

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 & ELECTRIC COMPANY,
Intervenor.

**PETITIONER'S RESPONSE IN OPPOSITION TO FEDERAL
RESPONDENTS' MOTION TO CONTINUE THIS CASE IN ABEYANCE**

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September 25, 2015

INTRODUCTION

On April 13, 2015, the Court issued an Order holding this case in abeyance for a limited time and, *inter alia*, directing the parties to “file motions to govern future proceedings in this case by September 15, 2015.” Pursuant to this Order, Petitioner filed a motion requesting that the Court set a briefing schedule without delay, order oral argument, and commence consideration of a motion to supplement the record filed by Petitioner on March 25, 2015. Petitioner’s Motion to Set Briefing Schedule and Order Oral Argument (Sep. 15, 2015). Petitioner contended that (1) exhaustion and finality are legal questions that are as a matter of course decided by appellate courts at the merits phase and are not cause for abeyance, *id.* at 3-5; (2) further abeyance would unnecessarily and unduly delay resolution of the issues raised by this petition for review, *id.* at 5-7; and (3) Respondents’ argument that they are unable to take a litigation position on the lawfulness of the agency’s approval of Revision 21 is without merit and, in any event, has been undermined by positions taken by counsel for Respondents after the Court initially placed this matter in abeyance, *id.* at 7-8. That same day, Respondents moved to continue abeyance. Federal Respondents’ Motion to Continue this Case in Abeyance (Sep. 15, 2015).

Respondents now contend that abeyance should be continued until resolution of another petition also filed by Friends of the Earth currently pending before the Nuclear Regulatory Commission (Commission). Respondents cite no legal support for this position—none. *See Res. Mtn. to Continue Abeyance* at 4-6. Instead, this argument is based on the untested premise that a similar issue is being litigated both before the agency and in this Court and, therefore, that Petitioner has not sought review in this Court of a final agency action. *See Respondents' Motion to Defer Briefing Schedule* (Feb. 26, 2015) at 3-7. The Commission's argument, which is accompanied by no legal authority, requires accepting this premise at face value, without determining the legal merits of that premise.

The Court should reject Respondents' attempt to elude the usual avenue for resolution of arguments such as those advanced by Respondents. If Respondents' position is that Petitioner has not sought review of a final action, it should advance that argument to a merits panel, citing proper legal authority for that proposition, rather than offer inventive arguments regarding counsel's inability to formulate an argument until it has received direct instruction from the five-member Commission. *Res. Mtn. to Continue Abeyance* at 5-6. The Court should reject these attempts and set a briefing schedule and order expeditious oral argument.

ARGUMENT

A. Continued abeyance would permit and encourage Respondents to further delay judicial review of this matter.

Continuing the abeyance will further delay resolution of Petitioner's challenge to the Commission's approval of Revision 21 of the Final Safety Analysis Report for Diablo Canyon Power Plant (Diablo Canyon). Respondents contend that continuing the abeyance will not prejudice any party, Res. Mtn. to Continue Abeyance at 5, and that current circumstances support further abeyance because "[n]othing has changed [since the Court's Order placing this case in abeyance] except that the agency has made substantial progress on an expedited basis in reaching a decision on FOE's petition to intervene and request for hearing." *Id.* at 5-6. But these assertions are demonstrably untrue. Shortly after the Court's April 13, 2015 Order placing this case in abeyance, the Commission, after taking no action on Friends of the Earth's agency petition for nearly nine months, issued an order that in effect created *two additional layers* of administrative review that, in the Commission's view, must be exhausted prior to seeking judicial review. See CLI 15-14, *Pacific Gas & Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), 81 NRC __ (May 21, 2015) at 2 (referring to an Atomic Safety and Licensing Board the question "whether Friends

of the Earth has identified an NRC activity that requires an opportunity to request an adjudicatory hearing pursuant to section 189a of the Atomic Energy Act”).

Even though the Commission has, and typically uses, plenary authority to consider and decide petitions to intervene in the first instance, 10 C.F.R. § 2.309(a), the Commission referred the central legal issue to the Atomic Safety and Licensing Board (“Licensing Board”). This referral required an additional round of briefing and oral argument before the Licensing Board and, in the Commission’s view, an appeal of the Licensing Board’s decision to the Commissioners before judicial review may be sought. The matter is now pending before the Licensing Board.

The timing of the Commission’s actions—almost immediately following this Court’s Order placing this matter in abeyance in light of the Commission’s consideration of Friends of the Earth’s petition to the Commission—suggests that, were abeyance continued, the Commission might seek to avoid and delay judicial review of these issues by delaying final adjudication of the petition currently pending before the agency. At the least, continued abeyance would without doubt create an incentive for further delay.

B. Resolution of Friends of the Earth’s agency petition is not imminent.

Though lacking any support for their position, and despite Supreme Court case law to the contrary, Respondents obdurately maintain that a dispute over

exhaustion and finality is cause for abeyance so that those alleged deficiencies can be remedied. *See* Pet. Mtn. to Set Briefing Schedule at 4 (citing *Far East Conference v. United States*, 342 U.S. 570, 577 (1952)). To the extent this argument has any merit at all, Respondents would rest on stronger ground if a final decision on the matter from the Commission were forthcoming within a reasonable amount of time. But, assuming *arguendo* that an appeal to the Commission of the Licensing Board's ruling is required before judicial review of that decision can be sought, as Respondents argue, Res. Mtn. to Continue Abeyance at 3-4, a final decision from the Commission is nowhere within sight.¹

Moreover, it is entirely speculative to claim, as Respondents do, that resolution of Friends of the Earth's administrative petition will perforce resolve or "facilitate the resolution of" the issues raised in this case. Res. Mtn. to Continue Abeyance at 6. In any event, even if final resolution of the agency petition would resolve this matter, a final decision is far from imminent. Any interest in judicial economy that would be served by further abeyance, therefore, is outweighed by the frustration of the parties' efforts to obtain resolution of this matter in a reasonably prompt manner.

¹ Petitioner does not concede that Commission regulations provide that any decision from the Licensing Board in this matter must first be appealed to the Commission before seeking judicial review.

C. Petitioner seeks expeditious adjudication on the merits, not emergency relief.

Respondents mistakenly argue that they are entitled to have the case held in abeyance because the Petitioner has not demonstrated that continued operation of Diablo Canyon is not safe by presenting an “expert opinion” or by demonstrating a “specific technical deficiency” making operation unsafe. Res. Mtn. to Continue Abeyance at 5. Respondents also argue that the Petitioner should not be allowed to proceed with the case because it has not filed “an emergency motion to stay operation of the facility.” *Id.* But these arguments seek to substitute the legal standard for whether to grant extraordinary emergency relief with the proper standard for simply releasing the hold and allowing the case to go forward to adjudication on the merits. *See* Fed. R. App. P. 8(a)(2) (request for stay or injunction pending appeal must include relevant parts of the record supporting the request). Tellingly, Respondents cite no authority for their argument that the party prepared to proceed must allege a specific technical deficiency related to safety. Rather, equity requires that the party seeking delay bear the burden of persuasion.

Respondents’ implication that no safety issue is present in this case is likewise incorrect. Petitioners bring this case before the Court because by

approving Revision 21, the Commission staff has changed the operating license for Diablo Canyon in a way that reduces the safety margin for operating the plant, without providing the public the opportunity to participate in an adjudicatory hearing as required in Section 189 of the Atomic Energy Act, 42 U.S.C. § 2239. Continued delay in resolving the issues presented here will continue to expose the public to a risk in excess of that provided for in the operating license of the plant. While it is not necessary for Petitioner to allege or prove this point to prevail on the question of whether the abeyance should be lifted, the continuing risk to which the public has been exposed by the Commission's action is an additional reason why the Court should grant Petitioner's motion and proceed to the merits.

Adjudication of this matter has been delayed enough, and cannot be put off while the agency continues its unhurried consideration of a separate agency petition. The parties should be permitted to brief the merits of this matter.

CONCLUSION

For the foregoing reasons, the Court should GRANT Petitioner's Motion to Set Briefing Schedule and Order Oral Argument, and DENY Federal Respondents' Motion to Continue this Case in Abeyance.

Respectfully submitted,

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Dated: September 25, 2015

Counsel for Petitioner

CERTIFICATE OF SERVICE

I certify that on September 25, 2015, I served “Petitioner’s Response in Opposition to Federal Respondents’ Motion to Continue this Case in Abeyance” in the above-captioned case upon all counsel registered with the Court’s CM/ECF system.

Respectfully submitted,

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