

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

IN RE: AIKEN COUNTY,)	
)	
Petitioner.)	No. 10-1050
_____)	
)	
ROBERT L. FERGUSON, et al.,)	
)	
Petitioners)	
v.)	
)	No. 10-1052
UNITED STATES DEPARTMENT)	
OF ENERGY, et al.,)	
)	
Respondents.)	
_____)	
)	
STATE OF SOUTH CAROLINA,)	
)	
Petitioner)	
v.)	No. 10-1069
)	
UNITED STATES DEPARTMENT)	
OF ENERGY, et al.,)	(CONSOLIDATED)
)	
Respondents.)	

**RESPONSE BY U.S. NUCLEAR REGULATORY COMMISSION TO
MOTIONS FOR EXPEDITED CONSIDERATION**

On April 8, 2010, this Court issued an order consolidating the three above-captioned cases and directing respondents to respond immediately (by April 12) to pending motions for expedited

consideration. The Nuclear Regulatory Commission (NRC) and NRC officials are among the respondents in two of the cases – *Aiken County* (No. 10-1050) and *South Carolina* (No. 10-1069) – but not in the third, *Ferguson* (No 10-1052).

Each of the cases involves, at bottom, a challenge to a determination by the U.S. Department of Energy (DOE) not to pursue its application for a license to build a high-level waste repository at Yucca Mountain (NV) and to file a motion to withdraw it, with prejudice. The NRC hearing tribunal presiding over the proceeding – the Atomic Safety and Licensing Board – recently issued a decision suspending consideration of DOE’s motion to withdraw, pending further developments in the three cases pending in this Court.¹ DOE has indicated that it will ask the Commission to overrule the Board decision.²

Hence, the Commission, in its adjudicatory capacity, will have to rule on DOE’s challenge to the Board’s decision to suspend

¹ See Petitioner’s Motion for Expedited Briefing, etc., *South Carolina v. U.S. Dept. of Energy*, No. 10-1069, Exhibit N (filed April 7, 2010).

² See Respondents’ Rule 28(j) letter, *In re Aiken County*, No. 10-1050 (filed April 7, 2010).

further consideration of DOE's motion to withdraw. And, ultimately, the Commission may also have to rule on the motion to withdraw itself. Because of the pendency of the intra-NRC administrative litigation on the "motion to withdraw" question, it would be inappropriate for the Commission, in a court pleading, now to speak to the merits and irreparable injury issues that petitioners in *Ferguson* and *South Carolina* raise in their motions to expedite judicial review. Those issues are identical or closely related to issues the Commission may have to decide as an adjudicator.

In addition, petitioners' motions seek to expedite the "petitions for review" filed in *Ferguson* and *South Carolina* -- where DOE actions, not NRC actions, are in issue. The *Ferguson* petition does not even name NRC or its officials as respondents; the *South Carolina* petition does, but only in its separate request for mandamus and stay or injunctive relief.³

³ In *Aiken County*, NRC (but not the NRC Licensing Board) joined the government's response opposing mandamus and injunctive relief, except insofar as the response discussed the lawfulness of DOE's motion to withdraw. See "Respondents' Response in

For these reasons, NRC is not addressing petitioners' arguments for expedited judicial review. But if this Court does issue a briefing schedule, and calls for briefs not just on the petitions for review of DOE actions but also on the requests for mandamus and injunctive relief against the NRC, the NRC agrees with the schedule proposed in DOE's response. The 17-day briefing period (11 business days) suggested by petitioners leaves inadequate time for NRC's lawyers to coordinate the agency's litigating position inside the NRC and with the Department of Justice.

Respectfully submitted,

April 12, 2010

s/
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Opposition to the Petition," *In re: Aiken County*, No. 10-1050 (filed Mar. 24, 2010), p. 1 note 1. In *South Carolina*, this Court has suspended the response period for the stay and injunctive motions (Order, April 8, 2010, at p. 2), and has not ordered any response to the mandamus petition. *See D.C. Circuit Local Rule 21(a)*.

CERTIFICATE OF SERVICE

I certify that on this date, April 12, 2010, I caused the foregoing “RESPONSE BY U.S. NUCLEAR REGULATORY COMMISSION TO MOTIONS FOR EXPEDITED CONSIDERATION” to be filed upon the Court through the use of the D.C. Circuit CM/ECF electronic filing system – as well as through hand-delivery pursuant to this Court’s order of April 8, 2010 – and thus also served upon counsel of record.

I also have served the following counsel by e-mail and by regular U.S. mail, postage prepaid, at the following addresses:

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