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)

IN RE AIKEN COUNTY,

Petitioner

v.

UNITED STATES DEPARTMENT OF ENERGY, et al.,

Respondents.

On May 3, 2010, this Court issued an order requiring the parties to confer and submit by May 10, 2010, a joint proposal for the proposed formats for the briefing of these consolidated cases. As per this Court's Order, the parties jointly propose the following formats:

I. Proposed Formats and Schedule:

• Filing of the Certified index to the Administrative record	May 17, 2010
• One Joint Opening Brief for Petitioners (the States of Washington and South Carolina, Aiken County and the Ferguson Petitioners) and intervenor/petitioners NARUC of **16,000 words** (see FRAP 32(a)(7); see below for justification for additional 2,000 words)	June 18, 2010
• Nuclear Energy Institute (NEI) brief as amicus curiae of **7,000** words (see FRAP 29(e))	June 28, 2010
• One brief for Federal Respondents (Department of Energy, NRC, the President)	July 28, 2010
One brief for intervenor/respondent State of Nevada (combined, respondents' two briefs will not exceed the allotted 23,000 words for petitioners and amicus curiae (justification below))	July 28, 2010
• Petitioners' Joint Reply Brief (7,000 words as per FRAP 32(a)(7))	August 11, 2010
• Deferred Joint Appendix	August 17, 2010
• Final Briefs	August 20, 2010
• Oral Argument	No earlier than September 20, 2010 (See May 4, 2010 letter from South Carolina counsel, and additional counsel conflicts)

II. Justifications for Briefing Formats and Word Limitations

The parties' justifications for (1) the filing of a separate brief for amicus curiae NEI in support of the Petitioners (*i.e.*, the consolidated petitioners will file one brief, and NEI as amicus curiae will file one brief); and (2) the filing of separate briefs for the Federal Respondents and intervenor/respondent State of Nevada; and (3) the modest expansion of the standard word allotments are provided below.

A. Briefing Formats

1. Justification for amicus curiae NEI filing a separate brief from the consolidated petitioners and intervenor petitioner:

As described above, all petitioners (the State of South Carolina, Aiken County, the State of Washington, and the Ferguson petitioners) and intervenor petitioner NARUC have agreed to file one joint brief. Amicus, NEI offers the following justification for filing a separate brief:

First, NEI's members include all companies licensed to operate commercial nuclear power plants in the United States. Used nuclear fuel from nuclear power plants operated by these companies will be disposed of at Yucca Mountain if the site is licensed by the NRC. It is important to NEI that it be afforded an opportunity to file separately in order to offer the unique perspective(s) of intended "users" of the Yucca Mountain repository. Further, in addition to nuclear power plant licensees, NEI's members include a wide variety of other NRC licensees. It is important to NEI that it have the opportunity to provide appropriate input concerning any unintended, collateral impact(s) of a ruling by the Court: [1] on NRC licensees, in general; and [2] on NRC licensing proceedings other than Yucca Mountain.

2. Justification for Separate Briefs for the Federal Respondents (one brief) and the State of Nevada (one brief):

a. The Federal Respondents and the State of Nevada Have Distinct Interests. – These consolidated cases challenge alleged decisions by the President, the Department of Energy and the Nuclear Regulatory Commission (NRC) with respect to an ongoing licensing proceeding before the NRC involving the use of Yucca Mountain as a permanent repository for nuclear waste. Petitioners have raised challenges under the Nuclear Waste Policy Act, the U.S. Constitution, the

National Environmental Policy Act ("NEPA"), the Administrative Procedure Act (APA) and mandamus. The State of Nevada was granted permission to intervene on behalf of the federal respondents in these consolidated petitions for review appeal.

The questions presented by petitioners are ones for which the federal respondents and intervenor/respondent the State of Nevada have somewhat distinct interests. The federal respondents must defend against all challenges to any alleged decisions and the federal government's interests with respect to its compliance with federal statutes are distinct from those of the State of Nevada, which has no obligations under the federal statutes. Furthermore, the State of Nevada has historically opposed the location of any permanent repository in Nevada and has brought numerous suits against the Department of Energy challenging its compliance with various federal statutes. Accordingly, the federal respondents should be permitted to file a brief separate from the State of Nevada. Additionally, the State of Nevada is a sovereign which should be permitted to file a separate brief on its behalf addressing the State's distinct interests in this case. For these reasons, the federal respondents and intervenor/respondent believe that although we propose filing separate briefs — to address separate and distinct issues in the case — the respondents' briefs will not be repetitious. See, D.C. Circuit Handbook, Part IX, A.2 (only parties with common interests should join in a single brief where feasible).

b. Close coordination of the Federal Respondents' and the State of Nevada's briefs will avoid repetition. – Although the federal respondents and the State of Nevada have proposed the filing of our briefs on the same day, the federal respondents and intervenor respondents have conferred and agreed to closely coordinate during the preparation of the briefs to avoid potential repetition. This close coordination between the federal respondents and the State will ensure that the briefs avoid any repetition and address the distinct interests of the federal respondents and the State. Additionally, the respondents believe that permitting the filing of separate briefs will ensure that each brief addresses only those issues necessary to the entity or entities involved and, in turn, ensure that each responsive brief may be shorter.

c. Filing one joint brief would be overly burdensome. – Finally, while the respondents believe that sufficient coordination and discussion during the preparation of briefs will avoid repetitious submissions, requiring the federal respondents to file one joint brief with the State of Nevada will present burdens to the federal respondents and the State. As noted, the entities do not share entirely

common interests in this action. Further, the United States Department of Justice review and approval process is quite lengthy and does not typically permit sharing a brief with non-federal parties until after the brief has been approved by the Assistant Attorney General (which typically occurs within one day of the filing deadline or on the day of filing). Although we will coordinate sufficiently to ensure a lack of repetition, logistical coordination of the filing of one brief between two governments (the federal government and the State) would be unduly burdensome under the proposed time schedule. Additionally, this Court's rules recognize that governmental entities such as the federal respondents need not join in the filing of a single brief in most circumstances. See D.C. Cir. Rule 28(d)(4); D.C. Cir. Handbook Part IX A.4 (addressing intervenors/amici but explaining that governmental entities not required to file a joint brief with other intervenors/amici).

B. Word Limitations

1. Justification for 16,000 words for the Joint Opening Brief of the Consolidated Petitioners and Intervenor/Petitioner NARUC. – As described in the proposed schedule above, the consolidated petitioners Washington, South Carolina, Aiken County, Ferguson et al., and aligned intervenor NARUC (collectively, the "five parties") propose filing one joint brief with a word allotment of 16,000 words. The five parties are agreeable to submitting a joint opening brief within the standard word allotment, but seek justification for the following allowance. Circuit Rule 28(a)(7) requires each party to address its basis for standing in the brief. The five parties—which include two states, a local government, an association, and individual petitioners—each assert a unique basis for standing that will require separate discussion to comply with Circuit Rule 28(a)(7). So that this discussion may occur in a single joint brief without coming at the expense of the merits briefing, the five parties request that the FRAP 32(a)(7) opening brief word limit be expanded to 16,000 words. Per Circuit Rule 28(a)(7), the five parties reserve the ability to present evidence in support of their respective standing arguments in a separate addendum to the brief.

2. Justification for Providing Respondents with the Same Combined Word Allotment of the Five Parties and their Amicus Curiae. – As described above, our proposal would have the five parties filing an opening brief of 16,000 words and would have amicus curiae, NEI, filing a brief of 7,000 words (the standard word allotment for an amicus brief) in support of the five parties. Combined, the petitioners and their supporters will have 23,000 words. The federal respondents and the State of Nevada request that together they be permitted an equivalent word allocation as the five petitioners/intervenor and their amicus

curiae combined (*i.e.*, 23,000 words) . Several reasons support this request. First, in light of the expedited consideration, the Court ordered that dispositive issues be addressed in the briefs, rather than in separate motions. As evidenced by prior filings, respondents have several affirmative bases to dispute the jurisdiction and justiciability of these suits. Second, in addition to the merits of petitions for review, federal respondents must address separate mandamus requests in our brief. Third, federal respondents may need to challenge the standing of the petitioners and, if so, will need to address each of the five sets of petitioners. While the federal respondents will endeavor to address standing in as few words as possible, we believe that having the same additional 2000 words that the petitioners expect to use to address standing is fair and necessary to provide the Court with adequate briefing on this issue. Fourth, respondents will be responding to 23,000 words and as per the above justifications, will need additional words to address the distinct interests and arguments set forth in a 7,000 word brief filed by amicus curiae, NEI. For all these reasons, it is appropriate to provide an equivalent word allocation for respondents as provided to petitioners, petitioner-intervenor, and their amici curiae.

Respectfully Submitted,

_/s/ Lisa E. Jones_____
Lisa E. Jones
(Signed with consent from all counsel for the parties to this litigation)
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Dated: __May 7, 2010_____

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 this date, May 7, 2010, I caused the foregoing motion to be filed upon the Court through the use of the D.C. Circuit CM/ECF electronic filing system, and thus also served on counsel of record. The resulting service is consistent with the preferences articulated by counsel of record in the Service Preference Report.

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