

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION  
ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Michael M. Gibson, Chairman  
Dr. Richard F. Cole  
Brian K. Hajek

In the Matter of

CROW BUTTE RESOURCES, INC.

(License Renewal for the In Situ Leach Facility,  
Crawford, Nebraska)

Docket No. 40-8943

ASLBP No. 08-867-02-OLA-BD01

December 30, 2008

ORDER

(Denying Motion for Joinder)

Shortly after the Board issued LBP-08-24, in which it admitted several of the Consolidated Petitioners and the Oglala Sioux Tribe (the "Tribe") as parties to this proceeding,<sup>1</sup> Consolidated Petitioners<sup>2</sup> submitted a motion to join the Tribe's Environmental Contentions A, B, C, D, and E on November 26, 2008.<sup>3</sup> The NRC Staff provided a response in opposition to Consolidated Petitioners' Motion for Joinder.<sup>4</sup> In its response, the NRC Staff maintains that the subject motion was filed months after the expiration of an alleged deadline in the Commission's May 27, 2008 "Notice of Opportunity for a Hearing."<sup>5</sup> Specifically, the NRC Staff points out that the Notice of Opportunity for a Hearing directed any petitioner wishing to adopt or co-sponsor a

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<sup>1</sup> Crow Butte Resources, Inc. (In Situ Leach Facility, Crawford, Nebraska), LBP-08-24, 68 NRC \_\_\_ (2008).

<sup>2</sup> Collectively, Consolidated Petitioners include Beatrice Long Visitor Holy Dance, Debra White Plume, Thomas Kanatakeniate Cook, Loretta Afraid of Bear Cook, the Afraid of Bear/Cook Tiwahe, Joe American Horse, Sr., the American Horse Tiospaye, Owe Aku/Bring Back the Way, and Western Nebraska Resources Council.

<sup>3</sup> Petitioners' Joinder to Oglala Sioux Tribe Environmental Contentions A, B, C, D and E (November 26, 2008) [hereinafter Pet.'s Motion for Joinder].

<sup>4</sup> NRC Staff's Response to Consolidated Petitioners' Joinder to Oglala Sioux Tribe Environmental Contentions A, B, C, D and E (December 8, 2008) [NRC Response]. The Board notes that the Applicant, Crow Butte Resources, Inc., did not file an opposition to Consolidated Petitioners' notice of joinder.

<sup>5</sup> See 73 Fed. Reg. 30,426 (May 27, 2008).

contention proposed by another petitioner to do so “within ten days of the date the contention is filed,”<sup>6</sup> which, according to the NRC Staff, would make Consolidated Petitioners’ Motion for Joinder impermissibly late. Finally, the NRC Staff claims Consolidated Petitioners have not demonstrated compliance with the representational designation requirement set forth in section 2.309(f)(3) of the Commission’s regulations.<sup>7</sup>

The NRC Staff interprets Consolidated Petitioners’ motion as a request under 10 C.F.R. § 2.309(f)(3) to adopt or co-sponsor another party’s contention, which appears to be the only substantive provision in the Commission’s regulations allowing one petitioner to participate in the proffered contention, albeit in a far more limited way than the sponsoring party.<sup>8</sup> Contrary to the NRC Staff’s supposition, Consolidated Petitioners apparently do not desire to adopt or co-sponsor the Tribe’s contentions as their own. Instead, Consolidated Petitioners seek to join the Tribe’s contentions in order that they be allowed independent submittal of arguments and briefing on the issues raised in those contentions.<sup>9</sup>

There is a significant difference between joinder, on the one hand, and adoption or co-sponsorship, on the other. The primary purpose for allowing contention adoption is to preserve the adopting party’s right to litigate the originally proposed contention in the event the sponsoring party were to leave the proceeding prior to the resolution of that contention.<sup>10</sup> Under § 2.309(f)(3), where a petitioner seeks to adopt the contention of another, that petitioner must agree that the sponsoring petitioner will act as the representative for that contention.

A second method by which a party may participate in the prosecution of another party’s admitted contention is through co-sponsorship. If a party elects to co-sponsor another party’s

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<sup>6</sup> Id. at 30,427.

<sup>7</sup> NRC Response at 2.

<sup>8</sup> Louisiana Energy Services, L.P. (National Enrichment Facility), CLI-04-35, 60 NRC 619, 627 (2004) (citing 10 C.F.R. § 2.309(f)(3)) (emphasis in original) (Commission’s rules do not otherwise provide an unconstrained right for a party to take an active role in another party’s contention). The Commission has stated that “petitioners seeking intervention as a party under section 2.309 may choose to participate on other petitioners’ contentions by adopting them.” Id. at 627 (citing 10 C.F.R. § 2.309(f)(3)) (emphasis in original).

<sup>9</sup> Petitioners’ Answer to NRC Response to Joinder at 2 (Dec. 15, 2008) [hereinafter Pet. Answer].

<sup>10</sup> 69 Fed. Reg. 2182, 2221 (Jan. 14, 2004).

contention, both parties must jointly designate a representative authorized to act on behalf of all petitioners with regard to the co-sponsored contention.<sup>11</sup> We note, however, that neither contention adoption nor co-sponsorship allows the adopting or co-sponsoring party to litigate the contention in question independently of the sponsoring party.

Acknowledging that the NRC regulations are silent regarding issues of joinder, Consolidated Petitioners instead point to Rule 20 of the Federal Rules of Civil Procedure as a basis for their motion. Consolidated Petitioners maintain that joinder is especially a concern for those who are members of the Tribe who seek an opportunity to be heard independent of the Tribe itself.<sup>12</sup> While the Federal Rules of Civil Procedure may serve as guidance in applying NRC rules of procedure, they are not required to be used in NRC proceedings.<sup>13</sup> Even if we were to apply Rule 20 of the Federal Rules of Civil Procedure, the Board does not agree that such joinder would be permissible here. Specifically, Consolidated Petitioners express a concern that those who are members of the Tribe should be afforded an opportunity to be independently heard. Such a concern in this instance would be misplaced. Because the Tribe is a party to this proceeding, it represents itself and all its members. If an individual tribal member has a concern with one or more of the Tribe's admitted contentions, those concerns are to be voiced through the Tribe as the individual tribal member's representative.

Stated otherwise, we will not allow Consolidated Petitioners to circumvent the contention admissibility requirements of § 2.309(f)(1) by asserting that the Tribe will somehow not address the concerns of its individual members. Moreover, allowing Consolidated Petitioners to submit additional arguments and briefing on the issues raised in the Tribe's contentions would potentially increase the level of effort required to respond to those submissions, thereby prejudicing the Applicant and the NRC Staff.

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<sup>11</sup> 69 Fed. Reg. at 2221.

<sup>12</sup> Pet. Answer at 2.

<sup>13</sup> Cincinnati Gas and Electric Co. (William H. Zimmer Nuclear Power Station, Unit 1), LBP-82-47, 15 NRC 1538, 1542 (1982).

For the foregoing reasons, the Board denies Consolidated Petitioners' Motion for Joinder. However, we also note that there is nothing either in the regulations, or in the statement of considerations for those regulations, that supports the NRC Staff's position that motions for adoption or co-sponsorship of another petitioner's contention must be filed prior to contention admissibility.<sup>14</sup> In the absence of a demonstration that allowing adoption or co-sponsorship of admitted contentions would prejudice any party or unduly delay this proceeding,<sup>15</sup> motions for adoption or co-sponsorship of another party's contentions would be appropriate.

It is so ORDERED.

FOR THE ATOMIC SAFETY  
AND LICENSING BOARD<sup>16</sup>

*/RA/*

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Michael M. Gibson, Chairman  
ADMINISTRATIVE JUDGE

*/RA/*

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Dr. Richard F. Cole  
ADMINISTRATIVE JUDGE

*/RA/ by E. Roy Hawkens for*

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Brian K. Hajek  
ADMINISTRATIVE JUDGE

Rockville, Maryland  
December 30, 2008

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<sup>14</sup> The only authority NRC Staff cites in support of its objection is the Federal Register notice itself. The Federal Register notice attempting to set a deadline by which contentions must be adopted is nugatory. In the absence of notice and comment rulemaking, such a bar date is violative of the rules the Commission has already promulgated that have no bar date.

<sup>15</sup> The Commission's regulations empower a Licensing Board to make orders that prevent prejudice or undue delay. See 10 C.F.R. 2.319(g) (Licensing Board has the power to "[r]egulate the course of the hearing and the conduct of participants"); see also id. at 2.319(k) (Licensing Board has the power to "[s]et reasonable schedules for the conduct of the proceeding and take actions reasonably calculated to maintain overall schedules").

<sup>16</sup> Copies of this memorandum and order were sent this date by the agency's E-Filing system to the counsel/representatives for (1) applicant Crow Butte Resources, Inc.; (2) Consolidated Petitioners; (3) NRC Staff; 4) Oglala Delegation of the Great Sioux Nation Treaty Council; and 5) Oglala Sioux Tribe.

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

In the Matter of )  
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CROW BUTTE RESOURCES, INC. ) Docket No. 40-8943  
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In-Situ Leach Uranium Recovery Facility, ) ASLBP No. 08-867-02-OLA-BD01  
Crawford, Nebraska )  
)  
(License Amendment) )

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LB ORDER (DENYING MOTION FOR JOINDER) have been served upon the following persons by Electronic Information Exchange.

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LB ORDER (DENYING MOTION FOR JOINDER)

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[Original signed by Nancy Greathead]

Office of the Secretary of the Commission

Dated at Rockville, Maryland  
this 30<sup>th</sup> day of December 2008