ORAL ARGUMENT SCHEDULED FOR SEPTEMBER 10, 2004

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No. 03-1181

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

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PUBLIC CITIZEN, INC., and SAN LUIS OBISPO MOTHERS FOR PEACE,

*Petitioners,*

v.

UNITED STATES NUCLEAR REGULATORY COMMISSION,

*Respondent.*

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On Petition for Review of an Order of the
United States Nuclear Regulatory Commission

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# PETITIONERS' REPLY BRIEF

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## INTRODUCTION AND SUMMARY OF ARGUMENT

The NRC's position rests on two fictions. The first is that the Commission didn't really "supersede" or "revise" a published regulation, even though that is exactly what it said it was doing. The second is that when, without any prior proceedings, the Commission announced a prospective standard of conduct applicable generically to *all* licensed nuclear plants and fuel fabrication facilities, it was nonetheless engaged in "adjudication," not "rulemaking."

The agency must resort to the first fiction because *it expressly acknowledges that it has no power to supersede or revise a regulation without notice-and-comment rulemaking.* This concession, by itself, is fatal to the agency's position on the merits unless it can convince this Court that the NRC did not actually supersede or revise the design basis threat regulation.

Even leaving this point aside, the NRC effectively concedes that if its issuance of a new design basis threat standard constituted "rulemaking," it was unlawful both because the agency made no findings that would justify bypassing notice and comment under the APA and because, as the NRC acknowledges, this Court has held that the Atomic Energy Act, unlike the APA, does not authorize the agency to forgo notice-and-comment rulemaking based on a finding of good cause. Hence the need for the second fiction: Unless the agency can successfully

characterize what it did as something other than rulemaking, it has no argument that its actions were lawful.

Neither of the agency's efforts to sidestep the true import of its actions can succeed. The NRC's brief asks the Court to believe that the Commission simply misspoke when it published an order in the Federal Register saying it was revising and superseding the design basis threat regulation. That argument runs afoul of the fundamental principle — which this Court has repeatedly reaffirmed in the face of similar creativity by agency litigators — that an agency's action can be sustained only on the basis of the explanation offered by the agency at the time of its action, not alternative theories cooked up by worried lawyers after the fact. Moreover, in this case, the agency's lawyers offer the Court nothing more than their own say-so that the agency really did just the opposite of what it said it was doing. Faced with the choice of accepting what the Commission said it was doing or what its lawyers now say in their brief, the Court must opt for the former. Once it does so, that ends the case on the merits, because even the agency's lawyers concede that the NRC cannot issue an order that supersedes or revises a *published regulation* without notice-and-comment rulemaking, regardless of whether it tries to call what it is doing an "adjudication."

Thus, unless the Court buys the agency's argument that the Commission misspoke, it need not reach the agency's argument that the Commission made a

permissible choice to act through "adjudication" rather than rulemaking. But even if the Court reaches the adjudication-versus-rulemaking issue, the agency's position cannot prevail, because what happened here was no adjudication. This Court has made clear that the label an agency chooses to place on an action is not determinative of its legality under the APA; what matters is the substance of what the agency has done. Here, the agency, by mere fiat, issued a prospective rule of conduct that is generically applicable to a broad class of regulated entities, without any proceedings that approximate an adjudication — i.e., a process through which legal principles are applied to the particular conduct of identified parties. What the NRC did here is not what either the Supreme Court or this Court have had in mind when they have stated that agencies may announce rules through case-by-case adjudication as well as rulemaking proceedings. Rather, what the agency did was to issue a legislative rule without any of the rulemaking procedures called for under the APA and the Atomic Energy Act, and without any valid basis for bypassing those procedures.

When the agency's vain attempts to call what it did something other than rulemaking are set aside, its effort to deny that this Court has jurisdiction fails as well, for the agency's principal argument that this Court's decision in *NRDC v. NRC*, 666 F.2d 595 (D.C. Cir. 1981), is inapplicable is that that case concerned rulemaking while this one, according to the agency, involves an adjudication.

Once the true nature of the agency's action in this case is recognized, it is apparent that here, as in *NRDC*, the agency issued a rule without affording the petitioners (or anyone else) *any* opportunity to become parties to a rulemaking proceeding. *NRDC* holds that in such circumstances the Hobbs Act's "party" requirement does not bar judicial review to those denied the opportunity to participate in a notice-and-comment rulemaking proceeding.

Finally, the agency's attempt to argue that petitioners lack standing is thoroughly unpersuasive. The agency's principal standing argument is that petitioners' injuries are unredressable because, even if the Court were to rule in their favor, they would receive no relief beyond that which is already available to them if they file a rulemaking petition. The NRC's redressability argument disregards the very real differences between the right to petition an agency to commence a rulemaking proceeding and the right to have comments received and considered by the agency when it has already commenced such a proceeding. Even allowing for the possibility that a rulemaking proceeding in this matter would have to be tailored to account for legitimate security concerns, the petitioners would receive real relief if, as they request, the Court were to order the agency to conduct a notice-and-comment rulemaking proceeding in which they and other members of the public could at least submit comments before the agency finalized its revision of the design basis threat regulation.

## ARGUMENT

## I.
## THE NRC'S ACTION WAS A RULEMAKING THAT DID NOT COMPLY WITH THE PROCEDURAL REQUIREMENTS OF THE APA AND THE ATOMIC ENERGY ACT.

### A. The Court Should Not Accept the Agency's Post Hoc Assertion that the Commission Did Not Supersede or Revise a Published Regulation.

We begin where the NRC's brief ends. Although the agency goes to great lengths to characterize its order revising the design basis threat regulation as a permissible exercise of adjudicatory authority, the agency ultimately must concede that, regardless of whether its action was an "adjudication" or a "rulemaking," it had no authority to amend a published regulation without engaging in notice-and-comment rulemaking: "It is true, as Petitioners stress (Pet. Brief at 19) that *agencies cannot amend existing rules outside the notice-and-comment process*." NRC Br. 46 (emphasis added). Thus, the agency's attempt to characterize its action as an "adjudication" is irrelevant unless it can somehow convince this Court that the Commission did not really "supersede" and "revise" its published design basis threat regulation, as it explicitly said it was doing. J.A. 2, 16, 23.

While admitting that the Commission's words "at first sight might suggest an NRC rulemaking," the NRC's lawyers now urge this Court to disregard those words as "inartful" (NRC Br. 46) because, according to the NRC's brief, the "effect" of the newly promulgated standard "is not to alter, relax, or rescind the

terms of any regulation — all regulations are left intact — but to require licensees to … provide greater physical protection against terrorist attack in a manner consistent with the NRC's existing security regulations." NRC Br. 47. According to the NRC's brief, the orders at issue simply "provide more details" about how to comply with the existing regulations. *Id*.

The problem is that that is just not what the NRC's orders say. The orders do *not* leave the existing regulations "intact" — they expressly *supersede* and *revise* them. The language of the Commission's orders is perfectly clear, and it is "inartful" only in the sense that it would now be more convenient for the agency if the orders had said something else.[1] To be sure, the new standard apparently does not "relax" the preexisting standard. But it surely "alters" it by revising it to add requirements not previously set forth in the regulation. Indeed, even the NRC's brief has to concede as much: It acknowledges that the new standard requires compliance with "additional adversary attributes never before contained in NRC regulations" (NRC Br. 48) and that licensees must now give "prime consideration

[1] That the NRC said what it meant, and vice versa, is confirmed by the remarks of Commissioner McGaffigan, quoted in our opening brief at page 10, which demonstrate that the Commissioners specifically intended to replace 10 C.F.R. § 73.1 with a new, secret order.

to the orders' *new requirements*" (*id.* (emphasis added)) — not to the terms of the superseded regulation.

The agency's attempts in its brief to recharacterize its orders are thus self-contradictory on their face. Even if the assertions in the brief were not facially implausible, however, this Court could not uphold the agency's orders on the basis of its attorneys' post hoc, revisionist explanations of the Commission's actions. As this Court has repeatedly stated, "we cannot credit an agency counsel's presentation of a position not clearly adopted by the agency." *Checkosky v. SEC*, 23 F.3d 452, 460 (D.C. Cir. 1994) (opinion of Silberman, J.) "This principle, grounded in the teachings of *SEC v. Chenery Corp*., 318 U.S. 80 … (1943) and *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 … (1971), requires that courts adjudicate agency actions based solely on the grounds relied upon by the agency." *Id.* at 460 n.9. "It is a well-established and equally wise principle that 'courts may not accept appellate counsel's post hoc rationalizations for agency action; [*Chenery*] requires that an agency's discretionary order be upheld, if at all, on the same basis articulated in the order by the agency itself.'" *K N Energy, Inc. v. FERC*, 968 F.2d 1295, 1303 (D.C. Cir. 1992) (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 168-69 (1962)). Here, the articulated basis of the agency's orders was plain and simple: The NRC was revising and superseding its

published regulations. The agency's action cannot now be upheld on the radically different theory advanced in its brief.

It would be particularly unwarranted in this case for the Court to look behind the clear terms of the NRC's published orders and rely instead on the representations now made by the agency's counsel about the effect of the secret provisions of those orders, because the NRC's attorneys have already stipulated that "petitioners' challenge to the manner in which the NRC imposed its new design-basis threat requirements does not require consideration of any 'administrative record' beyond the publicly available portions of the challenged NRC orders themselves." Stipulation of the Parties as to the Administrative Record 1 (filed Jan. 23, 2004). Having stipulated that the Court need look no further than the Commission's publicly available orders, the agency is hardly in a position now to argue that the Court should disregard what those orders say and rely instead on its counsel's unsupported representations about the effect of the secret provisions that have been provided neither to the public nor to this Court.

### B. The NRC's New Rule Was Not the Result of "Adjudication."

The NRC's reliance on the proposition that an agency can issue new rules through "adjudication" as well as "rulemaking" under the APA is fundamentally irrelevant because even the agency does not contend that it can supersede a duly promulgated regulation through adjudication. Even if this point could be

overlooked, however, the agency's position begs the question by assuming that what happened here was an "adjudication" merely because that is the label the agency has now chosen to put on it. This Court has made clear in a variety of contexts, however, that "[t]he label an agency attaches to its action is not determinative." *Continental Air Lines v. Civil Aeronautics Board*, 522 F.2d 107, 124 (D.C. Cir. 1975) (en banc); *see also Sea-Land Service, Inc. v. Department of Transportation*, 137 F.3d 640, 647 (D.C. Cir. 1998) ("the label placed by the agency on its action is normally not conclusive") (quoting *CBS v. United States*, 316 U.S. 407, 416 (1942)); *Batterton v. Marshall*, 648 F.2d 694, 705 n.58 ("Where necessary, the court will look behind the particular label applied by the agency to challenged action in order to discern its real intent and effect."). "[I]t is the substance of what the [agency] has purported to do and has done which is decisive." *Environmental Defense Fund v. Gorsuch*, 713 F.2d 802, 816 (D.C. Cir.1983) (quoting *CBS*, 316 U.S. at 416). Here, an examination of the substance of the agency's action belies any claim that the agency issued its rule through adjudication. Thus, the issue before the Court is not, as the agency would have it, "the wisdom of the NRC's decision to proceed by adjudication rather than rulemaking." NRC Br. 21. The issue is whether the NRC's decision to proceed by rulemaking was lawful.

The agency places primary reliance on the line of authority exemplified by *SEC v. Chenery Corp.*, 332 U.S. 194 (1947), and *NLRB v. Bell Aerospace Co.*, 416 U.S. 267 (1974), in which the Supreme Court recognized that, when an agency resolves cases presented to it for adjudication, it has the power to formulate and elaborate upon standards that will govern the future conduct of persons and entities subject to regulation. *See Bell Aerospace*, 415 U.S. at 292-94. But what the Supreme Court meant in those cases when it said that "the choice between rulemaking and adjudication lies in the first instance within the [agency's] discretion" (*id.* at 294) was *not* that an agency that wants to issue a general rule of prospective application can skip notice-and-comment rulemaking proceedings simply by issuing an order announcing the rule and *calling* it an adjudication. Rather, what the Court meant (and said) was that an agency can choose to forgo rulemaking in favor of a process of elaborating standards of conduct "on a case-by-case basis" through "individual, ad hoc adjudication." *Id.* at 293 (quoting *Chenery*, 332 U.S. at 202-03). In this way, "'[a]djudicated cases may and do … serve as vehicles for the formulation of agency policies, which are applied and announced therein,' and … such cases 'generally provide a guide to action that the agency may be expected to take in future cases.'" *Id.* at 294 (quoting *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 765-66 (1969) (opinion of Fortas, J.)).

To say that an agency may devise standards of conduct through the process of case-by-case adjudication, however, is not to say that it can freely engage in rulemaking in the guise of adjudication. As the Ninth Circuit has observed, "[a]n agency cannot avoid the requirement of notice-and-comment rulemaking simply by characterizing its decision as an adjudication." *Yesler Terrace Community Council v. Cisneros*, 37 F.3d 442, 449 (9th Cir. 1994). When an agency is not devising a rule of decision applicable to the particular facts of a case before it, but is instead simply announcing an across-the-board standard applicable in the future to a broad class of regulated entities, it is engaging in rulemaking, not adjudication, and it cannot disregard the APA's rulemaking provisions. *See NLRB v. Wyman-Gordon Co.*, 394 U.S. at 764-65; *see also Alabama Power Co. v. FERC*, 160 F.3d 7, 11 n.5 (D.C. Cir. 1998) ("The APA does not contemplate the use of adjudication to develop rules.").

This Court explained the distinction in *Association of National Advertisers v. FTC*, 627 F.2d 1151 (D.C. Cir. 1979):

> The object of the rule making proceeding is the implementation or prescription of law or policy for the future, rather than the evaluation of a respondent's past conduct. Typically, the issues relate not to the evidentiary facts, as to which the veracity and demeanor of witnesses would often be important, but rather to the policy-making conclusions to be drawn from the facts. … Conversely, adjudication is concerned with the determination of past and present rights and liabilities. Normally, there is involved a decision as to whether past conduct was unlawful, so that the proceeding is characterized by an accusatory flavor and may result in disciplinary action.

*Id.* at 1160 (quoting Attorney General's Manual on the Administrative Procedure Act 14 (1947)). In short, when an agency is "promulgating policy-based standards of general import" outside of the context of a particular case, it is "engaged in rulemaking." *Id.* at 1161. The fundamental dividing line between rulemaking and adjudication is the "recognized distinction in administrative law between proceedings for the purpose of promulgating policy-type rules … on the one hand, and proceedings designed to adjudicate disputed facts in particular cases on the other." *Id.* at 1165 (quoting *United States v. Florida East Coast Railway*, 410 U.S. 224, 245 (1973)).

In this case, the action of the NRC falls well within the realm of rulemaking. In issuing the new design basis threat standard, the Commission did not purport to be deciding a case about whether the practices of a particular licensee satisfied security requirements. The Commission did not "adjudicate" anything in any ordinary sense of the word: No parties appeared before it in a contested proceeding, whether on the record or otherwise, involving the application of law to fact. Rather, the new standard was the result of a "comprehensive review of [the Commission's] safeguards and security programs and requirements." J.A. 2. Based on this policy review, the Commission decided that it needed to revise the design basis threat for all licensees. *Id.* As is common in rulemaking, "[t]he decision was of general application only"; it "did not purport to decide any

individual case"; and it "applied prospectively only."[2] *Motion Picture Ass'n of America v. Oman*, 969 F.2d 1154, 1157 (D.C. Cir. 1992). In short, "[t]he proceeding was a rulemaking." *Id.*

### C. The Agency Effectively Concedes That If Its Action Was Rulemaking, It Was Improper.

The NRC does not claim to have made findings that would excuse it from conducting notice-and-comment rulemaking under 5 U.S.C. § 553. Moreover, the NRC concedes that this Court's decision in *Union of Concerned Scientists v. NRC*, 711 F.2d 370 (D.C. Cir. 1983), holds that, even if the NRC had made such findings, the Atomic Energy Act would — independently of the APA — itself require notice-and-comment proceedings before the agency could promulgate a rule. *See* NRC Br. 42. Thus, if the agency's action was a rulemaking — which, as we have demonstrated, it was — the agency has offered no legal justification for bypassing notice-and-comment proceedings. Provided that the Court has jurisdiction, a matter to which we turn next, petitioners are entitled to a remedy for

[2] The NRC's denial that its rule is "prospective" (NRC Br. 40) is difficult to fathom. Certainly the new standard is not retrospective — no one has been or will be penalized for failing to follow it in the past. And the NRC's assertion that it will not apply to future licensees is incredible. The design basis threat standard at 10 C.F.R. 73.1 applied to all licensees, and the new orders "superseded" and "revised" it. The NRC clearly intends the new standard to apply to all licensees, present and future.

the NRC's unlawful rulemaking. *Sugar Cane Growers Cooperative of Florida v. Veneman*, 289 F.3d 89, 96-97 (D.C. Cir. 2002).[3]

Before addressing jurisdiction, however, we briefly note that, in addition to being irrelevant because the law does not allow the NRC to engage in rulemaking without notice and comment, the policy reasons the agency offers to defend its decision to forgo that process are unconvincing. For example, the agency contends that to conduct a rulemaking involving security matters and "safeguards information" it first would have had to conduct an antecedent rulemaking to establish rulemaking procedures. NRC Br. 42-43. But the NRC acknowledges that it previously conducted just such a rulemaking with respect to truck bombs, without either compromising security or promulgating a special procedural rule governing the rulemaking. NRC Br. 11-12. As discussed further below (at pp. 22-

[3] As explained in our opening brief, *Sugar Cane Growers* also establishes that the remedy need not and should not involve vacatur of the NRC's new design basis threat standard pending the completion of a proper notice-and-comment rulemaking. *See* Pet. Br. 23 n.11. We emphasize, however, that this does not mean that petitioners are satisfied with the new standard. Petitioners have no way of knowing whether that standard, which is secret, is satisfactory or not. Because petitioners desire that nuclear plant security against terrorist threats be improved as much as feasible, and because the NRC has stated that its new rule imposes more stringent security measures than the old design basis threat, petitioners believe that the public interest would be best served by leaving the new standard in place while the Commission completes a rulemaking in which even more stringent measures, or alternative measures, may be considered.

24), there is, similarly, no reason to believe that the agency could not conduct a meaningful rulemaking proceeding here while at the same time safeguarding any legitimately protected information.

The NRC also contends that it had to proceed by order rather than by rule because of its need for flexibility. "Had the NRC acted by rule," the agency contends, "*every* licensee would likely have had to seek exemptions to address site-specific nuances relevant to their security plans." NRC Br. 45 (emphasis added). This hyperbolic assertion overlooks that the NRC's orders similarly impose across-the-board requirements on all licensees and require any licensee who believes that the new requirements need site-specific tailoring to seek a modification of the order, which would require a hearing. J.A. 4-6. If "every" licensee would have had to seek an exemption from a regulation, every licensee would also have had to seek modification of the order resulting from the agency's so-called "adjudication." Neither procedure is more flexible, or more burdensome, than the other.

## II.
## THIS COURT HAS JURISDICTION.

### A. The Hobbs Act Does Not Bar Review.

The NRC concedes, as it must, that this Court held in *NRDC v. NRC*, 666 F.2d 595 (D.C. Cir. 1981), that when an agency whose orders are subject to Hobbs Act review engages in rulemaking without offering interested persons notice and

opportunity for comment as required by the APA, a person aggrieved by the rule's issuance may seek judicial review notwithstanding that he or she was not a "party" to any agency proceeding. The NRC's principal rejoinder is that "the challenged DBT orders were not a rulemaking" (NRC Br. 24) — a point that stands or falls with the NRC's position on the merits, which, as shown above, is wrong.

The NRC cites no authority holding that where, as here, an agency *has* engaged in unlawful rulemaking without notice and comment, the Hobbs Act's "party" requirement precludes review by a person who was foreclosed from participation in the agency process that led to the rule. Nor does the agency cite any authority holding that a petitioner is required to participate in some after-the-fact proceeding in order to obtain review. Indeed, the NRC overlooks that the petitioners in *NRDC* were offered precisely such an opportunity by the agency: They were invited to submit comments after the rule had been issued. 666 F.2d at 600. Indeed, the *NRDC* petitioners were offered a much more meaningful opportunity to participate in the rulemaking process than the NRC claims to have offered in this case, for they were invited to comment on the merits of the rule, as well as to argue that its promulgation was unlawful.[4] Nonetheless, the Court held

[4] In this case, by contrast, the NRC did not offer petitioners or others in their position the opportunity to become parties to a rulemaking proceeding by offering comments on its standard; rather, it only stated that persons who could meet its

*(footnote continued)*

that the *NRDC* petitioners need not have availed themselves of the post-promulgation proceedings to obtain judicial review. *Id.* at 601-02 n.42. Indeed, it went further: It held that the petitioners could not preserve their procedural APA objection to the rule's promulgation unless they immediately sought judicial review. *Id.* at 601.

The NRC asserts that *NRDC* is not dispositive because it concerned the timeliness of the petition for review, and there is no timeliness issue here. The latter point is trivially true: The issue here is not timeliness. But among the *reasons* the Court gave for holding the NRDC's petition untimely was that the NRDC were required to seek review immediately, notwithstanding the NRC's offer of an opportunity to become a party after the fact by submitting post-promulgation comments. That reason is equally applicable here.[5]

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standards for intervention in individual licensing proceedings could ask for an adjudicatory hearing on whether the promulgation of the order was lawful.

[5] The NRC also contends that *NRDC* is distinguishable because the only issue it decided was whether the petitioners could preserve their challenge to the initial rulemaking in a "separate" proceeding initiated by a rulemaking petition. But the NRDC petitioners had also tried to keep their challenge alive by participating in a post-promulgation comment process that was initiated by the agency itself as a continuation of the rulemaking process, just as the agency here contends that its offer of a post-promulgation hearing is part of the "same" proceeding in which the rule was promulgated.

Moreover, despite the NRC's efforts to evade the effect of *NRDC*, it has no real answer to the point that the post-promulgation "hearing" that it supposedly offered to persons such as petitioners was not equivalent to a right to participate as a party to a notice-and-comment rulemaking. This Court's decision in *Gage v. AEC*, 479 F.2d 1214 (D.C. Cir. 1973), requires persons seeking to challenge an agency rulemaking under the Hobbs Act to have been parties to the rulemaking (assuming, of course, that they had that opportunity); it does not require them to be parties to some other form of proceeding altogether.

In addition, although the NRC buries the point in a footnote (NRC Br. 28 n.12), it cannot deny that it offered the possibility of a hearing only to persons who could establish that they had standing to participate in an enforcement adjudication under 10 C.F.R. 2.714(d), and that the Commission's standing jurisprudence denies standing to intervene in such a proceeding to those, like petitioners, who seek to have more protective measures imposed on a licensee. *See Bellotti v. NRC*, 725 F.2d 1380 (D.C. Cir. 1983) (upholding NRC's denial of intervention). The NRC's footnote tries to distinguish the *Bellotti* standing rule by asserting that petitioners, unlike the proposed intervenor in that case, are not seeking more stringent safety measures — which is simply not true, as the NRC's own brief elsewhere recognizes, *see* NRC Br. 18 ("[Petitioners'] concern is that the orders do not go far enough in enhancing nuclear security."). The NRC further asserts that the *Bellotti*

principle would not deny intervention to a petitioner who sought to present "a claim that the NRC followed the wrong procedures" (NRC Br. 28 n.12) — an argument that is disproved by *Bellotti* itself, where the precise claim that the proposed intervenor sought to assert was a procedural right to participate in NRC proceedings.

In short, what the NRC offered here was not the opportunity to become a party (even after the fact) to its rulemaking, but simply the chance to file a foredoomed petition for intervention. Moreover, the only point of such a proceeding would be to tell the NRC that it had already acted illegally — an argument that the agency's brief amply demonstrates would be futile. As *NRDC* establishes, the Hobbs Act does not require resort to such sterile formalities.

Finally, the NRC argues that if the Court finds *NRDC* applicable even though the agency has labeled its action something other than a rulemaking, it will "threaten to eviscerate the Hobbs Act's party requirement by allowing the exception to swallow the rule." NRC Br. 30. The agency invokes the specter that petitioners will attempt to avoid participation in agency proceedings by making groundless claims that adjudications are really rulemakings. *Id.* Of course, if the agency can avoid the effect of *NRDC* merely by calling a rulemaking an adjudication, that will create equally perverse incentives for agency evasion of legal requirements. In the end, the answer to the NRC's point is that this Court can

tell the difference between a meritorious claim that a purported adjudication is really a rulemaking and a spurious one (*see, e.g., Capital Legal Foundation v. Commodity Credit Corp.*, 711 F.2d 253, 259-60 (D.C. Cir. 1983)), and it can properly confine the application of *NRDC* to the former.

### B. Petitioners' Injuries Are Redressable.

The NRC contends that petitioners lack standing because the procedural (and informational) injuries they have suffered as the result of the NRC's failure to conduct notice-and-comment rulemaking are not redressable.[6] The agency's argument on this point is that if the Court were to remand for notice-and-comment rulemaking, petitioners would receive no more information than they now have about the security measures under consideration by the agency, because all such information would be "safeguards information" that could not be revealed to any

[6] The NRC also briefly argues that the petitioners do not claim injury from the promulgation of the new standard with respect to fuel facilities, and that petitioners have not shown how the denial of notice-and-comment rulemaking resulted in a rule that "threaten[s] their health and safety in a tangible way." NRC Br. 33. As to the first point, there is no requirement that petitioners show a likelihood of injury from every facility affected by the NRC's rulemaking, nor must petitioners show standing three times just because the NRC issued three orders instead of only one to supersede and revise the design basis threat rule. With respect to the NRC's second point, it is obviously impossible for the petitioners to point out specific inadequacies of a secret rule or, therefore, to demonstrate how notice-and-comment rulemaking would result in a better rule, and this Court's decisions have made clear that such showings are not required. *Sugar Cane Growers*, 289 F.3d at 94-95.

members of the public. Thus, petitioners would simply have to submit their comments blind. According to the agency, the right to participate in such a rulemaking process would be worth no more to petitioners than their right to petition the agency for a new rulemaking to replace the revised design basis threat — a right that they can exercise now.

But even if the agency's forecast of what a rulemaking proceeding would look like on remand were correct, its conclusion would not follow. The agency's argument overlooks the substantial difference between petitioning for initiation of a rulemaking and participating in a rulemaking that the agency has already undertaken. When an agency has commenced a rulemaking, it must thoroughly consider all comments it receives and may disregard them only if it has a reasoned and well-explained basis for doing so. A petition for rulemaking, by contrast, faces a much stiffer challenge, in part because of what this Court has called the "presumption of validity" attaching to existing agency rules. *Radio-Television News Directors Ass'n v. FCC*, 184 F.3d 872, 880 (D.C. Cir. 1999).

Thus, "an agency's refusal to institute rulemaking proceedings is at the high end of the range" of deference afforded to agency action, and "[s]uch a refusal is to be overturned 'only in the rarest and most compelling of circumstances ….'" *American Horse Protection Ass'n v. Lyng*, 812 F.2d 1, 4-5 (D.C. Cir. 1987) (citation omitted). Indeed, this Court has stated that it will almost always uphold

an agency's denial of a rulemaking petition absent "plain error of law or a fundamental change in the factual premises previously considered by the agency." *National Customs Brokers & Forwarders Ass'n of America v. United States*, 883 F.2d 93, 96-97 (D.C. Cir. 1989). Accordingly, even if petitioners are forced to submit their comments in the dark, it will make a substantial difference to them whether the agency is compelled to consider their views in a rulemaking proceeding, or whether they are relegated to the far less effective route of petitioning for a rulemaking.

Moreover, if the agency's redressability position were correct, then persons denied the right to participate in notice-and-comment proceedings would never be entitled to a judicial remedy, as they could always make the same comments after the fact in the form of a petition asking the agency to conduct a new rulemaking to revise or rescind the improperly promulgated rule. That has never been the law, as it would effectively render the right to notice-and-comment rulemaking judicially unenforceable. *Cf. Sugar Cane Growers*, 289 F.3d at 96-97.

In any event, the NRC's contention that *no* information could be provided to the public in a notice of proposed rulemaking concerning the design basis threat is implausible and, indeed, is contradicted by other statements in the NRC's own brief. For example, the NRC acknowledges that it was able to conduct a meaningful notice-and-comment proceeding regarding its last previous revision of

the design basis threat — the "truck bomb" rulemaking — even though some information relating to the truck bomb issue was withheld from the public as "safeguards information." NRC Br. 11-12. The NRC never explains why a similar procedure could not be followed here. *At the very least*, the agency's notice could inform the public that it was considering a range of options on subjects such as those described at pages 47-48 of the government's brief, and request comments on what standards would be appropriate for those subjects and whether any additional requirements (such as, for example, requiring plants to defend "in depth" against a threat that had penetrated their perimeters or including aircraft in the design basis threat) should be added if they were not already included in the proposed rule.

Moreover, the agency itself concedes that it has some uncertainty about how it would handle a rulemaking concerning security matters that may involve "safeguards information." *See* NRC Br. 42-43. Before it has even been tried, it is premature either to conclude that all information that would be otherwise be included in a notice of proposed rulemaking would necessarily qualify as safeguards information, or to speculate about what particular information would or would not be protected.[7] In short, a rulemaking proceeding, whatever its precise

[7] Nor is it necessarily even the case that, in a rulemaking proceeding, all public participants should be denied access to legitimately protected information, if they satisfy clearance standards for access and have a need to know in relation to
*(footnote continued)*

contours in light of the security concerns involved, will provide the petitioners with meaningful redress.

## CONCLUSION

For the reasons set forth above and in our opening brief, this Court should grant the petition for review, declare the NRC orders purporting to revise the design basis threat regulation unlawful, and remand the matter to the agency for rulemaking proceedings consistent with the requirements of the APA.

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their participation in the proceeding. Just as the Commission protects and limits access to "safeguards information" in its adjudications, it could consider similar mechanisms for a rulemaking. Again, however, it is premature to resolve this issue before the agency has even attempted to comply with its notice-and-comment obligations.

## RULE 32(a)(7)(C) CERTIFICATE

I hereby certify that the foregoing Petitioners' Reply Brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B). The Brief is composed in a 14-point proportional typeface, Times New Roman. As calculated by my word processing software (Microsoft Word) the Brief (not including those parts excluded under the Federal Rules of Appellate Procedure and the local rules of this Court) contains 5,834 words.

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Scott L. Nelson