ORAL ARGUMENT SCHEDULED FOR MAY 9, 2012

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

THE STATE OF VERMONT DEPARTMENT OF PUBLIC SERVICE, and the NEW ENGLAND COALITION Petitioners, v. UNITED STATES NUCLEAR REGULATORY COMMISSION, and the UNITED STATES OF AMERICA Respondents.	)	Nos. 11-1168 and 11-1177 (Consolidated)

FEDERAL RESPONDENTS' OPPOSITION TO PETITIONERS' MOTION TO STRIKE AMENDMENTS TO THE CERTIFIED INDEX OF THE RECORD

The Federal Respondents — the Nuclear Regulatory Commission (NRC) and the United States — oppose petitioners' March 5, 2012 motion to strike all references to four documents from the amended certified index of the record for the above-captioned cases, which the Federal Respondents filed on February 24, 2012. Petitioners' motion is meritless.

1. Generally, when an NRC rule or order faces judicial challenge, the NRC's Office of the Secretary prepares the certified index of the record for the

case by listing items contained in the adjudicatory or rulemaking docket she has compiled during the administrative proceeding.

In this case, petitioners' central claim in this Court — the NRC's allegedly unlawful failure to obtain a new Clean Water Act § 401 certification from Entergy before relicensing Entergy's Vermont Yankee nuclear power plant — was raised only briefly by petitioners before the NRC's Atomic Safety Licensing Board, which rejected it on procedural grounds. Petitioners then seemingly dropped the claim. They took no administrative appeal to the Commission. As our brief explains (at pp. 21-33), in light of petitioners' failure to exhaust administrative remedies, at the time of their lawsuit the agency did not have in hand the same kind of pre-determined and useful record for judicial review as it normally would. *See, e.g., McCarthy v. Madigan*, 503 U.S. 140, 145-46 (1992) ("produc[ing] a useful record for subsequent judicial consideration" is one of the key rationales for the exhaustion of remedies rule).

As a result, some documents relevant to the Clean Water Act question were never entered into the NRC's adjudicatory hearing docket, and did not appear among the 759 items listed on the original 121-page certified index prepared by the NRC's Secretary, which we filed with this Court on July 1, 2011. The NRC's counsel initially (and inadvertently) overlooked this omission when reviewing the draft certified index.

2. After recognizing later that we may have inadvertently omitted some relevant documents from the original certified index of the record, we contacted the other parties by email to ascertain whether there were any pertinent items they believed should be added to the record. Petitioners did not request any additions, but the intervenors suggested a few more documents.

On February 17, 2012, staff from this Court's Clerk's office, including a senior staff attorney, advised us by telephone that the proper procedure in this situation is to file an amended certified index to correct all lingering omissions in our initial certified index. After consulting with the parties, we had identified 19 additional documents, so we included them in our amended certified index, which (following the advice of the Clerk's office) we then filed in this Court.

Petitioners now oppose the addition of four of the 19 additional documents. Those four documents relate to Vermont Yankee's original state certification under § 401 of the Clean Water Act.

3. Petitioners imply that our filing of an amended certified index was procedurally improper. *See* Pet. Motion to Strike at 2. But Rule 16(b) of the Federal Rules of Appellate Procedure, while stating that the parties may supply any omission in the certified index of the record by stipulation, does not rule

out other approaches. Here, we followed an alternative path suggested by this Court's Clerk's office.

4. Procedural niceties aside, there is no reason for this Court to strike the four record items that petitioners find objectionable. This Court has held that "any document that might have influenced the agency's decision" may be properly considered part of the "record" under Federal Rule of Appellate Procedure 16(a) and 28 U.S.C. § 2112(b). *See National Courier Assoc. v. Bd. of Gov. of Fed. Res. Sys.*, 516 F.2d 1229, 1241 (D.C. Cir. 1975). *See also Pers. Watercraft Indus. Ass'n v. Dep't of Commerce,* 48 F.3d 540, 546 n.4 (D.C. Cir. 1995) (the "whole record" contains all materials "pertaining to the [challenged] regulation"); *Amfac Resorts, LLC v. DOI*, 143 F. Supp. 2d 7, 12-13 (D.D.C. 2001) ("First and most basically, a complete administrative record should include all materials that 'might have influenced the agency's decision,' and not merely those on which the agency relied in its final decision") (citations omitted).

Likewise, this Court has explained that"[i]f a court is to review an agency's action fairly, it should have before it neither more nor less information than did the agency when it made its decision. . . ." *Walter O. Boswell Memorial Hospital v. Heckler,* 749 F.2d 788, 792 (D.C. Cir. 1984) (citations omitted). *See also IMS, P.C. v. Alvarez,* 129 F.3d 618, 623-24 (D.C.

Cir. 1997) (materials outside the record are those that were not available to the agency when it took the action being challenged).

5. As petitioners point out, the Commission's final licensing order in this case did not address the continuing validity of Vermont Yankee's original § 401 water-quality certification. *See* Pet. Motion to Strike at 3. But that is because petitioners did not properly raise and litigate that issue before the Commission. Contrary to petitioners' apparent belief, the Commission never determined that the original certification documents had no potential legal significance, or that they were irrelevant to this case.

On the contrary, the original § 401 certification documents were and are available in the NRC's own files and are potentially pertinent to the agency action in this case, as demonstrated by the arguments in the intervenor's brief in this Court (pp. 20-32) and by intervenor's license-renewal application at NRC. *See* Certified Index #740 (Entergy's License Renewal Application for Vermont Yankee, which references the original § 401 certification).

There is no reason to strike from the record documents available in agency files and relied on by one of the parties (intervenor) in its application to NRC and in its brief before this Court. Notably, petitioners do not object to 15 of the 19 documents added to the original certified index. Their own brief cites a number of those documents.

6. The Federal Rules of Appellate Procedure require the agency to compile the record, and are premised on the presumption that agency recordkeepers, here the NRC Secretary, will be faithful to this task. *See, e.g., Citizens for Alternatives to Radioactive Dumping v. U.S. Dept. of Energy*, 485 F.3d 1091, 1097 (10th Cir. 2007) ("Designation of the administrative record, like any established administrative procedure, is entitled to a presumption of administrative regularity. The court assumes the agency properly designated the Administrative Record absent clear evidence to the contrary.") (internal citation omitted). *See also United States v. Chem. Found.*, 272 U.S. 1, 14-15 (1926) ("The presumption of regularity supports the official acts of public officers, and, in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties"); *Starr v. FAA,* 589 F.2d 307, 315 (7th Cir. 1979) (the "normal presumption of good faith . . . must be refuted by well-nigh irrefragable proof").

Here, petitioners have not shown that the four documents added to the amended certified index of the record were irrelevant or unavailable to the agency in this case, because they cannot do so. Instead, they generally allege that some malevolent "desire to distract" the Court, Pet. Motion to Strike at 5, or to unfairly aid the intervenor's arguments motivated the agency's action, rather than our simple desire to ensure that the Court had before it all

documents potentially relevant to its review in this case. But petitioners' allegations are based on nothing but unfounded speculation, and cannot defeat the presumption of good faith attendant to agency record-filing.

Conclusion

For the foregoing reasons, this Court should deny petitioners' motion to strike the four identified documents from the certified index of the record.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on **March 15, 2012**, a copy of foregoing "FEDERAL RESPONDENTS' OPPOSITION TO PETITIONERS' MOTION TO STRIKE AMENDMENTS TO THE CERTIFIED INDEX OF THE RECORD" was filed electronically. I understand that notice of this filing will be sent to all parties by operation of the Court's electronic filing system, and parties may access the filing through that system.

/s/
SEAN D. CROSTON