



UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D.C. 20555-0001

December 5, 2014

Mark Langer, Clerk of Court
United States Court of Appeals
for the District of Columbia Circuit
333 Constitution Ave., NW
Washington, DC 20001

Re: *State of New York et al. v. NRC*, No. 14-1210
Prairie Island Indian Community v. NRC, No. 14-1212
Beyond Nuclear, Inc. et al. v. NRC, No. 14-1216
Natural Resources Defense Council, Inc. v. NRC, No. 14-1217

Dear Mr. Langer:

I write on behalf of the Federal Respondents, the U.S Nuclear Regulatory Commission ("NRC") and the United States, to correct (or, at a minimum, to expand upon) the answers provided by the Petitioners in the docketing statements filed in the above-referenced consolidated cases.

In the docketing statements filed in the last seven days in these cases, counsel for Petitioners answered "No" to question 6(g), which inquires whether there are "any other cases, to counsel's knowledge, pending before the agency, this Court, another Circuit Court, or the Supreme Court which involve substantially the same issues as the instant case presents." Contrary to the answers provided, each of the four Petitions in fact raises at least one matter squarely at issue in pending litigation before the NRC.

Each Petitioner includes in its statement of issues an assertion that the Commission orders at issue in this case – promulgating a Continued Storage Rule and adopting an associated Generic Environmental Impact Statement – violate the Atomic Energy Act ("AEA"). The most specific articulation of this assertion is presented by Beyond Nuclear, Inc. and its co-Petitioners, who describe the issue as follows:

Whether the Continued Storage Rule and Continued Storage [Generic Environmental Impact Statement] violate the Atomic Energy Act, by failing to provide adequate assurances that waste generated during reactor operation can be safely disposed of in a repository, and therefore issuing

reactor licenses will not be inimical to the health and safety of the public.
42 U.S.C. § 2011 *et seq.*

At the same time they are raising this issue before this Court, Beyond Nuclear and its co-Petitioners are also pursuing precisely the same issue in litigation before the Commission. On September 29, 2014, a consortium of environmental groups that contains eight of the nine signatories to the Petition for Review in Case No. 14-1216 (and now includes all nine) petitioned the Commission to suspend final decisionmaking in all pending reactor and spent fuel storage licensing cases. Their suspension petition is based on a common “contention” (the Commission’s term for a theory of relief in adjudications before the agency), which they sought to litigate, with immaterial variation, in sixteen ongoing licensing actions, that:

[t]he NRC lacks a lawful basis under the Atomic Energy Act . . . for issuing or renewing an operating license . . . because it has not made currently valid findings of confidence or reasonable assurance that the hundreds of tons of highly radioactive spent fuel that will be generated during any reactor’s 40-year license term or 20-year renewal term can be safely disposed of in a repository. The NRC must make these predictive safety findings in every reactor licensing decision in order to fulfill its statutory obligation under the AEA to protect public health and safety from the risks posed by irradiated reactor fuel generated during the reactor’s license term (footnotes omitted).

This contention, as raised in the individual licensing actions, was consolidated for review before the Commission. Briefing on this issue has been completed. Its resolution will necessarily entail consideration of precisely the same issue that Petitioners have raised in their Petitions for Review under the AEA.

Similar duplication also exists with respect to an issue raised in the Petition for Review of the Prairie Island Indian Community (Case No. 14-1212). In addition to raising a claim under the AEA, the Community identifies in its statement of issues the following question:

Whether . . . the Continued Storage Rule and the [Generic Environmental Impact Statement] violate the NRC’s trust obligations to the Petitioner as a federally-recognized Indian tribe by, among other things, failing to adequately evaluate and mitigate the impacts of the Continued Storage Rule and the [Generic Environmental Impact Statement] on the Petitioner’s trust lands and other tribal resources as required by NEPA and other federal law.

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That issue is indistinguishable from the contention that, by motion filed on October 20, 2014, the Community is seeking to admit before the NRC's Atomic Safety and Licensing Board:

The Continued Storage Rule and [Generic Environmental Impact Statement] fail to satisfy the NRC's Federal trust responsibility to assess and mitigate the potential impacts on the PIIC, its people, and its land.

This contention is likewise still under consideration.

The Federal Respondents recognize that, in their Petitions for Review, Petitioners have also identified issues that are not pending before the Commission. But two issues before this Court are squarely and undisputedly before the NRC. For those two issues, agency review has not been exhausted.

Concurrently with this letter, we are filing a response to the Commonwealth of Massachusetts's motion to intervene. We believe that the issues we have identified above and in our response to Massachusetts's motion raise significant case-management concerns. We intend to explore these issues with the Petitioners and proposed intervenors in the hopes of streamlining the resolution of the issues currently before the Court.

Respectfully,

/s/ Andrew P. Averbach
Andrew P. Averbach
Solicitor

CERTIFICATE OF SERVICE

I certify that on December 5, 2014, I filed the foregoing document with the U.S. Court of Appeals for the District of Columbia Circuit by uploading it to the Court's CM/ECF system. That method is calculated to serve:

Geoffrey H. Fettus (gfettus@nrdc.org)
(counsel for Natural Resources Defense Council, Inc.)

Diane Curran (dcurran@harmoncurran.com; magolds@emory.edu)
(counsel of record for Beyond Nuclear, Inc. et al.)

Joseph F. Halloran (jhalloran@thejacobsonlawgroup.com;
sphemister@thejacobsonlawgroup.com; pmahowald@piic.org; kjohnson@piic.org)
(counsel of record for Prairie Island Indian Community)

John J. Sipos (john.sipos@ag.ny.gov; teresa.manzi@ag.ny.gov)
Robert D. Snook (robert.snook@ct.gov)
Kyle Landis-Marinello (kyle.landis-marinello@state.vt.us; Rebecca.Ronga@state.vt.us)
(counsel of record for State Petitioners)

John Emad Arbab (john.arbab@usdoj.gov)
(counsel of record for the United States)

David A. Repka (drepka@winston.com; dreddick@winston.com)
(counsel for Nuclear Energy Institute, Inc.)

Brad Fagg (bfagg@morganlewis.com)
(counsel of record for Entergy Nuclear Operations, Inc.)

Jay E. Silberg (jay.silberg@pillsburylaw.com)
(counsel for Northern States Power Company)

Tracy Leigh Triplett (tracy.triplett@state.ma.us)
(counsel for Commonwealth of Massachusetts)

/s/Andrew P. Averbach
Solicitor
Office of the General Counsel
U.S. Nuclear Regulatory Commission