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August 29, 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 Application for North Trend Expansion Project)	)	ASLBP No. 07-859-03-MLA-BD01
	)	

APPLICANT'S REPLY TO PETITIONERS' FILING RE STANDING

INTRODUCTION

In accordance with the August 5, 2008 Order of the Atomic Safety and Licensing Board in this matter,[1] Crow Butte Resources, Inc. ("Crow Butte" or "Applicant") hereby responds to the "Response to Applicant's Submission Re: Standing," dated August 22, 2008, filed by Petitioners and the Oglala Sioux Tribe ("Pet. Brief on Standing"). For the reasons discussed below, Petitioners have not demonstrated standing with respect to proposed Contention E. Accordingly, Contention E is inadmissible.

DISCUSSION

In their brief, Petitioners attempt to characterize the Applicant's position as "novel" in an effort to distract the Board from their failure to establish standing with respect to Contention E. However, Petitioners acknowledge the applicability of Commission precedent in CLI-96-01. *See* Pet. Brief on Standing, at 2. In that decision, the Commission discussed the

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[1] *See* Order (Confirming Matters Addressed at July 23, 2008, Oral Argument), dated August 5, 2008.

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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 injuries alleged by Petitioners — potential harm from contaminated surface water and groundwater — are not caused by the fact that a domestic entity has a foreign "grandparent."[2] And, the alleged injuries will not be redressed (*i.e.*, afforded relief) by a favorable decision with respect to Contention E. Even if the license amendment application for the North Trend Expansion is denied, Crow Butte will still continue its operations at its remaining mine units.[3] As Contention E, even if proved, will not remedy the asserted injury from contaminated groundwater and surface water, Petitioners may not raise that contention.

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2 Petitioners apparently allege a new injury from the "increased threat to U.S. national security posed when a foreign agent secretly acquires control of a US NRC licensee and is able to export yellowcake uranium and sell it internationally free of US restrictions." Pet. Brief on Standing, at 4. Beyond petitioners' failure to assert these injuries until well after the time for demonstrating standing had passed, the Board cannot allow such blatant misrepresentations of the facts to stand. As demonstrated in numerous filings, Crow Butte has consistently complied with NRC regulations regarding foreign ownership. Further, natural uranium can only be exported pursuant to an export license, which must be approved by the NRC. Finally, Petitioners have provided no facts or documents to support its position that U.S.-mined uranium can be sold internationally free of U.S. restrictions. It cannot. If Petitioners are referring to "Petitioners' Brief Concerning Contention E and Subpart G," dated May 23, 2008, at 20, their arguments are incredibly misguided. The "U.S. restrictions" to which they refer are trade restrictions imposed by the U.S. Department of Commerce to limit access to the U.S market for Russian-derived uranium. The restrictions are unrelated to any common defense, non-proliferation, or security concerns. Demonstrably false and misleading assertions cannot support an injury-in-fact. This is particularly true where, as here, Petitioners completely ignore the existing comprehensive international safeguards and nuclear disarmament regimes.

3 Put another way, there can be no redressibility (and, thus, no standing) because there is no change in ownership associated with the license amendment application.

The principle at issue is confused by the Board's apparent decision to consider the ownership of Crow Butte to be an issue within the scope of this narrow license amendment proceeding. As noted in prior filings, the scope of a license amendment proceeding is limited to the activities authorized by the requested license amendment. A Licensing Board only has jurisdiction over those matters which are within the scope of the amendment application. *Vermont Yankee Nuclear Power Corp.* (Vermont Yankee Nuclear Power Station), LBP-88-19, 28 NRC 145, 152-53 (1988). Petitioners may not challenge the safety of activities already permitted under the license. *Wisconsin Electric Power Co.* (Point Beach Nuclear Plant, Units 1 and 2), LBP-81-45, 14 NRC 853, 860 (1981). Because there is no change in ownership associated with the amendment application, any challenge related to the ownership of Crow Butte is an impermissible challenge to an activity already permitted under the current license. Petitioners cannot demonstrate redressibility (and, thus, standing) for Contention E precisely because the proposed contention raises issues outside the scope of the narrow license amendment proceeding.

Petitioners also attempt to distinguish the clear line of Supreme Court cases that require standing for each claim asserted. They fail in this regard. For example, Petitioners argue that the Commission decided, in CLI-96-01, that once standing is established, parties may assert the interests of the general public in support of its claims. Pet. Brief on Standing, at 3. To the contrary, the text quoted by Petitioners is from a signal citation to *Sierra Club v. Morton*, 405 U.S. 727, 740 n.15 (1972), and does not reflect a considered Commission's decision. In any event, in *Morton* the Supreme Court held that the Sierra Club did not have standing based on an asserted harm to the broad "public interest." *Id.*, at 736. The Court reaffirmed the principle that

a party must establish a concrete and particularized injury-in-fact rather than some generalized harm to the public at large. Once a party established a particularized harm for a claim, it may then assert interests of the general public in pursuing that particular claim. *Id.*, at 740 n.15. This conclusion is fully consistent with *Yankee*, where the Commission limited contentions to those that would afford petitioners relief from the injury relied upon for standing. Here, however, Petitioners have not established any particularized harm related to Contention E, and, therefore, cannot assert the interests of the general public with respect to Contention E.

Petitioners also fail to distinguish the most recent Supreme Court decision on point, *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). The Court analyzed standing separately for each of the claims asserted and performed two distinct analyses — one for § 319(a) and one for § 319(b). Here, the Licensing Board must do the same. Having concluded that Petitioners have standing for Contentions A and B based on claims under 10 C.F.R. §§ 40.32(c) and 51.45, the Licensing Board must also assess standing for Contention E under 10 C.F.R. § 40.32(d). As discussed above, Petitioners have not asserted any concrete and particularized injury associated with their claim under Section 40.32(d). Thus, Petitioners lack standing to pursue Contention E.

The *Lewis* decision further undermines Petitioners' argument. As Petitioners note, the Court emphasized that "a plaintiff who has been subject to injurious conduct of one kind [does not] possess by virtue of that injury the necessary stake in litigating conduct of another kind, although similar, to which it has not been subject." *Lewis v. Casey*, 518 U.S. 343,

358 (1996). The focus of the standing inquiry is on injurious conduct, which must be established for each administrative deficiency. Here, Petitioners have arguably established potentially injurious conduct with respect to Contentions A and B. They have not, however, established any particularized injurious conduct related to Contention E. This is similar to *Yankee*, where the Commission limited contentions to those that would redress the injurious conduct relied upon for standing. Again, having failed to establish any harm that would be redressed by a favorable decision related to Contention E, Petitioners lack standing for Contention E.

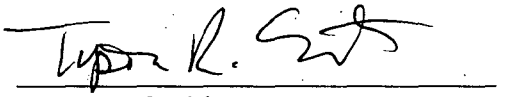
Finally, to the extent that Petitioners argue that they have standing with respect to Contention E because "each Petitioner, as a United States citizen and a member of the United States public, has standing with respect to Contention E" (Pet. Brief on Standing, at 2, 8-9), such broad-based arguments are clearly contrary to well-established Commission precedent. Under longstanding NRC (and judicial) interpretations, standing cannot be based solely on a "generalized grievance" shared in substantially equal measure by all or a large class of citizens (*e.g.*, the "public"). *Metropolitan Edison Co.* (Three Mile Island Nuclear Station, Unit 1), CLI-83-25, 18 NRC 327, 333 (1983). Assertions of broad public interest do not establish the particularized interest necessary for participation by an individual or group in NRC adjudicatory processes. *Id.*, at 332. A petitioner must establish that she will be specifically injured and that the injury is not a generalized grievance shared by the public at large. *Transnuclear, Inc.* (Ten Applications for Low Enriched Uranium Exports to EURATOM Member Nations), CLI-77-24, 6 NRC 525, 531 (1977). Here, Petitioners make no showing of individualized harm and therefore fail to demonstrate that they have standing.

Similarly, to the extent that Petitioners assert an interest in enforcing various treaties between the Oglala Sioux and the United States (Pet. Brief on Standing, at 9), such an interest is insufficient to support standing. Standing must be founded upon more than just a strong organizational interest in compliance with the dictates of federal and state laws and regulations. *Int'l Uranium (USA) Corp.* (White Mesa Uranium Mill), LBP-01-15, 53 NRC 344, 348 (2001); *Ten Applications for Low-Enriched Uranium Exports to EURATOM Member Nations*, CLI-77-24, 6 NRC 525, 531 (1977), *citing Warth v. Seldin*, 422 U.S. 490, 499 (1975). Such generalized interests are inadequate to support standing for Contention E.

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,



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Dated at Washington, District of Columbia
this 29th day of August 2008

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CERTIFICATE OF SERVICE

I hereby certify that copies of "APPLICANT'S REPLY TO PETITIONERS' FILING RE STANDING" in the captioned proceeding have been served on the following by deposit in the United States mail, first class, this 29th day of August 2008. Additional e-mail service, designated by *, has been made this same day, as shown below.

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