07-1482; 07-1483

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

COMMONWEALTH OF MASSACHUSETTS
Petitioner

v.

UNITED STATES; UNITED STATES NUCLEAR REGULATORY COMMISSION
Respondents

ON PETITIONS FOR REVIEW OF ORDERS OF THE U.S. NUCLEAR REGULATORY COMMISSION

SURREPLY BRIEF FOR PETITIONER COMMONWEALTH OF MASSACHUSETTS

THE COMMONWEALTH OF MASSACHUSETTS
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Dated: February 28, 2008

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In the event that the Court considers the issues raised in Federal Respondents' Reply To The Commonwealth's Supplemental Brief (February 21, 2008) ("NRC Reply"), the Commonwealth submits this rebuttal for the Court's consideration.

I. THE NRC'S CLAIM THAT THE COMMONWEALTH VIOLATED FIRST CIRCUIT RULE 33(c) IS CONTRADICTED BY THE PLAIN MEANING OF THE RULE, WHICH DOES NOT APPLY IN THIS CASE, AND DOES NOT PROHIBIT THE COMMONWEALTH FROM COMMENTING ON THE SETTLEMENT PROCESS ALREADY DISCUSSED ON THE PUBLIC RECORD.

Contrary to the plain meaning of First Circuit Rule 33(c), the NRC argues that the following statement in the Commonwealth's Supplemental Reply Brief did not comply with this Rule because it disclosed matters that the Rule makes confidential:

> As directed by the Court at oral argument, the Commonwealth entered into extensive discussions with the NRC to explore whether an alternative and lawful process did exist to protect the Commonwealth's rights and thereby defer judicial review at this time. However, clear deficiencies in the process, as discussed in this brief, as well as **new demands by the NRC for concessions by the Commonwealth on its substantive case**, made that process unworkable to protect the Commonwealth's interests in enforcing NEPA and the Atomic Energy Act.[1]

Citing to the above phrase (in bold in this brief), the NRC claims that the Commonwealth impermissibly disclosed matters beyond the scope of Rule 33(c) which limits disclosure to "[t]he fact of the conference having taken place, and the

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[1] Supplemental Reply Brief For Petitioner Commonwealth Of Massachusetts (February 14, 2008) ("Commonwealth Supplemental Reply") at footnote 19.

bare result thereof (*e.g.* 'settled,' 'not settled,' 'continued'), including any resulting Conference Order, [which] shall not be considered to be confidential."[2]

The NRC's argument is without merit. By its own terms, First Circuit Rule 33(c) applies to "Pre-argument" settlement conferences that occur *before* the oral argument. Here, the settlement conference was agreed to by the parties and ordered by the Court *during* the December 6, 2007, oral argument. Moreover, in addition to its plain meaning, there are important reasons of policy and practicality why Rule 33(c) would not apply in this case. During the pre-argument conference, where the parties have never appeared and presented positions to the Court, it is appropriate to extend confidentiality except as to "[t]he fact of the conference having taken place, and the bare result thereof (*e.g.* 'settled,' 'not settled,' 'continued'), including any resulting Conference Order." Rule 33(c).

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[2] First Circuit Rule 33(c) provides:

(c) Confidentiality: The Settlement Counsel shall not disclose the substance of the Pre-argument Conference, nor report on the same, to any person or persons whomsoever (including, but not limited to, any judge). The attorneys are likewise prohibited from disclosing any substantive information emanating from the conference to anyone other than their clients or co-counsel; and then only upon receiving due assurance that the recipients will honor the confidentiality of the information. See In re Lake Utopia Paper Ltd., 608 F.2d 928 (2nd Cir. 1979). The fact of the conference having taken place, and the bare result thereof (e.g., "settled," "not settled," "continued"), including any resulting Conference Order, shall not be considered to be confidential.

See Addendum to Commonwealth's Surreply Brief.

By contrast, the settlement conference in this case was discussed, and the issues to be addressed in the settlement conference (*i.e.* its scope) were agreed to by the parties and approved by the Court at oral argument: whether or not there is a lawful process that would protect the Commonwealth's rights as a party to judicial review of its NEPA claims and that would allow the Court to defer a decision at this time. As the Court commented:

> [I]t, strikes us that the, the parties are very close to positions that would allow you to agree upon a mechanism, which would preserve the Commonwealth's rights to seek judicial review in the end of any decision by the NRC, whether to issue a stay, should the licensing proceedings advance ahead of the rule making proceedings. The NRC, to its credit, has made a number of concessions today and you [Entergy] have as well that would preserve judicial review. However, the mechanism to be used would be the IGE mechanism and the rule 2.802 mechanism. It would be possible, if the parties could get together on this, I think for you to work out something that would both preserve flexibility for the Agency and cause no harm to the Commonwealth in terms of losing any rights. We could stay this action in the interim and that would allow you to work out a resolution along the lines we've, we've been discussing . . . If you are not going to work out a resolution, then of course, we would like further briefing . . .[3]

Counsel for all three parties agreed to pursue settlement discussions according to the precise terms outlined by the Court, *i.e.,* whether the Commonwealth could

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[3] Transcript of Oral Argument, Addendum to Commonwealth Supplemental Reply ("Add.") at 51, line 7 to 52, line 4; *see also* generally Add. 51 - 55.

take interested state status and use the 10 C.F.R. § 2.802 process without compromising its rights.[4]

Therefore, the subject of the Commonwealth's comment -- the scope of the settlement discussions – already was a matter of agreement and public record. Necessarily, the limited disclosure requirements of Rule 33(c) would not make sense to apply in these circumstances.[5]

Moreover, at no time during the oral argument did any counsel suggest that the parties should discuss or seek to negotiate or compromise the substance of the Commonwealth's claims. To the contrary, the agreed purpose of the discussions was to determine whether the parties could implement procedures that would postpone the need to resolve the case while at the same time protecting the Commonwealth's rights to pursue its claims. Having agreed, during oral argument before the Court, to focus settlement discussions solely on the procedural issues outlined above, the NRC was not free subsequently to inject substantive demands into the discussion, while at the same time insisting that the deviation from the scope of the settlement discussions agreed to by the parties and approved by the Court must be kept confidential. To do so would create an inference that is both

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[4] Add. 52, lines 9-19 (Entergy); 53 line 21 – 23; 48, line 5 (NRC); 54 lines 22 – 25; 55, 1 – 6 (Commonwealth).

[5] The only case relied upon by the NRC for its unfounded claim, *In Re Lake Utopia Paper Ltd.*, 608 F. 2d 928 (2nd Cir. 1979), involves a pre-argument conference disclosure and therefore is inapplicable here.

inaccurate and potentially adverse to the Commonwealth: that the sole reason that settlement failed was due to the parties' inability to reach an accommodation on the process issues discussed at oral argument. It was not, and the NRC should not be permitted to utilize a pre-argument confidentiality rule to maintain this misimpression on the post-argument public record.[6]

II. THE NRC'S REWRITE OF ITS REGULATORY HISTORY IS NOT CREDIBLE AND DOES NOT PROTECT THE COMMONWEALTH'S RIGHT TO JUDICIAL REVIEW.

The Commonwealth already has addressed the issue that the Interested State process under 10 C.F.R. § 2.315(c) does not confer party status on the Commonwealth and would not protect its rights to judicial review.[7] The Commonwealth notes, however, that the NRC's increasingly labored efforts to explain the "plain meaning" of its regulation -- that some non-parties are more like parties except when they are not -- as well as its concession that even its own regulatory history may not support the agency's new construction of the rule,

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[6] The Commonwealth recognizes the importance of confidentiality to settlement negotiations and understands its agreement to enter into those discussions in this case included the obligation not to disclose specific settlement positions of the parties -- and at no point has the Commonwealth done so. However, the agreement to explore settlement did not extend to allowing the NRC to materially alter the scope of settlement process agreed to in open Court, yet then assert that this change in scope – and inaccuracy on the public record -- cannot be disclosed.

[7] *See, e.g.,* Commonwealth Supplemental Reply 5 – 10; Reply Brief for Petitioner Commonwealth of Massachusetts (November 8, 2007) 11 – 13.

provide the best evidence that the alleged NRC process does not exist in the law and should not further delay a decision in this case.[8]

RESPECTFULLY SUBMITTED,

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[8] *See* NRC Reply at 5: "In any event, because the plain meaning of a regulation controls over remarks made in regulatory history, even if the sentence said what the Commonwealth suggests, it would be simply incorrect."

Attorney's Certificate of Compliance with Rule 32(a)

This supplemental reply brief complies with the type-volume requirements of Fed. R. App. P. 32(a)(7)(B)(ii) because it contains 6 pages, 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). The typeface used is Times New Roman, a proportionally spaced typeface using serifs, and the Brief is set in 14-point type. The word processing program used was Microsoft Word.

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Dated: February 28, 2008

Certificate of Service

I hereby certify that on February 28, 2008, copies of the Surreply Brief for Petitioner Commonwealth of Massachusetts were served by first class mail upon the following:

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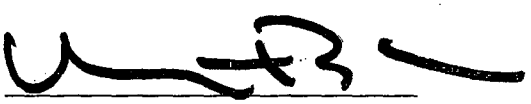

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ADDENDUM TO COMMONWEALTH'S

SURREPLY BRIEF

Rule 33. Appeal Conferences

The court may direct the attorneys — and, when appropriate, the parties — to participate in one or more conferences to address any matter that may aid in disposing of the proceedings, including simplifying the issues and discussing settlement. A judge or other person designated by the court may preside over the conference, which may be conducted in person or by telephone. Before a settlement conference, the attorneys must consult with their clients and obtain as much authority as feasible to settle the case. The court may, as a result of the conference, enter an order controlling the course of the proceedings or implementing any settlement agreement.

Local Rule 33.0. Civil Appeals Management Plan

Pursuant to Rule 47 of the Federal Rules of Appellate Procedure, the United States Court of Appeals for the First Circuit adopts the following plan to establish a Civil Appeals Management Program, said Program to have the force and effect of a local rule.

(a) Pre-Argument Filing; Ordering Transcript.

(1) Upon receipt of the Notice of Appeal in the Court of Appeals, the Clerk of the Court of Appeals shall send notice of the Civil Appeals Management Plan to the appellant. Upon receipt of further notice from the Clerk of the Court of Appeals, appellant shall, within ten days:

(A) file with the Clerk of the Court of Appeals, and serve on Settlement Counsel and all other parties a statement, in the form of the Docketing Statement required by Local Rule 3.0(a), detailing information needed for the prompt disposition of an appeal;

(B) certify and file with the Clerk of the Court of Appeals a statement, in the form required by Local Rule 10.0(b), that satisfactory arrangements have been made with the court reporter for payment of the cost of the transcript.

The Parties shall thereafter provide Settlement Counsel with such information about the appeals as Settlement Counsel may reasonably request.

(2) Nothing herein shall alter the duty to order from the court reporter, promptly upon filing of the Notice of Appeal in the District Court, a transcript of the proceedings pursuant to Fed. R. App. P. Rule 10(b).

(b) Pre-Argument Conference; Pre-Argument Conference Order.

(1) In cases where he may deem this desirable, the Settlement Counsel, who shall be appointed by the Court of Appeals, may direct the attorneys, and in certain cases the clients, to attend a pre-

argument conference to be held as soon as practicable before him or a judge designated by the Chief Judge to consider the possibility of settlement, the simplification of the issues, and any other matters which the Settlement Counsel determines may aid in the handling or the disposition of the proceeding.

(2) At the conclusion of the conference, the Settlement Counsel shall consult with the Clerk concerning the Clerk's entry of a Conference Order which shall control the subsequent course of the proceeding.

(c) ***Confidentiality.*** *The Settlement Counsel shall not disclose the substance of the Pre-argument Conference, nor report on the same, to any person or persons whomsoever (including, but not limited to, any judge). The attorneys are likewise prohibited from disclosing any substantive information emanating from the conference to anyone other than their clients or co-counsel; and then only upon receiving due assurance that the recipients will honor the confidentiality of the information. See In re Lake Utopia Paper Ltd., 608 F.2d 928 (2nd Cir. 1979). The fact of the conference having taken place, and the bare result thereof (e.g., "settled," "not settled," "continued"), including any resulting Conference Order, shall not be considered to be confidential.*

(d) ***Non-Compliance Sanctions.***

(1) If the appellant has not taken each of the actions set forth in section (a) of this Program, or in the Conference Order, within the time therein specified, the appeal may be dismissed by the Clerk without further notice.

(2) Upon the failure of a party or attorney to comply with the provisions of this rule or the provisions of the court's notice of settlement conference, the court may assess reasonable expenses caused by the failure, including attorney's fees; assess all or a portion of the appellate costs; dismiss the appeal; or take such other appropriate action as the circumstances may warrant.

(e) ***Grievances.*** *Any grievances as to the handling of any case under the Program will be addressed by the Court of Appeals, and should be sent to the Circuit Executive, One Courthouse Way, Suite 3700, Boston, MA 02210, who will hold them confidential on behalf of the Court of Appeals unless release is authorized by the complainant.*

(f) ***Scope of Program.*** *The Program will include all civil appeals and review of administrative orders, except the following: It will not include original proceedings (such as petitions for mandamus), prisoner petitions, habeas corpus petitions, summary enforcement actions of the National Labor Relations Board or any pro se cases. Nothing herein shall prevent any judge or panel, upon motion or sua sponte, from referring any matter to the Settlement Counsel at any time.*

The foregoing Civil Appeals Management Program shall be applicable to all such cases as set forth above, arising from the District Courts in the Districts of Maine, New Hampshire, Massachusetts, and