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

No. 10-1050

IN RE AIKEN COUNTY, Petitioner

No. 10-1052

ROBERT L. FERGUSON, *et al.*, Petitioners,

v.

BARACK OBAMA, President of the United States, *et al.*, Respondents.

No. 10-1069

STATE OF SOUTH CAROLINA, Petitioner,

v.

UNITED STATES DEPARTMENT OF ENERGY, *et al.*, Respondents.

No. 10-1082

STATE OF WASHINGTON, Petitioner,

v.

UNITED STATES DEPARTMENT OF ENERGY, *et al.*, Respondents.

Petitioners' Status Report

Status Summary

Petitioners, pursuant to the Court's July 28, 2010 order, submit this status report and respectfully submit that the stay of the present cases should be lifted due to the circumstances set forth herein. Respondents in these consolidated cases have continued shutdown activities at Yucca Mountain, despite the denial by the Nuclear Regulatory Commission's (NRC's) Atomic Safety & Licensing Board (Board) of the Department of Energy's (DOE's) motion to withdraw the license application for construction of the Yucca Mountain geologic repository on June 29, 2010. Furthermore, the NRC acting in its adjudicatory capacity (Commission) has not indicated whether it will in fact review the Board's denial of DOE's motion to withdraw, has not established a timeline for any such review to occur, if at all, and has not even indicated whether it will grant three of the Petitioners here leave to intervene. Briefing before the Commission has been completed since July 19, 2010.

Background and Procedural History

These consolidated actions present two distinct issues: (1) whether the decision by the President and Secretary of Energy to permanently shut down and abandon Yucca Mountain as a permanent repository for high level nuclear waste violated the Nuclear Waste Policy Act (NWPA), the National Environmental Policy Act and the Administrative Procedures Act; and (2) whether the NWPA

permits DOE to withdraw its license application to construct the Yucca Mountain project.¹ Only the second issue is before the NRC. Even if the Commission affirms the Board's denial of DOE's motion to withdraw its license application, the first issue will not be resolved, and indeed DOE would likely seek judicial review of the second.

The first issue – the authority of the President and Secretary of Energy to shut down Yucca Mountain – is raised in No. 10-1052 by the Ferguson Petitioners,² who named the President and the Secretary of Energy as Respondents, but did not name the NRC. Specifically, the Ferguson Petitioners challenged the January 29, 2010 decision of the President and Secretary to take Yucca Mountain “off the table” and terminate the project, a decision which is reviewable by this Court under Sections 119 (a)(1)(A)-(C) of the NWPA. *See* 42 U.S.C. §§ 10139(a)(1)(A)-(C). Both the first and second issue were also raised in

¹ *See* Brief of Petitioners, Aiken County, Robert L. Ferguson, William Lampson, Gary Petersen, State of South Carolina, State of Washington, and Intervenor-Petitioner, National Association of Regulatory Utility Commissioners (Petitioners' Brief) Doc. #1250770, filed June 18, 2010, at 1-2 (Statement of Issues) and 29, 32, 35-54 (wherein Petitioners present and address these issues separately).

² The Ferguson Petitioners, who have lived and worked in the shadow of the nuclear waste at Hanford, are the only individual petitioners in these cases. All other petitioners in these cases are governmental entities or other organizations.

the actions docketed at No. 10-1069 (South Carolina) and No. 10-1082 (Washington). These other two actions named the DOE and the NRC as parties, with only No. 10-1069 naming the President as well. South Carolina, Aiken County, and Washington also moved to intervene in the NRC proceeding concerning only the second issue – DOE’s authority to withdraw the license application. Those motions to intervene have not been granted by the NRC, nor have they been denied at this point. The Ferguson Petitioners did not seek intervention in the NRC proceeding.

Because DOE had already announced and implemented its plan to permanently and irrevocably shutter the Yucca Mountain project prior to filing its motion to withdraw the license application with prejudice, the State of Washington in No. 10-1082 sought a preliminary injunction against the shut down pending this Court’s review. *See* Motion for Preliminary Injunction, Doc. # 1239610, filed April 13, 2010. The Court denied the State of Washington’s requested relief, but granted a separate request by the Ferguson Petitioners and South Carolina for expedited briefing and argument, which was supported by Aiken County. *See* Per Curiam Order, Doc. # 1243016, filed May 3, 2010.

An expedited briefing schedule was established by agreement of all parties³ and argument was set for September 23, 2010. Petitioners filed a joint merits brief in this Court on June 18, 2010, in accordance with the expedited schedule and at considerable cost and expense to all Petitioners.

However, on July 2, 2010, Respondents moved to vacate the briefing and argument schedule and to hold these petitions in abeyance pending a decision by the Commission. The basis for Respondents' motion was the June 29, 2010, interlocutory decision of the Board that denied the DOE's motion to withdraw its license application for Yucca Mountain, and the NRC's June 30, 2010 *sua sponte* order calling for briefing by participants in the NRC proceeding regarding whether the Commission should review, and reverse or uphold, the Board's June 29, 2010 order.

Respondents' motion, to which the Petitioners objected, was granted by the Court. The Court's order was issued on July 28, 2010, the same day that Respondents' merits brief was due. The Court's order directed that the parties file status reports "pending further proceedings before the respondent agency *consistent with the motion*" at thirty day intervals, beginning on August 27, 2010. *See Per Curiam Order, Doc. # 1257762, filed July 28, 2010 (emphasis added).*

³ *See Joint Proposal for Briefing Format, Doc. #1243774, filed May 7, 2010.*

Current Status

The only issue before the NRC – the DOE’s authority to withdraw its license application – has been fully briefed and pending before the Commission since July 19, 2010. The Commission, however, has yet to act on the Board’s decision and has given no indication as to when, or if, it will review the Board’s denial of DOE’s motion to withdraw. In response to one Congressional inquiry expressing concerns about the “serious harm” caused by NRC’s delay and the concurrent shutdown of the Yucca Mountain, the NRC Secretary asserted on August 18, 2010, that the Commission “is moving with all due haste in arriving at a decision relative to review.” *See* Letter from NRC Secretary dated August 18, 2010, attached as Exhibit A. Despite this assertion, the Commission has issued no decision and no further scheduling order, and review of the Board order remains without any result.

The Commission’s failure to act expeditiously on this matter of great importance is inconsistent with this Court’s Order holding these cases in abeyance. The Commission’s inaction stands in stark contrast to the swift timeline it previously imposed on both the Board and the parties in the NRC matter. Specifically, after the Board’s initial determination that it would stay the license application matter before it and defer to this Court’s proceedings in this matter, the Commission overruled the Board and ordered it to issue a decision on

the motion to withdraw the license application “as expeditiously ... as possible.” See Commission Memorandum and Order, CLI-10-13, April 23, 2010, attached as Exhibit B. The Board considered briefs, held a day long oral argument, and then issued a 61-page decision 26 days after oral argument (33 days after completion of briefing) finding that DOE acted illegally in attempting to withdraw the application. Despite the Board’s prompt decision, the Commission has done nothing substantive with this matter since briefing was completed on July 19, 2010, including determining whether it will review the Board’s denial of DOE’s motion to withdraw. The NRC initiated the *sua sponte* appeal on June 30, 2010.

More importantly, at this point, the facts indisputably show that any decision by the Commission on DOE’s licensing application will not provide effective relief to Petitioners, for several reasons. First, the January 29, 2010 decision of the President and Secretary to shut down the Yucca Mountain project was made *before* DOE moved the NRC to withdraw its license application and DOE has been proceeding with the shut down independent of the withdrawal application. Thus, DOE apparently believes it can close the project even if it does not withdraw its license application.

Second, the Board’s decision that DOE may not withdraw its license application provided absolutely no practical relief to Petitioners, contrary to

DOE's claims.⁴ Despite the denial of DOE's motion to withdraw the Yucca Mountain license application by the Board, Respondents have continued with the shutdown of the Yucca Mountain project. A recent report by the DOE Office of Inspector General (OIG) indicates that that DOE has been shutting down the Yucca Mountain project on an "expedited" basis, without the benefit of a master plan, despite the fact that "no comparable single project termination in the Department's recent history [is] as consequential as Yucca Mountain." *See* DOE OIG Report dated July 21, 2010, attached as Exhibit C.

Weeks *after* the DOE's motion to withdraw its license application was denied by the Board, DOE's Office of Civilian Radioactive Waste Management (OCRWM) reported to OIG that "facility leases are being terminated as expeditiously as possible," *id.* at 6, and that "[c]omputers, printers, and other electronic devices are being transferred to other DOE programs [and] are being donated to Nevada county schools." *Id.* at 7.

Notwithstanding the Board's denial of DOE's motion to withdraw, DOE has also continued to terminate Yucca Mountain employees "in accordance with the Deputy Secretary's [pre-license withdrawal motion] memorandum of February

⁴ *See* Federal Respondents' Reply to Petitioners' Opposition to Motion to Vacate Briefing and Oral Argument Schedule and Hold Cases in Abeyance ("Respondents' Reply"), Doc. # 1254630, filed July 12, 2010, at 6.

3, 2010 concerning the affect [sic] of the President's FY 2011 budget request eliminating funding for [OCRWM]." *See* Memorandum, Specific Reduction in Force Notice of Separation, July 7, 2010, attached as Exhibit D. The specific target date for terminating employees is September 30, 2010. *See Id.*⁵

Finally, several information technology applications related to the Yucca Mountain project were shut down within *days* of the Board's denial of DOE's motion to withdraw. *See* E-mail Correspondence from DOE Technical Support dated July 2, 2010, attached as Exhibit E. DOE has, by its actions, demonstrated that its plans to shut down Yucca Mountain will not be altered by action of the NRC with respect to the license application.

⁵ DOE has represented to the Court that it "*can* reassemble its [Yucca Mountain] workforce." *See* Respondents' Reply at 6 (emphasis added). DOE has also represented to this Court that "if *any* NRC or court decision should require DOE to continue with the license application, a workforce can be reassembled...." *See* Respondents Response in Opposition to Petitioners' Motion for Preliminary Injunction, Doc. #1241457, filed April 23, 2010, at 16 (emphasis added). The basis for the Respondents' assertion that the Yucca Mountain workforce can be reassembled is that "DOE is assisting OCRWM federal employees seeking to remain at DOE and, to the extent successful, this would facilitate efforts to reconstitute the Yucca Mountain work force." *Id.* at 17, n.10. Contrary to the Respondents' assertions, DOE continued to terminate Yucca Mountain employees after the Board's decision, even employees who cannot be retained at DOE. *See* Exhibit D ("It has been determined that there are no other positions within the competitive area to which you have an assignment right.")

Third, Petitioners did not object to consolidation of these cases, but never conceded that any issues pending before the NRC would resolve broader and distinct issues before the Court, especially with respect to those raised in the case in which the NRC is not a party. Nothing in Petitioners' brief on the merits suggests otherwise.⁶ The NRC proceeding cannot and will not further crystallize the issue of whether the President and Secretary have the authority to abandon the Yucca Mountain project, as that issue is not before the NRC. Nor will the NRC proceeding address whether the President and Secretary violated NEPA or the APA by announcing, on January 29, 2010, that Yucca Mountain *will not* go forward. The withdrawal of the license application is but one aspect, albeit an important one, in the larger context of the Respondents' abandonment of Yucca Mountain, which is being challenged in this action. Petitioners respectfully submit that the NRC's failure to move forward in the NRC proceeding after the stay was ordered, and for the other reasons set forth above, is inconsistent with this Court's Order suspending the expedited briefing schedule previously agreed upon in this action.

⁶ Thus, for example, Petitioners distinguished between the two issues for purposes of identifying final agency action and dealt with the issues separately on the merits. *See* Petitioners' Brief at 29, 32, 35-54. Indeed, the majority of the brief focused on the decision to abandon the Project, which is not before the NRC.

The stay should, accordingly, be lifted and expedited briefing and argument should occur, at a minimum, on the issue of the authority of the President and Secretary to abandon the Yucca Mountain project. That issue is not before the NRC and, consequently, no parties before the NRC will be prejudiced should the Court proceed. Moreover, this issue has already been substantially briefed by Petitioners and it is presumed that Respondents are prepared to immediately file their opposition brief on at least this limited issue, as Respondents' brief was due on the same day the Court issued its stay order.

Finally, the direct challenges to the lawfulness of DOE's decision to withdraw the Yucca Mountain license application should also resume in this Court on an expedited briefing schedule. The NWPA vests this court with original and exclusive jurisdiction over civil actions alleging the Secretary of Energy has made a final decision or action contrary to the NWPA. *See* 42 U.S.C. § 10139. This consolidated action challenges the Secretary's actions and final decision to withdraw the Yucca Mountain license application. Neither the propriety nor the finality of DOE's decision to withdraw its license application depends on action by the NRC. Congress intended for challenges to the Secretary's duties under the NWPA to be resolved on an expedited basis by this Court, *see* Petitioners' Brief at 62, in its original and exclusive jurisdiction. This action represents a challenge to

a final decision and action by DOE that occurred almost six months ago.⁷ Further delay, based upon review by the Commission which may or may not occur, is contrary to the intent of Congress that NWPA-based court challenges occur in an expedited manner. Lastly, if the Commission upholds the Board's order, DOE would have 180 days to seek judicial review, calling into question what will happen to Yucca Mountain during the interim.

Conclusion

The Respondents have continued undeterred in the shutdown of Yucca Mountain, a decision challenged by Petitioners in this action, despite the order of the Board that withdrawal of the Yucca Mountain license application is unlawful. The NRC proceedings that served as a basis for the current stay of this action have not yielded even a decision to review the Board's denial of DOE's motion to withdraw its license application, and cannot provide the relief Petitioners seek regarding the broader issue of the shutdown of Yucca Mountain in any event. In light of these circumstances, Petitioners respectfully suggest that the Court: (1) lift the stay of these petitions; (2) direct Respondents to immediately file their opposition brief; and (3) calendar this matter for argument at the earliest possible time.

⁷ DOE announced its intent to withdraw the license application with prejudice on February 1, 2010, and filed its motion to withdraw on March 3, 2010.

Petitioners have contacted Respondents and Intervenor-Respondent who have indicated that they do not join this Status Report.

RESPECTFULLY SUBMITTED this 27th day of August 2010.

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CERTIFICATE OF SERVICE

I herby certify that on the 27th day of August 2010, a copy of the foregoing Petitioners' Status Report was filed electronically using the CM/ECF system, which will provide service on the following parties:

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I herby certify that service of the same was made on the following parties by

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