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

Eastern Environmental Law Center
Attorneys for Petitioners
744 Broad Street, Suite 1525
Newark, NJ 07102
Phone: 973-424-1166

Of Counsel: Richard Webster, Esq.

On the Brief: Richard Webster, Esq.
Julia LeMense, Esq.
Kevin Pflug, Esq.

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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

[1] NRC Br. at 15, 27, 32.

those gaps.

The NRC and Exelon make three main arguments in response to Citizens. First, they state that Citizens were granted adequate opportunities to obtain hearings on the late-breaking issues in accordance with the AEA hearing right. 42 U.S.C. § 2239(a). However, in its brief, instead of defending what it actually did, the NRC rewrites history in an effort to make its denial of a number of contentions appear less arbitrary. In addition, the NRC offers scant justification for applying its reopening and discovery rules in an arbitrary manner that made it virtually impossible for Citizens to obtain a hearing on a completely new issue that arose after the hearing record was closed. Second, the NRC states that the Commission need not supervise the NRC Staff's licensing decisions. This is straightforwardly incorrect, because the powers and responsibilities regarding licensing under the AEA belong to the Commission, so that any delegation of power by the Commission must be accompanied by close supervision. At minimum, the Commission must ensure that licensing decisions are based upon a complete record. Finally, the NRC asserts that that the Staff's decisions regarding licensing and Commission decisions regarding the Staff are unreviewable by this Court. This is incorrect because the AEA grants this Court the power to ensure that the Commission fulfills its statutory obligations under the AEA and the Staff merely

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

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

for the "periodic monitoring" that the initial contention alleged was required. R-83 at 4, 10.

NRC also suggests that Citizens were somehow remiss in failing to state at the outset that the periodic monitoring they desired, but did not yet exist, should be sufficient in spatial scope.[3] NRC Br. at 27. However, the Board recognized that where Petitioners initially identify the lack of a monitoring program, and the licensee subsequently adds such a program, then Petitioners may challenge the adequacy of the newly proposed program. R-83 at 7-9.

The program proposed on April 4, 2006 was similar in some respects to a limited monitoring plan that had been discontinued, but that does not mean the program could have been challenged before it even existed. Although some of the particulars of the discontinued program were available to Citizens at the time the initial contention was filed, Citizens could not have based a valid contention at the outset on the speculation that Exelon would subsequently add a periodic monitoring plan that would be very similar to the previously discontinued limited monitoring program.

Tacitly recognizing this reality, the NRC now argues that Citizens should have challenged the spatial scope of the monitoring program proposed on April 4,

[3]The very limited spatial scope of the existing program is illustrated at R-512 at Figures 3 to 11; 13.

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,

the NRC's current litigation position is not only *post hoc*, it also contradicts the views of the Staff and the Commission.

This confusion shows that the White Queen Fallacy is an appropriate metaphor, because the various parts of the NRC would have always found the contention about spatial scope to be either too late or too early. Indeed, Administrative Judge Farrar on a board panel in a different proceeding noted the same problem, referring to it as the "Prematurity/Belatedness Dilemma." *Shaw Areva MOX Services* (Mixed Oxide Fuel Fabrication Facility), LBP-08-10, 67 N.R.C. 460, 505 (Concurring Opinion of Judge Farrar, June 27, 2008) (NRC's application of timeliness rules "threatens to create entry demands on the Petitioners that are both procedurally unworkable and fundamentally unfair"). The NRC has been internally inconsistent on when the challenge to the spatial scope of the UT measurements should have been made. Furthermore, it has failed to provide any answer to the question of how Citizens were supposed to intuit what the spatial scope of the measurement program was going to be before it even existed. As such, the exclusion of the challenge to the spatial scope that Exelon ultimately proposed was a straightforward violation of Citizens' hearing right.

Moreover, these inconsistencies show that agency itself is confused about how to deal with contentions that arise as a result of information that is unavailable

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.

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[4]Exelon 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.

B. Citizens Filed Two Valid Contentions Based Upon the Discovery of Water in the Interior of the Drywell Which the NRC Denied by Arbitrary Application of the Procedural Rules.

The NRC offers more inaccurate *post hoc* rationalizations when it argues that contentions regarding monitoring for the embedded region and the inaccessible interior of the drywell were not triggered by the discovery of water in an excavated trench in late 2006. NRC Br. at 29 n. 10. In fact, prior to the discovery of that water, the UT monitoring of the inaccessible interior of the sandbed region was to take place from the exterior only once. R-112, Ex. ANC 1 at 14-15. Only when additional information later arose showing that Exelon had determined that water was present on the interior of the drywell, leading to a danger of ongoing corrosion occurring from the interior in areas where it could not be seen, did Exelon add periodic monitoring of the inaccessible interior in the sandbed region by taking UT measurements from the exterior of the drywell. R-125 at 2-5; R-112, Ex. ANC 1 at 2-3, 52-53.

In addition, for the first time, Exelon decided to monitor a small portion of the region of the drywell in the embedded region (the area below the sandbed that has concrete on both sides). R-112, Ex. ANC 1 at 19; R-125 at 3-4. In its brief, NRC mistakenly fails to recognize that prior to that time, the interior trenches only provided a snap shot of the inaccessible interior, but did not extend beyond the

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.

R-112, Ex. ANC 1 at 1, 17-18. Thus, Citizens had no reason to challenge the unenhanced program based on the failure to evaluate potential interior corrosion prior to the discovery of the water.

Furthermore, excluding these contentions by creating from whole-cloth an entirely new hurdle not contained in the text of any regulations, policies, or guidance documents is contrary to this Court's holding in *Beazer East* requiring agencies to adhere to the text of their regulations. *Beazer East v. EPA*, 963 F.2d 603, 606 (3d. Cir. 1992). Although Exelon alleges that this hurdle is not new, it fails to cite a previous proceeding where it was imposed. Exelon Br. at 37-38. The Board has repeatedly held that the text of the regulations allows new contentions to be added after the initial deadline has expired, provided they are based upon materially different new information. *E.g. Entergy Nuclear Vermont Yankee L.L.C. and Entergy Nuclear Operations, Inc.* (Vermont Yankee Nuclear Power Station), LBP-07-15, 66 NRC 261, 266-77 (2007); 10 C.F.R. § 2.309(f)(2).

Although Exelon argues that the new information was not "materially different," Exelon Br. at 37, this argument falls flat because the new information was sufficient to trigger Exelon to change the proposed terms of the license renewal. This in itself shows that the new information was different and material to licensing. Thus, the contentions were timely in accordance with the regulations.

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

the drywell before the water was found, they would have been too early.[5] Thus, the White Queen Fallacy applies once more. There was simply no time at which Citizens could have made a timely contention regarding these monitoring programs.

The Board also rejected the contentions filed in response to the discovery of water on the grounds that they failed to raise a material dispute. R-125 at 10-15, 16-19. The Board erred in making this ruling, because it looked into the disputed facts regarding the contentions and determined whether it thought they would make a material difference to the outcome of the licensing. *Id.* at 11-15; 16-18. This approach, which requires adjudicating disputes raised by the pleadings, is not permitted at the contention admission stage. *Sierra Club v. NRC,* 862 F.2d 222, 228 (9th Cir. 1988). Instead, the Board should have simply noted the existence of material disputes that needed to be resolved through the adjudicatory process.

In responding to Citizens' arguments in this regard, neither NRC nor Exelon suggest that the Board and the Commission did not adjudicate material disputes regarding the potential for future interior corrosion. Instead, they unsuccessfully attempt to distinguish *Sierra Club*. Exelon fails to state any specific reason why *Sierra Club* is no longer applicable. Exelon Br. at 39 n 11. Although the NRC

[5] *See* R-581 at 56 (merely showing interior corrosion could occur is insufficient to establish a basis for a contention)

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

1, 2, and 3), CLI-99-11, 49 N.R.C. 328, 334 (1999) (emphasis added). The required showing of materiality is not an onerous requirement, because all that is needed is a "minimal showing that material facts are in dispute, indicating that a further inquiry is appropriate." *Georgia Inst. of Tech.*, CLI-95-12, 42 N.R.C. 111, 118 (1995); *Final Rule, Rules of Practice for Domestic Licensing Proceedings – Procedural Changes in the Hearing Process*, 54 Fed. Reg. 33,168, 33,171 (Aug. 11, 1989). Thus, contrary to the suggestions from NRC and Exelon, regulatory developments since *Sierra Club* confirm that the role of the Board at the admissibility stage is to screen for the existence of material disputes, not to prematurely adjudicate those disputes on the merits.

Finally, although the NRC alleges that substantial deference is required, NRC Br. at 33-34, this is not correct where the Board undertook the wrong enquiry at the wrong time. As *Sierra Club* illustrates, where the NRC rules require one analysis, but the Board does an entirely different analysis, deference to technical expertise is not appropriate. Because the Board rejected the contentions regarding the monitoring of the inaccessible interior and the embedded region based upon an erroneous application of the timing rules and premature adjudication of the merits, this Court should vacate the licensing decision and remand these contentions for a hearing.

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

prevent all parties from ever raising a material issue, the aggrieved party could bring an as-applied challenge to the validity of the rules. *Union of Concerned Scientists v. NRC*, 920 F.2d 50, 56 (D.C. Cir. 1990) ("UCS II").

Furthermore, Exelon has acknowledged that the D.C. Circuit "held that under Section 189(a) the NRC may not unjustifiably require that a material contention satisfy the heightened evidentiary standard for re-opening a closed record." *Commonwealth of Mass. v. NRC*, 924 F.2d 311, 334 (D.C. Cir. 1991); Exelon Br. at 49. Exelon then proceeds to misinterpret this statement by discussing restrictions on timeliness that are not at issue here. *Id.* Interpreted properly, *Commonwealth of Mass.* stands for the proposition that although reasonable restrictions on timeliness may be applied, the stringency of the *substantive* reopening standards mean that they cannot be applied to new material contentions that deal with unlitigated issues in a manner that makes it virtually impossible for petitioners to exercise their hearing rights. This is precisely the situation in this case.

The NRC and Exelon both state that *Three Mile Island Alert v. NRC*, 771 F.2d 720 (3rd Cir. 1985) supports the Board's denial of Citizens' motion to reopen. NRC Br. at 37; Exelon Br. at 49. Their reliance on that case, however, is misplaced because one of the core pre-requisites to the holding in that case was that "the

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

Judge Baratta at 13. Allowing the luck of when the Staff finds deficiencies to determine whether the public can exercise its hearing right is manifestly capricious. The public's statutory right to a hearing should not vanish merely because the Staff failed to spot an error in an applicant's calculations in a timely manner.

The only other authority cited by Exelon to combat Citizens' point about the inapplicability of the reopening rules here is the more recent case of *San Luis Obispo Mothers for Peace v. NRC*, 44 F.3d 1016, 1026 (9th Cir. 2006), but that case provides as much support for Petitioners as it does for Respondents. In that case, because the NRC had directed the intervenors to an alternative forum and the petitioners were raising an issue that was outside the scope of the hearing, the court rejected the intervenors' 189(a) claim. *Id.* In contrast, here, Judge Baratta correctly warned that "to deny Citizens' motion and eliminate their access to the only means that will allow them to confront what appears to be a significant safety issue would be a grave error." R-517, Dissent of Judge Baratta at 17.

Moreover, the Appeals Board found that licensing proceedings are governed by a "cardinal rule of fairness." *Houston Lighting & Power Co.* (Allens Creek Nuclear Generating Station, Unit 1), ALAB-565, 10 N.R.C. 521, 524 (1979). As discussed in detail in Petitioners' opening brief, the NRC and Exelon combined to

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.

As previously discussed, such premature adjudication is contrary to the requirement that the Board and the Commission may not adjudicate material disputes at the contention admission stage to "ensure that the parties are not required to prove their contentions before they are admitted in the proceedings." *Sierra Club*, 862 F.2d at 228.

As previously briefed, Commission also erred by finding that a breach of NRC's safety requirements would not be safety significant and improperly disregarded the admission of the NRC spokesperson that fatigue failure of the nozzle would be safety significant, erroneously suggesting that there was some kind of evidentiary deficiency. R-546 at 19. Moreover, the Commission and the majority of the Board failed to consider the broader safety significance of the NRC Staff failing to notice that the non-compliant simplified calculations had also been used and approved at seven other plants. R-592 at 20.

In response to these arguments, Exelon erroneously suggests that Citizens are asking this Court to find that the metal fatigue contention should have been admitted by reaching "evidentiary conclusions." Exelon Br. at 52. This statement is wrong on two counts. First, there is no "evidence" to weigh regarding the metal fatigue contention, because both the Board and Commission decided not to open the evidentiary record. Second, neither the Commission nor this Court should

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

retains a supervisory role and duty to ensure that the agency as a whole is meeting its statutory and regulatory requirements. NRC Br. at 50-52. It is also undisputed that the performance of the NRC Staff cannot be the subject of a hearing before the Board. *Id.* at 50.

Recognizing these realities, Citizens did not file contentions with the Board about Staff performance when presented with evidence of significant weaknesses in the safety reviews conducted by the Staff during the Oyster Creek proceedings. Instead, they filed Petitions with the Commission to request Commission action to ensure that the record was sufficient to allow the Commission to adequately supervise the Staff and to ensure that the Staff adhered to the applicable statutory and regulatory safety standards. Although the Commission may not be obliged to review every Staff action, it is obliged at a minimum to affirmatively ensure that the Staff's actions on behalf of the Commission are based upon an adequate record. This is because Congress granted the Commission, not the Staff, the power under the AEA to issue licenses. 42 U.S.C. §§ 2133 and 2134(b). In addition, the Commission, not the Staff, must ensure that the licenses that are issued provide "adequate protection" and are not inimical" to public health and safety. 42 U.S.C. §§ 2232(a) and 2133(d).

Confirming this view, the Supreme Court has stated that "the responsibility

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 F2d 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*.

In that case, there was no dispute that the Commission was obliged to carefully scrutinize the safety issues, but the Commission was claiming it did not have to take a similar approach to environmental issues. *See Calvert Cliffs*, 449 F.2d at 1118 (Board checks safety issues in uncontested hearing). The *Calvert Cliffs* court found that environmental issues required similar scrutiny and that the Board "must at least examine the [environmental] statement carefully to determine whether the review by the Commission's regulatory staff has been adequate." *Id.* Now, even though the Supreme Court has found that the Commission is responsible for safeguarding public safety, the Commission is claiming that it has no affirmative duty to examine the safety findings of the regulatory staff and ensure that they are based on a complete record. This argument is tantamount to an abdication of the core responsibility of the Commission and is legally untenable. The Staff's decisions must be based on a complete record and must be reviewable by the Commission—otherwise the Commission would have no means of ensuring that the Staff is maintaining the safety standards required by Congress.

Indeed, the current Chair, then Commissioner Jaczko recognized the need for the Commission to ensure that the Staff's decisions on licensing are based on a complete and accurate record in this very proceeding. He correctly stated that the Staff safety reviews must establish a "complete and sound basis for the agency's

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 Repor ("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.

II) The Office of Inspection General ("OIG") had found that the Staff's safety reviews were inadequately documented and unverifiable. Pet. Br. at 12-14; R-588. The OIG concluded that these failures "cast doubt as to what, exactly, NRC did to independently review the licensee's program other that restate what was provided in the renewal application." *Id.* at 10. In addition "readers of the safety reviews could conclude that regulatory decisions are not adequately reviewed or documented." *Id.* at 12.

III) OIG subsequently found it was not possible to verify what the Staff had actually done during the safety review at Oyster Creek and other plants because the audit reports were not very detailed and the Staff discarded the working papers used during the safety reviews. R-486 at 3-5.

Because these issues highlight gaps and mistakes in the record that the Staff and the Board used to make the required "definitive finding of safety," on behalf of the Commission, the Commission should have required the gaps to be filled prior to allowing licensing to proceed. Instead, the Commission directed the Staff to deal with the issues regarding the Inspection Report post-licensing and took no action to resolve the gaps in the record regarding the Oyster Creek safety review highlighted by OIG.

With regard to the OIG issues, Chairman Jaczko would have ordered the

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

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

Jaczko would have required more frequent monitoring as a result of the Inspection report. R-581, Jaczko Dissent at 1. Even the Commission majority raised the possibility that Staff follow-up could include license amendments. R-581 at 84. Similarly, the deficiencies highlighted by OIG were fundamental.

The NRC also seeks to avoid dealing with the issues raised in the Inspection Report by claiming it is not part of the record. NRC Br. at 54-55, 57. The Report, however, is part of record certified to this Court as R-606, is referred to repeatedly in the Commission decision, and in any event, it is well established that the Commission may consider evidence that is outside the evidentiary record when reviewing Board decisions. NRC Br. at 40. In its briefing, the NRC appears to veer dangerously close to the theory that it may use extra-record evidence that is bad for intervenors, but that it may ignore extra-record evidence that cuts against the agency's position. Of course, that cannot actually be the NRC's position, because such a position would be manifestly unfair and unjust.[7]

Finally, the Commission cannot claim that its decisions regarding the NRC Staff are "enforcement" when the Commission itself is the entity that is bound by

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[7]In addition, the NRC raises a number of other tangential points which are irrelevant and without foundation. For example, although the Commission attempted to couch its findings about the need for increased Staff vigilance as "not adjudicatory in nature," the Commission was in fact denying Citizens' Petition for a Supplement to the SER. NRC Br. at 56; R-566.

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

scheme." NRC Br. at 62. The NRC, however, fails to point out that this case specifically holds that a statute "must upon its face give clear and convincing evidence of an intent to withhold" judicial review and that "[t]he mere failure to provide specially by statute for judicial review is certainly no evidence of intent to withhold review." *Ass'n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 156-57 (1970). Indeed, over 40 years of judicial review of licensing decisions made by the NRC pursuant to the AEA indicates that such review is routine. Furthermore, the review provision has been liberally interpreted. *Citizens Awareness Network, Inc. v. NRC*, 391 F.3d 338, 345-47 (1st Cir. 2004)

Thus, the failure of the Commission to base its licensing decision on a complete and accurate record was arbitrary. The licensing decision should therefore be remanded for the identified gaps and errors in the record to be corrected.

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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Richard Webster

(Counsel of Record)

Richard Webster, Esq.
Julia LeMense, Esq.
Eastern Environmental Law Center
744 Broad Street, Suite 1525
Newark, NJ 07102
973-424-1166
(Electronic Filing Users)

Attorneys for Petitioners

DATED: Newark, New Jersey
March 29, 2010

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 Microsoft Word 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 l.l(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:

Robert M. Rader, Esq.
United States Nuclear Regulatory Commission
Washington, DC 20555-0001

John E. Arbab, Esq.
U.S. Department of Justice
Environment & Natural Resources Division
P.O. Box 23795
Washington, DC 20026

Brad Fagg, Esq.
Morgan, Lewis & Bockius LLP
1111 Pennsylvania Ave., NW
Washington, DC 20004

/s/ Richard Webster
Richard Webster, Esq.

March 29, 2010
Newark, New Jersey