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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:  
Michael M. Gibson, Chairman  
Dr. Richard F. Cole  
Mr. Brian K. Hajek

In the Matter of

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

Docket No. 40-8943  
ASLBP No. 08-867-02-OLA-BD01

January 21, 2009

**PETITIONERS' BRIEF RE: MISC. CONTENTION K – FOREIGN OWNERSHIP**

Pursuant to LBP-08-24, as amended by the Board's December 9, 2008 Order, as described in Paragraph C at page 3 of the Board's Initial Scheduling Order dated January 8, 2009, Petitioners hereby submit this Brief 'on the merits' concerning Miscellaneous Contention K regarding authority of the NRC to issue a license to an Applicant that is 100% owned and controlled by a foreign corporation.

**PROCEDURAL BACKGROUND**

In LBP-08-24, the Board admitted Petitioners' Miscellaneous Contention K as it pertains to foreign ownership: lack of authority of the NRC to issue a source materials license to a US corporation which is 100% owned, controlled and dominated by foreign interests.<sup>1</sup> The Board found the need to make two legal determinations: (1) whether there is an absolute prohibition on foreign ownership under the Atomic Energy Act of 1954, as amended (the "AEA"); and (2) if there is no absolute prohibition, whether the issuance or renewal of a source materials license to a foreign-owned company would be

<sup>1</sup> LBP-08-24 at 70-75.

inimical to the US national interest, the common defense and security (“CD&S”), or the health and safety of the public (“PH&S”).<sup>2</sup> Significantly, the national interest and common defense aspects include protecting the health and safety of the public, including the environment and water resources.<sup>3</sup>

If the Board finds either that the AEA does not authorize the issuance of a source materials license to a foreign-owned US subsidiary or that the issuance of a source materials license to such a company would be inimical to the common defense and security or to the health and safety of the public, Applicant’s license renewal application must be denied. Or if the Board makes such findings not with respect to foreign-owned companies generally but with respect to Applicant specifically, the license renewal must be denied.

In either case, the mining and possession of Uranium by Applicant must immediately cease and all operations at the mine must be re-directed to water restoration and decommissioning until Applicant demonstrates that it is no longer under foreign ownership, control or influence (“FOCI”).<sup>4</sup>

### **APPLICABLE BURDEN OF PERSUASION**

The minimum burden for Applicant to meet is to show by a “preponderance” that the NRC is authorized to issue a source material license to a foreign-owned company and

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<sup>2</sup> Id. at 71, 73.

<sup>3</sup> See Citizens for Safe Power, Inc. v. NRC, 524 F.2d 1291, 1299 (DC Cir. 1975) (“[t]he Atomic Energy Act was passed years before broader environmental concerns prompted enactment of the [NEPA]. Yet many of those same concerns permeated provisions of the first-mentioned legislation and the regulations promulgated in accordance with its mandate.”)

<sup>4</sup> Petitioners acknowledge that it may be permissible for the NRC to issue a license to a US company in which foreign interests own a **non-controlling** interest in the absence of any other control factors and subject to an appropriate negotiation action plan.

that the issuance of the renewal of SUA-1549 is in furtherance of the US national interest, not inimical to CD&S and not inimical to PH&S. See Florida Power & Light Co. (St. Lucie Plant, Unit No. 2), 14 NRC 1167, LBP-81-58 (1981); 1981 NRC Lexis 13, 17 (“the ultimate burden of persuasion rests with Applicant, who seeks a licensing order”). See also Siegel v. Atomic Energy Commission, 400 F.2d 778, 784 (DC Cir. 1968) (“applicant for a license should bear the burden of proving the security.”)

In light of the nuclear security concerns presented by foreign ownership and control of radiological materials, Petitioners respectfully submit that the burden for Applicant when national security concerns are implicated should be raised to a showing of “clear and convincing”.<sup>5</sup> The lower standard of a preponderance is appropriate for most adjudications involving property rights.<sup>6</sup> The Board has the authority to apply the higher standard of “clear and convincing.”<sup>7</sup>

Under either standard, Applicant is unable to meet its burden because there is no section of the AEA that authorizes the issuance of licenses to foreign persons. Applicant’s argues that there is no prohibition in the AEA and therefore, it must be allowed. Such argument is syllogistic and dangerous in light of the nuclear threats. The only reasonable construction of the AEA is that if there is no express authority to grant a license, such authority may not be implied.

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<sup>5</sup> See, e.g., In Re: Barach, \_\_\_ F.3d \_\_\_; Slip. Op. 06-0833 at 7 (1<sup>st</sup> Cir. August 28, 2008) citing Vigilantes, Inc. v. U.S. Dep’t of Labor, 968 F.2d 1412, 1416 (1st Cir. 1992) (dealing with debarment from federal procurement).

<sup>6</sup> Id. citing Virgilantes.

<sup>7</sup> See, e.g., Koden v. U.S. Department of Justice, 564 F.2d 228 (7th Cir. 1977), cited in In Re: Barach at 8-9 (Immigration and Naturalization service applied higher ‘clear and convincing’ standard to debarment “on policy grounds, reasoning that ‘more than a mere preponderance of the evidence should be required to deprive an attorney of his right to practice his profession.’”)

In any case, Applicant's failure to point to any authority in the AEA for issuing a source materials license to a foreign-owned and controlled entity demonstrates that Applicant has failed to meet its burden of persuasion. Petitioners point to several express prohibitions on foreign ownership in the AEA as well as indications of Congressional intent that rebut any suggestions that there is any authority whatsoever for the issuance of source materials licenses to foreign persons or foreign-owned or controlled entities. Further, the dominance of Applicant's ultimate parent over the US uranium industry raises anti-trust concerns and other concerns discussed herein that offset any positive contributions that may be made by Cameco's Crow Butte operations including its payments into the local economy.

#### **RELEVANT FACTS**

Prior to World War I, foreign investment in and ownership of assets in the United States, including critical infrastructure<sup>8</sup>, was entirely unregulated with the notable exception of national banks which have been restricted from having foreign ownership since 1864.<sup>9</sup> In 1914, the US Navy became concerned that espionage activities were being conducted over foreign-owned radio stations located in the US. In 1915, concerns heightened when a German diplomat accidentally left a briefcase at a New York City transit station indicating that some German-controlled operations in the US were aimed at, or at least useful for, enhancing German war capabilities, reducing Allied capabilities

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<sup>8</sup> Although the US government's understanding of 'critical infrastructure' has changed over the years, it has always included energy resources (oil & gas), transportation, communications, and chemicals/explosive making materials. See E. Graham and D. Marchick, US National Security and Foreign Direct Investment, at 4, 14 (May 2006) (hereinafter "National Security and FDI").

<sup>9</sup> Id. at 14.

or spying on the US.<sup>10</sup> At that time, technologies associated with dyestuffs, ammonia and aniline-film production were applicable for production of high explosives.<sup>11</sup> Such “dual-use” materials were produced by several US-based chemical companies that were directly or indirectly controlled by German interests.<sup>12</sup> After the sinking of the British ship *Luistania* in 1915, the US seized the broadcasting facilities of the German electronics firm Telefunken and placed the assets under US Navy control.<sup>13</sup>

In 1917, as the US entered World War I, President Wilson seized all foreign-owned radio stations under the Radio Act of 1912.<sup>14</sup> Also in 1917, Congress passed, and the President signed into law, the Trading With the Enemy Act (“TWEA”).<sup>15</sup> In 1917-1918, President Wilson invoked the TWEA to take title to US assets held by all German companies and some non-German companies determined to be effectively under German control.<sup>16</sup> Since the US chemical industry was viewed at the time as strategically important to national security, forced transfers of chemical assets from German to US companies were prevalent.<sup>17</sup> The US government’s justification for the appropriation was that US ownership of these assets was needed for national security reasons.<sup>18</sup> The US needed the chemical assets, including key technologies that supported development of high explosives to match German munitions being used in combat against the Allied

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<sup>10</sup> *Id.* at 4.

<sup>11</sup> *Id.* at footnote 9.

<sup>12</sup> *Id.* at 4-5.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> Public Law 65-91, 40 US Stat. 411 (1917), 50 USC App. §1 et seq. In 1977, the TWEA was supplanted by the International Emergency Economic Powers Act (“IEEPA”), Public Law 95-223, 91 US Stat. 1625-26 (1977), 50 USC §1701 et seq.

<sup>16</sup> National Security and FDI at 5.

<sup>17</sup> *Id.* at 6.

<sup>18</sup> *Id.* at footnote 11.

forces.<sup>19</sup>

Immediately after the end of World War I in 1918, US chemical companies began technology transfer agreements with German firms that had missing links to technologies acquired from the US during the War.<sup>20</sup> During the 1920s, German companies reentered the US market in partnership with many of the same US firms that had acquired the German firms' former assets under the TWEA.<sup>21</sup> Aiming not to repeat pre-war mistakes, Congress passed, and the President signed into law, a series of laws aimed at preventing foreign control over assets in what was viewed at that time as key sectors: the Mineral Lands Leasing Act (limiting foreign participation in leasing US public land to extract or transport oil)<sup>22</sup>, the Radio Act of 1927 (prohibiting foreign control of radio broadcasting activities)<sup>23</sup>, the Jones Act (Section 27 of the Merchant Marine Act of 1920 requiring all coastal shipping between American ports to be handled by US registered ships owned at least 75% by US citizens)<sup>24</sup>, and the Air Commerce Act of 1926<sup>25</sup> (only US citizens could register aircraft in the US; foreign investment restrictions were carried over to the Federal Aviation Act of 1958<sup>26</sup>).<sup>27</sup>

During the 1920s and 1930s, a number of large-scale international cartels developed in the chemical, steel, oil and gas, electrical equipment and precision instrument industries – all sectors then considered strategic from a national security

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<sup>19</sup> Id.

<sup>20</sup> Id.

<sup>21</sup> Id. at 7.

<sup>22</sup> Public Law 66-146, 41 US Stat 437 (1920), 30 USC § 181 et seq.

<sup>23</sup> Public Law 69-632, 44 US Stat. 1162 (1927), 47 USC §87.

<sup>24</sup> Public Law 66-261, 46 USC App. §883.

<sup>25</sup> Public Law 69-254, 44 US Stat 568 (1926).

<sup>26</sup> Aviation Act of 1958, PL 85-726, US Stat 1958; codified 49 USC §40102

<sup>27</sup> National Security and FDI. at 11-14.

standpoint.<sup>28</sup> These international cartels would usually maintain so-called 'listening post' business operations within the territories assigned to rival firms under (illegal) cartel agreements to monitor activities of rival firms to ensure compliance with (illegal) output reduction agreements.<sup>29</sup> Such 'listening posts' were also operated to undermine US national security.<sup>30</sup>

After Hitler's rise to power in Germany in 1933, a close relationship developed between German chemical company I.G. Farben and the Nazi government.<sup>31</sup> Farben's chemical expertise and technologies were supplied the Nazi war machine with domestic synthetic alternatives to many raw materials that Germany had previously been required to import.<sup>32</sup> Following the Nazi rise to power, the German government pressured Farben to withhold technology sharing from US companies like Standard Oil of New Jersey which had been sharing its synthetic rubber technology with Farben under a joint venture agreement.<sup>33</sup> As a result, the Farben-Standard Oil venture was a form of foreign investment that clearly impeded the US war effort by slowing development of synthetic rubber.<sup>34</sup> In 1941, after the US entered World War II, President Roosevelt invoked the TWEA to seize German and Japanese assets in the US.

In 1945, the conclusion of World War II occurred at the same moment in time as the dawning of the nuclear age with the use of atomic weapons developed by The

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<sup>28</sup> Id. at 15.

<sup>29</sup> Id.

<sup>30</sup> Id.

<sup>31</sup> Id. at 16.

<sup>32</sup> Id.

<sup>33</sup> Id.

<sup>34</sup> Id. at 17. Noting that the US Department of Justice uncovered more than 160 agreements by IG Farben alone that it deemed illegal and detrimental to the interests of the US (citing Wilkins 2004, 536).

Manhattan Project in the United States using enriched Uranium. At that time, all Uranium and nuclear materials in the United States were under the control of the United States government. See the Atomic Energy Act of 1946 (the “1946 Act”) which created the Atomic Energy Commission, the predecessor to the Nuclear Regulatory Commission (“NRC”).<sup>35</sup> Thereafter, Congress passed and the President signed into law, the Atomic Energy Act of 1954 (the “1954 Act”), which governs this proceeding.<sup>36</sup>

During the post-World War II years, the pace of foreign investment in the US was slow while the US made large post-war investments in rebuilding Europe and Japan.<sup>37</sup> It was not until the 1970s that a US policy on foreign investment began to emerge.<sup>38</sup> In 1977, President Carter issued a statement that the US policy should be neutral, without a bias for or against either foreign investment in the US or US investment abroad.<sup>39</sup> Also in 1977, Congress amended the TWEA to limit the President’s power to seize foreign-owned assets to time of declared war or any “international emergency” pursuant to the National Emergencies Act of 1976.<sup>40</sup>

In 1983, President Reagan opened up foreign investment in the US declaring that the “United States believes that foreign investors should be able to make the same kinds of investment, under the same conditions, as nationals of the host country. Exceptions should be limited to areas of national security concern or related interests.”<sup>41</sup> In the mid-1980s, as the Crow Butte project was commenced, foreign investment in the US

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<sup>35</sup> See Section 5(a)(2) of the 1946 Act, Public Law 79-585, which was substantially amended but not repealed by the Atomic Energy Act of 1954.

<sup>36</sup> Public Law 83-703, 68 Stat. 919 (1954), 42 USC § 2011 et seq.

<sup>37</sup> National Security and FDI. at 18-19.

<sup>38</sup> Id. at 19-20.

<sup>39</sup> Id.

<sup>40</sup> Public Law 94-412, 90 US Stat. 1255 (1976), 50 USC § 1601 et seq.

<sup>41</sup> National Security and FDI at 33.

expanded.<sup>42</sup>

In the late 1980s, famed corporate raider Sir James Goldsmith's attempt to buy Goodyear Tire and Rubber and Fujitsu's attempt to buy 80% of Fairchild Semiconductor Corp. raised substantial public concerns about the interaction between national security and foreign investment which gave rise to the Exon-Florio Amendment in 1988.<sup>43</sup> Under Exon-Florio, there is a process for a voluntary filing with the Committee on Foreign Investment in the US ("CFIUS") and failure to make such a filing leaves a transaction open to being divested for national security reasons.<sup>44</sup> Many legitimate transactions are not reported to CFIUS for one reason or another.<sup>45</sup> The US General Accounting Office found that:

many foreign investments occur in high-technology or defense-related industries that were not reported to CFIUS. While the significance of the gap is unclear, it does suggest that the CFIUS process alone cannot be relied on to surface transactions posing national security concerns.<sup>46</sup>

Transactions that are not reported to CFIUS are subject to forced divestiture as happened in 1990 when President G. H.W. Bush ordered China National Aero-Technology Import and Export Corporation ("CATIC") to divest itself of US aerospace company MAMCO Manufacturing, Inc., a Washington corporation ("MAMCO").<sup>47</sup> MAMCO was an aircraft parts supplier for Boeing Company, among others, which sold

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<sup>42</sup> Id. at 21.

<sup>43</sup> Id. at 29. Public Law 100-418, 102 US Stat. 1107 (1988), 50 USC §2170, amending Section 721 of the Defense Production Act of 1950, made permanent by Section 8 of the Defense Production Act Extension and Amendments of 1991, Public Law 102-99, 105 US Stat. 487 (1991).

<sup>44</sup> 50 USC §2170.

<sup>45</sup> GAO/NSIAD-96-12 Foreign Investment: Implementation of Exon-Florio and Related Amendments (December 1995), at 5.

<sup>46</sup> Id. at 7.

<sup>47</sup> Executive Order dated February 1, 1990; at <http://www.presidency.ucsb.edu/ws/index.php?pid=18108>.

itself to CATIC in November 1989.<sup>48</sup> As in this case, the US subsidiary claimed and the foreign interests claimed that US national security was not implicated and that there was full compliance with all US laws.<sup>49</sup> In one later incident demonstrating bad intent, CATIC and the McDonnell Douglas Corporation were indicted on federal charges for making false statements (and omissions) in connection with the illegal exportation in 1994-1995 of sophisticated machinery used to build aircraft parts.<sup>50</sup>

In 1992, in the wake of the failed attempt by French government-owned Thomson-CSF to buy LTV Corporation's Missile Division, Congress passed the "Byrd Amendment"<sup>51</sup> to Exon-Florio, requiring a review of acquisitions of US firms by foreign government-owned or government-controlled firms.

There is no dispute that Applicant is 100% foreign owned, controlled and

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<sup>48</sup> See "China Ends Silence on Deal U.S. Rescinded," New York Times February 20, 1990, at <http://query.nytimes.com/gst/fullpage.html?res=9C0CE1D6143CF933A15751C0A966958260&sec=&spon=&pagewanted=all>.

<sup>49</sup> Id.

<sup>50</sup> See Press Release dated October 19, 1999 by the US Bureau of Industry and Security, at <http://www.bis.doc.gov/news/archive99/dojindictmentmcdonneldouglas.html> ("[t]he corporate defendants are charged with making false, fraudulent and misleading statements and material omissions on the applications, the end user certificates and in additional oral and written submissions upon which the Department of Commerce based its decision to issue the 10 export licenses. Specifically, the indictment charges that the license applications falsely represented that the equipment would be shipped to a factory -- that was purportedly to be built in Beijing for use in the production of 40 commercial aircraft in the People's Republic of China under a preexisting \$1 billion contract between CATIC and McDonnell Douglas. McDonnell Douglas concealed from licensing officials that the contract was in jeopardy and under negotiation. Moreover, even prior to filing the export license application, CATIC had sold a portion of the licensable equipment to Nanchang, a factory that was not associated with the contract and known to be used for military production.")

<sup>51</sup> See Sections 837 and 838 of the Fiscal Year 1993 National Defense Authorization Act (Public Law 102-484), amending 50 USC app. §2170 and adding 10 USC §2537, respectively.

dominated. LBP-08-24 at 64.<sup>52</sup> Geomex, a major shareholder (32%) of Applicant, was acquired by Cameco in 1995 or 1996<sup>53</sup> and Uranerz, the other major shareholder (58%) of Applicant was acquired by Cameco in 1998.<sup>54</sup> In 1998, after Cameco had acquired a 90% controlling interest in Applicant, it reported it to the NRC.<sup>55</sup> Upon information and belief, in 2000, Cameco purchased the remaining 10% of the Crow Butte mine from KEPCO, the South Korean state-owned utility. Upon information and belief, none of these transactions was reported to CFIUS under Exon-Florio; accordingly, they are subject to divestiture at any time.<sup>56</sup> Further, none of these transactions was subject to any detailed security risk analysis having the benefit of full disclosure of all material facts. Finally, even if such an analysis had been done in 1998, it would be analyzed anew in light of current events.

The September 11, 2001 attacks demonstrated the extent of US vulnerability to the

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<sup>52</sup> The Crow Butte project has always been under foreign control unbeknownst to regulators. See Petition at 53-59; and ML081570141 (particularly the 1988 DEC State Briefing Notes therein).

<sup>53</sup> See October 14, 1996 Cameco Press Release concerning acquisition of Power Resources, Inc., "Cameco presently owns about 32% of the Crow Butte ISL mine in Nebraska through its wholly owned subsidiary Geomex Minerals, Inc.", at p. 2., ML081570141.

<sup>54</sup> See LBP-08-24 at 64, footnote 311 and Cameco Press Release dated April 17, 1998, ML081570141 ("[w]ith the acquisition of UUS's 57.69% interest in the Crow Butte in-situ leach (ISL) production centre in Nebraska, Cameco's ownership increases to 90%. As a result of this purchase, Cameco also adds about 23 million pounds U308 to its US reserve and resource base.").

<sup>55</sup> LBP-08-24 at 64, footnote 311; See also Accession No. 9805260014 re: purchase of Uranerz USA, Inc. report to Staff, June 5, 1998; the NRC Staff consented to the proposed change and determined that no license amendment was necessary. (Accession No. 9806120319).

<sup>56</sup> Since CFIUS filings are not publicly disclosed, it should be assumed that there was not CFIUS filing unless Applicant or Cameco demonstrates otherwise.

terrorist threat.<sup>57</sup> In the introduction to The National Strategy for The Protection of Critical Infrastructures and Key Assets (2003), President G.W. Bush wrote:

The terrorist enemy that we face is highly determined, patient, and adaptive. In confronting this threat, protecting our critical infrastructures and key assets represents an enormous challenge. We must remain united in our resolve, tenacious in our approach, and harmonious in our actions to overcome this challenge and secure the foundations of our Nation and way of life.<sup>58</sup>

In 2005, a Congressional uproar over national security concerns terminated proposed purchase of Unocal by the China National Offshore Oil Corporation (“CNOOC”) even though CNOOC offered substantially more to Unocal shareholders.<sup>59</sup> Also in 2005, national security concerns were raised with the sale of IBM’s PC business to the Chinese firm Lenovo making it the third largest PC maker in the World behind Dell and Hewlett-Packard.<sup>60</sup> CFIUS approved the transactions after requiring some national-security related changes to the deal.<sup>61</sup> In 2006, the Dubai Ports World-P&O acquisition raised concerns about foreign control over six US ports and sparked a re-

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<sup>57</sup> President G.W. Bush, introductory note to The National Strategy for The Protection of Critical Infrastructures and Key Assets (February 2003), at [http://www.dhs.gov/xprevprot/publications/publication\\_0017.shtm](http://www.dhs.gov/xprevprot/publications/publication_0017.shtm).

<sup>58</sup> Id. There is no reason to believe that the Obama Administration will take a different view - “We will not apologize for our way of life, nor will we waver in its defense, and for those who seek to advance their aims by inducing terror and slaughtering innocents, we say to you now that our spirit is stronger and cannot be broken; you cannot outlast us, and we will defeat you.” President Obama Inauguration Speech, January 20, 2009.

<sup>59</sup> National Security and FDI at 128.

<sup>60</sup> See “IBM Completes Sale Of PC Business To Lenovo: IBM and Lenovo made minor modifications to the terms of the sale to win U.S. government approval.” InformationWeek (May 2, 2005) (“Some U.S. lawmakers expressed concerns that it would result in the transfer of sensitive technology to a communist-led country that some consider a political and economic rival to the United States....IBM and Lenovo had to make some "minor modifications" to the agreement to win federal approval.”) <http://www.informationweek.com/news/hardware/showArticle.jhtml?articleID=162100445>.

<sup>61</sup> Id.

examination of the national security implications of corporate transactions resulting in foreign control over strategic US assets.<sup>62</sup>

In 2007, Applicant filed its License Renewal Application which was accepted by the NRC Staff in March 2008. After publication, Petitioners filed a Petition for Intervention on July 28, 2008 and were admitted pursuant to LBP-08-24 on November 21, 2008.

In September 2008, 16 foreign individuals and companies involved in procuring items with military applications for Iranian entities through Dubai and Malaysia-based trade networks were indicted under IEEPA, Iran Trade Embargo, and Iranian Transactions Regulations.<sup>63</sup> In that case, a dozen 'innocent' US companies located in Arizona, California, Connecticut, Florida, Illinois, Massachusetts, Minnesota, New York, and Texas, were implicated in unknowingly supplying dual-use items to Iranian recipients in 2004. The dual-use US products (GPS, inclinometers, etc.) were usable (and probably used) to make high-tech Improvised Explosive Devices ("IEDs") that kill American soldiers in Afghanistan and Iraq.<sup>64</sup> The United Arab Emirates (UAE)'s port capital of Dubai:

functions as one of the world's most unrestrictive free trade and shipping zones. It also houses hundreds of front companies and foreign trading agencies that actively procure dual-use items for entities in countries under sanction.... It is difficult for manufacturers and suppliers to know when they are being exploited by these sophisticated procurement networks. The alleged successes of the Dubai and Malaysia-based networks in obtaining

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<sup>62</sup> See, e.g., Council on Foreign Relations Backgrounder: Foreign Ownership of U.S. Infrastructure, E. Kaplan & L. Teslik (February 13, 2007) at [http://www.cfr.org/publication/10092/foreign\\_ownership\\_of\\_us\\_infrastructure.html](http://www.cfr.org/publication/10092/foreign_ownership_of_us_infrastructure.html).

<sup>63</sup> Iranian Entities' Illicit Military Procurement Networks, D. Albright, P. Brannan and A. Scheel, Institute for Science and International Security (January 12, 2009); [www.isis-online.org](http://www.isis-online.org), at 1 with reference to US v. Ali Akbar Yahya et al., Case No. 08-20222-CR-LENARD(s) (filed September 11, 2008, US Dist. Ct., Southern Dist. Florida).

<sup>64</sup> Id. at 9-11.

the items show that U.S. companies often are unable to detect illicit procurement schemes on their own. Though the entities involved in this illicit procurement scheme allegedly purchased items which could be used in conventional weapons, a network using similar strategies to procure a range of dual-use items for use in an unsafeguarded nuclear program would likely have found a similar level of success. Iran's efforts to procure for its nuclear program, particularly its gas centrifuge program, are similar in their complexity and difficulty in discovering.

On October 28, 2008, Dr. Mohamed ElBaradei, Director General of the International Atomic Energy Agency (IAEA), addressed the United Nations General Assembly and warned the world about nuclear terror:

The possibility of terrorists obtaining nuclear or other radioactive material remains a grave threat. The number of incidents reported to the Agency involving the theft or loss of nuclear or radioactive material is disturbingly high....Equally troubling is the fact that much of this material is not subsequently recovered. Sometimes material is found which had not been reported missing.<sup>65</sup>

In December 2008, the Commission on the Prevention of WMD Proliferation and Terrorism (the "WMD Commission") reported:

We live in a time of increasing nuclear peril. The number of states armed with nuclear weapons or seeking to acquire them is increasing. Terrorist organizations are intent on acquiring nuclear weapons or the material, technology, and expertise needed to build them. **Trafficking in nuclear technology is a serious, persistent, and multidimensional problem. The worldwide expansion of nuclear power increases the danger of proliferation.**

The challenges for the United States and the world remain clear. Today, anyone with access to the Internet can easily obtain designs for building a nuclear bomb, but **the hardest part for those bent on nuclear terror has always been acquiring the weapons-grade uranium or plutonium required to make the bomb. Our crucial task is to secure that material before the terrorists can steal it or buy it on the black market.** And we must stop and reverse the proliferation of nuclear weapons while we can.

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<sup>65</sup> WORLD AT RISK - The Report of the Commission on the Prevention of WMD Proliferation and Terrorism, Graham & Talent (December 2008), <http://www.preventwmd.gov> (hereinafter "WMD Commission Report"), at 43.

...Our efforts must adapt to meet the rapidly evolving nuclear security challenges we confront today.<sup>66</sup>

The proliferation of nuclear weapons starts with Uranium mining.<sup>67</sup> Applicant is licensed by Source Materials License SUA-1549, the renewal of which is at issue in this case, to mine up to 1,000,000 pounds per year of U308 Yellowcake Uranium from the Crawford, NE mine. Cameco mines and exports millions of pounds of concentrated Uranium from Crawford, Nebraska and from Wyoming to its Canadian facilities for processing into nuclear fuel for nuclear power plants of its affiliate Bruce Power and for sale to the highest bidder on international markets.<sup>68</sup> Export is handled through an NRC licensed shipper which reports Applicant (as a licensed entity) as the customer/supplier under Part 110.<sup>69</sup>

## ARGUMENT

### INTRODUCTION

President Obama affirmed in his Inauguration Speech that “[o]ur Nation is at war against a far-reaching network of violence and hatred” which he described as “those who

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<sup>66</sup> Id. at 43-44 (emphasis added).

<sup>67</sup> Building a Corporate Nonproliferation Ethic, D. Albright and P. Gray (June 1993), at <http://isis-online.org/publications/expcontrol/isisrpt693.html>, Paths to the Bomb diagram at <http://isis-online.org/publications/expcontrol/oldpaths.jpg>.

<sup>68</sup> See Cameco 2007 Annual Statement (ML081570141) at 10.

<sup>69</sup> See attached Letter dated May 12, 2000 from RSB Logistic Inc. of Saskatoon, Canada, which is also where Cameco is based, holder of License XSOU-8744, adding Crow Butte Resources, Inc. as a “supplier” under its license. See also ML040720355 for an example of an Advance Notification of Export Shipment with respect to U308 mined/possessed by Applicant under SUA-1549 and shipped under its instructions to Cameco. See ML053000187 for an example of an Advance Notification of Export Shipment with respect to U308 mined/possessed by Applicant’s sister company Power Resources, Inc. under its SUA-1548.

seek to advance their aims by inducing terror and slaughtering innocents.”<sup>70</sup> The President affirmed that “[w]ith old friends and former foes, we will work tirelessly to lessen the nuclear threat.”<sup>71</sup> The only people who are not in favor of nuclear security are those who have bad intentions to cause harm to innocent people and who seek to undermine peaceful civil society. Such bad actors and their illicit procurement networks do not follow the law; rather, they manipulate front companies to induce innocent companies to violate export controls and nonproliferation laws.<sup>72</sup> Illicit networks, such as the A.Q. Khan network, are responsible for the proliferation of nuclear threats.<sup>73</sup> Nuclear smuggling was described by one expert as follows:

Nuclear smuggling involves phony front companies, false declared end-users, trading companies located anywhere in the world, and a continuous search for loopholes in laws....Such tricks of the trade help nuclear smugglers to avoid detection....Smugglers continue to corrupt seemingly incorruptible businessmen....Illegal businesses can be hidden inside legitimate ones, and the enormous growth of global trade provides the perfect cover to hide the black market’s transactions. Khan demonstrated that it’s possible for a shady network of scientists, industrialists and businessmen to sell turnkey nuclear weapons production facilities. A developing country could save years in its quest for nuclear weapons. In the future, **hostile groups and failed states could buy the facilities to make nuclear explosive material and fashion a crude atomic bomb. According to [former CIA Director George] Tenet, in the current market place if you have \$100 million, you can be your own nuclear power.**<sup>74</sup>

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<sup>70</sup> President Obama Inauguration Speech (January 20, 2009).

<sup>71</sup> Id.

<sup>72</sup> Iranian Entities’ Illicit Military Procurement Networks, at footnote 63 *infra*.

<sup>73</sup> “Iran’s Nuclear Program: Status and Uncertainties”, prepared testimony by D. Albright, President, Institute for Science and International Security (ISIS), before the House Committee on Foreign Affairs, Subcommittee on Terrorism, Nonproliferation, and Trade, Subcommittee on the Middle East and Asia (March 15, 2007), at 1 (“the Khan network provided Iran the ability to build and operate gas centrifuges. Without their assistance, Iran would have likely been unable to develop a gas centrifuge program.”); available at [www.isis-online.org](http://www.isis-online.org).

<sup>74</sup> D. Albright remarks at Finding Innovative Ways to Detect and Thwart Illicit Nuclear Trade, Carnegie Endowment for International Peace: Carnegie International

At no time have Petitioners suggested that Applicant is one of such bad actors or that Applicant itself is involved in an illicit procurement network. Rather, Petitioners have consistently argued that the export of the Yellowcake outside US control is contrary to nuclear security and that Applicant has attempted to create a loophole which is ripe for abuse by such bad actors. Both the attempted creation of the loophole and the loophole itself are contrary to the US national interest and are inimical to the common defense and security and to the health and safety of the public in violation of the AEA and 10 CFR §40.32(d). This “Cameco Loophole” needs to be fixed as part of fostering nuclear security.

On September 10, 2008, New York City Police Commissioner Raymond Kelly testified to the WMD Commission that:

[w]hether it's fixing gaping holes in regulation, securing loose nuclear materials abroad, or fully funding programs here at home that represent our last line of defense, we have absolutely no time to lose....Everything we know about al Qaeda tells us that they will try to hit us again, possibly the next time with a weapon of mass destruction. We must do everything in our power to stop them before it's too late.<sup>75</sup>

Concealment of the foreign ownership (Petitioners Miscellaneous Contention G; LBP-08-24 at 62-68) evidences a corporate culture of resistance to making full disclosures or to conducting a complete analysis of materiality in order to enable disclosures of all material facts. Such conduct is not consistent with corporate responsibility to support

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Nonproliferation Conference (June 26, 2007) at 5 (emphasis added), event transcript at <http://www.carnegieendowment.org/events/index.cfm?fa=eventDetail&id=1029>.

<sup>75</sup> WMD Commission Report at 112.

international non-proliferation efforts.<sup>76</sup> Such conduct is contrary to the national interest and is inimical to the common defense and security and to the health and safety of the public.

The patterns and practices of the bad actors evolve much faster than applicable laws. The evolution of national security restrictions on foreign investment in the United States can be traced from the Trading With the Enemy Act (“TWEA”) of 1917, the International Economic Emergency Act (“IEEA”), the 1988 Exon-Florio Amendment and 1992 Byrd Amendment related to Section 721 of the Defense Production Act, and reviews by the Committee on Foreign Investment in the United States (“CFIUS”), and more recently the Department of Defense’s issuance of NISPROM and an explanation of “Foreign Ownership Control or Influence” (“FOCI”) factors applied to defense and DOE contractors.<sup>77</sup>

In each case, the applicable laws were crafted or amended to protect national security after the occurrence of events that raised awareness of potential threats to national security (e.g., World War I, World War II, the 1988 attempted takeover of Fairchild Aviation by Fujitsu, the 1989 takeover of MAMCO by CATIC (divested by Presidential order), the events of September 11, 2001, the 2005 attempted takeover of Unocal by CNOOC and accomplished takeover of IBM’s PC business by Lenovo, the 2006 attempted takeover of six US ports by Dubai World Ports, the constant and

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<sup>76</sup> See Building a Corporate Nonproliferation Ethic, at footnote 67 *infra*.

<sup>77</sup> See Chapter 2, Section 3: Foreign Ownership, Control or Influence, §2-300 et seq.; (the FOCI policy for US companies is intended to facilitate foreign investment by ensuring that foreign firms cannot undermine US security and export controls to gain unauthorized access to critical technology or classified information.) See also 1993-June-06 DOE Order 5634.3 re Foreign Control at ML081570141 and footnote 91 *infra*.

increasing illicit procurement efforts by Iran, Al Qaeda and the like to acquire dual-use items and constant nuclear smuggling such as that evidenced by the A.Q Kahn network.

IAEA nuclear security expert Anne Nilsson explains that legal enforcement is the last step in the process of evolving nuclear security under “Lessons Learned.”<sup>78</sup> The first steps are: Prevention and Detection; then comes Response, Storage, Transportation, Remediation, Forensic Investigation and, finally, Legal Process.<sup>79</sup> It is widely agreed by nuclear security experts that the best course of action is to detect and prevent activities that might result in the use of a nuclear weapon or radiological device (“RDD” or “Dirty Bomb”).<sup>80</sup> Therefore, it is in furtherance of nuclear security to require disclosures of all information related to radioactive materials that is material to an analysis of the detection and prevention of nuclear security risks and further to conduct a thorough examination of the nuclear security threats posed by issuing source materials licenses to foreign-owned and controlled entities.

The so-called “Path to the Bomb” starts with Uranium ore in most cases. Natural uranium contains 0.7205% of the U-235, the fissile isotope of uranium.<sup>81</sup> Most civilian power reactors use enriched uranium fuel containing 3 to 4% U-235.<sup>82</sup> To make weapons-grade uranium, it must be enriched to greater than 90% U-235.<sup>83</sup>

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<sup>78</sup> Anita Nilsson, IAEA Office of Nuclear Security, Combating Illicit Nuclear Trafficking: Global Perspective (February 14-18, 2008) at 19, at <http://cstsp.aas.org/files/nilsson.pdf>.

<sup>79</sup> Id.

<sup>80</sup> A radiological device (“RDD”) is described as a “weapon of mass disruption” which causes more psychological and economic damage than physical damage; see NRC Fact Sheet on Dirty Bombs at <http://www.nrc.gov/reading-rm/doc-collections/fact-sheets/dirty-bombs.html>.

<sup>81</sup> Nuclear Chemistry: Uranium Enrichment, Dr. Frank Settle, Kennesaw State University (2005); <http://www.chemcases.com/nuclear/nc-07.htm>.

<sup>82</sup> Id.

<sup>83</sup> Id.

The 1945 “Manhattan Project” considered the four physical processes for uranium enrichment: gaseous diffusion (effusion), electromagnetic separation, liquid thermal diffusion, and centrifugation, and used the first three to produce enriched uranium for the Hiroshima bomb.<sup>84</sup> All four enrichment methods are available to terrorists and rogue nations due, in large part, to the nuclear smuggling by the A.Q. Kahn network.

One 55-gallon drum of U308 Yellowcake can be enriched relatively easily using any of four technologies (gas, electromagnetic, thermal, centrifuges), each of which requires vacuum pumps and a variety of other dual-use items. Once it is enriched, it has become special nuclear material capable of being used as a Weapon of Mass Destruction. Even before it is enriched, it is capable of being used as an RDD – a Weapon of Mass Disruption. In any case, Cameco mines and transfers from Nebraska and Wyoming to Canada and points unknown about 3,000,000 pounds per year of concentrated Yellowcake and each pound of it may be weaponized if obtained by bad actors.

If discovered by the IAEA, a radiological weapon or stolen radiological material would be investigated to determine the source(s). It is understood that Yellowcake is fungible and it may not be possible to track shipments to the mine; but we do not know the capacity of the IAEA forensic labs and it is not our task to make that determination. Suffice it to say that IAEA investigators would use all necessary resources to discover all relevant information concerning the weapon, including the source of the Uranium.

Many companies believe, such as Applicant has argued, that they are involved in peaceful, profit-making commercial business when, in fact, they are being manipulated

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<sup>84</sup> Id.

by bad actors to engage in illicit trade.<sup>85</sup> It comes as a complete shock when IAEA investigators come to their offices with evidence that some part they sold has been used on an Improvised Explosive Device (“IED”) in Afghanistan or Iraq or that was welded to enrichment centrifuges, or were found on equipment related to a rogue nation’s illegal nuclear program. Such was the case at Leybold when serial numbers from their vacuum pumps were actually found on uranium enrichment equipment in Iraq during Gulf War I.<sup>86</sup> Leybold executives were at first shocked but then conceded that it was their equipment and they started a new corporate program designed support the non-proliferation efforts of the IAEA.<sup>87</sup> Our task is to make sure the IAEA investigators don’t ever need to show up at the offices of the Crow Butte mine to find out how Nebraskan Yellowcake was weaponized by bad actors that got hold of it after it left the hands of the Nebraskans that work at the mine.

In our case, if Applicant were to prevail, the disclosure of foreign ownership would be trivialized to the point that it would be debated whether it was even material – as Applicant has done in this proceeding and in the North Trend Expansion proceeding – despite Section 184 of the AEA. If Applicant were to prevail, the analysis of foreign ownership itself would be trivialized. To do so would be to trivialize nuclear security and undermine all nuclear non-proliferation efforts.

Nuclear Security is defined by the IAEA as “the prevention and detection of, and response to, theft, sabotage, unauthorized access, illegal transfer or other malicious acts

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<sup>85</sup> See US v. Ali Akbar Yahya et al., footnote 63 *infra*.

<sup>86</sup> Remarks of R. Wirtz, of Oerlikon Leybold Vacuum, at Finding Innovative Ways to Detect and Thwart Illicit Nuclear Trade, footnote 74 *infra* at 11.

<sup>87</sup> Id.; see also Building a Corporate Nonproliferation Ethic, at footnote 67 *infra*.

involving nuclear material, other radioactive substances or their associated facilities.”<sup>88</sup>

The WMD Commission Report notes that there are several areas where the United States can improve its nonproliferation efforts specifically including strict compliance with the terms of the AEA.<sup>89</sup> The WMD Commission Report also notes the shortcomings in Congressional oversight of nonproliferation where IAEA inspections are required under the AEA.<sup>90</sup> Petitioners submit that the NRC’s failure to strictly comply with the AEA by issuing source materials licenses to foreign-owned entities in the past has no persuasive weight – especially in light of the WMD Commission’s admonition to require strict compliance with the AEA now and in the future in order to promote nuclear security.

A full and complete analysis of the nuclear security risks requires strict compliance with the “disclosure of citizenship” requirements of AEA Section 184 as well as a complete analysis of the implications of foreign ownership, control and influence (“FOCI”)<sup>91</sup> on the common defense and security and on the health and safety of the public.

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<sup>88</sup> A. Nilsson, footnote 78 *infra*, at 9.

<sup>89</sup> See WMD Commission Report at 92 discussing failure of nonproliferation assessments that are required under the AEA; failure to hold hearings regarding Turkey or Saudi Arabia; failure to properly review the nuclear cooperation agreements between Russia or India.

<sup>90</sup> Id.

<sup>91</sup> See 1993-June-06 DOE Order 5634.3 re Foreign Control (ML081570141) - Department of Energy implementation of a Foreign Ownership, Control, or Influence (FOCI) program designed to obtain information that indicates whether DOE offerors/bidders or contractors/subcontractors are owned, controlled, or influenced by foreign individuals, governments, or organizations, and whether that foreign involvement poses an undue risk to the common defense and security. DOE Order 5634.3 at ¶1. The DOE Order is also similar to the National Industrial Security Program Operating Manual (NISPOM) issued by the Department of Defense. See footnote 77, *infra*. The DOE 22

While we are thankful that Cameco is a real corporation run by recognized business professionals, Petitioners share the Board's finding that "previous Commission decisions regarding foreign ownership or control did not appear to turn on which particular nation the applicant was associated with." LBP-08-24 at 74, citing 64 Fed. Reg. at 52,357. In addition, such prior Commission decisions must be evaluated in the context of the threats we face in 2009 and rapidly evolving and adapting networks of illicit procurement and nuclear smuggling.

In this case, we have the luxury of addressing these issues before a tragic incident occurs that is traceable to this Cameco Loophole. As a matter of pure legal analysis, however, there is absolutely no distinction between the ability to use the Cameco Loophole by legitimate Canadian business people and the same ability to use the Cameco Loophole by enemies of the United States to perpetrate horrible wrongdoing. Under the Cameco Loophole, such enemies would have legal grounds to acquire US based uranium and nuclear assets through a complex of subsidiary companies that conceal the true beneficial owners and control persons until it is too late. These technical legal grounds could enable the creation and use of weapons of mass destruction or of mass disruption by enemies of the United States because Americans, including state and federal regulators, would be unwittingly assisting such enemies.

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requires that if the "ultimate parent" and any intervening levels of ownership, of the entity is controlled by another organization, to submit complete, current, and accurate information, certification and explanatory documentation which define the extent and nature of any relevant FOCI over the offeror/bidder and tier parents for use by DOE in determining the risk presented by that FOCI. DOE Order 5634.3 at ¶5. Another example of a common "ultimate parent" analysis can be found in the antitrust rules for pre-merger notifications under 15 USC §18a, which was part of the Hart-Scott-Rodino Antitrust Improvements Act of 1976.

“[M]inimally, the regulations under 10 CFR Part 40 for “Domestic Licensing of Source Material” clearly require, at Section 40.32(d), that the “issuance of the license will not be inimical to the common defense and security or to the health and safety of the public.” Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-84-45, 20 NRC 1343 , 1400 (1984). This is especially important where, as here, the source materials license is conjoined with the legal authority to export truckloads of 55-gallon drums of U308 Yellowcake from Nebraska to Canada and then to points unknown.<sup>92</sup>

For the reasons stated below, the AEA, and Section 40.32(d) clearly bar the issuance of the sought source materials license renewal.

#### **APPLICABLE LAW**

The United States Supreme Court has stated that a regulation “is not a reasonable statutory interpretation unless it harmonizes with the statute’s ‘origin and purpose.’” US v Vogel Fertilizer Co., 455 US 16, 26 (1982); see also LBP-08-24 at 71. Further, this Board “must give effect to the unambiguously expressed intent of Congress.”<sup>93</sup>

Congress has unambiguously expressed its intent that atomic energy and source material be regulated in the US national interest, to assure the common defense and

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<sup>92</sup> See footnote 69, *infra*, concerning export processes based on SUA-1549.

<sup>93</sup> Any court reviewing this issue will be required to apply the standards set forth by the Supreme Court in Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-44 (1984) (“Chevron”). Under the Chevron analysis, judicial review of an agency’s interpretation of a statute under its administration is limited to a two-step inquiry. At the first step, we inquire into “whether Congress has directly spoken to the precise question at issue.” *Id.* at 842. If we can come to the “unmistakable conclusion that Congress had an intention on the precise question at issue,” State of Ohio v. United States Dep’t of Interior, 880 F.2d 432, 441 (D.C.Cir.1989), our inquiry ends there; this Court naturally “must give effect to the unambiguously expressed intent of Congress.” Chevron, 467 U.S. at 843. The NRC’s regulations must be reviewed under the Chevron rubric. Nuclear Information Resource Serv. V. NRC, 969 F.2d 1169, 1173 (DC Cir. 1992).

security and to protect the health and safety of the public.<sup>94</sup> Federal courts have recognized that Congress' intent was to deny source materials and classified information to persons whose loyalties were not to the United States. Siegel v. Atomic Energy Comm'n, 400 F.2d 778, 784 (D.C. Cir. 1968) (“the internal evidence of the Act is that Congress was thinking of keeping such materials in private hands secure against loss or diversion; and of denying such materials and classified information to persons whose loyalties were not to the United States.”).<sup>95</sup> Therefore, Chevron requires the implementation by this Board of Congressional intentions concerning foreign ownership, control and/or domination over source materials licenses.

The AEA expressly provides that:

“the Congress of the United States hereby makes the following findings concerning the development, use and control of atomic energy:....[t]he development, utilization, and control of atomic energy for military and for all other purposes are vital to the common defense and security, [t]he processing and utilization of source 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, and [s]ource 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. AEA Section 2012(a), (c)(d)(e); 42 USC §2012.

Further evidence of Congressional intent is found in the Atomic Energy Act of 1946 (the “1946 Act”):

The significance of the atomic bomb for military purposes is evident. The effect of the use of atomic energy for civilian purposes upon the social, economic and political structures of today cannot now be determined. It is

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<sup>94</sup> AEA Section 2012(a), (c)(d)(e); 42 USC §2012.

<sup>95</sup> LBP-08-24 at 72, footnote 345.

a field in which unknown factors are involved. Therefore, any legislation will necessarily be subject to revision from time to time. It is reasonable to anticipate, however, that tapping this new source of energy will cause profound changes in our present way of life. Accordingly, it is hereby declared to be the policy of the people of the United States that, subject at all times to the paramount objective of assuring the common defense and security, the development and utilization of atomic energy shall, so far as practicable, be directed toward improving the public welfare, increasing the standard of living, strengthening free competition in private enterprise and promoting world peace. 1946 Act, §1(a).

In furtherance of preventing diversion of nuclear materials, the 1946 Act provided for US government ownership of all fissionable materials.<sup>96</sup> Section 5(a)(3) of the 1946 Act made it unlawful for any person to possess, transfer, import or export any fissionable material or *directly or indirectly engage in the production of any fissionable material outside of the United States.*<sup>97</sup> Since the 1946 Act only applies to persons within the United States, this implies Congressional intent that foreign persons would not control the production of fissionable material.<sup>98</sup>

Section 5(b)(1) of the 1946 Act provides the original definition of “source material” to include Uranium such as that mined by Applicant. Section 5(b)(2) of the 1946 Act imposed a licensing requirement identical to the one at issue in this case.

Section 5(b)(3) of the 1946 Act provides that:

[t]he Commission shall establish such standards for the issuance, refusal, or revocation of licenses as it may deem necessary to assure adequate source materials for production, research, or development activities pursuant to this Act or to prevent the use of such materials in a manner

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<sup>96</sup> 1946 Act, §5(a).

<sup>97</sup> 1946 Act, §5(a)(3)(C) (emphasis added).

<sup>98</sup> See, also, 10 CFR §40.2 (“the regulations in this part [40 - Domestic Licensing of Source Material] apply to all persons in the United States”).

inconsistent with the national welfare.

Further, Section 7(c) of the 1946 Act provided that:

[n]o license may be given to any person for activities which are not under or within the jurisdiction of the United States, to any foreign government, or to any person within the United States if, in the opinion of the Commission, the issuance of a license to such person would be inimical to the common defense and security.

It is significant that Section 7(c) speaks to three situations in which a license may not be issued: (1) a license for activities which are not under or within the jurisdiction of the United States; (2) a license to any foreign government; or (3) a license to any person within the United States if in the opinion of the Commission such issuance would be inimical to CD&S. Unlike many provisions of the 1946 Act that were superseded by the 1954 Act,<sup>99</sup> Section 7(c) quoted above was not amended by the 1954 Act and remains in full force and effect. Section 69 of the AEA supplements Section 7(c) of the 1946 Act with an emphasis on the last type of person described in Section 7(c).

Based on the foregoing, Section 7(c) of the 1946 Act bars the issuance of a source materials license for activities which are not within the jurisdiction of the United States or to any foreign government. Clearly, if an applicant were owned by foreign interests that were controlled by a foreign government, it could not be issued a source materials license consistent with Section 7(c).

Section 7(c) of the 1946 Act demonstrates Congressional intent to restrict foreign control over source materials licenses. It bars licenses to be issued for foreign activities and bars licenses to be issued to foreign governments. Petitioners submit that such intent also supports a finding that no source materials license may be issued to foreign entities

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<sup>99</sup> See, e.g., Section 5(b)(7) of the 1946 Act, which was superseded by Section 68(c) of the AEA.

or entities owned or controlled by them. This is supported by a fair reading of 10 CFR Section 40.38 which provides that a license may not be issued to the "Corporation" if it is owned, controlled or dominated by an alien, a foreign corporation or foreign government, or the issuance of the license would be inimical to the common defense and security of the US or maintenance of a reliable and economical domestic source of enrichment services.<sup>100</sup> Section 40.38 shows important factors to be considered in the analysis such as whether the licensee entity is owned, controlled or dominated by an alien, a foreign corporation or a foreign government. Section 40.38 also makes reference to the importance of a reliable and economical domestic source of enrichment services, which itself is a public policy goal that would be frustrated by allowing America's uranium assets to be owned, licensed and mined by foreign companies.

Congressional intent may be discerned from Section 170B of the AEA which provides that the Secretary of the Energy was required during the years 1983 to 1992 to report annually to Congress and the President a determination of the viability of the domestic uranium mining and milling industry.<sup>101</sup> How would the domestic uranium mining and milling industry be defined if foreign companies were allowed to acquire controlling interests in US uranium mines and mills? Section 170B of the AEA presumes that US uranium mines are owned by US persons which indicates Congressional intent that source materials licenses not be issued to foreign-controlled applicants.

Further Congressional intent is discerned from Section 10(b)(3) of the 1946 Act which provides that:

[w]hoever,...with intent to secure an advantage to any foreign nation,

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<sup>100</sup> 10 CFR §40.38.

<sup>101</sup> 42 USC §2210b.

acquires or attempts or conspires to acquire any...information involving restricted data shall, upon conviction thereof, be punished by death or imprisonment for life; or by a fine of not more than \$20,000 or imprisonment for not more than twenty years, or both.

This shows that Congress intended to prohibit foreign companies from acquiring control of US companies that possessed 'restricted data'<sup>102</sup> *under penalty of death*.

AEA Section 62 provides that "no person may transfer or receive in interstate commerce, transfer, deliver, receive possession of or title to, or import into or export from the United States any source material after removal from its place of deposit in nature."<sup>103</sup>

AEA Section 69 provides that "[t]he Commission shall not license any person to transfer or deliver, receive possession of or title to, or import into or export from the United States any source material if, in the opinion of the Commission, the issuance of a license to such person for such purpose would be inimical to the common defense and security or the health and safety of the public."<sup>104</sup>

AEA Section 103(d)<sup>105</sup> states:

[n]o license [for a utilization facility] may be issued to an alien or any corporation or other entity if the Commission knows or has reason to believe it is owned, controlled, or dominated by an alien, a foreign corporation, or a foreign government. In any event, no license may be issued to any person within the United States if, in the opinion of the Commission, the issuance of a license to such person would be inimical to the common defense and security or to the health and safety of the

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<sup>102</sup> "Restricted data" was defined as "all data concerning the manufacture or utilization of atomic weapons, the production of fissionable material, or the use of fissionable material in the production of power." 1946 Act, §10(b)(1).

<sup>103</sup> 42 USC §2092.

<sup>104</sup> 42 USC §2099.

<sup>105</sup> Since the Congressional purposes stated in AEA Section 2 are the same for source material as for utilization facilities, the guidance provided by AEA Section 103(d) is persuasive.

public.”<sup>106</sup>

AEA Section 105 provides that nothing in the AEA relieves any person from regulation under anti-trust laws.<sup>107</sup>

AEA Section 126, concerning export licensing, provides that no export license may be issued for source material until the Commission has been notified by the Secretary of State that it is the judgment of the executive branch that the proposed export or exemption will not be inimical to the common defense and security, and would not be inimical to the common defense and security because it lacks significance for nuclear explosive purposes.<sup>108</sup>

AEA Section 182 provides that in order to obtain a source materials license from the NRC, an applicant must file a license application.<sup>109</sup> Each application shall be in writing and “shall specifically state such information as the Commission, by rule or regulation, may determine to be necessary to decide such of the technical and financial qualifications of the applicant, the character of the applicant, **the citizenship of the applicant**, or any other qualifications of the applicant as the Commission may deem appropriate for the license.<sup>110</sup> Further, licenses issued under the AEA are not transferable, directly or indirectly, through transfer of control or otherwise unless full disclosure is made to the NRC and the NRC “after securing full information” finds that

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<sup>106</sup> 42 USC §2133(d).

<sup>107</sup> 42 USC §2135.

<sup>108</sup> 42 USC §2155; See also 10 CFR Part 110.

<sup>109</sup> 42 USC §2232.

<sup>110</sup> Id. (Emphasis added).

the transfer is in accordance with the provisions of the AEA.<sup>111</sup>

### **Discussion of Influential Prior Commission Decisions**

To the extent that AEA Section 103(d) and related interpretations are deemed to be relevant to foreign ownership of an Applicant for a source materials license, there are a handful of prior Commission decisions that merit consideration. However, none of these Commission decisions was rendered in the post-9/11 World or with any consideration to the current types of nuclear threats, nuclear smuggling, or illicit procurement networks. Accordingly, to the extent that the Commission granted approval to foreign-owned companies with Negation Plans, such approval must be reconsidered in light of current threats.

In General Electric Company and Southwest Atomic Energy Associates case (“SEFOR”), the Atomic Energy Commission (“AEC”) permitted a foreign interest to indirectly participate in the construction of a US commercial nuclear power plant through a contractual arrangement. The AEC found that Congress intended to prohibit situations in which a foreign entity would have the power to direct the actions of a United States licensee. The AEC interpreted the phrase “owned, controlled, or dominated” to mean a situation where **“the will of one party was subjugated to the will of another” with potential adverse implications “toward safeguarding the national defense and security.”**<sup>112</sup>

In contrast, in the case of Cintichem, Applicant was a Delaware corporation whose ultimate parent was F. Hoffman-LaRoche and Co., Ltd., a Swiss corporation. The

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<sup>111</sup> 42 USC §2234.

<sup>112</sup> Palmer Comment at 298-300 (emphasis added).

Commission concluded that it “has reason to believe” that the proposed transferee was owned, controlled, or dominated by an alien or foreign corporation and that the transfer would therefore be barred, without any need to consider whether the foreign ownership, control, or domination would be inimical to the common defense or security.<sup>113</sup> In response to the Commission's adverse decision, Congress added a rider to the NRC's 1984 Authorization Bill permitting the NRC to transfer this specific license to an entity owned or controlled by a foreign corporation if:

(a) the NRC could find that the transfer would not be inimical to the common defense and security, and

(b) the NRC included in the license such conditions as it deemed necessary to ensure that the foreign corporation could not direct the actions of the licensee in ways that would be inimical to the common defense and security.

After the special legislation was passed, the NRC conditionally approved the Cintichem transfer. The transfer was subject to the requirements that: (1) all of the directors of Cintichem had to be United States citizens unless otherwise approved by the NRC; (2) any actions by Switzerland or changes in Swiss law which would affect ownership or control of Cintichem had to be reported immediately to the NRC; and (3) only individuals with security clearances were permitted to have access to Restricted Data. **The Cintichem case illustrates solution for Applicant – it can seek special Congressional legislation and the President’s signature to allow Cameco’s continued foreign ownership and control.**

In 1977, Babcock & Wilcox (“B&W”), the NRC held that a transfer of “effective control” of a licensee constitutes a transfer of a license within the meaning of AEA

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<sup>113</sup> Id. at 300-301.

Section 184. The NRC indicated that one of its three major concerns in connection with the grant of a license or a license transfer was whether the applicant is under foreign domination or control or whether the common defense or security might otherwise be harmed.<sup>114</sup>

In another decision, the NRC approved the proposed transfer of a controlling interest in Exxon Nuclear, a Delaware corporation, to Kraftwerk Union AG (“KWU”) and a wholly-owned subsidiary of Siemens AG, two corporations organized under the laws of the Federal Republic of Germany. Since the NRC licenses held by Exxon Nuclear were for nuclear materials, and not for a production or utilization facility, the statutory prohibition against foreign ownership, control, or domination was not involved, but the license transfer still had to satisfy the not “inimical to the common defense and security” requirement. Exxon Nuclear took great measures in a “Negation Plan” to make sure that control by KWU would not be inimical to the common defense and security because, among other things, prior to the closing date, Exxon Nuclear would divest itself of all interests in DOE classified contracts and would transfer to another entity all of its intellectual property rights in various types of Restricted Data. In addition, Exxon Nuclear would remain a Delaware corporation and indicated that the current directors and principal operating officers, all of whom were United States citizens, would remain in office; that there would be no change in the fundamental materials control program or in the plans for physical security of the facilities or for the physical protection of Special Nuclear Materials in transit. Exxon Nuclear also noted that the Federal Republic of Germany is a signatory of the Nuclear Non-Proliferation Treaty and is a member of

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<sup>114</sup> Id. at 303.

Euratom. The NRC approved the transfer without comment or imposition of additional conditions.

It is important to note the substantial analysis and regulatory oversight that goes into the creation and acceptance of a Negation Plan under very limited circumstances and on a case-by-case basis where a non-controlling interest is held by a foreign company. Applicant should have given proper notice of the transfer of effective control of itself to foreign interests and allowed for the preparation and imposition of an appropriate Negation Plan if, in fact, a fully informed finding shall have been made that the licensing/transfer would not be “inimical.”

#### **NRC “Standard Review Plan on Foreign Ownership, Control or Domination**

The NRC has a “Standard Review Plan on Foreign Ownership, Control or Domination” (the “SRP”), published for interim use and comment on March 2, 1999<sup>115</sup>, which adopts the fundamental approach in SEFOR, and declines to offer a stock percentage threshold above which foreign control would be conclusive, in favor of an analysis of “all the information that bears on who in the corporate structure exercises control over what issues and what rights may be associated with certain types of shares.”<sup>116</sup> However, the SRP also provides that an applicant will be ineligible for a license if it is seeking to acquire a 100% interest in a license and is wholly owned by a U.S. company, where such company is wholly owned by a foreign corporation, unless the foreign parent's stock is largely owned by U.S. citizens.<sup>117</sup> In the instant case, such would be impossible due to the legal requirement imposed on Cameco limiting the

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<sup>115</sup> 64 Fed. Reg. at 52,357; LBP-08-24 at 74.

<sup>116</sup> Malch at 272.

<sup>117</sup> Id. at 273.

percentage ownership of non-Canadians and requiring at least a majority of the shares to be held by Canadians.

The SRP goes on to state that “an applicant that is partially owned by a foreign entity, for example, partial ownership of 50 percent or greater, may still be eligible for a license if certain conditions are imposed, such as requiring that officers and employees of the applicant responsible for special nuclear material must be U.S. citizens. These conditions, which will be necessary whenever the NRC reviewer believes that the applicant may be considered to be owned, controlled, or dominated by foreign interests, or that additional action would be necessary “to negate the foreign ownership, control, or domination,” are called a “Negation Action Plan.” The SRP also makes clear that factors not related to foreign ownership must also be considered, such as contracts and loan agreements. Finally, “further consideration is required” if a foreign applicant is seeking to acquire less than a 100% interest in the facility.<sup>118</sup> Contrary to Applicant’s assertions in this case, and consistent with the Board’s ruling, the mere fact that Canada is an ally of the US and has excellent non-proliferation credentials is not dispositive.<sup>119</sup>

Neither Cameco nor Applicant has ever proposed any form of Negation Action Plan in connection with the Crawford Uranium mine or the export or use of the Yellowcake concentrate that is prepared at the Crawford facility.

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<sup>118</sup> Of course, if the company secretly acquires control of the licensee, there is no opportunity for an NRC reviewer to craft a Negation Action Plan as contemplated by the SRP assuming there is not so much foreign control, domination or influence as to be barred by the AEA.

<sup>119</sup> LBP-08-24 at 74.

## LEGAL ARGUMENTS

It is clear that the determination of foreign ownership, control and domination is a statutory requirement that transcends all of the applicable NRC regulations concerning the issuance and transfers of various kinds of licenses. In this case, the source materials license at issue, SUA-1549, allows for the possession of the U308 and allows Applicant to cause a licensed exporter to ship Uranium out of the United States pursuant to Applicant's instructions.<sup>120</sup> The renewal of SUA-1549 would allow for Applicant to continue to cause the export of Uranium by a licensed shipper as in the case of RSB Logistics. As a result, the renewal of SUA-1549 is directly related to increased risk of proliferation of nuclear source material because it creates a legal basis to not only possess, but also to export, Uranium. Once exported, the Uranium concentrate is free of US restrictions or control. If stolen, one truckload of Uranium concentrate would itself be an RDD and if taken to an enrichment facility, would contain enough Yellowcake for several WMDs.

A full and complete analysis of the nuclear security risks in each case requires strict compliance with the "disclosure of citizenship" requirements of AEA Section 184 as well as a complete analysis of the implications of foreign ownership, control and influence ("FOCI") on the US national interest, common defense and security and on the health and safety of the public. The AEA, pursuant to Section 7(c) of the 1946 Act, bars the issuance of a source materials license to any foreign-owned and controlled entity because its decision-makers are outside the jurisdiction of the United States. Further, even if there were no absolute bar, in light of current nuclear threats and in light of

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<sup>120</sup> See export process described at footnote 69 *infra*.

nuclear smuggling and illicit procurement networks, any issuance to a foreign-owned and controlled applicant is currently inimical to the common defense and security. Finally, even not otherwise barred, the issuance to Cameco of a source materials license is inimical and must be denied for the reasons discussed below.

**I. ISSUANCE OF LICENSE TO FOREIGN OWNED APPLICANT IS NOT IN THE US NATIONAL INTEREST.**

Where is the US national interest served? Petitioners submit that the general US interest in allowing benign foreign investment in the United States is subject in all cases to the interests of national security. Here, the licenses in question are for radioactive source material which is the primogenitor of nuclear reactions, nuclear power and nuclear weapons. As discussed above, the best way to ensure that nuclear weapons do not fall into the wrong hands is to tightly restrict access to natural uranium – especially concentrated Yellowcake. Unfortunately, in our World, anyone with \$100 million can become a nuclear power. Petitioners submit that \$100 million is a paltry sum in light of the multi-billion dollar transactions that are commonplace (not to mention the recent multi-hundred billion dollar bailouts). Accordingly, the stakes now are higher than ever.

The concerns of nuclear security<sup>121</sup> are now paramount. The immediate detection and prevention of any form of nuclear threat is required to maintain our national security.

Three main nuclear threats have been identified by the IAEA:

1. Acquisition by non--State actors or State actors of nuclear material for

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<sup>121</sup> “Nuclear Security” means “the prevention and detection of, and response to, theft, sabotage, unauthorized access, illegal transfer or other malicious acts involving nuclear material, other radioactive substances or their associated facilities,” A. Nilsson, IAEA, footnote 78 *infra* at 9.

- an improvised nuclear explosive device or an existing device
2. Acquisition of radioactive material to construct a radiological dispersal device (“RDD” or “Dirty Bomb”)
  3. Sabotage of installations, locations or transport for dispersal of radioactivity.<sup>122</sup>

Petitioners submit Congress has never expressed any intent to expressly allow foreign interests to control source materials licenses.<sup>123</sup> There is substantial Congressional intent to disallow foreign control of nuclear materials and power plants. The AEA has not been amended to reflect the nuclear threats as currently expressed by the IAEA, the foremost experts in the field. Petitioners submit that the same Congressional intent that supports the prohibition on foreign ownership, control and domination of nuclear power plants under AEA Section 103, requires the conclusion that source materials licenses are likewise barred.

Put another way, the issuance of a source materials license to a foreign controlled entity is *per se* inimical to the common defense and security of the United States due to the nuclear threats posed by nuclear smuggling and proliferation of dual-use items that enable enrichment and the construction of atomic bombs by terrorists and rogue nations. The 1946 Act supports this conclusion.

It is now known that all three of the IAEA focused nuclear threats are posed by the diversion of Yellowcake Uranium and, in the case of WMDs, the enrichment and weaponization of the same. No less significant is the detection and prevention of RDDs

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<sup>122</sup> *Id.* at 3.

<sup>123</sup> Applicant’s argument that there is no prohibition in the AEA and therefore, it must be allowed without actually pointing out any authority in the AEA for issuing a source materials license to a foreign-owned and controlled entity demonstrates that Applicant has failed to meet its burden of persuasion.

which are weapons of mass disruption and cause massive psychological damage. Especially, in the current times of fragile public psyche, such a weapon of mass disruption could have profoundly adverse economic impacts and should not be underestimated as a real-world nuclear threat. Therefore, it is not in the US national interest to allow foreign companies to control the mining, transport and export of millions of pounds of Yellowcake Uranium or to dominate the US uranium industry.

Further, there is no support for the proposition that Congress intended source materials licenses to be issued to companies controlled by persons outside of US regulatory jurisdiction. NRC regulations in Part 40 apply to all persons in the United States.<sup>124</sup> There is no regulation that extends jurisdiction to persons outside of the United States.

While the 1954 Act does not address this issue directly, the 1946 Act Section 7(c) applies to bar any license from being “**given to any person for activities which are not under or within the jurisdiction of the United States.**”<sup>125</sup> Petitioners submit that when the activities of an applicant are controlled by decision-makers who are “not under or within the jurisdiction of the United States” such activities are likewise not “under or within the jurisdiction of the United States” for purposes of Section 7(c) of the 1946 Act. As a result, the AEA bars the issuance of any license to any person who is controlled by persons that are not “under or within the jurisdiction of the United States.”

In addition, from an economic standpoint, it is not in the US national interest to allow the entirety of the US domestic uranium industry to be controlled by foreign

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<sup>124</sup> 10 CFR § 40.2.

<sup>125</sup> 1946 Act, §7(c) (emphasis added.)

interests.<sup>126</sup> Further, the US national interest includes preventing “Economic Espionage”<sup>127</sup> which is made more likely if source materials licenses are issued to foreign-owned and controlled entities.

The US national interest requires a stable source of domestically controlled uranium to supply to US power plants and for medical and scientific needs now and projected needs in the future. It is noteworthy, that some of the objections of the proposed CNOOC purchase of Unocal was that the Chinese owned oil could be diverted away from global markets to exclusively serve China’s oil needs.<sup>128</sup> The same risk applies now because Cameco controls the US uranium industry and US uranium is required to fuel US nuclear power plants which in turn currently provide about 19% of the power generation in the US. If there were a shortage, what would keep Cameco from diverting Uranium and nuclear fuel from the global markets to exclusively serve Canada’s needs (e.g., its affiliate Bruce Power)?

Further, it is not in the US national interest for US people to be saddled with pollution caused by a mine where the results – the Yellowcake – is exported, sold and used outside the US for foreign profit. How has the United States become a “raw materials colony” for other countries and how can that be in the US national interest?

Therefore, there is an absolute prohibition against the issuance of source materials licenses to persons who are under foreign ownership, control and domination.

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<sup>126</sup> See AEA §105 concerning applicability of anti-trust laws.

<sup>127</sup> “Economic espionage” was defined in a 1994 U.S. government interagency report as “government-sponsored or coordinated intelligence activity designed to unlawfully and covertly obtain classified data and/or sensitive policy or proprietary information from a U.S. Government agency or company, potentially having the effect of enhancing a foreign country’s economic competitiveness and damaging U.S. economic security. See Defense Industrial Security: Weaknesses in DOD Security Arrangements at Foreign-Owned Defense Contractors (GAO/NSIAD-96-64) (February 1996), at 2.

<sup>128</sup> See National Security and FDI at 130.

**II. ISSUANCE OF LICENSE TO FOREIGN OWNED APPLICANT IS  
INIMICAL TO US COMMON DEFENSE AND SECURITY.**

In addition to the factor described above, for “common defense and security – “CD&S” factors, we look to whether the nuclear threats are exacerbated or mitigated by allowing foreign ownership, control and domination over companies that mine Uranium in the United States. Petitioners submit that the nuclear threats are exacerbated by foreign control over Uranium mines because **“the hardest part for those bent on nuclear terror has always been acquiring the weapons-grade uranium or plutonium required to make the bomb. Our crucial task is to secure that material before the terrorists can steal it or buy it on the black market.”**<sup>129</sup> Accordingly, even if the Board finds that there is no absolute prohibition on the issuance of a source materials license as argued in Section I above, in the current nuclear security environment, it is currently inimical to the common defense and security of the United States to allow the issuance of source materials licenses to foreign-owned and controlled entities. The pervasive corruption involved in nuclear smuggling and President Obama’s urging to “work tirelessly to lessen the nuclear threat,”<sup>130</sup> provide ample grounds for this Board to rule that all foreign ownership and control of source material is inimical to the common defense and security of the United States.

Petitioners further submit that it is in the interests of the US common defense and security to: (1) keep anything that is useful on the “Path to the Bomb” or an RDD out of the hands of bad actors; (2) prevent diversion of technology capable of assisting in the

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<sup>129</sup> WMD Commission Report at 43-44 (emphasis added).

<sup>130</sup> President Obama Inauguration Speech (January 20, 2009).

Path to the Bomb; (3) maintain a sufficient supply of Uranium for the US nuclear weapons program and military uses, and (4) maintain a sufficient supply of Uranium to ensure a domestically controlled supply of current and projected needs for US nuclear power generation.

We also look to preventing damage to critical infrastructure, including drinking water resources, due to intentional or reckless conduct by foreign interests which could have the same effect as a weapon of mass destruction or RDD.

If the 1989 MAMCO purchase by China Aero implicated national security due to the fabrication of aircraft parts then surely national security is implicated by the control, ownership and export of millions of pounds of U308 Yellowcake each year – as in the instant case.

Any issuance of a source materials license to a foreign-owned and controlled entity would be contrary to the foregoing interests of nuclear security, would exacerbate the risks of nuclear threats and are clearly inimical to the common defense and security.

**III. ISSUANCE OF LICENSE TO FOREIGN OWNED APPLICANT IS INIMICAL TO PUBLIC HEALTH AND SAFETY.**

In addition to the factors discussed above, for “health and safety of the public – PH&S” factors we look to avoiding contamination and releases into pathways for human ingestion; encouraging regulatory compliance through effective enforcement; collectability of under-collateralized cleanup costs (i.e., when as is often the case clean up costs exceed the amount of the applicable surety bond if any); access to restricted

information; jurisdiction of regulators and regulations over foreign decision-makers; access to records related to mine but stored at foreign affiliate locations; subpoena authority over foreign decision-makers and foreign located records.

One example of the negative impact of foreign ownership, control and domination on the operation of an ISL uranium mine is that foreign owners and control persons who are not US persons have no loyalty to prevent the reckless, negligent or intentional contamination of the environment by the ISL mining. Such activities could result in environmental damage or loss of drinking water resources in the aquifers that would be equivalent as if a WMD or RDD had been used against America.

In addition, a foreign controlled uranium mining company would be more inclined to suppress relevant geologic data that shows probabilities of structural control and mineralization (and related groundwater flows and contamination risks) or even forge compliance documents in favor of profit taking in what is often known as “cut and run” mining operations. The foreign ownership and control of a US mine creates a culture of recklessness at the foreign headquarters for the health and safety of the people living near the mine because the decision-makers do not live near the mine and do not drink the water there. This is why Section 7(c) of the 1946 Act prohibits licenses to be issued when the decision-makers are located outside the United States.

As a result, lack of foreign ownership, control and domination is required in order to properly preserve the health and safety of the public as required by the AEA and NRC Regulations.

**IV. EVEN IF NO ABSOLUTE BAR, ISSUANCE OF LICENSE TO  
FOREIGN OWNED CAMECO IS NOT IN THE US NATIONAL  
INTEREST**

For the reasons discussed above, particularly in Section I with respect to foreign-owned applicants generally, the issuance of a source materials license to foreign Cameco's US subsidiary, Cameco Resources (aka Crow Butte Resources, Inc.) is inimical to the US national interest. With Cameco's ownership of Applicant and of its sister company, Power Resources, Inc., Cameco mines and exports about 3,000,000 pounds of concentrated U308 per year – making Cameco the largest producer and exporter of Uranium mined in the US. This concentration of ownership of the US Uranium industry in the hands of a single foreign company has major anticompetitive implications. Petitioners note that AEA Section 105 provides that nothing in the AEA relieves any person from regulation under anti-trust laws.<sup>131</sup>

It is contrary to the US national interest to grant a foreign company a license to mine and export yellowcake uranium when, as in the instant case, the company (or its parent) takes the yellowcake uranium outside of US legal restrictions. Cameco is aware of this and makes the statement on pages 12-13 of its 2007 Annual Information Form dated March 28, 2008, that: “[t]he US restrictions have no effect on the sale of Russian uranium to other countries. About 70% of the world uranium requirements arise from utilities in countries unaffected by the US restrictions. In 2007, approximately 48% of Cameco's sales volume was to countries unaffected by the US restrictions.” This shows that while Canada is subject to the Non-Proliferation Treaty, there are other aspects of US

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<sup>131</sup> 42 USC §2135.

legal control over source and nuclear materials that can be avoided by foreign owners of US Uranium mines such as Cameco. Further, as discussed above, the Non-Proliferation Treaty has failed to keep up with the ever-evolving methods of nuclear smugglers and illicit procurement networks. Therefore mere compliance with the Non-Proliferation Treaty, or the fact that an activity does not violate the Treaty, does not in and of itself mean that the nuclear threat is not increased or that things are somehow fine.

The issuance of source materials licenses must be found to serve the US national interest. In this case, if the Applicant's position were to be accepted, how would the control persons of the parent company of Applicant be made subject to NRC Regulations if Section 40.2 makes them applicable only to persons in the United States? If Applicant's corporate shares were secretly acquired, at what point in the process would the NRC have an opportunity to secure full information and obtain sufficient assurances in a "Negation Plan" (through contracts, corporate restructuring, such as a "spin-off" of US assets to public shareholders, or otherwise) to neutralize the risks associated with foreign ownership, control and domination of an NRC licensee?

How can the Applicant ensure that a decision-maker in the ultimate parent at some far away headquarters will not be able to collaborate in a diversion of the Uranium concentrate in complicity with bad actors? We know that illicit procurement networks and nuclear smugglers have corrupted legitimate business executives in the past. What assurance is there that Cameco's executives in Saskatoon are immune from corruption when it comes to potential actions against American (not Canadian) interests?

How can it be in the US national interest to allow such large amounts of

Yellowcake concentrate to be exported on an annual basis under the control of persons who themselves are outside the jurisdiction of the United States? It is not.

Therefore, the license renewal must be denied.

**V. EVEN IF NO ABSOLUTE BAR, ISSUANCE OF LICENSE TO  
FOREIGN OWNED CAMECO IS INIMICAL TO US COMMON  
DEFENSE AND SECURITY**

For the reasons discussed above, particularly in Section II with respect to foreign-owned applicants generally, the issuance of a source materials license to foreign Cameco's US subsidiary, Cameco Resources (aka Crow Butte Resources, Inc.) is inimical to the common defense and security of the United States. If any further analysis is required it would be in light of what is known about current nuclear security threats, nuclear smuggling and illicit procurement networks.

The Court of Appeals recognized the problems associated with allowing non-US persons to control nuclear materials, "the internal evidence of the Act is that Congress was thinking of keeping such materials in private hands secure against loss or diversion; and of denying such materials and classified information to persons whose loyalties were not to the United States." Siegel v. Atomic Energy Commission, 400 F.2d 778, 784 (DC Cir. 1968).

Therefore, Cameco bears the burden of showing that its ownership of the entity licensed by SUA-1549 does not create any threat to the common defense and security of the United States. In the absence of any Negation Plan, and in light of the concealment

of Applicant's foreign ownership and Applicant's absolute failure to propose a Negation Plan, Applicant's license renewal for the benefit of foreign Cameco would be inimical to the public health and safety and, therefore, must be denied.

If any further analysis is required it would be under 10 CFR §40.32 which provides that once the Commission has received full disclosure in an application, it may approve the sought after source materials license in accordance if: (a) The application is for a purpose authorized by the Act;<sup>132</sup> (b) The applicant is qualified by reason of training and experience to use the source material for the purpose requested in such manner as to protect health and minimize danger to life or property; (c) The applicant's proposed equipment, facilities and procedures are adequate to protect health and minimize danger to life or property; and **(d) The issuance of the license will not be inimical to the common defense and security or to the health and safety of the public.**<sup>133</sup>

One could compare Canadian Cameco with Chinese CNOOC – both in the energy sector – identified as a part of “critical infrastructure.” CNOOC involved oil and Cameco involves Uranium. There are far fewer national security implications involved with oil than with Uranium due to the potential non-peaceful applications of Uranium.<sup>134</sup>

Cameco - a “Canadian Mining and Energy Corporation” was formed in 1988 by the merger and privatization of two Canadian (i.e., government-owned) crown corporations: the federally owned Eldorado Nuclear Limited (known previously as Eldorado Mining and Refining Limited) and Saskatchewan-based Saskatchewan Mining

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<sup>132</sup> Petitioners submit this means “in the US national interest.”

<sup>133</sup> 10 CFR §40.32 (emphasis added).

<sup>134</sup> Even compared as energy without regard to its radiological impact, Uranium would be on a par with oil as an energy resource.

Development Corporation (SMDC). The name was later shortened to "Cameco Corporation". Cameco was initially owned 62% by the provincial government and 38% by the federal government. The initial public offering (IPO) for 20% of the company was conducted in July, 1991. Government ownership of the company decreased over the next 9 years, with full privatization occurring in February, 2002.<sup>135</sup> Accordingly, during the time since the last renewal of SUA-1549, a Canadian Government-owned company acquired control of Applicant. Therefore, under the Byrd Amendment, there should have been a mandatory review by CFIUS under Exon-Florio; Applicant has not provided any evidence that Cameco's purchase of Applicant complied with Exon-Florio.

Although Petitioners could find no public records of favorable loans or financings by the Government of Canada to Cameco, it is possible that such finance arrangements or governmental back-ups or guarantees may be in place. Cameco purchased the two largest Uranium mines in the United States and controls 3,000,000 pounds of U308 Yellowcake that is mined and exported to its affiliates in Canada. Of that amount, about 1,000,000 pounds of U308 is mined and exported under SUA-1549.

CNOOC – "Chinese National Offshore Oil Corporation" was founded in 1982 and is one of the largest state-owned oil giants in China, as well as the largest offshore oil and gas producer. It is authorized to cooperate with foreign partners for oil and gas exploitation in China's offshore areas. Headquartered in Beijing, it has a total staff of 51,000 with a registered capital of RMB 94.9 billion.<sup>136</sup> In connection with the Unocal purchase, CNOOC received easy credit and investment from the Government of China in order to pay for the shares. At the time, Unocal's share of the US oil market was less

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<sup>135</sup> <http://en.wikipedia.org/wiki/Cameco>

<sup>136</sup> <http://www.cnooc.com.cn/yyww/gsjj/default.shtml>.

than Cameco's current share of the US Uranium market. CNOOC voluntarily filed with CFIUS.

Petitioners submit that the similarities between Cameco's 1996-2000 quiet purchase of Applicant (especially when viewed in light of Cameco's purchase of Power Resources, Inc of Wyoming) and CNOOC's 2005 failed purchase of Unocal are many – the same impacts on the common defense and security. The main differences between Cameco and CNOOC transactions are that one involved Canada and one involved China and of the two acquirers, CNOOC voluntarily filed with CFIUS and Cameco concealed its foreign ownership of the mines from regulators.

For the same reasons as CNOOC's purchase of Unocal was inimical to common defense and security, so was Cameco's purchase of Crow Butte Resources, Inc. and Power Resources, Inc. (Wyoming-SUA-1548). Petitioners submit that if Cameco had been owned by another country like China, it would be required to divest on national security grounds in the same way as the China Aero-Tech purchase of MAMCO was ordered divested in 1990.

**VI. EVEN IF NO ABSOLUTE BAR, ISSUANCE OF LICENSE TO  
FOREIGN OWNED CAMECO IS INIMICAL TO PUBLIC HEALTH  
AND SAFETY**

For the reasons discussed above, particularly in Section III with respect to foreign-owned applicants generally, the issuance of a source materials license to foreign Cameco's US subsidiary, Cameco Resources (aka Crow Butte Resources, Inc.) is

inimical to public health and safety of the people of the United States.

For example, it is inimical to the public health and safety to allow corporate recordkeeping practices that whereby records are maintained at the foreign parent's offices and outside the jurisdiction of the United States and NRC Regulations. This raises the question that if all key executive of Applicant attend a strategy meeting at their parent's headquarters in Canada, then to what extent is restricted data being compromised? To what extent are meeting minutes at that Canada meeting available for discovery in this US NRC proceeding. If Cameco resists lawful discovery requests concerning Cameco's corporate minutes related to any issue related to public health and/or safety, then enforcement of the AEA, NEPA (or other relevant statute such as antitrust, export control, etc.) would be frustrated. Accordingly, to the extent that the enforcement of the AEA and NRC Regulations is made more difficult by one iota, such is an indication that foreign ownership of Applicant is inimical to the public health and safety.

It is inimical to the public health and safety to fail to monitor Arsenic or to filter Arsenic out of the mined aquifer. The foreign ownership and control of Applicant creates a culture of recklessness for the health and safety of the people living near the mine because the decision-makers do not live near the mine and do not drink the water there.

The ultimate parent's non-US assets are beyond the reach of US jurisdiction and may not be used to satisfy restoration and decommissioning liabilities to the extent that such liabilities exceed the amount recovered under any surety bond or letter of credit. This creates financial insecurity for the payment of restoration costs creating contingent

liabilities for the local, state and federal budgets that would be used to pay for the shortfall. Such is inimical to the health and safety of the public.

### CONCLUSION

For all the foregoing reasons, the Board should issue a ruling that the NRC lacks the authority to grant the license renewal due to the complete foreign ownership, domination and control of Applicant, deny Applicant's renewal and order the Applicant to cease mining, transporting or exporting (or causing to be exported) source material and to commence full time water restoration and decommissioning; and further this Board should order that all amounts under the surety bond(s) be forthwith drawn down and put under the control of the NRC to pay for such restoration and decommissioning.

In the alternative, if the Board finds that there is no absolute bar, the Board should deny the renewal due to inimicality under Section 40.32(d) because Applicant failed to submit a complete Negation Action Plan that would irrevocably negate the adverse impacts of its foreign ownership to national security including: US persons select directors, no meetings outside the US; all minutes kept within the US according to US corporate standards and available for inspection by regulators and in US civil, criminal and regulatory proceedings; personal and corporate consents to jurisdiction; legally effective irrevocable pledges of foreign assets to collateralize obligations of US subsidiary; implementation of corporate nonproliferation code; identify all members of management structure of parent that have any management, control or access to the decision-making of the Applicant and they are to pass US background security checks at least as stringent as applied to the US management of Applicant and applied to foreign

owner/operators of nuclear power plants.

As noted by the Board in LBP-08-24, this issue is 'fatal' to Applicant's license renewal. Accordingly, the license renewal must be denied.

Dated this 21<sup>st</sup> day of January, 2009.

Respectfully submitted,

/s/ - electronically signed

David Frankel  
Attorney for Petitioners  
P. O. Box 3014  
Pine Ridge, SD 57770  
308-430-8160  
E-mail: [arm.legal@gmail.com](mailto:arm.legal@gmail.com)



RSB LOGISTIC INC.  
219 Cardinal Crescent  
Saskatoon, SK S7L 7K8  
Canada

VIA FACSIMILE  
301-415-2395

Phone 306-242-8300  
Toll-Free 800-667-3934  
Fax 306-242-2311

12 May 2000

United States Nuclear Regulatory Commission  
Office of International Programs  
Export/Import Licensing Office  
11555 Rockville Pike  
Rockville, MD 20852

Attention: Ms. Betty Wright

Re: Export License No. XSOU 8744 for Natural Uranium as Uranium  
Ore Concentrate (U<sub>3</sub>O<sub>8</sub>)

Dear Ms. Wright:

RSB LOGISTIC SERVICES INC. wishes to amend a current supplier to the  
"other parties to Export" under this license. The current supplier is:

Uranerz U.S.A./Crow Butte Resources, Inc.  
86 Crow Butte Road  
Crawford, NE 69339

Please be advised that Uranerz U.S.A. has changed names to UUS Inc. Please  
amend supplier to read:

UUS Inc./Crow Butte Resources, Inc.  
86 Crow Butte Road  
Crawford, NE 69339

If in the future, this export license would require an amendment, RSB LOGISTIC  
SERVICES INC. would add the above named additional supplier to previously  
Named "parties to export".

If you have any questions on this matter, please feel free to call me.

Thank you for your assistance.

Sincerely,

Basil R. Hobson  
Operations Manager  
Nuclear Transportation Management Division



RSB LOGISTIC INC.  
219 Cardinal Crescent  
Saskatoon, SK S7L 7K8  
Canada

VIA FACSIMILE  
301-415-2395

Phone 306-242-8300  
Toll-Free 800-667-3934  
Fax 306-242-2311

12 May 2000

United States Nuclear Regulatory Commission  
Office of International Programs  
Export/Import Licensing Office  
11555 Rockville Pike  
Rockville, MD 20852

Attention: Ms. Betty Wright

Re: Export License No. XSOU 8744 for Natural Uranium as Uranium  
Ore Concentrate (U<sub>3</sub>O<sub>8</sub>)

Dear Ms. Wright:

RSB LOGISTIC SERVICES INC. wishes to add an additional supplier to the  
"other parties to Export" under this license. The additional supplier is:

Geomex Minerals, Inc./Crow Butte Resources, Inc.  
86 Crow Butte Road  
Crawford, NE 69339

If in the future, this export license would require an amendment, RSB LOGISTIC  
SERVICES INC. would add the above named additional supplier to previously  
Named "parties to export".

If you have any questions on this matter, please feel free to call me.

Thank you for your assistance.

Sincerely,

Basil R. Hobson  
Operations Manager  
Nuclear Transportation Management Division

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

Before Administrative Judges:  
Michael M. Gibson, Chairman  
Dr. Richard F. Cole  
Mr. Brian K. Hajek

In the Matter of

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

Docket No. 40-8943

ASLBP No. 08-867-02-OLA-BD01

January 21, 2009

CERTIFICATE OF SERVICE

I hereby certify that copies "PETITIONERS' BRIEF RE: MISCELLANEOUS  
CONTENTION K – FOREIGN OWNERSHIP" in the above captioned proceeding has  
been served on the following persons by electronic mail as indicated by a double asterisk  
(\*\*); on this 21<sup>st</sup> day of January, 2009:

Judge Michael M. Gibson, Chair \*\*  
Atomic Safety and Licensing Board Panel  
U. S. Nuclear Regulatory Commission  
Washington, DC 20555-0001  
E-Mail: [mmg3@nrc.gov](mailto:mmg3@nrc.gov)

Judge Brian K. Hajek \*\*  
Atomic Safety and Licensing Board Panel  
U. S. Nuclear Regulatory Commission  
Washington, DC 20555-0001  
E-Mail: [hajek.1@osu.edu](mailto:hajek.1@osu.edu); [BHK3@nrc.gov](mailto:BHK3@nrc.gov)

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](mailto:Richard.Cole@nrc.gov)

Judge Alan S. Rosenthal \*\*  
Atomic Safety and Licensing Board Panel  
U. S. Nuclear Regulatory Commission  
Washington, DC 20555-0001  
E-mail- [rsnthl@verizon.net](mailto:rsnthl@verizon.net)

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](mailto: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](mailto:Hearing.Docket@nrc.gov)

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

Crow Butte Resources, Inc. \*\*  
Attn: Stephen P. Collings  
141 Union Blvd., Suite 330  
Lakewood, CO 80228

E-mail: [steve\\_collings@cameco.com](mailto:steve_collings@cameco.com)

Debra White Plume \*\*  
P. O. Box 71  
Manderson, SD 57756  
E-mail: [LAKOTA1@gwtc.net](mailto:LAKOTA1@gwtc.net)

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

Thomas Kanatakeniate Cook \*\*  
1705 S. Maple Street  
Chadron, NE 69337  
E-mail: [tcCook@indianyouth.org](mailto:tcCook@indianyouth.org)

Western Neb. Resources Council \*\*  
Attn: Buffalo Bruce  
P. O. Box 612  
Chadron, NE 69337  
E-mail: [buffalo.bruce@panhandle.net](mailto:buffalo.bruce@panhandle.net)

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

Shane C. Robinson, Esq. \*\*  
2814 E. Olive St.  
Seattle, WA 98122  
E-mail: [shaneCrobison@gmail.com](mailto:shaneCrobison@gmail.com)

Elizabeth Maria Lorina, Esq. \*\*  
Law Office of Mario Gonzalez  
522 7<sup>th</sup> Street, Suite 202  
Rapid City, SD 57701  
E-mail [elorina@gnzlawfirm.com](mailto:elorina@gnzlawfirm.com)

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

Catherine Marco, Esq.  
[Catherine.Marco@nrc.gov](mailto:Catherine.Marco@nrc.gov)

Brett M.P. Klukan, Esq.  
[Brett.Klukan@nrc.gov](mailto:Brett.Klukan@nrc.gov)

Shahram Ghasemian, Esq.  
[Shahram.Ghasemian@nrc.gov](mailto:Shahram.Ghasemian@nrc.gov)

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

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

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

Also From EIE Service List:

[lcarter@captionreporters.com](mailto:lcarter@captionreporters.com)  
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[rl@nrc.gov](mailto:rl@nrc.gov)  
[nsg@nrc.gov](mailto:nsg@nrc.gov)  
[elj@nrc.gov](mailto:elj@nrc.gov)  
[Linda.lewis@nrc.gov](mailto:Linda.lewis@nrc.gov)  
[esn@nrc.gov](mailto:esn@nrc.gov)  
[ogcmailcenter@nrc.gov](mailto:ogcmailcenter@nrc.gov)

[cmp@nrc.gov](mailto:cmp@nrc.gov)  
[matthew.rotman@nrc.gov](mailto:matthew.rotman@nrc.gov)  
[tpr@nrc.gov](mailto:tpr@nrc.gov)  
[csisco@winston.com](mailto:csisco@winston.com)  
[axr@nrc.gov](mailto:axr@nrc.gov)  
[sxg4@nrc.gov](mailto:sxg4@nrc.gov)  
[mxw6@nrc.gov](mailto:mxw6@nrc.gov)  
[rfcl@nrc.gov](mailto:rfcl@nrc.gov)  
[Bmk1@nrc.gov](mailto:Bmk1@nrc.gov)  
[clm@nrc.gov](mailto:clm@nrc.gov)  
[jrt3@nrc.gov](mailto:jrt3@nrc.gov)  
[megan.wright@nrc.gov](mailto:megan.wright@nrc.gov)  
[ace1@nrc.gov](mailto:ace1@nrc.gov)  
[nets@columbus.rr.com](mailto:nets@columbus.rr.com)

Respectfully submitted,

/s/ - electronically signed

David Frankel  
Attorney for Petitioners  
P. O. Box 3014  
Pine Ridge, SD 57770  
308-430-8160  
E-mail: [arm.lcgal@gmail.com](mailto:arm.lcgal@gmail.com)

## Hearing Docket

**From:** David Cory Frankel [davidcoryfrankel@gmail.com]  
**Sent:** Wednesday, January 21, 2009 10:50 PM  
**To:** Tom Ballanco; Johanna Thibault; Hearing Docket; ASLBP\_HLW\_Adjudication Resource; Elizabeth Lorina; Brett Klukan; trsmith@winston.com; shanecrobinson@gmail.com; OCAAMAIL Resource; arm.legal@gmail.com; Alan Rosenthal; rsnthl@verizon.net; Michael Gibson; Richard Cole; hajek.1@osu.edu; Marck McGuire; Secy; Bruce Ellison; Deb White Plume; Tom Cook; Buffalo Bruce; Monique Cesna; Shahram Ghasemian; BHK3@nrc.gov; Michael Gibson; Alan Rosenthal; Catherine Marco; lcarter@captionreporters.com; ejduncan@winston.com; Rebecca Giitter; Nancy Greathead; Emile Julian; Linda Lewis; Evangeline Ngbea; OGCMailCenter Resource; Christine Pierpoint; Matthew Rotman; Tom Ryan; csisco@winston.com; Shahram Ghasemian; Megan Wright; Johanna Thibault; Richard Cole; Brett Klukan; Megan Wright; Anthony Eitreim; nets@columbus.rr.com  
**Subject:** Transmitting Document in Docket No. 40-8943 - ASLBP No. 08-867-02-OLA-BD01  
**Attachments:** (Renewal) EIE conformed COS 01212009.pdf; XSOU RS Logistics Export Lic 003770416 May 12 2000 Letters re Crow Butte.pdf; Petitioners Brief re Contention K 01212009.pdf

Dear All,

Attached for filing are Petitioners Brief re: Miscellaneous Contention K - Foreign Ownership, and related COS; as well as the attachment referred to in footnote 69 of the Brief.

Sincerely,

/s/

David Frankel  
Counsel for Petitioners  
POB 3014  
Pine Ridge, SD 57770  
3078-430-8160  
[Arm.legal@gmail.com](mailto:Arm.legal@gmail.com)

Received: from mail1.nrc.gov (148.184.176.41) by TWMS01.nrc.gov  
(148.184.200.145) with Microsoft SMTP Server id 8.1.291.1; Wed, 21 Jan 2009  
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Return-Path: <davidcoryfrankel@gmail.com>

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Date: Wed, 21 Jan 2009 17:50:06 -1000

Subject: Transmitting Document in Docket No. 40-8943 - ASLBP No.  
08-867-02-OLA-BD01

From: David Cory Frankel <davidcoryfrankel@gmail.com>

To: Tom Ballanco <harmonicengineering1@mac.com>,

Johanna Thibault <Johanna.Thibault@nrc.gov>,

Hearing Docket <Hearing.Docket@nrc.gov>,

ASLBP\_HLW\_Adjudication Resource

<ASLBP\_HLW\_Adjudication.Resource@nrc.gov>,

Elizabeth Lorina <elorina@gnzlawfirm.com>,

Brett Klukan <Brett.Klukan@nrc.gov>,

"trsmith@winston.com" <trsmith@winston.com>,

"shanecrobinson@gmail.com" <shanecrobinson@gmail.com>,

OCAAMAIL Resource <OCAAMAIL.Resource@nrc.gov>,

"arm.legal@gmail.com" <arm.legal@gmail.com>,

Alan Rosenthal <Alan.Rosenthal@nrc.gov>,  
"rsnthl@verizon.net" <rsnthl@verizon.net>,  
Michael Gibson <Michael.Gibson@nrc.gov>,  
Richard Cole <Richard.Cole@nrc.gov>,  
"hajek.1@osu.edu" <hajek.1@osu.edu>,  
Marck McGuire <MDMSJN@alltel.net>,  
Secy <SECY@nrc.gov>,  
Bruce Ellison <belli4law@aol.com>,  
Deb White Plume <lakota1@gwtc.net>,  
Tom Cook <slmbttsag@bbc.net>,  
Buffalo Bruce <Buffalo.Bruce@panhandle.net>,  
Monique Cesna <mcesna@gnzlawfirm.com>,  
<Shahram.Ghasemian@nrc.gov>,  
<BHK3@nrc.gov>,  
<mmg3@nrc.gov>,  
<axr@nrc.gov>,  
Catherine Marco <Catherine.Marco@nrc.gov>,  
<lcarter@captionreporters.com>,  
<ejduncan@winston.com>,  
<rll@nrc.gov>,  
<nsg@nrc.gov>,  
<elj@nrc.gov>,  
<Linda.lewis@nrc.gov>,  
<esn@nrc.gov>,  
<ogcmailcenter@nrc.gov>,  
<cmp@nrc.gov>,  
<matthew.rotman@nrc.gov>,  
<tpr@nrc.gov>,  
<csisco@winston.com>,  
<sxg4@nrc.gov>,  
<mxw6@nrc.gov>,  
Johanna Thibault <JRT3@nrc.gov>,  
<rfc1@nrc.gov>,  
<bm1@nrc.gov>,  
<megan.wright@nrc.gov>,  
<ace1@nrc.gov>,  
<nets@columbus.rr.com>

Message-ID: <C59D10D4.2A4C9%davidcoryfrankel@gmail.com>

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