

August 22, 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
)	
(License Amendment for the North Trend Expansion Area))	ASLBP No. 07-859-03-MLA-BD01

NRC STAFF'S RESPONSE TO PETITIONERS' POST ARGUMENT
SUBMISSION RE: NDEQ CONSENT DECREE

INTRODUCTION

Pursuant to the Board's Order issued on August 5, 2008, the NRC Staff ("Staff") submits this response to the Petitioners' Post Argument Submission Re: NDEQ Consent Decree ("Post-Argument Submission") submitted on August 5, 2008. For the reasons explained in this response, documents and arguments related to the Nebraska Department of Environmental Quality Complaint and Consent Decree should not be considered in this license amendment proceeding.

DISCUSSION

Petitioners' Post-Argument Regarding a Nebraska Department of Environmental Quality (NDEQ) Complaint and Related Consent Decree of May 23, 2008 is Insufficient to Support a Request for Subpart G Hearing.

To support their request that Subpart G procedures apply to the license amendment proceeding, Petitioners contend that a recent complaint and consent decree between the Applicant and the NDEQ demonstrates a "failure to carry out disclosure responsibilities in accordance with the highest standards of integrity required under 40.9". Post-Argument Submission at 1.

The Commission has stated that Subpart G procedures are best used to resolve issues where “motive, intent, or credibility are at issue, or if there is a dispute over the occurrence of a past event...” See Final Rule: Changes to Adjudicatory Process, 69 Fed. Reg. 2, 182, 2, 205 (Jan. 14, 2004). Further, the Commission has stated with regard to allegations raising poor licensee character and integrity that “[l]icense amendment proceedings are not a forum ‘only to litigate historical allegations’ or past events with no direct bearing on the challenged licensing action”. See Georgia Power Co. (Vogtle Electric Generating Plant, Units 1 and 2), CLI-93-16, 38 NRC 25, 36 n.22 (1993).

While Petitioners construe the credibility and past event requirements as all encompassing to include state compliance issues, their attempt to tie these NDEQ allegations to the allegations in the NRC proceeding is grossly misplaced and has no direct bearing on these licensing proceedings. With regard to Contention E, foreign ownership and whether it is a requirement in a Part 40 source material license amendment application does not depend for its resolution on “intentional concealment” issues. Further, as the Staff explained in its June 9, 2008 submittal, issues regarding the allegation related to suppression of geologic information are immaterial to the litigation of the contention set forth by Petitioners. These allegations were addressed and resolved by the Staff in a letter to the allegor in June 1989 prior to issuance of the Applicant’s first license. Petitioners do not specify how any of the proffered contentions depend for their resolution on issues of motive, intent or credibility. Consequently, allegations related to the NDEQ complaint and consent decree cannot support intentional concealment either. In short, the Board should only consider issues related to the license amendment application and the NRC regulations.

Even if the Board considered such information, the Petitioners fail to set forth a valid assertion questioning the credibility of the Applicant with regard to the contentions

in this proceeding and/or that a dispute over an occurrence of a past event exists based on the NDEQ documents. See Final Rule: Changes to Adjudicatory Process, 69 Fed. Reg. 2, 182, 2, 205 (Jan. 14, 2004). Petitioners claim that the “Applicant shows itself to be a scofflaw based on its intentional disregard for applicable laws, rules and regulations” and that “Applicant intentionally violated the terms of its NDEQ Underground Injection Permit...” Post-Argument at 2. An examination of the NDEQ documents, however, reveals that the violations alleged by the NDEQ were “[v]iolations of a permit condition or limitation” under Neb. Rev. Stat. 81-1508.02(1)(b). See Complaint at 2, Paragraph 4. It appears that the Complaint did not encompass allegations of intentional misconduct by the Applicant. Further, according to the Consent Decree, the Applicant agreed to the settlement “without admitting any allegations of the Complaint.” See Consent Decree at 2, Paragraph 4. Therefore, any attempt to use this document to question the Applicant’s integrity and character should not serve as basis to satisfy unsupported allegations related to credibility in this licensing proceeding.

CONCLUSION

The Board is compelled to use Subpart L because they are strongly favored by the Commission and required for Part 40 licenses under Section 2.1200. Subpart G should only be used in very exceptional circumstances, which is not the case here. Therefore, the Staff respectfully requests that the Board reject Petitioners’ arguments.

Respectfully submitted,

/RA/

Andrea’ Z. Jones
Brett Michael Patrick Klukan
Counsel for NRC Staff

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NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

NRC STAFF'S RESPONSE TO OGLALA SIOUX TRIBE'S
RESPONSE TO THE BOARD'S ORDER

Pursuant to the August 5, 2008 Board Order¹, the NRC Staff ("Staff") submits this response to the Oglala Sioux Tribe's Response to the Board's Order Regarding Participation and Adoption of Contentions filed on August 15, 2008. In their submittal, the Oglala Sioux Tribe ("OST") provided formal notice to participate as a Federally-recognized Tribe under 10 C.F.R. § 2.315(c)² and adopted all of the Interveners' contentions. As indicated in its March 3, 2008 response, the Staff is unopposed to their participation in these proceedings.³ The Staff notes that OST's participation is limited by the principle that a late petitioner must take the proceeding as he finds it. See Pacific Gas and Electric (Diablo Canyon nuclear Power Plant, Units 1 and 2), ALAB-600, 12 N.R.C. 3, 8 (1980). Further, issues raised in the OST's Amicus Brief⁴ have

¹ Order ("Confirming Matters Addressed at July 23, 2008, Oral Argument").

² See discussion wherein Counsel for the Oglala Sioux Tribe requested participation under Section 2.315(c). See Transcript of July 23, 2008 at 427.

³ See NRC Staff's Answer to Motions of the Oglala Sioux Tribe and Center for Water Advocacy Et. Al For Leave to File Briefs as Amicus Curiae at 3.

⁴ See Motions of the Oglala Sioux Tribe and Center for Water Advocacy Et. Al For Leave to File Briefs as Amicus Curiae filed February 22, 2008.
(continued. . .)

previously been addressed by the Staff.⁵ See “NRC Staff’s Brief on Law Related to the Fort Laramie Treaties and the United Nations’ Declaration of Rights of Indigenous Peoples” (Feb. 21, 2008) at 3-11; “NRC Staff’s Reply to Petitioners’ Memorandum of Law Regarding Indigenous Rights, Treaties, and Federal Indian Law” (Feb. 29, 2008) at 4-6, 9-12, 14-16, 20-21.

Respectfully submitted,

/RA/

Andrea’ Z. Jones
Brett Michael Patrick Klukan
Counsel for NRC Staff

Dated at Rockville, Maryland
This 22nd day of August, 2008

(. . .continued)

⁵ See NRC Staff’s Answer to Motions of the Oglala Sioux Tribe and Center for Water Advocacy Et. Al For Leave to File Briefs as Amicus Curiae at 3, n.4.

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NRC STAFF’S RESPONSE IN OPPOSITION TO BLACK HILLS SIOUX
NATION TREATY COUNCIL’S RESPONSE TO THE BOARD’S ORDER

Pursuant to the August 5, 2008 Board Order¹, the Staff submits this response in opposition to the Black Hill Sioux Nation Treaty Council’s Response to the Board’s Order Regarding Participation and Adoption of Contentions (“Treaty Council Response”) filed on August 15, 2008. For the reasons explained in this response, the Staff cannot support the Black Hill Sioux Nation Treaty Council’s (“Treaty Council”) participation in these proceedings. The Treaty Council appears to request participation as an amicus curiae or friend of the court pursuant to 10 C.F.R. § 2.315 (c).² However, Section 2.315(c) applies to “an interested State, local governmental body...and affected, Federally-recognized Indian Tribe...”.³ In their notice,

¹ Order (“Confirming Matters Addressed at July 23, 2008, Oral Argument”).

² See discussion wherein the Chairman of the Treaty Council, Chief Oliver, requested participation in the proceeding through Counsel for the Oglala Sioux Tribe “much like the Oglala Sioux Tribe as an individual nation”, presumably as a federally recognized tribe under Section 2.315(c). See Transcript of July 23, 2008 at 584. The “Resolution of the Black Hills Sioux Nation Treaty Council”, dated January 31, 2008, which the Treaty Council filed in support of its August 15, 2008 submittal, declares that the Treaty Council will participate “through submission of an Amicus Brief which it will file as a friend of the court in this administrative action”.

³ The Staff notes that there are no NRC regulations that explicitly authorize amicus participation before a licensing board. See Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), (continued. . .)

the Treaty Council states that it is “a duly recognized body representing the membership of their respective Lakota, Dakota and Nakota bands and dedicated to protecting the 1851 and 1868 Fort Laramie Treaties”. They fail to demonstrate, however, that they are a Federally-recognized Tribe.⁴ Unless the Treaty Council can demonstrate that it is a Federally-recognized Tribe, the Staff cannot support their participation.

Respectfully submitted,

/RA/

Andrea' Z. Jones
Brett Michael Patrick Klukan
Counsel for NRC Staff

Dated at Rockville, Maryland
This 22nd day of August, 2008

(. . .continued)

ALAB-862, 25 NRC 144, 150 (1987). Section 2.315(d), states that “[i]f a matter is taken up by the Commission under [10 C.F.R.]§ 2.341 or sua sponte, a person who is not a party may, in the discretion of the Commission, be permitted to file a brief “amicus curiae,” refers to appellate actions before the Commission.

⁴ Even if the Treaty Council could demonstrate that it was a political or governmental entity of the Oglala Sioux Tribe, who has requested to be a participant, the Commission has stated that Section 2.310(c) requires that “each interested State, governmental body and Indian Tribe to designate a single representative for the proceeding; the Commission will no longer permit multiple agencies or offices within a political entity to separately participate under § 2.315(c). See Changes to Adjudicatory Process, 69 Fed. Reg. 2,182, 2,223 (Jan. 14, 2004).

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)	ASLBP No. 07-859-03-MLA-BD01
(License Amendment for the North Trend)	
Expansion Project))	

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "NRC STAFF'S RESPONSE TO PETITIONERS' POST ARGUMENT SUBMISSION RE: NDEQ CONSENT DECREE" and "NRC STAFF'S RESPONSE TO OGLALA SIOUX TRIBE'S RESPONSE TO THE BOARD'S ORDER" and "NRC STAFF'S RESPONSE IN OPPOSITION TO BLACK HILLS SIOUX NATION TREATY COUNCIL'S RESPONSE TO THE BOARD'S ORDER" have been served upon the following through deposit in the NRC's internal mail system, with copies by electronic mail, as indicated by an asterisk, or by deposit in the U.S. Postal Service, as indicated by double asterisk, with copies by electronic mail this 22nd day of August, 2008:

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