

# 07-0324-ag(L)

07-1276-ag(CON)

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United States Court of Appeals  
*for the*  
Second Circuit

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ANDREW J. SPANO, as County Executive of the County of 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.*

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ON APPEAL FROM THE NUCLEAR REGULATORY COMMISSION

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**REPLY BRIEF FOR PETITIONERS**

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## **PRELIMINARY STATEMENT**

For many, it would be inconceivable to suggest that the tragic events of September 11, 2001, or the worst nuclear safety incident since the near meltdown at Three Mile Island Nuclear Plant, raised no new issues for the relicensing of nuclear plants. The NRC suggested just that, however, when it deemed the Petitions deficient for failing to raise any issues not considered in the agency's 1995 license renewal rulemaking. This finding is contrary to the opinion of the United States Court of Appeals for the Ninth Circuit and is contradicted by the NRC's own internal actions. The record in this appeal confirms that these incidents, among others, called into question the factual foundations and legal validity of the NRC's current license renewal regulations.

The issues in this case are straightforward. First, the NRC violated its own procedures when it refused to give Petitioners an opportunity to augment their Petitions after the NRC arbitrarily decided that they were deficient. Second, the NRC again acted arbitrarily when it denied the Petitions without providing a reasoned explanation for the denial. In place of a reasoned denial, the NRC suggested that the Petitions raised no new issues or that the current rules did not provide for the type of relicensing review that was requested.

In its Brief, the NRC seeks to deflect the focus from the Petitions and the defective explanation it provided at the time of the NRC's Decision by offering

several unconvincing arguments and post-hoc rationalizations about why the Decision should be upheld. The NRC first invokes the usual specter of complicated nuclear issues and urges the Court to simply defer to it and uphold the denial. The NRC, however, incorrectly argues that the legal obligation to follow procedures is committed to agency discretion and overlooks precedent finding that failures to do so are not entitled to deference. The rest of the NRC's Brief largely addresses the substantive issue of whether the relicensing rules need to be changed and suggests alternative approaches to addressing the issues raised by the Petitions, even though these issues are, at best, secondary. Finally, the NRC argues that following its procedures to allow Petitioners to cure alleged deficiencies would have been pointless, because Petitioners would have had nothing more to add. This is unadulterated speculation, which is in fact entirely wrong. The New Jersey Petitioners are parties to the relicensing proceeding concerning the Oyster Creek Nuclear Generating Station ("Oyster Creek") that has revealed many more deficiencies in the relicensing process.

Contrary to the NRC's implication, *see* NRC Br. at 40, Petitioners are not asking this Court to make policy regarding the relicensing of nuclear plants. Instead they are asking this Court to require the NRC to follow standard administrative procedures and provide rational explanations for its decisions. While the substantive issue of the desired content of the relicensing rules is an

interesting and complex one, it is not the primary issue before this Court. Instead, NRC should have dealt comprehensively with that issue in its response to the Petitions. To avoid engaging in that process, the NRC arbitrarily found that the Petitions did not raise any issues beyond those already considered during the 1995 rulemaking. In fact, Petitioners raised many valid new issues, including the implications of the increased threat of terrorism since September 11, 2001 and a number of major failures of ongoing processes to ensure safety. Those issues went unanswered. Thus, the NRC's explanation for the denial was grossly inadequate.

On a different tack, the NRC also argues that Petitioners should have instead petitioned to change NRC regulations relating to ongoing processes. While this may have been an option, it cannot be the basis for the denial of the Petitions and ignores the procedural defects in the Decision. Additionally, it lends support for the argument that the NRC improperly concluded that Petitioners had raised no new issues.

Contrary to another implication in its Brief, the NRC is not constrained to requiring bare minimum safety standards when a new license is issued. Instead, at license renewal the NRC is presented with opportunities to both increase safety standards for old plants without being formally constrained by cost considerations and to review whether the established safety standards continue to be met. The Petitions presented persuasive evidence that, contrary to its current approach, the

NRC could not rely exclusively on ongoing processes to even maintain the outdated safety standards established approximately forty years ago. Petitioners also asked NRC to increase safety standards, comprehensively review whether existing standards are being met, and decide whether standards for new plants could be met. The NRC's response largely consisted of an explanation of the provisions of the current rules and omitted any explanation of why those provisions continue to be adequate in spite of the issues raised by Petitioners. By attempting to hide behind its existing regulations at every turn, the NRC exposes its unwillingness to reconsider those regulations, thus making the result of the petitioning process preordained.

In short, instead of treating the Petitions with the respect required by the Administrative Procedure Act ("APA") and the Atomic Energy Act ("AEA"), the NRC dismissed the Petitions without seriously considering the most important issues raised and consequently failed to provide a reasoned, public explanation of why the issues raised did not require a change to the relicensing rules. This Court should at minimum instruct the NRC to afford Petitioners the opportunity to cure any alleged deficiencies in the Petitions, hold a public hearing, and then carefully analyze the material in the record to determine whether outdated safety standards at forty year old nuclear plants need to be updated and ongoing processes need to

be comprehensively reviewed at least once before a forty year old nuclear power plant can obtain a twenty year license extension.

### **ARGUMENT**

This Brief shows that NRC failed to follow its own procedures for rulemaking and that such a failure is not entitled to any deference, but instead necessitates reversal of the Decision. First, the NRC should have allowed Petitioners the opportunity to cure any alleged deficiencies in the Petitions after the NRC made the incorrect finding that the Petitions were deficient. Second, with respect to NRC's arguments concerning terrorism, emergency planning and the regulatory failings highlighted by the David-Besse incident, the NRC not only failed to provide a rational explanation for the decision at the time, the NRC has not even provided a logical, post-hoc rationale. Thus, the Decision should be vacated and remanded to the NRC for further consideration in accordance with lawful procedure.

#### **I. NRC Violated the Law When It Failed to Follow Rulemaking Procedures**

The NRC committed two procedural violations in considering the Petitions. First, the NRC failed to give Petitioners an opportunity to cure any alleged deficiencies in the Petitions. Second, despite the NRC's finding of deficiency, after docketing the Petitions and seeking public comment, the NRC failed to provide a reasoned explanation for denying the Petitions. In fact, the NRC's

rationale for denying the Petitions was that the Petitions did not raise any new issues or did not provide the kind of information necessary to effectuate a rule change. This reasoning is incorrect as a matter of fact and law and shows that the NRC's failure to provide a reasoned explanation has its roots in the finding that the Petitions were deficient. The NRC's approach to the rulemaking process in this instance suggests that the Petitions were doomed from the start and that the outcome was preordained because NRC did not even attempt to carefully review the record, which contained much substantive information that raised many issues that were not considered during the formulation of the current license renewal rules.

**A. NRC Must Allow Petitioners Opportunity to Submit Additional Information to Cure Alleged Deficiencies**

The plain language of 10 C.F.R. §2.802(f) requires that if a petition is incomplete, the petitioner will be notified of the deficiencies and will be given an opportunity to submit additional data. Regulations are binding on all parties coming before an agency, as well as the agency itself. *Edelman v. Lynchburg College*, 535 U.S. 106, 124 (2002). To comply with the law the NRC was required to notify Petitioners of any alleged deficiencies and allow Petitioners to submit additional information to cure them. The NRC never afforded Petitioners this opportunity, and as such violated its own regulations governing rulemaking petitions. 10 C.F.R. §2.802(f). Contrary to NRC's protestations, this failure is not

“purely technical.” NRC Br. at 62. It is well-settled that an agency’s failure to follow its own regulations necessitates reversal. *Sierra Club v. Martin*, 168 F.3d 1, 4 (11th Cir. 1999).

**B. NRC Failed to Give a Reasoned Explanation for Its Decision**

There are “special formalities, including a public explanation,” that are required when an agency declines to initiate a rulemaking. *Massachusetts v. EPA*, 127 S. Ct. 1438, 1459 (U.S. 2007). The NRC attempts to divest itself of its responsibility to provide a reasoned explanation for its Decision and argues that as long as the rationale for an agency decision can “reasonably be discerned,” there is no requirement for the NRC to discuss specific reports and incidents. NRC Br. at 55. The cases cited by NRC are distinguishable since they deal with substantive issues under review and not with the procedural requirement to provide a public explanation. The cases also all address the area of economic interests, which is an area where courts are reluctant to compel rulemaking, and not the interests of safety and public welfare, where court intervention has been more typical. *See, Midwest Indep. Transmission Sys. Operator, Inc. v. FERC*, 388 f.3d 903, 911 (D.C. Cir. 2004).

NRC’s reliance on discernment, prior findings, depth of inquiry and agency discretion, NRC Br. at 53-56, is no substitute for a reasoned elaboration of a decision not to initiate a rulemaking. The NRC attempts to neutralize its

procedural failures by cloaking its shortcomings in the mantle of agency deference. NRC Br. at 56. Until the agency's procedural deficiencies are corrected, any ruling on substantive questions is premature. Petitioners should be allowed to amend the Petitions to cure any alleged deficiencies, and the NRC must provide the required, reasoned, public explanation to ensure that the agency "has adequately explained the facts and policy concerns it relied on and to [establish]...that those facts have some basis in the record." *WWHT, Inc. v. Federal Communications Comm'n*, 656 F.2d 807, 817 (D.C. Cir. 1981).

**1. The Decision Failed To Provide a Reasoned Explanation for Dismissing The Increased Threat of Terrorism**

The events of September 11, 2001 changed the world. The United States Court of Appeals for the Ninth Circuit recognized this reality when it ruled the increased terrorist threat requires the NRC to include in the scope of review required under the National Environmental Policy Act ("NEPA") the impact from a terrorist attack in both licensing and relicensing decisions. *San Luis Obispo Mothers for Peace v. Nuclear Regulatory Commission*, 449 F.3d 1016 (9th Cir. 2006), *cert. denied*, 127 S.Ct. 1124 (2007). Additionally, a National Academy of Sciences Report ("NAS Report") found the increased terrorist threat had serious implications for the storage of spent fuel at nuclear power plants. A-258-336. Incredibly, the NRC attempted to claim that the terrible events of September 11,

2001 did not raise any new issues for nuclear power plant relicensing. *E.g.* A-147. This conclusion flies in face of law and has no factual basis in the record.

First, the New Jersey Petitioners promptly sent the *San Luis Obispo* decision to the NRC. A-254-55. The NRC's denial fails to mention the Ninth Circuit's decision and offers no explanation as to why it does not raise valid issues or support Petitioners request for changes to the regulation. A few months after the NRC denied the Petitions, however, the Commission issued a ruling on the State of New Jersey's claim that the NRC should study the potential impact of terrorism as part of the relicensing process for the Oyster Creek Nuclear Generating Station ("Oyster Creek"). The Commission rejected the claim as beyond the scope of relicensing "notwithstanding a recent decision by United States Court of Appeals for the Ninth Circuit." *In the Matter of AmerGen Energy Co., LLC* (License Renewal for Oyster Creek Nuclear Generating Station) (CLI-07-08), Nuclear Reg. Rep.(CCH) P 31,530, 2007 WL 595084 at \*1 (Feb. 26, 2007). The Commission admitted that the *San Luis Obispo* decision requires study of the impact of terrorist attacks prior to relicensing in the Ninth Circuit, but declined to apply the holding elsewhere because "we [the NRC Commissioners] disagree with the Ninth Circuit's view." *Id.* at \*2. The Commission's opinion indicated it would begrudgingly adhere to the *San Luis Obispo* decision in the Ninth Circuit, but

would reject any contentions related to terrorism as “beyond the scope” of relicensing in other Circuits.<sup>1</sup> *Id.*

In its response brief, the NRC tries to overcome its fundamental failure to consider the Ninth Circuit’s decision by suggesting that the *San Luis Obispo* decision is not relevant to the scope of the relicensing rules. NRC Br. at 54 n.14. This post-hoc rationalization is unconvincing for two reasons. First, NEPA applies to the license renewal process.<sup>2</sup> Second, the Commission has already expressed its intention to ignore the *San Luis Obispo* decision outside of the Ninth Circuit. *In the Matter of AmerGen Energy Company, LLC* (CLI-07-08), 2007 WL 595084 at \*2.

With respect to the factual issues presented by the NAS Report, the NRC boldly alleges that all concerns with regard to terrorism have been dealt with, NRC Br. at 55 n. 15, and that spent fuel storage is an *economic*, not a *safety* issue. *Id.* at 43 n. 11. Neither of these allegations is correct nor relevant to the arguments presented by the New Jersey Petitioners.

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<sup>1</sup> In contrast, the Department of Energy has decided to apply the *San Luis Obispo* decision nationwide. Memorandum from Carol M. Borgstrom, Director, Dep’t of Energy, Office of NEPA Policy and Compliance, to DOE NEPA Community 1 (Dec. 1, 2006), *available at*: [http://www.eh.doe.gov/nepa/tools/terrorism-interim\\_nepa\\_guidance.pdf](http://www.eh.doe.gov/nepa/tools/terrorism-interim_nepa_guidance.pdf).

<sup>2</sup> EPA, *Environmental Impact Statements; Notice of Availability, EIS No. 20070017, Final EIS, NRC, NJ, GENERIC-License Renewal of Nuclear Plants (GEIS) Regarding Oyster Creek Nuclear Generating Station Supp. 28 to NUREG-1437*, 72 Fed. Reg. 3846 (Jan. 26, 2007)

Most obviously, the clear evidence in the record that a terrorist attack on a pool storing spent fuel could lead to “the release of large quantities of radioactive materials,” A-266, shows that the NRC is flat wrong when it argues that the storage of spent fuel is a mere “economic issue, not a safety issue.” NRC Br. at 47 n. 11. The NRC cites *Pacific Gas & Elec. Co. v. State Energy Res. Conservation & Development Comm’n*, 461 U.S. 190, 203, 207, 214-25 (1983), but that case does not support the NRC’s argument. In *Pacific Gas & Elec.*, the Supreme Court recognized that there are “both safety and economic aspects to the nuclear waste issue.” *Id.* at 196. The Supreme Court, addressing preemption questions posed by California’s attempt to regulate both safety and economic aspects of nuclear waste storage, held that spent fuel issues relating to safety are entirely within the province of the federal government. *Id.* at 212. The Court held that the States are left with “their traditional authority over the need for additional generating capacity, the type of generating facilities to be licensed, land use, ratemaking, and the like.” *Id.* For the NRC to suggest to the Court that nuclear waste “capacity” issues are solely economic is disingenuous, at best.

The NRC also argues that the denial responded to Petitioners concerns about the NAS Report in a passing reference to a NRC report to Congress dated March, 2005. NRC Br. at 55 n.15; *see also* A-818. While it is true that the denial mentioned the NAS Report, it did not explain how the NRC report was relevant.

Furthermore, a review of the March, 2005 NRC report reveals that it is no way responsive to the issues raised by Petitioners and is little more than NRC's promise to work closely with the nuclear industry in the future to decide exactly what to do about spent fuel storage. *E.g.* A-835. In fact, the NRC report explained to Congress that it had directed licensees to "consider implementing additional mitigation measures for SFP [spent fuel storage]." A-843.

Far from allaying, or even addressing, the New Jersey Petitioners concerns about the adequacy of ongoing processes or the license renewal provisions to protect spent fuel from terrorist attack, the NRC's response to Congress made it plain that the NRC had essentially delegated its exclusive responsibility<sup>3</sup> to regulate nuclear waste safety issues to the industry. Additionally, the response to Congress did not explain why the NRC did not consider relicensing as an opportunity to mandate structural responses to the increased terrorist threat. For example, although the NRC found it unnecessary to immediately require licensees to move older spent fuel from wet pools into dry storage, it could have required such a step as part of relicensing. As the NAS Report makes plain, this step would lower the potential consequences of a terrorist attack on spent fuel pools. A-326-28.

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<sup>3</sup> The States may not regulate the safety of spent fuel storage. 461 U.S. at 212.

Incongruously, shortly after rejecting Petitioners invitation to take action to improve the protections of relicensed plants from aircraft attacks without a reasoned explanation, the Commission moved to increase the protections built into new reactor designs. The NRC proposed rules requiring proponents of new designs to “assess how the design, to the extent practicable, can have greater built-in protection to avoid or mitigate the effects of the large commercial aircraft impact.” NRC News Release, dated April 24, 2007 *available at* <http://www.nrc.gov/reading-rm/doc-collections/news/2007/07-053.html>. It did not propose changes to regulations requiring a similar analysis to be carried out during license renewal. *Id.*

This mismatch illustrates precisely the concerns that Petitioners have about the current relicensing rules. The multi-tier safety scheme envisioned by the AEA was supposed to allow NRC to continually ratchet up safety requirements for new plants without causing investors in existing plants to lose their investment. Inevitably, a safety-gap emerged between old plants and new ones. The Petitions suggested that relicensing presents an opportunity to close the safety gap because, after a plant is fully depreciated, it is reasonable to require additional investment to bring a 40-year old plant in line with current safety standards. Reinforcing this request, the New Jersey Petitioners showed in their opening brief that the “backfit” rule, which requires considerations of cost versus benefit, does not apply at

relicensing. New Jersey Petitioners Br. at 28. Instead of closing the safety gap, however, the NRC decided to increase it by imposing new requirements regarding aircraft attack for new plant designs but not requiring any similar analysis to be done when old plants apply for a license renewal.<sup>4</sup>

## **2. The Decision Failed To Provide a Reasoned Explanation for Dismissing Emergency Planning Issues**

The NRC made similar errors regarding emergency planning issues as it did regarding terrorist threats. Petitioners requested that the NRC amend its regulations to include a review of emergency plans upon license renewal. A-12; A-182. In support of that request, Petitioners incorporated by reference the Witt Report, a detailed, technical document showing that ongoing procedures had not ensured that the emergency plan for Indian Point Nuclear Power Plant was realistic. A-12. Although the record included this review of emergency planning issues, the NRC arbitrarily declared the Petitions deficient. The NRC now argues

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<sup>4</sup> In an attempt to provide a *post-hoc* rationalization for this failure, NRC suggests that a once in 40-year update to licensing standards that is made without being formally constrained by consideration of costs and benefits would somehow put the nuclear industry (or any industry) out of business. NRC Br. at 52-53. This is absurd. First, few industries have the benefit of a 40-year term of relative regulatory stability in safety requirements. Second, Petitioners are not suggesting *any* change to the rules for the first 40-year term, but are instead suggesting changes to the relicensing rules. Moreover, even if closing the safety gap between 40-year old plants requesting new licenses and new plants requesting initial licenses would be cost prohibitive, then the nuclear industry could well benefit from the need to replace old outdated reactors with new, safer models.

that it did not deny the Petitions based on the finding of deficiency alone, NRC Br. at 58-60, and offers another post-hoc rationalization.

First, as set forth in Section I.A. of this Reply Brief, the NRC's threshold deficiency finding is the essence of arbitrary because it was patently incorrect. The Witt Report contains precisely the information that NRC claimed was lacking in the Petitions. A-7; A-162-63; A-337-532. There is no dispute that when an agency makes a finding that is flatly contradicted by the record, that finding is arbitrary. *Islander E. Pipeline Co., LLC v. Conn. Dep't Entvl. Prot.*, 467 F.3d 395, 310 (2d Cir. 2006). Even now NRC offers no argument to justify the deficiency finding. NRC Br. at 24-25; 53-56.

The only other explanations regarding emergency planning offered by NRC, apart from the deficiency finding, were that the rules excluded consideration of emergency planning and that emergency planning would not necessarily be outcome determinative. A-162-63. The first explanation is a clear example of the kind of circular reasoning that infects the whole Decision. Precisely because the current rules do not require consideration of emergency planning, the Petitions requested that they be changed. The second explanation is simply not rational. Just because an issue is not dispositive is not a reason to completely exclude it from the relicensing process. *See American Horse Prot. Ass'n, Inc. v. Lyng*, 812 F.2d 1, 5 (D.C. Cir. 1987) (holding that an agency's decision making must be well-

reasoned). Finally, although NRC now argues it “did not penalize petitioners for any filing deficiency,” NRC Br. at 61, in the denial it stated that “[n]either petitioner has presented . . . [technical or scientific] information [regarding emergency planning].” A-163. This statement indicated that in making its Decision, NRC failed to review the technical documents in the record, such as the Witt Report. The NRC’s failure to review critical parts of the record is, once again, arbitrary. *Islander*, 467 F.3d at 310.

Substantively, the allegation that NRC has fully addressed the emergency planning concerns is also incorrect. *See* NRC Br. at 55 n. 15. While Entergy took some action at Indian Point after the publication of the Witt Report, the evacuation plan for Oyster Creek is widely considered impracticable and, as far as the New Jersey Petitioners are aware, it has not been updated to take account of the possibility of faster developing incidents that could be caused by terrorism. Thus, a review upon relicensing to determine the current plan would be allow adequate response to a terrorist attack would not be duplicative.

### **3. The NRC’s Failure to Consider the 2002 Davis-Besse Incident Was Arbitrary**

Petitioners suggested to the NRC that the incident at Davis-Besse gives rise to the need to amend the regulations governing license renewal. A-11; *see also* A-186. As was the case with respect to the threat of a terrorist attack and emergency planning issues, the NRC entirely failed to mention the Davis-Besse incident in the

denial. Instead, the NRC arbitrarily found the Petitions deficient. Furthermore, the NRC provided no reasoned explanation as to why the Petitions, and the reference to the Davis-Besse incident, did not prompt the NRC to amend its regulations.

Again ignoring the threshold procedural issue, the NRC now suggests in yet another post-hoc rationalization that Petitioners should have been aware of the NRC's official response to the Davis-Besse incident, although it was not set forth in the denial. NRC Br. at 55 n. 15.<sup>5</sup> The NRC's argument, however, entirely misses the point. Even if the NRC's denial had provided a reasoned explanation for the denial and discussed the Davis-Besse incident, which it did not, it does nothing to address Petitioners overriding concerns that the ongoing processes do not ensure that the nation's nuclear plants meet existing regulatory requirements.

The NRC fails to acknowledge that the Office of the Inspector General determined that the NRC's decision to allow Davis-Besse to continue operating was driven in large part by a desire to lessen the financial impact on the licensee arising from an early shutdown. A-556. The Inspector General told Congress that cost considerations affecting licensee and agency actions are "not new in the history of the nuclear industry or NRC," and that they affect how the agency

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<sup>5</sup> NRC also suggests that the particular issues at Davis-Besse would be reviewed during relicensing. NRC Br. at 46-47 n. 11. This is contradicted by the NRC's frequently asked questions about license renewal which states "The reactor vessel head corrosion event at the Davis-Besse Nuclear Plant is an operational issue and outside the scope of license renewal."

[http://www.nrc.gov/reactors/operating/licensing/sr1850\\_faq\\_lr.pdf](http://www.nrc.gov/reactors/operating/licensing/sr1850_faq_lr.pdf)

defines what is “an acceptable level of risk and its relationship to safety.”<sup>6</sup> He further stated to Congress that the “events at Davis-Besse and possibly Indian Point, in my view, are instances where it appears that both the industry and the NRC allowed higher risks to be assumed.”<sup>7</sup> Various NRC Commissioners expressed both regret and concern over the fact that the extensive corrosion of one of the most critical components at the Davis-Besse plant went undetected by the licensee, as well as NRC inspectors. Indeed, Commissioner Meserve told Congress that he saw it “as a failure of our inspection system...”<sup>8</sup> In light of these facts, the NRC’s position becomes even more untenable.

More recent incidents, such as the collapse of a cooling tower cell at Vermont Yankee Nuclear Generating Station on August 22, 2007, reinforce this concern.<sup>9</sup> Because the basic factual predicate underlying the relicensing rules is that the ongoing processes are effective, evidence to the contrary, like the Davis-Besse incident, needed to be carefully examined by the NRC. Because the NRC

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<sup>6</sup> Statement of Hubert T. Bell, Inspector General of the U.S. Nuclear Regulatory Comm’n, *Hearing Before the Subcommittee on Clean Air, Climate Change, and Nuclear Safety of the Committee on Environment and Public Works*, United States Senate, 108<sup>th</sup> Cong. 1<sup>st</sup> Sess., Tr. at 41-42 (Feb. 13, 2003).

<sup>7</sup> *Id.* at 42.

<sup>8</sup> Statement of Commissioner Meserve, U.S. Nuclear Regulatory Comm’n, *Hearing Before the Subcommittee on Clean Air, Climate Change, and Nuclear Safety of the Committee on Environment and Public Works*, United States Senate, 108<sup>th</sup> Cong. 1<sup>st</sup> Sess., Tr. at 27-28

<sup>9</sup> NRC, Weekly Information Report - Week Ending August 31, 2007, *available at*: <http://www.nrc.gov/reading-rm/doc-collections/commission/secys/weekly-info-last.html>

failed provide a reasoned explanation why the Davis-Besse incident raised no new concerns regarding the efficacy of ongoing processes, its Decision is arbitrary and should be vacated and remanded.

## **II. NRC Improperly Attempts to Deny Petitioners of their Right to Petition the Government to Change License Renewal Regulations and Only Speculates that Petitioners Will Have Nothing of Import to Add on Remand**

Having severely narrowed the scope of licensing renewal by relying on the efficacy of ongoing processes, the NRC now has the audacity to suggest that license renewal and the efficacy of ongoing processes are not closely linked. *See* NRC Br. at 51 (arguing that it is illogical to address failures in ongoing processes through license renewal). NRC then trots out the old chestnut that it would rather address issues as they arise rather than through procedures for license renewal. *Id.* at 52. This is a false dichotomy. NRC must make ongoing processes as effective as possible, but it should also periodically perform a thorough, systematic review of how effectively those processes are working. Carrying out such a review at license renewal would provide assurances that the agency's ongoing processes are working effectively and could uncover issues that would otherwise have gone unaddressed. Furthermore, NRC's falsely dualistic depiction of its options does not provide any explanation for why the NRC failed to recognize that the Petitions raised issues about the license renewal process that needed to be carefully considered and not summarily dismissed.

The NRC also argues that the failure to offer an opportunity to cure the deficiency was not prejudicial because Petitioners had no new information to submit. NRC Br. at 61-62. The irony is that the record contains sufficient supporting material to render the finding of deficiency arbitrary. On remand Petitioners could merely have pointed that out. Furthermore, partly as a result of their participation in the relicensing proceeding for Oyster Creek, the New Jersey Petitioners have much more information to submit justifying their position that NRC's relicensing rules are currently failing to maintain adequate safety standards.

For example, a review of the corrosion of the primary containment at Oyster Creek revealed that the ongoing program to monitor corrosion was inadequate because it was based on data that incorrectly indicated the metal containment was getting thicker over time—a physical impossibility. Additionally, the State of New Jersey has been excluded from even raising concerns about terrorist threats during relicensing because NRC's Waste Confidence Rule deems the current approach to spent fuel storage adequate, even though this country does not have any viable long-term waste storage solution. The New Jersey Petitioners are also aware of many other issues, such as NRC's failure to include all required systems in the scope of license renewal, as illustrated by the recent collapse of a cooling tower cell at the Vermont Yankee Nuclear Power Plant, and the failure of the NRC to

enforce its fire protection requirements, despite a fire necessitating over \$1 billion worth of repairs at the Browns Ferry Nuclear Power Plant.

Finally, on remand, Petitioners are prepared to provide information from a survey completed in late 2002 finding that 47% of the NRC employees do not feel that it is “safe to speak up in the NRC.”<sup>10</sup> The NRC’s commitment to a safety culture is poorer than that of other similar government organizations.<sup>11</sup> Sadly, the 47% figure is actually an improvement over results of a similar survey undertaken in 1998.<sup>12</sup> The 2002 Report of the Office of the Inspector General revealed that staff was concerned “that the NRC is becoming influenced by private industry and its power to regulate is diminishing.”<sup>13</sup> This damning information about the NRC’s ability to effectively regulate bolsters Petitioners concerns that the NRC’s licensure renewal regulations must be improved, because reliance on ongoing

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<sup>10</sup> U.S. Nuclear Regulatory Comm’n, Office of the Inspector General, *Special Evaluation: OIG 2002 Survey of NRC’s Safety Culture and Climate: Key Areas for Improvement*, OIG-03-a-03, p. 36 (Dec. 11, 2002).

<sup>11</sup> See Statement of Hubert T. Bell, Inspector General of the U.S. Nuclear Regulatory Comm’n: Oversight of 2003 Programs, *Hearing Before the Subcommittee on Clean Air, Climate Change, and Nuclear Safety of the Committee on Environment and Public Works*, United States Senate, 108<sup>th</sup> Cong. 1<sup>st</sup> Sess., Tr. at 120 (Feb. 13, 2003).

<sup>12</sup> Testimony of Richard A. Meserve, Chairman, Nuclear Reg. Comm’n, *Hearing Before the Subcommittee on Clean Air, Climate Change, and Nuclear Safety of the Committee on Environment and Public Works*, United States Senate, 108<sup>th</sup> Cong. 1<sup>st</sup> Sess., Tr. at 36 (Feb. 13, 2003).

<sup>13</sup> U.S. Nuclear Reg. Comm’n, Office of the Inspector General, *Special Evaluation: OIG 2002 Survey of NRC’s Safety Culture and Climate: Key Areas for Improvement*, OIG-03-a-03, p. 4 (Dec. 11, 2002).

processes to ensure the safety of nuclear plants is, at best, misplaced. It is precisely this type of information that Petitioners could have offered if notified of alleged deficiencies, and intend to offer on remand. Thus, the NRC's suggestion that Petitioners have nothing to offer is pure speculation, and is entirely incorrect.

### CONCLUSION

For the foregoing reasons, this Court should remand the Petitions back to the NRC for further consideration in accordance with proper procedure and grant such further relief as this Court may see fit.

Respectfully Submitted,  
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