

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

Before Administrative Judges:

Michael M. Gibson, Chairman  
Dr. Richard E. Wardwell  
Brian K. Hajek  
Alan S. Rosenthal (Special Assistant to the Board)

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

March 16, 2015

MEMORANDUM AND ORDER

(Denying Motion to Amend Contention 13; Denying Motion to Strike)

Introduction

On January 30, 2015, the NRC Staff filed its answer to new contentions proffered by the Oglala Sioux Tribe and Consolidated Intervenors (CI) in this proceeding (together Intervenors).<sup>1</sup> The NRC Staff Answer concluded that newly proposed Contention 13 was admissible.<sup>2</sup> Contention 13 concerned consultation with the U.S. Fish & Wildlife Service (FWS) about potential effects to threatened or endangered (T&E) species on or near the Crow Butte license

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<sup>1</sup> NRC Staff's Combined Answer to New Contentions Filed by Consolidated Intervenors and the Oglala Sioux Tribe (Jan. 30, 2015) [hereinafter NRC Staff Answer]. The new contentions followed publication of the Environmental Assessment for the Crow Butte Resources Inc. (Crow Butte) license renewal. See Environmental Assessment Availability Notification, Letter from Marcia Simon, NRC Staff Counsel, to Administrative Judges and Parties (Oct. 27, 2014) (ADAMS Accession No. ML14300A228).

<sup>2</sup> NRC Staff Answer at 62.

renewal area.<sup>3</sup> The NRC Staff explained in its answer that it had engaged in informal consultation with FWS, but had yet to close out the process by getting a required concurrence from FWS that there would be no adverse effects to T&E species.<sup>4</sup> As a result, the NRC Staff stated, “the contention is admissible on this basis because the informal consultation concurrence has not been received.”<sup>5</sup>

One week later, the NRC Staff filed a motion to amend its answer by changing its position on Contention 13, to argue that it was wholly inadmissible.<sup>6</sup> The NRC Staff stated that although it could explain its change of position at oral argument, it sought to amend its answer to “promote efficiency and clarity.”<sup>7</sup> The proposed amendment argues that the NRC Staff only requires FWS concurrence if it finds that the project at issue “may affect” T&E species, supposedly not the case here.<sup>8</sup> CI filed a response opposing the NRC Staff’s request and

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<sup>3</sup> The Oglala Sioux Tribe’s Renewed and New Contentions Based on the Final Environmental Assessment (October 2014) at 109 (Jan. 5, 2015); Consolidated Intervenor’s New Contentions Based on the Final Environmental Assessment (October 2014) at 97 (Jan. 5, 2015).

<sup>4</sup> NRC Staff Answer at 62. The NRC Staff interpreted FWS regulations as requiring concurrence after undertaking informal consultation: “[u]nder 50 C.F.R. § 402.13(a), when engaging in informal consultation, an agency must provide its determination as to whether the proposed action will affect T&E species to FWS and request FWS concurrence.” Id.

<sup>5</sup> Id.

<sup>6</sup> NRC Staff’s Notice of Change in Position and Motion to Amend Response to Contention 13 (Feb. 6, 2015) [hereinafter Motion to Amend].

<sup>7</sup> Id. at 2.

<sup>8</sup> See NRC Staff’s Proposed Amended Response to Contention 13, attach. 1 (Feb. 6, 2015) (“Under the implementing regulations in 50 C.F.R. Part 402, formal Section 7 consultation is required only if an agency determines that an action ‘may affect’ listed species or critical habitat.” (citing 50 C.F.R. § 402.14(a)) (emphasis removed). According to the amended response, “the Staff determined there would be no effect on [listed] species.” Id. at 2 (emphasis removed).

moving to strike the NRC Staff's motion from the record.<sup>9</sup> Crow Butte filed a response to CI's motion to strike.<sup>10</sup>

### **Discussion**

Section 2.309(i) of 10 C.F.R. sets the schedule for filing answers and replies after the filing of motions to admit new contentions. The regulation states that after new contentions are proffered, the NRC Staff and applicant can answer within twenty-five days, and after that, the petitioning or intervening party can reply within ten days following; "[n]o other written answers or replies will be entertained."<sup>11</sup> Furthermore, under 10 C.F.R. § 2.335, "no rule or regulation of the Commission, or any provision thereof," is subject to attack "by way of discovery, proof, argument, or other means in any adjudicatory proceeding."<sup>12</sup> The NRC Staff did not seek a waiver of Section 2.309 in its Motion to Amend,<sup>13</sup> nor did it attempt to demonstrate "good cause" to warrant an extension of time in which to file an amended answer.<sup>14</sup> Other than for "efficiency

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<sup>9</sup> Consolidated Intervenor's Response and Motion to Strike Late-Filed NRC Staff Change of Position Re: Contention 13 (Feb. 10, 2015) [hereinafter CI Response].

<sup>10</sup> Crow Butte Resources' Response to Motion to Strike (Feb. 20, 2015) [hereinafter Crow Butte Response].

<sup>11</sup> 10 C.F.R. § 2.309(i). This prohibition does not apply to statements made during oral argument.

<sup>12</sup> Id. § 2.335(a); see also Exelon Generation Co. (Limerick Generating Station, Units 1 and 2), CLI-13-07, 78 NRC 199, 206 (2013) (describing 10 C.F.R. § 2.335(a) as a "general prohibition against challenges to NRC rules or regulations in adjudicatory proceedings").

<sup>13</sup> See Dominion Nuclear Conn., Inc. (Millstone Nuclear Power Station, Units 2 and 3), CLI-05-24, 62 NRC 551, 559–60 & nn.29–34 (2005) (describing the four requirements for a waiver); see also Honeywell Int'l, Inc. (Metropolis Works Uranium Conversion Facility), LBP-12-6, 76 NRC 256, 270–71 (2012) (applying the Millstone test to a non-intervening party), aff'd, CLI-13-1, 77 NRC 1 (2013).

<sup>14</sup> 10 C.F.R. § 2.307(a) (allowing for an extension of time "for good cause"); 77 Fed. Reg. 46,562, 46,571 (Aug. 3, 2012) (describing what constitutes "good cause" under Section 2.307, including "a weather event or unexpected health issues").

and clarity,” the NRC Staff has not provided any legal explanation at all for why an exception to the NRC’s strict rules governing adjudicatory proceedings should be allowed.

The Board appreciates the NRC Staff’s unique role in license proceedings as a “protector of the public interest.”<sup>15</sup> This gives the NRC Staff special privileges, such as the freedom to change its position based on new facts.<sup>16</sup> However, nothing about this unique role accords the NRC Staff unbridled permission to change its legal argument at whim.<sup>17</sup> As intervening groups in our proceedings are consistently reminded, the agency faces “an increasing adjudicatory docket” and efficiency is a priority.<sup>18</sup> For these reasons, we deny the NRC Staff’s motion, noting that allowing any party to amend its pleadings at its discretion would threaten to increase significantly the time and expense of our proceedings. As a protector of the public interest, the NRC Staff also has a duty to lead by example in complying with the Commission’s rules.

The Board is also concerned with the NRC Staff’s apparent lack of meaningful consultation with Intervenorors before filing its Motion to Amend. Pursuant to 10 C.F.R. § 2.323(b), a motion will be rejected if it does not come with a certificate by the moving party’s

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<sup>15</sup> Crow Butte Response at 1–2; Ga. Power Co., et al. (Vogtle Electric Generating Plant, Units 1 & 2), LBP-94-26, 40 NRC 93, 94 (1994).

<sup>16</sup> See Vogtle, LBP-94-26, 40 NRC at 94 (“[A]s a protector of the public interest, Staff will remain free to change its position in light of new information that may be produced in the course of a trial.”); see also Pub. Serv. Co. of Okla. et al. (Black Fox Station, Units 1 & 2), ALAB-505, 8 NRC 527, 532 (1978) (discussing the duty of candor applicable to all litigants before a licensing board concerning new material facts).

<sup>17</sup> Contrary to Crow Butte’s proposition, a change in the NRC Staff’s legal position concerning the Endangered Species Act, 16 U.S.C. § 1531 et seq., does not constitute new facts.

<sup>18</sup> Entergy Nuclear Operations & Entergy Nuclear Palisades, LLC (Palisades Nuclear Plant), et al., CLI-08-19, 68 NRC 251, 262 (2008) (quoting La. Energy Servs., L.P. (National Enrichment Facility), CLI-04-25, 60 NRC 223, 225 (2004), reconsid. denied, CLI-04-35, 60 NRC 619 (2004)); see also Shaw Aerva MOX Servs. (Mixed Oxide Fuel Fabrication Facility), LBP-07-14, 66 NRC 169, 212 n.198 (2007) (discussing Commission rulemakings promulgated to promote efficiency in the hearing process, although noting that those rulemakings “were not intended to create unfairness”), rev’d in part on other grounds, CLI-09-2, 69 NRC 55 (2009).

representative that there has been a “sincere effort to contact other parties in the proceeding and resolve the issue(s) raised in the motion.”<sup>19</sup> CI claims in its response that “within minutes” of being e-mailed about the proposed motion, it e-mailed a response taking the opposing view and seeking clarification.<sup>20</sup> According to CI, the NRC Staff’s counsel nonetheless filed the motion without any further effort to communicate with CI.<sup>21</sup>

In Vermont Yankee, a licensing board concluded that under a standard of objective reasonableness, last-minute communications that present no realistic opportunity for communication likely do not make for a “sincere effort” under Section 2.323(b).<sup>22</sup> We see no evidence that CI was unduly uncooperative, even if it took the opposing position.<sup>23</sup> Given that the NRC Staff is to lead by example in complying with the NRC’s rules, this perfunctory attempt at consultation presents another ground upon which to deny the motion.

We note as well that the NRC Staff’s position is not harmed by this denial. Crow Butte’s own answer put forward an argument similar to what the NRC Staff seeks to make in its proposed amended answer.<sup>24</sup> Moreover, given the NRC Staff’s eventual receipt of FWS concurrence, Contention 13 has been determined to be moot.<sup>25</sup>

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<sup>19</sup> 10 C.F.R. § 2.323(b) (emphasis added).

<sup>20</sup> CI Response at 7.

<sup>21</sup> Id. Neither the NRC Staff nor Crow Butte offer an alternate account of events.

<sup>22</sup> See Entergy Nuclear Vermont Yankee LLC & Entergy Nuclear Operations, Inc. (Vermont Yankee Nuclear Power Station), LBP-06-5, 63 NRC 116, 128–30 (2006) (also noting that this requirement still applies even if the consultation effort appears futile).

<sup>23</sup> Entergy Nuclear Vermont Yankee LLC & Entergy Nuclear Operations, Inc. (Vermont Yankee Nuclear Power Station), LBP-05-33, 62 NRC 828, 838 (2005) (“Obviously, any consultation needs to be prompt, and the opposing party needs to cooperate.”).

<sup>24</sup> See Crow Butte Resources’ Response to Proposed New Contentions Based on Final Environmental Assessment at 37–38 (Jan. 30, 2015) (arguing that consultation with FWS is not required when an agency makes a finding that there will be “no effect” on T&E species).

<sup>25</sup> See LBP-15-11, 81 NRC \_\_, \_\_ (slip op. at 54–56) (Mar. 16, 2015).

**Conclusion**

The NRC Staff's Motion to Amend is denied. Although licensing boards have the authority to strike motions that fail to comply with the NRC's pleading requirements,<sup>26</sup> striking the NRC Staff's motion is unnecessary at this time. CI's motion to strike the NRC Staff's Motion to Amend is denied.

It is so ORDERED.

THE ATOMIC SAFETY  
AND LICENSING BOARD

/RA/

Michael M. Gibson, Chair  
ADMINISTRATIVE JUDGE

/RA/

Dr. Richard E. Wardwell  
ADMINISTRATIVE JUDGE

/RA/

Brian K. Hajek  
ADMINISTRATIVE JUDGE

Rockville, Maryland  
March 16, 2015

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<sup>26</sup> See Nuclear Mgmt. Co. (Monticello Nuclear Generating Plant), LBP-05-31, 72 NRC 734, 743 n.13 (2005); see also 10 C.F.R. § 2.320.

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

In the Matter of	)	
	)	
CROW BUTTE RESOURCES, INC.	)	Docket No. 40-8943-OLA
	)	
In-Situ Leach Uranium Recovery Facility,	)	
Crawford, Nebraska	)	
	)	
(License Renewal)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing **MEMORANDUM AND ORDER (Denying Motion to Amend Contention 13; Denying Motion to Strike)** have been served upon the following persons by Electronic Information Exchange, and by electronic mail as indicated by an asterisk.

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**MEMORANDUM AND ORDER (Denying Motion to Amend Contention 13; Denying Motion to Strike)**

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DOCKET NO. 40-8943-OLA

**MEMORANDUM AND ORDER (Denying Motion to Amend Contention 13; Denying Motion to Strike)**

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Dated at Rockville, Maryland  
this 16<sup>th</sup> day of March, 2015