

J. Heck

IN THE UNITED STATES COURT OF APPEALS  
FOR THE SEVENTH CIRCUIT

ENVIRONMENTAL LAW AND POLICY CENTER, et. al,	)	
	)	
Petitioners,	)	No. 06-1442
	)	
v.	)	
	)	
U.S. NUCLEAR REGULATORY COMMISSION and the UNITED STATES OF AMERICA,	)	
	)	
Respondents.	)	
	)	

**RESPONSE TO PETITIONERS' FRAP 28 (j) CITATION OF  
SUPPLEMENTAL AUTHORITY**

In their "Citation of Supplemental Authority," Petitioners note the NRC has now published its final environmental impact statement (FEIS) for Exelon's early site permit (ESP). Petitioners say this "completes" NRC's consideration of alternatives to ESP and makes the challenged NRC orders final for judicial review. "Accordingly," they conclude, "this appeal is not premature."

Petitioners are incorrect. Their appeal remains premature because the NRC has not completed its decisionmaking process. The FEIS does not

end the process. After it is published several steps remain before the NRC issues a final order granting (or denying) the ESP. See Brief for the Federal Respondents at 25-29.


Moreover, even after a final order Petitioners' current appeal will remain premature. Substantial case law holds that a petition for review filed too soon remains "incurably" or "fatally" premature, despite subsequent final agency action. See *Clifton Power Corp. v. FERC*, 294 F.3d 108, 110 (D.C. Cir. 2002); *Sierra Club v. NRC*, 825 F.2d 1356, 1363 (9<sup>th</sup> Cir. 1987); *Western Union Telegraph Co. v. FCC*, 773 F.2d 375, 378 (D.C. Cir. 1985).

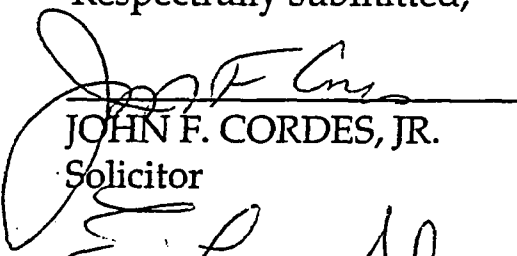

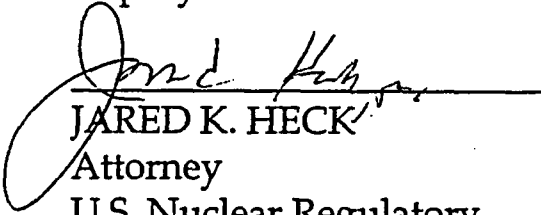
We recognize that in *North American Telecommunications Ass'n v. FCC*, 751 F.2d 207 (7<sup>th</sup> Cir. 1984), this Court took a position contrary to the D.C. Circuit's later *Western Union* decision. In both *North American Telecommunications* and *Western Union* petitions were filed after the FCC had completed all substantive work and released a final order to the public. Both petitions, however, were filed before formal "entry" of the order as defined by FCC rule. The D.C. Circuit in *Western Union* denied review. In *North American Telecommunications* this Court held that no purpose would

be served by denying judicial review to a petition that was only technically premature.

Here, the petition is premature for substantive (non-finality) reasons, not for technical procedural reasons. Notwithstanding recent issuance of the FEIS, the NRC has not finished its substantive work on Exelon's ESP application. Petitioners' lawsuit remains premature. Even after a final order issues (not expected until 2007), this petition, filed too early, will lie outside Hobbs Act jurisdiction. A new petition will be required.

Respectfully submitted,

  
RONALD SPRITZER  
Attorney  
Appellate Section  
Environment and Natural  
Resources Division  
U.S. Department of Justice  
P.O. Box 23795  
Washington, D.C. 20026-3795

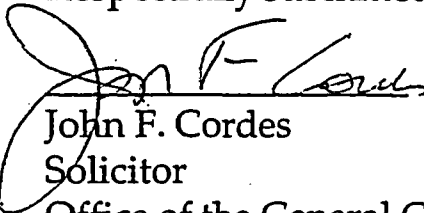
  
JOHN F. CORDES, JR.  
Solicitor  
  
E. LEO SLAGGIE  
Deputy Solicitor  
  
JARED K. HECK  
Attorney  
U.S. Nuclear Regulatory  
Commission  
Washington, D.C. 20555  
(301) 415-1623

Dated August 31, 2006

**CERTIFICATE OF COMPLIANCE WITH FRAP 28(J)'S WORD LIMIT**

I hereby certify that the number of words in the "RESPONSE TO PETITIONERS' FRAP 28 (j) CITATION OF SUPPLEMENTAL AUTHORITY," exclusive of headings, signature block, and certificates, is 347, as counted by the Corel WordPerfect 10 program. FRAP 28(j) prescribes a 350-word limit.

Respectfully submitted,



John F. Cordes

Solicitor

Office of the General Counsel

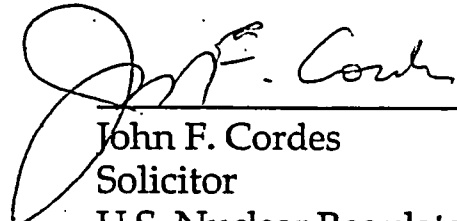
U.S. Nuclear Regulatory

**CERTIFICATE OF SERVICE**

I hereby certify that on August 31, 2006, copies of the "RESPONSE TO PETITIONERS' FRAP 28 (j) CITATION OF SUPPLEMENTAL AUTHORITY" were served by first-class mail, postage prepaid, upon the following:

Steven Frantz  
Paul Bessette  
Morgan, Lewis & Bockius LLP  
1111 Pennsylvania Ave., NW  
Washington, DC 20004

Howard A. Learner  
Shannon Fisk  
Environmental Law & Policy Center  
35 E. Wacker Dr., Suite 1300  
Chicago, IL 60601

  
\_\_\_\_\_  
John F. Cordes  
Solicitor  
U.S. Nuclear Regulatory  
Commission