

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

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STATE OF NEW YORK, INC., <i>et al.</i> ,))
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Petitioners,)	Case Nos. 14-1210,
)	14-1212, 14-1216,
)	14-1217
))
v.))
))
UNITED STATES NUCLEAR REGULATORY)	(Consolidated)
COMMISSION))
and))
THE UNITED STATES OF AMERICA))
Respondent.))
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MOTION FOR LEAVE TO INTERVENE AS PETITIONER

The Commonwealth of Massachusetts (“Commonwealth”) hereby moves for leave to intervene on its own motion and as of right in the above-captioned cases pursuant to Rule 15(d) of the Federal Rules of Appellate Procedure, Circuit Rule 15(b), and the provisions of 28 U.S.C. § 2348 and 42 U.S.C. § 2239(b). The Commonwealth offers the following grounds for the requested action.

BACKGROUND

1. The States of New York, Connecticut, and Vermont, the Prairie Island Indian Community, the Natural Resources Defense Council, Inc. and Beyond Nuclear, Inc., *et al.*, initiated the above-captioned consolidated proceeding seeking review of the following actions¹ by the Nuclear Regulatory Commission (“NRC”):

- Continued Storage of Spent Nuclear Fuel, Final Rule, 79 Fed. Reg. 56,238-56,263 (Sept. 19, 2014) (effective October 20, 2014) (“Continued Storage Rule”);

¹ As noted below, the Prairie Island Indian Community, the Natural Resources Defense Council, Inc. and Beyond Nuclear, Inc. *et al.* seek review of the Continued Storage Rule and the Generic EIS only.

- Generic Environmental Impact Statement for Continued Storage of Spent Nuclear Fuel, 79 Fed. Reg. 56,263-56,264 (Sept. 19, 2014) (“Generic EIS”);
- NRC Commissioner Memorandum and Order, CLI-14-08 (Aug. 26, 2014) (effective October 20, 2014) (“Order”) (lifting the suspension on all final licensing decisions for affected applications in view of the Commissioner’s approval of the final Continued Storage Rule and the Generic EIS); and
- Commission Vote and Directives to NRC Staff to revise and finalize the Generic EIS and Continued Storage Rule, CVR 2014-0072, (Aug. 26, 2014) (“Directives”).

2. In 1984, the NRC issued the first Temporary Storage Rule, 10 C.F.R.

§ 51.23,² which was supported by the Waste Confidence Decision.³ The Temporary Storage Rule addressed the storage of nuclear waste pending the siting of a permanent waste repository by the federal government. The NRC subsequently revised and updated the Temporary Storage Rule and the Waste Confidence Decision a number of times in the ensuing decades.

3. In *New York v. NRC*, 681 F.3d 471 (D.C. Cir. 2012), this Court vacated and remanded for further review the 2010 Update to the Temporary Storage Rule and the Waste Confidence Decision. *Id.* at 483. The Court found that the NRC had failed to comply with the National Environmental Policy Act (“NEPA”) by failing to assess: the environmental impacts of a hypothetical permanent federal failure to establish a high-level waste repository, the risks of spent fuel pool leaks, and the risks of spent fuel pool fires *Id.* at 478-483. This Court directed the NRC to assess these risks in a Generic Environmental Impact Statement (“GEIS”). *Id.* at 483.

4. In August, 2013, the NRC issued a draft rulemaking and GEIS for public comment, and set a deadline of December 20, 2013 for submitting comments. *New York*,

² Final Rule, Requirements for Licensee Actions Regarding the Disposition of Spent Fuel Upon Expiration of Reactor Operating Licenses, 49 Fed. Reg. 34,688 (Aug. 31, 1984).

³ Final Waste Confidence Decision, 49 Fed. Reg. 34,658 (Aug. 31, 1984).

Vermont, Connecticut and the Commonwealth presented extensive comments criticizing many of the assumptions used in the draft GEIS, and Vermont, Connecticut and the Commonwealth supplemented their comments in April, 2014.

5. New York, Vermont and Connecticut filed a petition seeking review of the Continued Storage Rule, the Generic EIS, the Order and the Directives on October 27, 2014; the Prairie Island Indian Community filed a petition challenging the Continued Storage Rule and the Generic EIS on October 27, 2014; Beyond Nuclear, Inc. *et al.* and the Natural Resources Defense Council filed a petition challenging the Continued Storage Rule and the Generic EIS on October 29, 2014.

ARGUMENT

A. The Commonwealth Has a Direct and Substantial Interest in this Action that Warrants Intervention under Fed. R. App. P. Rule 15(d).

6. Rule 15(d) of the Federal Rules of Appellate Procedure imposes no specific requirements on a party seeking to intervene other than that it must explain its interest in the proceeding and the grounds for the intervention. Rule 15(d) permits intervention where the intervenor has a direct and substantial interest in the outcome of the action. *See Yakima Valley Cablevision, Inc. v. FCC*, 794 F.2d 737, 744-45 (D.C. Cir. 1986) (allowing Rule 15(d) intervention because petitioners were “directly affected by” application of agency policy); *New Mexico Dep’t of Human Servs. v. HCFA*, 4 F.3d 882, 884 n.2 (10th Cir. 1993) (permitting intervention because intervenors had substantial and unique interest in outcome); *Bales v. NLRB*, 914 F.2d 92, 94 (6th Cir. 1990) (granting Rule 15(d) intervention to party with “substantial interest in the outcome”).

7. Here, the Commonwealth has a direct and substantial interest in the outcome of this action. The Commonwealth is home of the Pilgrim Nuclear Power Station (“Pilgrim”),

located in Plymouth Massachusetts. Like every nuclear power plant in the United States, Pilgrim stores spent nuclear waste onsite, and the NRC's actions in promulgating the Continued Storage Rule, adopting the Generic EIS, and issuing the Order and Directives impact the Commonwealth directly.

8. Thus, there can be no doubt that the Commonwealth has an interest in the subject matter of this litigation that is both substantial and direct, supporting its right to intervene in the action. The Commonwealth has sufficient interest in the rulemaking at issue to support intervention under Rule 15(d).

B. The Liberal Intervention Policies Underlying Fed. R. Civ. P. 24 Further Support Granting Intervention Here.

9. The intervention policies underlying Fed. R. Civ. P. 24 provide guidance in analyzing intervention under Rule 15(d), although the requirements of Fed. R. Civ. P. 24 do not directly apply to motions to intervene in challenges to administrative actions in the federal appellate courts. *See United States v. Bursery*, 515 F.2d 1228, 1238 n.24 (5th Cir. 1975) (policies underlying intervention in district courts may be applicable in appellate courts).

10. Addressing intervention as of right, Fed. R. Civ. P. 24(a) provides:

On timely motion, the court must permit anyone to intervene who: . . .

(2) claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.

Fed. R. Civ. P. 24(a)(2).

11. Rule 24(a) is construed liberally in favor of granting intervention. *See United States v. City of Los Angeles*, 288 F.3d 391, 397-98 (9th Cir. 2002); *Southwest Ctr. for Biological Diversity v. Berg*, 268 F.3d 810, 818 (9th Cir. 2001). The Commonwealth easily meets Rule 24(a)(2)'s criteria.

12. The courts are especially sensitive to the needs of states to intervene in actions that implicate State laws and policy interests. *See Cascade Natural Gas Corp. v. El Paso Natural Gas Co.*, 386 U.S. 129, 135 (1967) (allowing California to intervene as of right in an antitrust enforcement action to assert “California’s interests in a competitive system”).

13. The Commonwealth has a direct interest in ensuring that the NRC properly regulates the storage of nuclear waste within its borders, justifying intervention in this matter.

CONCLUSION

For the foregoing reasons, the Commonwealth respectfully requests that this Court grant its motion to intervene.

Dated: November 25, 2014

Respectfully Submitted,

COMMONWEALTH OF MASSACHUSETTS

By its attorneys,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Motion for Leave to Intervene filed through the Court's CM/ECF System has been served electronically on all registered participants of the CM/ECF System as identified in the Notice of Docket Activity, and that paper copies will be sent by first class mail, postage prepaid, to those indicated as non-registered participants who have not consented in writing to electronic service, on November 25, 2014.

/s/ Tracy Triplett

Tracy Triplett

Assistant Attorney General