

ORAL ARGUMENT NOT YET SCHEDULEDUNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

STATE OF NEVADA,)	
)	
Petitioner,)	
)	
v.)	
)	No. 09-1133
U.S. NUCLEAR REGULATORY COMMISSION,)	
)	
Respondent,)	
)	
NUCLEAR ENERGY INSTITUTE,)	
)	
Intervenor.)	
)	

JOINT MOTION TO CONTINUE ABEYANCE

In this case, Petitioner State of Nevada (“Nevada”) challenges a Nuclear Regulatory Commission (NRC) final rule on dose standards for the proposed Yucca Mountain radioactive material repository. Through a series of joint motions and orders from this Court, resulting in the filing of regular status reports by the parties, this case has been held in abeyance since this Court’s order dated March 12, 2010. This Court’s latest order of February 11, 2015, (ECF No. 1537129), granted the parties’ Joint Motion to Hold Case in Abeyance (Feb. 2, 2015 ECF No. 1535515), extended the

abeyance, ordered the Petitioner to file 90-day status reports (the most recent being Nevada's report filed on February 9, 2016, ECF No. 1598081), and directed all parties to file motions to govern further proceeding no later than February 12, 2016.¹

For the reasons set forth below, the parties now jointly seek to continue to hold this case in abeyance. In support of this motion, the parties, including Intervenor Nuclear Energy Institute, state:

1. This Court originally held this case in abeyance because the U.S. Department of Energy ("DOE") — which had been seeking an NRC license to construct the Yucca Mountain repository — filed a motion before the NRC to withdraw its license application with prejudice.

2. On June 29, 2010, an NRC Atomic Safety and Licensing Board (an adjudicatory hearing tribunal) denied DOE's motion to withdraw (LBP-10-11). After soliciting briefs on whether it should review, and reverse or uphold, the Licensing Board decision, the

¹ The Court entered the same order in the pending companion litigation involving the Environmental Protection Agency's final rule on dose standards for the proposed Yucca Mountain radioactive material repository. *Nevada v. EPA*, No. 08-1327. A parallel joint motion for abeyance is being filed in that case.

Commission issued a decision on September 9, 2011, stating that it “finds itself evenly divided on whether to take the affirmative action of overturning or upholding the board’s decision” (CLI-11-07 at 1). Thus, the June 29, 2010, Licensing Board decision (LBP-10-11) remains in place. On September 30, 2011, the Licensing Board, noting that future Congressional appropriations were uncertain, suspended the proceeding (LBP-11-24).

3. While Commission review of the NRC Licensing Board decision was ongoing, various parties filed a lawsuit, captioned a Petition for Writ of Mandamus, claiming unreasonable delay by the NRC and seeking judicial relief. On August 13, 2013, the panel in *In re Aiken County* issued a Writ of Mandamus ordering the NRC to “promptly continue with the legally mandated licensing process” for DOE’s Yucca Mountain application. 725 F.3d. 255, 267 (D.C. Cir. 2013).

4. Following submissions by the participants in the Yucca Mountain adjudicatory proceeding as to how the Commission should proceed, on November 18, 2013, the Commission issued a unanimous order (CLI-13-08) explaining how it would use its remaining appropriated funds to comply with this Court’s writ of

mandamus in *In re Aiken County*. This order: (1) directed the NRC Staff to complete and issue the safety evaluation report (“SER”) associated with DOE’s construction authorization application; (2) directed the Secretary of the Commission to enter certain important licensing documents into the agency-wide records management system; and (3) requested that DOE prepare the supplemental environmental impact statement that NRC staff determined would be needed to review the application under NEPA.² On January 24, 2014, the Commission denied motions to clarify and reconsider its November 18, 2013, order (CLI-13-08).

5. Notably, the Commission’s November 18, 2013, order continued to hold in abeyance the adjudicatory portion of the Yucca Mountain licensing proceeding and deferred decisions on case management “pending completion of the tasks described above.”

² In a May 19, 2014, Staff Requirements Memorandum, the Commission directed the NRC staff to “plan to develop and issue an Environmental Impact Statement (EIS) supplement and load Licensing Support Network (LSN) documents” into the agency-wide records management system. See <http://www.nrc.gov/reading-rm/doc-collections/commission/comm-secy/2014/2014-0013comsrm.pdf>.

CLI-13-08 at 1. The adjudicatory hearing process, which must be completed before any final licensing decision can be issued, involves discovery and a formal trial-type hearing on roughly 300 issues.

6. The NRC Staff issued the completed five-volume SER in early 2015. In August 2015, the NRC Staff published a draft supplement to DOE's environmental impact statement. NRC Staff received public comments on this draft until the comment period closed in November 2015. The Staff is currently reviewing those comments and preparing responses. Agency efforts, meanwhile, to transition certain licensing documents into the agency-wide records management system remain ongoing. As of December 31, 2015, the NRC reports that it has approximately \$1.8 million in unobligated nuclear waste fund money remaining.

7. Substantial uncertainties still remain as to the content and timing of the license application process, including whether and, if so, when the adjudicatory portion of the proceeding will recommence. These uncertainties include the possibility that further developments before the NRC and decisions by Congress and/or DOE regarding a repository could shape or narrow the scope of arguments in this case, or eliminate the need to litigate this case

altogether.

8. Though the parties would be prepared to move forward with this case if necessary, under the circumstances they continue to believe that abeyance is appropriate. Abeyance would preserve the Court's and the parties' resources, including the limited and dwindling funds that have been appropriated to the Commission from the Nuclear Waste Fund for Yucca Mountain-related activities. Indeed, the limited amount of funds available to the Commission has driven the "incremental" approach it has adopted. See CLI-13-08 at 9 ("We take an incremental approach, since the agency cannot engage in all of the licensing activities that we would undertake if fully funded – for example, we cannot at this time complete a formal hearing requiring disposition of nearly 300 contentions."). Furthermore, an abeyance will not prejudice any party.

WHEREFORE, the Court should continue to hold this case in abeyance, subject to the parties filing status reports at 90-day intervals, and the right of any party, upon 30 days' written notice, to request that the Court reactivate the litigation.

Respectfully submitted,

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Dated: February 12, 2016

CERTIFICATE OF SERVICE

I hereby certify that on February 12, 2016, a copy of the foregoing was filed with the Clerk and served upon all counsel of record in the case through the CM/ECF System.

_____/s/_____

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