UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

STATE OF NEW YORK, *et al.*,	
Petitioners,	
v.	No. 14-1210
UNITED STATES NUCLEAR REGULATORY COMMISSION and the UNITED STATES OF AMERICA,	(consolidated with Nos. 14-1212, 14-1216, and 14-1217)
Respondents.	

RESPONSE TO COURT'S ORDER OF DECEMBER 18, 2014 CONCERNING FORMAT OF BRIEFS

This submission constitutes the response of the United States Nuclear Regulatory Commission ("NRC") and the United States (collectively, "Federal Respondents") to the Court's order of December 18, 2014, concerning the format of briefs to be submitted in these consolidated Petitions for Review. Respondents-Intervenors the Nuclear Energy Institute, Inc., Entergy Nuclear Operations, Inc., and Northern States Power Co. have informed counsel for Federal Respondents that they agree with the format that Federal Respondents propose.

1. In its Order of December 18, 2014, the Court "strongly urged" the parties to file a joint submission proposing a briefing format for these cases. The Court allowed thirty days for the parties to reach a consensus. In light of the Court's directions, Federal Respondents organized a conference call among all

parties on January 13, 2015, and proposed a briefing format that was consistent with the Court's instructions, including its admonition that it looks upon on "repetitious submissions" with "extreme disfavor."

2. Petitioners articulated a counterproposal during the conference call, which Federal Respondents indicated a willingness to consider once they saw the counterproposal and proposed justification in writing. (*See* paragraph 4 below). As of the time of this filing, however, Federal Respondents have not received such a counterproposal.

3. In substance, Federal Respondents expressed their view to Petitioners during the conference call that the case should proceed in the same manner as the Court directed for briefing the earlier iteration of this case, filed as *New York v. NRC*, (Nos. 11-1045, 11-1051, 11-1056, and 11-1057) ("*New York v. NRC I*"), and later decided as *New York v. NRC*, 631 F.3d 471 (D.C. Cir. 2012). This proposal made sense for two important reasons. First, in *New York v. NRC I*, the parties had jointly agreed upon a format that allowed Petitioners more words than that allowed by Fed. R. App. P. 32(a)(7)(B), only to have the Court deny the parties' proposal and order compliance with the limitations of that rule. Specifically, the Court required each set of Petitioners in *New York v. NRC I*, plus the State of New Jersey (an intervenor), to share their allotted 14,000 words as they saw fit. Second, the Court's December 18, 2014, order stated that the Court would not hesitate to

require a "joint brief of aligned entities," *i.e.*, Petitioners, the State of Massachusetts (an intervenor, like New Jersey in the earlier case), and the amicus curiae, to avoid repetition. Accordingly, the Court directed the parties to provide detailed justification for any deviation from the standard page limits set forth in Rule 32.

4. During the January 13 telephone conference, Petitioners described a counterproposal that would have increased their own word limit for briefs from *New York v. NRC I* (and the Rules) and advised the Respondents that they had not yet prepared a written justification for this counterproposal. Respondents and Respondents-Intervenors advised that, although the increase seemed unfairly one-sided, they would consider whether to join Petitioners' counterproposal once they saw the justification. As of the time of this filing, Respondents and Respondents-Intervenors still have not been provided with any justification for Petitioners' last-stated position. Petitioners have advised that they are "continuing to work" on both the "substance of and justification for their proposal"; as a result, Petitioners are unsure whether the Petitioners still advocate the position that they previously articulated.

5. Respondents believe that the requirements to which the parties were required to adhere in *New York v. NRC I* provided ample opportunity for each party there to articulate its views. That format provided for the customary 14,000 words

in the aggregate for Petitioners' opening briefs, split among them;[1] 14,000 words for Federal Respondents; 8,750 words for Respondents-Intervenors; and 7,000 words for Petitioners' reply briefs, again, split up as they saw fit. Judging by the remand order in the case, the customary word allowance for briefs did not impair the effectiveness of Petitioners' advocacy in that case.

6. Like the challenges to the NRC's Continued Storage Rule and Generic Environmental Impact Statement in this case, *New York v. NRC I* involved challenges to NRC's "Waste Confidence" Rule and the supporting Environmental Assessment, based principally on alleged violations of the National Environmental Policy Act. The only difference between the parties in *New York v. NRC I* and in this case is that here Massachusetts, instead of New Jersey, has appeared as an intervenor on the side of Petitioners, and The Sierra Club has appeared as an amicus curiae.

7. Massachusetts's appearance as an intervenor in this case does not justify an additional word allocation to Petitioners. As we explained to the Court when we responded (and consented) to Massachusetts's motion to intervene, Massachusetts's interest in this case is ostensibly identical to the interest of the three other States who petitioned for review (New York, Connecticut, and

[1] The Petitioners in *New York v. NRC I* consisted of a group that included essentially the same diverse interests as here—several States, environmental groups, and an Indian community.

Vermont). Indeed, Massachusetts filed comments *with* each of those States when the draft Rule and draft Generic Environmental Impact Statement were promulgated yet inexplicably chose not to join the States' Petition for Review. Increasing the cumulative word limit so as to permit Massachusetts to present its own views would effectively create an end-run around both the 60-day statute of limitations for seeking Hobbs Act review as well as the Court's rules imposing word limits for briefs.

8. If the Court should deem it appropriate to increase the words afforded to Petitioners as a group for their principal brief, fairness dictates that the Federal Respondents receive a concomitant increase. Likewise, consistent with *New York v. NRC I*, Respondents-Intervenors should be afforded the opportunity to file their own brief subject to its own word count, increased beyond the limits set forth in Circuit Rule 32(a)(2)(B)(i) in proportion to any increase that Petitioners are afforded. We note, of course, that Petitioners will have the opportunity to respond to Respondents' and Respondents-Intervenors' arguments in their reply briefs.

9. In sum, Federal Respondents suggest the following briefing format:

- Petitioners and Petitioner-Intervenor file a principal brief or briefs not exceeding, in the aggregate, 14,000 words.
- Federal Respondents file a brief not exceeding 14,000 words.
- Respondent-Intervenors file a brief not exceeding 8,750 words.

- Petitioners and Petitioner-Intervenors file a reply brief or briefs not exceeding, in the aggregate, 7,000 words.

- Amicus curiae file briefs, to the extent they contain new arguments, in accordance with and Fed. R. App. P. 29 and Circuit Rule 29.

Respectfully submitted,

/s/ John E. Arbab
JOHN E. ARBAB
Attorney
United States Department of Justice
Environment & Natural Resources Division
Appellate Section
P.O. Box 7415
Washington, D.C. 20044
Phone: (202) 514-4046
Fax: (202) 353-1873
john.arbab@usdoj.gov

/s/Andrew P. Averbach
ANDREW P. AVERBACH
Solicitor

/s/Robert M. Rader
ROBERT M. RADER
Senior Attorney

/s/ Michelle D. Albert
MICHELLE D. ALBERT
Attorney

Office of the General Counsel
U.S. Nuclear Regulatory Commission
11555 Rockville Pike
Rockville, MD 20852
Phone: (301) 415-1956
Fax: (301) 415-3725
andrew.averbach@nrc.gov

Dated: January 20, 2015

CERTIFICATE OF SERVICE

I certify that on January 20, 2015, I filed the foregoing RESPONSE TO COURT'S ORDER OF DECEMBER 18, 2014 CONCERNING FORMAT OF BRIEFS with the U.S. Court of Appeals for the District of Columbia Circuit by uploading it to the Court's CM/ECF system. That method is calculated to serve:

Geoffrey H. Fettus (gfettus@nrdc.org)
(counsel of record for Natural Resources Defense Council, Inc.)

Diane Curran (dcurran@harmoncurran.com; magolds@emory.edu)
(counsel of record for Beyond Nuclear, Inc. et al.)

Joseph F. Halloran (jhalloran@thejacobsonlawgroup.com; sphemister@thejacobsonlawgroup.com; pmahowald@piic.org; johnson@piic.org)
(counsel of record for Prairie Island Indian Community)

John J. Sipos (john.sipos@ag.ny.gov; teresa.manzi@ag.ny.gov; Kathryn.DeLuca@ag.ny.gov)
Robert D. Snook (robert.snook@ct.gov)
Kyle Landis-Marinello (kyle.landis-marinello@state.vt.us; Rebecca.Ronga@state.vt.us)
(counsel of record for State Petitioners)

John Emad Arbab (john.arbab@usdoj.gov)
(counsel of record for the United States)

David A. Repka (depka@winston.com; dreddick@winston.com)
(counsel of record for Nuclear Energy Institute, Inc.)

Brad Fagg (bfagg@morganlewis.com)
(counsel of record for Entergy Nuclear Operations, Inc.)

Jay E. Silberg (jay.silberg@pillsburylaw.com)
(counsel of record for Northern States Power Company)

Seth G. Schofield (seth.schofield@state.ma.us; sethgschofield@aol.com; jillian.riley@state.ma.us)
(counsel of record for Commonwealth of Massachusetts)

Wallace A. Taylor (wtaylorlaw@aol.com; pammackeytaylor@aol.com)
(counsel of record for Sierra Club)

s/Andrew P. Averbach
Solicitor
Office of the General Counsel
U.S. Nuclear Regulatory Commission