



OFFICE OF THE
GENERAL COUNSEL

UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D.C. 20555-0001

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BY FACSIMILE AND FIRST-CLASS MAIL

Richard L. Brodsky
Assemblyman, 92nd District
Westchester County, State of New York
Legislative Office Building
Room 422
Albany, NY 12248

Re: *Brodsky v. U.S. Nuclear Regulatory Commission*, No. 08-1454-ag

Dear Mr. Brodsky,

The following responds to your e-mail of this date.

To start with basics, every commitment I have made for the NRC on compiling the index of the agency record is expressed in my e-mails to you discussed below. For the reasons discussed below, I cannot agree to your request for certification that vast categories of documents "exist" within the NRC, or that they constitute part of the record of decision.

My most recent e-mail of July 17th summarizes my efforts to prepare a complete and accurate record of the NRC's review and action upon the application for the exemption at issue in this case, including my cooperation with your client in this respect. What I said is stated below (I have emphasized certain portions to clarify the NRC's position):

Let me clarify lest there be any doubt or misunderstanding as to what I committed to do. First, I am asking the Staff who participated in the review and grant of the exemption to prepare a hard copy file and list of documents **that they reviewed in considering the exemption application**, whether favor or unfavorable to the grant of the exemption.

Once this catalogue has been developed, I will then ask each participant to review the list for completeness and accuracy to prepare the certified index of the record. I will also ask them to consider specifically whether any of the documents in your FOIA request should be added to the list of documents considered, meaning **any document they looked at in connection with the exemption request**, whether or they relied upon the document in granting or recommending the grant of the exemption.

This is NOT the same as putting into the certified index "all documents that were in the possession of the NRC staff as it considered the exemption," which, taken literally, would mean every document in any information system within the agency. Documents listed in your FOIA would be included in the certified index if they meet the above criteria, but not otherwise.

In other words, I committed to a three-fold process to ensure the accuracy and completeness of the record to be certified to the Second Circuit as the index of all documents that were a part of the NRC proceeding resulting in the grant of the exemption. To this, you responded by e-mail: "Fair enough."

My commitment on behalf of the NRC was based on my e-mail earlier the same day reviewing the responsibilities of the NRC in certifying the index of the record, which responded to your reading of FRAP 16, which, once again, tried to focus on what the NRC "had" or "possessed" as distinct from what it actually *considered* in reviewing the exemption application:

I do not know of any reading of Rule 16 or any case law on review of an agency record that would support the view you have expressed [*i.e.*, that documents be certified as part of the record because they "exist" somewhere within the NRC]. To the point of "other parts of the proceeding," the operative word is "proceeding," which defines an ascertainable sequence of events in which the flow of documents can be traced. The words "pleading" and "evidence" followed by "other parts" further suggest the elements of an evidentiary proceeding, such as a transcript, which is not applicable here.

To say that the agency "had" a document is really meaningless. The NRC "has" every document in its files and information systems. We can agree that the exemption reviewers did not review every document that the NRC "had" at the time, which would include "the full list of all documents in its' possession," whatever that means, as your e-mail suggests. The fact that someone thinks a document "should" have been considered merely accentuates the subjectivity and boundlessness of the approach you are suggesting. In short, the grant of the exemption did not involve an adjudicatory or rulemaking proceeding in which someone can point to a document indisputably in the record of the proceeding that was "ignored."

Finally, it is up to the NRC to put together and certify the record ***of what it considered in such as case***, just as in *Florida Power & Light v. Lorion*, 470 U.S. 729, 744 (1985) ("agencies typically compile records in the course of informal agency action").

I intend to put together a hard copy of the indexed record for you to assist you in the appeal, since there was no such previously compiled record from which you could otherwise work. If you disagree with the content of the record as certified, there are options open to petitioners. Frankly, however, I don't think the Court will be amenable to a motions practice that anticipates a problem in the abstract before the record is actually filed.

It bears repeating that, throughout this proceeding, and even during the first conference with the Court's staff counsel, I offered your clients the opportunity to institute a proceeding under 10 C.F.R § 2.206 to avoid exactly this kind of dispute over "the record." Had your clients chosen to do so, they could have offered any documents of their choice, utilizing the NRC's electronic data retrieval system, for the NRC to review their claims concerning the advisability or legality of the fire protection exemption granted Indian Point 3.

It is clear from what you have written that the petitioners do not desire to put before the Court an accurate and complete record of what the agency actually considered, but instead would like to develop an entirely new record supportive of their claims. This is precisely the function of a Section 2.206 citizen's petition, but not the process envisioned by FRAP 16.

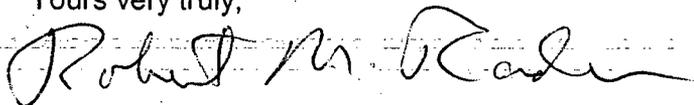
Your most recent e-mail today only serves to illuminate and perpetuate these problems. You have asked me to have the NRC staff "confirm that the documents we requested in our FOIA request exist and that they then be made part of the Record submitted to the Court." You then refer to these documents as contained in "a specific list," *i.e.*, your FOIA request. Far from any "specific list," the FOIA request reads like a laundry list that would be objectionable even as full-blown discovery in civil litigation. It requests "[a]ny documents currently or formerly in the possession of the NRC, NRC staff, affiliate organizations related to or concerning the exemption(s) from fire general design criteria, plant specific criteria, and/or federal rules including 10 C.F.R. § 50, Appendix R for any of the Indian Point Units, including but not limited to" some 28 open-ended categories.

Frankly, this is a preposterous extension of what is supposed to be "a certified index of the record," well beyond anything contemplated by FRAP 16 or any case law under it. Therefore, we do not agree with petitioners' concept of the record, which, according to our FOIA staff, would take 369 staff hours to compile at an agency cost of \$28,000. On the other hand, we do wish to cooperate and to avoid having to engage the Court in this process. Accordingly, as this litigation proceeds, if petitioners believe that a specific, identifiable document should have been part of the index, but is not, we would consider supplementing the record.

As I originally promised, I hope to have the certified index of the record in the mail by the end of this week. If you choose to go to Court, you might consider waiting until you receive this so at least we'll have something concrete to argue about.

Finally, based upon the anticipated filing of the index of the record shortly, please call me with your proposal for a briefing schedule, which the Court ordered the parties to agree upon.

Yours very truly,



Robert M. Rader
Senior Attorney
Office of the General Counsel
U.S. Nuclear Regulatory Commission
(301) 415-1955 (voice)
(301) 415-3200 (fax)

cc: Ellen J. Durkee
Attorney
Appellate Section
Environmental and Natural
Resources Division
U.S. Department of Justice
P.O. Box 23795
Washington, D.C. 20026-3795

Michael B. Wallace
Wise Carter Child & Caraway
P.O. Box 651
Jackson, MS 39205