

ORAL ARGUMENT NOT YET SCHEDULED

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

OHIO NUCLEAR-FREE
NETWORK, et al.

Petitioners,

v.

UNITED STATES NUCLEAR
REGULATORY COMMISSION and
UNITED STATES OF AMERICA,

Respondents.

Case No. **21-1162**

**UNOPPOSED MOTION OF AMERICAN CENTRIFUGE
OPERATING, LLC FOR LEAVE TO INTERVENE, AND FOR
LEAVE TO FILE OUT OF TIME**

Pursuant to Federal Rules of Appellate Procedure 26(b) and 15(d) and D.C. Circuit Rule 15(b), American Centrifuge Operating, LLC (“ACO”) respectfully moves for leave to intervene as a party-respondent in the above-captioned matter, and for leave to file this motion out of time. Respondent U.S. Nuclear Regulatory Commission (“NRC”), by its counsel Andrew P. Averbach, has indicated that the NRC does not oppose ACO’s motion. Respondent United States of America, by its counsel

Justin Heminger, has indicated that the United States of America does not oppose ACO's motion. (The United States and the NRC will be referred to as "the Federal Respondents.") Petitioners Ohio Nuclear-Free Network and Beyond Nuclear have indicated, through counsel Terry Lodge, that Petitioners do not oppose.

Although ACO ultimately became aware of this case after it was filed, ACO was not served with the petition in this Court, nor with other procedural filings. ACO understood that the Federal Respondents were filing a threshold motion to dismiss, which ACO believed to be meritorious. That threshold motion remained pending for some four months, until this Court, in an order dated January 20, 2022, directed that the motion to dismiss "be deferred to the merits panel to which the petition for review is assigned." Order, ECF No. 1931568 (January 20, 2022). ACO became aware of that order shortly after it was issued and, promptly upon learning that the case would proceed to the merits briefing stage, prepared and filed this motion. No party opposes, and no party would be prejudiced by the requested intervention.

In further support of the motion, ISP states as follows:

Background

1. The NRC was created to regulate the activities addressed in the Atomic Energy Act of 1954 (“AEA”) and “to ensure the safe use of radioactive materials for beneficial civilian purposes while protecting people and the environment.” NRC, About NRC (Feb. 8, 2021), <https://www.nrc.gov/about-nrc.html>. In this role, the NRC issues, amends, and oversees licenses for possession and use of nuclear materials.

2. ACO is the holder of a license issued by the NRC, Materials License SNM-2011. By letter dated December 5, 2019, as subsequently supplemented, ACO sought approval by the NRC of an amendment of that license to allow possession of certain radioactive materials for the purpose of demonstrating production of up to 600 kilograms of High Assay Low Enriched Uranium (“HALEU”) in the form of uranium hexafluoride for the U.S. Department of Energy (“DOE”). ACO had a contract with DOE to deploy and operate a cascade of 16 uranium enrichment centrifuges, and to produce HALEU at the American

Centrifuge Plant in Piketon, Ohio, although the scope of that contract was recently revised to encompass deployment, but to exclude operation, of the cascade, due to COVID-related supply chain delay in the DOE-supplied HALEU storage cylinders.¹ The NRC posted notice of the license amendment request on its website on January, 2, 2020.

3. Pursuant to its standard procedures, NRC staff prepared a “safety evaluation report,” involving a thorough review of safety, security, safeguards, and financial matters, and concluded that ACO’s application satisfied all applicable regulations. A public version of the safety evaluation report was made available on the NRC’s website, <https://adamswebsearch2.nrc.gov/webSearch2/main.jsp?AccessionNumber=ML21148A291>.

4. The NRC also prepared an Environmental Assessment prior to issuing the license amendment, consistent with the agency’s regulations implementing the National Environmental Policy Act, 10 C.F.R. Part 51. That report assessed and disclosed potential

¹ “Gas centrifuge” technology involves placing uranium hexafluoride gas in a cylinder that rotates at high speed. The centrifugal force separates lighter and heavier uranium isotopes, and the gas enriched in the lighter isotope (uranium-235) is then fed into additional centrifuges until the desired level of enrichment is achieved. The interconnected centrifuges are referred to as “cascades.”

environmental impacts associated with the requested license amendment, and concluded that a “finding of no significant impact” was appropriate. The Environmental Assessment was eventually published in the Federal Register in June 2021. America Centrifuge Operating, LLC; American Centrifuge Plant, 86 Fed. Reg. 31,539 (June 14, 2021).

5. The Atomic Energy Act and its implementing regulations provide the opportunity for parties to seek a hearing on an NRC licensing action. E.g., 10 C.F.R. § 2.309. Such requests, or any hearing if one were granted, are procedures in which ACO, as the applicant, would have been involved.

6. Petitioners in this proceeding, however, did not seek such a hearing. Rather, they, together with a number of other additional organizations, sent a letter to an NRC staff member on March 30, 2021, requesting additional reviews and assessments by the agency. See NRC Motion to Dismiss, ECF No. 1914862 (September 20, 2021), Exhibit 2. That letter copied various NRC and DOE entities, but not ACO. *Id.* p. 6 of 11. The NRC responded, directing Petitioners and the other groups to public information regarding the environmental assessment that the NRC planned to complete in June 2021, and the NRC duly placed the

Petitioner's letter and the NRC's response on the appropriate publicly-available web page in the Agencywide Documents Access and Management System ("ADAMS"). See NRC Motion to Dismiss, ECF No. 1914862 (September 20, 2021), Exhibit 3.

7. The NRC, after completing its reviews, issued the requested license amendment (the "Amendment") on June 11, 2021. NRC Motion to Dismiss, ECF No. 1914862 (September 20, 2021), Exhibit 1.

8. The next action by Petitioners was the filing of the petition in this Court, in this action, on August 4, 2021. Petitioners did not serve ACO with their Petition, nor with the required docketing statement or any of their other preliminary procedural filings. ACO did subsequently become aware of the lawsuit, as well as the intent of the Federal Respondents to file a threshold dispositive motion to dismiss, based upon lack of jurisdiction and/or failure to exhaust a mandatory statutory requirement. That motion was filed on September 20, 2021, and ACO heard nothing further until it learned of this Court's order directing the parties to address the jurisdictional issues in the merits briefing, shortly after the order was issued on January 20, 2022.

9. This Court has routinely permitted intervention by NRC licensees and license applicants in cases where petitioners seek to challenge license-related approvals by or pending before the NRC. See, e.g., *Commonwealth of Massachusetts v. U.S. Nuclear Regulatory Comm'n*, No. 19-1198, Order Granting Mot. to Intervene, ECF No. 1814533 (D.C. Cir. 2019); *Safe Energy Coalition of Mich. v. U.S. Nuclear Regulatory Comm'n*, 866 F.2d 1473 (D.C. Cir. 1989); see also *In re: Friends of the Earth, et al.*, No. 16-1189, Order Granting Mot. to Intervene, ECF No. 1620139 (D.C. Cir. 2016). ACO respectfully requests that it be allowed to intervene here.

Grounds for Intervention

10. Rule 15(d) states that a motion to intervene must be filed within 30 days after the petition for review is filed, and “must contain a concise statement of the interest of the moving party and the grounds for intervention.” Fed. R. App. P. 15(d). To satisfy this rule, a prospective intervenor must “simply . . . file a motion setting forth its interest and the grounds on which intervention is sought.” *Synovus Fin. Corp. v. Bd. of Governors of Fed. Reserve Sys.*, 952 F.2d 426, 433 (D.C. Cir. 1991). Since Rule 15(d) “provides no standard for resolving intervention

questions," appellate courts have identified two considerations: "first, the statutory design of the act and second, the policies underlying intervention in the trial courts pursuant to Fed. R. Civ. P. 24." *State of Tex. v. U.S. Dep't of Energy*, 754 F.2d 550, 551 (5th Cir. 1985) (internal citation omitted); see also *Sierra Club, Inc. v. E.P.A.*, 358 F.3d 516, 517-18 (7th Cir. 2004).

11. Under Federal Rule of Civil Procedure 24, this Court has held that "qualification for intervention as of right depends on the following four factors: (1) the timeliness of the motion; (2) whether the applicant 'claims an interest relating to the property or transaction which is the subject of the action'; (3) whether 'the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest'; and (4) whether 'the applicant's interest is adequately represented by existing parties.'" *Fund For Animals, Inc. v. Norton*, 322 F.3d 728, 731 (D.C. Cir. 2003) (quoting Fed. R. Civ. P. 24(a)(2)); see also *Roeder v. Islamic Republic of Iran*, 333 F.3d 228, 233-34 (D.C. Cir. 2003). ACO satisfies all of these requirements, as explained below.

The Motion Should be Deemed to be Timely, and Leave to File Out of Time Should be Granted

12. Although this motion was not filed within “30 days after the petition for review [was] filed.” Fed. R. App. P. 15(d), the motion should nevertheless be deemed timely under the unique circumstances of this case. In particular: (i) ACO was not originally served with the Petition or other filings in this Court by the Petitioners; (ii) when ACO became aware of this proceeding, ACO understood that a threshold dispositive motion would be filed by the Federal Respondents, which ACO reasonably believed would resolve the case; (iii) ACO acted promptly with the filing of this motion upon learning that merits briefing would, in fact, proceed; and (iv) no party opposes, and no party would be prejudiced by the granting of the late-filed request for intervention.

13. Federal Rule of Appellate Procedure 15(c)(1) requires a party seeking review of an agency order to “serve, or have served, a copy on each party admitted to participate in the agency proceedings, except for the respondents.” Fed. R. App. Proc. 15(c)(2) requires a petitioner to “file with the clerk a list of those served.”² Although the Petitioners’ failure

² D.C. Circuit Rule 15(a) allows a party to serve only the respondent agency and the United States “in cases involving informal agency rulemaking such

to follow the NRC's rules regarding licensing matters may render the identification of the precise "agency proceedings" here less than clear (indeed, that is part of the problem), there is no basis to consider ACO, the lone party requesting the license amendment itself, as anything other than a "party admitted to participate" in whatever agency proceedings are deemed to be at issue by Petitioners. As such, ACO should have been served. While ACO does not contend that it had no knowledge whatsoever of this proceeding, the lack of required service on ACO is a factor that should militate in favor of allowing leave for the filing of this motion out of time.

14. Federal Rule of Appellate Procedure 15(d) "permits equitable exceptions to the deadline" because it "does not implement any general jurisdictional statute." *Int'l Union of Operating Eng'rs, Local 18 v. Nat'l Labor Relations Bd.*, 837 F.3d 593, 596 (6th Cir. 2016). Because the thirty-day filing deadline in Rule 15(d) is a "'claim-processing rule' that does not affect [the Court's] subject matter jurisdiction," courts of appeals "can excuse" late filed petitions to intervene. *Id.* at 595, 596.

as, for example, those conducted under 5 U.S.C. § 553," but this case does not involve any such informal rulemaking.

15. The text of Fed. R. App. P. 26(b) provides that, with exceptions not relevant here, “[f]or good cause, the court may extend the time prescribed by these rules or by its order may permit an act to be done after that time expires.” Good cause exists here, for reasons that include the lack of service upon ACO, the lack of opposition by any party, and the lack of prejudice to any party resulting from the late-filed motion. E.g., *Int’l Union of Operating Eng’rs, Local 18*, 837 F.3d at 595-96 (failure to serve putative intervenor, and fact that “no prejudice [would] result” from allowing that potential intervenor to intervene, constituted good cause).

16. No party opposes ACO’s motion for leave to file out of time, and no party would suffer prejudice by the granting of ACO’s late-filed motion to intervene. Had a motion to intervene been filed within 30 days and granted at the very outset of this matter, the circumstances would be the same as they are today. That is, upon the Court’s order dated January 20, 2022, the parties and ACO would proceed to address the jurisdictional matters in the merits briefing as directed by the Court. That is all that ACO seeks with its late-filed request, and no party could credibly claim prejudice by virtue of the delay.

ACO Has A Significant Interest In The License Amendment That Is The Subject Of The Petition

17. ACO is the entity that is performing the work under the DOE demonstration contract for HALEU production. ACO has committed substantial resources to the performance of that work, and is uniquely situated to provide the important services to DOE. ACO has potential interests in future HALEU production opportunities. Plainly, ACO has a direct, substantial, financial and business interest in the preservation of the Amendment.

18. Preservation of the Amendment will allow ACO to proceed with its business objective of demonstrating the technical, commercial, and economic viability of the domestic production of HALEU at the American Centrifuge Plant. As a result, ACO clearly has a significant interest in the Amendment that is the subject of Petitioners' challenges.

Disposition Of The Petition May As A Practical Matter Impair Or Impede ACO's Ability to Protect That Interest

19. Petitioners seek a review of NRC rulings and processes relating to the Amendment, and, ultimately, that the Amendment be "vacated." Petition at p.7. If this Court were to grant such relief, ACO's ability to proceed with any further or related work relating to HALEU would be eliminated.

The Federal Agency Respondent May Be Unable To Represent ACO's Unique Interests Adequately

20. A prospective intervenor's burden of showing inadequate representation "is not onerous," as it "need only show that representation of [its] interest 'may be' inadequate, not that representation will in fact be inadequate." *Dimond v. District of Columbia*, 792 F.2d 179, 192 (D.C. Cir. 1986) (citing *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n.10 (1972)).

21. Although ACO is aligned with the NRC insofar as ACO supports the NRC processes and assessments that led to the approval of the Amendment, ACO may have a unique perspective to offer beyond that of the NRC. In particular, because it is ACO that is actually performing the demonstration project work contemplated by the Amendment, there may be facts and circumstances that bear on the issues that ACO is uniquely positioned to offer. In other words, ACO may have different interests from the NRC in this litigation, beyond the shared interest of preserving the NRC regulatory framework and decision-making process. As a result, the NRC may not adequately represent ACO's interests.

22. To ensure that ACO's participation as an intervenor is helpful to the Court, ACO will endeavor to coordinate with the NRC to avoid

duplicative briefing and to ensure that ACO focuses on arguments and/or background facts that the NRC may not address.

WHEREFORE, ACO respectfully requests that the Court grant leave to file this motion out of time, and that ACO be granted leave to intervene as a party-respondent.

Dated: January 26, 2022 Respectfully submitted,

By /s/ Brad Fagg
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**CERTIFICATE OF COMPLIANCE WITH
FEDERAL RULE OF APPELLATE PROCEDURE 27(D)**

I certify that this filing complies with the requirements of Fed. R. App. P. 27(d)(1)(E) and Circuit Rule 27(a)(2) because it has been prepared in 14-point Century Schoolbook, a proportionally spaced font.

I further certify that this filing complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(A) and Circuit Rule 27(a)(2) because it contains 2,426 words, according to the count of Microsoft Word, excluding the parts of the filing exempt under Fed. R. App. P. 32(f).

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**ADDENDUM—CERTIFICATE OF PARTIES AND
CORPORATE DISCLOSURE STATEMENT**

Pursuant to Federal Rule of Appeal Procedure 26.1 and D.C. Circuit Rule 26.1, American Centrifuge Operating, LLC represents as follows:

American Centrifuge Operating, LLC is a limited liability company organized and existing under the laws of Delaware, involved in uranium enrichment and the nuclear fuel cycle. American Centrifuge Operating, LLC is a wholly owned indirect subsidiary of Centrus Energy Corp. Other than Centrus Energy Corp., no other publicly held company has 10 percent or more equity interest in American Centrifuge Operating, LLC.

In addition, pursuant to Circuit Rules 27(a)(4) and 28(a)(1)(A), the undersigned counsel certifies that no parties appeared before a district court; and all parties, intervenors, or amici in this Court are as follows:

- Parties: Ohio Nuclear-Free Network and Beyond Nuclear, Inc.; U.S. Nuclear Regulatory Commission and the United States of America (Respondents);
- Intervenors (Motion Pending): American Centrifuge Operating, LLC; and
- Amici: None.

/s/ Brad Fagg
Brad Fagg

Dated: January 26, 2022

CERTIFICATE OF SERVICE

I, Brad Fagg, a member of the Bar of this Court, hereby certify that on January 26, 2022, I electronically filed the foregoing "UNOPPOSED MOTION OF AMERICAN CENTRIFUGE OPERATING, LLC, FOR LEAVE TO INTERVENE, AND FOR LEAVE TO FILE OUT OF TIME" and the Addendum thereto, "CERTIFICATE OF PARTIES AND CORPORATE DISCLOSURE STATEMENT" with the Clerk of the Court for the United States Court of Appeals for the D.C. Circuit by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate ECF system.

/s/ Brad Fagg
Brad Fagg

Dated: January 26, 2022