



Environment and Natural Resources Division

EJDURKEE

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

Telephone (202) 514-2748
Facsimile (202) 353-1873

May 20, 2011

Mr. Mark Langer
Clerk, 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; Respondents' Response to Petitioners' May 13, 2011, Rule 28(j) letter

Dear Mr. Langer:

In a May 13, 2011, Rule 28(j) letter, Petitioners point to portions of the NRC Chairman's testimony at a recent Congressional hearing and assert that his testimony shows "the futility of awaiting any NRC decision." This is inaccurate. In fact, the Congressional testimony shows that all four Commissioners participating in the proceeding have voted on the adjudicatory question whether it is lawful for DOE to withdraw its Yucca Mountain license application, but have not yet finalized a Commission order (Tr. 19, 29, 33, 34).

Chairman Jaczko explained: "This particular issue is done like a judicial issue, where we do not deliberate in public, the results are only released with the final decision when the commission comes to that final decision. We don't yet have that final decision." (Tr. 66). Commissioner Svinicki stated: "[W]hat the commission has been looking at is what form that order would take regarding the decision." (Tr. 19). Commissioner Magwood added: "[I]t's an issue we will continue to work on." (Tr. 20). Commissioner Ostendorff pointed out that "I have taken steps since I cast my original vote to try to get the commission to achieve a majority position in order to reach an order." (Tr. 20). And Chairman Jaczko said, "It certainly is a priority . . . we are working to achieve a majority position . . . we do not yet have." (Tr. 20). Similar statements appear throughout the testimony. *See, e.g.*, Tr. 13, 22, 28, 29, 33-36, 53, 54, 67.

Other testimony, including a passage petitioners' letter quotes extensively, dealt chiefly with budget issues that Chairman Jaczko expressly called a "separate matter." Tr. 58. Not all Commissioners agreed with the Chairman's view that NRC's limited Yucca Mountain funds under (initially) a continuing resolution and (ultimately) the agency's 2011 appropriation should be devoted to "closeout" activities. *See, e.g.*, Tr. 39-41, 45-47, 50-51, 55-56, 57, 58. However, the Commissioners' budget-related disagreement does not equate to an adjudicatory determination by the Commission to defer to DOE's withdrawal decision or show "the futility" of allowing the NRC to complete its adjudicatory deliberations prior to judicial review.

Sincerely,

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

/s/ Ellen J. Durkee
Counsel for Department of Energy

May 20, 2011
90-13-5-13056

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, May 20, 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 on May 20, 2011, 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

