

SCHEDULED FOR ORAL ARGUMENT ON MARCH 22, 2011

NO. 10-1050, 10-1052, 10-1069, 10-1082 *Consolidated*

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

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No. 10-1050

IN RE AIKEN COUNTY, Petitioner

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No. 10-1052

ROBERT L. FERGUSON, *et al.*, Petitioners,

v.

BARACK OBAMA, President of the United States, *et al.*, Respondents.

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No. 10-1069

STATE OF SOUTH CAROLINA, Petitioner,

v.

UNITED STATES DEPARTMENT OF ENERGY, *et al.*, Respondents.

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No. 10-1082

STATE OF WASHINGTON, Petitioner,

v.

UNITED STATES DEPARTMENT OF ENERGY, *et al.*, Respondents.

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On Petitions for Review and for Other Relief With Respect to Decisions  
of the President, the Secretary of Energy, the Department of Energy,  
and the Nuclear Regulatory Commission

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**Amended Motion of Petitioners, Aiken County, Robert L. Ferguson,  
William Lampson, Gary Petersen, State of South Carolina,  
State of Washington, and Intervenor-Petitioner,  
National Association of Regulatory Utility Commissioners  
for Consideration of Format for Oral Argument**

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Petitioners respectfully move this Court pursuant to Circuit Rule 27 to consider the following proposed format for presentation of Petitioners' arguments at oral argument.

**I. BASIS FOR PROPOSED ORAL ARGUMENT FORMAT**

This case involves four separate petitions for review that have been consolidated because they involve a common set of facts and some common parties. While the Petitioners all believe that various of the Respondents' actions violate several federal laws, most particularly the Nuclear Waste Policy Act (NWPA), and all four petitions overlap in some regard, the four petitions are not identical. As further described below, the petitions assert different claims, name different defendants, and in some cases request different relief. As a result, certain arguments raised by Respondents apply to some Petitioners, but not others, and not all Petitioners have raised every issue that is before the Court. Consequently, it would be appropriate for different Petitioners to address issues unique to their respective cases. Petitioners have set forth a proposed format that they all believe recognizes these differences and suggests to the Court how Petitioners propose to be prepared to present these issues. These differences are explained below.

**A. Actions Challenged**

The three public entity Petitioners (State of Washington; State of South Carolina; Aiken County) have challenged the decision of the Department of

Energy (DOE) and Secretary to withdraw the application to construct the Yucca Mountain facility. The private party Petitioners (the “Ferguson Petitioners”), along with South Carolina and Washington, also challenge the broader January 29, 2010, decision of the President, Secretary, and DOE to abandon the entire process under the NWPA for proceeding with the Yucca Mountain project, which includes but is not limited to the decision to withdraw the license application.

**B. Relationship of Actions Challenged to Finality and Related Justiciability Issues**

In addition to filing petitions with this Court, the three public entity Petitioners each, as a protective measure, sought participation in a proceeding before the Nuclear Regulatory Commission (NRC). These three Petitioners therefore respond to the finality, ripeness, and exhaustion issues that Respondents assert arise from the NRC proceeding, which necessarily relate only to the specific license withdrawal issue.

The Ferguson Petitioners are not parties in the matter before the NRC, nor is the action they challenge pending before the NRC. As described above, the Ferguson Petitioners challenge the January 29, 2010, core decision to abandon the entire NWPA process for developing a repository at Yucca Mountain, one indicia of which is the license application withdrawal. To the extent Respondents assert finality, ripeness, and exhaustion issues based on the NRC proceeding, those issues

thus do not affect the Ferguson Petitioners. They also do not affect the claims of Washington and South Carolina related to the core decision challenge.

**C. Parties**

The Ferguson Petitioners and South Carolina name the President as a defendant. As a result, to the extent the Respondents argue that the President should not be named, or that the President did not violate the NWPA or Constitution by directing the Secretary to abandon the NWPA process, only the Ferguson Petitioners and South Carolina are in a position to present these issues.

**D. Requested Relief**

South Carolina and Aiken County have requested mandamus relief against their named Respondents related to the specific action of maintaining the license application. Therefore, only they are in a position to address such relief.

**II. PROPOSED FORMAT**

Based on the above, Petitioners jointly propose the following format for oral argument. Arguing counsel will present the argument for all parties who raise each specific point:

1. Counsel for Washington will be prepared to address the following issues, for which 20 minutes is sought:

a. Whether the January 29, 2010, core decision to abandon the process under the NWPA for developing a repository at Yucca Mountain is consistent with the law.

b. Whether the NWPA permits DOE to withdraw its license application and the NRC to grant such withdrawal.

c. Whether the decision to withdraw the license application is final and otherwise justiciable.

d. Any standing concerns with respect to the public entity Petitioners.

2. Counsel for the Ferguson Petitioners will be prepared to address the following issues, for which seven minutes is requested:

a. Whether the Secretary, DOE, and/or the President have the authority to abandon the NWPA's process, as announced in the January 29, 2010, core decision.

b. Whether the decision to abandon the NWPA's process is final for purposes of judicial review.

c. Whether the President is a proper party.

d. Whether the President violated the NWPA or the Constitution by directing the Secretary to abandon the NWPA's process.

e. Whether the decision to abandon the Yucca Mountain project violates the Administrative Procedure Act and National Environmental Policy Act.

3. Counsel for Aiken County will be prepared to address the question of why mandamus relief is necessary with regard to the license withdrawal matter. Three minutes is requested for this presentation.

Counsel for Washington has conferred with counsel for Respondents prior to filing this motion. Respondents' counsel take no position on Petitioners' motion.

Respectfully submitted this 28th day of February 2011.

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**CERTIFICATE OF SERVICE**

I hereby certify that on the February 28, 2011, a copy of the Amended Motion of Petitioners Re: Oral Argument was filed electronically using the CM/ECF system, which will provide service on the following parties:

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I herby certify that service of the same was made on the following parties by

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