

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

No. 10-1050

IN RE AIKEN COUNTY, Petitioner

No. 10-1052

ROBERT L. FERGUSON, *et al.*, Petitioners,

v.

BARACK OBAMA, President of the United States, *et al.*, Respondents.

No. 10-1069

STATE OF SOUTH CAROLINA, Petitioner,

v.

UNITED STATES DEPARTMENT OF ENERGY, *et al.*, Respondents.

No. 10-1082

STATE OF WASHINGTON, Petitioner,

v.

UNITED STATES DEPARTMENT OF ENERGY, *et al.*, Respondents.

Petitioners' Motion to Calendar Oral Argument

Petitioners respectfully move this Court to calendar oral argument in the above-captioned matter pursuant to Fed. R. App. P. 27 and D.C. Cir. R. 27 and 34(a)(1), and hereby state as follows:

1. Petitioners' cases challenge actions taken by various of the Respondents under the Nuclear Waste Policy Act with respect to the planned repository for high-level radioactive waste at Yucca Mountain, Nevada.
2. This Court consolidated Petitioners' cases by two orders dated April 8, 2010 and May 3, 2010.
3. On May 3, 2010, this Court granted Petitioners' Motion for an expedited briefing schedule, and specifically ordered the Clerk to calendar the consolidated cases for argument on the first available date in September following completion of briefing. *See* May 3, 2010 Order, attached hereto as Exhibit 1.
4. On May 13, 2010, in response to the parties' proposal, the Court set a briefing schedule that required, *inter alia*, that final briefs be filed by August 20, 2010. *See* May 13, 2010 Order, attached hereto as Exhibit 2.
5. On June 15, 2010, the Court scheduled the cases for oral argument on September 23, 2010. *See* June 15, 2010 Order, attached hereto as Exhibit 3.
6. Petitioners timely filed their Opening brief on June 18, 2010. On July 2, 2010, Respondents moved to set aside the briefing schedule and hold the cases in

abeyance. The Court granted Respondents' Motion on July 28, 2010. *See* July 28, 2010 Order, attached hereto as Exhibit 4.

7. On September 28, 2010, Petitioners moved this Court to lift the stay and set a new expedited briefing schedule. *See* Exhibit 5 hereto. The Court granted Petitioners' Motion on December 10, 2010. It accepted Petitioners' earlier filed brief, ordered that (a) Respondents file their Opposition by January 3, 2010; (b) Petitioners' file their Reply Brief by January 18, 2010; and (c) final briefs be filed by February 3, 2010. The order did not set a date for oral argument. *See* December 10, 2010 Order attached hereto as Exhibit 6.

8. The first expedited briefing schedule included a date for oral argument approximately one month after final briefs were due. For the reasons set forth in Petitioners' now-granted Motion to Lift Stay and Set Expedited Briefing Schedule Petitioners respectfully request that oral argument under the new schedule be set for the week of March 7 or March 14, 2011, also approximately one month after final briefs are due. If those dates are not available, Petitioners requires that oral argument be set as soon as possible thereafter.

9. Intervenor NARUC concurs in this Motion.

10. The federal Respondents and the state intervenor Nevada, have advised that they take no position with respect to this Motion.

RESPECTFULLY SUBMITTED this 7th day of January 2011.

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CERTIFICATE OF SERVICE

I hereby certify that on the 7th day of January 2011, a copy of the foregoing Petitioners' Motion to Calendar Oral Argument was filed electronically using the CM/ECF system, which will provide service on the following parties:

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I hereby certify that service of the same was made on the following parties by

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Exhibit 1

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 10-1050

September Term 2009

**DOE-Yucca Mtn
NRC-63-001**

Filed On: May 3, 2010

In re: Aiken County,

Petitioner

Consolidated with 10-1052, 10-1069, 10-1082

BEFORE: Ginsburg, Griffith, and Kavanaugh, Circuit Judges

ORDER

Upon consideration of the petitions for review filed in No. 10-1052, No. 10-1069, and No. 10-1082; the petitions for a writ of mandamus filed in No. 10-1050 and No. 10-1069; the response to the mandamus petition in No. 10-1050, and the reply thereto; the requests for a stay and injunctive relief filed in No. 10-1050, No. 10-1069, and 10-1082; the motions for expedited consideration filed in No. 10-1052 and No. 10-1069, the responses thereto, and the replies; the Rule 28(j) letters; the motion to hold No. 10-1050, et al., in abeyance, and the opposition thereto; and the motion for a preliminary injunction filed in No. 10-1082, the opposition thereto, and the reply, it is

ORDERED that the motion to hold the cases in abeyance be dismissed as moot. The Nuclear Regulatory Commission has issued its decision on the Department of Energy's petition for administrative review. It is

FURTHER ORDERED that the motion for a preliminary injunction filed in No. 10-1082 and the request for a stay of the Atomic Safety and Licensing Board proceedings filed in No. 10-1069 be denied. Petitioners have not satisfied the stringent standards required for an injunction or stay pending court review. See Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc., 559 F.2d 841, 843 (D.C. Cir. 1977);

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FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 10-1050

September Term 2009

D.C. Circuit Handbook of Practice and Internal Procedures 32-33 (2009). In particular, Petitioners have not demonstrated that they are likely to suffer irreparable injury absent a preliminary injunction or stay. See Winter v. Natural Resources Defense Council, 129 S.Ct. 365, 375 (2008). It is

FURTHER ORDERED that the requests for an injunction in No. 10-1050 and No. 10-1069 to prevent the Department of Energy from filing a motion to withdraw the license application be dismissed as moot, in light of the fact that the Department of Energy has already filed such a motion. It is

FURTHER ORDERED that the remaining requests for injunctive relief, construed as requests for permanent injunctions, be referred to the merits panel to which these cases are assigned. It is

FURTHER ORDERED that the petitions for a writ of mandamus be referred to a merits panel. The parties are directed to address in their briefs the issues presented in the petitions, rather than incorporate those arguments by reference. It is

FURTHER ORDERED that the motions for expedited consideration be granted in part. The Clerk is directed to calendar these cases for argument on the first available date in September following the completion of briefing. Due to the expedited nature of these cases, the court will not entertain dispositive motions. The parties should therefore address in their briefs any arguments otherwise properly raised in such motions. Although not otherwise limited, the parties are directed to address in their briefs whether final agency action is necessary to confer jurisdiction over a petition for review filed pursuant to the Nuclear Waste Policy Act, 42 U.S.C. § 10139(a)(1)(A), (B), (C), (D), and, if so, whether final agency action has been taken. It is

FURTHER ORDERED, on the court's own motion, that the parties and amicus curiae submit, by May 10, 2010, proposed formats for the briefing of these cases. The parties and amicus are strongly urged to submit a joint proposal and are reminded that the court looks with extreme disfavor on repetitious submissions and will, where appropriate, require a joint brief of aligned parties with total words not to exceed the standard allotment for a single brief. The parties and amicus are directed to provide detailed justifications for any request to file separate briefs or to exceed in the aggregate the standard word allotment. Requests to exceed the standard word allotment must specify the word allotment necessary for each issue. It is

United States Court of Appeals
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September Term 2009

FURTHER ORDERED that the Respondents file the certified index to the record within 14 days of the date of this order.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

By: /s/
MaryAnne Lister
Deputy Clerk

Exhibit 2

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 10-1050

September Term 2009

DOE-Yucca Mtn
NRC-63-001

Filed On: May 13, 2010

In re: Aiken County,

Petitioner

Consolidated with 10-1052, 10-1069, 10-1082

BEFORE: Rogers, Garland, and Brown, Circuit Judges

ORDER

Upon consideration of the joint proposed briefing format and schedule, it is

ORDERED that the following briefing format and schedule will apply in these consolidated cases:

Joint Brief of Petitioners and Intervenor NARUC (not to exceed 16,000 words)	June 18, 2010
Brief of Amicus Curiae in support of the Petitioners Nuclear Energy Institute (not to exceed 7,000 words)	June 28, 2010
Brief(s) of Respondents and Intervenor State of Nevada (not to exceed 23,000 words in the aggregate, divided as the parties deem fit)	July 28, 2010
Joint Reply Brief of Petitioners and Intervenor NARUC (not to exceed 7,000 words)	August 11, 2010

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 10-1050

September Term 2009

Deferred Appendix August 17, 2010

Final Briefs August 20, 2010

The parties will be notified by separate order of the date of oral argument and the composition of the merits panel. The court reminds the parties that

In cases involving direct review in this court of administrative actions, the brief of the appellant or petitioner must set forth the basis for the claim of standing. . . . When the appellant's or petitioner's standing is not apparent from the administrative record, the brief must include arguments and evidence establishing the claim of standing.

See D.C. Cir. Rule 28(a)(7).

The parties are directed to hand deliver the paper copies of their briefs and appendix to the Clerk's office on the date due. All briefs and appendices must contain the date that the case is scheduled for oral argument at the top of the cover. See D.C. Cir. Rule 28(a)(8).

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Sabrina M. Crisp
Deputy Clerk

Exhibit 3

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 10-1050

September Term 2009

**DOE-Yucca Mtn
NRC-63-001**

Filed On: June 15, 2010 [1250007]

In re: Aiken County,

Petitioner

Consolidated with 10-1052, 10-1069,
10-1082

ORDER

It is **ORDERED**, on the court's own motion, that this case be scheduled for oral argument on September 23, 2010, at 9:30 A.M., before Circuit Judges Garland and Kavanaugh and Senior Circuit Judge Williams.

The time and date of oral argument will not change absent further order of the Court.

A separate order will be issued regarding the allocation of time for argument.

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Cheri W. Carter
Deputy Clerk

The following forms and notices are available on the Court's website:

Memorandum to Counsel Concerning Cases Set for Oral Argument (Form 71)

Exhibit 4

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 10-1050

September Term 2009

**DOE-Yucca Mtn
NRC-63-001**

Filed On: July 28, 2010

In re: Aiken County,

Petitioner

Consolidated with 10-1052, 10-1069, 10-1082

BEFORE: Garland and Kavanaugh, *Circuit Judges*, and Williams, *Senior Circuit Judge*

ORDER

Upon consideration of respondents' motion to vacate briefing and oral argument schedule and hold case in abeyance, and the response and reply thereto, it is

ORDERED that the motion be granted. These cases are removed from the September 23, 2010 oral argument calendar and the briefing schedule established by this court's order is vacated. It is

FURTHER ORDERED that these cases be held in abeyance pending further proceedings before the respondent agency consistent with the motion. The parties are directed to file status reports at 30-day intervals beginning 30 days from the date of this order. The parties are further directed to file motions to govern future proceedings within 10 days from respondent agency's final decision in its pending review of the Licensing Board's June 29, 2010 decision.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Cheri Carter
Deputy Clerk

Exhibit 5

NO. 10-1050, 10-1052, 10-1069, 10-1082 *Consolidated*

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

No. 10-1050

IN RE AIKEN COUNTY, Petitioner

No. 10-1052

ROBERT L. FERGUSON, *et al.*, Petitioners,

v.

BARACK OBAMA, President of the United States, *et al.*, Respondents.

No. 10-1069

STATE OF SOUTH CAROLINA, Petitioner,

v.

UNITED STATES DEPARTMENT OF ENERGY, *et al.*, Respondents.

No. 10-1082

STATE OF WASHINGTON, Petitioner,

v.

UNITED STATES DEPARTMENT OF ENERGY, *et al.*, Respondents.

**PETITIONERS' CORRECTED MOTION TO LIFT STAY
AND SET EXPEDITED BRIEFING SCHEDULE**

Petitioners move this Court to lift the stay it imposed in this matter on July 28, 2010, and to set an expedited briefing schedule as outlined herein. Such action is necessary because the apparent basis for the stay has been shown to be illusory in the time since its imposition. In addition, an expedited briefing schedule is warranted given the federal government's continuing dismantling of the Yucca Mountain project in clear violation of Congressional directives embodied in several statutes, including the Nuclear Waste Policy Act (NWPA), 42 U.S.C. §§ 10101-10270.

I. STATEMENT OF THE CASE

The United States' efforts at investigating the viability of a permanent repository for high-level nuclear waste at Yucca Mountain, Nevada, have been ongoing since the late 1970s and represent billions of dollars of investment to date. The legal framework guiding the Yucca Mountain project is the NWPA, enacted by Congress in 1982.

The work at Yucca Mountain culminated in 2002 with the Department of Energy's (DOE) recommendation that Yucca Mountain is a suitable site for a permanent repository and Congress' adoption of that recommendation and subsequent identification of Yucca Mountain as the sole site for the nation's

permanent repository.¹ Consistent with this, in 2008 DOE filed with the Nuclear Regulatory Commission (NRC) its application for a license to begin construction of the repository. This is the final step in the NWPA's siting process.

In January 2010, DOE abruptly announced its intention to withdraw the license application and forever terminate the Yucca Mountain project. DOE determined that the appropriate course is essentially to go back to the drawing board, a decision reflected in the creation of a study group rather than the identification of another repository site. This decision was not made based on any allegation that Yucca Mountain is unsafe (and, indeed, DOE does not allege this), but rather on general and vague statements that there may be better ways to store high-level waste.

The response to DOE's decision by various interested parties was two-fold. First, numerous parties, including three of the four Petitioners in this matter, filed motions before the NRC's Atomic Safety and Licensing Board (Board) opposing DOE's withdrawal of the license application.² In addition, the Petitioners in this case filed original actions in the Courts of Appeals challenging both the decision

¹ U.S. Dept. of Energy, Recommendation by the Secretary of Energy Regarding the Suitability of the Yucca Mountain Site for a Repository Under the Nuclear Waste Policy Act of 1982, 4 (2002); P.L. 107-200.

² The Petitioners in this matter who are involved in the NRC litigation are Aiken County, South Carolina, and the states of South Carolina and Washington.

to withdraw the license application, as well as the larger decision by DOE to forever terminate the Yucca Mountain project. These original actions are expressly authorized by the NWPA, *see* 42 U.S.C. § 10139(a)(1)(A), (B), (D), and were consolidated by this Court in this matter.

As explained in Petitioners' prior status report, these consolidated actions present two distinct issues: (1) whether the decision by the President and Secretary of Energy to irrevocably shut down and abandon Yucca Mountain as a permanent repository for high level nuclear waste violates the NWPA, the National Environmental Policy Act (NEPA), and the Administrative Procedure Act (APA); and (2) whether the NWPA permits DOE to withdraw its license application to construct the Yucca Mountain project. Only the second, narrower issue is before the NRC.

Since the inception of this action, Petitioners have pressed for a speedy consideration and determination of the lawfulness of DOE's actions for the simple reason that DOE has since its January 2010 announcement continued to dismantle the Yucca Mountain project. Petitioners have noted DOE's termination actions, including:

- February 8, 2010: DOE withdraws water permit applications necessary to the Yucca Mountain project.

- February 17: DOE advises Congress of its intent to use funding expressly granted for use in the license application process to begin closing down the Yucca Mountain project.
- March 1: DOE ends data collection and performance confirmation activities at the Yucca Mountain site.
- March 10: DOE issues a notice of expected separation to all employees of the Office of Civilian Radioactive Waste Management (OCRWM), the federal agency responsible for overseeing and implementing the Yucca Mountain siting process.
- March 18: DOE and its Yucca Mountain contractors draft plans for the termination of Yucca Mountain related contract work.
- July 21: DOE's Inspector General issues report reflecting DOE's rush to terminate Yucca Mountain project on an "expedited" basis without the benefit of a master plan.

Petitioners' Status Report (Aug. 27, 2010) at 8-9; Brief of Petitioners (June 18, 2010) at 15-16; Motion for Preliminary Injunction (Apr. 13, 2010) at 5-7.

Presumably in response to the pace of DOE's termination activities, as well as the national importance of the future of the Yucca Mountain project, this Court initially granted on May 3, 2010, the request of two of the Petitioners herein for expedited briefing and argument. Consistent with this order, the Petitioners submitted their merits brief on June 18, 2010.

On June 29, 2010, the NRC's Board denied DOE's motion to withdraw the license application, agreeing with Petitioners' argument in this matter that DOE is without authority to do so pursuant to the plain language of the NWPAA. The following day, the NRC asked the parties involved in the Board proceeding to

submit briefing on a greatly accelerated schedule on the issues of whether the NRC should review the Board's decision and, if so, whether it should be affirmed. Briefing by all the parties before the NRC was completed on July 18, 2010.

Relying on what appeared at the time to be the NRC's commitment to a swift determination of the issue before it, the Respondents in this matter filed on July 2, 2010, a motion to vacate the expedited briefing and argument schedule ordered by the Court. Respondents argued that this Court should await a decision by the NRC since it could "crystallize, narrow or even wholly eliminate the issues" before the Court, thereby serving the interests of judicial economy. Federal Respondents' Motion to Vacate Briefing and Oral Argument Schedule and Hold Cases in Abeyance (July 2, 2010) at 2. On July 28, 2010, the same date the Respondents' merits brief was due, this Court granted this motion.

The NRC has stated publicly that it "is moving with all due haste in arriving at a decision relative to review." Petitioners' Status Report (Aug. 27, 2010) at 6. However, in the time since this Court vacated the expedited briefing and argument schedule, the NRC has not issued a decision in the licensing application matter. Indeed, it has not issued any order in that matter on any subject (such as indicating whether it will, in fact, even review the Board's decision).

Unlike the NRC, DOE has continued to take action: action to terminate the Yucca Mountain project. For example, on September 20, 2010, DOE announced

that as of September 30, 2010, the OCRWM, a Congressionally-created agency that oversees the Yucca Mountain project, will “cease to exist.” Ex. A.

II. ARGUMENT

This Court should lift the stay previously imposed in this matter and enter an expedited briefing and argument schedule for several reasons. First, it is apparent that the NRC will not issue a decision any time soon, and not before DOE has succeeded in completely dismantling the Yucca Mountain project. A speedy NRC decision appears to have been one of the reasons the stay was imposed in this matter. Briefing before the NRC was complete in mid-July, more than two months ago. The issue should be capable of a relatively swift resolution, as it is an issue of statutory construction and does not involve any factual disputes. Indeed, the NRC ordered the Board to consider the matter and decide it “as expeditiously . . . as possible” and the Board issued a 61-page decision 33 days after briefing was complete (and just 26 days after hearing oral argument). Petitioners’ Status Report (Aug. 27, 2010) at 6-7. If anything, with the benefit of the Board order and yet another round of briefing, the NRC should be able to decide the case even more quickly than the Board. The NRC, however, has proven unable to act within the schedule it imposed on the Board. Despite the NRC’s promise to “mov[e] with all due haste” to reach a decision, the NRC has

remained utterly silent since this Court vacated the expedited briefing and argument schedule.

In addition, another apparent reason for the stay—that a decision by the NRC may assist this Court and promote judicial economy—is simply illusory. Petitioners have presented this Court with fully-crystallized legal issues that are ripe for disposition and go beyond the more narrow issue before the NRC. Even if the NRC affirms the Board’s denial of DOE’s motion to withdraw its license application, the broader issue before this Court will not be resolved, and indeed DOE would likely seek judicial review of the narrower issue before the NRC.

As Petitioners have consistently maintained, DOE is without authority to withdraw its license application to construct the Yucca Mountain project because it contravenes the NWPAA, NEPA, and the APA, and it violates the separation of powers doctrine. *See e.g.* Brief of Petitioners (June 18, 2010) at 35-59. The NWPAA expressly provides that upon Congressional approval of the Yucca Mountain site, which as noted occurred in 2002: (1) “the Secretary *shall submit* to the [Nuclear Regulatory] Commission an application for a construction authorization for a repository at such site”; (2) the Commission “*shall consider*” such application; and (3) the Commission “*shall issue a final decision approving or disapproving*” a construction authorization within a prescribed timeframe. 42 U.S.C. § 10134(b), (d) (emphasis added). Therefore, Petitioners’ actions to

forever terminate the Yucca Mountain project are in clear violation of the plain language of the NWPA. There simply is no reason for this Court to defer in any fashion to the NRC on these legal issues.

Finally, there is an imperative need for a speedy resolution of this matter. In contrast to the NRC, DOE has been anything but inactive. DOE has continued its efforts to terminate all aspects of the Yucca Mountain project, including its most recent statement that by September 30, 2010, it intends to completely eliminate the entire agency responsible for the Yucca Mountain project, the OCRWM. The OCRWM, however, is an agency created by Congress as part of the NWPA. *See* 42 U.S.C. § 10224(a) (“There is hereby established within the Department of Energy an Office of Civilian Radioactive Waste Management . . .”). In its latest action to eliminate an entire Congressionally-created office without express Congressional approval, DOE has continued to engage in behavior that forms the basis of Petitioners’ complaint in this matter. Put another way, DOE’s apparent intent to abolish the OCRWM is just the latest example of their violation of the NWPA and the Congressional intent expressed in that statute, as well as a violation of the doctrine of separation of powers.

The basis for imposing the stay and vacating the expedited briefing and argument schedule does not exist, as demonstrated by the inaction of the NRC. The issues involved in this matter are of paramount national importance and in

each month of delay, DOE continues to take actions that violate the plain language of the NWPA and other statutes. As a result, the Petitioners respectfully request that the Court lift the stay and impose an expedited briefing schedule as follows: The Respondents' joint merits brief would be due 15 days after the date upon which the Court enters an expedited briefing schedule. Reply briefs would then be due 15 days after Respondents' merits brief. Argument would then be held before the Court at a date to be set by the Court. Such a schedule should be easy to sustain, since Respondents presumably have completed their brief as it was due the same date the Court imposed the stay in this matter.

RESPECTFULLY SUBMITTED this 28th day of September, 2010.

s/ Thomas R. Gottshall

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Attorneys for State of Washington

CERTIFICATE OF SERVICE

I hereby certify that on the 28th day of September 2010, a copy of the foregoing Petitioners' Corrected Motion to Lift Stay and Set Expedited Briefing Schedule was filed electronically using the CM/ECF system, which will provide service on the following parties:

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I hereby certify that service of the same was made on the following parties

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Exhibit 6

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 10-1050

September Term 2010

**DOE-Yucca Mtn
NRC-63-001**

Filed On: December 10, 2010

In re: Aiken County,

Petitioner

Consolidated with 10-1052, 10-1069, 10-1082

BEFORE: Henderson, Garland, and Brown, Circuit Judges

ORDER

Upon consideration of the motion to lift stay and set expedited briefing schedule and the supplement thereto, the response to the motion and the supplements thereto, and the reply, it is

ORDERED that the motion to lift stay and set expedited briefing schedule be granted. It is

FURTHER ORDERED that the following revised briefing schedule apply in these consolidated cases:

Joint Brief of Petitioners and Intervenor NARUC	Already Filed
Brief of Amicus Curiae in support of the Petitioners Nuclear Energy Institute	Already Filed
Brief(s) of Respondents and Intervenor State of Nevada (not to exceed 23,000 words in the aggregate, divided as the parties deem fit)	January 3, 2011

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 10-1050

September Term 2010

Joint Reply Brief of Petitioners
and Intervenor NARUC
(not to exceed 7,000 words)

January 18, 2011

Deferred Appendix

February 1, 2011

Final Briefs

February 8, 2011

Per Curiam

FOR THE COURT:

Mark J. Langer, Clerk

By: /s/
Amy Yacisin
Deputy Clerk