ORAL ARGUMENT SCHEDULED MAY 9, 2012

Nos. 11-1168 and 11-1177

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

VERMONT DEPARTMENT OF PUBLIC SERVICE, and
NEW ENGLAND COALITION
Petitioners,

v.

UNITED STATES OF AMERICA, and
NUCLEAR REGULATORY COMMISSION
Respondents,

and

ENTERGY NUCLEAR OPERATIONS, INC. and
ENTERGY NUCLEAR VERMONT YANKEE, LLC
Intervenor-Respondents

PETITIONERS' REPLY TO RESPONDENTS' AND INTERVENORS' MEMORANDA IN OPPOSITION TO PETITIONERS' MOTION TO STRIKE

The Court should grant Petitioners' motion to strike four extra-record documents in Respondents' "Amended Certified Index" for at least three reasons. First, the Nuclear Regulatory Commission (NRC) filed a certified record index of documents it considered during the licensing proceeding that appropriately did not include the four documents at issue (Amended CI 760-763), because NRC admits that it did not consider these documents or the issue they relate to prior to granting

the challenged license. Second, because NRC admits that it did not consider the issues to which the documents relate, it cannot supplement the record to provide a *post hoc* rationalization that it does not even adopt in its briefing. Third, NRC violated Rule 16(b) of the Federal Rules of Appellate Procedure (FRAP) when it sought to add documents to the administrative record without stipulation or court order.

I. NRC DID NOT CONSIDER THE DOCUMENTS IN QUESTION DURING THE LICENSING PROCEEDING.

NRC admits that it did not consider the issue to which the extra-record documents relate—much less the documents themselves—on the record below. NRC Opp. to Mot. to Strike at 5 (admitting that NRC "did not address the continuing validity of Vermont Yankee's original § 401 water-quality certification"[1] prior to issuing the challenged license.). Thus, there can be no argument that they are part of the "whole record" upon which APA review is based. *See Amfac Resorts, L.L.C. v. U.S. Dept. of the Interior*, 143 F. Supp. 2d 7, 12-13 (D.D.C. 2001) ("'The complete administrative record consists of all documents and materials directly or indirectly considered by the agency.'" (*quoting Bar Mk Ranches v. Yuetter*, 994 F.2d 735, 740 (10th Cir.

[1] NRC's filings repeatedly and erroneously refer to "Vermont Yankee's original state certification under § 401 of the Clean Water Act." As explained in Petitioners' briefing, Congress did not codify state certification requirements in § 401 until 1972, after Vermont officials issued the prior certification in 1970.

1993))). Accordingly, there is no basis to support the conclusion that the four documents comprise any part of "'the order sought to be reviewed or enforced, the findings or report upon which it is based, and the pleadings, evidence, and proceedings before the agency.'" *Nat'l Courier Ass'n v. Bd. of Governors of Fed. Reserve System* 516 F.2d 1229, 1241 (D.C. Cir. 1975) (defining the proper contents of an agency record and quoting 28 U.S.C. § 2112(b)).

Both NRC and ENVY attempt to shift blame for the absence of these documents in the record below by once again turning the Clean Water Act on its head, alleging that the documents would have been considered by NRC if Petitioners had exhausted their § 401 claims. For the reasons set forth fully in Petitioners' briefing, this argument misapprehends the Clean Water Act § 401 requirements by failing to acknowledge that NRC is obligated to comply with § 401 prior to granting a license, regardless of whether any party raises the issue in the Agency licensing proceeding. *See* Pet. Reply Br. at 16-17. Moreover, during the course of the relicensing process, Petitioners diligently and directly argued to NRC that, without a § 401 Certification, NRC could not issue the new license. *See* Pet. Br. at 6 and record sources cited therein.

ENVY argues that the single, ambiguous,[2] and cursory reference to the 1970 WQC in its Environmental Report is sufficient to incorporate by reference the 1970 WQC and documents related thereto under applicable NRC rules. Yet Petitioners were not alone in being unable to discern, on the basis of this solitary reference, that ENVY was supposedly asserting that the 1970 WQC issued in connection with VY's original operating license could satisfy § 401 with respect to the new license. Understandably, NRC also was unable to connect the dots across the decades and thus "did not address" the issue on the record below.

II. ALLOWING THE NRC TO SUPPLEMENT THE RECORD WITH DOCUMENTS THE AGENCY DID NOT CONSIDER BELOW IS INCONSISTENT WITH THE PREVAILING STANDARDS OF AGENCY REVIEW.

Proper administration of appellate rules do not permit an Agency, acting at the behest of a third-party intervenor, to supplement the record on appeal with documents that it never relied upon in its proceeding simply because the documents reside somewhere in the vast records repository of the agency. While NRC and ENVY correctly note that Agency action is generally "entitled to a

[2] Although ENVY repeatedly asserts that it "explicitly" relied on "Vermont Yankee's 1970 WQC to satisfy the Clean Water Act's § 401certification requirements" (ENVY Opp. to Mot. to Strike at 6) its Environmental Report merely noted that it possessed a certificate issued in 1970, never asserted that the old certification satisfied § 401 obligations with respect to the new license and, most significantly, its comprehensive list of "VYNPS Environmental Permits and Compliance Status" did not include any reference to the 1970 WQC. SRA:4-6.

presumption of regularity," nothing about the present attempt to supplement the administrative record at issue is "regular."

In sharp contrast to the Agency record upheld in *Bar MK Ranches v. Yuetter*, a decision cited by ENVY, the attempt by NRC to "amend" its previously sworn and certified record has not proceeded in accordance with any agency regulation governing creation of the record. *See* 994 F.2d 735, 738-740 (10th Cir. 1993) (explaining how the Forest Service complied with its own regulations on the proper compilation of an administrative record for judicial review). In further contrast to the Forest Service record-compiling process in *Yuetter*, the idea to include the documents at issue here did not originate within the agency itself. *See id.* (describing actions of Forest Service personnel in compiling record). Rather, NRC admits that it included the additional documents at ENVY's request. NRC Opp. to Mot. to Strike at 3. Moreover, the *Yuetter* Court recognized that the record on appeal must be limited to "all documents and information *considered* [during]…the [Agency's] decision and review process, *nothing more and nothing less*" and thus should not include "*post hoc* rationalizations" for the Agency's decision. *Id*. at 739-40 (emphasis added). The *Yuetter* Court upheld the challenged Forest Service record because Petitioners in that case ultimately failed to show that the challenged documents were not "part of the materials considered by the Deciding Officer." *Id.* at 740. Here, Petitioners can easily make the required

showing because NRC has expressly admitted that the documents were not part of the materials NRC considered before granting the license.

Other cases cited by NRC and ENVY also belie the merits of their opposition. *E.g.*, *Walter O. Boswell Memorial Hosp. v. Heckler* 749 F.2d 788, 792, (D.C. Cir. 1984) ("To review more than the information before the Secretary at the time she made her decision risks . . . allowing them to take advantage of post hoc rationalizations."). Likewise,while the Court in *Environmental Defense Fund v. Costle*, noted that "additional explanations of the reasons for the agency decision as may prove necessary'" can be entered into the record on appeal when the record is inadequate, it went on to explain that "[t]he new materials should be merely explanatory of the original record and should contain no new rationalizations." 657 F.2d 275, 285 (D.C. Cir. 1981). NRC's express disavowal of any reliance below on the 1970 WQC or documents related thereto demonstrates that the only purpose of the four documents is to advance a new rationalization supplied by Intervenor-Respondent ENVY. The Court may not consider such *post hoc* rationalization.

Contrary to ENVY's characterization, Petitioners are not asking the Court to "second-guess the Agency in identifying the content of its own administrative record," ENVY Opp. to Mot. to Strike at 4, because NRC admits that it did not itself identify these documents; it acted at the behest of ENVY's appellate counsel.

The NRC action challenged here is not entitled to a presumption of regularity because it runs afoul of the very standards set forth in the cases upon which the memoranda in opposition rely.

III. NRC IMPERMISSIBLY VIOLATED FEDERAL RULE OF APPELLATE PROCEDURE 16(b).

NRC filed the Amended Certified Index without Petitioners' stipulation and without a request for the Court to order supplementation of the Certified Index of the Record, as is explicitly required pursuant to FRAP 16(b). The Rules dictate the procedures to be followed to allow the fair administration of justice, and are not merely "procedural niceties" which a party or agency may simply ignore, as NRC and ENVY erroneously suggest is permissible. *See* NRC Opp. to Mot. to Strike at 4.

ENVY and NRC have failed to follow the requisite § 401 procedures throughout the entire licensing process. In keeping with this pattern, NRC's attempt to supplement the record at this late stage runs counter to the APA and the rules of appellate procedure. NRC did not "inadvertently" leave these documents out of the record on appeal. They were never in during the proceedings below. Thus, under FRAP 16(b), they cannot come in now without Petitioners' stipulation—which Petitioners have not provided—or an order from this Court.

CONCLUSION

The Court should grant Petitioners' motion to strike the four extra-record documents from the "Amended Certified Index" and references in NRC and ENVY's briefs to such documents because NRC admits that it did not consider the specific issue to which the records relate, much less the documents themselves, prior to granting the challenged license. The four documents relate solely to *post hoc* rationalization offered by ENVY. The documents are thus not part of the record for judicial review and cannot be injected into the case now, especially via filing of an "Amended Certified Index" in a manner inconsistent with the Appellate Rule 16.

Respectfully submitted this 22nd day of March by:

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CERTIFICATE OF SERVICE

I hereby certify that on March 22, 2012, I electronically filed Petitioners' Reply to Respondents' and Intervenors' Memorandum In Opposition to Petitioners' Motion to Strike with the Clerk of the Court using the CM/ECF filing system.

Service of Petitioners' Reply to Respondents' and Intervenors' Memorandum In Opposition to Petitioners' Motion to Strike will be accomplished via the CM/ECF system to participants in this case that are registered CM/ECF users in consolidated Case No's. 11-1168 and 11-1177. The following non CM/ECF participants will receive service by electronic mail:

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Dated this 22nd day of March 2012

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