07-0324-ag(L), 07-1276-ag(CON)

United States Court of Appeals

for the

Second Circuit

ANDREW J. SPANO, as County Executive of the County Westchester, COUNTY OF WESTCHESTER, NEW JERSEY ENVIRONMENTAL FEDERATION and NEW JERSEY CHAPTER OF THE SIERRA CLUB,

Petitioners,

– v. –

UNITED STATES NUCLEAR REGULATORY COMMISSION, UNITED STATES OF AMERICA,

Respondents.

ON APPEAL FROM THE NUCLEAR REGULATORY COMMISSION

REPLY BRIEF FOR PETITIONERS

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Background

On December 2, 2006, the U.S. Nuclear Regulatory Commission ("NRC" or the "Agency") denied two separate petitions (the "petitions") for rulemaking asking the NRC to reexamine its license renewal regulations. Those petitions, filed by Andrew J. Spano, as County Executive of Westchester County, and Westchester County ("Westchester County" or "Petitioners") and by Mayor Scarpelli of Brick Township, New Jersey ("Brick Township") alerted the NRC to new information which has caused the landscape of nuclear plant safety to change and now requires a reevaluation of the scope of the license renewal regulations. (J.A. at A-11; A-188.)

Despite the fact that the license renewal regulations were promulgated over a decade ago in 1991 and 1995, the NRC concluded that the Petitioners "did not present any new information that would contradict positions taken by the Commission when the regulation was established or demonstrate that sufficient reason exists to modify the current regulations." (Joint Appendix ("J.A.") at A-147-A148.) In doing so, the NRC disregarded its own rulemaking regulations found in Subpart H of Title 10, Part 2 of the Code of Federal Regulations ("C.F.R."). The NRC also ignored new circumstances that have occurred over the last 12 years that affect nuclear safety and are not accounted for in its license renewal regulations.

On January 27, 2007, Westchester County filed a petition for review with this Court and submitted its Brief asserting that NRC's denial of its petition for rulemaking was arbitrary and capricious. The Petitioners requested that this Court set aside the NRC's denial and remand this matter to the NRC to hold hearings and conduct fact-finding pursuant to 10 C.F.R. Part 2, Subpart H or, in the alternative, provide Petitioners with the opportunity to submit additional data as required by 10 C.F.R. § 2.802(f).

Summary of the Argument

It was arbitrary and capricious for the NRC to deny the petitions for rulemaking requesting the NRC to consider revising its 1991 and 1995 license renewal regulations for nuclear facilities. The Petitioners are not before this Court to discuss the fundamental policy questions of nuclear safety. Rather, the Petitioners request the NRC to properly follow its rulemaking regulations. In their petitions, the Petitioners alerted the NRC to new information that was not considered during the NRC's 1991 and 1995 rulemakings because the information simply did not exist. The NRC, without any evidence in the Record that it considered this new information, denied the petitions. This was arbitrary and capricious. And despite the fact that the petitions alerted the NRC of serious deficiencies in the current license renewal regulations, the NRC did not "deem it advisable" to hold a hearing and therefore, the denial was made without any further fact-finding. *See* 10 C.F.R. § 2.803. That also was arbitrary.

Further, the NRC did not follow its own rulemaking regulations when it failed to alert the Petitioners to alleged deficiencies in the petitions. The regulations required the NRC to notify petitioners of defects and provide them an opportunity to submit additional data. 10 C.F.R. § 2.803. NRC's failure to follow its own regulations was arbitrary and justifies remand of this matter to provide Petitioners the opportunity to submit additional data. Finally, in its decision to

deny the petitions, the NRC stated that the public had other administrative avenues by which to raise concerns regarding a particular licensee.[1] (J.A. at A-158-A-159.) As noted in Petitioners' Brief, that effectively precludes petitions for rulemaking procedures under 10 C.F.R Part 2, Subpart H that relate to license renewal. Of course, there is no such preclusion in the regulations. *See* Brief for Petitioners Spano and Westchester County at 42 (June 18, 2007) ("Petitioners' Brief"). It was arbitrary for the NRC to deny the petitions on that basis.

In its Brief to this Court, the NRC does not explain how it considered the Petitioners' new information in denying the petition. (*See* Brief for the Federal Respondents (Aug. 31, 2007) ("NRC Brief").) Instead, the NRC repeats many of the same arguments that it asserted in its December 2, 2006 denial decision. Those arguments fail for the reasons stated in Petitioner's Brief. The NRC still has failed to provide a rational explanation for its denial of the petitions for rulemaking. In addition, the Petitioners submit the following response to NRC's Brief to this Court.

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[1] The NRC now claims that its statement that other procedural mechanisms were available to the public was "not intended to constitute an independent rationale for denying the petitions but simply to point out the existence of mechanisms such as the citizen participation process (*see* 10 C.F.R. § 2.206) for public involvement in the ongoing regulatory process." (*See* NRC Brief at 58-59.) It makes no difference what the NRC now claims was its intent. It is clearly part of the denial of the petition and the Court should not consider the NRC's post-hoc rationalizations of its denial. *See SEC v. Chenery Corp.*, 318 U.S. 80, 93-94 (1943). In any event, the fact remains that the NRC did not conduct a hearing on Petitioners' petitions in which the public was permitted to participate.

Argument

I. The standards of review

A reviewing court shall set aside an agency's rulemaking action where the agency's conduct is found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. *Waterkeeper Alliance, Inc. v. EPA*, 399 F.3d 486, 498 (2d Cir. 2005); *see also* 5 U.S.C. § 706(2)(A).

A reviewing court, however, should examine the basis of the agency's conduct but not the post-hoc rationalizations put forth during litigation. *See SEC v. Chenery Corp.*, 318 U.S. 80, 93-94 (1943) ("[The agency's] action must be measured by what [it] did, not by what it might have done. . . . The [agency's] action cannot be upheld merely because findings might have been made and considerations disclosed which would justify its order as an appropriate safeguard for the interests protected by the Act."); *see also Fort Stewart Schs. v. Fed. Labor Relations Auth.*, 495 U.S. 641, 651-52 (1990) ("[I]t is elementary that if an agency's decision is to be sustained in the courts on any rationale under which the agency's factual or legal determinations are entitled to deference, it must be upheld on the rationale set forth by the agency itself.").

Moreover, although an agency is afforded "proper deference" for "matters which are clearly within the expertise of the agency," for "those matters falling within the clear purview of the Courts, such as interpreting the law, the Court must

scrutinize them from a more critical perspective." *See The Montana Power Co. v. EPA,* 429 F. Supp. 683, 695 (D. Mont. 1977).

Here, the Petitions have challenged the failure of the NRC to follow procedural regulations. The courts are well-suited to interpret those regulations. The NRC is owed no deference in that area.

II. The NRC's post-hoc explanation does not cure its failure to follow its own rulemaking regulations

As noted in Petitioners' Brief, the NRC's rulemaking regulations require the NRC to notify Petitioners of defects in petitions (*see* 10 C.F.R. §2.802(f)) and provide Petitioners with an opportunity to submit additional data. (*See* Petitioners' Brief at 40-41.) The NRC failed to provide this required notice and opportunity to the Petitioners. (Petitioners' Brief at 40-41; *see also* NRC Brief at 55-56 (stating that the NRC did not give petitioners an opportunity to submit additional data despite the absence of information required by § 2.803(c)).) Yet, the NRC believes that Petitioners were not harmed by the lack of notice and opportunity to submit additional data. (*See* NRC Brief at 54-57.) The NRC is wrong.

The requirement at issue is found at title 10 C.F.R. § 2.802(f):

> If it is determined by the Executive Director for Operations that the petition does not include the information required by [2.802(c)] and is incomplete, **the petitioner will be notified of that determination and** the respects in which the petition is deficient and **will be accorded an opportunity to submit additional data.**

10 C.F.R. § 2.802(f) (emphasis added). The NRC's denial of rulemaking stated:

> A petition for rulemaking, as set forth at § 2.802(c)(3), must contain "relevant technical, scientific or other data involved which is reasonably available to the petitioner . . ." **Neither petitioner has presented this type of information.**

(J.A. at A-162-A-163 (emphasis added).) The NRC asserts "that the rulemaking petitions did not contain the type of information specified for rulemaking petitions under 10 C.F.R. § 2.802(c)" and admits that it failed to notify Petitioners of that deficiency as required by § 2.803(f). (*See* NRC Brief at 55.)

According to the NRC, it followed the procedures at 10 C.F.R. § 2.802(e) (for petitions that contain all the information required by 2.802(c)) rather than 10 C.F.R. § 2.803(f) (for petitions that do not include all the information required by 2.803(c)). (*See* NRC Brief at 56.) Title 10 C.F.R. § 2.802(e) states:

> **If it is determined that the petition** includes the information required by [2.803(c)] and **is complete**, the Director, Division of Administrative Services, Office of Administration, or designee, will assign a docket number to the petition, will cause the petition to be formally docketed, and will make a copy of the docketed petition available at the NRC website. . .[emphasis added.]

The NRC claims that because it formally docketed the petition, despite its knowledge that there was a deficiency that required notice to the Petitioners and an opportunity to cure the deficiency, the requirements under section 2.802(f) became moot. (*See* NRC Brief at 56.) This Court should not accept the NRC's strained reading of these procedural requirements. Matters typically within the expertise of

the courts, such as the interpretation of laws, may be scrutinized with less deference than matters that are clearly within the expertise of the agency. *See, e.g., The Montana Power Co. v. EPA,* 429 F. Supp. 683, 695 (D. Mont. 1977) (reviewing EPA's interpretation of terms used in EPA regulation). This is not a policy question regarding nuclear safety, it is an interpretation of rulemaking procedures, which this Court is well-equipped to handle.

Curiously, it is the NRC's position that when it followed the wrong procedure, namely those found at 10 C.F.R § 2.802(e), and formally docketed the petition as if it were complete, it "did not penalize petitioners for any filing deficiency." (*See* NRC Brief at 56.) The reality is the Petitioners were unfairly penalized. The NRC stated in its denial that the petitions failed to submit information required by §2.802(c)(3). (J.A. at A-162-A-163.) The NRC should have alerted the Petitioners to this deficiency *before* issuing a final decision. In addition, the NRC should have requested additional data from the Petitioners *before* issuing a final decision. As the NRC admits, it did neither.

The NRC also claims that it reached its decision on the merits and implies that it would have reached the same decision had it given the Petitioners the opportunity to submit additional data. (*See* NRC Brief at 55.) Unless the NRC is arguing that it would have ignored whatever information the Petitioners submitted, it cannot say that Petitioners were not prejudiced. The NRC cannot claim to know

what it would have done with the additional evidence that could have been but was not presented by the Petitioners. The NRC's actions below should not be measured by what it claims it might have done had it followed the requirements of its own regulations. *See, e.g., SEC v. Chenery Corp.*, 318 U.S. 80, 93-94 (1943) ("[The agency's] action must be measured by what [it] did, not by what it might have done. . . . The [agency's] action cannot be upheld merely because findings might have been made and considerations disclosed which would justify its order as an appropriate safeguard for the interests protected by the Act.").

As a consolation prize, the NRC now invites the Petitioners to submit the data it would have submitted to this Court or a "fresh rulemaking petition, backed with whatever new data they have. . . ." (NRC Brief at 57.) This is not the process contemplated by the NRC's own regulations. Section 2.802(f) requires the NRC to allow an opportunity to submit this information prior to issuing its final decision. Petitioners respectfully request that this Court remand the matter back to NRC and direct it to follow the requirements of § 2.802(f).

III. There is no evidence that the NRC meaningfully considered the new information submitted when it denied the petitions

With no indication of any real review of the evidence in the Record, the NRC's denial of the petitions stated that the Petitioners "did not present any new information that would contradict positions taken by the Commission when the license renewal rule was established or demonstrate that sufficient reason exists to

modify the current regulations." (J.A. at A-147-A148.) Yet the Record reflects that the Petitioners did, in fact, present new information. This included:

- Two comprehensive studies published in 2003 that documented failures in evacuation planning caused by dramatic demographic changes in the areas surrounding existing nuclear power facilities.
- Examples of failures of the NRC's Current Licensing Basis process that occurred after 1995.
- A 2006 National Academy of Sciences Report that disclosed an imminent lack of storage space for spent fuel.
- The continuing problems securing spent fuel storage space at Yucca Mountain.
- The heightened security risks associated with the events and aftermath of September 11, 2001.

In its brief to this Court, the NRC does not cite to any portion of the Record to show that it considered this new information when it reviewed the petitions. And, in fact, there is no evidence in the Record that the NRC considered this new information in reaching its decision to deny the petitions.

For instance, the Record reflects that the NRC disregarded a 2003 Report by KLD Associates, Inc., *Indian Point Energy Center Development of Evacuation Time Estimates* (J.A. at A-658-696.), which concluded that evacuation times in areas around Indian Point had increased dramatically due to changes in population. (J.A. at A-24.) The KLD Report is not mentioned in the NRC's denial of the petitions.

The NRC also failed to consider the 2003 study by James Lee Witt, former head of FEMA titled *Review of the Emergency Preparedness of Areas Adjacent to Indian Point and Millstone* (the "Witt Report"). The Witt Report concluded that emergency planning for the areas around Indian Point were dangerously affected by an increase in population, changes in demographics, and out-dated technology. (J.A. A-337-A-532.) Both Westchester County (J.A. at A-12) and Riverkeeper, Inc. (J.A. at A-24-25.) alerted the NRC to the Witt Report. But despite acknowledging the existence of the Witt Report (by quoting Westchester's petition) (J.A. at A-152), there is no evidence in the Record that the NRC considered the Witt Report before denying the petitions.

A report released by the National Academy of Science titled *Safety and Security of Commercial Spent Fuel Storage* (2006) ("NAS Report") was also raised by Brick Township (J.A. at A-189.) and Riverkeeper, Inc. (J.A. at A-23). The NAS Report, among other things, concluded that the nation's nuclear facilities will run out of spent fuel storage space within a matter of years. (*See* J.A. at A-258-A-336.) It also noted security concerns relating to the storage of spent fuel at each nuclear facility. Without discussing the substance of the NAS Report, the NRC dismissed it, citing to its 1999 Waste Confidence Decision and to a March 2005 NRC Report to Congress on the National Academy of Sciences Study on the Safety and Security of Commercial Spent Nuclear Storage. (J.A. at A-177-A-178.)

Instead of considering the new evidence presented to it, the NRC appears to argue that it is not required to consider this information because "petitioners raise issues that the Commission has already considered at length in developing the license renewal rule." (J.A. at A-147.) That, however, is impossible because none of this information existed during the 1991 or 1995 license renewal proceedings. The NRC simply could not consider the impact of the above post-1995 evidence when it last considered the license renewal regulations in 1995.

The majority of NRC's brief appears to focus on everything but the license renewal regulations. The NRC hangs its hat on the "current licensing basis" ("CLB") of nuclear facilities, which encompasses the "entire gamut of NRC requirements applicable to a specific nuclear plant over the life of the plant's license." (*See* NRC Brief at 5.) The underlying theory is that the CLB process is simply enough and according to the NRC, it is essentially bullet-proof: "[T]he cited incidents of licensee noncompliance or reports critical of the NRC's regulatory activities, ***however serious***, reveal no 'fundamental change in the factual premises previously considered by the agency' in adopting its license renewal rule." (*See* NRC Brief at 46 (citations omitted) (emphasis added).)

The NRC not only has admitted to not reviewing the new information presented in the petitions, but has essentially stated that it will never review deficiencies in the CLB process for purposes of its license renewal rules, no matter

how serious. In short, the NRC believes that any new information relating to the deficiency of its CLB process, despite the fact that it forms the basis for the NRC's extremely narrow license renewal review, has nothing to do with the license renewal issues. (*See* NRC Brief at 41.)

The Petitioners have no desire to engage in a policy argument over nuclear safety or specific technical changes that are necessary to make the renewal regulations more effective. The Petitioners have pointed to numerous studies and reports that the NRC admittedly failed to review when it denied the petitions for rulemaking. It was arbitrary for the NRC to ignore this new information when it denied the petitions.

Conclusion

The world has changed since 1995. The demographics, population, traffic and roads around Westchester County have changed in the last 30 years. Petitioners presented evidence of these changes. Petitioners presented sound reasoning to support changing regulations for relicensing. In response, the NRC failed to consider that evidence, failed to conduct public hearings on the fair issues raised by Petitioners and, contrary to its own regulations, denied the petitions because they were incomplete.

The NRC's actions were arbitrary. Petitioners should not be required to go back to go and file new petitions. The NRC should be required to review the

petitions that it already has in accordance with its own rules. Petitioners request that the petitions be remanded for consideration of the evidence presented by Petitioners, for submission of additional information by Petitioners, and for the conduct of public hearings.

Respectfully submitted,

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