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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

September 8, 2008

**PETITIONERS' RESPONSE TO NRC STAFF AND APPLICANT'S
RESPONSES DATED AUGUST 29, 2008 TO AUGUST 19TH ORDER**

INTRODUCTION

Petitioners¹ hereby respectfully submit this Response, pursuant to Judge Young's Order dated August 19, 2008 ("Order"). Specifically, "before ruling on this issue the Board would like to hear the parties' arguments on whether the Intervenor could realistically assert their concerns about the potential exports in any future export licensing proceeding. Order at 3. Petitioners submit that since there is no public notice, no opportunity to intervene and no hearing for a license to export uranium, there is no way for Intervenor to realistically assert concerns about potential exports of uranium except in this Proceeding (and Applicant's Renewal Proceeding). This is so clear from a reading of the regulations of Part 110 that the NRC Staff has refused to even answer the question and has begged to be excused. See, NRC Staff's Motion for Partial Consideration dated

¹ By email dated September 8, 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 September 8, 2008, Elizabeth Lorina, Attorney for the Oglala Sioux Tribe joined in this Response.

August 29, 2008 and Petitioners' Motion to Strike NRC Staff's Motion for Partial Reconsideration dated September 8, 2008.

The Answers to the Board's Questions are simple, albeit not in support of the positions taken by the NRC Staff and Applicant on the record at the July 23rd Hearing. As discussed in Petitioners' Brief dated August 29, 2008 filed in response to the Order, there is no clear regulatory basis for public notice or intervention in a Part 110 export licensing proceeding for a general export license such as the one held by Applicant. **As a result, this Proceeding represents the first opportunity to be heard on this issue.**

It is 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. See, 10 CFR §110.19(a), §110.22(a); §110.70(a). Or, alternatively, if no license has ever been issued to Applicant, then the same conclusion applies.

The general standards of the due process clause and of the trust responsibility apply. These are violated unless Petitioners are afforded an opportunity to be heard on these issues in this Proceeding. 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.

SPECIFIC RESPONSES TO APPLICANT

1. Applicant argues that this line of inquiry is too speculative. Applicant's Response at 5. However, it fails to mention that its general license is issued under regulation and without any application, public notice, or public hearing. Or, if no license is being issued, then again, there is no opportunity for public participation in *that* proceeding. Therefore, there is no need to speculate as there are no unknown facts that would change the conclusion. Therefore, Applicant's speculation argument is unfounded, unpersuasive and must be rejected.

2. Applicant argues that it is not possible to anticipate how the Commission might rule on standing issues with respect to a petition to intervene in an export licensing proceeding. Applicant's Response at 6. However, this misses the point. Applicant has a general license and there is no process for intervention. As for a specific license, there is a process to establish standing. If no license is issued to Applicant, then again this is the appropriate proceeding for this issue.

3. Applicant notes that a hearing may be held concerning export licensing if the Commission determines it to be in the public interest. *Id.* at 6. This is in agreement with Petitioners who have argued that a public hearing should be held on the export of yellowcake uranium. See, Petitioners' Brief at 5-6.

4. Applicant correctly notes that applicable regulations "would appear to present them [Intervenors] with clear challenges." Applicant's Response at 8. This is especially

true where, as here, there is no application, no public notice, no hearing and no avenue for intervention for a general export license for uranium source material. Applicant then misleads the Board by suggesting that “preliminary assessment – made without the benefit of input from Intervenor – does not preclude successful intervention.” Id. Petitioners are curious how Applicant’s Counsel is able to reach a legal conclusion that intervention is not precluded in the case of a general license such as that held by Applicant.

5. Applicant also notes that it “cannot anticipate every conceivable Part 110 application.” Id. However, Applicant must concede that there are two types of export licenses under Part 110: general and specific. Applicant does not have a specific license. Applicant has a general license. There is no application, public notice or hearing or intervention opportunity in the case of a general license. Therefore, all Applicant’s argumentation concerning Questions 2 & 3 should be disregarded.

6. Applicant misleads the Board concerning Questions 8, 9 & 10 when it says “Crow Butte is not currently the holder of an export license issued by the NRC.” Id. at 15, 16 & 17. The regulations of Part 110 clearly show that Crow Butte is the holder of a general export license issued by the NRC pursuant to Section 110.22(a). 10 CFR §110.22(a). In fact, Crow Butte is the holder of an export license. Crow Butte is not the holder of a specific export license but it has contracted with a shipper that is a holder of a specific export license. The fact that Petitioners might be able to intervene in the export licensing proceeding of the shipper, does not mean that there is no right to raise the issues in this proceeding because the shipper is merely a contractor of the Applicant. Therefore, at some point in the process, there must be a meaningful opportunity to challenge Applicant on these issues.

SPECIFIC RESPONSES TO NRC STAFF

1. NRC Staff has refused to answer Question 1 *in toto*. See, NRC Staff Response at 4. NRC Staff has refused to issue parts of Questions 2 and 3 and has impermissibly filed a Motion for Reconsideration which is the subject of Petitioners Motion to Strike filed today. The stated basis for NRC Staff's refusal to answer these questions is that this line of inquiry is too speculative. NRC Staff Response at 4. However, NRC Staff fails to mention that Applicant's general license is issued under regulation and without any application, public notice, or public hearing. See, 10 CFR §110.19(a), §110.22(a); §110.70(a). Therefore, there is no need to speculate as there are no unknown facts that would change the conclusion. Therefore, NRC Staff's speculation argument is unfounded, unpersuasive and must be rejected.

2. NRC Staff misleads the Board when it says "Staff's search of its electronic database of export licenses and its paper files did not reveal that the NRC has ever issued a specific export license to the Applicant" (NRC Staff Response at 4), because it omits to state that NRC has issued a general export license to Applicant under Section 110.22(a). NRC Staff further misleads the Board on page 5 of its Response by referring to a general license but failing to mention that Applicant has a general license. Or, alternatively, if Applicant really does not require such a license and has not been issued such a license, it is inappropriate to object to Petitioners' introduction of the export issues in this Proceeding.

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 8th day of September, 2008.

Respectfully submitted,

/s/

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CERTIFICATE OF SERVICE

I hereby certify that copies "PETITIONERS' RESPONSE TO REPLIES TO AUGUST 19TH ORDER" 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 8th day of September, 2008:

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