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GENERAL COUNSEL

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

August 12, 2008

Catherine O'Hagan Wolfe, Clerk
United States Court of Appeals
for the Second Circuit
United States Court House
40 Foley Square
New York, New York 10007

BY OVERNIGHT DELIVERY

Attn: Maria Rodriguez

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

Dear Ms. Wolfe,

Enclosed for filing please find an original and four copies of Federal Respondents' Opposition to Petitioners' Motion to Supplement the Record and Declaration of Robert M. Rader, with attachments.

Thank you for your kind assistance.

Yours truly,

Robert M. Rader
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cc: All Counsel

**IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

RICHARD L. BRODSKY, et al.,

Petitioners,

v.

U.S. NUCLEAR REGULATORY COMMISSION

and

UNITED STATES OF AMERICA,

Respondents.

)
)
)
) **Federal Respondents'**
) **Answer to Petitioners'**
) **Motion to Supplement**
) **the Record**

) **Docket No. 08- 1454-ag**
)
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**Federal Respondents' Opposition to
Petitioners' Motion to Supplement the Record**

Preliminary Statement

Petitioners ask this Court for relief unprecedented in appellate law governing review of an agency order. In essence, they ask this Court to order discovery of some 40,000 pages of NRC files under the guise of "correcting" or "supplementing" the administrative record – to spare them the expense of their Freedom Of Information Act ("FOIA") request to the NRC for the same documents – and then require the NRC to "correct" its officially certified record with whatever documents result. They demand

this relief whether or not those documents *were even considered by the NRC* in issuing the order under review.¹

Petitioners' motion fundamentally misconceives what the agency record is supposed to be. The petitioners repeatedly characterize the record as including "any document that 'might have influenced' the agency's decision." *See, e.g.* Petitioners' Memorandum at 5. Thus, petitioners would have the record include any agency document that, in their view, could bear upon the agency's decision, whether or not the agency actually looked at that document or even knew of its existence. This expansive record includes all documents "in the possession of the NRC" so long as *petitioners* regard them "relevant and probative." Affidavit of Richard L. Brodsky ¶ 23 (July 30, 2008); Motion at 6.

This standard turns FRAP 16 on its head, giving non-agency parties the power to certify the record of the administrative proceeding. It likewise reverses the deference that courts ordinarily extend to agencies in subject

¹ Petitioners' motion does not comply with FRAP and Local Rules. The aggregate of the Motion and Memorandum far exceeds the 20-page limit of FRAP 27(d) and Local Rule 27(a)(1)(C)(vi). Because petitioners have ignored the typeface rules (14-point+) of FRAP 27(d)(1)(E) and Rule 32(a)(5)(A), the page number exceedence is actually greater. Under Local Rule 27(a)(2), this Court dismisses non-complying motions.

matter expertise because it would have this Court – under the auspices of “correcting” the record – tell the NRC what documents it needed to consider in exercising scientific and engineering judgment on the exemption request. Petitioners’ expansive and hopelessly impractical notion of what constitutes the agency record is not and could not be the law, and most certainly is nowhere authorized by FRAP 16 or supporting case law.²

Factual Background

Pursuant to FRAP 17(b)(1)(B), the Secretary to the Commission has certified “that the documents listed and described [in the certified index of the record] constitute the record for the administrative proceedings” resulting from the NRC orders challenged by petitioners. *See* Certified Index of the Record (July 24, 2008); Declaration of Robert M. Rader, dated Aug. 12, 2008, ¶ 3(Exh. 1)(attached). Because the Commission denied petitioners’ request for a hearing on the Indian Point 3 exemption at issue, no hearing record exists. To produce the certified index of the record, it was

² As a practical matter, petitioners can simply append to their opening merits brief whatever documents they believe should have been included in the record or, if the documents are too voluminous, describe them with sufficient clarity that the Court can understand why the record is supposedly deficient. At that point, the merits panel can sort out the arguments about supplementing the record.

necessary for the NRC to compile, with the assistance of the undersigned counsel, all documents considered by the agency in granting the exemption. *See* Rader Decl. ¶¶ 1-8. This compilation was accomplished as follows.

First, the principal reviewers of the exemption application were asked to compile the documents they considered, whether favorable or unfavorable to the application, in the course of their review. This included documents specific to the application as well as generic documents generally utilized in such reviews. Second, ten NRC staff and managers who participated in the review of the application were identified. Third, each person was shown the preliminary list of documents compiled and asked to identify any other documents that were considered and therefore should be added to the list. A second half to this third step is discussed below. (Rader Decl. ¶ 9).

As a result, a list of all documents considered by the NRC in any fashion in granting the Indian Point 3 exemption was developed. To this, the Secretary added the documents pertinent to petitioners' request for a hearing on the exemption. The result was a list of 31 documents, totaling 1,985 pages. (Rader Decl. ¶ 10).

While the record was developed, legal counsel for petitioner Richard L. Brodsky, by his office legal counsel, submitted a FOIA request on July

10, 2008 for “[a]ny documents currently or formerly *in the possession of* NRC, NRC staff, or 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 categories of information. (Rader Decl. ¶ 11, Exh. 2)(emphasis added; footnotes omitted).

On July 18, 2008, an NRC FOIA officer advised Mr. Brodsky’s counsel that the FOIA request would encompass *an estimated 40,000 pages at an agency cost of \$28,272.65, including 369 man-hours* of research and reproduction. (Rader Decl. ¶ 12). In the same time frame, NRC counsel had several discussions and e-mail exchanges with Mr. Brodsky over the content of the record in this case. To assure that the record was in fact complete and to resolve petitioners’ concerns, NRC counsel asked each participant in the exemption review to examine Mr. Brodsky’s FOIA request to see if any of the documents requested should be added to the record. This was the second half of the third step in developing the record mentioned above. Mr. Brodsky was informed of these procedures. (Rader Decl. ¶ 13, Exh. 4).

Nevertheless, petitioners were not satisfied. On July 22nd, Mr. Brodsky insisted that the NRC “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.” (Rader Decl. ¶ 14, Exh. 5)(emphasis added). When NRC counsel declined, the July 24th conference call with Court Attorney Stanley Bass resulted. Before the call, NRC counsel sent to Mr. Bass and the parties a letter summarizing the dispute and the reasons why the NRC opposed the petitioners’ request. (Rader Decl. ¶ 15, Exh. 6).

Argument

I. The Certified Index of the Record filed by the NRC is presumed by law to be complete.

The Secretary of the Commission, as part of her official duties under 10 C.F.R. § 1.25(g), has certified the Index of the Record as follows:

I hereby certify that the documents listed and described [in the attached Index of the Record] constitute the record for the administrative proceedings resulting in the issuance of “Entergy Nuclear Operations, Inc., Entergy Nuclear Indian Point 3, LLC, Indian Point Nuclear Generating Unit No. 3; Revision to Existing Exemptions,” Docket No. 50-286, published at 72 Fed. Reg. 56798 (Oct. 4, 2007), and the Commission’s denial, by letter dated January 30, 2008, of petitioners’ request for a hearing on the issuance of the aforementioned “Revision to Existing Exemptions,” the two decisions that are the subject of the Petition for Review in this case.

Certified Index of the Record (July 24, 2008).

It has been the unchallenged rule for decades that “[t]he presumption

of regularity supports the official acts of public officers, and, in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties.” *United States v. Chemical Foundation*, 272 U.S. 1, 14-15 (1926). *Accord*, *Williams v. Trans World Airlines*, 509 F.2d 942, 949 n.11 (2d Cir. 1975). *See also Adams v. U.S.*, 350 F.3d 1216, 1228 (9th Cir.2003)(presumption of regularity attaches to actions of government agencies); *Starr v. FAA*, 589 F.2d 307, 315 (7th Cir.1979)(“normal presumption of good faith that, in courts of law, government officials still enjoy, . . . must be refuted by well-nigh irrefragable proof”). The Commission’s Secretary and other NRC officials who helped to put together the record in this case are to be accorded this “presumption of honesty and integrity.” *Withrow v. Larkin*, 421 U.S. 35, 47 (1975). Thus, the rule has evolved that the agency enjoys a presumption that it properly designated the administrative record, absent clear evidence to the contrary. *Bar MK Ranches v. Yuetter*, 994 F.2d 735, 739-40 (10th Cir. 1993).

In compiling the record, the NRC as the certifying agency followed FRAP 16(a). Here, as required by FRAP 16(a)(1), the “order involved” is certainly included. As for FRAP 16(a)(3), “pleadings, evidence, and other parts of the proceedings” obviously refers to an adjudicatory hearing, which

did not occur in this case. The key provision of FRAP 16 is subpart (a)(2), which requires that “any findings or report on which [the order] *is based*” be included in the record (emphasis added). Thus, this rule compels the agency to certify the record of documents it *considered*, not a far more expansive record of what petitioners believe it *should have considered*, and certainly not every document that *exists* in its files for that docket. Therefore, the test proposed by petitioners – all Indian Point 3 documents in some 28 categories that the NRC *possessed* in its files at the time – flies in the face of FRAP 16.

II. Petitioners have not met their burden under Rule 16(b) of proving that documents were omitted from the record.

A. The agency’s decision on review must “stand or fall” on the record compiled by the agency.

Disagreements about the content of the record are rare and, of the dimension in this case, probably unheard of. Here, no hearing occurred on the exemption request, as is consistent with unbroken NRC policy and practice, twice affirmed by the federal courts.³ Accordingly, there was no

³ In its motion to dismiss, the NRC cited *Kelley v. Selin*, 42 F.3d 1501, 1514 (6th Cir. 1995), and *Massachusetts v. NRC*, 878 F.2d 1516, 1521 (1st Cir. 1989). We cite those cases here only to explain why no hearing record exists.

formal adjudicatory record, and it was necessary for the NRC to go back and assemble a record from the materials it actually *considered*. This was done, faithfully and completely.

Appellate courts are not free, absent special circumstances not present here, to consider materials beyond the record compiled and certified by the agency.⁴ The NRC has certified to this Court, as called for by FRAP 16, every document it *did consider* in the course of the non-adjudicatory proceeding below. Its exemption grant must “stand or fall” on the state rationale in the decision, based on whatever documents the agency “directly

⁴ On this point, the Supreme Court has been adamant:

We have made it abundantly clear before that when there is a contemporaneous explanation of the agency decision, the validity of that action must “stand or fall on the propriety of that finding, judged, of course, by the appropriate standard of review. If that finding is not sustainable on *the administrative record made*, then the Comptroller's decision must be vacated and the matter remanded to him for further consideration.”

Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519, 549 (1978), quoting *Camp v. Pitts*, 411 U.S. 138, 143 (1973)(emphasis added). See also *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985)(judicial review is based on the record “the agency presents to the reviewing court”).⁴ Conversely, the record may not include “some new record made initially in the reviewing court.” *Center for Auto Safety v. FHA*, 956 F.2d 309, 314 (D.C. Cir. 1992).

or indirectly considered.” *Bar MK Ranches*, 994 F.2d at 739. Thus, the record here contains all information “pertaining to” the exemption, not just documents the NRC relied upon. *Personal Watercraft Indus. Ass’n v. Department of Commerce*, 48 F.3d 540, 546 n.4 (D.C. Cir. 1995).

This Court has followed these principles. “Generally, a court reviewing an agency decision is confined to the administrative record compiled by that agency when it made the decision.” *National Audubon Soc. v. Hoffman*, 132 F.3d 7, 14 (2d Cir. 1997). The court may consider documents beyond the record only “when there has been a *strong showing* in support of a claim of *bad faith or improper behavior* on the part of agency decisionmakers or where the *absence of formal administrative findings* makes such investigation necessary in order to determine the reasons for the agency's choice.” *Id.* (emphasis added).⁵

⁵ The First Circuit recently restated the same governing law:

In considering whether an agency action was arbitrary and capricious, the focal point for judicial review should be the administrative record already in existence, *not some new record made initially in the reviewing court*. Supplementing the administrative record on judicial review is therefore the exception, not the rule, and is discretionary with the reviewing court. There are two types of situations in which we may exercise that discretion. This court may (although it is not (continued. . .))

Here, neither narrow exception applies. First, the lengthy certified record of technical documents the NRC reviewed in granting the exemption easily demonstrates its good faith.⁶ Second, the NRC's published decision at 72 Fed. Reg. 56798 (Oct. 4, 2007) more than adequately explains the basis for its grant of the exemption.

This established rationale for reviewing only the agency record presented to the Court has been firmly applied to NRC proceedings. When

(...continued)

required to) supplement the record where there is a strong showing of bad faith or improper behavior by agency decision makers. Alternatively, supplementation of the record may be permissible where there is a failure to explain administrative action as to frustrate effective judicial review.

Town of Winthrop v. FAA, 2008 WL 2814806 at 12 (1st Cir. July 23, 2008)(citations and quotation marks omitted; emphasis added).

⁶ The closest petitioners come to alleging bad faith or misconduct is their suspicion that documents might have been omitted as a result of the NRC's document retention policy per Management Directive 3.53 Handbook 1, Section II.C.14. Memorandum at 10. Section II.C.14 is within the NRC's lawful authority, 44 U.S.C.A. § 3501 *et seq.*, and is merely a housekeeping provision that permits NRC employees to discard personally held "*non-record material*" that would not even be considered "agency records" if requested under FOIA. As the Court can plainly see (Rader Decl. ¶ 16), this policy does not permit destruction of agency records, much less records of an agency proceeding.

petitioners offered extra-record evidence in *San Luis Obispo Mothers for Peace v. NRC*, 751 F.2d 1287 (D.C. Cir. 1984), *vac. on other grounds*, 760 F.2d 1320 (D.C. Cir. 1985), to overturn an NRC decision in a reactor proceeding, the Court of Appeals summarily rejected their rationale:

We recognize at the outset that “[a]lthough this court has sanctioned supplementation of the record in certain circumstances . . . the practice decidedly is the exception not the rule.” In discharging their obligation to monitor agency action, courts review a *record* compiled by the agency and containing its rationale and supporting findings, accompanied by *record* evidence. . . .

The principle that judges review administrative action on the basis of the agency's *stated* rationale and findings, and our correlative reluctance to supplement the record, is well-established. . . .

Precedent aside, judicial reliance on an agency's stated rationale and findings is central to a harmonious relationship between agency and court, one which recognizes that the agency and not the court is the principal decision-maker. Were courts cavalierly to supplement the record, they would be tempted to second-guess agency decisions in the belief that they were better informed than the administrators empowered by Congress and appointed by the President. The accepted deference of court to agency would be turned on its head: the so-called administrative state would be replaced with one run by judges lacking the expertise and resources necessary to discharge the function they had arrogated unto themselves.

751 F.2d at 1324-26 (footnotes and citations omitted; emphasis in original).

Exceptions to the rule prohibiting extra-record supplementation are narrowly defined. *Commercial Drapery Contr. v. United States*, 133 F.3d 1,

7 (D.C. Cir. 1998); *San Luis Obispo Mothers for Peace*, 751 F.2d at 1327 (supplementing record requires petitioners to make “a prima facie showing that the agency excluded . . . evidence adverse to its position”); *Bunker Hill Co. v. EPA*, 572 F.2d 1286, 1292 (9th Cir. 1977)(augmenting materials were merely explanatory of the original record). Thus, cases that *permit* supplementation serve to underscore the very limited nature of exceptions.⁷

Petitioners’ theory that FRAP 16 permits massive supplementation also reverses the deference that courts properly accord the NRC’s technical judgment on scientific and engineering issues. When and if this Court reviews the merits of the exemption, it will be “most deferential” to the NRC’s technical review. *Baltimore Gas & Electric v. NRDC, Inc.*, 462 U.S. 87, 103 (1983). If this Court will defer to the NRC’s technical judgment on the merits, the Court certainly would not intrude on the same technical

⁷ See also *Dopico v. Goldschmidt*, 687 F.2d 644, 654 (2d Cir.1982) (strong suggestion that “fundamental documents – the very basis” for the decision were “inconceivabl[y]” missing from record); *NLRB v. Klinger Elec. Corp.*, 656 F.2d 76 (5th Cir. 1981)(affidavits relied upon by agency head were omitted). *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 54 (D.C.Cir.1977) (undisclosed *ex parte* communications rendered the record a “fictional account” of the actual decisionmaking process).

judgment at this stage by telling the NRC what technical documents it should have considered in deciding the exemption.

As the Ninth Circuit observed in *The Lands Council v. Powell*, 395 F.3d 1019, 1030 (9th Cir. 2005), “[w]ere the federal courts routinely or liberally to admit new evidence when reviewing agency decisions, it would be obvious that the federal courts would be proceeding, in effect, *de novo* rather than with the proper deference to agency processes, expertise, and decision-making.” *Id.* at 1030 (emphasis added). Petitioners would stand this customary deference on its head.

B. Petitioners have not identified specific documents allegedly omitted from the record.

A related problem with petitioners’ approach is that they have not identified any particular document that, in their view, ought to be part of the record. Rather, they insist that this proceeding stop in its tracks so that the NRC can take an estimated 369 man-hours at a cost of roughly \$28,000 to help them identify “missing” documents, and only *then* will petitioners designate other documents for inclusion in the record.

Nothing in FRAP 16(b) or the case law even vaguely supports this extraordinary procedure. The rule allows a court to order the agency to

“supply any omission” or “correct a misstatement.” This surely means that the proffering party must be able to identify specific documents allegedly omitted from the record. Petitioners have not done so here and this alone is fatal to their motion. *Compare* Rader Decl., Exh. 2 with Memorandum at 13-17.⁸ Indeed, by requesting that the NRC determine whether categories of documents are in its “possession” (Motion at 1, 6, 7, 9, 10), petitioners in effect concede that they *cannot* specify any allegedly “missing” documents.

Rule 16(b) was intended to permit specifically identifiable corrections to the record, not the kind of 40,000 page free-for-all suggested by petitioners.⁹ As the Sixth Circuit held in denying a similar, but far more limited, attempt to supplement the record:

The materials appellant seeks to include in the record by his motion are clearly not omissions from the record since they were

⁸ Petitioners’ FOIA request contains 28 categories of documents, while their motion has 23. Both lists are anything but “specific,” as claimed. Motion at 7.

⁹ Petitioners rely on *High Sierra Hikers Ass’n v. Weingardt*, 2007 WL 3231698 (N.D. Cal. 2007), but that case quotes from *The Lands Council*, 395 F.3d at 1030, that the courts have crafted exceptions that “are narrowly construed and applied,” which “operate to identify and plug holes in the administrative record.” Petitioners also misplace reliance on *ITT World Communications, Inc. v. FCC*, 621 F.2d 1201, 1205 (2d Cir. 1980). That case merely authorized supplementing the record with the full text of the agency’s decision.

not part of the ‘pleadings, evidence and proceedings before the agency.’ The significance of Rule 16(b) lies mainly in the area of inadvertent errors and omissions in the transcript, 9 Moore's Federal Practice, ¶216.03, n.2 (2nd ed. 1985), and has no application to the situation herein.

Boyer v. Secretary of Health and Human Services, 767 F.2d 919 (Table), 1985 WL 13400 (6th Cir. 1985).

Petitioners’ reliance upon *Bethlehem Steel Corp. v. EPA*, 638 F.2d 994 (7th Cir. 1980), is misplaced. Only serious infractions of due process convinced the Court there to accept extra-record evidence on appeal:

Here, Bethlehem is not only challenging the merits of the Administrator's disapproval, but also contends that Agency personnel improperly commingled adjudicative and prosecutorial functions and relied upon improper ex parte communications in arriving at the decision to disapprove the DCO. These accusations make relevant and material the documentation of communications and memoranda revealing internal agency procedures.

638 F.2d at 1000.¹⁰ Likewise, the Court in *National Courier Ass’n v. Board*

¹⁰ Distinguishing this case, the Fifth Circuit observed that in it was a “combination of . . . factors” that concerned the Seventh Circuit in *Bethlehem Steel*, namely, “that EPA failed to disclose the grounds for its decision, that prosecutorial staff sought to delay the timing of an adjudication in order to gain a tactical advantage, or that adjudicatory staff sought to force MSP to waive certain litigation defenses in return for favorable treatment on its permit application . . . , together with the improper mixing of adjudicatory and prosecutorial staff.” *Marine Shale Processors, Inc. v. EPA*, 81 F.3d 1371, 1386 (5th Cir. 1996); accord, *Coeur* (continued. . .)

of *Governors*, 516 F.2d 1229, 1241 (D.C. Cir. 1975), added to the record only evidence that *the agency actually considered but deliberately omitted* on account of privilege. Thus, any document that “might have influenced the agency's decision” (*id.* at 1241) – and only a document the decisionmakers actually considered could have “influenced” its decision – differs vastly from *could or should* have influenced the agency. The other cases cited by petitioners are also unhelpful.¹¹ None of petitioners’ cases even discusses, much less authorize, including in the record documents that the agency did not consider. And by comparing the NRC rules for reopening a closed

(. . .continued)

d’Alene Tribe v. Asarco Inc., 280 F. Supp. 2d 1094, 1110 (D. Idaho 2003). None of this outlandish conduct occurred here.

¹¹ The Court in *Consumers Union of U.S., Inc. v. FPC*, 510 F.2d 656, 661 (D.C. Cir. 1975), found “wide latitude in correcting omissions from the agency record” to consider two specific hearing exhibits omitted from the record that the parties discussed in their briefs. In *Silva v. Lynn*, 482 F.2d 1282, 1283 (1st 1973), the agency produced only the end result of the agency’s review, omitting “the more detailed studies and background of deliberation which form the basis of the final EIS,” prompting the Court to require “production of the entire administrative record.”

Similarly, this Court noted in *Suffolk County v. Secretary of the Interior*, 562 F.2d 1368, 1384-85 (2d Cir. 1977), that review in a NEPA suit is vastly different because NEPA is an environmental disclosure statute. The essence of a NEPA suit is to challenge the agency’s *failure to disclose in the record* – the EIS – environmental impacts it was legally required to disclose.

record (Memorandum at 7) to the exceptions allowing supplementation of an agency record, petitioners show how very far afield they have gone.

**C. Petitioners are seeking discovery, which is not
authorized by appellate rules or practice.**

In essence, petitioners are using FRAP 16 as a discovery device in appellate practice. Whether their extravagant demands would be deemed relevant or reasonable judged as document production requests in an NRC adjudication, *see* 10 C.F.R § 2.709(b), or under Fed. R. Civ. P. 34, federal appellate rules simply do not authorize petitioners to demand of a respondent agency that it scour its entire agency files for information the petitioners regards as potentially helpful, at enormous time and cost to the taxpayer, and then certify to the court that such records “exist.”

This is not the first time that a Hobbs Act petitioner has sought discovery to “correct” or “supplement” the record.” As discussed, the same tactic was rejected in *San Luis Obispo Mothers for Peace*, where the District of Columbia Circuit held:

Petitioners style this motion as one to supplement the record. As a practical matter, however, *they first seek disclosure*, under the Sunshine Act, of the predecisional transcripts and related documents of the Commission's deliberations; *only then do they seek to include these disclosures in the administrative record and the record on appeal*. Because these heretofore confidential

transcripts and documents *are not properly a part of the record of these proceedings*, we have no occasion to consider petitioners' Sunshine Act claims. *This appeal is not the proper forum for resolving satellite discovery requests.*

San Luis Obispo Mothers for Peace, 751 F.2d at 1324 (footnotes omitted; emphasis added).

Petitioners' real grievance is that they think the NRC should have considered, but did not consider, a vast number of documents they regard as relevant to the exemption. A way exists for that argument to be made, but certainly not under the guise of a FRAP 16 motion. As the NRC has repeatedly acknowledged throughout this proceeding, petitioners could have filed a citizen's petition with the NRC pursuant to 10 C.F.R. § 2.206. In fact, they still may.¹² This is the proper route for a party who wishes to present additional documents and arguments to the agency.

¹² The federal courts have long recognized that this procedure affords a means by which private citizens can ask the NRC to review its decisions or take enforcement action against a nuclear power plant licensee. *See, e.g., Florida Power & Light Co. v. Lorion*, 470 U.S. 729 (1985); *Riverkeeper v. Collins*, 359 F.3d 156, 158 (2d Cir. 2004). The courts have noted that persons like petitioners denied a hearing on an exemption request are "not without recourse" inasmuch as they may file a Section 2.206 petition. *Kelley v. Selin*, 42 F.3d 1501, 1515 (6th Cir. 1995).

Conclusion

The unprecedented relief sought by petitioners is unauthorized by federal appellate rules and practice. Their motion should be denied.

Respectfully submitted,

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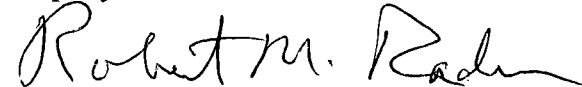
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Dated: August 12, 2008

CERTIFICATE OF SERVICE

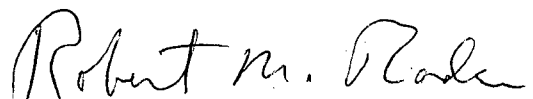
I hereby certify that I have on this 12th day of August 2008 served upon the following, by deposit in the United States Mail, first class, postage prepaid, and by electronic transmission, a copy of Federal Respondents' Opposition to Petitioners' Motion to Supplement the Record and Declaration of Robert M. Rader (with attachments):

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Counsel for Federal Respondents

RICHARD L. BRODSKY, et al.,

V.

and

Respondents.

Docket No. 08- 1454-AG

1. I am a member in good standing of the Bar of the District of Columbia and admitted to this Court and the Supreme Court of the United States. I am also a retired member of the New Jersey Bar and an inactive member of the Virginia Bar. I have practiced law in the area of nuclear licensing and regulation in private practice since 1978 and as a Senior Attorney, Office of the General Counsel, Nuclear Regulatory Commission, respondent in the captioned case, since March 2008. I have personal knowledge of the events and matters discussed in this

Declaration as well as thirty years practical experience in the handling of Hobbs Act cases. I file this Declaration in support of the Federal Respondents' Opposition to Petitioners' Motion to Supplement the Record to explain to the Court how the administrative record of the proceedings below was compiled in the captioned case.

2. I am the NRC attorney with lead responsibility for the handling of the captioned case, and I have had such responsibility since the filing of the petition for review.

3. As part of my responsibilities in this case, I have assisted the Secretary of the Commission and her staff with the identification, assembly and indexing of documents constituting the record in two relating proceedings, both of which are identified in the Certified Index of the Record, dated July 24, 2008 and filed with this Court thereafter (Exh. 1).

4. The first of these administrative proceedings resulted in the issuance of "Entergy Nuclear Operations, Inc., Entergy Nuclear Indian Point 3, LLC, Indian Point Nuclear Generating Unit No. 3; Revision to Existing Exemptions," Docket No. 50-286, published at 72 Fed. Reg. 56798 (Oct. 4, 2007). The second resulted in the Commission's denial, by letter dated January 30, 2008, of petitioners' request for a hearing on the issuance of the aforementioned "Revision to Existing

Exemptions.”

5. The petition for review in this case challenged both resulting orders of the NRC in these proceedings. As to the second of these proceedings, the hearing request by petitioners was the first document received, and the proceeding concluded with the Commission’s denial of petitioners’ request. These documents are catalogued in the Certified Index at ID Nos. 3-7.

6. The documents constituting the record in the first of these proceedings clearly included the issuance of the revised exemption requested by the licensee of Indian Point Nuclear Generating Unit 3, published at 72 Fed. Reg. 56798 (ID No. 1) as well as the related Environmental Assessment, published at 72 Fed. Reg. 55254 (ID No. 2), plus the documents (ID No. 3-7) already noted.

7. After my review of this record and the relevant case law, I prepared and filed on behalf of the NRC a Motion to Dismiss, asserting defenses to the petition, which, if sustained by the Court, would have obviated the need to consider further what documents, if any, would constitute a part of the record. Because there was no hearing in the matter below, no identified “record” existed.

8. After this Court referred the NRC’s Motion to Dismiss to the Merits Panel, it became necessary to focus squarely on what would be material to the Court’s review under FRAP 16 and 17. My research led me to conclude that,

since no "record" beyond the limited documents mentioned already existed in some readily identifiable form, it would be necessary to re-create the record by surveying NRC staff to determine what documents they considered in reviewing and ultimately granting the application for the revised exemption. This was accomplished as described below.

9. First, the principal reviewers of the exemption application were asked to compile the documents they considered, whether favorable or unfavorable to the application, in the course of their review. The reviewers were instructed to include documents specific to the application as well as generic documents generally utilized in such reviews. Second, ten NRC staff and managers who participated in the review of the application were identified. Third, each person was shown the preliminary list of documents compiled and asked to identify any other documents that were considered and therefore should be added to the list. A second half to this third step is discussed below.

10. As a result, a list of all documents considered by the NRC in any fashion in reviewing and granting the application for the revised Indian Point 3 exemption was developed. To this, the Secretary added the documents pertinent to petitioners' request for a hearing on the exemption, discussed in Paragraph 5, above. The result was a list of 31 documents, totaling 1,985 pages, which became

the Certified Index of the Record in this case.

11. While the record was developed, petitioner Richard L. Brodsky, by his office legal counsel, submitted a FOIA request on July 10, 2008, for “[a]ny documents currently or formerly in the possession of NRC, NRC staff, or 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 categories of information (Exh. 2).

12. On July 18, 2008, an NRC FOIA officer advised Mr. Brodsky’s counsel that the FOIA request would encompass an estimated 40,000 pages at an agency cost of \$28,272.65, including 369 man-hours of research and reproduction (Exh. 3).

13. In this time frame, I had several telephone discussions and e-mail exchanges with Mr. Brodsky over the content of the record in this case. To assure that the record was in fact complete and to resolve petitioners’ concerns, I pledged to Mr. Brodsky that I would, and I in fact did, ask each NRC participant in the exemption application review to examine Mr. Brodsky’s FOIA request to see if any of the documents requested should be added to the record, or if any request jogged memories as to other documents that should be added to the record. This

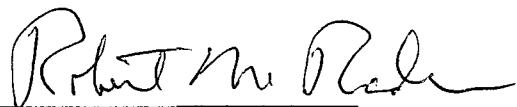
was the second half of the third step in developing the record discussed above in Paragraph 9. Mr. Brodsky was informed that this additional review had been performed. (Exh. 4)

14. Nevertheless, petitioners were not satisfied. As stated in his e-mail of July 22nd, Mr. Brodsky asked that the NRC “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.” (Exh. 5)(emphasis added).

15. As NRC counsel, I declined Mr. Brodsky’s suggestion to confirm what documents from the FOIA request might “exist” and to include what “existed” as part of the administrative record. The July 24th conference call with Court Attorney Stanley Bass resulted. Before the call, NRC counsel sent to Mr. Bass and the parties a letter summarizing the dispute and the reasons why the NRC opposed the petitioners’ request (Exh. 6).

16. As a separate matter, petitioners have questioned the NRC’s application of NRC Management Directive 3.53, “NRC Records and Document Management Program” (Rev. March 15, 2007). I have appended hereto a true copy of the relevant pages of this directive (Exh. 7).

I declare under penalty of perjury that the foregoing is true and correct. Executed on August 12, 2008.

A handwritten signature in cursive script, appearing to read "Robert M. Rader", written in black ink.

Robert M. Rader

**IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

RICHARD L. BRODSKY, et al.,

Petitioners,

v.

U.S. NUCLEAR REGULATORY COMMISSION

Docket No. 08- 1454-AG

and

UNITED STATES OF AMERICA,

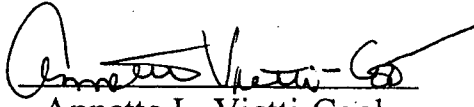
Respondents.

CERTIFIED INDEX OF THE RECORD

I hereby certify that the documents listed and described below constitute the record for the administrative proceedings resulting in the issuance of "Entergy Nuclear Operations, Inc., Entergy Nuclear Indian Point 3, LLC, Indian Point Nuclear Generating Unit No. 3; Revision to Existing Exemptions," Docket No. 50-286, published at 72 Fed. Reg. 56798 (Oct. 4, 2007), and the Commission's denial, by letter dated January 30, 2008, of petitioners' request for a hearing on the issuance of the aforementioned "Revision to Existing Exemptions," the two decisions that are the subject of the Petition for Review in this case.

Respectfully submitted,




Annette L. Vietti-Cook
Secretary of the Commission

Dated at Rockville, Maryland
this 24th day of July 2008.

CERTIFIED INDEX OF THE RECORD

BRODSKY, ET AL. v. U.S. NUCLEAR REGULATORY COMMISSION

Docket No. 08-1454-AG

Thursday, July 24, 2008

ID NO.	DOCKET NUMBER	PLANT NAME	DESCRIPTION	DOCUMENT DATE	ACCESSION NO.
1	50-247/286	INDIAN POINT 3	EXEMPTION FROM SPECIFIC REQUIREMENTS OF 10 CFR 50, APPENDIX R FOR INDIAN POINT UNIT 3 (ATTACHED TO 9/28/2007 LETTER FROM J. BOSKA, NRC TO M. BALDUZZI, ENTERGY AND PUBLISHED IN THE FEDERAL REGISTER AT 72 FED. REG. 56798 (OCTOBER 4, 2007) 18 PAGES	09/28/2007	ML072410254
2	50-247/286	INDIAN POINT 3	INDIAN POINT UNIT NO. 3 - ENVIRONMENTAL ASSESSMENT AND FINDING OF NO SIGNIFICANT IMPACT (ATTACHED TO 9/24/2007 LETTER FROM J. BOSKA, NRC TO M. BALDUZZI, ENTERGY AND PUBLISHED IN THE FEDERAL REGISTER AT 72 FED. REG. 55254 (SEPT. 28, 2007) 8 PAGES	09/24/2007	ML072110018
3	50-247/286	INDIAN POINT 3	NOTICE OF APPEARANCE OF SUSAN H. SHAPIRO 3 PAGES	12/03/2007	ML081960375

ID NO.	DOCKET NUMBER	PLANT NAME	DESCRIPTION	DOCUMENT DATE	ACCESSION NO.
4	50-247/286	INDIAN POINT 3	REQUEST TO CHAIRMAN DALE KLEIN AND IG BY SUSAN SHAPIRO FOR THE COMMISSION TO WITHHOLD FROM PUBLIC DISCLOSURE PURPORTED SECURITY RELATED INFORMATION THAT ADDRESSED THE GRANT OF AN NRC EXEMPTION FOR IP3 FROM THE APPLICATION OF 10 CFR PART 50, APPENDIX R 2 PAGES	12/03/2007	ML081970234
5	50-247/286	INDIAN POINT 3	OBJECTION TO GRANT OF EXEMPTION AND LICENSE AMENDMENT, PETITION TO REOPEN FOR CONSIDERATION, PETITION FOR LEAVE TO INTERVENE AND REQUEST FOR HEARING, AND CONTENTIONS, WITH SUPPORTING EXHIBITS AND THE FIRST DECLARATION OF ULRICH WITTE. 398 PAGES	12/03/2007	ML081960773
6	50-247/286	INDIAN POINT 3	LETTER TO CHAIRMAN DALE KLEIN, NRC FROM S. SHAPIRO, REPRESENTING SEVERAL STAKEHOLDERS. THE LETTER TRANSMITTED A COMPACT DISC CONTAINING ITEMS 3, 4 AND 5 ABOVE (APPEARANCE, REQUEST TO WITHHOLD DOCUMENTS, OBJECTION AND SUPPORTING DOCUMENTS) 1 PAGE	12/04/2007	ML081210183

ID NO.	DOCKET NUMBER	PLANT NAME	DESCRIPTION	DOCUMENT DATE	ACCESSION NO.
7	50-247/286	INDIAN POINT 3	LETTER FROM ANNETTE VIETTI-COOK, SECRETARY OF THE COMMISSION, TO SUSAN SHAPIRO, ESQUIRE, DENYING HER OBJECTION AND HEARING REQUEST CONCERNING THE NRC GRANT OF AN EXEMPTION FOR INDIAN POINT UNIT 3 FROM THE COMMISSION'S FIRE PROTECTION STANDARDS 1 PAGE	01/30/2008	ML080300243
8	50-247/286	INDIAN POINT 3	INFORMATION NOTICE 2005-07: RESULTS OF HEMYC ELECTRICAL RACEWAY FIRE BARRIER SYSTEM FULL SCALE FIRE TESTING 8 PAGES	04/01/2005	ML050890089
9	50-247/286	INDIAN POINT 3	GENERIC LETTER 2006-03: POTENTIALLY NONCONFORMING HEMYC AND MT FIRE BARRIER CONFIGURATIONS 13 PAGES	04/10/2006	ML053620142
10	50-247/286	INDIAN POINT 3	IP3 RESPONSE TO GL 2006-03 12 PAGES	06/08/2006	ML061720091
11	50-247/286	INDIAN POINT 3	IP3 ORIGINAL SUBMISSION OF REQUEST FOR REVISION OF EXISTING EXEMPTIONS FROM 10CFR50, APPENDIX R FOR HEMYC ELECTRICAL RACEWAY FIRE BARRIER SYSTEM IN FIRE AREAS ETN-4 AND PAB-2 18 PAGES	07/24/2006	ML062140057
12	50-247/286	INDIAN POINT 3	MEMO FROM DRA TO DORL SUBMITTING REQUEST FOR ADDITIONAL INFORMATION ON IP3 EXEMPTION REQUEST 3 PAGES	02/02/2007	ML070310544

ID NO.	DOCKET NUMBER	PLANT NAME	DESCRIPTION	DOCUMENT DATE	ACCESSION NO.
13	50-247/286	INDIAN POINT 3	LETTER FROM DORL TO ENTERGY REQUESTING ADDITIONAL INFORMATION ON IP3 EXEMPTION REQUEST 6 PAGES	03/15/2007	ML070730309
14	50-247/286	INDIAN POINT 3	IP3 RESPONSE TO REQUEST FOR ADDITIONAL INFORMATION 7 PAGES	04/30/2007	ML071280504
15	50-247/286	INDIAN POINT 3	IP3 SUPPLEMENT RESPONSE TO REQUEST FOR ADDITIONAL INFORMATION 10 PAGES	05/23/2007	ML071520177
16	50-247/286	INDIAN POINT 3	IP3 SUPPLEMENT SUBMISSION OF REQUEST FOR REVISION OF EXISTING EXEMPTIONS FROM 10CFR50, APPENDIX R FOR HEMYC ELECTRICAL RACEWAY FIRE BARRIER SYSTEM IN FIRE AREAS ETN-4 AND PAB-2 11 PAGES	08/16/2007	ML072400369
17	50-247/286	INDIAN POINT 3	MEMO FROM DRA TO DORL SUBMITTING THE FIRE PROTECTION SAFETY EVALUATION INPUT FOR IP3 EXEMPTION REQUEST 15 PAGES	08/27/2007	ML072350095
18	50-247/286	INDIAN POINT 3	LETTER FROM DORL TO ENTERGY GRANTING EXEMPTION FOR IP3 REQUEST FOR REVISION OF EXISTING EXEMPTIONS FROM 10CFR50, APPENDIX R 18 PAGES	09/28/2007	ML072410254

ID NO.	DOCKET NUMBER	PLANT NAME	DESCRIPTION	DOCUMENT DATE	ACCESSION NO.
19	50-247/286	INDIAN POINT 3	MEMO FROM RES TO NRR TO COMMUNICATE PRELIMINARY TEST RESULTS FOR THE HEMYC 1-HOUR RATED ELECTRICAL RACEWAY FIRE BARRIER SYSTEMS 9 PAGES	03/28/2005	ML050880176
20	50-247/286	INDIAN POINT 3	FINAL REPORT OF HEMYC 1-HOUR RATED CONDUIT AND JUNCTION BOX ELECTRICAL RACEWAY FIRE BARRIER SYSTEM PERFORMANCE TESTING 542 PAGES	04/11/2005	ML051190046
21	50-247/286	INDIAN POINT 3	FINAL REPORT OF HEMYC 1-HOUR RATED CABLE TRAY, CABLE AIR DROP AND JUNCTION BOX ELECTRICAL RACEWAY FIRE BARRIER SYSTEM PERFORMANCE TESTING 522 PAGES	04/18/2005	ML051190096
22	50-247/286	INDIAN POINT 3	MEMO FROM RES TO NRR TO PROVIDE TEST RESULTS FOR INDUSTRY-SPONSORED HEMYC 1-HOUR RATED ELECTRICAL RACEWAY FIRE BARRIER SYSTEMS 35 PAGES	09/02/2005	ML052450387
23	50-247/286	INDIAN POINT 3	MEMO FROM RES TO NRR TO PROVIDE TEST RESULTS FOR INDUSTRY-SPONSORED HEMYC 1-HOUR RATED ELECTRICAL RACEWAY FIRE BARRIER SYSTEMS 24 PAGES	11/22/2006	ML063260420
24	50-247/286	INDIAN POINT 3	ORIGINAL IP3 EXEMPTIONS FOR FIRE AREAS ETN-4 12 PAGES	02/02/1984	LL8402170510

ID NO.	DOCKET NUMBER	PLANT NAME	DESCRIPTION	DOCUMENT DATE	ACCESSION NO.
25	50-247/286	INDIAN POINT 3	IP3 APPENDIX R FIRE PROTECTION PROGRAM DESCRIPTION WITH PROPOSED MODIFICATIONS 6 PAGES	08/16/1984	LL8408230164
26	50-247/286	INDIAN POINT 3	ORIGINAL IP2 EXEMPTIONS FOR FIRE AREA ETN-4 (FOR COMPARISON) 52 PAGES	10/16/1984	LL8410290219
27	50-247/286	INDIAN POINT 3	IP3 PROPOSED EXEMPTIONS FOR FIRE AREA ETN-4 13 PAGES	09/19/1985	LL8509300292
28	50-247/286	INDIAN POINT 3	ADDITIONAL IP3 EXEMPTIONS FOR FIRE AREA ETN-4 AND PAB-2 31 PAGES	01/07/1987	LL8701140391
29	50-247/286	INDIAN POINT 3	REGULATORY GUIDE 1.189, FIRE PROTECTION FOR NUCLEAR POWER PLANTS (REV. 1, MARCH 2007) 134 PAGES	03/28/2007	ML070370183
30	50-247/286	INDIAN POINT 3	NUREG-0800, 9.5.1, STANDARD REVIEW PLAN, FIRE PROTECTION PROGRAM (REV. 5, MARCH 2007) 26 PAGES	03/23/2007	ML063190014
31	50-247/286	INDIAN POINT 3	ASTM E 119-83, STANDARD METHODS OF FIRE TESTS OF BUILDING CONSTRUCTION AND MATERIALS 27 PAGES	07/01/1983	



THE ASSEMBLY
STATE OF NEW YORK
ALBANY

RICHARD L. BRODSKY

Westchester County

CHAIRMAN

Committee on
Corporations, Authorities and Commissions

July 10, 2008

NRC Freedom of Information Act
And Privacy Act (FOIA/PA) Officer
U.S. Nuclear Regulatory Commission
Mail Stop T5-F11
Washington, DC 20555-0001

To Whom It May Concern:

Pursuant to the Freedom of Information Act (FOIA), I hereby request the following:

Any documents¹ currently or formerly in the possession of NRC, NRC staff, or affiliate organizations related to or concerning the exemption(s)² 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;

- (1) Requests for such exemptions;
- (2) Modifications to the operating license, Safety Analysis Reports (SARs), Plant Technical Specifications regarding fire protection program or hardware, or operational changes;
- (3) Those portions of Nuclear Regulatory Commission (NRC) Inspection histories for Indian Point Units 2 and 3 with respect to fire protection activities;
- (4) The fire protection design basis document(s) for Indian Point 3;
- (5) Current safe shutdown analysis;
- (6) Current Fire hazards analysis;
- (7) Current Electrical separation analysis;

¹ Documents as used in this request means any material that is written or typed or electronic, whether currently or formerly in the possession of an entity, including but is not limited to, any and all documents, data, information, maps, diagrams, charts, recordings, photographs, videos, charts, communications, correspondence, memoranda, files, and notes.

² Nuclear units licensed prior to January 1, 1979, pursuant to Appendix R are issued "exemptions" to the regulations NRC, while those licensed after 1979 are issued "deviations" from conditions in their licenses. For purposes of clarity, hereafter, this request will use the generic term "exemptions."

- (8) Types and installation dates of fire seals, fire wraps³, barriers, insulation materials
- (9) Temporary and permanent modifications, required to support implementation of the fire protection program at each of the three units;
- (10) Interim compensatory measures which are “temporary measures that units can take without prior approval to compensate for equipment that needs to be repaired or replaced,” including roving or continuously manned fire watches that occur while nuclear units take corrective actions;
- (11) Drawings indicating the specific shut down train protected, and the shutdown controls PI&Ds (Piping & Instrument Diagrams);
- (12) Operator manual actions or interim compensatory measures instituted in lieu of reliance on fire wrap including where and when made;
- (13) Spurious action analysis including multiple spurious action analysis;
- (14) Specific communication(s) between the licensee of Indian Point and the NRC regarding Thermolag, Hemyc, Kaowool, and fire seal integrity verification;
- (15) Proposed modifications for fire protection relating to Indian Point components or related equipment affecting appendix R compliance to any of the three units requiring NRC approval;
- (16) Proposed modifications to any of the three units under the 50.59 process as related to fire protection and appendix R compliance, or changes to CLB (current licensing basis) with respect to fire protection;
- (17) All communications with the NRC regarding consideration of alternative (c) to 10 C.F.R. § 50.48;⁴
- (18) Most recent triennial inspections relating to fire safety;
- (19) All Licensee event reports associated with Fire protection systems, fire related events, or changes to operational modes made as a result of a potential non-operational system related to fire protection;

³ NRC’s technical term for such a wrap is “Electrical Raceway Fire Barrier System.” However we use the term “fire wrap” because this term is widely used in practice by industry.

⁴ NRC, through 60 *Fed. Reg.* 33536 (June 16, 2004)(codified at 10 *C.F.R.* § 50.48(c)), endorsed the use of key aspects of National Fire Protection Association, NFPA-805, Performance-Based Standard for Fire Protection for Light Water Reactors Electric Generating Plants, 2001 Edition (Quincy, Massachusetts, 2001). NRC differentiates between “risk-informed” and “risk-based” regulation, noting that the former uses risk analysis to augment other information used to support management decisions, while the latter approach relies solely on the numerical results of risk assessments. NRC does not endorse a risk-based approach for fire protection.

- (20) The use of Hemyc material inside containment on Unit 3;
- (21) All docketed commitments regarding fire protection for any of the three Indian point plants;
- (22) Information concerning all fires at Indian Point;
- (23) Copies of the 900 exemptions granted since 2001 to the nation's nuclear units;
- (24) Documents that pertain to the use of operator manual actions, both approved or unapproved for Indian Point Units 2 and 3;
- (25) Exemptions, license amendments, relevant sections of changes to the SARs (Safety analysis reports) including Appendix R plants and BTP (branch technical position) 9.5.1. plants for Three Mile Island, James A. Fitzpatrick, and SONGS;
- (26) Any document concerning testing or environmental analysis conducted by the NRC prior to granting the fire safety exemption to Indian Point; and
- (27) Copies of any exemption granted to any nuclear power plant in which the exemption permits said nuclear plant to reduce to fire safety requirements from one hour;
- (28) Any communications or any other relevant information concerning an exemption from fire standards⁵ for Indian Point.

This FOIA request is related to a public interest litigation matter and is not being sought for commercial use. If any material requested is privileged, please state the name of the document and the reason it is not disclosed. To expedite release of these documents, please disclose them electronically as they become available without waiting until all the documents have been gathered. If you have any questions regarding the identity of records, the scope of the request, or any other matter, please do not hesitate to contact me. Thank you for your assistance.

Sincerely,


Sarah L. Wagner
Legal Counsel for
Assemblyman Richard Brodsky
L.O.B. 422

⁵ Fire "standards" include but not limited to, Appendix A, general design criterion 3, Appendix R, Bulletins, Information Notices, Generic Letters, NUREGS, NFPA codes, NEI guidance, INPO evaluations specific to fire protection programs, FSARs, Current License Basis specific to fire protection, NEPA codes, State and Federal Statutes, Commitments made by the Licensee regarding fire protection, License conditions, and License Amendments.

Albany, N.Y. 12248

518-455-5753

email: sarahwagneresq@gmail.com

NRC FORM 509 (6-2007)		U.S. NUCLEAR REGULATORY COMMISSION APPROVED BY OMB: 3150-0043 EXPIRES: 10/31/2008		REQUEST NUMBER FOIA/PA - 2008-0275	
		STATEMENT OF ESTIMATED FEES FOR FREEDOM OF INFORMATION ACT (FOIA) REQUEST			
REQUESTER Sarah L. Wagner		NRC CONTACT Natalie Brown		DATE 07/18/2008	
TELEPHONE 301-415-6878					
<p>Pursuant to the NRC's regulations, 10 CFR 9.40, 52 FR 49350, the NRC notifies a requester when estimated applicable fees exceed \$25.00 or a limit stated in an FOIA request. The estimated fees for processing your FOIA request are noted below. If you wish to re-scope your request to reduce fees, you may telephone the NRC contact identified above to discuss re-scoping the request. Otherwise, please provide a written response on required action noted below. If the NRC does not receive notice from you on re-scoping your request or the required written response within 10 working days from the date of this notice, the NRC will presume that you have no further interest in NRC processing your request and will close the file on your request.</p>					
ESTIMATED FEES					
SEARCH	\$ 20,292.65	369 hours (excludes 2 free hours)			
REVIEW	\$				
DUPLICATION *	\$ 7,980.00	40,000 (excludes 100 free pages)			
TOTAL	\$ 28,272.65				
<p>* Duplication estimate is based on the assumption that you want copies of disclosed records mailed directly to you. If you prefer, the NRC will make disclosed records available, if appropriate, at the NRC Electronic Reading Room accessible from NRC's web site at http://www.nrc.gov. Please note your preference in the Response section below.</p>					
<p><input checked="" type="checkbox"/> Please note the comments provided on the attached NRC Form 509A.</p> <p><input type="checkbox"/> For fee purposes, the NRC has aggregated the multiple requests identified above under the presumption that the requested records could have been the subject of a single request.</p> <p><input type="checkbox"/> Your request for a waiver or reduction of fees does not provide sufficient information under 10 CFR 9.41 for the NRC to make a determination to waive or reduce fees. If you want the NRC to consider this matter further, please submit a written request pursuant to 10 CFR 9.41 within 10 working days from the receipt of this notice.</p>					
REQUIRED ACTION					
<p><input type="checkbox"/> Please agree in writing to pay fees as high as estimated by signing and dating the Response section of this form and returning the form to the NRC contact identified above at the U.S. Nuclear Regulatory Commission, Washington, DC, 20555-0001, within 10 working days from the date of this notice.</p> <p><input checked="" type="checkbox"/> Please provide an advance payment of the estimated fees by one of the methods described on the attached NRC Form 509A within 10 working days from the date of this notice. Any overpayment of fees will be refunded to you.</p>					
<p>SIGNATURE - FOIA/PA SPECIALIST</p> <p><i>Natalie Brown</i></p>					
RESPONSE					
<p>As required above, I agree to pay fees as high as estimated. I agree to pay estimated search fees even if the NRC conducts an unsuccessful search for responsive records or determines records located are exempt from disclosure. I prefer that copies of disclosed records be provided as stated below.</p>					
<p><input type="checkbox"/> Mailed directly to me. <input type="checkbox"/> Placed in the NRC Electronic Reading Room.</p>					
SIGNATURE - FOIA/PA REQUESTER					DATE

Robert Rader

From: Richard Brodsky [richardbrodsky@msn.com]
Sent: Tuesday, July 22, 2008 1:01 PM
To: Robert Rader; sarah; richardbrodsky@msn.com

Dear Mr. Rader,

This will confirm our telephone conversation in which I asked, in an attempt to avoid unnecessary litigation, that you ask NRC staff to 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. I wish to emphasize that we do not seek an open-ended or vague search of all documents in the possession of the NRC, and are willing to work cooperatively to avoid any undue burden. But I do point out that a variety of governmental investigations into, among others, the matter before the Court have raised questions about NRC practices, including document retention and the actions of staff over the years. The Court should have as part of the Record, the documents relevant to the NRC decision, even if ignored by staff, within reason. That's why we gave you a specific list. I had hoped that we could move beyond your insistence that only documents considered by the staff would be included by specifying the other documents. If we cannot agree that you will at least seek to know if those documents exist, we should inform the Court promptly.

Richard Brodsky



OFFICE OF THE
GENERAL COUNSEL

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

July 22, 2008

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.

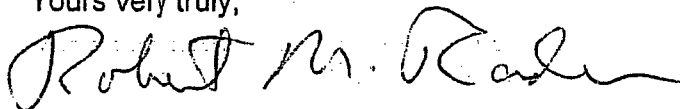
Your most recent e-mail today only serves to illuminate and perpetuate these problems. You have asked me to have the NRC staff "confirm that the documents we requested in our FOIA request exist and that they then be made part of the Record submitted to the Court." You then refer to these documents as 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,



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OFFICE OF THE
GENERAL COUNSEL

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

July 22, 2008

Mr. Stanley Bass
Court Attorney
United States Court of Appeals
for the Second Circuit
United States Court House
40 Foley Square
New York, New York 10007

BY FACSIMILE ONLY

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

Dear Mr. Bass,

This responds to your telephone call to me inquiring about the status of the expedited briefing schedule the Court had asked the parties to agree upon. You noted that the Court issued this Order two weeks ago and asked why this has not been done.

The NRC is, and throughout the past two weeks has been, ready to agree upon a reasonable briefing schedule. The delay to this point has been occasioned by back and forth discussions and correspondence between Mr. Brodsky and myself over the content of the certified index of the record.

As discussed below, the filing of the certified index of the record is solely the responsibility of the NRC under FRAP 16(a), but we have nonetheless carefully considered, and done our best to accommodate, the petitioners' requests in this regard.

The NRC intends to certify an index of all documents the NRC considered in granting the exemption to Indian Point 3, whose issuance the petitioners have challenged on appeal. The petitioners take a far broader view of what constitutes the record below. I will leave it to Mr. Brodsky to describe petitioners' position rather than characterize it for him. We have nonetheless taken the extraordinary step of inquiring of the NRC staff whether any documents in Mr. Brodsky's recent request to the NRC under the Freedom of Information Act were also considered and, thus, should be part of the index of the record.

While we have tried to cooperate with petitioners, the bottom line is that the responsibility for filing the index of the record belongs to the respondent federal agency alone. Accordingly, the NRC intends to file the index this Friday, July 25th, and the briefing schedule can be keyed to that date.

With that in mind, we would suggest the following schedule:

Pet. Br.: September 3, 2008

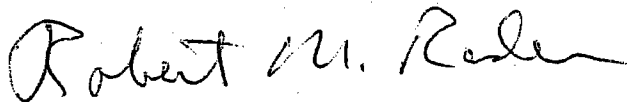
Resp. Br.: October 8, 2008

Pet. Reply Br: October 27, 2008.

We are amenable to any reasonable modification proposed by petitioners.

Thank you for your kind assistance.

Yours truly,

A handwritten signature in black ink, reading "Robert M. Rader". The signature is fluid and cursive, with the first letters of the first and last names being capitalized and prominent.

Robert M. Rader
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cc: All Counsel

U.S. NUCLEAR REGULATORY COMMISSION

DIRECTIVE TRANSMITTAL

TN: DT-07-04

To: NRC Management Directives Custodians

Subject: Transmittal of Management Directive 3.53, "NRC Records and Document Management Program"

Purpose: Management Directive 3.53 is being revised to reflect organizational changes and changes in responsibilities for managing the agency's records in the Agencywide Documents Access and Management System (ADAMS). MD 3.53 includes two handbooks: Handbook 1, "NRC Records Management Program," and Handbook 2, "ADAMS Document Processing."

No change bars have been used because of the extent of the revision.

Office of Origin: Office of Information Services

Contact: Margaret A. Janney, 301-415-7245

Date Approved: June 15, 1995 (Revised: March 15, 2007)

Volume: 3 Information Management

Part: 2 Records Management

Directive: 3.53 NRC Records and Document Management Program

Availability: Rulemaking, Directives and Editing Branch
Office of Administration
Michael T. Lesar, 301-415-7163
Christy Moore, 301-415-7086

OFFICE OF ADMINISTRATION

NRC Records and Document Management Program

**Directive
3.53**

Volume 3, Part 2 - Records Management
NRC Records Management Program
Handbook 1 of MD 3.53 Part II

**Records Disposition Objectives and
Procedures (C) (continued)**

Microfilming (13) (continued)

Temporary Records (b)

Approval by the Archivist is not required for microfilm projects involving temporary records. If it is anticipated that the microfilm copies of the records will have a value of 10 or more years, the microfilm record should conform to the standards specified in this MD.

Disposition of Personally Held Nonrecord Materials (14)

Federal officials may remove from NRC their personal papers and extra copies of publicly released, nonrecord material that they organize and maintain for reference during their employment. (a)

Extra copies of records that have not been released to the public must be handled under the requirements of this part, relevant Federal statutes, and NRC regulations and directives (e.g., Section 147 of the Atomic Energy Act of 1954, as amended; the FOIA; the Privacy Act; 10 CFR 2.390; and MDs 12.2 and 12.6). (b)

Extra copies of nonpublic records may not be removed from the agency by any NRC employee (including records generated or signed by the employee) upon retirement or separation, except for personnel-related documents such as the employee's own performance appraisals and personnel actions. In addition, special access provisions apply to the Commissioners (see Part IV, "Procedures for Managing Commissioners' Records and Papers," of this handbook for guidance on the disposition of a Commissioner's personal papers, nonrecord copies of agency records, and his or her office files). (c)

Personal papers, referred to as "personal records" under the FOIA and pertinent case law, are— (d)

Volume 3, Part 2 - Records Management
NRC Records Management Program
Handbook 1 of MD 3.53 Part II

**Records Disposition Objectives and
Procedures (C) (continued)**

Disposition of Personally Held Nonrecord Materials (14)
(continued)

Extra copies of agency records are commonly regarded as nonrecord material and may be disposed of without reference to the Federal Records Act, which defines these records and prohibits their destruction or removal from Government custody without the approval of the Archivist of the United States. (f)

Preservation of Official Record Facsimile Transmissions (15)

Fax transmissions have the same potential to be official records as any other documentary materials made or received by NRC. They are official NRC records if they are made or received in connection with agency business and are appropriate for preservation as evidence of the agency's organization and activities, or because of the value of the information they contain. (a)

Additionally, some NRC personnel may send and receive fax transmissions via personal computer fax/modems and software. When a computer is used to send or receive facsimile documents, those that are official records must be printed on paper and placed in the appropriate file. (b)

ANTI-VIRUS CERTIFICATION FORM

See Second Circuit Interim Local Rule 25(a)6.

CASE NAME: Brodsky v. U.S. Nuclear Regulatory Commission

DOCKET NUMBER: 08-1454-ag

I, (please print your name) Robert M. Rader, certify that

I have scanned for viruses the PDF version of the attached document that was submitted in this case as

an email attachment to ☒ <agencycases@ca2.uscourts.gov>.

☐ <criminalcases@ca2.uscourts.gov>.

☐ <civilcases@ca2.uscourts.gov>.

☐ <newcases@ca2.uscourts.gov>.

☐ <prosecases@ca2.uscourts.gov>.

and that no viruses were detected.

Please print the **name** and the **version** of the anti-virus detector that you used Symantec

If you know, please print the version of revision and/or the anti-virus signature files _____

(Your Signature) Robert M. Rader

Digitally signed by Robert M. Rader
DN: cn=Robert M. Rader, o=U.S.N.R.C., ou=OGC,
email=Robert.Rader@nrc.gov, c=US
Date: 2008.08.12 16:23:56 -04'00'

Date: 08/12/2008