July 25, 2016

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)	)	

REPLY IN SUPPORT OF
PETITION FOR REVIEW OF LBP-15-11 AND LBP-16-07

I. INTRODUCTION

On July 14, 2016, Consolidated Intervenors filed an answer opposing Crow Butte's petition for review of LBP-15-11 and LBP-16-07.[1] Crow Butte had argued that Contention 1 was untimely and never should have been admitted because the information on which the contention was based had been available for a year or more. As discussed below, in their answer the Consolidated Intervenors continue to ignore NRC regulations requiring contentions to be filed based on the availability of information.[2] The intervenors' reading of the regulations would upend the Commission's longstanding framework for assessing timeliness of proposed contentions.

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1 "Consolidated Intervenors Answer to the Petition for Review, " dated July 14, 2016 ("Answer").

2 The intervenors' answer focuses exclusively on the timeliness of Contention 1. The intervenors did not respond to Crow Butte's arguments regarding the adequacy of the cultural resource evaluation in the final EA. *See* "Petition for Review of LBP-15-11 and LBP-16-07," dated June 20, 2016, at 14-22 ("Petition"). Issues involving compliance with NEPA and NHPA therefore are not discussed further here.

II. DISCUSSION

The Consolidated Intervenors argue that proposed Contention 1 was timely based on "guidance" from the Commission in CLI-09-09 that "[i]ntervenors were required to wait until the publication of the Environmental Assessment for the filing deadline to be triggered."[3] This is a flawed reading of the Commission's decision, and one that ignores 10 C.F.R. § 2.309. The Commission in CLI-09-09 addressed the Board's specific concern that requiring the intervenors to wait until the NEPA review was complete before proffering a "consultation" contention would effectively preclude the filing of *any* timely contention on NHPA compliance. But, as the Commission pointed out (slip op. at 24), the NRC's rules "explicitly allow the filing of new contentions on the basis of the draft or final environmental impact statement where that document contains information that differs 'significantly' from the information that was previously available." This statement was intended to show only that filing a NHPA contention based on a draft or final NEPA document would not *automatically* be precluded. Nothing in that description of the regulations absolves intervenors from their obligation to file contentions based on the availability of information. Indeed, the Commission's discussion in CLI-09-09 recognizes that a contention can be timely only when it is based on new information — that is, information differing "significantly" from information available previously. The Commission's discussion also is fully consistent with 10 C.F.R. § 2.309(c)(1), which requires a showing of good cause for late filing, including a demonstration that "the information upon which the filing is based was not previously available."[4] Consolidated Intervenors never even acknowledge the applicability of 10 C.F.R. § 2.309(c)(1).

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[3] Answer at 2.

[4] In this case, all of the information on which Contention 1 was based had been included in the NRC Staff's draft assessment of cultural resources, which was available to the

The intervenors also argue that NRC regulations do not require them to file new contentions "based on every single new or amended document issued by the NRC," and that they can instead file new contentions following *either* a draft or a final NRC environmental review document.[5] Consolidated Intervenors again ignore 10 C.F.R. § 2.309(c)(1). 10 C.F.R. § 2.309(f)(2) allows participants to file a new or amended environmental contention based on a draft or final NRC environmental review document, but *only if the contention also satisfies* 10 C.F.R. § 2.309(c)(1). Section 2.309(c)(1) allows a new or amended contention after the initial deadline where information upon which the contention is based was not previously available; the information upon which the contention is based is materially different from information previously available; and the contention has been submitted in a timely fashion based on the availability of the subsequent information.[6] Consolidated Intervenors cannot meet that standard where, as here, the exact same information regarding the identification of cultural resources, including traditional cultural properties ("TCPs"), and the impact of license renewal on those resources was available to the parties in draft form for more than a year prior to the final EA.

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intervenors *more than a year prior* to publication of the final EA. Some of that same information also had been available in the initial License Renewal Application (LRA). In particular, the LRA contained information relating to the "identification" of cultural resources that was carried forward into the draft EA discussion. Even though the Board found that Contention 1, as admitted, related to the adequacy of the identification of cultural resources in the final EA, the Board never compared the cultural resources identified in the final EA to those in the LRA to assess whether the final EA contained information that differed "significantly" from that previously available. The Board simply ignored the fact that the LRA had previously identified cultural resources.

5 Answer at 3.

6 These requirements are not new to the intervenors. *See, e.g.*, "Petition for Leave to File New Contention Re: Arsenic," dated September 22, 2008 (acknowledging the obligation to timely file new contentions based on the availability of new information and applying the criteria in 10 C.F.R. § 2.309 when assessing timeliness).

The intervenors finally argue that, "[e]ven if the Commission agreed with CBR's onerous interpretation of the rules of admissibility" — that is, an interpretation based on the language of the regulation itself and longstanding Commission precedent — they "relied on the Board's direction in LBP-15-11."[7] But, based on simple temporal logic, Consolidated Intervenors cannot rely on a Board statement in the very decision assessing the timeliness of their proposed contention as the basis for their (untimely) actions. Instead, the intervenors had an obligation to meet both 10 C.F.R. §§ 2.309(c)(1) and (f)(2) prior to filing their proposed contentions. The Board's subsequent (and incorrect) decision on timeliness does not somehow cure the intervenors' original tardiness in filing proposed Contention 1.

In the end, the intervenors' reliance on the final EA as the trigger for new cultural resource contentions — rather than the LRA, the draft EA documentation, or the availability of new and materially different information — is contrary to the Commission's Rules of Practice and longstanding Commission precedent on timeliness. New contentions must be based on new facts not previously available, and documents, like the final EA here, that merely compile pre-existing, publicly available information (*e.g.*, the LRA and the draft cultural resource assessment) do not render "new" the summarized or compiled information.[8] There simply is no excuse for the intervenors' tardiness where, as here, the information that formed the basis for the contention was publicly available on the NRC docket for more than a year prior.

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7 *Id*. at 4.

8 *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); *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).

III. CONCLUSION

For the above reasons, the Board erred in finding Contention 1 timely.

Respectfully submitted,

/s/ signed electronically by
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Dated at San Francisco, California
this 25th day of July 2016

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CERTIFICATE OF SERVICE

I hereby certify that copies of "REPLY IN SUPPORT OF PETITION FOR REVIEW OF LBP-15-11 AND LBP-16-07" in the captioned proceeding have been served this 25th day of July 2016 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
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