

No.

**United States Court of Appeals
for the Third Circuit
U.S. Courthouse
601 Market Street
Philadelphia, PA 19106**

**Eric Joseph Epstein, *Pro se*
Petitioner**

v.

United States; United States Nuclear Regulatory Commission

**On Petition for Review of Order by the
United States Nuclear Regulatory Commission**

**Brief for Petitioner
Eric Joseph Epstein**

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Dated: September 22, 2008

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Petition

Petition for Rulemaking Submitted by Eric Epstein, Re
Requiring Periodic Comprehensive NRC Review of
Emergency Planning Around U.S. Nuclear Power Plants
During The License Renewal Process [Docket No. PRM-54-5].....1

I. Subject Matter & Appellate Jurisdiction

This is a civil action by Eric Joseph Epstein (“Petitioner,” “Epstein,” or “Mr. Epstein”) Appealing the U.S. Nuclear Regulatory Commission’s (“NRC” or “the Commission”) Denial of A Petition for Rulemaking Submitted by Eric Epstein, Three Mile Island Alert, Re Requiring Periodic Comprehensive NRC Review of Emergency Planning Around U.S. Nuclear Power Plants During The License Renewal Process on July 25, 2008 . (1)

The Third Circuit Court of Appeals (“the Court”) has jurisdiction pursuant to the Hobbes Act, 28 U.S.C. 28 § 2342(4); the Administrative Procedure Act (APA), 5 U.C.S. § 702; and, the Atomic Energy Act (AEA, 42 U.S.C. § 2239(b).

The Petitioner’s Complaint falls under 42 U.S.C.S. section 2239(b)(1) which provides for judicial review of the actions, "proceeding under this chapter, for granting, suspending, revoking or amending of any license or construction permit or application to transfer control and in any proceeding for the issuance of modification of rules and regulations dealing with the activities of licensees..." of the former Atomic Energy Commission (now NRC) according the chapter 158 of title 28. Title 28, Chapter 158 , 28 U.S.C.S. section 2342(4) provides for jurisdiction for all appeals of the former Atomic Energy Commission lies in the Circuit Court of Appeals. 28 U.S.C.S. section 2343 establishes venue in either the Washington DC Circuit or the Third Circuit which is where the Petitioner lives and works.

¹ Please refer to the “Appendix: Volume I” for a copy of the “Petition for Rulemaking, ” and also a copy of the “NRC’s Denial of the Petition for Rulemaking.”

Mr. Epstein has also established standing before the Atomic Safety Licensing Board at the Nuclear Regulatory Commission In the Matter of PPL Susquehanna, LLC, Susquehanna Steam Electric Station Units 1 and 2, Docket Nos. 50-387-LR & 50-388-LR, ASLBP No. 07-851-01-LR. (2)

The Appeal is timely pursuant to 28 U.C.S. § 2344 because the Petitioner is afforded sixty (60) days from the date of the NRC's issuance of its determination on the Petitioner's request for Rulemaking which occurred on July 25, 2008.

II. Issues Presented for Review

- 1) Does the Petition for Rulemaking merit a public discussion?
- 2) Did the Petitioner present new and significant information?
- 3) Was the NRC staff aware of the new information?
- 4) Is there a dissenting Opinion to base this Appeal?
- 5) Does the public possess a reasonable assurance “reasonable assurance of adequate protection of the population?”

² U.S. NRC, “Memorandum and Order,” III. Board Ruling on Standing of Petitioner, pp. 6-11, March 22, 2007.

III. Case

The Petitioner is asking the Third Circuit Court of Appeals to Stay the NRC's Denial of Eric Epstein's Petition for Rulemaking, and Order the Commission to post the Petition Rulemaking for public comment, and allow the staff to render a decision based on the merits of Petition after an engaged and informed public debate has occurred which factors new and significant information that has come to light.

Mr. Epstein asked that the NRC amend its regulations that govern renewal of operating licenses for nuclear power plants. Specifically, the Petitioner requests that the NRC conduct a comprehensive review of U.S. nuclear power plant licensees' emergency planning during the license renewal proceedings based on new information he produced.

The Commission's position was that the NRC's emergency planning system is part of a comprehensive regulatory process that is intended to provide continuing assurance that emergency planning for every nuclear plant is adequate. Thus, the Commission has already extensively considered and addressed the types of issues raised in the petition. Also, the NRC alleged the Petition failed to present any significant new information or arguments that would warrant the requested amendment.

The Petition for Rulemaking does **not** oppose the relicensing nuclear generating stations. The Petitioner is asking the Court to compel the NRC to publish the Petition for Rulemaking and allow an open discussion based on the new information presented and subsequently revealed after the filing of the Petition.

The NRC staff has recently published new and significant information established, i.e., Protective Action Recommendations (PAR) Project NUREG-0654 /FEMA-REP-1, Rev. 1, “Criteria for Preparation and Evaluation of Radiological Emergency Response Plans and Preparedness in Support of Nuclear Power Plants.” The staff has demonstrated the Commission has not provided “reasonable assurances” that existing emergency plans will adequately protect the public’s health and safety as the world we live in undergoes dramatic challenges.

IV. Statement of Facts

On July 18, 2006, US NRC Commissioner Gregory B. Jaczko told the Tri-State Emergency Management meeting in Danvers, Massachusetts:

The NRC only issues a comprehensive affirmative finding that both onsite and offsite emergency plans are in place around a nuclear power plant, and that they can be implemented, at the time it grants an initial operating license. We do not perform periodic reviews of emergency planning around nuclear power plants for the purpose of making a new finding of a ‘reasonable assurance of adequate protection of the population.’

...But because there is a lack of specificity in our regulations and guidance, and because there are no opportunities to periodically assess how all of the pieces fit together, there is little incentive for DHS [Department of Homeland Security] or the NRC to provide new guidance and support for you as your community and the world we live in undergoes dramatic changes.

I understand the argument that emergency preparedness requirements are in effect at all times. **But considering emergency preparedness during the license renewal process would be good public policy and a very valuable exercise. (Bold face type added)**

A Petition for Rulemaking was submitted by Eric Epstein, Three Mile Island Alert, Re: Requiring Periodic Comprehensive NRC Review of Emergency Planning Around U.S. Nuclear Power Plants During The License Renewal Process on September 12, 2007. Commissioner Jaczko's remarks was included as a statement of support.

On April 18, 2008, the Secretary of the NRC, Annette L. Vietti-Cook, released the "Commission Voting Record" SECY-070225, "Revision for NUREG-0654, Supplement 3, "Criteria for Protective Action Recommendations for Severe Accidents." (3)

By a 4-0 vote the "Commissioners approved the staff's recommendations" to revise NUREG-0654, and "provide a thorough evaluation of alternative protective actions that could potentially reduce the possible consequences to the public during a severe radiological emergency at a nuclear power plant." (4) Mr. Jaczko also noted that new data provided by the staff,

"...cause me significant additional concern about the Commission's October 26, 2005 denial of a petition for rulemaking to revise 10 CFR part 50 to require offsite emergency plans to include nursery schools and day care centers (PRM 50-79). The petitioner raised several concerns about the adequacy of evacuation plans for these facilities and argued that they needed to be address[ed] in a systematic way. (5)

3 Please refer to "Appendix: Volume 2" for a copy of "Commission Voting Record."

4 U.S. NRC Chairman, Dale E. Klein's Comments on SECY-07-0225, January 15, 2008.

5 (In a Memorandum to Luis A. Reyes, U.S. NRC Executive Director of Operations, Ms. Vietti-Cook actually said, "In the absence of any significant new information, there is no reason for the Commission to revisit this issue." (January 19, 2007, please refer to Appendix: Volume 2.)

I believe that this study provides sufficient evidence for accepting this petition and therefore, consistent with the Commission's internal procedures, I formally offer a motion for reconsideration of the Commission decision...

Along those same lines the staff should evaluate other findings from this study to determine if there are issues of such importance that they should not only be the subject addressed in NUREG-0654 guidance, but should also be the subject of rulemaking to enhance existing EP regulatory requirements and ensure sufficient minimum mandates are replaced on licensees in a transparent manner. (6) (Bold face type added)

On July 25, 2008, the Secretary of the NRC, Annette L. Vietti-Cook, sent a letter to Mr. Epstein informing Mr. Epstein of the Denial of his Petition for Rulemaking. The correspondence from Ms. Vietti-Cook was postmarked July 28, 2008. Mr. Epstein actually received the correspondence on July 31, 2008.

On July 31, 2008 (Volume 73, Number 148) the Federal Register published the NRC's Denial of Eric Epstein's Petition for Rulemaking.

The U.S. Nuclear Regulatory Commission (NRC) is denying a petition for rulemaking submitted by Eric Epstein (PRM-54-5). The petition requests that the NRC amend its regulations that govern renewal of operating licenses for nuclear power plants. Specifically, the petitioner requests that the NRC conduct a comprehensive review of U.S. nuclear power plant licensees' emergency planning during the license renewal proceedings. (7)

6 NRC Commissioner, Gregory B. Jaczko's Comments on SECY-07-0225, February 13, 2008.

7 Proposed Rules, [Page 44671-44673] Federal Register Online , 10 CFR Part 54 [Docket No. PRM-54-5].

V. Standard of Review

Under the APA, an Appeals court must “hold unlawful and set aside agency action, findings and conclusions found to be arbitrary, capricious, and abuse of discretion, or otherwise not in accordance with law. (*Dubois v. U.S. Department of Agriculture*, 102 F.3d 1273, 1284 (1st Circuit 1996) citing 5 U.S.C., § 706 92)

While the Court may not be endowed with the requisite scientific expertise to referee technical nuclear matters, this Appeal does not rest on the NRC’s scientific expertise and the deference owed by the Court is relative (*Puerto Rico Aqueduct & Sewer Authority v. EPA*, 35 F.3d 600, 604 (1st Circuit, 1994))

VI. Summary of Argument

The Petitioner is asking the Third Circuit Court of Appeals to Stay the NRC’s Denial of Eric Epstein’s Petition for Rulemaking, and Order the Commission to post the Petition Rulemaking for public comment, and allow the staff to render a decision based on the merits of Petition after an engaged and informed public debate has occurred which factors the new and significant information that has come to light.

Mr. Epstein asked that the NRC amend its regulations that govern renewal of operating licenses for nuclear power plants. Specifically, the Petitioner requested that the NRC conduct a comprehensive review of U.S. nuclear power plant licensees' emergency planning during the license renewal proceedings based on new and significant information.

VII. Argument

1) Does the Petition for Rulemaking merit a public discussion?

Answer: Yes.

Based on the new and significant information Mr. Epstein presented in his Petition for Rulemaking and data subsequently revealed on April 18, 2008 as a result NRC staff's recommendations to revise NUREG-0654, it is clear that Mr. Jaczko's concerns have been verified and require an open and transparent discussion.

The Court should remand the case back to the NRC and compel the agency to advertise and solicit input in the Federal Register Re: Mr. Epstein's Petition for Rulemaking.

The Court's action would represent a huge opportunity to improve public confidence, and incorporate new and significant into emergency planning during the relicensing of aging nuclear power plants.

2) Did the Petitioner present new and significant information?

Answer: Yes.

Mr. Epstein submitted U.S. NRC Commissioner Gregory B. Jaczko's comments at the Tri-State Emergency Management meeting in Danvers, Massachusetts on July 18, 2006.

I understand the argument that emergency preparedness requirements are in effect at all times. **But considering emergency preparedness during the license renewal process would be good public policy and a very valuable exercise. (Bold face type added)**

Mr. Jaczko's comments were actually supported by finding in the NRC staff's recommendations" to revise NUREG-0654, and point to the gaping shortcoming embedded in current emergency preparedness planning in place at nuclear power plants (**most of which make no preparations for nursery school and day care facilities**) as they seek a license extension.

The Protective Action Recommendations (PAR) project "evaluated the current NRC PAR guidance contained in Supplement 3 to NUREG-0654 / FEMA-REP-1, Rev. 1, "Criteria for Preparation and Evaluation of Radiological Emergency Response Plans and Preparedness in Support of Nuclear Power Plants" (NRC, 1996) and assessed whether implementation of alternative protective actions could reduce potential health effects in the event of a nuclear power plant (NPP) accident." (Executive Summary, pp. ix-x)

Several relevant conclusions have been drawn from the PAR project, including:

- The study indicates that shelter-in-place followed by evacuation is more protective than immediate evacuation for rapidly developing releases.
- Evacuation should remain the major element of protective action strategies.
- Revision of NUREG-0654, Supplement 3, should be considered to better address the use of alternative protective actions.

- The study indicates that consideration should be given to protective action strategies that allow the population to quickly distance themselves from the plant, such as an early or staged evacuation, because this can reduce public health consequences.
- The study indicates that precautionary efforts during Site Area Emergency are prudent.
- The study indicates that strategies that reduce evacuation time can reduce consequences.
- The study and other ongoing studies indicate that special needs populations that do not reside in special facilities may be under served in evacuation planning. It appears that this issue warrants further investigation and development of guidance on this issue may be appropriate.

The new and significant conclusions recently released by the NRC's study support the following protective action strategies for **all nuclear power plants**:

- Immediate radial evacuation
- Shelter-in-place,
- Staged evacuation,
- Preferential sheltering for special needs individuals,
- Delayed evacuation, until traffic controls are in place,
- Early closure of schools, parks, government facilities, etc., at the Site Area Emergency
- Early notification of the general population within the 16 km (about 10 mile) Emergency Planning Zone (EPZ) to prepare for evacuation.

A revisions to Supplement 3 should consider addressing the following items and be incorporated into **license extension planning**:

- Clarification of the conditions for which shelter-in-place is effective.
- Guidance on the importance tracking the plume passage, communicating with those sheltered, and directing an effective evacuation immediately upon the termination of the shelter event.
- Emphasis on the benefits of staged evacuation.
- Guidance and expectations for the transit dependent persons.

“If a revision to Supplement 3 is pursued, the effort would benefit from stake holder input as it should foster development of protective actions that include the breadth of available options within the context of site specific considerations.”

There is absolutely no reason a nuclear generation seeking a license extension should be exempted from the data, conclusions and new significant information produced by this recent NRC study and endorsed by the Commissioners.

3) Was the NRC staff aware of the new information?

Answer: Yes.

The staff produced and then ignored new and significant information it generated internally. The new and significant information contained in the Protective Action Recommendations, Supplement 3 to NUREG-0654 /FEMA-REP-1, Rev. 1, and the Commissioners' comments, did not come to Mr. Epstein's attention until he conducted a data search in June 2008.

4) Is there a dissenting Opinion to base this Appeal?

Answer: Yes.

Following the NRC's Denial of Eric Epstein's Petition for Rulemaking, the Commission directed that the Notice include the following comments of Commissioner Jaczko:

I disagree with the decision to deny this petition for rulemaking. Instead, I believe the review of a license renewal application authorizing, if granted, an additional twenty-years of operation, provides the opportune time at which the agency should reevaluate emergency preparedness issues. Currently, the only time the NRC issues a comprehensive affirmative finding that both onsite and offsite emergency plans are in place around a nuclear power plant, and that they can be implemented, is at the time it grants an initial operating license. Although there are regular assessments of these plans through exercises and reviews, we do not periodically reassess that initial reasonable assurance of adequate protection of the public- - even if it was made decades ago--unless and until we find a serious deficiency in a biennial exercise. I believe considering emergency preparedness during the license renewal process would provide an opportunity to improve public confidence in the licensees and in all levels of government.

**5) Does the public possess a reasonable assurance
“reasonable assurance of adequate protection of the
population?”**

Answer: No.

The NRC's decision to Deny the Petition for Rulemaking was arbitrary and capricious, made without public input, and ignored new and significant information, including data produced by the staff. The staff's recommendations and Commissioner comments Re: PAR NUREG-0654, clearly indicate the need to update and review emergency planning for nuclear plants seeking license extensions.

VIII. Conclusions and Request for Relief

For the foregoing reasons, and the new and significant information produced by the Plaintiff, the Court should reverse and remand the NRC's Denial of the Petition for Rulemaking submitted by Eric Epstein, Three Mile Island Alert, Re: Requiring Periodic Comprehensive NRC Review of Emergency Planning Around U.S. Nuclear Power Plants During The License Renewal Process.

Respectfully submitted

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Dated: September 22, 2008

I hereby certify that on September 22, 2008 ten copies of the Brief for the Petitioner were served via overnight service to the United States Court of Appeals for the Third Circuit U.S. Courthouse, 601 Market Street Philadelphia, PA 19106 and copies were sent via electronic mail and by the United States Postal Service to:

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APPENDIX: VOLUME I

APPENDIX: VOLUME II