



THE ASSEMBLY
STATE OF NEW YORK
ALBANY

RICHARD L. BROESKY
Assemblyman 92nd District
Westchester County

CHAIRMAN
Committee on
Corporations, Authorities
and Communities

August 25, 2008

Clerk's Office
United States Court of Appeals
for the Second Circuit
United States Court House
500 Pearl Street
New York, New York 10007

Dear Clerks:

Enclosed please the original and four copies of Petitioners' Reply to the Intervenor, Entergy's Nuclear Operations, Inc.'s, Answer to Petitioners' Motion to Correct and Supplement the Record on Review and the Anti-Virus Certification.

Thank you for your assistance in this matter.

Respectfully submitted,

RICHARD L. BROESKY

CC: Robert Rader, Esq. U.S.
Michael Wallace, Esq.
Ellen Durkee, Esq.
John Sipes, Esq.

RICHARD L. BRODSKY, et al.,

Petitioners,

**PETITIONERS' REPLY TO THE
INTERVENORS ANSWER**

against

U.S. NUCLEAR REGULATORY COMMISSION,

Respondent,

Docket No. 08-1454-AG

and

ENTERGY NUCLEAR OPERATIONS, INC.,

Intervenor.

**I. ENTERGY'S STATEMENT THAT PETITIONERS DID NOT ASSERT
THE NEED FOR SOUGHT DOCUMENTS IS FALSE.**

Entergy Nuclear Operations, Inc. (hereinafter "Entergy") falsely asserts that Petitioners "... do not claim that a single document '*might have influenced*' the denial of their petition." Brief of Intervenor Entergy Nuclear Operations, Inc. in Opposition to Motion to Supplement and Correct the Record dated August 13, 2008 at p. 3 (hereinafter "Entergy brief"). In fact, Petitioners in their papers repeatedly state that the documents are relevant, material, probative, and might have influenced the NRC decisions, as required by Rule 16.

Petitioners request that the NRC be ordered to include all relevant and probative documents in their possession, including but not limited to the following documents specifically requested by Petitioners as part of the Record on Review because they are directly related to the NRC decisions, *might have influenced* the decisions, and/or the NRC failed to consider these documents, materials, and facts... (emphasis added) Petitioners' Motion at p. 7; see also, Appendix D to the Affidavit of Richard Brodsky, Esq.

Petitioners assert the existence of specific documents in the possession

of the NRC that are relevant and material to these matters that influenced or *might have influenced* the NRC decisions to grant the exemption and reject the December 3, 2008 Petition to the NRC. These omitted documents will show that the NRC ignored important facts, did not have evidence sufficient to justify its decision, and/or that the balance of the evidence did not support its conclusion. A list of specific documents and the relevance to particular issues is attached to the Affidavit of Richard Brodsky, Esq. as Appendix D. (emphasis added) Petitioners' Memorandum of Law at p. 4.

The specific documents sought by Petitioners are directly related to the NRC decision. They meet and surpass the requirement that they "*might have influenced*" the decision, are direct evidence of the public health and safety consequences of the NRC action, the level of secrecy used, the decision to exclude the public from notice and participation procedures, and the failure to consider facts, documents, and analyses that are required by law and regulation. A list of the documents Petitioners seek to have included in the Record on Review with brief summaries of their relevance and probative value is attached as Appendix D to Brodsky Aff. (emphasis added) Petitioners' Memorandum at p. 12.

II. PETITIONERS HAVE MET THE REQUIREMENTS FOR STANDING.

A. Petitioners assert violations of numerous laws and regulations including but not limited to the Hobbs Act.

Entergy argues that Petitioners do not have standing under the Hobbs Act insofar as "they were not party to Entergy's exemption proceeding, they lack standing to challenge that exemption proceeding..."¹ Entergy brief at pp. 7.

Petitioners have repeatedly asserted in their papers that the Nuclear Regulatory Commission has violated several laws and regulations, including but not limited to, the Hobbs Act. "Petitioners are not 'Hobbs Act petitioner[s]'", as

¹ Entergy does not raise standing issues with respect to the denial of the Petition to the NRC, only

suggested by the Respondent. Respondent Answer at p. 18. Petitioners allege that the NRC acted arbitrarily, abused its discretion, and violated the Atomic Energy Act, the Energy Policy Act of 2005, the Administrative Procedures Act, the National Environmental Policy Act, and other applicable laws and regulations, including but not limited to the Hobbs Act. Petition for Review at p. 3.

Petitioners' Reply dated August 20, 2008 at p. 9. Entergy's attempt to say limit standing to a Hobbs Act analysis is a fundamental misstatement of the Petitioners' position.

B. Petitioners have standing under the Hobbs Act to challenge the exemption.

Petitioners have standing under the Hobbs Act in that such standing limitations apply only to NRC proceedings in which the Petitioners had the ability to seek party status.

In this case, the NRC secretly, without public notice, without an opportunity for public comment, and without the opportunity for Petitioners to be given party status, granted the "exemption." To bar this Petition for direct review because Petitioners were not a party to a proceeding in which by NRC definition it could not join, would be to exalt literalism over common sense; indeed, to bar such review would create dangerous precedent, for it would grant agencies power to remove [exemptions] from direct review by simply [granting] them without notice to the NRC granting the exemption.

and comment.” *Natural Resources Defense Council v. Nuclear Regulatory Com.*, 666 F.2d 595 (App. D.C. 1981);² *Comm. of Mass. v. U.S. Nuclear Regulatory Com.*, 878 F.2d 1516 (1st Cir. 1989). If it is determined that the right to intervene was improperly denied³, then a Court of Appeals may order the Commission to permit intervention and reopen the prior order for reconsideration. *Amer. Trucking Assos. v. Interstate Commerce Com.*, 673 F.2d 82 (5th Cir. 1982), cert den (1983) 460 U.S. 1022.

Petitioners have been aggrieved by both the order granting the exemption and the agency decision denying their Petition. The exemption was adopted secretly and illegally without notice or comment. Because Petitioners filed with this Court a Petition for Review of this order within sixty days of the denial of their Petition to the NRC, and because its Petition raised before the Nuclear Regulatory Commission the decision granting the exemption, the Court has jurisdiction to hear Petitioners’ complaint.

Entergy’s reasoning is circular. Entergy contends that because the Nuclear Regulatory Commission acted in secret without public notice and the opportunity

² The present case is distinguishable from *Erie-Niagara Rail Steering Comm. v. Surface Transp. Bd.*, 167 F.3d 111 (2d Cir. 1999). In *Erie*, the petitioners could have been a party to the proceeding.

Riverkeeper v. Collins, 359 F.3d 156 (2d Cir. 2004) does not stand for the proposition stated by Entergy. Entergy brief at p. 5-6. The Second Circuit Court of Appeals held in *Riverkeeper v. Collins*, that the Court did not have jurisdiction to hear the case, but does not discuss whether Riverkeeper had standing. 359 F.3d at 171.

³ Those who would intervene but are denied permission to do so are not without remedies: they may take immediate appeal from that denial within agency and, if necessary, to Court of Appeals.

for public comment in violation of laws and regulations. Petitioners are not an aggrieved party and the Court is precluded from ruling on the resulting decision. Entergy brief at pp. 4-7. Several cases including *Florida Power and Light Company v. Lorion*, 470 U.S. 729, 737 (1985), conclude that even if there was no hearing, the Court can review the agency's final orders. *See also, Riverkeeper v. Collins*, 359 F.3d 156, 164 (2d. Cir. 2004). Here, Petitioners challenge the unlawful decision by the Nuclear Regulatory Commission to grant the "exemption" and the decision denying Petitioners' request for reconsideration and a hearing.⁴

It should be noted that the issue of whether the Court has jurisdiction⁵, in response to Respondents Motion to Dismiss, has previously been referred to the merits panel.⁶

⁴ For further discussion, Petitioners refer the Court to Petitioners' Reply to the Motion to Dismiss dated May 28, 2008, Argument Section 1 at pp. 7-10.

⁵ Entergy brief at p. 4

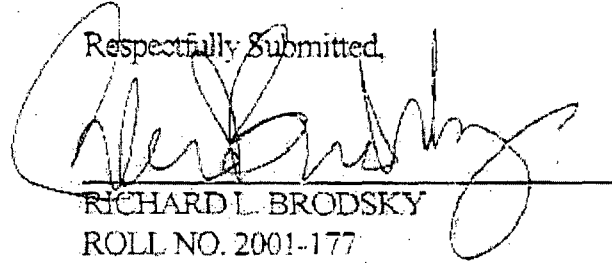
⁶ U.S. Court of Appeal for the Second Circuit Decision July 7, 2008.

CONCLUSION

Based on the foregoing, Petitioners move this Court for an order compelling the Respondent to correct the Record.

Dated: August 25, 2008
Albany, New York

Respectfully Submitted,



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ANTI-VIRUS CERTIFICATION FORM

See Second Circuit Injunctive Local Rule 25(a)(6)

CASE NAME: Swadlow et al v E.S. Nielsen, Reg. Comm'r

DOCKET NUMBER: 08-1454-RR

I, (please print your name) Richard L. Profsky, certify that:

I have scanned for viruses the PDF version of the attached document that was submitted in this case as
an email attachment to <scandocases@ca2.uscourts.gov>

<criminalcases@ca2.uscourts.gov>

<civilcases@ca2.uscourts.gov>

<nowcases@ca2.uscourts.gov>

<otroscases@ca2.uscourts.gov>

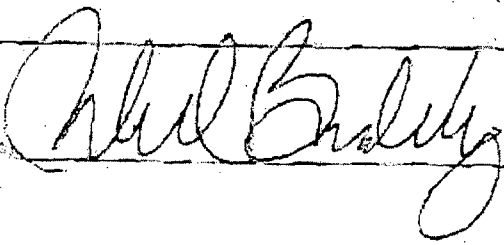
and that no viruses were detected.

Please print the name and the version of the anti-virus detector that you used _____

Symantec 7.5

If you know, please print the version of revision and/or the anti-virus signature files _____

(Your Signature)



Date: August 25, 2008