



OFFICE OF THE  
GENERAL COUNSEL

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

November 24, 2008

Marcia M. Waldron, Clerk  
United States Court of Appeals  
For the Third Circuit  
21400 United States Courthouse  
601 Market Street  
Philadelphia, PA 19106-1790

Re: *New Jersey Dept. of Environmental Protection v. NRC*, No. 07-2271 (3d Cir.)  
**Scheduled (tentatively) for oral argument on Monday, December 8**

Dear Ms. Waldron:

On behalf of the federal respondents, I call the Court's attention to a recent decision, *Massachusetts v. United States*, 522 F.3d 115 (1<sup>st</sup> Cir. 2008), that supports our position here. See F.R.A.P. 28(j).

In *Massachusetts*, the Commonwealth of Massachusetts argued that "new and significant information" on (among other things) terrorism justified litigating site-specific environmental contentions at an NRC license renewal hearing, notwithstanding generic findings in NRC's "Generic Environmental Impact Statement for License Renewal of Nuclear Plants" (GEIS) and implementing regulations (10 C.F.R. 51.23(c)(3)(i)). See 522 F.3d at 118, 122, 124-26. NRC found Massachusetts's contentions inadmissible, absent a petition to waive the regulations or a petition for rulemaking to change them. *Id.* at 127. The First Circuit upheld NRC's approach as "reasonable." *Id.* at 127, 129-30.

*Massachusetts* confirms, as our brief shows (pp.54-59), that NRC's generic environmental findings are not subject to challenge in an individual license renewal adjudication. The way to bring such challenges, as *Massachusetts* holds (522 F.3d at 129-30) and as our brief argues (pp. 57-58), is not through adjudicatory contentions but through a petition for rulemaking or (in some circumstances) a petition for a rule waiver. Here, New Jersey has filed neither. Thus, "as a matter of law," New Jersey "has chosen the wrong path." 522 F.3d at 118.

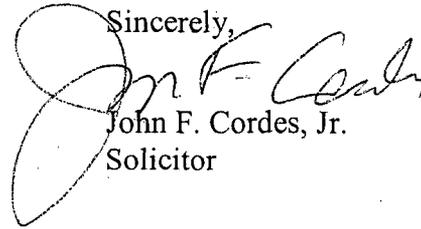
New Jersey maintains (Reply Br.22-26) that alleging "new and significant information" avoids the bar against using an individual licensing adjudication to challenge generic environmental findings. But *Massachusetts* rejected essentially the same argument. *Id.* at 126-27. As NRC pointed out in the administrative decision upheld

in *Massachusetts*, “plant-by-plant litigation ... ‘would defeat the purpose of resolving generic issues in a GEIS.’” *Id.* at 125.

I also take this opportunity to note that a lawsuit mentioned in our brief (p.59n.19) has been decided in NRC’s favor. *Spano v. NRC*, 2008 WL 4280329 (2d Cir. 2008). And two rulemaking petitions also mentioned in our brief (p.59n.19) have been resolved (73 Fed.Reg. 46204 (2008)), and are the subject of pending lawsuits. *New York v. NRC*, No. 08-3903-ag (2d Cir.) (and related cases).

Please distribute this letter to the judges hearing this case.

Sincerely,

A handwritten signature in black ink, appearing to read "John F. Cordes, Jr.", written over the typed name.

John F. Cordes, Jr.  
Solicitor

cc: Service List