

NO. 11-1271

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

In Re: AIKEN COUNTY, SOUTH CAROLINA; ROBERT L.
FERGUSON; WILLIAM LAMPSON; GARY PETERSEN; STATE
OF SOUTH CAROLINA; STATE OF WASHINGTON; NATIONAL
ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS;
NYE COUNTY, NEVADA, Petitioners.

UNITED STATES NUCLEAR REGULATORY COMMISSION,
and GREGORY B. JACZKO, Chairman of the United States Nuclear
Regulatory Commission, Respondents.

**PETITIONERS' RESPONSE TO NUCLEAR REGULATORY
COMMISSION'S MOTION FOR AN EXTENSION OF TIME
IN WHICH TO FILE STATUS REPORTS**

Counsel for the Petitioners fully appreciate the gravity of Mr. Mullins's circumstance and they extend to him their most sincere wishes for a speedy recovery. To be clear, the Petitioners' opposition bears no relation to Mr. Mullins's circumstance.¹ Rather, as explained below, the Petitioners' opposition relates to the NRC's substantive proffered reason for delay: the "possibility" that despite no tangible legislative proposals, Congress might do *something else* after December 14, which this Court should wait on. That reason provides no basis for delaying action on this case.

The Court's status report requirement stems from the Court's August 3 Order (Order) holding this case in abeyance. That Order directed "that the parties file, *by no later than* December 14, 2012, updates on the status of Fiscal Year 2013 appropriations with respect to the issues presented." Order at 1 (ECF No. 1387350) (emphasis added).

¹ The NRC's Motion, requesting that the reporting date be specifically extended until January 4, 2013, is justified entirely on the "possibility" of Congressional action, not Mr. Mullins circumstance. *See* Motion at 3 (ECF No. 1408389) ("Thus, we think it reasonable to suggest that this Court await the conclusion of the current legislative session, which may last until the end of the calendar year."). The Petitioners respectfully suggest that irrespective of Mr. Mullins's circumstance, any one of the Respondents' three other counsel of record have the capacity to file a status report on December 14.

On September 28, 2012, President Obama signed into law a continuing budget resolution that funds the federal government until March 27, 2013. The Petitioners filed a status report the same day apprising the Court of this appropriations decision; explaining that the continuing resolution included no prohibition on using previously appropriated funds to comply with the NRC's statutory mandate; and requesting that mandamus now issue. *See* Petitioners' Status Report (ECF No. 1397206). Congress has thus already made a decision on Fiscal Year 2013 appropriations that will run well into the next calendar year. The Order's reporting requirement has already been satisfied.²

In responding to the Petitioners' September status report, the NRC asserted it would defer filing its own report—and asked this Court also defer ruling—until December 14 because Congress might act again. Now, even before December 14 arrives, the NRC asks the Court to wait again, this time until January 4, 2013. The NRC bases its request on the assertion that “it is certainly possible that the ongoing negotiations between the Executive Branch and the Legislative Branch will address the underlying issue in this case, *i.e.*, *whether to provide additional*

² Nevertheless, in an abundance of caution, the Petitioners expect to file a status report on December 14, 2012, that transmits one simple fact: since passing the above continuing resolution, Congress has taken no other action with respect to Fiscal Year 2013 appropriations.

funding for both the NRC and the Department of Energy” Motion at 2 (ECF No. 1408389) (emphasis added). This implies that the NRC believes it may continue to engage in a “transparent violation of law,” *see* Order, Randolph, J. dissenting at 1, unless and until Congress provides additional funding for the Yucca Mountain licensing effort.

Whether or not Congress provides “additional funding,” however, is not the underlying issue in this case, nor is it the standard that applies to the NRC’s conduct and whether mandamus should issue. Two members of this Court have already made it clear that so long as appropriated funds remain available, the NRC remains subject to its legal duty unless Congress either changes the underlying law or otherwise *specifically directs the agency not to act*. In concurring with the Order, Judge Kavanaugh stated:

[T]his case may soon be mooted by Congress’s actions in enacting Fiscal Year 2013 appropriations. For example, Congress may decide to appropriate additional money to the [NRC] for the Yucca Mountain licensing process, in which case the Commission’s arguments against mandamus would clearly be unavailing. Alternatively, Congress may enact statutory text *that makes clear that the [NRC] may not use any appropriated money (including previously appropriated funds) for the Yucca Mountain licensing process*, in which case petitioners’ arguments against mandamus would clearly be unavailing.

Of course, it is possible that Congress will take neither of those steps and add no clarity to the current dispute. In that circumstance, I believe mandamus likely would have to be granted. *An executive or independent agency generally has no authority to disregard a statute*

that mandates or prohibits specific agency actions, at least so long as there is some appropriated funding available. Here, the law mandates that the Nuclear Regulatory Commission act on the license application, and the agency still has a significant amount of appropriated money available to at least begin that task. In those circumstances, an agency appears to have no legal authority to defy the law in the manner suggested by the Nuclear Regulatory Commission in this case.

Order, Kavanaugh, J. concurring at 1-2 (ECF No. 1387350). Likewise, Judge

Randolph stated:

Congress enacted the Nuclear Waste Policy Act, which requires the Commission to rule on the Yucca Mountain application, and it appropriated funds for that purpose. Our duty is to enforce these statutes, plain and simple.

Id., Randolph, J. dissenting at 2.

While the Respondents frame their motion as a request for a status report extension, they effectively ask the Court to continue holding this case in abeyance despite Congress having provided “no additional clarity” when it enacted the current continuing budget resolution. As the Petitioners have previously noted, the Respondents’ rationale for delay—that Congress might do something else in the future—can be extended indefinitely. The Petitioners note that the Respondents’ requested extension date (January 4, 2013) corresponds with the date on which the 113th Congress is scheduled to commence. At that time, the Petitioners fully expect the Respondents to again ask this Court to wait, this time to see what the new Congress might do.

As Judge Randolph has stated: “Holding the case in abeyance indefinitely, based on the mere *possibility* of future legislative action, shirks [the Court’s] basic obligation and perpetuates the Commission’s unlawful delay.” *Id.*, Randolph, J. dissenting at 2. The Petitioners respect the fact that in August, this Court chose to wait and see what the 112th Congress might do in the near term with respect to appropriations decisions regarding the Nuclear Waste Policy Act. It could have barred the use of existing appropriated funds, added more funds, or done neither. Congress, however, has already acted. It has neither barred the use of existing funds nor added new funds. Its provided “no additional clarity to the current dispute,” *id.*, Kavanaugh, J. concurring at 1, and there is no reason to believe that waiting any longer—be it the end of this Congress or into the next one—will alter that result. As with any current law, if Congress changes the law in the future, then the NRC must act accordingly and any other appropriate action can be taken. In the meantime, the law as written and currently in effect should be followed without further delay to respect not only what the current Congress has chosen to do (or not to do), and what prior ones have done. An extension request that subverts this principle should be denied. The Petitioners respectfully request that the Respondents’ request for extension be denied and that mandamus immediately issue.

RESPECTFULLY SUBMITTED this 6th day of December 2012.

s/ Thomas R. Gottshall

THOMAS R. GOTTSHALL
S. ROSS SHEALY
Haynsworth Sinkler Boyd, P.A.
Post Office Box 11889
Columbia, SC 29211-1889
Attorneys for Aiken County

s/ Barry M. Hartman

BARRY M. HARTMAN
CHRISTOPHER R. NESTOR
JOHN ENGLERT*
K&L Gates LLP
1601 K Street, N.W.
Washington, DC 20006-1600
**not admitted*

*Attorneys for Robert L. Ferguson,
William Lampson, and Gary Petersen*

ALAN WILSON*
Attorney General for the State of
South Carolina
JOHN W. MCINTOSH*
ROBERT D. COOK*
Post Office Box 11549
Columbia, SC 29211
**not admitted*

ROBERT M. MCKENNA*
Attorney General

s/ Andrew A. Fitz

ANDREW A. FITZ
TODD R. BOWERS
State of Washington
Office of the Attorney General
Post Office Box 40117
Olympia, WA 98504-0117
**not admitted*

Attorneys for State of Washington

s/ Kenneth Paul Woodington

WILLIAM HENRY DAVIDSON, II
KENNETH PAUL WOODINGTON
Davidson & Lindemann, P.A.
1611 Devonshire Dr., 2nd Floor
Post Office Box 8568
Columbia, SC 29202-8568

*Attorneys for the State of
South Carolina*

s/ James Bradford Ramsay

JAMES BRADFORD RAMSAY
HOLLY RACHEL SMITH
National Assoc. of Regulatory Utility
Commissioners
1101 Vermont Ave. N.W., Suite 200
Washington, DC 20005

Attorneys for NARUC

s/ Robert M. Andersen

ROBERT M. ANDERSEN
Clark Hill PLC
601 Pennsylvania Ave. N.W.
North Building, Suite 1000
Washington, DC 20004

Attorney for Nye County

CERTIFICATE OF SERVICE

I hereby certify that on the 6th day of December 2012, a copy of the foregoing was filed using the CM/ECF system which will serve the same on all parties of record as follows:

Mr. Charles Mullins: charles.mullins@nrc.gov

Christopher R. Nestor: christopher.nestor@klgates.com,
dottie.messimer@klgates.com,
klgateseservice@klgates.com

Mr. Robert Michael Andersen: randersen@clarkhill.com

Jerry Stouck: stouckj@gtlaw.com, sklarm@gtlaw.com,
goggan@gtlaw.com

Mr. Charles J. Fitzpatrick: cfitzpatrick@nuclearlawyer.com,
smontesi@nuclearlawyer.com

Mr. John F. Cordes, Jr.: John.Cordes@nrc.gov

Ms. Ellen J. Durkee: ellen.durkee@usdoj.gov

Mr. Aaron Peter Avila: aaron.avila@usdoj.gov,
efile_app.enrd@usdoj.gov,
aaronpavila@yahoo.com

Mr. Martin Guilbert Malsch: mmalsch@nuclearlawyer.com,
cfitzpatrick@nuclearlawyer.com

Anne Williams Cottingham: awc@nei.org

Mr. James Bradford Ramsay: jramsay@naruc.org

Mr. John W. Lawrence: jlawrence@nuclearlawyer.com,
lborski@nuclearlawyer.com

Mr. Barry M. Hartman: barry.hartman@klgates.com,
klgateseservice@klgates.com

Ms. Robin Kimlin Jensen Lunt: rlunt@naruc.org

Mr. Thomas Rush Gottshall: tgottshall@hsblawfirm.com,
lgantt@hsblawfirm.com,
bvaldes@hsblawfirm.com

Mr. Kenneth Paul Woodington: kwoodington@dml-law.com,
sstafford@dml-law.com, jangus@dml-law.com,
nbouknight@dml-law.com

Mr. Todd R. Bowers: toddb@atg.wa.gov, TORSeaEF@atg.wa.gov,
aaronw@atg.wa.gov, hollyal@atg.wa.gov

Andrew Arthur Fitz: andyf@atg.wa.gov, ecyolyef@atg.wa.gov,
dianam@atg.wa.gov

Jeremy Sutttenberg: jeremy.sutttenberg@nrc.gov

Samuel Ross Shealy: rshealy@hsblawfirm.com

I further certify that, a copy of the same was served by First Class United

States Mail on the following:

Mr. Stephen Gilbert Burns
U.S. Nuclear Regulatory Commission (NRC)
11555 Rockville Pike
One White Flint North
Rockville, MD 20852

William Henry Davidson, II
Davidson Morrison & Lindemann, PA
1611 Devonshire Drive, Second Floor
PO Box 8568
Columbia, SC 29202-8568

Ms. Holly Rachel Smith
NARUC
1101 Vermont Avenue, NW, Suite 200
Washington, DC 20005-0000

DATED this 6th day of December 2012, in Olympia, Washington.

s/ Andrew A. Fitz

ANDREW A. FITZ
Senior Counsel
(360) 586-6752