

SCHEDULED FOR ORAL ARGUMENT ON SEPTEMBER 23, 2010

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

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No. 10-1050

Consolidated With Nos. 10-1052, 10-1069, 10-1082, 10-1084

IN RE AIKEN COUNTY,  
PETITIONER

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ON PETITIONS FOR MANDAMUS AND PETITIONS FOR REVIEW  
AND INJUNCTIVE RELIEF

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FEDERAL RESPONDENTS' REPLY TO PETITIONERS' OPPOSITION TO  
MOTION TO VACATE BRIEFING AND ORAL ARGUMENT SCHEDULE  
AND HOLD CASES IN ABEYANCE

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On June 29, 2010, the Nuclear Regulatory Commission's ("NRC") Atomic Safety and Licensing Board denied the Department of Energy's ("DOE") motion to withdraw its license application for Yucca Mountain. The NRC Licensing Board thus largely granted Petitioners the relief they seek from this Court and, as things stand now, Petitioners are not adversely affected by DOE's motion to withdraw the license application. The Commission may, or may not, review the Board order. The parties to the NRC proceeding, including nearly all of the Petitioners in these consolidated petitions, have just recently (on July 9, 2010) filed briefs with

Commission arguing for and against Commission review. Based on this material change of circumstance, on July 2, 2010, the Federal Respondents moved to vacate the briefing and oral argument schedule in these consolidated cases pending a decision by the Commission, the body with final authority over NRC decision-making. Petitioners' response in opposition is unpersuasive.

Initially, there is no truth to Petitioners' suggestion that the Federal Respondents filed its motion to vacate in defiance of the Court's May 3, 2010, order granting in part the Petitioners' motions to expedite the cases.<sup>1/</sup> Rather, the Federal Respondents' motion is a straightforward and good faith request for this Court to revisit its order based on a subsequent development in the ongoing NRC proceedings that materially changes these court of appeals proceedings in such a way that the Court should hold the proceedings in abeyance. While Petitioners wish to press forward no matter the degree of changing circumstances, the Federal

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<sup>1/</sup>Petitioners argue (at 2) that the Federal Respondents have supposedly "*agreed*" to the expedited schedule. (emphasis in original). Actually, because this Court lacks jurisdiction to review the non-final agency actions that are the subject of these consolidated lawsuits and because Petitioners are under no threat of imminent harm, the Federal Respondents vehemently opposed expedited briefing. The Court nonetheless partially granted Petitioners' motions, thereby setting parameters for a briefing schedule that the Court ordered the parties to jointly propose. Thus, the Federal Respondents' agreement to the current schedule was within the confines of that which we had opposed.

Respondents submit that the Court's interest lies in pausing these proceedings while the Commission makes a decision with respect to the Board order.

The benefits of the Federal Respondents' suggested course are plain. In two out of three ways in which the Commission may act, the issues before this Court will be significantly crystallized, reduced, or even wholly eliminated. The Commission, for instance, might choose not to review the Board order, in which case the Board order stands and Petitioners continue not to be adversely affected and their claims in this Court are moot. The Commission also could affirm the Board order, in which case the Board order stands and Petitioners are not injured and their claims in this Court are moot. In either of these potential scenarios, awaiting the Commission's decision is obviously in the interest of judicial economy, and indeed, may avoid judicial review of Petitioners' claims altogether.

Even under the third potential scenario, *i.e.*, if the Commission reverses the Board order and grants DOE's motion to withdraw, it would be of substantial benefit for this Court to await that result. The NRC order would be a reviewable final agency action, which, as the matter stands now, is lacking. Petitioners could petition for review of the NRC action and this Court could address that action without the jurisdictional and many of the justiciability defects plaguing the current petitions. Moreover, by unflinchingly pressing forward despite the NRC's

ongoing proceedings to which most Petitioners are parties, Petitioners virtually ensure that events will overtake many of the arguments in the opening briefs and that supplemental briefing – or fresh lawsuits challenging the final NRC action – will be needed to resolve the issues raised in these cases.

Petitioners attempt (at 9) to evade the significance of the Board order by now claiming that the primary issue before this Court is not the withdrawal of the license application and instead is the broader issue of whether DOE can abandon or terminate the “larger process of developing Yucca Mountain of which the license proceeding is only a subpart.” Petitioners’ attempt to downplay the significance of withdrawal issue is unpersuasive: it is central to their argument before this Court. In their brief filed in this Court on June 18, 2010, Petitioners state that the licensing stage is the final stage in the Nuclear Waste Policy Act process. Pet. Merits Br. at 9. And most Petitioners have conceded, at least in the NRC proceedings, that DOE is not required to construct the repository even if a construction license is approved. *See* Transcript of June 3-4, 2010 Oral Argument Before NRC Licensing Board at 74, 187, 240 (Attached). Moreover, while Petitioners organize their merits briefing into two separate sections addressing the authority to withdraw the license application and DOE’s authority to terminate the process, the arguments on

behalf of and legal support for each supposedly separate argument are largely identical. Pet. Merits Br. at 36-46.

Petitioners' speculation (at 7-8) about the impartiality of the Commission is inappropriate and provides no basis for going forward with this case under its current posture. Several Petitioners have joined in a motion filed with the Commission on July 9, 2010, to disqualify three NRC Commissioners. It must be presumed that the NRC Commissioners will act on the disqualification motion responsibly. "As [this Court has] so often said, 'agencies are entitled to a presumption of administrative regularity and good faith.'" *FTC v. Invention Submission Corp.*, 965 F.2d 1086, 1091 (D.C. Cir. 1992). Contrary to Petitioners' view (at 7), the mere raising of the issue does not signify that the "integrity of [the NRC] process has been compromised." The disqualification issue is still pending, and has not yet been decided. Nor has the Commission yet decided whether to review the Board order denying DOE's motion to withdraw. It would be prudent for this Court to postpone further briefing in this Court, as well as oral argument, until the NRC completes its deliberations on these matters.

Finally, as Petitioners note (at 10-12), DOE is continuing a process to reduce its Yucca Mountain workforce that is being taken in anticipation of, and in preparation for, a lack of funding in the 2011 federal budget for Yucca Mountain-

related activities. As a result of the anticipated lack of funding in the next fiscal year, DOE believes that it is engaging in an orderly wind-down of Yucca Mountain to ensure that all records and science are preserved and the harm to its employees is minimized. Most importantly, this Court already has denied a preliminary injunction because Petitioners failed to demonstrate that such reductions in the Yucca Mountain workforce cause them any irreparable harm. *See In re: Aiken County*, D.C. Cir. No. 10-1050, Order at 2 (May 3, 2010) (“Petitioners have not demonstrated that they are likely to suffer irreparable injury absent a preliminary injunction or stay.”). If a final NRC or court decision requires DOE to continue with the license application, DOE can reassemble its workforce. Thus, no matter the schedule upon which these consolidated petitions are briefed and argued, Petitioners will suffer no irreparable harm.

Seen in this light, there is no sound reason to continue on the current briefing and oral argument schedule. At this moment, Petitioners have obtained from the Licensing Board effective relief on their claims and they will not be adversely affected or positioned unless the Commission reverses the Board. This Court thus should vacate the current briefing and oral argument schedule and hold these consolidated petitions in abeyance pending a final Commission decision.

## CONCLUSION

For the foregoing reasons as well as those in the opening motion, this Court should vacate the current briefing and oral argument schedule and hold these consolidated petitions in abeyance pending a final Commission decision. It should further direct the parties to file motions regarding further court of appeals proceedings within seven days after the Commission's final decision.

Respectfully Submitted.

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### **CERTIFICATE OF SERVICE**

Pursuant to Fed. R. App. P. 25(c), D.C. Circuit Rule 25(c), and this Court's Administrative Order of May 15, 2009, I hereby certify that on July 12, 2010, I caused the foregoing to be filed upon the Court through the use of the D.C. Circuit CM/ECF electronic filing system, and thus also served counsel of record. The resulting service by e-mail is consistent with the preferences articulated by all counsel of record in the Service Preference Report.

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