

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

In re: AIKEN COUNTY,)
)
 Petitioner,)
 _____)
)
 ROBERT L. FERGUSON, et al.,)
)
 Petitioners,)
)
 v.)
)
 U.S. DEPARTMENT OF ENERGY, et al.,)
)
 Respondents,)
 _____)
)
 STATE OF SOUTH CAROLINA,)
)
 Petitioner,)
)
 v.)
)
 U.S. DEPARTMENT OF ENERGY, et al.,)
)
 Respondents,)
 _____)
)
 STATE OF NEVADA,)
)
 Intervenor.)

Case Nos. 10-1050
10-1052
10-1069

**RESPONSE OF INTERVENOR STATE OF NEVADA TO
PETITIONERS' SUPPLEMENTAL FILING REGARDING
MOTION TO LIFT STAY AND SET EXPEDITED BRIEFING SCHEDULE**

The State of Nevada (Nevada) provides the following Response to Petitioners Supplemental Filing Regarding Motion to Lift Stay and Set Expedited Briefing Schedule, and would show as follows:

A. The Supplemental Filing is Unauthorized

Nevada files this Response, even though no such Response (or schedule for filing it) is addressed in the Federal Rules of Appellate Procedure (FRAP).

Nevada does so in an abundance of caution, even though the Supplemental Filing to which it is addressed is likewise not contemplated by the FRAP, because it makes assertions Nevada believes should not be delivered uncorrected, to the Court.¹

B. The Supplemental Filing is Misdirected

In addition to Petitioners' Supplemental Filing being procedurally unauthorized, it is also both misdirected and misleading to the Court. It is misdirected due to its irrelevant focus on its assertion (stated more than a half dozen times by Petitioners in their Supplemental Filing) that the Nuclear Regulatory Commission (NRC) is terminating NRC Staff's technical review of DOE's License Application. The issue of whether NRC Staff has been told to terminate that technical review (i.e., its Safety Evaluation Report (SER) review) is

¹ Under the guise of a purported status report filed on October 27, 2010, Petitioners inappropriately again reiterate the relief sought in their Motion to Lift Stay and Supplemental Filing. They also make the statement that they were "advised by Court staff" that their September 27 Motion to Lift Stay "automatically lifted the abeyance order." Nevada does not believe the Court would so act without advising the parties; that any member of Court staff would make such a statement; or that Petitioners believe their own words, since they allege this occurred last week, and yet Petitioners have made two filings this week inconsistent with a lift of the stay.

immaterial to the Court's existing abeyance order and constitutes no reason for the Court to reconsider that Order. The Court's abeyance was granted so that the Court could await the NRC's decision regarding DOE's right to withdraw its pending Yucca Mountain License Application. DOE's Motion to Withdraw was denied by the NRC's Construction Authorization Board (CAB) on June 29, 2010. That Board decision is before the full Commission, which is still considering whether to review it and, if so, whether to uphold or reverse it. Even Petitioners concede that it is **that** Commission review of **that** (June 29) CAB decision which is the "basis for the current stay of this action" (referring to this Court's abeyance Order) (Supplemental Filing at 2).

Nowhere do Petitioners even suggest that the Commission has terminated its consideration of the June 29 CAB decision. (As will be shown, *infra*, quite the opposite is true.) It is that decision which is the reason for this Court's abeyance Order – in order to provide the Court with the agency views, in the form of a final agency action interpreting NRC regulations and applicable statute law in the context of a motion by DOE to withdraw its License Application. The alleged stoppage of NRC Staff's SER work – which is on a separate track, unrelated to the licensing proceeding – is irrelevant to the abeyance and provides no reason to reconsider it.

C. The Supplemental Filing is Misleading

Petitioners make the blatantly untrue statement in their Supplemental Filing (at 6) that "there is no evidence that the NRC intends to render any further decision regarding the ASLB [CAB] Order." This is not a matter of innocent conjecture by Petitioners. The evidence they say does not exist is contained in the transcript of the NRC All Hands Meeting of October 18, 2010 – the very document which Petitioners attach as Exhibit A to their Supplemental Filing. While quoting from the transcript no less than seven times (addressing the irrelevant matter of NRC Staff's technical review work), Petitioners omit the single statement of decisive interest to this Court. Thus, at 35-36 of that transcript, in response to a question about the pending CAB decision and the Commission's pending review of it, NRC Chairman Gregory Jaczko stated that was "an adjudicatory issue before the Commission," that "it's a very important issue," and finally, that "the Commission is working very hard on it."

For Petitioners not to quote Chairman Jaczko's statements and to assert there is no evidence of the Commission's intent to decide this issue, is knowingly misleading.

D. Conclusion

For the foregoing reasons, Nevada respectfully requests that the Court deny Petitioners Motion to Lift Stay and Set Expedited Briefing Schedule (as improperly

supported by their unauthorized, misdirected, and misleading Supplemental Filing).

Respectfully submitted,

signed electronically

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Dated: October 28, 2010

CERTIFICATE OF SERVICE

I certify that on October 28, 2010, the Response of Intervenor State of Nevada to Petitioners' Supplemental Filing Regarding Motion to Lift Stay and Set Expedited Briefing Schedule was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

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