



OFFICE OF THE
GENERAL COUNSEL

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

January 12, 2009

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 Proceed on the Original Record. Please stamp the extra copy of this letter and return to me in the enclosed self-addressed, stamped envelop.

This package was originally intended for delivery to your office on January 6, 2009 – the date of the document enclosed. It was, however, misaddressed and delivered to another address by mistake at that time. This letter and enclosures correct that mistake. The parties were served on January 6, 2009 as indicated in the attached Certificate of Service.

Thank you for your kind assistance.

Yours truly,

A handwritten signature in black ink that reads "Robert M. Rader".

Robert M. Rader
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cc: All Counsel

from the customary practice of this Court, not to mention the unbroken practice of the NRC in litigation before the Courts of Appeals. By a rough count, the full record is about 2500 pages. It will not help this Court to have all 2500 pages filed with the Clerk. The contrary, it will defeat the very purpose of the Joint Appendix, which is to provide the panel judges with copies of the really important documents.

As a courtesy, the NRC provided the entire record to petitioners and to intervenor Entergy when the certified index was filed. Therefore, it should be no problem for the parties to designate those parts of the record important to their respective cases for inclusion in the Joint Appendix in the usual manner. Rather than burden the Court with the entire record, the parties can present in a Joint Appendix, as called for by the Federal Rules of Appellate Procedure, those documents that “are of essential importance to the issues raised on appeal.” Brodsky Declaration ¶ 7.

Finally, we note that the time for designating the contents of the Joint Appendix per FRAP 30(b)(1) – ten days after filing the record – has long since passed. If petitioners wanted relief from their duty to prepare an appendix, they should have asked for it long ago, rather than risk delaying this case even more. Nonetheless, even at this late date, the NRC stands

ready to cooperate with petitioners in designating record documents for a Joint Appendix.

Argument

This case was filed nearly a year ago and has been largely consumed since that time by petitioners' efforts to supplement the NRC administrative record of the proceedings at issue here. Following a number of conferences among counsel and the Court's Staff Attorney as well as a formal motion by petitioners, this Court ordered an expedited briefing and argument schedule, and forwarded petitioners' motion to supplement the record to the merits panel. The Court further stated: "In their briefs, the parties are free to address the need *vel non* to supplement the record in light of any particular argument that may be advanced on appeal." Order (Dec. 15, 2008).

We thought that settled what constitutes the record before the Court and how the parties should proceed in briefing the case, including the ordinary responsibilities under FRAP 30 for petitioners' preparation of the Joint Appendix. Now, however, petitioners have filed yet another motion seeking to rearrange things.

As this Court is aware from the current docket, the Secretary to the Commission has certified, as outlined in FRAP 17(b)(1)(B), "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. This follows the procedure that the NRC has routinely pursued in every Hobbs Act¹ case before the United States Courts of Appeals, including the Second Circuit.

Petitioners now ask that this Court order the NRC to file the entire 2500-page administrative record and dispense with the filing of a Joint Appendix. The only rationale offered for this relief is that record documents “are of essential importance to the issues raised on appeal.” Brodsky Declaration ¶ 7. That is true, of course, in every judicial review case. Yet, petitioners do not explain why filing the filing of the *entire* record here would facilitate (rather than encumber) the Court’s focus upon “essentially important” documents – precisely the purpose of the Joint Appendix. This Court has made clear that it finds Joint Appendix references in the brief critical to its review. *United States v. Zhou*, 428 F.3d 361, 366 n.3 (2d Cir.

¹ The Hobbs Act, in combination with the Atomic Energy Act, is the statute that provides direct court of appeals jurisdiction over NRC orders, *See* 28 U.S.C. § 2342(4); 42 U.S.C. § 2239(b).

2005), citing *Kushner v. Winterthur Swiss Ins. Co.*, 620 F.2d 404, 407 (3d Cir.1980) (if the Court of Appeals “is not supplied with the proper tools to decide cases, then extremely valuable time, already severely rationed, must be diverted from substantive work into correspondence and communications with the Clerk and counsel to obtain the vital information negligently or deliberately omitted from the appendix”).

It certainly will not help the Court or the parties to file the roughly 2500-page administrative record in its entirety.² The Courts of Appeals have repeatedly stated that they do not want to deal with volumes of record documents. See, e.g., *St. John's United Church of Christ v. FAA*, 2008 WL 5264654, 5 (D.C. Cir. 2008). Some of those documents, or portions of them,

² The Notes of the Advisory Committee indicate that FRAP 30(f) – which allows courts to dispense with an appendix and proceed on the full record -- arises from the (now discontinued) practice of the Ninth Circuit in requiring the entire administrative record to be filed. The Ninth Circuit now allows agencies to file a certified index of the record per FRAP 17(b)(1)(B), and then requires each party to file Excerpts of the Record (akin to an appendix) with their respective briefs. See Ninth Circuit Rule 30-1.

In fact, the undersigned counsel recently filed the Certified Index of the Record in a Ninth Circuit Hobbs Act case. *Crane v. NRC*, No. 08-72973 (9th Cir.). Each party filed its brief along with its own Excerpts of the Record. The Advisory Committee further indicates that other circuits have used FRAP 30(f) sparingly, for example, a civil case with a record less than 200 pages. To our knowledge, no court uses FRAP 30(f) as petitioners have requested.

are likely to prove not pertinent to the issues on appeal. For example, the record contains two reports prepared by consulting firms on the fire rating of the cable firewrap at issue in this case. Those two reports alone total over 1,000 pages. *See* Certified Index of the Record, Items 20 and 21 (July 24, 2007). Likewise, petitioners' own submission to the NRC seeking an administrative hearing is 400 pages. *Id.*, Items 4, 5, and 6. No justification exists for cluttering the Court's docket with all of this material.

The unstated reason for petitioners' request, by inference, might be to relieve petitioners of the cost and effort in preparing the Joint Appendix. But FRAP 30(a) makes clear that it is the petitioner's responsibility to prepare and file an Appendix, after conferring with the other parties to determine its contents. FRAP 30(b)(1). Further, we have already advised petitioners' counsel that the NRC is mindful of its obligation not to over-designate and would cooperate in producing a manageable Joint Appendix. *See Stewart Park & Reserve Coalition, Inc. v. Slater*, 352 F.3d 545, 561 (2d Cir. 2003) (criticizing "prolix" appendix).

Finally, FRAP 30(b)(1) obligated petitioners to have designated those parts of the record they intend to include in the Joint Appendix ten days after the NRC filed the Certified Index of the Record (and delivered a full copy of

the record to the other parties) on July 25, 2008). Petitioners never did so, but instead pursued relief before this Court on supplementing the record.

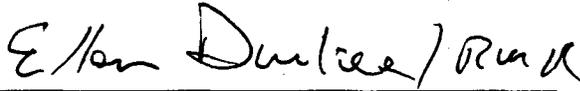
If petitioners had solid grounds for asking that the entire record be filed, rather than the certified index, they certainly should have asked the NRC to consider that option *before* the agency incurred the time and expense of preparing the Certified Index. Even if the NRC had declined, petitioners should have designated the record for Joint Appendix contents, and explained to this Court at the time why this procedure was inadequate.

Conclusion

Petitioners have stated no reason why this Court should not employ its customary practice under FRAP 30 for the filing of a Joint Appendix from which the parties may make references to important parts of the record in their briefs. The novel approach suggested by petitioners would mark an unprecedented and unjustified departure from agency review procedures in this Court as well as the way the NRC has prepared the agency's administrative record for judicial review in every other circuit.

Respectfully submitted,

RONALD J. TENPAS
Assistant Attorney General

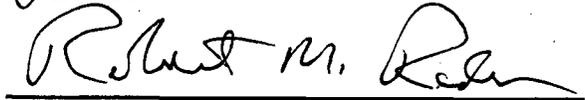


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Dated: January 6, 2008

CERTIFICATE OF SERVICE

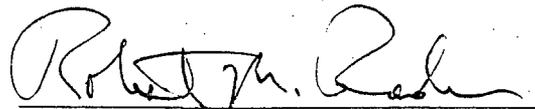
I hereby certify that I have on this 6th day of January 2009 served upon the following, by deposit in the United States Mail, first class, postage prepaid, and by electronic transmission, a copy of Federal Respondents' Federal Respondents' Opposition to Petitioners' Motion to Proceed on the Original Record:

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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

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(Your Signature) Robert M. Rader

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