UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of	)	
	)	
CROW BUTTE RESOURCES, INC. ,	)	Docket No. 40-8943
	)	ASLBP No. 08-867-02-OLA-BD01
(License Renewal for the	)	
In Situ Leach Facility, Crawford, Nebraska)	)	April 20, 2015

CONSOLIDATED INTERVENORS' AND OGLALA SIOUX TRIBE'S JOINT RESPONSE TO APPLICANT'S PETITION FOR INTERLOCUTORY REVIEW

The Consolidated Intervenors and the Oglala Sioux Tribe, both parties to the above captioned case hereby file this joint response to Crow Butte Resources' Petition for Interlocutory Review by the Commission. The Consolidated Intervenors and the Oglala Sioux Tribe assert that Applicant's Petition does not meet the standards for interlocutory review and should be denied. Even if the Commission were to accept review, the Consolidated Intervenors and the Oglala Sioux Tribe assert that the Board ruling being challenged by Applicant, LBP-15-11 is legally, procedurally and factually sound and should stand as written.

PROCEDURAL HISTORY

LBP-15-11 details the procedural history in this case from the initial filing of the License Renewal Application (hereafter "LRA") by Applicant in May 2008 through to the Order being challenged. *Crow Butte Resources*, LBP-15-11, 1-6. Consolidated Intervenors and the Oglala Sioux Tribe accept this history as accurate and add only that on March 25, 2015, Applicant filed its Petition for Interlocutory Review, to which this timely Joint Response is now filed.

LEGAL STANDARD FOR REVIEW

10 C.F.R. § 2.341(f)(2) governs the standards for interlocutory review by the Commission. That section specifies that interlocutory review of a Board's decision is appropriate where the ruling, "threatens immediate and serious irreparable impact, which, as a practical matter, could not be alleviated through a petition for review" or where the ruling, "affects the basic structure of the hearing in a pervasive or unusual manner." In an earlier ruling in this case referencing this section, the Commission pointed out that, "This rule reflects the Commission's general policy to minimize interlocutory review." *Crow Butte Resources, Inc.*, CLI-09-09, 43 fn 178.

DISCUSSION

In its Petition for Interlocutory Review, the Applicant argues in opposition to the Commission's "general policy." Since NRC Staff has already issued the License Renewal that is the subject of the current proceeding, the Applicant is precluded from

demonstrating any "immediate and serious irreparable impact" as the Crow Butte Facility continues to operate during the pendency of this case. Further, the Consolidated Petitioners and the Oglala Sioux Tribe are each already admitted parties in the case, each with contentions pending for consideration at an evidentiary hearing scheduled for August, 2015. Regardless of the Board's ruling in LBP-15-11, the Applicant, NRC Staff, Consolidated Petitioners and the Oglala Sioux Tribe must all prepare for, and participate in, an evidentiary hearing in this case.

Accordingly, the Applicant must hinge its Petition on its assertion that the Board's ruling "affects the basic structure of the hearing in a pervasive or unusual manner." Again in this case, the Commission has already pointedly addressed this assertion:

> Our case law is clear that "the rejection or admission of a contention, where a Petitioner has been admitted as a party and has other contentions pending, neither constitutes serious and irreparable impact, not affects the 'basic structure of the proceeding in a pervasive and unusual manner.'"

CLI-09-09 at 44, citing, *Indian Point*, CLI-08-7 and *Exelon Generation Co., LLC* (Early Site Permit for the Clinton ESP Site), CLI-04-31, 60 NRC 461, 466-67 (2004). *Accord*, *Entergy Nuclear Generation Co. and Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), 65 NRC 10, 12 (2007); *Private Fuel Storage, LLC* (Independent Spent Fuel Storage Installation), CLI-00-2, 51 NRC 77, 79-80 (2000). The Commission goes on to explain that the Applicant, "will have the opportunity to appeal the Board's contention admissibility decisions at the end of the case pursuant to 10 C.F.R. § 2.341(b)." *Id.*

Accordingly, the Applicant fails to meet the clear standards for interlocutory review and must hold its claims in abeyance until the end of the present case.

SUBSTANTIVE ISSUES

Even if the Commission decides to forego its "clear" case law and accepts interlocutory review, the Applicant still fails to make a case for disturbing the Board's ruling in LBP-15-11. All of the new contentions proposed by the Consolidated Intervenors and the Oglala Sioux Tribe assert failure by the NRC Staff to comply with NEPA's standards. Under Applicant's proposed rationale, the Consolidated Intervenors and the Oglala Sioux Tribe should have asserted that NRC Staff failed to comply with NEPA seven years before the NEPA document was issued.

While it is an unfortunate reality, of which this Commission should be aware, that in almost any case it is no doubt accurate to make such an assertion, the Consolidated Intervenors and the Oglala Sioux Tribe do not believe such an absurd result is contemplated by NRC rules.

NEPA is an action-forcing statute applicable to all federal agencies. Its purpose is to "prevent or eliminate damage to the environment and biosphere by focusing government and public attention on the environmental effects of proposed agency action." *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 371 (1989). NEPA requires "that the agency will inform the public that it has indeed considered environmental concerns in its decision making process." *Baltimore Gas and Electric Company v. NRDC*, 462 U.S. 87, 97 (1983). The United States Supreme Court has ruled that in a NEPA document, the government must disclose and take a "hard look" at the foreseeable environmental consequences of its decision. *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n.21, 96 S. Ct. 2718, 2730 n.21 (1976); *Citizens to Preserve Overton Park, Inc.*

v. Volpe, 401 U.S. 402, 416 (1971). In order to comply with NEPA, "an agency must set forth a reasoned explanation for its decision and cannot simply assert that its decision will have an insignificant effect on the environment." *Marble Mountain Audubon Society v. Rice*, 914 F.2d 179, 182 (9th Cir. 1990), *citing Jones v. Gordon*, 792 F.2d 821 (9th Cir. 1986). "An agency cannot avoid its statutory responsibilities under NEPA merely by asserting that an activity it wishes to pursue will have an insignificant effect on the environment. The agency must supply a convincing statement of reasons why potential effects are insignificant." *Public Service Co. of Colorado v. Andrus*, 825 F.Supp. 1483, 1496 (D. Idaho 1993) *citing The Steamboaters v. FERC*, 759 F.2d 1383, 1393 (9th Cir. 1985) (internal quotes and citations omitted).

The Applicant and NRC Staff may think and act with one mind, but federal law still views them as distinct entities and it is the NRC Staff, as the federal agency, that must comply with NEPA. *Duke Energy Corp*. (McGuire Nuclear Station, Units 1 & 2, Catawba Nuclear Station, Units 1 & 2), CLI- 02-28, 56 NRC 373, 385 (2002) ("NRC Staff's analyses in the SEISs, while taking into account Duke's responses, are not identical to Duke's analyses. The SEISs often go a step further, providing additional information, analysis, and reaching some conclusions different from Duke's.") While it may incorporate information contained in the LRA and other documents submitted by the Applicant, the NRC Staff as the federal agency, bears ultimate responsibility for ensuring that NEPA standards are met. *In re Calvert Cliffs 3 Nuclear Project, LLC* (Calvert Cliffs Nuclear Power Plant, Unit 3), LBP-12-17, 76 N.R.C. 71, 80 (2012) ("For contentions based on NEPA, such as the one at issue here, the burden shifts to the Staff, because the NRC, not the applicant, bears the ultimate burden

of establishing compliance with NEPA.").

The Board in LBP-15-11 was correct in ruling that the release by NRC Staff of the Environmental Assessment in October 2014, "triggered the deadline for filing new/amended contentions" based on the document. LBP-15-11, 4. *See generally, Pac. Gas & Elec. Co.*, (Diablo Canyon Power Plant Independent Fuel Storage Installation), CLI-08-1, 6. The Applicant would have these new contentions denied under the procedural late filing standards.

Once again, the Commission has already spoken to this point in its earlier ruling in this case. In overruling this Board's admission of one of the Oglala Sioux Tribe's contentions in CLI-09-09, the Commission addressed the Board's concern about subsequent NEPA based contentions being subject to "late-filing standards," ruling that,

> [O]ur rules of procedure explicitly allow the filing of new contentions based on the draft or final environmental impact statement where that document contains information that differs 'significantly' from the information that was previously available.

CLI-09-09, 24, fn 104 ("In such a case, the 'late filing' standards are no bar to properly supported contentions."). The Oglala Sioux Tribe filed a new contention substantially similar to the one rejected as untimely by the Commission in CLI-09-09 and in its Combined Reply to Applicant's and NRC Staff's Responses to Newly Filed EA Contentions, filed on February 6, 2015, the Consolidated Intervenors detailed for each proposed new contentions, the numerous and specific differences between information contained in the LRA and that contained in the EA.

The Applicant also asserts that contentions made under NEPA should have been raised based on material contained in the Safety Evaluation Report (hereafter "SER"). The Consolidated Intervenors and the Oglala Sioux Tribe point out that there is

overlapping federal law regarding the licensing of facilities by the NRC. The SER is governed by the Atomic Energy Act, while the Environmental Assessment or Environmental Impact Statement is governed by NEPA, each of which must be complied with independently. *In re Pac. Gas & Elec. Co.*, CLI-08-1, 67 N.R.C. 1, 13 (N.R.C. Jan. 15, 2008)("There is no genuine dispute that NEPA and AEA legal requirements are not the same. . . and NEPA requirements must be satisfied.").

The contentions admitted by the Board in LBP-15-11 are all based on materially different information contained in the NRC Staff's Environmental Assessment and/or on NRC Staff's failure to comply with NEPA's rigorous requirements in its finding of no significant impact to the environment. As such the contentions are timely and properly admitted by the Board.

CONCLUSION

For all the foregoing reasons, the Commission should deny Applicant's Petition for Interlocutory Review.

Dated this 20th day of April, 2015.

Respectfully submitted,

/s/

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing '**CONSOLIDATED INTERVENORS' AND OGLALA SIOUX TRIBE'S JOINT RESPONSE TO APPLICANT'S PETITION FOR INTERLOCUTORY REVIEW**, in the captioned proceeding were served via email on the 20th day of April 2015, which to the best of my knowledge resulted in transmittal of same to those on the EIE Service List for the captioned proceeding.

Respectfully submitted,

/s/

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