



Environment and Natural Resources Division

A.Brabender
90-13-5-13056

*Appellate Section
P.O. Box 23795
L'Enfant Plaza Station
Washington, DC 20026-3795*

*Telephone (202) 514-5316
Facsimile (202) 353-1873*

April 6, 2011

Mr. Mark Langer
Clerk of Court
U.S. Court of Appeals for the D.C. Circuit
333 Constitution Ave., NW
Washington, D.C. 20001

Re: *In re Aiken*, Nos. 10-1050, 10-1052, 10-1069, 10-1082; Response to Petitioners'
April 1, 2011, letter

Dear Mr. Langer:

Invoking Fed.R.App.P. 28(j), Petitioners filed an April 1, 2011, letter with this Court. The letter characterizes recent testimony by NRC's Chairman, Gregory Jaczko, at a Congressional budget hearing as "an admission" that "there is no decision for the NRC to make" on DOE's motion to withdraw the Yucca Mountain license application. However, the testimony makes no such admission. To the contrary, Chairman Jaczko expressly testified that NRC, as a body, has not yet made a final decision on the motion to withdraw:

We have not, in our formal process made a final decision on that. Voting at the NRC is not much as you do voting here [in Congress]. It is not the final action. In fact, the final action would be commission agreement on an order responding to the particular issue in question. That has not happened at the commission yet.

Hearing at 36. Later on, Chairman Jazcko reiterated that NRC's "process . . . ultimately requires there to be an order." *Id.* at 41. He went on to say, "I am not solely responsible for the decisions of the commission. We function as a body." *Id.* at 43.

Petitioners' letter also cites *CSI Aviation Serv., Inc. v. U.S. Dep't of Transp.*, D.C. Cir. No. 09-1307 (April 1, 2011), holding that a cease-and-desist letter was a final agency order subject to judicial review. *CSI Aviation* is in no way analogous to the present petitions. The cease-and-desist order challenged there put the petitioner company "to the painful choice between costly compliance and the risk of prosecution. . . ," a dilemma that has been held sufficient in other cases for regulated parties to obtain pre-enforcement judicial review. Here, Petitioners are not regulated parties and face no risk of prosecution. Moreover, Petitioners have

not demonstrated (and cannot do so) that the filing of a motion to withdraw the license application has legal consequences or imposes an immediate or significant burden on them. For this and other reasons set forth in Respondents' brief (at 35-46), the petitions should be dismissed as unripe and for failure to challenge a final agency action.

Sincerely,

/s/ John F. Cordes
Counsel for Nuclear Regulatory Commission

/s/ Allen M. Brabender
Counsel for Department of Energy

CERTIFICATE OF SERVICE

Pursuant to Fed. R. App. P. 25(c), D.C. Circuit Rule 25(c), and this Court's May 15, 2009 Administrative Order, I hereby certify that on this date, April 6, 2011, I caused the foregoing letter to be filed upon the Court through the use of the D.C. Circuit CM/ECF electronic filing system, and thus also served counsel of record. The resulting service by e-mail 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/ Allen M. Brabender
ALLEN M. BRABENDER
Attorney, U.S. Dep't of Justice
Env't & Natural Res. Div.
P.O. Box 23795 (L'Enfant Station)
Washington, DC 20026-3795
Telephone: (202) 514-5316
allen.brabender@usdoj.gov