UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

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<th>ASLBP BOARD 09-877-HLW-CAB02</th>
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<td>Mark O. Barnett</td>
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In the Matter of: ) February 25, 2009
U.S. Department of Energy ) Docket No. 63-001
(High Level Waste Repository )
Construction Authorization Application )

ANSWER OF THE U.S. DEPARTMENT OF ENERGY TO THE NATIVE COMMUNITY ACTION COUNCIL’S MOTION FOR EXTENSION OF TIME

The U.S. Department of Energy (DOE or the Department) hereby files its Answer to the “Native Community Action Council’s Motion for Extension of Time” filed on February 24, 2009. (NCAC’s Renewed Motion.) On February 23, 2009, one day before the deadline for filing National Community Action Council’s (NCAC) Reply, NCAC filed its original motion for an extension of time to file its Reply. On February 24, 2009, the Atomic Safety and Licensing Boards denied NCAC’s original motion because NCAC failed to include the certification required by 10 C.F.R. § 2.323(b), that it had made a “sincere effort to contact other parties in the proceeding and resolve the issue(s) raised in the motion . . . .” February 24, 2009 Order at 1
On that same day, the day NCAC’s Reply was due, NCAC filed its Renewed Motion.

NCAC’s failure to properly consult with all the parties prior to filing its Renewed Motion requires the Boards to deny the relief requested. As noted in the Boards’ February 24, 2009 Order, 10 C.F.R. § 2.323(b) states that:

A motion must be rejected if it does not include a certification by the attorney or representative of the moving party that the movant has made a sincere effort to contact other parties in the proceeding and resolve the issue(s) raised in the motion, and that the movant’s efforts to resolve the issue(s) have been unsuccessful.

The “sincere effort” in this regulation has been interpreted to require more than a few hours advance notice. See Entergy Nuclear Vt. Yankee, L.L.C. (Vt. Yankee Nuclear Power Station), LBP-06-05, 63 NRC 116, 129-30 & 130 n.18 (2006) (stating that in the context of the “short” time period of ten days to file a motion in § 2.323(a), “it may be understandable if the ‘sincere effort’ does not occur until the last few days” but chiding “[t]he last minute timing of the telephone call, on the same day that the motion had to be filed”); see also Entergy Nuclear Operations, Inc. (Indian Point Nuclear Generating Units 2 and 3) (unpublished Order) at 6 n.6 (Feb. 29, 2008) (“the requirement established by 10 C.F.R. § 2.323(b) . . . contemplates something more than mere notification that a motion will be filed made moments before a deadline”). NCAC did not make a sincere effort to resolve the issues raised in its Renewed Motion.

Furthermore, after the Boards’ Order denying NCAC’s February 23, 2009 Motion for Extension of Time was issued, NCAC sent an e-mail to the parties and participants requesting consent to a 15 day extension of time to file its Reply. This e-mail, sent by Mr. Curtis Berkey at approximately 4:45 PM on February 24, 2009, does not constitute a “sincere effort” because it
was not sent to all individuals, parties and participants on the EIE service list. None of the attorneys with the law firm of Morgan, Lewis & Bockius LLP, who have entered an appearance in this matter on behalf of the Department and are on the EIE service list, received an e-mail from Mr. Berkey.\(^1\) Additionally, this e-mail was sent about two hours before NCAC’s Renewed Motion was filed. Morgan Lewis did not become aware of the potential Renewed Motion until it was issued on the EIE. Moreover, we have confirmed with the Office of the Secretary of the NRC that neither the attorney who sent the e-mail requesting consent of the parties, Mr. Berkey, nor his law firm, Alexander, Berkey, Williams & Weathers LLP, have made an appearance on behalf of NCAC in this proceeding.

For all these reasons, DOE objects to NCAC’s Renewed Motion for an Extension of Time filed on February 24, 2009 and the Renewed Motion should be denied.

Respectfully submitted,

Signed (electronically) by Donald J. Silverman
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Dated in Washington, DC
this 25th day of February 2009

\(^1\) DOE acknowledges that the attorneys in the DOE’s Office of the General Counsel received this e-mail. However, NCAC’s consultation remains inadequate for the reasons discussed above.
UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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CERTIFICATE OF SERVICE

I hereby certify that copies of the “ANSWER OF THE U.S. DEPARTMENT OF ENERGY TO THE NATIVE COMMUNITY ACTION COUNCIL’S MOTION FOR EXTENSION OF TIME” have been served on the following persons this 25th day of February 2009 through the Nuclear Regulatory Commission’s Electronic Information Exchange.

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