



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

November 17, 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

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 Unopposed Motion by U.S. Nuclear Regulatory Commission for Leave to File Rule 28(j) Letter. Electronic filing and service upon counsel have been made as well.

Thank you for your kind assistance.

Yours truly,

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

Robert M. Rader  
Senior Attorney  
Office of the General Counsel  
Nuclear Regulatory Commission  
(301) 415-1955 (voice)  
(301) 415-3200 (fax)  
[Robert.Rader@nrc.gov](mailto:Robert.Rader@nrc.gov) (e-mail)

cc: All Counsel

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Thurgood Marshall U.S. Courthouse at Foley Square 40 Centre Street, New York, NY 10007 Telephone: 212-857-8500

MOTION INFORMATION STATEMENT

Docket Number(s): 08-1454-ag

Caption [use short title]

Motion for: Leave to File Rule 28(j) letter

Richard L. Brodsky v. NRC

Set forth below precise, complete statement of relief sought:
Leave requested to file Rule 28(j) letter with new authority in support of pending NRC Petition for Rehearing and Rehearing en Banc

MOVING PARTY: Respondent NRC

OPPOSING PARTY: Richard L. Brodsky

- Plaintiff Defendant
Appellant/Petitioner Appellee/Respondent

MOVING ATTORNEY:

[name of attorney, with firm, address, phone number and e-mail]
Robert M. Rader
Senior Attorney
Office of the General Counsel
U.S. Nuclear Regulatory Commission
11555 Rockville Pike, Mail Stop O-15D21
Rockville, MD 20852

OPPOSING ATTORNEY [Name]:

[name of attorney, with firm, address, phone number and e-mail]
Richard L. Brodsky
Assemblyman, 92nd District
Westchester County, State of New York
Legislative Office Building
Room 422
Albany, NY 12248

Court-Judge/Agency appealed from:
NRC

Please check appropriate boxes:

- Has consent of opposing counsel?
A. been sought?
B. been obtained?
Has service been effected?
Is oral argument requested?

FOR EMERGENCY MOTIONS, MOTIONS FOR STAYS AND INJUNCTIONS PENDING APPEAL

- Has request for relief been made below?
Has this relief been previously sought in this Court?

Has argument date of appeal been set?
If yes, enter date: 5/11/09 (already heard)

Requested return date and explanation of emergency:

Signature of Moving Attorney:
Date: 11/17/09

ORDER

IT IS HEREBY ORDERED that the motion is GRANTED DENIED.

FOR THE COURT:
CATHERINE O'HAGAN WOLFE, Clerk of Court

Date:
Form T-1080 (Revised 10/31/02)

By:

IN THE UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

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RICHARD L. BRODSKY, et al.,	)	
	)	
Petitioners,	)	
	)	
v.	)	Motion for Leave to
	)	File Rule 28(j) Letter
	)	
U.S. NUCLEAR REGULATORY	)	
COMMISSION,	)	Docket No. 08-1454-AG
	)	
and	)	
	)	
UNITED STATES OF AMERICA,	)	
	)	
Respondents.	)	
	)	

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**UNOPPOSED MOTION BY U.S. NUCLEAR REGULATORY  
COMMISSION FOR LEAVE TO FILE RULE 28(j) LETTER**

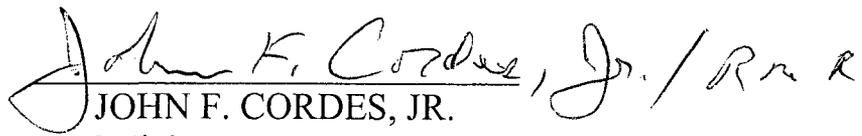
This case was decided on August 27, 2009. On October 9, 2009, NRC petitioned this Court for rehearing and rehearing *en banc*. On November 4, 2009, NRC filed a Rule 28(j) letter with the Court, including 24 copies for distribution to the *en banc* Court. The letter informs the Court of a new Ninth Circuit case, *California Energy Comm'n v. DOE*, 2009 WL 3448422 (9<sup>th</sup> Cir., Oct. 28, 2009), decided and reported *after* the petition for rehearing was filed. Because this new decision presents fact and law strikingly analogous to the decision in this case for which rehearing has been

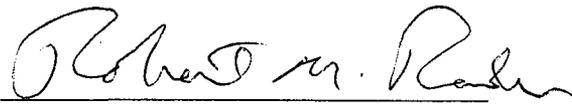
sought, NRC wished to bring this important development to the attention of the Court.

Before filing the Rule 28(j) letter, the below signed attorney for NRC called the Clerk's office concerning procedure and was instructed to send 24 copies of the letter to the Court. NRC took this instruction to mean that the filing was permissible. On November 17, 2009, counsel received a call from the clerk nonetheless stating that permission to file the Rule 28(j) letter was required.

Accordingly, NRC requests leave to file the Rule 28(j) letter dated November 4, 2009, and requests that such permission be granted *nunc pro tunc* to the date of filing so that the undocketed letter can be distributed to the *en banc* Court. Opposing counsel has consented to this relief. All parties have been served.

Respectfully submitted,

  
JOHN F. CORDES, JR.  
Solicitor

  
ROBERT M. RADER  
Senior Attorney  
Office of the General Counsel  
U.S. Nuclear Regulatory Commission  
(301) 415-1955 (voice)  
(301) 415-3200 (fax)

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

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<b>RICHARD L. BRODSKY, et al.,</b>	)	
	)	
<b>Petitioners,</b>	)	
	)	
<b>v.</b>	)	<b>Declaration of</b>
	)	<b>Robert M. Rader</b>
	)	
<b>U.S. NUCLEAR REGULATORY</b>	)	
<b>COMMISSION,</b>	)	<b>Docket No. 08-1454-AG</b>
	)	
<b>and</b>	)	
	)	
<b>UNITED STATES OF AMERICA,</b>	)	
	)	
<b>Respondents.</b>	)	

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**Declaration of Robert M. Rader**

Pursuant to 28 U.S.C. § 1746, I, Robert M. Rader, do declare:

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 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. I file this Declaration in support of the attached Unopposed Motion by U.S. Nuclear

Regulatory Commission for Leave to File Rule 28(j) Letter.

2. This case was argued on May 11, 2009 and decided on August 27, 2009. On October 9, 2000, the U.S. Nuclear Regulatory Commission filed a Petition for Rehearing and Rehearing en Banc. That petition is now pending.

3. On November 4, 2009, the NRC filed by overnight delivery, and served upon the parties electronically and by U.S. mail, a Rule 28(j) letter bringing to the attention of this Court the decision in *California Energy Comm'n v. DOE*, 2009 WL 3448422 (9<sup>th</sup> Cir., Oct. 28, 2009).

4. On November 17, 2009, the undersigned counsel was advised by the Clerk that leave to file the aforesaid Rule 28(j) letter must be made by motion. Accordingly, this Declaration is made in support of NRC's motion for leave to file its Rule 28(j) letter in support of its pending petition for rehearing and rehearing en banc.

5. The decision in *California Energy Comm'n v. DOE*, 2009 WL 3448422 (9<sup>th</sup> Cir., Oct. 28, 2009) is pertinent to this Court's decision on the pending petition and the NRC respectfully urges this Court to consider this decision and the accompanying letter of November 4, 2009.

I declare under penalty of perjury that the foregoing is true and correct. Executed on November 17, 2009.



Robert M. Rader

## CERTIFICATE OF SERVICE

I hereby certify that I have on this 17<sup>th</sup> day of November 2009 served upon the following, by deposit in the United States Mail, first class, postage prepaid, and by electronic transmission, a copy of Unopposed Motion by U.S. Nuclear Regulatory Commission for Leave to File Rule 28(j) Letter and supporting Declaration of Robert M. Rader Rehearing and Suggestion of Rehearing En Banc:

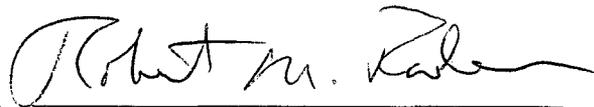
Richard L. Brodsky  
Assemblyman, 92<sup>nd</sup> District  
Westchester County, State of New  
York  
Legislative Office Building  
Room 422  
Albany, NY 12248

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New York, NY 10271



Robert M. Rader  
Counsel for Federal Respondents

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: 2009.11.17 15:22:39 -0500

Date: 11/17/2009