

## § 1023.300

## 10 CFR Ch. X (1–1–11 Edition)

### DISMISSALS

Rule 29 *Dismissal Without Prejudice.* In certain cases, appeals docketed before the Board are required to be placed in a suspense status and the Board is unable to proceed with disposition thereof for reasons not within the control of the Board. Where the suspension has continued, or may continue, for an inordinate length of time, the Board may, in its discretion, dismiss such appeals from its docket without prejudice to their restoration when the cause of suspension has been removed. Unless either party or the Board acts within three years to reinstate any appeal dismissed without prejudice, the dismissal shall be deemed with prejudice.

Rule 30 *Dismissal for Failure to Prosecute.* Whenever a record discloses the failure of any party to file documents required by these rules, respond to notices or correspondence from the Board or otherwise indicates an intention not to continue the prosecution or defense of an appeal, the Board may issue an order requiring the offending party to show cause why the appeal should not be dismissed or granted, as appropriate. If no cause, the Board may take such action as it deems reasonable and proper.

### SANCTIONS

Rule 31 *Failure to Obey Board Order.* If any party fails or refuses to obey an order issued by the Board, the Board may issue such orders as it considers necessary to the just and expeditious conduct of the appeal, including dismissal with prejudice.

[44 FR 64270, Nov. 6, 1979. Redesignated at 62 FR 24808, May 7, 1997]

## Subpart B [Reserved]

## Subpart C—Procedures Relating to Awards Under the Equal Access to Justice Act

AUTHORITY: Sec. 644, Title VI, Pub. L. 95–91, 91 Stat. 599; 5 U.S.C. 504.

SOURCE: 57 FR 53542, Nov. 12, 1992, unless otherwise noted.

### GENERAL PROVISIONS

#### § 1023.300 Definitions.

For purposes of these procedures:

*Agency Counsel* means the attorney representing the Department or other agency in a proceeding under this subpart.

*Board* means the Department of Energy Board of Contract Appeals.

*Covered Proceeding* means an underlying proceeding as specified by paragraph (a) of § 1023.303.

*Days* means calendar days.

#### § 1023.301 Purpose of these rules.

The Equal Access to Justice Act, 5 U.S.C. 504 (called “the Act” in this subpart), provides for the award of attorney fees and other expenses to eligible individuals and entities who are parties to covered proceedings. An eligible party may receive an award when it prevails over an agency, unless the agency’s position was substantially justified or special circumstances make an award unjust. These procedures describe the parties eligible for awards and covered Board proceedings. They also explain how to apply for awards and the procedures and standards that the Board will use to make them.

#### § 1023.302 When the Act applies.

The Act applies to any covered proceeding pending or commenced before the Board on or after August 5, 1985. It also applies to any such proceeding commenced before the Board on or after October 1, 1984, and finally disposed of before August 5, 1985, provided that an application for fees and expenses, as described in § 1023.310 of this subpart, has been filed with the Board within 30 days after August 5, 1985, and to any such proceeding pending on or commenced on or after October 1, 1981, in which an application for fees and other expenses was timely filed and was dismissed for lack of jurisdiction.

#### § 1023.303 Proceedings covered.

(a) The Act applies to appeals from decisions of contracting officers made pursuant to section 6 of the Contract Disputes Act of 1978 (41 U.S.C. 605) to the Board as provided in section 8 of that Act (41 U.S.C. 607).

(b) If a proceeding includes both matters covered by the Act and matters specifically excluded from coverage, any award made will include only fees and expenses related to covered issues.

#### § 1023.304 Eligibility of applicants.

(a) To be eligible for an award of attorney fees and other expenses under the Act, the applicant must be a party

## Department of Energy

## § 1023.306

to the covered proceeding for which it seeks an award. The term “party” is defined in 5 U.S.C. 551(3). The applicant must show that it meets all conditions of eligibility set out in this subpart.

(b) The types of eligible applicants are as follows:

(1) An individual with a net worth of not more than \$2 million;

(2) The sole owner of an unincorporated business who has a net worth of not more than \$7 million, including both personal and business interests, and not more than 500 employees;

(3) A charitable or other tax-exempt organization described in section 501(c)(3) of the Internal Revenue Code (26 U.S.C. 501(c)(3)) with not more than 500 employees;

(4) A cooperative association as defined in 15(a) of the Agricultural Marketing Act (12 U.S.C. 1141j(a)) with not more than 500 employees; and

(5) Any other partnership, corporation, association, unit of local government, or organization with a net worth of not more than \$7 million and not more than 500 employees.

(c) For the purpose of eligibility, the net worth and number of employees of an applicant shall be determined as of the date the applicant filed its appeal under 41 U.S.C. 606.

(d) An applicant who owns an unincorporated business will be considered as an “individual” rather than a “sole owner of an unincorporated business” if the issues on which the applicant prevails are related primarily to personal interests rather than to business interests.

(e) The employees of an applicant include all persons who regularly perform services for remuneration for the applicant, under the applicant’s direction and control. Part-time employees shall be included on a proportional basis.

(f) The net worth and number of employees of the applicant and all of its affiliates shall be aggregated to determine eligibility. Any individual, corporation or other entity that directly or indirectly controls or owns a majority of the voting shares or other interests of the applicant, or any corporation or other entity of which the applicant directly or indirectly owns or controls a majority of the voting shares or

other interest, will be considered an affiliate for purposes of this part, unless the Board determines that such treatment would be unjust and contrary to the purposes of the Act in light of the actual relationship between the affiliated entities. In addition, the Board may determine that financial relationships of the applicant, other than those described in this paragraph, constitute special circumstances that would make an award unjust.

(g) An applicant that participates in a proceeding primarily on behalf of one or more other persons or entities that would be ineligible is not itself eligible for an award.

### § 1023.305 Standards for awards.

(a) A prevailing applicant may receive an award for fees and expenses incurred in connection with a proceeding or in a significant and discrete substantive portion of the proceeding, unless the position of the agency over which the applicant has prevailed was substantially justified. The position of the agency includes, in addition to the position taken by the agency in the covered proceeding, the action or failure to act by the agency upon which the covered proceeding is based. The burden of proof that an award should not be made to an eligible prevailing applicant because the agency’s position was substantially justified is on the agency counsel.

(b) An award will be reduced or denied if the applicant has unduly or unreasonably protracted the proceeding or if special circumstances make the award sought unjust.

### § 1023.306 Allowable fees and expenses.

(a) Awards will be based on rates customarily charged by persons engaged in the business of acting as attorneys or expert witnesses even if the services were made available without charge or at a reduced rate to the applicant.

(b) No award for the fee of an attorney under these rules may exceed \$75 per hour. No award to compensate an expert witness may exceed the highest rate at which the respondent agency or agencies pay expert witnesses. However, an award may also include the reasonable expenses of the attorney or