

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

In Re: Aiken County, Petitioner

Aiken County,

Petitioner,

vs.

Steven Chu, Secretary of the
Department of Energy, in his
Official Capacity; United States
Department of Energy; Gregory B.
Jaczek, Chairman of the Nuclear
Regulatory Commission, in his
Official Capacity; United States
Nuclear Regulatory Commission;
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.

**PETITIONER'S MEMORANDUM IN OPPOSITION TO THE MOTION
FOR LEAVE TO INTERVENE OF THE STATE OF NEVADA**

Petitioner, Aiken County, brought this petition seeking declaratory and injunctive relief and a writ of mandamus as to the Department of Energy's ("DOE's") decision to withdraw its previously submitted application for

Construction Authorization to construct a high-level waste geologic repository at Yucca Mountain in Nevada (the "License Application") and the decision of the NRC Atomic Safety and Licensing Board ("Board") to grant a stay in the consideration of the License Application pending the filing of a motion to withdraw.

Aiken County has not made any arguments as to the merits of the License Application itself. Instead, it has argued that DOE may not withdraw the License Application and the Board may not allow the application to be withdrawn because Congress has expressly required that such application be made and considered. *See* 42 U.S.C.A. §§ 10134(b) & (d) (2005). Very simply, Aiken County believes the Secretary of Energy was required to submit a License Application and once that License Application was submitted, the Board must consider it and vote it up or down. *Id.* On this point, Nevada and DOE have the same interest: DOE wants to withdraw the License Application and Nevada wants the License Application withdrawn. As reflected in its motion at Para. 4(c), Nevada supports DOE's efforts to withdraw the License Application, and there is no reason to believe DOE cannot adequately present its reasons justifying this course of action.

Nevada now seeks to intervene in this petition, arguing that it will be harmed if the Yucca Mountain repository goes forward as proposed in the License Application. Aiken County objects to this request because its petition presents

narrow issues of statutory construction that can be presented fully and fairly by the parties originally named.

As reflected in its motion to intervene at Para. 4 and the attached affidavit of Bruce Breslow, Nevada seeks to expand the petition beyond these narrow issues and inject elements relating to the technical merits of the underlying License Application.¹ Intervention is not a proper means for injecting new or different arguments into this petition. *Ala. Mun. Distribs. Group v. FERC*, 300 F.3d 877 (D.C. Cir. 2002) (stating “absent extraordinary circumstances, intervenors may join issue only on a matter that has been brought before the court by another party) (quotation omitted).

Further, there is no prejudice as Nevada retains its ability to pursue these technical merit arguments relating to the License Application before the Board in the event Aiken County prevails in this matter. Aiken County has not taken any position here as to the merits of the License Application, arguing instead that the Board must consider it and decide whether it should be approved or denied.

Aiken County further notes that the Court has previously set a briefing schedule in this matter pursuant to Rule 21, FRAP, that requires DOE to submit a brief on March 24, 2010 and allows Aiken County until April 5, 2010 to reply. Any briefing beyond the initial petition in this matter lies solely within the

¹ This is why Aiken County declined to consent to Nevada’s intervention. See communication to Nevada’s counsel from Aiken’s counsel, attached as Exhibit 1.

discretion of the Court. *See* Rule 21, FRAP, DC Cir. Rule 21. Given the timeframe the Court has established and the absence of any divergence of interest as to the issues presented between DOE and Nevada, the Court should deny Nevada's intervention request.

In addition to its attempt to intervene in this action, Nevada also purports to file its motion in two other cases relating to the DOE's recent actions with respect to the License Application, *State of South Carolina v. President Obama*, 4th Cir. No. 10-1229 (filed February 26, 2010, motion for transfer filed March 4, 2010), and *Ferguson v. Obama*, D.C. Cir. No. 10-1052 (filed February 25, 2010) (not a mandamus action). Aiken County notes that the petitioners in those cases have not been served with the motion and that the *South Carolina* case is not presently before the Court. For those reasons, Nevada's motion should not be considered a motion to intervene in any case other than the one above-captioned.

Respectfully submitted,

HAYNSWORTH SINKLER BOYD, P.A.

By: s/ Thomas R. Gottshall

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Attorneys for Petitioner Aiken County

March 25, 2010

Gottshall, Tom

From: Shissias, Alex
Sent: Friday, March 12, 2010 4:12 PM
To: 'jlawrence@nuclearlawyer.com'
Subject: RE: position in intervention

Dear Mr. Lawrence,

Unfortunately, Aiken County must oppose Nevada's intervention in the DC Circuit case, based on your statement on the phone that Nevada is concerned about alleged defects associated with the Yucca Mountain site or whether Yucca Mountain is substantively the appropriate place for the facility. With respect, this is not an issue in this action.

The case at the D.C. Circuit deals with questions of statutory law regarding the legality of DOE's abandonment of the licensing procedure mandated by Congress. With regard to the issues relevant to this case, there is no reason to believe that Nevada's interests cannot be adequately represented by DOE.

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CERTIFICATE OF SERVICE

I certify that on March 25, 2010, the PETITIONER'S MEMORANDUM IN OPPOSITION TO THE MOTION FOR LEAVE TO INTERVENE OF THE STATE OF NEVADA was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

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