act. In fact, this Court recently endorsed our understanding of *Lorion* in *Riverkeeper, Inc. v. Collins,* 359 F.3d 156, 164 (2d Cir. 2004), finding that it had jurisdiction to review an NRC Director's denial of a §2.206 citizen's petition, *even though the denial was not an order in a hearing case.* Because the Hobbs Act applies, and allows 60 days to appeal, petitioners are late.

The Attorney General does not challenge our observation that the NRC has no rule or practice authorizing a motion to "reopen" or "reconsider" a Commission decision in non-hearing cases, but argues that a hearing request "should" have a tolling effect (Amicus Br. 15). New York cannot rewrite the tolling principles of *ICC v. Locomotive Engineers,* 482 U.S. 270, 284 (1987), which allows tolling only if there is a timely reconsideration motion under established agency procedures. While the NRC agrees that petitioner's challenge to the Commission's denial of hearing is timely, reviewing the grant of the exemption itself is an entirely separate matter. Final agency action granting the exemption was effective on October 4, 2007, *not* when the Commission denied petitioners' hearing request months later. [2]

The remainder of New York's amicus boils down to an *ipse dixit* that exemptions deny hearing rights, assuming, with circular logic, that every NRC proceeding entails the right to a hearing. For example, the Attorney General suggests that the NRC has "deprived petitioners . . . of the process to which they are entitled." Amicus Br. 17. The Attorney General has simply assumed the result

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[2] The Attorney General's citation to 10 C.F.R. § 2.309(b)(3)(iii) is inapposite, as that provision relates solely to NRC actions for which a hearing may be requested. As noted in our earlier briefs, the NRC does not offer an opportunity for hearing for exemptions, nor is it required to do so under Section 189 of the Act.

he seeks. Yet, as the Supreme Court has recognized, the NRC can and does take action in some cases where "a hearing before the Commission . . . *could [not] have occurred.*" *Lorion,* 470 U.S. at 837 (emphasis added).

Further, New York's attempt to distinguish judicial precedent authorizing exemptions without hearings must fail because it would limit 10 C.F.R. § 50.12, the NRC regulation authorizing exemptions, to "temporary" exemptions under subsection (a)(2)(v) and eviscerate the remaining subsections, which plainly contemplate permanent exemptions under specified circumstances. In any event, as the Sixth Circuit has held unequivocally, and directly contrary to New York's view, "the grant of an exemption from a generic requirement *does not constitute an amendment to the reactor's license* that would trigger hearing rights." *Kelley v. Selin,* 42 F.3d 1501, 1517 (6th Cir. 1995)(emphasis added).

Respectfully submitted,

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ANTI-VIRUS CERTIFICATION FORM

See Second Circuit Interim Local Rule 25(a)6.

CASE NAME: Brodsky v. U.S. Nuclear Regulatory Commission

DOCKET NUMBER: 08-1454-ag

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CERTIFICATE OF SERVICE

I hereby certify that I have on this 2nd day of July 2008 served upon the following, by deposit in the United States Mail, first class, postage prepaid, and by electronic transmission, a copy of Respondents' Response to State of New York's Motion for Leave to File an Amicus Memorandum of Law:

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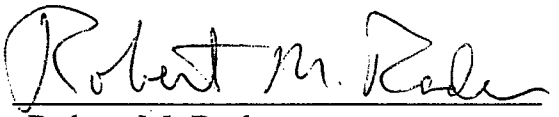

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