UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
Washington, D.C. 20230

OFFICE OF THE GENERAL COUNSEL

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VIA FAX AND U.S. MAIL

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Re: Consistency Appeal of Mill River Pipeline, LLC

Dear Counsel:

This responds to the Motion of the City of Fall River for Leave to Intervene (Motion to Intervene) filed by the City of Fall River, Massachusetts (City or Fall River) concerning the above-referenced appeal. For the following reasons, the Motion to Intervene is denied.

I. Background

Mill River Pipeline, LLC (Mill River or Appellant) appealed the Commonwealth of Massachusetts' objection under the Coastal Zone Management Act, 16 U.S.C.A. §§ 1451-1466 (2007) (CZMA), on August 27, 2007. On September 6, 2007, the City filed its Motion to Intervene. Massachusetts and Mill River submitted responses on September 21 and 24, 2007, respectively.[1]

II. Fall River's and the Parties' Contentions

Fall River and the parties have raised a number of arguments concerning the Motion to Intervene.

[1] On September 28, 2007, without requesting leave to make a further submission, Fall River filed a Reply in Further Support of its Motion for Leave to Intervene. This brief was not considered as part of the analysis below pursuant to 15 C.F.R. § 930.127(e) (2007).

A. Fall River and Massachusetts' Positions

The City cites the Administrative Procedure Act, 5 U.S.C.A. § 555(b), for the standard governing its motion. The statute, in part, states:

> So far as the orderly conduct of public business permits, an interested person may appear before an agency or its responsible employees for the presentation, adjustment, or determination of an issue, request, or controversy in a proceeding, whether interlocutory, summary, or otherwise, or in connection with an agency function.

The City then raises four arguments. First, the City contends as the "host city" for the project it qualifies as an "interested person." Fall River argues it has "been the primary public participant throughout the myriad environmental review and permitting processes." Memorandum of Law in Support of the Motion of the City of Fall River for Leave to Intervene at 6.

Second, Fall River maintains one of the primary policies supporting the CZMA is to encourage the participation of local governments in coastal zone management. In this regard, the City observes municipalities have been permitted to appear in previous CZMA consistency appeals. *Id.* at 6-7.

Third, Fall River contends its involvement will not impede the orderly conduct of business because it would be willing to submit a brief at the same time as Massachusetts.

Finally, the City argues its interests in the project differ from those of Massachusetts and Mill River. While Fall River admits its "interests may overlap to some extent" with those of Massachusetts, it claims the City's interests are distinct because the City will "bear the brunt of any harm" caused. *Id.* at 7-8. The City also states it is unclear whether Massachusetts will address Fall River's public safety concerns because Massachusetts based its objection on procedural grounds. *Id.* at 8.

For its part, Massachusetts agrees that due to the proximity of the Mill River project to the City, Fall River "has a substantial and unique interest in the project." Massachusetts therefore supports the City's request for intervention.

B. Mill River's Position

In contrast, while Appellant does not dispute the City qualifies as an "interested person", Mill River objects because in its view Fall River's involvement would disrupt the orderly conduct of public business. Mill River notes that courts interpreting 5 U.S.C.A. § 555(b) have upheld denials of a party's opportunity to appear where a) another party adequately represents the would-be-intervenor's viewpoint; b) a third-party's intervention would unduly broaden the issues considered or obstruct or overburden the proceedings, or c) the intervention would not assist the agency's decisionmaking. Response of Mill River Pipeline, LLC Opposing Fall River's Motion for Leave to Intervene at 2-3.

Mill River contends all three of these reasons militate in favor of denying the Motion to Intervene. The Appellant first claims the Secretary should presume Massachusetts represents Fall River's interests under the doctrine of *parens patriae*. Mill River also maintains Fall River's appearance would run counter to NOAA's regulations, which no longer require the solicitation of public comments regarding energy project appeals. In this regard, Appellant argues allowing Fall River to participate would improperly augment the consolidated record and undercut the Secretary's ability to meet the decision deadlines established under the Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594 (2005).

Appellant also states the City's involvement would be unhelpful because Fall River has already made its views known during relevant federal and state environmental review periods. Mill River contends Fall River's comments have already been made part of the consolidated record. Finally, Appellant maintains Fall River's intervention would unduly broaden the issues considered to include public safety, an issue not cognizable under the CZMA.

III. Analysis

With respect to informal adjudications, such as the current proceeding, the Administrative Procedure Act provides "[s]o far as the orderly conduct of public business permits, an interested person may appear before an agency." 5 U.S.C.A. § 555(b).[2] The grant of the right to appear, however, is not "blindly absolute, without regard to time of appearance, the status of the proceedings, the administrative avenues established by other statutes and agency rules for participation, or . . . as 'the orderly conduct of public business permits.' " *Colorado River Water Cons. Dist. v. Morton*, 593 F.2d 907, 911 (10th Cir. 1977) (quoting *Easton Utilities Comm'n v. Atomic Energy Comm'n*, 424 F.2d 847, 852 (D.C. Cir. 1970)); *see also Akzo N.V. v. U.S. Int'l Trade Comm'n*, 808 F.2d 1471, 1484 (Fed. Cir. 1986). In deciding whether a party's appearance would disturb "the orderly conduct of public business," agencies may inquire whether "other parties to the proceeding adequately represent the would-be intervenor's viewpoint." *Nichols v. Bd. of Trustees of Asbestos Workers Local 24 Pension Plan*, 835 F.2d 881, 897 (D.C. Cir. 1987).

After considering the arguments submitted by counsel, I am not persuaded that Fall River has made a showing sufficient to justify its intervention as a party to this proceeding. In particular, Fall River fails to explain why Massachusetts cannot or will not adequately advance the same interests and concerns as would the City for those issues that are germane to this proceeding. While asserting that its interests are distinct by virtue of its status as the host city, the City makes little effort to explain how its interests differ from those of Massachusetts. Indeed, the City acknowledges that its interests "may overlap" with those of Massachusetts. Concern as to whether the State will advance the City's interests appears to be based upon conjecture, given that Massachusetts has yet to file its initial brief. Absent the City's ability to justify intervention as a party, Fall River's motion to intervene is therefore ***denied.***

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[2] In its motion, Fall River uses the terms "appear" and "intervene" interchangeably. However, the City provides no analysis or justification to support its supposition that the type of appearance contemplated by APA section 6(a), 5 U.S.C.A. § 555(b), necessitates a grant of full intervention as opposed to some other, more limited form of participation.

While Fall River's request to intervene is denied, the City is not foreclosed from seeking leave to file a brief as an *amicus curiae*. The Secretary has the discretion to allow *amicus* participation in an appeal proceeding, and, under certain circumstances, has permitted interested cities and local municipalities to participate as such. *See Decision and Findings by the U.S. Secretary of Commerce in the Consistency Appeal of Millennium Pipeline Company, L.P. from an Objection by the State of New York* (Dec. 12, 2003) (citing *amicus* brief filed by New York City); *Decision and Findings in the Consistency Appeal of Amoco Production Company from an Objection by the Division of Governmental Coordination of the State of Alaska* (July 20, 1990) (permitting North Slope Borough to submit briefs).

Because the Secretary must close the decision record in this appeal (absent a stay) on or before March 4, 2008, any motion for leave to file an *amicus* brief must occur well in advance of this date to allow sufficient time for review and a decision. A movant should provide its proposed *amicus* brief along with its motion for leave to file.[3]

Questions should be directed to Brett Grosko, NOAA Office of General Counsel for Ocean Services, at Brett.Grosko@noaa.gov.

Sincerely,

Jane C. Luxton
General Counsel

[3] Any *amicus* brief should be limited to a discussion of those facts within the consolidated record. Under the CZMA, the record used by the Secretary in deciding this appeal is the consolidated record developed by the lead federal permitting agency associated with the project. 16 U.S.C. § 1466. This record was filed by Mill River along with its Notice of Appeal. The Secretary is authorized to request supplemental information deemed necessary to rule on any appeal. 16 U.S.C. § 1465(b)(3)(A). To date, no additional information has been requested by the Secretary.