UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

In Re: State of Texas	)	
	)	No. 17-60191
	)	

FEDERAL RESPONDENTS' OPPOSITION TO MOTION BY TEXAS AND THE STATE OF NEVADA FOR EXTENSIONS OF TIME

The Federal Respondents (the Departments of Energy ("DOE") and of the Treasury and the Nuclear Regulatory Commission ("NRC"))[1] oppose the relief requested in the Motion by Texas and the State of Nevada for Extensions of Time ("Motion"). Though styled a motion for "extensions of time," the Motion would alter the overall structure and format of briefing in this case and further complicate and extend the briefing in what should be a straightforward mandamus action that this Court typically would resolve based only on Texas' Petition and the responses ordered by the Court. Fed. R. App. P. 21; *Practitioner's Guide to the U.S. Court of Appeals for the Fifth Circuit* ("*Practitioner's Guide*") at 26 ("Ordinarily the court decides the petition on its merits without further briefing or hearing."). The Motion also inexplicably *excuses only Nevada* from responding to Texas' Petition, pending resolution of Nevada's countermotion to dismiss. Mot. ¶ 6.

[1] The NRC is an agency with independent litigating authority in the courts of appeals and is represented by its own attorneys. For the convenience of the Court, NRC joins the other Federal Respondents in this joint opposition.

1. Motion practice by Texas, and now Nevada, has made this case needlessly wordy and complicated. The Petition and any responses – the only filings contemplated by Federal Rule of Appellate Procedure 21 and this Court's March 20, 2017, order calling for responses – are sufficient to address all of the issues in the Petition. As DOE pointed out in opposition to Texas' Motion for Preliminary Injunction and Declaratory Relief (Doc. 000514014425), the claims in the Motion were duplicative of the Petition or waived, unnecessary, and, in any case, not grounded in this Court's rules. DOE Opposition, Doc. 00514029904 at 2-5. Nevada's countermotion was also unnecessary, as Nevada could have raised the same arguments in its response to the Petition (due on July 31 per the Court's May 30 order). Indeed, this Court did not expressly call for dispositive motions, and the responses to the Petition ordered by the Court may appropriately address any procedural, jurisdictional, and merits issues raised by the Petition. As such, the Federal Respondents are poised to address in their responses to the Petition (due June 30) the many jurisdictional, justiciability, and merits failings of the Petition. In other words, Rule 21 and this Court's scheduling orders established an expeditious and efficient process for resolving the entire Petition, appropriately based on the Petition itself and the responses ordered by the Court. No other filings are provided for by the rules, nor are other filings necessary.

2. Nevertheless, Nevada did file its countermotion to dismiss, and Texas now must respond to it. It is only appropriate that the main briefing on Nevada's motion to dismiss the Petition conclude before the Federal Respondents file briefs on the merits of the Petition, as would occur under the present schedule. Texas' opposition to Nevada's countermotion is due by June 22. As noted, the Federal Respondents responses to the Petition are due shortly thereafter, by June 30. Neither Rule 21(b) nor this Court's scheduling orders in this case provide for Texas to file a reply brief in support of its Petition. Apparently recognizing this, Texas seeks an extension of time until July 14, *i.e.*, *after* the Federal Respondents file their responses to the Petition, that would enable Texas to respond both to Nevada's countermotion and address any similar "jurisdictional issues" raised in the Federal Respondents' June 30 responses to the Petition. Mot. ¶ 7. Under the guise of judicial economy and using its opposition to the Nevada countermotion as a vehicle, Texas transparently seeks to re-configure the briefing to give itself a reply, and the last word, on the merits of its Petition. However, neither the rules, Fed. R. App. P. 21(b), nor this Court's orders allow a reply or further briefing from Texas on the Petition.[2]

[2] If the Court grants the instant scheduling Motion and permits Texas to file a response on July 14 that addresses jurisdictional or other issues in the Federal Respondents' response to the Petition, the Federal Respondents agree that Federal Respondents would be entitled to a reply brief to be filed by July 28 as proposed if they, too, file a motion to dismiss as part of their June 30 filing. Mot. ¶ 5(c).

3. Texas and Nevada appear to operate from the premise that other motions like Nevada's countermotion to dismiss will be filed and thus propose new deadlines based on this speculation. Mot. ¶ 5. However, as explained above, such motions are not procedurally necessary. Thus, there is no reason to upset the currently-applicable schedule. Even if such additional motions were filed, this Court's rules provide a schedule for briefing them, *see* Fed. R. App. P. 27(a)(3)(B), and scheduling issues can be addressed then if necessary. The schedule proposed by Texas and Nevada will only inject delay and procedural confusion into a case that has already grown more complex than is warranted as a result of needless motions practice.

4. Texas again insists that its case is unique and subject to "no dedicated set of rules or timelines," Mot. ¶ 7, let alone the Federal Rules of Appellate Procedure. However, this case is, if anything, a challenge to agency action, or inaction, with a supposed jurisdictional footing in the Nuclear Waste Policy Act's petition for review provision. 42 U.S.C. § 10139. Like many other statutes, the NWPA authorizes an Administrative Procedure Act-style petition for review with jurisdiction in the court of appeals that is comfortably accommodated by the Federal Rules of Appellate Procedure. This Court and other courts follow the ordinary process for briefing such petitions for review.[3]

[3] *See, e.g., Texas v. U.S. Dep't of Energy*, 754 F.2d 550, 551 (5th Cir. 1985)

In reality, this case is a petition for a writ of mandamus, and has been docketed as such. Thus, and contrary to Texas' claim that its case "does not fall neatly within any of the pre-established rules of this Court," Mot. ¶ 7, this Court already has determined that it fits quite neatly, at least, into the petition for mandamus box governed by Rule 21. Well-established procedures also govern petitions for review of agency action (or inaction). In the instant Motion, and in its many filings making this assertion, Texas has failed to cite a single example of a court of appeals handling a Nuclear Waste Policy Act petition for review or a mandamus petition as if it were district court action as Texas advocates.[4]

5. Finally, Texas and Nevada primarily cite their agreement with each other on these scheduling matters as "good cause" for the Motion. Mot. ¶ 7. Of course, that is not cause at all. Neither Texas nor Nevada provides any reason why it needs more *time* to prepare its filing, such as a schedule conflict. In fact, as

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(characterizing NWPA action as "petition for review" and "administrative appeal[]."); *Texas v. U.S. Dep't of Energy*, 764 F.2d 278, 282 (5th Cir. 1985) (applying "finality" as used in the APA to NWPA petition for review); *In re Aiken*, 645 F.3d 428, 436-37 (D.C. Cir. 2011) (NWPA challenges reviewable under the APA).

[4] Texas suggests without explanation that the NWPA's mere use of the term "civil action" indicates that an NWPA action is not a petition for review to which appellate rules apply. Mot. ¶ 7. However, the NWPA is not unique in referring to a "civil action" in its petition for review provision, *see* 15 U.S.C § 717r(d) (Natural Gas Act grant to Court of Appeals "original and exclusive jurisdiction over *any civil action* for the review of an order or action"), and for purposes of transfer for want of jurisdiction, Congress has explicitly recognized "a petition for review of administrative action" as a form of "civil action." 28 U.S.C. § 1631.

stated in the Motion (¶ 8), the Federal Respondents were agreeable to an extension of time for Texas up to June 29 in order to preserve the proper sequence of filings.

The Motion also includes an indefinite extension of Nevada's July 31 deadline to respond to Texas' Petition, pending this Court's resolution of Nevada's countermotion to dismiss. Mot. ¶ 6. Texas and Nevada give no reason why *Nevada alone* should delay its response to the Petition pending the Court's disposition of Nevada's motion to dismiss. Rather, Nevada should file its reply in support of its countermotion in accordance with the rules and, together with Intervenor Nuclear Energy Institute, file its response to the Petition by July 31 as currently scheduled. Of course, the jurisdictional and justiciability issues raised by Nevada's countermotion and the DOE's opposition to Texas' motion for preliminary injunctive and declaratory relief (Doc. 00514029904) suggest that the case could be resolved without the Court having to reach the merits of the Petition.

For the foregoing reasons, the Motion should be denied and the current schedule for responses to Nevada's countermotion and Texas' Petition maintained.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This Motion complies with the type-volume limitation of Federal Rule of Appellate Procedure 27(d)(2) and Fifth Circuit Rule 27.4 because it contains 1,498 words, except for the items excluded from the word count pursuant to F. R. App. P. 32(f), as determined by the word-count function of Microsoft Word 2013.

2. This Motion complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and Fifth Circuit Rule 32.1 and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2013 Times New Roman 14-point font.

Dated: June 20, 2017

/s/David S. Gualtieri
David S. Gualtieri
Counsel for Federal Respondents DOE and Treasury

CERTIFICATE OF SERVICE

I hereby certify that on the date below a copy of the foregoing was filed electronically with the Clerk and served upon all counsel of record in the case and is available through the court's CM/ECF System.

Dated: June 20, 2017

/s/David S. Gualtieri
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