

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

THE STATE OF NEW JERSEY,)
Petitioner,)

v.)

UNITED STATES NUCLEAR)
REGULATORY COMMISSION)
and UNITED STATES OF)
AMERICA,)

Respondents.)
)

Docket Nos. 06-5140, 07-1559,
& 07-1756¹

**FEDERAL RESPONDENTS' RESPONSE
TO THE MOTIONS TO INTERVENE**

The U.S. Nuclear Regulatory Commission ("NRC" or "Commission") and the United States of America (jointly, "the Federal Respondents") hereby reply to the Motions to Intervene by the Shieldalloy Metallurgical Corporation ("SMC"), dated January 16, 2007, and the Board of Chosen Freeholders of Gloucester County ("Gloucester County"), dated January 19, 2007. This Court granted Federal Respondents an extension of time to respond to the Motions to Intervene until after a ruling on our Motion to Dismiss. This Court's Order of April 11, 2007, directed Federal Respondents to respond to the Motions to Intervene within 14 days (*i.e.*, by April 25, 2007). This Response complies with that Order.

I. Introduction.

The Federal Respondents do not object to the intervention of either party. However, in acceding to Gloucester County's request to intervene the Federal Respondents do not concede that the County has standing to proceed or that it has a claim that is "ripe." Moreover, as an intervenor, Gloucester County may not independently raise issues on its own. Gloucester County is confined to the issues raised by the party who filed the petition for review – the State of New Jersey.

¹This Court's Order of April 11, 2007, consolidated these three cases "for all purposes."

II. Discussion.

1. This consolidated case is filed under jurisdiction of the Hobbs Act, 28 U.S.C. § 2341, *et seq.* Thus, intervention is governed by 28 U.S.C. § 2348, which provides:

The Attorney General is responsible for and has control of the interests of the Government in all court proceedings under this chapter. The agency, and any party in interest in the proceeding before the agency whose interests will be affected if an order of the agency is or is not enjoined, set aside, or suspended, may appear as parties thereto of their own motion and as of right, and be represented by counsel in any proceeding to review the order. Communities, associations, corporations, firms, and individuals, whose interests are affected by the order of the agency, may intervene in any proceeding to review the order. The Attorney General may not dispose of or discontinue the proceeding to review over the objection of any party or intervenor, but any intervenor may prosecute, defend, or continue the proceeding unaffected by the action or inaction of the Attorney General.

28 U.S.C. § 2348.

2. This consolidated case involves challenges to two NRC actions or "Orders": the issuance of the revised version of NUREG-1757 (Case Nos. 06-5140 and 07-1559) and the issuance of an Order on January 12, 2007, denying New Jersey's request for a hearing on the issuance of the NUREG (Case No. 07-1756). SMC has moved to intervene in all three cases, while Gloucester County has moved to intervene in No. 06-5140 only.

Neither SMC nor Gloucester County filed comments with the NRC on the draft revisions to NUREG-1757. Thus, neither participated as a "party" before the agency in the "proceeding" that led to the issuance of the revised NUREG-1757.²

Likewise, Gloucester County did not file a pleading with the agency addressing New Jersey's request for a hearing on the issuance of the NUREG. But SMC did file a response in

²By use of the word "proceeding" to describe the process leading to the issuance of NUREG-1757, the Federal Respondents do concede that the issuance of NUREG-1757 was a "final" Order within the meaning of the Hobbs Act. Earlier in this proceeding, we filed a motion to dismiss New Jersey's petitions as premature, but this Court has held over decision on that motion until after full briefing. See Order dated April 11, 2007.

opposition to New Jersey's request for a hearing and the Commission acknowledged that response in the January 12 Order. See Order of January 12, at 1. Thus, SMC was a "party in interest in the proceeding before the agency" in Case No. 07-1756 and thus is entitled to status as a party in this Court. See 28 U.S.C. § 2348 (second sentence).

Moreover, both SMC and the County arguably have "interests [that] are affected by the order of the agency[.]" See 28 U.S.C. § 2348 (third sentence). For example, SMC has filed an application for a license amendment (approval of a proposed decommissioning plan) based – at least in part – on the guidance contained in the disputed portions of revised NUREG-1757; thus, it may have an interest in the viability of that guidance. Gloucester County is the location of the SMC facility at issue; thus, it may be affected by an NRC Order approving a license amendment authorizing the decommissioning of the facility. For those reasons, the Federal Respondents do not object to the intervention of both parties.

3. The District of Columbia Circuit recently addressed the question of intervention in cases involving judicial review of agency action by persons or groups who were not parties to the administrative proceeding. In that case, *Beethoven.com LLC v. Librarian of Congress*, 394 F.3d 939 (D.C. Cir. 2005), the Court held that while persons who had an "interest" could intervene in the litigation, they were unable to raise issues not raised by those who were parties below and who had filed the petition for review at issue. 394 F.2d at 946. See *Vinson v. Washington Gas Light Co.*, 321 U.S. 489, 498 (1944) ("an intervenor is admitted to the proceeding as it stands, and in respect of the pending issues, but is not permitted to enlarge those issues").³ Thus, Gloucester County's participation is limited to the issues raised by the

³See also *Edison Elec. Institute v. E.P.A.*, 391 F.3d 1267, 1274 (D.C. Cir. 2004); *Illinois Bell Telephone Co. v. F.C.C.*, 911 F.2d 776, 786 (D.C. Cir. 1990) ("An intervening party may join issue only on a matter that has been brought before the court by another party.")

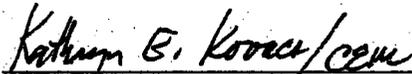
State of New Jersey, which was a party to both "proceedings" below and filed the petition for review. *See Beethoven.com LLC v. Librarian of Congress*, 394 F.3d at 946.

4. By agreeing to Gloucester County's intervention, the Federal Respondents do not concede that the County has standing to bring this action or that it has a claim that is "ripe" for adjudication. Furthermore, granting intervention here does not relieve the County, as an intervenor on the side of the petitioner, from showing that it has standing and a claim that is ripe for adjudication and within the jurisdiction of this Court – just as New Jersey (the Petitioner) must do. *See, e.g., Roeder v. Islamic Republic of Iran*, 33 F.3d 228, 233 (D.C. Cir. 2003); *Rio Grande Pipeline Co. v. F.E.R.C.*, 178 F.3d 533, 538 (D.C. Cir. 1999).

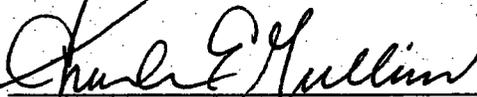
CONCLUSION

For the foregoing reasons, this Court should grant both Motions to Intervene.

Respectfully submitted,



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Dated: April 24, 2007.

CERTIFICATE OF SERVICE

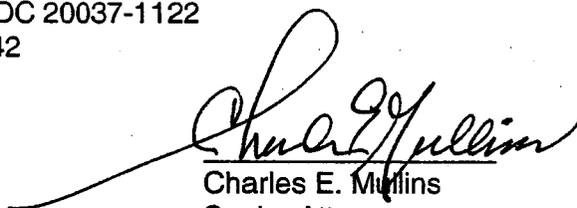
I hereby declare under penalty of perjury that I filed the Federal Respondents' Response to the Motions to Intervene in consolidated Case Nos. 06-5140, 07-1559, and 07-1756 by placing it in an overnight delivery service, postage prepaid, addressed to this Court.

I further declare under penalty of perjury that I served a copy of the Federal Respondents Response to the Motions to Intervene in consolidated Case Nos. 06-5140, 07-1559, and 07-1756 on the following counsel by placing it in an overnight delivery service, postage prepaid:

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