



OFFICE OF THE  
GENERAL COUNSEL

UNITED STATES  
NUCLEAR REGULATORY COMMISSION  
WASHINGTON, D.C. 20555-0001

June 4, 2008

Catherine O'Hagan Wolfe, Clerk  
United States Court of Appeals  
for the Second Circuit  
United States Court House  
40 Foley Square  
New York, New York 10007

BY OVERNIGHT DELIVERY

Attn: Maria Rodriguez

Re: *Brodsky v. U.S. Nuclear Regulatory Commission*, No. 08-1454-ag

Dear Ms. Wolfe,

Enclosed for filing please find an original and four copies of Federal Respondents' Reply in Support of its Motion to Dismiss.

Thank you for your kind assistance.

Yours truly,

A handwritten signature in black ink that reads "Robert M. Rader".

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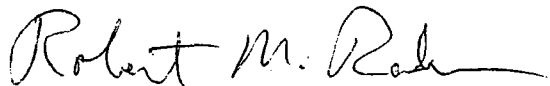
## CERTIFICATE OF SERVICE

I hereby certify that I have on this 4th day of June 2008 served upon the following, by overnight delivery(\*) or by deposit in the United States Mail, first class, postage prepaid, a copy of Federal Respondents' Reply in Support of its Motion to Dismiss:

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**IN THE UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT**

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**RICHARD L. BRODSKY, et al.,**

**Petitioners,**

**v.**

**U.S. NUCLEAR REGULATORY COMMISSION**

**and**

**UNITED STATES OF AMERICA,**

**Respondents.**

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)  
) **Motion to Dismiss -**  
) **Respondents' Reply**

) **Docket No. 08- 1454-AG**  
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**Federal Respondents' Reply in Support of Motion to Dismiss**

**Preliminary Statement**

Petitioners' response to our motion to dismiss intermingles and confuses two separate and distinct claims: (1) alleged substantive deficiencies in an NRC decision to exempt the "Indian Point 3" nuclear power reactor from certain regulatory requirements, and (2) an alleged procedural right to an agency hearing on the exemption. Our motion to dismiss pointed out that petitioners waited too long to seek substantive judicial review, thus depriving this Court of jurisdiction

to consider the matter. Our motion agreed that petitioners' procedural challenge was timely, but showed that it was insubstantial on its face – the Commission and the courts of appeals have held repeatedly that the Atomic Energy Act grants no right to an agency hearing on exemptions. Petitioners' response to our motion is unpersuasive. Their petition for review should be rejected summarily.

### Argument

#### I. Petitioners' substantive challenge to the exemption is untimely.

Our motion to dismiss showed that the sixty days for filing under the Hobbs Act expired long before this petition for review was filed. Petitioners concede that notice of the exemption was published on October 4, 2007, and that they had actual notice of the publication. The Hobbs Act sixty-day jurisdictional limitation is crystal clear. “We first look to the statute's plain meaning; if the language is unambiguous, we will not look farther.” *Estate of Pew v. Cardarelli*, 2008 WL 2042809, 4 (2d Cir. 2008). “This is all the more true of statutory provisions specifying the timing of review, for those time limits are . . . ‘mandatory and jurisdictional . . . and are not subject to equitable tolling.’” *Stone v. INS*, 514 U.S. 386, 405 (1995), *quoting Missouri v. Jenkins*, 495 U.S. 33, 45 (1990).

To excuse their lateness, petitioners argue that they “took reasonable steps to exhaust their administrative remedies.” (Pet. Resp. 11). Yet, they cite no NRC

regulation authorizing their supposed “exhaustion” by the means they chose: filing a motion to “reopen” with the Commission.<sup>1</sup> No court has ever permitted a petitioner to invent agency procedures for “exhaustion” and then claim that the Hobbs Act was tolled while the fictitious procedure was “exhausted.” To accept such a bootstrap argument would give a petitioner potentially endless review opportunities and would render the sixty-day limitation a nullity.

The courts will reject an “attempt to circumvent the sixty-day limitations period of the Hobbs Act” where, “despite the petitioners’ characterization of their action, the requested relief would have required [the] court to reverse an agency order for which the limitations period of the Hobbs Act had expired.” *Nebraska State Legislative Bd., United Transp. Union v. Slater*, 245 F.3d 656, 659 (8<sup>th</sup> Cir. 2001). Petitioners cannot self-create jurisdiction in this Court by goading the NRC into a reply on a closed matter, and then claim that the NRC has “reopened”

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<sup>1</sup> Contrary to petitioners’ argument that the exemption had to be signed by the Commissioners (Pet. Resp. 12), orders by officials acting under delegated powers are equally final and appealable. *E.g., H.C. MacClaren, Inc. v. Dept. of Agriculture*, 342 F.3d 584, 588 n.3 (6<sup>th</sup> Cir. 2003). The Director who authorized the exemption on behalf of the Commission acted under an internal delegation of authority, just as NRC officials do all the time. *See, e.g., Riverkeeper, Inc. v. Collins*, 359 F.3d 156, 160 (2d Cir. 2004)(review of Director’s denial of §2.206 citizen’s petition).

it. *Massachusetts v. ICC*, 893 F.2d 1368, 1372 (D.C. Cir 1990).<sup>2</sup>

The “petition for rulemaking” cases that petitioners cite (Pet. Resp. 14-15) don’t help their cause. Those cases merely allow access to the courts, under a severely limited standard of review, when an agency refuses to reconsider previously-resolved generic regulations. Those cases do not authorize reopening a case like this one, involving specific relief to an identified licensee. Petitioners did not seek, and were not denied, any revision of NRC regulations.

Petitioners did not vigilantly protect their rights. “It is incumbent upon an interested person to act affirmatively to protect himself in administrative proceedings, and . . . [s]uch person should not be entitled to sit back and wait until

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<sup>2</sup> Hence, petitioners misread *ICC v. Brotherhood of Locomotive Engineers*, 482 U.S. 270 (1987), and its progeny. That line of cases applies only when a motion for reconsideration is made *under established agency procedures*. Further, it applies only when the Commission “reopens a proceeding” and issues a merits-related decision on “the rights and obligations set forth in the original order.” *Id.* at 278. Here, the Commission neither “reopened” the exemption nor issued any decision on its merits. It merely denied the request for a hearing, which was *not* the subject of the final agency order published on October 4, 2007.

Petitioners thus are wrong in suggesting that the Commission “granted” the exemption in its order of January 30, 2007. (Pet. Resp. 5). On its face, that order did no more than deny petitioners’ hearing request. In any event, “when in response to comments that are beyond the scope” of the original proceeding, the agency “merely reaffirms its prior position,” no new appeal period is created. *United Transp. Union, Illinois Legislative Bd. v. Surface Transp. Bd.*, 132 F.3d 71, 76 (D.C. Cir. 1998).

all interested persons who so act have been heard, and then complain that he has not been properly treated.” *Nader v. NRC*, 513 F.2d 1045, 1054 (D.C. Cir. 1975)(footnotes and internal quotation marks omitted), *quoting Red River Broadcasting Co. v. FCC*, 98 F.2d 282, 286 (D.C. Cir. 1938). Nothing prevented petitioners from filing a timely protective petition following the issuance of the exemption, even if they thought that the clock would not start to run until later.<sup>3</sup> *See Horsehead Res. Dev. Co. v. EPA*, 130 F.3d 1090, 1095 (D.C.Cir.1997).  
Petitioners’ failure to do so is fatal.

## **II. An exemption is not a licensing action or rulemaking.**

To persuade this Court to order an agency hearing on the exemption they challenge, petitioners have no choice but to fiddle with the plain language of Section 189 of the Atomic Energy Act, 42 U.S.C. § 2239, in effect originating a

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<sup>3</sup> Petitioners erroneously state that respondents’ timeliness argument depends on whether the exemption was not really a license amendment. (Pet. Resp. 11). This is not so. Granting the exemption, however petitioners might characterize it (*id.* at 11-12, 14), was clearly final agency action. The exemption was “effective upon issuance” (72 Fed. Reg. 56801(Oct. 4, 2007)), and nothing more remained to be done. Thus, the nature of the relief granted the licensee is irrelevant to the finality of the granting order. Commission orders are reviewable by the courts of appeals “whether or not a hearing before the Commission occurred *or could have occurred.*” *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 737 (1985)(emphasis added).

wholly new category of hearings for grant of an “exemption.”<sup>4</sup> While petitioners predictably equate “exemption” with “amendment” – a form of NRC action that does fall under the Section 189 “hearing” mandate – both terms are used in the statute in different sections and nowhere can an inference be drawn that these statutory terms are used interchangeably. *Compare* Section 187 of the Act, 42 U.S.C. § 2237 (license amendments) *with* Section 170(k) of the Act, 42 U.S.C. § 2210(k) (exemption from financial qualifications requirements).

In *Massachusetts v. NRC*, 878 F.2d 1516 (1<sup>st</sup> Cir. 1989)(“*Pilgrim*”), the First Circuit agreed that the plain text and legislative history of the Atomic Energy Act demonstrate that Congress did not equate granting an exemption with granting a license amendment:

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<sup>4</sup> Petitioners vastly distort the exemption at issue here. The exemption granted Indian Point 3 by the Commission from the requirements of 10 C.F.R. Part 50, Appendix R, III.G.2, does not excuse the licensee from compliance with its fire protection regulations, but rather allows the licensee to meet the technical requirements of those regulations by other means than those specified in the regulation.

Thus, the exemption states that the NRC Staff found that “the application of the regulation in these particular circumstances is not necessary to achieve the underlying purpose of the rule.” 72 Fed. Reg. 56801. Accordingly, the NRC Staff also determined that granting the exemption “will not result in a violation of the Atomic Energy Act of 1954, as amended, or the Commission’s regulations.” *Id.* at 56800.



A hearing is mandatory only when the proceeding concerns the “granting, suspending, revoking or amending” of the license. . . . [W]hat legislative history there exists suggests that Congress intended the provisions of the section *to be construed quite literally*. If a particular form of Commission action *does not fall within one of the eight categories* set forth in the section, no hearing need be granted by the Commission.

*Id.* at 1522 (emphasis added), *quoting in part San Luis Obispo Mothers for Peace v. NRC*, 751 F.2d 1287, 1314 (D.C. Cir. 1984); *accord, Kelley v. Selin*, 42 F.3d 1501, 1515 (6<sup>th</sup> Cir. 1995) (“the right to an automatic hearing applies only when the agency acts in a matter provided for in § 189(a), which includes matters generally concerned with the licensing process”).<sup>5</sup>

Even if further recourse were made to the “design of the statute as a whole,” *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988), the statute remains unambiguous, both in text and context. By its plain terms, Section 189’s list of categories for which a hearing must be offered is exclusive. Where Congress has

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<sup>5</sup> “Well-established principles of construction dictate that statutory analysis necessarily begins with the ‘plain meaning’ of a law’s text and, absent ambiguity, will generally end there.” *Puello v. Bureau of Citizenship and Immigration Services*, 511 F.3d 324, 327 (2d Cir. 2007), *quoting Collazos v. United States*, 368 F.3d 190, 196 (2d Cir. 2004). No ambiguity exists in the exhaustive list of actions for which a person may request a hearing. Petitioners may not apply a “blue pencil” to omit the words that define proceedings for which a hearing may be requested. *Massachusetts Mut. Life v. Russell*, 473 U.S. 134, 142 (1985).

enacted a list connected in the disjunctive, “the phrase can be reasonably interpreted as limiting” the list to those specifically mentioned. *Huls America Inc. v. Browner*, 83 F.3d 445, 450 (D.C. Cir. 1996). If Congress had wished to grant hearings on exemptions, it could have done far more discernibly. As the Supreme Court said in *Whitman v. American Trucking Assocs.*, 531 U.S. 457, 468 (2001), Congress “does not hide elephants in mouseholes.”

Petitioners try to distinguish *Pilgrim* as only a temporary reprieve from emergency drill requirements under NRC rules. This characterization, however, does not alter the language of Section 189 defining the right to a hearing, which *Massachusetts* strictly limited to specified licensing actions. In any event, the First Circuit merely pointed out that the NRC had relied on a provision of 10 C.F.R. § 50.12 that provides temporary relief from compliance with a regulation. 878 F.2d at 1521. While the *Pilgrim* exemption was temporal, *see* 10 C.F.R. § 50.12(a)(2)(v), other exemptions provided by regulation are not. A temporal exemption excuses the licensee altogether, albeit for a brief period, from complying with the applicable regulation. Here, by contrast, the licensee was *not* excused from regulatory compliance, even temporarily. Instead, as is evident from the *Federal Register* notice announcing the exemption, the NRC relied on another provision of §50.12 governing equivalent means of compliance.

Thus, just as in *Pilgrim*, “[t]his is not a situation in which the NRC permanently,” or even temporarily, “exempted the licensee from following a specific license requirement,” or “changed [the] license in such a way that [the licensee] is no longer required to follow NRC’s regulations and rules.”<sup>6</sup> 878 F.2d at 1521. Instead, the NRC found that, given the licensee’s commitment to plant modifications, interim “compensatory measures in place” and “administrative control procedures that control hot work and limit transient combustibles in the affected areas,” “the application of the [fire protection] regulation is not necessary to achieve the underlying purpose of the rule.” 72 Fed. Reg. 56801; *see* 10 C.F.R. § 50.12(a)(2)(ii). Hence, no license “amendment” has occurred, and no hearing right attaches.

### **Conclusion**

The petition is untimely insofar as it seeks a merits review of the exemption granted to Indian Point 3. As for petitioners’ hearing request, Section 189 of the Act does not provide for hearings on exemptions, including the fire protection

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<sup>6</sup> Petitioners cite similar language from *Kelley v. Selin*. (Pet. Resp. 8), but this adds nothing to their argument. As discussed, the NRC has not exempted the Indian Point 3 licensee from any fire protection requirement, but has simply authorized an equivalent means of compliance. 72 Fed. Reg. 56801.

exemption at issue here. Accordingly, this petition for review should be dismissed for lack of jurisdiction insofar as it seeks merits review, and denied summarily insofar as it challenges the Commission's denial of a hearing.

Respectfully submitted,

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