

**UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION**

**BEFORE THE COMMISSION**

In the Matter of:

STRATA ENERGY, INC.

(Ross In Situ Uranium Recovery Facility)

---

)  
)  
) Docket No.: 40-9091-MLA  
)  
) Date: August 22, 2011  
)  
)  
)  
)

**MOTION FOR RECONSIDERATION OF OFFICE OF SECRETARY'S DECISION  
GRANTING NATURAL RESOURCE DEFENSE COUNCIL/POWDER RIVER  
BASIN RESOURCE COUNCIL MOTION FOR EXTENSION OF TIME TO FILE  
A REQUEST FOR A HEARING**

Strata Energy, Inc. (Strata), by its undersigned counsel of record, hereby submits this Motion for Reconsideration of Office of Secretary's Decision Granting Natural Resource Defense Council/Powder River Basin Resource Council (hereinafter the "Council") Motion for Extension of Time to File a Request for a Hearing (hereinafter the "Motion") regarding Strata's license application for a new combined source and 11e.(2) byproduct material license to construct and operate an in situ leach uranium recovery (ISR) facility (hereinafter the "Ross ISR Project") in Crook County in the State of Wyoming. For the reasons discussed below, Strata respectfully requests that the Commission or the Presiding Officer, if so designated, grant Strata leave to file its Motion for Reconsideration and, assuming grant of such leave, reverse the Office of the Secretary's August 17, 2011 decision granting the Council's Motion.

## **I. PROCEDURAL HISTORY**

On December 31, 2010 and January 4, 2011 respectively, Strata submitted a comprehensive license application to NRC requesting the grant of a combined source and 11e.(2) byproduct material license to construct and operate the proposed Ross ISR Project in Crook County in the State of Wyoming. When Strata's license application was submitted, NRC Staff held a Category 1 public meeting to discuss the submission and the series of procedures that would follow during the licensing process, including its "acceptance review" which typically takes approximately ninety (90) days to complete. However, on January 19, 2011, NRC Staff informed Strata that its "acceptance review" would not commence until May 2, 2011 due to agency resource constraints. But, while NRC Staff's "acceptance review" of the license application and, thus, formal docketing of the application would be delayed, on January 26, 2011, NRC Staff made Strata's license application publicly available on its ADAMS database. Thus, Strata's license application was available for review by the Council and other interested parties for more than three (3) months prior to the commencement of NRC Staff's "acceptance review."

NRC Staff commenced its "acceptance review" on May 2, 2011 and, on June 28, 2011, announced that the "acceptance review" had resulted in formal docketing of Strata's license application. NRC issued a Federal Register notice dated July 13, 2011, which announced the formal docketing of Strata's license application and the opportunity to request a hearing within a sixty (60) day time period.<sup>1</sup> Based on the Federal Register notice issuance date, Strata's license application was publicly available for review by the Council and other interested parties for more than five (5) months.

---

<sup>1</sup> See 76 Fed. Reg. 41308 (July 13, 2011).

On August, 10, 2011, the Council submitted its Motion. On August 17, 2011, the Office of the Secretary issued an Order granting the Council's Motion without allowing Strata's counsel (or NRC Staff's counsel) to submit a response, in which response Strata would have opposed the Motion. Thus, Strata asserts that the Acting Secretary's action has deprived Strata of its procedural rights under 10 CFR Part 2. Accordingly and for the reasons discussed below, Strata hereby submits this Motion for Reconsideration and respectfully requests that the Commission or the Presiding Officer, if so designated, grant Strata leave to file its Motion for Reconsideration and, assuming grant of such leave, reverse the Office of the Secretary's August 17, 2011, decision to grant the Council's Motion.

## **II. ARGUMENT**

### **A. The Commission Should Grant Leave for Strata's Motion for Reconsideration**

Initially, Strata believes that reconsideration of the Office of the Secretary's August 17, 2011 is warranted under 10 CFR § 2.323(e). Section 2.323(e) states in pertinent part:

"Motions for reconsideration may not be filed except upon leave of the presiding officer or the Commission, upon a showing of compelling circumstances, such as the existence of a clear and material error in a decision, which could not have reasonably been anticipated, that renders the decision invalid."

10 CFR § 2.323(e).

Strata's Motion for Reconsideration is warranted in accordance with relevant NRC procedural regulations.

First, neither Strata (nor NRC Staff) have had an opportunity to respond to the Council's Motion in the ten (10) day time period allowed by Section 2.323(c). As stated above, the Office of the Secretary's August 17, 2011, decision to grant the Council's Motion deprived Strata of its procedural rights under 10 CFR Part 2, which should be considered a "clear and material error." Second, per 10 CFR § 2.323(e), the Council's Motion is based upon either

incorrect or incomplete information and, thus, the Office of the Secretary's decision to grant the Request was based on a "clear and material error, which could not have reasonably been anticipated...." The additional facts to be offered below are facts that could not have been reasonably anticipated by the Office of the Secretary when rendering its decision, because they were not a matter of public record at the time the Council's Motion was filed and no Response to this Motion was permitted. Third, as will be shown below, the Council's Request failed to comply with the Commission's requirements for motions, most notably the requirement to consult with counsel for other parties to attempt to obtain concurrence on the Request. *See* 10 CFR § 2.323(b). Thus, Strata asserts that the Commission or the Presiding Officer, if so designated, should grant Strata leave to file this Motion for Reconsideration.

**B. The Council's Request Should Have Been Denied Based on the Commission's Requirements for Extensions of Time**

Based on the substance of its Motion, Strata asserts that the Council's Motion should have been denied. As a general proposition, the Commission's legal standards for granting an extension of time to file a request for a hearing can be found at 10 CFR § 2.307(a) which states:

“Except as otherwise provided by law, the time fixed or the period of time prescribed for an act that is required or allowed to be done at or within a specified time, *may be extended or shortened either by the Commission or the presiding officer for good cause, or by stipulation approved by the Commission or the presiding officer.*”<sup>2</sup>

Indeed the Final Rule associated with the revisions to the Commission's adjudicatory procedures notes that, “under § 2.307 of the final rule...a presiding officer may shorten or lengthen the time required for filing for good cause. This provision expressly allows a presiding officer to set deadlines for filing, such as the filing of contentions.”<sup>3</sup> Given that Strata did not and does not

---

<sup>2</sup> 10 CFR § 2.307(a) (2011) (emphasis added).

<sup>3</sup> *See* United States Nuclear Regulatory Commission, *Changes to the Adjudicatory Process*, 69 Fed. Reg. 2182, 2186 (January 14, 2004).

stipulate to the Council's Motion, the requirement for "good cause" is the relevant factor to be evaluated by the Commission or the Presiding Officer, if so designated.

The standard for "good cause," while not specifically defined by regulation, has been addressed by the Commission and Licensing Boards in the context of late filed petitions for intervention.<sup>4</sup> According to these Commission and Licensing Board decisions, the burden of showing good cause is on the petitioner seeking the extension.<sup>5</sup> The Licensing Board has stated that a party seeking an extension must state in detail what "unavoidable and extreme circumstances" warrant an extension.<sup>6</sup> The Commission's Statement of Policy on Conduct of Adjudicatory Proceedings notes that "parties to a proceeding...are expected to adhere to the time frames specified in the Rules of Practice in 10 CFR Part 2 for filing...."<sup>7</sup> This Policy Statement also notes that extensions of time are only warranted by "unavoidable and extreme circumstances."<sup>8</sup>

Based on the requirement that "unavoidable and extreme circumstances" be demonstrated to satisfy the "good cause" standard, Strata asserts that the Council's Request should have been denied for three reasons and, as such, the Office of the Secretary's August 17, 2011 decision to grant such Request should be reconsidered and reversed. First, the Council states that:

"[t]he 60 day review period (that includes this late summer vacation season) is simply insufficient time to gather and thoroughly review all the relevant

---

<sup>4</sup> See e.g., *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-05-24, 62 NRC 551, 564 (2005); see also *Private Fuel Storage, LLC* (Independent Spent Fuel Storage Installation), CLI-00-2, 51 NRC 77, 79 (2000); *Boston Edison Co.* (Pilgrim Nuclear Power Station), ALAB-816, 22 NRC 461, 468 n. 27 (1985).

<sup>5</sup> *Compare Detroit Edison Co.* (Enrico Fermi Atomic Power Plant, Unit 2), LBP-82-96, 16 NRC 1408, 1432 (1982).

<sup>6</sup> See *Duke Energy Corporation* (Catawba Nuclear Station, Units 1 and 2), 2003 NRC LEXIS 176 (2003) citing United States Nuclear Regulatory Commission, *Statement of Policy on Conduct of Adjudicatory Proceedings*, 48 NRC 18 (1998).

<sup>7</sup> United States Nuclear Regulatory Commission, *Statement of Policy on Conduct of Adjudicatory Proceedings*, 48 NRC at 21.

<sup>8</sup> *Id.*

documents to constructively address whether this application meets NRC's requirements of 10 C.F.R. Part 40."

Council August 10, 2011 Extension Request at 2.

This statement is factually incorrect as the Council is suggesting that there has only been 60 days to review Strata's application and to formulate a series of contentions. As stated above, Strata's license application has been publicly available for more than (5) months prior to the official docketing and NRC's issuance of the aforementioned July 13, 2011 Federal Register notice. In the past, the Commission has stated that the public availability of materials for a proposed NRC licensing action for at least five (5) months was enough to defeat a requestor's argument for "good cause."<sup>9</sup> Thus, based on this fact alone, Strata asserts that the Council's Request does not satisfy the Commission's standards for good cause.

Second, in addition to the public availability of Strata's license application, the Council's request does not properly account for the level of notification the Council has received with respect to Strata's license application. During the license application preparation phase and proceeding through the public notice and acceptance review phases, Strata provided the Council with ample notice of the contents and availability of its NRC license application. For example, Strata hosted a pre-license application submission audit meeting which was classified as a Category 1 public meeting and, therefore, open to the public. Representatives of PRBRC attended this public meeting and were made aware of Strata's proposed timeline for license application submission for December, 2010 or January, 2011. *See* Affidavit of Benjamin Schiffer at 2, Section 5(a). Further, Strata directly informed PRBRC and, hence, the Council of the submission of its NRC license application on January 4, 2011 and of NRC Staff's May 2,

---

<sup>9</sup> *See Detroit Edison Co.* (Enrico Fermi Atomic Power Plant, Unit 3), CLI-09-4, 69 NRC 80, 82 (2009) (rejecting extension request based on asserted need for more time to review application materials, noting that by the hearing request deadline the materials would have been in the public record for five months).

2011, commencement of its acceptance review on May 5, 2011. *See id.* at 3, Section 5(c).

Additionally, on February 7, 2011, Strata provided PRBRC and, hence, the Council with a hyperlink to NRC's license application review schedule for Strata's license application, including the typical 60 day time period for hearing requests. *See id.* In addition to these notifications specific to the NRC license application, Strata also has maintained constant communication with representatives of the Council regarding all aspects of the Ross ISR project's development. *See id.* Thus, the Council's claim that they have not had enough time to review Strata's license application and prepare a hearing request is not supported by the facts.

In addition to the ample notification received by the Council of Strata's NRC license application, its submission, and its "acceptance review" and formal docketing, the Council's Motion fails to inform the Commission that it had retained a technical expert (hydrologist) to review Strata's license application well in advance of its official docketing. On June 9, 2011, the Council informed Strata that it had retained an expert, Dr. Robert Moran, to review the NRC license application and requested a meeting between such expert and Strata's lead licensing contractor, WWC Engineering. *See id.* at 3, Section 5(d). Then, on June 16, 2011, WWC Engineering and the Council participated in a telephone conference on which WWC Engineering provided the Council's expert with citations to his areas of interest in the license application to facilitate a timely review process. *See id.* Further, the Council provides no statements or affidavits of support from its members or experts supporting its claim that "summer vacations" contributed to their inability to review Strata's license application and prepare a request for a hearing. Therefore, the Council cannot claim that the allotted 60 day time period is insufficient to allow for complete review of Strata's license application and for preparation of a hearing

request as its designated expert was reviewing the license application in June, 2011, and no formal support for its assertions of delay.

**C. The Council's Motion Should Not Have Been Granted Because It Does Not Comply with the Commission's Regulations for Motions**

Lastly, Strata asserts that the Council's Motion fails to meet the Commission's regulations for motions in its adjudicatory proceedings. Under 10 CFR § 2.323(b):

"A motion must be rejected if it does not include a certification by the attorney or representative of the moving party that the movant has made a sincere effort to contact other parties in the proceeding and resolve the issue(s) raised in the motion, and that the movant's efforts to resolve the issue(s) have been unsuccessful."

10 CFR § 2.323(b).

Within the language of the Council's Motion, there is no certification present demonstrating that the Council's counsel attempted to contact Strata regarding its Motion. The Council is well-aware of the fact that Strata has counsel specifically dedicated to obtaining an NRC license and, even if that information was not available, the Council has had regular communications with Strata over the past year and could have contacted the applicant directly. Strata is also not aware of any attempts by the Council to contact NRC Staff or its counsel to obtain concurrence on its Motion. As such, Strata found that the Acting Secretary's decision to grant the motion surprising as no concurrence with the Council's Motion had been sought, let alone obtained. Thus, pursuant to Section 2.323(b)'s language, the Council's Motion should have been rejected.



### **III. CONCLUSION**

Strata certifies that it communicated to the Council and NRC Staff via electronic message on August 22, 2011, that it intended to file this motion. NRC Staff agreed with the position taken by Strata via electronic message dated August 22, 2011, and stated it would support the motion, while the Council indicated that it would oppose such motion via electronic message dated August 22, 2011. A subsequent telephone conference with the Council's counsel further demonstrated that no agreement could be reached. As a result of the failure to obtain a consensus from both parties, Strata is filing this motion.

For the reasons discussed above, Strata respectfully requests that the Commission or the Presiding Officer, if so designated, grant Strata leave to file its Motion for Reconsideration and, assuming grant of such leave, reverse the Office of the Secretary's August 17, 2011, decision to grant the Council's Motion.

Respectfully submitted,

**/Signed (electronically) by/  
Christopher S. Pugsley, Esq.**

Dated: August 22, 2011

---

Anthony J. Thompson, Esq.  
Christopher S. Pugsley, Esq.  
Thompson & Simmons, PLLC  
1225 19<sup>th</sup> Street, NW  
Suite 300  
Washington, DC 20036  
COUNSEL TO STRATA ENERGY, INC.

**BEFORE THE ATOMIC SAFETY AND LICENSING BOARD**

Date: August 22, 2011