

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
BEFORE THE COMMISSION**

In the Matter of)	
)	
U.S. DEPARTMENT OF ENERGY)	Docket No. 110-06361
)	
(Export of 93.35% Enriched Uranium))	License No. XSNM3810
)	

**RESPONSE TO DOE’S MOTION TO STRIKE OR IN THE ALTERNATIVE TO DENY
CURIUM’S MOTION FOR ORDER TO SHOW CAUSE**

I. INTRODUCTION

On August 5, 2019, DOE filed an export license application to ship 4.772 kilograms of 93.35% high-enriched uranium (“HEU”) to Europe for target fabrication and irradiation in research reactors across Europe, for the benefit of the Institute for Radioelements (“IRE”) (the “Application”).¹ On November 6, 2019, Curium US LLC (“Curium”) filed a Motion for Order to Show Cause as to Why the License Application Should Not Be Terminated (the Curium “Motion”).² The U.S. Department of Energy (“DOE” or “Applicant”) in response filed a Motion to Strike or in the Alternative to Deny Curium’s Motion for Order to Show Cause (the DOE “Response”).³

DOE’s Response should be denied. First, the Response is untimely pursuant to 10 CFR 110.109. Second, Curium has standing to bring its Motion, particularly in the highly unusual circumstance in which the lead party to an NRC Application has declined to support its filing, and has instead yielded its defense to *ex parte* communications. In the alternative to granting

¹ Accession No. ML19213A204, as amended in Accession No. ML19246A247.

² Motion for Order to Show Cause as to Why the License Application Should Not Be Terminated (Nov. 6, 2019) (Accession No. ML19310E574).

³ Motion to Strike or in the Alternative to Deny Curium’s Motion for Order to Show Cause (Nov. 15, 2019) (Accession No. ML19319A988).

Curium’s Motion, the Commission should grant the unopposed petitions and schedule a hearing, a solution which DOE implied in its Response it is not opposed to.

II. DOE’S FILING IS ESSENTIALLY AN UNTIMELY RESPONSE

NRC regulations at 10 CFR 110.109 state that “[r]esponses to written motions or requests shall be filed within 5 days after service.” This is the only regulation pertaining to general motions practice in 10 CFR Part 110. DOE even calls attention to this regulation as an authority for motions practice under Part 110.⁴ The NRC has regulations governing motions practice in 10 CFR Part 2, at 10 CFR 2.323, which allows for 10 days for answers. However, as DOE reiterates on page 2 of its Response, pursuant to 10 CFR 110.80, “[t]he procedures in this part [i.e., 10 CFR Part 110] will constitute the *exclusive* basis for hearings on export and import license applications.”⁵ The procedures in 10 CFR Part 110 overwrite a number of aspects of 10 CFR Part 2, such as the requirements for contention admissibility. Where Part 110 is silent (such as on *ex parte* communications), the procedures of 10 CFR Part 2 prove useful. However, where there is a conflict between the two sets of hearing procedures, 10 CFR 110.80 makes an unequivocal statement that the procedures in 10 CFR Part 110 should prevail.

DOE’s Response should therefore be judged under the rules it chooses to emphasize. Curium’s Motion was filed on November 6, 2019. DOE’s Response was filed on November 15, 2019, nine days later. DOE’s filing is in all major respects a response to Curium’s Motion for Order to Show Cause, as it addresses the Motion both on substantive and procedural (standing) grounds—and DOE cannot circumvent the NRC’s timing restriction by re-characterizing its response opposing Curium’s Motion as a new motion. DOE’s move to strike Curium’s motion is

⁴ DOE Response at 2.

⁵ 10 CFR 110.80; DOE Response at 2 (emphasis in original).

a follow-on appendage to DOE's underlying Response and related arguments.⁶ Therefore, pursuant to 10 CFR 110.109, DOE's filing should be rejected outright as untimely.⁷

III. CURIUM MAY BRING A MOTION FOR ORDER TO SHOW CAUSE IN HIGHLY UNUSUAL CIRCUMSTANCES

DOE argues that only admitted parties to a hearing can bring or respond to motions, under 10 CFR 2.323 or 10 CFR 110.109. This reading of the regulations ignores NRC motions practice that at times permits persons who have petitioned to intervene and requested a hearing, but have not yet been admitted to a proceeding, to file and respond to motions, for example as to hearing rules, timing, or other procedural matters.⁸ DOE's very hardline reading of the rules would encumber basic functioning of the NRC administrative litigation process.

More importantly, however, Curium's Motion is justified given the unique circumstances of this proceeding. Curium acknowledges that its Motion is an unusual one. At the same time, however, rarely has an applicant intentionally chosen not to defend its application in response to multiple petitions to intervene—something that actually goes beyond the examples cited in Curium's Motion. And DOE should not reap the benefits of its inaction by having any disputes in the record construed in its favor. In the examples cited in Curium's Motion, the parties subject to the Order to Show Cause were at some point in time duly participating in the

⁶ For example, DOE states on page 2 of its Response that the Motion for Order to Show Cause “should be stricken because Curium does not have standing to file such a motion,” and then proceeds to provide arguments answering Curium's Motion on procedural matters (emphasis added). DOE likewise states on page 3 that Curium's Motion “should be stricken or in the alternative be denied because it is without merit,” then proceeds to substantively respond to Curium's Motion (emphasis added).

⁷ Although NRC regulations indicate that 10 CFR 110.109 applies to motions practice under Part 110, Curium nonetheless complied with the consultation requirements of 10 CFR 2.323(b) in its Motion as a matter of good litigation practice.

⁸ See, e.g., *Tennessee Valley Auth.*, Docket No. 02-796-01-OLA, 2002 WL 264539, at *4 (Feb. 7, 2002) (a licensing board setting rules on motions practice, applying to all persons including petitioners, before granting petitions to intervene); *Dominion Nuclear N. Anna, LLC*, CLI-04-8, 59 NRC 113, 118 (Mar. 2, 2004) (In this example, not only did non-admitted parties respond to a motion without objection from the Commission, the Commission stated that it would consider the “motion of a party or potential party to a hearing” as to the use of certain hearing procedures. (emphasis added)).

proceeding. Yet here DOE has never engaged substantively as to the petitions. In its Response, DOE does not even argue that it was unaware of the petitions to intervene, or that it could not fund a defense. Instead, to this day it simply has chosen not to address them, ignoring the important role the hearing process plays in the NRC licensing framework.⁹

Stepping back, DOE in its Response seems to want to rely on IRE and its analyses to lead the defense of the Application, for example citing to IRE source information in its Response¹⁰ with no evidence provided that the agency conducted its own independent review. The fact that DOE heavily leans on IRE, explicitly in its Application and implicitly in its Response, an entity which tried to influence the proceeding through *ex parte* communications, itself raises the issue of whether the NRC should require DOE to “show cause why its claim or interest in the proceeding should not be dismissed, denied, disregarded, or otherwise adversely affected,” under 10 CFR 2.347(d).

IV. DOE APPEARS UNOPPOSED TO A HEARING

As stated in its Motion (page 1), Curium believes that a hearing is the best opportunity for the NRC to fully understand the complex implications of DOE’s Application. While DOE may be opposed to an NRC order to show cause as to why its application should not be terminated, on the contrary *it seems unopposed to a hearing*. Not only did DOE not respond to the petitions to intervene—viewed in the best light as ‘taking no position’ on the filings—DOE invites in its Response “further orders of the Commission as to how the Commission proposes to proceed with its review of DOE/NNSA’s license application.”¹¹ Moreover, DOE has stated that in relation to the petitions it “stands ready to provide such information” as may be required.¹²

⁹ See Curium Motion at 5.

¹⁰ DOE Response at 4-5.

¹¹ *Id.* at 3-4.

¹² *Id.* at 5.

Curium agrees that motions practice about motions practice is not an efficient use of NRC resources. The best approach, and the one that best serves the public interest and will lead to the most informed decision by the Commission, is simply to grant a hearing on the Application.

V. CONCLUSION

For the reasons stated above, Curium respectfully requests that the Commission deny DOE's Response. Curium reaffirms that the Commission should grant Curium's Motion, or in the alternative, admit the unopposed petitions to intervene in this proceeding.

Respectfully Submitted,

/S/ Signed (electronically) by Amy C. Roma

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CERTIFICATE OF SERVICE

I hereby certify that on November 20, 2019 copies of the above **Response to DOE's Motion to Strike or in the Alternative to Deny Curium's Motion for Order to Show Cause** have been served through the U.S. Nuclear Regulatory Commission E-Filing system on the participants of the above-captioned proceeding. Pursuant to 10 C.F.R. § 110.89(b) and the Memorandum of Russell E. Chazell, NRC Assistant for Rulemaking and Adjudications, to the parties in this proceeding, dated September 23, 2019, I further certify that a copy was served by email to the Executive Secretary, Department of State, at kennald@state.gov.

Respectfully Submitted,

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Dated in Washington, D.C.
November 20, 2019