

February 12, 2015

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

NRC STAFF'S OPPOSITION TO CONSOLIDATED INTERVENORS' MOTION TO STRIKE

Pursuant to 10 C.F.R. § 2.323(c), the NRC Staff (Staff) responds to Consolidated Intervenor's (CI) motion to strike¹ the Staff's Notice of Change in Position and Motion to File Amended Response to Contention 13 (Staff's Motion) and the Staff's Proposed Amended Response.² CI assert in their motion to strike that the Staff's Motion and Proposed Amended Response were filed "in violation of NRC Regulations and without a statement of good cause or compelling circumstances."³ The Staff opposes the motion to strike because the Staff complied with the requirements for submitting a motion in 10 C.F.R. § 2.323, because the Staff's Motion otherwise comports with the regulations in 10 C.F.R. Part 2, and because the Board's decision to grant or deny the Staff's Motion will determine the fate of the Proposed Amended Response.

As stated in the Staff's Motion, upon realizing that the Staff's position on Contention 13 was based on an inaccurate interpretation of the law, Staff counsel sought to inform the Board and parties of the Staff's current position as soon as possible and prior to oral argument in order

¹ Consolidated Intervenor's Response and Motion to Strike Late-Filed NRC Staff Change of Position Re: Contention 13 (February 10, 2015) (CI Motion). Because CI have filed their answer opposing the Staff's Motion and their motion to strike as one combined document, the Staff is responding only to the motion to strike, recognizing that the Staff has no right to reply to CI's answer to the Staff's Motion under 10 C.F.R. § 2.323(c).

² NRC Staff's Notice of Change in Position and Motion to File Amended Response to Contention 13 (February 6, 2015); NRC Staff's Proposed Amended Response (February 6, 2015).

³ CI Motion at 2.

to give them time to prepare and respond, rather than first raising the issue at oral argument.⁴ While indicating that Staff counsel was prepared to address the issue at oral argument, the Staff requested leave to file an amended response for the purposes of efficiency and clarity.⁵ Under 10 C.F.R. § 2.323, a motion must be made no later than 10 days after the occurrence or circumstances from which the motion arises, and must state with particularity the grounds and the relief sought. The Staff complied with those provisions. Staff counsel also made a sincere effort to contact other parties and resolve the issues raised in the motion; however, those efforts were not successful.⁶ Finally, there is no limitation in 10 C.F.R. § 2.323 on what may be requested in a motion. Therefore, 10 C.F.R. § 2.323 is not a basis to strike the Staff's Motion.

Similarly, 10 C.F.R. § 2.309(i) does not bar the Staff's Motion. In essence, the Staff has asked the Board for leave to file an additional, supplemental pleading and to allow other parties to respond to it.⁷ The NRC regulations governing answers and replies, 10 C.F.R. § 2.309(i)(1)-(3), apply "[u]nless otherwise specified by . . . the Atomic Safety and Licensing Board designated to rule on the request, petition or motion. . . ."⁸ In NRC proceedings, licensing boards have directed parties to file additional pleadings.⁹ Because boards have the power to

⁴ Staff's Motion at 1-2. In moving to strike the Staff's Motion and amended response, CI propose that Staff counsel should wait to raise the change in position at oral argument. See CI Motion at 5, 7.

⁵ Staff's Motion at 2.

⁶ 10 C.F.R. § 2.323(b). The consultation e-mail stated that the Staff's position had changed based on an inaccurate reading of the regulations in 50.C.F.R. Part 402, and explained the basis for filing the motion as follows: ". . . we think it would be beneficial to provide the Board and parties with an amended written response reflecting our revised position prior to the oral argument. This would allow the Staff to clearly explain its revised position, and would give the Board and parties time to consider it, and develop questions and responses to it, instead of having to address it on the fly at oral argument." The consultation e-mail also stated that the Staff was willing to request an opportunity for other parties to respond in writing to the amended response prior to oral argument.

⁷ Staff's Motion at 1-2.

⁸ See 10 C.F.R. § 2.309(i) (first sentence) (emphasis added).

⁹ See, e.g., *Crow Butte Resources, Inc.* (Marsland Expansion Area), Memorandum and Order (Establishing Schedule for Additional Pleadings to Address Information in Recent Tribal Cultural Resources Survey Report) at 3 (March 22, 2013) (unpublished) (ADAMS Accession No. ML13081A175).

authorize additional pleadings, there is no reason why parties may not request leave to file them. Therefore, the Staff's request to do so is not contrary to the rules. In its motion, the Staff specifically asked the Board to provide other parties an opportunity to respond to the amended response if the Board granted the Staff's Motion.¹⁰ Therefore, the Staff was, in effect, asking the Board to allow a round of supplemental pleadings. Because granting such a request is within the Board's power under 10 C.F.R. §§ 2.309(i) and 2.319, 10 C.F.R. § 2.309(i) is not a basis to strike the Staff's Motion.

Finally, CI characterize the Staff's Motion as "late-filed" and argue that the motion to strike should be granted because the Staff did not establish good cause for late filing.¹¹ But, as discussed above, the Staff's request was to file a supplemental pleading and to allow other parties to respond to it. The Staff was not requesting to file its answer to the new contentions late, and the motion itself was timely filed. Therefore, 10 C.F.R. § 2.307(a) does not apply. Whether good cause exists to grant the motion is a different issue, and is not a basis for striking the Staff's Motion.

For the reasons stated above, the motion to strike should be denied.

Respectfully submitted,

/Signed (electronically) by/

Marcia J. Simon

Counsel for the NRC Staff

U.S. Nuclear Regulatory Commission

Office of the General Counsel

Mail Stop: O-15 D21

Washington, D.C. 20555-0001

(301) 415-1261

marcia.simon@nrc.gov

Dated at Rockville, Maryland
This 12th day of February 2015.

¹⁰ Staff's Motion at 2.

¹¹ CI Motion at 4.

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "NRC STAFF'S OPPOSITION TO CONSOLIDATED INTERVENORS' MOTION TO STRIKE" in the above captioned proceeding have been served this 12th day of February, 2015, via the NRC's Electronic Information Exchange ("EIE"), and via e-mail to David Frankel and Thomas Ballanco, counsels for Consolidated Intervenors, which to the best of my knowledge resulted in transmittal of the foregoing to those on the EIE Service List for the above captioned proceeding.

Signed (electronically) by

Marcia J. Simon
Counsel for the NRC Staff
U.S. Nuclear Regulatory Commission
Mail Stop O-15 D21
Washington, DC 20555-0001
(301) 415-1261
marcia.simon@nrc.gov