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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NUCLEAR INFORMATION AND)
RESOURCE SERVICE; COMMITTEE)
TO BRIDGE THE GAP; PUBLIC)
CITIZEN, INC.; AND REDWOOD)
ALLIANCE,)
Petitioners,)
v.)
UNITED STATES NUCLEAR)
REGULATORY COMMISSION and the)
UNITED STATES OF AMERICA,)
Respondents)

No. 04-71432

**STATUS REPORT AND MOTION TO EXTEND STAY OF
PROCEEDINGS
(Not Opposed)**

The present petition for review under FRAP Rule 15 challenges final agency action in a rulemaking proceeding by the Respondents UNITED STATES NUCLEAR REGULATORY COMMISSION (NRC). The challenged rulemaking was one of two companion rulemakings separately undertaken by NRC and the UNITED STATES DEPARTMENT OF TRANSPORTATION RESEARCH AND SPECIAL PROGRAMS ADMINISTRATION (DOT-RSPA).

Following Petitioners' April 28, 2004 Motion To Stay Proceedings, this Court granted a stay of its review of the NRC rulemaking until August 13, 2004. The Court granted the stay on grounds that a request to DOT-RSPA for administrative review of the companion rulemaking, the outcome of which could moot or otherwise materially influence the outcome of the present case, was still pending before that agency. The Court required that on or before expiration of that stay Petitioners shall file either the opening brief or a status report and appropriate motion.

As discussed below, due to the continued pendency of the DOT-RSPA administrative challenge, this case remains unripe for review. Accordingly, pursuant to F.R.A.P. Rule 27 and Local Rule 27-1, Petitioners Nuclear Information and Resource Service, et al. move the Court to extend its stay of its review proceedings for the following reasons:

First, the present petition for review, timely taken, is based on a final decision in one of two companion rulemakings separately undertaken by two Federal agencies: (a) the Respondents UNITED STATES NUCLEAR REGULATORY COMMISSION (NRC), et al., RIN 3150-AG71 published January 26, 2004 at 69 F.R. 3698, and (B) the UNITED STATES DEPARTMENT OF TRANSPORTATION RESEARCH AND SPECIAL

PROGRAMS ADMINISTRATION (DOT-RSPA), RIN 2137-AD40

published January 26, 2004 at 69 F.R. 3632;

Second, the decision in the DOT-RSPA rulemaking is pending administrative review under 49 C.F.R. Part 106, and is thus not yet ripe for judicial review;

Third, the Memorandum of Understanding (MOU) between NRC and DOT-RSPA dated June 8, 1979 provides that each agency, in consultation with the other, will develop safety standards within their respective subject-matter jurisdictions, but that DOT will be the national competent authority with respect to the administrative requirements set forth in the regulations for the Safe Transport of Radioactive Materials of the International Atomic Energy Agency (IAEA) and will act as the U.S. representative to the IAEA on matters pertaining to the administrative and safety regulatory aspects of transportation of radioactive materials, and the NRC will provide technical support and advise to DOT – the MOU was published at 44 F.R. 38690;

Fourth, the NRC rulemaking at issue in this appeal is directly related to the DOT rulemaking since the companion rulemakings at their core ultimately concern the safe transportation of radioactive materials, an

activity over which the MOU effectively establishes DOT as the “lead agency;”

Fifth, stay of the review of the NRC rulemaking before this Court would appropriately accommodate the process and time necessary to complete the administrative appeal pending at DOT, and do so without disadvantage or prejudice to either party since the proposed stay does not affect implementation at this time; and

Sixth, counsel for the appellants NIRS et al. and respondent NRC have discussed the proposed request for an extension of the stay of review proceedings, and NRC has consented to the stay.

Wherefore, Petitioner NUCLEAR INFORMATION AND RESOURCE SERVICE, et al. request the Court to grant this motion to extend the stay of its review proceedings until the completion of the DOT administrative appeal, upon which if decided adversely to Petitioners, the Petitioners will promptly notify the Court no later than ten (10) days after DOT’s decision so that judicial review of two final agency decisions in companion proceedings of DOT and NRC may be undertaken in coordinated proceedings.

Dated: August 10, 2004

Respectfully submitted,

M. R. WOLFE & ASSOCIATES



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for

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Attorneys for Petitioners

I HEREBY CERTIFY that a true and correct copy of the forgoing document was mailed to the Respondent indicated below via first class mail, postage prepaid this 10th day of August, 2004:

- (1) Clerk
United States Nuclear Regulatory Commission
Washington, DC 20555-0001

and

- (2) Grace H. Kim, Esq.
Office of the Solicitor
United States Nuclear Regulatory Commission
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