

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) May 5, 2015

**CONSOLIDATED INTERVENORS' AND OGLALA SIOUX TRIBE'S JOINT
RESPONSE TO NRC STAFF'S PETITION FOR INTERLOCUTORY REVIEW**

The Consolidated Intervenor and the Oglala Sioux Tribe, both parties to the above captioned case hereby file this joint response to NRC Staff's Petition for Interlocutory Review by the Commission. The Consolidated Intervenor and the Oglala Sioux Tribe assert that the Staff's Petition does not meet the standards for interlocutory review and should be denied. Even if the Commission were to accept review, the Consolidated Intervenor and the Oglala Sioux Tribe assert that the Board ruling being challenged, 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 April 10, 2015, NRC Staff 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

Since NRC Staff has already issued the License Renewal that is the subject of the current proceeding, there is no demonstrable “immediate and serious irreparable impact” as the Crow Butte Facility continues to operate during the pendency of this case. Also,

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. Further, prior to the completion of briefing on NRC Staff's Petition for Interlocutory Appeal, the parties will already have been required to submit their initial statements of position and exhibits for all of the admitted contentions. And before the time expires for Commission action on NRC Staff's request, the evidentiary hearing will already be concluded.

NRC Staff hinges 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 NRC Staff, "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 NRC Staff 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 NRC Staff still fails to make a case for disturbing the Board’s ruling in LBP-15-11.

NRC Staff begins its Petition by mischaracterizing two of the Board’s actions during the telephonic oral argument on February 17, 2015.

First, NRC Staff asserts that, “the Board, on its own initiative, informed the parties that the (EPA) had just published a proposed rule on health and safety standards for uranium and thorium milling.” NRC Staff Petition for Interlocutory Review at 5. This is an inaccurate assessment.

The Consolidated Intervenors and the Oglala Sioux Tribe have been asserting in these very proceedings for eight years now, that the rules, or lack thereof, regulating in situ leach uranium mining were insufficient to protect groundwater resources. Counsel for the Consolidated Intervenors and the Oglala Sioux Tribe were very aware when the EPA finally acknowledged it shared their concern by publishing its Notice of Proposed Rulemaking (“NPRM”) in the Federal Register. The Board did not alert the parties to the existence of the NPRM, it merely delineated a timing protocol to follow in order that the established briefing and hearing schedule could proceed without alteration. The Consolidated Intervenors’ did file a motion for new contentions based on the NPRM, in accordance with the established briefing schedule, which was subsequently denied by the

Board. LBP-15-15.

Next, NRC Staff misconstrues the Board's statement of legal procedure in a footnote denying Contention 13, as an "invitation" for Intervenors to file a new contention. NRC Staff Petition for Interlocutory Review at 6. The Consolidated Intervenors and the Oglala Sioux Tribe see no substantive difference between the Board's statement in footnote 305 on page 56 of LBP-15-15, and this Commission's statement in CLI-09-09 that, "In this case, whether and how the Staff fulfills its NHPA obligations are issues that could form the basis for a new contention...." CLI-09-09 at 24-25.

The NRC Staff Petition goes on to list five instances where it claims the Board either erred on contention admissibility or broadened the issues for litigation, as if these might somehow affect "the basic structure of the hearing in a pervasive or unusual manner" and give rise to the need for interlocutory review.

Commission precedent is clear that the interlocutory appeal process is not intended to be used for "piecemeal review" during the pendency of proceedings:

These [section 2.341(f)(2)] criteria, as well as Commission precedent, reflect disfavor of piecemeal review of licensing board rulings during ongoing proceedings.¹⁵ We will address such rulings after a licensing board has issued a final decision in a case, barring "extraordinary circumstances." As a general matter, we do not consider contention admissibility decisions to be extraordinary, particularly where, as here, the petitioner has been admitted as a party and has other contentions pending.

NextEra Energy Seabrook, (Seabrook Station, Unit 1) (2013) CLI-13-3 at 5 (internal citations omitted).

CONCLUSION

Accordingly, the Commission should deny the NRC Staff's Petition for Interlocutory Review.

Dated this 5th day of May, 2015.

Respectfully submitted,

/s/

David Frankel
Counsel for Consolidated Intervenors
1430 Haines Ave., Ste. 108-372
Rapid City, SD 57701
Tel: 605-515-0956
E-mail: arm.legal@gmail.com

/s/

Thomas J. Ballanco
Counsel for Consolidated Intervenors
945 Taraval Ave. # 186
San Francisco, CA 94116
(650) 296-9782
E-mail: HarmonicEngineering@gmail.com

/s/

Bruce Ellison
Counsel for Consolidated Intervenors
P.O. Box 2508
Rapid City, SD 57709
Tel: 605-348-9458
Email: belli4law@aol.com

/s/

Andrew B. Reid, Esq.
Counsel for Oglala Sioux Tribe
The Ved Nanda Center for International
& Comparative Law
University of Denver Sturm College of Law
2255 East Evans Avenue
Denver, CO 80208
Tel: 303.437.0280 / Fax: 303.832.7116
Email: lawyerreid@gmail.com

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)) May 5, 2015

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing '**CONSOLIDATED INTERVENORS' AND OGLALA SIOUX TRIBE'S JOINT RESPONSE TO NRC STAFF'S PETITION FOR INTERLOCUTORY REVIEW**, in the captioned proceeding were served via email on the 5th day of May 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/

Thomas J. Ballanco
Counsel for Consolidated Intervenors
945 Taraval Ave. # 186
San Francisco, CA 94116
(650) 296-9782
E-mail: HarmonicEngineering@gmail.com