ORAL ARGUMENT NOT YET SCHEDULED

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14-1213

FRIENDS OF THE EARTH,
Petitioner,
v.

U.S. NUCLEAR REGULATORY COMMISSION
and
UNITED STATES OF AMERICA,
Respondents,
and
PACIFIC GAS AND ELECTRIC COMPANY,
Intervenor.

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FEDERAL RESPONDENTS' RESPONSE TO PETITIONER'S MOTION TO SET BRIEFING SCHEDULE AND ORDER ORAL ARGUMENT

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I. Introduction

On April 13, 2015, a motions panel of this Court issued an order holding this case in abeyance pending Commission[1] action on the petition to intervene and request for hearing filed by Friends of the Earth ("FOE"). Shortly thereafter, the Commission referred the hearing request to the NRC's Atomic Safety and Licensing Board with directions to complete a review of the hearing request within 140 days. The Licensing Board, in turn, conducted additional briefing on the issues raised by FOE, held expedited oral argument on the matter, and announced that it would issue a decision by October 9, 2015, which is approximately two weeks from the date of this filing.

Despite the progress in the administrative proceeding, FOE has now filed a Motion to Set Briefing Schedule and Order Oral Argument ("Motion"), which would re-activate this case. But the only thing that has changed since April 13th, when this Court decided to hold the case in abeyance, is that the agency has made significant progress toward processing FOE's hearing request, which would appear to have been this Court's intent in holding this case in abeyance in the first place. Thus, this Court should deny FOE's motion and continue to hold this case in abeyance pending Commission resolution of FOE's hearing request.

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[1] This Response will use "Commission" to refer to the 5-member body that manages the agency and "NRC" to refer to the agency as a whole.

II. Background

Petitioner Friends of the Earth ("FOE") filed this petition for review claiming that the NRC approved Revision 21 to the Final Safety Analysis Report ("Safety Report") of the Diablo Canyon Nuclear Power Plant.[2] FOE claimed that the NRC's approval of Revision 21 constituted a *de facto* amendment of the Diablo Canyon licenses and that the NRC failed to offer the public an opportunity to request a hearing on that amendment as required by the Atomic Energy Act. But, at the same time, FOE filed a petition to intervene and request for hearing before the Commission seeking an administrative hearing on the *de facto* amendment allegedly granted by the approval of Revision 21.

Respondents initially moved to dismiss this case, arguing that the decision challenged by FOE was not final and that FOE had not exhausted its agency remedies. A motions panel of this Court referred that motion to the merits panel assigned to this case. Respondents then asked this Court to defer briefing in this case pending Commission resolution of FOE's administrative request, pointing out, *inter alia*, that the agency's lawyers could not defend the Commission unless and until the Commission actually adopted a position on FOE's request. FOE opposed

[2] Diablo Canyon is a two-unit nuclear power plant located near San Luis Obispo, California, owned and operated by Pacific Gas and Electric Company ("PG&E").

the request, arguing that the Commission had in fact taken such a position. FOE also asked this Court to supplement the administrative record of the case.

On April 13, 2015 this Court issued an order holding the case in abeyance, requiring Respondents to file status reports on 60-day intervals and directing the parties to file motions to govern further proceedings by September 15. The April 13 order also deferred ruling on FOE's motion to supplement the record. Respondents filed status reports as directed, and now both Respondents and Petitioner have filed motions to govern further proceedings. This pleading responds to FOE's motion to Set Briefing Schedule and Order Oral Arguments.

III. This Court Should Continue to Hold This Case in Abeyance.

A. Continuing To Hold This Case In Abeyance Furthers Judicial Economy.

For the reasons described in our motion to defer briefing, and as apparently recognized by this Court, holding this matter in abeyance will further judicial economy and prevent the unnecessary expenditure of resources by all involved in this case. The Commission will, in due course, issue a decision determining whether the NRC Staff's alleged approval of Revision 21 constituted a *de facto* amendment of the Diablo Canyon licenses. If the Commission concludes that no *de facto* amendment took place, FOE can then challenge that decision in federal court through a separate petition for review, which can be consolidated with the existing petition for review. This Court will then be able to decide both petitions

for review in one proceeding rather than conducting two separate proceedings with the resulting inefficiency.

Indeed, this court has considered judicial economy while keeping a case in abeyance pending consideration by an administrative body. For example, it has taken issues filed in one lawsuit and consolidated them with another lawsuit filed by the same plaintiff and held in abeyance pending agency reconsideration. *See Time Warner Entm't Co., L.P. v. F.C.C.*, 93 F.3d 957, 980 (D.C. Cir. 1996) ("Time Warner has challenged these regulations in a direct appeal to this court in *Time Warner Entertainment Co. v. FCC*, No. 94–1035, a case currently held in abeyance pending Commission reconsideration. In the interest of judicial economy, we consolidate this challenge to the constitutionality of these two statutory provisions with the challenge to the regulations in No. 94–1035."). Here, FOE is litigating the same issue before both the Commission and this Court. As in the *Time Warner* litigation, allowing the Commission to complete its adjudicatory process and then reviewing the two actions in a consolidated petition for review is in the best interests of judicial economy and fully consistent with previous practice.

B. FOE Is Not Harmed by Continuing To Hold This Case in Abeyance.

FOE's motion relies in large part on the assertion that Respondents are improperly attempting to delay the proceedings, and that this delay is somehow causing harm. For instance, FOE claims that Respondents attempted to hold this

case in abeyance by filing a Motion to Dismiss (Dec. 14, 2014). Motion at 5. But that claim is clearly incorrect. Unsurprisingly, Respondents' Motion to Dismiss sought to *dismiss* this case outright on jurisdictional and justiciability grounds, not delay it.

A motions panel of this Court referred those arguments to the merits panel. That referral to the merits panel assures FOE that this Court will hear its claims that the NRC has *de facto* amended the Diablo Canyon licenses without providing the public with an opportunity to request a hearing under the Atomic Energy Act. Thus, continuing to hold this case in abeyance does not harm FOE in this respect. Even if this Court's continues to hold this case in abeyance, FOE will still receive a full "airing of the issues." Motion at 5.

FOE also argues that continuing to hold this case in abeyance will prevent its claims from being heard in a "timely fashion" and that "[e]xpedition" of its claims is "particularly important" when the case "involves the safety of a nuclear power plant." Motion at 5. FOE implies, as it claimed in response to the Motion to Defer, that there is some "extreme urgency" in deciding this case.

But as we have pointed out on several occasions, FOE does not claim any specific technical deficiency at Diablo Canyon or present any expert opinion that continued operation of the Diablo Canyon facility is unsafe. Moreover, FOE has not filed an emergency stay motion with either the Commission or with this Court

making any specific safety claims related to seismic considerations at Diablo Canyon and asking that the Commission or this Court shut down the facility. In sum, FOE has not taken advantage of the various administrative processes available before the agency to raise any safety concerns; thus, it cannot now claim that those concerns should prevent this Court from continuing to hold this case in abeyance.

Finally, FOE complains that the agency process is moving at a "glacial pace," Motion at 6, and that "[a] decision from the Commission, to the extent one will be issued at all, is nowhere within sight." *Id*. But that claim is belied by the facts, which demonstrate orderly yet concerted progress toward resolution of the complicated technical issues FOE raises. The Commission has issued an order referring FOE's request to the Licensing Board and directing the Board to issue an order on the hearing request within 140 days of the Commission's Order.[3]

The Licensing Board, in turn, promptly issued an order directing the NRC Staff to respond to FOE's Reply pleading, which raised issues about Revision 21 that were not in its earlier pleadings, and allowed FOE to file a Response to the Staff's filing. The Licensing Board then conducted oral argument on an expedited basis on FOE's request, and, at the close of the oral argument, the Presiding

[3] Respondents have filed the Commission Order with this Court. *See* Exhibit 1, Federal Respondents' Status Report (June 12, 2015).

Officer stated that the Board intended to issue an Order responding to the request by October 9, 2015 (if not sooner). That date is the deadline imposed by the Commission and is less than two weeks from the date of this pleading. In fact, the Board may issue its Order before the briefing on this motion is complete.

That process does not resemble a "glacial pace." Instead, it suggests careful and thorough consideration of FOE's claims by an adjudicatory body intent on providing FOE with a full and fair opportunity to present its arguments. Indeed, it is no small irony for FOE to argue that it is being delayed by the very adjudicatory processes it seeks to invoke in making its hearing request.

It is true that the losing party before the Licensing Board must appeal to the Commission if it wishes to seek review of an adverse Licensing Board decision. *See* 10 C.F.R. § 2.311. But that process is no less cumbersome or time-consuming than a proceeding involving full-scale briefing and oral argument before this Court. And FOE's suggestion that the Commission might not actually issue a decision (*i.e.*, "to the extent [a decision] will be issued at all," Motion at 6) is meritless. Like any adjudicatory body, the Commission requires time to resolve the numerous issues before it and must prioritize items on its docket. But the fact that a decision might not be issued immediately does not mean that one will never be issued.

In sum, FOE has not demonstrated that it will suffer any harm if this Court continues to hold this case in abeyance. The NRC's administrative proceedings are

moving forward efficiently and are providing FOE with an even more expansive opportunity to raise its arguments than it would have before this Court. FOE has not supplied any reason not to wait until they reach their logical conclusion.

C. The NRC Staff's Filing Before the Licensing Board Cannot be Considered the Commission's Position for Purposes of This Lawsuit.

In our Motion to Defer Briefing, we argued that, as attorneys representing the Commission, we could not take a position on the issues in this case without a ruling by the Commission itself. *See* Motion to Defer Briefing at 5-7. FOE's motion now argues that "Respondents attorneys *have already* adopted a litigation position on whether the agency's approval of Revision 21 violates the [Atomic Energy Act]." Motion at 7 (emphasis in original). FOE then cites filings made by the NRC Staff's counsel in the proceeding before the Licensing Board. *Id*. at 7-8.

This claim is obviously wrong. As we noted in our Motion to Defer Briefing, the NRC Staff is an independent party in NRC proceedings. *See* Motion to Defer Briefing at 6. Thus, the NRC Staff does not speak for the Commission, especially during the pendency of a contested administrative proceeding. Obviously, when it sits in its adjudicatory capacity, the Commission has the authority to overrule the NRC Staff's position. Should it do so, the Commission's attorneys (who represent the Commission in this case before this Court) must represent the Commission's position, not the NRC Staff's position.

Here, the NRC attorneys in the administrative proceeding (who are not the NRC attorneys representing the Commission before this Court) have advocated the position espoused by the NRC technical staff. But the whole point of an adjudicatory proceeding is for the Commission – as opposed to the NRC Staff – to reach a position on a contested issue. In fact, were the Commission's attorneys in this case to advocate before this Court the position adopted by the NRC Staff before the Licensing Board before the Commission reaches a decision on the issue, FOE would claim – justifiably – that the agency has violated its duty to consider the merits of the arguments without prejudging them.

Moreover, as we noted in the Motion to Defer Briefing, if the Commission's attorneys present the NRC Staff's position (or PG&E's position) to the Court as the Commission's position, they will be usurping the Commission's prerogatives and denying FOE the benefit of the Commission's unbiased consideration. *Id*. at 6-7. The same would hold true if the Commission's attorneys present FOE's position to the Court as the Commission's position (which would deny PG&E the benefit of the Commission's unbiased consideration). *Id*. And in both cases the information that the Commission's attorneys would provide would not assist the Court because the Commission would not have adopted either position.

In sum, FOE's argument rests on a complete misapprehension of the administrative process and basic administrative law. This Court should reject this

claim and continue the case in abeyance pending a Commission decision on FOE's petition to intervene and request for hearing.

D. Continuing To Hold the Case in Abeyance Allows the Commission to Contribute its Expertise to the Proceeding.

FOE has never addressed the fact that deferring briefing – and continuing to hold this case in abeyance – will allow the Commission to bring its regulatory and technical expertise to bear on FOE's claims. *See* Motion to Defer Briefing at 7-9; Reply at 9-10. FOE's claims before the NRC center on the relationship between the earthquake faults in the Diablo Canyon region and that facility's licensing basis and raise issues related to ground acceleration associated with a possible earthquake on one (or more) of the faults in the region and the potential resulting impact on the facility itself. Not only do these claims raise complicated questions about the agency's regulatory and licensing processes, but they also raise complex geoscience issues as well. Resolving these claims will require an assessment of the agency's regulatory practices and their impact on the licensee's activities as well as (potentially) various technical issues.

This Court is not well-positioned to determine whether FOE or the NRC Staff has the superior regulatory and technical arguments without the benefit of the agency's viewpoint on these issues. Yet making decisions in these regulatory and technical areas will be necessary to determine whether the changes contained in Revision 21 to the Diablo Canyon Safety Report provided the facility with

additional operating authority that (as FOE claims) would constitute an amendment to the facility license. If this Court attempts to resolve these complex regulatory and technical issues on its own, it will do so without the benefit of the Commission's application of its expertise in these disciplines to FOE's claims. Continuing to hold this case in abeyance will allow the Commission to create an administrative record for this Court to review and permit this Court to take advantage of the agency's expertise in resolving the complex legal and technical issues that FOE has raised.

E. Continuing To Hold This Matter in Abeyance Does Not Deviate From Usual Appellate Procedure.

In its Motion, FOE claims that questions of finality normally are addressed by courts of appeals at the merits phase, rather than holding related cases in abeyance while parties pursue related issues in administrative proceedings. In fact, FOE argues that holding a related case in abeyance "would deviate from appropriate and usual appellate procedure." Motion at 3. In support, FOE cites *In re Murray Energy Corp*, 788 F.3d 330 (D.C. Cir. 2015) and *Koch v. White*, 744 F.3d 162, 165 (D.C. Cir. 2014). But those cases do not stand for that proposition. Instead, the decisions in those cases simply ruled on whether the petition for review at issue challenged a final agency action (*Murray Energy*, 788 F.3d at 334) or challenged an action in which agency remedies had been exhausted (*Koch v. White*, 744 F.3d at 165). Neither decision addresses the issue of whether it is

appropriate to hold a related case in abeyance pending agency action. Thus, neither case sheds any light on the issue presented here.

FOE also cites several cases for the unexceptional proposition that appellate courts can address questions of finality and exhaustion of administrative remedies under the Hobbs Act, 28 U.S.C. § 2342. *See, e.g.*, Motion at 4, citing *CSX Transp., Inc. v. Surface Transp. Bd.*, 774 F.3d 25 (D.C. Cir. 2014) and *Vt. Dept. of Pub. Serv. v. United States*, 684 F.3d 149 (D.C. Cir. 2012). But not only is that issue not in dispute, it is not relevant to the question presented here, *i.e.*, whether this Court should continue to hold this case in abeyance. This Court has already referred Respondents' jurisdictional and justiciability claims under the Hobbs Act to the merits panel, and that panel will decide those issues. The issue *now* before this Court is whether to continue to hold in abeyance FOE's instant petition for review filed with this Court pending Commission resolution of an identical issue, *i.e.*, FOE's claim that the NRC Staff's alleged approval of Revision 21 to the Diablo Canyon Safety Report constitutes a *de facto* amendment of the Diablo Canyon licenses.

FOE also cites *Blue Ridge Envtl. Defense League v. Nuclear Regulatory Comm'n,* 668 F.3d 747 (D.C. Cir. 2012) for its argument concerning courts' ability to address issues of finality and exhaustion. Motion at 4. But *Blue Ridge* actually supports Respondents' request that this Court continue to hold this case in

abeyance. In *Blue Ridge*, this Court held an initial petition for review in abeyance pending further proceedings before the Commission on a related issue. *Id.* at 752. Once those proceedings were complete, the petitioner filed a new petition for review, which this Court consolidated with the existing petition and then reviewed the consolidated case. *Id*. at 752-53. Thus, continuing to hold this current petition for review in abeyance and consolidating it with any petition to review the eventual decision on FOE's administrative request clearly does not "deviate" from this Court's procedure when a related matter is pending before the same administrative agency. Instead, if anything, continuing to hold the current petition for review in abeyance would be fully consistent with this Court's practice.

Finally, FOE claims that "a dispute over whether a petitioner has failed to exhaust is an issue to be addressed on its merits, rather than cause for abeyance pending exhaustion of administrative remedies." *See* Motion at 4, citing *Far East Conference v. United States*, 342 U.S. 570, 577 (1952). But *Far East* does not support FOE's position.

In *Far East*, the United States filed an antitrust action against several shipping companies, who argued that the government should first exhaust its remedies with the Federal Maritime Board under the Shipping Act. 342 U.S. at 571-72. The Supreme Court agreed, holding that the government was required to exhaust its remedies before the Board before bringing suit in federal court. *Id*. at

572-76. Given that the government had not yet filed an action before the Board, the Court held that the federal district court need not hold the case in abeyance on its docket; instead, it held that it could be dismissed. *Id.* at 576-77.

This case is entirely distinguishable. In *Far East*, the Court had already decided the issue of exhaustion when it considered whether abeyance was appropriate. And the Supreme Court certainly did not direct the district court to move forward with the case while the government pursued administrative remedies, as FOE apparently suggests should happen here. Rather, it simply concluded that no purpose would be served in maintaining the previous action on the district court's docket where exhaustion was required and (unlike here) no administrative process had even been invoked. *Id.* at 577. Moreover, the *Far East* Court did not announce a categorical prohibition against holding cases in abeyance pending the completion of the administrative process; it expressly recognized cases in which abeyance was appropriate and determined that "[b]usiness-like procedure" militated against abeyance in the circumstances presented. And, of course, considerations of this type (including conservation of resources, judicial economy, and reliance upon agency expertise) are precisely the ones that justified our original motion to defer briefing and that, for the reasons explained above, warrant continuation of the Court's abeyance order here. Thus, to the limited extent *Far East* bears at all on this case, it supports Respondents' position.

Conclusion

For the foregoing reasons, this Court should deny FOE's Motion to Set Briefing Schedule and Order Oral Argument. Instead, this Court should continue to hold this case in abeyance and direct the Respondents to file Status Reports every 60 days. The Court should also direct the parties to file motions to govern further proceedings 20 days after the issuance of any final agency action on FOE's petition to intervene and request for hearing now pending before the NRC.

Respectfully submitted,

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September 25, 2015

CERTIFICATE OF SERVICE

I certify under penalty of perjury that on September 25, 2015, I filed "*Federal Respondents' Response to Petitioner's Motion to Set Briefing Schedule and Order Oral Argument"* in Case No. 14-1213 with the U.S. Court of Appeals for the District of Columbia Circuit by filing it with the Court's CM/ECF system. That method is calculated to serve:

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