

February 8, 2008

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	
	)	
CROW BUTTE RESOURCES, INC.	)	Docket No. 40-8943
In-Situ Leach Facility, Crawford, Nebraska	)	
	)	ASLBP No. 07-859-03-MLA-BD01
(License Amendment for the North Trend	)	
Expansion Project)	)	

NRC STAFF'S RESPONSE TO PETITIONERS' EXHIBITS A AND B

INTRODUCTION

Pursuant to the Board's January 24, 2008 Order,<sup>1</sup> the NRC Staff ("Staff") submits this response to Exhibits A and B offered by Petitioners Debra White Plume, Thomas Cook, Owe Aku/Bring Back the Way ("Owe Aku"), Slim Buttes Agricultural Development Corporation ("SBADC") and Western Nebraska Resources Council ("WNRC") ("Petitioners") at the January 16, 2008 pre-hearing conference in Chadron, Nebraska. For the reasons explained below, the Staff opposes Exhibits A and B as support for Petitioners' standing because the documents are untimely and are insufficient to support a finding of injury in fact to establish standing. Furthermore, neither Exhibit A nor Exhibit B meets the requirements for amended contentions in 10 C.F.R. § 2.309(f)(2) or for late-filed contentions in § 2.309(c). Finally, even if Petitioners satisfied the requirements for amended or late-filed contentions, Exhibits A and B do not meet the general contention admissibility requirements of 10 C.F.R. § 2.309(f)(1). Therefore, the

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<sup>1</sup> Order (Confirming Matters Addressed at January 23 Teleconference) (Jan. 24, 2008) at 2.

Staff respectfully requests that the Board reject Exhibits A and B as supplemental support for standing and for Contentions A and B.

### BACKGROUND

On May 30, 2007, Crow Butte Resources (“CBR” or “Applicant”) requested an amendment to its existing operating license that would allow the development of a satellite in-situ leach (ISL) uranium recovery facility, the “North Trend Expansion Area” or “North Trend,” near its existing ISL operation in Crawford, Nebraska.<sup>2</sup> On November 12, 2007, NRC received timely petitions from Debra White Plume, Thomas Cook, Owe Aku, SBADC, and WNRC. On December 7, 2007, the Staff filed a response to the petitions (“NRC Staff Response”), and on December 28, 2007, pursuant to the Board’s December 20, 2007 Order, two replies were filed: one on behalf of Thomas Cook, SBADC, and WNRC (“Cook Reply”), and the other on behalf of Debra White Plume and Owe Aku (“Owe Aku Reply”).<sup>3</sup>

On January 16, 2008, the Board heard oral argument on standing and contention admissibility in Chadron, Nebraska. At the hearing, counsel for Petitioners offered two documents (Exhibits A and B) in support of Petitioners’ standing and as additional bases for Contentions A and B. Transcript of January 16 Hearing (“HT”) at 65, 87. Exhibit A is an e-mail from Dr. Hannan Lagarry of Chadron State College containing four paragraphs that discuss the subsurface geology of western Nebraska. Exhibit B consists of two documents: a two-page

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<sup>2</sup> Letter from Stephen P. Collings to Charles L. Miller dated May 30, 2007 (ADAMS ML0715500570).

<sup>3</sup> The Cook Reply also included supplemental affidavits concerning representational standing filed pursuant to the Board’s December 20, 2007 Order. The staff responded to these supplemental affidavits on January 4, 2008. Pursuant to the Board’s order granting an extension of time, Owe Aku provided three supplemental affidavits on January 10, 2008. The Staff and Applicant responded to those affidavits at the January 16 pre-hearing conference.

cover letter, dated November 8, 2007, from the Nebraska Department of Environmental Quality (“NDEQ”) to the Applicant regarding the Applicant’s petition to NDEQ for an aquifer exemption for the North Trend Expansion Area (“NDEQ Letter”), and an eighteen-page enclosure containing NDEQ technical review comments on the Applicant’s aquifer exemption petition (“NDEQ Technical Review”). At the January 16, 2008 pre-hearing conference, counsel for Petitioners stated that they had received these exhibits on January 15, 2008. HT at 89.

The Staff and Applicant objected to these exhibits and requested an opportunity to respond after the pre-hearing conference. *Id.* at 68, 91. After a teleconference on January 23, 2008, the Board issued an order directing the Staff and Applicant to file responses to the new exhibits, “including addressing whether the exhibits in question, insofar as they were provided in support of Petitioners’ Contentions A and B, meet the requirements for newly-filed and/or late-filed contentions and amendments to contentions set forth at 10 C.F.R. §§ 2.309(f)(2) and/or 2.309(c); and, insofar as the exhibits were provided in support of standing, whether they were timely under relevant law on standing.” Order (Confirming Matters Addressed at January 23 Teleconference) (Jan. 24, 2008) at 2.

## DISCUSSION

### I. Standing

#### A. Legal Standards for consideration of late-filed information pertaining to standing

Under the Commission’s regulations, “[n]ontimely requests and/or petitions and contentions” will not be entertained unless they meet the requirements of 10 C.F.R. § 2.309(c). These provisions apply to submissions in support of standing, which are part of a request for a hearing or petition for intervention. See 10 C.F.R. § 2.309(d) (listing the information concerning standing that must be included in a request for hearing or petition for leave to intervene).

After the 2004 revisions to 10 C.F.R. Part 2, amendment of petitions as a matter of right was no longer permitted.<sup>4</sup> See *Carolina Power & Light Co.* (Shearon Harris Nuclear Power Plant, Unit 1), LBP-07-11, 66 NRC 41, 56 n.45.<sup>5</sup> The Commission, however, retained the nontimely filing requirements. 10 C.F.R. § 2.309(c) (formerly 10 C.F.R. § 2.714(a)(1)). Thus, amendments to petitions, including amendments in support of standing, should be allowed only after balancing the factors delineated in § 2.309(c).<sup>6</sup>

Commission case law does recognize, however, that procedural requirements should not be applied inflexibly to preclude participation in NRC proceedings. See *Shearon Harris*, LBP-07-11, 66 NRC at 54, n.34 (quoting *Virginia Electric and Power Co.* (North Anna Power Station, Units 1 and 2), ALAB-146, 6 AEC 631, 633-34 (1973)). Thus, Boards have allowed petitioners to cure technical defects with respect to standing, such as failure to properly assert representational standing and deficiencies in affidavits. See *Shearon Harris*, LBP-07-11, 66 NRC at 55 (accepting affidavits for representational standing despite lack of the word “authorize”); *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), LBP-91-1,

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<sup>4</sup> Under former § 2.714(a)(3), a petitioner who filed a timely original petition had the right to amend his petition to address standing deficiencies without prior approval of the presiding officer at any time up to 15 days before the first prehearing conference or, if a prehearing conference was not going to be held, at a date established by the Board. See, e.g., *Tennessee Valley Authority* (Sequoyah Nuclear Plant, Units 1 & 2; Watts Bar Nuclear Plant, Unit 1), Nos. 50-327-OLA, 50-328-OLA, 50-390-OLA, 2002 WL 264539, at \*1 (LBP Feb. 7, 2002) (unpublished Memorandum and Order). After this deadline, a petition could be amended only if the nontimely filing requirements of former § 2.714(a)(1) (now § 2.309(c)) were met. See 10 C.F.R. §§ 2.714(a)(3), (a)(1)(i)-(v) (2004).

<sup>5</sup> This decision is in Volume 66, No. 2 of the NRC Issuances on page 41. However, the “cite as” reference for the case incorrectly refers to 65 NRC 41, not 66 NRC 41, as the citation. Thus, in Westlaw, the case appears at the citation 65 NRC 41.

<sup>6</sup> However, the rules permit petitioners to move for an extension of time for filing a petition. See 10 C.F.R. § 2.323; *Louisiana Energy Services, L.P.* (National Enrichment Facility), CLI-04-35, 60 NRC 619, 623 (2004). Also, once a petition has been filed, petitioners may seek leave to amend their petition. The Staff notes that Petitioners in this proceeding did not make such a request prior to the pre-hearing conference.

33 NRC 15, 29, 40 (1991) (allowing organizational petitioners to cure defects in asserting representational standing).

B. Exhibits A and B should not be considered in support of standing

Petitioners seek to use Exhibits A and B to bolster their showing of injury in fact, particularly that there is a plausible chain of causation between the requested action (granting of the license amendment) and their alleged injury (groundwater contamination). HT at 99. Although Petitioners argue that they were only able to obtain these exhibits within days of the hearing, *id.* at 89, 92, the information in these exhibits that Petitioners point to in support of standing was available well before the original filing deadline. Exhibit A consists of summaries of studies that were all published prior to 1999 and reference to a groundwater management plan that has been in effect since September, 2006.<sup>7</sup> While Exhibit B was unavailable at the time of the original petition, it was available two weeks later, and well before the filing deadline for Petitioners' replies. Furthermore, the Petitioners cite the *studies* mentioned in Exhibit B as support of their standing. HT at 99. Failure to provide information from studies, such as those referenced in Exhibits A and B, is not the kind of technical defect that Boards have traditionally allowed to be cured. See *Shearon Harris*, LBP-07-11, 66 NRC at 55, *Shoreham*, LBP-91-1, 33 NRC at 29, 40.

The Commission recently held that a petitioner could not make vague assertions of standing in an initial petition and then use a petition for reconsideration to provide more specific information that was available at the time of initial filing. *Consumers Energy Co.* (Big Rock Point ISFSI), CLI-07-21, 65 NRC 519, 522 (2007). While the instant case does not involve a petition

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<sup>7</sup> The Upper Niobrara/White Natural Resources District web site indicates that the groundwater management plan referred to in Exhibit A became effective in September, 2006. See <http://www.unwnrd.org/waterupdates.htm>.

for reconsideration, the situation is analogous. The standard for granting a petition for reconsideration requires, among other things, that the “petitioners’ argument must be new and petitioners must not previously have been able to make that argument.” *Id.* Because all of the studies mentioned in Exhibits A and B were published well before the original hearing deadline, Petitioners cannot claim that the information was not previously available. Therefore, the information in Exhibits A and B that was available prior to the original filing should not be considered by the Board for standing purposes.

C. The information in Exhibits A and B does not support a finding of an injury in fact that is fairly traceable to the proposed amendment.

Even if the Board decides to consider Exhibits A and B as support for standing, the information in these exhibits does not strengthen Petitioners’ showing of injury in fact. Standing requires a “realistic threat ... of direct injury.” The injury must be “concrete and particularized,” not “conjectural” or “hypothetical.” *Sequoyah Fuels Corp. & Gen. Atomics* (Gore, Oklahoma Site), CLI-94-12, 40 NRC 64, 72 (1994). A petitioner must establish a causal nexus between the alleged injury and the challenged action. *Commonwealth Edison Co.* (Zion Nuclear Power Station, Units 1 & 2), LBP-98-27, 48 NRC 271, 276 (1998), *aff’d*, CLI-99-4, 49 NRC 185 (1999). In a materials license amendment proceeding, the Petitioner must show that the amendment will cause a “distinct new harm or threat’ apart from the activities already licensed,” and a “plausible chain of causation” linking the amendment with the distinct new harm or threat. *Int’l Uranium (USA) Corp.* (White Mesa Uranium Mill), CLI-01-21, 54 NRC 247, 251 (2001); *Commonwealth Edison Co.* (Zion Nuclear Power Station, Units 1 and 2), CLI-99-4, 49 NRC 185, 192 (1999).

Here, Petitioners suggest that the studies cited in Exhibits A and B show intermixing of aquifers and “feel this raises a plausible connection between drinking supplies of our clients and Owe Aku even if they are outside the immediate area.” HT at 99. The additional information in Exhibits A and B does not, however, show such a connection. Contrary to Petitioners’

arguments, Exhibit A merely makes several general, regionally-based statements about the subsurface geology of western Nebraska without outlining plausible pathways by which the Petitioners would suffer concrete and particularized injury from operations at the North Trend site. For instance, the first statement asserts that because the Basal Chadron is part of the Chamberlain Pass Formation, the “ability to predict where water in the Basal Chadron is and where it is going is not as good as we thought.” Ex. A at ¶ 1.<sup>8</sup> This statement is a general assertion that is not specific to the North Trend site or even to the immediate area. In contrast, the Applicant’s technical report provides site-specific geological information and aquifer testing results for the North Trend area that contradict the statement. See Technical Report (“TR”) at §§ 2.6 and 2.7. Therefore, the first statement does not support a finding of a concrete, particularized injury in fact to these Petitioners or a plausible chain of causation connecting such an injury with the license amendment.

The other statements in Exhibit A suffer from the same defect. For example, the second statement is an observation that groundwater generally flows southeastward from Crawford in the Chamberlain Pass formation, and that groundwater flow in western Nebraska follows this trend. Ex. A. at ¶ 2. Petitioners have not explained how this supports their standing. The statements that discuss fracturing and faulting of the High Plains Aquifer in some areas, and connections between the High Plains Aquifer and the Chamberlain Pass formation, Ex. A at ¶ 3, are not only general observations but are irrelevant because the High Plains Aquifer does not exist at or near the North Trend site, These statements merely indicate that fracturing and connections occur at some unidentified locations within the High Plains Aquifer, or within the

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<sup>8</sup> Citations to Exhibit A are made to the four numbered paragraphs (the “four main points”) in the e-mail.

Pine Ridge escarpment<sup>9</sup> that covers parts of three Nebraska counties. Similarly, the statements concerning surface spills south of the Pine Ridge being transmitted through porous sandstones of the Ogallala and Arikaree groups directly into the High Plains Aquifer, Ex. A ¶ 4, are again general statements about regional geology insufficient to support Petitioners' standing.

Exhibit A suggests that the Pine Ridge is a large feature, encompassing parts of three counties in Nebraska, Ex. A at ¶ 3, but the Petitioners have not provided any indication of the location of the North Trend relative to this feature. More importantly, the Applicant's technical report indicates that neither the Ogallala nor the Arikaree groups exist at the North Trend site, thus there is no possibility of transmitting spills. TR at § 2.6. Therefore, none of these statements supports a finding of a concrete and particularized injury to these Petitioners, or a plausible chain of causation indicating that an injury is fairly traceable to the license amendment.

The statements in Exhibit A based on the Upper Niobrara/White Natural Resources District ("UNWNRD") Groundwater Management Plan ("GMP"), Ex. A at ¶ 3, also fail to support standing.<sup>10</sup> While the GMP does recognize "[p]otential problems of contamination of usable aquifers from the activities of in-situ uranium mining exist in the Crawford area," it later states in the same paragraph that "[g]round water monitoring data ... from the area indicates that to date, there is no indication of any problem resulting from mining activities." GMP at § 7.5. The GMP also discusses "potential" problems related to water level declines and an increased probability

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<sup>9</sup> The Staff assumes that the references to "the Pine Ridge" in Exhibit A is to the Pine Ridge escarpment. See Ex. A at ¶¶ 3-4.

<sup>10</sup> Section 7 of the GMP, cited in Exhibit A, is available at <http://www.unwnrd.org/Water%20Dept/Chapter%207.0-Crit.%20Areas%20Jan%202006.pdf>. The Staff notes that some of the statements in Exhibit A mischaracterize the actual content of the GMP. For example, Exhibit A states that "the fault zones are considered areas of critical concern by UNWNRD," but neither this statement, nor the term "fault zone," appears anywhere in the cited section. See GMP at § 7. Also, the GMP does not state that "planned use of the fault zones for residential, municipal, agricultural use increases likelihood of drawing up contaminated water from below." *Id.*

of pulling up inferior quality water as wells are deepened; however, this discussion applies to the entire four-county region<sup>11</sup> served by UNWNRD and there is no indication that such declines or quality issues are occurring or will occur at or near the North Trend site. *Id.* at § 7.6. At most, then, the GMP points to speculative, “potential” problems and does not support a concrete and particularized injury that is fairly traceable to the North Trend expansion. Therefore, this statement, like the others in Exhibit A, does not support a finding of injury or a plausible chain of causation making an injury fairly traceable to the license amendment.

With respect to Exhibit B, Petitioners have not identified specific portions that support their standing except to argue that, with respect to standing, the document points to studies that have been done that show intermixing. HT at 92. However, the studies referenced in Exhibit B focus on the stratigraphy of western Nebraska. See NDEQ Technical Review at 2-4, 6, 8, 10. Although faults are discussed in some of these references, see *id.* at 8, 10, there is no indication that these faults are present anywhere near the proposed site. Also, those portions of Exhibit B that identify and address deficiencies in the Applicant’s aquifer exemption petition with NDEQ, which is completely unrelated to this NRC proceeding, do not support standing.<sup>12</sup> Thus, for the reasons stated above, Exhibits A and B do not support a finding of injury in fact fairly traceable to the proposed expansion.

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<sup>11</sup> UNWNRD serves Box Butte, Sheridan, Dawes Counties and most of Sioux County. See <http://www.unwnrd.org/aboutus.htm>.

<sup>12</sup> As discussed in greater detail in Section II.D *infra*, the NDEQ technical review of the aquifer exemption petition is irrelevant to this proceeding. Because the NDEQ aquifer exemption petition is a different document than the NRC license amendment application, information that was provided in the NRC application may be absent in the NDEQ petition. Also, the NDEQ aquifer exemption process is independent of NRC’s licensing process; therefore, NDEQ’s requirements for granting an aquifer exemption may be significantly different than NRC’s requirements for granting a source material license or amendment.

II. Admissibility of Exhibits A and B as Amended Contentions

A. Legal Standards

In NRC adjudicatory proceedings, a new or amended contention filed after the original petition deadline must meet the requirements of 10 C.F.R. §§ 2.309(f)(2) and (c).<sup>13</sup> See *Consumers Energy Company, Nuclear Management Company, LLC, Entergy Nuclear Palisades, LLC, and Entergy Nuclear Operations, Inc.* (Palisades Nuclear Power Plant), CLI-07-18, 65 NRC 399, 413 n.46 (2007); *Louisiana Energy Services, L.P.* (National Enrichment Facility), CLI-04-35, 60 NRC 619, 625 (2004). Under § 2.309(f)(2), a contention filed after the initial filing period may be admitted with leave of the presiding officer only upon a showing that:

- (i) the information upon which the amended or new contention is based was not previously available;
- (ii) the information upon which the amended or new contention is based is materially different than information previously available; and
- (iii) the amended or new contention has been submitted in a timely fashion based on the availability of the subsequent information.

10 C.F.R. § 2.309(f)(2).<sup>14</sup>

Nontimely filings may only be entertained following a determination by the presiding officer that a balance of the following eight factors, all of which must be addressed in the petitioner's filing, weighs in favor of admission:

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<sup>13</sup> The Staff notes that several licensing boards have concluded that when new or amended contentions are found to be meet the requirements of 10 C.F.R. § 2.309(f)(2), petitioners should not be required to address the late-filing requirements of 10 C.F.R. § 2.309(c). See, e.g., *Entergy Nuclear Vermont Yankee LLC* (Vermont Yankee Nuclear Power Station), LBP-06-14, 63 NRC 391, 395-96 and n.3 (2006). However, the Commission has indicated that because any contention filed after the initial petition deadline is late-filed, the factors in 10 C.F.R. § 2.309(c) and (f)(2) should be addressed. See, e.g., *Louisiana Energy Services, L.P.* (National Enrichment Facility), CLI-04-35, 60 NRC 619, 625 (2004). In the instant case, because Petitioners have not satisfied either requirement, the distinction is immaterial.

<sup>14</sup> The criteria in § 2.309(f)(2)(i)-(iii) apply when a contention submitted after the initial filing deadlines is not based on new information in Staff environmental documents. 10 C.F.R. § 2.309(f)(2).

- (i) Good cause, if any, for the failure to file on time;
- (ii) The nature of the requestor's/petitioner's right under the Act to be made a party to the proceeding;
- (iii) The nature and extent of the requestor's/petitioner's property, financial or other interest in the proceeding;
- (iv) The possible effect of any order that may be entered in the proceeding on the requestor's/petitioner's interest;
- (v) The availability of other means whereby the requestor's/petitioner's interest will be protected;
- (vi) The extent to which the requestor's/petitioner's interests will be represented by existing parties;
- (vii) The extent to which the requestor's/petitioner's participation will broaden the issues or delay the proceeding; and
- (viii) The extent to which the requestor's/petitioner's participation may reasonably be expected to assist in developing a sound record.

10 C.F.R. § 2.309(c).

Petitioners seeking admission of a late-filed contention bear the burden of showing that a balancing of these factors weighs in favor of admittance. *Baltimore Gas & Electric Co.* (Calvert Cliffs Nuclear Power Plant, Units 1 & 2), CLI-98-25, 48 NRC 325, 347 (1998) (noting that the Commission has summarily dismissed petitioners who failed to address the factors for a late-filed petition). The first factor, whether good cause exists for the failure to file on time, is entitled to the most weight. *State of New Jersey* (Department of Law and Public Safety), CLI-93-25, 38 NRC 289, 296 (1993). Where no showing of good cause for the lateness is tendered, "petitioner's demonstration on the other factors must be particularly strong." *Texas Utilities Electric Co.* (Comanche Peak Steam Electric Station, Units 1 & 2), CLI-92-12, 36 NRC 62, 73 (1992) (quoting *Duke Power Co.* (Perkins Nuclear Station, Units 1, 2 & 3), ALAB-431, 6 NRC

460, 462 (1977)).<sup>15</sup> In evaluating the factors in the absence of good cause, factors five and six, the availability of other means to protect the petitioner's interest and the ability of other parties to represent the petitioner's interest, are to be given less weight than factors seven (broadening issue or delaying the proceeding) and eight (assisting in developing a sound record). *Private Fuel Storage, LLC* (ISFSI), LBP-01-13, 53 NRC 319, 324 (2001).

Finally, in addition to fulfilling the requirements of 10 C.F.R. § 2.309(f)(2) and § 2.309(c), a petitioner must show that the contention meets the contention admissibility requirements of 10 C.F.R. § 2.309(f)(1). For each contention, the petitioner must provide: (1) a specific statement of the issue of law or fact to be raised; (2) a brief explanation of the basis for the contention; (3) a demonstration that the issue raised in the contention is within the scope of the proceeding; (4) a demonstration that the issue raised in the contention is material to the findings the NRC must make to support the action that is involved in the proceeding; (5) a concise statement of the alleged facts or expert opinions which support the requestor's position; and (6) sufficient information to show that a genuine dispute exists on a material issue of law or fact, including references to specific portions of the application that the petitioner disputes and the supporting reasons for each dispute or the identification of each failure to include necessary information in the application and the supporting reasons for the petitioner's belief. 10 C.F.R. § 2.309(f)(1)(i)-(vi). Petitioners must cite "specific sections of the application" that they dispute and must support their position. 10 C.F.R. § 2.309(f)(1)(vi); *Entergy Nuclear Generating Co. and Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), LBP-06-23, 64 NRC 257, 357 (2006). Also, attaching a document in support of a contention with no explanation of its

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<sup>15</sup> When these cases were decided, there were only five factors. The cases remain applicable, however, as they discuss the five factors most pertinent to this discussion. Factors (ii), (iii), and (iv), which relate to the petitioner's standing, were included in 2004. Final Rule, Changes to Adjudicatory Process, 69 Fed. Reg. 2,182, 2,239 (Jan. 14, 2004).

significance does not provide an adequate basis for a contention. *Private Fuel Storage, LLC* (ISFSI), LBP-98-10, 47 NRC 288, 298-99 (1998).

Petitioners have an "ironclad obligation" to examine the application and publicly available documents to uncover any information that could serve as a foundation for a contention. *Florida Power & Light* (Turkey Point Units 3 and 4), CLI-01-17, 54 NRC 3, 24-25 (2001). The "onus of obtaining supporting documentation... necessary to support its proposed contentions" is on the petitioner. *Amergen Energy Co.* (Oyster Creek Nuclear Generating Facility), CLI-06-24, 64 NRC 111, 123 n.71 (2006). Despite the "significant burden" that the limited time frame and pleading requirements may pose, even for *pro se* petitioners who have limited time and resources,<sup>16</sup> the Commission adheres to the long-standing principle that "a person who invokes the right to participate in an NRC proceeding also voluntarily accepts the obligations attendant upon such participation." *Oconee*, CLI-99-11, 49 NRC at 338-39 (quoting *Texas Utilities Generating Co.* (Comanche Peak Steam Elec. Station), Units 1 and 2), CLI-83-18, 17 NRC 1037, 1048 (1983)).

B. Exhibits A and B do not meet the requirements for timely amended contentions<sup>17</sup> under 10 C.F.R. § 2.309(f)(2)

1. Exhibit A

Exhibit A should be rejected because Petitioners have not shown that the information summarized by Dr. Lagarry was unavailable to them prior to the original filing deadline. See 10 C.F.R. § 2.309(f)(2)(i). Indeed, all of the studies referenced in Dr. Lagarry's e-mail were

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<sup>16</sup> The Staff notes that even though the petitions in this matter were filed by the petitioners, and not their attorneys, the petitioners had some assistance from at least two attorneys, David Frankel and Jacob Frohman, as early as October 29, 2007.

<sup>17</sup> The Board has indicated that it considers Exhibits A and B to be amendments providing additional bases in support of Contentions A and B of the original petition. See January 23 Teleconference Transcript at 382, 385.

published in 1998 or earlier. Likewise, Petitioners have not shown that the GMP cited in Exhibit A, which has been in effect since September, 2006,<sup>18</sup> was unavailable to them prior to the initial filing deadline. Petitioners have an “ironclad obligation” to search the public record for information supporting their contentions. *Florida Power & Light Co. (Turkey Point, Units 3 & 4)*, CLI-01-17, 54 NRC 3, 24-25 (2001); *Duke Energy Corp. (Oconee Nuclear Station, Units 1, 2, and 3)*, CLI-99-11, 49 NRC 328, 338 (1999). This obligation applies equally to *pro se* petitioners.<sup>19</sup> *Oconee*, CLI-99-11, 49 NRC at 338-39. Thus, because all of the information relied upon in Exhibit A was previously available, Exhibit A should be rejected for failing to satisfy 10 C.F.R. § 2.309(f)(2)(i).

Exhibit A also fails to meet §§ 2.309(f)(2)(ii)-(iii), because Petitioners have not shown that the information it contains is materially different from information that was previously available, or that the information was submitted in a timely fashion in relation to its availability. Therefore, for the reasons stated above, Exhibit A should be rejected as an amendment to Petitioners’ Contentions A and B.

## 2. Exhibit B

Exhibit B should also be rejected as an amendment to Contentions A and B because Petitioners have not satisfied all of the requirements of 10 C.F.R. § 2.309(f)(2). Exhibit B was not available to Petitioners prior to the original filing deadline of November 13, 2007. However, as discussed more fully in Section II.D below, Exhibit B consists largely of NDEQ’s comments on the Applicant’s aquifer exemption petition submitted to NDEQ in accordance with state

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<sup>18</sup> As noted previously, the UNWNRD web site indicates that the groundwater management plan has been in effect since September, 2006. <http://www.unwnrd.org/waterupdates.htm>.

<sup>19</sup> As noted previously (*see note 17 supra*), the petitioners had some assistance from at least two attorneys, David Frankel and Jacob Frohman, as early as October 29, 2007.

statutes and regulations governing underground injection control. The Applicant's aquifer exemption petition is a different document than the NRC application and was submitted to NDEQ under a different, independent review process that has no bearing on this NRC licensing proceeding. Thus, any comments or questions that NDEQ has with respect to the aquifer exemption petition apply solely to that document.<sup>20</sup> Because Petitioners have not shown that any information in Exhibit B, other than comments related to the aquifer exemption, was not previously available to them, or is materially different from previously available information, they have failed to meet their burden under 10 C.F.R. § 2.309(f)(2)(i)-(ii).

Even if Petitioners had met that burden, they have not provided Exhibit B in a timely fashion relative to its availability. See 10 C.F.R. § 2.309(f)(2)(iii). At the pre-hearing conference, Petitioners stated that they obtained this document on January 15, 2008, from "a research organization in the southwest." HT at 89. However, this document has been publicly available in ADAMS since November 26, 2007, two weeks before the Staff's and Applicant's responses to the original petitions were due, a month before Petitioners' replies were due, and seven weeks prior to the January 16 pre-hearing conference. See State of Nebraska Technical Review of Aquifer Exemption Petition for Crow Butte's North Trend Expansion, ADAMS Accession No. ML073300399. The NRC web site states that all public documents are provided in ADAMS, and NRC offers assistance in searching ADAMS for documents. It was Petitioners'

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<sup>20</sup> For example, several of the NDEQ technical review comments state that something "may be fractured" or "may be more permeable" or "may" have some other effect. See, e.g. NDEQ Technical Review at 6. These statements are made in the context of suggesting that site specific information or other data is required in order to rule out a particular concern, and apply only to the aquifer exemption petition. Other statements are NDEQ's interpretations of the information in the aquifer exemption petition. See, e.g., NDEQ Technical Review at 9 (discussing the contact between the Brule and the Chadron). Such statements are not support for petitioners contentions about the NRC application, which is an entirely different document that may not contain the same information or suffer from the same deficiencies.

obligation to discover this document, *Turkey Point*, CLI-01-17, 54 NRC at 24-25, and Petitioners had ample opportunity to do so before the pre-hearing conference, and to request an amendment to their petition. Thus, Petitioners have not satisfied the third requirement of 10 C.F.R. § 2.309(f)(2). For these reasons, Exhibit B should not be admitted as an amendment to Contentions A and B.

C. Exhibits A and B do not meet the standards for untimely submissions in 10 C.F.R. § 2.309(c).

As explained below, Exhibits A and B are also inadmissible under the rules for untimely submissions set forth in § 2.309(c). Of the eight factors to be weighed by the Board, the first and most important consideration is good cause. *State of New Jersey* (Department of Law and Public Safety), CLI-93-25, 38 NRC 289, 296 (1993). Absent good cause, Petitioners must make a compelling showing of the other balancing factors. *Private Fuel Storage, LLC* (ISFSI), LBP-01-13, 53 NRC at 324. At the pre-hearing conference, Petitioners claimed that they had “a limited amount of time to collect any form of documentary evidence.” HT at 67. With respect to Exhibit A, Petitioners also stated that, since they do not pay experts, they do not receive priority in experts’ schedules. HT at 271.

1. Exhibit A

Petitioners’ arguments fail to show good cause with respect to Exhibit A. The notice of the license amendment application and opportunity for a hearing was posted on the NRC web site on September 13, 2007, sixty days prior to the petition deadline. Furthermore, based on their testimony to the Natural Resources Committee of the Nebraska legislature on August 21, 2007,<sup>21</sup> Petitioners Debra White Plume and Thomas Cook knew of the proposed expansion

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<sup>21</sup> The transcript of this proceeding was provided as an attachment to the Cook Reply.

even before the notice of opportunity for a hearing was posted on the NRC web site. See Transcript of the Natural Resources Committee, Rough Draft (August 21, 2007) at 48-49, 56. The entire application package, including the environmental and technical reports, was publicly available on ADAMS as of July 6, 2007. Therefore, Petitioners had ample time, more than the amount considered sufficient by the Commission, to obtain and review the application, prepare their petition, and contact potential experts. See *Louisiana Energy Services*, CLI-04-35, 60 NRC 619, 623 (2004). Petitioners have not indicated when they first contacted Dr. Lagarry, nor have they provided a good reason why they could not have sought and obtained Dr. Lagarry's input well before the original filing deadline. Dr. Lagarry is a professor at Chadron State College in Chadron, Nebraska, and thus was readily accessible to Petitioners.<sup>22</sup>

Petitioners also indicated that problems with the ADAMS system hampered their efforts. Specifically, they claimed that the application was not available on ADAMS for the "week immediately prior to the filing deadline," and that they had "only 48 hours to review the CD copy sent by NRC Staff." HT at 199. This argument does not support a finding of good cause, because difficulties with ADAMS would not have affected Petitioners' ability to contact an expert or obtain papers and reports from sources other than the NRC. Also, as discussed above, Petitioners had sufficient notice of the opportunity for a hearing in time to download or request a copy of the license application from the NRC before the problems with ADAMS arose. Therefore, Petitioners cannot show good cause with respect to Exhibit A.

Without a showing of good cause, Petitioners must make "compelling" showing on the other factors. *Private Fuel Storage, LLC* (ISFSI), LBP-01-13, 53 NRC at 324. Petitioners

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<sup>22</sup> Thomas Cook, individual petitioner and representative of SBADC, lives in Chadron, as does Buffalo Bruce (Bruce McIntosh), representative of WNRC. Debra White Plume, individual petitioner and representative of Owe Aku, lives approximately 40 miles from Chadron.

cannot make such a showing. With respect to the fifth factor, Petitioners do and will have recourse to 10 C.F.R. § 2.206 enforcement petitions to address concerns regarding incidents that they fear would lead to groundwater contamination. With respect to the sixth factor, the Petitioners' interest would only be protected if any one of them were to be admitted as a party. Factor eight clearly weighs against Petitioners, because none of the Petitioners have demonstrated specific expertise or knowledge with respect to ISL mining, geology, or hydrogeology that would be expected to assist in developing a sound record. *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), LBP-90-1, 31 NRC 19, 35-36 (1990), *aff'd on other grounds*, ALAB-936, 32 NRC 75 (1990). Because Petitioners fail to make a compelling showing on the other factors, Exhibit A should not be admitted under § 2.309(c).

2. Exhibit B

Petitioners have also failed to show good cause with respect to Exhibit B. At the pre-hearing conference, Petitioners stated that they only received Exhibit B the day before and that they received it from a research organization in the southwest. HT at 89. However, as discussed above, this document was publicly available on ADAMS seven weeks before the hearing. Furthermore, as discussed in Section II.B.2 above, much of the information Exhibit B is irrelevant to this proceeding, and the information based on studies cited in Exhibit B was available before the original filing date.

With respect to good cause for late filing, "the test is when the information became available and when Petitioners reasonably should have become aware of that information." *Texas Utilities Electric Company, et al.* (Comanche Peak Steam Electric Station, Unit 2), CLI-93-4, 37 NRC 156, 164 (1993). Petitioners "must act promptly" after learning of new information. *Id.* Here, as explained above, the information from Exhibit B that Petitioners could use in this proceeding is not new. Furthermore, Petitioners had the assistance of attorneys since at least the end of October, and were formally represented by attorneys as of mid-

December.<sup>23</sup> Exhibit B was placed in ADAMS two weeks after the petitions were filed, a month before Petitioners' replies were due, and seven weeks before the pre-hearing conference. Thus, it is reasonable under these circumstances to have expected Petitioners or their attorneys to find this information prior to the hearing. Also, Petitioners have provided no good reason why they could not have obtained the assistance of an expert who could have identified the information from studies that are cited in Exhibit B.<sup>24</sup> Finally, with respect to Petitioners' claims of limited time, limited resources, and problems with ADAMS, the same arguments discussed above for Exhibit A apply.

Absent a showing of good cause, the analysis of other factors is identical to that discussed above for Exhibit A. Because good cause does not exist and, on balance, the other factors do not provide a compelling showing, Exhibit B should not be admitted under § 2.309(c).

D. Exhibits A and B do not meet the requirements for contention admissibility in 10 C.F.R. § 2.309(f)(1).

Even if the Board finds that Petitioners have met the requirements for amended petitions or untimely filings, Petitioners must still show that Contentions A and B, as amended by Exhibits A and B, meet the contention admissibility requirements of 10 C.F.R. § 2.309(f)(1).<sup>25</sup> Petitioners argue that Exhibits A and B provide bases for their groundwater contamination contentions because they show aquifer mixing and support Petitioners' belief in a slow-moving plume. Petitioners also rely heavily on the deficiencies identified in Exhibit B with respect to the Applicant's NDEQ aquifer exemption petition as support for their contentions. As explained below, Exhibits A and B are not adequate bases to support Contentions A and B, nor are they

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<sup>23</sup> See note 14 *supra*; Transcript of December 18, 2007 Teleconference at 6-7.

<sup>24</sup> Dr. Lagarry, who provided the information in Exhibit A, is also the author of several of the references cited in Exhibit B. See NDEQ Technical Review at 8.

sufficient to raise a genuine dispute of material law or fact. 10 C.F.R. § 2.309(f)(1)(v)-(vi). In addition, to the extent that Exhibit B addresses deficiencies in the Applicant's aquifer exemption petition to NDEQ, it is outside the scope of this proceeding and not material to a decision that the NRC must make. *Id.* at § 2.309(f)(1)(iii)-(iv).

1. Exhibit A

Exhibit A does not provide factual support for Contentions A and B. See 10 C.F.R. § 2.309(f)(v). As discussed in the standing section above, Exhibit A provides general statements about subsurface geology from a regional perspective. Ex. A at ¶¶ 1-4. Petitioners have failed to show, however, that the information in Exhibit A applies specifically at the North Trend site or the immediate surrounding area. For instance, the statements regarding fracturing and faulting of the High Plains Aquifer do not support Petitioners' contention, because the High Plains Aquifer does not exist at or near the North Trend site. The statement concerning surface spills south of the Pine Ridge being transmitted through porous sandstones of the Ogallala and Arikaree groups do not support Petitioners' contention because Petitioners have not disputed the Applicant's assertion that neither the Ogallala nor the Arikaree groups exist at the North Trend site. If neither group exists at the site, it is impossible for spills at the site to be transmitted through them. In summary, Exhibit A does not provide facts or expert opinions that "set forth the necessary technical analysis" to support Petitioners' position that aquifer mixing could result in contamination of Petitioners' water. *Pilgrim*, LBP-06-23, 64 NRC at 355. Because Petitioners have provided Exhibit A without explaining its significance, Exhibit A is not

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(. . .continued)

<sup>25</sup> The Staff has already responded to original contentions A and B. See NRC Staff Response. Because the only amendment to these contentions is the addition of Exhibits A and B as supporting bases, the discussion here will be limited to whether these exhibits satisfy the contention admissibility requirements.

an adequate basis for a contention. *Private Fuel Storage, LLC* (ISFSI), LBP-98-10, 47 NRC at 298-99.

Exhibit A also fails to raise a genuine dispute with the Applicant on the issue of aquifer “mixing” and groundwater contamination. 10 C.F.R. § 2.309(f)(vi). The Applicant has provided detailed geological and aquifer testing data specific to the proposed expansion site indicating that there is no interconnectivity between the Chadron and Brule aquifers. See TR at §§ 2.6, 2.7. As mentioned above, nothing in Exhibit A applies directly and specifically to the North Trend site or the immediate vicinity. Furthermore, Exhibit A does not dispute the information in the Applicant’s technical report or suggest that the Applicant’s test methods or data interpretation are inadequate. Thus, Exhibit A fails to raise a genuine dispute regarding interconnectivity between the aquifers.

## 2. Exhibit B

As an initial matter, the Staff notes that Exhibit B is part of the NDEQ aquifer exemption process and reflects information submitted by the Applicant to NDEQ, not information submitted to NRC. Thus, to the extent that Exhibit B addresses deficiencies in the NDEQ petition, it is out of the scope of the proceeding and not material to a finding that NRC must make. An issue is material to a licensing action if its resolution would make a difference in the outcome of the proceeding. *Pilgrim*, LBP-06-23, 64 NRC at 354. Although there may be some overlap between the Applicant’s aquifer exemption petition and its NRC license amendment application, they are two distinct documents that are subject to review under different statutory and regulatory review processes. NRC does not review or comment on the aquifer exemption petition, and NDEQ does not comment on the NRC license amendment application. The approval or denial of the aquifer exemption petition makes no difference in this NRC licensing proceeding; therefore, NDEQ’s comments regarding the petition are immaterial here.

Petitioners have also failed to show how Exhibit B supports their assertions of aquifer mixing as required by 10 C.F.R. § 2.309(f)(v). Petitioners have not provided “the necessary technical analysis” to show why the NDEQ Technical Review of the aquifer exemption petition supports their contentions concerning the NRC application. *Pilgrim*, LBP-06-23, 64 NRC at 355. Instead, Petitioners have simply provided a document without explaining how the document supports their contentions. Such a document is not an adequate basis for a contention. *Private Fuel Storage, LLC* (ISFSI), LBP-98-10, 47 NRC at 298-99.

Finally, the NDEQ review comments on the aquifer exemption petition, without more, are not sufficient to raise a genuine dispute of material fact or law with the Applicant with respect to the NRC application. 10 C.F.R. § 2.309(f)(vi). Under the Commission’s contention admissibility requirements, Petitioners must cite specific portions of the application that are in dispute and explain the reasons for disagreement, or identify sections of the application that are deficient and explain why it is deficient. *Pilgrim*, LBP-06-23, 64 NRC at 357-58. At oral argument, Petitioners repeatedly stressed the importance of Exhibit B because it shows that the Applicant relied on data from the original site and provided very little information regarding the new site. HT at 87-89, 166-67, 203, 207, 208, 272-73. However, *Petitioners have not shown that the same deficiencies exist in the NRC application*. For example, Petitioners argue that according to NDEQ, CBR failed to provide site-specific evidence to address significant differences between the sites, such as the presence of artesian groundwater at the North Trend site. HT at 167. However, the NRC application contains site-specific information and discussion related to this issue. See TR at 2.7-10. Petitioners also question the ability of the layer overlying the Basal Chadron to function as a barrier, citing NDEQ’s comment that data does not support containment. HT at 209-10. In its NRC application, however, the Applicant provided site-specific geologic cross-sections and pumping test data in support of its conclusions about lack of connectivity of aquifers. See TR at §§ 2.6, 2.7 and Appendix C. Petitioners have not argued

that these data have been misinterpreted or that the information in the application is incorrect, nor have they provided their own site-specific geological information to contest the Applicant's findings and conclusions. Because Petitioners have failed to show that Exhibit B meets the contention admissibility requirements, Exhibit B should be rejected.

CONCLUSION

For the reasons stated above, Exhibits A and B should not be considered for standing purposes and do not, in any event, support a finding of injury in fact that is fairly traceable to the license amendment. Furthermore, Exhibits A and B are not admissible under the Commission's rules for amended and untimely contentions, nor do they satisfy the standard contention admissibility requirements.

Respectfully submitted

***/RA by Marcia J. Simon/***

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Andrea' Z. Jones  
Marcia J. Simon  
Counsel for the NRC Staff

Dated at Rockville, Maryland  
This 8th day of February, 2008

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of )  
)  
CROW BUTTE RESOURCES, INC. ) Docket No. 40-8943  
In-Situ Leach Facility, Crawford, Nebraska )  
) ASLBP No. 07-859-03-MLA-BD01  
(License Amendment for the North Trend )  
Expansion Project) )

CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC Staff's Response to Petitioners' Exhibits A and B" in the above-captioned proceeding have been served on the following by deposit in the United States mail; through deposit in the Nuclear Regulatory Commission's internal system as indicated by an asterisk (\*), and by electronic mail as indicated by a double asterisk (\*\*) on this 8th day of February, 2007:

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