Attachment 10

Federal Respondents' Brief
dated July 14, 2004
filed in *Citizens Action Network v. United States*
First Circuit, Docket No. 04-1145
(excerpt)

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

Nos. 04-1145 and 04-1359 (Consolidated)

CITIZENS AWARENESS NETWORK, et al.,

Petitioners,

v.

U.S. NUCLEAR REGULATORY COMMISSION
and the UNITED STATES OF AMERICA,

Respondents,

ON PETITION TO REVIEW AN ORDER OF THE
U.S. NUCLEAR REGULATORY COMMISSION

BRIEF FOR THE FEDERAL RESPONDENTS

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B. Subpart L requires mandatory disclosure of relevant documents.

Petitioners' claims, most notably NWC's extravagant claim that Part 2 "abolishes" discovery, NWC Brief 16, reveal, once again, an inattention to the APA and to the NRC rule itself. It is well-established that the APA does not require any discovery. *Kelly and Prisk v. EPA*, 203 F.3d 519, 523 (7th Cir. 2000); *NLRB v. Valley Mold Co.*, 530 F.2d 693, 695 (6th Cir. 1975), *cert. denied*, 429 U.S. 824, (1976); *Frilette v. Kimberlin*, 508 F.2d 205, 208 (3d Cir. 1974), *cert. denied*, 421 U.S. 980 (1975). But the new Part 2 actually provides significant discovery. First and foremost, Subpart L, and Subpart G also, mandate disclosure of an immense amount of material, precisely the sort of material subject in the past to rounds of document requests and interrogatories -- "documents relevant to the issues in the proceeding." 10 C.F.R. 2.336.[16]

"reasonable opportunity to interrogate witnesses." We have shown that Part 2 does in fact provide "reasonable opportunity to interrogate witnesses." This issue is being raised for the first time on appeal, and by the *amici*, who, moreover, did not participate in the rulemaking. The Court should therefore not even consider the issue. *See U.S. v. Tucker Truck,* 344 U.S. 33, 36-37 (1952); *Brigham v. Sun Life of Canada*, 317 F.3d 72, 82 (1st Cir. 2003); *American Federation of Government Employees, Local 3936, AFL-CIO, v. FLRA*, 239 F.3d 66, 69 n.1 (1st Cir. 2001).

[16]Thus, even though the new Subpart L is labeled "informal," it actually provides more formality than the APA's "on-the-record" provisions require. The "informal" misnomer reflects AEC and NRC terminology only, in which

Mandatory disclosure is the now decade-old practice in federal district courts, adopted to reduce the resources consumed in discovery. *See generally* Advisory Committee Notes on the 1993 amendments to FRCP 26. The Commission has simply tailored mandatory disclosure to the particular kinds of information that are likely to matter in NRC license proceedings. 69 FR 2194. In the final rule, the Commission explained that mandatory disclosure "has the potential to significantly reduce the delays and resources expended by all parties in discovery." *Id.*[17]

Furthermore, Part 2 leaves room for traditional discovery. Subpart G clearly says that discovery is to be had by the usual devices. 10 C.F.R. 2.704, 2.705. Subpart L says that discovery is not available except as Subpart C provides, 2.1203(d), but C provides the usual discovery devices as one possible sanction for failure to comply with mandatory disclosure. In fact, such discovery is the only sanction available when continuing adjudication of an issue, because

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Subpart G has always been called "formal" and Subpart L "informal."

[17]The *amici* claim that mandatory disclosure would not cover enforcement documents. Brief 22. However, in a proceeding on enforcement, or in any other proceeding where enforcement documents might be relevant, enforcement documents would be disclosed, unless the documents were privileged or otherwise withholdable. Moreover, Subpart G procedures apply in enforcement proceedings, and Subpart G provides the usual range of discovery devices. 10 C.F.R. 2.705.

CONCLUSION

For the foregoing reasons, the petitions for review should be denied.

Respectfully submitted,

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Dated: July 14, 2004