

07-0324-ag(L), 07-1276-ag(CON)

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**United States Court of Appeals**  
*for the*  
**Second Circuit**

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ANDREW J. SPANO, as County Executive of the County Westchester,  
COUNTY OF WESTCHESTER, NEW JERSEY ENVIRONMENTAL  
FEDERATION and NEW JERSEY CHAPTER OF THE SIERRA CLUB,

*Petitioners,*

– v. –

UNITED STATES NUCLEAR REGULATORY COMMISSION,  
UNITED STATES OF AMERICA,

*Respondents.*

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ON APPEAL FROM THE NUCLEAR REGULATORY COMMISSION

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**BRIEF FOR PETITIONERS**

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## **Jurisdictional Statement**

Petitioners Andrew J. Spano, as County Executive of the County of Westchester, and the County of Westchester (“Petitioners”), submitted a Petition for Rulemaking (the “Petition”) to the United States Nuclear Regulatory Commission (“NRC”) on May 10, 2005, requesting that the NRC amend certain provisions of the NRC regulations relating to applications for renewal of nuclear power plant licenses (10 C.F.R. pt. 54, *et seq.*) to require current licensees to meet the same standards as are required of new licensees. (Joint Appendix (“J.A.”) at A-9 – A-13.) The NRC denied the Petition in Agency Case No. PRM-54-02 on December 2, 2006. (J.A. at A-147 – A-179.) The NRC’s denial of the Petition constituted a final order in Agency Case No. PRM-54-02. Petitioners timely filed a Petition for Review with this Court on January 27, 2007, within 60 days of the NRC’s denial of the Petition. *See* 28 U.S.C. § 2344.

This Court has subject matter jurisdiction to enjoin, set aside, suspend, or to determine the validity of all final orders of the NRC relating to the issuance or modification of rules and regulations dealing with the activities of licensees. *See* 28 U.S.C. § 2342; 42 U.S.C. § 2239.

Additionally, venue is proper under 28 U.S.C. § 2343 because Petitioners reside and/or maintain their principle offices within the jurisdiction of the Court of Appeals for the Second Circuit.

## Statement of the Issues

1. Whether the NRC's decision to deny the Petition on the basis that the Petitioners did not present any "new information" that took place after the 1991 issuance of the license renewal rule or the 1995 amendments, or otherwise demonstrate that sufficient reason existed to modify the current regulations was arbitrary, capricious, or otherwise not in accordance with law.
2. Whether it was arbitrary and capricious for the NRC to deny the Petition on the basis that the County did not present sufficient new information that occurred the 1995 amendments to the license renewal regulations without providing notice of such deficiency and providing Petitioner an opportunity to submit additional data as required by 10 C.F.R. § 2.802(f).
3. Whether the NRC's decision to deny the Petition without holding a hearing under 10 C.F.R. § 2.803 or providing for any additional fact-finding was arbitrary, capricious, or otherwise not in accordance with law given the NRC's determination that the record was inadequate.
4. Whether the NRC's decision to deny the Petition because the public has administrative mechanisms available other than to petition for rulemaking under 10 C.F.R. § 2.802 was arbitrary, capricious, or otherwise not in accordance with law.

## Statement of the Case

Westchester County (the "County") is home to the Indian Point ("IP") Energy Facility, which consists of two nuclear power units ("IP2" and "IP3"). (J.A. at A-10.) The County is a municipality of New York and located immediately north of New York City. (*Id.*) Over three decades ago, under the then-current NRC regulations, the NRC issued licenses to IP2 and IP3 based, in part, on an assessment of the original site characteristics, including population density, the climate, surface and groundwater characteristics, the risks of groundwater and surface water contamination, and other factors. Reactor Site Criteria, 27 Fed. Reg. 3509, 3510 (Apr. 12, 1962). The NRC also reviewed the structural and barrier design of IP2 and IP3, including their components and equipment. *Id.* At the time IP2 and IP3 were originally licensed in 1973 and 1975, respectively, the NRC's regulations permitted plants to receive licenses for up to 40 years and did not provide for an extension of the 40 year operating term.<sup>1</sup> Fifteen years after IP3 was licensed, the NRC first adopted regulations in 1991 for relicensing of nuclear power plants. These 1991 regulations were subsequently narrowed by amendments in 1995 to focus the renewal process only on age-related

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<sup>1</sup> The NRC is the successor to the Atomic Energy Commission with regard to, among other things, the issuance of licenses and on-going operation of nuclear power reactors. *See* 42 U.S.C. § 5841.

issues affecting passive structures and components after the initial 40 year license term.

On May 10, 2005, Andrew J. Spano, on behalf of the County, submitted a Petition for Rulemaking to the NRC requesting that the Commission amend its license renewal regulations found at Title 10 of the Code of Federal Regulations (“CFR”) Part 54. (J.A. at A-9 – A-13.) In support of the Petition, the County pointed to several events that had occurred after the 1991 renewal rules and 1995 amendments that raised concern about the safety and management of nuclear facilities, including, among others, the terrorist attacks of September 11, 2001. (*Id.* at A-11.) Based on these events and other new circumstances, the County requested that the license renewal regulations be amended to require a plant operator to demonstrate “that the plant meets all criteria and requirements that would be applicable if the plant was being proposed *de novo* for initial construction.” (*Id.* at A-9.) The County noted that the renewal process should be “performed in a manner that focuses the NRC’s attention on the critical plant-specific factors and conditions that have the greatest potential to affect public safety.” (*Id.*) These factors should include demographics, siting, emergency planning, evacuation plans, and site security. (*Id.*) Presently, those factors are considered when a plant applies for an initial license but are not required to be considered under the relicensing regulations. Instead, the renewal process

presently focuses narrowly on age-related issues with passive systems, structures and components at the facility and on an environmental review.

The Petitioners requested that the NRC consider a number of key renewal issues relating to nuclear power plants. (*See id.* at A-12 – A-13.) For instance:

- Could a new plant, designed and built to current standards, be licensed on the same site today?
- Have the local societal and infrastructure factors that influenced the original plant licensing changed in a manner that would make the plant less apt to be licensed today?
- Can the plant be modified to assure public health and safety in a post-9/11 era?
- Have local/state regulations changed that would affect the plant's continued operation?
- The original design basis of older nuclear power plants did not include extended onsite storage of spent nuclear fuel ("SNF").

On June 9, 2005, the NRC published a notice of receipt of a petition for rulemaking and invited public comments. (*See J.A.* at A-1 – A-8.) Prior to issuing its final decision, the NRC joined with the County's Petition, a second, nearly identical petition for rulemaking submitted by Mayor Joseph C. Scarpelli of Brick Township, New Jersey. (*Id.* at A-148 – A-149.) In total, the NRC received

twenty-five (25) comment letters in response to the issues raise by Petitioners. (*Id.* at A-154 – A-156.) Sixteen (16) letters supported granting the petitions and nine (9) supported denial. (*Id.*) Additionally, the NRC received 1,238 emails from the public in support of the Petitioners’ request for rulemaking. (*Id.* at A-105 – A-144.)

On December 2, 2006, without providing any prior notice to the Petitioners or Mr. Scarpelli, the NRC denied both petitions pursuant to 10 C.F.R. § 2.803, stating that “[t]he petitioners did not present new information that would contradict the positions taken by the Commission when the license renewal rule was established [in 1991 and 1995] or demonstrate that sufficient reason exists to modify the current regulations.” (*See id.* at A-157.) On January 27, 2007, Westchester County filed this Petition for Review of NRC’s decision to deny the Petitions.

## Statement of Facts

The Indian Point facilities were licensed originally in 1973 and 1975.<sup>2</sup>

Under then-current NRC regulations, the NRC based its decision to issue licenses for IP upon an assessment of the original site characteristics, which included an evaluation of both the characteristics particular to the site, such as population density and use of the site environs, and the proposed reactor design *See* 27 Fed. Reg. at 3,510.<sup>3</sup> At the time these licenses were first issued, NRC regulations did not provide guidelines for the relicensing of such facilities after the expiration of their initial forty-year term.

Eighteen years after the NRC issued operating licenses to IP2 and over fifteen years ago, the NRC first adopted its license renewal regulations. Nuclear Power Plant Renewal, 56 Fed. Reg. 64,943 (Dec. 13, 1991) (“1991 Rules”). In

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<sup>2</sup> The original reactor (IP1) was licensed in approximately 1962 and was permanently shut down in 1974 because the emergency core cooling system did not meet regulatory requirements.

<sup>3</sup> The regulations in effect at the time of the licensing of IP2 and IP3 were specifically “intended to reflect past practice and current policy of the [NRC] of keeping stationary power and test reactors away from densely populated centers . . . One basic objective of the criteria is to assure that the cumulative exposure dose to large numbers of people as a consequence of any nuclear accident should be low in comparison with what might be considered reasonable for total population dose. Further, since accidents of greater potential hazards than those commonly postulated as representing an upper limit are conceivable, although highly improbable, it was considered desirable to provide for protection against excessive exposure doses to people in large centers, where effective protective measures might not be feasible.” 27 Fed. Reg. at 3509.

adopting the 1991 Rules, the NRC found that it was “not inimical to the public health and safety” if a renewal application was not held to the same standards that apply to newer plants. *Id.* at 64,946. Instead, the NRC relied on its determination at the issuance of the initial license (a determination made decades prior to the application for relicensing) that “an acceptable level of safety existed” at the nuclear reactor site. *Id.* at 64,947. Moreover, according to the regulation, because the licensee continued to be subject to NRC oversight through its current licensing basis (“CLB”)<sup>4</sup>, the regulatory process “provides ongoing assurance that the licensing bases of nuclear power plants provide an acceptable level of safety.” *See id.*

Therefore, the NRC premised its 1991 Rules on two principles. First, the regulatory process is sufficient to ensure that all operating reactors would continue to operate at an acceptable level of safety with the exception of age-related

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<sup>4</sup> The CLB:

includes the NRC regulations contained in 10 C.F.R. parts 2, 19, 20, 21, 26, 30, 40, 50, 51, 54, 55, 70, 72, 73, 100 and appendices thereto; orders; license conditions; exemptions; and technical specifications. It also includes the plant-specific design-basis information defined in 10 C.F.R. § 50.2 as documented in the most recent final safety analysis report (FSAR) as required by 10 C.F.R. § 50.71 and the licensee’s commitments remaining in effect that were made in docketed licensing responses to NRC bulletins, generic letters, and enforcement actions, as well as licensee commitments documented in NRC safety evaluations or licensee event reports.

10 C.F.R. § 54.3(a).

degradation unique to license renewal. *Id.* at 64,946. Second, a plant's CLB must be maintained during the license renewal term "in part through a program of age-related degradation management for systems, structures, and components that are important to license renewal . . . ." *See id.*

In 1995, the NRC amended the license renewal regulations, further narrowing the scope of the license renewal review to "certain systems, structures, and components that the Commission has determined require evaluation to ensure that the effects of aging will be adequately managed in the period of extended operation." *See Nuclear Power Plant License Renewal Revisions*, 60 Fed. Reg. 22,461, 22,464 (May 8, 1995) ("1995 Amendments"). Under the current license renewal regulations, the NRC's review is **limited** to managing the effects of aging on only non-moving structures and components. *See* 10 C.F.R. §§ 54.4 (scope of review of license renewal applications), 54.21 (providing that contents of renewal applications need only contain technical information relative to such non-moving structures and components), and 54.29 (renewal standards). In short, the nuclear facility requesting renewal is not held to the standards required of a new nuclear power facility. There is no requirement that a plant demonstrate, as a precondition to receiving a renewed term, that it has met, at minimum, any of the NRC requirements contained in the CLB of a specific plant. *Id.* § 54.30. There is no requirement for relicensing applications that the NRC assess whether roads are

adequate to handle any required evacuation, whether changes in demographics or transportation patterns require new safety precautions, or whether nearby airports pose a physical threat or hazard as would be considered during the licensing of a new reactor.

In comparison to the limited review during license renewals, the initial licensing review is significantly more extensive. *See, e.g.*, 10 C.F.R. pts. 2, 19, 20, 21, 26, 30, 40, 50, 51, 55, 73, and 100 (requirements for initial licensing of a nuclear power reactor). It requires a thorough assessment of site characteristics, including an examination of the distribution of the population in the vicinity of the site, identification of potential hazards in the vicinity, climate, surface and ground water characteristics, an evaluation of groundwater and surface water contamination, and related emergency operations. 10 C.F.R. pt. 50 (new licensing requirements); 10 C.F.R. pt. 100 (siting criteria for nuclear reactors). Structural design and appropriate barrier design, components and equipment also are reviewed, including an analysis of aircraft or potential airborne hazards in the vicinity of the facility. *See, e.g.*, 10 C.F.R. § 50.34 (technical information required of applications for new reactor licensing); 10 C.F.R. §50.47 (emergency planning requirements); U.S. Nuclear Regulatory Comm'n, NUREG-800, *Standard Review Plan for the Review of Safety Analysis Reports for Nuclear Power Plants* (last rev. March 2007). An analysis of the on-site and off-site power systems, radioactive

waste management, and emergency planning is also performed. These are a few examples of the issues taken under consideration when reviewing a new facility.

There are currently 104 commercial nuclear power reactors in the United States.<sup>5</sup> Forty-eight of these facilities' licenses have been renewed.<sup>6</sup> Thus, the majority of U.S. nuclear power plants likely will undergo the license renewal process in the coming years. Conversely, the number of new licenses is comparatively small – the NRC anticipates only 18 new reactor license applications over the next few years.<sup>7</sup> Consequently, in the coming years, under the current regulatory scheme, the overwhelming majority of U.S. commercial nuclear reactors will have had their applications for license renewal reviewed under less stringent standards than required for newly licensed reactors.

Westchester County's Petition for Rulemaking reflected the concern that, given the circumstances today, would an existing nuclear facility be granted a new license to operate at the same site? The answer is that some nuclear facilities that are fully eligible for relicensing may not qualify for a new license.

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<sup>5</sup> U.S. Nuclear Regulatory Comm'n, *2006-2007 Information Digest* 32 (Aug. 2006), available at <http://www.nrc.gov/reading-rm/doc-collections/nuregs/staff/sr1350/> (hereinafter "NRC Digest").

<sup>6</sup> U.S. Nuclear Regulatory Comm'n, *Backgrounder on Reactor License Renewal* (Apr. 2007), available at <http://www.nrc.gov/reading-rm/doc-collections/fact-sheets/license-renewal-bg.html>.

<sup>7</sup> See NRC Digest at 40.

The bottom line is that under the NRC's current license renewal regulations, the NRC has never denied an application to extend/renew a license beyond the 40 year license term set forth in the law. Specifically, the NRC is granted the authority to issue commercial licenses to operate a nuclear power facility by section 103 of the Atomic Energy Act of 1954 ("AEA"). 42 U.S.C. § 2133. That authority, however, may not extend the period of the initial license period:

Each such license shall be issued for a specified period, as determined by the Commission, depending on the type of activity to be licensed, **but not exceeding forty years . . . ,** and **may** be renewed upon the expiration of such period.

42 U.S.C. § 2133(c) (emphasis added). Thus, the NRC was free to determine the term of the initial license period, so long as it did not exceed 40 years. Further, upon expiration of the initial license period, the AEA grants the NRC the authority to renew licenses. *See id.* The AEA, however, does not prescribe the standards a licensee must meet in order to renew its license. Those standards, which are prescribed by regulation, are the subject of the Petition.

## Summary of the Argument

The NRC is charged with overseeing and regulating the nation's commercial nuclear power facilities for the common defense and security, the environment, and to protect the health and safety of the public under the Atomic Energy Act of 1954, 42 U.S.C. §§ 2011, *et seq.* There is no question that many of the decisions made by the NRC are highly technical and that the NRC should be afforded reasonable discretion to make those technical decisions. At the same time, the law recognizes that the NRC's regulations may not be adequate to perform its important duties. For that reason, the law recognizes that "[a]ny interested person may petition the Commission to issue, amend or rescind any regulation." 10 C.F.R. § 2.802(a). Similarly, the NRC itself recognizes that things change and "new information" may justify modifying old regulations. (*See, e.g.,* J.A. at A-157.)

Here, the NRC has failed to carry out its Congressionally mandated obligations to the public by ignoring the changed realities of nuclear safety since the initial licensing of the vast majority of U.S. nuclear power reactors and since the NRC last examined its license renewal rules 12 years ago. An agency's rulemaking action shall be set aside if the reviewing court finds that its conduct was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. *Waterkeeper Alliance, Inc. v. EPA*, 399 F.3d 486, 498 (2d Cir. 2005).

The NRC's denial of Westchester County's petition for rulemaking was arbitrary and capricious for a number of reasons.

First, it was arbitrary and capricious for the NRC to determine that no new information occurred since the 1995 amendments over a decade ago. In making this determination, the NRC ignored evidence in the Record that alerted it to events and changed circumstances over the last decade that necessitate, at minimum, a reevaluation of the current licensing regulations.

Second, the NRC was alerted, at least, to the need for further fact-finding. Yet, the NRC did not conduct further fact-finding. Instead, the NRC did not "deem[] it advisable" to hold a hearing under 10 C.F.R. § 2.803. Given the experiences of the last decade, this failure to request additional evidence from various experts and invite further information regarding the collective experience under the current license renewal scheme was arbitrary and capricious.

Moreover, the NRC, in fact, violated its own regulations by failing to give the Petitioners notice of any deficiency in the Petition regarding the information submitted and failing to provide the Petitioners with the opportunity to present additional data. *See* 10 C.F.R. § 2.802(f).

Finally, the NRC declined to further consider the Petition on the basis that the public has other administrative mechanisms by which to address concerns with the license renewal regulation. First, there is no exception in the regulation that

permits the NRC to deny petitions to amend regulations where there may be other administrative mechanisms. If the NRC's position is correct, no one ever could successfully petition to amend regulations regarding relicensing because the petitioners would have the opportunity to submit their views in connection with individual relicensing applications. Again, there is no such exception in 10 C.F.R. § 2.802. Second, these other administrative mechanisms fail to adequately address the global concerns raised by the Petitioners. The Petitioners have requested that for future license renewals, the applicant must meet the same requirements and standards that apply to initial licenses. The other administrative avenues suggested by the NRC amount to no more than a piecemeal review of the nation's nuclear reactor fleet. This request only can be addressed adequately through the rulemaking process.

## ARGUMENT

**I. The NRC's denial of the petition for rulemaking on the basis that Petitioners presented no "new information" or sufficient reason to modify the current regulations was arbitrary and capricious.**

The NRC claimed in its denial of the petition for rulemaking that the Petitioners did not present any new information that would contradict the position it had previously taken or demonstrate that sufficient reason existed to modify the current regulations. (J.A. at A-157.) In particular, the NRC concluded that it already had considered the same issues raised by Petitioners in its previous

rulemakings from 1991 and 1995 when it determined that the “[o]ngoing regulatory processes provide reasonable assurance that, as new issues and concerns arise, measures needed to ensure that operation is not inimical to the public health and safety and common defense and security are ‘backfitted’ onto the plants.” (*See id.* at A-159 (quoting 56 Fed. Reg. at 64,945).)

Boiled down, the NRC viewed the Petitioners’ request as asking to “set forth a new standard for issuance of a renewed license that would be essentially the same as what the Commission rejected in formulating the license renewal rule.” (*See id.* at 160.) This is not true. In drawing that conclusion, the NRC overlooked a number of post-1995 events and other changed circumstances and experiences that were documented in various studies. All of these changed circumstances and new events impact the efficacy of the current license renewal regulations.

**A. The relicensing regulations should be amended to require consideration of changes in local demographics and infrastructure, and emergency evacuation planning needs.**

Pursuant to the 1991 Rule and 1995 Amendments, the NRC does not consider “siting” conditions (including issues such as changes in population density and infrastructure) when reviewing an application for relicensing. According to the NRC, these types of issues are relevant to current reactor operations and will be addressed by the existing regulatory structure governing reactor operation. *See, e.g.*, 1995 Amendments, 60 Fed. Reg. at 22,463-64.

Petitioners requested that the NRC consider emergency planning in the license renewal process, primarily to account for changes in local demographics and infrastructure that may have occurred since the time of initial licensing. (J.A. at A-11 – A-12.) The NRC’s response was that emergency planning is not germane to age-related degradation and therefore outside the scope of the license renewal process. (*Id.* at A-161 – A-162.) And, even if it were to consider emergency planning, the NRC stated that the Petitioners only provided “broad, conclusory statements without a factual or technical basis [which] are insufficient to support a position for rulemaking under the Commission’s regulations.” (*See id.* at A-162.)

The changing demographics surrounding the Indian Point reactors and the problems associated with evacuation planning are well-documented. There have been two comprehensive studies performed to study the evacuation capabilities of the areas surrounding the Indian Point Facilities. The first report was authored by KLD Associates, Inc. in March 2003, and was prepared for Entergy, the current owner of Indian Point. KLD Assocs., Inc., KLD TR-369, *Indian Point Energy Center Development of Evacuation Time Estimates* (May 2003) (the “KLD Report”). (*See* J.A. at A-658 – A-696.) The second report was prepared by James Lee Witt Associates, LLC, also in 2003. James Lee Witt Assoc’s, *Review of Emergency Preparedness of Areas Adjacent to Indian Point and Millstone* (2003)

(the “Witt Report”). (See J.A. at A-337 – A-532.) These reports concluded that evacuation capabilities have been seriously affected by the increase in population.

Both studies focused on the changed demographics surrounding the Indian Point facilities. For instance, the KLD Report concluded that the evacuation time estimates had increased since 1993. In 1993, the evacuation time estimate averaged 5.5 hours in good weather. (J.A. at A-671.) That figure increased to 9.25 hours in 2003. (*Id.*) Under snowy conditions, it will take some evacuees up to 12 hours to reach safety. (*Id.* at A-684.) The inescapable reality is that the increase in population coupled with a stagnant infrastructure has dramatically slowed the evacuation response time in the event of an emergency.

The Witt Report also highlights the challenges that are caused by the demographics surrounding the Indian Point facilities and the acute dangers to the local population. It noted “the disconnect between the population/evacuation information and the [emergency evacuation] plans and response” (see J.A. at A-504.) and observed:

significant planning inadequacies, expected parental behavior that would compromise school evacuation, difficulties in communications, outdated vulnerability assessment, the use of outdated technologies, lack of first responder confidence in the plan(s), problems caused by spontaneous evacuation, the nature of the road system, the thin public education effort, and how these issues may impact an effective response in a high population area. None of these problems, when considered in isolation, precludes effective response. When considered

together, however, **it is our conclusion that the current radiological response system and capabilities are not adequate to overcome their combined weight and protect the people from an unacceptable dose of radiation in the event of a release from Indian Point.**

(J.A. at A-340 (emphasis added).) The Witt Report also expressed concern over protection of the water supply surrounding Indian Point, particularly given the dense population. It found that:

[a]lthough plans generally addressed protection of food and water as required by applicable guidance in the EPA 400 and applicable Food and Drug Administration documents, there was no mention of the site-specific sensitivity of the New York reservoir system to a radiological release. **This is a significant observation given the large New York population potentially served by these water supplies.**

(*Id.* at A-360 (emphasis added).)

Even more alarming is the fact that Indian Point's hazard assessment technology (used to report radiation status and movement of the "plume" in the event of a disaster) "us[ed] 1970s-vintage overlay information to calculate the area of risk" and could not account for wind or complex weather patterns. (*Id.* at A-530.) Data was transmitted through telephone lines on paper forms, rather than electronically. (*Id.*) The Witt Report recommended that Indian Point's "hazard assessment technology infrastructure be **significantly** upgraded." (*Id.* at A-530.) (emphasis added).

The upshot from these reports is that the emergency evacuation plans must account for the changing demographics surrounding a nuclear facility and use the best available technology. The KLD and Witt Reports provided scientific and technical evidence of the need for improved emergency planning that adjusts to changes in population, infrastructure and technology, and local governments. The Petitioners submit that this new information was sufficient to raise questions as to whether the NRC relicensing regulations should require consideration of the viability of emergency evacuation by applicants. However, in denying the Petition, the NRC did not even bother to consider the Witt Report and the KLD Report. Other than acknowledging the existence of the Witt report (J.A. at A-152.), the NRC's decision does not include any discussion or analysis of the reports. This was arbitrary and capricious and flies in the face of the Congressional mandate to protect the public health and safety.

**B. Past failures have shown the current licensing basis process alone is inadequate to ensure "moving parts" will function safely in the extended license period.**

As noted above, the current license renewal regulations are premised on the theory that the ongoing regulatory process encompassed in a nuclear facility's CLB is sufficient to ensure that nuclear facilities continue to perform safely. Experience suggests otherwise. As outlined below, NRC was presented with evidence that

alerted it to problems that escaped the CLB process but likely would be detected under a more thorough renewal review.

In its comments to the Petition for Rulemaking, Riverkeeper, Inc. (“Riverkeeper”) raised examples of incidents that place in question whether the CLB process has proven adequate to ensure that a plant’s “moving parts” would continue to function safely in the extended term of a renewed license. (See J.A. at A-20 – A-21.) As stated above, a plant’s “moving parts” are specifically excluded from review in an applicant’s Integrated Plant Assessment. See 10 C.F.R. § 54.21(a)(1)(i).

In the mid 1990’s, IP3 was shut down due to repeated problems with its ATWT mitigation system actuation circuitry (“AMSAC”) system. (J.A. at A-21.) The AMSAC system is part of the reactor protection system, yet is also considered a “moving part” that is exempt from the license renewal review. During the shutdown, a total of 43 additional items requiring repair were discovered and IP3 was required to fix each before the reactors were restarted. (*Id.*) Many of the items were “moving parts.” (*See id.*) In this case, it took a complete shutdown of IP3 to discover an additional 43 parts in need of repair. (*Id.*) Under present regulations, applicants for license renewals can receive the license renewal without demonstrating that moving parts will function safely. It is arbitrary to wait for a

plant to shut down for one reason in order to conduct thorough inspections for unrelated, yet critical, safety issues.

Following this shutdown and repair of IP3, IP2 was issued a notice of violation after an operator failed to properly repair a safety injection pump. (*See* J.A. at A-21 n.1 (citing Letter from NRC to Entergy Nuclear Operations, Inc., Indian Point 2, FINAL SIGNIFICANCE DETERMINATION FOR A WHITE FINDING (NRC Eng'g Team Inspection Report 050000247/2005006) Indian Point Nuclear Generating Unit 2 (Aug. 1, 2005).) Prior to that time, the CLB process had failed to address the risk to the plant's safety injection system. In this situation, the leak from the safety injection pump caused a release and buildup of nitrogen gas that affected two additional pumps. (*Id.* at A-21.) Ultimately, it took the operator 77 days to address the leak – even though the NRC regulations require this type of malfunction to be handled within 72 hours. (*See id.*) While the leak ultimately was fixed without death or injury, there is no assurance that waiting until problems surface before correcting them always will have benign consequences.

The NRC seems to argue that maintenance is performed on a regular basis and, therefore, no special inspection of moving parts is required at the time of license renewal. That logic doesn't even justify failing to give a safety inspection to a car before the owner can renew the vehicle's DMV registration – let alone

justify ignoring moving parts in a nuclear power plant. When Congress set a fixed term for licensing commercial nuclear power plants and required applications for license renewal, it did not envision that renewal would be automatic. *See* 42 U.S.C. § 2133 (“[Licenses for nuclear power reactors] shall be issued for a specified period, as determined by the Commission, depending on the type of activity to be licensed, **but not exceeding forty years . . .**, and **may** be renewed upon the expiration of such period.”) (emphasis added). Instead, the expiration of the license signaled that it was time for the NRC to do something – not say it has been continuously monitoring the plant while it was licensed. The mechanical systems involved in both of the Indian Point incidents discussed above are considered “moving parts,” and as such, they are currently excluded from the license renewal review process. Again, at a minimum, the NRC should hold hearings to determine whether such failures could and should be uncovered during the license renewal review and addressed before a licensee is granted an additional 20-year term.

**C. On-site spent fuel storage has become increasingly problematic since 1995 given the failure to establish a repository at Yucca Mountain and the heightened security risk after 9/11.**

Another factor that was not present during the debates about the 1991 Rules and 1995 Amendments is the increased problems associated with spent fuel storage, particularly given the failure to establish a repository at Yucca Mountain.

“Spent fuel” is radioactive waste and is the byproduct of the reactions that occur inside the nuclear reactors. It is removed from the nuclear reactors, put in containers, and cooled in water-filled pools, called spent fuel pools, at each nuclear facility. All commercial nuclear power reactors have spent fuel pools. (See J.A. at A-263.) Yucca Mountain, located in Nye County, Nevada, was intended as a long-term storage solution for spent fuel, but its approval continues to be delayed. And even if approved, Yucca Mountain has “only enough space in the repository to store spent fuel produced by all nuclear plants in the U.S. until 2011.” (J.A. at A-22.)

The current license renewal regulations attempt to specifically exclude spent fuel storage as a factor in the applicant’s supplemental Environmental Impact Statement (“EIS”) or Environmental Assessment (“EA”). See 10 C.F.R. § 51.95(c)(2). The National Academy of Sciences (“NAS”) issued a report in 2003 which concluded that:

Most commercial power plants were designed with small pools under the assumption that fuel would be cooled for a short period of time after discharge from the reactor and then sent offsite for recycling (i.e., reprocessing). . . . Newer power plants were designed with larger pool storage capacities. Even plants with larger-capacity pools will run out of pool space if they operate beyond their initial 40-year licenses. In 2000, the nuclear power industry projected that roughly **three or four plants per year** would run out of needed storage space in their pools without additional interim storage capacity.

Comm. on the Safety and Security of Commercial Spent Nuclear Fuel Storage, Bd. on Radioactive Waste Mgmt., Div. on Earth and Life Studies, Nat'l Research Council of the Nat'l Acad. of Sciences, *Safety and Security Of Commercial Spent Nuclear Fuel Storage: Public Report* (2006) ("NAS Report") (emphasis added). (J.A. at A-279.) But the NAS Report was substantively ignored by the NRC in its denial of the Petitions. Rather, with regard to the spent fuel storage issue, the NRC simply stated that the Agency's "Waste Confidence Rule," adopted 23 years ago in 1984 and contained in 10 C.F.R. § 51.23, declares that "spent fuel generated in any reactor can be stored safely and without significant environmental impacts for at least 30 years beyond the licensed life for operation (which may include the term of a revised or renewed license) of that reactor at its spent fuel storage basin or at either onsite or offsite ISFSIs." (See J.A. at A-165 – A-166.)

The NRC's discussion of the Waste Confidence Rule does not address the NAS Report. And as the NAS Report noted, even newer power plants with large-capacity spent fuel pools will run out of pool space after the initial 40-year license term. (J.A. at A-279.)

Nor does the NRC's discussion address the security concerns identified by the NAS Report. The spent fuel storage also implicates security concerns at nuclear facilities. Every nuclear facility in the United States stores spent fuel on-site. (See J.A. at A-263.) Each facility has unique characteristics that will affect

its potential to cause damage to the surrounding area if attacked. The NAS concluded that “[t]he potential vulnerabilities of spent fuel pool to terrorist attacks are plant-design specific. Therefore, specific vulnerabilities can be understood by examining the characteristics of spent fuel storage at each plant.” (See J.A. at A-266.) The NAS Report discussed various ways to minimize the damage from a terrorist attack on spent fuel. (See, e.g., J.A. at A-316 – A-317, A-326.) Again, the NRC’s written determination did not substantively address the analysis contained in the NAS Report. (See J.A. at A-177 – A-178.)

The NRC’s response was simply that it “has reviewed and updated security requirements and continues to do so.” (*Id.* at A-164.) Because security issues are not “age-related,” the NRC believes that it is irrelevant to the license renewal issue. See, e.g., 10 C.F.R. § 54.4 (scope of renewal review); 10 C.F.R. § 54.21(a)(3) (effects of aging). However, even if a nuclear facility’s security is monitored on an ongoing basis, why should it also not be required to meet certain security standards as a precondition to its license renewal?

The increase in spent fuel storage amounts since 1995, the problems with developing adequate long-term storage at Yucca Mountain, the heightened security risk since September 11, 2001, and the unique characteristics of each nuclear facility necessitate that the NRC revisit the role of the renewal process in ensuring that every plant improves its structures to minimize the damage that could result

from a terrorist attack. At minimum, the Court should remand the matter to the NRC and direct it to provide a substantive response to the NAS study.

**D. Changes in local and state regulations should be considered during the license renewal process.**

The NRC completely disregarded the Petitioners' question regarding the role of new local or state regulations in the evaluation of a renewal application. (*See* J.A. at A-12.) Such changes in state and local regulations are appropriate subjects of consideration when the NRC determines whether or not the license for a commercial reactor should be renewed.

For example, under federal and New York law, the New York State Department of Environmental Conservation ("DEC"), not the federal EPA, regulates cooling water intake systems. 6 N.Y. Comp. Codes R. & Regs. 6, § 704.5 (2007); Notice of Approval of Program for Control of Discharges of Pollutants to Navigable Waters, 40 Fed. Reg. 54,462 (Nov. 24, 1975). In fact, the New York DEC has issued a draft State Pollutant Discharge Elimination System ("SPDES") permit that requires the owner of Indian Point to implement closed-cycle cooling at Indian Point. *See In re Renewal and Modification of a SPDES Permit by Entergy Nuclear Indian Point 2, LLC and Entergy Nuclear Indian Point 3, LLC*, DEC No. 3-5522-00011/00004, Interim Decision (Feb. 3, 2006).

Petitioners raised this issue in their Petition and noted that under state law "Indian Point must convert from once-through cooling to a closed-cycle design using

cooling towers.” (See J.A. at A-12.) The Indian Point facilities currently use an outdated once-through cooling system. Under its regulatory authority, New York State has indicated that the Indian Point facilities must change to a closed-cycle cooling system in order to prevent on-going harm to the Hudson River. The Petitioners asked the NRC whether regulations such as this should be considered when renewing a license. (See *id.*)

The NRC denied Petitioners’ request. Among other things, the NRC stated that the regulation of cooling water intake systems was a federal standard, not a state one, and that the Environmental Protection Agency (“EPA”) “performance standards” do not require existing power plans to convert to closed-cycle cooling. (*Id.* at A-167 (citing EPA’s Phase II cooling water rule at 40 C.F.R. Part 122).) The NRC’s denial is contrary to New York law and disregards this Court’s decision in *Riverkeeper v. EPA*, 475 F.3d 83 (2d Cir. 2007) vacating and remanding EPA’s Phase II rule.

Based on its incorrect view that one or more federal statutes preempted the state’s role in protecting water quality, the NRC concluded that consideration of state regulations are not “necessary” under the NRC’s current license renewal process. This fundamental misunderstanding of the state’s regulatory role is another reason why it was arbitrary for the NRC to deny the Petitions.

**II. The NRC's decision to deny the petition for rulemaking without holding a hearing or conducting further fact-finding was arbitrary and capricious given the NRC's determination that the Record was inadequate.**

Even if it is true that Petitioners did not present sufficient new information to modify the current regulations, the NRC is obliged to ensure that the basis of its determination is complete. *See Scenic Hudson Pres. Conference v. Fed. Power Comm'n*, 354 F.2d 608, 620 (2d Cir. 1965). As discussed in detail above, the NRC was aware of new information that would, at minimum, alert it to serious inadequacies of the current license renewal regulations. And the NRC's mandate from Congress is to oversee and regulate the nation's commercial nuclear power facilities for the common defense and security, the environment, and to protect the health and safety of the public under the AEA. 42 U.S.C. §§ 2011, *et seq.* To accomplish this, the NRC was granted the authority to issue commercial licenses to operate a nuclear power facility by section 103 of the AEA. 42 U.S.C. § 2133. Yet, as noted above, it is clear that a nuclear facility's license is not held in perpetuity:

Each such license shall be issued for a specified period, as determined by the Commission, depending on the type of activity to be licensed, **but not exceeding forty years . . .**, and **may** be renewed upon the expiration of such period.

42 U.S.C. § 2133(c) (emphasis added).

The NRC claims (without supporting citations) that the “40-year license term was selected on the basis of economic and antitrust considerations, not technical limitations.” (See J.A. at A-157.) But, contrary to the NRC’s suggestion, the 40-year term was not a Congressional stamp of approval that all nuclear reactors should continue to operate past their initial term. The 40-year license term, **instead of a 25-year term**, was selected in order to ensure that utility companies could obtain financing (based on the normal 40-year amortization period of a generating unit) and remain competitive with traditional fuel industries. See The Atomic Energy Act of 1954: Hearing on S. 3323 and H.R. 8862, to Amend the Atomic Energy Act of 1946 Before the Joint Committee on Atomic Energy, 83<sup>rd</sup> Cong. 230 (1955) (Statement of E.H. Dixon, Chairman of the Comm. on Atomic Power of the Edison Electric Institute, President, Middle South Utilities, Inc.). This, of course, has no bearing on whether a particular license **should** be renewed beyond the initial 40-year license term. In fact, during the hearings, it was suggested that the technology could be obsolete in as little as five or ten years, well before the end of the 40-year term. *Id.* at 229-30.

Simply put, the NRC was tasked with determining the standards by which a licensee may be granted a renewed license period. But the standards that the NRC selects must continue to meet its Congressional mandate concerning public health and safety. Otherwise, such standards would be arbitrary and capricious.

At the end of the day, the present license renewal rules have no teeth: out of 49 license renewal applications submitted, 48 have been approved (The operator withdrew one renewal application, an act that occurred prior to the relaxing of the renewal requirements with the 1995 Amendments). A nuclear facility requesting renewal is simply not held to the standards required of a new nuclear facility. There is absolutely no requirement that a renewal applicant demonstrate, as a precondition to receiving a renewed term, that it has met, at minimum, any of the NRC requirements contained in the CLB of a specific plant. 10 C.F.R. § 54.30. The NRC does not dispute this fact.

In its 1991 rulemaking, the NRC stated that “[i]t is not necessary for the Commission to review each renewal application against standards and criteria that apply to newer plants or future plants in order to ensure that operation during the period of extended operation is not inimical to the public health and safety.” *See* 56 Fed. Reg. at 64,945. At the time it made that assumption and at the time of the 1995 Amendments, the NRC had yet to complete the review of any renewal applications. Therefore, the record before the NRC during the license renewal rulemakings in 1991 and 1995 did not have the benefit of the studies and experiences that it could examine today.

Petitioners have provided the NRC with sufficient new information to alert it to the need to further investigate whether its license renewal regulations effectively

protect the health and safety of the public. Events such as the attacks of September 11, 2001, the delays at Yucca Mountain and the imminent spent fuel storage problem, emergency evacuation problems associated with increases in population and limitations of infrastructure, and evidence of the failures of the CLB scheme all show that it is time for the relicensing regulations to be revised.

The NRC's regulations state that "[n]o hearing will be held on the petition unless the Commission deems it advisable." *See* 10 C.F.R. § 2.803. Accordingly, it is reasonable to interpret the regulations as requiring a hearing where it is advisable. And, while the NRC is entrusted with making the decision as to whether it is advisable to hold a hearing, that decision must have a reasonable basis. Here, there was no reasonable basis for the NRC to deny the Petition without holding a hearing.

The NRC did not say that holding a hearing would be too time consuming. The NRC did not say that holding a hearing would be too costly. The NRC did not offer any reason for not holding a hearing. Instead, the NRC found that the Petition lacked merit because there was no new information since 1991 and 1995. On its face, that decision was arbitrary. As discussed above and as shown in the Record, it is obvious that there has been new information since 1995. Petitioners submit that the NRC's decision to not hold a hearing was arbitrary and capricious given the circumstances here.

Elevating form over substance, the NRC criticized the Petitioners for making “broad, conclusory statements without a factual or technical basis.” (J.A. at A-162.) This criticism was arbitrary and did not provide a reasonable basis for failing to hold a hearing or deny the Petition. While the Petitions did summarize certain information in a conclusory manner, that information was known by the NRC and was expressly cited by the Petition. For instance, the NRC admits that the Petition referred to the Witt Report. (J.A. at A-152.) And, as noted above and in the Record, the Witt Report was extensive and provided detailed factual information regarding public health and safety issues. (See J.A. at A-337-532.) Despite that, after acknowledging that the Petition had referred to the Witt Report, the NRC never considered or mentioned the Witt Report in denying the Petition. The NRC’s criticism would seem to imply that it would have treated the Petition differently had Petitioners simply “cut and pasted” the substance of the Witt Report and incorporated it into the Petition itself.

Similarly, the Petition refers to issues regarding population growth, road infrastructure, emergency evacuation plans, and post 9/11 issues. (*Id.* at A-152.) Accepting the NRC’s argument that the Petition did not present “a factual or technical basis,” NRC cannot deny the obvious. Since 1995, there have been major changes that impact what requirements should be imposed on applicants for extended licenses. NRC and the Court know that there have been such changes.

The Petition is intended to highlight the possible need to revise regulations -- not conclusively establish that the regulation should be revised in a specific manner. Those facts and specifics are fleshed out in hearings. It was arbitrary for the NRC to deny the Petition without conducting a hearing or seeking further facts.

Finally, although a court may not substitute its discretionary judgment for that of an agency, it may require the agency to fulfill its "affirmative duty to inquire into and consider all relevant facts." *See Scenic Hudson Pres. Conference*, 354 F.2d at 620. Where an agency has ignored recent events that illustrate deficiencies in the record, a court may remand the matter back to the agency for consideration of all matters where the record was deficient. *See id.* at 624.

**III. The NRC violated its own regulation at 10 C.F.R. § 2.802(f) by failing to give the Petitioners notice of any deficiency in the Petition regarding the information submitted and failing to provide the Petitioners with the opportunity to present additional data.**

The NRC regulations required the NRC to notify Petitioners of defects and allow them the opportunity to provide additional expert testimony and other evidence. Title 10 C.F.R. § 2.802(f) requires the NRC to alert a party if there are deficiencies in the information provided with the Petition for Rulemaking:

If it is determined by the Executive Director for Operations that the petition does not include the information required by . . . this section and is incomplete, **the petitioner will be notified of that determination and the respects in which the petition is deficient and will be accorded an opportunity to submit additional data.**

10 C.F.R. § 2.802(f) (emphasis added). Here, the NRC specifically found that the Petitioners did not present “relevant technical, scientific or other data involved which is reasonably available to the petitioner. . . .” (J.A. at A-162 – A-163.) Despite that belief, NRC did not alert Petitioners of the need for additional data or provide Petitioners with the opportunity to supplement the record. (As set out above, if given the opportunity, Petitioners would have been able to present additional factual data to demonstrate the need for rule-making.) That failure violated the NRC’s own regulations. For this reason alone, the NRC’s denial of the petition for rulemaking was arbitrary and capricious and should be reversed and remanded to provide the County with an opportunity to submit additional data.

**IV. The existence of other administrative mechanisms is not a valid basis to deny the petition for rulemaking submitted by Petitioners.**

Westchester County’s Petition for Rulemaking requested that 10 C.F.R. Part 54 (Requirements for Renewal of Operating Licenses for Nuclear Power Plants) be amended so as to require that a renewed license only be issued for a nuclear facility that meets all the criteria and requirements applicable as if the plant was being proposed *de novo* for an initial license. (J.A. at A-9-A-10.) The Petitioners’ request is for a global requirement for future license renewals. Nonetheless, as one basis for denial, the NRC stated that the public had other administrative avenues by which to raise concerns regarding a particular licensee.

In its order denying the Petition for Rulemaking, the NRC stated that:

Other procedural mechanisms are available to the public to raise concerns related to the current operations or the renewal of a license for nuclear power plants. An interested party could, for instance, file a request under § 2.206, requesting that the NRC take action to institute a proceeding, under § 2.202 to modify, suspend or revoke a license, or for any other action as may be proper. Furthermore, any interested person may report a safety or security concern, or allegation to the NRC at anytime. [sic] The Commission's regulations also provide for numerous opportunities for interested parties to become involved in licensing actions and rulemaking proceedings.

(J.A. at A-158 – A-159.)

In denying the Petition, the NRC has essentially written out of 10 C.F.R. § 2.802 (petition for rulemaking), the ability to petition for revision of the regulations related to relicensing. The existence of other administrative mechanisms should not render § 2.802 (petition for rulemaking) superfluous. It was arbitrary for the NRC to deny the Petition on this basis.

In addition, even a cursory review of the NRC's administrative decisions concerning petitions to modify, suspend or revoke a license according to 10 C.F.R. § 2.206 shows that as a matter of practice, the NRC denies all such petitions. For example, since 2000 there have been at least five petitions to modify, suspend, revoke or otherwise change the CLB for IP2 or IP3. *See In the Matter of Cons. Edison Co. of N.Y., Inc. (Indian Point, Unit 2)*, 51 N.R.C. 183 (2000) (denying

petition to modify or suspend the IP2 license to prevent restart of the reactor until issues concerning the power supply to the reactor's components could be addressed); *In the Matter of Power Auth. of the State of N.Y. (Indian Point Nuclear Generating Station, Unit 3)*, 52 N.R.C. 17 (2000) (denying petition to conduct assessments of the IP3 corrective action program prior to license transfer); *In the Matter of Consol. Edison Co. of N.Y., Inc. (Indian Point, Unit 2)*, 52 N.R.C. 243 (2000) (denying petition for the issuance of an order preventing restart of the IP2 reactor until certain emergency preparedness concerns were addressed); *In the Matter of Entergy Nuclear Operations, Inc. and Entergy Nuclear IP2 (Indian Point, Unit 2)*, 54 N.R.C. 326 (2001) (denying a petition to suspend the IP2 license due to persistent and pervasive neglect which endangered public health and safety); *In the Matter of Entergy Nuclear Operations, Inc. (Indian Point, Unit Nos. 2 and 3)*, 60 N.R.C. 343 (2004) (denying petition to review emergency planning and preparedness for IP2 and IP3). All five petitions have been denied except to the extent the NRC had been investigating specific, narrowly-tailored operational issues.

And the NRC is no stranger to suggesting that parties chase windmills, so to speak, in its administrative process. The NRC suggested to another party seeking to intervene in a relicensing review that it submit comments to the Petition at issue here as a means of pursuing concerns about emergency planning and preparedness.

*See In the Matter of Dominion Nuclear Conn., Inc. (Millstone Nuclear Power Station, Units 2 and 3), 2005 WL 4131574 (Oct. 26, 2005).*

### **Conclusion**

The Petitioners reasonably and in good faith suggested that the NRC should consider revising the regulations that apply to the relicensing of commercial nuclear power plants. The Petitioners do not have all the answers about what specific technical changes to the regulations are necessary. They know that a nuclear power plant is within the County's borders. They know that under the current regulations, there is no requirement for the applicants for extended licenses to demonstrate that critical parts in the plant can withstand the attack of an aircraft; or that the roads around the plant can accommodate the evacuation of the residents and visitors to the County; or whether moving parts in the plant have remaining useful life before they break down; or whether spent nuclear fuel at the plant is adequately stored.

In response, the NRC ruled that the Petition should have given more specifics, that nothing has changed since 1995 and that there are other procedures for Petitioners to raise their concerns. Essentially, the NRC is saying that it is the expert, it monitors plants regularly and we should trust it.

The NRC misses the point. The Petitioners are not challenging how the NRC monitors plants or enforces its regulations. Instead, Petitioners showed that,

given substantial changes since the regulations were last revised in 1995, the NRC should have developed more facts and held hearings to determine how, if at all, the relicensing regulations should be revised.

It was arbitrary for the NRC to ignore the Witt Report, the NAS Report and the KLD Report in its Decision. It was arbitrary for the NRC to fault the Petition for making conclusory statements at the same time the NRC did not request additional information from the Petitioners. It was arbitrary for the NRC to find that there had been no changed facts since 1995. It was arbitrary for the NRC to deny the Petition without holding hearings. It was arbitrary for the NRC to deny the Petition based on the Record before it.

For all of these reasons, Petitioners respectfully request that their Petition for Review be sustained and that the Court set aside the NRC's denial of the Petition in Agency Case No. PRM-54-02. Petitioners further request that the Court remand the matter to the NRC to hold hearings and conduct fact-finding on whether and how the regulations relating to applications for renewal of nuclear power plant licenses (10 C.F.R. Part 54, *et seq.*) should be amended. In the alternative, Petitioners request that the Court direct the NRC to give Petitioners the opportunity to submit additional data in support of the Petition to the NRC as required by 10 C.F.R. § 2.802(f).

Respectfully submitted,

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I certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 8,830 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). This brief also complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman, 14 point size.

Dated: June 16, 2007

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