UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

OGLALA SIOUX TRIBE, ALIGNING FOR RESPONSIBLE MINING,	)	
Petitioners,	)	No. 20-1489
v.	)	
UNITED STATES NUCLEAR REGULATORY COMMISSION and UNITED STATES OF AMERICA,	)	
Respondents.	)	

PETITIONERS' RESPONSE TO
REVISED MOTION FOR LEAVE TO INTERVENE

On December 28, 2020, Powertech (USA) Inc. ("Powertech") filed a Motion for Leave to Intervene ("Motion") in this proceeding. Petitioners filed a Response to the Motion on January 6, 2021. In an Order dated February 2, 2021, this Court ordered Powertech to "file a corrected motion to intervene that includes all arguments in support of intervention and attaches a disclosure statement that complies with D.C. Cir. Rule 26.1." February 2, 2021 Order at 1.

On February 8, 2021, Powertech filed a "Revised Motion for Leave to Intervene" ("Revised Motion") requesting intervention in this case "[p]ursuant to Federal Rule of Appellate Procedure (FRAP) 15(d) and D.C. Circuit Rule 15(b)."

Revised Motion at 2. Powertech asserts that its interests in the Nuclear Regualtory Commission ("NRC") license are at stake in this litigation and that the NRC Staff and United States do not adequately represent the company's interests.

Based on Powertech's newly-filed corporate disclosure statement and the arguments presented in the Revised Motion, Petitioners do not object to Powertech's intervention in support of Respondents in this case. However, Petitioners suggest that should the Court permit intervention, it should impose reasonable restrictions on the intervention of the licensee(s) in order to ensure the efficient conduct of the proceedings.

Because F.R.A.P. 15(d) does not provide an explicit standard for resolving intervention questions, Circuit Courts rely upon the factors and policies underlying Federal Rule of Civil Procedure 24(a)(2) ("Rule 24") to decide F.R.A.P. 15(d) motions. Synovus Fin. Corp. v. Board of Governors of Federal Reserve Sys., 952 F.2d 426, 431-434 (D.C. Cir. 1991); Canadian Tarpoly Co. v. U.S. Int'l Trade Commn., 649 F.2d 855, 856-857 (C.C.P.A. 1981). The U.S. Supreme Court has endorsed this approach, instructing that the standards to evaluate intervention in a U.S. District Court proceeding can serve as guidance for a Circuit Court considering a motion to intervene. *See* Int'l Union v. Scofield, 382 U.S. 205, 217 n. 10 (1965).

As held by the Supreme Court, "[a]n intervention of right under the amended Rule 24(a) may be subject to appropriate conditions or restrictions responsive among other things to the requirement of efficient conduct of proceedings." Stringfellow v. Concerned Neighbors in Action, 480 U.S. 370, 383 n.2 (1987). "The Advisory Committee Notes to the 1966 amendment to FRCP 24(a) states that intervention of right under the amended rule may be subject to appropriate conditions or restrictions responsive, among other things, to the requirements of efficient conduct of the proceedings." Federal Procedure, Lawyer's Edition, §59:442. 25 Fed. Proc., L.Ed. §59:442. *See also* Fund for Animals v. Norton, 322 F.3d at 737 n.11 (D.C. Cir. 2003) (citing the Advisory Committee Note to support district court's authority to limit participation of intervenors).

Limiting intervention for reasons of judicial efficiency is "a firmly established principle" in the federal courts. Beauregard, Inc. v. Sword Servs., LLC, 107 F.3d 351, 352-53 (5th Cir. 1997); *see also* Stringfellow, 480 U.S. at 378 (limitations upon intervention do not constitute a denial of the right to participate); San Juan County v. U.S., 503 F.3d 1163, 1189 (10th Cir. 2007) (recognizing Rule 24 permits "limitations on the scope of intervention"); Southern v. Plumb Tools, 696 F.2d 1321, 1323 (11th Cir. 1983) ("It appears,

therefore, that imposing certain conditions on either type of intervention, of right or permissive, poses no problem in the federal courts.").

Powertech's Revised Motion does not indicate whether it seeks permissive intervention or intervention as of right and does not cite any case law. To the extent permissive intervention is sought, Rule 24(b) grants this Court even broader discretion when considering a request for permissive intervention. "A district court's discretion to grant or deny permissive intervention is broad, and includes the discretion to limit intervention to particular issues or for limited purposes." Center for Biological Diversity v. Brennan, 571 F.Supp.2d 1105, 1130 (N.D.Cal. 2007), *citing* San Jose Mercury News v. U.S. Dist. Court—Northern Dist., 187 F.3d 1096, 1100 (9th Cir. 1999) and Van Hoomissen v. Xerox Corp., 497 F.2d 180, 181 (9th Cir. 1974). "When granting an application for permissive intervention, a federal district court is able to impose almost any condition." Columbia-America Discovery Group v. Atlantic Mut. Ins. Co., 974 F.2d 450, 469 (4th Cir. 1992), *cert. denied*, 507 U.S. 1000 (1993). *See also* EDF v. Costle, 79 F.R.D. at 244 (limiting intervenors to the filing of briefs on a single issue).

Regarding conditions, Petitioners suggest the Court require consolidation of Powertech's briefing with any other entities that may in the future seek to join the litigation based on a similar interest. Further, Powertech should not be

permitted to raise issues not germane to those identified by Petitioners in the Statement of Issues to be Raised and Petitioners' Brief. Lastly, Powertech should be instructed not to duplicate the legal or factual arguments presented by NRC and the United States of America. This last limitation can be accomplished via a standard briefing schedule that requires any Intervenor for Respondent to file its brief after the Respondents' brief, but before Petitioners' Reply brief, so that an Intervenor can be sure not to duplicate Respondents' arguments and Petitioners may reply to all of the opposing arguments in one filing.

Respectfully submitted,

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Filed this 15th day of February, 2021.

CERTIFICATE OF COMPLIANCE

I, Jeffrey C. Parsons, hereby certify that the foregoing Response to Motion for Leave to Intervene complies with the formatting and type-volume restrictions of the rules of the U.S. Court of Appeals for the District of Columbia Circuit. The motion was prepared in 14-point, double spaced, Times New Roman font in accordance with Fed. R. App. P. 32(a)(5) and Fed. R. App. P. 32(a)(6). The response contains 857 words and therefore complies with Fed. R. App. P. 27(d)(2)(A).

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CERTIFICATE OF SERVICE

I, Jeffrey C. Parsons, hereby certify that the foregoing Response to Motion for Leave to Intervene was served on all counsel of record in case number 20-1489 through the electronic filing system (CM/ECF) of the U.S. Court of Appeals for the District of Columbia Circuit.

Dated: February 15, 2021

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