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BY OVERNIGHT COURIER

March 29, 2010

Office of the Clerk
United States Court of Appeals for the Third Circuit
21400 U.S. Courthouse
601 Market Street
Philadelphia, PA 19106-1790.

Re: Petition for Review of Decisions Associated with License Renewal of Oyster
Creek Nuclear Power Plant - Docket No. 09-2567

Dear Ms. Koperna:

I have enclosed 10 copies of the Reply Brief of Petitioners plus one copy for stamping by the Court. Also enclosed is a self-addressed pre-paid envelope for return of the stamped reply brief. Thank you for your attention to this matter.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Richard Webster', is written over a long, thin horizontal line that extends across the page.

Richard Webster, Esq.

Enclosures

c.c. Robert M. Rader, Esq., U.S. Nuclear Regulatory Commission
John E. Arbab, Esq., U.S. Department of Justice
Brad Fagg, Esq., Morgan, Lewis & Bockius, LLP

No. 09-2567

United States Court of Appeals
for the
Third Circuit

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

Petitioners,

v.

UNITED STATES NUCLEAR REGULATORY COMMISSION,
UNITED STATES OF AMERICA

Respondents

and

EXELON CORPORATION

Intervenor.

ON APPEAL FROM THE NUCLEAR REGULATORY COMMISSION
DECISIONS CLI-09-07, CLI-08-28 AND CLI-08-23

REPLY BRIEF OF PETITIONERS

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PRELIMINARY STATEMENT

This case concerns two major issues. First, the Nuclear Regulatory Commission (“NRC” or the “Commission”) has arbitrarily and capriciously curtailed its statutory mandate to allow citizens groups to request hearings concerning reactor licensing. Through the arbitrary application of a thicket of procedural rules that the NRC freely admits are designed to be “strict,” “deliberately stringent,” and “deliberately heavy,”¹ the NRC has improperly denied Petitioners (“Citizens”) any opportunity to raise a number of material safety issues that arose after the proceeding had commenced. Illustrating the arbitrary nature of these decisions, the NRC has been serially inconsistent about when and how Petitioners could have successfully raised many of these issues.

The second major issue is whether the NRC may wholly abdicate its statutory duty to ensure that renewed licenses for nuclear reactors offer “adequate protection” to public health and safety by delegating to its Staff the power to make the required safety findings and grant licenses, but failing to ensure that the Staff exercises the delegated power in the manner required by the Atomic Energy Act (“AEA”). For example, even after Petitioners showed that there were significant gaps and errors in the administrative record supporting the Staff’s and Board’s decisions to allow the license renewal to proceed, the Commission failed to fill in

¹NRC Br. at 15, 27, 32.

acts on behalf of the Commission.

ARGUMENT

I. The NRC Violated Petitioners' Rights to Hearings on New Material Issues that Arose During the Proceeding

A. The NRC Unlawfully Denied Petitioners Any Opportunity to Challenge the Spatial Scope of Ultrasonic Measurements After License Renewal

In attempting to defend the Board's decision to reject Citizens' contention regarding the scope of the area that would be monitored using ultrasonic testing after license renewal, the NRC does not dispute that the AEA requires Petitioners to be provided with an opportunity to obtain a hearing on this material issue. Instead, the NRC makes a fundamental error by suggesting that initially Citizens demanded "frequent UT measurements," instead of challenging "*all* aspects of AmerGen's [Exelon's] plan." NRC Br. at 7, 24. This is simply incorrect. The initial contention concerned the lack of periodic UT monitoring of the thickness of the sand-bed region of the drywell shell. R-36 at 33. Thus, Citizens challenged the complete lack of a monitoring plan.² This is made even clearer by the Board's finding that the April 4, 2006 commitment to undertake periodic ultrasonic testing after license renewal had rendered the initial contention moot because it provided

²The NRC repeats this mistake when it alleges that the initial contention focused on UT monitoring frequency. NRC Br. at 27-28.

2006 in December 2005. NRC Br. at 26. However, in December 2005, Exelon merely agreed to take one more round of UT measurements prior to license renewal. R-83 at 4. There is simply no basis to argue that Citizens should have: (1) assumed that Exelon would later add monitoring commitments to take periodic measurements during license renewal on the same basis as the one-time measurements added in December 2005; and (2) challenged that non-existent monitoring in December 2005.

Moreover, the NRC's current litigation position that the correct time to challenge the spatial scope of the UT monitoring during the license renewal period was in December 2005 is contradicted by the NRC Staff, a decision of the Board, and the Commission. The NRC Staff, who were generally adverse to Citizens, regarded this element of the contention as timely. R-99 at 28. The Board itself ruled that Citizens could not challenge UT monitoring that occurs prior to any period of extended operation, like the one-time monitoring that was proposed in December 2005. R-197 at 2. Even on appeal the Commission confirmed that a challenge made after the December 2005 commitment would not have been timely because "the December 2005 commitment made no changes to these measurement locations, and thus provided no new information on which to base a new contention relevant to the scope of testing." Final Decision, R-581 at 50. Thus,

at the start of the proceeding. Judge Farrar warned that the timing rules can easily turn NRC proceedings into a shell game “with the usual street corner outcome: whatever guess petitioners make is wrong.” *Id.* at 505. Furthermore, raising new issues is onerous by design—which should be protection enough for NRC—and intervenors are forced to dissipate scarce resources on duplicative filings to try to overcome “Catch-22 situations” created by very strict timing requirements. *Id.* at 504 n. 15.⁴

Judge Farrar also noted that intervenors had brought valuable issues to the Board’s attention, despite the many disadvantages, and wondered how much more the public might contribute to nuclear safety if the NRC’s procedural rules allowed them to. *Id.* at 500. Similarly, the hearing process here led to major improvements in the monitoring frequency, but the NRC made it impossible for Citizens to challenge the spatial scope of the monitoring. This Court should therefore vacate the licensing decision and remand this matter for a hearing on the spatial scope contention.

⁴Exelon at times complains about the vigor with which Citizens litigated this matter. However, given the uncertainty in the arbitrary application of the NRC’s procedural rules and the dire consequences associated with losing the “shell game,” it was necessary for Citizens to make duplicative filings to ensure that the doctrines of timeliness and mootness did not rear their heads and prevent a decision on the merits.

sandbed into the embedded region, where there is concrete on both sides of the iron drywell shell. R-125 at 4-5.

Shortly after the water was discovered and Exelon added the new monitoring, Petitioners proposed two new contentions: one alleging that the spatial scope of the exterior measurements was insufficient to reliably detect interior corrosion, and another alleging that more monitoring was needed in the embedded region. R-125 at 5. The Board found that both of these contentions were untimely. To justify this finding, however, it had to rely upon a previous Board decision finding that enhancements to existing programs cannot constitute new information upon which new contentions can be based. R-99 at 23; R-125 at 8, 16. The Commission endorsed this finding on policy grounds and declined to review the Board's decision in this regard. Final Decision, R-581 at 51-52.

In defense of this approach, the NRC argues that if the monitoring program is inadequate after enhancement, it must have been inadequate before that and thus Citizens should have challenged it at the outset. NRC Br. at 29. While superficially attractive, this reasoning is fallacious. The potential for corrosion from the inaccessible interior was only revealed to Exelon and the NRC Staff when Exelon discovered the water in the trench. Exelon admitted that the presence of this water was not anticipated when it prepared the License Renewal Application.

Furthermore, the decisions of the Board and the Commission to exclude the contentions were inconsistent with prior decisions in other proceedings and with the decision to allow the enhancement of the monitoring frequency for the drywell to serve as the basis for a new contention. Such inconsistent decision-making is arbitrary. *N. Ind. Pub. Serv. Co. v. Porter County Chapter of the Izaak Walton League of America*, 423 U.S. 12, 14-15 (1975).

In addition, while Exelon correctly states that policy considerations are secondary, Exelon completely misstates Citizens' policy position. Exelon Br. at 37. Citizens believe that this situation amply illustrates that licensees already have sufficient incentives to enhance programs when unexpected findings arise. Allowing Citizens to base contentions upon such findings would encourage applicants to submit complete applications and would enable hearings to focus on areas of the application which prove deficient during the safety review.

Moreover, although both Exelon and the NRC state that Citizens should have challenged these programs at the outset, NRC Br. at 30, Exelon Br. at 36, they forget that these programs were non-existent at the outset and could not have been challenged. Neither Exelon nor NRC attempts to challenge Citizens assertion that even if Citizens had proffered contentions at the outset about a lack of such monitoring based upon the mere possibility of water being present on the inside of

attempts a more specific argument, it merely parrots the requirements of the current rule on intervention, which focus on the identification of material disputes, not their adjudication. NRC Br. at 31 n. 11.

The reason neither party is able to distinguish *Sierra Club* is because it simply not distinguishable. In *Sierra Club*, the NRC erroneously rejected the contention because it was “nonspecific” and then went on to base its ruling on the admissibility of the contention on the merits. *Sierra Club*, 862 F.2d at 228. The *Sierra Club* court logically concluded that finding a contention inadmissible based upon its merit is not appropriate because at that stage no evidence has been admitted. *Id.* It also cited a long list of NRC decisions affirming this policy. *Id.*

Exelon and NRC attempt to suggest, without citing any authority, that this constraint is now obsolete, but their efforts are unconvincing. At the admissibility stage Citizens do not have to submit admissible evidence to support their contention, rather they have to “[p]rovide a brief explanation of the basis for the contention,” 10 C.F.R. § 2.309(f)(1)(ii), and “a concise statement of the alleged facts or expert opinions which support the ... petitioner’s position.” 10 C.F.R. § 2.309(f)(1)(v). This rule ensures that “full adjudicatory hearings are triggered only by those able to proffer ... *minimal factual and legal foundation* in support of their contentions.” *In the Matter of Duke Energy Corp.* (Oconee Nuclear Station, Units

C. The NRC Unlawfully Denied Petitioners a Hearing Regarding Metal Fatigue of Recirculation Nozzles Because the NRC Staff Belatedly Discovered Problems With the Fatigue Calculations

1. The Rules Regarding Reopening of the Record Were Not Applicable to the Metal Fatigue Contention

In its brief the NRC now erroneously claims that Petitioners failed to raise in their appeal the possibility that the reopening rules were invalid as-applied. NRC Br. at 35. This argument is without merit. Petitioners argued in their initial appeal brief to the Commission that their AEA hearing rights would be violated if the metal fatigue contention were not admitted, because the issue was material, entirely new, and not previously litigated. R-518 at 19. Additionally, in their reply, Petitioners made an even more specific argument that the rules on reopening would be subject to an as-applied challenge if the Commission used them to prevent Petitioners from ever being able to raise the fatigue issue, because it was material. R-521 at 1.

These arguments were based upon sound law. The D.C. Circuit has found that the ability to request reopening is not an adequate substitute for the opportunity to request a hearing required by Section 189(a). *Union of Concerned Scientists v. NRC*, 735 F.2d 1437, 1443-44 & n. 11 (1984) ("UCS I"). The D.C. Circuit later cautioned that although new rules further restricting re-opening did not violate the AEA on their face, if the NRC's procedural rules were applied to

parties extensively litigated the issues regarding management competence [that they sought to reopen] before the Licensing Board closed the record.” 771 F.2d at 730-31. In the present case, Citizens were afforded no such opportunity. Similarly, Exelon cites to *Ohio v. NRC*, 814 F.2d 258, 261-63 (6th Cir. 1987) in support of its argument, but that case dealt with a contention that was clearly lacking in basis because it was supported only by a single newspaper article. *Id.* at 262. Thus, neither case cited by Respondents dealt with the application of the reopening rules to the unusual situation at issue here where completely unlitigated new material issues arise after the hearing has closed.

In this case, Petitioners only became subject to the reopening rules because the NRC Staff belatedly discovered after the record had closed that the fatigue calculations it had previously approved did not meet the NRC's requirements. There is little doubt that had the Staff made this discovery earlier, Petitioners would have been able to obtain a hearing on the metal fatigue issue. As correctly noted by Judge Baratta, the application of the reopening rules, coupled with the extreme difficulty of obtaining the requisite information to make a showing of compliance with those rules makes it “virtually impossible to ever reopen a proceeding no matter how safety significant an issue raised in a contention might be and turns 10 C.F.R. § 2.326 into an academic exercise.” R-517, Dissent of

make the detailed documentation regarding the metal fatigue analyses unavailable to Citizens. This created an unfair and arbitrary procedural Catch-22 for Petitioners. According to the majority, Petitioners' did not meet the reopening standard, but without reopening, they could not obtain detailed information to enable them to meet that standard. Notably, the NRC makes no attempt to defend the fairness of the approach taken here by the Board and affirmed by the Commission.

2. Citizens Met the Requirements for Reopening

Even if this Court decides that the reopening standard is applicable to the metal fatigue contention, it should find that Petitioners met that test. Ultimately, faced with a dispute between experts, the Board and Commission adjudicated the issue of whether the applicable engineering code allows Exelon to make a less conservative assumption than it initially made. R-546 at 17-18; R-496, Ex. MFC-2 at ¶¶ 4-11. They each did so, however, without any analyses of the prior condition of these particular nozzles at this particular plant. R-546 at 18. The Commission erroneously dismissed as "speculation" sworn statements by the very expert who had proved correct in his identification of deficiencies in fatigue calculations during the Vermont Yankee proceeding that prompted the Staff to belatedly raise the metal fatigue issue in this proceeding. *Id.* at 19; R-477, Ex. MFC-1 at ¶¶ 2-7.

reach any conclusions regarding the supporting materials presented, beyond evaluating whether there are material disputes to be adjudicated.

II. The Final Licensing Decision Was Arbitrary and Capricious Because It Was Not Supported by a Complete Record

A. The Commission Must Require a Complete Record Prior to a Licensing Decision

To refute Citizens' arguments about the need for the Commission to ensure that record is complete and the Staff's work was sound, the NRC argues that the agency's decisions about these issues are insulated from judicial review and that there is no statutory mandate requiring the Commission to ensure that the Staff's decisions about licensing are supported by a complete record. This specious argument is based upon a "smoke and mirrors" discussion regarding the roles of the Commission and the Staff.

With regard to those roles, there is no dispute that the Commission has delegated to the NRC Staff the authority to renew full reactor power licenses, except where there is a contested issue that is subject to a hearing. NRC Br. at 47-48. Thus, the Staff normally take licensing decisions on behalf of the Commission and the Staff's findings on the adequacy of a license renewal application normally form the sole basis for the NRC's decision whether to allow facilities to operate twenty years beyond its original license term. *Id.* However, the Commission

for safeguarding that health and safety [of the public] belongs under the statute to the Commission.” *Power Reactor Dev. Co. v. Int’l Union of Elec., Radio and Mach. Workers*, 367 U.S. 396, 404 (1961). Where a statute requires an agency to consider certain issues, its duty to the public “does not permit it to act as an umpire blandly calling balls and strikes for adversaries appearing before it; the right of the public must receive active and affirmative protection at the hands of the Commission.” *Scenic Hudson Preservation Conf. v. Fed. Power Comm’n*, 354 F.2d 608, 620 (2d Cir. 1965). The D.C. Circuit subsequently echoed these words stating “the primary responsibility for fulfilling that mandate [regarding environmental protection] lies with the Commission. Its responsibility is not simply to sit back, like an umpire, and resolve adversary contentions at the hearing stage.” *Calvert Cliffs Coordinating Comm. v. AEC*, 449 F.2d 1109, 1119 (DC Cir. 1971). Finally, before taking a licensing decision the Commission “must see to it that the record is complete” because it “has an affirmative duty to inquire into a consider all relevant facts.” *Scenic Hudson*, 354 F.2d at 608; *Confederated Tribes and Bands of Yakima Indian Nation v. FERC*, 746 F.2d 466, 472 (9th Cir. 1984). The Second Circuit has recently reaffirmed this elementary principle. *Green Island Power Auth. v. FERC*, 577 F.3d 148, 168 (2d Cir. 2009).

The NRC's position in this case is the inverse of its position in *Calvert Cliffs*.

ultimate license renewal decisions.” R-540 at 34.

B. The NRC Failed to Generate a Complete Record Supporting the Licensing Decision

Before the Staff made the licensing decision on April 8, 2010, one day before the initial license was set to expire, Petitioners had brought the following gaps in the administrative record to the Commission's attention, but the Commission did not require the Staff to take any remedial action prior to licensing:

I) contrary to the assumptions of the Staff when it made the “definitive finding of safety” that is required for licensing in the Safety Evaluation Report (“SER”) and the assumptions of the Board when it issued its decision regarding the contention, a subsequent inspection report revealed a number of failings that directly contradicted those assumptions, as follows:

1. The system to prevent leakage of water into the sandbed region was far from foolproof.
2. The coating designed to protect the sandbed region from corrosion was not pristine.
3. The ad-hoc system of bottles attached to 50 feet plastic tubes that was intended to warn of the presence of water in the sandbed was not effective.

R-581, Jaczko Dissent; R-606; R-590 at 4-69; R-555.

Staff to ensure its reviews followed the required guidance and checked “whether its review reflected an exercise of independent staff judgment.” R-540 at 34. He pointedly stated: “I can find no justification or benefit to leaving a record begging these obvious questions.” *Id.* at 35. Finally, he would also have verified whether the Staff’s destruction of documents was wise or improper. *Id.* The majority failed to take even these rudimentary steps. Therefore, it allowed the Staff’s decision to approve the license for Oyster Creek to be based upon an incomplete record.

In response, the NRC alleges that minor issues “not pertinent to its basic findings” can be resolved post-licensing. NRC Br. at 53. Even if correct, this assertion is irrelevant. The issues here were directly pertinent to the basic findings required and required pre-licensing resolution to ensure that the licensing decision took account of all relevant facts and was based upon a sound record. *See Confederated Tribes and Bands of Yakima Indian Nation v. FERC*, 746 F2d 466, 471 (9th Cir. 1984) (statutory findings must be made before not after licensing). As both the majority and the dissent recognized, the issues related to the Inspection Report directly pertain to the appropriate monitoring frequency that should be required during the extended period of operation, which was precisely the issue that was also raised at the hearing.⁶ *E.g.* R-581 at 82. Indeed, Commissioner

⁶Although the Board could have dealt with these issues, the Commission decided not to reopen the proceeding to allow that to happen.

the statute and the Staff is an arm of the Commission. In this situation, the narrow exception to judicial review articulated in *Heckler v. Chaney* is simply inapplicable. *Heckler* involved a refusal by the Food and Drug Administration to initiate enforcement proceedings against *third parties*. *Heckler v. Chaney*, 470 U.S. 270 (1987). The NRC's compliance with a statutory mandate imposed upon it by Congress, simply does not implicate the concept of prosecutorial discretion protected in *Heckler*.

Furthermore, this Court has established “a broad presumption in favor of reviewability, holding that the exception applied only when there is no law to apply.” and that “the APA’s ‘generous review provisions must be given a “hospitable” interpretation.” *Raymond Proffitt Found. v. U.S. Army Corps of Eng’rs*, 343 F.3d 199, 203-04 (3d Cir. 2003) (citing *Hondros v. U.S. Civil Serv. Comm’n*, 720 F.2d 278, 293 (3d Cir. 1983) (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 141 (1967))). Accordingly, only when a party can show by clear and convincing evidence that Congress intended to restrict judicial review should a reviewing court decline to exercise jurisdiction. *Raymond Proffitt* at 203.

The NRC also cites to *Ass’n of Data Processing Service Organizations, Inc. v. Camp* for the notion that “the congressional intent to preclude judicial review of how NRC conducts Staff review of an application is fairly discernible the statutory

CONCLUSION

For the foregoing reasons, this Court should vacate the appealed decisions and remand them back to the Commission for further consideration in accordance with the guidance provided by this Court, or grant such alternative or additional relief as this Court may see fit.

Respectfully Submitted,

s/ Richard Webster

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COMBINED CERTIFICATIONS

In accordance with the Fed. R. App. P. and the Local Rules, I hereby certify that:

1. I am a member in good standing of the bar of the United States Court of Appeals for the Third Circuit.
2. This Brief complies with Fed. R. App. P. 29(d) and 32(a)(7)(C) because the principal portions of the Brief contain 6,945 words according to the “Word Count” function of the Open Office software program, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).
3. This Brief complies with the type-face limitations of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because the brief has been prepared in proportionally spaced typeface using 14 point Times New Roman in Open Office.
4. This Brief complies with Third Circuit Rule 3.1(c) because text in the electronic copy of this Brief is identical to the text in the paper copies. The electronic copy of this Brief was scanned for viruses by Norton Anti-Virus 2010 and no viruses were detected.

5. I caused two copies of this brief to be served today by overnight mail, and a courtesy copy electronically, on the following counsel to the parties in this matter:

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