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STATE OF VERMONT
OFFICE OF THE ATTORNEY GENERAL
109 STATE STREET
MONTPELIER, VT
05609-1001

November 12, 2008

Catherine O'Hagan Wolfe
Clerk of the Court
U.S. Court of Appeals, Second Circuit
Thurgood Marshall U.S. Courthouse
40 Foley Square
New York, NY 10007

Re: Blumenthal v. United States Nuclear Regulatory
Commission, 08-4833-ag

Dear Ms. Wolfe:

Enclosed please find the original and four copies of:

- (1) Motion to Reconsider Leave to Intervene by the State of Vermont and the Vermont Department of Public Service;
- (2) Motion Information Form
- (3) Antivirus Certification Form
- (4) Certificate of Service.

Sincerely,

A handwritten signature in cursive script, appearing to read "Rebecca Ellis".

Rebecca Ellis
Assistant Attorney General

Enclosures

VERMONT

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

RICHARD BLUMENTHAL,
ATTORNEY GENERAL OF
CONNECTICUT,

Petitioner,

Docket No. 08-4833-ag

-against-

UNITED STATES NUCLEAR
REGULATORY COMMISSION, and
UNITED STATES OF AMERICA

Respondents

MOTION TO RECONSIDER REQUEST FOR LEAVE TO INTERVENE
BY THE STATE OF VERMONT AND
VERMONT DEPARTMENT OF PUBLIC SERVICE

On October 27, 2008, the State of Vermont and the Vermont Department of Public Service [collectively "State of Vermont"] filed a motion for leave to intervene as party petitioners. On November 3, 2008, the motion was "DENIED without prejudice to renew to merits panel. Meanwhile, Petitioner[]s may file amicus brief." While the State of Vermont appreciates the Court's willingness to allow an amicus brief in this docket, the State of Vermont also believes that intervention will streamline the briefing process and, at the same time, will better protect

Vermonters' interests. The State therefore asks the Court to reconsider its order and to allow intervention by the State of Vermont as a party petitioner.

1. Intervention will streamline the briefing process. If the State of Vermont is allowed to intervene in this docket, the State fully intends to cooperate with Connecticut on briefing the appeal. The Court's 11/3/08 order contemplates that Vermont would submit a separate amicus brief. However, if allowed to intervene, Vermont does not intend to submit a separate brief. Allowing Vermont and Connecticut to collaborate on a single brief will reduce the amount of paperwork for both the parties and the Court.

This opportunity to streamline the briefing in this case will be lost if Vermont submits an amicus brief together with a renewed motion to intervene when the case is heard on the merits. For this reason, Vermont seeks reconsideration at this time, in advance of briefing the merits.

2. Intervention is necessary to protect Vermonters' interests.

Standard for Intervention. In ruling upon intervention applications filed under Fed. R. App. P. 15(d), appellate

courts have looked to the standard for intervention applicable in district courts under Fed. R. Civ. P. 24(a)(2). See *Sierra Club v. EPA*, 358 F.3d 516, 517-18 (7th Cir. 2004); *Bldg. & Constr. Trades Dep't v. Reich*, 40 F.3d 1275, 1282 (D.C. Cir. 1994). The district court rule provides that intervention is proper "when the applicant claims an interest relating to the property or transaction which is the subject matter of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impeded the applicant's ability to protect that interest, unless the applicant's interest in adequately represented by existing parties." Fed. R. Civ. P. 24(a)(2) (emphasis added). Vermont's motion meets both prongs of this test.

Vermont has a direct and substantial interest in the NRC rulemaking challenge. The Vermont Yankee Nuclear Power Station was designed and constructed in the early 1970s. At the time, it was anticipated that spent nuclear fuel would be reprocessed. The spent-fuel pool at Vermont Yankee was designed and constructed under this assumption.

In 1976, however, the fear of nuclear weapons proliferation led to a presidential directive to suspend the commercial reprocessing and recycling of plutonium in

the United States. Since 1976, Vermont Yankee has re-racked its spent fuel pool three times to allow storage of more spent fuel in the pool. The last re-racking at the Station, which used a high-density rack design, filled all of the available floor space in the pool. In fact, prior to the recent loading of five dry fuel storage casks onto the independent spent fuel storage installation, the fuel pool was so full that Vermont Yankee no longer had full-core discharge capability¹. See *Massachusetts v. United States*, 522 F.3d 115, 122-23 (1st Cir. 2008) (describing use of high-density storage racks at Vermont Yankee).

By the end of the current licensed operations in 2012, there will be 3039 fuel assemblies generated by the plant in the fuel pool. If Vermont Yankee is relicensed, the packing of the fuel pool may not be abated for 20 years absent regulatory direction from the NRC.

This dense packing of spent fuel is precisely why the State of Vermont wants the Nuclear Regulatory Commission to consider the new and significant information presented to the NRC in the petitions for rulemaking that are the

¹ Full-core discharge capability refers to the ability of the spent fuel pool to accommodate all of the fuel rods located with the reactor and place them in the spent fuel pool.

subject of this appeal. It is important to Vermont that this issue be fully vetted as Vermont Yankee is being considered at this time for license renewal for operation beyond its current license. The density of the spent fuel pool is a radiological safety issue. Because of preemption considerations, the State of Vermont has no other opportunity to have this issue reviewed at the State level. Accordingly, Vermont has a direct and substantial interest in the outcome of this rulemaking decision.

Vermont's interests will not be adequately represented by Connecticut. As a sovereign state, Vermont has a duty to protect the interests of its residents. Among the important rights Vermont seeks to preserve is the right to appeal from an adverse decision of this Court. These appellate rights will be lost if intervention is denied.

Vermont also seeks, through intervention, to provide state-specific information to the Court regarding the impact of the NRC's rulemaking decision on Vermont residents. While Connecticut may attempt to provide the Court with information about other States, the State of Vermont is best situated to inform the Court regarding the health and welfare of Vermonters.

Counsel for the State of Vermont has been authorized by Robert Snook, counsel for the State of Connecticut, and James Adler, counsel for the NRC, to represent that they consent to Vermont's intervention in this action.

Dated: November 12, 2008
Montpelier, Vermont

WILLIAM S. SORRELL
ATTORNEY GENERAL



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Vermont and the Vermont
Department of Public Service

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Director of Public Advocacy
Vermont Dep't of Public Service
112 State Street
Montpelier VT 05620

Attorney for the Vermont
Department of Public Service

MOTION INFORMATION STATEMENT

Caption [use short title]

Docket Number(s): 08-4833-ag

Blumenthal v United States Nuclear Regulatory Commission

Motion for: State of Vermont and Vermont Dep't of Public Service

Set forth below precise, complete statement of relief sought:
Motion to Reconsider Request for Leave to Intervene by the State of Vermont and Vermont

Department of Public Service

MOVING PARTY: State of Vermont and Vermont Dep't of Public Service
 Plaintiff Defendant
 Appellant/Petitioner Appellee/Respondent

OPPOSING PARTY: U.S. Nuclear Regulatory Commission

MOVING ATTORNEY: Rebecca Ellis
[name of attorney, with firm, address, phone number and e-mail]
Rebecca Ellis
Vermont Attorney General's Office, 109 State Street, Montpelier VT 05609
(802) 839-0515
rellis@atg.state.vt.us
ellisvermont@yahoo.com

OPPOSING ATTORNEY [Name]: James Adler
[name of attorney, with firm, address, phone number and e-mail]
James Adler
U.S. Nuclear Regulatory Commission
11555 Rockville Pike, Rockville MD 20852-2738

Court-Judge/Agency appealed from: Nuclear Regulatory Commission

Please check appropriate boxes:

Has consent of opposing counsel:
A. been sought? Yes No
B. been obtained? Yes No
Is oral argument requested? Yes No
(requests for oral argument will not necessarily be granted)
Has argument date of appeal been set? Yes No
If yes, enter date _____

FOR EMERGENCY MOTIONS, MOTIONS FOR STAYS AND INJUNCTIONS PENDING APPEAL:

Has request for relief been made below? Yes No
Has this relief been previously sought in this Court? Yes No
Requested return date and explanation of emergency:

Signature of Moving Attorney:

Rebecca Ellis

Date: 11/12/08

Has service been effected? Yes No
[Attach proof of service]

ORDER

IT IS HEREBY ORDERED THAT the motion is GRANTED DENIED.

FOR THE COURT:
CATHERINE O'HAGAN WOLFE, Clerk of Court

Date: _____

By: _____

ANTI-VIRUS CERTIFICATION FORM

See Second Circuit Interim Local Rule 25(a)6.

CASE NAME: Blumenthal v. United States Nuclear Regulatory Commission

DOCKET NUMBER: 08-4833-ag

I, (please print your name) Rebecca Ellis, certify that

I have scanned for viruses the PDF version of the attached document that was submitted in this case as

an email attachment to <agencycases@ca2.uscourts.gov>
 <criminalcases@ca2.uscourts.gov>
 <civilcases@ca2.uscourts.gov>
 <newcases@ca2.uscourts.gov>
 <prosecases@ca2.uscourts.gov>

and that no viruses were detected.

Please print the **name** and the **version** of the anti-virus detector that you used _____
McAfee VirusScan Enterprise 8.5. Oi

If you know, please print the version of revision and/or the anti-virus signature files _____
Scan Engine Version (32-bit) 5300.2777; DAT Version 5429.0000

(Your Signature) 

Date: 11/12/08

CERTIFICATE OF SERVICE

I, Rebecca M. Ellis, certify that a copy of the Motion to Reconsider Leave to Intervene by the State of Vermont and Vermont Department of Public Service was sent via U.S. first class mail on November 12, 2008 to the following:

Robert Snook
Assistant Attorney General
Office of the Connecticut Attorney General
55 Elm Street
Hartford CT 06141-0120
Tel. (860)808-5107
Email: Robert.Snook@po.state.ct.us

Annette L. Vietti-Cook, Esq.
James Adler, Esq.
United States Nuclear Regulatory Commission
11555 Rockville Pike
Rockville MD 20852-2738
Tel. (301)415-1656

Michael Mukasey
Attorney General of the United States
P.O. Box 878
Ben Franklin Station
Washington D.C. 20044

Courtesy Copies by email:

John J. Sipos
Assistant Attorney General
Office of the Attorney General
The Capitol
Albany NY 12224
Tel: (518)402-2251
Email:
john.sipos@oag.state.ny.us
Docket: 08-3903-ag

Sarah Hofmann
Director for Public Advocacy
Vermont Department of Public
Service
112 State Street
Montpelier, VT 05620-2601
Phone: 802-828-3088
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Email:
Sarah.Hofmann@state.vt.us



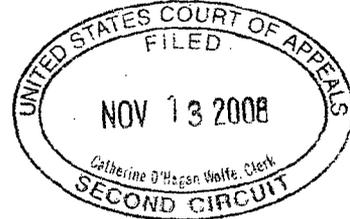
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Docket Number(s): 08-4833-ag

Blumenthal v United States Nuclear Regulatory Commission

Motion for: State of Vermont and Vermont Dept of Public Service



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Department of Public Service

MOVING PARTY: State of Vermont and Vermont Dept of Public Service

OPPOSING PARTY: U.S. Nuclear Regulatory Commission

- Plaintiff Defendant
 Appellant/Petitioner Appellee/Respondent

MOVING ATTORNEY: Rebecca Ellis
[name of attorney, with firm, address, phone number and e-mail]
Rebecca Ellis
Vermont Attorney General's Office, 109 State Street, Montpelier VT 05609
(802) 839-0515
rellis@atg.state.vt.us
ellisvermont@yahoo.com

OPPOSING ATTORNEY [Name]: James Adler
[name of attorney, with firm, address, phone number and e-mail]
James Adler
U.S. Nuclear Regulatory Commission
11555 Rockville Pike, Rockville MD 20852-2738

Court-Judge/Agency appealed from: Nuclear Regulatory Commission

Please check appropriate boxes:

Has consent of opposing counsel:
A. been sought? Yes No
B. been obtained? Yes No

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(requests for oral argument will not necessarily be granted)

Has argument date of appeal been set? Yes No
If yes, enter date _____

FOR EMERGENCY MOTIONS, MOTIONS FOR STAYS AND INJUNCTIONS PENDING APPEAL:

Has request for relief been made below? Yes No

Has this relief been previously sought in this Court? Yes No

Requested return date and explanation of emergency: _____

Signature of Moving Attorney:

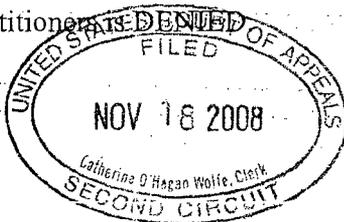
Date: 11/12/08

Has service been effected? Yes No
[Attach proof of service]

ORDER

Before: Hon. Reena Raggi, Circuit Judge

IT IS HEREBY ORDERED that the motion by the State of Vermont & Vermont Department of Public Service for reconsideration of the November 3, 2008 order denying leave to intervene on the side of Petitioner is DENIED.



FOR THE COURT:

Catherine O'Hagan Wolfe, Clerk

by

Joy Fallick
Joy Fallick, Administrative Attorney