

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

In re: Aiken County, et al.,

Petitioners,

v.

U.S. NUCLEAR REGULATORY
COMMISSION and GREGORY
JACZKO, Chairman of the
Nuclear Regulatory Commission, in
His Official Capacity,

Respondents.

No. 11-1271

**MOTION OF THE STATE OF NEVADA
FOR LEAVE TO INTERVENE AS INTERVENOR-RESPONDENT**

Pursuant to Federal Rule of Appellate Procedure 15(d), the State of Nevada ("Nevada") moves for leave to intervene in this action as an intervenor-respondent. In support of this motion, Nevada states as follows:

1. In the instant case, Petitioners (Aiken County, South Carolina, Robert L. Ferguson, William Lampson, Gary Petersen, State of South Carolina, State of Washington, National Association of Regulatory Utility Commissioners, and Nye County, Nevada) seek a writ of mandamus to compel the U.S. Nuclear Regulatory Commission (NRC) to take certain actions related to the proposed Yucca Mountain geologic repository that, they claim, have been unreasonably delayed. Petitioners ask this Court to (among other things) (1) compel the NRC to direct its staff to resume its

technical safety review of the Yucca Mountain license application, (2) compel the NRC to issue a final decision regarding review of a June 29, 2010 decision of one of its atomic safety and licensing boards denying the U.S. Department of Energy's (DOE's) motion to withdraw its Yucca Mountain license application within 30 days, (3) compel the NRC to provide the Court with a proposed schedule with milestones and a date certain on which a decision approving or disapproving the Yucca Mountain license application will be issued, and (4) require the NRC to update the Court on the status of the matter every 60 days.

2. The NRC adjudicatory proceeding on DOE's application for a license to construct a geologic repository for disposal of high-level radioactive waste in Yucca Mountain, Nevada, about 90 miles north of Las Vegas, began with the publication of a notice of hearing on October 22, 2008 (73 Fed. Reg. 63029). Nevada was admitted as a party-intervenor in that proceeding on May 11, 2009. Nevada is opposed to the repository and has been actively litigating numerous legal and technical issues since then.

3. NRC's Rules of Practice provide that "[w]ithdrawal of an application after the issuance of a notice of hearing shall be on such terms as the presiding officer may prescribe." 10 C.F.R. § 2.107(a). On March 3, 2010, after completion of numerous pre-hearing matters and commencement of discovery, DOE moved the atomic safety and licensing board appointed to preside over the licensing proceeding to withdraw its Yucca Mountain license application. On June 29, 2010, the board denied DOE's motion and, the next day, the NRC Commission issued an order indicating that it would be considering whether to review the board decision and, if review was undertaken, whether

to affirm or reverse it. On July 15, 2010, NRC Commissioner Apostolakis recused himself because of his prior involvement in Yucca Mountain matters as a DOE consultant, leaving only four commissioners to decide the matter. Briefing before the Commission was completed on July 19, 2010. On or about August 10, 2010, the Commission's opinion writing staff prepared alternative draft decisions for the Commission's consideration. A Commission decision is still pending. Apparently, the Commission is split 2-2 on the matter. *See* Exhibit 7 to Petition for Writ of Mandamus at pg. 36. Meanwhile, discovery in the proceeding is suspended.

4. Under Section 201(a)(1) of the Energy Reorganization Act of 1974, 42 U.S.C. §5841(a)(1), the Commission cannot issue an order affirming or reversing a licensing board decision unless a majority of a quorum of at least three commissioners votes to support the order at a meeting. Votes of individual commissioners before then (such as the votes that have been received by the Commission's Secretary regarding the licensing board decision denying DOE's motion to withdrawal the Yucca Mountain license application) are informal and non-final as a matter of law. If, based on the informal voting, the Commission appears to be divided 2-2 regarding the correctness of a licensing board decision, there is no majority vote in support of any order, whether to affirm or reverse, and a meeting to cast votes would be pointless. Further, a 2-2 split would not affect the status of the licensing board decision in any way, even if the split were to be announced publicly. In particular, a 2-2 split does not constitute an approval of a licensing board decision, eliminate the possibility of a later Commission reversal, or

constitute any final Commission action. This is unlike a judicial process where a split vote denies the petition for review.

5. On October 4, 2010, at NRC Chairman Jaczko's initiative, the NRC Staff was directed to stop work on its Yucca Mountain Safety Evaluation Report. A Safety Evaluation Report documents the results of the NRC Staff's safety review. The Staff's review proceeds separate from but in parallel to the adjudicatory proceeding, in which NRC Staff participates as a party (but not as a decision-maker). However, the NRC Staff promptly began work on a nearly identical Technical Evaluation Report, which would document the Staff's review efforts and conclusions regarding consistency with Staff licensing review criteria. A Report over 500 pages long, documenting the Staff review efforts and conclusions on disposal safety, was issued publicly on July 21, 2011 (the Report may be found on the NRC's ADAMS public document system at ML111990436).

6. For the reasons set forth below, Nevada has a significant interest in this proceeding and sets forth the following grounds for intervention.

a. For over 20 years Nevada has consistently opposed DOE's efforts to site and license a geologic repository at Yucca Mountain, based upon numerous and serious safety, environmental, social and economic injuries that would be inflicted upon Nevada's lands and resources, and its economy and citizens, if the repository should go forward. *See* Affidavit of Joe Strolin, Acting Executive Director, Nevada Agency for Nuclear Projects (attached hereto as Exhibit 1, and incorporated herein by reference). *See also*, "Mountain of Trouble: A Nation at Risk – Report on Impacts of the Proposed Yucca Mountain High-Level Nuclear Waste Program," February 2002 (prepared by the

Nevada Agency for Nuclear Projects, Office of the Governor of the State of Nevada), available at <http://www.state.nv.us/nucwaste/yucca/impactreport.pdf>. A final Commission decision granting DOE's motion to withdraw its license application would prevent these injuries from occurring, but Petitioners' request for relief in the form of an order directing the NRC to set a proposed schedule for issuance of a merits decision on DOE's application presumes the application cannot be withdrawn.

b. Petitioners' request for relief in the form of an order directing the NRC to propose a schedule for issuance of a merits decision on DOE's application effectively asks the Court to impose a schedule on the NRC, either the one proposed by NRC or some different schedule developed by the Court. In either case, such a schedule could affect Nevada's ability to participate effectively in the NRC adjudicatory proceeding by, for example, imposing burdensome deadlines for completion of deposition discovery, filing of testimony, or commencement and completion of evidentiary hearings.

c. Nye County has for years supported the establishment of a nuclear waste repository at Yucca Mountain, even after DOE concluded that such a repository was not a viable option and moved to withdraw its License Application. Nye County's support for the project – apparently based on its hopes of financial enrichment – runs directly contrary to the State of Nevada and the vast majority of the State's citizens, only about one point seven percent (1.7%) of whom live in Nye County. Nye County, therefore, cannot and will not represent or articulate the position of Nevada in this case, nor will any of the other Respondents.

d. Congress has recognized that the host state for the waste repository should be accorded broad “rights of participation and consultation,” and that state participation “is essential in order to promote public confidence in the safety of disposal of such waste and spent fuel.” Sections 101(b) and 111(a)(6) of the Nuclear Waste Policy Act of 1982 (“NWPA”), as amended, 42 U.S.C. §§ 10121(b) and 10131(a)(6). Accordingly, Nevada views were routinely solicited and their comments were timely considered throughout the Yucca Mountain site characterization process, the site approval process, the site selection process, and the construction authorization process. *See* NWPA Secs. 113(a) & (b), 114(a)(1)(H), 115(b), 116(a)-(c), and 117(a) & (b). Under the NRC Rules of Practice, Nevada was granted automatic standing to intervene in the Yucca Mountain licensing proceeding. 10 C.F.R. § 2.309(d)(2). The fact that Nevada has been heard and afforded full participation rights at every stage of the Yucca Mountain process suggests that this Court should similarly allow Nevada to participate as an intervenor in this proceeding to offer its unique views and perspectives as the host state for the repository. Moreover, Nevada was allowed to intervene in the D.C. Circuit case that set the stage for the instant one, *In re Aiken County*, No. 10-1050, consolidated with Nos. 10-1052, 10-1069, and 10-1082, decided on July 1, 2011.

7. Nevada’s interests will not be adequately represented in the absence of intervention. Only Nevada is in a position to represent its sovereign and other interests. Moreover, Nevada may be in a position to present arguments in support of Respondents that Respondents cannot make themselves given the pendency of the NRC proceeding.

In sum, Nevada's views on the arguments advanced by Petitioners will be of assistance to the Court.

8. Petitioners filed their Petition for Writ of Mandamus on July 29, 2011. A motion for leave to intervene in this case must be filed within 30 days, or by August 29, 2011 (August 28, 2011 falls on a Sunday). Fed. R. App. P. 15(d). This motion meets that deadline. Nevada's participation as intervenor-respondent will not delay the proceedings or prejudice any party. Nevada also stands ready to cooperate with the parties and the Court to ensure efficient and timely adjudication of the present case.

9. Counsel for Nevada has contacted counsel for all parties regarding this motion for leave to intervene. Petitioners Aiken County, South Carolina, the State of Washington, the State of South Carolina, the National Association of Regulatory Utility Commissioners, Robert L. Ferguson, William Lampson and Gary Peterson, and Respondents the United States Nuclear Regulatory Commission and Gregory B. Jaczko all stated that they do not oppose Nevada's Motion for Leave to Intervene.

Nye County stated that it takes no position, but reserves the right to respond to Nevada's Motion.

Respectfully submitted,

/s/

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DATED: August 24, 2011

CERTIFICATE OF SERVICE

I certify that on August 24, 2011, the *Motion of the State of Nevada for Leave to Intervene as Intervenor-Respondent* 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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**UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT**

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Case Caption: In Re: Aiken County, South Carolina, et al.

v.
U.S. Nuclear Regulatory Com'n, et al.

Case No: 11-1271

ENTRY OF APPEARANCE

Party Information

The Clerk shall enter my appearance as counsel for the following parties:
(List each party represented individually. Use an additional blank sheet as necessary)

☐ Appellant(s)/Petitioner(s) ☐ Appellee(s)/Respondent(s) ☒ Intervenor(s) ☐ Amicus Curiae

State of Nevada

_____	_____
_____	_____
_____	_____
_____	_____
Names of Parties	Names of Parties

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Notes: This form must be submitted by a member of the Bar of the U.S. Court of Appeals for the D.C. Circuit.

Names of non-member attorneys listed above will not be entered on the court's docket.

Applications for admission are available on the court's web site at <http://www.cadc.uscourts.gov/>