

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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

NRC STAFF'S PETITION FOR REVIEW OF LBP-15-11

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NRC STAFF'S PETITION FOR REVIEW OF LBP-15-11

INTRODUCTION

Pursuant to 10 C.F.R. § 2.341(f)(2), the NRC Staff (Staff) hereby files a petition for review of LBP-15-11,¹ in which the Atomic Safety and Licensing Board (Board) ruled on the admissibility of new contentions based on the Staff's Environmental Assessment (EA) for the license renewal of the Crow Butte Resources, Inc. (CBR) in situ recovery (ISR) facility in Crawford, Nebraska. In LBP-15-11, the Board, on its own initiative, improperly expanded the scope of this proceeding. Specifically, the Board expanded the scope of existing contentions C, D and F (originally admitted in 2008² and affirmed by the Commission in 2009³), supplied bases for new contentions, and failed to define the scope of a new contention by not specifying the admissible bases. As discussed below, these repeated instances of the Board, on its own initiative, taking actions that improperly expand the scope of the proceeding create a "pervasive or unusual" effect on the structure of the proceeding and warrant interlocutory review.

¹ *Crow Butte Resources, Inc.* (License Renewal for the In-Situ Leach Facility, Crawford, Nebraska), LBP-15-11, 81 NRC ____ (slip op.) (March 16, 2015) (LBP-15-11).

² *Crow Butte Resources, Inc.* (In Situ Leach Facility, Crawford, Nebraska), LBP-08-24, 68 NRC 691, 724-27, 738-40 (2008) (LBP-08-24).

³ *Crow Butte Resources, Inc.* (In Situ Leach Facility, Crawford, Nebraska), CLI-09-9, 69 NRC 331, 351-54, 357-58 (2009) (CLI-09-9).

BACKGROUND

CBR holds NRC source materials license SUA-1534, which authorizes operation of its ISR facility in Dawes County, Nebraska.⁴ On November 27, 2007, CBR submitted an application requesting renewal of NRC source materials license SUA-1534 for a 10-year period.⁵ In response to the Staff's *Federal Register* notice of the opportunity to request a hearing or petition to intervene in the license renewal proceeding,⁶ Consolidated Intervenors (CI) and the Oglala Sioux Tribe (OST) filed timely hearing requests⁷ and were admitted as parties to this proceeding.⁸ After the Commission's decision on the parties' appeals of contention admissibility,⁹ four contentions remained: CI Technical Contention F and OST Environmental Contentions A, C, and D.¹⁰

In December 2012, the NRC Staff issued its Safety Evaluation Report (SER) on the license renewal application.¹¹ On October 30, 2014, after conducting its NEPA review pursuant to the regulations in 10 C.F.R. Part 51, the Staff issued a final Environmental Assessment (EA)

⁴ See NRC Source Materials License SUA-1534 (Nov. 5, 2014) (ADAMS Accession No. ML13324A101).

⁵ "Application for 2007 License Renewal, USNRC Source Materials License SUA-1534, Crow Butte License Area" (Nov. 27, 2007) (LRA) (ADAMS Accession Nos. ML073480266 & ML073480267).

⁶ Notice of Opportunity for Hearing, Crow Butte Resources, Inc., Crawford, NE, In Situ Leach Recovery Facility, 73 Fed. Reg. 30,426 (May 27, 2008).

⁷ "Request for Hearing and/or Petition to Intervene" (July 28, 2008) (OST 2008 Petition); "Consolidated Request for Hearing and Petition for Leave to Intervene" (July 28, 2008) (CI 2008 Petition).

⁸ LBP-08-24 at 760.

⁹ CLI-09-9, 69 NRC 331.

¹⁰ Order (Canceling Oral Argument, Ruling on Summary Disposition of Consolidated Petitioners' Miscellaneous Contention G, Requiring Filing of Affidavits) at 3 (May 27, 2009) (unpublished) (ADAMS Accession No. ML091470499). In LBP-15-11, the Board held that those contentions migrate from the LRA to the EA. LBP-15-11 at 5.

¹¹ Safety Evaluation Report for License Renewal of the Crow Butte Resources ISR Facility, Dawes County, Nebraska, Materials License No. SUA-1534 (December 2012) (ADAMS Accession No. ML103470470). The Staff subsequently revised and reissued the SER in August 2014 to revise several license conditions and the discussion of them in the SER. (ADAMS Accession No. ML14149A433).

and Finding of No Significant Impact (FONSI).¹² Pursuant to a Board order granting an unopposed motion for extension of time, CI and OST timely filed new contentions on the EA on January 5, 2015.¹³ The NRC Staff and CBR filed answers on January 30, 2015,¹⁴ and CI and OST replied on February 6, 2015.¹⁵ The Board held oral argument by telephone on February 17, 2015,¹⁶ and issued LBP-15-11 on March 16, 2015.

ARGUMENT

I. The Petition Meets the Standard For Interlocutory Review

Pursuant to 10 C.F.R. § 2.341(f)(2), the Commission may, in its discretion, grant interlocutory review of a Board decision when the party seeking review demonstrates that the issue in question:

- (i) Threatens the party adversely affected by it 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.

¹² Final Environmental Assessment for the License Renewal of U.S. Nuclear Regulatory Commission License No. SUA-1534 (October 2014) (ADAMS Accession No. ML14288A517); License Renewal of Crow Butte ISR, Uranium In-Situ Recovery Project, 79 Fed. Reg. 64,629 (October 30, 2014).

¹³ "Consolidated Intervenor's New Contentions Based on the Final Environmental Assessment (October 2014)" (Jan. 5, 2015); "The Oglala Sioux Tribe's Renewed and New Contentions Based on the Final Environmental Assessment (October 2014)" (Jan. 5, 2015) (OST New Contentions). The two intervening parties' new contentions are functionally identical except for minor exceptions not relevant to this Petition for Review; therefore, for simplicity, the Staff will refer to CI and OST collectively as "Intervenor's" and provide page references to the OST New Contentions.

¹⁴ NRC Staff's Combined Answer to New Contentions Filed by Consolidated Intervenor's and the Oglala Sioux Tribe (Jan. 30, 2015) (Staff Answer to New Contentions); Crow Butte Resources' Response to Proposed New Contentions Based on Final Environmental Assessment (Jan. 30, 2015).

¹⁵ Consolidated Intervenor's Combined Reply to NRC Staff and Applicant's Responses to Newly Filed EA Contentions (Feb. 6, 2015); Oglala Sioux Tribe's Combined Reply to NRC Staff's and Crow Butte Resources' Responses to Tribe's Renewed and New Contentions Based on the Final Environmental Assessment (Feb. 6, 2015).

¹⁶ Tr. at 590-881.

The Commission has stated that it “disfavors review of interlocutory Board orders, which would result in unnecessary ‘piecemeal interference with ongoing Licensing Board proceedings.’”¹⁷ Consequently, interlocutory review is granted only in “extraordinary circumstances.”¹⁸ Nonetheless, the Commission has taken interlocutory review under 10 C.F.R. § 2.341(f)(2) when a party has demonstrated a threat of “serious and irreparable harm” that could not, as a practical matter, be alleviated through reversal of a board’s action at the end of the proceeding,¹⁹ or where a board’s action may have a “pervasive and unusual” effect on the “basic structure of the proceeding.”²⁰

As a general matter, the Commission does not grant a petition for interlocutory review based on mere assertions of Board errors on contention admissibility, or because the Board’s decision merely broadens the issues for litigation.²¹ Moreover, under 10 C.F.R. § 2.319, the Board has broad authority to allow it to conduct litigation efficiently. However, in this situation the Board, *on its own initiative*, has broadened the proceeding in several instances. In Section II *infra*, the Staff discusses five examples in LBP-15-11 where the Board took such actions.

¹⁷ *Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), CLI-08-2, 67 NRC 31, 33-34 (2008) (citing, *inter alia*, *Entergy Nuclear Operations Inc.* (Pilgrim Nuclear Power Station), CLI-07-2, 65 NRC 10, 12 (2007)).

¹⁸ *Entergy Nuclear Operations, Inc.* (Indian Point, Units 2 and 3), CLI-09-6, 69 NRC 128, 133 (2009).

¹⁹ *Pilgrim*, CLI-08-2, 67 NRC at 35-36 (citing *Duke Energy Corp.* (Catawba Nuclear Station, Units 1 and 2), CLI-04-6, 59 NRC 62, 71 (2004) (potential release of safeguards information); *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-02-8, 55 NRC 222, 224-25 (2002) (Board’s planned inquiry into the internal financial affairs of a federally-recognized Indian Tribe); *Georgia Power Co.* (Vogtle Electric Generating Plant, Units 1 and 2), CLI-95-15, 42 NRC 181, 184 (1995) (disclosure of privileged information)).

²⁰ *Pilgrim*, CLI-08-2, 67 NRC at 35; *see also Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), CLI-02-7, 55 NRC 205, 213-14 & n.15 (2002) (challenge to the basic structure of a proceeding involving a two-step hearing for construction and operating authority); *Safety Light Corp.* (Bloomsburg Site Decontamination and License Renewal Denials), CLI-92-13, 36 NRC 79, 85-86 (1992) (order consolidating an informal subpart L proceeding with a formal subpart G proceeding affected the basic structure of the proceeding in a pervasive and unusual manner).

²¹ *See, e.g., NextEra Energy Seabrook* (Seabrook Station, Unit 1), CLI-13-3, 77 NRC 51, 54-55 (2013).

Moreover, the Board's actions broadening the proceeding are not limited to LBP-15-11. The Commission has clearly established that intervenors bear the burden of identifying information in the public record to support any contentions they submit.²² Directing parties to sources of new contentions is inconsistent with the Board's role, especially where, as here, the intervenors are represented by counsel familiar with NRC proceedings. Yet at the outset of the February 17 oral argument on admissibility of the new contentions, the Board, on its own initiative, informed the parties that the U.S. Environmental Protection Agency (EPA) had just published a proposed rule on health standards for uranium and thorium milling.²³ The Board then directed the intervenors to inform the Board if they wished to file new contentions based on that proposed rule.²⁴ After informing the Board of their intent to do so, on March 16, 2015, the intervenors filed 11 new contentions based on the proposed EPA rule.

Later in the oral argument, after the Staff informed the Board and parties that it had received concurrence letters related to Endangered Species Act (ESA) consultation, the Board instructed the intervenors to notify the law clerk if they wished to file new contentions on those

²² *E.g.*, *USEC, Inc.* (American Centrifuge Plant), CLI-06-10, 63 NRC 451, 457 (2006) ("it is not up to the boards to search through pleadings or other materials to uncover arguments and support never advanced by the petitioners themselves . . . [i]t is a contention's proponent, not the licensing board, that is responsible for formulating the contention and providing the necessary information to satisfy the basis requirement for the admission of contentions") (citing *Statement of Policy on Conduct of Adjudicatory Proceedings*, CLI-98-12, 48 NRC 18, 22 (1998) (quotations omitted); see also *Florida Power and Light Co.* (Turkey Point Nuclear Power Plant, Units 3 and 4), CLI-01-17, 54 NRC 3, 24-25 (2001) ("Petitioners have an ironclad obligation to examine the application and publicly available documents to uncover any information that could serve as a foundation for a contention.") (quotation omitted).

²³ Tr. at 598-99:

. . . as I'm sure all of you are all aware, on January 26th of this year the United States Environmental Protection Agency issued new proposed standards for uranium and thorium mill tailings. Just in case you've been living under a rock and weren't aware of them, you might want to consult 80 Federal Register 4156. . . .

²⁴ *Id.* at 599. Although the Board's stated reason for bringing up the proposed EPA rule was to avoid possible delay of the hearing, the Board did not require the intervenors to submit new contentions until March 16, 2015, nearly four weeks after the oral argument and approximately 50 days from the issuance date of the proposed EPA rule to submit new contentions. But had the Board applied the typical 30-day time period after a triggering event, new contentions would have been due February 25 (30 days after publication of the proposed EPA rule in the *Federal Register*), and no delay would have occurred.

letters.²⁵ The Intervenors did not provide such notification, nor did they submit new contentions based on the ESA concurrence letters. In LBP-15-11, despite finding the ESA contention moot, the Board nonetheless *again* invited the intervenors to file new contentions based on those letters.²⁶

The structure of the proceeding, as defined in the NRC rules of practice and case law, is that petitioners or intervenors have the responsibility for identifying their concerns, and the licensing board determines whether those issues meet the standards to be admitted for hearing.²⁷ The rules do not contemplate, especially when petitioners or intervenors are represented by counsel, that the board assist the intervenors in identifying issues for hearing, and the Intervenors here did not request such assistance.

Accordingly, taken as a whole, LPB-15-11 and the Board's related actions have a pervasive impact on the structure of this proceeding that warrants interlocutory review. Therefore, the Staff respectfully requests that the Commission review LBP-15-11 and remand the decision to the Board with instructions to limit previously-admitted contentions to their scopes as admitted by the Board in LBP-08-24 and affirmed by the Commission in CLI-09-9, and to limit the scope of Contention 1 by identifying and specifying the admissible bases. For the same reasons, the Staff also requests that the Commission reverse the Board's decisions to admit Contentions 10 and 14 to the extent that they rely on bases supplied by the Board, not the Intervenors.

II. The Board, On its Own Initiative, Improperly Expanded the Scope of the Proceeding In Several Instances

The NRC regulations in 10 C.F.R. Part 2 give a licensing board the powers necessary to "conduct a fair and impartial hearing . . . , to take appropriate action to control the prehearing

²⁵ Tr. at 868-69.

²⁶ LBP-15-11 at 56 & n.305.

²⁷ See *Statement of Policy on Conduct of Adjudicatory Proceedings*, CLI-98-12, 48 NRC at 22.

and hearing process, to avoid delay and to maintain order.”²⁸ The Staff recognizes that the Board’s authority under this provision is broad. But as discussed below, the Staff submits that in LBP-15-11, the Board, in several instances, exceeded its authority by expanding the scope of contentions.

A. The Board Improperly Expanded the Scope of Already-Admitted Contentions to Include Issues Raised in a Rejected New Contention

In LBP-15-11, the Board considered the admissibility of Contention 4. As described by the Board, “[t]he crux of Intervenor’s contention is that the NRC staff must conduct a new baseline [water quality] study of the license renewal area rather than relying on the baseline study conducted during the original license application.”²⁹ The Board rejected this contention as untimely because the information regarding baseline data was available in the LRA and thus this issue could have been raised in the intervenors’ original hearing requests in 2008. The Board also noted that this contention relied exclusively on supporting documents that had been provided with the Intervenor’s original petitions.³⁰ After finding Contention 4 inadmissible, however, the Board effectively provided a “back door” for the Intervenor to incorporate issues from Contention 4 into previously-admitted Environmental Contentions C and D and Technical Contention F:

We note, however, that the information presented in support of EA Contention 4 might well be relevant to already-admitted Contentions C and D, insofar as both concern impacts to ground and surface waters. In addition, any information supporting Intervenor’s general claim that the NRC Staff failed to use recent research in determining baseline water quality can be applied to already-admitted Contention F.³¹

²⁸ 10 C.F.R. § 2.319. The powers of a presiding officer apply to a licensing board under § 2.321(c).

²⁹ LBP-15-11 at 20.

³⁰ *Id.* at 21 n.99. These documents included the opinion of Dr. Richard Abitz, the opinion of JR Engineering (Paul Ivancie and W. Austin Creswell), and a list of spills and leaks compiled by Shane Robinson. *Id.*

³¹ LBP-15-11 at 21 (citing LBP-08-24 at 724-27, 739).

In these statements, the Board provides direction to the Intervenor on how to present their case and indicates that it will allow information provided in support of Contention 4—a contention asserting that new baseline water quality measurements are needed—in support of previously-admitted contentions that raised different issues. According to the Board’s directive above, issues raised in the Abitz Opinion, which was submitted as support for Contention 4 as well as with the Intervenor’s original petitions—and which the Board did not cite as support when it originally admitted Contentions C, D, and F³²—have now been added to those contentions. But the Abitz opinion raises issues completely different from those raised in Contentions C, D, and F.

In previously-admitted Environmental Contention C, OST challenged the LRA’s discussion of surface water impacts from accidents:

In 7.4.2.2 in its application for renewal, [Crow Butte’s] characterization that the impact of [n] surface waters from an accident is ‘minimal since there are no nearby surface water features,’ does not accurately address the environmental harm to the White River.³³

OST cited two bases for this contention. First, OST argued that the application stated that no surface water features are nearby while elsewhere identifying two White River tributaries that cross the project area. Second, OST asserted that the White River alluvium is at risk of contamination from the Crow Butte project via surface spills, waters transmitted through the mined aquifer, or faults. Nowhere in this contention did OST raise issues related to new measurements of baseline water quality, and nowhere in its decision to admit the contention did

³² See LBP-08-24 at 724-27, 738-40. OST did provide the JR Engineering opinion as support for previously-admitted Contention C, and the Staff does not contest its applicability to that contention. *Id.* at 724 n.175. However, OST did not provide the JR Engineering opinion as support for Contention D, nor did Consolidated Intervenor provide it as support for Contention F.

³³ LBP-08-24 at 724 (quoting OST 2008 Petition at 16).

the Board do so either.³⁴ It is unclear, therefore, why the Board now considers information related to Contention 4 germane to this contention.

In previously-admitted Environmental Contention D, OST challenged the LRA's statement that the mined aquifer is not in communication with the nearby drinking water aquifer:

In 7.4.3 [Crow Butte's] Application incorrectly states there is no communication among the aquifers, when in fact, the Basal Chadron aquifer, where mining occurs, and the aquifer, which provides drinking water to the Pine Ridge Indian Reservation, communicate with each other, resulting in the possibility of contamination of the potable water.³⁵

OST supported this contention with an opinion from Dr. Hannan LaGarry and a 2007 letter from the Nebraska Department of Environmental Quality (NDEQ) related to the aquifer exemption petition for the North Trend Expansion site. The Board admitted this contention as proposed, i.e., on the issue of whether there is communication among aquifers—specifically, between the mined aquifer at the CBR site and the aquifer supplying drinking water to the Pine Ridge Reservation.³⁶ Again, neither OST, in proposing this contention, nor the Board, in admitting it, raised issues related to new measurements of baseline water quality.

Finally, in previously-admitted Technical Contention F, CI argued that the LRA “[f]ail[ed] to include recent research” concerning the geology and hydrology of the site and surrounding area. CI specifically cited Section 2.6. of the LRA, which addresses “Geology, Soils and Seismology,” and stated their contention as “Failure to include recent research.”³⁷ CI again cited the opinion of Dr. LaGarry and the 2007 NDEQ letter in support of this contention. Those documents both asserted failures to include recent research related to geology—specifically, reliance on the “layer cake concept” and use of outdated nomenclature for stratigraphic units.

³⁴ See LBP-08-24 at 724-25.

³⁵ *Id.* at 725.

³⁶ *Id.* at 725-27. In affirming the Board's admission of Contention D, the Commission likewise identified the issue in the contention as “whether the aquifers are interconnected.” CLI-09-9 at 353.

³⁷ CI 2008 Petition at 30, citing LRA § 2.6.

Again, those documents—the ones put forth by CI in support of the contention—make no assertions related to recent research in the context of baseline water quality. Thus, based on the plain language of the original contention and the supporting documents provided, the Board’s directive, and particularly its statement that information related to “the general claim the NRC Staff failed to use recent research in determining baseline water quality can be applied to already-admitted Contention F,” clearly expands the scope of that contention beyond what was admitted and affirmed.³⁸

In summary, even though the Board properly held that Contention 4 was untimely, it nonetheless effectively admitted the issues in Contention 4 into the proceeding by incorporating them into previously-admitted contentions, thereby broadening the scope of those contentions beyond what had been previously established by the Board and understood by the parties. Therefore, the Commission should remand LBP-15-11 to the Board with instructions to limit the scope of Contentions C, D, and F as originally admitted in LBP-08-24 and CLI-09-9.

B. The Board Improperly Provided Bases for New Contentions That Were Not Advanced by Intervenors

The Board has also broadened the scope of the proceeding by supplying bases for new contentions that the Intervenors themselves did not provide, and by finding contentions admissible, in whole or in part, using those added bases.

First, in Contention 10, the Intervenors asserted that the EA fails to consider cumulative impacts resulting from the three planned Crow Butte expansion areas (North Trend, Marsland, and Three Crow). This was the Intervenors’ sole basis for the contention.³⁹ The Board properly

³⁸ It is well-settled that a contention’s proponent, not the licensing board, “is responsible for formulating the contention and providing the necessary information to satisfy the basis requirement for the admission of contentions.” *Statement of Policy on Conduct of Adjudicatory Proceedings*, CLI-98-12, 48 NRC at 22 (quotations omitted). Here, the Intervenors did not ask the Board to expand the existing contentions; rather, the Board did so on its own initiative, and without explanation.

³⁹ OST New Contentions at 103-104 (“This contention is one of omission . . . The Tribe notes that while these expansion areas are discussed in the cultural resources sections because the NRC Staff has TCP surveys related thereto that it would like to discuss in the Final EA, the scope of the Final EA is not

rejected this claim because the EA's discussion of cumulative impacts does in fact address the potential expansion areas.⁴⁰ But the Board nonetheless proceeded to admit Contention 10 by supplying a new basis related to environmental justice (EJ)—specifically, that “[a]dditional analysis on the cumulative impacts with respect to environmental justice may be necessary.”⁴¹ This is a basis the Intervenor never advanced, either in Contention 10 or in Contention 3, which asserted inadequacy in the Staff's EJ analysis.⁴²

Second, in Contention 14, the Intervenor made two claims: (1) that two 2011 earthquakes felt in Crawford, Nebraska were not included in the EA, and (2) that even small earthquakes can alter secondary porosity in an aquifer.⁴³ The Board found this contention

elsewhere expanded to include the cumulative impacts of the CBR Expansion Areas to all areas of the Final EA.”)

⁴⁰ LBP-15-11 at 39.

⁴¹ *Id.* at 40.

⁴² Although the intervenors' Contention 3 claimed that the Staff's EJ analysis was inadequate, that claim was limited to the assertion that the Staff should have used a 50-mile radius when considering EJ. OST New Contentions at 40-47. The Staff used a 4-mile radius pursuant to the guidance in Appendix C of NUREG-1748, “Environmental Review Guidance for Licensing Actions Associated with NMSS Programs” (August 2003), which was endorsed by the Commission in its 2004 policy statement on EJ. See Policy Statement on the Treatment of Environmental Justice Matters in NRC Regulatory and Licensing Actions, 69 Fed. Reg. 52,040, 52,047-48 (Aug. 24, 2004). The Board admitted Contention 3 based on the possibility that contamination from the CBR facility could reach the Pine Ridge reservation—an issue the Board previously found admissible in OST Contention D. LBP-15-11 at 19. Nowhere in new Contention 3, however, did the intervenors raise the issue of cumulative impacts and EJ. Nor was the issue raised at oral argument, where the intervenors specifically affirmed that their concern with regard to cumulative impacts was the expansion areas. Tr. at 820.

The Staff also notes, in the context of Contention 3, that the Board failed to address the issue of “disproportionately high and adverse” impact in deciding to admit that contention, although the Staff raised that issue in its pleading and at oral argument. In the Staff's view, the Board's unexplained departure from Commission case law, NUREG-1748, and the NRC EJ Policy creates a significant legal and policy question (i.e., can the Staff rely on its Commission-endorsed guidance?) that may be appropriate for Commission review under its inherent supervisory authority. This issue is particularly timely in light of the Commission's recent decision in the *Indian Point* license renewal proceeding. See *Entergy Nuclear Operations, Inc.* (Indian Point Nuclear Generating Station, Units 2 and 3), CLI-15-6 (slip op. at 21-22 & n.85) (March 9, 2015) (stating that although Staff guidance documents do not have the force of law, they are entitled to special weight and should not lightly be set aside in favor of a board's own determination without sufficient justification); *id.* (slip op. at 51) (explaining the “disproportionately high and adverse” standard).

⁴³ OST New Contentions at 114-16.

admissible with respect to those bases, but then supplied an additional basis the Intervenor had not provided:

The EA analysis might also be incomplete because it only reviewed earthquakes recorded in Nebraska, neglecting earthquakes felt in nearby states. . . . [T]he EA contains no discussion of seismic activity in these nearby areas.”⁴⁴

It is well-established that a Board may not add information or bases to supplement a party’s pleading.⁴⁵ The Commission recently held that a board “committed legal error by supplying a basis not argued by [the petitioner].”⁴⁶ And under the Commission’s regulations, boards in ISR hearings do not have the authority to adjudicate matters not put into controversy by the parties.⁴⁷ Yet the Board—on its own initiative and without explanation for the departure from Commission case law—added bases to two contentions and admitted those contentions (one in its entirety and one in part), based on the added information. Therefore, the Staff

⁴⁴ LBP-15-11 at 59.

⁴⁵ See, e.g., *USEC*, CLI-06-10, 63 NRC at 457 (“it is not up to the boards to search through pleadings or other materials to uncover arguments and support never advanced by the petitioners themselves”); *Turkey Point*, CLI-01-17, 54 NRC at 24-25 (stating that *petitioners* have an “ironclad obligation” to identify support for contentions).

⁴⁶ *NextEra Energy Seabrook* (Seabrook Station, Unit 1), CLI-12-5, 75 NRC 301, 349 (2012). Also, in CLI-09-9, the Commission reversed this Board’s admission of a contention where the Board expanded the contention to include issues beyond those asserted by the intervenors. CLI-09-9, 69 NRC at 355.

⁴⁷ 10 C.F.R. § 2.340(e) states as follows:

In a proceeding not involving production or utilization facilities, the presiding officer shall make findings of fact and conclusions of law on the matters put into controversy by the parties to the proceeding, and on any matters designated by the Commission to be decided by the presiding officer. Matters not put into controversy by the parties, but identified by the presiding officer as requiring further examination, must be referred to the Director, Office of Nuclear Material Safety and Safeguards. Depending on the resolution of those matters, the Director, Office of Nuclear Material Safety and Safeguards after making the requisite findings, shall issue, deny, revoke or appropriately condition the license, or take other action as necessary or appropriate.

Id. Even in proceedings where boards are permitted to adjudicate such issues *sua sponte*, they may only do so with the Commission’s “express approval,” and “only in extraordinary circumstances.” *DTE Electric Co.* (Fermi Nuclear Power Plant, Unit 3), CLI-15-1, 81 NRC __ (slip op. at 9-10) (Jan. 13, 2015).

requests that the Commission reverse the admission of Contention 10 in its entirety, and Contention 14 insofar as it challenges the EA's discussion of earthquakes in other states.

C. The Board Improperly Broadened the Scope of a New Contention By Not Specifying the Admissible Bases

Finally, the Board effectively expanded the scope of the proceeding by admitting the portion of Intervenor's Contention 1 that alleged cultural resource surveys conducted at the CBR facility were inadequate without defining its scope based on specific admissible bases.⁴⁸ Although the Intervenor asserted several specific bases for this claim, the Board did not identify which of those bases were admissible or explain its reasoning, instead stating only that "[f]actual issues remain regarding what the NRC Staff did and whether it was sufficient to comply with NEPA."⁴⁹ This constitutes a "de facto" expansion of the scope of the contention, as the Board did not identify the factual issues that remain.

It is well-settled that "the scope of an admitted contention is defined by its bases."⁵⁰ Furthermore, licensing boards have a duty to explain the scope of matters to be litigated, and

⁴⁸ LBP-15-11 at 17. The Intervenor originally proffered two new contentions (Contentions 1 and 2) related to cultural resources. *Id.* at 12. In admitting those contentions in part, the Board consolidated them into a single contention and labeled it Contention 1. *Id.*

⁴⁹ *Id.* at 17. The Board's explanation, in its entirety, reads as follows:

Finally, insofar as Contentions 1 and 2 challenge whether the cultural surveys performed and incorporated into the EA are not adequate support for the EA's conclusions in this regard, they are admissible. Factual issues remain regarding what the NRC Staff did and whether it was sufficient to comply with NEPA, both of which will be explored in pre-filed witness testimony and at the upcoming hearing.

Id. The Intervenor's specific bases comprised the following: (1) surveys conducted in 1982 and 1987 were too old, (2) the traditional cultural properties survey conducted in 2012 was ineffective due to snow and ice on the ground, (3) the surveys of the project area did not include subsurface testing, and (4) the traditional cultural properties survey conducted in 2012 was based on the input of a limited number of tribes. OST New Contentions at 18, 23, 24, 34-35.

⁵⁰ *Crow Butte Resources, Inc.* (North Trend Expansion Project), CLI-09-12, 69 NRC 535, 553 (2009) (citing *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-28, 56 NRC 373, 379 (2002)).

the Commission has previously found a board's failure to do so to warrant reversal.⁵¹ In the *Crow Butte* North Trend proceeding, the Commission reversed that board's admission of a contention, holding that "[t]he Board should have explicitly stated which bases were admitted, including the reasons for their admissibility, and to which contention each basis applied. . . ."⁵² The Commission further found that, because the *North Trend* board "failed to specify which bases were admissible and which were not, and which applied to each admitted contention, . . . the Board improperly recast the contentions."⁵³ Here, by admitting this portion of Contention 1 without defining the admissible bases, the Board effectively broadened the scope of the issue to include any aspect of the cultural resources surveys that were performed, rather than specific inadequacies alleged by the Intervenors. Given the vagueness of the Board's ruling, the parties cannot be sure of the precise issues for litigation. As the Commission recently stated, "contested proceedings must be governed by some level of specificity to ensure the proceeding is conducted efficiently, with fairness to all of the parties."⁵⁴ Here, the Board has failed to provide "a clear road map" of the issues to be litigated.⁵⁵ Therefore, the Commission should remand LBP-15-11 to the Board with instructions to explain the precise bases that remain at issue in Contention 1.

⁵¹ *Id.* at 553-54; see also *Seabrook*, CLI-12-5, 75 NRC 301, 309 (reversing admission of a contention after finding that Board did not explain specifically why bases supported admissibility of a contention, but merely issued a blanket statement finding that the petitioner met the contention admissibility requirements).

⁵² *North Trend*, CLI-09-12, 69 NRC at 554.

⁵³ *Id.*

⁵⁴ *Fermi*, CLI-15-1, 81 NRC at ____ (slip op. at 13 n.53) (Jan. 13, 2015).

⁵⁵ See *Progress Energy Florida, Inc.* (Levy County Nuclear Power Plant, Units 1 and 2), CLI-10-2, 71 NRC 27, 32-33 (2010) (describing the effect of the board's error in *North Trend* as leaving the parties "without a clear roadmap as to which elements of several broadly worded claims were, in fact, admissible").

CONCLUSION

For the foregoing reasons, the Staff respectfully requests that the Commission grant interlocutory review and take the following actions: reverse the admission of Contention 10 in its entirety and Contention 14 in part and remand LBP-15-11 to the Board with instructions to limit the scope of Contentions C, D, and F as originally admitted in LBP-08-24 and CLI-09-9 and to define the admissible bases of Contention 1.

Respectfully submitted,

/Signed (electronically) by/

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Executed in accord with 10 C.F.R. § 2.304(d)

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Dated at Rockville, Maryland
This 10th day of April, 2015.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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))

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "NRC Staff's Petition for Review of LBP-15-11" in the above-captioned proceeding have been served via the Electronic Information Exchange (EIE), the NRC's E-Filing System, and by email to David Frankel and Thomas Ballanco, counsel for Consolidated Intervenors, this 10th day of April, 2015, 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/

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