

UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

STATE OF NEW YORK, <i>et al.</i> ,	)	
	)	
Petitioners,	)	
	)	No. 14-1210
v.	)	
	)	(consolidated with Nos.
UNITED STATES NUCLEAR	)	14-1212, 14-1216, and
REGULATORY COMMISSION and	)	14-1217)
the UNITED STATES OF AMERICA,	)	
	)	
Respondents.	)	

**FEDERAL RESPONDENTS’ MOTION TO DEFER BRIEFING  
PENDING AGENCY DECISION ON PETITIONERS’  
REQUEST TO SUSPEND REACTOR LICENSING**

The United States Nuclear Regulatory Commission (“NRC” or “Commission”) and the United States (collectively, “Federal Respondents”) move to defer briefing on these four consolidated Petitions for Review pending an adjudicatory decision by the Commission on an issue that one set of Petitioners has raised before the agency and that each of the Petitioners has raised before this Court. The issue, which arises under the Atomic Energy Act (AEA), forms the basis of a pending request—styled as a “Petition to Suspend Final Decisions in All Pending Reactor Licensing Proceedings Pending Issuance of Waste Confidence Safety Findings”—that the agency suspend all final licensing decisions for nuclear power plants pending issuance of a specific finding under the AEA. Deferring

briefing on the Petitions for Review before the Court until the Commission rules upon the issue raised in the petition to suspend pending (and thereby provides the agency's most current view on that issue) is not likely to delay substantially resolution of the Petitions for Review. Moreover, it will eliminate the possibility of unwieldy, and potentially confusing, supplemental briefing; enable the Court to hear the agency's most current views as to the interpretation of its organic statute; and clarify the issues raised before the Court.

Petitioners and Petitioner-Inteviewer have informed the Federal Respondents that they do not consent to this motion. Respondents-Intervenors have informed the Federal Respondents that they consent to the motion.

### **BACKGROUND**

These consolidated Petitions for Review present a challenge to the Commission's adoption of its Continued Storage Rule and associated Generic Environmental Impact Statement. *See* Final Rule, Continued Storage of Spent Nuclear Fuel, 79 Fed. Reg. 56,238 (Sept. 19, 2014); Generic Environmental Impact Statement for Continued Storage of Spent Nuclear Fuel, 79 Fed. Reg. 56,263 (Sept. 19, 2014).<sup>1</sup> The rule, issued in response to this Court's decision in *New York v. NRC*, 681 F.3d 471 (D.C. Cir. 2012), codifies the agency's generic identification,

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<sup>1</sup> The Generic Environmental Impact Statement is available at <http://pbadupws.nrc.gov/docs/ML1419/ML14196A105.pdf> (volume 1) and <http://pbadupws.nrc.gov/docs/ML1419/ML14196A107.pdf> (volume 2).

for purposes of the National Environmental Policy Act (NEPA), of the environmental impacts of storing spent nuclear fuel after the licensed life of a nuclear power plant. Recognizing the uncertainty as to when a repository for the disposal of spent nuclear fuel will become available, the Generic Environmental Impact Statement identifies the impacts of storing spent fuel after the licensed life of a nuclear reactor in three scenarios: a short-term time frame (for sixty years after the licensed life of a reactor), a long-term time frame (for one hundred years after the expiration of the short-term period), and an indefinite time frame. *See* Final Rule, 79 Fed. Reg. at 56,245.

Four groups of petitioners have challenged the agency's actions related to the Rule, and the Court has consolidated their Petitions for Review. Common to each of the four Petitions is the assertion that the Rule, the Generic Environmental Impact Statement, or both violate the AEA, NEPA, and the Administrative Procedure Act. Although the Petitioners have identified their claims in their Statements of the Issues with varying levels of detail, the most specific articulation is presented by Beyond Nuclear, Inc. and its co-Petitioners (collectively, "Beyond Nuclear") (Case No. 14-1216), who describe the AEA claim in their Nonbinding Statement of the Issues (Dec. 1, 2014) 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.

This assertion tracks the comments that the agency received when it published the draft Generic Environmental Impact Statement for public comment. Specifically, some commenters asserted that the NRC is required under the AEA to make reasonable assurance “safety” findings concerning a permanent repository for spent fuel disposal.<sup>2</sup>

As Beyond Nuclear has acknowledged in a corrected docketing statement filed on December 12, 2014, substantially the same issue is pending before the agency as a result of a petition filed by Beyond Nuclear and its co-Petitioners. Indeed, on September 29, 2014, a consortium of environmental groups that contains each of the nine signatories to Beyond Nuclear’s Petition for Review filed a petition with the Commission to suspend final decisions in seventeen separate reactor licensing cases. The suspension petition is based on the “contention” (the

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<sup>2</sup> Generic Environmental Impact Statement, Vol. 2 (<http://pbadupws.nrc.gov/docs/ML1419/ML14196A107.pdf>) at D-28 to D-29. The agency addressed these comments, *see id.* at D-29 to D-32, explaining that it had adopted the Rule and codified the impacts of continued storage pursuant to its obligations under NEPA, and that it would make safety determinations pursuant to the AEA as part of the licensing process. This conclusion is consistent with our argument here—that Petitioners’ AEA arguments relate most directly to, and should be considered in light of, the conclusions that the Commission reaches in connection with the petition to suspend reactor licensing.

Commission's term under its rules for a statement of a specific material dispute to be adjudicated) 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.

Although Beyond Nuclear acknowledges in its corrected docketing statement that the issues before the Court and the Commission are "similar," they are, in fact, identical in all material respects and rest upon the same basic legal theory: that the AEA requires the Commission to make a specific "waste confidence safety finding"—i.e., a specific determination concerning the feasibility of disposing of spent nuclear fuel in a geologic repository—as a precondition to issuing licenses for nuclear power plants. Beyond Nuclear's assertions before the agency and before this Court hinge upon resolution of this same legal issue.<sup>3</sup>

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<sup>3</sup> Beyond Nuclear and its co-Petitioners filed a corrected docketing statement in light of (1) a letter filed with the Court on December 5, 2014, by counsel for the NRC, which challenged the omission from Beyond Nuclear's original docketing statement of any reference to the suspension petition as a "substantially similar issue"; and (2) the December 8, 2014, filing by Missouri Coalition for the Environment (one of Beyond Nuclear's co-Petitioners in Case No. 12-1416) of a contention before the Commission in a licensing proceeding concerning the

(continued. . .)

Briefing on the AEA safety issue before the Commission was completed on November 7, 2014, after the submission of two briefs by Beyond Nuclear and its co-Petitioners, a consolidated opposition by the NRC Staff, and numerous briefs opposing the petition filed by intervenors (the holders of, or applicants for, licenses to operate the sixteen facilities for which suspension of the licensing proceeding has been sought). The issue is now before the Commission and awaiting decision.

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Callaway Plant that raises a series of NEPA-related challenges to the Continued Storage Rule. The Federal Respondents do not seek to defer briefing pending resolution of the Missouri Coalition's NEPA challenge because the challenge is, by its own terms, a "place-holder" contention. The Coalition acknowledged that it raised the contention solely to "lodge a formal challenge to the NRC's complete and unqualified reliance, in the separate license renewal proceeding for [Callaway], on the legally deficient Continued Spent Fuel Storage Rule and Continued Spent Fuel Storage [Generic Environmental Impact Statement]" and, thereby, preserve its right to appeal a final order renewing the license for the Callaway facility.

The December 5, 2014, letter from NRC counsel to the Court also noted that an issue raised by the Prairie Island Indian Community (the Petitioner in Case No. 14-1212) is substantially the same as a contention that the Community has raised before the agency concerning the NRC's trust obligations to the Community as a federally-recognized Indian tribe. On December 23, 2014, the agency's Atomic Safety and Licensing Board denied the Community's request for leave to file this contention. The Federal Respondents do not seek to defer briefing pending the Commission's final resolution of that issue because (1) the "trust obligation" issue is not common to each Petitioner before this Court; and (2) an appealable order relating to the Community's contention is not on the immediate horizon.

## ARGUMENT

Sound principles of case management and respect for the delegation of authority by Congress to the NRC to interpret and administer its organic statute strongly militate in favor of deferring briefing until the Commission issues a decision on the suspension petition that Beyond Nuclear and its co-Petitioners have filed.

First, the Commission is currently considering, in an adjudication commenced by Beyond Nuclear and its co-Petitioners before this Court, the same issue that Petitioners raise here—whether the AEA requires a so-called “waste confidence safety finding” as a precondition to issuing licenses. Historically, the Commission has not interpreted the AEA in this manner, having previously denied a petition for rulemaking requesting that it do so, and its interpretation of the AEA has been affirmed on appeal by the Second Circuit. *See* Natural Resources Defense Council, Denial of Petition for Rulemaking, 42 Fed. Reg. 34,391, 34,393 (July 5, 1977), *aff’d*, *Natural Res. Def. Council v. NRC*, 582 F.2d 166 (2d Cir. 1978) (“[W]e hold that NRC is not required to conduct the rulemaking proceeding requested by NRDC or to withhold action on pending or future applications for nuclear power reactor operating licenses until it makes a determination that high-level radioactive wastes can be permanently disposed of safely.”).

Beyond Nuclear is effectively asking this Court to revisit the same question decided by the Second Circuit in *NRDC v. NRC* but to reach a different result. Before the Court entertains Beyond Nuclear's claim that the Commission is required to make a "waste confidence safety determination" as a prerequisite to making licensing decisions, the Court would benefit greatly from the current views of the Commission—the agency entrusted by Congress under the AEA to ensure the health and safety of the public from radiological hazards—in light of nearly four decades of legal and regulatory developments since *NRDC*. *See generally McCarthy v. Madigan*, 503 U.S. 140, 144-47 (1992) (explaining, in the context of the exhaustion doctrine, that "deference to Congress' delegation of authority to coordinate branches of Government" dictates that "agencies, not the courts, ought to have primary responsibility for the programs that Congress has charged them to administer"). And Beyond Nuclear and its eight co-Petitioners, having expressly requested that the Commission examine this very issue anew (and take the extraordinary step of suspending final licensing decisions), are hard-pressed to assert that the Commission's views on the subject, issued in an adjudicatory context in which the issue has been squarely raised, should not inform the Court's decisionmaking process. The Commission's views will be reached only after consideration of comprehensive briefing on the issue by the parties and the intervenors before the agency, who have also appeared in this Court.

Respondents' request to defer briefing is closely aligned with the jurisprudential doctrine of exhaustion. This "long settled rule of judicial administration" serves several important purposes: it permits the agency to develop the factual background of the case and apply its expertise, while conserving scarce judicial resources. *United States v. White*, 431 F.3d 431, 434 (5th Cir. 2005); *Andrade v. Lauer*, 729 F.2d 1475, 1484 (D.C. Cir. 1984). As a jurisprudential doctrine, failure to exhaust precludes judicial review if "the purposes of exhaustion" and the "particular administrative scheme" support such a bar. *Hidalgo v. FBI*, 344 F.3d 1256, 1258-59 (D.C. Cir. 2003) (citing *Oglesby v. U.S. Dep't of the Army*, 920 F.2d 57, 61 (D.C. Cir. 1990)). While exhaustion does not apply here, strictly speaking (because the Petitioners need not, and could not challenge, the Continued Storage Rule through the agency's adjudicatory process), the principles underlying jurisprudential exhaustion do apply: "afford[ing] the parties and the courts the benefit of [the agency's] experience and expertise." *Id.* at 1259 (brackets in original) (quoting *Oglesby*, 920 F.2d at 61).

In addition to the benefits of letting the suspension petition come to its adjudicatory conclusion, deferring briefing until the suspension petition has been resolved is also consistent with principles of sound case management. Although we cannot predict exactly when the Commission will issue a decision on the suspension petition, briefing on the issue was completed on November 7. Because

the issue presents a matter of substantial significance to the agency, to the public, and to the nuclear industry, we expect relatively prompt action by the Commission. A decision by the Commission likely will be issued substantially in advance of the time that this case is ready for oral argument. Assuming this is the case, it is inconceivable that the parties will not want to be heard with respect to the Commission's decision, a situation that may result in the filing of supplemental briefing (including the likelihood of duplication and inefficiency) as well as a new Petition for Review in the event of a denial.<sup>4</sup>

We do not take lightly the concern that deferral of briefing could delay resolution of Petitioners' challenge to the Continued Storage Rule, particularly given that the challenge is not limited to the AEA and that not all of the Petitioners before the Court have sought relief before the agency. But the matter pending before the agency is of great significance to all interested parties, and each of the four Petitions has invoked the AEA as a basis for its legal challenge to the agency's actions. We believe that any delay caused by deferral is likely to be modest and, to the extent it occurs at all, is greatly offset by the benefits of (1) enabling the Commission to address squarely and in an adjudicatory context the AEA issue that has been presented by nine different co-Petitioners; and (2)

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<sup>4</sup> If the suspension petition were granted, of course, the Court would likely not need to consider Petitioners' assertions under the AEA.

consolidating the parties' arguments into a single set of briefs that are prepared after the agency has issued the requested ruling.

### CONCLUSION

For the foregoing reasons, the Federal Respondents respectfully request that the Court defer briefing on the consolidated Petitions for Review until the Commission issues a decision on Beyond Nuclear's "Petition to Suspend Final Decisions in All Pending Reactor Licensing Proceedings Pending Issuance of Waste Confidence Safety Findings."

Respectfully submitted,

/s/ John E. Arbab  
JOHN E. ARBAB  
Attorney  
United States Department of Justice  
Environment & Natural Resources  
Division  
Appellate Section  
P.O. Box 7415  
Washington, D.C. 20044  
Phone: (202) 514-4046  
Fax: (202) 353-1873  
[john.arbab@usdoj.gov](mailto:john.arbab@usdoj.gov)

/s/Andrew P. Averbach  
ANDREW P. AVERBACH  
Solicitor

/s/ Robert M. Rader  
ROBERT M. RADER  
Senior Attorney

/s/ Michelle D. Albert  
MICHELLE D. ALBERT  
Attorney

Office of the General Counsel  
U.S. Nuclear Regulatory Commission  
11555 Rockville Pike  
Rockville, MD 20852  
Phone: (301) 415-1956  
Fax: (301) 415-3725  
[andrew.averbach@nrc.gov](mailto:andrew.averbach@nrc.gov)

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## CERTIFICATE OF SERVICE

I certify that on January 9, 2015, I filed FEDERAL RESPONDENTS' MOTION TO DEFER BRIEFING PENDING AGENCY DECISION ON PETITIONERS' REQUEST TO SUSPEND REACTOR LICENSING 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](mailto:gfettus@nrdc.org))  
(counsel of record for Natural Resources Defense Council, Inc.)

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

Joseph F. Halloran ([jhalloran@thejacobsonlawgroup.com](mailto:jhalloran@thejacobsonlawgroup.com);  
[sphemister@thejacobsonlawgroup.com](mailto:sphemister@thejacobsonlawgroup.com); [pmahowald@piic.org](mailto:pmahowald@piic.org); [johnson@piic.org](mailto:johnson@piic.org))  
(counsel of record for Prairie Island Indian Community)

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

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

David A. Repka ([depka@winston.com](mailto:depka@winston.com); [dreddick@winston.com](mailto:dreddick@winston.com))  
(counsel of record for Nuclear Energy Institute, Inc.)

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

Jay E. Silberg ([jay.silberg@pillsburylaw.com](mailto:jay.silberg@pillsburylaw.com))  
(counsel of record for Northern States Power Company)

Seth G. Schofield ([seth.schofield@state.ma.us](mailto:seth.schofield@state.ma.us); [sethschofield@aol.com](mailto:sethschofield@aol.com),  
[jillian.riley@state.ma.us](mailto:jillian.riley@state.ma.us))  
(counsel of record for Commonwealth of Massachusetts)

Wallace A. Taylor ([wtaylorlaw@aol.com](mailto:wtaylorlaw@aol.com); [pammackeytaylor@aol.com](mailto:pammackeytaylor@aol.com))  
(counsel of record for Sierra Club)

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