ORAL ARGUMENT SCHEDULED FOR FEBRUARY 22, 2016

14-1210(L) & 14-1212(CON)

14-1216(CON), 14-1217(CON)

United States Court of Appeals for the District of Columbia Circuit

STATE OF NEW YORK; STATE OF VERMONT; STATE OF CONNECTICUT,

Petitioners,

v.

U.S. NUCLEAR REGULATORY COMMISSION; UNITED STATES OF AMERICA,

Respondents,

COMMONWEALTH OF MASSACHUSETTS,

Intervenor for Petitioner,

ENTERGY NUCLEAR OPERATIONS INC.; NORTHERN STATES POWER, COMPANY; NUCLEAR ENERGY INSTITUTE, INC.,

Intervenors for Respondent.

(caption for No. 14-1212 listed on inside front cover)

On Petition for Review of Final Action of the United States Nuclear Regulatory Commission

SUPPLEMENTAL BRIEF FOR STATES OF NEW YORK, VERMONT, CONNECTICUT, AND MASSACHUSETTS, AND THE PRAIRIE ISLAND INDIAN COMMUNITY

BARBARA D. UNDERWOOD
Solicitor General
ANISHA S. DASGUPTA
Deputy Solicitor General
ANDREW W. AMEND
Senior Assistant Solicitor General

LEMUEL M. SROLOVIC
Bureau Chief
MONICA WAGNER
Deputy Bureau Chief
Environmental Protection Bureau

of Counsel

(*counsel listing continued on signature pages*)

ERIC T. SCHNEIDERMAN
Attorney General of the State of New York
Attorney for State of New York
120 Broadway
New York, New York 10271
(212) 416-8020

JOHN J. SIPOS
KATHRYN M. DELUCA
LAURA E. HESLIN
Assistant Attorneys General

Dated: February 12, 2016

(caption for No. 14-1212)

PRAIRIE ISLAND INDIAN COMMUNITY,

Petitioner,

v.

U.S. NUCLEAR REGULATORY COMMISSION; UNITED STATES OF AMERICA,

Respondents.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

PRELIMINARY STATEMENT 1

ARGUMENT 2

THE HOBBS ACT AND ATOMIC ENERGY ACT VEST THIS COURT WITH ORIGINAL JURISDICTION TO REVIEW FINAL COMMISSION RULES DEALING WITH THE ACTIVITIES OF LICENSEES 2

A. "Final Rules" Are Generally Presumed to Be Reviewable in the Same Way as "Final Orders." 3

B. Compelling Reasons Support Initial Appellate Review of NRC Rules Dealing with the Activities of Licensees. 6

C. The Continued Storage Rule Deals with the Activities of Licensees. 12

CONCLUSION 14

TABLE OF AUTHORITIES

Cases **Page(s)**

Amshoff v. United States,
228 F.2d 261 (7th Cir. 1955) 4

* *Citizens Awareness Network v. United States*,
391 F.3d 338 (1st Cir. 2004) 9, 10

City of Peoria v. Gen. Elec. Cablevision Corp. (GECCO),
690 F.2d 116 (7th Cir. 1982) 9

City of Trenton v. FCC,
441 F.2d 1329 (3d Cir. 1971) 4

Columbia Broad. Sys. v. United States,
316 U.S. 407 (1942) 3, 6

* *Florida Power & Light Co. v. Lorion*,
470 U.S. 729 (1985) 5, 7, 11, 13

Gage v. AEC,
479 F.2d 1214 (D.C. Cir. 1973) 4

Gen. Elec. Uranium Mgmt. Corp. v. Dep't of Energy,
764 F.2d 896 (D.C. Cir. 1985) 9, 11

* *Inv. Co. Inst. v. Bd. of Governors. of Fed. Reserve Sys.*,
551 F.2d 1270 (D.C. Cir. 1977) 3, 5, 7

Media Access Project v. FCC,
883 F.2d 1063 (D.C. Cir. 1989) 9

* *N.Y. Rep. State Committee v. SEC*,
799 F.3d 1126 (D.C. Cir. 2015) 5, 11

Natural Res. Def. Council v. NRC,
539 F.2d 824 (2d Cir. 1976) 10

Authorities chiefly relied on are marked with an asterisk (*).

TABLE OF AUTHORITIES (cont'd)

Cases **Page(s)**

Natural Res. Def. Council v. NRC,
666 F.2d 595 (D.C. Cir. 1981) 12, 13

Nevada v. Watkins,
939 F.2d 710 (9th Cir. 1991) 10

Nuclear Energy Inst. v. EPA,
373 F.3d 1251 (D.C. Cir. 2004) 10

Quivira Mining Co. v. EPA,
728 F.2d 477 (10th Cir. 1984) 10

Reytblatt v. NRC,
105 F.3d 715 (D.C. Cir. 1997) 10

United States v. Storer Broad. Co.,
351 U.S. 192 (1956) 4, 9

Westinghouse Elec. Corp. v. NRC,
555 F.2d 82 (3d Cir. 1977) 10

Laws

5 U.S.C. § 551 7

28 U.S.C.
§ 2342 (1970) 8
* § 2342 .... 1, 2, 7, 8
§ 2344 8
§§ 2341-2351 1

42 U.S.C.
§ 2231 .... 6, 7
* § 2239 .... 2, 3, 6, 7, 12
§ 5871 2

Act of Dec. 29, 1950, Pub. L. 81-901, 64 Stat. 1129 (1950) 7

TABLE OF AUTHORITIES (cont'd)

Laws **Page(s)**

Atomic Energy Act of 1954, Pub. L. No. 83-703,
68 Stat. 919 (1954) 3

10 C.F.R.
Pt. 51, Subpt. A, App. B, Table B-1 12
§ 51.23 12

GLOSSARY OF ABBREVIATIONS

AEC	Atomic Energy Commission
APA	Administrative Procedure Act
NRC	Nuclear Regulatory Commission
Reply Br.	Reply Brief for States of New York, Vermont, Connecticut, and Massachusetts, and the Prairie Island Indian Community
States' Br.	Brief for States of New York, Vermont, Connecticut, and Massachusetts, and the Prairie Island Indian Community
NRC Br.	Initial Brief of Federal Respondents NRC

PRELIMINARY STATEMENT

Petitioners seek review of a final rule of the Nuclear Regulatory Commission (NRC) under the Atomic Energy Act and the Hobbs Act, 28 U.S.C. §§ 2341-2351, which vests exclusive jurisdiction in the courts of appeals to review NRC's "final orders," 28 U.S.C. § 2342(4). This Court has directed the parties to address its jurisdiction to review "final rules" in light of § 2342(4)'s "final orders" language. The resolution of this issue will determine whether the parties' dispute is resolved now in this Court or whether it must first undergo district court review under the Administrative Procedure Act (APA) and 28 U.S.C. § 1331.

The relevant statutes demonstrate that jurisdiction lies in this Court. To be sure, in many contexts the terms "rule" and "order" have distinct meanings and serve distinct purposes. But in the particular context of statutes authorizing judicial review of agency action, this Court has long presumed that provisions referring to "orders" encompass challenges to "rules," and that review should take place in the courts of appeals. Although this presumption can be overcome by specific indicia that Congress intended otherwise, no such indicia exist here. To the contrary, Congress specifically *included* rulemaking within

the class of NRC actions subject to Hobbs Act review. *See* 42 U.S.C. § 2239(a)(1)(A), (b). And the policy considerations supporting direct court-of-appeals review of agency action—including avoiding needless duplication and delay—are particularly compelling in the context of regulations concerning the highly toxic spent nuclear fuel continually being produced at power plants nationwide.

ARGUMENT

THE HOBBS ACT AND ATOMIC ENERGY ACT VEST THIS COURT WITH ORIGINAL JURISDICTION TO REVIEW FINAL COMMISSION RULES DEALING WITH THE ACTIVITIES OF LICENSEES

The Administrative Orders Review Act, commonly known as the Hobbs Act, vests the courts of appeals with "exclusive jurisdiction" to review "all final orders of the Atomic Energy Commission made reviewable by section 2239 of title 42." 28 U.S.C. § 2342(4).[1]

[1] The Atomic Energy Commission (AEC) is NRC's predecessor agency; decisions taken by NRC under authority transferred from the AEC are subject to judicial review as if taken by the AEC. *See* 42 U.S.C. § 5871(g).

Section 2239 of title 42—initially adopted as § 189 of the Atomic Energy Act of 1954, Pub. L. No. 83-703, 68 Stat. 919, 955-56 (1954)—in turn makes reviewable "[a]ny final order entered in any proceeding of the kind specified in subsection (a)" of that section. 42 U.S.C. § 2239(b). And the proceedings specified in subsection (a) include "any proceeding for the issuance or modification of rules and regulations dealing with the activities of licensees." 42 U.S.C. § 2239(a)(1)(A).

NRC's Continued Storage Rule is a final order in such a proceeding. Accordingly, this Court has jurisdiction over the present petitions, which timely sought review of the Rule under § 2239(b) and the Hobbs Act. (States' Br. at 4; NRC Br. at 1.)

A. "Final Rules" Are Generally Presumed to Be Reviewable in the Same Way as "Final Orders."

The "particular label placed upon" an agency determination "is not necessarily conclusive" of its reviewability. *Columbia Broad. Sys. v. United States*, 316 U.S. 407, 416 (1942) ("*CBS*"); *see also Inv. Co. Inst. v. Bd. of Governors. of Fed. Reserve Sys.*, 551 F.2d 1270, 1278 (D.C. Cir. 1977). Rather, the "substance" of what the agency "has purported to do and has done" is decisive. *CBS*, 316 U.S. at 416.

The Supreme Court thus has long recognized that regulations can be challenged as "final orders" under the Hobbs Act. For instance, the Court held in 1956 that the Hobbs Act's provision for review of "final orders" of the Federal Communications Commission (FCC) vested the courts of appeals with original jurisdiction to review FCC regulations issued through notice-and-comment procedures. *See United States v. Storer Broad. Co.*, 351 U.S. 192, 198-200 (1956) (applying *CBS*). Moreover, it did so despite Justice Harlan's view that the challenged "regulations" did not "constitute an 'order' within the meaning of" the Hobbs Act. *Id.* at 207 (Harlan, J. concurring in part and dissenting in part).

This Court and other courts of appeals have long applied the Hobbs Act the same way. *See, e.g.*, *Gage v. AEC*, 479 F.2d 1214, 1215-18 & n.1 (D.C. Cir. 1973); *City of Trenton v. FCC*, 441 F.2d 1329, 1333 (3d Cir. 1971); *Amshoff v. United States*, 228 F.2d 261, 265 (7th Cir. 1955). In 1973, this Court described an AEC regulation published in the Federal Register after notice-and-comment procedures as an "order" that "promulgated rules," and explained that petitioners' challenge to those rules was governed by the Hobbs Act. *Gage*, 479 F.2d at 1215-18 & n.1. Four years later, this Court recognized the "predominant case

law construing jurisdictional statutes authorizing review of 'orders' to include review of regulations," and adopted a presumption that such review should take place in the courts of appeals. *See Inv. Co. Inst.*, 551 F.2d at 1276-80. As the Court explained, district court review of determinations directly reviewable by the courts of appeals is duplicative and risks conflicting litigation. *Id.* at 1276-77. Accordingly, "[f]or nearly four decades, it has been blackletter administrative law that, absent countervailing indicia of congressional intent, statutory provisions for direct review of orders encompass challenges to rules." *N.Y. Rep. State Committee v. SEC*, 799 F.3d 1126, 1129 (D.C. Cir. 2015).

The Supreme Court expressed the same views in its leading case interpreting the Hobbs Act and 42 U.S.C. § 2239. *See Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 741-45 (1985) (citing *Inv. Co. Inst.*). The Court explained that a "crucial purpose of the Hobbs Act" and similar provisions is to "avoid the waste" resulting from duplicative review of agency action by multiple courts. *Id.* at 744. Thus, the Court declared, "[a]bsent a firm indication" that Congress intended otherwise, "we will not presume that Congress intended to depart from the sound policy of placing initial APA review in the courts of appeals." *Id.* at 745.

B. Compelling Reasons Support Initial Appellate Review of NRC Rules Dealing with the Activities of Licensees.

This case does not warrant a departure from the presumption of initial review in the courts of appeals because there is no indication that Congress intended NRC rules dealing with licensee activities to undergo initial district court review.

The Atomic Energy Act has since its inception authorized Hobbs Act review of final agency action in "any proceeding *for the issuance or modification of rules and regulations* dealing with the activities" of atomic energy "licensees." 42 U.S.C. § 2239(a) (emphasis added). Although Congress called that reviewable action a "final order," rather than a "final rule," it was legislating against the backdrop of the Supreme Court's declaration that regulations could be "orders" under analogous statutes. *See CBS*, 307 U.S. at 417. To be sure, Congress stated that Commission proceedings are to be governed by the APA, *see* 42 U.S.C. § 2231, and the APA defines an "order" as a "final disposition"

of an agency "in a matter other than rule making," 5 U.S.C. § 551(6).[2] But it would effectively nullify key terms of § 2239 if § 2231 were read to exclude rules from Hobbs Act review because rules are not "orders" under the APA.[3]

The Atomic Energy Act should not be read to negate its own provisions in this way. Nor should the same result be achieved by an ahistorical reading of the term "final order" in the Hobbs Act, 28 U.S.C. § 2342(4), based on statutory amendments relating to *other* agencies. The provision today codified at § 2342 initially authorized judicial review in the courts of appeals of "final orders" of covered agencies; it mentioned no other type of administrative action. *See* Act of

---

[2] At the same time, 42 U.S.C. § 2231 explicitly adopts the APA's definitions of "the terms 'agency' and 'agency action,'" but does *not* explicitly adopt the APA's definition of "order."

[3] Indeed, NRC does not ever appear to use the word "order" when adopting a final rule; rather, it declares, as here, that it is adopting a "final rule." But Hobbs Act review of rulemaking proceedings "dealing with the activities of licensees," 42 U.S.C. § 2239(a), should not turn on the "label" NRC "chooses to employ" for its final determinations in such proceedings. *See Inv. Co. Inst.*, 551 F.2d at 1278; *see also Lorion*, 470 U.S. at 742 & n.10 (NRC rulemaking not excluded from Hobbs Act review due to lack of formal hearing); NRC Br. at 1 (calling Continued Storage Rule "a 'final order'").

Dec. 29, 1950, Pub. L. 81-901, 64 Stat. 1129, 1129-30 (1950) (codified at 5 U.S.C. § 1032 (1952)). That remained the case after 1954, when Congress added the AEC to the Act, and again after 1966, when it recodified the Act. *See* 28 U.S.C. § 2342 (1970).

Since 1975, Congress has added and amended certain provisions of the Act to address issues specific to particular agencies—for example, by adding new Hobbs Act agencies, renaming agencies, or creating new reviewable actions. In doing so, Congress has, at times, provided for review of other agencies' "rules" and "regulations," in addition to their "orders." *See*, *e.g.*, 28 U.S.C. § 2342(3), (5). But Congress has not revised the Hobbs Act as a whole or revisited the provision for judicial review of decisions of NRC, which the Act still identifies as the "Atomic Energy Commission." *Id.* § 2342(4); *see also id.* § 2344 (requiring petition for review of a "final order").

Congress thus has left intact the scope of judicial review of AEC (and NRC) determinations that existed under the Hobbs Act in the 1950s. And that version of the Act was understood to vest the courts of appeals with jurisdiction to review regulations through its reference to

covered agencies' "final orders." *See Storer Broad. Co.*, 351 U.S. at 198-200; see also *supra* 4-5.

Indeed, Congress has also left intact the Hobbs Act's decades-old provision for appellate court review of "final orders" of the FCC. But appellate courts, including this one, have not changed their reading of the Hobbs Act since 1975 to exclude FCC rules from the Act's ambit. *See, e.g.*, *Media Access Project v. FCC*, 883 F.2d 1063, 1068-69 (D.C. Cir. 1989); *City of Peoria v. Gen. Elec. Cablevision Corp. (GECCO)*, 690 F.2d 116, 119 (7th Cir. 1982). There is no reason to treat NRC rules differently—especially given Congress's express provision for Hobbs Act review of NRC rulemakings in 42 U.S.C. § 2239.

Moreover, even if the Hobbs Act and Atomic Energy Act were ambiguous, "where it is unclear whether review jurisdiction is in the district court or the court of appeals the ambiguity is resolved in favor of the latter." *Gen. Elec. Uranium Mgmt. Corp. v. Dep't of Energy*, 764 F.2d 896, 903 (D.C. Cir. 1985) (quotation marks omitted). In fact, the First Circuit has considered the same provisions at issue here and concluded it had original jurisdiction to review NRC regulations. *See Citizens Awareness Network v. United States*, 391 F.3d 338, 345-47 (1st

Cir. 2004). The First Circuit observed that it was not writing on a "pristine page" in interpreting those provisions and therefore applied *Lorion*'s presumption that NRC's rules are reviewable in the courts of appeals. *Id.*

This Court, likewise, is considering its jurisdiction against the backdrop of appellate precedent. This Court has repeatedly considered petitions for review of NRC regulations in the past, and expressly stated that "the Hobbs Act gives this court jurisdiction to review final NRC rules dealing with the activities of licensees." *Reytblatt v. NRC*, 105 F.3d 715, 720 (D.C. Cir. 1997). And it has held that it has jurisdiction under the Hobbs Act and § 2239 over challenges to regulations issued by the Environmental Protection Agency (EPA) under authority transferred from the AEC. *See Nuclear Energy Inst. v. EPA*, 373 F.3d 1251, 1264-65 (D.C. Cir. 2004).[4]

---

[4] *See also, e.g., Nevada v. Watkins*, 939 F.2d 710, 712 n.4 (9th Cir. 1991); *Quivira Mining Co. v. EPA*, 728 F.2d 477, 481-84 (10th Cir. 1984); *Westinghouse Elec. Corp. v. NRC*, 555 F.2d 82, 84-85 (3d Cir. 1977); *Natural Res. Def. Council v. NRC*, 539 F.2d 824, 836-37 (2d Cir. 1976), *vacated and remanded for consideration of mootness*, 434 U.S. 1030 (1978).

This case presents no occasion to depart from these decisions or from the "sound policy of placing initial APA review" in the courts of appeals. *Lorion*, 470 U.S. at 745. Diverting petitioners' challenges to district court would cause unnecessary duplication and delay in the context of spent nuclear fuel regulation, where time is of the essence. Facing a similar jurisdictional inquiry, albeit under different statutory provisions, this Court has observed that it is "hard to believe that Congress intended to have any of the basic issues surrounding disposal" of spent nuclear fuel "tied up in duplicative litigation for years on end," given that disposal "is an acknowledged global problem of dramatic urgency." *Gen. Elec. Uranium Mgmt. Corp.*, 764 F.2d at 904.

The problem of spent nuclear fuel disposal has not grown any less urgent. Moreover, this matter features a robust administrative record and a dispute that all parties are ready to have resolved now. As this Court has previously observed, "[i]n rulemakings, in which there is no need for judicial development of an evidentiary record, there is no gain from vesting jurisdiction in the district courts." *N.Y. State Rep. Comm.*, 799 F.3d at 1131.

C. The Continued Storage Rule Deals with the Activities of Licensees.

Finally, the Continued Storage Rule is reviewable under the Hobbs Act and Atomic Energy Act because it "deal[s] with the activities of licensees," 42 U.S.C. § 2239(a). The regulatory amendments effected by the Rule exclude a major issue posed by plant operation—the environmental impacts of indefinite onsite storage of spent nuclear fuel—from consideration on a plant-specific basis. *See* 10 C.F.R. § 51.23(a). Licensees are consequently excused from (i) assessing those impacts in the environmental reports they submit in the licensure process, *see* 10 C.F.R. § 51.23(b); (ii) addressing those impacts in site-specific licensing proceedings, *see Entergy Nuclear Operations, Inc.*, Nos. 50-247-LR, 50-286-LR, Order at 2-3 (Nov. 10, 2014) (addendum to Reply Br.); and (iii) taking specific steps to lessen or avoid those impacts, including consideration and implementation of plant-specific mitigation measures and alternatives, *see*, *e.g.*, 10 C.F.R. Pt. 51, Subpt. A, App. B, Table B-1; Reply Br. at 18-19.

The Continued Storage Rule thus "deal[s] with the activities of licensees" no less than other Commission rules this Court has treated under the rubric of 42 U.S.C. § 2239(a). *See*, *e.g.*, *Natural Res. Def.*

Council v. NRC, 666 F.2d 595, 597-601 (D.C. Cir. 1981) (rule exempting certain equipment from requirement to report defects in components of nuclear power plants). This Court thus has jurisdiction.[5]

[5] If this Court were to conclude otherwise, we respectfully request a transfer of this proceeding to the United States District Court for the District of Columbia under 28 U.S.C. § 1631. *See*, *e.g.*, *Lorion*, 470 U.S. at 734 n.5 (noting such a transfer).

CONCLUSION

For these reasons, this Court has jurisdiction over this proceeding.

Dated: New York, NY
February 12, 2016

Respectfully submitted,

ERIC T. SCHNEIDERMAN
Attorney General of the State of New York

By: /s/ Andrew W. Amend
ANDREW W. AMEND
Senior Assistant Solicitor General

120 Broadway, 25th Floor
New York, NY 10271
(212) 416-8022

BARBARA D. UNDERWOOD
Solicitor General
ANISHA S. DASGUPTA
Deputy Solicitor General

LEMUEL M. SROLOVIC
Bureau Chief
MONICA WAGNER
Deputy Bureau Chief
JOHN J. SIPOS
KATHRYN M. DELUCA
LAURA E. HESLIN
Assistant Attorneys General
Environmental Protection Bureau of Counsel

Reproduced on Recycled Paper

GEORGE JEPSON
Attorney General of the State of Connecticut

By: /s/ Robert D. Snook
Robert D. Snook
Assistant Attorney General
55 Elm Street, P.O. Box 120
Hartford, Connecticut 06141
(860) 808-5250

MAURA HEALY
Attorney General of the Commonwealth of Massachusetts

By: /s/ Seth Schofield
Seth Schofield
Assistant Attorney General
One Ashburton Place, 18th Floor
Boston, Massachusetts 02108
(617) 963-2436

WILLIAM H. SORRELL
Attorney General of the State of Vermont

By: /s/ Kyle H. Landis-Marinello
Kyle H. Landis-Marinello
Assistant Attorney General
109 State Street
Montpelier, Vermont 05609
(802) 828-3186

JACOBSON, MAGNUSON, ANDERSON & HALLORAN, PC
Special Counsel to the Prairie Island Indian Community

By: /s/ Joseph F. Halloran
Joseph F. Halloran
Philip R. Mahowald
180 East Fifth Street, Suite 940
Saint Paul, Minnesota 55101
(651) 644-4710

CERTIFICATE OF COMPLIANCE

Andrew W. Amend, an attorney in the Office of the Attorney General of the State of New York, hereby certifies that according to the word count feature of the word processing program used to prepare this brief, the brief contains 2,496 words and complies with this Court's February 1, 2016 Order.

_/s/ Andrew W. Amend___
Andrew W. Amend