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

OFFICE OF THE
GENERAL COUNSEL

December 4, 2008

Catherine O'Hagan Wolfe, Clerk
United States Court of Appeals for the Second Circuit
Thurgood Marshall U.S. Courthouse
40 Foley Square
New York, NY 10007

RE: *Massachusetts v. NRC* (08-5571-ag); *New York v. NRC* (08-3903-ag(L)); *Blumenthal v. NRC* (08-4833-ag(CON))

Dear Ms. Wolfe:

Enclosed please find, for the cases referenced above, the response by respondents U.S. Nuclear Regulatory Commission and United States of America to the Commonwealth of Massachusetts Motion to Transfer Venue and for Stay of Proceedings, which was dated November 20, 2008. 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,

James E. Adler
Attorney
Office of the General Counsel

Enclosure: As stated.

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

COMMONWEATH OF MASSACHUSETTS Petitioner, v. UNITED STATES NUCLEAR REGULATORY COMMISSION and the UNITED STATES OF AMERICA, Respondents.	No. 08-5571-ag
STATE OF NEW YORK, and RICHARD BLUMENTHAL, ATTORNEY GENERAL OF CONNECTICUT Petitioners, v. UNITED STATES NUCLEAR REGULATORY COMMISSION and the UNITED STATES OF AMERICA, Respondents.	Nos. 08-3903-ag(L) 08-4833-ag(CON)

NRC AND USA RESPONSE TO MASSACHUSETTS MOTION TO TRANSFER VENUE AND FOR STAY OF PROCEEDINGS

Massachusetts seeks twofold relief: (1) a transfer of its petition for review, along with two related petitions for review, to the United States Court of Appeals for the First Circuit; and (2) an order staying further proceedings in this Court (Docket Nos. 08-5571-ag and 08-3903-ag(L) (which includes, via consolidation, case no. 08-4833-ag(CON)) during the time it takes the Court to consider the transfer motion.

On behalf of respondents U.S. Nuclear Regulatory Commission (NRC) and the United States of America, we support Massachusetts's request for a stay of proceedings while the issue of transfer remains pending. We agree with Massachusetts that moving ahead with briefing while the ultimate venue of these cases is still unknown would run counter to efficient judicial administration.

As to the request to transfer these three petitions for review to the First Circuit, we are prepared to litigate these cases in whichever Circuit this Court in its discretion deems appropriate.

But we do *not* agree with Massachusetts that there is a clear or compelling affirmative basis for transfer. In our view, the prior First Circuit case that Massachusetts portrays as closely related to the instant proceedings is not, in fact, so closely related that it calls for a transfer. Other fairness and convenience considerations also do not clearly favor either circuit.

Because discretionary transfer under 28 U.S.C. § 2112(a)(5) is generally not appropriate absent legitimate affirmative grounds for doing so, *see Liquor Salesman's Union Local 2 v. NLRB*, 664 F.2d 1200, 1204 (D.C. Cir. 1981) (approving parties' assumption that "the court of first filing will hear the case absent a good reason to transfer it elsewhere"), it does not appear that transfer to the First Circuit is warranted.

BACKGROUND

The instant proceedings arise out of the NRC's joint denial of two separate petitions for rulemaking filed by Massachusetts and

California, respectively.[1] These rulemaking petitions asserted that the NRC must change its current generic environmental impact findings regarding spent fuel pool storage at nuclear power plants.[2] Specifically, the rulemaking petitions claimed that there is new and significant information, relating to the risk of fire at spent fuel pools, which the NRC has not yet factored into its generic environmental impact determinations. *See, e.g.*, Attachment 1 to Motion at 8.

New York and Connecticut, which each filed comments with the NRC during the applicable public comment period, *see* Motion at 9, have filed separate petitions for review in this Court (consolidated Second Circuit appeals 08-3903-ag(L) and 08-4833-ag(CON)) challenging the NRC's denial of these rulemaking petitions.

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[1] This joint denial was attached to the various petitions for review in this matter and is Attachment 2 to the Motion.

[2] Consistent with the U.S. Supreme Court's holding in *Baltimore Gas & Electric Co. v. Natural Resources Defense Council*, 462 U.S. 87 (1983), the NRC, where appropriate, addresses certain environmental impacts related to nuclear power plant licensing on a generic basis rather on a plant-by-plant basis. *See, e.g.*, 10 C.F.R. Part 51, Subpt. A., App. B (summarizing NRC generic environmental impact findings applicable to nuclear power plant license renewal).

Massachusetts also filed a similar petition for review in the First Circuit (First Circuit docket number 08-2267). Because New York's petition for review in this Court was filed on August 8, 2008, nearly two months before Massachusetts filed its September 29 petition in the First Circuit, the First Circuit, as required by law, transferred the Massachusetts petition to this Court. Attachments 3 and 5 to Motion; 28 U.S.C. § 2112(a).

This Massachusetts petition for review has since been designated by this Court as appeal number 08-5571-ag. Pursuant to the statute, this initial transfer from the First Circuit was based purely upon filing dates, with no room for judicial discretion. *See* 28 U.S.C. § 2112(a). Massachusetts now asserts that these three cases—08-3903-ag(L), 08-4833-ag(CON), and 08-5571-ag—should be transferred to the First Circuit, on the grounds that 28 U.S.C. § 2112(a)(5) permits such a transfer (following the initial non-discretionary transfer) where appropriate "for the convenience of the parties in the interests of justice." 28 U.S.C. § 2112(a)(5).

In addition to filing its petition for rulemaking with the NRC on the issue of spent fuel pool fires, Massachusetts simultaneously

attempted to litigate the same spent fuel pool fire issues before the NRC in two individual license renewal adjudications.[3] *See Massachusetts v. United States*, 522 F.3d 115, 121-24 (1st Cir. 2008). The NRC rejected those adjudicatory challenges on the ground that the issues raised were generic issues that should be addressed through rulemaking (as Massachusetts had already, by then, begun to do through its rulemaking petition) rather than by filing contentions in individual licensing adjudications. *Id.* at 125 (citing *Entergy Nuclear Vt. Yankee, LLC (Vt. Yankee Nuclear Power Station)*, 65 N.R.C. 13, 2007 WL 172517 (2007), *reconsid. denied, Entergy Nuclear Vt. Yankee, LLC (Vt. Yankee Nuclear Power Station)*, 65 NRC 211 (2007)).

Massachusetts appealed this procedural dispute to the First Circuit, which, as Massachusetts admits, resolved the question without reaching the substantive merits of Massachusetts's spent fuel pool fire concerns. Motion at 13. The First Circuit held "as a

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[3] These two licensing proceedings involved the Pilgrim and Vermont Yankee nuclear power plants, respectively. *See id.*

matter of law that [Massachusetts] ha[d] chosen the wrong path in seeking to raise the safety issues as a party in [individual power plant] licensing proceedings." 522 F.3d at 118. According to the First Circuit, a "well-established [NRC] rule" did not permit Massachusetts "in individual relicensing proceedings to raise generic safety concerns." *Id.* at 129-130. Therefore, the First Circuit upheld the NRC's requirement that such generic issues be dealt with on a generic basis via the rulemaking process. *Id.* at 130.

These substantive spent fuel pool environmental impact issues are now before this court on petitions for review arising out of the Massachusetts rulemaking petition, and a similar one filed by California. (The NRC considered the petitions together.).

DISCUSSION

Massachusetts seeks to return its petition for review to the First Circuit, where it was filed originally, along with New York's and Connecticut's, which were filed in this Court. We quite agree that all three petitions should be consolidated and decided together in the same Circuit. That would seem to be the very point of 28 U.S.C. § 2112(a)(5). But by operation of that statute all three petitions are

now already before this Court and can be decided together here. We do not believe Massachusetts has made a strong showing that this litigation is sufficiently related to a prior First Circuit case to dictate transfer to that Circuit, or that Massachusetts is substantially more aggrieved than New York or Connecticut so as to give its choice of venue priority.

I. Relatedness of Cases

The Massachusetts and California rulemaking petitions asked the NRC to amend its regulations in a manner that would impact National Environmental Policy Act[4] reviews in all nuclear power plant licensing proceedings. These generic environmental impact regulations had been developed through a rulemaking process, and so any amendments to the regulations should also, logically, be implemented through the rulemaking process. Despite this, Massachusetts's prior petition for review in the First Circuit, which that court denied, sought to compel the NRC to litigate the propriety

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[4] 42 U.S.C. §§ 4321-4370f.

of these generic rulemaking determinations at plant-specific agency hearings. In our view, the prior First Circuit case simply closed the door on a procedural misstep by Massachusetts. Accordingly, that case should have little bearing on a venue dispute in the instant case, which is the outgrowth of a procedurally separate, and procedurally proper, attempt to change the substance of an NRC generic environmental impact determination.

The distinction between generic and plant-specific issues is not merely a technicality. Because the instant case involves a generic issue applicable to all nuclear power plant licensing, *see, e.g.*, Attachment 1 to Motion at 1-2 (summarizing the rule changes sought by Massachusetts), there is no clear reason why this case is any more related to the particular nuclear plants of concern to Massachusetts—Pilgrim and Vermont Yankee—than to the nuclear plants of concern to New York and Connecticut. Moreover, the specific NRC order whose review is now sought did not arise out of the Vermont Yankee or Pilgrim license renewal proceedings at issue in the prior First Circuit case; rather, the order addressed petitions for rulemaking filed by Massachusetts and another state—

California—which presumably has little particularized interest in plants located in Vermont and Massachusetts.

In addition, because the instant proceedings present substantive environmental impact questions in a generic context, whereas the prior First Circuit case presented procedural questions in a plant-specific context, the various cases cited by Massachusetts provide little support for transfer on case-relatedness grounds.

For instance, the decisions in *NLRB v. Bayside Enterprises, Inc.*, 514 F.2d 475 (1st Cir. 1975), and *ACLU v. FCC*, 486 F.2d 411 (D.C. Cir. 1973), which Massachusetts cites for support (*see* Motion at 12-13), addressed the initial *automatic* transfer under § 2112(a)(5), not the recipient Circuit's option for subsequent discretionary transfer based upon "convenience" or the "interests of justice." *See* 514 F.2d at 476 (explaining that Congress created the initial automatic transfer mechanism to avoid "confusion and duplication of effort"); 486 F.2d at 413-14 (construing the term "the same order" broadly to encompass multiple agency orders issued under the same agency docket number and involving the exact same

agency administrative record); *see also Eastern Airlines, Inc. v. CAB*, 354 F.2d 507, 509 (D.C. Cir. 1965) (referring to the discretionary transfer provision solely to support a holding that a broad reading of the initial *automatic* transfer provision would not conflict with the statute's overall intent).[5]

Meanwhile, in the cases cited by Massachusetts that *do* relate to the discretionary transfer provision of § 2112(a)(5), the degree of relatedness between the cases in question was much greater than here. *See AT&T v. FCC*, 519 F.2d 322 (2d Cir. 1975) (reasoning that particular outcomes in a parallel D.C. Circuit case "would, in effect,

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[5] Even if *Eastern Airlines* were viewed as applying to the discretionary transfer provision of § 2112(a)(5) rather than the automatic transfer provision, the facts of that case would not support Massachusetts's claim. In *Eastern Airlines*, the D.C. Circuit transferred to the First Circuit a petition for review challenging a Civil Aeronautics Board (CAB) order that the First Circuit had already reviewed in an earlier case. 354 F.2d at 509. Moreover, the challenged CAB order had been issued "in response to [a prior First Circuit] remand." *Id.* The *Eastern Airlines* court was also careful to note that if, hypothetically, additional related proceedings at the CAB had produced a brand new CAB order, a judicial challenge to that new order in the D.C. Circuit would not necessarily have required transfer to the First Circuit. *Id.* at 511.

moot [the Second Circuit's] proceeding"); *ITT World Communications, Inc. v. FCC*, 621 F.2d 1201, 1208 (2d Cir. 1980) (finding that two cases presented "the same essential issue" regarding the Western Union Telegraph Company's right to offer direct overseas telegraph services). In the instant scenario, we are not aware of, and Massachusetts has not identified, any pending court case that could undermine the viability of the instant proceedings.

In sum, the procedural issue the First Circuit considered and decided in *Commonwealth of Massachusetts v. NRC* is very different from (and so not "essentially the same" as) the substantive environmental impact issues that will be litigated in the instant proceedings. The First Circuit simply did not speak to the merits issues at stake in the current set of petitions for review. Thus, as we see it, this Court ought not give much if any weight to the prior First Circuit decision. Given the lack of true relatedness, we see no particular "efficiency" reason for this Court to send this litigation to the First Circuit.

II. Other Considerations

As indicated above, Massachusetts did submit one of the two

rulemaking petitions whose denial by the NRC is at issue in this case. New York and Connecticut, meanwhile, were involved in the petitions for rulemaking only as commenters on the petitions.

This distinction, however, provides little apparent indication that Massachusetts is more "aggrieved" than either New York or Connecticut by the NRC's generic conclusions on the issue of fire risks at spent fuel pools. Indeed, just as Massachusetts did in the NRC's Vermont Yankee and Pilgrim license renewal proceedings, *see* Motion at 3-4, New York and Connecticut filed intervention petitions in the presently ongoing Indian Point nuclear power plant license renewal proceeding, and each petition presented spent fuel pool environmental impact concerns similar to those raised in the Massachusetts and California rulemaking petitions. *See Entergy Nuclear Operations, Inc. (Indian Point Nuclear Power Station, Units 2 and 3),* LBP-08-13, 68 NRC __, slip op. at 117-19, 147-48 (slip op. July 30, 2008).[6]

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[6] This decision is not yet available on Westlaw or Lexis, but it is available via the Agency-Wide Document Management System
(continued. . .)

Indeed, the generic nature of the NRC's environmental impact determination for spent fuel pools means that plants of concern to New York and Connecticut are affected by the NRC's generic determination on spent fuel pool environmental impacts just the same as the plants of concern to Massachusetts, particularly given that plants of interest to each state are currently seeking renewed licenses.[7] Massachusetts's claim that it is the party "*most* clearly aggrieved," Motion at 14-15 (emphasis added), therefore, seems to us incorrect.

(. . .continued)

(ADAMS) on the NRC's public website (www.nrc.gov/reading-rm/adams/web-based.html) as ADAMS Accession # ML082130436.

[7] Note that Massachusetts and California had already filed rulemaking petitions by the time the plant generating New York's and Connecticut's interest—Indian Point—sought license renewal. *See* Motion at 5 n.5; Attachment 2 to Motion at 46204; 72 Fed. Reg. 26850 (May 11, 2007) (announcing receipt of Indian Point renewal application). New York and Connecticut reasonably choose to participate in the already-pending rulemaking process by commenting on the existing rulemaking petitions rather than filing duplicative petitions of their own.

As to "convenience" factors, although the NRC and the United States are based in the Washington, D.C. area (which is somewhat closer to the Second Circuit's headquarters than to the First Circuit's), we are fully capable of traveling to either circuit, and the difference in convenience between the two would appear to be minimal.

CONCLUSION

For the reasons stated above, we support the Massachusetts request for a stay of 08-3903-ag(L), 08-4833-ag(CON), and 08-5571-ag while the transfer request remains pending. We do not, however, agree with Massachusetts that there is a strong affirmative case supporting transferring these cases to the First Circuit.

Respectfully submitted,

John E. Arbab
Attorney
Appellate Section
Environmental and Natural
Resources Division
U.S. Department of Justice
P.O. Box 23795
L'Enfant Plaza Station

John F. Cordes
Solicitor

James E. Adler
Attorney
Office of the General Counsel
U.S. Nuclear Regulatory

Washington, D.C. 20026
202-514-4046

Commission
Washington, D.C. 20555
301-415-1656

Dated at Rockville, Maryland
this 4th day of December, 2008

CERTIFICATE OF SERVICE

I, John Cordes, hereby certify that on December 4, 2008, copies of the enclosed NRC and USA Response to Massachusetts Motion to Transfer and for Stay of Proceedings were served by email and mail, postage prepaid, upon the following:

Matthew Brock, Esq.
Assistant Attorney General
Environmental Protection Division
Office of the Attorney General
One Ashburton Place
Boston, MA 02108
matthew.brock@state.ma.us

Robert Snook, Esq.
Assistant Attorney General
Office of the Attorney General
State of Connecticut
55 Elm Street
Hartford, CT 06106
robert.snook@po.state.ct.us

John J. Sipos, Esq.
Assistant Attorney General
Office of the Attorney General
The Capitol
Albany, NY 12224
john.sipos@oag.state.ny.us

Catherine E. Stetson, Esq.
Hogan & Hartson LLP
555 Thirteenth Street, NW
Washington, DC 20004
cestetson@hhlaw.com

David R. Lewis, Esq.
Pillsbury Winthrop Shaw and Pittman, LLP
2300 N Street, NW
Washington, DC 20037
david.lewis@pillsburylaw.com

Jessica L. Ellsworth, Esq.
Hogan & Hartson LLP
555 Thirteenth Street, NW
Washington, DC 20004
jlellsworth@hhlaw.com

_____
Date

_____
John F. Cordes
Solicitor
U.S. Nuclear Regulatory Commission