ORAL ARGUMENT NOT YET SCHEDULED

No. 21-1162

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

OHIO NUCLEAR-FREE NETWORK and BEYOND NUCLEAR,
Petitioners,

v.

UNITED STATES NUCLEAR REGULATORY COMMISSION and
UNITED STATES OF AMERICA,
Respondents.

On Petition for Review of Action by the
Nuclear Regulatory Commission

RESPONDENTS' REPLY TO PETITIONERS' OPPOSITION TO MOTION TO DISMISS

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APA	Administrative Procedure Act
NEPA	National Environmental Policy Act
NRC	Nuclear Regulatory Commission

INTRODUCTION

Ohio Nuclear-Free Network and Beyond Nuclear (Petitioners) oppose Respondents' motion to dismiss based on an erroneous understanding of hearing rights associated with Nuclear Regulatory Commission (NRC) licensing proceedings. At the threshold, Petitioners fail to contend that they complied with the administrative exhaustion requirements in the Atomic Energy Act and the NRC's regulations. That failure confirms that this Court lacks jurisdiction and should dismiss the petition.

Nonetheless, Petitioners posit that because the NRC never published a Federal Register notice announcing receipt of the license amendment application in question, nor a Federal Register notice soliciting public comment on its Environmental Assessment, there was "no opportunity to participate in the agency's proceedings[.]" Petitioners' Opposition at 11. Thus, the argument goes, these organizations have attained "party" status for purposes of the Hobbs Act (28 U.S.C. § 2344), because submitting their views to the agency by letter was their sole opportunity to participate in the NRC's "closed proceeding." This is fundamentally incorrect as a matter of both law and fact. Petitioners also repeatedly support their arguments with precedent that is either inapplicable or supports Respondents' position.

ARGUMENT

I. The NRC provided public notice of the license amendment application and did not conduct a "closed proceeding."

As an initial matter, Petitioners are incorrect when they state that "the first notification to the public" of the existence of the license amendment application was the NRC's issuance of its completed Environmental Assessment on June 14, 2021, "three days after the license amendment was finalized[.]" Petitioners' Opposition at 2, 9. Petitioners do not square this assertion with the fact that they demonstrated actual knowledge of the license amendment application nearly three months earlier when they submitted their letter to the NRC on March 30, 2021. Moreover, as Respondents explained (Motion to Dismiss at 10), the NRC provided notice of the license amendment application on its public website in January 2020.

It is true that the NRC did not additionally publish a Federal Register notice announcing receipt of the application, but Petitioners identify no applicable legal requirement that the agency neglected. The NRC's regulations expressly permit interested parties to submit hearing requests even where no Federal Register notice has been published. *See* 10 C.F.R. § 2.309(b)(4) (permitting hearing requests in licensing proceedings for which there has been no Federal Register notice). Under that regulation, a hearing request may be submitted within sixty days of notice published on the NRC website, or sixty days after the requestor receives actual

notice of the license application, whichever is later. *Id*. Petitioners are simply incorrect when they assert that the NRC's actions foreclosed the possibility of seeking an administrative hearing, or that doing so "would obviously have been a futile exercise." Petitioners' Opposition at 8. To the contrary, Petitioners demonstrated actual knowledge of the license amendment application well before the NRC staff's approval. Petitioners' Opposition at 3. Rather than timely requesting the administrative hearing which they were entitled to seek, they instead chose to write a letter requesting the NRC take certain actions. By foregoing "the appropriate and available administrative procedure," Petitioners cannot now invoke the jurisdiction of this Court under the Hobbs Act as a "party aggrieved" by the agency's final decision. *Gage v. AEC*, 479 F.2d 1214, 1217-18 (D.C. Cir. 1973).

Petitioners characterize the holding of *Gage*, without citation, as declaring that the Hobbs Act "applies to proceedings where persons can, or must, participate only by commenting." Petitioners' Opposition at 10. This is incorrect. *Gage* declares that, in proceedings described in section 189 of the Atomic Energy Act (which includes both adjudicatory licensing proceedings as well as rulemakings "dealing with the activities of licensees," 42 U.S.C. § 2239(a)(1)), parties "who could have but did not participate" in the underlying proceeding cannot then seek judicial review under the Hobbs Act. *Gage*, 479 F.2d at 1216. This applies with equal force in both rulemaking and adjudication—in either type of proceeding,

petitioners must participate in the "appropriate and available administrative procedure" to later claim "party aggrieved" status. *Id.* at 1218.

Petitioners also surmise that the NRC would have rejected any attempt to submit a hearing request as "clearly premature," in the absence of the publication of a formal "notice of hearing" or "notice of proposed action." Petitioners' Opposition at 8. However, the Commission decisions cited by Petitioners for this assumption—one concerning the renewal of licenses to operate a nuclear power reactor, the other concerning the Department of Energy's application to construct the Yucca Mountain geologic repository—involve materially different kinds of NRC licensing proceedings governed by NRC requirements that are not applicable here.

The NRC will publish a "notice of hearing" in the Federal Register in the case of applications where a hearing is required by law (i.e., a "mandatory" hearing, which the agency must conduct regardless of whether one is requested by the public), or when the Commission finds that a hearing is required because it is in the public interest. *See* 10 C.F.R. § 2.104. The NRC has also committed, by regulation, to publish a "notice of proposed action" before taking action on certain enumerated types of license applications. This type of notice is to be published either in the Federal Register or on the NRC's public website, or both, at the discretion of the agency. *Id*. § 2.105. The two Commission decisions cited by

Petitioners involved prospective litigants seeking to intervene in an NRC proceeding prior to the issuance of this required notice.[1]

The type of licensing proceeding at issue here—amendment of a license for a uranium enrichment facility—is not encompassed by either of these two regulations. Notice in the Federal Register was not required, and thus the opportunity to seek a hearing (and the window of time in which to do so) is governed by 10 C.F.R. § 2.309(b)(4). The NRC did not "decline" to provide Petitioners with an avenue for intervening in the proceeding. Petitioners' Opposition at 9. Rather, Petitioners declined (or misunderstood) the opportunity that was always available to them.

II. Commenting on an NRC licensing proceeding does not make Petitioners a "party."

Because Petitioners were able to seek an adjudicatory hearing before the NRC in which their concerns with the proposed license amendment could have

[1] For example, in *Dominion Nuclear Connecticut*, concerning the renewal of licenses to operate the Millstone Nuclear Power Station, the agency had expressly notified the public in the Federal Register that a notice of opportunity for a hearing under 10 C.F.R. § 2.105 was forthcoming, and the Commission rejected as premature a hearing request that had been submitted prior to this notice. CLI-04-12, 59 N.R.C. 237, 239-40 (2004), 2004 WL 1123831, at *1-3. Similarly, in *U.S. Department of Energy*, concerning the Yucca Mountain geologic repository, the Commission dismissed without prejudice a hearing request the state of Nevada filed one day after the NRC received the license application and prior to the publication of a notice of hearing under 10 C.F.R. § 2.104. CLI-08-20, 68 N.R.C. 272, 274-75 (2008), 2008 WL 3914104, at *1-2.

been raised, merely commenting on the NRC staff's review by letter does not make them "parties aggrieved" under this Circuit's precedent. *See* Respondent's Motion to Dismiss at 9-10. When arguing otherwise, Petitioners repeatedly cite to inapplicable precedent taken from decisions involving participation in *rulemaking* proceedings, where commenting and not formal intervention is the means by which the public participates.

For example, Petitioners cite *NRDC v. NRC*, 666 F.2d 595 (D.C. Cir. 1981), as support for a liberal interpretation of "party aggrieved" in circumstances where there is "no affirmative opportunity for public participation." Petitioners' Opposition at 11. But Petitioners' selected block quotation from *NRDC* declares the unremarkable proposition that an agency cannot insulate *final rules* from judicial review by directly promulgating them without notice and comment and then faulting subsequent petitioners for not participating in the proceeding. 666 F.2d at 601 n.41.[2] Petitioners also cite to *Reytblatt v. NRC*, 105 F.3d 715 (D.C. Cir. 1997), arguing that "tendering comments" makes one a "party" to an

[2] Petitioners also cite to the Eighth Circuit's decision in *North American Savings Association v. Federal Home Loan Bank Board*, a decision involving an adjudication the court expressly characterized as a "closed hearing" with no opportunity for administrative participation by the appellants. 755 F.2d 122, 125 (8th Cir. 1985). But the NRC licensing proceeding here was not "closed," and Petitioners were entitled under NRC regulations to seek a hearing before the agency.

administrative proceeding "if that avenue is available for participation." Petitioners' Opposition at 5. In *Reytblatt*, commenting *was* an available avenue because, as in *NRDC*, it involved judicial review of an NRC final rule, not an adjudicatory proceeding for which a hearing was available. 105 F.3d at 720.

The closest Petitioners come to citing applicable precedent is *Water Transport Association v. Interstate Commerce Commission*, 819 F.2d 1189 (D.C. Cir. 1987), a decision of this Circuit in a Hobbs Act case that involved judicial review of an agency adjudicatory proceeding. Petitioners' Opposition at 5-6. But even that case supports Respondents' position. There, the agency had provisionally approved a railroad's application for rate contracts, but invited protest from interested objectors before the approval went into effect. 819 F.2d at 1191. The petitioner in that case had raised its objections before the agency, which were considered and denied in a final order. *Id.* When determining whether the petitioner was a "party" under the Hobbs Act, the Court concluded that it was, given the "informality" of the proceeding and the fact that the petitioner had done precisely what was asked of it by the agency. Specifically, the Court declared that the "degree of participation necessary to achieve party status" varies according to the formality or structure of the proceeding, but where *intervention is a prerequisite to participation*, "standing to seek judicial review of the outcome will be denied" to those who did not seek leave to intervene. *Id.* at 1192-93 (emphasis

added). Unlike in *Water Transport Association*, the NRC did not informally solicit views of interested persons or invite such persons to participate in ways other than "formal intervention." *Id.* at 1193. Participation in this NRC licensing proceeding was governed by the NRC's procedural rules of general applicability, namely the requirements for submitting hearing requests in 10 C.F.R. § 2.309, which Petitioners did not utilize.[3]

On this point, Petitioners also urge the Court to come to its own determination of what constitutes a "party" for purposes of the Hobbs Act, rather than "depending upon the agency's labeling of an entity as a party." Petitioners' Opposition at 5. Of course, Respondents do not dispute that this Court is the ultimate determinant of its own jurisdiction. But Respondents' position—that seeking an administrative hearing is a mandatory prerequisite to judicial review of the NRC's licensing decisions—follows from the express statutory command enacted by Congress and from this Court's precedents.[4] *See* Respondents' Motion

[3] For the same reason, Petitioners' reliance on *ACA International v. FCC* also fails. That decision, citing *Water Transport Association*, stated that making a "full presentation of views to the agency" through submission of comments may confer "party aggrieved" status in "agency proceedings *that do not require intervention as a prerequisite to participation*." 885 F.3d 687, 711 (D.C. Cir. 2018) (emphasis added).

[4] Petitioners repeatedly cite decisions from the First Circuit for the proposition that "party" for purposes of the Hobbs Act "does not equate" to the regulatory definition of "party" as defined by the agency, but these decisions are consistent

to Dismiss at 6-7. The NRC is required, by statute, to provide an opportunity for a hearing whenever it grants or amends a license. 42 U.S.C. § 2239(a)(1)(A). The NRC carries out this statutory mandate through its comprehensive rules of adjudicatory procedure in 10 C.F.R. Part 2. And the NRC notifies the public of the availability of these procedures through the website referenced in 10 C.F.R. § 2.309(b)(4), on which the NRC provides notice of license applications involving the use of nuclear materials.[5] These rules are the prescribed means by which interested persons must participate in NRC licensing decisions, the "appropriate and available administrative procedure" that is the "statutorily prescribed prerequisite" to obtaining judicial review under the Hobbs Act. *Gage*, 479 F.2d at 1217.

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with Respondents' position. *See Clark & Reid Co., Inc. v. U.S.*, 804 F.2d 3, 5 (1st Cir. 1986) ("We have held that ["party aggrieved"] means that a petitioner must have been a party to the agency proceedings."); *Massachusetts v. U.S.*, 522 F.3d 115, 131 (1st Cir. 2008) ("party aggrieved" status is determined by "whether the would-be petitioner directly and actually participated in the administrative proceedings" (cleaned up)).

[5] *See* https://www.nrc.gov/about-nrc/regulatory/adjudicatory/hearing-license-applications.html, "Hearing Opportunities and License Applications." The web address codified in section 2.309(b)(4)(i) directs visitors to this page.

III. Petitioners' NEPA-related arguments have no bearing on whether they are a "party aggrieved" under the Hobbs Act.

Lastly, Petitioners also appear to assert that the Court should consider them "parties" because they participated in the "NEPA proceeding." Petitioners' Opposition at 9-10 ("Petitioners' claim is governed by NEPA, not the Atomic Energy Act . . . Petitioners' comments on the NRC's proposal to issue an [Environmental Assessment] made them parties to the NEPA process.").

However, this Court's jurisdiction under the Hobbs Act extends to "final orders" issued in proceedings described in section 189 of the Atomic Energy Act. 28 U.S.C. § 2342(4); 42 U.S.C. § 2239(a)(1)(A), (b)(1). The Hobbs Act does not confer general jurisdiction for the Court to review the NRC's "NEPA process," divorced from any final order in a section 189 licensing proceeding to which the Petitioners were parties. Petitioners are again incorrect as a matter of law when they argue they had "no opportunity" to raise their NEPA-related concerns other than their March 2021 letter to the agency. Petitioners' Opposition at 9, 14. This is because NRC regulations governing hearing requests expressly permit the submission of contentions (i.e., statements of law or fact to be raised or controverted in a hearing) on "issues arising under [NEPA]." 10 C.F.R. § 2.309(f)(2). If Petitioners wanted to raise these NEPA issues before the agency

in a way that preserved the possibility of this Court's review, they could have done so by filing a hearing request.

Petitioners also argue that this Court must review the NRC's decision to forego public participation prior to issuing its Environmental Assessment. Petitioners' Opposition at 12-15. This entire discussion has no bearing whatsoever on the issues presented in the Respondents' motion to dismiss—whether Petitioners are "parties aggrieved" under the Hobbs Act.[6]

CONCLUSION

Petitioners undeniably knew of the existence of the license amendment application while it was pending before the NRC and were entitled by the agency's rules of procedure to seek an administrative hearing, yet failed to do so. Under this Court's precedents they are not "parties aggrieved" under the Hobbs Act, and the Court should dismiss the petition for review for the reasons articulated in the Respondents' motion to dismiss.

[6] The irrelevance of this argument is underscored by Petitioners' extensive citation to the Second Circuit's decision in *Brodsky v. NRC*, 704 F.3d 113 (2d Cir. 2013), which is not a Hobbs Act case but rather an appeal from a district court's award of summary judgment in an action brought under the Administrative Procedure Act (APA). That case concerns the appropriate standards of review under the APA when reviewing an agency's compliance with NEPA, and it has nothing to do with the jurisdictional issues raised by Respondents.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH FEDERAL RULE OF APPELLATE PROCEDURE 27(D)

I certify that this filing complies with the requirements of Fed. R. App. P. 27(d)(1)(E) and Circuit Rule 27(a)(2) because it has been prepared in 14-point Times New Roman, a proportionally spaced font.

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