

September 14, 2015

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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))	

NRC STAFF'S RESPONSE TO BOARD'S SEPTEMBER 10 ORDER

In orders dated September 4, 2015, and September 10, 2015, the Atomic Safety and Licensing Board ("Board") admitted into evidence new exhibits that were identified during the August 24-28 evidentiary hearing for the license renewal of the Crow Butte Resources in-situ uranium recovery facility.¹ In its September 10 Order, the Board granted the parties an opportunity to file written objections to these exhibits. Accordingly, the NRC Staff provides the following written objections.

The Staff objects to the admission of exhibits BRD-011 through BRD-016 and BRD-018 through BRD-029 because these exhibits were provided by the Board, on its own initiative, rather than by the intervenors in this proceeding.² In the Statements of Consideration for the 2004 rulemaking revising 10 C.F.R. Part 2, the Commission stated that "each party must bear its burden by going forward with affirmative evidentiary presentations and testimony, its rebuttal evidence and rebuttal testimony."³ Therefore, according to the Commission, "the responsibility

¹ Order (Admitting Exhibits; Scheduling Supplemental Testimony and October Hearing Day) at 1 (Sept. 4, 2015) (unpublished) ("September 4 Order"); Order (Admitting Remaining Exhibits; Scheduling Transcript Corrections) at 1 (Sept. 10, 2015) (unpublished) ("September 10 Order").

² The intervenors are the Oglala Sioux Tribe and Consolidated Intervenors (collectively, "Intervenors").

³ Changes to Adjudicatory Process, 69 Fed. Reg. 2181, 2213 (Jan.14, 2004) (final rule).

for developing an adequate record for decision is on the parties, not the presiding officer.”⁴ The Commission later reiterated that “the parties are responsible for ensuring that there is sufficient evidence on-the-record to meet their respective burdens.”⁵ The Intervenors had ample opportunity to prepare testimony and to provide exhibits such as BRD-011 through BRD-016 and BRD-018 through BRD-029 to support their case-in-chief or their rebuttal testimony. The Intervenors did not do so.⁶ Therefore, it was not appropriate, in the Staff’s view, for the Board to supply these exhibits.⁷ In addition, one purpose of the deadlines and procedures in 10 C.F.R. Part 2 is to ensure that “other litigants are not taken by surprise and are accorded an appropriate opportunity to respond to new arguments or new information.”⁸ Here, the Staff (and other parties) had no notice prior to the hearing that the Board would be supplying these exhibits or questioning witnesses on them. For the aforementioned reasons, the Staff objects to admitting these exhibits.

Respectfully submitted,

/Signed (electronically) by/

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Dated at Rockville, Maryland
this 14th day of September, 2015.

⁴ *Id.*

⁵ *Id.*

⁶ In fact, on the issue of tornados, which exhibits BRD-011 through BRD-016 pertain to, the Intervenors provided no direct or rebuttal testimony or exhibits.

⁷ See *DTE Electric Co.* (Fermi Nuclear Power Plant, Unit 2), CLI-15-18, 82 NRC ____, ____ (Sept. 8, 2015) (slip op. at 19) (stating that “The Board may not substitute its own support for a contention or make arguments for the litigants that were never made by the litigants themselves.”).

⁸ *Id.* (slip op. at 15).

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CERTIFICATE OF SERVICE

I hereby certify that copies of the "NRC STAFF'S RESPONSE TO BOARD'S SEPTEMBER 10 ORDER" have been served in the above-captioned proceeding this 14th day of September, 2015, via the NRC's Electronic Information Exchange ("EIE"), and via e-mail to David Frankel and Thomas Ballanco, counsels for Consolidated Intervenors, 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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