

JAN 21 2005

No. 04-1145

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

CITIZENS AWARENESS NETWORK, INC., et al.,
Petitioners,

v.

UNITED STATES OF AMERICA, et al.,
Respondents,

Petition For Panel Rehearing and For Rehearing En Banc of the Decision of the 1st
Circuit Court of Appeals Panel

BRIEF FOR INTERVENORS
NATIONAL WHISTLEBLOWER CENTER and
COMMITTEE FOR SAFETY AT PLANT ZION

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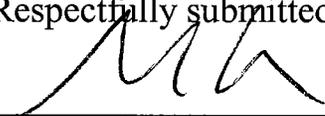
Dated: January 19, 2005

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

CITIZENS AWARENESS NETWORK, INC.)	
<i>Petitioner,</i>)	
)	
)	
v.)	Docket No. 04-1145
UNITED STATES OF AMERICA,)	
)	
and)	
)	
UNITED STATES NUCLEAR)	
REGULATORY COMMISSION)	
<i>Respondents.</i>)	

CORPORATE DISCLOSURE STATEMENT

The National Whistleblower Center is a 501(c)(3) not-for-profit corporation.
The National Whistleblower Center has no parent corporation and is not owned,
wholly or in part, by any publicly-traded corporation.

Respectfully submitted,


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UNITED STATES NUCLEAR)	
REGULATORY COMMISSION)	
<i>Respondents.</i>)	

**COMMITTEE FOR SAFETY AT PLANT ZION'S
CORPORATE DISCLOSURE STATEMENT**

The Committee for Safety at Plant Zion is a not-for-profit voluntary association. The Committee for Safety at Plant Zion has no parent corporation and is not owned, wholly or in part, by any publicly-traded corporation.

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**REASONS WHY PANEL OR EN BANC REHEARING
SHOULD BE GRANTED**

Intervenors respectfully requests panel or en banc rehearing of the Court of Appeals' December 10, 2004 decision. Pursuant to Federal Rule of Appellate Procedure 35(b)(1)(B), intervenors assert that two main "questions of exceptional importance" must be addressed by panel or en banc rehearing: (1) the incongruity of the panel's decision with prior court precedent; and (2) the impact the panel's decision will have on adjudicatory process in hearings mandated by Congress under the Administrative Procedure Act. Points and authorities regarding these two questions of exceptional importance appear in NWC's arguments, herein.

Moreover, the central legal issues in question here continues to be paramount to nuclear safety and the public interest: whether citizens who reside within the NRC-recognized hazard zone of a nuclear power plant (i.e. a 50 mile radius of the plant) receive proper Due Process and have full access to the procedural requirements of a formal hearing under the Administrative Procedure Act (APA), 5 U.S.C. § 556(d), in order to sufficiently adjudicate contested safety or security issues of utmost importance to the community.

STATEMENT OF JURISDICTION

This case arises from a petition for review of a Final Rule issued by the

respondent United States Nuclear Regulatory Commission entitled “Changes to the Adjudicatory Process,” which was published in the Federal Register. 69 Fed. Reg. 2182 (Jan. 14, 2004). Therefore, this court has jurisdiction over the case under 28 U.S.C. §§ 2342, 2343, 2344 and F.R.A.P. 15. Moreover, this petition for panel or en banc rehearing arises from a final decision by a panel of the First Circuit Court of Appeals, dated December 10, 2004. Therefore, this petition is timely filed under F.R.A.P. 40(a)(1).

STATEMENT OF THE ISSUES

The issues presented in this case are twofold. The first issue is whether the rules promulgated in 10 C.F.R. Part 2 comply with the full and formal adjudicatory requirements of the Administrative Procedure Act (“APA”), 5 U.S.C. § 556, including the rights of rebuttal and cross-examination applies to licensing hearings. The second issue is whether the aforementioned rules comply with the procedural requirements of Due Process.

STATEMENT OF THE CASE

On April 16, 2001 the U.S. Nuclear Regulatory Commission (“NRC”) published a proposed rule entitled “Changes to the Adjudicatory Process” in the Federal Register. 66 F.R. 19610. The National Whistleblower Center (“NWC”) and the Committee for Safety at Plant Zion (“CSPZ”) filed a timely response to the

proposed rule on September 14, 2001 in accordance with 66 Federal Register No. 95, 27045-27046 (May 16, 2001). J.A. 751. The NRC published the final rule on January 14, 2004 in the Federal Register. Nuclear Regulatory Commission, Final Rule, 69 Federal Register 2182 (January 14, 2004). On January 27, 2004, the Citizens Awareness Network, Inc. ("CAN") filed a timely petition for review. The NWC filed a timely motion to intervene on February 12, 2004. 28 U.S.C. § 2348, F.R.A.P. 15(d). On April 28, 2004 this Court consolidated the CAN appeal with an appeal of the NRC's rule filed by Public Citizen Critical Mass Energy and Environmental Program and the Nuclear Information and Resource Service. Pursuant to the order of this Court, the NWC's brief was due to be filed on or before June 7, 2004. The brief was timely filed.

On December 10, 2004, a three-judge panel of the First Circuit Court of Appeals issued its decision. Citizen Awareness Network, Inc. v. U.S. 391 F.3d 338 (1st Cir. 2004). Pursuant to F.R.A.P. 40(a)(1), a party had 45 days to file a petition for panel or en banc rehearing.

STATEMENT OF THE FACTS

On January 14, 2004 the NRC published its Final Rule, entitled "Changes to Adjudicatory Process; Final Rule. 69 *Federal Register*, 2182 (January 14, 2004). The Final Rule affirmed the position of the Nuclear Regulatory Commission that

“on-the-record hearings are not required under the Atomic Energy Act,” except in certain limited circumstances not relevant to this appeal. 69 Federal Register, p. 2192 (January 14, 2004). Based on its legal assumption that the Administrative Procedures Act’s adjudicatory mandates did not apply to most NRC licensing proceedings, the Commission approved a complex hybrid hearing structure which radically diminished to prior hearing procedures available to residents who resided within a nuclear plant’s evacuation zone.

Subpart L sets forth “informal hearing procedures” for citizens who reside within the evacuation zone of a NRC licensed facility. 69 Federal Register, pp. 2267-70 (January 14, 2004). Meaningful discovery is not permitted. Id., p. 2268, 10 C.F.R. § 2.1203. Parties have no right to cross examine any witness. Id., p. 2268, , 10 C.F.R. § 2.1204. At the hearing, the “only” person permitted to orally question any witness is the “presiding officer or the presiding officer’s designee.” Id., p. 2269, 10 C.F.R. § 2.1207(b)(6). There is no provision for taking testimony under oath and witness statements may be filed without any requirement that the testimony be sworn. 10 C.F.R. § 2.1207(a). There is no provision for calling adverse witnesses. (Parties can only call their own witnesses or recommend rebuttal questions to witnesses the opponent party chooses to submit.) Id. Parties are not permitted to call witnesses in the control of an opponent, nor can a party

conduct pre-trial depositions of such witnesses. Id.; 10 C.F.R. § 2.1203(d). There is no provision to call a custodian of records at a hearing or obtain documents within control of an opponent. Id. Finally, cross examination may theoretically be granted, within the discretion of a judge. However, the Commission stated that any cross examination would be “rare.” 69 Fed.Reg. 2228.

A party must submit all testimony, rebuttal testimony and proposed questions in writing well before the hearing date. Id., p. 2269,, 10 C.F.R. § 2.1207(a). At the hearing itself, parties may *not* file a motion or request to submit any follow-up questions for the presiding officer to ask a witness, regardless of what a witness may say on the stand. Id., p. 2269, , 10 C.F.R. § 2.1207(b)(6).

In Citizens Awareness Network, Inc. v. United States of America, 391 F.3d 338 (1st Cir. 2004) the intervenors, along with other petitioners, challenged the limitations imposed on his right to present his case pursuant subpart 10 C.F.R. subpart L. On December 10, 2004, the Court held that subpart L comported with the Administrative Procedure Act. Intervenors now petition for a panel En Banc rehearing.

ARGUMENT

I. SUBPART L VIOLATES THE APA

Pursuant to the Administrative Procedure Act, 5 U.S.C. § 556(d), [a] party

is entitled to present his case or defense by oral or documentary evidence, submit rebuttal evidence and to conduct such cross-examination as may be required for a full and true disclosure of the facts.” 5 U.S.C.A. § 556(d).

As outlined in the statement of facts, the procedures in subpart L, on their face, do not comport with the Administrative Procedure Act.

First, a party cannot present his or her case by “oral or documentary evidence.” Section 10 C.F.R. § 2.1207(a) sets forth the procedure for calling witnesses. A party has no right or ability to call any witness in the control of an opposing party. Thus, the testimony of adverse witnesses cannot be obtained. Without the ability to call witnesses who have relevant information, but are in the control of the opposing party, the hearing procedures do not permit a party to present his or her case by oral testimony.

The same is true for documentary evidence. There are no provisions for discovery of documents which may be adverse to an opposing party. There are also no provisions permitting pre-hearing depositions, 10 C.F.R. § 2.1203(d). Thus a party cannot obtain evidence from an opposing party and present that evidence in documentary form at the hearing.

Second, a party cannot question any witnesses. The contested regulations expressly state that “[p]articipants and witnesses will be questioned orally or in

writing and *only by the presiding officer*” or a designee. 10 C.F.R. § 2.1207(b)(6) (emphasis added). All such questions must be submitted at least 5 days before the hearing commences, and once the hearing has begun, “[n]o party may submit proposed questions to the presiding officer ... *except upon request by, and in the sole discretion of, the presiding officer.*” *Id.* at § 2.1207(a)(3), (b)(6) (emphasis added). Whether the presiding officer uses the questions submitted by the parties is a matter of discretion. 10 C.F.R. § 2.1207(b)(6).

Third, a party may not request permission to submit rebuttal questions in response to testimony elicited at a hearing. As set forth in 10 C.F.R. § 2.1207(b)(6), “[n]o party may submit proposed questions to the presiding officer at the hearing, except upon request by, and in the sole discretion of the presiding officer.” 10 C.F.R. § 2.1207(a)(6). Thus, parties cannot submit rebuttal testimony as a matter of right, and cannot even request the presiding officer for permission to file such testimony. 10 C.F.R. § 2.1207(a)(3)(i). Only a presiding officer, at his or her own initiative, and without the benefit of a request being filed by a party, can decide whether to permit rebuttal testimony.

Fourth, the provisions are clearly intended and worded to eliminate any meaningful ability to cross examine witnesses on the stand. There is no right to cross examination. Cross examination is only permitted in the discretion of the

administrative judge, and only if a party adheres to a complex process for requesting cross examination. 10 C.F.R. § 2.1204(b). Indeed, the NRC's commentary in the Federal Register outright states that it "expects that the use of cross-examination will be rare." 69 Federal Register 2228 (January 14, 2004).

Additionally, the prohibition on submitting proposed questions at a hearing clearly forecloses any meaningful cross examination of the evidence orally introduced into the record at a hearing. Under the new rules, at the hearing itself, no party can request that the presiding officer (the only person permitted to question witnesses) ask any new questions based on the oral testimony of a witness. 10 C.F.R. § 2.1207(b)(6).

Fifth, there is no requirement that any of the testimony pre-filed with a hearing examiner or orally introduced at a hearing be submitted under oath. 10 C.F.R. § 2.1207.

Though it is acknowledged that NRC administrative judges have some discretion to control hearing procedure, the regulations go too far in achieving their explicit aim of restraining direct and cross-examination. The contested regulations contain troubling language that serves only to limit, not expand, the procedural rights of the APA. Specifically, the regulations only give presiding officers the discretion to further *limit* the procedures set forth in subpart L:

“[u]nless otherwise *limited* by this subpart [L] or by the presiding officer, participants in an oral hearing may submit and sponsor in the hearings: [initial written statements, written responses, and proposed questions for witnesses].” 10 C.F.R. § 2.1207(a).

Thus, hearing officers lack the discretion to increase the procedural rights afforded the parties.

The panel’s holding that the subpart L procedures met with the mandates of the APA sets very bad precedent, not only in the context of NRC safety hearings, but in the context of all administrative proceedings in which Congress has intended to afford the parties the protections set forth in the APA.

II. THE NRC REGULATIONS VIOLATE DUE PROCESS

Though it is true that an administrative judge may be given discretion to limit hearing procedures, these limitations must nonetheless be reasonable and comport with the basic outlines of due process. Hornsby v. Allen, 326 F.2d 605 (5th Cir. 1964). In particular, the Fifth Circuit Court of Appeals, has specifically held that because “licensing consists in the determination of factual issues and the application of legal criteria to them—a judicial act—the fundamental requirements of due process are applicable to it. Id. at 608. Here, we have the same question of

licensure, with the need for highly fact-based inquiries, and thus the same need to preserve due process.

More precisely, the court in Hornsby held that, though administrative hearings need not adhere strictly to the most formal rules of evidence, “the parties must generally be allowed an opportunity to ... cross-examine witnesses for the other side ...” Id. Quite simply, if a party may only cross-examine adverse witnesses through a presiding officer, only according to a pre-screened set of questions, and with no ability to present additional or more specific questions as the witnesses present testimony unless the presiding officer requests it only upon her own motion, the ability to cross-examine is rendered toothless to a degree beyond that which due process requires.

What is more troubling is the failure of the NRC regulations to require that all testimony be submitted under oath. Under Hornsby, the failure to require all testimony to be submitted under oath is fatal. 326 F.2d at 608.

The adjudicatory procedures upheld by the Court will, over time, negatively impact the due process rights afforded to parties in other agency proceedings. If their broad restrictions upon the calling of witnesses, cross-examination, discovery, rebuttals, and even the swearing-in of witnesses are allowed to stand as fitting within the parameters of due process and the APA, this will lower the bar of

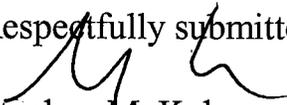
the entire APA standard. The effect could be to drastically change the way many agencies perceive the requirements of the APA, and could easily encourage other similar regulations that strip parties of the procedural protections they have for some time understood as applying under the APA and due process.

The petitioned case represents a split among federal circuits on the question of what due process requires. The holding in cases such as Hornsby, which clearly stand for the proposition that due process protects a party's ability to conduct direct and cross-examination from being whittled out of existence, conflict with this Court's holding.

CONCLUSION

For all of the foregoing reasons, the Court should grant this petition for panel or en banc rehearing.

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CERTIFICATE OF SERVICE

I hereby certify that on January 19, 2005 a copy of the following "Petition for Panel Rehearing and For Rehearing En Banc of the Decision of the 1st Circuit Court of Appeals Panel" was served by U.S. first class mail upon the following:

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