



OFFICE OF THE
GENERAL COUNSEL

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

October 16, 2008

Richard Cushing Donovan, Clerk
U. S. Court of Appeals for the First Circuit
United States Courthouse
1 Courthouse Way, Suite 2500
Boston, MA 02210

RE: Massachusetts v. U.S. NRC, No. 08-2267

Dear Mr. Donovan:

Enclosed please find, for the case referenced above, respondent U.S. Nuclear Regulatory Commission's unopposed motion for an automatic transfer pursuant to 28 U.S.C. 2112(a)(5). Please date stamp the enclosed copy of this letter to indicate date of receipt, and return the copy to me in the enclosed envelope, postage pre-paid, at your convenience.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "J. Adler", written over a horizontal line.

James E. Adler
Attorney
Office of the General Counsel

Enclosure: As stated.

cc: service list

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

COMMONWEALTH OF)
MASSACHUSETTS,)
)
Petitioner,)
)
v.)
)
UNITED STATES NUCLEAR)
REGULATORY COMMISSION)
and the)
UNITED STATES OF AMERICA,)
)
Respondents.)

No. 08-2267

**UNOPPOSED RESPONDENT'S MOTION FOR AUTOMATIC
TRANSFER PURSUANT TO 28 U.S.C. § 2112(a)(5)**

The U.S. Nuclear Regulatory Commission (NRC) hereby moves for a transfer of the above-captioned proceeding to the United States Court of Appeals for the Second Circuit in accordance with 28 U.S.C. § 2112(a)(5).¹

¹ Matthew Brock, counsel for the Commonwealth of Massachusetts, was provided a copy of the instant motion and stated that the Commonwealth does not oppose the motion, (continued. . .)

On August 1, 2008, the NRC issued a single order denying petitions for rulemaking PRM-51-10 and PRM-51-12, which had been submitted to the NRC by the Commonwealth of Massachusetts and the State of California, respectively, and which sought very similar changes to NRC regulations relating to the environmental impacts of spent fuel pool storage of spent nuclear fuel. On August 8, 2008, the State of New York filed in the Second Circuit a petition for review of the NRC's joint denial of these rulemaking petitions. The New York petition for review was docketed by the Second Circuit on August 8, 2008 as case number 08-3903-ag, and was received by the NRC on August 11, 2008. In accordance with the deadline established by the Second Circuit, the

(...continued)

provided, however, that the Commonwealth reserves the right to request the Second Circuit to transfer the case back to the First Circuit in accordance with 28 U.S.C. § 2112(a)(5), which provides that "[f]or the convenience of the parties in the interest of justice, the court in which the record is filed may thereafter transfer all the proceedings with respect to that order to any other court of appeals."

NRC filed a certified index of the record in that court on October 10, 2008.

On September 29, 2008, the Commonwealth of Massachusetts filed in this Court the instant petition for review of the NRC's denial of the rulemaking petitions.² The Court instituted proceedings with respect to the Massachusetts petition on September 30, 2008.

When review of a single federal agency order is sought concurrently in multiple federal courts, 28 U.S.C. § 2112(a) applies. That provision first sets forth the rules for determining the destination court for the agency's administrative record, *see* § 2112(a)(1)-(3), and then requires all other courts to transfer their cases to that court, *see* § 2112(a)(5).

With respect to the scenario presented by the instant case, § 2112(a)(1) states:

² The Attorney General of Connecticut also filed a petition for review of PRM-51-10 and PRM-51-12 in the Second Circuit on September 30, 2008. That petition, because it is already in the Second Circuit, is not relevant to the instant motion to transfer.

If within ten days after the issuance of the order the agency, board, commission, or officer concerned receives, from the persons instituting the proceedings, the petition for review with respect to proceedings in only one court of appeals, the agency, board, commission, or officer shall file the record in that court notwithstanding the institution in any other court of appeals of proceedings for review of that order.

§ 2112(a)(1). The NRC received New York's petition for review on August 11, 2008, which is within the ten-day window following the August 1, 2008 issuance of the NRC's order. No other petition seeking review of this NRC order was received by the NRC within that ten-day period. Therefore, the Second Circuit is the proper court to receive the administrative record in this matter.

Section 2112(a)(5) prescribes that "[a]ll courts in which proceedings are instituted with respect to the same [agency] order, other than the court in which the record is filed pursuant to this subsection, shall transfer those proceedings to the court in which the record is so filed." Accordingly, because the Second Circuit is the proper court for the filing of the administrative record in these proceedings, § 2112(a)(5) requires that this Court transfer the instant proceeding to the Second Circuit. The statute is ministerial

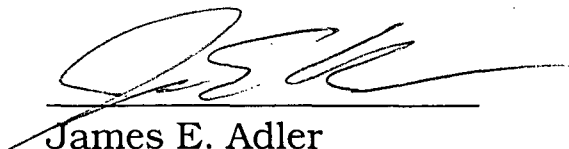
in nature. It leaves no room for judicial discretion at this stage of the proceeding.³

Therefore, the NRC respectfully requests that this Court transfer the instant proceeding to the Second Circuit.

Respectfully submitted,



John F. Cordes, Jr.
Solicitor



James E. Adler
Attorney
U.S. Nuclear Regulatory Commission
Respondent

Dated at Rockville, Maryland
this 16th day of October, 2008.

³ Section 2112(a)(5) further provides that, *following* the transfer of all proceedings to the court in which the record is filed, the latter court, “[f]or the convenience of the parties in the interest of justice...may thereafter transfer all proceedings with respect to [the agency order] to any other court of appeals.”

CERTIFICATE OF SERVICE

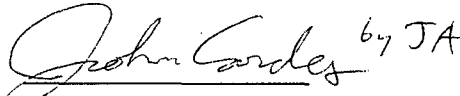
I hereby certify that on October 16, 2008, copies of the enclosed Unopposed Respondent's Motion for Automatic Transfer Pursuant to 28 U.S.C. § 2112(a)(5) were served by mail, postage prepaid, upon the following:

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 by JA
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