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

No. 10-1050
Consolidated With Nos. 10-1052, 10-1069, 10-1082, 10-1084

IN RE AIKEN COUNTY,
PETITIONER

ON PETITIONS FOR MANDAMUS AND PETITIONS FOR REVIEW AND INJUNCTIVE RELIEF

RESPONDENTS' RESPONSE IN OPPOSITION TO PETITIONERS' MOTION TO LIFT STAY AND SET EXPEDITED BRIEFING SCHEDULE

Respondents[1/] and the State of Nevada[2/] hereby oppose Petitioners' motion, filed September 27, 2010, to lift the stay and set an expedited briefing schedule in these consolidated cases. On July 28, 2010, the Court ordered these cases held in abeyance pending issuance of a decision by the Nuclear Regulatory Commission (Commission) in its pending consideration of a June 29, 2010, decision by the NRC's Licensing Board. The Commission has not yet rendered such decision, and

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[1/] Named as respondents in one or more of the petitions are the President, Department of Energy ("DOE"), Secretary of Energy, Nuclear Regulatory Commission ("NRC"), NRC Commissioners, and NRC Licensing Board Judges.

[2/] Intervenor State of Nevada concurs in and joins this response.

Petitioners present no good reason to lift the stay and brief these cases now in the absence of a Commission decision. The fact remains, as we argued in our original motion asking that these cases be held in abeyance, that withholding judicial review until after the Commission renders a decision would likely crystallize, narrow, or even wholly eliminate the issues that this Court would need to address to resolve these petitions, conserving both judicial and the parties' resources. Furthermore, Petitioners' request that this Court proceed at this time to review an issue that thus far has been adjudicated in their favor gives rise to numerous jurisdictional and justiciability infirmities, and is contrary to basic administrative law principles. Petitioners have in hand a favorable decision from the NRC's Licensing Board. They suffer no irreparable harm from waiting for the Commission's decision whether to uphold the Board. Petitioners' motion should be denied.

BACKGROUND

Respondents have previously set forth the relevant factual and legal background and procedural posture of these consolidated cases in several earlier-filed motions, responses to motions, status reports, and a response to petition for

mandamus.[3/] Briefly summarized, these four consolidated cases relate to an ongoing licensing proceeding before the NRC, *In the Matter of U.S. Dep't of Energy*, Docket No. 63-001-HLW, ASLBP No. 09-892-HLW-CAB04, to consider DOE's application for construction authorization for a permanent spent nuclear fuel and high-level radioactive waste geologic repository at Yucca Mountain, Nevada. Petitioners seek to litigate simultaneously, in both the administrative licensing proceeding and in this Court, the question of DOE's authority to withdraw the license application, as DOE requested in a motion filed in the NRC licensing proceeding on March 3, 2010.[4/]

On June 29, 2010, the Atomic Safety and Licensing Board ("Board"), the hearing tribunal of the NRC, issued an order denying DOE's motion to withdraw the license application. The Board ruled, as Petitioners have argued both here and

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[3/] *See, e.g.*, Respondents' Response in Opposition to Petition, filed March 23, 2010, in No. 10-1050, at 1-8; Respondents' Response in Opposition to Petitioner's Motion for Preliminary Injunction, filed April 23, 2010, in No. 10-1082, at 1-6; Federal Respondents' Motion to Vacate Briefing and Oral Argument Schedule and Hold Cases in Abeyance, filed July 2, 2010, in consolidated cases, at 1-6.

[4/] After filing the instant cases, Petitioners in three of the four consolidated cases were permitted to intervene in the licensing proceeding to oppose DOE's motion to withdraw the license application. As indicated at the outset of this litigation, the NRC Respondents, who are charged with reviewing DOE submissions on the Yucca Mountain application, take no position in this Court on the merits of DOE's motion to withdraw or on related DOE activities. See Respondents' Response in Opposition to Petition, filed March 23, 2010, in No. 10-1050, at 1 n.1.

at the NRC, that under the Nuclear Waste Policy Act, DOE cannot withdraw the license application. The Board's denial of DOE's request to withdraw the license application effectively grants Petitioners relief on its primary claim in the instant consolidated cases before this Court. The Board's June 29 order is, however, an interlocutory order and does not necessarily reflect the views of the Commission itself. On June 30, 2010, the Commission issued a briefing schedule to enable the Commission to decide whether it should review, and reverse or uphold, the Board's June 29 order.

Because of these developments, on July 2, 2010, Respondents filed a motion in this Court to vacate the briefing and oral argument schedule and to hold the cases in abeyance. That motion, as well as Respondents' reply filed July 12, 2010, explained that holding the cases in abeyance until the Commission renders a decision in its review of the Board's order would be beneficial because a Commission decision would likely aid the Court's consideration of the legal issues and crystallize, narrow, or even wholly eliminate the issues that this Court would need to address to resolve these petitions, conserving both judicial and the parties' resources. Furthermore, in the absence of a final Commission decision adverse to Petitioners, there are numerous jurisdictional and justiciability impediments to judicial review, including lack of subject matter jurisdiction, finality and ripeness,

failure to exhaust administrative remedies, and the primary jurisdiction doctrine. The motion and reply also explained that Petitioners would not be unduly harmed by a delay in briefing and by abeyance of these cases because (1) Petitioners have obtained from the Board effective relief on their primary claim and they will not be adversely affected unless the Commission reverses the Board; and (2) DOE workforce reductions would cause Petitioners no irreparable harm.

On July 28, 2010, this Court granted Respondents' motion and ordered "these cases be held in abeyance pending further proceedings before the respondent agency consistent with the motion." *Id*. The Court ordered the parties to file status reports at 30-day intervals and to file motions to govern future proceedings within 10 days from the Commission's "final decision in its pending review of the Licensing Board's June 29, 2010 decision." *Id*.

Although the Commission has not yet made a final decision in its pending review of the Licensing Board's decision, Petitioners filed a motion on September 27, 2010, asking the Court to lift the stay of these cases and to set an expedited briefing schedule.

DISCUSSION

Nothing has changed that would warrant granting Petitioners' request for reactivation and expedited briefing of these cases. Petitioners advance three

arguments in support of their request to lift the stay and expedite briefing of these consolidated cases. None of these arguments is persuasive. Abeyance of these cases pending the Commission's review of the Board's June 29, 2010, order remains fully justified and appropriate. Petitioners' motion should be denied.

1. Petitioners first contend that the primary reason for holding these cases in abeyance was "NRC's commitment to a swift determination of the issue before it" (Pet. Mot. at 5; *see also* Pet. Mot. at 1, 6), and they argue that the stay should therefore be lifted because NRC has not yet issued a decision. But in actuality Respondents' motion to hold these cases in abeyance made no representations on how swiftly the NRC would be able to complete its consideration of the Licensing Board decision on DOE's motion to withdraw.[5/] The NRC is of course actively considering the matter, but the Commissioners have before them hundreds of pages of densely-reasoned legal briefs. The passage of a few months' time is not unusual or the slightest bit remarkable, particularly considering the novelty and complexity of the legal issues pending before the Commission, and is consistent with the

[5/] Petitioners' assertion that NRC promised "'to mov[e] with all due haste'" (Pet. Mot. 7) is based on an August 18, 2010, letter from the Secretary of the NRC to a congressman, and not on a representation made in a filing by Respondents in this Court. Respondents' motion to hold the cases in abeyance and reply made no commitments as to the timing of a Commission decision on review of the Board's order.

decision-making time tables of other adjudicatory bodies such as the United States Courts of Appeals.

In any event, the primary reasons to hold these cases in abeyance are not altered or diminished by any perceived delay in the NRC's rendering of its appellate decision. As summarized above, these reasons include judicial economy, basic principles governing judicial review of administrative action, and the absence of harm to Petitioners.

2. Second, Petitioners argue a final decision by the Commission will not assist the Court or promote judicial economy. Pet. Mot. at 7. That is incorrect. As Respondents explained before the Court granted abeyance, it is self-evident that if the Commission does not disturb the Board's decision many, if not all, of Petitioners' grievances will be rendered moot.[6/]

Petitioners suggest that the question of DOE's authority to withdraw the license application is ripe for this Court's review, even though the Board has ruled in its favor and the Commission has not yet rendered a final decision reversing or modifying the Board's order, because DOE would likely seek judicial review if the

[6/] *See* Federal Respondents' Reply to Petitioners' Opposition to Motion to Vacate, filed July 12, 2010, at 3-4.

Commission affirms the Board's decision. Petitioners cannot, however, avoid the mootness or demonstrate ripeness of *their* claims (or jurisdiction or standing) based solely on speculation about what DOE might do – and what issues would then be properly before this Court – if the Commission agrees with the NRC Board.

Moreover, even if the Commission reverses or modifies the Board order and grants DOE's motion to withdraw, it would be of substantial benefit for this Court to await that result. The Commission's interpretation of NRC's regulations and of statutory provisions pertaining to it may warrant judicial deference and at the very least will assist the Court. Furthermore, the Commission order would be a reviewable final agency action, which, as the matter stands now, is lacking.

In sum, contrary to Petitioners' contention, moving forward at this juncture with judicial review of the question of DOE's authority to withdraw the license application invites the very consequences that the ripeness doctrine is intended to avoid.[7/] As the Supreme Court has said in the context of reviewing agency

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[7/] An array of other doctrines and principles likewise render judicial resolution of this issue inappropriate at this time. To name just a few: (1) the Court's jurisdiction is limited to review of final agency action and neither DOE's motion nor the Board's order are final agency actions; (2) prevailing parties in an administrative proceeding are not adversely affected and therefore cannot seek judicial review; and (3) courts should defer to the primary jurisdiction of administrative agencies.

determinations, the doctrine of ripeness serves "to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148-49 (1967). "A further objective [of the ripeness doctrine] is to avoid piecemeal, duplicative, tactical and unnecessary appeals which are costly to the parties and consume limited judicial resources." *Mount Wilson FM Broadcasters, Inc. v. F.C.C.*, 884 F.2d 1462, 1466 (D.C. Cir.1989). Those objectives are advanced by continuing the abeyance here.

3. Third, Petitioners assert that there is an imperative need for a speedy resolution of these cases because DOE recently stated that the Office of Civilian Radioactive Waste Management ("OCRWM") will cease operation by September 30, 2010. Pet. Mot. at 8. This is not, however, a new development, nor one that has not previously been considered by the Court.

Respondent DOE explained in prior filings with this Court – filings that resulted in the Court's denial of Petitioner State of Washington's motion for a preliminary injunction to stop shutdown activities and the Court's grant of Respondents' motion to hold this matter in abeyance – that it was proceeding with

an orderly wind-down of OCRWM in anticipation of, and in preparation for, zero funding in the 2011 federal budget for Yucca Mountain-related activities, as requested in the President's budget.[8] As DOE has previously explained, it was important to take these actions in FY2010 both to ensure that DOE could assist employees to find new positions either at the Department or elsewhere in the federal government[9] and to preserve relevant documents and scientific knowledge. DOE has now done exactly what it has explained in prior filings to this Court that it was in the process of doing.

In previous filings, Petitioners cited the OCRWM wind-down process as reason to preliminarily enjoin the shutdown activities and to deny respondents'

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[8] *See* Respondents' Response in Opposition to Petitioner's Motion for Preliminary Injunction, filed April 23, 2010, in No. 10-1082, at 16-17; Federal Respondents' Reply to Petitioners' Opposition to Motion to Vacate, filed July 12, 2010, at 5-6. The Department of Energy Organization Act provides the Secretary of Energy with broad discretionary authority "to establish, alter, consolidate or discontinue such organizational units or components within the Department as he may deem to be necessary and appropriate." 42 U.S.C. § 7253(a). The Secretary's discretion does "not extend to the abolition of organizational units or components established by" the Organization Act (*id.*); the OCRWM was not established by the Organization Act.

[9] DOE has, in fact, provided substantial assistance to employees in the form of priority consideration for advertised positions within the Department and financial assistance to relocate. The result is that, of the 184 OCRWM federal employees employed as of January 31, 2010, only 3 were involuntarily separated on September 30, 2010.

motion to hold the case in abeyance.[10/] The Court nevertheless granted the motion to hold the case in abeyance, and it denied Petitioners' request for a preliminary injunction because Petitioners failed to demonstrate any irreparable harm. *See In re: Aiken County*, D.C. Cir. No. 10-1050, Order at 2 (May 3, 2010) ("Petitioners have not demonstrated that they are likely to suffer irreparable injury absent a preliminary injunction or stay."). The lack of demonstrated irreparable injury remains unchanged. If a final NRC or court decision requires DOE to continue with the license application, DOE can reassemble its workforce and resume activities, provided Congress appropriates funds.[11/]

[10/] *See* Petitioners' Response in Opposition to Respondents' Motion to Vacate Briefing and Oral Argument Schedule and Hold Cases in Abeyance, filed July 7, 2010 (arguing that the consolidated cases should not be held in abeyance because DOE has continued "its shut down efforts including permanently abolishing its work force effective September 30, 2010"); Motion for Preliminary Injunction, filed April 13, 2010, in No. 10-1082, at 4-6, 19.

[11/] *See* Respondents' Response in Opposition to Petitioner's Motion for Preliminary Injunction, filed April 23, 2010, in No. 10-1082, at 16 ("[I]f any NRC or court decision should require DOE to continue with the license application, a workforce can be reassembled and contracts can be renewed. [] Moreover, the existing data relevant to the application is being preserved and performance confirmation can be resumed. To be sure, restarting the licensing application process may well involve some delay, but delay alone is not irreparable injury."). *Id*., Ex. 1 (Affidavit of David Zabransky, Acting Principal Deputy Director of OCRWM).

In any event, the closure of OCRWM has now occurred. Thus, expedited resolution of these cases cannot prevent the harm, if any, to Petitioners from closing that office. Accordingly, the closure of that office provides no reason to reactivate and expedite these consolidated cases at this time.

CONCLUSION

Petitioners' Motion to Lift Stay and Set Expedited Briefing Schedule should be denied.

Respectfully submitted,

/s/ JOHN F. CORDES, JR.
Solicitor
Solicitor (Mail Stop 15 D21)
Nuclear Regulatory Commission
11555 Rockville Pike
Rockville, MD 20852-2738
(301) 415-1956

JEREMY M. SUTTENBERG
Office of General Counsel
Nuclear Regulatory Commission
Washington, D.C. 20555
(202) 415-2842
For Respondent NRC

IGNACIA S. MORENO
Assistant Attorney General
Environment & Natural Resources Division

LISA E. JONES
AARON P. AVILA
ALLEN BRABENDER
/s/ ELLEN J. DURKEE
Appellate Section, Environment & Natural Resources Division
Department of Justice
P.O. Box 23795, L'Enfant Plaza Sta.
Washington, D.C. 20026
(202) 514-5316
For Respondents President Obama & DOE

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CERTIFICATE OF SERVICE

Pursuant to Fed. R. App. P. 25(c), D.C. Circuit Rule 25(c), and this Court's Administrative Order of May 15, 2009, I hereby certify that on this date, October 12, 2010, I caused the foregoing response to be filed upon the Court through the use of the D.C. Circuit CM/ECF electronic filing system, and thus also served on counsel of record. The resulting service is consistent with the preferences articulated by counsel of record in the Service Preference Report. I have also served a copy by U.S. Mail to the following addresses:

Mr. William Henry Davidson III
Davidson, Morrison & Lindemann
1611 Devonshire Drive, Second Floor
P.O. Box 8568
Columbia, SC 29202-8568

Ms. Anne Williams Cottingham
Nuclear Energy Institute
1776 Eye Street N.W.
Washington, DC 20006-3708

/s/ Ellen J. Durkee
U.S. Dep't of Justice
Env't & Natural Res. Div.
P.O. Box 23795 (L'Enfant Station)
Washington, DC 20026-3795
(202) 514-4426
ellen.durkee@usdoj.gov