ORAL ARGUMENT SCHEDULED FEBRUARY 22, 2016

Nos. 14-1210, 14-1212, 14-1216, 14-1217 (consolidated)

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

STATE OF NEW YORK, *et al.*; PRAIRIE ISLAND INDIAN COMMUNITY; BEYOND NUCLEAR, INC., *et al.*; and NATURAL RESOURCES DEFENSE COUNCIL, INC., *Petitioners*,
and
COMMONWEALTH OF MASSACHUSETTS, *Intervenor-Petitioner*,
v.
UNITED STATES NUCLEAR REGULATORY COMMISSION and THE UNITED STATES OF AMERICA, *Respondents*,
and
NUCLEAR ENERGY INSTITUTE, INC., *et al.*, *Intervenor-Respondents.*

On Petition for Review of Final Action by the U.S. Nuclear Regulatory Commission

SUPPLEMENTAL BRIEF OF INTERVENOR-RESPONDENTS NUCLEAR ENERGY INSTITUTE, ENTERGY NUCLEAR OPERATIONS, INC., AND NORTHERN STATES POWER COMPANY ADDRESSING JURISDICTION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

JUDICIAL DECISIONS

*Authorities upon which we chiefly rely are marked with astericks.

STATUTES

REGULATIONS

LEGISLATIVE HISTORY

GLOSSARY

AEA - Atomic Energy Act

AEC - Atomic Energy Commission

APA - Administrative Procedure Act

EPA - Environmental Protection Agency

GEIS - Generic Environmental Impact Statement

NRC - Nuclear Regulatory Commission

ISSUE PRESENTED

Are challenges to the Nuclear Regulatory Commission ("NRC") "Continued Storage Rule"[1] properly before this Court under the Hobbs Act, 28 U.S.C. § 2342(4), and Section 189 of the Atomic Energy Act ("AEA"), 42 U.S.C. § 2239.

STATEMENT OF CASE

In *New York v. NRC*, 681 F.3d 471 (D.C. Cir. 2012) ("*New York I*"), this Court vacated NRC's Waste Confidence Decision and Temporary Storage Rule. On remand, NRC conducted a robust administrative process and published a 1,400-page Generic Environmental Impact Statement ("GEIS") on Continued Storage of Spent Nuclear Fuel. Following notice and comment, the NRC promulgated the Continued Storage Rule, which incorporates the GEIS findings into the environmental reviews of license applications for power reactors and spent fuel storage facilities. Petitioners seek review in this Court of the Continued Storage Rule under the Administrative Procedure Act ("APA"), the AEA, and the Hobbs Act.

[1] Continued Storage of Spent Nuclear Fuel, 79 Fed. Reg. 56,238, 56,239 (Sept. 19, 2014) (amending NRC regulations at 10 C.F.R. Part 51).

ARGUMENT

A. The Text of the AEA Makes Challenges to Final Orders in a Rulemaking Directly Reviewable in the Court of Appeals Under the Hobbs Act

Under the Hobbs Act, 28 U.S.C. § 2342(4), the courts of appeals have exclusive jurisdiction to review "all final orders" of the NRC[2] made reviewable by Section 189 of the AEA. Section 189.b of the AEA specifies the NRC actions that are subject to judicial review, including "[a]ny final order entered in any proceeding of the kind specified in subsection (a)." Section 189.a, in turn, includes "any proceeding for the issuance or modification of rules and regulations dealing with the activities of licensees." Thus, the Hobbs Act encompasses a final action in an NRC rulemaking. *See Gage v. AEC*, 479 F.2d 1214, 1218 (D.C. Cir. 1973) ("The clear words of the statutes involved make no distinction between orders which promulgate rules and orders in adjudicative proceedings."); *Natural Resources Defense Council v. NRC*, 666 F.2d 595, 601 n.40 (D.C. Cir. 1981).

NRC's Continued Storage Rule resulted from a notice-and-comment rulemaking proceeding. It addresses the environmental impacts of storage of spent fuel after the licensed term of a reactor. The rule references the generic determinations in the GEIS and specifies that those determinations will be

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[2] The Energy Reorganization Act of 1974 transferred the licensing and regulatory functions of the Atomic Energy Commission ("AEC") to the NRC, 42 U.S.C. § 5841(f), and made the judicial review provisions of the Hobbs Act applicable to the NRC. 42 U.S.C. § 5871(g).

incorporated into site-specific NRC licensing reviews. The Continued Storage Rule therefore deals with the "activities of licensees" and, under the plain text of the AEA and the Hobbs Act, falls within the jurisdiction of this Court.

B. Jurisdiction in the Court of Appeals is Consistent with Precedent and the Purpose of the Hobbs Act

In *New York I,* this Court exercised jurisdiction to review the NRC's prior Waste Confidence Decision and Temporary Storage Rule. And this Court has a long practice of reviewing NRC rules under the Hobbs Act. *See, e.g.*, *Union of Concerned Scientists v. NRC*, 824 F.2d 108 (D.C. Cir. 1987) (review of NRC "backfit" rule); *Union of Concerned Scientists v. NRC*, 880 F.2d 552 (D.C. Cir. 1989) (second review of "backfit" rule); *Connecticut Light & Power Co. v. NRC*, 673 F.2d 525 (D.C. Cir. 1982) (review of fire protection regulations); *Environmental Defense Fund v. NRC*, 902 F.2d 785, 786 (D.C. Cir. 1990) (review of regulations on licensing of uranium mills and disposal of uranium mill tailings, specifically noting jurisdiction in the courts of appeals); *Florida Power & Light Co. v. United States*, 846 F.2d 765 (D.C. Cir. 1988) (challenge to NRC license fee rule); *Professional Reactor Operations Society v. NRC*, 939 F.2d 1047 (D.C. Cir. 1991) (review of rule governing sequestration of witnesses in NRC investigations and inspections).

The Supreme Court also has found that the purpose of the Hobbs Act supports initial jurisdiction for review of NRC actions in the courts of appeal. In

Florida Power & Light Co. v. Lorion, 470 U.S. 729 (1985), the Court addressed the applicability of the Hobbs Act to NRC's denial of a petition for enforcement action—an administrative action not clearly included in Section 189.a The Supreme Court found that the Hobbs Act provides for review of all final orders in licensing proceedings in the court of appeals, regardless of whether the agency held a hearing. *Lorion*, 470 U.S. at 738. Importantly, the Court observed that "[o]ne purpose of the Hobbs Act was to avoid the duplication of effort involved in creation of a separate record before the agency and the district court." *Id*. at 740 (citing H.R. Rep. No. 81-2122, at 4 (1950)).

That same purpose applies with equal force to an agency rulemaking—an administrative action clearly included in Section 189.a. That purpose applies regardless of whether the rule at issue resulted from a notice-and-comment informal rulemaking process or a more formal agency hearing process. Where the agency has (as here) established an ample record in an administrative proceeding, review in the district court is not necessary. As stated by the Supreme Court in *Lorion*, "the focal point for judicial review should be on the administrative record already in existence, not some new record made initially in

the reviewing court." *Id.* at 743 (quoting *Camp v. Pitts*, 411 U.S. 138, 142 (1973)).[3]

The First Circuit addressed jurisdiction over an NRC rule in *Citizens Awareness Network, Inc. v. United States*, 391 F.3d 338 (1st Cir. 2004). The court recognized that the petitioners were challenging a "rule, not an order." *Id*. at 345.[4] But, ultimately, the court recognized that under *Lorion*, and "[a]bsent a firm indication that Congress intended to locate initial APA review of agency action in the district courts, 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 346 (citing *Lorion*, 470 U.S. at 745).

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[3] Consistent with the intent to avoid duplication, sequential review in the court of appeals of individual licensing decisions relying on the Continued Storage Rule (which is a rule of generic applicability) also would be wildly inefficient.

[4] The court observed that the Hobbs Act itself, in places, separately addresses review of "rules, regulations, or final orders." *Id*. at 346. But the court overlooked that the separate Hobbs Act provisions for different agencies were not enacted at the same time, and therefore cannot be viewed as a cohesive whole. When the AEA amended the Hobbs Act in 1954 to add the AEC (discussed below), the term "order" did not mean an order as defined in the APA. Thus, the specific AEA provision referencing rulemaking proceedings should trump the generic definition of "order" from the APA. *See New York Republican State Committee v. SEC*, 799 F.3d 1126, 1129 (D.C. Cir. 2015) (explaining "that the word 'order' is a word of many meanings, and it makes sense to read it broadly in the context of direct review provisions unless a statute has separate review provisions for 'rules' and 'orders'").

In *Quivira Mining Co. v. EPA*, 728 F.2d 477 (10th Cir. 1984), the court addressed jurisdiction under the Hobbs Act to review Environmental Protection Agency ("EPA") standards promulgated under the AEA. The court had no difficulty in concluding that rules dealing with the activities of NRC licensees are final "orders" that trigger Hobbs Act review. *Id*. at 479. Foreshadowing both *Lorion* and *Citizens Awareness Network*, the court observed that "[u]ntil Congress clearly indicates its intent to alter the coherent energy plan inherent in the Atomic Energy Act, it is not for us to do so by implication." *Id*. at 482. This Court more recently reached the same conclusion regarding its jurisdiction to review EPA regulations setting standards for a high-level waste repository in *Nuclear Energy Institute v. EPA*, 373 F.3d 1251, 1264-65 (D.C. Cir. 2004).

At least one district court found no distinction between a "final order" reviewable under the Hobbs Act and a final rule. *See Utility Workers Union of America, AFL-CIO v. NRC*, 664 F. Supp. 136, 138 (S.D.N.Y. 1987) ("Whether an order is the result of agency adjudication or agency rulemaking is of no consequence for purposes of determining whether or by what court judicial review is appropriate."). Indeed, to draw such a distinction would, in effect, read the entire "rules and regulations" clause out of Section 189.a, denying courts of appeals of jurisdiction over rulemaking proceedings for no clear reason.

Like the Supreme Court in *Lorion*, when faced with potentially ambiguous statutes this Court has broadly construed its jurisdiction based on practical considerations. *See, e.g.*, *Shell Oil Co. v. FERC*, 47 F.3d 1186, 1195 (D.C. Cir. 1995) ("[A] district court offers no advantages over a court of appeals with respect to on-the-record review of completed administrative proceedings, while a bifurcated approach might lead to confusion and unnecessary duplication."); *Natural Resources Defense Council, Inc. v. EPA*, 673 F.2d 400, 405 n.15 (D.C. Cir. 1982) ("National uniformity, an important goal in dealing with broad regulations, is best served by initial review in a court of appeals."). Here, the purpose of the Hobbs Act supports initial review of an extensive NRC rulemaking record in the courts of appeals.

C. The Legislative History Confirms Congressional Intent to Encompass Rules in the Hobbs Act

The Hobbs Act as initially enacted in 1950 did not include a provision for review of actions by the AEC.[5] What is now in Section 2342(4) was added in 1954 by the AEA, ch. 1073, § 2(b), 68. Stat. 919, 961 (1954). The Supreme Court carefully considered the legislative history of the 1954 modifications of Section 189 in *Lorion*, 470 U.S. at 737-40. The Court found nothing in the legislative history that "affirmatively suggests" that Congress intended to exclude

[5] Act of Dec. 29, 1950 (Hobbs Act), ch. 1189, § 2, 64 Stat. 1129, 1129 (current version at 28 U.S.C. § 2342).

initial court of appeals review of the agency action in that case. *Id.* at 739-40. That same legislative history suggests congressional intent to include NRC rules within the reviewability provision of the AEA and therefore within the Hobbs Act, and certainly provides no evidence to affirmatively suggest intent to exclude rules.

As it came from the Joint Committee on Atomic Energy, Section 189 was identical in both Senate Bill S. 3690 and House Bill H.R. 9757. It read

> Sec. 189. JUDICIAL REVIEW— Any final order granting, suspending . . . or any final order issuing or modifying rules and regulations dealing with the activities of licensees entered *in an 'agency action' of the Commission* shall be subject to judicial review in the manner prescribed [by the Hobbs Act], and to the scope of judicial review and other remedies [in § 10 of the APA].

H.R. Rep. No. 83-2181, at 85 (1954); S. Rep. No. 83-1699, at 85 (1954) (same) (emphasis added). The reference to an "agency action" illustrates the intended broad scope of reviewable "orders." Section 181 (now 42 U.S.C. § 2231) stated that "agency action" under the AEA had the same definition as in the APA. That definition, as it does today, encompassed "the whole or a part of an agency rule, order, license . . . or the equivalent." 5 U.S.C. § 551(13).[6] The clear intent therefore was to include rules.

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[6] Within APA Section 10 on judicial review, the very acts that were reviewable were "agency actions." 5 U.S.C. § 1009(c) (1958) (current version at 5 U.S.C. § 704). Thus, this section was instructing that all "agency actions" related to licensees were to be reviewed in courts of

A subsequent amendment to Section 189 introduced by Senator Hickenlooper bifurcated Section 189 into the two subsections we know today—one on hearings (incorporating provisions from the former Section 181) and one on reviewability. In his own words, the purpose of his amendment was "to specify clearly the circumstances in which hearings are to be held. The section also reincorporates the former provisions of section 189 dealing with judicial review." 100 Cong. Rec. 10,686 (1954) (statement of Sen. Hickenlooper). From this statement, and the comparison of the language before and after the floor amendment, it is clear that the purpose of the change in Section 189 was not to alter any substantive provision for judicial review, nor to limit jurisdiction, but rather to give more specificity to the hearing provision. The amendment that was introduced and passed on that day retained the broad reference to the reviewability of an "agency action":

> b. Any final order entered in any proceeding of the kind specified in subsection a. above entered in an "agency action" of the Commission shall be subject to judicial review in the manner prescribed in the act of December 29, 1950, as amended (ch. 1189, 64 Stat. 1129), and to the provisions of section 10 of the Administrative Procedure Act, as amended.

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appeals, and that those courts should review "agency actions" under the standards of the APA.

100 Cong. Rec. 10,686 (1954).[7]

Ultimately, the reference to an "agency action" was removed from Section 189.b in conference. But the changes were described as only "technical, clarifying, and conforming changes." H.R. Rep. No. 83-2639, at 45 (1954) (Conf. Rep.). In this light, there is no "firm indication" that this was done to substantively alter the scope of jurisdiction for initial review. *Cf. Citizens Awareness Network*, 391 F.3d at 346. And, as in *Lorion*, nothing in the legislative history "affirmatively suggests" an intent to exclude rules and regulations from initial court of appeals review. *Lorion*, 470 U.S. at 739-40. With this context, the Hobbs Act should be given a broad scope consistent with the language of the AEA, the precedent, and the purpose of the statute.

CONCLUSION

The Continued Storage Rule is reviewable in this Court. Jurisdiction is consistent with the text of the statute, the purpose of the Hobbs Act to achieve judicial efficiency, and the legislative history.

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[7] The next amendment on the floor was introduced by Senator Pastore to remove "agency action" from a portion of Section 181. 83 Cong. Rec. 10,686 (1954) (statement of Sen. Pastore). The Senator referred to that term as "too broad" for the purposes of hearings on licenses. *Id.* But his amendment did *not* affect the same term in Section 189.b, again showing intent to retain judicial review in the court of appeals for a broad scope of "agency actions." The provision retaining "agency action" in Section 189 was adopted in the House. 100 Cong. Rec. 11,745-46 (1954). The bill passed the House three days later. 100 Cong. Rec. 12,025 (1954).

Respectfully submitted,

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Dated in Washington, D.C.
this 12th day of February 2016

CERTIFICATE OF COMPLIANCE

In accordance with Fed. R. App. P. 32(a)(7)(C) and D.C. Cir. Rule 32(e)(1), the undersigned counsel certifies that the foregoing Answering Brief of Intervenor-Respondent is proportionally spaced, has a typeface of 14 points or more, and contains 2,426 words, excluding the title page, Table of Contents, Table of Authorities, and certificates of counsel. The word count was determined by Microsoft Word.

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CERTIFICATE OF SERVICE

I certify that on this day, copies of "Supplemental Brief of Intervenor-Respondents Nuclear Energy Institute, Entergy Nuclear Operations, Inc., and Northern States Power Company Addressing Jurisdiction" in the captioned proceeding have been served on the attached service list by Electronic Case Filing ("ECF"), or, for any party not registered for ECF, by U.S. Mail, first class, postage prepaid.

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