

**IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

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|---|---|--------------------|
| NEW JERSEY ENVIRONMENTAL FEDERATION; |) | |
| SIERRA CLUB; NUCLEAR INFORMATION AND |) | |
| RESOURCE SERVICE; NEW JERSEY PUBLIC |) | |
| INTEREST RESEARCH GROUP; GRANDMOTHERS, |) | |
| MOTHERS AND MORE FOR ENERGY SAFETY |) | |
| |) | |
| Petitioners, |) | |
| |) | |
| v. |) | No. 09-2567 |
| |) | |
| UNITED STATES NUCLEAR REGULATORY |) | |
| COMMISSION and the UNITED STATES OF |) | |
| AMERICA |) | |
| |) | |
| Respondents, |) | |
| |) | |
| EXELON GENERATION COMPANY, LLC |) | |
| |) | |
| Intervenor. |) | |

**PETITIONERS' MOTION TO COMPEL RESPONDENTS
TO PROVIDE A COMPLETE RECORD ON REVIEW
AND FOR OTHER APPROPRIATE RELIEF**

Petitioners New Jersey Environmental Federation, Sierra Club, Nuclear Information and Resource Service, New Jersey Public Interest Research Group, and Grandmothers Mothers and More for Energy Safety, hereby move pursuant to Federal Rules of Appellate Procedure (“F.R.A.P.”) 16 and 17 to require Respondents to complete the record on review by adding all documents to which

parties specifically referred in their pleadings below that were documents generated by the Nuclear Regulatory Commission (“NRC” or “Commission”) or its Staff. Despite the multiple, timely requests of Petitioners, the NRC has refused to include at least one such document in Respondents’ Supplemented Certified Index of the Record filed July 31, 2009 (the “Index”). Furthermore, because the Commission has insisted that it did not consider this document, Petitioners respectfully request that this Court consider remanding certain claims made to the Commission by the Petitioners that relied upon this document back to the Commission. Specifically, these claims are that that the NRC Staff’s conduct in the proceeding below unreasonably impinged upon Petitioners’ statutory hearing rights by denying them access to key documents that would have helped them obtain a hearing regarding deficiencies in certain metal fatigue analyses.

In support of this Motion, Petitioners state as follows:

1. One of the claims to be raised in this appeal is that the NRC illegally constricted Petitioners’ right to a hearing pursuant to Section 189(a) of the Atomic Energy Act (“AEA”), 42 U.S.C. § 2239(a), by allowing the NRC Staff to impede Petitioners’ access to certain analyses regarding metal fatigue. The metal fatigue analyses became relevant to the proceedings below when the NRC Staff notified the Atomic Safety and Licensing Board (the “Board”) that certain metal fatigue

analyses were potentially not conservative. Letter from NRC Staff to Board Enclosing Copy of April 3, 2008 Notification, dated April 3, 2009 (Index No. 475). Ultimately, Petitioners alleged that although they were litigating the adequacy of the metal fatigue analyses they had been unable to obtain those analyses by any route, including through a Freedom of Information Act (“FOIA”) request:

Citizens have been trying to obtain a copy of the metal fatigue analyses for some time. First, AmerGen refused to provide a copy of the analyses to Citizens. E-mail from A. Polonsky to R. Webster, dated May 22, 2008. Then, the Board refused to order AmerGen to provide Citizens with a copy. Board Memorandum and Order, LBP-08-12 (July 24, 2008) slip op. at 25 n. 23. Finally, in response to a Freedom of Information Act ("FOIA") request, NRC Staff advised Citizens that the analyses had been reviewed at Exelon's office and were therefore not available through FOIA. NRC Response to FOIA Request 2008-0283, dated August 13, 2008. As a result, Citizens have been placed in the anomalous position that they are forced to litigate about the adequacy of analyses that they have not been able to review.

Citizens' Answer to NRC Staff Motion to Respond to Citizens' October 14, 2008 Letter, dated November 5, 2009 (Index No. 544), attached as Exhibit 1 to the Declaration of Richard Webster, dated August 5, 2009 (the “Webster Declaration”)¹. As fully discussed in Exhibit 1, Petitioners argued that the NRC

¹ All subsequent references to “Exhibit ___” refer to exhibits attached to the Webster Declaration.

Staff and the procedural rules employed in licensing proceedings placed Citizens in an impossible situation. First, Exelon² and then the Atomic Safety and Licensing Board (the “Board”) refused to grant Petitioner access to the analyses. Second, the Staff made the metal fatigue analyses unavailable to Petitioners through FOIA by the simple device of reviewing them in Exelon's Washington, D.C. office instead of at the NRC's headquarters, which is close to Washington D.C. In addition, after the Staff provided more information about how those analyses had been conducted in a Supplemental Safety Evaluation Report, Staff argued that Petitioners were too late in submitting additional comments to the Commission.

On appeal, the Commission affirmed the Board on the discovery issue and adopted the Staff's approach by excluding from the record additional comments from Petitioners' expert on the new information contained in the Supplemental Safety Evaluation Report. *In the Matter of AmerGen Energy Co, LLC* (License Renewal for Oyster Creek Nuclear Generating Station), CLI-08-28, Memorandum and Order, slip op. at 25 notes 73 and 74 (November 6, 2008) (the “Metal Fatigue Decision”). However, the Commission failed to address Petitioners' arguments that the NRC Response to FOIA Request 2008-0283, dated August 13, 2008, (the “FOIA Response,” attached as Exhibit 2), showed that the NRC Staff had

² Exelon Generation Co., LLC (“Exelon”) is the corporate successor of AmerGen Energy Co., LLC (“AmerGen”).

concealed documents from Petitioners in violation of the “cardinal rule of fairness” that the Commission has found governs licensing proceedings.³ Exhibit 1 at 5-6. Furthermore, while the Commission dismissed Petitioners' claims regarding the inappropriate use of the stringent reopening procedures (Metal Fatigue Decision at 27-28), it did not address Petitioners' claim that “[t]he Staff's approach [which included preventing Citizens from obtaining the analyses through FOIA]. . . would unreasonably abridge Citizens' right to request a hearing on issues that are material to relicensing pursuant to the Atomic Energy Act ("AEA") [Section 189(a), 42 U.S.C. § 2239(a)].” Exhibit 1 at 2.

2. The Index purporting to comprise the Administrative Record in this case does not include the FOIA Response, even though Petitioners informed the NRC that the FOIA response was specifically referenced in a pleading to the Commission and was an agency document that was readily available to the Commission.⁴

³ *Houston Lighting & Power Co.* (Allens Creek Nuclear Generating Station, Unit 1), ALAB-565, 10 NRC 521,525 (1979); *Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), LBP-96-2, 43 NRC 61, 83 n. 17 (1996); *rev'd in part on other grounds*, CLI-96-7, 43 NRC 235

⁴ Generally NRC documents are assigned an electronic accession number in a document storage system called ADAMS. Documents can be retrieved through ADAMS by using the accession number or searching for the document at a webpage: <http://www.nrc.gov/reading-rm/adams/web-based.html>. NRC has agreed that where references to documents in pleadings included the accession number, those documents are included the record. Letter from Rader to Webster, dated

3. Under well-settled principles of administrative law this Court's review of Respondents' actions and inactions must "be based on the full administrative record that was before" the agency at the time of its decision. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971). See also *James Madison Ltd. v. Ludwig*, 82 F.3d 1085, 1095 (D.C. Cir. 1996); *Environmental Defense Fund v. Costle*, 657 F.2d 275, 284 (D.C. Cir. 1981). Because, "[i]f a court is to review an agency's action fairly, it should have before it neither more nor less information than did the agency when it made its decision," *Walter O. Boswell Memorial Hospital v. Heckler*, 749 F.2d 788, 792 (D.C. Cir. 1984). Furthermore, the "complete administrative record" upon which the Court's review is to be based "consists of all documents and materials directly or indirectly considered by the agency." *Bar MK Ranches v. Yuetter*, 994 F.2d 735, 739 (10th Cir. 1993).

4. Indeed, in a recent submission to the Second Circuit, the NRC has acknowledged these principles and has stated that F.R.A.P. 16(a)(2) "compels the

July 29, 2009. In addition, the NRC has agreed to include certain agency documents that were cited specifically and are now in ADAMS even though the pleading did not contain the accession number, perhaps because one had not yet been assigned by the NRC. E.g. Index No. 596, referenced by Index No. 477 (includes reference to an E-mail from NRC Staff counsel to Petitioners' counsel, but does not include an accession number). However, the FOIA Response does not appear to be in ADAMS. This deficiency should not have impeded access to the document by the Commission, which could easily have corrected this omission.

agency to certify the record of documents it considered . . .” Federal Respondents' Answer to Petitioners' Motion to Supp. the Record at 8, *Brodsky v. Nuclear Regulatory Comm'n*, No. 08-1454-ag (2d Cir. Jul 24, 2008) (Exhibit 3) at 8. It also endorsed the holding in *Bar MK Ranches* that the record should consist of “whatever documents the agency 'directly or indirectly considered.” *Id.* at 9.

5. Despite multiple and timely requests by Petitioners' counsel, the NRC has refused to include the FOIA Response in the Index. However, because the FOIA Response is an agency document to which Petitioners specifically referred in a pleading before the Commission, it was directly or indirectly considered and should therefore be part of the record. *See Bar MK Ranches*, 994 F.2d at 739 (“An agency may not unilaterally determine what constitutes the Administrative Record.”); *Miami Nation of Indians of Indiana v. Babbitt*, 979 F. Supp. 771, 777 (N.D. Ind. 1996) (court rejected the agency's argument that “items are not part of the administrative record unless they were reviewed in some fashion by the ultimate decisionmaker,” in part, because “a document need not literally pass before the eyes of the final agency decision maker to be considered part of the administrative record”); *Environmental Defense Fund, Inc. v. Blum*, 458 F. Supp. 650, 661 (D.D.C. 1978) (court rejected EPA's attempt “to exclude from consideration pertinent material submitted as an integral part of the rulemaking

process or otherwise located in EPA's own files"). Petitioners, therefore, respectfully request that the Court grant this motion and order the NRC to include the FOIA Response in the Certified Index as part of the record.

6. In addition, because the NRC has insisted that the FOIA Response is not part of the record, the Commission has admitted that in deciding the admissibility of the metal fatigue contention, it actually failed to consider the FOIA Response at all. This omission is confirmed by the Commission's failure to even mention Petitioners' claims regarding the NRC Staff's concealment of the analyses. Petitioners, therefore, respectfully ask this Court to consider remanding these claims to the Commission for further consideration taking full account of the FOIA Response referenced in the pleadings below.

7. Finally, Petitioners have tentatively identified a number of other similar references to portions of internal NRC documents in the pleadings that the NRC has omitted from the Index. Because the NRC has the duty of compiling the complete record, Petitions respectfully request this Court to order Respondents to add to the record any other internal agency documents that were specifically referenced in pleadings, but which it has omitted from the record.

WHEREFORE, for the foregoing reasons, Petitioners respectfully request this Court to direct the NRC to file a complete administrative record by adding all documents to which parties specifically referred in their pleadings below that were documents generated by the Commission or its Staff, including the FOIA Response. Furthermore, this Court should consider remanding Petitioners' claims that the NRC Staff improperly abridged Petitioners' statutory hearing rights by placing the analyses beyond the reach of FOIA to the Commission for further consideration taking the FOIA Response into account.

Respectfully Submitted,

s/ Richard Webster

Richard Webster

(Counsel of Record)

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Dated: August 6, 2009

Attorneys for Petitioners

CERTIFICATE OF SERVICE

Pursuant to Rule 25 of the Federal Rules of Appellate Procedure and Circuit Rules 25.1 and 113.4 of this Court, I hereby certify that I have this 6th day of August, 2009, served the foregoing document and the attached declaration and exhibits through the electronic filing system upon all the parties set forth on the list below.

s/ Richard Webster

Service List

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NEW JERSEY ENVIRONMENTAL FEDERATION;)
SIERRA CLUB; NUCLEAR INFORMATION AND)
RESOURCE SERVICE; NEW JERSEY PUBLIC)
INTEREST RESEARCH GROUP; GRANDMOTHERS,)
MOTHERS AND MORE FOR ENERGY SAFETY)

Petitioners,)

v.)

No. 09-2567

UNITED STATES NUCLEAR REGULATORY)
COMMISSION and the UNITED STATES OF)
AMERICA)

Respondents,)

EXELON GENERATION COMPANY, LLC)

Intervenor.)

DECLARATION OF RICHARD WEBSTER

Pursuant to 28 U.S.C. § 1746, I, Richard Webster, do declare:

1. I am a member in good standing of the Bars of New York and New Jersey and am admitted to this Court. I am the lead attorney representing the Petitioners in this case and was also the lead attorney representing the Petitioners in the proceeding below.

2. Exhibit 1 attached to this declaration is a true and correct copy of Citizens' Answer to NRC Staff Motion to Respond to Citizens' October 14, 2008 Letter, dated November 5, 2009 (Index No. 544).

3. Exhibit 2 attached to this declaration is a true and correct copy of the NRC

Response to FOIA Request 2008-0283, dated August 13, 2008.

4. Exhibit 3 attached to this declaration is a true and correct copy of Federal Respondents' Answer to Petitioners' Motion to Supp. the Record at 8, Brodsky v. Nuclear Regulatory Comm'n, No. 08-1454-ag (2d Cir. Jul 24, 2008).

5. On a number of occasions prior to July 29, 2009, when NRC mailed the Supplemented Certified Index of the Record, I have pointed out to counsel for NRC that Exhibit 2 is an agency document that was specifically referenced in Exhibit 1, and as such it is part of the record. In response counsel for NRC has insisted that Exhibit 2 is not part of the record.

I declare under penalty of perjury that the foregoing is true and correct.

/s Richard Webster

Richard Webster

Dated: August 6, 2009