

December 18, 2008

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of: )  
 ) Docket No. 40-8943  
CROW BUTTE RESOURCES, INC. )  
 ) ASLBP No. 08-867-02-OLA-BD01  
(License Renewal) )

CROW BUTTE RESOURCES' NOTICE OF APPEAL OF LBP-08-27

Pursuant to 10 C.F.R. §§ 2.311(a) and (c), Crow Butte Resources, Inc. files, together with an attached Brief, this Notice of Appeal of the Atomic Safety and Licensing Board's December 10, 2008, Memorandum and Order, which admitted for hearing in the above captioned proceeding one late-filed contention related to Crow Butte's license renewal application for the Crow Butte facility.

Respectfully submitted,

/s/ signed electronically by  
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COUNSEL FOR CROW BUTTE  
RESOURCES, INC.

Dated at San Francisco, California  
this 18th day of December 2008

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CROW BUTTE RESOURCES' BRIEF IN SUPPORT OF APPEAL FROM LBP-08-27

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Tyson R. Smith  
COUNSEL FOR CROW BUTTE  
RESOURCES, INC.

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CROW BUTTE RESOURCES' BRIEF IN SUPPORT OF APPEAL FROM LBP-08-27

I. INTRODUCTION

Pursuant to 10 C.F.R. §§ 2.311(a) and (c), Crow Butte Resources, Inc. ("Crow Butte" or "Applicant") hereby appeals the Atomic Safety and Licensing Board ("Board") decision, LBP-08-27, dated November 21, 2008, which admitted a late-filed contention. That decision concerns an application by Crow Butte for renewal of its existing license at its uranium recovery operation. For the reasons discussed below, the late-filed contention should not have been admitted and the Consolidated Petitioners' request for hearing should be wholly denied.<sup>1</sup>

II. BACKGROUND

The standards governing the admissibility of late-filed and amended contentions are found in the Commission's rules of practice in 10 C.F.R. Part 2. Briefly, contentions initially

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<sup>1</sup> In LBP-08-24, the Licensing Board found that Consolidated Petitioners had standing and admitted four contentions (or parts of contentions) (Environmental Contention E, Technical Contention F, and Miscellaneous Contentions G and K). Crow Butte and the NRC Staff have both appealed the Board's decision, arguing that the Consolidated Petitioners' request for hearing should have been wholly denied. See "Crow Butte Resources' Notice of Appeal From LBP-08-24," dated December 10, 2008, and "NRC Staff's Notice of Appeal of LBP-08-24, Licensing Board's Order of November 21, 2008, and Accompanying Brief," dated December 10, 2008. Reversal of LBP-08-27, in conjunction with a reversal of LBP-08-24, would result in the Petition being wholly denied. For this reason, the appeal of LBP-08-27 is appropriate under 10 C.F.R. § 2.311.

must be based on the applicant's License Renewal Application ("LRA"). Intervenors may amend those contentions if there are data or conclusions in environmental or safety documents that "differ significantly from the data or conclusions in the applicant's documents." 10 C.F.R. § 2.309(f)(2). Otherwise, contentions may be amended or new contentions filed only if (1) the information upon which the amended or new contentions is based was not previously available; (2) the information upon which an amended or new contention is based is materially different than information previously available; and (3) the amended or new contention has been submitted in a timely fashion based on the availability of subsequent information.

For non-timely filings, the Board must also weigh the following five factors: (1) good cause, if any, for the failure to file on time; (2) the availability of other means whereby the requestor's interest will be protected; (3) the extent to which the requestor's interests will be represented by existing parties; (4) the extent to which the requestor's participation will broaden the issues or delay the proceeding; and (5) the extent to which the requestor's participation may reasonably be expected to assist in developing a sound record. 10 C.F.R. § 2.309(c)(1). The first factor, good cause for lateness, carries the most weight in the balancing test, and the lack thereof requires the petitioner to make a "compelling showing" relative to the remaining factors.<sup>2</sup> The finding of good cause for late-filing of contentions is related to the *total previous unavailability* of information. *Philadelphia Elec. Co.* (Limerick Generating Station, Units 1 and 2), LBP-83-39, 18 NRC 67, 69 (1983). Additionally, the proffered late-filed contention must meet the admissibility standards set forth in 10 C.F.R. § 2.309(f)(1)(i)-(vi).

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<sup>2</sup> See *State of New Jersey* (Department of Law and Public Safety's Requests Dated October 8, 1993), CLI-93-25, 38 NRC 289, 296 (1993) (citations omitted).

### III. DISCUSSION

In LBP-08-27, the Licensing Board re-framed and admitted a late-filed contention alleging a connection between low-level arsenic in water purportedly released from the Crow Butte facility and pancreatic failures such as diabetes and cancer. LBP-08-27 at 7; *see also*, “Consolidated Petitioners’ “Petition for Leave to File New Contention Re: Arsenic,” dated September 22, 2008 (“Late-Filed Petition”). For the reasons discussed below, the Board erred in admitting the late-filed contention. The proposed contention fails to satisfy the NRC’s standards for new or untimely contentions and also fails to meet the strict admissibility requirements in 10 C.F.R. § 2.309.<sup>3</sup>

A. The Proposed Contention Does Not Satisfy The Standards for Admitting a New or Amended Contention

In LBP-08-27, the Board applied only the criteria for new or amended contentions in 10 C.F.R. § 2.309(f)(2), incorrectly concluding that the proposed new contention was based on new information materially different than that previously available. LBP-08-27 at 4. Although the criteria in section 2.309(f)(2), in effect, codify the test for establishing “good cause,” they are not sufficient, on their own, to warrant admission of a new contention.<sup>4</sup> Thus, the Board also

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<sup>3</sup> We do not repeat our conclusions regarding the Consolidated Petitioners’ lack of standing herein, having already fully briefed the reasons for their lack of standing in prior filings. “Crow Butte Resources’ Notice of Appeal From LBP-08-24,” dated December 10, 2008.

<sup>4</sup> *See Duke Power Co.* (Catawba Nuclear Station, Units 1 and 2), CLI-83-19, 17 NRC 1041, 1045-50 (1983). The late-filed factors in section 2.309(c)(1) apply fully even in cases where contentions are filed late only because the information on which they are based was not available until after the filing deadline. Although the Commission has ruled that while the first factor — good cause for filing late — is met in such circumstances, the other factors, if implicated, permit the denial of the contention in a given case. *Id.*; *see also Union of Concerned Scientists v. NRC*, 920 F.2d 50, 52 (D.C. Cir. 1990).

erred by declining to apply the late-filed factors in 10 C.F.R. § 2.309(c).<sup>5</sup> In any event and as discussed below, the proposed contention fails both standards.

In the Late-Filed Petition, the only allegedly “new” expert information is an August 20, 2008 study by the Johns Hopkins Bloomberg School of Public Health published in the *Journal of the American Medical Association*. According to the Consolidated Petitioners, the study suggests a possible link between inorganic arsenic and type-2 diabetes. Late-Filed Pet. at 1-2. Although the Johns Hopkins study on which Consolidated Petitioners rely was not published until August, the issue — the alleged link between arsenic contamination and Crow Butte’s operations — that underlies the contention could have been raised earlier. Indeed, Petitioners had previously proposed a contention alleging contamination of aquifers (including arsenic contamination) from Crow Butte’s operations. *See* Petition to Intervene, at 21-26 (Environmental Contention B); Late-Filed Pet. at 2-3 (noting that the original petition alleged both arsenic exposure and diabetes); *see also* LBP-08-24 at 43-45 (rejecting Environmental Contention B as unsupported). The Licensing Board even acknowledged earlier studies that suggested exposure to arsenic could contribute to diabetes in humans. *See* LBP-08-27 at 2 (noting that “a link between arsenic contamination and diabetes has been considered likely for some time”).

Applying the factors in 10 C.F.R. § 2.309(f)(2), the information in the petition is not materially different from that available previously. Chronic arsenic exposure has long been known to cause adverse health effects, including cancer and diabetes; there is no “new” reason to

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<sup>5</sup> The requirement to apply the factors in 10 C.F.R. § 2.309(c) did not change with the promulgation of the revised 10 C.F.R. Part 2. *See* “Changes to Adjudicatory Process; Final Rule,” 69 Fed. Reg. 2182, 2202 (Jan. 14, 2004) (“If information in [a new Staff document] bears upon an existing contention or suggests a new contention, it is appropriate for the Commission to evaluate under § 2.309(c) the possible effect that the admission of amended or new contentions may have on the course of the proceeding.”).

be concerned with potential exposure to arsenic.<sup>6</sup> The study cited by Petitioners does not constitute a new revelation that warrants admission of the late-filed contention. Indeed, in the context of NRC licensing proceedings, the D.C. Circuit has recognized a distinction between an *issue* that was apparent at the time of the application and new *evidence*, which may arise after an application is filed but before a licensing decision. *See UCS*, 920 F.2d at 55. Here, the Hopkins study is, at best, new evidence of the dangers of arsenic exposure. But, it does not raise for the first time the issue of the potential dangers of arsenic, nor does it raise a new issue regarding the safety controls at Crow Butte's operations. At bottom, there is no "good cause" or a "new basis" for late-filing where, as here, the salient facts regarding the dangers of arsenic and information regarding the controls and safety of Crow Butte's operations were available to Petitioners long ago.

Even a cursory look at the late-filed contention relative to previously-rejected contentions confirms that the contention does not involve any "new" issues. The original Environmental Contention B that was rejected by the Board states:

CBR's proposed mining operations will use and contaminate water resources, resulting in harm to public health and safety, through mixing of contaminated groundwater in the mined aquifer with water in surrounding aquifers and drainage of contaminated water into the White River.

Con. Pet. at 21-26. In the basis for proposed Environmental Contention B, Petitioners specifically discussed several potential contaminants, including uranium, arsenic, and selenium. Clearly, therefore, Petitioners were aware of the risks associated with arsenic contamination.

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<sup>6</sup> As the Commission has noted, NRC adjudicatory proceedings would prove endless if parties were free at hearing to introduce new claims (or putative evidence of claims) which they either originally opted not to make or which simply did not occur to them at the outset. *Hydro Resources, Inc.* (Rio Rancho, NM), CLI-04-33, 60 NRC 581, 591 (2004).

Despite the fact that Petitioners had already alleged arsenic contamination from Crow Butte and the fact that the Board had previously rejected that proposed contention as unsupported, the Board reframed the proposed late-filed contention as follows:

The oxidation of uranium due to Crow Butte's mining operations releases low-levels of arsenic that contaminates drinking water. This contamination threatens the health and safety of the public in that it contributes to an increase in diabetes and pancreatic cancer. The AEA and NRC regulations require Crow Butte's operations to be conducted without harm to the public health and safety.

This admitted contention is in essence the same as the previously-rejected contention: both contentions assert contamination of aquifers and resulting harm to public health. The only difference between the original contention and the proposed contention is the allegedly "new" evidence of a link between arsenic and diabetes and cancer. As discussed above, there is a clear distinction between new "evidence" of possible health impacts related to arsenic, such as the Hopkins study, and information that supports a new issue involving Crow Butte warranting a hearing. The potential for contamination from Crow Butte and the allegation of health effects not only could have been raised earlier, but were raised earlier.

The late-filed contention is also nearly identical to a contention submitted by the Oglala Sioux Tribe. The Board admitted the Oglala Sioux Tribe's Environmental Contention A, which asserts that there is "no evidence based science for CBR's conclusion that ISL mining has 'no non radiological health impacts.'" LBP-08-24 at 26-29. The Board even notes that Oglala Environmental Contention A implicates many of the same concerns and technical issues (in the environmental context) as the late-filed contention (in the safety context) and suggests that these issues might be amenable to a combined evidentiary presentation. LBP-08-27 at 8 n.33.

Inexplicably, the Licensing Board does not discuss how the contention could be "new" given that the Oglala Tribe successfully proposed a contention on the same issues several

months prior.<sup>7</sup> The Commission should not permit a petitioner to “bootstrap” an otherwise untimely contention into a proceeding by finding a single piece of new information. Otherwise, Petitioners could circumvent the Commission’s strict contention admissibility rules by using any new information — even if only “new” in the strictest sense and not materially different from information previously available — as a basis for a late-filed contention.

Admitting this late-filed contention also unnecessarily expands this proceeding to encompass the medical consequences of low-level arsenic exposure and the statistical significance of the incidence of diabetes and cancer in western Nebraska. *See* 10 C.F.R. § 2.309(c)(1)(vii). Neither epidemiological statistics nor the carcinogenic properties of arsenic have any direct relationship to Crow Butte’s operations, particularly in the absence of any evidence of offsite groundwater contamination. The Board and parties are not equipped to determine whether there is a medical link between arsenic exposure and pancreatic cancer (especially in the absence of any demonstrated link in scientific literature). Suffice it to say, arsenic exposure can have adverse consequences, including other forms of cancer. But, resolution of the specific question of arsenic’s contribution to the risk for pancreatic cancer would broaden the proceeding unnecessarily.

Further, participation by the Petitioners would not assist in developing a sound record. *See* 10 C.F.R. § 2.309(c)(1)(viii). In addressing the late-filed factors, petitioners are expected to specify the precise issues they expect to cover and summarize their proposed testimony. *Mississippi Power and Light Co.* (Grand Gulf Nuclear Station, Units 1 and 2), ALAB-704, 16 NRC 1725, 1730 (1982). Here, Petitioners do not provide any factual or documentary evidence to support a link between arsenic and pancreatic cancer. Instead, their

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<sup>7</sup> In light of the Oglala Sioux Tribe’s contention, Consolidated Petitioners’ interests are already represented in this proceeding. *See* 10 C.F.R. § 2.309(c)(1)(vi).

conclusions are based only on anecdotal evidence — a personal conversation with an individual at Hills Tire in Chadron, Nebraska — of pancreatic cancer.<sup>8</sup> The Late-Filed Petition all but acknowledges that it lacks sufficient information to support its contention. According to Petitioners, “[d]uring discovery, the parties can ascertain the exact status of these cases several of which resulted in the death of the cancer patient.” Late Filed Pet. at 4. However, the NRC’s contention rules “bar contentions where petitioners have only ‘what amounts to generalized suspicions, hoping to substantiate them later.’” *Duke Power Co. (Catawba Nuclear Station, Units 1 & 2)*, ALAB-687, 16 NRC 460, 468 (1982), *vacated in part on other grounds*, CLI-83-19, 17 NRC 1041 (1983). Notice pleading is simply not permitted.

For the forgoing reasons, the Board erred in finding that the Petitioners satisfied the criteria for new or late-filed contentions.

**B. The Proposed Contention Is Inadmissible**

The Board also erred in finding that the proposed contention satisfies the NRC’s strict standards for admissibility. The existence of a new study on arsenic and anecdotal information regarding cancers are wholly inadequate to affirmatively demonstrate a genuine dispute on a material issue with the application. Admitting this late-filed contention will effectively sanction “notice pleading” in NRC proceedings.<sup>9</sup> The Commission’s procedures

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<sup>8</sup> See Affidavit of David Frankel, dated September 22, 2008. Further, there is no reason why this information — even if relevant — could not have been obtained sooner. Intervenors are expected to diligently uncover and apply all publicly available information to the prompt formulation of contentions. See *Catawba*, CLI-83-19, 17 NRC at 1048. There simply is no good cause for late-filing where the information could have been identified earlier.

<sup>9</sup> See *Dominion Nuclear Conn., Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-01-24, 54 NRC 349, 358 (2001) (The “contention rule is strict by design,” having been “toughened . . . because in prior years ‘licensing boards had admitted and litigated numerous contentions that appeared to be based on little more than speculation.’”).

simply do not allow “the filing of a vague, unparticularized contention,’ unsupported by affidavit, expert, or documentary support.” *N. Atl. Energy Serv. Corp.* (Seabrook Station, Unit 1), CLI-99-6, 49 NRC 201, 219 (1999). Moreover, contrary to Commission precedent, the Board failed to examine documents to confirm that they provide the requisite support for the proposed contentions. *See Vt. Yankee Nuclear Power Corp.* (Vermont Yankee Nuclear Power Station), ALAB-919, 30 NRC 29, 48 (1989). As a result and as discussed below, the Board erred in admitted the late-filed contention.

The Petitioners arguments are best characterized as unfounded speculation, which cannot form the basis for an admissible contention. *See Fansteel, Inc.* (Muskogee, Oklahoma Site), CLI-03-13, 58 NRC 195, 203 (2003) (“A petitioner’s issue will be ruled inadmissible if the petitioner ‘has offered no tangible information, no experts, no substantive affidavits,’ but instead only ‘bare assertions and speculation.’”). The information and articles provided by Petitioners do not establish a genuine dispute on a material issue. As noted previously, the proposed contention is apparently based on a personal conversation between the attorney for the Consolidated Petitioners and a single individual in Chadron, Nebraska. But, there is no evidence provided in the Late-Filed Petition — anecdotal or otherwise — to suggest that arsenic poisoning has occurred. There is also no information regarding the quality or source of water consumed by the individuals with cancer. To the extent that the individuals obtain their drinking water from the City of Chadron water supply, the drinking water must meet the EPA’s drinking water standards for arsenic. To the extent that individuals obtain drinking water from private wells, there is no data presented to suggest that these wells contain arsenic.

Although the Board states that the proposed contention included “affidavits supporting a high incidence of pancreatic cancer and diabetes near the mine and on the

Reservation” (LBP-08-27 at 6), there is no information to support a link between arsenic exposure and pancreatic cancer (and the only affidavit is one filed by Consolidated Petitioners’ attorney, as described above). The supposed “link” is nothing more than the bald allegation of the Petitioners.<sup>10</sup>

Further, even if chronic arsenic exposure is contributing to the incidence of pancreatic cancers in Chadron, there is no evidence to suggest that Crow Butte’s operations are causing such exposures.<sup>11</sup> Groundwater in northwestern Nebraska contains naturally-high levels of arsenic. *See, e.g.*, U.S. Geological Survey, National Water-Quality Assessment Program, “County map: Arsenic concentrations found in at least 25% of ground-water samples in each county” (available at [http://water.usgs.gov/nawqa/trace/pubs/geo\\_v46n11/fig2.html](http://water.usgs.gov/nawqa/trace/pubs/geo_v46n11/fig2.html)). The lead author of the study cited by Petitioners even cautions that “[p]eople who get their drinking water from private wells and live in areas where groundwater is naturally contaminated with arsenic are at an especially high risk of being exposed to water with levels above the 10 parts per billion acceptable limit set by the Environmental Protection Agency.” U.S. News and World Report, “Is Your Drinking Water Giving You Diabetes?” (Aug. 19, 2008) (available at <http://health.usnews.com/articles/health/diabetes/2008/08/19/is-your-drinking-water-giving-you-diabetes.html>). While the wells used by Petitioners may or may not contain elevated levels of

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<sup>10</sup> The Petition states that “[d]uring discovery, the parties can ascertain the exact extent status of these cases [of pancreatic cancer].” Late Filed Pet. at 4. Notice pleading is not allowed. “[N]either Section 189a. of the Act nor Section [2.309] of the Rules of Practice permits the filing of a vague, unparticularized contention, followed by an endeavor to flesh it out through discovery against the applicant or staff.” *Catawba*, ALAB-687, 16 NRC at 468.

<sup>11</sup> For example, other factors, such as smoking, obesity, alcohol consumption, genetic makeup, and age, are known to be much greater contributors to the overall risk of diabetes, pancreatitis, or pancreatic cancer.

arsenic, there is simply no basis offered to support a contention that Crow Butte's operations have resulted in any arsenic contamination outside the mining area.

Another shortcoming in the Late-Filed Petition relates to the Petitioners' misleading statistical analyses. The Petitioners argue (Late-Filed Pet. at 3-4) that Chadron, with seven cases, has a pancreatic cancer rate that is approximately 20 times the national average of 11.5 cases per 100,000 persons. However, Petitioners fail to mention that this statistic refers to *new cases* diagnosed each year. In other words, there are 11.5 new cases of pancreatic cancer diagnosed each year per every 100,000 people. Persons diagnosed with pancreatic cancer, who are still alive the following year, are not counted again. Without information regarding the timing of the diagnoses, Petitioners' arguments lack context and therefore have no statistical significance.

The Late-Filed Petition also fails to challenge the application. The only reference to the application in the Late-Filed Petition is an oblique reference to Section 2.9.6 (page 2-243). Late-Filed Pet. at 6. That section simply describes baseline soil sampling and briefly describes the mining process. Petitioners do not dispute any statement in the application. The Commission has stated that the petitioner must "read the pertinent portions of the license application . . . [and] state the applicant's position and the petitioner's opposing view," and explain why it disagrees with the applicant. "Rules of Practice for Domestic Licensing Proceedings – Procedural Changes in the Hearing Process; Final Rule," 54 Fed. Reg. 33168, 33170 (Aug. 11, 1989). A contention that does not directly controvert a position taken by the applicant in the application is subject to dismissal. *See Tex. Utils. Elec. Co. (Comanche Peak Steam Electric Station, Unit 2)*, LBP-92-37, 36 NRC 370, 384 (1992).

In total, there is little substantive information to support the contention and nothing that demonstrates a possible causal mechanism for exposure. In applying the admissibility criteria, the Board uncritically accepted the Petitioners' statements. By doing so, the Board read the word "genuine" out of the requirement that the basis for a proposed contention demonstrate a genuine dispute.<sup>12</sup> The existence of new study on arsenic and anecdotal information regarding cancers are wholly inadequate to affirmatively demonstrate a genuine dispute on a material issue with the application.

#### IV. CONCLUSION

For the foregoing reasons, the Commission should reverse the Board's ruling on the admissibility of the late-filed contention in LBP-08-27. The Petition should be denied and the proceeding should be terminated.

/s/ signed electronically by  
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Dated at San Francisco, California  
this 18th day of December 2008

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<sup>12</sup> With respect to factual information or expert opinion proffered in support of a contention, "the Board is not to accept uncritically the assertion that a document or other factual information or an expert opinion supplies the basis for a contention." *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-98-7, 47 NRC 142, 181 (1998).

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CERTIFICATE OF SERVICE

I hereby certify that copies of "CROW BUTTE RESOURCES' BRIEF IN SUPPORT OF APPEAL FROM LBP-08-27" in the captioned proceeding have been served on the following persons via the Electronic Information Exchange this 18th day of December 2008, which to the best of my knowledge resulted in transmittal of the foregoing to those on the EIE Service List for the captioned proceeding.

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