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ADJUDICATIONS STAFF

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

BEFORE THE COMMISSION

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

**PETITIONERS' ANSWER TO NRC STAFF'S NOTICE OF APPEAL AND BRIEF AND
OPPOSITION TO INTERLOCUTORY REVIEW BY THE COMMISSION**

Petitioners¹ hereby respectfully submit this Answer to NRC Staff's Notice of Appeal and Brief and Opposition to Interlocutory Review by the Commission, pursuant to 10 CFR Sections 2.311(a), 2.341(b)(3), and 2.341(c)(2).

INTRODUCTION

On April 29, 2008, by written Memorandum and Order ("Memorandum"), the Atomic Safety and Licensing Board ("Board"), granted standing to Petitioners Debra White Plume, Owe Aku, and Western Nebraska Resources Council ("WNRC"), and Petitioners' request for a hearing on Contentions A-C [LBP-08-06]. The Nuclear Regulatory Commission ("NRC") Staff filed a Notice of Appeal and accompanying Brief ("Brief"), seeking interlocutory review by the

¹ By email dated May 19, 2008, Bruce Ellison, Attorney for Petitioners Owe Aku and Debra White Plume, approved of this Memorandum and authorized the undersigned sign it on his behalf and to file it on behalf of his clients as well as Western Nebraska Resources Council represented by the undersigned.

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Commission, pursuant to 10 CFR §§2.311(a) and (c). Alternatively, the NRC Staff seeks interlocutory review pursuant to 10 CFR §§2.341(f)(2) making the extreme allegation that in the Board's well-reasoned, 130 page Memorandum, replete with citations and support, the Board committed "errors which "will have a pervasive and unusual effect on the proceeding." Brief at 5-6. For the reasons discussed herein, it would be inappropriate for the Commission to accept review and, in any case, if the Commission were to overturn the Board's rulings, such action by the Commission would itself be subject to being set aside as arbitrary, capricious, an abuse of discretion and not in accordance with law.

STANDARDS FOR REVIEW

The NRC Staff Brief omits any discussion of the standards of review. The proper standard for review is found in Section 706 of the Administrative Procedure Act, which provides that the agency action, in this case, the Board's rulings, may be set aside if found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 USC Section 706(2) (emphasis added).

Further, the Commission has expressed its "general unwillingness to engage in 'piecemeal interference in ongoing Licensing Board proceedings'." *Exelon Generation Co., LLC* (Early Site Permit for the Clinton ESP Site), CLI-04-31, 60 NRC 461, 466 (2004) [quoting, *Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), CLI-02-7, 55 NRC 205, 213 (2002)]. This is especially the case when the Commission itself is comprised of only four out of the five Commissioners due to the vacancy left by the passing of Commissioner McGaffigan last September.

ARGUMENT

A. Interlocutory Review Is Not Appropriate.

There is good reason why the Commission has expressed its “general unwillingness to engage in ‘piecemeal interference in ongoing Licensing Board proceedings’. *Exelon Generation Co., LLC* at 466. The Commission has also noted the high bar which exists for interlocutory appeals, requiring the interlocutory petitioner to demonstrate that the Board’s ruling at issue either “threatens the party adversely affected by it with immediate and serious irreparable impact which, as a practical matter, could not be alleviated through a petition for review of the presiding officer’s final decision; or...affects the basic structure of the proceeding in a pervasive or unusual manner.” 10 CFR §2.341(f)(2)(i)-(ii). The NRC Staff has not alleged such immediate and serious irreparable impact would occur if the interlocutory appeal is denied and, accordingly, it is appropriate for NRC Staff to make its appeals after the Board’s final decision.

Further, the NRC Staff has only alleged “the Board’s errors will have a pervasive and unusual effect on the proceeding.” Brief at 5-6. On its face, the NRC Staff has failed to plead the requisite which is that the Board’s error will “affect the basic structure of the proceeding in a pervasive or unusual manner.” 10 CFR Section 2.341(f)(2). Accordingly, the NRC Staff’s alternative interlocutory petition under Section 2.341(f)(2) should be denied as facially defective.

B. Even if the Commission Reviewed the Board, Reversal is Inappropriate

Contrary to the NRC Staff’s assertions, the unanimous decision of the Board was contained in a well-reasoned and articulated, factually and authoritatively based, 130 page Memorandum. It was authored by an experienced panel of Nuclear Regulatory Commission

judges (arguably the most experienced in the field of ISL uranium mining and including the NRC's Chief Administrative Judge) who took additional time to fully explore, analyze and determine the issues of standing and contentions under existing precedent and applicable law. Citing the NDEQ report (Exhibit B), the Board noted the NDEQ found Applicant submitted to the regulatory agency, conclusions and information which were "unsupported and misleading." The Board noted the NDEQ noted available data and research ignored by Applicant which pertains to fractures and faults in the geology of the proposed new mine site, with the potential for intermixing and contamination of aquifers utilized by Petitioners, together with the danger to existing domestic water users by its operation, all as contended by Petitioners. The Board also noted the NDEQ found the Applicant's information as to hydraulic conductivity and communication among the aquifers and the White River to be insufficient and conclusions about lack of containment and lack of potential conductivity due to fractures and faults in the project area to be contrary to existing geological and hydrological data. In short, the State agency charged with ensuring protection of surface and subsurface water supplies from potential contamination by the proposed new mine site found the same concerns as were being raised by Petitioners. See, Memorandum and Order, p. 16-18.

The Board found that Contention E was not outside the scope of the instant proceedings since the Petitioners' concerns related to the foreign ownership of CBR "are potentially material to the safety and environmental requirements of 10 CFR Part 40." Memorandum and Order, p. 119. However, the Board was cognizant of what may be confusing language in the definition of a "Corporation" in 10 CFR §40.4. *Ibid*, pp. 119-120. See, also, pp. 120-122. It therefore instructed the Parties to further brief the issue and scheduled argument thereon at a hearing to be

held July 23, 2008.

Additionally, this pending contention is potentially a dispositive issue, pertaining to the legality of the foreign corporation Cameco, Inc., to even hold an NRC license through its wholly-owned subsidiary, to extract, process, and export uranium from within the United States, and therefore, the legality of the NRC to approve an amendment under the license. In addition, since the standing of WNRC is not challenged by the NRC Staff and such Party also raises Contentions A-C and E, the proceedings would continue regarding the raised Contentions regardless of the appellate relief sought by the NRC Staff regarding the standing of Petitioners White Plume and Owe Aku.

The Petitioners respectfully urge the Commission to exercise its discretion and deny this appeal as premature and inappropriate because the NRC Staff has failed to allege that anything in the Board's decision was arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law.

C. The Board's Decision Regarding Standing Of Petitioners' White Plume, Owe Aku, Together With Contentions A-C Were Not Arbitrary or Capricious, An Abuse Of Discretion, Or Otherwise Not In Accordance With Law.

1. The Standing of Petitioners White Plume and Owe Aku Is Supported By The Record And Authority.

NRC Staff seek to appeal the Board's finding that Debra White Plume and Owe Aku, the organization of which she is the Executive Director, have standing to raise and present evidence supporting their contentions at a hearing.² The NRC Staff contend this highly experienced Board used "impermissibly broad construction of 'plausible chain of causation,'" to find these

Parties have standing. Brief, pp. 6-7. However, there is nothing impermissible about it. The Board simply interpreted applicable precedent and applied it within its discretion. Such is not reversible error. The NRC Staff then proceeds to re-argue the merits when the proper standard is to discern whether there has been an abuse of discretion by the Board – there has not been.

Specifically, the NRC Staff urge standards for standing and the admissibility of contentions so onerous as to be violative of the due process clause and, if adopted by the Board (or by the Commission in a review of the Board's decision), would constitute an abuse of discretion reversible under Section 706(2) of the Administrative Procedure Act.

NRC Staff disagree with the conclusions reached by the Board granting standing and a hearing on contentions. This does not make such conclusions reversible error.

The Board noted the relevancy and similarity of concerns put forth by Petitioners and the NDEQ regarding the potential intermixing of the aquifer to be mined at the new site with aquifers used by Petitioners for their domestic water supplies, with the resulting potential for contamination and therefore degradation or harm thereto.³ Memorandum, p. 18, 94-96. As the Board found, Petitioner White Plume has standing to raise concerns regarding the potential contamination of the Arikaree aquifer which flows generally north from the proposed mine site area. Contrary to NRC Staff's assertions, due to fracture or solution permeability and the existence of a major fault within the proposed mining area, there is plausible evidence of the hydrological connection between the Brule aquifer proposed to be mined, and the Chadron

² It should be noted that the NRC Staff, which also filed a Notice of Appeal and Brief in this matter, does not challenge the granting of standing to the organization WNRC. See, NRC Staff's Notice of Appeal of LBP-08-06, Licensing Board's Order of April 29, 2008 and Accompanying Brief.

Group and High Plains aquifer, which contains the Arikaree Group in the area. Memorandum, p. 41-42 (citing, USGS Ground Water Atlas of the United States; Kansas, Missouri and Nebraska; HA 730-D). While it may take years for any contamination to reach her family's well in the Arikaree, the Board found that future potential harm from aquifer contamination was sufficient to grant standing. Memorandum, p. 37, 54-55. Similar standing for Owe Aku was found to exist not only due to White Plume's interest, but also the close proximity of the residence of Owe Aku member David House, who uses a well in the Brule aquifer proposed to be mined. Memorandum, p. 47. The Board also found White Plume has standing since her family fishes in the White River, which flows through the proposed mine site area and then north onto the Pine Ridge Indian Reservation where Petitioner and her family reside and farm. Memorandum, p. 54-55. There was simply no abuse of discretion in making such determinations.

2. Contentions A and B.

Aside from the NRC Staff's dislike for the consolidation and therefore re-forming of the language of the respective Petitioner's Contentions A and B [Brief, p. 21-22], it argues that the Contentions related to aquifer intermixing, potential contamination of water sources, with resulting potential impacts on public health and safety, are "inadmissible" in these proceedings [Brief, p. 12]. Wanting the Commission to ignore the revelations and questions found in the NDEQ report (Exhibit B), as well as the Board's finding of the similarity of concerns and questions between the report and Petitioners' Contentions A and B, the NRC complains that Exhibit B was not properly rejected by the Board since it was not "relevant" and "untimely."

³ The Board further found that Exhibit B provided "more than sufficient information to show that the parties are in genuine dispute over material issues," and constituted expert evidence consistent with Petitioners' standing and the issues raised by contentions A and B. Memorandum, p. 97.

Ibid, p. 14-17. The Board found that the late disclosure was excused by it being unavailable to Petitioners until the night before the hearing and therefore admissible under 10 CFR §2.309(f)(2) or alternatively 10 CFR §2.309(c). Memorandum, p. 13-14. Petitioners further respectfully submit that NRC Staff cannot claim surprise over the NDEQ report since a copy was expressly designated to Stephen Cohen of the NRC Staff. See, Exhibit B, p. 19. Again, there was no abuse of discretion by the Board in making this determination.

Citing the NDEQ report to CBR, the Board noted that Petitioners have the “same” concerns as the NDEQ regarding the hydraulic conductivity and communication among aquifers and the White River of the aquifer CBR seeks to mine. These include the hydraulic conductivity and communication among aquifers and the White River. As such and in due to its failure to consider existing hydrological and geological data contrary to CBR’s conclusions of no impact, the Board found the NDEQ report (Exhibit B) went “well beyond mere requests for additional information” [*Ibid*], as Applicant and the NRC Staff contend.

For example, although Applicant claims that confining zones above and below the aquifer sought to be mine “clearly demonstrates the lateral continuity of the overlying and underlying confining zones on both regional and local scales”, and the NRC Staff has accepted and relied on that statement, the NDEQ concluded that such statements were “unsupported and misleading,” there was significant evidence to suggest the contrary, in both previous geological and hydrological studies, but also Applicant’s own reports. Regarding permeability, the NDEQ report noted the impropriety of concluding the to-be-mined aquifer was confined by the over and under strata due to fracturing or strata in the area, together with the “widely dispersed or intermittent channel sandstones” in heretofore uncharacterized pathways. *Ibid*, p. 20 (Exhib. B,

p. 8). See, Memorandum, p. 65-69. The NDEQ pointed out that CBR's own data showed that the water bearing zone within the aquifer to be mined "is likely dissected, and is in communication with the White River." *Ibid*, p. 21 (Exhib. B, p. 14). See, Memorandum, p. 68. And by way of a final example, the NDEQ noted Applicant's claim that there is no domestic water usage in the immediate proposed new mine site,⁴ "at least one well is used for domestic purposes and number of wells are used for agricultural purposes."⁵ *Ibid* (Exhib. B, p. 16). The Board thus properly rejected the Applicant's contentions that nothing in Exhibit B raised real questions about CBR's claim that the Basal Chadron is hydraulically separated from the Brule aquifer or shows any distinct new harm or threat apart from those being caused by the existing CBR mine. *Ibid*, p. 22 (other citations omitted). The Petitioners respectfully submit that the Commission should not accept the NRC Staff's appeal of the admissibility of Contentions A & B.

3. Contention C.

The NRC Staff argues that Contention C, regarding failures to reasonably consult with local Indian tribal elders and leaders regarding a "prehistoric" Indian camp noted in the Application as near, but not within the proposed mine sight, is not admissible before the Licensing Board. The Board found that the consultation requirements of the National Historic Preservation Act (NHPA) appeared to require more than performed by Applicant regarding such consultation and that therefore Contention C was admissible. Memorandum, p. 107-110. Petitioners also note that under Executive Order No. 13175, Consultation and Coordination With

⁴ CBR Technical Report (TR) 2.2.3

Indian Tribal Governments, 65 Fed. Reg. 67249, 2000 WL 175460 (Nov. 06, 2000), the NRC “shall respect Indian tribal self-government and sovereignty, honor tribal treaty and other rights, and strive to meet the responsibilities that arise from the unique legal relationship between the Federal Government and Indian tribal governments.” As a result, the NRC Staff’s interpretation must be rejected and the Board’s determination must be upheld as being in accordance with applicable law.

CONCLUSION

For all the foregoing reasons, the Commission should refuse to consider the interlocutory appeal or reverse the standing and contention findings of the Board.

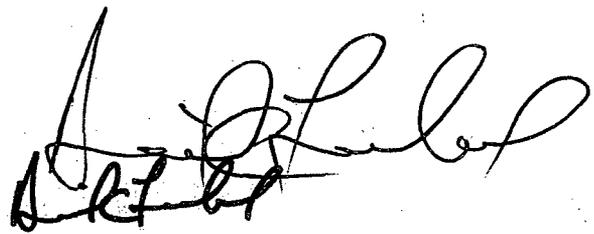
Dated this 19th day of May, 2008.

Respectfully submitted,

/s/

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⁵ Applicant admitted in its Environmental Assessment (ER) that “[t]wo residences are supplied by wells completed in the Brule Formation” within the proposed new mine area and there is likely to be an impact on the nearby city of Crawford’s water supply. Memorandum, p. 79 (citing ER 3.4.1).

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CERTIFICATE OF SERVICE

I hereby certify that copies "PETITIONERS' ANSWER IN OPPOSITION TO NRC STAFF'S APPEAL OF LBP-08-06," in the above captioned proceeding have been served on the following persons by deposit in the United States Mail as indicated by an asterisk (*); and by electronic mail as indicated by a double asterisk (**) on this 19nd day of May, 2008:

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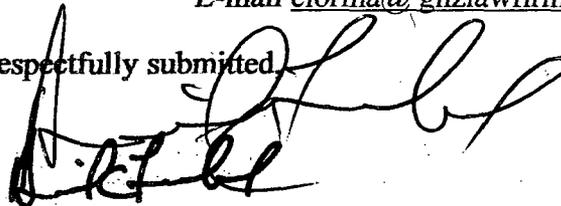
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