October 6, 2003

Mark J. Langer, Clerk
U. S. Court of Appeals for the
District of Columbia Circuit
E. Barrett Prettyman U.S. Courthouse
333 Constitution Ave., N.W.
Washington, D.C. 20001

RE: Public Citizen, Inc., and San Luis Obispo Mothers For Peace v. NRC,
No. 03-1181

Dear Mr. Langer:

Enclosed you will find an original and four copies of the Federal Respondents' Reply to Petitioners' Opposition to Motion to Dismiss. Please date stamp the enclosed copy of this letter to indicate date of receipt, and return the copy to me in the enclosed envelope, postage pre-paid, at your convenience.

Respectfully submitted,

/RA/

Jared K. Heck
Attorney
Office of the General Counsel

Enclosures: As stated

cc: service list

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

PUBLIC CITIZEN, INC., and SAN LUIS OBISPO MOTHERS FOR PEACE, Petitioners, v. U.S. NUCLEAR REGULATORY COMMISSION and the UNITED STATES OF AMERICA, Respondents.	No. 03-1181

REPLY TO PETITIONERS' OPPOSITION TO MOTION TO DISMISS

Pursuant to the Hobbs Act, 28 U.S.C. § 2341 *et seq.*, Petitioners have sought judicial review of three orders of the Nuclear Regulatory Commission (NRC or Commission). Each NRC order explicitly provided that any person adversely affected by the order could submit an answer and request a hearing to "set forth. . . the reasons as to why the Order should not have been issued." *See All Power Reactor Licensees*, *Order Modifying Licenses (Effective Immediately)*, 68 Fed. Reg. 24,517 (May 7, 2003); *In the Matter of BWX Technologies, Lynchburg, VA; Order Modifying License (Effective Immediately)*, 68 Fed. Reg. 26,675 (May 16, 2003); *In the Matter of Nuclear Fuel Services, Inc., Erwin, TN; Order Modifying License (Effective*

Immediately), 68 Fed. Reg. 26,676 (May 16, 2003). Petitioners did not request a hearing on the NRC orders they now challenge in this Court.

On August 14, 2003, we filed a motion to dismiss this case for lack of jurisdiction. Our motion argued that Petitioners' failure to request an NRC hearing means that they are not a "*party* aggrieved," a prerequisite to judicial review under the Hobbs Act. *See* 28 U.S.C. § 2344 (emphasis added).

Petitioners have opposed our motion to dismiss. Pointing to *Natural Resources Defense Council v. NRC*, 666 F.2d 595 (D.C. Cir. 1981), they maintain that "a petitioner challenging an agency's issuance of a final rule without notice-and-comment proceedings is not barred by the 'party aggrieved' rule." (Pet. Opp. at 7) Petitioners' argument is founded on a fundamental misinterpretation of the agency action at issue in this case, as well as a misreading of this Court's decision in *NRDC*.

1. The key to *NRDC* was its rulemaking setting. Here, though, Petitioners challenge NRC orders that on their face are not rules, but licensing orders. Each is called an "Order Modifying License." In *NRDC*, by contrast, the NRC issued an immediately effective *rule*. 666 F.2d at 599. The NRC issued the rule without notice and comment, although it invited informal comments on the need for further changes to the rule after the fact. *Id.* at 600-601. NRDC submitted

comments in response, asking the Commission to rescind the rule for failure to comply with the notice and comment procedures of the Administrative Procedure Act (APA). *Id.* When the Commission refused, NRDC petitioned for review in this Court seventeen months after the rule's issuance, and argued that the NRC had engaged in a procedurally defective rulemaking. *See id.* at 601.

This Court concluded that the Hobbs Act precluded judicial review of NRDC's procedural challenge because more than 60 days had passed since the NRC initially promulgated the rule. *See id.* at 601-02. NRDC argued that it could not have petitioned for review within 60 days after the rule's promulgation because, having not been able to participate in notice and comment proceedings, it was not then a "party aggrieved" as required by the Hobbs Act. This Court rejected NRDC's argument. The Court held that the Hobbs Act's "party" requirement covers those with "an opportunity to participate in the underlying Commission proceedings," but not those, like NRDC, with no such opportunity:

> NRDC contends that it could not petition for direct review of the order promulgating the amendments because it was not a party to the proceedings which gave birth to the order as required by the Hobbs Act. . . We disagree. In [*Gage v. AEC*, 479 F.2d 1214 (D.C. Cir. 1973)] and [*Easton Utilities Commission v. AEC* 424 F.2d 847 (D.C. Cir. 1970)], we refused to recognize as "parties" those who *had the opportunity to participate* in the underlying Commission proceedings *but who had failed to take advantage of it*. In this case, however, since the amendments were

> promulgated without notice and comment, there were no underlying proceedings in which the NRDC could join to obtain party status.

Id. at 601 n. 42 (emphasis added).

In the present case, there *were* "underlying Commission proceedings." Petitioners *did* have an "opportunity to participate," but "failed to take advantage of it" when they chose not to request an NRC hearing on their notice and comment (or any other) objections. *Id.* Had they done so, the NRC could have considered Petitioners' objections in the first instance. But Petitioners instead came straight to this Court. Under the rationale set forth in footnote 42 of *NRDC*, Petitioners' default on an NRC-provided "opportunity to participate" deprives this Court of jurisdiction.

2. Petitioners attempt to turn the rationale of *NRDC* on its head by asserting that the NRC orders in this case constitute a "procedurally defective rulemaking." (Pet. Brief at 7, 9) But that is precisely how this case differs from *NRDC*—that case undeniably involved an NRC "rule," whereas this one involves NRC licensing orders that Petitioners *claim* are rules.[1] Petitioners cite

[1] Petitioners' opposition repeatedly attempts to characterize the NRC's action in this case as a rulemaking in an effort to escape the Hobbs Act's "party" requirement. (Pet. Brief at 6, 7, 8, 9) But in title and substance the supposed rules are licensing orders. Petitioners' own opposition quotes remarks by an NRC Commissioner (Commissioner McGaffigan) making clear that the Commission deliberately chose to implement security improvements through licensing orders, not rules. Agencies have "very broad discretion" to impose new requirements by order rather than rule. *See, e.g., Time Warner Entertainment Co. v. FCC*, 240 F.3d 1126, 1141 (D.C. Cir. 2001). Here, the NRC opted to enhance security at nuclear power reactors and fuel fabrication facilities through adjudication, issuing orders modifying the licenses of each

NRDC for the proposition that a petitioner "[does] not *need* to do anything further to make itself a 'party aggrieved' once the NRC issued a rule without proper notice and comment." (Pet. Opp. at 8) Even if this is an accurate understanding of *NRDC*, that case certainly did *not* hold that a petitioner may ignore a clear opportunity to become a party to an agency's adjudicatory proceedings simply because it considers those proceedings to be an unlawful rulemaking. *NRDC* suggests the opposite— where, as here, an "opportunity to participate in the underlying Commission proceedings" exists, a petitioner *must* "take advantage of it" to preserve the option of judicial review under the Hobbs Act. *See* 666 F.2d at 601 n. 42.

Petitioners try to excuse their failure to request a hearing by arguing that they had no choice but to seek direct review of the NRC's design basis threat orders without first seeking "party" status in the proceedings below. Petitioners claim that "by taking part in further agency proceedings before the Commission," they would "forever lose" their opportunity to raise their procedural challenge to the NRC's orders. (Pet. Opp. at 8) To support this

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individual facility. As we have stressed, the NRC orders explicitly offered Petitioners an opportunity to become a "party" to the proceedings they now challenge in this Court, but Petitioners declined.

claim, Petitioners try to analogize the procedural posture of this case with that of *NRDC*. (Pet. Opp. at 8-9)

Petitioners' analogy is inapposite. In *NRDC*, the petitioner failed to timely petition for review of an NRC rule, thus foreclosing the possibility of judicial review under the Hobbs Act. The present case has nothing to do with timeliness, nor does it involve the promulgation of rules. Here, the Hobbs Act bars the instant petition for review due to Petitioners' failure to achieve (or even attempt) "party" status in the adjudicatory proceedings below.

3. *NRDC* is distinguishable from the instant case in another important respect. In *NRDC*, the petitioners had no meaningful opportunity to participate in the NRC's proceedings—they were only allowed to submit informal comments suggesting further changes to an already-issued final rule. This Court specifically relied on the lack of a meaningful opportunity to participate to justify a departure from the normal "party" requirements of the Hobbs Act. *See* 666 F.2d at 601 n. 42. Here, Petitioners *did* have a meaningful opportunity to participate through formal adjudicatory proceedings—where they could have contended that the orders were unlawful and "should not have been

issued"[2]—but chose not to. Nothing in *NRDC* justifies departing from the clear statutory language of the Hobbs Act under these circumstances.

Had Petitioners actually requested a hearing on the NRC's orders in this case, the NRC would of course have had to issue a final order in response. This order would have been reviewable in this Court under the Atomic Energy Act (AEA) and the Hobbs Act. *See* AEA § 189, 42 U.S.C. § 2289; 28 U.S.C. § 2344. Those Acts, in combination, expressly grant judicial review of final NRC orders in proceedings modifying (or amending) licenses. Petitioners' claim that participation in an NRC hearing on the challenged licensing orders would be "*fatal* to [judicial] review" is baseless. (Pet. Opp. at 9)

4. Petitioners' final excuse for failing to request an NRC hearing is that "the 'hearing' opportunity that the Commission now relies on was not even intended for challenges such as those presented by petitioners." (Pet. Opp. at 9) Petitioners claim that they did not request a hearing because their procedural "notice and comment" objections do not fit within NRC's legal framework for "adjudicatory enforcement procedures," and because "the requirements for intervention in enforcement proceedings. . . may differ considerably from the entitlement to participate in. . . a rulemaking." (Pet. Opp. at 9, 9 n. 2)

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[2] This is language from the NRC's *Federal Register* notices offering agency hearings on the licensing orders at issue in this case. *See* pp. 1-2, *supra*.

That the requirements for participation in an NRC hearing are different from those for participation in rulemaking does not justify Petitioners' circumvention of the NRC's offer of an agency hearing. If the NRC orders had an adverse impact on Petitioners they could and should have sought a hearing before the agency. At a minimum, Petitioners had to *attempt* to take advantage of their hearing opportunity. As already noted, a hearing request would have led to a final NRC order reviewable under the Hobbs Act. But Petitioners made no attempt to participate. They simply ignored the Hobbs Act's "'party' status requirement, and the 'exhaustion' doctrine implicit therein." *Gage*, 479 F.2d at 1218.

Petitioners cite no instance where the NRC has declared procedural grievances out of bounds in agency adjudicatory proceedings. On the contrary, in *Cleveland Electric Illuminating Co.* (Perry Nuclear Power Plant, Unit 1), CLI-96-13, 44 NRC 315, 319-20 (1996), the Commission and its hearing board gave full consideration to a procedure-based claim that allowing changes in certain testing and inspection schedules would unlawfully deprive intervenors of their NRC hearing rights in the future. That the Commission considered and responded to this procedural claim belies Petitioners' argument that NRC's adjudicatory hearings "cannot reasonably be understood as affording a hearing

opportunity to petitioners who object on procedural grounds. . ." (Pet. Brief at 10) *See also Edlow International Co.*, CLI-76-6, 3 NRC 563, 580-84 (1976) (considering procedural contentions).

As this Court has noted, "procedural objections premised on the APA [are] precisely the sort appropriately raised before [the agency] in the first instance." *Petroleum Communications, Inc., v. FCC*, 22 F.3d 1164, 1170 (D.C. Cir. 1994), *quoting City of Brookings Mun. Tel. Co. v. FCC*, 822 F.2d 1153, 1163 (D.C. Cir. 1987). Petitioners had a statutory obligation under the Hobbs Act to present their procedural arguments to the NRC before seeking judicial review. But Petitioners "refrained from participating in the appropriate and available administrative procedure, which is the statutorily prescribed prerequisite for this court's jurisdiction to entertain their petition for review of an Atomic Energy Commission order." *Gage*, 479 F.2d at 1217. Petitioners therefore failed to achieve "party" status in the proceedings below, and their petition for review must be dismissed.

CONCLUSION

For the reasons stated above and in our motion to dismiss, this Court

should dismiss the instant petition for review for lack of jurisdiction.

Respectfully submitted,

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October 6, 2003

CERTIFICATE OF SERVICE

I hereby certify that on October 6, 2003, copies of the foregoing Reply to Petitioners' Opposition to Motion to Dismiss were served by mail, postage prepaid, upon the following counsel:

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