

NO. 10-1050, 10-1052, 10-1069, 10-1082 *Consolidated*

**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' SUPPLEMENTAL FILING REGARDING MOTION TO
LIFT STAY AND SET EXPEDITED BRIEFING SCHEDULE**

The consolidated Petitioners provide this supplemental filing regarding their September 28, 2010, Corrected Motion to Lift Stay and Set Expedited Briefing Schedule (Petitioners' Motion), for which motion briefing has been completed. Developments subsequent to Petitioners' October 15, 2010 Reply to Respondents' Opposition to Motion to Lift Stay and Set Expedited Briefing Schedule (Petitioners' Reply) clearly demonstrate that Respondent NRC is terminating its review of the Yucca Mountain license application without an official Commission vote, rendering this supplemental filing appropriate and necessary.

I. SECOND SUPPLEMENTAL STATEMENT OF THE CASE

A. Status as of October 15, 2010: DOE's Shutdown Activities and NRC's Termination of License Application Review by Chairman over Objections from Two Commissioners.

Petitioners provide the following supplement to their previously-submitted Statement of the Case, *see* Petitioners' Motion at 1-6, and Supplemental Statement of the Case, *see* Petitioners' Reply at 1-5.

In Petitioners' Motion, Petitioners informed the Court that the NRC has not yet indicated whether the Commission will review the Atomic Safety and Licensing Board's (ASLB's) denial of the Department of Energy's (DOE's) motion to withdraw -- even though such review is the purported basis for the current stay of this action. Petitioners' Motion at 5. Furthermore, despite the denial of Respondent DOE's motion to withdraw by the NRC's Atomic Safety

and Licensing Board, DOE had planned to shut down the Office of Civilian Radioactive Waste Management, the Congressionally-created agency that oversees the Yucca Mountain project, by September 30, 2010. *Id.* at 5-6.

In Petitioners' Reply of October 15, 2010, Petitioners informed the Court that the NRC Chairman has terminated NRC's review of the Yucca Mountain license application without a vote of the Commission, notwithstanding the above-captioned challenges to the lawfulness of DOE's abandonment of Yucca Mountain, and notwithstanding the ASLB's denial of DOE's motion to withdraw its license application for Yucca Mountain. Petitioners' Reply at 2-4. Although two NRC Commissioners moved for full Commission deliberation regarding the termination of the NRC staff's technical review of the application, the NRC Secretary determined that the proposal failed because a majority of Commissioners failed to participate in the matter. *Id.* at 4-5.

B. New Evidence that a Decision to Terminate Yucca Mountain Has Been Reached Without Commission Deliberation, and that Commission Deliberation Was Prevented by "Inside Baseball"

Subsequent to Petitioners' Reply, new evidence has come to light demonstrating that the termination of NRC Staff review of the Yucca Mountain license application was a "decision," and that failure to vote on the termination was "inside baseball," in the words of two of the non-voting Commissioners. At a recent "All-Hands Meeting" of the NRC, the Commissioners were directly asked

by an NRC employee why no other Commissioners voted on the proposal for the full Commission to decide the appropriateness of the termination of NRC Staff's technical review of the Yucca Mountain license application. NRC All-Hands Meeting Transcript, October 18, 2010 (attached hereto as Exhibit A) at 16:14-17. Commission Chairman Gregory Jaczko responded that his non-vote "was, perhaps, by and large, inside, I guess inside ... baseball, the exact mechanism that I used to register ... disagreement with [the] proposal." *Id.* at 16:20-25. Commissioner William Magwood, who also did not vote on the proposal for deliberation by the full Commission, responded that he agreed with the Chairman and considered the non-vote "inside baseball." *Id.* at 17:1-10.

The Chairman also stated that the Commission was "embark[ing] on the effort to look at closing out the program" and that "in the coming months ... the staff [will] begin[] to look at what, exactly, is entailed in the closeout procedure." *Id.* at 21:14-15.

Finally, an NRC employee questioned the Commission about the personal betrayal felt by certain NRC employees who "have spent the better part of 30 years, in many cases their entire career here preparing for" the review of the license application, due to the recent decision to terminate NRC Staff review. *Id.* at 39:4-16.

The Chairman responded that:

“I can appreciate concern, and the disagreement with *the decision*. But, unfortunately, that is, I think, where we are. I think there is a lot of work to be done. There is a lot of work *as we begin the process of closeout* that will be needed to be accomplished...”

Id. at 39:19-23 (emphasis added).

Finally, an NRC employee asked if the Commissioners “could elaborate on how the agency is meeting its statutory requirements under the Nuclear Waste Policy Act, the law, in light of the recent direction that we're getting” *Id.* at 43:22-26. In response, the NRC Chairman stated that “this issue was one that was reviewed very, very carefully by the General Counsel, and it's in 100 percent compliance with all our statutory and legal obligations.” *Id.* at 43:27-44:2.

In addition to the statements at the All-Hands Meeting, the NRC also defended the termination of technical review of the license application in a media release to several newspapers. The NRC media release refers to “[t]he *decision to transition to closeout activities* for the high level waste program.” *Response to Editorial on Yucca Mountain*, Oct. 22, 2010 (attached hereto as Exhibit B) (emphasis added). The NRC media release asserts that the closeout decision is premised on a “budgetary approach” which the Commission approved “almost a year ago.” *Id.* The media release states: “This action is consistent with appropriations law, commission policy, staff delegated responsibilities and ultimately *the chairman's authority* as the agency's principal executive officer.”

Id. (emphasis added). The media release also asserts that “[t]he commission declined to revisit this decision in voting earlier this month,” *id.*, but fails to mention that every Commissioner who actually voted sought Commission deliberation on the decision.

The NRC media release further justified the directive to terminate the NRC Staff’s review of the Yucca Mountain license application by stating that: “[t]he Energy Department has decided not to pursue its application to construct a repository at Yucca Mountain and has closed its Yucca Mountain office.” *Id.*

II. SUPPLEMENTAL DISCUSSION: A Decision by NRC to Closeout the Yucca Mountain Program Has Been Made.

It is clear that the NRC has rendered a “decision”¹ to terminate the review of the Yucca Mountain license application and “transition to closeout activities”² for the Yucca Mountain high-level waste program. This termination decision has occurred despite the *denial* of DOE’s motion to withdraw the license application by the NRC’s own ASLB. This termination decision has occurred despite the pendency of this action challenging the withdrawal of the license application and the larger issue of the abandonment of the Yucca Mountain project.

¹ NRC All-Hands Meeting Transcript, Exhibit A, at 39:20.

² *Response to Editorial on Yucca Mountain*, Oct. 22, 2010 (attached hereto as Exhibit B).

This Court previously granted Respondents' motion to hold these consolidated petitions in abeyance based on the proposition that the Commission was going to review the ASLB's order denying DOE's motion to withdraw, and the Respondents' assertion that the NRC should be given time to "crystallize" the issue. Federal Respondents' Motion to Vacate Briefing and Oral Argument Schedule and Hold Cases in Abeyance (July 2, 2010) at 2. But the Chairman of the NRC has made it clear that the decision to shut down Yucca Mountain as sought by DOE, has already been made, notwithstanding the fact that the only adjudication of this issue (by the ASLB) held that DOE could not withdraw its license application consistent with the Nuclear Waste Policy Act. Since this Court granted Respondents' requested stay, DOE has shut down its Yucca Mountain office and there is no evidence that the NRC intends to render any further decision regarding the ASLB Order. Respondents have sought to make review by this Court meaningless by dismantling the Yucca Mountain project and ending review of the license application.

III. CONCLUSION

Based on the foregoing, Petitioners respectfully reiterate their request that the Court immediately impose an expedited briefing schedule as set forth in Petitioners' Motion.

RESPECTFULLY SUBMITTED this 25th day of October, 2010.

s/ Thomas R. Gottshall

THOMAS R. GOTTSBALL
ALEXANDER SHISSIAS
S. ROSS SHEALY
Haynsworth Sinkler Boyd, P.A.
Post Office Box 11889
Columbia, SC 29211-1889

Attorneys for Aiken County

HENRY DARGAN MCMASTER*
Attorney General for the State of
South Carolina
JOHN W. MCINTOSH*
ROBERT D. COOK*
LEIGH CHILDS CANTEY*
Post Office Box 11549
Columbia, SC 29211
**not admitted*

s/ Kenneth P. Woodington

WILLIAM HENRY DAVIDSON, II
KENNETH PAUL WOODINGTON
Davidson, Morrison & Lindemann
1611 Devonshire Dr., 2nd Floor
Post Office Box 8568
Columbia, SC 29202-8568

*Attorneys for the State of
South Carolina*

s/ James B. Ramsay

JAMES BRADFORD RAMSAY
ROBIN J. LUNT
National Assoc. of Regulatory Utility
Commissioners
1101 Vermont Ave. N.W., Suite 200
Washington, DC 20005

*Attorneys for Intervenor-Petitioner
NARUC*

s/ Barry M. Hartman

BARRY M. HARTMAN
CHRISTOPHER R. NESTOR
CHRISTOPHER R. TATE*
JOHN ENGLERT*
K&L Gates LLP
1601 K Street, N.W.
Washington, DC 20005-1600
**not admitted*

*Attorneys for Robert L. Ferguson,
William Lampson, and Gary Petersen*

ROBERT M. MCKENNA*
Attorney General

s/ Andrew A. Fitz

ANDREW A. FITZ
TODD R. BOWERS
State of Washington
Office of the Attorney General
Post Office Box 40117
Olympia, WA 98504-0117
**not admitted*

Attorneys for State of Washington

CERTIFICATE OF SERVICE

I herby certify that on the 25th day of October 2010, a copy of the foregoing Petitioners' Supplemental Filing on Motion to Lift Stay and Set Expedited Briefing Schedule was filed electronically using the CM/ECF system, which will provide service on the following parties:

Avila, Aaron Peter	aaron.avila@usdoj.gov efile_app.enrd@usdoj.gov aaronpavila@yahoo.com
Bauser, Michael Alan	mab@nei.org
Bowers, Todd R.	toddb@atg.wa.gov
Brabender, Allen Michael	allen.brabender@usdoj.gov efile_app.enrd@usdoj.gov
Cordes, John F., Jr.	John.Cordes@nrc.gov
Durkee, Ellen J.	ellen.durkee@usdoj.gov
Fitz, Andrew Arthur	andyf@atg.wa.gov dianam@atg.wa.gov ecyolyef@atg.wa.gov
Fitzpatrick, Charles J.	cfitzpatrick@nuclearlawyer.com smontesi@nuclearlawyer.com
Gottshall, Thomas Rush	tgottshall@hsblawfirm.com lgantt@hsblawfirm.com bvaldes@hsblawfirm.com
Hartman, Barry M.	barry.hartman@klgates.com klgateseservice@klgates.com
Jones, Lisa Elizabeth	lisa.jones@usdoj.gov efile_app.enrd@usdoj.gov
Lawrence, John W.	jlawrence@nuclearlawyer.com lborski@nuclearlawyer.com
Lunt, Robin Kimlin Jensen	rlunt@naruc.org
Malsch, Martin Guilbert	mmalsch@nuclearlawyer.com cfitzpatrick@nuclearlawyer.com
Ramsay, James Bradford	jramsay@naruc.org

Shealy, Samuel Ross Beheler	rshealy@hsblawfirm.com
Shissias, Alexander George	ashissias@hsblawfirm.com , efoster@hsblawfirm.com
Woodington, Kenneth Paul	kwoodington@dml-law.com sstafford@dml-law.com jangus@dml-law.com

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

by first class United States mail:

Mr. Kilbourne, James Conwell
U.S. Department of Justice
Environment & Natural Resources Division
PO Box 23795, L'Enfant Plaza Station
Washington, DC 20026-3795

Davidson, William Henry, II
Davidson Morrison & Lindemann, PA
1611 Devonshire Drive, Second Floor
PO Box 8568
Columbia, SC 29202-8568

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

s/ Thomas R. Gottshall
THOMAS R. GOTTSBALL
Haynsworth Sinkler Boyd, P.A.
Post Office Box 11889
Columbia, SC 29211-1889