

DOCKETED
USNRC

August 29, 2008 (3:31pm)

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

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

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

August 29, 2008

**PETITIONERS' RESPONSE TO BOARD'S QUESTIONS BY
ORDER DATED AUGUST 19, 2008**

INTRODUCTION

Petitioners¹ hereby respectfully submit this Brief, pursuant to Judge Young's Order dated August 19, 2008 ("Order"). Specifically, Judge Young requested that this Brief address various questions regarding 10 CFR §§ 110.82(a)(4),² 110.84(b). Order, pp. 3-4.

Petitioners respectfully submit that a necessary factual backdrop for this discussion must include information obtained during the July 24, 2008 tour of the current CBR processing operation. When questioned about the final stages of the uranium extraction and conversion into yellowcake, the Cameco spokesman described how 55

¹ By email dated August 28, 2008, Bruce Ellison, Attorney for Petitioners Owe Aku and Debra White Plume, approved of this Memorandum 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. By email dated August 28, 2008, Elizabeth Lorina, Attorney for the Oglala Sioux Tribe and for the Black Hills Sioux Nation Treaty Council, joined in this Brief.

² Since 10 CFR §110.82(a) does not contain a sub-paragraph (4), Petitioners assume the Board meant 10 CFR §110(b)(4).

gallon drums are filled and then sealed. He described further how approximately once every week to week and a half, enough drums are filled to fill a semi-tractor trailer, at which point a truck arrives, is loaded, and driven straight to Cameco's enrichment facility in Canada. Such a process, Petitioners contend, reflects a plan and practice to ship all yellowcake produced at the CBR facility directly and immediately out of the country to Canada. It also strongly suggests that there is little or no time for any meaningful notice, or opportunity to challenge or be heard on the merits and propriety of any such export of our uranium to foreign users. In fact, as discussed below, there is literally no provision for notice or intervention in Part 110 issuances of general licenses for exporting Uranium such as the one relied upon by Applicant to export Uranium to its sister company in Canada for processing.

DISCUSSION OF PART 110 EXPORT LICENSING

The NRC Regulations concerning export licensing are set forth at 10 CFR Part 110. Section 110.19(a) provides that there are two types of export licenses: general licenses and specific licenses. 10 CFR §110.19(a). Section 110.19(a) further provides that “a general license is effective without the filing of an application with the Commission or the issuance of licensing documents to a particular person.” *Id.* (Emphasis added.)

Applicant has a general license issued by Section 110.22(a). This is confirmed by Section 110.22(a) which is operative to issue a general license to Applicant automatically

without any filing of any application.³ Section 110.70(a) provides that public notice is required for the issuance of a specific license and that there is no public notice for the issuance of a general license such as that of Applicant. Section 110.82(a) provides that a person may request a hearing or petition to intervene on a license application for a specific export license and there is no process for a person to request a hearing or petition to intervene on a general license. 10 CFR §110.70; 10 CFR §110.82. Based on this it is clear that the reliance of the Applicant and the NRC Staff is misplaced to the extent they would redirect Petitioners in this proceeding to seek intervention in a Part 110 proceeding. Such intervention is impossible under NRC regulations which would put the Petitioners in the unenviable position of attempting to challenge an NRC regulation which would likely be found impermissible under 10 CFR Section 2.335(a). At some point (not far from where we are now) it would be kafka-esqe and unconstitutional.

In the July 23rd oral argument, Counsel for Applicant and Counsel for the NRC Staff put great emphasis on the availability of a Part 110 proceeding and intervention as the appropriate proceeding. They argued vigorously that, as a result of the existence of purported intervention rights in a Part 110 proceeding, it would be inappropriate to allow Petitioners to raise the issues of foreign ownership, domination and control and export of yellowcake in the Part 40 license amendment proceeding of this case. See July 23 Hearing Transcript at 445, 446-447, 448, 481-483, 499, 550-551, and 555.

³ Section 110.22(a) issues the export license for U308 to any person for any country not listed in Section 110.28 (Cuba, Iran, Iraq, North Korea, Sudan and Syria). Apparently, the true regulatory mechanism is the instant Part 40 licensing to possess and use source material; thus, the requirement for Applicant to hold License SUA-1534, the subject of this proceeding.

During the oral argument, the following discussion took place:

Ms. Jones: "I'm not aware that any license application under Part 110 has been submitted to the agency." Id. at 446-447.

Mr. Smith: "[M]y understanding is that each individual export requires a separate licensing action by the NRC either under specific or generalized under Part 110. And it's wholly separate and apart from this Part 40 license amendment which is just to possess and use source material." Id. at 446.

Chairman Young: "Have you gotten export licenses before.?"

Mr. Smith: "The export licenses had been obtained to ship the material from Crow Butte outside this country, yes." Id.

Chairman Young: "With regard to the Part 110 is there a Federal register notice and an opportunity for a hearing on that?" Id. at 447.

Ms. Jones: "As I understand it...I think that there is..." Id.

Chairman Young: "I think it would be of interest to know the extent of the right to hearing and where that would be published...." Id.

Mr. Frankel: "We would submit that...parties that do not have a license to use or possess yellow cake Uranium would not be eligible to get a license to export such material. Id. at 447-448.

Chairman Young: "And then that brings in the whole...export license proceedings -- and who could intervene and how they, how a petitioner could show standing. I believe Mr. Smith said they showed standing by showing that there was some law or international treaty provision that would be actually violated which would normally be more comparable to a sort of contention admissibility question as opposed to a standing question. But, I mean just looking at the whole situation from a practical real world standpoint that provides for the kind of basic fairness that we are required to fulfill. If the only alternative is something that in all practical effects is something that cannot be -- cannot lead to any meaningful participation. I mean that's the standard, the due process standard is a meaningful opportunity for a hearing. A meaningful opportunity to object. And so that's why I'm raising these questions. If it's always -- well you can't do it here but you can do it somewhere else, but when you get to that somewhere else there are other barriers because there really is essentially no way to show standing. You know then the question of meaningfulness arises." Id. at 555.

Judge Young's final comment in this discussion (at p. 555) is on point. Based on a clear reading of Part 110 it is clear that there is no public notice or intervention opportunity in the issuance of a general export license such as that held by Applicant. The only reference to an export license that turned up in Petitioners ADAMS search was License XSOU-8744 issued to RS Logistic Inc. in 2000 to ship yellowcake from Crow Butte to Cameco. See ML003770416. We could not find any references to an export license in an ADAMS search using Applicant's docket number. It shouldn't be so difficult to find out how Applicant is licensed in this area. The reason it is difficult is that there is no separate license application filed, and no public notice, and no opportunity to be heard on the issuance of Applicant's export license.

ANSWERS TO THE BOARD'S QUESTIONS

- 1. How might Intervenors show standing to participate in any future export license proceeding under 10 CFR §§ 110.82(b)(4), 110.84(b)?**

As discussed above, there is no clear regulatory basis for public notice or intervention in a Part 110 export licensing. As a result, this proceeding represents the first opportunity to be heard on this issue.

Petitioners respectfully submit that it would be in the public interest, under 10 CFR §110.84(a) to hold a public hearing on these issues with each export license that allows a substantial amount of Yellowcake to leave the United States. Petitioners also note that in the absence of a regulatory proceeding of which they can be a part, they would still have their rights to judicial review for agency action under the Administrative

Procedure Act. However, the fact that Petitioners have APA rights does not support the arguments of the NRC Staff or Applicant that Part 110 is the appropriate proceeding to raise these foreign ownership and export issues.

2. How could any potential intervenor show standing to participate in any future export license proceeding under 10 CFR §§ 110.82(b)(4), 110.84(b)?

It seems impossible for any potential intervenor to show standing in an issuance of a general license where no application is filed, no public notice is given and no opportunity to intervene is contained in the NRC regulations under Part 110.

3. What sort of interest(s) would satisfy the requirements of 10 CFR §§ 110.82(b)(4), 110.84(b)?

Petitioners submit that the general interests of retaining nuclear fuel resources within the United States and under United States control would satisfy the requirements of 10 CFR §§ 110.82(b)(4), 110.84(b). However, the foregoing is speculative at the present time because there is no application or information to look at. In such an information vacuum, it is not possible to adequately evaluate and describe standing issues.

4. What standards should be applied in determining whether a petitioner has satisfied these and other requirements under 10 CFR §§ 110.82(a)(4), 110.84(b)?

The general standards of the due process clause and of the trust responsibility apply. As to the due process clause, the Commission has recognized that “[d]ue process

requires only that an opportunity to be heard be granted at a meaningful time and in a manner appropriate for the case.” Advanced Medical Systems, Inc., CLI-94-6, 39 NRC 285 (1994), *aff’d* Advanced Medical Systems, Inc. v. NRC, 61 F.3d 903 (6th Cir. 1995). Nothing in Part 110 provides any opportunity to be heard at any time. As a result, the arguments of the NRC Staff and Applicant must fail to the extent that they relied on the notion that Part 110 proceedings would be more appropriate than this proceeding to raise issues of foreign ownership, control, domination and the export of yellowcake outside of US restrictions.

CONCLUSION

For all the foregoing reasons, the Board should reject the arguments of Applicant and the NRC Staff concerning the Part 110 issues.

Dated this 29th day of August, 2008.

Respectfully submitted,

/s/

Bruce Ellison
Counsel for Owe Aku and D. White Plume
Law Offices of Bruce Ellison
P. O. Box 2508
Rapid City, SD 57709
Tel: 605-348-9458
E-mail: belli4law@aol.com



David Frankel
Counsel for WNRC
POB 3014
Pine Ridge, SD 57770
Tel: 308-430-8160
Email: arm.legal@gmail.com

/s/

Elizabeth Maria Lorina
Counsel for Oglala Sioux Tribe
Law Office of Mario Gonzalez
522 7th Street, Suite 202
Rapid City, SD 57701
E-mail elorina@gnzlawfirm.com

/s/

Elizabeth Maria Lorina
Counsel for Black Hills Sioux Nation
Treaty Council
Law Office of Mario Gonzalez
522 7th Street, Suite 202
Rapid City, SD 57701
E-mail elorina@gnzlawfirm.com

DOCKETED
USNRC

August 29, 2008 (3:31pm)

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

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

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

August 29, 2008

CERTIFICATE OF SERVICE

I hereby certify that copies "PETITIONERS' RESPONSE TO BOARD'S QUESTIONS BY ORDER DATED AUGUST 19, 2008" 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 29th day of August, 2008:

Judge Ann Marshall Young, Chair * **
Atomic Safety and Licensing Board Panel
U. S. Nuclear Regulatory Commission
Washington, DC 20555-0001
E-Mail: Ann.Young@nrc.gov

Judge Fred W. Oliver * **
10433 Owen Brown Road
Columbia, MD 21044
E-mail: FWOLIVER@verizon.net

Judge Richard F. Cole * **
Atomic Safety and Licensing Board Panel
U. S. Nuclear Regulatory Commission
Washington, DC 20555-0001
E-mail: Richard.Cole@nrc.gov

Crow Butte Resources, Inc. **
Attn: Stephen P. Collings
141 Union Blvd., Suite 330
Lakewood, CO 80228
E-mail: steve_collings@cameco.com

Mrs. Johanna Thibault * **
Board Law Clerk
Atomic Safety and Licensing Board Panel
U. S. Nuclear Regulatory Commission
Washington, DC 20555-0001
E-mail: Johanna.Thibault@nrc.gov

Office of the Secretary * **
Attn: Docketing and Service
U.S. Nuclear Regulatory Commission
Washington, DC 20555
E-mail: Hearing.Docket@nrc.gov
(original & 2 copies)

Office of Comm. App. Adjudication * **
U.S. Nuclear Regulatory Commission
Washington, D.C 20555
E-mail: OCAAMAIL.Resource@nrc.gov

Debra White Plume **
P. O. Box 71
Manderson, SD 57756
E-mail: LAKOTA1@gwtc.net

Office of the General Counsel **
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Andrea Z. Jones, Esq.
Andrea.Jones@nrc.gov

Catherine Marco, Esq.
Catherine.Marco@nrc.gov

Brett M.P. Klukan, Esq.
Brett.Klukan@nrc.gov

Tyson R. Smith, Esq. **
Winston & Strawn LLP
1700 K St. NW
Washington, DC 20006
E-Mail: trsmith@winston.com

Mark D. McGuire, Esq. **
McGuire and Norby
605 South 14th Street, Suite 100
Lincoln, NE 60508
E-Mail: mdmsjn@alltel.net

Bruce Ellison, Esq. **
Law Offices of Bruce Ellison
P. O. Box 2508
Rapid City, SD 57709
E-mail: belli4law@aol.com

Thomas Kanatakeniate Cook **
1705 S. Maple Street
Chadron, NE 69337
E-mail: tcCook@indianyouth.org

Western Neb. Resources Council **
Attn: Buffalo Bruce
P. O. Box 612
Chadron, NE 69337
E-mail: buffalobruce@panhandle.net

Owe Aku, Bring Back the Way **
Attn: Debra White Plume
P. O. Box 325
Manderson, SD 57756
E-mail: LAKOTA1@gwtc.net

Elizabeth Maria Lorina, Esq. **
Law Office of Mario Gonzalez
522 7th Street, Suite 202
RapidCity, SD 57701
E-mail elorina@gnzlawfirm.com

Thomas J. Ballanco, Esq. **
Harmonic Engineering, Inc.
945 Taraval St., #186
San Francisco, CA 94116
E-mail: harmonicengineering1@mac.com

Shane C. Robinson, Esq. **
2814 E. Olive St.
Seattle, WA 98122
E-mail: shanecrobinson@gmail.com

Respectfully submitted,



David Frankel
P. O. Box 3014
Pine Ridge, SD 57770
308-430-8160
E-mail: arm.legal@gmail.com