

February 23, 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)	ASLPB Nos. 09-876-HLW-CAB-01
)	09-877-HLW-CAB-02
(High-Level Waste Repository))	09-878-HLW-CAB-03
)	

NRC STAFF ANSWER TO NUCLEAR ENERGY INSTITUTE'S
MOTION TO STRIKE

Pursuant to 10 C.F.R. §2.323(c), the NRC Staff (Staff) hereby files its answer to the Nuclear Energy Institute's (NEI) February 13, 2009 motion to strike.¹ (NEI Motion). The NEI Motion seeks to strike Nevada's February 9, 2009 answer² (Nevada Answer) to NEI's December 19, 2008 intervention petition³ (NEI Petition). As set forth below, the Staff agrees with NEI's position that Nevada has no right to file an answer to NEI's Petition, however, the Staff does not oppose Nevada's alternative request for permission to file such an answer.

DISCUSSION

In response to the Commission's Notice of Hearing, NEI filed its petition to intervene and contentions on December 19, 2008. See *U.S. Department of Energy* (High Level Waste Repository), CLI-08-25, 68 NRC ____, (Oct. 17, 2008) (slip op. at 7). On February 9, 2009, Nevada filed an answer which opposed NEI's intervention on the basis that NEI lacked standing and that NEI had not submitted any admissible contentions. On February 13, 2009, NEI moved to strike Nevada's answer.

¹ The Nuclear Energy Institute's Motion to Strike Nevada's Answer to the Nuclear Energy Institute's Petition to Intervene, February 13, 2009

² Answer of the State of Nevada to Nuclear Energy Institute's Petition to Intervene, February 9, 2009

³ The Nuclear Energy Institute's Petition to Intervene, December 19, 2008

The right to file answers to requests for hearing and petitions to intervene is governed by 10 C.F.R. § 2.309(h), which provides that

Unless otherwise specified by the Commission, the presiding officer, or the Atomic Safety and Licensing Board designated to rule on requests for hearings or petitions for leave to intervene--

(1) The applicant/licensee, the NRC staff, and any other party to a proceeding may file an answer to a request for a hearing, a petition to intervene and/or proffered contentions . . .

(2) . . .

(3) No other written answers or replies will be entertained. 10 C.F.R. § 2.309(h)

NEI moves to strike Nevada's Answer on the basis that "answers to intervention petitions and contentions may only be filed by 'the applicant/licensee, the NRC Staff and any other party to a proceeding.'" NEI Motion, at 1. Emphasis in the original. NEI asserts that although Nevada has "standing" pursuant to 10 C.F.R. § 2.309(d)(2)(i), Nevada is not a "party" to this proceeding, because, at this time, Nevada has no contentions admitted pursuant to 10 C.F.R. § 2.309(f)(1). Therefore, NEI asserts that since Nevada is not a party, Nevada is not entitled to file an answer to any intervention petitions and contentions. *Id.*

In its Answer, Nevada, asserted that it is a party under 10 C.F.R. § 2.1001, notwithstanding that at this time, none of Nevada's filed contentions have been admitted. Nevada Answer at 2. Therefore, Nevada believes that since it is a party, it is entitled to file an answer to NEI's Intervention petition, under 10 C.F.R. § 2.309(h). Nevada asserts that "a fair and reasonable reading of the regulations" supports its position. Nevada Answer at 2. In the alternative, Nevada requests permission to file its answer. *Id.* at 3.

Both NEI and Nevada acknowledge that answers to petitions to intervene and contentions can only be filed by parties. The dispute centers on NEI's assertion that Nevada is not a party and therefore may not file an answer, and Nevada's contrary assertion that it is a party and may file an answer. The Staff agrees with NEI that Nevada is not a party to this proceeding until at least one of its proffered contentions is found to be admissible. 10 C.F.R. § 2.1001

10 C.F.R. § 2.1001 defines party, for purposes of Subpart J, Procedures Applicable to Proceedings for the Issuance of Licenses for the Receipt of High-Level Radioactive Waste at a Geologic Repository, as “DOE, the NRC staff, the host State, any affected unit of local government. . .any affected Indian Tribe. . .and a person admitted under § 2.309 to the proceeding. . .provided that a host State, affected unit of local government, or affected Indian Tribe files a list of contentions in accordance with the provisions of § 2.309. (Emphasis added). The Staff submits that this language is unambiguous in making an admitted contention a mandatory requirement for party status.

Nevada does not cite any case law to support its argument that it is a party, even though it has no admitted contentions. Nevada relies instead on a complex grammatical analysis of the use of the present tense of the word “files” in 10 C.F.R. § 2.1001’s definition of “party,” in an effort to establish that having an admitted contention is not a prerequisite to party status.

Nevada’s position is misplaced. In addition to the plain language of 10 C.F.R. § 2.1001, quoted above, the Commission hearing notice specifically provides that “the Commission shall permit intervention by the State (of Nevada) and (the) local governmental body . . . in which the geologic repository operations area is located, . . . if the contention requirements in 10 C.F.R. 2.309(f) are satisfied with respect to at least one contention.” *High Level Waste Repository*, CLI-08-25, 68 NRC at ____ (slip op. at 7) (Emphasis added). Contrary to Nevada’s position, this statement demonstrates that admission of “at least one contention” is required to establish party status.

Further, the Commission’s Statement of Consideration, that accompanied the Final Rule that promulgated the current 10 C.F.R. § 2.309(h), states that “Section 2.309(h) allows the applicant or licensee and the NRC Staff twenty-five (25) days to file written answers to requests for hearing/petitions to intervene and contentions, and allows the petitioner to file a written reply to the applicant/licensee and staff answers within seven (7) days after service of any answer. No other written answers or replies will be entertained.” Final Rule, Changes to Adjudicatory

Process, 69 Fed. Reg. 2181, 2222 (Jan. 14, 2004) (Emphasis added). This statement further supports the position that the Commission expects that answers to petitions to intervene and contentions will only be filed by the applicant/licensee and the NRC Staff.

Finally, in *Florida Power & Light Company* (Turkey Point Nuclear Plant, Units 3 & 4) CLI-01-17, 54 NRC 3 (2001), the Commission clearly confirmed that, regardless of standing, a valid contention was required to establish party status. There the Commission held that the petitioner “seems to believe that simply because the Licensing Board found he had standing, he automatically should be allowed to intervene as a party in the proceeding. . . . To gain admission as a party, however, a petitioner must proffer a least one valid contention for litigation. *Id* at 20. See also *Carolina Power & Light Co. and North Carolina Eastern Municipal Power Agency* (Shearon Harris Nuclear Power Plant, Units 1 and 2), LBP-82-119A, 16 NRC 2069, 2070 (1982) (“A petitioner for intervention is entitled to party status if he (1) establishes standing and (2) pleads at least one valid contention.”).

Although Nevada does not have a right to file a reply to NEI’s petition, the Staff does not oppose Nevada’s alternative request for permission to file its answer.

CONCLUSION

For all of the foregoing reasons, the Staff respectfully requests the Board to find that Nevada has no right to file an answer to NEI's Intervention petition. However, the Staff does not oppose granting Nevada's request for permission to file an answer.

Respectfully submitted by,

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Dated at Rockville, Maryland
This 23rd 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 NUCLEAR ENERGY INSTITUTE'S MOTION TO STRIKE" in the above-captioned proceeding have been served on the following persons this 23rd day of February, 2009, by Electronic Information Exchange.

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