

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

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AIKEN COUNTY,	)	
	)	
	)	
Petitioner,	)	
	)	
	)	
v.	)	
	)	
STEVEN CHU, Secretary of the Dept.	)	
of Energy, in his Official Capacity;	)	
U.S. DEPARTMENT OF ENERGY;	)	
GREGORY JACZKO, Chairman of the	)	
Nuclear Regulatory Commission, in	)	
his Official Capacity; U.S. NUCLEAR	)	Case No. 10-1050
REGULATORY COMMISSION;	)	
THOMAS MOORE, PAUL RYERSON	)	
and RICHARD WARDWELL,	)	
U.S. Nuclear Regulatory Commission	)	
Atomic Safety and Licensing Board Judges,	)	
in their Official Capacity; and the NRC	)	
ATOMIC SAFETY AND LICENSING	)	
BOARD,	)	
	)	
Respondents.	)	

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

On March 19, 2010, pursuant to Federal Rule of Appellate Procedure 15(d), the State of Nevada (“Nevada”) filed a Motion for Leave to Intervene in this proceeding (“Motion”). The Motion was unopposed by the Respondents. *See*

Motion ¶ 8 at 6. On March 25, 2010, Petitioner Aiken County filed a Memorandum in Opposition to the Motion (“Opposition”). In accordance with Federal Rule of Appellate Procedure 27(a)(4), Nevada herein replies to Aiken County’s Opposition to the Motion. Underlying these pleadings is Aiken County’s judicial challenge (filed February 19, 2010) to prevent Respondent U.S. Department of Energy (DOE) from withdrawing with prejudice its License Application for a construction authorization for a geologic repository at Yucca Mountain, which is now pending before Respondent U.S. Nuclear Regulatory Commission (NRC). *See* Motion ¶ 1 at 2; Opposition at 1-2. Yucca Mountain is located in the State of Nevada. *Ibid.*

In its Opposition to the Motion, Aiken County does not argue that the Motion was untimely, or that Nevada lacked Article III standing or otherwise failed to show an interest related to the agency decisions and proceedings at issue. Rather, Aiken County argues that a merits disposition of the case cannot impair Nevada’s interests, and that Nevada’s interests are in any event represented by the existing parties. *See generally* Opposition at 2-3. On the first point, Aiken County claims that “there is no prejudice as Nevada retains its ability to pursue [its] technical merits arguments relating to [DOE’s] License Application before the [NRC] in the event Aiken County prevails in this matter.” Opposition at 3. Aiken County misses the point since this judicial review proceeding focuses narrowly on

whether DOE may withdraw its Yucca Mountain License Application. The NRC is currently considering this very issue in response to a DOE motion to withdraw the License Application that was properly filed before its Licensing Board. *See* Motion ¶ 3 at 3. Nevada will be answering DOE's motion by offering argument in support of a withdrawal with prejudice. *See* Motion ¶ 4c at 4. If Aiken County were to prevail in this judicial review proceeding, DOE's motion filed with the NRC would be declared unlawful, and there would no longer be any NRC proceeding in which Nevada's arguments could be presented.

On the second point, Aiken County simply asserts, without supporting argument, that "there is no reason to believe DOE cannot adequately present its reasons justifying this course of action [*i.e.*, the withdrawal of the License Application]," and that its petition "presents narrow issues of statutory construction that can be presented fully and fairly by the parties originally named." Opposition at 2 and 3. Nevada does not doubt that DOE can adequately defend its interests, but DOE's interests and Nevada's interests are not identical. Nevada seeks to participate as an intervenor "to represent its sovereign and other interests" and "to present arguments in support of Respondents that Respondents cannot make themselves given the pendency of the NRC proceeding." Motion ¶ 5 at 5. Specifically, if the Court should require DOE to respond to the merits of Aiken

County's challenges,<sup>1</sup> DOE may be inclined to avoid making certain arguments regarding the reasons for its withdrawal of the Yucca Mountain License Application because, if Aiken County should succeed on its challenges, it is possible that DOE's arguments could be used against them in the NRC proceeding. In other words, faced with the possible continuation of its License Application, DOE would be forced to "pull its punches" in explaining to this Court its motion to withdraw. Nevada is not so constrained. Moreover, only Nevada can represent its sovereign interests before this Court.

Aiken County next misconstrues the issue of harm to Nevada, claiming that Nevada seeks to litigate its harm in this proceeding. *See* Opposition at 2-3. To the extent that Aiken County's claims require a balancing of harms none of the current parties can articulate "the harm that will befall Nevada" if the requested relief is granted for the simple reason that none of them can know what harm Nevada would suffer (which is clearly relevant since Yucca Mountain is located in Nevada). Motion at ¶ 4b at 4. Nevada would show, if necessary, that any harm Aiken County may suffer if its merits arguments are not successful must be balanced against the harm Nevada may suffer if those merits arguments are

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<sup>1</sup> On March 24, 2010, the Respondents filed a Response in Opposition to the Petition, and therein requested Aiken County's Petition be summarily denied for a variety of non-merits reasons. If the Court should grant Respondents' request, none of Aiken County's merits-based arguments would be heard here, and assumedly Nevada's Motion would be denied as moot.

successful. It is also not relevant to the issue of Nevada's intervention request that this case presents "narrow issues of statutory construction." Opposition at 3. If that were sufficient to deny intervention, intervention in the vast majority of judicial review proceedings would be denied.

Contrary to the assertion of Aiken County, Nevada is **not** seeking to "inject elements relating to the technical merits of the underlying License Application" into this proceeding. Opposition at 3. Nevada has been "actively litigating numerous legal and technical contentions" **before the NRC** since May 2009. Motion ¶ 1 at 2. Nevada does not intend to argue the merits of any of its 200-plus contentions (or the issues identified therein) in this proceeding.<sup>2</sup> While Aiken County attaches to its Opposition (as Exhibit 1) a copy of an email message purportedly to support its "injection" argument, the email message was **sent from** counsel for Aiken County to counsel for Nevada and thus it is nothing more than a self-serving and inaccurate statement **made by** counsel for Aiken County to support its Opposition. Nevada disagrees with the characterization of certain statements contained in the email message and the implication that the merits of its technical contentions before the NRC will become an issue in this action if intervention is granted.

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<sup>2</sup> This absence of duplication cannot be asserted by Aiken County because it has petitioned to intervene in the pending Yucca Mountain licensing proceeding before the NRC to advocate the same positions presented to this Court. *See* Motion ¶ 3 at 3.

Finally, Aiken County raises two procedural matters that deserve a reply. First, Aiken County claims that because this Court has established a timeframe for briefing its mandamus petition the intervention request by Nevada should be denied. *See* Opposition at 3-4. Nevada was aware of this Court's briefing schedule, and therefore Nevada made clear that it would "not delay the proceedings or prejudice any party" if its intervention request were granted. Motion ¶ 6 at 5-6. Thus, Aiken County's concern regarding the timely progress of its judicial challenge is misplaced.

Second, Aiken County challenges the ability of Nevada to use its Motion as a basis to participate as an intervenor in other similar cases involving similar respondents. *See* Opposition at 4. Nevada made its request pursuant to Local Circuit Rule 15(b), *see* Motion ¶ 7 at 6; however, Nevada also filed motions for leave to intervene in those other two cases. On March 19, 2010, the U.S. Court of Appeals for the Fourth Circuit granted Nevada's motion for leave to intervene in Case No. 10-1229 (*see* Exhibit 1, attached hereto), and on March 25, 2010, the Fourth Circuit transferred that case to the D.C. Circuit (*see* Exhibit 2, attached hereto). Nevada's motion for leave to intervene in Case No. 10-1052 is still pending before this Court; however, that motion is unopposed by the Petitioners and the Respondents.

For the foregoing reasons, the arguments raised by Aiken County in its Opposition should be rejected and the intervention request set forth by Nevada in its Motion should be granted.

Respectfully submitted,

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/s/

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DATED: March 31, 2010

# Exhibit 1

FILED: March 19, 2010

UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT

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No. 10-1229  
(63-001)

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STATE OF SOUTH CAROLINA, ex rel. Henry Dargan McMaster,  
Attorney General,

Petitioner,

v.

UNITED STATES DEPARTMENT OF ENERGY; BARACK OBAMA, President  
of the United States; STEVEN CHU, Secretary of Energy, in  
his Official Capacity; NUCLEAR REGULATORY COMMISSION;  
GREGORY B. JACZKO, Chairman of the Nuclear Regulatory  
Commission, in his Official Capacity; THOMAS MOORE; PAUL  
RYERSON; RICHARD WARDWELL, United States Nuclear Regulatory  
Commission Atomic Safety and Licensing Board Judges, in  
their Official Capacity; NRC ATOMIC SAFETY AND LICENSING  
BOARD,

Respondents,

STATE OF NEVADA,

Intervenor - Respondent.

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O R D E R

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Upon consideration of the unopposed motion of the State of  
Nevada for leave to intervene as an intervenor respondent, the  
Court grants the motion.

The State of Nevada is granted leave to file a separate brief. All parties to a side shall continue to share the time allowed for oral argument as provided by the Federal Rules of Appellate Procedure.

For the Court - By Direction

/s/ Patricia S. Connor

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Clerk

## Exhibit 2

FILED: March 25, 2010

UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT

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No. 10-1229  
(63-001)

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STATE OF SOUTH CAROLINA, ex rel. Henry Dargan McMaster,  
Attorney General,

Petitioner,

v.

UNITED STATES DEPARTMENT OF ENERGY; BARACK OBAMA, President  
of the United States; STEVEN CHU, Secretary of Energy, in  
his Official Capacity; NUCLEAR REGULATORY COMMISSION;  
GREGORY B. JACZKO, Chairman of the Nuclear Regulatory  
Commission, in his Official Capacity; THOMAS MOORE; PAUL  
RYERSON; RICHARD WARDWELL, United States Nuclear Regulatory  
Commission Atomic Safety and Licensing Board Judges, in  
their Official Capacity; NRC ATOMIC SAFETY AND LICENSING  
BOARD,

Respondents,

STATE OF NEVADA,

Intervenor - Respondent.

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O R D E R

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Upon consideration of the submissions relative the  
respondents' motion to transfer this case to the United States  
Court of Appeals for the District of Columbia Circuit, the  
motion is granted, and the clerk is directed to transfer this

petition for review to the United States Court of Appeals for the District of Columbia Circuit.

Entered at the direction of Chief Judge Traxler, with the concurrence of Judge Niemeyer and Judge Agee.

For the Court

/s/ Patricia S. Connor

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Clerk

## CERTIFICATE OF SERVICE

I certify that on March 31, 2010, the Reply of the State of Nevada to Petitioner's Memorandum in Opposition to 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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/s/

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John W. Lawrence