

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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STATE OF NEW YORK, *et al.*

Petitioners,

-against-

UNITED STATES NUCLEAR
REGULATORY COMMISSION and
THE UNITED STATES OF AMERICA,

Respondents.
-----x

Case Nos. 14-1210,
14-1212, 14-1216,
14-1217

(Consolidated)

**STATES OF NEW YORK, CONNECTICUT, VERMONT,
THE COMMONWEALTH OF MASSACHUSETTS, AND
THE PRAIRIE ISLAND INDIAN COMMUNITY'S OPPOSITION
TO FEDERAL RESPONDENTS' MOTION TO DEFER BRIEFING**

New York, Connecticut, Vermont, the Commonwealth of Massachusetts, and the Prairie Island Indian Community oppose the federal respondents' motion to defer the briefing in this case until the United States Nuclear Regulatory Commission resolves an administrative petition filed by certain non-governmental groups of non-governmental petitioners in this proceeding — *Beyond Nuclear, et al.* Respondents' motion should be denied because *Beyond Nuclear's* administrative petition was filed after the final agency action at issue in

this proceeding, and seeks relief not sought by the States in this proceeding.

Specifically, Beyond Nuclear's administrative petition seeks to suspend the licensing of various nuclear facilities. None of the State petitioners have joined in the administrative petition or otherwise seek to suspend license issuances and renewals. Thus, although the federal respondents argue that the exhaustion doctrine would be served by deferring briefing (Resp. Mot. at 9), there is no need for the Court to wait for further Commissioner action before hearing the pending petitions for review. As federal respondents have explained, NRC determined when it issued the rule that the rule would not make safety findings pursuant to the Atomic Energy Act. Resp. Mot. at 4, n.2. As federal respondents have further explained, Beyond Nuclear's statement of issues indicates that it intends to argue to the Court that NRC was required to make those safety findings in the rule. *Id.* at 3. That issue can be briefed and decided without a decision from the Commission on whether license issuances and renewals should be suspended on the ground that the safety findings have not yet been

made in either the rule or another NRC decision.

Federal respondents argue that briefing should be deferred so the Court can have the benefit of the Commission's decision on the suspension request (Resp. Mot. at 8), but again NRC has already decided the issue before the Court — whether safety findings had to be made in the rule — when it issued the rule. That decision is now final, however, and must rise or fall on the administrative record before the NRC at the time the agency made it, *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 419-20 (1971), and not some new record or post-hoc rationalization developed in a separate, non-final, adjudicatory proceeding now pending before the agency. *See id.*; *see also Honeywell Int'l, Inc. v. NRC*, 628 F.3d 568, 581 (D.C. Cir. 2010) (rejecting NRC's attempt to justify its decision through post-hoc rationalization).¹ Barring an NRC decision to request a voluntary remand and stay of both the Final Continued Storage Rule and the Final GEIS pending further agency review, there is no reason to delay the Court's decision

¹ Here, in fact, the NRC has already filed with this Court a certified index of the administrative record on which the agency based its decision on both the Final Continued Storage Rule and the Final GEIS.

on this issue.

The States and Prairie Island Indian Community, together with co-petitioners, propose the following schedule:

April 10, 2015 Petitioners' and Intervenor-Petitioner's briefs
April 17, 2015 Amicus curiae Sierra Club brief
June 10, 2015 NRC Brief
June 17, 2015 Intervenor-Respondents' Brief
July 10, 2015 Petitioners' Reply Brief
July 24, 2015 Joint Appendix
July 31, 2015 Final briefs

Dated: January 20, 2015

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Kathryn DeLuca, certify that on January 20, 2015, I served the States of New York, Connecticut, Vermont, the Commonwealth of Massachusetts, and the Prairie Island Indian Community's Opposition to Federal Respondents' Motion to Defer Briefing via the D.C. Circuit's Case Management/Electronic Case Filing (CM/ECF) System upon the following counsel of record:

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