

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
	)	ASLBP No. 08-867-02-OLA-BD01
(License Renewal for the	)	
In Situ Leach Facility, Crawford, Nebraska)	)	February 10, 2015

**CONSOLIDATED INTERVENORS' RESPONSE AND MOTION TO STRIKE  
LATE-FILED NRC STAFF CHANGE OF POSITION RE: CONTENTION 13**

Consolidated Intervenors<sup>1</sup> hereby timely submit the following response pursuant to the Board's Order dated February 6, 2015 concerning the NRC Staff's late-filed change of position re: Contention 13, including this motion to strike from the record the NRC's Change of Position filed February 6, 2015 as well as the amended position filed on that same date.

**I. INTRODUCTION**

Contrary to NRC regulations and precedent, NRC Staff's Change of Position improperly includes new arguments and references, and deletes substantive argument to amend its position in a one-hundred and eighty (180) degree turnabout. Prior to its filing, on February 5, 2015 (on the date before replies were due to the answers filed to the new

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<sup>1</sup> Western Nebraska Resources Council ("WNRC"), Owe Aku/Bring Back the Way, Debra White Plume, Beatrice Long Visitor Holy Dance, Joe American Horse & Tiospaye, Thomas Cook, Loretta Afraid-of-Bear Cook & Tiwahe. Debra White Plume, Beatrice Long Visitor Holy Dance, Joe American Horse and Loretta Afraid-of Bear Cook are members of the Oglala Sioux Tribe (the "Tribe") at Pine Ridge Indian Reservation.

contentions), presumably to be in accord with 10 C.F.R. § 2.323, NRC Staff contacted the parties stating it was proposing a 'motion' to change its position on Contention 13.

Applicant stated it supported the motion. Consolidated Intervenors stated that they opposed the motion and requested NRC Staff to cite to its legal authority for making such a filing. NRC Staff never replied to Consolidated Intervenors request for the citation to applicable legal authority and went ahead and filed its motion.

Thereafter, Consolidated Intervenors by email alerted the parties that they would be filing a motion to strike the NRC Staff's Change of Position re: Contention 13 which Consolidated Intervenors stated was an abuse of process and violative of NRC Regulations. Applicant Crow Butte stated that it would oppose the motion to strike after asking a clarifying question which was answered promptly by counsel for Consolidated Intervenors. NRC Staff stated that it did not see any authority for a motion to strike and so would oppose the motion to strike. OST counsel stated that it would support the motion to strike.

Accordingly, the Consolidated Intervenors hereby move to strike the new information contained in the NRC Staff's Change of Position filed both in its motion on February 6, 2015 as well as filed in response to the Board's Order dated February 6, 2015 because such new information was filed in violation of NRC Regulations and without any statement of good cause or compelling circumstances. Consolidated Intervenors also oppose the NRC Staff's motion to admit the amended position as being untimely and, in effect, an impermissible attack on NRC Regulations. Therefore, NRC Staff's motion should be denied, and Consolidated Intervenors motion to strike should be granted.

In order to test the validity of Consolidated Intervenors assertions, we invite you to imagine the opposite scenario where Consolidated Intervenors read the pleading of another party, e.g., OST, and remorsefully decide that we should have included some arguments or should have taken a different position and wish we had waited until after reading the other party's pleading to file our own pleading. Is there anyplace in the NRC regulatory universe where such a request by intervenors would not be thrown out? Why then would NRC Staff deserve special treatment? At what point can NRC Staff's unilateral actions and special treatments be viewed collectively as a legal force that arbitrarily and capriciously imposes its whims on the parties, their counsels and the public? Is NRC Staff without check and, if not, what is their limiting principle?

## II. APPLICABLE NRC REGULATIONS

There are several applicable NRC Regulations but none of them provides authority for granting the NRC Staff's motion re: Change of Position.

First, 2.309 is the operative regulation concerning the filing of contentions.

Section 2.309(i)(3) is unambiguous when it says, among other things, "no other written answers or replies will be entertained":

*(i) Answers to hearing requests, intervention petitions, and motions for leave to file new or amended contentions filed after the deadline. Unless otherwise specified by the Commission, the presiding officer, or the Atomic Safety and Licensing Board designated to rule on the request, petition, or motion—*

(1) The applicant/licensee, the NRC staff, and other parties to a proceeding may file an answer to a hearing request, intervention petition, or motion for leave to file amended or new contentions filed after the deadline in § 2.309(b) within 25 days after service of the request, petition, or motion. Answers should address, at a minimum, the factors set forth in paragraphs (a) through (h) of this section insofar as these sections apply to the filing that is the subject of the answer.

(2) Except in a proceeding under § 52.103 of this chapter, the participant who filed the hearing request, intervention petition, or motion for leave to file new or amended contentions after the deadline may file a reply to any answer. The reply must be filed within 7 days after service of that answer.

(3) No other written answers or replies will be entertained.

Section 2.307 provides a process to extend times for good cause. However, the NRC Staff has not provided any explanation of ‘good cause’ of any kind. The NRC Staff could have just raised this during oral argument. However, it chose to drop this additional filing on the parties and counsels on the day before replies were due.

Further, Staff provides no statement of ‘good cause’ except that it changed its views (presumably after reading Crow Butte’s pleading). That, in and of itself, does not conjure up any form of good cause - even a scintilla. The closest the NRC Staff comes to asserting any ‘good cause’ is when it says that its filing of its change of position is actually a benefit to the other parties, including the ones objecting to it, so everyone involved can be clearly aware of the NRC Staff’s position change. See Staff’s Feb. 6 Motion at 2.

The NRC Staff’s failure to establish any good cause for extending its time to answer under 2.309(i)(1) is fatal to its motion and its filings in general and is grounds for granting Consolidated Intervenors motion to strike.

Further, it was inappropriate and unauthorized for the Board to allow Staff to file its changed position without first affording the parties an opportunity to be heard on the motion. Doing so has created confusion and a waste of resources by all parties and the

Board and support staff all to deal with something that could easily have been raised at oral argument by the NRC Staff.

Also fatal to the NRC Staff's motion is that the Board is not authorized to consider challenges to NRC Regulations under Section 2.335(a) which provides that:

no rule or regulation of the Commission, or any provision thereof, concerning the licensing of ...source material...or byproduct material, is subject to attack by way of discovery, proof, argument, **or other means** in any adjudicatory proceeding subject to this part. (Emphasis added.)

Clearly, the NRC Staff is not permitted to use this motion/notice of Change of Position as a mechanism, or 'other means,' of attacking the time and date rules of Section 2.309(i)(1), (3), or of attacking the rules for extension of time in Section 2.307, which would be the effect of granting the NRC Staff's motion and allowing its Change of Position on Contention 13 to be part of the record. Neither is the Board permitted to allow the amended information to be used as such a mechanism in violation of Section 2.335(a).

Section 2.320 also supports Consolidated Intervenors motion to strike, it says: "[i]f a party fails to file an answer or pleading within the time prescribed in this part ... the presiding officer may make any orders in regard to the failure that are just." 10 CFR 2.320. The granting of a motion to strike is also supported by Section 2.323(d):

(d) *Accuracy in filing.* All parties are obligated, in their filings before the presiding officer and the Commission, to ensure that their arguments and assertions are supported by appropriate and accurate references to legal authority and factual basis, including, as appropriate, citations to the record. Failure to do so may result in appropriate sanctions, including striking a matter from the record or, in extreme circumstances, dismissal of the party.

As described in the Introduction, counsel for Consolidated Intervenors requested counsel for NRC Staff to provide a legal citation for the basis for the filing of the Change of Position and there was no response. In light of counsel for NRC Staff's duties to support their filings with references to legal authority and in light of the complete absence of a legal citation in NRC Staff's pleading that would purport to authorize the filing, the NRC Staff has failed to comply with Section 2.323(d). The remedy for such failure is expressly stated in Section 2.323(d) to include striking the offending filing from the record which is precisely what Consolidated Intervenors have moved for herein. In light of the foregoing, it would be a just order for the Board to grant Consolidated Intervenors motion to strike.

Finally, Consolidated Intervenors note that contrary to Section 2.323(b), the NRC Staff did not make a sincere effort to resolve the issues raised by their motion re: Change of Position. Section 2.323(b) provides that:

A motion must be rejected if it does not include a certification by the attorney or representative of the moving party that the movant has made a sincere effort to contact other parties in the proceeding and resolve the issue(s) raised in the motion, and that the movant's efforts to resolve the issue(s) have been unsuccessful.

A review of the NRC Staff's February 6th Motion does not reveal any information that indicates that a sincere effort was made by NRC Staff to resolve the issue and that such efforts have been unsuccessful. At Footnote 2 (assuming Footnote 2 constitutes the kind of certification required by 2.323(b)), NRC Staff describes contacting the parties' counsels and states who objected, who supported, and who failed to respond. No mention is made of any efforts to resolve the issues raised by the proposed motion. In

fact, counsel for Consolidated Intervenors David Frankel engaged NRC Staff counsel Marcia Simon in consultation concerning the proposed motion within minutes of receiving her email re: consultation:

“Dear Ms. Simon,

I don't believe you have any regulatory basis to file such an amended response and, accordingly, Consolidated Intervenors object to your motion.

At most, I believe the regulations would support a motion for leave to file an amended motion based on whatever good cause you are able to articulate. Depending on the nature of the 'good cause' asserted, Consolidated Intervenors would take a position at that time.

Otherwise the regulations concerning the filing of responses and replies would have no meaning. If you were to file such an amended response to change your position (as opposed to correcting a typo, for example) that would be an abuse of the process - it makes it look like you read CBR's pleading and had remorse that you hadn't had a chance to preview it. Such is unacceptable - you should have got your position clear before you filed your Response.

Kindly provide a legal citation for your authority to file such an amendment to change your response on contention 13.

Otherwise, I believe that you should wait until oral argument.

Sincerely,

David Frankel  
Counsel for Consolidated Intervenors"

Based on the foregoing, Ms. Simon should have followed up with either some legal citation or perhaps in the absence of any legal citation, Ms. Simon should have waited until oral argument to raise the issue or else proposed another resolution in a 'sincere' effort to resolve the issues. Instead, Ms. Simon ignored Mr. Frankel's request for legal authority and went full steam ahead and filed her motion. Such action falls short of compliance with Section 2.323(b) and,

since this is not Ms. Simon's first rodeo, so to speak, she should be held accountable by denying her motion, and striking both her motion and the amended position re: Contention 13 from the record.

The NRC Regulations discourage 'buyers remorse' or, in this case, 'counsel's remorse.' Although most of the Commission precedent relates to petitioners and intervenors, the same rules apply to the NRC Staff itself. 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). Clearly, the Board has the power under Section 2.319 to "take appropriate action to control the prehearing ...process" which includes the power to strike the offending material or intentionally decide to not consider it in rendering its decision. 10 CFR 2.319. See, e.g., La. Energy Servs. L.P.; Entergy Nuclear Vt. Yankee, LLC (Vermont Yankee Nuclear Power Station), LBP-06-20, 64 NRC 131, 182, 198-199 (2006).

Finally, because Crow Butte has raised the same arguments with respect to Contention 13 as NRC Staff seeks to raise in its Change of Position, there is no doubt that the arguments concerning the inadmissibility of Contention 13 will be articulated by Crow Butte's counsel and that the matter will be heard at the oral argument. Therefore, there is no real prejudice to any party or the public if NRC Staff is forced to stick to its original position. NRC Staff, however, should be bound to its original position concerning Contention 13 as far as these proceedings are concerned. Accordingly, the equities run in favor of denying NRC Staff's motion and granting Consolidated Intervenors motion to strike herein.

### **III. SUBSTANTIVE RESPONSE PURSUANT TO BOARD ORDER**

Consolidated Intervenors have been ordered to respond to the NRC Staff's proposed amendment on substantive grounds. For the same reasons stated in its Reply generally, Consolidated Intervenors assert that there has been compliance with Section 2.309 as to the newly filed contentions based on the Final EA, including Contention 13. Consolidated Intervenors maintain that position with regard to the NRC Staff's proposed amendment to its position re: Contention 13.

### **IV. CONCLUSION**

For all the foregoing reasons, the Board should deny the NRC Staff's motion to amend its pleadings concerning Contention 13 and should grant the motion by Consolidated Intervenors to strike the NRC Staff's Change of Position and amended

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information from the record.

Dated this 10<sup>th</sup> day of February, 2015.

Respectfully submitted,



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(License Renewal for the )  
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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing ‘**CONSOLIDATED INTERVENORS’  
RESPONSE AND MOTION TO STRIKE LATE-FILED NRC STAFF CHANGE  
OF POSITION RE: CONTENTION 13**’, together with the Exhibits attached thereto  
and filed therewith, in the captioned proceeding were served via email on the 10<sup>th</sup> day of  
February 2015, which to the best of my knowledge resulted in transmittal of same to  
those on the EIE Service List for the captioned proceeding.

Respectfully submitted,



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