Notley RES

August 18, 1982 SECY-82-342

ADJUDICATORY ISSUE
(Information)

For: The Commissioners

From: E. Leo Slaggie
Acting Solicitor

Subject: CONNECTICUT LIGHT AND POWER COMPANY, et al., v. NUCLEAR REGULATORY COMMISSION

Purpose: To provide the Commission with copies of the government's opposition to the utilities' petition for a writ of certiorari in this case.

Discussion: Attached for your information are copies of the brief filed by the Department of Justice in opposition to the utilities' petition for Supreme Court review of the D.C. Circuit's decision affirming the fire protection rule. The brief argues that, contrary to petitioners' claims; (1) the D.C. Circuit did not find any technical or procedural inadequacies in the administrative record or in the Commission's compliance with the notice and comment requirements in the Administrative Procedure Act; (2) the Commission's regulations did not limit the licensee's options for protecting the safe-shut-down capability of nuclear reactors to three exclusive methods because there is an fourth alternative provided by an exemption procedure based on a fire hazards analysis; (3) the D.C. Circuit did not rely on the rule's exemption procedure to compensate for

CONTACT:
Sheldon L. Trubatch, OGC
X43224

alleged substantial differences between the proposed and final rules because the Court found the final rule to be the logical successor to the proposed rule; and (4) the Court did not substitute its judgment for the Commission's on the acceptability of fire retardant coatings. We believe that it is improbable that the Supreme Court will find a "certworthy" issue in this case, because the arguments all depend on the specific and unique aspects of this particular rulemaking.

E. Leo Slaggie
Acting Solicitor

Attachment

DISTRIBUTION:
Commissioners
OGC
OPE
OCA
OIA
OPA
EDO
ELD
ASLBP
ASLAP
SECY

No. 81-2293

In the Supreme Court of the United States

OCTOBER TERM, 1982

CONNECTICUT LIGHT AND POWER COMPANY, ET AL.,
PETITIONERS
v.
NUCLEAR REGULATORY COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

REX E. LEE
Solicitor General

CAROL E. DINKINS
Assistant Attorney General

HARRIET S. SHAPIRO
Assistant to the Solicitor General

Department of Justice
Washington, D.C. 20530
(202) 633-2217

E. LEO SLAGGIE
Acting Solicitor

SHELDON L. TRUBATCH
Attorney

Nuclear Regulatory Commission
Washington, D.C. 20555

QUESTION PRESENTED

Whether, in upholding the Nuclear Regulatory Commission's regulations establishing fire protection standards for nuclear power plants, the court of appeals improperly relied on the provision permitting covered plants to apply for exemptions from the regulatory requirements.

TABLE OF CONTENTS

Page

Opinion below 1

Jurisdiction 1

Statutes and regulation involved 1

Statement 2

Argument 6

Conclusion 9

TABLE OF AUTHORITIES

Cases:

E.I. du Pont de Nemours & Co. v. *Train*, 430 U.S. 112 6

FPC v. *Texas Inc.*, 377 U.S. 33 6

National Broadcasting Co. v. *United States*, 319 U.S. 190 6

Permian Basin Area Rate Cases, 390 U.S. 747 ... 6

Petition for Emergency and Remedial Action, In re, 11 N.R.C. 707 3

United States v. *Storer Broadcasting Co.*, 351 U.S. 192 6

Statutes and regulation:

Administrative Procedure Act, 5 U.S.C. 551 *et seq.* 5, 7, 9

Section 4 (5 U.S.C. 533) 1

Section 10(e) (5 U.S.C. 706) 1

Page

Statutes and regulation—Continued:

10 C.F.R. Part 50:

Section 48 1

App. R. 1, 3

Section III. G 4
Section III. J 4
Section III. O 4

In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 81-2293

CONNECTICUT LIGHT AND POWER COMPANY, ET AL., PETITIONERS

v.

NUCLEAR REGULATORY COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A-1 to A-23) is reported at 673 F. 2d 525.

JURISDICTION

The judgment of the court of appeals was entered on March 16, 1982. The petition for a writ of certiorari was filed on June 14, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES AND REGULATION INVOLVED

Sections 4 and 10(e) of the Administrative Procedure Act (APA), now 5 U.S.C. 553 and 706, are set forth at Pet. App. D-1 and E-1.

The Nuclear Regulatory Commission's fire protection regulation, 10 C.F.R. 50.48 and App. R, is set forth at Pet. App. B-31 to B-56.

STATEMENT

After a 1975 fire at the Browns Ferry Nuclear Power Station revealed inadequacies in the system for safely shutting down the nuclear power plant after an accident, the Nuclear Regulatory Commission initiated a fire protection research program and fire hazard reviews of all nuclear power plants licensed by the Commission to assure that the redundant shut-down systems could not be simultaneously disabled by a single fire. The fire hazard reviews revealed that additional fire protection was necessary at other plants as well as at Browns Ferry, and all licensees took some corrective measures.

The fire hazard reviews were based in part on the fire protection research program, which tested the adequacy of the fire protection features that had been used to protect the electric circuits and cables that are duplicated throughout a nuclear power plant to assure shut down capability even if one of the circuits is lost through fire or other causes. Fire protection tests conducted for the Commission by the Sandia Laboratories as part of the research program showed that previously accepted separations of redundant cables provided inadequate protection against simultaneous loss of capability due to a single fire. Other tests on fire-retardant coatings of the types that had been applied to electrical cables in operating power plants showed that some of these coatings were not fire proof, suggesting that fire retardant coatings by themselves would not provide adequate protection against fires.

These test results were widely disseminated to nuclear power plant licensees and were considered at two public proceedings in 1977 and 1978 (Pet. App. C-2 to C-3). Some licensees nevertheless questioned the need for additional measures to protect redundant safe shutdown capability. When plant-by-plant negotiations in the context of the fire hazard reviews had failed to resolve these questions four

and one-half years after the Browns Ferry fire, the Commission proposed a fire protection rule to resolve the contested issues by establishing minimum fire protection requirements (*In re Petition for Emergency and Remedial Action*, 11 N.R.C. 707, 717-718 (1980); Pet. App. C-4).

The fire protection rule as originally proposed (Pet. App. C-14 to C-37) set out several general requirements and 17 specific fire protection features addressing, among other things, the protection of safe shutdown capability (Pet. App. C-17, C-19 to C-21, C-30 to C-32). To demonstrate that redundant safe shutdown capability was adequately protected from fire, the Commission proposed that licensees could either meet specific requirements set out in the rule[1] or perform fire hazards analyses justifying alternative fire protection features (*id.* at C-17, C-19 to C-21, C-32).

After considering comments on the proposed rule,[2] the staff prepared a proposed final rule for Commission consideration. The Commission then held three public meetings at which it discussed the proposed final rule and approved issuance of the final rule (Pet. App. B-1 to B-56).

The final rule (Pet. App. B-31 to B-35) required each operating nuclear power plant to have a fire protection plan, and identified (in App. R)[3] certain features required in such plans. The rule also provided, however, that most of

---

[1]Separation of redundant equipment by a three-hour fire barrier (Pet. App. C-17, C-32), or by 50 feet of space free of intervening combustibles (*id.* at C-17).

[2]The Commission received more than 50 written comments on the proposed rule. Several licensees not only provided their own comments, but also provided comments by a consulting firm expert in the field of fire protection at nuclear power plants. Several of the comments suggested that the proposed requirements were too detailed (Pet. App. B-10 to B-30).

[3]The final Appendix R is reproduced at Pet. App. B-35 to B-56.

the requirements of Appendix R would not apply to nuclear power plants licensed to operate prior to January 1, 1979, to the extent that they had previously implemented changes approved by the Commission on the basis of a specific fire hazard review. Only three requirements of Appendix R applied to such plants regardless of their earlier compliance—the standards for safe shutdown capability (Section III. G), emergency lighting (Section III. J) and the reactor coolant pump lubrication system (Section III. O).[4]

The regulation established a time table for compliance with the requirements of Appendix R, but specifically noted that a timely, technically reasonable request for an exemption from any such requirement on the ground that it "would not enhance fire protection safety * * * or * * * may be detrimental to overall facility safety" would toll the applicable time schedule until final Commission action on the request (Pet. App. B-33 to B-34).[5]

---

[4]The safe shutdown standards listed three acceptable options for separation of redundant equipment: 1) a three-hour fire barrier, 2) a 20 foot combustible-free space of an automatic fire suppression system, or 3) a one-hour fire barrier and an automatic fire suppression system (Pet. App. B-16, B-41 to B-42).

[5]The Statement of Considerations published with the final rule explained the basis for the exemption procedure (Pet. App. B-6):

> Requirements that account for all of the parameters that are important to fire protection and consistent with safety requirements for all plant-unique configurations have not been developed. In light of the experience gained in fire protection evaluations over the past four years the Commission believes that the licensees should reexamine those previously approved configurations of fire protection that do not meet the requirements as specified in Section III.G to Appendix R. Based on this reexamination the licensees must either meet the requirements of Section III.G of Appendix R or apply for an exemption that justifies alternatives by a fire hazard analysis.

Petitioners, operators of a number of nuclear power plants licensed to operate before January 1, 1979 that had implemented changes recommended by the Commission staff to reduce fire hazards, filed a petition for review of the final rule in the court of appeals. Petitioners contended, *inter alia,* that the Commission had failed to provide adequate notice of the technical bases of the rule, that the technical bases were inadequate to support the rule, and that an additional comment period should have been provided before adoption of the final rule because that rule differed substantially from the proposed rule in that the final rule specified features for protecting redundant safe shut down equipment and no longer permitted the use of fire hazards analyses to justify alternative fire protection features.

The court of appeals held that the Commission had provided the notice required by the Administrative Procedure Act, and that "the administrative record contained adequate support for the Commission's determination that adoption of the rules was urgently needed to protect the public safety" (Pet. App. A-4).[6]

The court also rejected petitioners' contention that the final rule differed so drastically from the proposed rule that an additional notice period was required. Instead, the court accepted the Commission's interpretation of the rule's requirements as including the use of fire hazards analyses to

---

[6]The court noted (Pet. App. A-12) that the Commission's identification of technical support for the rule was sufficient to permit meaningful comment, in light of "the utilities' *common* knowledge of problems that had recurred in plant after plant and of reports that had been publicly filed. There was in fact a common store of experience on which the NRC drew, that had been developed and accumulated in the interaction with the utilities during the five-year period that followed the Browns Ferry fire." Moreover, the court recognized (Pet. App. A-13 to A-14, A-19) that the Sandia technical studies had been considered at public hearings, and supported the fire protection methods chosen by the Commission.

justify alternative fire protection features that would provide equivalent safety protection (Pet. App. A-19 to A-21). On this understanding, the court concluded that the final rule was simply a logical outgrowth of the proposed rule, rather than a major shift in policy requiring an additional comment period (Pet. App. A-15 to A-17).

ARGUMENT

Petitioners' claims in this Court are based on a fundamental misinterpretation of the Commission's regulation, an interpretation that was correctly rejected by the court of appeals and that does not merit further consideration in this Court. Petitioners are simply incorrect in their repeated assertions that the final rule establishes three exclusive methods for protecting the safe shut-down capability of the nuclear reactor. Instead, as the Commission explained in its Statement of Considerations (Pet. App. B-6), there are four methods for complying with the fire protection rules: the three methods defined in Appendix R and the exemption alternative based on a fire hazard analysis. This Court has frequently recognized that an agency may appropriately proceed in complex areas through general rules supplemented by a "safety valve" provision for agency consideration of exemptions based on special circumstances. *E.I. du Pont de Nemours & Co.* v. *Train,* 430 U.S. 112, 128 (1977); *Permian Basin Area Rate Cases,* 390 U.S. 747, 771-772 (1968); *FPC* v. *Texaco Inc.,* 377 U.S. 33, 40-41 (1964); *United States* v. *Storer Broadcasting Co.,* 351 U.S. 192, 204-205 (1956); *National Broadcasting Co.,* v. *United States,* 319 U.S. 190, 207 (1943). There is no reason for this Court to review the Commission's interpretation, accepted by the court below, of its own regulation as one of this type.[7]

---

[7]That interpretation has been recognized by the utilities covered, and followed by the Commission to date. As of July 1, 1982, 42 licensees have applied for 239 exemptions based on individual hazards analyses. Of these applications, 21 have been granted, 30 have been denied, 175

Contrary to the petitioners' reading of the decision below, the court did not find any technical or procedural inadequacies in the administrative record, nor did it hold that an exemption procedure would excuse such inadequacies. The record of the rulemaking proceeding unequivocally shows that the Commission complied with the notice and comment requirements in the Administrative Procedure Act. This compliance was recognized by the court of appeals (Pet. App. A-4). Nowhere did the court state that the NRC had omitted steps from the notice-and-comment procedures established by the APA, or that the NRC had added the exemption procedure to compensate for deficiencies in the rulemaking process. Moreover, the court explicitly found that the reports of fire tests by the Sandia Laboratories provided record support for the options specified in Appendix R for the protection of redundant safe shutdown equipment (Pet. App. A-19 to A-20). Thus, there is no doubt that the record supports the level of fire protection established by the Commission as necessary for adequate protection of public health and safety.[8]

Petitioners are also incorrect in their contention that the court relied on the exemption procedure to compensate for alleged substantial differences between the proposed and final rules. The court explicitly found that the final rule was the logical successor to the proposed rule because the

---

are still pending, 4 have been withdrawn and 9 were determined to be unnecessary.

[8]The court noted (Pet. App. A-19) that the record did not *conclusively* show that the fire protection methods specified in Appendix R are the *only* methods capable of protecting safe shutdown capability. No such showing was necessary to support the rule, which recognized the possibility of establishing by a fire hazard analysis the adequacy of other methods (see Pet. App. B-6).

exemption procedure in the final rule continued to allow licensees to use the fire hazards approach contained in the proposed rule (Pet. App. A-17).[9]

Finally, there is no merit to petitioners' contention that the court substituted its judgment for the Commission's by allegedly rewriting the rule regarding the use of fire retardant coatings as fire barriers. The court did not, as claimed by petitioners, require the Commission to consider fire retardent coatings to compensate for alleged deficiencies in the record. Petitioners' argument is based on their interpretation of a single phrase in the Statement of Considerations that "based on present information, the Commission does not expect to be able to approve exemptions for fire-retardant coatings used as fire barriers" (Pet. App. B-6), and the court of appeals' statement (Pet. App. A-21) that: "it must remain open to power companies to show in individual exemption applications that fire retardant coatings in conjunction with other protective means can provide adequate levels of fire protection." These two statements are not inconsistent, as the Commission's rule and its interpretation by the Commission staff demonstrate. Thus, the final rule did not completely disapprove the use of fire retardant coatings, but only indicated that they would not be accepted *alone* as fire barriers because tests showed that coatings burn. The staff accordingly continues to allow credit for fire retardant coatings when used in conjunction with other fire protection features.

---

[9]Although the court relied on a statement made at oral argument, we submit that the explanation in the Commission's Statement of Considerations (Pet. App. B-6) amply supports the Commission's interpretation.

In sum, as a procedure for giving credit to licensees who have previously cooperated with agency attempts to upgrade safety systems, the Commission's exemption procedure makes good sense.[10] The court's decision recognizing the rule's exemption procedure went no further and creates no need for Supreme Court review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

CAROL E. DINKINS
Assistant Attorney General

HARRIET S. SHAPIRO
Assistant to the Solicitor General

E. LEO SLAGGIE
Acting Solicitor

SHELDON L. TRUBATCH
Attorney
Nuclear Regulatory Commission

AUGUST 1982

---

[10]Moreover, analysis and consideration of exemption requests requires extensive commitment of agency resources, and the denial of such an exemption is a final agency action, reviewable under the APA for any abuse of discretion (Pet. App. A-9). Thus, the exemption procedure cannot plausibly be characterized as a method of "cut[ting] corners" (Pet. 11).