

ORAL ARGUMENT NOT YET SCHEDULED

**UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

In Re: State of Texas

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) No. 17-60191

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**FEDERAL RESPONDENTS’ MOTION TO HOLD CASE IN
ABEYANCE AND ALTERNATIVE UNOPPOSED MOTION TO
EXTEND TIME TO RESPOND TO THE PETITION**

In this case, Petitioner Texas seeks a writ of mandamus and other relief against the Nuclear Regulatory Commission (“NRC”),¹ the United States Department of Energy (“DOE”), and the United States Department of the Treasury,² and officers in their official capacities (collectively, “Federal Respondents”) with respect to certain alleged actions or inaction in processing DOE’s license application for the Yucca Mountain nuclear waste repository under the Nuclear Waste Policy Act, 42 U.S.C. § 10101 et seq. (“NWPA”). For the reasons stated below, and pursuant to Federal Rules of Appellate Procedure 26(b) and 27 and Circuit Rules 26.2, 27.1.3, and 27.4, Federal Respondents request that

¹ The NRC is an agency with independent litigating authority in the courts of appeals and is represented by its own attorneys. For the convenience of the Court, NRC joins the other Federal Respondents in this joint motion.

² The Department of the Treasury joins the other Federal Respondents in seeking an abeyance under this joint motion, but notes that it has had no direct role in the DOE and NRC Yucca Mountain activities raised specifically in this motion and makes no factual representations as to them.

the Court enter an order holding this case in abeyance until the earlier of: (1) September 30, 2017; or (2) 30 days after the legislative appropriations process for Fiscal Year 2018 is completed. The Federal Respondents further request that, at the conclusion of the abeyance period, the parties be permitted to file a motion to govern further proceedings to inform the Court whether they wish to either continue the abeyance or to re-establish litigation deadlines in the case. As required by Circuit Rule 27.4, and addressed in more detail below, the Federal Respondents have contacted all parties and state that Texas and Intervenors Nuclear Energy Institute, et al., oppose the motion for abeyance, while Intervenor State of Nevada takes no position.

If the Court does not grant an abeyance at this time, the Federal Respondents alternatively request a 30-day extension of time to file their response to the Petition as detailed below. As required by Circuit Rule 27.4, the Federal Respondents state that no party opposes the alternative request for a 30-day extension.

In support of this motion and as good cause, the Federal Respondents state:

Background. Texas filed the Petition on March 14, 2017. On March 20, 2017, this Court ordered the Federal Respondents to respond to the Petition by April 19, 2017. By order dated April 12, 2017, the Court granted the Federal Respondents' unopposed request for an extension of time until and including May 30, 2017, to file a response to the Petition.

The Petition prays for twenty-four different remedies related to the licensing and construction of a permanent geologic waste repository under the NWPA. However, as described by Texas, the “thrust” of the Petition is “equitable relief prohibiting [DOE] from conducting any other consent-based siting activity and ordering Respondents [DOE and NRC] to finish the Yucca licensure proceedings.” Doc. 00513963325 at 1 (citing Pet. at 3). Texas concedes that certain other remedies in the Petition are “prospective” and that litigating them now would be “premature.” *Id.* at 2; *see also* Pet. at 24 (describing “later” remedies including contempt, a special master, disgorgement and restitution sought only if the Federal Respondents “fail to act” following an order of this Court).

In conferring with Texas, the Federal Respondents have explained how anticipated Congressional and administrative developments (both ongoing and in the coming months) are likely to narrow, eliminate, or resolve the two central issues presented by the Petition – conduct of the NRC licensing process and DOE’s “consent-based siting activities.”⁴ Most notably, and the principal driver for this motion, Congressional appropriations action for Fiscal Year 2018 could

⁴ The Petition does not define this term. However, for purposes of this motion, it is sufficient to acknowledge that “consent-based siting activities” include the *Draft Consent-Based Siting Process for Consolidated Storage and Disposal Facilities for Spent Nuclear Fuel and High-Level Radioactive Active Waste* that was released for public comment on January 12, 2017, by the previous Administration.

significantly impact the central issues raised in the Petition.

Congress previously had funded DOE and NRC activities related to the Yucca Mountain licensing process with specific, annual appropriations from the Nuclear Waste Fund, *see* 42 U.S.C. §§ 10105, 10222(c) & (d), (e), but neither DOE nor NRC has received such appropriations for the Yucca Mountain licensing process since 2010 and 2011, respectively. Thus, for example, NRC's conduct of the licensing process has been shaped by budget and appropriations considerations. NRC's actions in conducting the Yucca Mountain licensing process in recent years have been focused on completion of safety and environmental analyses and document processing and have reduced the amount of carryover appropriated funds available to NRC from the NWF from more than \$13 million in August 2013 to less than \$740,000 at the end of March 2017.⁶ For the NRC to undertake substantial new additional activity, such as resuming the adjudication phase of the licensing process as sought in the Petition, NRC would require a specific Congressional appropriation. *See* 42 U.S.C. § 10105.

The President's Proposed Budget Has Already Impacted or Eliminated Several Issues in the Petition. For the first time in several years, the prospects for Congressional appropriations for the Yucca Mountain license proceeding may be

⁶ NRC, Monthly Status Report to Congress – Activities Related to the Yucca Mountain Licensing Action Report for March 2017 at 3 (<https://www.nrc.gov/docs/ML1708/ML17089A341.pdf>).

impacted by an Administration request for such funding. On May 23, 2017, the Office of Management and Budget released *A New Foundation for American Greatness: Budget of the United States Government for Fiscal Year 2018* (the “Proposed Budget”). See generally <https://www.whitehouse.gov/omb/budget>. The Proposed Budget, in its appendices, requests appropriations from Congress for both DOE and NRC (\$90 million and \$30 million, respectively) for activities related to the Yucca Mountain license proceeding.

As to DOE, the Proposed Budget describes how budgeted funds would address “the reestablishment of organizational, essential management, and subject matter expert, capabilities” needed for DOE’s “participation in the [NRC] licensing process” for Yucca Mountain.⁷ And NRC has explained that the requested “resources will support the continuation of the licensing proceeding” for Yucca Mountain and that “[p]rincipal activities would include support to, and restart of, the adjudicatory proceeding.” NRC, *Congressional Budget Justification: Fiscal Year 2018*, at 75, available [here](#).

The release of the Proposed Budget for Fiscal Year 2018 and its provisions relating to the Yucca Mountain licensing process directly impact, and likely have eliminated altogether, those elements of the Petition seeking an order that the

⁷ Proposed Budget, Appendix - Department of Energy, at 394, available [here](#); see also Proposed Budget, Appendix – Other Independent Agencies, at 1198-99 (as to NRC), available [here](#).

Federal Respondents request funding from Congress for the Yucca Mountain licensing process. *See* Pet. Prayers for Relief 3, 4, 7, 8. In any case, the prayed-for request for appropriations has already occurred, and this single administrative development has narrowed the issues in this case.

Appropriations for Fiscal Year 2018 Could Impact or Eliminate Several Additional Issues in the Petition. If Congress were to resume making specific appropriations to DOE and NRC for the Yucca licensing process for Fiscal Year 2018 (which begins October 1, 2017), additional elements of the Petition related to the actual *conduct* of the licensing process by DOE and NRC could similarly be eliminated, narrowed, or otherwise impacted. *See, e.g.,* Pet., Prayers for Relief 5, 6, 11. For instance, were Congress to appropriate the funds from the Nuclear Waste Fund needed by NRC and DOE to conduct the licensing process, which will be known by October 2017, the Petition offers no reason to believe that DOE and NRC will not resume the adjudicatory process and participate therein or that the Department of the Treasury would not release the funds as prayed for. *Id.* Much more will be known about the potential for any of these concerns in the Petition to arise under the new Administration once the appropriations for Fiscal Year 2018 are complete. The Proposed Budget and the final appropriations acts for Fiscal Year 2018 could also bear upon whether DOE requests, or Congress provides, funding for the “consent-based siting activities” at issue in the Petition. *See* Pet.,

Prayers for Relief 1, 2.

Other, Already Completed Administrative Actions Demonstrate the Benefit of Delaying Briefing in this Case. Even prior to the release of the Proposed Budget, DOE had undertaken administrative measures germane to its participation in the Yucca Mountain NRC licensing proceeding. For example, in an April 25, 2017, letter from Secretary of Energy Perry to the Chairman of the House Subcommittee on Environment, John Shimkus, the Secretary noted that the President's March 13, 2017, budget "blueprint" for Fiscal Year 2018 included a \$120 million request for DOE Yucca Mountain licensing activities¹⁰ and highlighted the fact that Secretary Perry's recent tour of the Yucca Mountain site imprinted on him "the importance of resuming the licensing process."¹¹ Notably, the budget blueprint was issued the day before Texas filed this Petition. In recent months, DOE also has initiated administrative steps to renew or extend contracts related to conducting the Yucca Mountain licensing process.¹²

¹⁰ See *America First: A Budget Blueprint to Make America Great Again*, <https://www.govinfo.gov/features/FY2018-Budget-Blueprint>.

¹¹ See *Energy Secretary: Importance of resuming Yucca licensing 'became clearer' after Nevada trip, geologic repository is the 'best long-term solution' for U.S. nuclear waste*, *The Nevada Independent*, Apr. 26, 2017 (describing and providing link to Perry letter [here](#)).

¹² See https://www.eenews.net/assets/2017/04/27/document_gw_03.pdf.

With respect to the consent-based siting activities that Texas challenges in the Petition, DOE has taken down the website that previously hosted material related to consent-based siting as part of an internal review and replaced it with this message: “Thank you for your interest in this topic. We are currently updating our website to reflect the Department’s priorities under the leadership of President Trump and Secretary Perry.” See <https://www.energy.gov/ne/consent-based-siting>. Further, DOE represents that it has no present intention of taking further policy action on the previous Administration’s *Draft Consent-Based Siting Process for Consolidated Storage and Disposal Facilities for Spent Nuclear Fuel and High-Level Radioactive Active Waste* document that was previously available at that web address.

Conclusion. The Petition raises numerous complex legal issues addressing a decades-long process to develop a permanent geological repository for spent nuclear fuel and high-level radioactive waste. The responses to the Petition are likely to raise still more justiciability and other legal issues. However, as the foregoing describes, these issues and related questions about the new Administration’s and Congress’ plans for resuming the NRC Yucca Mountain licensing process, including the adjudicatory hearing component, may be addressed in a matter of months. Additionally, certain actions related to consent-based siting that have already been undertaken at DOE, and are anticipated going forward, are

likely to address Texas' objections.

There is a strong likelihood that during the course of the requested abeyance, still more issues presently raised by the Petition could be eliminated, narrowed, or otherwise addressed by administrative options, potentially obviating the need for further litigation altogether. Therefore, the Court's and the parties' resources could be saved significantly if further litigation of this matter were held in abeyance until the completion of the Fiscal Year 2018 appropriations process in October 2017.

Every court has the inherent authority to stay proceedings in order to manage its docket in the interest of judicial economy. *See, e.g., Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936). The requested abeyance is in the interest of judicial economy; is for a modest, defined period that will not unduly delay these proceedings; and prejudices no party.

Pursuant to Fifth Circuit Rule 27.4, undersigned counsel has contacted counsel for all parties. Texas opposes the motion for abeyance and intends to file an opposition. Intervenors Nuclear Energy Institute, et al., oppose the motion for abeyance, but do not intend to file an opposition. Intervenor State of Nevada takes no position on the motion for abeyance.

Alternative Motion for Extension to File Response. If the Court does not grant an abeyance at this time, the Federal Respondents alternatively request an extension of 30 days, until June 30, 2017, to file a response to the Petition. That

period of time will be sufficient for the Federal Respondents to review and address in their response the Proposed Budget and the degree to which it has eliminated or otherwise impacted issues raised in the Petition. The Federal Respondents further request that all related deadlines for the Intervenors to respond to the Petition be adjusted accordingly. Pursuant to Fifth Circuit Rule 27.4, undersigned counsel for the Federal Respondents have consulted with counsel for Texas and Intervenors NEI, et al. and the State of Nevada, and no party opposes this alternative request for relief.

WHEREFORE, the Federal Respondents respectfully request that the Court issue an order: (1) staying all proceedings in this case until the earlier of September 30, 2017, or 30 days after the legislative appropriations process for Fiscal Year 2018 is completed; and (2) requiring the parties to file a motion to govern further proceedings (preferably joint) within 21 days of the expiration of the abeyance. Alternatively, the Federal Respondents respectfully request an extension until June 30, 2017, to respond to the Petition.

Respectfully submitted,

**For Federal Respondents DOE,
Treasury, et al. (excluding NRC):**

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CERTIFICATE OF COMPLIANCE

1. This Motion complies with the type-volume limitation of Federal Rule of Appellate Procedure 27(d)(2) and Fifth Circuit Rule 27.4 because it contains 2,215 words, except for the items excluded from the word count pursuant to F. R. App. P. 32(f), as determined by the word-count function of Microsoft Word 2013.

2. This Motion complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and Fifth Circuit Rule 32.1 and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2013 Times New Roman 14-point font.

Dated: May 23, 2017

/s/David S. Gaultieri

David S. Gaultieri

Counsel for Federal Respondents DOE and
Treasury

CERTIFICATE OF SERVICE

I hereby certify that on the date below a copy of the foregoing was filed electronically with the Clerk and served upon all counsel of record in the case and is available through the court's CM/ECF System.

Dated: May 23, 2017

/s/David S. Gaultieri
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