May 23, 2008

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 Amendment for the North Trend Expansion Area)	)	ASLBP No. 07-859-03-MLA-BD01
	)	

NRC STAFF'S RESPONSE TO BOARD'S ORDER OF APRIL 29, 2008

INTRODUCTION

On April 29, 2008, the Board issued a Memorandum and Order[1] ("April 29 Order") of its decision on the Petition to Intervene and Request for Hearing[2] in the above referenced proceeding. The Board admitted Contentions A, B and C, but found Contentions D and F inadmissible under 10 C.F.R. § 2.309(f) (1). The Board refrained from ruling on Contention E and requested additional briefs because the issues raised by Contention E presented "significant questions on which this Board believes the parties should be heard, and on which [the Board wishes] to make a fully informed ruling." April 29 Order at 122. Subsequent to the April 29 Order, the Board issued another Order (Following up on Matters Addressed at May 8, Telephone Conference, and Raised by Petitioner Debra White Plume) ("May 14 Order") on May

[1] Memorandum and Order (Ruling on Standing and Contentions of Petitioners Owe Aku, Bring Back the Way; Western Nebraska Resources Council; Slim Buttes Agricultural Development Corporation; Debra L. White Plume; and Thomas Kanatakeniate Cook), LBP-08-06, 67 N.R.C. ___, (Apr. 29, 2008) (slip op.)

[2] Petitioners submitted a reference petition on December 28, 2007, and subsequently, submitted a "Corrected Reference Petition" ("Ref. Pet.") on January 9, 2008, to correct inconsistencies in the referenced petition.

14, 2008, requesting information regarding 10 C.F.R. §§ 40.32 and 40.45 as applied to the current license amendment proceeding. In accordance with the April 29 Order and the May 14 Order, the Staff submits this response to the Board's questions of: 1) whether issuance of a license amendment to the Applicant would be in direct violation of 10 C.F.R. § 40.38; and (2) if not restricted under § 40.38, whether foreign ownership of the Applicant would, under Part 40, including § 40.32(d), have an impact on or endanger the common defense or security of the United States, so as to bring into question the propriety of granting the sought license amendment; 3) what standards should be applied and what are the sources for any standards to be applied, in determining which criteria set forth in 10 C.F.R. § 40.32 are applicable in deciding whether to amend a license under section 40.45, particularly in light of the principle that the standards for amendment of a license are generally the same as those for issuance of an original license and 4) whether Subpart G procedures should apply to the license amendment proceedings.[3] April 29 Order at 122; May 14 Order at 1, 2.

DISCUSSION

I. Whether issuance of a license amendment to the applicant would be in direct violation of 10 C.F.R. § 40.38?

Issuance of a license amendment would not be in direct violation of 10 C.F.R. § 40.38 because section 40.38 is not applicable to in-situ leach uranium recovery facilities. Section 40.38 was promulgated to implement the USEC Privatization Act ("Act"), which amended the Atomic Energy Act of 1954 ("AEA"), and applies exclusively to uranium enrichment facilities[4]. *See* USEC Privatization Act: Certification and Licensing of Uranium Enrichment Facilities, 62 Fed. Reg. 6,664, 6,666 (Feb. 12, 1997). While the Board is correct that some provisions

[3] The Board issued an additional Order on May 2, 2008, that included a request for additional briefs on the Petitioners' request for a Subpart G hearing.

[4] "Corporation", as used in Section 40.38, refers exclusively to the "licensing of the Corporation (USEC) or its successor for operation of the AVLIS facility." *Id*. at 6,664, 6,666.

related to the Act have been repealed, provisions governing licensing proceedings of uranium enrichment facilities under Parts 40 and 70 remain in effect due to the fact that there is one gaseous diffusion plant in the United States that is subject to the NRC regulatory authority.[5] Thus, any application of section 40.38 to the license amendment application for a proposed in-situ leach uranium recovery facility would be contrary to the plain meaning and intent of the Act.

II. Whether foreign ownership of the Applicant would, under Part 40, including § 40.32(d), have an impact on or endanger the common defense or security of the United States, so as to bring into question the propriety of granting the sought license amendment?

The matter of whether the Applicant is owned by a Canadian company is irrelevant because the amendment application is requesting approval to conduct an additional in-situ leach uranium recovery operation at another location. The application does not involve a change of ownership. For these and other reasons discussed below, the Staff maintains that the foreign ownership of the Applicant as alleged by the Petitioners is irrelevant to the safety and environmental standards for the amendment application.[6]

In the domestic materials licensing of in-situ leach uranium recovery facilities[7], there is no statutory prohibition to foreign ownership similar to the prohibition that exists under Section 103(d) of the AEA for production and utilization facilities.[8] Section 40.32(d) requires only that

[5] The Act also amended the AEA to require that "AVLIS [atomic vapor laser isotope separation] uranium enrichment facilities be licensed subject to the provisions of the Act pertaining to source material and special nuclear material rather than the provisions pertaining to a production facility…." *Id.* at 6,664.

[6] *See* NRC Staff's Combined Response in Opposition to Petitioners' Requests for Discretionary Intervention and Petitions for Hearing and/or to Intervene of Debra White Plume, Thomas Cook, Owe Aku/Bring Back the Way, Chadron Native American Center, High Plains Development Corporation, Slim Buttes Agricultural Development Corporation, and Western Nebraska Resources Council (Dec. 7, 2007) at 43.

[7] *See* 42 U.S.C. § 2091 *et. seq*.; *See also* Sections 61-69 of Chapter 7 of the AEA, "Source Material."

[8] Section 103(d) of the AEA applies to nuclear reactors and facilities that use or handle special (continued. . .)

the Commission examine whether "[t]he issuance of the license will not be inimical to the common defense and security or to health and safety of the public…." A determination that issuance of the license amendment is inimical to the common defense and security would require more than a mere showing of foreign ownership. Previous Commission decisions have examined issues pertaining to common defense and security in materials licensing proceedings. For example, in *In the Matter of Kerr-McGee Corporation* (West Chicago Rare Earths Facility), CLI-82-2, 15 N.R.C. 232, 238 n.3 (1982), the Commission recognized that because the import and export of nuclear materials was not at issue, "common defense and security considerations under section 40.32(d) [were] not implicated." *Id*. at 238. The proposed project in *Kerr-McGee* involved an amendment to a Part 40 materials license for the domestic use and possession of source material at a demolition site in the state of Illinois.[9] Like the license amendment application in *Kerr-McGee*, the license amendment application in this case concerns a Part 40 materials license for domestic possession of source materials. Also, there is no proposal in the application to export source material to another country. In another decision addressing allegations of nuclear proliferation and terrorists concerns, the Commission determined whether a challenge by intervenors to two materials license amendments demonstrated that issuance would be inimical to common defense and security. In *In the Matter of Curators of the University of Missouri*, CLI-95-1, 41 N.R.C. 71, 165 (1995), the Commission opined that "unless the specific 'common defense and security' risk asserted by intervenors in this proceeding is reasonably related to, and would arise as a direct result of, the specific license amendments that the University asks the Commission to approve," intervenors were not entitled to litigate the

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(. . .continued)
nuclear material. *See also* 42 U.S.C. § 2133.

[9] The amendment in *Curators* allowed Kerr-McGee to demolish certain buildings at one of its sites and to receive onsite for temporary storage a small quantity of mill tailings containing thorium from other sites in the city. *Id*. at 235.

area of concern raised by the allegations. Intervenors in *Curators* argued that the proposed research activities of the University could result in nuclear proliferation, undermine the government's efforts to get an international agreement to renew the Non-Proliferation Treaty, and potentially create commerce that would result in a risk that nuclear materials might be sold on the black market and/or used by terrorists. *Id*. at 163-164. But, the Commission rejected those arguments on the basis that intervenors could not demonstrate that the University's proposed project would lead directly to nuclear weapons proliferation.[10] *Id*. at 165,166. Therefore, common defense and security risk is dependent upon the specific amendment in question---which here is not for a change of ownership.[11]

The Board should note that the Part 40 materials license amendment sought in this proceeding pertains to domestic possession of source material and does not authorize transfers to destinations outside of the United States.[12] 10 C.F.R. Part 110 addresses the export of source material and the export of source material to other countries requires satisfaction of

[10] The Commission affirmed the decision of the presiding officer who found that the project did not violate the general provisions of either section 57 of the AEA or section 70.31(d) of the Commission's regulations, each of which prohibits issuance of NRC licenses that would be inimical to the common defense and security. *Id.* at 164. The presiding officer rejected the allegation on the grounds of relevance because intervenors did not point to any violation of a treaty, law, regulation or Commission guidance, a determination the Commission agreed with in part. *Id*. at 164, 165. Section 70.31, which applies to special nuclear material, is similar to section 40.32(d) for source materials licenses.

[11] In this regard, the Staff considers that Petitioners have not provided a sufficient explanation or documentation as required under 10 C.F.R. § 2.309(f) (1) to support admission of Contention E. Contention E raises several claims that are rooted in the alleged foreign ownership of the Applicant such as profit gain and business interests of a foreign company, claims related to use of source materials by countries other than the United States, and use of source material for nuclear weapons of a foreign country or terrorists. It fails to explain, through supporting documentation, expert opinion, and/or facts, however, that the proposed amendment to extract uranium at an additional location presents a specific risk to the common defense and security of the United States. Thus, the allegation that "it is material that CBR is owned by a Canadian company…" Ref. Pet. at 26, and that "yellowcake uranium might end up in other countries or in the hands of enemies of the U.S." is insufficient to demonstrate that issuance of a license amendment to the Applicant creates a risk to common defense and security that mandates litigation. Ref. Pet. at 4. Put a different way, without a more precise showing of how foreign ownership in this case creates a risk to the common defense and security of the United States, the contention is inadmissible.

[12] 10 C.F.R. § 40.51(b) (6) requires compliance with 10 C.F.R. Part 110 to export source material.

those licensing regulations.[13] Part 110 licensing requirements are separate from the licensing provisions under Part 40. Therefore, should the Applicant seek to ship source material to another country, it must satisfy the requirements in Part 110.

III. What standards should be applied and what are the sources for any standards to be applied, in determining which criteria set forth in 10 C.F.R. § 40.32 are 'applicable' in deciding whether to amend a license under § 40.45, particularly in light of the principle that the standards for amendment of a license are generally the same as those for issuance of an original license?

The Commission's regulations set forth the criteria the Staff is to employ to review a license amendment application. 10 C.F.R. § 40.45 references section 40.32 which, when read together, sets forth the general scope and criteria that an Applicant for a license amendment must meet prior to approval. The Staff takes the criteria listed in section 40.32 into consideration during the review of material license applications, except that the criteria set forth in section 40.32(f) and (g) are not applicable to in-situ leach uranium recovery facilities.[14] The standards, with regard to review of the license amendment application, are found in 10 C.F.R. Part 20 and Appendix A to 10 C.F.R. Part 40. The Staff uses NUREG-1569, "Standard Review Plan for In Situ Leach Uranium Extraction License Applications" (June 2003), as a means of assessing whether the Applicant would comply with the aforementioned standards. The full extent of the Staff's review will be documented in a safety evaluation report prepared by the Staff upon completion of their review.

IV. Staff's Opposition to Petitioners' Request for Subpart G Proceedings

The Staff maintains its opposition to Petitioners' request that Subpart G hearing

[13] For example, 10 C.F.R. § 110.22 and 10 C.F.R. § 110.28 provide for general licenses to export source material to countries not prohibited under 10 C.F.R. § 110.28 and destinations restricted under 10 C.F.R. § 110.29.

[14] Section 40.32(f) pertains to special requirements contained in section 40.34. Section 40.32(g) pertains to use of source material in uranium enrichment facilities.

procedures apply to this license amendment proceeding.[15] Petitioners' reliance on section 2.310(d) is misplaced because this section applies only to "nuclear power reactors;" not license amendments issued under Part 40. 10 C.F.R. § 2.310(d) ("In proceedings for the grant, renewal, licensee-initiated amendment, or termination of licenses or permits for *nuclear power reactors* . . .") (emphasis added). While section 2.310 prescribes to the Board discretionary powers---denoted in 2.310(a) by use of the phrase "may be conducted under the procedures of subpart L of this part"---the Commission also intended, as evidenced by "[e]xcept as determined through the application of paragraphs (b) through (h) of this section…", to limit that discretion to a determination of whether the request for a Subpart G hearing meets any of the exceptions of paragraphs (b) through (h). *See* 2.310(a); Final Rule: Changes to Adjudicatory Process, 69 Fed. Reg. 2,182, 2,206 (January 14, 2004). Here, the Petitioners' request fails because it does not meet any of those exceptions. Even when the exceptions listed in the scope of section 2.1200, which provides that the provisions of Subpart L govern <u>all</u> but a select few proceedings, are applied the Petitioners' request, application of procedures other than Subpart L to the license amendment proceedings in the instant case is not justified.[16]

Furthermore, in response to public comments from groups opposed to Subpart L proceedings and in favor of formal hearings, i.e. Subpart G, the Commission determined to "continue using the approach set out in the proposed rule, whereby most adjudications would be conducted under the hearing procedures in subpart L, unless one of the more specialized hearing tracks in Subparts G, K, M, or N, apply." *Id.* at 2,193. In the Commission's view, as well as the view of case law, Subpart G proceedings are best used to resolve issues where "motive, intent, or credibility are at issue, or if there is a dispute over the occurrence of a past

[15] Ref. Pet. at 5.

[16] For example, Section 2.1200 provides that subpart L governs all proceedings except the licensing of uranium enrichment facilities, high-level waste proceedings, proceedings on enforcement matters unless all parties agree to Subpart L procedures, and transfer of control of an NRC license.

event"[17] because "the central feature of a Subpart G proceeding is an oral hearing where the decisionmaker has an opportunity to directly observe the demeanor of witnesses in response to appropriate cross-examination…." *Id*. at 2,205. Even if the Board determined it had discretion to use Subpart G procedures for this license amendment proceeding, the Petitioners have not put forth any allegations that justifies "resolution of issues of material fact relating to the occurrence of a past activity, where the credibility of an eyewitness may reasonably be expected to be at issue, and/or issues of motive or intent of the party or eyewitness material to the resolution of the contested matter." *See* 10 C.F.R. § 2.310(d). Because the Petitioners have not properly put forth information that warrants the application of Subpart G procedures, their request should be denied.

Respectfully submitted,

/RA/

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Andrea Z. Jones
Counsel for NRC Staff

[17] *Id*. at 2205 *quoting Union Pac. Fuels v. FERC*, 129 F. 3d 157, 164 (D.C. Cir. 1997), citing *La. Ass'n of Indep. Producers & Royalty Owners v. FERC*, 958 F. 2d 1101, 1113 (D.C. Cir. 1992).

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NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of	)	
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CROW BUTTE RESOURCES, INC.	)	Docket No. 40-8943
In-Situ Leach Facility, Crawford, Nebraska	)	
	)	ASLBP No. 07-859-03-MLA-BD01
(License Amendment for the North Trend Expansion Project)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S RESPONSE TO BOARD'S ORDER OF APRIL 29, 2008" in the above-captioned proceeding have been served on the following by deposit in the United States mail; through deposit in the Nuclear Regulatory Commission's internal system as indicated by an asterisk (*), and by electronic mail as indicated by a double asterisk (**) on this 23rd day of May, 2008:

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