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May 7, 2008

VIA FEDERAL EXPRESS

United States Court of Appeals
for the Second Circuit
Ms. Catherine O'Hagan Wolfe, Clerk of Court
Daniel Patrick Moynihan U.S. Courthouse
500 Pearl Street
New York, NY 10007

Re: *Richard L. Brodsky, et al. v. U. S. Nuclear Regulatory Commission*;
Case No. 08-1454-AG

Dear Ms. Wolfe:

With regard to the above-referenced appeal, I am enclosing herewith the original and three (3) copies of the reply of Entergy Nuclear Operations, Inc., to petitioners' response and in further support of its motion to intervene.

Thank you for your attention to this matter.

Sincerely,

WISE CARTER CHILD & CARAWAY

Michael B. Wallace

Michael B. Wallace

MBW/gr
Enclosures
cc: Richard L. Brodsky, Esq. (Via Federal Express)
Robert Rader, Esq. (Via Federal Express)
Attorney General of the United States (Via Federal Express)

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

RICHARD L. BRODSKY, NEW YORK STATE ASSEMBLYMAN, FROM THE 92ND ASSEMBLY DISTRICT IN HIS OFFICIAL AND INDIVIDUAL CAPACITIES, WESTCHESTER CITIZENS AWARENESS NETWORK (WESTCAN), ROCKLAND COUNTY CONSERVATION ASSOCIATION, INC. (RCCA), PUBLIC HEALTH AND SUSTAINABLE ENERGY (PHASE), and SIERRA CLUB - ATLANTIC CHAPTER (SIERRA CLUB)	**PETITIONERS**
VS.	**DOCKET NO. 08-1454-AG**
U. S. NUCLEAR REGULATORY COMMISSION	**RESPONDENT**

**REPLY OF ENTERGY NUCLEAR OPERATIONS, INC.,
TO PETITIONERS' RESPONSE AND IN FURTHER SUPPORT
OF ITS MOTION TO INTERVENE**

Having timely moved to intervene in this appeal pursuant to Fed.R.App.P. 15(d), Entergy Nuclear Operations, Inc. ("Entergy"), now timely replies to the response in opposition filed by petitioners, as permitted by Fed.R.App.P. 27(a)(4).

INTRODUCTION

The U.S. Nuclear Regulatory Commission (hereinafter sometimes "the Commission" or "NRC") approved Entergy's request for an exemption from certain regulations contained in Title 10 of the Code of Federal Regulations, Part 50, Appendix R for the Indian Point Nuclear Generating Unit No. 3 ("Unit 3"). The newly approved exemption (hereinafter the "Exemption") actually constituted a revision to previously granted exemptions which had garnered prior Commission approval.

Petitioners' base their entire challenge to Entergy's Exemption on the assertion that this Court has jurisdiction under 28 U.S.C. § 2342(4), which grants to the Courts of Appeals jurisdiction over "all final orders of the Atomic Entergy Commission made reviewable by section 2239 of title 42."[1] Petitioners begin by purporting to act "[p]ursuant to § 189 of the Atomic Entergy Act, 42 U.S.C. § 2239," Petition at 1, and affirmatively assert, "Jurisdiction ... is set forth under 22 U.S.C. § 2342; 42 U.S.C. § 2239." Petition at 3. Petitioners set forth no other jurisdictional basis in their petition or in their response to Entergy's motion to intervene.

If petitioners are correct in their assertion of jurisdiction, a proposition presently challenged by the Commission's motion to dismiss, then they are wrong in asserting in ¶ 5 of their response that Entergy has nothing more than an economic interest in the outcome of this appeal. Where jurisdiction exists under 28 U.S.C. § 2342, Congress has expressly declared that "any party in interest in the proceeding before the agency ... may appear as parties thereto of their own motion and as of right." 28 U.S.C. § 2348. If petitioners are properly before this Court, then so is Entergy.

ARGUMENT

No reported decision of this Court addresses the standards for allowing intervention under the Atomic Entergy Act or, for that matter, under Fed.R.App.P. 15(d). This Court may find guidance, however, in the Supreme Court's treatment of appellate intervention under the National Labor Relations Act in International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, AFL-CIO, Local 283, v. Scofield, 382 U.S. 205 (1965). Although decided two years before the adoption of the Rules of Appellate Procedure,

[1] The Nuclear Regulatory Commission now performs the functions of the old Atomic Entergy Commission, pursuant to 42 U.S.C. § 5841(f).

the Courts of Appeals apply the principles established by Scofield in adjudicating motions under Rule 15. See Sierra Club, Inc., v. Environmental Protection Agency, 383 F.3d 516, 517-18 (7th Cir. 2004); Texas v. United States Dep't of Energy, 754 F.2d 550, 551-52 (5th Cir. 1985).

The Supreme Court in Scofield held that the intent of Congress governs the intervention decision. "We think that Congress intended to confer intervention rights upon the successful party to the Labor Board proceedings in the court in which the unsuccessful party challenges the Board's decision." 382 U.S. at 208. Although the statute did not "provide explicitly for intervention at the appellate court level," id., at 209, the Court found sufficient evidence to authorize intervention. In so doing, the Court relied by analogy on Fed.R.Civ.P. 24, id., at 216 & n.10, and the intervention provisions of the Hobbs Act, now codified at 28 U.S.C. § 2348. Id., at 216 & n.9.[2]

Here, this Court need not reason by analogy. If jurisdiction exists to entertain the petition under U.S.C. § 2342, then Congress in 28 U.S.C. § 2348 has conferred upon Entergy the right to intervene to defend its Exemption. Petitioners assert that the Exemption "result[ed] in an amendment to the operating license for Unit 3." Not a word of petitioners' response provides any basis whatsoever for concluding that Entergy lacks an enforceable interest in the terms of its own license.

From beginning to end, the petition addresses the exemption itself granted on September 28, 2007, and published in the Federal Register on October 4, 2007. 72 Fed.Reg. 56798 (Oct. 4, 2007). However, petitioners purport to seek review of the Commission's "30th day of January,

[2] It is worth noting that, even before Scofield, this Court had already reached the common-sense position that parties to an administrative proceeding may intervene in an appeal to review that proceeding. Id., at 211 n.4, citing Carrier Corp. v. National Labor Relations Bd., 311 F.2d 135, 136 (2d Cir. 1962).

2008 Order denying their Petition filed on December 3, 2007." Petition at 1. Should this Court read their petition as seeking a hearing before the Commission, and not the denial of Entergy's Exemption, arguably different issues are presented. Congress in 28 U.S.C. § 2348 allowed intervention as of right by "any party in interest the proceeding before the agency," but petitioners may question whether the Commission's denial of their petition constituted a proceeding[3] or whether Entergy was a party to it. However, 28 U.S.C. § 2348 also explicitly authorizes intervention by "corporations ... whose interests are affected by the order of the agency." Because its exemption is the ultimate target of the hearing petitioners seek, Entergy unquestionably falls within this statutory language.

Petitioners base their entire argument that a mere economic interest will not support intervention, Response ¶ 5, on Texas v. United States Dep't of Energy, supra (hereinafter "the Texas Nuclear Depository Case"), in which the Fifth Circuit reviewed Commission action, not under the Atomic Energy Act, but under the Nuclear Waste Policy Act, 42 U.S.C. § 10101 et seq. The State of Texas sought judicial review of the Department of Entergy's designation of several Texas sites as potential long-term nuclear waste depositories. Thirty-one utilities moved to intervene, but the Fifth Circuit concluded that the utilities did not have a sufficient legally protectable interest which might be affected. 754 F.2d at 551.

The Court reasoned that Congress did not intend the utilities to play an active role in the statutory scheme at issue, which provided that a nuclear depository plan would be developed by the Department of Energy. The utilities' only role under the statute was to fund the development of the nuclear depository plan by contributions to the Nuclear Waste Fund. The contributions

[3] If the rejection of their petition did not constitute a proceeding under 42 U.S.C. § 2239(a)(1)(A), then judicial review is not authorized by 42 U.S.C. §2239(b)(1).

were sizable, reported to be $1 million per day. However, beyond sharing the burden of funding the program with the other utilities, none of the utilities had any particularized or differing interest in the proceedings, and the statute did not expressly provide for an active role for the utilities in the decision making process. Thus, there was no statutory basis for intervention.

However, the Fifth Circuit did not hold that, *as a matter of law*, a purely economic interest could never be sufficient to justify intervention, as asserted here by petitioners, and in fact stated that, "[i]f the DOE's administration of the Fund were being challenged, intervention by the utilities would arguably be appropriate, but the Fund is not at issue here." Id., at 552. Thus, the Fifth Circuit contemplated that under proper circumstances, a purely economic interest could justify intervention as of right.

Application of the same criteria and well-reasoned analysis used by the Fifth Circuit in the Texas Nuclear Waste Depository Case would result in a different outcome in the instant case. First and foremost, although Entergy's interest in the present appeal can be categorized as "economic" in the broad sense of the term, that interest is unique, and substantially different from the generalized economic interest of the utilities in the Texas Nuclear Waste Depository Case. Entergy applied for and received approval for an Exemption from detailed regulations as they applied to certain specific areas and operations of Unit 3. Entergy's unique interest in exercising its right to continue operating Unit 3 under the current Exemption is different from the more general interest of utilities seeking only the minimize the financial obligation all of them owed to the Government.

As for petitioners' contention that Entergy's supposed "general interest can be adequately represented by the NRC," Response ¶ 4, courts have recognized that the interests of agencies and private parties do not always coincide. In Sierra Club, Inc., v. Environmental Protection Agency,

supra, the Seventh Circuit considered a challenge to a company's permit to construct an electric power plant. Relying on Scofield, the Court permitted the company to intervene, and explained the company's right to protect its own interest:

> An agency will stick up for its actions in response to the petition for review, but if it loses the Solicitor General may decide that the matter lacks sufficient general importance to justify proceedings before the court en banc or the Supreme Court. Intervention by the original victor places the private adversaries on equal terms and permits both to make their own decisions about the wisdom of carrying the battle forward.

358 F.3d at 518.

When Congress vested jurisdiction in the Courts of Appeals under 28 U.S.C. § 2342, it clearly understood the need for private parties to protect their own rights. After authorizing intervention by interested parties, 28 U.S.C. § 2348 concludes:

> 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.

Congress unquestionably intended to allow Entergy to intervene to defend its right to operate Unit 3 under the terms allowed by the Commission.

Certainly, petitioners seek to litigate "whether NRC abided by applicable laws and regulations," Response ¶ 4, but process is not an end in itself. Under our Constitution, "[n]o person shall ... be deprived of ... property, without due process of law." U.S. Const. Amend. V. If this Court is to consider the process of regulating Entergy's property, then Entergy has a right to be heard.

CONCLUSION

For the reasons stated herein and in the original motion, this Court should grant leave for Entergy to intervene in this appeal.

Respectfully submitted,

WISE CARTER CHILD & CARAWAY, P.A.

By: Michael B. Wallace

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CERTIFICATE OF SERVICE

I certify that I have this day mailed by Federal Express a true and correct copy of the above and foregoing document to the following:

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THIS the 7th day of May, 2008.

Michael B. Wallace

MICHAEL B. WALLACE