

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

---

No. 10-1069

STATE OF SOUTH CAROLINA, EX REL. HENRY DARGAN MCMASTER,  
ATTORNEY GENERAL,  
Petitioner,

v.

THE UNITED STATES DEPARTMENT OF ENERGY, BARACK OBAMA,  
PRESIDENT OF THE UNITED STATES, in his official capacity; STEVEN CHU,  
SECRETARY OF ENERGY, in his official capacity; THE NUCLEAR  
REGULATORY COMMISSION; and GREGORY B. JAZKO, CHAIRMAN OF  
THE NUCLEAR REGULATORY COMMISSION, in his official capacity;  
THOMAS MOORE, PAUL RYERSON AND RICHARD WARDWELL,  
UNITED STATES NUCLEAR REGULATORY COMMISSION ATOMIC  
SAFETY AND LICENSING BOARD JUDGES, in their official capacity; and  
THE NRC ATOMIC SAFETY AND LICENSING BOARD,  
Respondents.

---

*On Petition for Review and Petition for Writ of Mandamus, Writ of Prohibition,  
Stay, and/or Declaratory and Injunctive Relief*

---

**FEDERAL RESPONDENTS' MOTION FOR LEAVE TO FILE  
CONSOLIDATED RESPONSES TO MOTION FOR DECLARATORY AND  
INJUNCTIVE RELIEF AND WRIT OF MANDAMUS**

---

JOHN F. CORDES, JR.  
Solicitor (Mail Stop 15 D21)  
Office of the General Counsel  
U.S. Nuclear Regulatory Commission  
11555 Rockville Pike  
Rockville, MD 20852-2738  
(301) 415-1956

ALLEN M. BRABENDER  
Appellate Section, Environment &  
Natural Resources Division  
U.S. Department of Justice  
P.O. Box 23795, L'Enfant Plaza Sta.  
Washington, D.C. 20026  
(202) 514-5316

## **CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES**

### **(A) Parties and Amici:**

Petitioner is: State of South Carolina, ex rel. Henry Dargan McMaster, Attorney General.

Respondents are: U.S. Department of Energy; Barack Obama, President of the United States, in his official capacity; Steven Chu, Secretary of Energy, in his official capacity; Nuclear Regulatory Commission; Gregory B. Jazko, Chairman of the Nuclear Regulatory Commission, in his official capacity; Thomas Moore, Paul Ryerson and Richard Wardwell, U.S. Nuclear Regulatory Commission Atomic Safety and Licensing Board judges, in their official capacity; and U.S. Nuclear Regulatory Commission Atomic Safety and Licensing Board.

Intervenor-Respondent is: State of Nevada.

**(B) Ruling Under Review:** Not applicable.

**(C) Related Cases:** This case has not been before this Court previously. *In re: Aiken County*, D.C. Cir. No. 10-1050, and *Ferguson v. Obama*, D.C. No. 10-1052, present, in part, issues similar to those in this case.

Pursuant to Fed. R. App. P. 27 and D.C. Cir. R. 27, the Federal Respondents hereby move for leave to file a consolidated response to Petitioner's motion for declaratory and injunctive relief and its writ of mandamus. We further request that the consolidated response be governed by the 30 page limit in Fed. R. App. P. 21(d), and that it be due 30 days from the Court's order.

### **BACKGROUND**

This motion relates to a petition for review and petition for writ of mandamus, writ of prohibition, stay, and/or declaratory and injunctive relief filed by the State of South Carolina. The petition is one of three cases pending before this Court challenging recent events relating to the Department of Energy's application for construction authorization for a permanent geologic repository for spent nuclear fuel and high-level radioactive waste at Yucca Mountain, Nevada.<sup>1/</sup> That application, including a motion to withdraw it, currently is being considered in administrative proceedings before the Nuclear Regulatory Commission.

South Carolina originally filed this action in the U.S. Court of Appeals for the Fourth Circuit. On March 25, 2010, pursuant to the Federal Respondents' request, the Fourth Circuit transferred the case to this Court.

---

<sup>1/</sup>The other cases currently pending before this Court include: *In re: Aiken County*, D.C. Cir. No. 10-1050, and *Ferguson v. Obama*, D.C. Cir. No. 10-1052.

After receiving the Fourth Circuit's transfer order, this Court docketed the case on March 26, 2010, and served notice on the parties on March 30, 2010. At docketing, the Clerk of Court deemed South Carolina's petition to constitute three separate requests for relief: (1) a petition for review; (2) a petition for writ of mandamus and writ of prohibition and stay; and (3) a motion for declaratory and injunctive relief. The Clerk's order for the Court set an April 12, 2010, deadline for responses to what the Clerk deemed to be the motion for declaratory and injunctive relief. The Court has not ordered the Federal Respondents, pursuant to Fed. R. App. P. 21(b), to respond to the petition for writ of mandamus and writ of prohibition and stay.

### **DISCUSSION**

The Federal Respondents respectfully request this Court to allow them to file a consolidated response to the petition for the writs of mandamus, prohibition, and stay, and to the motion for declaratory and injunctive relief. In our view, these requests are nearly identical and at a minimum have substantial overlap and cannot be parsed out neatly into separate requests for relief. Indeed, both requests appear to arise from the "Seventh Claim for Relief" in South Carolina's petition, entitled "Mandamus, Prohibition, Stay, And/Or Injunction." Pet. at 21-22. The Federal Respondents response thus likely will be very similar for each requested relief.

Allowing the Federal Respondents to file a consolidated response would be consistent with the proceedings in the pending case *In re: Aiken County*, No. 10-1050. There, similar to here, Petitioner Aiken County styled its filing as a “Petition for Declaratory and Injunctive Relief and Writ of Mandamus.”<sup>27</sup> On February 24, 2010, this Court ordered the Department of Energy to file a response to the petition, not to exceed 30 pages, by March 24, 2010. On that date, the Department of Energy and the other Federal Respondents filed a response that addressed all requests for relief made in Aiken County’s petition – the request for mandamus as well as the request for declaratory and injunctive relief.

This Court should follow a similar approach to briefing as it did in *Aiken County*. Namely, the Court should order the Federal Respondents to file a single response, not to exceed 30 pages and within 30 days, to South Carolina’s motion for declaratory and injunctive relief as well as its petition for writs of mandamus, prohibition and stay. Allowing a consolidated response would conserve judicial resources by reducing the amount of material before the Court and judicial time

---

<sup>27</sup>Unlike here, however, Aiken County did not style its request for mandamus, declaratory and injunctive relief as an alternative to a “petition for review.” This Court has not set a briefing schedule on South Carolina’s petition for review. Many of the jurisdictional arguments we anticipate making in the consolidated response could provide a basis for dismissing the petition for review aspect of this case as well. Nonetheless, in order to move these proceedings forward, we respectfully suggest setting an ordinary schedule for disposition of the petition for review, as this Court did in the pending case, *Ferguson v. Obama*, No. 10-1052.

expended on this matter. A consolidated response also would allow the Court to address each requested relief with the benefit of a broader case context. Placing the responses on separate tracks would require the parties to file, and this Court to read, multiple filings making essentially the same arguments.

On April 1, 2010, the undersigned contacted counsel for the States of South Carolina and Nevada about this motion. Nevada does not object. South Carolina consents to the consolidation, but takes no position on the 30 day request.

### CONCLUSION

For the foregoing reasons, the Court should order the Federal Respondents to file a single, consolidated response, not to exceed 30 pages and within 30 days, to South Carolina's motion for declaratory and injunctive relief as well as its petition for writs of mandamus, prohibition and stay.

Respectfully submitted,

JOHN F. CORDES, JR.  
Solicitor (Mail Stop 15 D21)  
Office of the General Counsel  
U.S. Nuclear Regulatory Commission  
11555 Rockville Pike  
Rockville, MD 20852-2738  
(301) 415-1956  
*Counsel for Nuclear Regulatory  
and Commission Respondents*

s/ ALLEN M. BRABENDER  
Appellate Section, Environment &  
Natural Resources Division  
U.S. Department of Justice  
P.O. Box 23795, L'Enfant Plaza Sta.  
Washington, D.C. 20026  
(202) 514-5316  
*Counsel for Department of Energy,  
Secretary of Energy Steven Chu, and  
President Barack Obama*

