

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))	

PETITION FOR INTERLOCUTORY REVIEW OF LBP-15-11

David A. Repka
Tyson R. Smith
Winston & Strawn LLP
101 California Street
San Francisco, CA 94111

Mark D. McGuire
McGuire Law Firm
625 South 14th Street, Suite C
Lincoln, Nebraska 68508

COUNSEL FOR CROW BUTTE
RESOURCES, INC.

March 25, 2015

TABLE OF CONTENTS

INTRODUCTION 1

STANDARD FOR REVIEW 3

DISCUSSION 4

 A. The Board’s Ruling Is Clearly Erroneous..... 4

 1. Contentions Must Be Filed When Information First Becomes
 Available 4

 2. The Board Applied the Incorrect Standard In Assessing the Timeliness
 of Proposed New Contentions 6

 B. The Board Ruling Affects the Basic Structure of the Proceeding in a Pervasive
 and Unusual Manner 13

CONCLUSION..... 15

TABLE OF AUTHORITIES

ADMINISTRATIVE DECISIONS

AmerGen Energy Co., LLC (Oyster Creek Nuclear Generating Station),
CLI-09-7, 69 NRC 235 (2009).....8

Crow Butte Resources, Inc. (License Renewal),
CLI-09-09, __ NRC __ (2009).....12

Dominion Nuclear Connecticut, Inc. (Millstone Nuclear Power Station, Units 2 and 3),
CLI-01-24, 54 NRC 349 (2001).....6

Duke Energy Corp. (Catawba Nuclear Station, Units 1 and 2),
CLI-04-6, 59 NRC 62 (2004).....4

Duke Energy Corp. (McGuire Nuclear Station, Units 1 and 2),
CLI-02-28, 56 NRC 373 (2002).....5

Duke Power Co. (Catawba Nuclear Station, Units 1 & 2),
CLI-83-19, 17 NRC 1041 (1983).....9

Entergy Nuclear Generation Co. and Entergy Nuclear Operations, Inc. (Pilgrim Nuclear Power
Station),
CLI-08-2, 67 NRC 31 (2008).....3

Entergy Nuclear Generation Co. and Entergy Nuclear (Pilgrim Nuclear Power Station),
CLI-12-10, 75 NRC 479 (2012).....5, 12

Entergy Nuclear Vt. Yankee, LLC (Vt. Yankee Nuclear Power Station),
LBP-06-14, 63 NRC 568 (2006).....9

Entergy Nuclear Vermont Yankee, L.L.C. and Entergy Nuclear Operations, Inc. (Vermont
Yankee Nuclear Power Station),
CLI-11-2, 73 NRC 333 (2011).....12

Exelon Generation Co., LLC (Early Site Permit for the Clinton ESP Site),
CLI-04-31, 60 NRC 461 (2004).....4

Florida Power & Light Co. (Turkey Point Nuclear Generating Station, Units 3 & 4),
CLI-01-17, 54 NRC 3 (2001).....5

Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 & 2),
ALAB-252, 8 AEC 1175 (1975).....4

Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 and 2),
CLI-10-27, 72 NRC 481 (2010).....6

<i>Pac. Gas & Elec. Co.</i> (Diablo Canyon Independent Spent Fuel Storage Installation), CLI-08-1, 67 NRC 1 (2008).....	6
<i>Philadelphia Elec. Co.</i> (Limerick Generating Station, Units 1 and 2), LBP-83-39, 18 NRC 67 (1983).....	5
<i>Private Fuel Storage, LLC</i> (Independent Spent Fuel Storage Installation), LBP-00-27, 52 NRC 216 (2000).....	4
<i>Private Fuel Storage, L.L.C.</i> (Independent Spent Fuel Storage Installation), CLI-01-1, 53 NRC 1 (2001).....	13
<i>Public Service Co. of Indiana</i> (Marble Hill Nuclear Generating Station, Units 1 & 2), ALAB-459, 7 NRC 179 (1978)	14
<i>Sacramento Municipal Utility District</i> (Rancho Seco Nuclear Generating Station), CLI-93-3, 37 NRC 135 (1993).....	5
<i>Shaw Areva MOX Services, LLC</i> (Mixed Oxide Fuel Fabrication Facility), CLI-09-2, 69 NRC 55 (2009).....	5

STATUTES AND REGULATIONS

10 C.F.R. § 2.309(c).....	1, 2, 5, 8, 9
10 C.F.R. § 2.309(f).....	1, 2, 4, 8, 9
10 C.F.R. § 2.341(b)	3
10 C.F.R. § 2.341(f).....	1, 2, 3

March 25, 2015

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))	

PETITION FOR INTERLOCUTORY REVIEW OF LBP-15-11

INTRODUCTION

Pursuant to 10 C.F.R. § 2.341(f)(2), Crow Butte Resources, Inc. (“Crow Butte”) requests that the Commission grant interlocutory review of the Licensing Board Memorandum and Order (LBP-15-11), dated March 16, 2015, insofar as it admits Contentions 1, 3, 5, 6, 9, 12, and 14 in the above-captioned proceeding. Contentions 1, 3, 5, 6, 9, 12, and 14 were filed following publication of the NRC Staff’s final Environmental Assessment (“EA”). In LBP-15-11, the Board admitted all or portions of these contentions after finding that they were timely raised.

For each of the contentions the Board incorrectly applied the timeliness criteria in 10 C.F.R. §§ 2.309(f)(2) and (c). Specifically, the Board found the proposed contentions to be timely because they were filed within 30 days of the final EA — even though the specific information and, in some cases, the exact same analysis and conclusions, had been available to the intervenors for more than a year prior to publication of the EA. According to the Board, the Commission has explained that the intervenors “were to wait until the publication of the EA before proffering any NEPA-related new contentions, as long as the new contentions were based

on data or conclusions not available at the time of the [License Renewal Application (“LRA”)].”¹ This allowed, in effect, the intervenors to wait for months, or even years, before proposing new contentions based on “new” information. The Board’s reading is contrary to the clear and explicit requirements of 10 C.F.R. §§ 2.309(f)(2) and (c)(1), which require the proponent of a contention to file the contention based on the application, or demonstrate that the information on which a later contention is based was not previously available and is materially different from information that was previously available, and that the contention has been timely filed based on the availability of that information. The Board is reading 10 C.F.R. § 2.309(c)(1) out of the regulation.

The admission of Contentions 1, 3, 5, 6, 9, 12, and 14 plainly affects the basic structure of this proceeding in a pervasive or unusual manner.² In finding the contentions to be timely, the Board ignored or misread NRC regulations and controlling Commission precedent in a manner that dramatically expands the scope of this and potentially other proceedings. There is a pending request for admission of 11 other new contentions in this proceeding that implicates the timeliness criteria. There are also currently three ongoing proceedings — each with different licensing boards — involving the Crow Butte facility and the same intervenors. Left unreviewed, the Board decision below undermines the Commission’s timeliness rule in all of these proceedings and risks inconsistent application of timeliness criteria for cases involving the exact same parties. The Board decision involves more than one or two isolated contentions; it “sweeps in” an entire “class” of otherwise untimely contentions. The Commission previously found similar circumstances to constitute pervasive and unusual effects on a proceeding. Even if

¹ LBP-15-11 at 26.

² 10 C.F.R. § 2.341(f)(2)(ii).

this does not meet the standard for interlocutory review, the Commission should nonetheless take review under its inherent supervisory authority to correct the Board's mistaken interpretation of the timeliness requirements.

Ultimately, this appeal presents a relatively narrow question: whether a contention is timely merely if filed following issuance of an NRC Staff NEPA document even though the information on which the contention is based was available previously. Prompt interlocutory review and reversal of the Board's ruling on timeliness and remand for further consideration by the Board is warranted in these extraordinary circumstances. Crow Butte believes that the Commission should be able to act expeditiously to clarify the appropriate standard and remand the issue to the Board to revise the portions of LBP-15-11 that rely on the mistaken application of the timeliness criteria.

STANDARD FOR REVIEW

Pursuant to 10 C.F.R. § 2.341(f)(2), the Commission may, at its discretion, grant a party's request for interlocutory review of a decision. A petition for interlocutory review will be granted only if the party seeking review demonstrates that the issue for which it seeks review:

- (i) threatens the party with immediate and serious irreparable impact which, as a practical matter, could not be alleviated through a petition for review of the presiding officer's final decision; or
- (ii) affects the basic structure of the proceeding in a pervasive or unusual manner.

In general, the "mere potential for legal error" in a contention admissibility decision is not a ground for interlocutory review because such issues can be addressed through a normal petition for review after a full or partial initial decision.³ However, interlocutory review

³ *Entergy Nuclear Generation Co. and Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), CLI-08-2, 67 NRC 31, 35 (2008); 10 C.F.R. § 2.341(b).

may be appropriate when a decision affects a large “class” of contentions or where a decision has potential application to multiple proceedings.⁴ Interlocutory review may also be appropriate when there is no opportunity to seek review of a Board decision following issuance of a full or partial decision and a ruling has broad and recurring significance. The Commission may also grant interlocutory review as an exercise of its inherent supervisory authority over ongoing adjudicatory proceedings where the Board ruling raises significant and novel legal or policy issues.⁵

DISCUSSION

A. The Board’s Ruling Is Clearly Erroneous

The Board’s decision is contrary to the plain language of NRC regulations and to longstanding Commission precedent.

1. Contentions Must Be Filed When Information First Becomes Available

The timeliness and admissibility of proposed contentions must be evaluated in accordance with the Commission’s standards in 10 C.F.R. Part 2. In general, a contention must be based on the application or other documents available at the time the hearing request and petition to intervene is filed.⁶ Section 2.309(f)(2) provides that intervenors may file a new or amended environmental contention after the initial deadline — for example, based on a draft or

⁴ *Northern States Power Co.* (Prairie Island Nuclear Generating Plant, Units 1 & 2), ALAB-252, 8 AEC 1175, 1177 (1975).

⁵ *Duke Energy Corp.* (Catawba Nuclear Station, Units 1 and 2), CLI-04-6, 59 NRC 62, 70 (2004); *Exelon Generation Co., LLC* (Early Site Permit for the Clinton ESP Site), CLI-04-31, 60 NRC 461, 466-68 (2004).

⁶ 10 C.F.R. § 2.309(f)(2); *Private Fuel Storage, LLC* (Independent Spent Fuel Storage Installation), LBP-00-27, 52 NRC 216, 223 (2000) (time to submit contentions tolls when the information on which the contention is based first becomes available, not publication of an NRC Staff NEPA review document).

final NRC review document — but only if the contention complies with 10 C.F.R. § 2.309(c)(1). Under 10 C.F.R. § 2.309(c)(1), new or amended contentions may not be filed after the initial deadline unless the intervenor demonstrates that:

- (i) The information upon which the filing is based was not previously available;
- (ii) The information upon which the filing is based is materially different from information previously available; and
- (iii) The filing has been submitted in a timely fashion based on the availability of the subsequent information.

These criteria are consistent with the Commission’s longstanding policy that a petitioner has an “iron-clad obligation to examine the publicly available documentary material ... with sufficient care to enable it to uncover any information that could serve as the foundation for a specific contention.”⁷ The finding of good cause for late-filing of contentions is related to the total previous unavailability of information.⁸ New or amended contentions must be based on new facts not previously available.⁹ Documents merely summarizing earlier documents or compiling pre-existing, publicly available information into a single source do not render “new”

⁷ *Sacramento Municipal Utility District* (Rancho Seco Nuclear Generating Station), CLI-93-3, 37 NRC 135, 147 (1993); *see also Shaw Areva MOX Services, LLC* (Mixed Oxide Fuel Fabrication Facility), CLI-09-2, 69 NRC 55, 65 n.47 (2009); *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2), CLI-02-28, 56 NRC 373, 386 (2002); *Florida Power & Light Co.* (Turkey Point Nuclear Generating Station, Units 3 & 4), CLI-01-17, 54 NRC 3, 24-25 (2001).

⁸ *Philadelphia Elec. Co.* (Limerick Generating Station, Units 1 and 2), LBP-83-39, 18 NRC 67, 69 (1983).

⁹ *Entergy Nuclear Generation Co. and Entergy Nuclear* (Pilgrim Nuclear Power Station), CLI-12-10, 75 NRC 479, 493 n.70 (2012) (emphasis in original).

the summarized or compiled information.¹⁰ New or amended contentions, including those based on the EA, also must meet the admissibility standards that apply to all contentions, which the Commission has said are “strict by design.”¹¹

2. *The Board Applied the Incorrect Standard In Assessing the Timeliness of Proposed New Contentions*

At the outset, the Board incorrectly summarized the applicable regulatory requirements. The Board began by stating that a timely filing of an intervenor’s challenge to the adequacy of the NRC Staff’s National Environmental Policy Act (“NEPA”) review process “is generally triggered by the release of a NEPA document.”¹² The Board also cited a Commission decision for the proposition that the NRC Staff’s first attempt to analyze a NEPA issue gives rise to an intervenor’s “first opportunity to raise contentions on the adequacy of this assessment.”¹³ According to the Board, the Commission explained that intervenors “were to wait until the publication of the EA before proffering any NEPA-related new contentions, as long as the new contentions were based on data or conclusions not available at the time of the LRA.”¹⁴ The Board also stated that:

¹⁰ See *Northern States Power Co.* (Prairie Island Nuclear Generating Plant, Units 1 and 2), CLI-10-27, 72 NRC 481, 493-96 (2010) (finding that a contention based on pre-existing information compiled in a safety evaluation report was untimely).

¹¹ *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-01-24, 54 NRC 349, 358 (2001), *pet. for reconsideration denied*, CLI-02-01, 55 NRC 1 (2002). While Crow Butte disagrees with the Board’s application of the “migration tenet” and the contention admissibility criteria to the intervenors’ contentions based on the EA, this petition is limited to the timeliness issue, which has a pervasive and unusual effect on the proceeding.

¹² LBP-15-11 at 7.

¹³ *Id.* at 8, citing *Pac. Gas & Elec. Co.* (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), CLI-08-1, 67 NRC 1, 6 (2008).

¹⁴ LBP-15-11 at 26.

Intervenors had no obligation to proffer new or amended environmental contentions to challenge information in the SER, which concerns safety findings. Instead, Intervenors were constrained to await the issuance of the EA, which came out shortly thereafter, as the triggering event for filing new or amended environmental contentions.¹⁵

The Board therefore reasoned that the intervenors could (indeed, must) wait until the EA to raise new environmental contentions — even when the detailed data and information on which the contention ultimately was based had been included in an earlier, publicly-available safety evaluation report in the same matter. The Board’s formulation of the timeliness requirements is not supported by the language of the regulation or Commission precedent.¹⁶ It, in effect, allows intervenors to “lie in wait” with respect to environmental challenges until very late in the licensing process.

First, the Board’s interpretation of the timeliness provisions ignores the plain language of the regulation. Conspicuously absent from the Board’s decision was any recognition of the regulatory language that expressly requires a new or amended contention — even one based on a NEPA document — to “compl[y] with the requirements in paragraph (c) of this

¹⁵ LBP-15-11 at 27 (emphasis in original) (internal citations omitted). The SER was not published “shortly” before the EA. The SER was first published in December 2012 and revised in August 2014. The revisions in the 2014 SER did not implicate the subject matter of any admitted contentions. See NRC Staff Notice to ASLB and Parties, dated August 20, 2014 (ADAMS Accession No. ML14232A141). The EA was not published until October 2014.

¹⁶ Crow Butte specifically highlighted the Commission’s timeliness criteria during oral argument on the proposed contentions. See Tr. at 752-756; *but see id.* at 754 (JUDGE ROSENTHAL: “And, moreover, it seems to me that the regulations do not contemplate that over the lengthy period that staff took in completing its environmental review addressed to environmental issues that the intervenors had to take into account a safety report.”); *id.* at 752-753 (JUDGE ROSENTHAL: “I mean, that’s what I thought the scheme was, but you’re saying, no, that they’ve got to keep track of whatever the staff issues. And if they have a problem with that, they’ve got to move then. They can’t wait until the end of the process.”). The NRC’s rule contemplate exactly that obligation.

section.”¹⁷ The Board never acknowledged the application of this requirement to the proposed contentions. Instead, the Board concluded that a contention was timely if it was filed within 30 days of a NEPA document and that document contained information that differed from the original LRA — without any consideration of whether the contention was based on new and materially different information or was filed promptly once the new information became available.¹⁸

Second, the Board’s formulation of the timeliness criteria allows an intervenor to “lie in wait” until the NRC Staff issues its NEPA documents before raising contentions.¹⁹ As the Commission has noted, there simply would be “no end to NRC licensing proceedings if petitioners could disregard [the] timeliness requirements and add new contentions at their convenience during the course of a proceeding based on information that could have formed the basis for a timely contention at the outset of the proceeding.”²⁰ Indeed, the Commission has

¹⁷ 10 C.F.R. § 2.309(f)(2).

¹⁸ 10 C.F.R. § 2.309(c)(1). Crow Butte recognizes that 30 days is an accepted standard for timeliness of filing a contention after the issuance of a NEPA document, but the petitioner must still show that the filing is timely with respect to the availability of information.

¹⁹ As discussed further below, there is substantial overlap among safety and environmental issues at Crow Butte. As a result, the Board’s formulation gives the intervenors two opportunities to file contentions on the very same issue. For example, the intervenors could have filed a contention challenging the adequacy of the NRC Staff’s assessment of tornado hazards based on the SER (*see* SER at Section 7.3.5, pg. 158, noting the low probability of a tornado and concluding that Crow Butte had developed appropriate emergency procedures, decontamination procedures, and area cleanup methods related to natural disasters), but instead waited until publication of the EA to allege an environmental contention of omission (*see* LBP-15-11 at 44, which admits the contention because “the EA, without explanation, leaves out any discussion of tornadoes”). The Commission’s timeliness standards aim to avoid precisely this result.

²⁰ *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-09-7, 69 NRC 235, 271-272 (2009) (footnotes, internal quotation marks, and citations omitted). The Commission has explained that its “expanding adjudicatory docket makes it critically

emphasized that “an intervenor in an NRC proceeding must be taken as having accepted the obligation of uncovering information in publicly available documentary material” and explained that even the “institutional unavailability of a licensing-related document [(e.g., an EA)] does not establish good cause for filing a contention late if information was available early enough to provide the basis for the timely filing of that contention.”²¹ It therefore is not the availability of an EA or EIS that is the trigger for a timely contention, but rather the availability of the information upon which the contention is based.²²

Third, the Board’s improper application of the timeliness requirements in 10 C.F.R. § 2.309 fundamentally altered its assessment of the proposed new contentions.²³ For example, in evaluating the timeliness of Contention 3, the Board explained only that: “This contention is a challenge specifically hinged on the adequacy of the NRC Staff’s NEPA analysis, and so was timely filed.”²⁴ The Board found other contentions to be timely because — even though the same information and analysis was available in the 2012 or 2014 Safety Evaluation Reports (“SERs”) — intervenors “were constrained to await the issuance of the EA ... as the

important that parties comply with our pleading requirements and that the Board enforce those requirements.” *Id.*

²¹ *Duke Power Co. (Catawba Nuclear Station, Units 1 & 2)*, CLI-83-19, 17 NRC 1041, 1048 (1983).

²² *See Entergy Nuclear Vt. Yankee, LLC (Vt. Yankee Nuclear Power Station)*, LBP-06-14, 63 NRC 568, 573, 579-80 (2006) (rejecting petitioner’s attempt to “stretch the timeliness clock” because its new contentions were based on information that was previously available and it failed to identify precisely what information was “new” and “different”).

²³ In fact, the intervenors did not address the timeliness of any of their proposed contentions. They never cited 10 C.F.R. § 2.309(f)(2) or 10 C.F.R. § 2.309(c)(1). And, they never claimed that their contentions were based on new or different information than that available previously, or that their contentions were timely filed based on the availability of that information.

²⁴ LBP-15-11 at 18.

triggering event for filing new or amended environmental contentions.”²⁵ The Board reached this conclusion even though entire portions of the EA discussion of groundwater impacts were taken directly from the previously-issued SER.²⁶ The distinction drawn by the Board between safety and environmental issue is irrelevant at Crow Butte because the most important safety and environmental issues are the same: the ability of Crow Butte to control underground mining fluid and prevent contamination of adjacent aquifers.²⁷ If intervenors believed that the SER analysis, which was eventually incorporated into the EA, was inadequate or its conclusions incorrect, they were obligated to timely file a contention.

This same error pervades the Board’s consideration of other proposed contentions. Proposed Contentions 1 and 2 both challenged the adequacy of the NRC Staff’s compliance with historical preservation and consultation requirements. In assessing timeliness, the Board stated:

In 2008 the Board admitted a cultural resources consultation contention, but on appeal the Commission ruled that the contention was not yet ripe

²⁵ *Id.* at 27.

²⁶ For example, the NRC Staff’s discussion and conclusions regarding the White River Structural Feature and the NRC Staff’s groundwater modeling are the same in both documents. *Compare* EA at 38-39 (Section 3.5.2.3.3, *Ground Water Modeling of the White River Structural Feature*) to December 2012 SER at 23 (Section 2.4.3.3, *Evaluation of White River Structural Feature by Groundwater Modeling*).

²⁷ Owing to the overlap, Crow Butte addressed environmental and safety together issues in a single application. For its part, the Board never addressed the fact that the NRC Staff’s conclusions in the safety review (*i.e.*, there is adequate confinement and ability to control mining fluids) directly inform the NRC Staff’s environmental conclusions (*i.e.*, no significant environmental impacts because there is adequate confinement and ability to control mining fluids). The artificial distinction between safety and environmental issues created by the Board’s interpretation not only gives the intervenors two opportunities to file contentions on the exact same issue, but also creates the bizarre circumstance where contested issues have already been addressed and resolved in an uncontested SER, yet now are subject to reconsideration after-the-fact. This situation only serves to highlight the importance of proper application of the timeliness criteria in NRC proceedings.

for adjudication. The Commission, however, stated that the NRC Staff's fulfillment of its National Historic Preservation Act (NHPA) obligations could form the basis for a new contention, and that new contentions are "usually considered timely if filed within 30 days of publication" of a NEPA document. Accordingly, contentions 1 and 2 were timely filed.²⁸

There are two problems with this simplistic conclusion. As the NRC Staff explained in the EA (at 87), it posted a draft of its Section 106 documentation for the project on the NRC's public website on September 30, 2013, and requested public comment.²⁹ E-mails were sent notifying the consulting parties, including OST, of the website. And, a specific notice of the availability of this information was provided to the parties in this proceeding.³⁰ The website and comment solicitation included the NRC Staff's documentation of its Section 106 review findings that formed the basis for National Historic Preservation Act ("NHPA") compliance and the cultural resource evaluation in the EA.³¹ Indeed, the information in the NRC Staff's 2013 consultation documents — including the description of the consultation process, the assessment of previously-identified cultural resources, reliance on prior surveys, review of traditional cultural property ("TCP") surveys, and the overall conclusion — is the same as that later incorporated into the EA. As a result, the information on which the contention is based, and the conclusions it challenged, were available at least as early as September 30, 2013. There are no material differences between that information and the information in the EA that would

²⁸ LBP-15-11 at 15-16 (internal citations omitted).

²⁹ The information was posted at <http://www.nrc.gov/info-finder/materials/uranium/licensed-facilities/crow-butte/section-106-license-renewal-docs.html>.

³⁰ See NRC Staff Letter to ASLB, dated October 1, 2013 (ADAMS Accession No. ML13274A631) (notifying the Board and the parties that the Staff had published on the NRC website information related to its cultural resources evaluation under Section 106).

³¹ "Crow Butte In-Situ Uranium Recovery Facility License Renewal National Historic Preservation Act of 1966, As Amended, Consultation" (ADAMS Accession No. ML13260A566).

warrant waiting until the Section 106 documentation was placed in the EA to file a cultural resources contention.

The Board's reliance on the earlier Commission decision in this proceeding also is misplaced. While the Commission previously found that OST's Environmental Contention B, which related to NHPA compliance, was not ripe because the NHPA applies only to federal agencies, and not to private applicants,³² the Commission never indicated that a contention could only become ripe upon issuance of the EA. In fact, the Commission in CLI-09-09 specifically highlighted the regulatory requirement that a new contention be based on information that differs "significantly" from information previously available.³³ Nothing in the Commission's decision should be read to suggest that intervenors can wait until the EA is published to file new contentions, particularly when they were specifically notified by the NRC Staff in the interim of the availability of the NRC Staff's cultural resource assessments and draft review documents.

In the end, the Board's focus on the EA as the trigger for new or amended contentions, rather than the availability of new and materially different information, is contrary to longstanding Commission assessments of timeliness. New or amended contentions must be based on new facts not previously available,³⁴ and documents, like the EA here, that merely summarize earlier documents (*e.g.*, the 2012 or 2014 SERs) or compile pre-existing, publicly available information (*e.g.*, draft cultural resource assessments) into a single source do not render "new" the summarized or compiled information.³⁵ There simply is no excuse for the

³² CLI-09-09 at 24.

³³ *Id.* at 25.

³⁴ *Pilgrim*, CLI-12-10, 75 NRC at 493 n.70 (emphasis in original).

³⁵ *Entergy Nuclear Vermont Yankee, L.L.C. and Entergy Nuclear Operations, Inc.* (Vermont Yankee Nuclear Power Station), CLI-11-2, 73 NRC 333, 344 (2011).

intervenors' tardiness where, as here, the information that forms the basis for the contention has been publicly available on the NRC docket for months, if not years. The Board therefore erred by applying an incorrect standard in finding Contentions 1, 3, 5, 6, 9, 12, and 14 to be timely and admissible.

B. The Board Ruling Affects the Basic Structure of the Proceeding in a Pervasive and Unusual Manner

The Board's decision meets the standard for interlocutory review. The Commission's regulations are intended to assure that NRC licensing proceedings are conducted — and concluded — in a timely and efficient manner. In particular, the Commission's timeliness rules require a level of discipline and preparation by intervenors, who must examine the publicly available material and set forth their claims and the support for their claims in a timely manner. The Board's interpretation nullifies the clear language and intent of the regulations and, in effect, allows petitioners to disregard the timeliness requirements and add new contentions very late in a proceeding based on information that could have formed an earlier contention.

The Board's decision has implications beyond the mere broadening of issues for hearing. The holding goes to the very nature of the NRC's hearing process and is not limited to one or two isolated contentions. The Board's ruling admits an entire class of otherwise untimely contentions — an action that has previously provided a basis for interlocutory review of a decision owing to its pervasive and unusual effect on a proceeding.³⁶ There also is a pending

³⁶ See *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-01-1, 53 NRC 1, 5 (2001) (granting interlocutory review based on its effect on a class of contentions). In *PFS*, the Board's ruling denied an entire class of contentions as untimely. Here, the issue presented is the opposite — the Board found an entire class of contentions to be timely.

request to admit an additional 11 contentions in this proceeding that may hinge on proper application of the timeliness criteria.

The Board's decision also raises issues that pervade numerous ongoing NRC proceedings in an unusual manner. Crow Butte is currently engaged in three proceedings involving the same facility and the same intervenors, though with different panels of judges: (1) License Renewal; (2) the North Trend Expansion Area; and (3) the Marsland Expansion Area.³⁷ The Board's erroneous ruling in this proceeding therefore could adversely impact the efficient conduct of other proceedings involving the same parties in which timeliness of new or amended contentions may be raised. For example, if Crow Butte were to wait until this proceeding were complete and then seek review of the Board's timeliness determinations, the *North Trend* or *Marsland* licensing boards may have already relied on the reading in LBP-15-11 to admit untimely contentions, perpetuating application of the incorrect standard — further increasing the protracted timelines in all of these cases.³⁸ Perhaps as importantly, should the board in the *Marsland* or *North Trend* proceeding correctly apply the timeliness standards to reject proposed new or amended contentions, the intervenors may have been falsely lulled into delaying the filing of those contentions. The issue raised in this petition therefore is of clear, imminent, and recurring importance beyond just this proceeding.

³⁷ There are three different chief judges for each of the three Crow Butte proceedings, though there is some overlap of the technical judges. There is also substantial overlap in the environmental and technical issues admitted for hearing in all three proceedings.

³⁸ Crow Butte may, in fact, never have an opportunity to seek Commission review of the Board's ruling. A petition for review is unnecessary and inappropriate when a party seeks to appeal a decision whose ultimate result is in that party's favor. *Public Service Co. of Indiana* (Marble Hill Nuclear Generating Station, Units 1 & 2), ALAB-459, 7 NRC 179, 202 (1978). Given the potential for the decision to be relied upon by other *Crow Butte* boards and absence of a certain path to Commission review, interlocutory review to correct a misapplication of the timeliness criteria is especially important now.

At bottom, the holding to which this petition for interlocutory review is addressed may impact the course of many licensing hearings. Unless and until overturned by action of the Commission, the Board's reading of the timeliness criteria will — whether in fact or in practice — be binding upon the parties in this and the other two Crow Butte proceedings now under way, as well as in future cases. Crow Butte is not asking that a second look be taken on a minor point of law of uncertain prospective significance, or the mere admissibility of one or two contentions. Rather, this petition goes to a legal issue of immediate and recurring importance for a large class of contentions that has an unusual and pervasive effect on the structure of this and other ongoing NRC proceedings.

CONCLUSION

For the reasons, the Commission should accept interlocutory review of the LBP-15-11 and expeditiously reverse the Board's holding on the application of the Commission's contention timeliness criteria.

Respectfully submitted,

 /s/ signed electronically by
Tyson R. Smith
Winston & Strawn LLP
101 California Street
San Francisco, CA 94111

Mark D. McGuire
McGuire Law Firm
625 South 14th Street, Suite C
Lincoln, Nebraska 68508

COUNSEL FOR CROW BUTTE
RESOURCES, INC.

Dated at San Francisco, California
this 25th day of March 2015

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))	

CERTIFICATE OF SERVICE

I hereby certify that copies of “PETITION FOR INTERLOCUTORY REVIEW OF LBP-15-11” in the captioned proceeding have been served this 25th day of March 2015 via electronic mail to Consolidated Intervenors at davidcoryfrankel@gmail.com, Arm.legal@gmail.com, and harmonicengineering@gmail.com and via the Electronic Information Exchange (“EIE”), which to the best of my knowledge resulted in transmittal of the foregoing to all those on the EIE Service List for the captioned proceeding other than Consolidated Intervenors.

/s/ signed electronically by _____
Tyson R. Smith
Winston & Strawn LLP
101 California Street
San Francisco, CA 94111

COUNSEL FOR CROW BUTTE
RESOURCES, INC.