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UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION  
ATOMIC SAFETY AND LICENSING BOARD PANEL

OFFICE OF SECRETARY  
RULEMAKINGS AND  
ADJUDICATIONS STAFF

Before Administrative Judges:

Ann Marshall Young, Chair

Dr. Richard F. Cole

Dr. Fred W. Oliver

In the Matter of

CROW BUTTE RESOURCES, INC.  
(In Situ Leach Facility, Crawford, NE)

Docket No. 40-8943

ASLBP No. 07-859-03-MLA-BD01

June 16, 2008

**PETITIONERS' CONSOLIDATED RESPONSE TO  
THE NRC STAFF'S AND APPLICANT'S REPLIES  
REGARDING FOREIGN OWNERSHIP AND SUBPART G**

Petitioners<sup>1</sup> hereby respectfully submit this Consolidated Response to the NRC Staff's and Applicant's Replies, pursuant to Judge Young's Orders dated May 14, 2008 and May 29, 2008, respectively:

**RESPONSE**

In all this briefing, neither NRC Staff nor Applicant has been able to cite any legal authority for the issuance of the sought license amendment to an applicant that fails to disclose foreign ownership, control and domination, and fails to hold valid mineral leases due to such foreign ownership violating the Nebraska Alien Ownership Law. Further, simply because something is not expressly prohibited by the AEA, does not make it authorized. This is especially true when it comes to the regulation of nuclear materials, which the AEA specifically requires to be regulated in the United States national interest.

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<sup>1</sup> By email dated June 16, 2008, Bruce Ellison, Attorney for Petitioners Owe Aku and Debra White Plume, approved of this Response and authorized the undersigned to sign it on his behalf and to file it on behalf of his clients as well as WNRC represented by the undersigned.

Petitioners White Plume, Owe Aku, and WNRC have continuously contended in this proceeding, from the time the Petition was filed, that the NRC itself lacks authority under the AEA to grant a license or amendment where, as here, there is no benefit to the US national interest, common defense or security and there are clear detriments to the health and safety of the public. Accordingly, it is incumbent upon the Applicant to show, and the NRC Staff to determine, how granting the license or amendment would serve the **US national interest and not be inimical to the common defense and security**, as well as the protection of public health and safety.

### DISCUSSION

**I. APPLICANT'S FOREIGN OWNERSHIP, CONTROL AND DOMINATION IS HIGHLY RELEVANT IN LIGHT OF A PATTERN AND PRACTICE OF INTENTIONAL FAILURE TO MAKE ADEQUATE DISCLOSURES.**

**A. THE NRC STAFF ADMITS THAT FOREIGN OWNERSHIP IS RELEVANT.**

The NRC Staff admits that “foreign ownership alone cannot support a finding of inimicality with respect to the license amendment under consideration.” NRC Staff Reply, p. 2 (emphasis added). The calculus is simple: foreign ownership plus what has been alleged in this case, namely the concealment (expressly pled in the Petition) of foreign ownership, plus various intentional failures to disclose material facts in the Application as required under Section 40.9, do in this case support a finding of a failure to serve US national interest and inimicality to the purposes of the AEA. This is especially true where, as here, we are in a preliminary stage of this proceeding and all facts must be read and determinations made in the light most favorable to the Petitioners.

Examples of such intentional concealment of material facts include the change of ownership of an existing license (in 1995/1996 with the purchase of Geomex Minerals,

Inc.); violation of the Nebraska Alien Ownership Law (by virtue of the purchase of Uranerz's stock in Applicant in 1998 and failure to disclose to the NRC the voiding of the underlying mineral leases); and failure to disclose known geologic data concerning fractures and faults connecting the mined aquifer with adjacent aquifers used for drinking purposes with the potential for radiological and toxic contamination threatening the public.

Accordingly, even if as the NRC Staff argues, foreign ownership "alone" does not support inimicality, foreign ownership, domination and control together with intentional failures to make material and legally required disclosures in violation of NRC regulations add up to inimicality and is, therefore, highly relevant.

B. SCOPE OF PROCEEDING.

The NRC Staff and Applicant attempt to truncate this proceeding by arguing that Petitioners are presenting information outside the scope of the original petition. Petitioners note that the "legitimate amplification" of originally-filed contentions is permitted under Entergy Nuclear Generation Co. (Pilgrim Nuclear Power Station), LBP-06-23, 64 NRC 257, 359 (2006). See, the Board's Order, LBP 08-06 (April 29, 2008, corrected May 21, 2008), at 12. Here, any allegedly "new information" presented is simply an amplification of how foreign ownership of the Applicant was concealed intentionally as stated in Contention E of the Petition, and how the same is inimical to the national interest, the common defense and security and the health and safety of the public. We note that "a petitioner may...respond to and focus on any legal, logical, or factual arguments presented in the answers, and the 'amplification' of statements provided in an initial petition is legitimate and permissible." *Id.*

The NRC Staff would like to disregard Applicant's failure to comply with the Nebraska Alien Ownership Law despite the fact that Applicant's uranium mineral leases are now void due to the operation of that law (and having an illegal subject matter under Nebraska law). The NRC Staff and Applicant should realize that Section 40.9 requires complete and accurate disclosure of all material facts, including the disclosure of the legal right of Applicant to hold mineral leases. Such legal right is necessary especially in connection with the findings that must be made under Section 40.32 as to competence and inimicality. Only after "securing full information", can the NRC Staff make a determination under the Final Standard Review Plan and Section 40.46 and Section 40.32. And, yet, how can the NRC Staff secure "full information" if Applicant intentionally conceals material facts and believes that there is no obligation to disclose or discuss foreign ownership in its Application.

C. INCOMPLETE DISCLOSURES BY APPLICANT DEMAND HIGHEST LEVEL OF SCRUTINY.

Incomplete disclosures and the lack of transparency in the past are not new contentions, but rather a track record illustrating that Applicant and the Application should be reviewed under the highest level of scrutiny. NRC Staff and Applicant contend that this constitutes new bases for Contention E. However, Contention E's primary thrust is that Applicant has failed to disclose in the past and continues to not fully disclose its ownership, control or domination by an alien, foreign corporation, or a foreign government. Canadian law imposes a general requirement that uranium mines in Canada be owned by at least 51%

Canadian individuals,<sup>2</sup> and the Nebraska Alien Ownership Act prohibits corporations organized under the laws of any state or country outside Nebraska from acquiring title to, or taking or holding, any land or real estate.<sup>3</sup> By intentionally allowing the omission of such material facts in its Application, Applicant is trying to revealing its violation of one or both of these laws. Accordingly, the NRC Staff and the Board, should require, at a minimum, full and complete disclosures of all material facts concerning the citizenship of the owners and control persons of the Applicant and the preparation and approval of an adequate Negation Action Plan given past history of this Applicant.

NRC Staff assure us that “Applicant has reported changes in corporate shareholders and the management structure of the Licensee *at various times* dating back to 1989,” NRC Staff Reply, p. 7 (emphasis added), but it is clear that Applicant did not report at all required times. No evidence is presented that Applicant complied with the disclosure requirements of 40.9 and 40.46 in 1995/1996 when Applicant’s shareholders re-arranged their shareholders to facilitate Cameco’s creeping acquisition that started with Geomex Minerals, Inc.

Assuming proper disclosures are made, only then will the NRC Staff and the Board be in a position to evaluate whether, as required by 10 CFR §40.32(c)-(d), the Applicant is qualified to ensure the proposed new mine can operate “to protect the health and minimize danger to life or property;” whether its “equipment, facilities and procedures are adequate to protect health and minimize danger to life or property;” as well as that it “not be inimical to the common defense and security or to the health and safety of the

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<sup>2</sup> See Investment Canada Act, R.S.C. 1985, c. 28 (1<sup>st</sup> Supp.), Investment Canada Regulations, SOR/85-611, Policy on Non-Resident Ownership in the Uranium Mining Sector, 1987.

<sup>3</sup> Neb.Rev.Stat. § 76-400-415.

public.” Therefore, foreign ownership is highly relevant to the NRC Staff’s underlying authority to approve the sought license amendment.

Finally, because of Applicant’s intentional violations of disclosure regulations, which amount to a blatant disregard of the entire NRC licensing process, the doctrine of “unclean hands” should be applied by the Board to Applicant.<sup>4</sup> This is directly relevant to Petitioners’ request for Subpart G procedures, and Applicant must be held to the highest standard for the protection of the US interest, common defense and security and health and safety of the public.

#### D. NOTICES OF TRANSFER MUST INCLUDE FULL INFORMATION

The NRC Staff believes that Applicant complied with the NRC Regulations concerning disclosure in 1998 when it advised the NRC that Cameco Corporation intended to acquire 90% of Applicant’s outstanding shares. NRC Reply at p.7. However, no reference is made to any proper notice being filed in 1995/1996 when Cameco acquired just a hair under 1/3 of Applicant’s shares. Further, there is no assertion that the notice from 1998 properly disclosed that Applicant would lose its mineral leases under the Nebraska Alien Ownership Act due to the application of governing law to the leases.

Further, the NRC Staff does not explain how Applicant’s disclosures would have complied with the guidance in NRC Information Notice 89-25 (rev. 1), “**Unauthorized Transfer of Ownership or Control of Licensed Activities,**” (December 7, 1994), which provides:

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<sup>4</sup> See Petitioner’s Brief, May 23, 2008, p. 17, *citing* Precision Inst. Mfg. Co. v. Automotive M.M. Co. 324 U.S. 806 (1945).

Full information on changes of ownership or control of licensed activities should be submitted to the appropriate NRC regional or Headquarters office, 90 days prior to the proposed action. The purpose of such notification is to allow NRC to assure that: (1) radioactive materials are possessed, used, owned, or controlled only by persons who have valid NRC licenses; (2) materials are properly handled and secured; (3) persons using such materials are capable, competent, and committed to implement appropriate radiological controls; (4) licensees provide adequate financial assurance for compliance with NRC requirements; and (5) public health and safety are not compromised by the use of such materials. Although the burden of notification is on the existing licensee, it may still be necessary for the transferee to provide supporting information or to independently coordinate the change in ownership or control with the appropriate NRC office.

**NRC licensees planning to transfer ownership, to change the corporate status, or to change control of licensed activities are required to provide sufficient prior notice and full information about the change to NRC, and to obtain written consent from the Commission before the transfer.** Failure to comply with this requirement may adversely affect the public health and safety and interfere with NRC's ability to inspect licensed activities. Cases where change of ownership or control has occurred without prior written consent from NRC will be treated as noncompliance with the provisions of 10 CFR 30.34 (or the similar provisions of 10 CFR 40.46, and 70.36), and will be referred to the inspection staff and/or Office of Investigations, as appropriate. The failure to receive required NRC approval prior to a change in ownership or control of licensed activities is considered to be a Severity Level III violation and may warrant escalated enforcement action, to include civil penalties and orders, if indicated by the circumstances, against one or both of the parties involved. Willful failure to obtain prior NRC approval of the transfer may result in referrals to the Department of Justice for consideration of criminal prosecution.

*Id.* (Emphasis added.)

## **II. THE ATOMIC ENERGY ACT REQUIRES A FINDING OF BOTH SERVICE OF US NATIONAL INTEREST AND NO INIMICALITY IN ORDER TO ISSUE A LICENSE AMENDMENT.**

Consideration of the ownership of Applicant is necessary as this goes to the primary purpose of the Atomic Energy Act ("AEA") and the common defense and security of the United States of America and the health and safety of the US public. Applicant would like

everyone to believe that foreign ownership is completely irrelevant to source materials licensing and should be ignored. See, e.g., Applicant's Reply at 2. Applicant would like to trivialize the quite serious allegations stated in Petitioners' May 23<sup>rd</sup> Brief as "historical allegations." Applicant's Reply at 9. Petitioners note that these serious allegations concerning the concealment of foreign ownership, sham transactions and suppression of geologic data tending to show fractures and faults connecting the aquifers (as alleged by Petitioners in this proceeding) have not been denied by Applicant in its briefing. Such failure to deny is a legal admission<sup>5</sup>, particularly in light of the applicable rule at this stage of the proceeding to make findings in the light most favorable to the Petitioners.

As a result, it is admitted that Applicant and its management engaged in sham transactions to evade regulators and intentionally concealed and suppressed information concerning foreign ownership as well as geologic data tending show fractures and faults in the mined area. This amply demonstrates Applicant's "unclean hands" in this matter. Further, despite many highly technical arguments advanced by Applicant, in an attempt to force these issues into a place "outside the scope of this proceeding," nothing could be more relevant and material to the issuance of the sought after license amendment placing these matters squarely inside the scope of this proceeding.

The Board has already determined materially disputed issues of fact in determining whether or not this license would be inimical to the common defense and security or to the health and safety of the public. The issues are ripe for a hearing especially in the context of the long history of the mining industry using cut and run approaches to its environmental

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<sup>5</sup> See Federal Rules of Civil Procedure 8(d). Effect of Failure to Deny. Averments in a pleading to which a responsive pleading is required, ... are admitted when not denied in the responsive pleading.

costs. Issuing a license to a wholly owned foreign corporation would greatly increase the risk of such environmental costs without considering available alternatives such as the preparation and approval of an adequate Negation Action Plan.

The AEA is clear: “[t]he Congress of the United States makes the following findings concerning the development, use, and control of atomic energy:

(a) The development, utilization, and control of atomic energy for military and for all other purposes are vital to the common defense and security.

...

(c) The processing and utilization of *source*, byproduct, and special nuclear *material* affect interstate and foreign commerce and *must be regulated in the national interest*.

(d) *The processing and utilization of source, byproduct, and special nuclear material must be regulated in the national interest and in order to provide for the common defense and security and to protect the health and safety of the public.*

(e) *Source and special nuclear material, production facilities, and utilization facilities are affected with the public interest, and regulation by the United States of the production and utilization of atomic energy and of the facilities used in connection therewith is necessary in the national interest to assure the common defense and security and to protect the health and safety of the public.*

(f) The necessity for protection against possible interstate damage occurring from the operation of facilities for the production or utilization of source or special nuclear material places the operation of those facilities in interstate commerce for the purposes of this chapter.

...

(i) In order to protect the public and to encourage the development of the atomic energy industry, in the interest of the general welfare and of the common defense and security, the United States may make funds available for a portion of the damages suffered by the public from nuclear incidents, and may limit the liability of those persons liable for such losses.

42 USC § 2012 (emphasis added).

The NRC Staff and Applicant try to avoid this issue by saying the AEA only pertains to production and utilization facilities; however, these policies do not use that terminology. Congress, in passing the AEA, mandated that source material production be regulated in

the US national interest. The suggestion that foreign ownership is only relevant in regards to nuclear reactors and facilities that handle or use special nuclear material is not supported by the clear language of the AEA. Accordingly, the NRC Staff and Applicant may not avoid the relevance of foreign ownership, domination and control as part of the determination concerning inimicality and also a determination concerning how the proposed licensing would serve the US national interest. Since the Application lacks any information concerning foreign ownership of Applicant, it fails to express how the sought amendment would serve the US national interest.

**III. NEBRASKA STATE LAW AND CANADIAN LAW ARE RELEVANT BECAUSE THEY DEMONSTRATE APPLICANT'S PURPOSEFUL EVASION OF APPLICABLE DISCLOSURE REQUIREMENTS.**

**A. NEBRASKA LAW PROHIBITS APPLICANT'S OWNERSHIP**

Applicant states that "there is simply no prohibition on foreign ownership of Crow Butte." Applicant's Reply, p.3. This statement is factually inaccurate as there is a clear state law prohibition under the Nebraska Alien Ownership Law.<sup>6</sup> Further, there is no authority for licensing unless it is shown that it serves the United States' interest and is not inimical to the common defense and security. Since Applicant has made no showing in its Application as to how Applicant's operations serve the US interest and for what reasons the foreign ownership, control and domination are not inimical, Applicant's license amendment application must fail. If Applicant wants to amend its application to explain these things, it may be possible for the NRC to evaluate it under the Standard Review Plan

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<sup>6</sup> See Neb.Rev.Stat. §76-400 – 415.

("SRP") and make a decision that would then be subject to judicial review under the Administrative Procedures Act.

Additionally, Applicant cites *Georgia Institute of Technology* (Georgia Tech Research Reactor, Atlanta, Georgia) CLI-95-12, 42 NRC 111, 120 (1995), which contains the following guidance:

"When relevant, the Commission has evaluated whether a licensee's management displays the 'climate,' 'attitude,' and 'leadership' expected. In determining whether to grant a license (or, by logical extension, to renew a license), the Commission makes what is in effect predictive findings about the qualifications of an applicant. The past performance of management may help indicate whether a licensee will comply with agency standards. When a licensee files a license renewal application, it represents 'an appropriate occasion for apprais[ing] ... the entire past performance of [the] licensee.' Of course, the past performance must bear on the licensing action currently under review." *Id.* at 120.

The same person, Steve Collings, is President of Applicant and has been directly related in all activities herein alleged, including the concerted effort to conceal foreign ownership.

Accordingly, under the *Georgia Institute of Tech.* rationale above, the Applicant's management can be seen to have displayed the 'climate, attitude and leadership' of minimal disclosures, failure to disclose material facts, use of outdated geologic data, and suppression of geologic data tending to show fracturing and faulting that would indicate a likelihood of groundwater contamination risks. This past performance of management indicates that Applicant is a scofflaw with no intention of complying with the purposes of the AEA pertaining to the regulation of source material production in the US national interest.

B. ALIEN OWNERSHIP ISSUE NOT 'RESOLVED'

Applicant further contends that the "State of Nebraska has definitively addressed and resolved the concerns with foreign ownership of Crow Butte." Applicant's Reply, at 5.

This statement is not factually or legally correct. Based on misrepresentations that the shareholders were mostly US corporations except 1% owned by KEPCO, the Nebraska regulators dropped their objections. However, those representations were untrue because the US corporations were owned by foreign person and also the 1% KEPCO was really 10% and it was only a sham transaction that gave the impression of 1% ownership. Again, under the doctrine of ‘unclean hands’ the Applicant cannot be allowed to profit from its wrongful conduct. For purposes of this analysis, the ‘unclean hands’ doctrine requires that the Applicant’s arguments concerning the purported resolution of the Nebraska alien ownership issue be rejected.

**IV. THE NORTH TREND EXPANSION FAILS TO SERVE THE US NATIONAL INTEREST AND IS INIMICAL TO THE COMMON DEFENSE AND SECURITY AND TO THE HEALTH AND SAFETY OF THE PUBLIC.**

**A. APPLICANT’S IRONCLAD OBLIGATIONS OF DISCLOSURE.**

Applicant mentions the “ironclad obligation”<sup>7</sup> of a petitioner without acknowledging Applicant’s own ironclad obligation to make full disclosure under Section 40.9 of all material facts, *which include all facts that a reasonably prudent person making a licensing decision would consider important.*<sup>8</sup> How could the total foreign control, ownership and domination of Applicant not be considered important? How could the voidability of the Applicant’s mineral leases due to a transfer to foreign ownership not be considered important? These are the ironclad obligations that must be fulfilled by

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<sup>7</sup> Applicant’s Reply, at 10.

<sup>8</sup> See, e.g., Basic Inc. v. Levinson, 485 U.S. 224 (1988), establishing the federal law standard for materiality in securities transactions. Petitioners submit that the standard for disclosure of material facts in the area of nuclear licensing should be at least as stringent as the standard applicable for the sale of a share of stock which, unlike source material licensing, typically does not involve irreparable harm to a damaged party.

Applicant in order to give meaning to the responsibilities of the NRC as the unique agency that it is with the mandate to regulate nuclear materials in the US national interest. See 42 U.S.C. § 2012 (a), (c)-(e).

B. SUBPART G

There is no dispute that the Board has the discretion to go beyond Subpart L streamlined discovery when circumstances require it,<sup>9</sup> and this case, in light of intentional concealment and incomplete disclosures of material facts, shows that Subpart L procedures would be inadequate to create an accurate record. Applicant has a proven track record of noncompliance, incomplete disclosure, and concealment, so that there are many areas where the credibility of eyewitnesses, such as Applicant's President, Steven Collings, are at issue. Therefore, not only are Petitioners entitled to Subpart G procedures, it is necessary uncover the facts and undisclosed material facts that Applicant has intentionally omitted from the Application in order to minimize the potential for regulatory or public objections.

CONCLUSION

For all the foregoing reasons, the Board should reject the arguments advanced by the NRC Staff and Applicant in their respective Replies. Petitioners are reminded in this case of the old Turkish proverb, "No matter how far you've ridden in the wrong direction, turn back!" It makes no difference that foreign ownership has been allowed for many years due to the failure of Applicant to make disclose full information to the NRC and the

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<sup>9</sup> As noted at the oral argument and in Petitioner's Brief, May 23, p. 50, Entergy Nuclear Vermont Yankee et al. (Vermont Yankee Nuclear Power Station), LBP-06-20, 64 NRC 131, 201 (2006), stands for the proposition that the word "may" in 10 CFR Section 2.310(a) indicates that the Board has discretion in determining whether to hold hearings under Subpart L or Subpart G.

resulting inability of the NRC to perform a proper analysis of the foreign domination attributes under the AEA US interest standard and the inimicality standard. Rather, it is incumbent on this Board to “turn back” from the wrong direction and return to a proper grounding in the expressly stated purposes of the AEA to regulate source materials in the US national interest. Courts have not been shy to cause the reorganization of large corporate enterprises in order to obtain compliance with applicable laws.<sup>10</sup> Similarly, where regulators have failed to enforce disclosure obligations, the public has been forced to suffer damages due to massive corporate fraud which undermines public confidence in the regulatory system.<sup>11</sup>

In order to avoid the potential for continued omissions of material facts in license applications and to foster public confidence in the NRC regulatory process, this Board should find for the Petitioners concerning Contention E and Subpart G.

Dated this 16<sup>th</sup> day of June, 2008.

Respectfully submitted,

*/s/ Bruce Ellison*

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<sup>10</sup> See, e.g., the 20 year AT&T litigation, as described in, US v. AT&T, 531 F. Supp. 131 (D.C. Dist. 1982).

<sup>11</sup> See, e.g., US v. BCCI Holdings (Luxembourg), SA, 1992 WL 100334 (D.C. Dist. 1992).

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CERTIFICATE OF SERVICE

I hereby certify that copies "PETITIONERS' CONSOLIDATED RESPONSE TO NRC STAFF AND APPLICANT'S REPLIES CONCERNING FOREIGN OWNERSHIP AND SUBPART G" in the above captioned proceeding has been served on the following persons by electronic mail as indicated by a double asterisk (\*\*), and by deposit in the United States Mail as indicated by an asterisk (\*); on this 16<sup>th</sup> day of June, 2008:

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