

**ORAL ARGUMENT IN NO. 13-1311 SCHEDULED
FOR NOVEMBER 21, 2014**

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

NATURAL RESOURCES)	
DEFENSE COUNCIL, INC.)	
Petitioner,)	
)	
)	
v.)	
)	
UNITED STATES NUCLEAR)	
REGULATORY COMMISSION and the)	
UNITED STATES OF AMERICA,)	No. 13-1311
Respondents,)	
)	
)	
and)	
)	
EXELON GENERATION COMPANY, LLC,)	
Intervenor.)	

**FEDERAL RESPONDENTS’ RESPONSE IN OPPOSITION TO
PETITIONER’S MOTION TO CONSOLIDATE**

For the reasons stated below, the U.S. Nuclear Regulatory Commission (“NRC”) and the United States of America (together, “Federal Respondents”) oppose the Motion to Consolidate filed on November 5, 2014, by Petitioner Natural Resources Defense Council (“NRDC”).

As NRDC’s motion indicates, the Federal Respondents contend that the Court lacks jurisdiction over Case No. 13-1311. The Federal Respondents have maintained this position consistently throughout this litigation, including

communicating this position to NRDC shortly after NRDC filed the petition for review in Case No. 13-1311, filing a Motion to Dismiss for Lack of Jurisdiction, and reiterating the arguments regarding jurisdiction in the Federal Respondents' Brief as directed by the Court. The Federal Respondents do not believe it appropriate, or consistent with the Court's direction in other cases, to seek to consolidate a case over which the Court has no jurisdiction with one over which jurisdiction is properly exercised. Instead, the Federal Respondents believe that the proper course of action is for the Court to dismiss Case No. 13-1311 for lack of jurisdiction for the reasons stated in Federal Respondents' brief, and to permit Case No. 14-1225 to proceed as a newly filed petition.

To be sure, the Federal Respondents are not aware of any basis to object to the Court exercising jurisdiction over NRDC's more recent petition for review, which initiated Case No. 14-1225. That petition for review was filed within 60 days after the agency order that finally and completely denied NRDC's request to intervene as a party in the NRC's Limerick Generating Station license renewal adjudication by dismissing NRDC's final proposed basis for intervention.¹ The Federal Respondents also have no reason to doubt NRDC's assertion that it "does

¹ That order—an order from the NRC's Atomic Safety and Licensing Board dismissing the final remaining contention that NRDC had proffered to support its request to intervene—is the third order listed in, and attached to, NRDC's Petition for Review in Case No. 14-1225.

not seek to raise any additional issues or arguments in Case No. 14-1225” beyond what NRDC has raised in its briefs in Case No. 13-1311.

Nonetheless, the Federal Respondents oppose NRDC’s motion to consolidate. First, the Court’s endorsement of NRDC’s approach, which would effectively paper over the jurisdictional flaws in Case No. 13-1311, would encourage prospective Hobbs Act petitioners to file multiple petitions for review per dispute at different times “out of an abundance of caution,” *see* NRDC motion at 4, safe in the knowledge that so long as *one* of the petitions turns out to be jurisdictionally proper, the Court will find a way to “make it work” without inconveniencing the petitioner. This is of particular concern to the Federal Respondents, given that Federal agencies are repeat players in Hobbs Act litigation. Neither Federal agencies nor the Court should be forced to devote substantial resources to challenging or resolving the Court’s jurisdiction over incurably premature petitions for review that are filed “just in case.”

Second, even were the parties to conclude amongst themselves that at least one of the petitions for review provides the Court with jurisdiction, it would not relieve the Court of its own independent obligation to assess jurisdiction.²

² *See, e.g., Mendoza v. Perez*, 754 F.3d 1002, 1018 (D.C. Cir. 2014) (stating that “federal courts have an independent obligation to assure [them]selves of jurisdiction, even where the parties fail to challenge it” (internal quotation marks omitted)); *Blue Ridge Environmental Defense League v. NRC*, 668 F.3d 747, 753 (D.C. Cir. 2012).

NRDC's motion asserts that its proposal would obviate the need for the Court to resolve the parties' jurisdictional arguments. NRDC motion at 5. Yet, the Court, in performing its own independent analysis of jurisdiction, would still need to determine for itself that *one* of the petitions provides it jurisdiction.³ Doing that would likely require the Court to delve into and resolve the very same jurisdictional issues raised by the parties, even if the parties were no longer pressing jurisdictional arguments themselves.

Third, because NRDC did not file its second petition for review until after briefing on the initial petition for review was complete, the Federal Respondents had little choice but to devote a substantial portion of the Federal Respondents' Brief to addressing the jurisdictional (and ripeness) flaws in NRDC's initial petition for review. *See, e.g.*, Federal Respondents' Brief at 1-2, 21, 27-38. It would have been unnecessary for the Federal Respondents to raise these arguments or for the Court to review them in preparation for oral argument had the case, at the time of briefing, been supported by a proper and timely petition for review.

In sum, while the Federal Respondents recognize that NRDC has now apparently properly petitioned, in Case No. 14-1225, for review of the NRC

³ It is doubtful that there could be two separate "final orders" by the agency with regard to the exact same issues, and NRDC has confirmed that its two petitions here address the exact same issues. NRDC motion at 2. If one of the orders proves to be "final" as to those issues for purposes of determining Hobbs Act jurisdiction, *see* 28 U.S.C. §§ 2342, 2344, presumably the other is not.

decision to deny NRDC's request to intervene in the Limerick Generating Station license renewal proceeding, the Federal Respondents do not support NRDC's proposed solution to the jurisdictional defects in its initial petition for review. The Federal Respondents believe that the appropriate course of action is for the Court to dismiss Case No. 13-1311 for lack of jurisdiction and for Case No. 14-1225 to proceed independently. If the Court sees fit to accelerate the timetable for briefing and arguing the latter case in light of the work the parties have already devoted to Case No. 13-1311, the Federal Respondents are certainly amenable to that. Further, to help conserve its own resources, the Court could consider assigning Case No. 14-1225 to the same panel that is preparing to hear Case No. 13-1311.

Respectfully submitted,

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Dated: November 12, 2014

CERTIFICATE OF SERVICE

I certify that on November 12, 2014, I filed the foregoing Federal Respondents' Response in Opposition to Petitioner's Motion to Consolidate with the U.S. Court of Appeals for the District of Columbia Circuit by uploading it to the Court's CM/ECF system. That method is calculated to serve:

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