

September 15, 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 Renewal))	ASLBP No. 08-867-02-OLA-BD01
)	

APPLICANT’S MOTION TO STRIKE PORTIONS OF PETITIONERS’ REPLIES

I. INTRODUCTION

On September 3, 2008, the Consolidated Petitioners¹ filed their “Reply to Applicant and NRC Staff Answers to Consolidated Petition to Intervene;” the Oglala Delegation of the Great Sioux Nation Treaty Council filed its “Reply to Applicant and NRC Answers to Petition for Leave to Intervene;”² and the Oglala Sioux Tribe filed their “Reply to Applicant’s Response to Petition to Intervene.” Contrary to U.S. Nuclear Regulatory Commission (“NRC” or “Commission”) regulations and precedent, Petitioners’ replies improperly include new arguments, references, and attachments. In accordance with 10 C.F.R. § 2.323, Crow Butte

¹ The “Consolidated Petitioners” are Beatrice Long Visitor Holy Dance, Joe American Horse, Sr., Debra White Plume, Loretta Afraid of Bear Cook, Thomas Kanatakeniate Cook, Dayton O. Hyde, Bruce McIntosh, Afraid of Bear/Cook Tiwahe, American Horse Tiospaye, Owe Aku/Bring Back the Way, and Western Nebraska Resources Council, who collectively submitted a petition to intervene in this proceeding.

² Due to difficulties with the Electronic Information Exchange, the reply of the Oglala Delegation was not actually served on the parties until September 4, 2008.

Resources, Inc. (“Crow Butte”) hereby files this motion to strike³ those portions of Petitioners’ replies that contain new information.

II. BACKGROUND

Crow Butte Resources, Inc. is currently licensed to operate an in-situ leach (“ISL”) uranium recovery facility near Crawford, Nebraska. On November 27, 2007, Crow Butte requested that the NRC renew its source material license. Ltr. from Stephen P. Collings to Charles Miller (ADAMS ML0734706415). A notice of opportunity to request a hearing was published in the *Federal Register* with a deadline for filing petitions of July 28, 2008. See “Notice of Opportunity for Hearing, Crow Butte Resources, Inc., Crawford, NE, In Situ Leach Recovery Facility, and Order Imposing Procedures for Access to Sensitive Unclassified Non-Safeguards Information (SUNSI) for Contention Preparation,” 73 Fed. Reg. 30426 (May 28, 2008). On July 28, 2008, Consolidated Petitioners, the Oglala Delegation of the Great Sioux Nation Treaty Council, and the Oglala Sioux Tribe timely filed petitions to intervene and requests for hearing.

In response, the NRC Staff and Crow Butte filed their answers to these requests for hearing and petitions for leave to intervene on August 25, 2008 and August 22, 2008 respectively. On September 3, 2008, Consolidated Petitioners, the Oglala Delegation of the Great Sioux Nation Treaty Council, and the Oglala Sioux Tribe each filed a reply to the NRC Staff’s and Crow Butte’s answers. As discussed in Section III below, Petitioners’ replies contain

³ As required by 10 C.F.R. § 2.323(b), counsel for Crow Butte contacted Mr. Frankel, Mr. Ballanco, and Ms. Lorina, representatives for the Petitioners, and counsel for the NRC Staff regarding this Motion. Mr. Frankel and Ms. Lorina indicated that they oppose this Motion. Mr. Ballanco and counsel for the NRC Staff stated that they would respond to the Motion in accordance with 10 C.F.R. § 2.323.

extensive new arguments, references, and attachments not contained in their petitions which should therefore be stricken.⁴

A reply is intended to give a petitioner an opportunity to address arguments raised in the opposing parties' answers. A reply may not be used as a vehicle to introduce new arguments or support, may not expand the scope of arguments set forth in the original petition, and may not attempt to cure an otherwise deficient contention.⁵ As the Commission has stated:

It is well established in NRC proceedings that a reply cannot expand the scope of the arguments set forth in the original hearing request. Replies must focus narrowly on the legal or factual arguments first presented in the original petition or raised in the answers to it. New bases for a contention cannot be introduced in a reply brief, or any other time after the date the original contentions are due, unless the petitioner meets the late-filing criteria set forth in 10 C.F.R. § 2.309(c), (f)(2).

See Nuclear Mgmt. Co., LLC (Palisades Nuclear Plant), CLI-06-17, 63 NRC 727, 732 (2006).

The Commission's prohibition on new arguments in replies is rooted in the Commission's interest in conducting adjudicatory hearings efficiently and on basic principles of

⁴ In any event, the new arguments, references, and attachments do not provide an adequate basis for an admissible contention. If the Licensing Board decides to consider the new arguments, references, and attachments raised in the replies, Crow Butte requests an opportunity to file a response.

⁵ *See Entergy Nuclear Vt. Yankee, LLC (Vermont Yankee Nuclear Power Station), LBP-06-20, 64 NRC 131,182, 198-99 (2006)* (granting in part a motion to strike and finding that petitioners impermissibly "expand[ed] their arguments" by filing a second declaration from their expert in a reply brief that provided additional detail regarding the proposed contention). The Licensing Board in the same proceeding struck all portions of that reply and its supporting documents including "new arguments and factual information that were not included in the initial petition and do not directly address challenges in the answers, and that therefore exceed the permissible scope of a reply." *Id.* at 191; *see also Nuclear Mgmt. Co., LLC (Palisades Nuclear Plant), LBP-06-10, 63 NRC 314, 351-63 (2006), aff'd CLI-06-17, 63 NRC 727 (2006)* (declining to consider references to documents identified in a petitioner's reply that were not included in the original petition).

fairness. The Commission has recognized that “[a]s we face an increasing adjudicatory docket, the need for parties to adhere to our pleading standards and for the Board to enforce those standards are paramount.” *La. Energy Servs., L.P.* (National Enrichment Facility), CLI-04-25, 60 NRC 223, 225 (2004) (“LES”). It has further stated that:

NRC contention admissibility and timeliness requirements demand a level of discipline and preparedness on the part of petitioners. But there would be no end to NRC licensing proceedings if petitioners could disregard our timeliness requirements every time they “realize[d] . . . that maybe there was something after all to a challenge it either originally opted not to make or which simply did not occur to it at the outset.”

Duke Energy Corp. (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-03-17, 58 NRC 419, 428-29 (2003); *see also LES*, CLI-04-25, 60 NRC at 224-25.

Accordingly, a petitioner must include all of its arguments and claims in its initial filing. Allowing a party to amend or supplement its pleadings in reply to the applicant’s or NRC Staff’s answers would run afoul of the Commission’s clear directives:

Allowing contentions to be added, amended, or supplemented at any time would defeat the purpose of the specific contention requirements . . . by permitting the intervenor to initially file vague, unsupported, and generalized allegations and simply recast, support, or cure them later. The Commission has made numerous efforts over the years to avoid unnecessary delays and increase the efficiency of NRC adjudication and our contention standards are a cornerstone of that effort.

La. Energy Servs., L.P. (National Enrichment Facility), CLI-04-35, 60 NRC 619, 622-23 (2004) (internal quotes omitted). Moreover, because NRC regulations do not allow the applicant to respond to a petitioner’s reply, principles of fairness mandate that a petitioner restrict its reply brief to addressing issues raised in the applicant’s or NRC Staff’s answer. “Allowing new claims in a reply not only would defeat the contention-filing deadline, but would unfairly deprive other

participants an opportunity to rebut the new claims.” *Palisades*, CLI-06-17, 63 NRC at 732. Thus, “[i]n Commission practice, and in litigation practice generally, new arguments may not be raised for the first time in a reply brief.” *LES*, CLI-04-25, 60 NRC at 225. Accordingly, “[a]ny reply should be narrowly focused on the legal or logical arguments presented in the applicant/licensee or NRC Staff answer.” “Changes to Adjudicatory Process; Final Rule,” 69 Fed. Reg. 2182, 2203 (Jan. 14, 2004).

Accordingly, the Licensing Board may consider it appropriate to formally strike the new arguments and material from the record. *See Entergy Nuclear Vt. Yankee, LLC* (Vermont Yankee Nuclear Power Station), LBP-06-20, 64 NRC 131, 182, 198-199 (2006). The Board may also choose to simply exclude the new information and arguments from consideration in ruling on the Petitions.⁶ *See LES*, LBP-04-14, 60 NRC 40, 63-64 (2004). Either approach would be consistent with this Motion, which identifies for the Licensing Board those arguments, references, and attachments that are beyond the permissible scope of a reply.

III. BASES FOR MOTION TO STRIKE

In their replies, Petitioners impermissibly attempt to augment their standing discussion by referencing new injuries, new theories for standing, and new “rights.” Petitioners also attempt to expand the scope of their contentions by providing new bases and new supporting material for contentions, without addressing the criteria for late-filed or amended contentions. Petitioners may not now remedy defects in their original petition by providing new information and arguments in their replies.

⁶ A Licensing Board has the authority to strike individual arguments and exhibits. *See, e.g.*, 10 C.F.R. § 2.319 (stating that the presiding officer has all the powers necessary “to take appropriate action to control the prehearing . . . process”).

As detailed in the following table, Petitioners’ replies contain numerous new arguments, references, and attachments.

Location of New Information in the Consolidated Petitioners’ Reply	Description of New Information
<p><u>Preliminary Matters</u></p> <ul style="list-style-type: none"> The heading on page 2 which states “<u>Collateral Estoppel and Issue Preclusion Principles Require Identical Issues Not Be Re-Litigated</u>” through the end of the discussion on page 4. 	<p>Petitioners advance new arguments regarding collateral estoppel in support of their proposed contentions that were not raised in the original petition.⁷</p>
<p><u>Preliminary Matters</u></p> <ul style="list-style-type: none"> The last paragraph under the heading entitled “<u>Foreign Ownership and Transfer of License Issues</u>” on page 9. 	<p>This paragraph of the reply references a new document, RIS 2008-19, without addressing the amended contention or late-filed factors in 10 C.F.R. § 2.309.⁸</p>
<p><u>Preliminary Matters</u></p> <ul style="list-style-type: none"> The last sentence on page 9, under the heading entitled “<u>General Description of the Petitioners</u>” through the end of the paragraph on page 10, including footnote 6 on page 10. 	<p>This paragraph and footnote of the reply reference a new document — <u>Arsenic Exposure and Prevalence of Type 2 Diabetes in U.S. Adults</u>, Ana Navas-Acien, <i>et al.</i> Journal of the American Medical Association, 2008; 300 (7):814-822 (August 20, 2008). This document was not included in the original petition.</p>
<p><u>Preliminary Matters</u></p> <ul style="list-style-type: none"> The full paragraph on page 12 under the heading entitled “<u>General Description of the Petitioners.</u>” 	<p>This paragraph of the reply includes a reference to L. Torrell <i>et al.</i>, <u>The Market Value of Water in the Ogallala Aquifer</u>, 66 Land Economics 2d 163 (1990). This document was not included in the original petition.</p>

⁷ Collateral estoppel requires presence of at least four elements in order to be given effect: (1) the issue sought to be precluded must be the same as that involved in the prior action, (2) the issue must have been actually litigated, (3) the issue must have been determined by a valid and final judgment, and (4) the determination must have been essential to the prior judgment. *Houston Lighting & Power Co.* (South Texas Project, Units 1 & 2), LBP-79-27, 10 NRC 563, 566 (1979). There has been no valid and final judgment in the North Trend Expansion proceeding, and, thus, the principles of collateral estoppel would not, in any event, apply in this License Renewal proceeding.

⁸ RIS 2008-19, on its face, addresses Part 70 special nuclear material licensees, not source material licensees under 10 C.F.R. Part 40.

<p><u>Discussion of Specific Petitioners as to Standing</u></p> <ul style="list-style-type: none"> • This section beginning on page 17 through the end of the discussion on page 45. 	<p>Petitioners here have impermissibly augmented their original petition by describing and referencing a series of “rights,” including General Public Rights, Native American Rights, Treaty Rights, Religious Rights, Water Rights, and Lakota Cultural Rights. To the extent that this information is intended to demonstrate a specific interest for purposes of standing, such interests were not identified in the standing discussion in the initial petition.</p>
<p><u>Discussion of Specific Petitioners as to Standing</u></p> <ul style="list-style-type: none"> • Beatrice Long Visitor Holy Dance, page 22, paragraphs (b) and (d). 	<p>Petitioners introduce new arguments regarding impacts to property values.</p>
<p><u>Discussion of Specific Petitioners as to Standing</u></p> <ul style="list-style-type: none"> • Debra White Plume, page 26-27. 	<p>Petitioners introduce new arguments in support of standing regarding collateral estoppel that were not raised in the original petition.</p>
<p><u>Discussion of Specific Petitioners as to Standing</u></p> <ul style="list-style-type: none"> • Thomas Kanatakeniate Cook, page 31. 	<p>Petitioners introduce new arguments regarding “unity of interest” between Mr. Cook and Slim Buttes Agriculture Development Corporation and Running Strong for American Indian Youth.</p>
<p><u>Discussion of Specific Petitioners as to Standing</u></p> <ul style="list-style-type: none"> • Dayton O. Hyde, page 33. 	<p>Petitioners introduce new arguments regarding “unity of interest” between Mr. Hyde and Black Hills Wild Horse Sanctuary.</p>
<p><u>Discussion of Specific Petitioners as to Standing</u></p> <ul style="list-style-type: none"> • Owe Aku, page 39-42. 	<p>Petitioners reference several new persons (David House, Sandy Sauser, Lester Davis) in support of standing. These individuals were not identified in the original petition and did not execute a valid affidavit in this proceeding.</p>
<p><u>Discussion of Specific Petitioners as to Standing</u></p> <ul style="list-style-type: none"> • WNRC, page 42-44. 	<p>Petitioners reference several new persons (Francis Anders, Jan Mize, Beth Ranger) in support of standing. These individuals were not identified in the original petition and did not execute an affidavit in this proceeding.</p>
<p><u>Discussion of Each Contention</u></p> <ul style="list-style-type: none"> • Environmental Contention A, page 50. 	<p>Petitioners provide new bases in support of contention admissibility. In particular, they argue — for the first time — that the contention is admissible for the reasons found by the Board in a different proceeding involving a different application.</p>

<p><u>Discussion of Each Contention</u></p> <ul style="list-style-type: none"> • Environmental Contention B, page 50-51. 	<p>Petitioners provide new bases in support of contention admissibility. In particular, they argue — for the first time — that the contention is admissible for the reasons found by the Board in a different proceeding involving a different application.</p>
<p><u>Discussion of Each Contention</u></p> <ul style="list-style-type: none"> • Environmental Contention C, page 51-52. 	<p>Petitioners provide new bases in support of contention admissibility. In particular, they argue — for the first time — that the contention is admissible for the reasons found by the Board in a different proceeding involving a different application.</p>
<p><u>Discussion of Each Contention</u></p> <ul style="list-style-type: none"> • Environmental Contention D, page 52-53. 	<p>Petitioners provide new bases in support of contention admissibility. In particular, they argue — for the first time — that the contention is admissible for the reasons found by the Board in a different proceeding involving a different application.</p>
<p><u>Discussion of Each Contention</u></p> <ul style="list-style-type: none"> • Technical Contention B, page 54. 	<p>Petitioners provide new bases in support of contention admissibility. In particular, they argue — for the first time — that the contention is admissible for the reasons found by the Board in a different proceeding involving a different application.</p>
<p><u>Discussion of Each Contention</u></p> <ul style="list-style-type: none"> • Technical Contention C, page 54. 	<p>Petitioners provide new bases in support of contention admissibility. In particular, they argue — for the first time — that the contention is admissible for the reasons found by the Board in a different proceeding involving a different application.</p>
<p><u>Discussion of Each Contention</u></p> <ul style="list-style-type: none"> • Technical Contention E, page 55. 	<p>Petitioners provide new bases in support of contention admissibility. In particular, they argue — for the first time — that “basic safety precautions require a back-up power source” and “question how a negative bleed can be maintained” in the event of a power outage.</p>

<p><u>Discussion of Each Contention</u></p> <ul style="list-style-type: none"> • Technical Contention G, page 56-57. 	<p>Petitioners provide new bases in support of contention admissibility. In particular, they argue — for the first time — that “[i]t is Applicant’s responsibility under Section 40.9 and the AEA to disclose the information in a way that is fundamentally understandable by the average member of the public.”</p>
<p><u>Discussion of Each Contention</u></p> <ul style="list-style-type: none"> • Miscellaneous Contention A, page 58-60. 	<p>Petitioners provide new bases in support of contention admissibility. In particular, they argue — for the first time — that the contention is admissible for the reasons found by the Board in a different proceeding involving a different application. Petitioners also make new arguments regarding collateral estoppel.</p>
<p><u>Discussion of Each Contention</u></p> <ul style="list-style-type: none"> • Miscellaneous Contention D, page 61-62. 	<p>Petitioners provide new bases in support of contention admissibility. In particular, they argue — for the first time — that contamination of water infringes upon their <i>Winters</i> rights.</p>
<p><u>Discussion of Each Contention</u></p> <ul style="list-style-type: none"> • Miscellaneous Contention F, page 63. 	<p>Petitioners provide new bases in support of contention admissibility. In particular, they argue — for the first time — that hunting and fishing rights are impacted when game eats certain food or bioaccumulation occurs. Further, the original contention contained no reference to Mr. Davis.</p>
<p><u>Discussion of Each Contention</u></p> <ul style="list-style-type: none"> • Miscellaneous Contention G, page 65. 	<p>Petitioners provide new bases in support of contention admissibility. In particular, they argue — for the first time — that the change of ownership in 1998 violates the due process clause or somehow warrants a hearing at this time.</p>

Location of New Information in the Great Sioux Nation Treaty Council’s Reply	Description of New Information
<ul style="list-style-type: none"> Second full paragraph on page 2: “These people and many additional Oglala Lakota drink water from streams and wells that show signs of impact from the mining activities of the Crow Butte Mine. As do the people who drink from them.” 	<p>Petitioner introduce new arguments to support standing. In particular, Petitioner argues — without support — that streams, wells, and people show signs of impact from Crow Butte.</p>
<ul style="list-style-type: none"> First full paragraph on page 3. 	<p>Petitioner attempts to “join” the Consolidated Petitioners’ reply, regarding all contentions in their entirety. To the extent that Petitioner is seeking to augment its contentions with those of Consolidated Petitioners, it is raising new issues and contentions not included in its original petition.</p>

Location of New Information in the Oglala Sioux Tribe’s Reply	Description of New Information
<p>I. <u>The Oglala Sioux Tribe Has Standing in this Action</u></p> <ul style="list-style-type: none"> Under “c. Organizational standing” on page 4, starting with “The Tribe is the freely...,” through the end of the discussion on page 5. 	<p>Petitioner introduces new bases and legal theories to support standing. In particular, they argue — for the first time — that the tribe does not need to comply with legal requirements for organizational or representational standing.</p>
<p><u>Exhibit</u></p> <ul style="list-style-type: none"> Letter from Mr. John Petersen to Mr. Gary Konwinski at the Nuclear Regulatory Commission (Apr. 4, 1989) 	<p>Petitioner filed this exhibit with its reply. The letter was not included with the original petition.⁹</p>
<p><u>Exhibit</u></p> <ul style="list-style-type: none"> Dr. Richard Abitz Expert Report 	<p>Petitioner filed this exhibit with its reply. The report was not included with the original petition.</p>

⁹ Although Petitioner states that these three exhibits “were originally submitted with the Tribe’s Petition to Intervene” (*see* “Resend of Exhibits,” dated September 3, 2008), the “Service on Licensee Applicant” (Oglala Sioux Tribe Pet., at 23) clearly identifies those exhibits that were attached to the Tribe’s petition. That list of exhibits does not include the three new documents that were submitted with Petitioner’s reply on September 3, 2008.

<u>Exhibit</u> <ul style="list-style-type: none">• JR Engineering Report	Petitioner filed this exhibit with its reply. The report was not included with the original petition.
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IV. CONCLUSION

For the foregoing reasons, the Licensing Board should strike the new arguments, references, and attachments impermissibly included in Petitioners' replies. Alternatively, the Board may choose to simply exclude the new information and arguments from consideration in ruling on the Petitions.

Respectfully submitted,

/s/ signed electronically by _____
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Dated at San Francisco, California
this 15th day of September 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 Renewal)) ASLBP No. 08-867-02-OLA-BD01
)
)

CERTIFICATE OF SERVICE

I hereby certify that copies of “APPLICANT’S MOTION TO STRIKE PORTIONS OF PETITIONERS’ REPLIES” in the captioned proceeding have been served on the following persons via the Electronic Information Exchange this 15th day of September 2008.

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