IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NEW JERSEY ENVIRONMENTAL FEDERATION, *et al.*,	)	
Petitioners,	)	
v.	)	No. 09-2567
NUCLEAR REGULATORY COMMISSION, *et al.*,	)	
Respondents,	)	
and	)	
EXELON CORPORATION,	)	
Intervenor.	)	

FEDERAL RESPONDENTS' MEMORANDUM ON THE EVENTS AT THE FUKUSHIMA DAIICHI NUCLEAR POWER STATION

By letter dated March 21, 2011, this Court directed counsel "to advise the Court what impact, if any, the damages from the earthquake and tsunami at the Fukushima Daiichi Nuclear Power Station have on the propriety of granting the license renewal application for the Oyster Creek Generating Station." The Nuclear Regulatory Commission (NRC) is carefully monitoring those events, and assisting the Japanese government in

understanding, controlling and limiting plant damage. NRC is also evaluating the information from these events for planning both short-term and longer-term responses to ensure the safety of United States reactors. In support of these tasks, NRC is gathering and absorbing data from the Fukushima Daiichi site that will enable NRC, with appropriate public participation, to put in place any new safety measures necessary to protect public health and safety in the United States.

NRC issued a renewed license for Oyster Creek Nuclear Generating Station almost two years ago, on April 8, 2009 (*see* Fed. Resp. Br. 48 & n.23). The renewed license is before this Court on a series of process-driven challenges brought by petitioners. As our brief shows, none of petitioners' claims finds support in the extensive administrative record underlying NRC's license-renewal decision. Oyster Creek now is operating under its 20-year renewed NRC license, but its owner, Exelon Generating Company, has announced publicly that it will cease operations in 2019.[1]

In response to the disaster at Fukushima Daiichi, NRC has authority to order Exelon, like other licensees of operating nuclear plants, to adopt whatever measures NRC determines are needed in the short term for continued assurance of the public health and safety while NRC considers

[1] *See* http://www.nytimes.com/2010/12/09/nyregion/09nuke.html.

longer-term measures, including changes in its safety regulations. Such measures may be subject to site-specific considerations. At this point, however, NRC has stated that licensed nuclear power reactors in the United States are currently safe, and may continue to operate under NRC's comprehensive scheme of safety regulations and inspections, pending development of any new safety measures that emerge as NRC's "lessons-learned" project moves forward.

I. NRC will carefully gather and analyze data from the damage to the Fukushima Daiichi plant to ensure safety at U.S. reactors as necessary to protect public health and safety in the United States.

A. NRC's immediate response to Japan events.

On March 21, 2011, the NRC Commissioners and the head of the NRC Staff – the Executive Director of Operations (EDO) -- conducted a public briefing on NRC's response to the events at the Fukushima Daiichi facility.[2] Each Commissioner extended personal condolences to the Japanese people for their hardships and losses in this great tragedy. Chairman Jaczko stated that the purpose of the meeting was "to discuss the tragic events in Japan and to begin to consider possible actions we may take to verify the safety of the nuclear facilities" in the United States. (Tr. 3).

[2] The transcript of this public hearing may be found at the NRC website in the "ADAMS" database as Accession No. ML110810254.

The Chairman noted that, since the earthquake and tsunami had struck, the NRC's headquarters operations center has, in addition to ordinary 24-hour operations, been continuously staffed just to "monitor and analyze events at nuclear power plants in Japan." (Tr. 4). The Chairman also pointed out that, at the request of the Japanese government, NRC had sent a team of agency technical experts in Japan to provide on-the-ground support. (*Id.*).

Chairman Jaczko outlined how these tragic events would shape NRC policy and regulatory changes:

> Here in the United States we have an obligation to the American people to undertake a systematic and methodical review of the safety of our own domestic nuclear facilities in light of the natural disaster and resulting nuclear situation in Japan. Beginning to examine all available information is an essential part of our effort to analyze the event and understand its impacts on Japan and implications for the United States. Our focus will always be on keeping plants and radioactive materials in this country safe and secure.
>
> As the immediate crisis in Japan comes to an end we will look at any information we can to gain experience from the event and see if there are any changes we need to make to further protect public health and safety. Together with my colleagues on the Commission, we will review the current status and identify the steps we will take to conduct that review. In the meantime we will continue to oversee and monitor plants to ensure that U.S. reactors remain safe.[3] (Tr. 5)

[3] Each Commissioner supported the Chairman's approach, noting the need for NRC to confirm, by thoughtful and rational examination, that its approach to the regulation of nuclear power is comprehensive and correct, while applying any lessons learned from these events. (Tr.7-8).

EDO William Borchardt then commented on how NRC had utilized this "lessons learned" process following significant events in the United States. Concluding that the "current fleet of reactors and materials licensees continue to protect the public health and safety," the EDO pointed to the principle of redundant defenses against unanticipated events called "Defense in Depth:"

> The fact that every reactor in this country is designed for natural events based upon the specific site that that reactor is located, that there are multiple fission product barriers, and that there are a wide range of diverse and redundant safety features in order to provide that public health and safety assurance. We have a long regulatory history of conservative decision-making. We've been intelligently using risk insights to help inform our regulatory process, and we have never stopped [making] improvements to the plant design as we learn from operating experience over the more than 35 years of civilian nuclear power in this country. Some have been derived from lessons learned from previous significant events, such as Three Mile Island. We have severe accident management guidelines, revisions to the emergency operating procedures, procedures and processes for dealing with large fires and explosions, regardless of the cause.[4] (Tr. 9-10).

As the EDO stated, NRC's "philosophy of Defense-in-Depth . . . recognizes that the nuclear industry requires the highest standards of design, construction, oversight, and operation," but even so, NRC regulation does

[4] In support of this "lessons learned" philosophy, the EDO observed that NRC continues "to gather information [from Japan] and assess that information for implications on the U.S. facilities." (Tr. 10)

"not rely on any one level of protection" to protect public health and safety. (Tr. 13-14) Further, the EDO said, "the designs for every single reactor in this country take into account *the specific site* that that reactor is located and does a detailed evaluation for any natural event such as *earthquakes, tornadoes, hurricanes, floods, tsunami,* and many others."[5] (Tr. 14) (emphasis added).

Later, Chairman Jaczko reiterated in testimony before Congress that NRC has "taken advantage of the lessons learned from previous operating experience,"[6] including most significantly, the Three Mile Island accident in 1979, "to implement a program of continuous improvement for the U.S.

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[5] The EDO stressed that NRC planning for severe accidents includes the assumption of system failures:

> Also as a result of operating experience and ongoing research programs, we have developed requirements for severe accident management guidelines. These are programs that perform the "what if" scenario. What if all of this careful design work, all of these important procedures and practices and instrumentation, what if that all failed? What procedures and policies and equipment should be in place to deal with the extremely unlikely scenario of a severe accident? Those have been in effect for many years and are frequently evaluated by the NRC inspection program. (Tr. 15)

[6] Written Statement by Gregory B. Jaczko, Chairman, U.S. Nuclear Regulatory Commission to the Subcomm. on Energy and Water of the Senate Appropriations Comm. at 6 (March 30, 2011) ("Jaczko Statement"). (ADAMS Accession No. ML110890505)

reactor fleet."[7] The Chairman added that operating experience and research programs have produced severe accident management guidelines for U.S. reactors to ensure that, in the event all precautions failed and a severe accident occurred, "the plant would still protect public health and safety."[8]

In short, the public statements of NRC's leaders show that the agency remains confident that U.S. reactors, as designed, constructed, and operated, are safe, but acknowledge the need to monitor and learn from the events at the Fukushima Daiichi Nuclear Power Station to ensure safety at U.S. reactors, as NRC assists the Japanese government in that disaster.[9]

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[7] *Id.*

[8] *Id.* at 6-7.

[9] President Barack Obama, in addressing the American people on March 17, 2011, echoed the statements by NRC leaders:

> Our nuclear power plants have undergone exhaustive study, and have been declared safe for any number of extreme contingencies. But when we see a crisis like the one in Japan, we have a responsibility to learn from this event, and to draw from those lessons to ensure the safety and security of our people. That's why I've asked the Nuclear Regulatory Commission to do a comprehensive review of the safety of our domestic nuclear plants in light of the natural disaster that unfolded in Japan.

See http://www.whitehouse.gov/blog/2011/03/17/president-obama-we-will-stand-people-japan.

B. NRC's "lessons-learned" approach.

As the EDO mentioned, past significant events in the United States have prompted NRC toward insights leading to enhanced reactor design and operational safety. Two events stand out as models of NRC actions to respond to significant occurrences with "lessons learned" applied to licensed reactors. The first was the accident at the Three Mile Island, Unit 2 reactor on March 28, 1979. The other was the terrorist attacks on the United States on September 11, 2001.

In April 1979, just after the Three Mile Island-2 (TMI-2) accident, NRC created a Bulletin and Orders Task Force as the focal point for TMI 2-related Staff activities necessary to assure the immediate safety of all other operating power reactors. In May 1979, the NRC established the TMI-2 Lessons Learned Task Force to identify and evaluate safety concerns requiring prompt licensing actions for operating reactors, beyond the immediate actions announced by the Bulletins and Orders Task Force effort.[10]

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[10] Licensing Requirements for Pending Operating License Applications: Proposed Rule, 46 Fed. Reg. 26491 (May 13, 1981). A set of short-term recommendations offered by this task force was published as NUREG-0578 in July 1979. *Id.*

A steering group then assessed the many recommendations, from within and beyond NRC, "which would provide a comprehensive and integrated plan for all actions necessary to correct or improve the regulation and operation of nuclear facilities."[11] After issuance of TMI-2 Action Plan requirements in guidance, NRC determined that the new reactor requirements should be codified by regulation.[12] For a variety of reasons, this specific TMI rule was not adopted, but NRC did adopt a number of rules to update licensing requirements on the basis of TMI "lessons learned." Thus, a decade after the TMI-2 accident NRC Staff ultimately was able to advise the Commission that "all regulatory changes needed to implement [the TMI-2 Action Plan] have been completed and that compliance with existing regulations and orders is a sufficient response to all applicable TMI-2 accident 'lessons learned.'"[13]

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[11] *Id.* This "TMI-2 Action Plan" was published as NUREG-0660 in May 1980. These action items led NRC to issue a list of "Requirements for New Operating Licenses," published in NUREG-0694, which was later clarified and superseded by NUREG-0737. *Id.*

[12] *Id.* at 26492.

[13] *See* Statement of Policy on Litigation of TMI-Related Issues in Power Reactor Operating License Proceedings; Revocation of Superseded Policy Statement Concerning TMI-Related Procedures, 54 Fed. Reg. 7897 (Feb. 23, 1989). As noted above, the Chairman cited the lessons learned from the TMI-2 accident as major source of improvement in NRC safety. Jaczko Statement at 6.

The second example of NRC's lessons-learned approach is the agency effort to improve reactor site security following the terrorist attacks on September 11, 2001. NRC quickly issued interim advisories and directives upgrading security at all nuclear power plants.[14] By 2003, NRC had issued formal orders to its reactor licensees to improve security against terrorist attacks, including changes in physical barriers, security guard posts and patrols, more restrictive site access and a host of other security enhancements.[15] These included measures, such as additional makeup water and equipment to mitigate fires, that would have beneficial effects regardless of the triggering event.[16]

Eventually, NRC enacted many of its post-9/11 security improvements as formal regulations. In 2007, NRC upgraded the terrorist

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[14] *See Private Fuel Storage, L.L.C.* CLI-02-25, 56 NRC 340, 343-44, 356 (2002).

[15] These post-9/11 actions are described in the NRC's later "Design Basis Threat" rulemaking. *See* Design Basis Threat; Proposed Rule, 70 Fed. Reg. 67380 (Nov. 7, 2005); Design Basis Threat; Final Rule, 72 Fed. Reg. 12705 (Mar. 19, 2007).

[16] *See New York v. NRC*, 589 F.3d 551, 555 (2nd Cir. 2009). In his Congressional testimony, Chairman Jaczko reiterated that, as a result of the September 11 attacks, NRC has ordered reactor licensees to upgrade equipment available to deal with "a significant fire or explosion," regardless of its cause. Jaczko Statement at 7.

threat that licensees must defend against by issuing an enhanced "Design Basis Threat" rule.[17] And, in 2009, after "a thorough review of the existing physical protection program requirements," NRC enacted a new "Power Reactor Security Requirements" rule that "codif[ied] generically-applicable security requirements."[18] On judicial review, the courts have declined to second-guess the various measures NRC took in response to the September 11 attacks.[19]

These upgrades – and the methodology by which NRC developed and implemented them – illustrate how NRC undertakes "lessons learned" improvements to reactor safety from events that may bear on the safety and security of U.S. reactor operations.[20] As the Chairman and EDO explained at the agency's March 21st public meeting on still-unfolding events in Japan,

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[17] *See* 10 C.F.R. § 73.1; 72 Fed. Reg. 12705 (Mar. 19, 2007).

[18] Power Reactor Security Requirements; Final Rule, 74 Fed. Reg. 13926, 13927 (Mar. 27, 2009)

[19] *See, e.g., Public Citizen v. NRC*, 573 F.3d 916 (9th Cir. 2009); *Riverkeeper, Inc. v. Collins*, 359 F.3d 156 (2nd Cir. 2004).

[20] We note that "lessons learned" from the Chernobyl accident also "added to our understanding of some of the phenomena that may be involved in a severe nuclear accident" and "provided some additional insights that are useful in guiding our severe-accident programs." *See* Potential Implications of Chernobyl Accident for all NRC-Licensed Facilities, 26 NRC 520, 523 (1987).

NRC will use the same "lessons learned" approach in applying information from the Fukushima Daiichi experience to ensure safety here.

Toward that end, the Chairman, with the agreement of the Commission, has already instructed NRC Staff to create a Task Force to perform both short-term and longer-term tasks relating to Fukushima Daiichi to assure and enhance safety. In the short term, the NRC Task Force has been directed to:

> . . . evaluate currently available technical and operational information from the events [that have occurred at the Fukushima Daiichi nuclear complex] in Japan to identify potential or preliminary near term/immediate operational or regulatory issues affecting domestic operating reactors of all designs[, including their spent fuel pools,] in areas such as protection against earthquake, tsunami, flooding, hurricanes; station blackout and a degraded ability to restore power; severe accident mitigation; emergency preparedness; and combustible gas control."[21]

The Task Force will begin a longer-term review "as soon as NRC has sufficient technical information from the events in Japan," and will develop "lessons learned" as it has in the past – that is, NRC will "evaluate all technical and policy issues related to the event to identify potential research,

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[21] SRM-COMGBJ11-0002 (March 21, 2011)(available via NRC web site for ADAMS (Accession No. ML110800456). Further, this Task Force will "develop recommendations, as appropriate, for potential changes to inspection procedures and licensing review guidance, and recommend whether generic communications, orders, or other regulatory requirements are needed."

generic issues, changes to the reactor oversight process, rulemakings, and adjustments to the regulatory framework that should be conducted by NRC."[22]

The Commission, however, has not suspended reactor operations or licensing activity. As with the post-TMI and post-9/11 regulatory enhancements, any "lessons learned" from the Fukushima Daiichi event will be applied generically to all reactors, including Oyster Creek, as appropriate to their location, design, construction, and operation. No safety, technical, or policy justification exists to single out particular reactors for different treatment just because of their place in the licensing queue or status on judicial review.

For instance, NRC issued a renewed license for the Vermont Yankee Nuclear Power Plant quite recently – on March 21, 2011 – despite the events at Fukushima Daiichi.[23] This decision reflects NRC's confidence in the robust and redundant safety design and construction of currently operating U.S. nuclear reactors, as restated by the Commissioners and the EDO in their

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[22] *Id.*

[23] *See* Entergy Nuclear Operations, Inc.; Vermont Yankee Nuclear Power Station; Notice of Issuance of Renewed Facility Operating License No. DPR-28 for an Additional 20-Year Period, 76 Fed. Reg. 17162 (March 28, 2011).

public briefing on March 21, 2011, and by the Chairman in his Congressional testimony.

II. NRC's statutory and regulatory scheme for operating reactors involves ongoing oversight to enhance safety and ample opportunities for public participation.

The petition for review pending before this Court in this case arises out of an NRC adjudicatory proceeding, initiated by petitioner, on alleged defects in the Oyster Creek application for license renewal. License renewal, of course, is an important matter and receives NRC's full attention. But, as we explain in detail below, NRC's license-renewal process was designed as a particularized and limited inquiry into aging management during the renewal period. It is NRC's continuous and ongoing oversight of licensed reactors, which includes a comprehensive scheme of safety regulation and the presence of resident inspectors at every reactor in the country, that assures public health and safety every day.

Indeed, Chairman Jaczko recently reassured Congress that review of information from Japan thus far, "combined with our ongoing inspection and licensing oversight, gives us confidence that the U.S. plants continue to operate safely."[24] As the basis for this confidence, the Chairman pointed to the "diverse and redundant safety systems that are required to be maintained

[24] Jaczko Statement at 3.

in operable condition and frequently tested to ensure that the plant is in a high condition of readiness to respond to any situation."[25]

NRC's ongoing oversight assures that a licensed facility remains in compliance with what is known as the plant's "current licensing basis" or CLB.[26] The CLB "represents the evolving set of requirements and commitments for a specific plant that are modified as necessary over the life of a plant to ensure continuation of an adequate level of safety."[27] NRC has emphasized that its ongoing oversight "continuously analyzes conditions, acts, and practices that could affect safe operation of plants"[28] through the ongoing regulatory process, which "includes research, inspections, audits, investigations, evaluations of operating experience, and regulatory actions to resolve identified issues."[29]

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[25] *Id.* at 6.

[26] Oyster Creek's CLB with respect to earthquake and flood analysis is not part of the record on review. Oyster Creek's CLB, however, does implement plant design and construction criteria applicable to earthquakes and floods. This analysis is captured in Chapters 2.4 and 3.7 of the licensee's Final Safety Analysis Report ("FSAR") for that facility.

[27] Nuclear Power Plant License Renewal; Revisions, 60 Fed. Reg. 22461, 22473 (May 8, 1995).

[28] *Id.* at 22485.

[29] Nuclear Power Plant License Renewal: Final Rule, 56 Fed. Reg. 64943, 64947 (Dec. 13, 1991); *see also* 60 Fed. Reg. at 22485 (NRC's "program

NRC utilizes information gathered through routine oversight – or from external events – to improve safety through various regulatory mechanisms, any one or all of which NRC might use to implement "lessons learned" from the Fukushima Daiichi disaster. For example, NRC often promulgates new regulations, issues orders modifying or suspending licenses, requires amendments to existing licenses, or takes other licensing actions to improve safety. Such agency actions are accompanied by an opportunity for public comment or a hearing under Section 189a of the Atomic Energy Act, 42 U.S.C. § 2239(a).

Concerned citizens also have two important avenues of redress to seek further action by NRC. The first is a petition for rulemaking under 10 C.F.R. §2.802, by which anyone may be request NRC to initiate a rulemaking to issue, amend, or rescind a regulation. Second, concerned citizens may submit enforcement petitions under 10 C.F.R. § 2.206 to request the NRC to institute a proceeding to modify, suspend or revoke a license, or for other appropriate action, where a citizen believes that NRC or

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for the review of operating events at nuclear power plants . . . offers a high degree of assurance that events that are potentially risk significant or precursors to significant events are being reviewed and resolved expeditiously").

one of its licensees has not adequately addressed a safety or environmental issue.[30]

In sum, the license renewal proceeding before this Court is narrowly focused on aging management. NRC has in place many broader regulatory tools that are appropriate vehicles to implement "lessons learned" from the events at Fukushima Daiichi, including mechanisms for members of the public to bring to NRC's attention safety concerns that they believe the agency might have overlooked or underappreciated.

III. The petition for review before this Court concerns discrete issues arising out of a now-closed adjudicatory record.

As discussed above, NRC's comprehensive and ongoing oversight of licensed facilities will assure that useful data and "lessons learned" from Fukushima Daiichi disaster will be absorbed by changes in NRC rules, orders, and license amendments as needed, accompanied by the public participation required by statute and regulation. This process is distinct, however, from the disposition of specific contentions admitted for hearing

[30] *See, e.g., Florida Power & Light Co. v. Lorion*, 470 U.S. 729 (1985); *Riverkeeper, Inc. v. Collins*, 359 F.3d 156, 158 (2nd Cir. 2004); *Union of Concerned Scientists v. NRC*, 920 F.2d 50, 56 n.4 (D.C. Cir. 1990); *Massachusetts v. NRC*, 878 F.2d 1516, 1520 (1st Cir. 1989). *See also Carolina Power & Light Co.* (Shearon Harris Nuclear Power Station, Unit 1; H.B. Robinson Plant, Unit 2), DD-06-1, 63 NRC 133, 140 (2006) (granting a § 2.206 petition on fire protection).

(or proposed for admission) in a license renewal adjudication such as the current case before this Court.

As explained in our brief, the license renewal hearing process that is the focus of petitioners' lawsuit in this Court focused strictly on contentions relating to the "potential detrimental effects of aging that are not routinely addressed by ongoing regulatory programs" (Fed. Resp. Br. 3); the license renewal process was "not intended to duplicate the Commission's ongoing review of operating reactors." *Id.*

Years ago, when NRC considered what should be reviewed when the agency is considering a license-renewal application, the agency developed a process by which "adequate safety will be assured during the extended period of operation," but which avoided duplicative, inefficient assessments covered by routine regulatory oversight.[31] Accordingly, NRC decided that it would not be necessary or desirable to open up the full range of criteria in a plant's current licensing basis to re-analysis during the one-time-only license renewal review. Instead, NRC concluded that "issues concerning operation

[31] 60 Fed. Reg. at 22464.

during the currently authorized term of operation should be addressed as part of the current license rather than deferred until a renewal review."[32]

The NRC therefore determined that, for license renewal, the agency's everyday regulatory process should be supplemented only by a very particularized inquiry, appropriate at the license-renewal stage, into "the detrimental effects of aging on the functionality of certain systems, structures, and components in the period of extended operation."[33] In contrast to aging-management issues, NRC's ongoing "regulatory process provides reasonable assurance that there is compliance with the [current licensing basis]."[34]

Accordingly, the NRC hearing below – now before this Court on judicial review – was limited exclusively to aging-management issues. The

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[32] *Id.* at 22481. NRC concluded that its ongoing regulatory process is "sufficiently broad and rigorous" (56 Fed. Reg. at 64950) to "provide reasonable assurance that, as new issues and concerns arise, measures needed to ensure that operation is not inimical to the public health and safety and common defense and security are 'backfitted' onto the plants." 56 Fed. Reg. at 64945.

[33] 60 Fed. Reg. at 22464.

[34] *Id.* at 22473. Indeed, "NRC conducts its inspection and enforcement activities under the presumption that non-compliances will occur." *Id.* at 22473-74.

hearing, like all NRC contested hearings on license renewal, was limited to contentions material to license renewal and admitted for hearing. The only admitted contention in the present Oyster Creek case required NRC's adjudicatory tribunal, the Atomic Safety and Licensing Board, to determine whether Exelon's program for ultrasonic testing "is adequate to manage the aging effects of corrosion in the sand bed region of Oyster Creek's drywell shell so the intended functions of the shell (*i.e.*, structural integrity and pressure containment) will be maintained during the renewal period consistent with the current licensing basis." (Fed. Resp. Br. 4). That question was answered in the affirmative by the Licensing Board and (on administrative appeal) by the Commission. As our brief explains (*id.* at 43-49), the NRC Staff made all other necessary findings and issued the renewed license on April 8, 2009.

The record before this Court has been closed since the proceeding before the Licensing Board concluded two years ago (Appendix 831-32). As in all Hobbs Act lawsuits seeking direct review in the courts of appeals, this case must be decided "on the basis of the agency record compiled" in

the course of the proceedings below, not on a new record made for the first time in the court of appeals.[35]

In any event, as discussed above, petitioners have other avenues open to them to raise Fukushima Daiichi-related issues on their own or in public-participation opportunities likely to arise after NRC, the industry, and the public have absorbed the technical, scientific and engineering knowledge that might evolve from the "lessons learned" process.

NRC has shown in implementing upgraded site security requirements after 9/11 to thwart terrorist attacks at nuclear facilities, and in adding safety enhancements after considering the lessons learned from the TMI-2 accident, that the agency is not dependent upon contested hearings to upgrade plant safety. NRC has already announced its plan to draw upon "lessons learned" from the Japan events, as the agency has done previously after natural or man-made disasters. As in the past, NRC will conduct

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[35] *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985). This Court has Hobbs Act jurisdiction only to review the "final agency action" from which petitioners have sought review. If petitioners were to seek relief before NRC regarding the events at Fukushima Daiichi, which they have not, any resulting final NRC action would not be reviewable under the rubric of the current petition. Rather, as in reopening cases in which a fresh agency order is entered, "the challenging party must file a new . . . petition for review from the now-final agency order." *TeleSTAR, Inc. v. FCC*, 888 F.2d 132, 134 (D.C. Cir. 1989). *Accord*, *Council Tree Communications, Inc. v. FCC*, 503 F.3d 284, 287 (3rd Cir. 2007).

rulemaking, or issue orders and other directives, to make upgrades required to implement whatever short-term or longer-term safety improvements emerge from the Task Force directed by the Commission to analyze the Fukushima Daiichi disaster.

Conclusion

For the reasons given in our brief and at oral argument, the petition for review should be denied, based on the record before this Court. The disaster at the Fukushima Daiichi reactors in Japan is, of course, tragic and serious, and has triggered a full lessons-learned inquiry at NRC that may well lead to new safety measures at American operating reactors. But the disaster is not a basis for judicial relief in this case.

Respectfully submitted,

JOHN E. ARBAB
Attorney
U.S. Department of Justice
P.O. Box 23795
Resources Division
Washington, D.C. 20026-3795

JOHN F. CORDES, JR.
Solicitor

ROBERT M. RADER
Senior Attorney
Office of the General Counsel
U.S. Nuclear Regulatory Commission
11555 Rockville Pike
Mailstop 15D21
Rockville, MD 20852

April 4, 2011

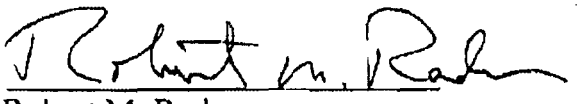
CERTIFICATE OF SERVICE

I hereby certify that I have on this 4th day of April 2011 served, by e-mail and by electronic transmission through the Electronic Filing System, and by U.S. Mail, First-Class, postage prepaid, a copy of "Federal Respondents' Memorandum on the Events at the Fukushima Daiichi Nuclear Power Station" upon the following:

Richard Webster, Esq.
Julia LeMense, Esq.
Eastern Environmental Law Center
744 Broad St., Suite 1525
Newark, NJ 07102
rwebster@easternenvironmental.org
jlemense@easternenvironmental.org

Brad Fagg, Esq.
Morgan, Lewis & Bockius LLP
1111 Pennsylvania Ave., NW
Washington, DC 20004
bfagg@morganlewis.com

John E. Arbab
Attorney, Appellate Section
United States Department of Justice
Environment & Natural Resources Division
P.O. Box 23795 (L'Enfant Station)
Washington, DC 20026
(202) 514-4046
john.arbab@usdoj.gov



Robert M. Rader