

DOCKETED  
USNRC

August 15, 2008

August 15, 2008 (4:46pm)

OFFICE OF SECRETARY  
RULEMAKINGS AND  
ADJUDICATIONS STAFFUNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSIONBEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of:

CROW BUTTE RESOURCES, INC.

(License Amendment Application for North  
Trend Expansion Project)

Docket No. 40-8943

ASLBP No. 07-859-03-MLA-BD01

APPLICANT'S RESPONSE TO BOARD ORDER REGARDING STANDINGINTRODUCTION

In accordance with the August 5, 2008 Order of the Atomic Safety and Licensing Board in this matter,<sup>1</sup> Crow Butte Resources, Inc. ("Crow Butte" or "Applicant") hereby submits information regarding the requirement that petitioners demonstrate standing for each contention.

DISCUSSIONA. Nexus Between Standing and Contentions in NRC Proceedings

The Commission previously addressed the requirement to demonstrate standing for each contention in CLI-96-1. There, the Commission discussed the nexus between standing and contentions stating that "once a party demonstrates that it has standing to intervene on its own accord, that party may then raise any contention that, if proved, will afford the party relief from the injury it relies upon for standing." See *Yankee Atomic Electric Company* (Yankee Nuclear Power Station), CLI-96-1, 43 NRC 1 (1996). The Commission went on to specifically state that an intervenor's contentions may be limited to those that will afford it relief from the

<sup>1</sup> See Order (Confirming Matters Addressed at July 23, 2008, Oral Argument), dated August 5, 2008.

injuries asserted as a basis for standing. *Id.*, at n.3. This is the same principle that Crow Butte has advanced with respect to Contention E.<sup>2</sup>

The significance of this principle is apparent in the instant case. Contentions A and B address the potential for contamination of groundwater and surface water. Standing to bring Contentions A and B is based on the alleged injuries to petitioners from Crow Butte's operations from groundwater and surface water contamination. Thus, there is a nexus between the claim asserted and the alleged injury-in-fact.

Contention E, in contrast, alleges (without support or basis) that, because Crow Butte is ultimately owned by Cameco, uranium from Crow Butte may be sold to other non-U.S. buyers such as China, India, Pakistan, North Korea and possibly Iran. This issue is wholly unrelated to groundwater or surface water contamination. Petitioners have not attempted to show how they might suffer particularized injury from such sales, much less shown how a decision to deny the license amendment application would remedy any such harm. Indeed, such a showing would not be possible because denial of the license amendment would not cause Crow Butte's current operations to cease.<sup>3</sup> In this regard, there is no nexus between the injury (groundwater and surface water contamination) and the contention (foreign ownership and sales of uranium). Consequently, Contention E cannot be admitted.

---

<sup>2</sup> This same issue is currently before the Commission with respect to Contention C. See "Crow Butte Resources' Notice of Appeal of LBP-08-06," dated May 9, 2008, at 29.

<sup>3</sup> This conclusion supports and amplifies the other arguments made by Crow Butte and the NRC Staff with respect to Contention E. Specifically, Crow Butte and the NRC Staff have argued that Contention E impermissibly raises issues outside the scope of the license amendment proceeding because the amendment request does not involve a change in ownership. Because Crow Butte has not requested a change in ownership, a favorable decision on Contention E would not redress any alleged injury caused by ongoing operations under the current ownership. Any issue with respect to past ownership changes would be an enforcement issue, not a present licensing issue.

In light of the fact that the vast majority of Commission adjudications involve power reactor licensing actions that are subject to the “proximity presumption,”<sup>4</sup> it is unremarkable that the issue of standing to raise particular contentions has not arisen more often. With standing presumed, petitioners can raise any issue linked to offsite injury within the scope of the proceeding. Conversely, there is no need to assess standing for individual contentions where there is insufficient injury, causation, or redressibility to support standing for any one contention. In the end, the absence of numerous Commission decisions addressing this issue may simply reflect a failure (as discussed below) to incorporate contemporaneous judicial concepts of standing into NRC proceedings — a oversight that this Board now has the opportunity to remedy.

B. Application of Judicial Concepts of Standing to NRC Proceedings

The Commission has repeatedly and unambiguously stated that contemporaneous judicial concepts of standing should be applied by adjudicatory boards in determining whether a petitioner is entitled to intervene as of right under Section 189a of the Atomic Energy Act.<sup>5</sup> As discussed below, the U.S. Supreme Court has made clear that parties must demonstrate standing for every claim and for every form of relief requested.

---

<sup>4</sup> In such proceedings, petitioners are simply presumed to have standing to intervene without demonstrating injury-in-fact, causation, or redressibility if the petitioner lives within 50 miles of the nuclear power reactor. See, e.g., *Florida Power & Light* (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-01-06, 53 NRC 138, 146-150 (2001).

<sup>5</sup> See, e.g., *Portland General Electric Co.* (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610, 613-14 (1976); *Atlas Corporation* (Moab, Utah), LBP-00-4, 51 NRC 53, 55 (2000); *Georgia Institute of Technology* (Georgia Tech Research Reactor, Atlanta, Georgia), CLI-95-12, 42 NRC 111, 115 (1995); *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), LBP-02-4, 55 NRC 49, 62 (2002).

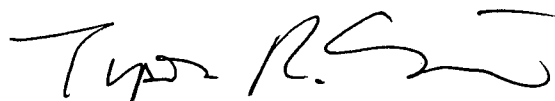
The Supreme Court recently reaffirmed the principle that standing must be shown for every single claim in *Davis v. Federal Election Commission*. Precisely relevant to the current situation, the *Davis* Court reiterated that “standing is not dispensed in gross,” and remarked that a party “must demonstrate standing for each claim he seeks to press” and “for each form of relief that is sought.” \_\_ U.S. \_\_, slip op. at 7 (June 26, 2008) citing *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006) and *Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc.*, 528 U.S. 167, 185 (2000); see also, *Rosen v. Tenn. Commissioner of Finance and Admin.*, 288 F.3d 918 (6th Cir. 2002) (“It is black-letter law that standing is a claim-by-claim issue.”). According to the Court, standing for one claim does not suffice for all claims even where those claims arise from the same nuclear of operative fact. *DaimlerChrysler*, 547 U.S. at 352. Because standing is rooted in the need for an actual “case or controversy,” holding otherwise, the Court noted, would undermine other important judicial principles and permit, for example, adjudication of moot or unripe claims. *Id.*

In articulating its reasoning for requiring standing for each claim, the Court explained that the actual-injury requirement would hardly serve its intended purpose of ensuring that there is legitimate role for an agency adjudicatory body in dealing with a particular grievance if, once a party demonstrated harm from one particular inadequacy in government administration, the adjudicatory body were authorized to remedy all inadequacies in that administration. *Lewis v. Casey*, 518 U.S. 343, 357 (1996). As the Court emphasized in *Lewis*, “[t]he remedy must of course be limited to the inadequacy that produced the injury in fact that the [party] has established.” *Id.* This statement echoes the description of the nexus between standing and contentions articulated by the Commission in *Yankee*: contentions must be limited to those that will afford relief from the injuries asserted as a basis for standing.

## CONCLUSION

Unambiguous judicial precedent — supported by fundamental considerations of the proper role of adjudicatory bodies and basic principles of justiciability — requires a party to demonstrate standing for *each and every* claim. This precedent is fully consistent with the Commission precedent in *Yankee* and with Crow Butte's position that petitioners lack standing to raise certain claims (Contentions C and E) in this proceeding. Because the Commission applies judicial principles of standing in agency adjudications, the Licensing Board must reject proposed Contention E, which is not sponsored by a party with standing to raise that contention.

Respectfully submitted,



---

Tyson R. Smith  
Winston & Strawn LLP  
1700 K Street, N.W.  
Washington, DC 20006-3817

COUNSEL FOR CROW BUTTE  
RESOURCES, INC.

Dated at Washington, District of Columbia  
this 15<sup>th</sup> day of August 2008

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

CERTIFICATE OF SERVICE

I hereby certify that copies of "APPLICANT'S RESPONSE TO BOARD ORDER REGARDING STANDING" in the captioned proceeding have been served on the following by deposit in the United States mail, first class, this 15<sup>th</sup> day of August 2008. Additional e-mail service, designated by \*, has been made this same day, as shown below.

Administrative Judge\*  
Ann Marshall Young, Chair  
Atomic Safety and Licensing Board Panel  
Mail Stop: T-3 F23  
U.S. Nuclear Regulatory Commission  
Washington, DC 20555-0001  
(e-mail: AMY@nrc.gov)

Administrative Judge\*  
Richard F. Cole  
Atomic Safety and Licensing Board Panel  
Mail Stop: T-3 F23  
U.S. Nuclear Regulatory Commission  
Washington, DC 20555-0001  
(e-mail: RFC1@nrc.gov)

Administrative Judge\*  
Frederick W. Oliver  
Atomic Safety and Licensing Board Panel  
10433 Owen Brown Road  
Columbia, MD 21044  
(e-mail: FWOliver@verizon.net)

Office of Commission Appellate  
Adjudication\*  
Mail Stop: O-16 G4  
U.S. Nuclear Regulatory Commission  
Washington, DC 20555-0001  
(e-mail: OCAEmail@nrc.gov)

Office of the Secretary\*  
Attn: Docketing and Service  
U.S. Nuclear Regulatory Commission  
Mail Stop: O-16 G4  
U.S. Nuclear Regulatory Commission  
Washington, DC 20555-0001  
(original + two copies)  
(e-mail: HEARINGDOCKET@nrc.gov)

Andrea Z. Jones, Esq.\*  
Catherine Marco, Esq.\*  
Office of the General Counsel  
U.S. Nuclear Regulatory Commission  
Mail Stop: O-5 D21  
Washington, DC 20555-0001  
(e-mail: axj4@nrc.gov, clm@nrc.gov)

Stephen P. Collings, President\*  
Crow Butte Resources, Inc.  
141 Union Boulevard, Suite 330  
Lakewood, CO 80228  
(e-mail: steve\_collings@cameco.com)

David C. Frankel, Esq.\*  
P.O. Box 3014  
Pine Ridge, SD 57770  
(e-mail: arm.legal@gmail.com)

Bruce Ellison, Esq.\*  
Law Offices of Bruce Ellison  
P. O. Box 2508  
Rapid City, SD 57709  
(e-mail: belli4law@aol.com)

Western Nebraska Resources Council\*  
Attn: Buffalo Bruce  
P.O. Box 612  
Chadron, NE 69337  
(e-mail: buffalobruce@panhandle.net)

Elizabeth Maria Lorina\*  
Mario Gonzalez  
Law Offices of Mario Gonzalez  
522 7<sup>th</sup> Street, Suite 202  
Rapid City, SD 57701  
(e-mail: elorina@gnzlawfirm.com)

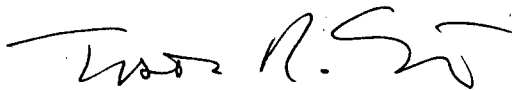
Mark D. McGuire, Esq.\*  
McGuire and Norby  
605 South 14<sup>th</sup> Street, Suite 100  
Lincoln, NE 68508  
(e-mail: mdmsjn@alltel.net)

Debra White Plume\*  
P.O. Box 71  
Manderson, SD 57756  
(e-mail: LAKOTA1@gwtc.net)

Johanna Thibault, Law Clerk\*  
Atomic Safety and Licensing Board Panel  
Mail Stop: T-3 F23  
U.S. Nuclear Regulatory Commission  
Washington, DC 20555-0001  
(e-mail: JRT3@nrc.gov)

Owe Aku, Bring Back the Way\*  
Attn: Debra White Plume  
P.O. Box 325  
Manderson, SD 57756  
(e-mail: LAKOTA1@gwtc.net)

Shane C. Robinson  
2814 E. Olive St.  
Seattle, WA 98122  
(e-mail: shanecrobinson@gmail.com)



---

Tyson R. Smith  
Winston & Strawn LLP  
1700 K Street, N.W.  
Washington, DC 20006-3817

COUNSEL FOR CROW BUTTE  
RESOURCES, INC.