

June 11, 2009

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
	)	
(License Renewal for the In Situ Leach	)	ASLBP No. 08-867-02-OLA-BD01
Facility, Crawford, Nebraska)	)	

NRC STAFF'S RESPONSE TO INTERVENORS' MOTION  
AND APPLICATION FOR STAY PENDING APPEAL

INTRODUCTION

On June 1, 2009, Intervenors filed a motion to stay this proceeding<sup>1</sup> pending judicial review of an appeal filed in the 8th Circuit Court of Appeals<sup>2</sup> concerning the Commission's May 18, 2009 Memorandum and Order.<sup>3</sup> For the reasons set forth below, the NRC staff ("Staff") submits that the Intervenors have not made the necessary legal showing that a stay is warranted and, therefore, the motion should be denied.<sup>4</sup>

DISCUSSION

Intervenors in this instance have not applied for a stay of a decision or action by a presiding officer, thus their motion is appropriately assessed under 10 C.F.R. § 2.323.

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<sup>1</sup> "Intervenors' Motion and Application for Stay Pending Appeal" (June 1, 2009) ("Stay Motion").

<sup>2</sup> "Petition for Review" (May 29, 2009) ("Appeal").

<sup>3</sup> *Crow Butte Resources, Inc.* (License Renewal for In Situ Leach Facility, Crawford, Nebraska), CLI-09-09, 69 NRC \_\_ (May 18, 2009) (slip op.).

<sup>4</sup> In their Stay Motion, Intervenors specified that they do not wish the stay to "interfere with the perpetuation of testimony of Aloysius Weasel Bear should Safety Contention A (Arsenic) be re-admitted after the appeal is resolved." Stay Motion at 1. The perpetuation of testimony of Aloysius Weasel Bear, however, is not a matter that should go forward as a result of the Commission's ruling in CLI-09-09, which rejected the Contention to which it applied.

However, § 2.323 does not contain any standards to evaluate stay motions; therefore, it is necessary to look to the “general stay standards” in 10 C.F.R. § 2.342(e),<sup>5</sup> which provides that:

In determining whether to grant or deny an application for a stay, the Commission or presiding officer will consider:

- (1) Whether the moving party has made a strong showing that it is likely to prevail on the merits;
- (2) Whether the 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.<sup>6</sup>

I. Irreparable Harm

Of the four factors, “the most crucial is whether irreparable injury will be incurred by the movant absent a stay.”<sup>7</sup> The Intervenors provide four examples of claimed irreparable harm: (1) the nature and scope of the proceeding are dramatically changed by the rejection of Environmental Contention B, Miscellaneous Contentions G and K and Safety Contention A; (2) should their appeal be granted, there would be a waste in the proceeding because the parties would need to re-integrate previously dismissed issues and update mandatory disclosures; (3) the denial of contentions forecloses the ability to raise those issues in the proceeding; and (4) should the 8th Circuit re-admit Miscellaneous Contention K, that issue would need to be

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<sup>5</sup> See *Sequoyah Fuels Corp. and General Atomics (Gore, Oklahoma Site)*, CLI-94-9, 40 NRC 1, 6 (1994).

<sup>6</sup> See also *Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation)*, CLI-02-11, 55 NRC 260, 262-263 (2002).

<sup>7</sup> *Alabama Power Co. (Joseph M. Farley Nuclear Plant, Units 1 & 2)*, CLI-81-27, 14 NRC 795, 797 (1981).

resolved in advance of any litigation.<sup>8</sup> Intervenors' stated harms, however, are better categorized as wasted resources and the possibility of legal error, neither of which evidence irreparable harm as outlined by the Commission.

In the Stay Motion, Intervenors base much of their rationale on a potential need to re-do mandatory disclosures or re-structure the scope and style of the proceeding should their appeal be granted. Presumably this concern is rooted in lost time and effort.<sup>9</sup> The Atomic Safety and Licensing Appeal Board ("ALAB"), however, stressed that "the key word in this consideration is *irreparable*. Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay, are not enough."<sup>10</sup> The Commission has also clearly stated that "[m]ere litigation expense, even substantial and unrecoupable cost, does not constitute irreparable injury."<sup>11</sup> In this instance, Intervenors do not appear to claim any harm that could be categorized as substantial, let alone something more that might reach the threshold of irreparable.

Intervenors state that the Commissions' rejection of a number of previously-admitted contentions means they will be unable to litigate those issue and thus the nature of the proceeding has changed;<sup>12</sup> however, they are unable to point to a specific resulting harm.

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<sup>8</sup> Stay Motion at 2.

<sup>9</sup> *Id.*

<sup>10</sup> *Toledo Edison Co.* (Davis-Besse Nuclear Power Station, Units 1, 2 & 3), ALAB-385, 5 NRC 621, 628 (1977), quoting *Virginia Petroleum Jobbers Ass'n v. FPC*, 295 F.2d 921, 925 (D.C. Cir. 1958) (emphasis in original).

<sup>11</sup> *Metropolitan Edison Co.* (Three Mile Island Nuclear Station, Unit 1), CLI-84-17, 20 NRC 801, 804 (1984), quoting *Consumers Power Co.* (Midland Plant, Units 1 and 2), ALAB-395, 5 NRC 772, 779 (1977). Accord *U.S. Dept. of Energy* (High Level Waste Repository), CLI-05-27, 62 NRC 715, 718 (2005); *Private Fuel Storage*, CLI-02-11, 55 NRC at 263.

<sup>12</sup> Stay Motion at 2.

Intervenors then claim that one of the rejected contentions could be “fatal” to the license amendment.<sup>13</sup> But, there must be more than a mere showing of the possibility of legal error to warrant a stay.<sup>14</sup> Even if the 8th Circuit were to overturn the Commission’s decision and re-admit all the rejected contentions, the proceeding could be re-structured and mandatory disclosures could be amended to accommodate the new contentions. Further, whether or not the foreign ownership issue is in fact dispositive, Intervenors have not articulated an irreparable harm were it to be resolved after litigation commenced.

II. Likelihood to Prevail on the Merits

When a party “fails to show irreparable harm, then it must make an overwhelming showing that it is likely to succeed on the merits.”<sup>15</sup> Intervenors claim, however, that it is not possible to address the likelihood of success in their appeal and make no attempt to meet this requirement.<sup>16</sup> Despite Intervenors’ assertion to the contrary, it is entirely possible to determine the likelihood of success: the Appeal fails to meet the threshold requirement of the Hobbs Act<sup>17</sup> and thus their Appeal is likely to be denied.

Although in their Appeal Intervenors state that CLI-09-09 is a final agency action, the Commission’s order rejecting some previously admitted contentions is interlocutory in nature and thus not reviewable by a federal circuit court. The Hobbs Act gives federal circuit courts jurisdiction over all “final orders” of the NRC that are made reviewable by § 189 of the Atomic

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<sup>13</sup> *Id.* at 2-3.

<sup>14</sup> See *Philadelphia Electric Co.* (Peach Bottom Atomic Power Station, Units 2 & 3), ALAB-221, 8 AEC 95, 98 (1975).

<sup>15</sup> *Sequoyah*, CLI-94-9, 40 NRC at 7.

<sup>16</sup> Stay Motion at 3.

<sup>17</sup> The Hobbs Act allows petitioners to appeal all final orders of the Commission to federal circuit courts. 28 U.S.C. § 2342(4) (2006).

Energy Act.<sup>18</sup> Section 189 correspondingly provides for judicial review of “any final order entered in any proceeding,” that is “for the granting, suspending, revoking, or amending of any license.”<sup>19</sup> Under these two statutes, “an NRC order is final if it disposes of all issues as to all parties in the licensing proceeding, that is, if it consummates the agency’s decisionmaking process and results in granting, denying, suspending, revoking, or amending a license.”<sup>20</sup>

In the instant proceeding, the Commission order rejected some of Intervenor’s previously admitted contentions, but allowed four others to remain in the proceeding. Thus, not all issues were disposed of for Intervenor and their challenge to the license renewal request remains; their appeal is therefore interlocutory rather than final. Although courts have recognized two exceptions to the finality requirement,<sup>21</sup> Intervenor fails to address either of those criteria or provide any basis to support such a finding. Consequently, the “final order” requirement would allow Intervenor to challenge the Commission’s decision only when the NRC issues a final adjudicatory order authorizing the license renewal.<sup>22</sup>

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<sup>18</sup> 28 U.S.C. § 2342.

<sup>19</sup> 42 U.S.C. § 2239(a), (b) (1996); *see also Massachusetts v. NRC*, 924 F.2d 311, 321-22 (D.C. Cir. 1991).

<sup>20</sup> *Massachusetts*, 924 F.2d at 322; *see also NRDC v. NRC*, 680 F.2d 810, 815 (D.C. Cir. 1982), *quoting Citizens for a Safe Env’t v. AEC*, 489 F.2d 1018, 1021 (3d Cir. 1974).

<sup>21</sup> Those two exceptions are: (1) “rulings that are ‘so flagrantly wrong and demonstrably critical as to make’ reversal a virtual certainty if the petitioner were to lose at the administrative level,” *NRDC*, 680 F.2d at 816, fn. 15, *quoting Ecology Action v. AEC*, 492 F.2d 998, 1001 (2d Cir. 1974), and (2) “collateral orders” that result if an “immediate appeal [is] necessary to preserve rights that would otherwise be lost on review from final judgment.” *NRDC*, 680 F.2d at 816, fn.16.

<sup>22</sup> *See NRDC*, 680 F.2d at 815 (“Strictly interpreted, then, a final order in the adjudicatory proceedings in this case would be a decision on the license amendments challenged by NRDC. Obviously, the NRC has yet to issue such a final order.”).

III. Other Factors: Harm to Other Parties and Public Interest

Because the Intervenor has failed to meet their burden on the first two issues, the Board “need not give lengthy consideration to the other two factors.”<sup>23</sup> Even so, Intervenor fails to provide sufficient support for a stay in the final two prongs: harm to the other parties and public interest.

Intervenor states that there would be no harm to the other parties if a stay were granted because the Crow Butte mine operates under an automatic extension and therefore there is no pressing need to move forward while the Petition for Review is pending.<sup>24</sup> But, the fact that an urgent decision is not required is actually a neutral factor, rather than one that tips in favor of granting a stay.<sup>25</sup> Further, even if the lack of exigency were a positive factor for Intervenor, it is not sufficient to overcome their failure to demonstrate irreparable injury and a likelihood of success on the merits.

Intervenor also states that the public interest factor weighs in their interest because a stay would “foster public confidence in the integrity of the NRC licensing process” yet fail to explain this rationale.<sup>26</sup> Further, they state that a stay would “foster conservation of parties’ and

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<sup>23</sup> *Sequoyah*, CLI-94-9, 40 NRC at 8.

<sup>24</sup> Stay Motion at 3.

<sup>25</sup> See *Sequoyah*, CLI-94-9, 40 NRC at 7 (finding that an order that was not made immediately effective and is not “urgently required to protect the public interest or the public health and safety” only points to the fact that the stay “would not actually contravene the public interest,” not that it would be in the public interest).

<sup>26</sup> Stay Motion at 3.

ASLBP and judicial resources;”<sup>27</sup> however, again, this alone is not sufficient to overcome their failure to meet either of the two first, and most important, factors.<sup>28</sup>

CONCLUSION

Intervenors were unable to demonstrate a sufficient showing with respect to the four factors to warrant the grant of a stay. Thus, the Board should deny their Motion.

Respectfully submitted,

**Executed in Accord with 10 CFR 2.304(d)**

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Dated at Rockville, Maryland  
this 11<sup>th</sup> day of June, 2009

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<sup>27</sup> *Id.*

<sup>28</sup> See *Sequoyah*, CLI-94-9, 40 NRC at 7. (finding that the “mere possibility” of saving potentially unnecessary litigation costs was not enough to overcome failure of the first two criteria).

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "NRC STAFF'S RESPONSE TO INTERVENORS' MOTION AND APPLICATION FOR STAY PENDING APPEAL" in the above captioned proceeding have been served via the Electronic Information Exchange ("EIE") this 11<sup>th</sup> 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 above captioned proceeding.

**Executed in Accord with 10 CFR 2.304(d)**

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