



THE ASSEMBLY
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Corporations, Authorities
and Commissions

March 12, 2009

Clerk's Office
United States Court of Appeals
for the Second Circuit
United States Court House
500 Pearl Street
New York, New York 10007

Dear Clerks:

Enclosed for filing please find the original and ten copies of Petitioners' Reply brief, affidavit of service, Certificate of Compliance, and Anti-Virus certificate.

Thank you for your assistance in this matter.

Respectfully submitted,

A handwritten signature in cursive script that reads "Richard Brodsky".

RICHARD L. BRODSKY

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DOCKET NO. 08-1454-ag

UNITED STATES COURT OF APPEALS for the SECOND CIRCUIT

RICHARD L. BRODSKY, NEW YORK STATE ASSEMBLYMAN, FROM THE 92ND ASSEMBLY DISTRICT IN HIS OFFICIAL AND INDIVIDUAL CAPACITIES, WESTCHESTER'S CITIZENS AWARENESS NETWORK (WESTCAN), ROCKLAND COUNTY CONSERVATION ASSOCIATION, INC. (RCCA), PUBLIC HEALTH AND SUSTAINABLE ENERGY (PHASE), AND SIERRA CLUB - ATLANTIC CHAPTER (SIERRA CLUB),

Petitioners,

-against-

U.S. NUCLEAR REGULATORY COMMISSION,

Respondent,

And

ENTERGY NUCLEAR OPERATIONS, INC.

Intervenor.

PETITIONERS' REPLY BRIEF

On Appeal from the Nuclear Regulatory Commission

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PRELIMINARY STATEMENT

The Federal Respondent's, the Nuclear Regulatory Commission (hereinafter "NRC" or "Commission") brief leaves Petitioners' core arguments intact. The single largest part of the NRC brief is a recitation of the actions allegedly taken by the NRC in granting the "exemption" to Entergy. Because these actions were taken in secret, and because Petitioners and the public were denied an opportunity to present evidence and ask questions, Petitioners are simply unable to agree or disagree with the descriptions of the actions of NRC staff. Petitioners emphatically do not ask this Court to sit as a technical review panel to judge the engineering or scientific validity of the "exemption".

Petitioners seek an order of the Court that ensures that their right to participate in the decision are preserved; that the "exemption" itself have a basis in federal law; that the exemption rely only on documents that appear in the Certified Record; that all required elements of an "exemption" actually be present; that the NRC is not permitted to ignore relevant evidence it possesses; and that the requirements of NEPA be observed.

NRC continues to oppose Petitioners' claim for relief on the grounds that: (1) the appeal is untimely (NRC Brief at 20); (2) hearings are not required when the NRC grants an "exemption" (NRC Brief at 25); and (3) the "exemption" granted should be sustained. (NRC Brief at 43). The Intervenor in this case,

Entergy Nuclear Operations, Inc. (hereinafter "Entergy") argues that the: (1) the court lacks jurisdiction (Entergy Brief at 23); (2) the "exemption" was not arbitrary, capricious, an abuse of discretion, nor otherwise contrary to the law (Entergy Brief at 33); (3) the "exemption" regulation is valid; (4) the NRC did not violate NEPA (Entergy Brief at 44); and (5) Petitioners lack standing (Entergy Brief at 23-24, 29-31).

ARGUMENT

I. PETITIONERS HAVE STANDING.

Entergy argues that Petitioners do not have standing because they are not a party to the "exemption" proceeding. (Entergy Brief at 18, 28-30).

Since the NRC regulation did not permit notice and comment, and there were no underlying proceedings to which Petitioners could have been a party, it cannot be said that Petitioners could have petitioned for judicial review. *Nat'l Resources Defense Council v. Nuclear Regulatory Comm'n*, 666 F.2d 595, 602, fn 42 (D.C. Cir. 1981); *Deukmejian v. Nuclear Regulatory Comm'n*, 751 F.2d 1287 (D.C. Cir. 1981). "To bar a petition for direct review because the petitioner was not a party to proceedings in which, by definition, it could not join would be to exalt literalism over common sense. . . . Indeed to bar direct review in such circumstances would create a dangerous precedent, for it would grant agencies the power to remove their regulations from direct review by simply promulgating them

without notice and comment.” *Nat’l Resources Defense Council*, 666 F.2d at 602, fn 42. Similarly, in the present case Petitioners were not permitted to be a party but have standing to challenge the NRC’s decision.

Since in the present case it is undisputed that Petitioners had no opportunity to become a party in the “exemption” proceeding or otherwise participate in that proceeding, their standing to bring this Petition for Review to this Court is preserved.

It is notable that the NRC does not join Entergy in arguing that Petitioners do not have standing.

II. THE PETITION FOR REVIEW WAS TIMELY FILED.

The NRC and Entergy argue respectively that “[t]he petition for review should be dismissed as untimely”, and Petitioners “failed timely to file a petition for review.... citing the Hobbs Act requirement that a petition for review be filed within 60 days of entry of the order.” (NRC Brief at 20) (Entergy Brief at 23). Neither the NRC nor Entergy dispute that Petitioners timely filed for judicial review of the denial of their request a right to a hearing.

Insofar as the Hobbs Act, 28 U.S.C. § 2244, is concerned Petitioners did timely file their Petition for Review.¹ The final NRC decision was dated January 30, 2008 and the Petition for Review was filed on March 27, 2008, within the 60 day limitation period. (JA at 910).

Petitioners took the required step of exhausting their administrative remedies by filing their NRC Petition, and sought judicial review within 60 days of the NRC final order denying their NRC Petition. On January 30, 2008 the NRC's final order, entitled "Objection to NRC's Grant of an Exemption to Indian Point 3," explicitly denied the request for a hearing and was silent on the Petitioners' request for relief with respect to the "exemption" itself. (JA at 909). The NRC cannot fall silent and then use that silence to undermine the Petitioners ability to seek judicial relief. The prudent and necessary step of exhausting administrative remedies cannot now be turned against Petitioners in their request for judicial relief. Furthermore, Petitioners argue that their NRC Petition tolled any applicable time limitation. These arguments are more fully set forth in Petitioners' Brief replying to the NRC Motion to Dismiss, which was referred to the merits panel.

The NRC argues that Petitioners' request for judicial review of the merits of the "exemption" was untimely under the sixty-day limitations period in the Hobbs

¹ The Petition for Review did not limit jurisdictional claims to the AEA, other statutes are cited including the Hobbs Act, the Administrative Procedures Act, NEPA and other applicable laws and regulations. (JA at 910).

Act, 28 U.S.C. § 2244. (NRC Brief at 20). The Hobbs Act only applies to proceedings under § 189 and the NRC argues that it did not issue the Entergy “exemption” under § 189. Atomic Energy Act § 189(a), 42 U.S.C. § 2239, (hereinafter § 189(a)). It is a mark of the NRC’s arbitrary and capricious use of the law that it claims strict interpretation of the Hobbs Act 60 day limit on the timing of a claim, but dispute the availability of § 189(a), which invoke the Hobbs Act 60 day limitation period, to Petitioners when it comes to granting them the right to judicial relief of any sort.

Florida Power & Light Co. v. Lorion, 470 U.S. 729, 737 (U.S. 1985), does not stand for the contrary. Recognizing that the Hobbs Act applies only to proceedings under § 189(a) the Supreme Court held that a citizen’s petition to suspend a nuclear power plant’s license, which was filed pursuant to 10 C.F.R. § 2.206, constituted a “licensing proceeding” under § 189(a). The NRC has not argued that the “exemption” granted here was the result of any proceeding that Congress identified in § 189(a). Indeed, the NRC insists that the underlying “exemption” was not a proceeding within the scope of § 189(a). (NRC Brief at 2-3, 18, 25-26).

Even if the “exemption” is not a proceeding under §189(a), a final agency action is still subject to judicial review under the Administrative Procedure Act (APA). 5 U.S.C. § 701-706. A final agency action is reviewable under the APA

unless: (1) “statutes preclude judicial review”; or (2) “the [a]gency action is committed to agency discretion by law.” 5 U.S.C. § 701(a). Granting “exemptions” is neither precluded from judicial review nor committed to agency discretion by law. The Atomic Energy Act (AEA) does not preclude judicial review as “exemptions” are not mentioned in the AEA. Unlike *Riverkeeper v. Collins*, 359 F.3d 156, 171 (2d Cir. 2004), granting an “exemption” is not a refusal to take agency action and § 50.12 of 10 C.F.R. does provide meaningful standards for judicial review. Therefore, the grant of an “exemption” is reviewable under the APA and the six year statute of limitations is applicable.

Moreover the Petition for Review² in this case was timely filed under the long-standing rule that a claim that agency action was violative of statute may be raised outside a statutory limitations period, as more fully argued in point heading III (A)(2) on page 11. *See, e.g., Natural Resources Defense Council v. Nuclear Regulatory Comm’n*, 666 F.2d 595, 601-02 (D.C. Cir. 1981).

² The NRC had the right and discretion to treat the Petition to the NRC as a § 2.206 Petition but did not do so therefore any suggestion that Petitioners could not file a §2.206 Petition is illogical and moot. (NRC Brief at 42-43). The 2.206 Petitions are a meaningless remedy since they are not judicially reviewable. Furthermore the NRC is free to ignore 2.206 Petitions and in one case did not respond to a 2.206 Petition for over 20 years. (73 Fed. Reg. 55 (March 20, 2008)).

III. THE “EXEMPTION” WAS GRANTED IN VIOLATION OF LAW AND REGULATION.

Petitioners have challenged the specific “exemption” granted to Entergy on three separate grounds: lack of statutory authority to grant the exemption, failure to abide by regulatory requirements, and reliance on documents not in the Certified Record. The NRC Brief does not contest or refute those challenges.

A. THERE IS NO LEGAL BASIS FOR THE ENTERGY “EXEMPTION”.

1. THE STATUTES GOVERNING THE NRC DO NOT MENTION OR AUTHORIZE AN “EXEMPTION”.

Petitioners again assert that the NRC does not have the statutory authority to issue the Entergy “exemption”. While stating in a caption in its brief that “the NRC has statutory authority for granting specific exemptions to its regulations”, the NRC does not, indeed cannot, cite any such statutory authority. (NRC Brief at 40). Rather than cite such statutory authority, it suggests hopefully that “no one doubted NRC’s power to issue” exemptions, and that the “NRC long ago refuted such objections”. (NRC Brief at 41). The NRC’s Brief fails to cite a single word of law justifying the issuance of the Entergy “exemption” is no less than an admission that there is no statutory authority for the “exemption”.

The statutes do authorize and enumerate specific NRC actions. “[T]he terms and conditions of all licenses shall be subject to amendment, revision, or

modification, by reason of amendments of this Act or by reason of rules and regulations issued in accordance with the terms of this Act;” and “the granting, suspending, revoking, or amending of any license,” and “the issuance or modification of rules and regulation”, and no other actions § 187 [42 U.S.C. 2237], § 189(a). To assert the existence of an additional power to issue an “exemption,” without statutory language, and to act on that asserted power in secret and without public participation, is simply outside the laws of the land.

The NRC does suggest that it can grant such “exemptions” based on what it calls a “comprehensive regulatory framework.” It is again a mark of the arbitrary actions by the NRC that it everywhere else argues for strict interpretation of the words of the statutes, while the extraordinary power to exempt a licensee from license conditions is inferred from a vague and unspecified interpretation of the purposes of the statutes.

The NRC is insistent and absolute in its repeated demand that the words of the enabling statutes must be read literally when determining whether or not the NRC is authorized or required to take a specific action. Among a series of quotes and arguments advancing the “strict construction” of the law the NRC says in its brief:

“...[w]hat legislative history exists suggests the Congress intended the provisions of the section to be construed quite literally. *Deukmejian v. NRC*, 751 F.2d 1287, 1314 (D.C. Cir. 1984).” (NRC Brief at 29).

“the basic rule is that party ‘must point to a statute specifically mandating that procedure... *Union of Concerned Scientists v. NRC*, 920 F.2d at 53.’” (NRC Brief at 33).

Yet that rule of strict construction is completely abandoned when the NRC reaches the issue of the statutory right to issue an “exemption”. For that purpose the NRC asserts a broad, generalized power not based on statutes and strict construction. (*See e.g.* NRC Brief at 41).

“NRC’s rules for granting an exemption from its regulations under Section 50.12 are part of the ‘comprehensive regulatory framework’ created by the Atomic Energy Act.” (NRC Brief at 40).

“Congress broadly ‘empowered’ NRC ‘to promulgate rules and regulations...’” (NRC Brief at 41).

This gross inconsistency is compounded by the NRC’s insistence that the implied and circumstantial power to issue an “exemption” is completely unfettered by any requirement of public participation or other type of limitation and review, including judicial review.

The NRC relies on *Siegel v. AEC* and *Connecticut Light and Power Co.* for its statutory authority for granting exemptions. (NRC Brief at 40-41). *Siegel* does not discuss exemptions. *Siegel v. AEC*, 400 F.2d 777 (D.C. Cir. 1968). In *Connecticut Light and Power Co.* petitioners challenged 10 C.F.R. Part 50, Appendix R, the fire safety regulations, but not challenge exemptions. *Connecticut Light & Power Co. v. NRC*, 673 F.2d 525 (D.C. Cir. 1982). The Court in

Connecticut Light & Power Co., did show concern about some of the procedures followed by the NRC in the rulemaking process and discussed exemptions, but did not rule on their validity. 673 F.2d 525, 528, 530 (D.C. Cir. 1982). In *Connecticut Light & Power Co.* the Court discusses exemptions under 10 C.F.R. §50.48(6)(c)(1980), which subsequently has been repealed. *Id.* at 530.

The question of a statutory basis for the issuance of an “exemption” has not been litigated and is a case of first impression for the Court.

2. PETITIONERS’ CLAIM THAT THE ENTERGY “EXEMPTION” HAS NO BASIS IN LAW IS NOT TIME BARRED.

The NRC’s Brief attacks the timeliness of Petitioners’ claim that there is not a statutory basis for “exemptions”, effectively saying Petitioners should have challenged the rule in 1972 when it was promulgated. (NRC Brief at 41).

Petitioners are not litigating the 1972 “exemption” rule itself. They are litigating the legal sufficiency of the specific “exemption” granted to Entergy in this case. They have every right and obligation to point out to the Court that this “exemption” has no basis in law. Whether 35 years ago a regulation was properly or improperly promulgated does not limit Petitioners’ right to seek redress from the granting of a specific “exemption” pursuant to that regulation, if standing and jurisdictional requirements are otherwise met. *See e.g., NRDC v. Nuclear Regulatory Comm’n*, 666 F.2d 595.

A substantive challenge to a regulation, which is based on the claim that the regulation as applied exceeds constitutional or statutory authority or is arbitrary, capricious, or an abuse of discretion, accrues on the date the agency takes final action in applying the regulation to the plaintiff. *Air India v. Brien*, 261 F.Supp.2d 134 (E.D.N.Y. 2003) *citing* 5 U.S.C.A. §§ 706(2)(A-C). A regulation may be challenged after the six-year limitations period for civil actions against United States has expired, if the ground for the challenge is that the issuing agency exceeded its constitutional or statutory authority, but the claimant must show direct and final agency action involving a particular plaintiff within six years of filing suit; agency's application of the regulation to party creates a new, six-year cause of action to the challenge agency's constitutional or statutory authority. *Dunn-McCampbell Royalty Interest, Inc. v. Nat'l Park Serv.*, 112 F.3d 1283 (5th Cir. 1997) *citing* 28 U.S.C.A. § 2401(a); *Nat'l Res. Defense Council v. Nuclear Regulatory Comm'n*, 666 F.2d 595, 601.

Because the NRC's power to issue an "exemption" is not supported by statute, Petitioners can now challenge the legal basis for the Entergy "exemption" issued by the NRC.

B. THE NRC DID NOT FOLLOW THE REQUIREMENTS OF ITS OWN REGULATIONS FOR THE GRANTING OF AN “EXEMPTION”.

Even if, *arguendo*, the NRC is authorized by law to issue an “exemption”, the NRC must meet the regulatory requirements of 10 C.F.R. § 50.12. It did not do so in this case.

The NRC is explicitly required by its own regulation § 50.12 to consider and make a finding with respect to “the common defense and security”. It did not do so. The NRC Brief addresses this failure by citing what it characterizes as “well-documented safety findings”. (NRC Brief at 51). Petitioners do not know what findings the NRC references, whether or not they are in the Certified Record, or whether they included “common defense and security” findings. There is no such finding, such finding is legally required, and the “exemption” is therefore invalid on its face.

Petitioners similarly point out that the NRC is required by § 50.12 to issue a finding that “the grant of the “exemption” does not violate any law”. The NRC has made no such finding. The NRC responds to its failure by turning the burden on its head. The NRC states that “[p]etitioners identify no violation of law here...” (NRC Brief at 52). It is the NRC’s responsibility to review the relevant laws and determine that none were violated, not Petitioners. Moreover, Petitioners have repeatedly identified laws violated.

Neither the “common defense and security” finding and the “authorized by law” finding required by § 50.12 were made by the NRC. Either or both are facial violations sufficient to invalidate the “exemption”.

C. THE ENTERGY “EXEMPTION” SPECIFICALLY AND ADMITTEDLY RELIED ON A SPECIFIC DOCUMENT NOT IN THE CERTIFIED RECORD.

In complete violation of law, the “exemption” issued to Entergy explicitly relies on and cites a document that is not in the Certified Record. The Entergy “exemption” itself, as published in the Federal Register, states unequivocally that the “exemption” is “based upon consideration of the information in the licensee’s Fire Hazards Analysis...” (JA at 510). No such document exists in the Certified Record, no such document has been produced by the NRC, and no such document is posted on the NRC’s document retrieval system. In spite of this explicit admission, the NRC blandly asserts that “in granting the revised exemptions, NRC relied *only* on upon documents in the record before this Court.” (NRC Brief at 9, fn 4). The NRC brief is flatly and completely contradicted by the explicit language of the “exemption” itself.

The reliance on a document not in the Certified Record is a violation of the right and ability of Petitioners and the Court to fully understand and judge the truth, legal sufficiency, and factual basis of the NRC’s grant of the “exemption” to Entergy.

IV. PETITIONERS AND THE PUBLIC'S RIGHT TO PARTICIPATION IN THE "EXEMPTION" PROCESS WAS VIOLATED.

Petitioners stand by their argument that the scope, breadth, permanence, and subject matter of the "exemption" requires public participation because it is either a license amendment or a modification or revision of a rule. Petitioners do not claim that § 189(a) requires a hearing on every "exemption." However, because the "exemption" at issue here amended both or either of Indian Point's license and NRC regulations that right is clear in the statute, and case law. Petitioners bring to the Court's attention the extensive arguments in their original brief concerning the statutory language, the legislative history and the public policy supporting the public's right to participate in NRC decisions. The NRC's brief does not disturb those analyses.

Petitioners do not argue that § 189(a) requires a hearing on every "exemption." They argue, instead, that § 189(a) gives interested persons the right to a hearing when the NRC amends a license or modifies or revises a regulation. The "exemption" at issue here replaced the existing 1 hour fire-resistance standard applicable to Indian Point with a new 24 minute standard. By doing so, it altered both Indian Point's license and the regulation establishing the existing standard, thereby entitling Petitioners to a hearing.

The NRC has regulatory language, 10 C.F.R. § 50.59 (6) (c) (2), concerning when an NRC action is actually a license amendment, which may be instructive in this case.

The 8 standards for license amendments are set forth in 10 C.F.R. § 50.59 (6)(c)(2)³:

A licensee shall obtain a license amendment pursuant to Sec. 50.90 prior to implementing a proposed change, test, or experiment if the change, test, or experiment would:

- (i) Result in more than a minimal increase in the frequency of occurrence of an accident previously evaluated in the final safety analysis report (as updated);
- (ii) Result in more than a minimal increase in the likelihood of occurrence of a malfunction of a structure, system, or component (SSC) important to safety previously evaluated in the final safety analysis report (as updated);
- (iii) Result in more than a minimal increase in the consequences of an accident previously evaluated in the final safety analysis report (as updated);
- (iv) Result in more than a minimal increase in the consequences of a malfunction of an SSC important to safety previously evaluated in the final safety analysis report (as updated);
- (v) Create a possibility for an accident of a different type than any previously evaluated in the final safety analysis report (as updated);
- (vi) Create a possibility for a malfunction of an SSC important to safety with a different result than any previously evaluated in the final safety analysis report (as updated);
- (vii) Result in a design basis limit for a fission product barrier as described in the FSAR (as updated) being exceeded or altered;

³ Section 50.59 provides the relevant definition that “Change means a modification or addition to, or removal from, the facility or procedures that affects a design function, method of performing or controlling the function, or an evaluation that demonstrates that intended functions will be accomplished.”

- or
- (viii) Result in a departure from a method of evaluation described in the FSAR (as updated) used in establishing the design bases or in the safety analyses.

The “exemption” granted to Entergy clearly involves a number of these characteristics of a license amendment. Petitioners do not assert that in fact the “exemption” from the 1-hour rule necessarily causes any of the enumerated increases in likelihood of danger to the public. Petitioners do assert that the NRC is required to engage in its decision through a license amendment process, which includes full public participation, and to make a determination on each of the above 8 required factors before it can use the “exemption” process.

The NRC has raised in its brief a completely new matter which similarly sheds light on what constitutes a license amendment. The NRC in its brief attempts to justify the “exemption” by mentioning NFPA 805. NFPA 805 is an alternative to the existing fire technical specifications under 10 C.F.R. § 50.48 which provides licensees with performance based and risk informed protection fire requirements. Indian Point nuclear facilities have chosen not to adopt NFPA 805. (Pamphlet at 30).

It shall be first noted that NFPA 805 is not part of the Certified Record and as such cannot be relevant to the issues in this case.

However the extra-record NFPA 805 argument introduced by the NRC in its brief does illuminate the arbitrary and capricious nature of the granting the

“exemption” in this case. NRC seeks to rely on NFPA 805 to justify its grant of an “exemption” to Indian Point (NRC Brief at 46), but ignores the fact that NFPA 805 requires a formal license amendment.⁴ According to the NRC, NFPA 805 “is considered to be a relaxation of requirements to the extent that it would allow licensees to use risk-informed and performance-based methods” in lieu of the existing prescriptive requirements. (*Regulatory Analysis* at 4, ML040540542) and all licensees that opt into the new program must do so through a formal application for a license amendment. See NRC March 29, 2004 *Regulatory Analysis Revision to 10 CFR 50.48, “Fire Protection”* at 6, ML040540542 (“Licensees must submit a request in the form of an application for license amendment under 10 CFR 50.90.”).

The NRC thus requires that each individual licensee must amend its license to adopt the very procedures cited by the NRC as supportive of the Entergy “exemption” There ought to be a limit to the inconsistencies and arbitrary manipulation of process and language in which the NRC consistently engages.

If one were to assume that rather than seeking the “exemption”, Entergy was seeking a new license for a new plant and asked the NRC to absolve it of compliance with the 1-hour rule, it would clearly be a matter considered in the

⁴ The risk-based consensus standard developed by industry, NRC, and the National Fire Protection Association is embodied in a new regulation permitting nuclear power plants to adopt that standard as an alternative to the prescriptive one-hour fire-resistance requirement and other

required public participation process. If a matter would have been part of an original licensing proceeding, it is a license amendment when it happens later, no matter how tortuously the NRC tries to change the label.

Florida Power & Light does not support NRC's argument that Petitioners were not entitled to a hearing here. The Supreme Court recognized that, while §189 does not require the NRC to hold a hearing every time it considers a citizen's petition to suspend a license, the grant of a citizen's petition to suspend a license would "culminate in a full formal proceeding" under § 189(a). 470 U.S. at 745, n.11. The denial of a citizen's petition for enforcement action is, by definition, a decision to take no action and, as this Court has since ruled, committed to the agency's discretion.⁵ Here, in contrast, the NRC affirmatively imposed a new fire-resistance standard on Indian Point. That new standard amended Indian Point's license and established a new regulatory standard, both of which required a hearing under § 189(a).

Nor is the NRC's treatment of "exemptions" consistent. In one case the NRC states that if a Petitioner raises a material issue of fact, then a hearing on the "exemption" may be required. *Carolina Power of Company and North Carolina Eastern Municipal Power Agency (Shearon Harris Nuclear Power Plant)*, 24

requirements currently imposed on the plants. NRC Br. at 14-16, 46, citing 69 Fed. Reg. 33536 (June 16, 2004):

STATE OF NEW YORK)
)
COUNTY OF ALBANY)

ss.:

**AFFIDAVIT OF SERVICE
BY U.S. OVERNIGHT MAIL**

I, JANE CAREY, being duly sworn, depose and say that deponent is not a party to the action, is over 19 years of age and resides at Albany, New York, County of Albany.

On March 13, 2009, deponent caused two true copies of Petitioners' Reply Brief, to the following addresses:

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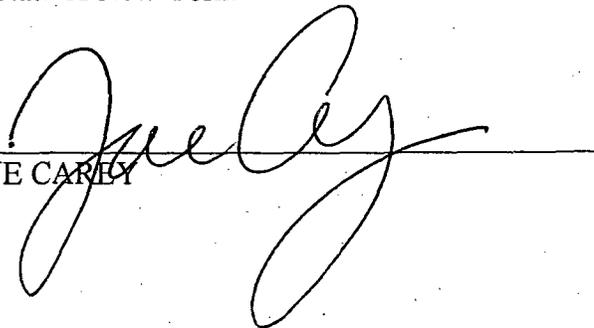
John Sipos, Esq.
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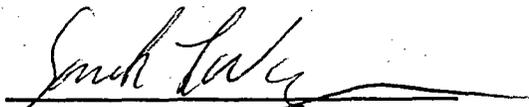
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The addresses designated below by said attorneys for that purpose by depositing two true copies of Petitioners' Reply Brief enclosed in a postpaid properly addressed envelope, under the exclusive custody and care of FedEx, within the State of New York.

JANE CAREY



Sworn to before me this 13th day of
March, 2008.


Notary Public

SARAH L. WAGNER
Notary Public, State of New York
No. 02WA6133401
Qualified in Albany County
Commission Expires Sept. 19, 20 09

ANTI-VIRUS CERTIFICATION FORM

See Second Circuit Interim Local Rule 25(a)6.

CASE NAME: Brodsky et. al. v. U.S. Nuclear Reg. Com'n

DOCKET NUMBER: 08-1454-ag

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Date: 3/13/09

N.R.C. 769, CLI-86-24 (Dec. 5, 1986). The Commission grants a hearing an “exemption” request when it is necessary for the applicant to obtain an initial license or amend its license. *Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation)*, 53 N.R.C. 459 (2001). In *Private Fuel Storage*, the NRC stated that “we are aware of no licensing case where we have declared “exemption”-related safety issues outside the hearing process altogether.” *Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation)*, 53 N.R.C. 459, fn 3 (2001). If an “exemption” raises material questions directly related to an agency’s licensing action, it comes within the hearing rights of interested parties. *Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation)*, 53 N.R.C. 459 (2001).

With respect to the *Massachusetts and Kelley*⁶ cases that the NRC tries to distinguish, Petitioners again point out that in those cases, and in every case where “exemptions” have been approved, a Court relied on the existence of varying forms of public participation, that the “exemptions” themselves were temporary, and that public health and safety were not involved. *See e.g. Kelley v. Selin*, 42 F.3d 1501 (6th Cir. 1995). There is no case where, as here, there was no announcement and

⁵ In *Riverkeeper v. Collins*, 359 F.3d 156, 171 (2d Cir. 2004) the Second Circuit Court of Appeals held that petitioners lacked subject matter jurisdiction to review merits of Commission’s decision to deny a citizen group’s petition for enforcement action pursuant to 10 C.F.R. § 2.206).

⁶ *Commonwealth of Mass. v. U.S. Nuclear Regulatory Com’n*, 878 F.2d 1516 (1st Cir. 1989); *Kelley v. Selin*, 42 F.3d 1501 (6th Cir. 1995).

no form of public participation for a permanent safety-related decision by the NRC.

Courts have acknowledged that the NRC has discretion to decide what matters are relevant to its licensing decision, but its discretion to limit public participation is more circumscribed. "Administrators may not lightly sidestep procedures that involve the public in deciding important questions of public policy... 'the Commission is entitled to great freedom in its efforts to structure its proceedings so as to maintain their integrity while assuring meaningful public participation, *but one of its goals must be to assure that there is meaningful public participation.*'" *Union of Concerned Scientist v. Nuclear Regulatory Comm'n*, 735 F.2d 1437, 1446 (D.C. Cir. 1984)(emphasis in original).

The Commission correctly points out that we have observed that the term "amend," as used in § 189(a), is to be construed quite literally.... But we were careful to note as well that it is the substance of the NRC action that determines entitlement to a § 189(a) hearing, not the particular label the NRC chooses to assign to its action.

Citizens Awareness Network, Inc. v. Nuclear Regulatory Comm'n, 59 F.3d 284, 295 (1st Cir. 1995).

Thus, if § 189(a) is to serve its intended purpose, surely it contemplates that parties in interest be afforded a meaningful opportunity to request a hearing before the Commission retroactively reinvents the terms of an extant license by voiding its implicit limitations on the licensee's conduct. *See Skidgel v. Maine Dep't of Human Servs.*, 994 F.2d 930, 937 (1st Cir. 1993) (statutory language must be interpreted in context, including its legislative purpose). The

claimed right to deny such a hearing request undermines the integrity of the licensing process.

Citizens Awareness Network, Inc. v. Nuclear Regulatory Comm'n, 59 F.3d 284, 294-295 (1st Cir. 1995).

Bellotti v. NRC, 725 F.2d 1380 (D.C. Cir. 1983), emphasizes the importance of public participation in NRC decision making about whether to relax safety standards for nuclear power plants. At issue there was a proposed license amendment requiring a plant to develop a new management plan that would ensure greater safety at the plant. *Id.* at 1381. Unlike here, NRC recognized that it was required to conduct a hearing on the license amendment but denied the Attorney General of Massachusetts the right to intervene in the hearing.

The NRC, in its brief, admits that *Cleveland Elec. Illuminating Co. (Perry Nuclear Power Plant, Unit 1)*, 44 N.R.C. 315, CLI-96-13 (1996) actually encompasses the facts in this case. (NRC Brief at 38). The "exemption" herein substantially changes the operating authority that Entergy enjoys by permanently authorizing it to ignore the explicit 1-hour standard of the existing rule and to operate as if the rule did not exist. Whether or not that judgment has a basis in federal law, it is a significant addition to or supplementation of Entergy's existing operating authority, and therefore is intended to be subject to public participation requirements.

Petitioners again assert that the “exemption” is subject to public participation requirements even if it is not a license amendment because it would then amount to a modification or revision of a rule under § 187 and § 189. The actions the NRC are authorized to take are limited to license amendments and “amendment, revision, or modification” of a rule or regulation. § 189(a). Given the permanence, scope, subject and significance of the “exemption” to the one hour rule, given that Entergy has been permanently excused from compliance with the facial command of the regulation, the NRC has clearly revised or modified the 1-hour rule as it applies to Indian Point 3.

V. THE NRC CONCEDES THAT RELEVANT AND PROBATIVE MATERIAL IN ITS POSSESSION WAS IGNORED.

The NRC brief asserts that “Petitioners ask that this court supplement the record with information not considered by NRC officials who granted the “exemption.” (NRC Brief at 56). The NRC correctly characterizes Petitioners request. Petitioners assert that the NRC had in its possession relevant and probative materials which might have influenced the decision to grant the “exemption” which it arbitrarily refused to consider, in violation of law. The NRC brief does not dispute that assertion.

The NRC is legally required to consider all relevant and probative material in its possession which might have influenced the agency decision, or which might

have yielded a different result. In short, the NRC is required to produce anything in its possession which, whether considered or ignored, was relevant or probative. "... we rely on the same court-sanctioned test applied by the Commission in reaching its decision: 1) whether the motion to reopen is timely; 2) whether the information raises a significant safety (or environmental) concern; and 3) *whether the information might have led the Licensing Board to reach a different result.* CLI-86-1, 23 N.R.C. at 4-5; see *San Luis Obispo Mothers for Peace v. Nuclear Regulatory Comm'n*, 751 F.2d 1287, 1318 (D.C. Cir. 1984), *vacated in part and rehearing en banc granted on other grounds*, 760 F.3d 1320 (1985), *affirmed*, 789 F.2d 26 (1986) ("*Mothers for Peace*")." *Oystershell Alliance et. Al. v. U.S. Nuclear Regulatory Com'n*, 800 F.2d 1201 (D.C. Cir. 1986)(Emphasis added).

In *Bethlehem* the Court, citing *Nat'l Courier Ass'n. v. Bd. Of Governors of Fed. Reserve Sys.* (where the Government took the position that certain internal agency memoranda were not a proper part of the record because they were not expressly relied upon by the agency when reaching the challenged position) stated:

We think a fuller analysis is called for. Private parties and review courts alike have a strong interest in fully knowing the basis and circumstances of an agency's decision. The process by which the decision has been reached is often mysterious enough without the agency maintaining unnecessary secrecy. To be sure, the agency may have a strong interest of its own in keeping internal documents from public view, but it will normally be far easier for the agency to establish its interest in suppressing such documents than for private litigants to establish their interest in exposing them to judicial scrutiny. *The proper approach, therefore, would appear to be to*

consider any document that might have influenced the agency's decision to be "evidence" within the statutory definition, but subject to any privilege that the agency properly claims as protecting its interest in non-disclosure. *Bethlehem Steel Corp., Steel Corp. v. U.S. Envtl Prot. Agency*, 638 F.2d 994, 1000 (7th Cir. 1980) citing *Nat'l Courier Sys. v. Bd. Of Governors of Fed. Reserve Sys.* 516 F.2d 1229, 1241 (D.C. Cir. 1975) (emphasis added).

The agency itself cannot be the final arbiter of what it must consider:

"...[A]s the Ninth Circuit explained in *Asarco, Inc. v. EPA*, 616 F.2d at 1158-1159. A satisfactory explanation of agency action is essential for adequate judicial review... The court cannot adequately discharge its duty to engage in a "substantial inquiry" if it is required to take the agency's word that it considered all relevant matters." *High Sierra Hikers Ass'n, et al. v. Bernie Weingardt, et al.*, 2007 U.S. Dist. LEXIS 84746 (N.D. Cal. 2007).

The Courts are unequivocal and clear. If the NRC has relevant and probative material in its possession it must consider it. It can decide if a document is relevant or irrelevant. It can reasonably assign whatever weight it wishes to the document. But it cannot arbitrarily ignore relevant material in its possession.

Rather than abide by that requirement, in this case the NRC arbitrarily and secretly limited what it considered. It informed the Court that it restricted the Certified Record to only those documents "... considered in granting the exemption...." without explanation of why certain documents were considered and others were not. (NRC Brief in Opposition to Petitioners Motion to Correct and Supplement the Record dated Aug. 13, 2008 at p. 9).

The NRC brief is notable in its continuing refusal to explain why certain documents were considered and certain other documents were not, when all are

relevant and might have influenced the NRC's decision. It instead characterizes the Petitioners as requesting that irrelevant material be considered by the Court.

Petitioners reemphasize that they seek NRC consideration only of relevant⁷ materials that might have influenced the ultimate decision, that such documents have been specified by Petitioners by letter and in submissions to the Court, and that the NRC is legally required to consider these documents and to make them part of the Certified Record.

VI. THE NRC VIOLATED NEPA.

The NRC asserts that Petitioners did adequately challenge the Environmental Analysis (EA) in their Petition for Review (NRC Brief at 58) and that the EA complied with NEPA. (NRC Brief at 60). Entergy further argues that Petitioners lack standing to challenge the EA. (Entergy Brief at 18).

Petitioners challenge to the NRC's EA was timely because the Court may examine "prior agency action on which the validity of the later agency action under review depend[s]". *Nat'l Ass'n of Greeting Card Publishers v. U.S. Postal Serv.*, 607 F.2d 392, 425 n. 59 (D.C.Cir.1979), *cert. denied*, 444 U.S. 1025 (1980).

In their Petition for Review, Petitioners stated that: "[t]he NRC acted arbitrarily, abused its discretion, and violated the Atomic Energy Act, the Energy Policy Act

⁷ Petitioners have repeatedly explained the relevance of each document sought to be considered. (Petitioners' Motion to Supplement and Correct the Record, Affidavit of Richard L. Brodsky

of 2005, the Administrative Procedures Act, the National Environmental Policy Act, and other applicable laws and regulations.” (JA at 910). The EA conducted by the NRC was incorporated in the “exemption.” (See JA at 495).⁸ The NRC was on timely notice that Petitioners were challenging the EA conducted by the NRC in granting the “exemption.”

It is undisputed that this is an action which requires compliance with NEPA.⁹ (JA at 492); (NRC Brief at 60).¹⁰ NEPA requires that the agency consider every significant aspect of the environmental impact of a proposed action. NEPA of 1969 § 102, 42 U.S.C.A. § 4332. The NRC only considered one alternative- the no action alternative. (NRC Brief at 61); (Entergy Brief at 47). This is not an alternative under NEPA and thus the NRC violated NEPA. In defense of its decision and for the first time in its brief, the NRC says “retrofitting cannot produce less than ‘insignificant’ impacts”. (NRC Brief at 61). The NRC may not supplement the Certified Record and EA with a bland assertion in its brief. The

dated July 30, 2008, Appendix D.)(cf. NRC Brief at 55 and Entergy Brief at 39).

⁹ Both the NRC and Entergy claim that national statistics on fire and fire alerts at commercial nuclear facilities are irrelevant to the environmental analysis of the risk of fire and hemyc. (NRC Brief at p. 60); (Entergy Brief at 48-49). These arguments are completely irrational and devoid of merit.

¹⁰ Both the NRC and Entergy claim that national statistics on fire and fire alters at commercial nuclear facilities are irrelevant to the environmental analysis o the risk of fire and hemyc. (NRC brief at 60).(Entergy Brief at 48-49). These arguments are irrational and devoid of merit.

NRC failed to take a “hard look” at the impact of its decision as required by NEPA.¹¹

Procedurally, the NRC failed to re-examine the risk of fire when the “exemption” request was amended from 30 minutes to 24 minutes. (JA at 487, 501). The NRC concedes that it did not start the analysis over after the “exemption” request was amended to 24 minutes. (NRC Brief at 48). The EA does not state whether it is reviewing the request for an “exemption” for thirty or twenty-four minutes. The NRC claims that the reduction in the fire protection capabilities of hemyc does “not significantly increase the consequences of a fire,” yet a 24 minute “exemption” reduces the fire safety standards by a total of 76%. A 76% reduction in fire safety standards clearly has a “reasonably close causal relationship between a change in the physical environment and the effect at issue”. National Environmental Policy Act of 1969, § 102, 42 U.S.C.A. § 4332.

¹¹ The NRC failed to inquire and consider all facts relevant to its statutory obligation to protect the public and to “see to it that the record is complete” (*Scenic Hudson Pres. Conf. v. Fed. Power Comm’n*, 354 F.2d 608, 620 (2d Cir. 1965)); to mention scientific studies in the record with findings contrary to those relied upon by the agency (*Islander E. Pipeline Co., LLC v. Conn. Dep’t of Env’tl. Prot.*, 467 F.3d 295, 313 (2d Cir. 2006)); to consider an important aspect of the problem” or “offered an explanation for its decision that runs counter to the evidence before the agency” (*Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)); and to “[b]riefly provide sufficient evidence and analysis for determining whether to prepare an [EIS] or a finding of no significant impact” 40 C.F.R. §§ 1501.4, 1508.9.

Petitioners have standing to challenge the violations of the NRC's EA under NEPA. *Portland Audubon Soc'y v. The Endangered Species Comm.*, 984 F.2d 1534 citing *Lujan*, 112 S.Ct. at 2136.

CONCLUSION

At the heart of this case is an unanswered question: What is an "exemption"? It is a question that has never been directly asked and answered by a Court.

Petitioners point out that there is simply no statutory basis for the grant to Entergy of the "exemption", and that the convenience of the NRC is no substitute for a legal basis for administrative action.

If the Court determines that the NRC does need a way to handle anomalous and particular problems, then common sense and the public interest argue that it ought to be limited to what NRC Commissioner Jaczko called "limited and unanticipated situations" (Pet. Brief at 21). The Entergy "exemption" shows how the NRC has morphed the "exemption" process into a way to address inconvenient and serious issues arbitrarily and in secret.

If the NRC needs to address "limited and unanticipated situations," it should not be permitted to do so in secret. The law does not permit, nor does the public

interest require, that serious decisions about a particular nuclear facility be made in the dark of night, with no public knowledge or ability to affect the outcome.

There is in fact no statutory authorization for "exemptions". In fact, several of the specific requirements for a § 50.12 "exemption" were not completed. The NRC in fact refused to consider relevant evidence in its possession. The "exemption" explicitly relies on a document not in the Certified Record. The requirements of NEPA were in fact truncated. The NRC offers only inconsistent and convoluted procedural arguments made to avoid the constructive involvement of the public. They are flimsy technical shields against a public that is increasingly skeptical of government in general, and the NRC specifically.

What the NRC presented in its brief is a combination of "trust me", and a mischaracterization of Petitioners' goals. Petitioners are painted as those with a "radical claim"; who wish to "leverage the grant of two particular exemptions...into judicial review of Entergy's overall compliance"; who are "meandering into irrelevant issues"; who have an "apparent agenda"; who seek "a sweeping review of how NRC oversees Indian Point 3," and more (NRC Brief at 40, 53, 57).

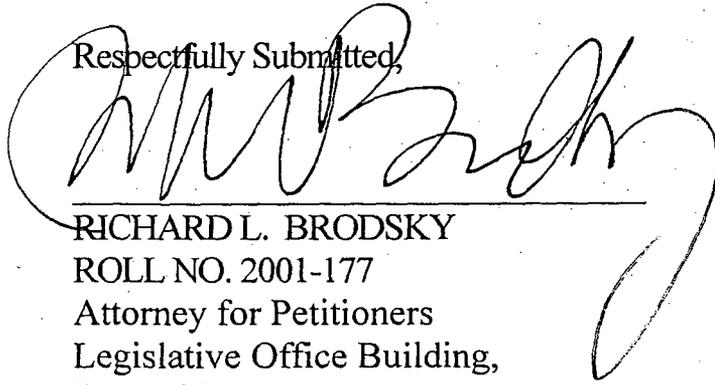
Not so. Petitioners seek judicial relief from a specific action by the NRC that was significant, safety-related, done in secret, and justified by a sweeping assertion of NRC power to avoid public knowledge of and participation in the

decision. In the end, the public needs to be confident of the openness, fairness, and competence of the NRC. The need for confidence is not limited to those who may have been skeptical of the claims and performance of the nuclear power industry. Those who would seek an expansion of nuclear power, and the public at large, also need to be confident that the NRC is in fact, and in appearance, fair, open and competent.

The facts and the law, as well as the good of the country, are consistent with the relief sought by Petitioners. We respectfully turn to this Court to vindicate those rights.

Dated: March 12, 2009
Albany, New York

Respectfully Submitted,

A large, stylized handwritten signature in black ink, appearing to read 'Richard L. Brodsky', is written over a horizontal line. The signature is fluid and cursive, with a large loop at the end.

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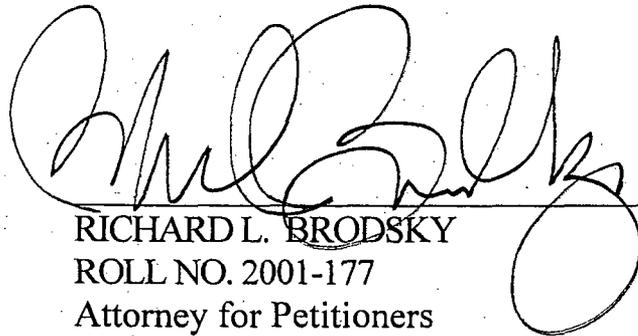
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Certificate of Compliance

I certify that this brief complies with the type-volume of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,633 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). This brief also complies with the type face requirements of Fed. R. App. P. 32(a)(5). And the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman, 14 size font.

Dated: March 12, 2009



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