

June 11, 2009

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

CROW BUTTE RESOURCES' ANSWER TO INTERVENORS'
MOTION AND APPLICATION FOR STAY PENDING APPEAL

I. INTRODUCTION

In accordance with 10 C.F.R. § 2.323(c), Crow Butte Resources, Inc. (“Crow Butte” or “Applicant”) hereby responds to the “Intervenors’ Motion and Application for Stay Pending Appeal,” dated June 1, 2009 (“Motion”). In that Motion, Intervenors request that the Board issue an Order: (1) staying this proceeding until the appeals from CLI-09-09 are finally resolved, including a stay of this Board’s Order dated May 27, 2009 (other than the part regarding the filing of affidavits for David House and Francis Anders); (2) allowing for the perpetuation of the testimony of Aloysius Weasel Bear during the period of the stay in case Safety Contention A is readmitted after the appeal; and (3) including such other Orders as the Board finds to be necessary or appropriate in the interests of justice and developing a sound record in this proceeding.

For the reasons discussed below, the Intervenors’ Motion should be denied.

II. BACKGROUND

On May 18, 2009, the Commission issued a memorandum and order, CLI-09-09,¹ ruling on the appeals filed by Crow Butte and the NRC Staff with respect to two Licensing Board decisions in this proceeding. The Commission decision addressed an initial decision granting a hearing to Intervenors, LBP-08-24,² and a subsequent decision admitting a late-filed contention concerning the effects of arsenic, LBP-08-27.³ The Commission affirmed in part and reversed in part the Board's decisions in LBP-08-24 and LBP-08-27.⁴ Following the Commission's decision, the Board ordered summary disposition of Miscellaneous Contention G, cancelled oral argument, and limited mandatory disclosure obligations to the remaining contentions not affected by CLI-09-09. *See* Order (Canceling Oral Argument, Ruling on Summary Disposition of Consolidated Petitioners' Miscellaneous Contention G, Requiring Filing of Affidavits), dated May 27, 2009.

On May 29, 2009, Western Nebraska Resources Council ("WNRC"), Beatrice Long Visitor Holy Dance, Debra White Plume, Joe American Horse, Sr., The American Horse Tiospaye, Owe Aku – Bring Back the Way, Thomas Kanatakeniate Cook, Loretta Afraid of Bear Cook, and The Afraid of Bear/Cook Tiwahe, collectively, and the Oglala Sioux Tribe,

¹ *See Crow Butte Resources, Inc.* (License Renewal for In Situ Leach Facility, Crawford, Nebraska), CLI-09-09, 69 NRC __ (slip op. at 1) (May 18, 2009).

² 68 NRC __ (Nov. 21, 2008) (slip op.).

³ 68 NRC __ (Dec. 10, 2008) (slip op.).

⁴ Specifically, the Commission upheld the license renewal Board's ruling on the Petitioners' standing, but found that that Board erred in admitting two of the Oglala Sioux Tribe's environmental contentions, one of the Consolidated Petitioners' environmental contentions, two of their miscellaneous contentions, and one of their safety contentions. The Commission upheld the admission of three environmental contentions and one technical contention.

individually, filed a Petition for Review of the Commission decision in CLI-09-09 in the United States Court of Appeals for the Eighth Circuit. On June 1, 2009, Intervenors filed their Motion with this Board, which Crow Butte now answers.

III. DISCUSSION

The Intervenors' Motion should be denied because it does not satisfy the requirements for a stay of a proceeding pending judicial review.⁵

A. The Commission Disfavors Holding Proceedings in Abeyance Pending Judicial Review

Generally speaking, the Commission is reluctant to suspend pending adjudications in order to await outcome of other proceedings. *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-01-27, 54 NRC 385, 390 (2001). And, it is the Commission's general policy to expedite adjudicatory proceedings. *See generally Statement of Policy on Conduct of Adjudicatory Proceedings*, CLI-98-12, 48 NRC 18 (1998); *see also Pacific Gas and Electric Co.* (Diablo Canyon Power Plant, Units 1 and 2), CLI-02-16, 55 NRC 317, 334 (2002). Consequently, the Commission has repeatedly refused to suspend proceedings based only on the existence of pending, related proceedings at the NRC, in State court, or in State or other Federal agencies.⁶

⁵ A request for a stay of a Commission decision pending judicial review is more properly entitled a "Motion to Hold in Abeyance." *Texas Utilities Electric Co.* (Comanche Peak Steam Electric Station, Unit 2), CLI-93-11, 37 NRC 251 (1993).

⁶ *See, e.g., Power Authority of the State of New York et. al.* (Indian Point 3), CLI-00-22, 52 NRC 266, 288-90 (2000) (denying motions for stay pending decisions by New York courts, Internal Revenue Service, FERC, and the New York State Department of Environmental Conservation); *Power Authority of the State of New York et. al.* (Indian Point 2), CLI-01-8, 53 NRC 225, 228-30 (2001) (denying request to suspend proceeding until completion of *Indian Point 3* license transfer and decision on 10 C.F.R. § 2.206 enforcement petition); *Niagara Mohawk Power Corp.* (Nine Mile Point Nuclear Station Units 1 and 2), CLI-99-30, 50 NRC 333, 343-44 (1999) (granting short suspension

The Commission sees suspension of licensing proceedings as a “drastic” action that is only warranted in the event of “immediate threats to public health and safety.”⁷ Even in the wake of the September 11 terrorist attacks, the Commission ultimately rejected requests for suspension or abeyance of proceedings pending the Commission’s review of anti-terrorist measures at licensed facilities.⁸ Such drastic action is not warranted here.

B. This Proceeding Should Not Be Held In Abeyance Pending Judicial Review

The Intervenors have not satisfied the criteria for suspending a proceeding pending judicial review. A full stay pending judicial review of a Commission decision requires the movant to meet the equitable criteria in *Virginia Petroleum Jobbers Ass’n v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958). See *Northern Indiana Public Service Co. (Bailly Generating Station, Nuclear-1)*, ALAB-224, 8 AEC 244, 272 (1974). Those factors are:

- (1) Whether the moving party has made a strong showing that it is likely to prevail on the merits;
- (2) Whether the injured party will be irreparably injured unless a stay is granted;
- (3) Whether the granting of a stay would harm other parties; and
- (4) Where the public interest lies.

pending decisions on rights of first refusal, but denying further suspension until conclusion of New York Public Service Commission proceeding).

⁷ *Vermont Yankee Nuclear Power Corp. & AmerGen Vermont, LLC* (Vermont Yankee Nuclear Power Station) CLI-00-20, 52 NRC 151, 173-74 (2000) (refusing request to suspend license transfer proceedings while the Commission examined the effects of limited liability companies’ ownership).

⁸ See *Private Fuel Storage, LLC*, (Independent Spent Fuel Storage Installation), CLI-01-26, 54 NRC 376 (2001); see also *Pacific Gas and Elec. Co. (Diablo Canyon Power Plant, Units 1 and 2)*, CLI-02-23, 56 NRC 230 (2002); *Duke Cogema Stone & Webster (Savannah River Mixed Oxide Fuel Fabrication Facility)*, CLI-01-28, 54 NRC 393 (2001).

Virginia Jobbers, 259 F.2d at 925. The most important of these factors is irreparable harm. *Sequoyah Fuels Corp.* (Gore, Oklahoma Site), CLI-94-9, 40 NRC 1, 6 (1994). To obtain a stay, a party must show “imminent irreparable harm that is both ‘certain and great.’” *Entergy Nuclear Vermont Yankee, LLC, & Entergy Nuclear Operations, Inc.* (Vermont Yankee Nuclear Power Station), CLI-06-8, 63 NRC 235, 237 (2006). Even “raising the specter of a nuclear accident does not demonstrate irreparable harm.” *Id.* If there is no showing of irreparable harm, there must be an overwhelming showing of likely success on the merits (*i.e.*, that success on the merits is “a virtual certainty”). *Sequoyah Fuels*, CLI-94-9, 41 NRC at 6-7. As discussed below, under these standards, the motion should be denied.

First, there is no showing of likely success on the merits. Intervenors claim that because the appeal is from a Commission ruling on issues of first impression, it is impossible to make a showing that the Intervenors are likely to prevail on the merits. Motion at 3. However, access to Federal Courts is limited under the Hobbs Act to “final orders” of the Commission. 28 U.S.C. § 2342. It is well settled that the “final order” in a licensing proceeding is an order granting or denying a license. *See, e.g., NRDC v. NRC*, 680 F.2d 810, 815 (D.C. Cir. 1982); *Thermal Ecology Must Be Preserved v. AEC*, 433 F.2d 524, 525 (D.C. Cir. 1970). There is no issue of first impression here. Because Intervenors are appealing an interlocutory decision of the Commission, they are unlikely to prevail on the merits of the current appeal.

Moreover, the Commission decision is based on its interpretation of its regulations governing the admissibility of contentions. The NRC is entitled to significant deference in interpreting its own regulations. *See, e.g., Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994). And, where the agency interprets its statutory authority “in the course of adjudication, its interpretation governs in the absence of unambiguous statutory language to the

contrary or unreasonable resolution of language that is ambiguous.” *United States v. Eurodif S.A.*, 129 S. Ct. 878, 886-87 (2009) (citations omitted). The Intervenors have not addressed any of these review standards in their motion or otherwise attempted to show likelihood of success on the merits.

Second, there is no showing of irreparable harm that would justify a stay. The Intervenors’ claim that they will be “severely prejudiced” if this proceeding is allowed to continue during the pending appeal. Motion at 2. The Intervenors also argue that they would be harmed because they would be foreclosed from raising issues related to the denied contention until the appeal is resolved and by that time the proceeding would have progressed to a point whereby matters such as disclosures would have to be redone. *Id.* These asserted harms are nothing more than the ordinary consequences of a continued hearing pending interlocutory appeal. These consequences are insufficient to demonstrate “certain and great” irreparable harm. Without imminent issuance of the renewed amendment, there is no threat of immediate and irreparable harm to the Intervenors. *See Amergen*, CLI-08-13, 67 NRC at 400. Indeed, under the Commission’s timely renewal rule, the operating license for Crow Butte remains in effect until there is a final decision on the license renewal request. Moreover, Intervenors will have another, later opportunity for administrative or judicial review if the license amendment request is granted.

Nor is there obvious irreparable harm from continuation of the proceeding. A mere increase in the burden of litigation does not constitute serious and irreparable harm. *Connecticut Yankee Atomic Power Co.* (Haddam Neck Plant), CLI-01-25, 54 NRC 368, 374 (2001). The burden of litigating a contention or conducting disclosures is same whether conducted now or at some future point in time. Moreover, the vast majority of the effort and

expense related to disclosures has already been conducted in conjunction with the initial disclosures, which were made prior to the Commission decision. In the absence of a potential for truly exceptional delay or expense, the risk that the Commission's interlocutory ruling may eventually be found to have been erroneous, and that because of the error further proceedings may have to be held, is one which must be assumed by the parties to the proceeding. *See Duke Power Co.* (Catawba Nuclear Station, Units 1 & 2), ALAB-768, 19 NRC 988, 992 (1984). Thus, the Intervenor has failed to show irreparable harm.

Finally, the requested stay would harm Crow Butte by denying a determination on their license renewal application for an indefinite period, creating uncertainty with respect to continued operation of the facility. An applicant and the public have an interest in the efficient and expeditious resolution of administrative proceedings. *See Statement of Policy on Conduct of Adjudicatory Proceedings*, CLI-98-12, 48 NRC 18. This stay, if granted, would be for an indefinite and uncertain period of time and would not advance resolution of the proceeding.

IV. CONCLUSION

For the reasons discussed above, the Intervenor has failed to satisfy the criteria for holding this proceeding in abeyance pending judicial appeal. Accordingly, the Licensing Board should deny the motion.

/s/ signed electronically by _____

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COUNSEL FOR CROW BUTTE
RESOURCES, INC.

Dated at San Francisco, State of California
this 11th day of June 2009

June 11, 2009

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CERTIFICATE OF SERVICE

I hereby certify that copies of “CROW BUTTE RESOURCES, INC’S ANSWER TO INTERVENOR’S MOTION AND APPLICATION FOR STAY PENDING APPEAL” in the captioned proceeding have been served via the Electronic Information Exchange (“EIE”) this 11th day of June 2009, which to the best of my knowledge resulted in transmittal of the foregoing to those on the EIE Service List for the captioned proceeding.

/s/ signed electronically by _____

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