

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

_____)	
In re: AIKEN COUNTY,)	
)	
Petitioner,)	
_____)	
)	
ROBERT L. FERGUSON, et al.,)	
)	
Petitioners,)	
)	
v.)	
)	
U.S. DEPARTMENT OF ENERGY, et al.,)	
)	
Respondents,)	
_____)	Case Nos. 10-1050
)	10-1052
STATE OF SOUTH CAROLINA,)	10-1069
)	
Petitioner,)	(Consolidated)
)	
v.)	
)	
U.S. DEPARTMENT OF ENERGY, et al.,)	
)	
Respondents,)	
_____)	
)	
STATE OF NEVADA,)	
)	
Intervenor.)	
_____)	

**RESPONSE OF INTERVENOR STATE OF NEVADA
TO MOTIONS FOR EXPEDITED BRIEFING AND CONSIDERATION**

On April 2, 2010, Petitioners Ferguson, *et al.* moved before this Court for expedited briefing and consideration of its petition for review in Case No. 10-1052 (“Ferguson Motion”). On April 8, 2010, Petitioner State of South Carolina also moved before this court for expedited briefing and consideration of its petition for review in Case No. 10-1069 (“South Carolina Motion”). In both cases, the Petitioners request this Court to issue a scheduling order that would require dispositive motions to be filed on April 30, 2010, responses to those dispositive motions to be filed on May 17, 2010, and replies to those responses to be filed on June 1, 2010. Ferguson Motion at 19; South Carolina Motion at 19. In those Motions, the Petitioners also request this Court to order simultaneous briefing on the merits of the Petitioners’ claims – with Petitioner briefs to be filed on April 30, 2010, Respondent briefs to be filed on May 17, 2010, and Petitioner reply briefs to be filed on June 1, 2010. *Ibid.* Petitioner State of South Carolina also requests an oral argument at an appropriate time this summer. South Carolina Motion at 2.

By Order dated April 8, 2010, this Court consolidated Case No. 10-1052 and Case No. 10-1069 with Case No. 10-1050, and ordered the Respondents and Intervenor State of Nevada (“Nevada”) to respond to the motions for expedited consideration by 4:00 pm on Monday, April 12, 2010. This response filed by Nevada complies with the Court’s Order.

As this Court is aware, there is an administrative proceeding now pending before the U.S. Nuclear Regulatory Commission (NRC) involving Respondent U.S. Department of Energy (DOE). Nevada was admitted to that proceeding as an intervenor in May 2009, and Petitioners Aiken County and State of South Carolina are now seeking intervention status as well. Until April 6, 2010, the NRC proceeding was before an Atomic Safety and Licensing Board, and that Licensing Board was considering whether DOE may withdraw its pending license application for a construction authorization for a geologic repository (for the disposal of spent nuclear fuel and high-level radioactive waste) at Yucca Mountain, Nevada. On April 6, 2010, the Licensing Board issued a Memorandum and Order that stayed further consideration of those matters until this Court could decide the claims asserted by the Petitioners here. On April 12, 2010, DOE appealed the Licensing Board's Memorandum and Order to the Nuclear Regulatory Commission, the collegial body vested by Congress with final decision authority. Thus, it is still possible that some or all of the Petitioners' claims will be addressed on the merits in a final, judicially reviewable order of the NRC notwithstanding the Licensing Board's Memorandum and Order.

Nevada supports the request of Petitioners Ferguson, *et al.* and the State of South Carolina to expedite the filing of dispositive motions in their cases; however, Nevada respectfully suggests that it would seem highly desirable for the Court to

delay its ruling on dispositive motions until after NRC decides DOE's appeal. Nevada does not now support the concurrent request by Petitioners Ferguson, *et al.* and the State of South Carolina to expedite the briefing of the merits of any of the Petitioners' claims. The reasons for Nevada's positions are set forth below.

Dispositive Motions

The three cases (now consolidated) were first filed on February 19, 2010 (Aiken County, Case No. 10-1050), February 25, 2010 (Ferguson, *et al.*, Case No. 10-1052) and February 26, 2010 (State of South Carolina, Case No. 10-1069).¹ Pursuant to the Order of this Court dated February 24, 2010, Respondents in Case No. 10-1050 filed their opposition to Aiken County's Petition on March 24, 2010, and therein requested the Court to "summarily deny the petition without addressing the merits." Respondents' Response in Opposition to Petition at 3 (Case No. 10-1050, Document No. 1236616 at 12). Aiken County filed its Reply in Support of Petition for Declaratory and Injunctive Relief and Writ of Mandamus on April 2, 2010 (Case No. 10-1050, Document No. 1237826). As a result, the dispositive pleadings filed by Respondents and Petitioner Aiken County in Case No. 10-1050 are now ripe for decision by this Court and need not be re-litigated in another round of dispositive motions.

¹ This Court docketed the Petition filed by State of South Carolina in Case No. 10-1069 on March 26, 2010, after it was transferred to this Court from the U.S. Court of Appeals for the Fourth Circuit. The State of South Carolina filed its Petition in the Fourth Circuit on February 26, 2010.

Respondents have indicated that they intend to file dispositive motions in Case No. 10-1052, presumably to raise jurisdictional arguments similar to those contained in their March 24th filing in Case No. 10-1050. *See* Ferguson Motion at 18. Respondents have also announced that similar dispositive motions will be filed in Case No. 10-1069. *See* Federal Respondents’ Motion for Leave to File Consolidated Responses to Motion for Declaratory and Injunctive Relief and Writ of Mandamus at 2-3 and n.2 (filed April 1, 2010, Case No. 10-1069, Document No. 1237796, at 4-5 and n.2). Respondents have acknowledged that they are willing to file those dispositive motions circa the end of April. *Id.* at 4 (where the Federal Respondents request the Court to order a single consolidated response to the Petition filed by the State of South Carolina “within 30 days” – the request was filed with the Court on April 1, 2010).

Nevada is *not* supportive of any of the claims on the merits by any of the three Petitioners in this consolidated proceeding, and accordingly does *not* agree with certain statements regarding those claims made by Petitioners Ferguson, *et al.* or State of South Carolina in their motions to expedite. However, Nevada does support Petitioners’ request to file dispositive motions, responses and replies on the dates proposed in their motions to expedite. Nevada respectfully suggests that it would seem highly desirable for the Court to delay its ruling on dispositive motions until after NRC decides DOE’s appeal, *supra*.

Merits Briefing

Nevada does not concur with the requests of Petitioners Ferguson, *et al.* or State of South Carolina to schedule expedited briefing on the merits of the claims at issue in their Petitions under the present circumstances. Since dispositive motions are intended to dispose of some or all of a case on jurisdictional grounds without wasting the resources of the parties in briefing merits issues, judicial economy suggests that dispositive motions should be decided *before* addressing the merits. It may or may not be prudent to expedite the briefing on the merits of any or all of the claims at issue in the Petitions if the cases proceed to the merits phase; however, Nevada respectfully suggests that any such decision be deferred until after this Court rules on the dispositive motions. If any or all of the Petitioners' claims survive dispositive motions and will then proceed to the merits phase, Nevada proposes that this Court could then inquire of the parties again whether expeditious briefing on the merits is warranted, and if so, solicit an appropriate schedule for that briefing. Accordingly, Nevada is opposed to the proposed schedule for expeditiously briefing the merits of the Petitioners' claims as set forth in the Ferguson Motion and the South Carolina Motion. Likewise, Nevada is opposed to scheduling any oral hearing on those merits briefs as requested in the South Carolina Motion.

Respectfully submitted,



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DATED: April 12, 2010

CERTIFICATE OF SERVICE

I certify that on April 12, 2010, the Response of Intervenor State of Nevada to Motions for Expedited Briefing and Consideration was filed with the Court by hand service and served on all parties or their counsel of record electronically by email or by serving a true and correct copy at the addresses listed below:

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