

SCHEDULED FOR ORAL ARGUMENT ON SEPTEMBER 23, 2010

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

No. 10-1050

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

IN RE AIKEN COUNTY,
PETITIONER

ON PETITIONS FOR MANDAMUS AND PETITIONS FOR REVIEW
AND INJUNCTIVE RELIEF

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

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Because of very recent events in the licensing proceeding before the Nuclear Regulatory Commission, Federal Respondents hereby move to vacate the briefing and oral argument schedule and hold these consolidated cases in abeyance pending a final decision by the Nuclear Regulatory Commission (“NRC”) on what are largely the same merits issues pending before this Court. Under this Court’s current schedule, Respondents’ brief is due on July 28, 2010, and oral argument is set for September 23, 2010. Petitioners and Intervenor National Association of Regulatory Utility Commissioners oppose this motion. Intervenor State of Nevada does not oppose the motion.

INTRODUCTION

These four consolidated cases relate to an ongoing licensing proceeding before the NRC, *In the Matter of U.S. Dep’t of Energy*, Docket No. 63-001-HLW, ASLBP No. 09-892-HLW-CAB04, to consider DOE’s application for construction authorization for a permanent spent nuclear fuel and high-level radioactive waste geologic repository at Yucca Mountain, Nevada. Petitioners’ primary claim in these cases is that the Nuclear Waste Policy Act (“NWPA”) precludes withdrawal of the license application, as DOE has requested in a motion filed in the NRC proceeding on March 3, 2010. This Court should vacate the briefing schedule and oral argument calendar for the instant cases because of very recent orders in the NRC proceeding. Specifically, on June 29, 2010, the Atomic Safety and Licensing

Board (“Board”), the hearing tribunal of the NRC, issued an order denying the Department of Energy’s (“DOE’s”) motion to withdraw with prejudice the license application for Yucca Mountain. Attachment 1. The Board’s June 29 order granted effective relief for Petitioners’ primary claim in this Court, *i.e.*, the Board ruled, as Petitioners have argued both here and at the NRC, that under the NWPA, DOE cannot withdraw the license application. However, the Board’s June 29 order is an interlocutory order of an administrative hearing tribunal within the NRC and does not necessarily reflect the views of the Commission itself. On June 30, 2010, the Commission, *sua sponte*, issued an expedited briefing schedule to enable the Commission to decide whether it should review, and reverse or uphold, the Board’s June 29 order. Attachment 2. The order provides that briefing will proceed simultaneously with initial briefs due July 9, 2010, and responsive briefs due a week later on July 16, 2010. Holding the cases in abeyance until the Commission renders a final decision in response to that briefing would likely crystallize, narrow, or even wholly eliminate the issues that this Court would need to address to resolve these petitions, conserving both judicial and the parties’ resources.

DISCUSSION

1. Secretary of Energy Chu has stated his conclusions that Yucca Mountain has not proven to be a workable option for a permanent repository for high-level waste and spent nuclear fuel and that the technical and scientific context is significantly different today than it was at the time of the 1982 enactment of the NWPA. In Secretary Chu's view, these advances in scientific and engineering knowledge provide an opportunity to develop better alternatives to Yucca Mountain and to that end, the Secretary, at the direction of the President, has convened a Blue Ribbon Commission, chaired by former Congressman Lee Hamilton and General Brent Scowcroft, to evaluate options and make recommendations. Congress has appropriated funds for this purpose.

2. On March 3, 2010, DOE filed in the licensing proceeding before the NRC's Atomic Safety and Licensing Board a motion to withdraw its license application for Yucca Mountain with prejudice. Five parties, including all Petitioners in this consolidated litigation but the ones in *Ferguson v. Obama*, No. 10-1052, petitioned to intervene in the NRC proceeding to oppose DOE's motion before the agency.

3. Petitioners did not wait for a decision in the NRC proceeding on DOE's motion. Instead, they filed premature petitions on February 19, 25, 26, and April

13, 2010, challenging DOE's authority to terminate the license application process through withdrawal of the license application. The President, Secretary of Energy, DOE, NRC, NRC Commissioners, and the NRC Licensing Board Judges are named as respondents in one or more of the petitions.^{1/}

The cases were consolidated, and the State of South Carolina and *Ferguson* petitioners requested expedited review. In a May 3, 2010, order, this Court granted Petitioners' motions to expedite in part, stating that the Court would not entertain dispositive motions and directing the clerk to calendar the cases for oral argument on the first available date in September 2010.^{2/} Subsequent scheduling orders (on

^{1/} On February 19, 2010, a petition styled as "Petition for Declaratory and Injunctive Relief and Writ of Mandamus," seeking relief against DOE, NRC, and agency officials, was filed in this Court and docketed as *In re Aiken County*, D.C. Cir. No. 10-1050. On February 25, 2010, a "Petition for Review," docketed as *Ferguson v. Obama*, D.C. Cir. No. 10-1052, was filed in this Court against DOE and the President. On February 26, 2010, South Carolina filed in the Fourth Circuit a "Petition for Review and Petition for Writ of Mandamus, Writ of Prohibition, Stay, and/or Declaratory and Injunctive Relief" against the President, DOE, NRC, and agency officials; that case was transferred to this Court and docketed as *South Carolina v. U.S. Dep't of Energy*, D.C. Cir. No. 10-1069. On April 13, 2010, the State of Washington filed a Petition for Review and for Declaratory and Injunctive Relief, docketed as *State of Washington v. DOE*, No. 10-1082, against DOE, the Secretary of Energy, and NRC.

^{2/} The May 3, 2010, order also denied as moot a motion filed by DOE in response to Petitioners' motions to expedite requesting that the Court hold these cases in abeyance for thirty days, to May 12, 2010, in order to allow the Commission opportunity to consider DOE's petition for review of an April 6, 2010, Board order where the Board decided that it would withhold making any decisions on DOE's

May 15, 2010, and June 15, 2010, respectively) provided for the filing of Petitioners' joint opening brief on June 18, 2010 and Respondents' answering brief on July 28, 2010; oral argument was set for September 23, 2010.

Petitioners' primary argument in their joint brief filed on June 18, 2010, is that, as a matter of law, the NWPA precludes the license application from being withdrawn for any reason.^{3/} Petitioners request, *inter alia*, declaratory relief

motion to withdraw the license application and motions to intervene pending this Court's ruling in the instant petitions. DOE petitioned the Commission to review the April 6, 2010, Board order and on April 23, 2010, the Commission issued an order directing the Licensing Board to render a decision by June 1, 2010, on DOE's motion to withdraw. With all due respect, DOE submits that the Commission's April 23, 2010, order did not fully moot DOE's motion to hold the cases in abeyance because the motion proposed that the case be held in abeyance to May 12, 2010, at which time Respondents would file a status report that would provide a basis for reassessment. Furthermore, the fundamental reasons that warrant holding these cases in abeyance remained after the Commission directed the Licensing Board to make a decision expeditiously on DOE's motion to withdraw. Doctrines of ripeness, exhaustion, primary jurisdiction and fundamental principles of administrative law dictate that judicial review should be withheld unless and until after the NRC renders a final decision on DOE's motion to withdraw that is adverse to Petitioners. At any rate, we submit that the Licensing Board's June 29, 2010, order and the Commission's June 30, 2010, order materially change the posture of these cases and warrant this Court taking a fresh look at whether these cases should be held in abeyance until the Commission renders a final decision in response to the briefing it has invited.

^{3/} Petitioners state that they challenge two distinct actions: (1) for purposes of the mandamus writs sought by South Carolina and Aiken County, the action they challenge is Respondents' failure to comply with an alleged nondiscretionary duty to pursue a license construction application for the Yucca Mountain repository; and (2) Washington, Ferguson petitioners, and South Carolina challenge Respondents'

declaring that Respondents may not withdraw the licensing application. Br. 65.

4. In responses to Petitioners' various filings in this Court, Federal Respondents have repeatedly pointed out that these cases were filed prematurely, creating attendant jurisdictional and justiciability infirmities, because the matter was still pending before the NRC and the NRC might deny DOE's motion to withdraw the license application, rendering Petitioners' request for relief in this Court moot. The Licensing Board did just that in its June 29, 2010, order. If that order withstands appellate review at the Commission, the Board's denial of DOE's request to withdraw the license application effectively grants Petitioners relief on its primary claim and thus eliminates or considerably narrows Petitioners' claims and arguments.

The Commission's immediate invitation to the participants in the licensing proceeding to file briefs on July 9 and July 16, 2010, addressing whether the Commission should review and reverse or uphold the Board's order suggests that the Board's order may not be the final word of that agency. The Commission's response to the invited briefing would be directly relevant to questions respecting this Court's jurisdiction over the instant petitions, the justiciability of issues, and

decision and actions to terminate the Yucca Mountain process, including withdrawal of the license application. Br. 17.

whether merits issues briefed in Petitioners' opening brief are even presented. Thus, there will be considerable uncertainty with respect to many issues until the Commission makes a final decision in response to the invited briefing. It seems highly unlikely that the NRC would issue such a final decision before the current July 28 deadline for Federal Respondents' brief: the briefing with the NRC will occur during the same time period that Respondents would need to prepare the brief for filing in this Court under the current schedule.

In light of these uncertainties, Federal Respondents request that the briefing schedule and oral argument calendar for the instant cases be vacated and the cases held in abeyance until the NRC issues a final ruling in response to the briefing that is about to occur before the agency. Holding the case in abeyance until the Commission issues a ruling would likely conserve judicial and the parties' resources by narrowing the issues and volume of material that the Court would have to review. If briefs continue to be filed under the current schedule, supplemental briefing – or, perhaps, a fresh round of petitions for judicial review – would likely be required when the Commission renders a final decision in response to the invitation to submit briefing. Principles of justiciability, including ripeness, exhaustion, and primary jurisdiction doctrines, and fundamental principles of administrative law support holding these cases in abeyance until the NRC makes a

final decision in response to the briefing it has invited.

Petitioners should not be unduly harmed by a delay in briefing and continuance of oral argument in these cases because unless and until altered, the Board's June 29, 2010, order prevents DOE from withdrawing its license application. Moreover, in a May 3, 2010, order, this Court denied Petitioner State of Washington's request for a preliminary injunction pending review on the ground that Petitioner had not demonstrated that it would likely suffer irreparable harm in the absence of the preliminary injunction.

CONCLUSION

For the foregoing reasons, Federal Respondents request that the briefing and oral argument schedules be vacated and the cases held in abeyance pending a final decision by the Commission in response to the briefing it has invited. This Court should postpone further briefing, remove the current oral argument date from the calendar, and direct the parties to file motions to govern further proceedings within seven days after the NRC's final decision in its pending review of the Licensing Board's June 29, 2010, 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 2, 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.

s/
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