

**BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA**

In the matter of the
application for an
amendment of a Major
Facility Siting Act
certificate by Talen
Montana LLC

BRIEF IN SUPPORT OF
EMERGENCY MOTION FOR
EXPEDITED RELIEF FROM
ARM17.20.1803(d)
BY WESTMORELAND MINING LLC
AND WESTMORELAND ROSEBUD
MINING LLC

Background

1. Colstrip Units 3 and 4 are operated by Talen Montana (“Talen”) as part of a four-unit mine-mouth steam coal power plant in the City of Colstrip.¹ *See* Notice of Contest (the “Notice”), attached as Exhibit 4, ¶¶ 6-9.

2. Colstrip Units 3 and 4 were designed and constructed pursuant to an original certificate issued under the Major Facility Siting Act, MCA 75-20-101, *et seq.* (“MFSA”). *Id.* ¶ 10.

3. Consistent with the MFSA requirement that certified facilities minimize environmental impacts, Colstrip Units 3 and 4 must burn only the locally available, mine-mouth coal in the Rosebud seam. *Id.* ¶ 11. This limitation on the source of coal available to Colstrip Units 3 and 4 has been a requirement of operation since

¹ Colstrip Units 3 and 4 are collated with Colstrip Units 1 and 2, which are not subject to the original MFSA certificate and are not involved in this matter. Ex. 4, ¶ 5.

the units opened in 1984 and 1986, respectively, and it is essential to the statutorily required findings giving rise to the operation of Colstrip Units 3 and 4. *Id.*

4. Over the course of several decades, Contesters, thousands of families, local governments, and the State have made numerous decisions and significant investments in reliance on the mine-mouth coal requirement. *Id.* ¶¶ 12-13.

5. The resulting economic impact on the city of Colstrip and the State are tremendous: Contesters alone employ approximately 390 employees in Colstrip, pay over \$40 million in local payroll annually, and spend over \$60 million annually for goods and services in Montana. *Id.* ¶ 15. Contesters' operations in Colstrip have generated over \$30 million annually for the State in gross proceeds, severance, and RITT taxes. *Id.* ¶ 16.

6. Despite this, on March 15, 2019, Talen applied to the State of Montana Department of Environmental Quality (the "Department") for an amendment of the MFSA Certificate for Colstrip Units 3 and 4. *Id.* ¶ 1. Talen submitted a revised application on March 29, 2019. *Id.* ¶ 23.

7. Talen's requested amendment to the certificate seeks to (i) eliminate the requirement that Colstrip Units 3 and 4 utilize only local Rosebud seam coal and (ii) permit Colstrip Units 3 and 4 to receive and use coal mined elsewhere, including coal located 300 miles away by rail in Wyoming, by altering and adding to the facility and the surrounding area. *Id.* ¶¶ 17-18.

8. As set forth in the Notice, given the limitations of sourcing coal from the other mines in Montana that Talen included in its application, only Wyoming coal will be utilized if the requested amendment is approved. *Id.* ¶ 18.

9. On April 23, 2019, the Department prepared a draft environmental assessment that was inadequate considering the extensive harm that will result from the approval of Talen’s requested amendment. *Id.* ¶ 27.

10. Among other inadequacies, the Department’s draft environmental assessment did not address the wide-ranging environmental impacts, socioeconomic harms, and harms to local government and the State that will occur if Talen’s requested amendment is approved. *Id.* ¶¶ 27-34. Additionally, only two people prepared and reviewed the draft environmental assessment. *Id.* ¶ 40.

11. After the Department provided only two days for public comment on the draft environmental assessment, and without providing any opportunity for public comment on Talen’s application, the Department preliminarily approved Talen’s requested amendment on May 3, 2019. *Id.* ¶¶ 1, 34-37, 41-43.

12. On an insufficient evidentiary record, the Department issued a second document on May 10, 2019, addressing its finding that “use of the non-Rosebud Seam coal from the [non-local] mines . . . would not result in a material increase in any environmental impact or substantial change in the location of the facility[.]” *Id.* ¶ 43-44.

13. In addition to the Department's failure to address the breadth of socioeconomic and environmental harms that Talen's requested amendment will cause, *see id.* ¶¶ 32, 49, the Department's approval directly contravenes the plain language of ARM 17.20.1804, which permits the Department to grant a requested amendment only if it finds that the amendment does not materially alter the findings that were the basis for granting the certificate. *Id.* ¶ 52.

14. Following the Department's approval of Talen's requested amendment, Contesters filed the Notice on May 17, 2019, seeking a show-cause hearing before the Board pursuant to MCA 17.20.1803(c).

15. The Notice requests that the Board deem the Department's approval of Talen's amendment to its certificate void *ab initio* and remand the matter to the Department for further review in conformance with the requirements of the MFSA and other applicable rules. *Id.* at Prayer for Relief.

16. The Notice details the shortcomings of the Department's procedures in approving Talen's requested amendment and the deficiencies of the Department's draft environmental assessment, and it further provides a non-exhaustive list of over 40 matters in contest. *Id.* ¶¶ 63-107.

17. Because the Department's approval was made without providing an opportunity for public comment, the first sentence of MCA 75-20-223(1)(b) does not apply and the Board reviews the issues raised in the Notice *de novo*.

18. The resolution of this contested case will entail the presentation of extensive factual evidence and expert testimony that will show that granting the amendment is unlawful and unreasonable due to the resulting impacts on the environment, the people of Montana, and the State.

19. ARM 17.20.1803(d) requires, to the extent that it applies, the party requesting the hearing to “file with the board all testimony, evidence and exhibits in writing that it intends to present at the hearing within 15 days after filing a request for a hearing.” ARM 17.20.1803(d).

20. To the extent that it applies, ARM 17.20.1803(d) provides that if the requesting party fails to submit the testimony, evidence, and exhibits in writing within the 15-day deadline the party waives the “request for a hearing” and “rights to participate in the hearing.” *Id.*

21. Because Contesters filed the Notice on May 17, 2019, compliance with ARM 17.20.1803(d) would require Contesters to submit all evidence in support of their position on the Department’s approval of Talen’s requested amendment by June 3, 2019, because June 1, 2019, falls on a Saturday.

22. In light of the extensive evidence that Contesters intend to submit to the Board, application of ARM 17.20.1803(d) would be tremendously inappropriate.

23. ARM 17.20.1803(d) could not possibly have been intended to apply to a matter such as this under these circumstances when it was originally promulgated.

24. The Department's approval of Talen's requested amendment would remove the mine-mouth coal requirement and facilitate the substitution of the local Rosebud coal with coal transported from Wyoming mines.

25. It is likely the amendment will directly result in the premature closure of the Rosebud mine. As such, Contesters, as well as the businesses and individuals who rely on the economic benefits generated by the operation of Colstrip Units 3 and 4, are deeply invested in the outcome of Talen's request.

26. Additionally, the approval of Talen's requested amendment would permit the transportation of millions of tons of coals per year by rail or by truck through the State of Montana, including through the reservation of a federally recognized Indian tribe, if Colstrip Units 3 and 4 are no longer required to burn the local mine-mouth coal. This is likely to cause significant, unnecessary environmental impacts and harm to people who live and work in the surrounding communities.

27. The environmental impacts from the unnecessary transportation of coal alone pose an absolute legal bar to the amendment sought by Talen under the provisions of the MFSA.

28. Contesters intend to introduce extensive evidence to the Board regarding the environmental and socioeconomic harms that approval of Talen's requested amendment will cause, including, *inter alia*, evidence relating to:
- a. Demonstrating the result of the amendment will be the substitution of the local Rosebud coal with Wyoming coal and not coal from other Montana mines;
 - b. Demonstrating the amendment will likely result in the premature closure of the entire Rosebud mine;
 - c. The environmental impacts on communities across Montana due to the transportation of millions of tons of coal per year by rail or truck across the State, including up to 1.3 billion ton-miles of diesel exhaust emissions per year from coal hauling trains;
 - d. The deficiencies of the methodology utilized by the Department to conclude without adequate basis that the composition of Wyoming coal is equivalent to the local Rosebud coal;
 - e. The differences in the composition of the Rosebud seam coal and the Wyoming coal identified by Talen in its requested amendment and the resulting environmental impacts caused by burning the new coal by examination of, among other things, the fly and bottom ash

composition, the water intake and waste water discharges, the emission impacts, and the safety impacts;

- f. The local socioeconomic and health impacts that likely closure of the Rosebud mine will have on workers, spouses, and children over the short term and over the long term;
- g. The impacts resulting from transporting billions of ton-miles of coal per year through the Crow reservation; and
- h. The impacts on State revenue and the local economy that would result from the premature closure of the Rosebud mine and the replacement of its coal with Wyoming coal.

29. The Board's assessment of this evidence and more is necessary to a complete, reasonable consideration of (i) Talen's requested amendment and (ii) the Board's review of Contesters' requested relief from the Department's decision preliminarily approving Talen's request.

30. Contesters will retain numerous experts to testify regarding the impacts of the amendment, and the preparation of expert testimony alone ordinarily takes several months to complete even in simple proceedings.

31. Additionally, Contesters would have to prepare exhibits and written testimony from fact witnesses.

32. Given the extensive evidence that Contesters intend to present for consideration at the hearing, Contesters would be severely prejudiced by application of ARM 17.20.1803(d).

33. ARM 17.20.1803(d) cannot reasonably be applied in light of the high stakes and the numerous complex issues central to Talen's requested amendment.

34. As a result, requiring Contesters to comply with the 15-day deadline would be unreasonable and violate Contesters' rights guaranteed by state law, the Constitution of the State of Montana, and the Constitution of the United States.

35. Waiver of ARM 17.20.1803(d) will ensure that this matter is appropriately and fairly presented to the Board for its consideration to ensure a reasonable and lawful outcome.

36. The Board has authority to grant the requested relief.

37. "The Board is not a slave of its rules." *NLRB v. Grace Co.*, 184 F.2d 126, 129 (8th Cir. 1950); *Connecticut State Labor Relations Bd. v. Connecticut Yankee Greyhound Racing, Inc.*, 402 A.2d 777, 782 (Conn. 1978). Rather, "[i]t is always within the discretion of a court or an administrative agency to relax or modify its procedural rules adopted for the orderly transaction of business before it when in a given case the ends of justice require it." *NLRB v. Monsanto Chemical Co.*, 205 F.2d 763, 764 (8th Cir. 1953); *American Farm Lines v. Black Ball Freight Service*, 397 U.S. 532, 539 (quoting and applying this rule); *City of Fremont v.*

FERC, 336 F.3d 910, 917 (9th Cir. 2003) (same); *see also Sun Oil Company v. FPC*, 256 F.2d 233, 239 (5th Cir. 1958) (“In a particular case an administrative agency may relax or modify its procedural rules and its action in so doing will not be subjected to judicial interference in the absence of a showing of injury or substantial prejudice.”); *NLRB v. Grace Co.*, 184 F.2d 126, 129 (8th Cir. 1950) (an agency “in its discretion may apply or waive” “a procedural rule” “as the facts of a given case may demand”); *Martorano v. Dep’t of Pub. Utils.*, 516 N.E.2d 131, 134–35 (Mass. 1987); *Forquer v. State*, 677 P.2d 1236, 1243–44 (Alaska 1984); *Mentor v. Kitsap Cty.*, 588 P.2d 1226, 1229 (Wash. App. 1978).

38. Furthermore, the only sensible application of ARM 17.20.1803(d) would be in an instance where a change in a separate permit called for a mere conforming or technical amendment that does not involve changing or eliminating any significant or material condition in the certificate. On this basis, the Board can decide that ARM 17.20.1803(d) does not apply in this proceeding because the amendment is not merely a conforming or technical amendment due to a change in a separate permit.

39. Likewise, the Board can decide that ARM 17.20.1803(d) does not apply where, as here, the hearing notice identifies increased environmental impacts resulting from the amendment (*e.g.*, diesel exhaust emissions from transporting millions of tons of coal annually). On this basis, the Board can decide that ARM

17.20.1803(d) does not apply in this proceeding because both the hearing notice and also the Department identify material environmental impacts that will result from the amendment sought by Talen.

Requested Relief

Considering the foregoing, Contesters respectfully request that the Board waive ARM 17.20.1803(d) or hold that it does not apply.

Respectfully Submitted this 20th Day of May 2019.

/s/ Rosario C. Doriott Domínguez

*On behalf of Contesters Westmoreland Mining LLC,
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Certificate of Service

I certify that on May 20, 2019, in accordance with BER Policy No. 2002.01.01 and applicable law, I mailed an original copy of this Emergency Motion for Expedited Relief and Brief in Support with all accompanying exhibits to the Secretary, Board of Environmental Review, Department of Environmental Quality, Metcalf Building, 1520 East Sixth Avenue, P.O. Box 200901, Helena, MT 59620-0901, with copies by e-mail to the following:

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