

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term 2008

(Argued: May 11, 2009 Decided: August 27, 2009)

Docket No. 08-1454-ag

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RICHARD L. BRODSKY, New York State Assemblyman, from
the 92nd Assembly District in his official and
individual capacities, WESTCHESTER CITIZEN'S
AWARENESS NETWORK (WESTCAN), ROCKLAND COUNTY
CONSERVATION ASSOCIATION, INC. (RCCA), PUBLIC HEALTH
AND SUSTAINABLE ENERGY (PHASE), and SIERRA CLUB -
ATLANTIC CHAPTER (SIERRA CLUB),

Petitioners,

-- v. --

U.S. NUCLEAR REGULATORY COMMISSION,

Respondent,

ENTERGY NUCLEAR OPERATIONS, INC.,

Intervenor.

-----x

B e f o r e : WALKER and WALLACE,* Circuit Judges.**

Pursuant to the Hobbs Act, Petitioners seek review of a
final order of the U.S. Nuclear Regulatory Commission, granting

* The Honorable J. Clifford Wallace, of the United States Court of Appeals
for the Ninth Circuit, sitting by designation.

** The Honorable Sonia Sotomayor, originally a member of the panel, was
elevated to the Supreme Court on August 8, 2009. The two remaining members of
the panel, who are in agreement, have determined the matter. See 28 U.S.C.
§ 46(d); Local Rule 0.14(2); United States v. Desimone, 140 F.3d 457 (2d Cir.
1998).

1 an exemption from certain fire safety regulations to Entergy
2 Nuclear Operations, Inc., the operator of Indian Point nuclear
3 power plant in Buchanan, NY. We hold that we lack jurisdiction
4 under the Hobbs Act to review exemptions. We also conclude that
5 the order being challenged is indeed an exemption, and not
6 actually an amendment or other order covered by the Hobbs Act.

7 DISMISSED without prejudice for want of jurisdiction.

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9 NY, for Petitioners.

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6 State.
7

8 JOHN M. WALKER, JR., Circuit Judge:

9 This case tests the limits of our jurisdiction under the
10 Hobbs Act to review orders of the U.S. Nuclear Regulatory
11 Commission ("NRC" or "Commission"). The NRC is the federal
12 agency that licenses and regulates all nuclear power plants in
13 the United States, including the Indian Point Energy Center
14 ("Indian Point") in Buchanan, NY, operated by Entergy Nuclear
15 Operations, Inc. ("Entergy"). The Atomic Energy Act ("AEA"),
16 which gives the NRC its authority, requires the Commission to
17 hold hearings before taking certain actions, such as granting or
18 amending a license. Petitioners Richard Brodsky et al. contend
19 that the NRC violated this hearing requirement when granting
20 Indian Point an exemption from a fire safety regulation with
21 which it was out of compliance. Petitioners also argue that,
22 apart from the hearing requirement, the exemption is an invalid
23 exercise of the NRC's authority.

24 Petitioners filed their action in this court pursuant to the
25 Hobbs Act, which vests the courts of appeals with exclusive
26 jurisdiction over NRC orders made reviewable by the AEA. We
27 hold, however, that the Hobbs Act does not give us jurisdiction

1 over NRC exemptions. We also conclude that the order being
2 challenged by Petitioners is indeed an exemption, and not an
3 amendment or other type of NRC order within the ambit of the
4 Hobbs Act. Accordingly, we dismiss the petition without
5 prejudice for lack of jurisdiction.

6 **BACKGROUND**

7 Indian Point, like all nuclear power plants, is licensed and
8 regulated by the NRC, pursuant to the AEA. The AEA requires
9 that, when granting a license, the NRC determine that a plant's
10 operation is "in accord with the common defense and security and
11 will provide adequate protection to the health and safety of the
12 public." 42 U.S.C. § 2232(a). Under the AEA, "all licenses
13 shall be subject to amendment, revision, or modification . . . by
14 reason of rules and regulations issued [by the NRC] in accordance
15 with [the Act]." Id. § 2237.

16 The AEA also mandates that the NRC hold hearings, if
17 requested, when taking certain license-related actions:

18 In any proceeding . . . for the granting, suspending,
19 revoking, or amending of any license[,]. . . the Commission
20 shall grant a hearing upon the request of any person whose
21 interest may be affected by the proceeding, and shall admit
22 any such person as a party to such proceeding.
23

24 Id. § 2239(a)(1)(A). Additionally, the NRC has promulgated
25 regulations requiring a public notice-and-comment period to
26 precede any amendments to a license. See 10 C.F.R. § 50.91(a).

27 NRC regulations also permit the agency to grant "exemptions

1 from the requirements of the regulations," as long as (1) the
2 exemptions are "[a]uthorized by law, will not present an undue
3 risk to the public health and safety, and are consistent with the
4 common defense and security," and (2) "special circumstances are
5 present." 10 C.F.R. § 50.12(a). The regulations set out six
6 potential "special circumstances," any of which can justify an
7 exemption. See id. § 50.12(a)(2)(i)-(vi).¹ The regulations do
8 not require the NRC to hold hearings for exemptions.

9 In 1980, the NRC adopted fire safety regulations in response
10 to a nearly catastrophic fire five years earlier at the Browns
11 Ferry power plant. The regulations, inter alia, required nuclear
12 plants to use fire barriers to protect the electrical cables that

1 ¹ Special circumstances are "present whenever":

2
3 (i) Application of the regulation in the particular circumstances
4 conflicts with other rules or requirements of the Commission; or

5
6 (ii) Application of the regulation in the particular circumstances would
7 not serve the underlying purpose of the rule or is not necessary to
8 achieve the underlying purpose of the rule; or

9
10 (iii) Compliance would result in undue hardship or other costs that are
11 significantly in excess of those contemplated when the regulation was
12 adopted, or that are significantly in excess of those incurred by others
13 similarly situated; or

14
15 (iv) The exemption would result in benefit to the public health and
16 safety that compensates for any decrease in safety that may result from
17 the grant of the exemption; or

18
19 (v) The exemption would provide only temporary relief from the
20 applicable regulation and the licensee or applicant has made good faith
21 efforts to comply with the regulation; or

22
23 (vi) There is present any other material circumstance not considered
24 when the regulation was adopted for which it would be in the public
25 interest to grant an exemption.

26
27 10 C.F.R. § 50.12(a)(2).

1 power the plants' shutdown systems. See Fire Protection Program
2 for Operating Nuclear Power Plants, 45 Fed. Reg. 76,602, 76,608
3 (Nov. 19, 1980). By shielding these electrical systems, the
4 barriers would improve a plant's ability to shut down its
5 reactors safely after a fire had started. The regulations
6 mandated that the barriers should be able to withstand a fire for
7 at least one hour, and longer if the plant does not have
8 automatic sprinklers installed. See id.

9 In 1984, the NRC granted Indian Point several exemptions
10 from compliance with certain of the fire protection program's
11 requirements. In doing so, the agency noted that the plant was
12 using a popular fire barrier called Hemyc, which was rated for
13 one hour of protection. However, in 2005, the NRC discovered
14 that Hemyc, despite its one-hour rating, could actually withstand
15 a fire for only 27 to 49 minutes. The agency required Indian
16 Point and all other licensees "to confirm compliance with the
17 existing applicable regulatory requirements in light of" this
18 newfound problem. Licensees were directed to "implement
19 appropriate compensatory measures and develop plans to resolve
20 any nonconformances." The NRC asked for a response from each
21 licensee so that it could "determine whether a facility license
22 should be modified, suspended, or revoked, or whether other
23 action should be taken."

24 In June 2006, Entergy alerted the NRC to potentially

1 noncompliant Hemyc barriers at Indian Point. Entergy stated that
2 it could not meet NRC standards, but that it had implemented
3 hourly "fire watch tours" and other compensatory measures.
4 Entergy asked the NRC to issue Indian Point a revised exemption
5 to reflect a thirty-minute fire resistance rating, in lieu of the
6 one-hour rating, for two "[f]ire [a]reas" at the plant. In
7 August 2007, Entergy amended its request to ask that one of the
8 two fire areas be rated for 24 minutes.

9 On September 24, 2007, pursuant to the National
10 Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321-4347, the
11 NRC issued an environmental assessment ("EA") finding that
12 Entergy's requested exemption would not significantly impact the
13 environment. Four days later, the NRC granted the revised
14 exemption, which was published in the Federal Register on October
15 4, 2007. Revision to Existing Exemptions, 72 Fed. Reg. 56,798
16 (Oct. 4, 2007). In approving Entergy's request, the agency
17 explained that, "given the existing fire protection features in
18 the affected fire zones, [Entergy] continues to meet the
19 underlying purpose" of the fire protection program. Id. at
20 56,799.

21 On December 3, 2007, Petitioners wrote to the NRC objecting
22 to the agency's "grant of an exemption . . . in an amendment" to
23 the Indian Point license. Petitioners asked the agency to reopen
24 the matter, grant them leave to intervene, and hold a public

1 hearing. The NRC responded on January 30, 2008, treating the
2 petition solely as a request for a hearing. The agency explained
3 that Petitioners were "challenging . . . an exemption from NRC
4 regulations[,] . . . not a license amendment as asserted in [the]
5 petition." The agency stated that the AEA "does not provide for
6 hearings on exemptions from NRC regulations" and denied the
7 request.

8 On March 27, 2008, Petitioners filed the instant petition in
9 this court, seeking review of the NRC's order denying their
10 December 3 petition. Petitioners contend that the September 28
11 exemption "fails, among other things, to provide reasonable
12 assurance of adequate protection of the health and safety of the
13 public as required by law under the [AEA]." The petition also
14 argues that the NRC violated the AEA, NEPA, Administrative
15 Procedures Act ("APA"), and various regulations by granting the
16 exemption, and that the agency acted arbitrarily and abused its
17 discretion in granting the exemption. Petitioners request that
18 we vacate the exemption and remand for a public hearing on the
19 matter.

20 The NRC moved to dismiss the petition, arguing that
21 Petitioners' challenges to the September 28 exemption were
22 untimely, and that the agency's January 30 order should be
23 summarily affirmed because exemptions do not warrant hearings
24 under NRC regulations. A previous panel of this court referred

1 the motion to us. See Brodsky v. U.S. Nuclear Regulatory Comm'n,
2 No. 08-1454-ag (2d Cir. July 7, 2008). We reserved decision on
3 that and two other motions.

4 DISCUSSION

5 I. Whether We Have Jurisdiction Over Exemptions

6 Pursuant to the Hobbs Act, Petitioners have challenged the
7 NRC's actions directly in this court without first filing in a
8 district court. The Act gives the courts of appeals "exclusive
9 jurisdiction to enjoin, set aside, suspend (in whole or in part),
10 or to determine the validity of . . . all final orders of the
11 [NRC] made reviewable by section 2239 of title 42." 28 U.S.C. §
12 2342(4).² Section 2239, in turn, makes reviewable "[a]ny final
13 order entered in any proceeding of the kind specified in [§
14 2239(a)]." 42 U.S.C. § 2239(b)(1). And § 2239(a), in relevant
15 part, encompasses "any proceeding . . . for the granting,
16 suspending, revoking, or amending of any license." In defining
17 the scope of our jurisdiction under the Hobbs Act, § 2239(a) does
18 not mention exemptions.

19 The NRC contends that the Hobbs Act should nonetheless apply
20 to exemptions because of the Supreme Court's decision in Florida
21 Power & Light Co. v. Lorion, 470 U.S. 729 (1985). Lorion sheds

1 ² The Hobbs Act actually refers to the Atomic Energy Commission ("AEC"),
2 not the NRC, but the AEC has been abolished. 42 U.S.C. § 5814. The AEC's
3 functions (including licensing) have largely been transferred to the NRC, and
4 NRC orders entered pursuant to those functions are reviewable as if entered by
5 the AEC. See 42 U.S.C. §§ 5841(f), 5871(g); Gen. Atomics v. U.S. Nuclear
6 Regulatory Comm'n, 75 F.3d 536, 538 n.2 (9th Cir. 1996).

1 light on how § 2239(a) operates. Section 2239(a) serves multiple
2 ends: In addition to establishing Hobbs Act jurisdiction in the
3 courts of appeals, it also dictates when the NRC must hold
4 hearings. 42 U.S.C. § 2239(a)(1)(A). These two purposes may or
5 may not coexist in particular instances. For example, with
6 respect to license amendments, § 2239(a) gives the courts of
7 appeals the exclusive jurisdiction to review an amendment and
8 simultaneously compels the NRC to hold a hearing (if requested)
9 before issuing an amendment. See id. Lorion tells us, however,
10 that the jurisdictional element and hearing requirement of
11 § 2239(a) are not coextensive, because we have Hobbs Act
12 jurisdiction over "all final orders in licensing proceedings
13 whether or not a hearing before the Commission occurred or could
14 have occurred."³ Lorion, 470 U.S. at 737. The NRC argues that
15 this distinction between § 2239(a)'s two elements establishes
16 that we have Hobbs Act jurisdiction over exemptions even though,
17 under § 2239(a), exemptions do not require hearings. We
18 disagree.

19 In separating § 2239(a)'s hearing requirement from the
20 provision's jurisdictional component, Lorion did not alter the
21 basis for jurisdiction pursuant to that section: we have
22 jurisdiction over only an appeal from an order "issued in a

1 ³ For instance, the Lorion Court noted that we have Hobbs Act jurisdiction
2 over final orders in summary proceedings and informal NRC rulemaking, even
3 though hearings may be unavailable with respect to each. See 470 U.S. at 742
4 & n.10.

1 'proceeding . . . for the granting, suspending, revoking, or
2 amending of any license.'" Id. at 735 (quoting 42 U.S.C. §
3 2239(a)(1)) (ellipsis in original). The Supreme Court has
4 commanded "strict fidelity to the[] terms" of judicial review
5 provisions that create jurisdiction, such as those contained in
6 the Hobbs Act. Stone v. INS, 514 U.S. 386, 405 (1995). The
7 plain text of § 2239(a) does not confer appellate jurisdiction
8 over final orders issued in proceedings involving exemptions,
9 irrespective of any hearing requirement.

10 Lorion's facts are instructive on this point. Lorion
11 specifically held that the Hobbs Act gives the courts of appeals
12 exclusive jurisdiction to review the NRC's denial of a citizen
13 petition without a hearing. Id. at 746. The NRC suggests that
14 the Hobbs Act similarly applies to an appeal from a final order
15 granting an exemption without a hearing. But a citizen petition
16 is a "request to institute a proceeding . . . to modify, suspend,
17 or revoke a license." 10 C.F.R. § 2.206(a) (emphasis added).
18 The petition is "but the first step in a process that will, if
19 not terminated for any reason, culminate in a full formal
20 proceeding under 42 U.S.C. § 2239(a)(1)." Lorion, 470 U.S. at
21 745 n.11.

22 In contrast, the NRC contends that an exemption is distinct
23 from "the granting, suspending, revoking, or amending" of a
24 license. We think this is a reasonable interpretation of the

1 Hobbs Act, and one that deserves deference. See Chevron U.S.A.,
2 Inc. v. Natural Resources Def. Council, Inc., 467 U.S. 837
3 (1984). The NRC takes this stance to avoid having to hold
4 hearings for exemptions; but by asserting that exemptions are
5 different from amendments, a position to which we defer, the NRC
6 necessarily deprives us of the ability to review exemptions
7 pursuant to § 2239(a).

8 There are, of course, policy advantages in finding Hobbs Act
9 jurisdiction over exemptions. Placing initial review of agency
10 action in the courts of appeals improves judicial efficiency.
11 "The factfinding capacity of the district court is . . .
12 typically unnecessary to judicial review of agency
13 decisionmaking," and thus proceeding in the district court often
14 adds an unneeded layer of review. Lorion, 470 U.S. at 744-45.
15 These advantages led the Lorion Court to hold that, "[a]bsent a
16 firm indication that Congress intended to locate initial APA
17 review of agency action in the district courts, we will not
18 presume that Congress intended to depart from the sound policy of
19 placing initial APA review in the courts of appeals." Id. at
20 745. The First Circuit gave this policy "special weight" when
21 finding that it had Hobbs Act jurisdiction to review NRC rules
22 that, as a textual matter, "appear[ed] to fall outside" the Act.
23 Citizens Awareness Network, Inc. v. United States, 391 F.3d 338,
24 346-47 (1st Cir. 2004). But ultimately, policies alone are not

1 dispositive. “Whether initial subject-matter jurisdiction lies
2 initially in the courts of appeals must of course be governed by
3 the intent of Congress and not by any views we may have about
4 sound policy.” Lorion, 470 U.S. at 746.

5 “[T]he plain language of the enacted text is the best
6 indicator of intent.” Nixon v. United States, 506 U.S. 224, 232
7 (1993). Indeed, when the First Circuit broadly construed its
8 Hobbs Act jurisdiction in light of the Lorion policies, the
9 statutory text still constrained the court to hold that it could
10 “review any NRC action that could be cognizable in a petition for
11 review from a proceeding under section 2239.” Citizens Awareness
12 Network, 391 F.3d at 347 (emphasis added). Here, we cannot read
13 exemptions into the plain text of § 2239(a), particularly when
14 the NRC itself (to which deference is owed) is urging that
15 exemptions are different from “amending . . . [a] license” and
16 the other orders mentioned in that section. See, e.g., Resp’t’s
17 Mot. to Dismiss at 7 (“An exemption is not a licensing action or
18 rulemaking.”); Resp’t’s Br. at 39 (“License amendments and post-
19 licensing exemptions are entirely distinct and serve distinct
20 purposes under NRC’s regulatory scheme”). Moreover, the
21 NRC’s exemption program has been on the books in some form since
22 1956, see 21 Fed. Reg. 356 (Jan. 19, 1956), and Congress has
23 amended § 2239(a) since then, see Energy Policy Act of 1992, Pub.
24 L. 102-486, 106 Stat. 2776, 3120, but has never included

1 exemptions in the statute's text. This reinforces our view,
2 evident from the text, that Congress intended to have exemptions
3 treated differently from the orders mentioned in § 2239(a).

4 The NRC points out that the First and Sixth Circuits have
5 each reviewed an exemption under the Hobbs Act. In both cases,
6 however, other orders plainly within § 2239(a)'s scope were also
7 being challenged. In Commonwealth of Massachusetts v. U.S.
8 Nuclear Regulatory Commission, 878 F.2d 1516 (1st Cir. 1989), the
9 petitioners appealed not only an NRC exemption, but also a
10 citizen petition denial (the subject of Lorion) and a decision
11 allowing a previously shutdown plant to resume operations. Id.
12 at 1519-20. Similarly, Kelley v. Selin, 42 F.3d 1501 (6th Cir.
13 1995), concerned several NRC orders, only one of which was an
14 exemption. Id. at 1503-04. Neither case explained how or why
15 exemptions fall under the Hobbs Act. It is possible that the
16 issue was not squarely presented to those courts, which
17 frequently occurs when parties prefer that the court decide an
18 issue despite its potential jurisdictional infirmity, especially
19 when the problem is relevant to only part of the appeal. It is
20 also possible that the two courts assumed some type of
21 supplemental jurisdiction over the exemption, in light of their
22 undisputed Hobbs Act jurisdiction over the other orders at issue.
23 See Conoco, Inc. v. Skinner, 970 F.2d 1206, 1214 n.10 (3d Cir.
24 1992) ("As long as this court has jurisdiction over one of the

1 challenged regulations, the interests of judicial economy and
2 efficiency allow us to hear the entire matter."). Regardless, to
3 the extent that Commonwealth of Massachusetts and Kelley are
4 inconsistent with our jurisdictional analysis, we decline to
5 follow them.

6 We therefore hold that we lack jurisdiction under the Hobbs
7 Act to review an NRC exemption. In the absence of jurisdiction,
8 we lack the authority to review not only an NRC order that issues
9 an exemption, but also any orders "preliminary or ancillary" to
10 an exemption, such as a denial of a hearing request. Lorion, 470
11 U.S. at 743 ("[R]eview of orders resolving issues preliminary or
12 ancillary to the core issue in a proceeding should be reviewed in
13 the same forum as the final order resolving the core issue.").
14 But our inquiry does not end there, because we lack jurisdiction
15 in this case only if the challenged NRC order is indeed an
16 exemption and not an amendment or otherwise within the purview of
17 § 2239, an issue to which we now turn.

18 **II. Whether the NRC's Order is an Exemption**

19 Whether the challenged order is an exemption, as the NRC has
20 labeled it and thus beyond our jurisdiction, or is properly
21 regarded as an amendment and within our Hobbs Act jurisdiction,
22 is itself an issue that is within our jurisdiction. See Estate
23 of Pew v. Cardarelli, 527 F.3d 25, 28 (2d Cir. 2008) ("As always,
24 we have jurisdiction to determine our jurisdiction.").

1 "The particular label placed upon [an order] by [an agency]
2 is not necessarily conclusive, for it is the substance of what
3 the [agency] has purported to do and has done which is decisive."
4 Columbia Broad. Sys., Inc. v. United States, 316 U.S. 407, 416
5 (1942). Still, the NRC's labels, though not dispositive, deserve
6 deference when those labels are reasonable. The NRC, in deciding
7 whether to treat an order as an exemption, applies its
8 regulations governing when exemptions can be granted. See 10
9 C.F.R. § 50.12. An agency's application of its own regulations
10 is "controlling unless plainly erroneous or inconsistent with the
11 regulation[s]." Auer v. Robbins, 519 U.S. 452, 461 (1997)
12 (internal quotation marks omitted); see also Fed. Express Corp.
13 v. Holowecki, 128 S. Ct. 1147, 1155 (2008) ("[T]he agency is
14 entitled to . . . deference when it adopts a reasonable
15 interpretation of regulations it has put in force."). We serve
16 as an important check on the agency's decisionmaking process, but
17 ultimately the agency's judgment, if reasonable, must prevail.

18 Here, we think the NRC reasonably applied its regulations
19 when it classified the relief granted to Indian Point as an
20 exemption.⁴ Consistent with 10 C.F.R. § 50.12, the agency
21 concluded that treating the challenged order as an exemption was
22 authorized by law, presented no undue risk to public health and

1 ⁴ We assume without deciding that the regulations themselves are valid.
2 Although the parties contest the issue, our lack of jurisdiction precludes us
3 from resolving it.

1 safety, and was consistent with the common defense and security.
2 As required by 10 C.F.R. § 50.12, the NRC also found that
3 "special circumstances" justified this exemption: specifically,
4 that "the underlying purpose" of the fire safety rule would still
5 be satisfied after the modification. See 10 C.F.R.
6 § 50.12(a)(2)(ii). Although it appears that the NRC could have
7 alternatively treated the order as an amendment to Indian Point's
8 license, the Commission applied its regulations reasonably in
9 opting instead to grant Indian Point an exemption.

10 Neither Petitioners nor amicus curiae New York State have
11 persuaded us otherwise. Petitioners argue that this exemption
12 should be deemed an amendment because it is permanent, noting
13 that the First Circuit found that the exemption at issue in
14 Commonwealth of Massachusetts did "not amount to a license
15 amendment" because it had only "temporarily exempted the
16 licensee" from a rule. 878 F.2d at 1521. But the NRC had
17 granted that exemption pursuant to 10 C.F.R. § 50.12(a)(2)(v),
18 which allows exemptions providing "temporary relief from the
19 applicable regulation." 878 F.2d at 1521 & n.7. In citing the
20 temporary nature of the exemption before it, the First Circuit
21 confirmed that the NRC had applied its regulations reasonably,
22 but did not announce a general standard for distinguishing
23 exemptions from amendments. Nor would such a standard comport
24 with the NRC regulations: a requirement that exemptions must be

1 temporary would conflict with the five "special circumstances"
2 that allow for exemptions even if the relief is permanent. See
3 10 C.F.R. § 50.12(a)(2)(i)-(iv), (vi); supra note 1.

4 We also reject New York State's position that a
5 modification, purported to be an exemption, should be treated as
6 an amendment if it relaxes a safety standard. The State's
7 position may or may not be sound policy, but it lacks a basis in
8 law.⁵

9 Petitioners' claim that the NRC requires hearings for
10 exemptions involving "material questions directly related to an
11 agency's licensing action" is also unavailing. Pet'rs' Reply Br.
12 at 19. Petitioners rely solely on In re Private Fuel Storage,
13 L.L.C., 53 N.R.C. 459 (2001), to demonstrate this alleged NRC
14 practice, but Private Fuel Storage concerned the unrelated issue
15 of whether claims normally appropriate for an exemption, and thus
16 not warranting a hearing, nonetheless can be included in an
17 ongoing licensing hearing. Id. at 461, 466. Here, there is no
18 such hearing.

19 In sum, none of the standards offered by Petitioners and the
20 State for deciding when to treat exemptions as amendments

1 ⁵ The State relies on Bellotti v. U.S. Nuclear Regulatory Commission, 725
2 F.2d 1380 (D.C. Cir. 1983), to support its position, noting that Bellotti held
3 that "automatic participation at a hearing may be denied only when the
4 Commission is seeking to make a facility's operation safer." Id. at 1383.
5 However, Bellotti concerned the different question of whether the
6 Massachusetts Attorney General could intervene in the statutorily required
7 hearing for an amendment, see id. at 1381-82, and is therefore inapposite.

1 withstand scrutiny. More importantly, none of their proffered
2 distinctions between exemptions and amendments establish that the
3 NRC acted unreasonably in considering the modification at issue
4 in this case to be an exemption.

5 We recognize that, under the NRC regulations, little appears
6 to distinguish an exemption from an amendment. But as long as
7 the NRC has applied its regulations reasonably, we will not
8 displace the agency's judgment with our own as to whether an
9 exemption or amendment is warranted. Accordingly, we defer to
10 the NRC's classification in this case and hold that the
11 modification order that the Commission granted to Entergy and
12 labeled an exemption is indeed an exemption. Petitioners
13 challenge only that exemption in this appeal. Because we lack
14 jurisdiction under the Hobbs Act over exemptions, we must dismiss
15 the petition.

16 Finally, because we lack jurisdiction, we also express no
17 opinion as to whether the NRC's hearing denial was proper,
18 whether the exemption at issue is arbitrary and capricious, or
19 the other issues raised by Petitioners. We hold only that
20 Petitioners are indeed challenging an exemption, and that
21 exemptions cannot be reviewed under the Hobbs Act.⁶

1 ⁶ We note that our holding does not necessarily shut off every avenue
2 Petitioners may have at their disposal for relief. Petitioners are free to
3 seek review in the district court of the NRC's actions pursuant to the APA.
4 See Sharkey v. Quarantillo, 541 F.3d 75, 84 (2d Cir. 2008) ("[A] suit that
5 arises under the APA is properly brought in district court.").

1

2

3

4