

February 26, 2009

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)	Docket No. 63-001
)	
U.S. DEPARTMENT OF ENERGY)	ASLBP Nos. 09-876-HLW-CAB-01
)	09-877-HLW-CAB-02
(High-Level Waste Repository))	09-878-HLW-CAB-03

NRC STAFF ANSWER TO EUREKA COUNTY'S MOTION FOR LEAVE TO FILE REPLY

INTRODUCTION

Pursuant to 10 C.F.R. § 2.323(c), the staff of the Nuclear Regulatory Commission (Staff) hereby files this answer in opposition to Eureka County's February 24, 2009 "Motion for Leave to File Reply to Oppositions by the U.S. Department of Energy and the NRC Staff to Admission of Contentions on Which Eureka County Intends to Participate" (Motion). As discussed below, Eureka County's Motion should be denied.

DISCUSSION

Eureka County seeks leave, as an interested governmental participant, to file a reply to general arguments in opposition to the admission of certain contentions made by DOE and the Staff. Motion at 2. Specifically, Eureka County claims that it has identified three categories of issues on which it intends to participate and would like to reply to some of DOE's and Staff's general arguments in opposition to the admission of contentions in these categories. Motion at 1-2. Eureka County contends that if the Board accepts DOE's and the Staff's positions on these broad issues, then a significant portion of the issues on which it wants to participate would not be admitted. *Id.* at 2. Further, while acknowledging that it is not a "requestor/petitioner" entitled to file a reply under § 2.309(h)(2), Eureka County argues that it would be "reasonable" under

§ 2.315(c) to allow it to advocate for the admission of the contentions in which it is interested.

Id.

However, pursuant to 10 C.F.R. § 2.323(a), Eureka's Motion is untimely because it was not filed within ten (10) days after the occurrence or circumstance from which the motion arises, *i.e.* the filing of the answer to the intervention petitions. DOE filed its answers to the intervention petitions on January 15 and 16, 2009,¹ and the Staff filed its answer on February 9, 2009.² As such, Eureka County's Motion filed on February 24, 2009 is beyond the ten-day period provided in § 2.323(a). Eureka County argues that the ten-day time period does not apply in these circumstances because the Commission has already established a time frame for filing replies to the DOE's and NRC's answers. Motion at 3 n.1. However, Appendix D to 10 C.F.R. Part 2, as modified by the Notice of Hearing, sets forth a time for *petitioners* to reply to answers. *U.S. Dep't of Energy* (High Level Waste Repository), CLI-08-25, 68 NRC ___ (Oct. 17, 2008) (slip op.

¹ "Answer of the U.S. Department of Energy to Caliente Hot Springs Resort's Petition to Intervene," filed Jan. 15, 2009; "Answer of the U.S. Department of Energy to Clark County, Nevada's Request for Hearing, Petition to Intervene and Filing of Contentions," filed Jan. 15, 2009; "Answer of the U.S. Department of Energy to a Petition for Leave to Intervene by the County of Inyo, California on an Application by the U.S. Department of Energy for Authority to Construct a Geologic High-Level Waste Repository at a Geologic Repository Operations Area at Yucca Mountain, Nevada," filed Jan. 15, 2009; "Answer of the U.S. Department of Energy to the Native Community Action Council Petition to Intervene as a Full Party," filed Jan. 15, 2009; "Answer of the U.S. Department of Energy to Nevada Counties of Churchill, Esmeralda, Lander and Mineral Petition to Intervene," filed Jan. 15, 2009; "Answer of the U.S. Department of Energy to Nye County, Nevada Petition to Intervene and Contentions," filed Jan. 15, 2009; "Answer of the U.S. Department of Energy to the Timbisha Shoshone Tribe's Petition for Leave to Intervene in the Hearing," filed Jan. 15, 2009; "Answer of the U.S. Department of Energy to the Timbisha Shoshone Yucca Mountain Oversight Program Nonprofit Corporation Petition to Intervene as a Full Party," filed Jan. 15, 2009; "Answer of the U.S. Department of Energy to White Pine County's Request for Hearing and Petition for Leave to Intervene Including Supporting Contentions on the Application by the U.S. Department of Energy for Authority to Construct a Geologic Repository at a Geologic Repository Operations Area at Yucca Mountain," filed Jan. 15, 2009; "Answer of the U.S. Department of Energy to the Nuclear Energy Institute's Petition to Intervene," filed Jan. 16, 2009; "Answer of the U.S. Department of Energy to State of California's Petition for Leave to Intervene in the Hearing," filed Jan. 16, 2009; "Answer of the U.S. Department of Energy to the State of Nevada's Petition to Intervene," filed Jan. 16, 2009.

² "NRC Staff Answer to Intervention Petitions," filed Feb. 9, 2009.

at 11).³ See also 10 C.F.R. § 2.309(h)(2). Eureka County concedes that it is not a “requester/petitioner” and acknowledges that it must seek permission from the Licensing Board to file its reply. See Motion at 2. Consequently, the Commission’s schedule for the filing of replies does not apply to Eureka County. Further, the pertinent portion of the Commission’s schedule only applies to the filing of *replies* and not to motions filed pursuant to 10 C.F.R. § 2.323. If Eureka County’s Motion had been timely filed and subsequently granted by the Licensing Board, then Eureka County’s reply would have been subject to the Commission’s schedule. Therefore, Eureka County should have filed its Motion within the ten-day time period in 10 C.F.R. § 2.323(a). Because Eureka County did not, its Motion is untimely and should be denied.

In addition, even if timely filed, the Motion should still be denied. Eureka County’s argument that it would not be able to participate on a significant portion of issues important to it, or participate in a meaningful way, if certain contentions were not admitted to the proceeding does not justify allowing it to reply to the answers of DOE and the Staff. See Motion at 2. While interested governmental participants are afforded many rights and responsibilities with respect to participation in a proceeding, they are limited to participation on admitted contentions.

Section 2.315(c) states

The representative shall be permitted to introduce evidence, interrogate witnesses where cross-examination by the parties is permitted, advise the Commission without requiring the representative to take a position with respect to the issue, file proposed findings in those proceedings where findings are permitted, and petition for review by the Commission under § 2.341 with respect to the *admitted* contentions.

³ See also “Order (Addressing Procedural Matters)” (Jan. 15, 2009) (slip op. at 2) (establishing due date for replies to answers as February 24, 2009).

10 C.F.R. § 2.315(c) (emphasis added). All of the rights listed in the rule apply after contentions have been admitted. The “reasonable opportunity to participate in a hearing” afforded to interested governmental participants includes the stages of the proceeding after contentions have been admitted. Nothing in the rules provides for interested governmental participants, such as Eureka County, to file replies. Eureka County offers no reason why, in this case, it should be granted greater participation than the regulations would normally provide to an interested governmental participant.

CONCLUSION

For the reasons set forth above, Eureka County’s Motion for Leave to File Reply to Oppositions by the U.S. Department of Energy and the NRC Staff to Admission of Contentions on Which Eureka County Intends to Participate should be denied.

Respectfully submitted,

Signed (electronically) by

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Dated at Rockville, Maryland
this 26th day of February, 2009.

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NUCLEAR REGULATORY COMMISSION

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CERTIFICATE OF SERVICE

I hereby certify that copies of the "NRC STAFF ANSWER TO EUREKA COUNTY'S MOTION FOR LEAVE TO FILE REPLY" in the above-captioned proceeding have been served on the following persons this 26th day of February, 2009, by Electronic Information Exchange.

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