

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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

NRC STAFF'S NOTICE OF APPEAL OF LICENSING BOARD'S
ORDER OF JANUARY 27, 2009 (LBP-09-01), AND ACCOMPANYING BRIEF

Brett Michael Patrick Klukan
Counsel for the NRC Staff

February 6, 2009

TABLE OF CONTENTS

<u>TABLE OF CONTENTS</u>	i
<u>TABLE OF AUTHORITIES</u>	ii
<u>INTRODUCTION</u>	1
<u>BACKGROUND</u>	2
<u>ARGUMENT</u>	7
I. <u>Legal Standards for Contention Admissibility</u>	7
II. <u>The Board Erred in Several Respects in Admitting Contention E</u>	8
A. <u>Issues Pertaining to the Applicant’s Failure to Disclose its Foreign Ownership</u>	9
B. <u>Issues Pertaining to the Significance of Applicant’s Foreign Ownership</u>	11
1. <u>The Board Accepts Arguments in Support of the Contention Not Actually Alleged by the Petitioners in the Reference Petition</u>	11
2. <u>The Board Incorrectly Concludes that the Petitioners Provided Sufficient Factual Support for Contention E</u>	12
3. <u>The Board Based its Acceptance of Contention E on Matters Outside the Scope of the License Amendment Proceeding</u>	13
4. <u>In its Analysis of 10 C.F.R. § 40.32(d), the Board Engages in an Unwarranted Reconsideration of the NRC’s Past Regulatory Approval of Cameco’s Control of CBR</u>	18
<u>CONCLUSION</u>	20

TABLE OF AUTHORITIES

STATUTES

42 U.S.C. § 2133(d)	18
42 U.S.C. § 2134(d)	18
42 U.S.C. § 2232(a)	10

ADMINISTRATIVE DECISIONS

Commission

<i>Arizona Pub. Serv. Co.</i> (Palo Verde Nuclear Generating Station, Units 1, 2, and 3) CLI-91-12, 34 NRC 149 (1991)	8
<i>Baltimore Gas & Elec. Co.</i> (Calvert Cliffs Nuclear Power Plant, Units 1 and 2) CLI-98-25, 48 NRC 325 (1998)	8
<i>Curators of the University of Missouri</i> CLI-95-1, 41 NRC 71 (1995)	14, 15, 16
<i>Dominion Nuclear Connecticut, Inc.</i> (Millstone Nuclear Power Station, Units 2 & 3) CLI-01-24, 54 NRC 349 (2001)	7
<i>Duke Energy Corp.</i> (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2) CLI-02-28, 56 NRC 373 (2002)	11
<i>Fansteel, Inc.</i> (Muskogee, Oklahoma Site) CLI-03-13, 58 NRC 195 (2003)	8, 12
<i>Florida Power & Light Co.</i> (Turkey Point Nuclear Generating Units No. 3 and No. 4) 4 AEC 9 (1967)	18
<i>Florida Power and Light Co.</i> (Turkey Point Nuclear Generating Plant, Units 3 and 4) CLI-00-23, 52 NRC 327 (2000)	7
<i>GPU Nuclear, Inc.</i> (Oyster Creek Nuclear Generating Station) CLI-00-6, 51 NRC 193 (2000)	12
<i>Kerr-McGee Corp.</i> (West Chicago Rare Earths Facility) CLI-82-2, 15 NRC 232 (1982)	14, 15

Louisiana Energy Services, L.P.
(National Enrichment Facility)
CLI-05-20, 62 NRC 523 (2005)..... 11

N. Alt Energy Serv. Corp
(Seabrook Station, Unit 1)
CLI-99-6, 49 NRC 201 (1999)..... 8

Private Fuel Storage, LLC
(Independent Spent Fuel Storage Installation)
CLI-99-10, 49 NRC 318 (1999)..... 8

Shaw AREVA MOX Services
(Mixed Oxide Fuel Fabrication Facility)
CLI-09-02, 68 NRC ____ (Feb. 2, 2009)..... 7

Atomic Safety and Licensing Appeal Board

General Public Utilities Nuclear
(Three Mile Island Nuclear Station, Unit No. 1)
ALAB-881, 26 NRC 465 (1987) 17

Virginia Electric and Power Co.
(North Anna Nuclear Power Station, Units 1 and 2)
ALAB-584, 11 NRC 451 (1980) 19

Atomic Safety and Licensing Board Decisions and Orders

Entergy Nuclear Vermont Yankee, LLC and Entergy Nuclear Operations
(Vermont Yankee Nuclear Power Station)
LBP-06-14, 63 NRC 568 (2006)..... 7

Georgia Institute of Technology
(Georgia Tech Research Reactor)
LBP-95-6, 41 NRC 281 (1995)..... 8

Louisiana Energy Services, L.P.
(National Enrichment Facility)
LBP-04-14, 60 NRC 40 (2004)..... 8

REGULATIONS

10 C.F.R. § 2.309(f)(1)..... 7, 8

10 C.F.R. § 2.309(f)(1)(v)..... 12

10 C.F.R. § 2.311(a)	1
10 C.F.R. § 2.311(c)	1
10 C.F.R. § 40.9(a)	10
10 C.F.R. § 40.32(d)	9, 13, 14, 18
10 C.F.R. § 40.46.....	18
10 C.F.R. § 110.5.....	13
10 C.F.R. § 110.19(a)	13
10 C.F.R. § 110.20(a)	13
10 C.F.R. § 110.20(a)(2).....	13

FEDERAL REGISTER

Final Standard Review Plan on Foreign Ownership, Control, or Domination 64 Fed. Reg. 52,355 (Sept. 28, 1999)	18
Changes to Adjudicatory Process; Final Rule 69 Fed. Reg. 2182 (Jan. 14, 2004)	8
Crow Butte Inc.; Establishment of Atomic Safety and Licensing Board, 72 Fed. Reg. 71,448 (Dec. 17, 2007)	17

February 6, 2009

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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

NRC STAFF'S NOTICE OF APPEAL OF LBP-09-01, LICENSING
BOARD'S ORDER OF JANUARY 27, 2009, AND ACCOMPANYING BRIEF

INTRODUCTION

Pursuant to 10 C.F.R. § 2.311(a) and (c), the NRC staff ("Staff") hereby files its Notice of Appeal, with accompanying brief, of the Atomic Safety and Licensing Board's ("Board") Memorandum and Order of January 27, 2009.¹ In its Order, the Board admitted Petitioners' Contention E. For the reasons detailed herein, the Staff submits that Petitioners' Contention E should have been rejected by the Board. In light of the Staff's pending appeal of LBP-08-06,² and for the reasons detailed herein, the Commission should reverse LBP-08-06 and LBP-09-01 and terminate the proceeding.

¹ Memorandum and Order (Ruling on Foreign Ownership and Arsenic Contentions and Other Pending Matters), LBP-09-01, 68 NRC ____ (slip op.) (Jan. 27, 2009) ("LBP-09-01" or "Order").

² See NRC Staff's Notice of Appeal of LBP-08-06, Licensing Board's Order of April 29, 2008, and Accompanying Brief (May 9, 2008) ("Staff's Appeal of LBP-08-06"). In its May 9, 2008 appeal, the Staff seeks the dismissal of all of the contentions admitted in LBP-08-06.

BACKGROUND

On May 30, 2007, Crow Butte Resources, Inc. (“CBR” or “Applicant”) requested an amendment to its existing operating license³ that would allow the development of a satellite in-situ leach (ISL) uranium recovery facility, the “North Trend Expansion Area,” near its existing ISL operation in Crawford, Nebraska.⁴ On November 12, 2007, NRC received timely petitions from Debra White Plume, Thomas K. Cook, Owe Aku, Slim Buttes Agricultural Development Corporation (“SBADC”), and WNRC. On December 6, 2007, the Applicant filed responses to the petitions and, on December 7, 2007, the Staff filed the same.⁵

On December 18, 2007, the Board directed Counsel for the Petitioners to designate one of the petitions as a “Reference Petition” because all of the Petitioners had submitted identical contentions.⁶ On December 28, 2007, the Petitioners submitted their reference petition in accordance with the Board’s Order.⁷ In the Reference Petition, the Petitioners proffered the following as Contention E:

³ CBR currently possesses source material license, SUA-1534.

⁴ Letter from Stephen P. Collings to Charles L. Miller (dated May 30, 2007) (ML0715500570).

⁵ Response of Applicant, Crow Butte Resources to Petitions to Intervene Filed by Ms. Debra L. White Plume, Chadron Native American Center, Inc., High Plains Community Development Corporation, Thomas Kanatakeniate Cook, Slim Buttes Agricultural Development Corporation, Western Nebraska Resources Council (Dec. 6, 2007); NRC Staff’s Combined Response in Opposition to Petitioners’ Requests for Discretionary Intervention and Petitions for Hearing and/or to Intervene of Debra White Plume, Thomas Cook, Owe Aku/Bring Back the Way, Chadron Native American Center, High Plains Development Corporation, Slim Buttes Agricultural Development Corporation, and Western Nebraska Resources Council (Dec. 7, 2007).

⁶ Order (Confirming Matters Addressed on December 18, 2007 Telephone Conference), at 1, 3 (Dec. 20, 2007).

⁷ Reference Petition (Dec. 28, 2007). On January 9, 2008, the Petitioners submitted a “Corrected Reference Petition” to correct inconsistencies noted by Staff counsel between the first reference petition and the original petitions. Corrected Reference Petition (Jan. 9, 2008) (“Reference Petition”).

CBR Fails to Mention It is Foreign Owned by Cameco, Inc. So All The Environmental Detriment and Adverse Health Impacts Are For Foreign Profit and There is No Assurance The CBR Mined Uranium Will Stay in US for Power Generation.⁸

On the same day, the Petitioners filed two replies: one on behalf of Thomas Cook, SBADC, and WNRC, and the other on behalf of Debra White Plume and Owe Aku.

On April 29, 2008, the Board issued an Order, in which, *inter alia*, the Board granted standing to Owe Aku, Western Nebraska Resources Council, and Debra L. White Plume and granted, as reframed and limited by the Board, Petitioners' Contentions A, B, and C.⁹ With regard to Contention E, the Board found that the disposition of such depended on two questions:

(1) whether the issuance of a license amendment to the Applicant would be in direct violation of 10 C.F.R. § 40.38; and (2) if not restricted under § 40.38, whether foreign ownership of the Applicant would, under Part 40, including § 40.32(d), have an impact on or endanger the common defense and security of the United States, so as to bring into question the propriety of granting the sought license amendment.¹⁰

As the Board believed those questions to be significant issues on which the parties should be heard, the Board refrained from ruling on the admissibility of Contention E and instead directed the parties to brief the questions.¹¹ In accordance with the Board's Orders of April 29, 2008, and of May 14, 2008, the parties each filed briefs on the questions raised by the Board with regard to Contention E.¹² In its brief, the Staff maintained that, as to the first question, 10 C.F.R. §

⁸ Reference Petition at 24.

⁹ Memorandum and Order (Ruling on Standing And Contentions of Petitioners Owe Aku, Bring Back the Way; Western Nebraska Resources Council; Slim Buttes Agricultural Development Corporation; Debra L. White Plume; and Thomas Kanatakeniate Cook), LBP-08-06, 67 NRC ____ (slip op. at 182) (April 29, 2008). Hereinafter, "Petitioners" refers to Debra White Plume, Owe Aku, and Western Nebraska Resource Council, those persons and organizations previously granted standing by the Board.

¹⁰ *Id.* at 122.

¹¹ *Id.*

¹² Applicant's Brief Regarding Foreign Ownership Issues (May 23, 2008); Petitioners' Brief Concerning Contention E and Subpart G (May 23, 2008) ("Petitioners' Brief on Contention E"); NRC Staff's Response to Board's Order of April 29, 2008 (May 23, 2008) ("Staff's Brief on Contention E").

40.38 does not apply to in situ leach uranium recovery facilities,¹³ and, as to the latter “that the foreign ownership of the Applicant as alleged by the Petitioners is irrelevant to the safety and environmental standards for the amendment application.”¹⁴ Each party thereafter responded to the briefs of each other.

On July 23, 2008, the Board held a prehearing conference on matters pertaining to Contention E with regard to the foreign ownership of the Applicant. The Board issued an Order dated August 5, 2008 directing the parties to answer questions raised at the prehearing conference by the Board that the parties at that time were unable to address.¹⁵ In the Order, the Board directed the Staff to file by August 15, 2008

an informative brief regarding the requirements and process for an entity such as the Applicant to obtain an export license, specifically including information regarding the means of publication of notice of opportunity for hearing with regard to such a proceeding, as well as argument and supporting law relating to the standards for showing standing to participate in such a proceeding.¹⁶

Pursuant to the Board’s direction, the Staff filed its response on August 15, 2008.¹⁷ With regard to the Staff’s response, the Board found that, while it “appreciate[d] the Staff’s recitation of relevant regulatory provisions,” the Staff had not proffered any argument as to “the issue before [the Board] relating to potential export of uranium from the proposed new Crow Butte mining site.”¹⁸ The Board noted that “the likely success of any persons, including the current Intervenors, in intervening in any future export license proceeding relating to potential exports

¹³ Staff’s Brief on Contention E at 2-3.

¹⁴ *Id.* at 3-6.

¹⁵ Order (Confirming Matters Addressed at July 23, 2008, Oral Argument), at 1 (Aug. 5, 2008).

¹⁶ *Id.* at 2.

¹⁷ NRC Staff’s Response to Board’s Order of August 5, 2008, at 2-6 (Aug. 15, 2008).

¹⁸ Order (Regarding Matters to be Addressed in Further Filings by Parties), at 2 (Aug. 19, 2008).

by the Applicant, might be relevant to the question of whether the current proceeding is an appropriate context to consider Intervenors' arguments in support of Contention E that relate to potential future exports," and, as such, the Board expressed that it "would like to hear the parties' arguments on whether the Intervenors could realistically assert their concerns about potential exports in any future export licensing proceeding."¹⁹ Thus, the Board solicited the parties' responses to four questions relating to export license proceedings and requirements under 10 C.F.R. Part 110:

- (1) how Intervenors might show standing to participate in any such future export license proceeding under 10 C.F.R. §§ 110.82(a)(4), 110.84(b);
- (2) how could *any* potential intervenor show standing in any such proceeding under 10 C.F.R. §§ 110.82(a)(4), 110.84(b), and otherwise under 10 C.F.R. §§ 110.82, 110.84;
- (3) what sort of interest(s) would satisfy the requirements of 10 C.F.R. §§ 110.82(a)(4), 110.84(b);
- (4) what standards should be applied in determining whether a petitioner has satisfied these requirements, and any other requirements under 10 C.F.R. §§ 110.82, 110.84, with citation to any relevant case law.²⁰

In addition, the Board directed the "*Staff and/or Applicant*" to:

- (5) identify all cases of which they [Staff and/or Applicant] are aware in which any persons have petitioned to intervene with regard to any export license.
- (6) provide citations to relevant regulatory and case law and documents in any such instances, including any notices, requests for hearing and rulings on any such requests;
- (7) state what standards were applied in determining whether to find standing in such cases (i.e. what regulatory standards, as well as any other standards developed in case law, including e.g. to what extent does proximity come into play, proximity to what, etc.);
- (8) indicate which provisions of Part 110 were applicable to past export licenses sought and/or used by the Applicant;
- (9) indicate whether there were notices of opportunity for hearing with respect to any such export licenses; and
- (10) if so, provide citations to any such notices, any requests for hearing with regard to them, and any rulings on any such requests.²¹

¹⁹ *Id.* at 2-3.

²⁰ *Id.* at 3.

²¹ *Id.* at 4 (*emphasis in original*).

On August 29, 2008, along with its response to questions 8, 9, and 10, the Staff petitioned the Board to reconsider the rest of the questions to the Staff in its Order of August 19, 2008.²² The Staff stated that “responses [to those questions] depend on various potential scenarios” and, as such, the Staff was “unable to meaningfully respond to such inquiries as such response would necessarily be based on speculation and hypothesis regarding the Intervenors.”²³ On September 8, 2008, the Petitioners filed a motion to strike Staff’s motion for reconsideration.²⁴ On September 16, 2008, the Staff withdrew its motion for reconsideration and filed its response to the Petitioners’ motion to strike.²⁵

On January 27, 2009, the Board issued an Order, wherein, *inter alia*, the Board admitted Petitioners’ Contention E.²⁶ The Board disagreed with Staff’s arguments that the concerns presented by Contention E were not material to and outside the scope of the instant license amendment proceeding.²⁷ The Staff hereafter respectfully submits that the Board committed several errors in rejecting the Staff’s arguments and in admitting Contention E.

²² NRC Staff’s Motion for Partial Reconsideration and Response to Board’s Order of August 19, 2008 (August 29, 2008).

²³ *Id.* at 4.

²⁴ Petitioners’ Motion to Strike NRC Staff’s Motion for Partial Reconsideration and Response to the Board’s Order of August 19, 2008 (Sept. 8, 2008).

²⁵ NRC Staff’s Withdrawal of its Motion for Reconsideration and Response to Petitioners’ Motion to Strike NRC Staff’s Motion for Partial Reconsideration and Response to the Board’s Order of August 19, 2008 (Sept. 16 2008).

²⁶ LBP-09-01 at 36-37.

²⁷ *Id.* at 23-33.

ARGUMENT

I. Legal Standards for Contention Admissibility.

For each contention submitted by a petitioner the six admissibility standards of 10 C.F.R. § 2.309(f)(1)(i)-(v)(i) must be met.²⁸ Additionally, a contention must be within the scope of the proceeding as defined by the notice of hearing in order to be admissible.²⁹ The contention rule is “strict by design.”³⁰ The rule operates as a “[t]hreshold standard [] necessary to ensure that hearings cover only genuine and pertinent issues of concern and that the issues are framed and supported concisely enough at the outset to ensure that the proceedings are effective and

²⁸ *Entergy Nuclear Vermont Yankee, LLC and Entergy Nuclear Operations, Inc.* (Vermont Yankee Nuclear Power Station), LBP-06-14, 63 NRC 568, 575 (2006). Pursuant to 10 C.F.R. § 2.309(f)(1), for each contention a petitioner wishes to have admitted at hearing, the petitioner must

- (i) Provide a specific statement of the issue of law or fact to be raised or controverted;
- (ii) Provide a brief explanation of the basis for the contention;
- (iii) Demonstrate that the issue raised in the contention is within the scope of the proceeding;
- (iv) Demonstrate that the issue raised in the contention is material to the findings the NRC must make to support the action that is involved in the proceeding;
- (v) Provide a concise statement of the alleged facts or expert opinions which support the requestor’s/petitioner’s position on the issue and on which the petitioner intends to rely at hearing, together with references to the specific sources and documents on which the requestor/petitioner intends to rely to support its position on the issue; and
- (vi) Provide sufficient information to show that a genuine dispute exists with the applicant/licensee on a material issue of law or fact. This information must include references to specific portions of the application (including the applicant’s environmental report and safety report) that the petitioner disputes and the supporting reasons for each dispute, or, if the petitioner believes that the application fails to contain information on a relevant matter as required by law, the identification of each failure and the supporting reasons for the petitioner’s belief.

²⁹ *See Florida Power and Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4) CLI-00-23, 52 NRC 327, 329 (2000).

³⁰ *See Shaw AREVA MOX Services* (Mixed Oxide Fuel Fabrication Facility), CLI-09-02, 68 NRC ____ (slip. op. at 10) (Feb. 2, 2009); *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3) CLI-01-24, 54 NRC 349, 358 (2001).

focused on real, concrete issues.”³¹ As such, failure to comply with any of the elements of 10 C.F.R. § 2.309(f)(1) is grounds for a contention’s dismissal.³² Commission practice does not “permit ‘notice pleading,’”³³ and, therefore, the Commission does not permit the “filing of vague, unparticularized contention[s],’ unsupported by affidavit, expert, or documentary support.”³⁴ A petitioner may not rely on mere speculation nor base allegations as support for the admission of a proffered contention.³⁵ If a petitioner fails to provide sufficient support for proffered contentions, it is not within the authority of a Board to construct assumptions of fact to shore up those deficiencies.³⁶ Similarly, a petitioner must provide sufficient explanation as to the significance of materials and documents referenced in support of a contention.³⁷

II. The Board Erred in Several Respects in Admitting Contention E.

In its analysis, the Board construes the structure of Contention E as being of two distinguishable parts: (1) issues pertaining to the Applicant’s failure to disclose in the Application its foreign ownership and the significance of such failure; and (2) issues pertaining the significance and impacts of the foreign ownership itself.³⁸ As to the first, the Board erred by

³¹ Changes to Adjudicatory Process, 69 Fed. Reg. at 2,182, 2,189-90 (Jan. 14, 2004).

³² *Private Fuel Storage* (Independent Spent Fuel Storage Installation), CLI-99-10, 49 NRC 318, 325 (1999); *Arizona Pub. Serv. Co.* (Palo Verde Nuclear Generating Station, Units 1, 2, and 3), CLI-91-12, 34 NRC 149, 155-56 (1991); *Louisiana Energy Servs.* (National Enrichment Facility), LBP-04-14, 60 NRC 40, 54 (2004).

³³ *N. Alt. Energy Serv. Corp.* (Seabrook Station, Unit 1), CLI-99-6, 49 NRC 201, 219 (1999).

³⁴ *Id.* (quoting *Baltimore Gas & Elec. Co.* (Calvert Cliffs Nuclear Power Plant), CLI-98-25, 48 NRC 325, 349 (1998)).

³⁵ See *Fansteel, Inc.* (Muskogee, Oklahoma Site), CLI-03-13, 58 NRC 195, 203 (2003).

³⁶ See *Georgia Institute of Technology* (Georgia Tech Research Reactor, Atlanta, Georgia) LBP-95-6, 41 NRC 281, 305 (1995).

³⁷ See *Fansteel, Inc.*, CLI-03-13, 58 NRC at 204.

³⁸ See LBP-09-01 at 25-26. As stated by the Board

(continued. . .)

accepting such issues as material to the Staff's review of the Application. As to the second, the Board committed the following errors: (a) the Board errs by accepting arguments in support of the contention that were not actually alleged by the Petitioners in the Reference Petition; (b) the Board incorrectly concludes that the Petitioners provided sufficient factual support for the arguments raised by Contention E, when, in fact, the Petitioners have not done so; (c) the Board bases its acceptance of Contention E on matters outside the scope of this license amendment proceeding; and (d) in its analysis of 10 C.F.R. § 40.32(d), the Board engages in an unwarranted reconsideration of the NRC's past regulatory approval of Cameco's controlling interest in CBR. All of these errors in combination, if corrected, should result in the rejection of the Petitioners' Contention E by the Commission.

A. Issues Pertaining to the Applicant's Failure to Disclose its Foreign Ownership.

As the Staff argued to the Board in its response to Contention E, there is no requirement in 10 C.F.R. Part 40 that the Applicant make a statement of ownership in the application. However, the Board notes that the Petitioners cited to 10 C.F.R. § 40.9(a), which requires that "[i]nformation provided to the Commission [by an applicant for a license or by a license]" be "complete and accurate in all material respects."³⁹ The Board's apparent reliance on 10 C.F.R. § 40.9(a) as a regulatory requirement for the completeness and accuracy of information in the

(. . .continued)

If Contention E concerned only the issue of disclosure of Crow Butte's foreign ownership, and no questions of the significance or impact of such ownership, it might be argued that Applicant could easily cure any possible defect in its Application by amending it with respect to its actual ownership and citizenship and thereby dispose of the contention. Intervenors have, however, alleged more than a mere lack of disclosure of Applicant's foreign ownership. They have made factual allegations concerning various impacts of such ownership, including the potential for exports to countries other than Canada, and alleged motivation of the Canadian owners to put their own profits above environmental and health concerns.

Id.

³⁹ LBP-09-01 at 25 (*citing* Petitioners' 5/23/08 Brief at 15 (*internal citations omitted*)).

Application, such that the Applicant must disclose information regarding its foreign ownership in the Application, is misplaced, as 10 C.F.R. § 40.9(a) only enjoins the completeness and accuracy of information that is otherwise required to be submitted to the NRC.⁴⁰ That section does not create an independent obligation for the submission of certain information by the Applicant. Thus, as there is no requirement in 10 C.F.R. Part 40 that requires the Applicant to disclose information regarding its foreign ownership in its Application, 10 C.F.R. § 40.9(a) is not applicable.

Also, as another potential requirement that the Applicant include information regarding its foreign ownership in the Application, the Board points to Section 182 of the Atomic Energy Act which it interprets as requiring “applicants for licenses [to] state their citizenship.”⁴¹ The Board’s reading of that section of the Atomic Energy Act is incorrect. Rather, that section states, in pertinent part,

Each application for a license hereunder 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.⁴²

As such, absent any requirement in 10 C.F.R. Part 40 requiring the Applicant to affirmatively disclose information regarding its foreign ownership upon submission of its Application, the Applicant did fail to meet that section of the Act. For the above reasons, the Staff argues that the Board committed error.

⁴⁰ See 10 C.F.R. § 40.9(a). That section provides that

[i]nformation provided to the Commission by an applicant for a license or by a licensee or information required by statute or by the Commission's regulations, orders, or license conditions to be maintained by the applicant or the licensee shall be complete and accurate in all material respects.

⁴¹ LBP-09-01 at 25 (*citing* 42 U.S.C. § 2232).

⁴² 42 U.S.C. § 2232(a) (*emphasis added*).

B. Issues Pertaining to the Significance of Applicant's Foreign Ownership.

1. The Board Accepts Arguments in Support of the Contention Not Actually Alleged by the Petitioners in the Reference Petition.

A petitioner “cannot seek to cure deficiencies of earlier pleadings by later introducing wholly new issues that could have been raised previously.”⁴³ With regard to Contention E, the Board, in error, accepts arguments in support of the contention not actually alleged by the Petitioners in the Reference Petition. The Board points out that in their May 23, 2008 brief on Contention E, the Petitioners argue “that under 10 C.F.R. § 40.2, relevant provisions of Part 40 ‘apply to all persons in the United States,’ and not those outside the United States, even those in Canada.”⁴⁴ Based on observations it made during a site tour of CBR’s facility, the Board posits that “whatever Crow Butte mine personnel may do with regard to NRC requirements, ultimate control of the Licensee/Applicant appears to rest with Cameco personnel, who are based in Canada, not in the United States.”⁴⁵ Out of this, the Board suggests that Contention E raises the “question of the extent to which it is realistic to expect that relevant regulatory requirements could be enforced with Crow Butte if the need ever arose...”⁴⁶ According to the Board, “this would in turn seem to bring into question whether the ‘applicant’s proposed ... procedures are adequate to protect health and minimize danger to life or property,’ under [10 C.F.R.] § 40.32(c).”⁴⁷ None of the foregoing issues were raised by the Petitioners in the

⁴³ *Louisiana Energy Services, L.P.* (National Enrichment Facility), CLI-05-20, 62 NRC 523, 532 (2005) (citing *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-28, 56 NRC 373, 386 (2002)).

⁴⁴ LBP-09-01 at 26 (citing Petitioners’ Brief on Contention E at 14).

⁴⁵ *Id.*

⁴⁶ *Id.* at 27.

⁴⁷ *Id.*

Reference Petition.⁴⁸ The Petitioners only raised such issues at a later time.⁴⁹ As such, In light of the foregoing, the Board erred in including such issues within the scope of Contention E.

2. The Board Incorrectly Concludes that the Petitioners Provided Sufficient Factual Support for Contention E.

The Board holds that with regard to Contention E the Petitioners met the requirement of 10 C.F.R. § 2.309(f)(1)(v) to provide a concise statement of facts or expert opinions which support the Petitioners' position on the contention.⁵⁰ Acknowledging that the "Intervenors provide no expert opinions in support of the contention," the Board nonetheless finds that the "Intervenors clearly provide a concise statement of alleged facts that support the contention."⁵¹ With regard to those issues pertaining to the significance and impacts of the Applicant's foreign ownership, this is simply not the case. In the Reference Petition, the Petitioners make several general statements regarding the Applicant's operations would not be in the interest of the United States and that there is "no reference to the chain of possession of this nuclear source material or who the buyers are and where it may end up or how it may be ultimately used."⁵² Instead of offering tangible, probative information, those statements constitute nothing more than inadmissible "bare assertions and speculation."⁵³ The Reference Petition even reflects that the Petitioners are uncertain about the veracity of their own assertions.⁵⁴ As such, it was an

⁴⁸ See Reference Petition at 24-26.

⁴⁹ Petitioners' Brief on Contention E at 14-15.

⁵⁰ LBP-09-01 at 19.

⁵¹ *Id.*

⁵² Reference Petition at 24-26.

⁵³ See *Fansteel, Inc.*, CLI-03-13, 58 NRC at 203 (*quoting GPU Nuclear, Inc. (Oyster Creek Nuclear Generating Station)*, CLI-00-6, 51 NRC 193, 208 (2000)).

⁵⁴ See Reference Petition at 25 ("Cameco also runs operations in Canada and Kazakhstan and which sells Uranium products to other non-US buyers which may include China, India, Pakistan, North Korea (continued. . .)

error of the Board to find that the Petitioners had, as to the identified issues, satisfied the contention pleading requirement of 10 C.F.R. § 2.309(f)(1)(v).

3. The Board Bases its Acceptance of Contention E on Matters Outside the Scope of the License Amendment Proceeding.

With regard to the issues raised by the Petitioners pertaining to potential exports of uranium as risks to the “common defense and security of the United States,”⁵⁵ the Staff argued that such issues are not within the scope of this proceeding because the license amendment sought by CBR would not grant it the authority to export source material. A 10 C.F.R. Part 110 export license would be required, which is, both substantively and procedurally, a separate and distinct license from the license that would be authorized by the instant proceeding involving a 10 C.F.R. Part 40 domestic source material application. Pursuant to Part 110, “no person may export any nuclear ... material listed in ... § 110.9 ... unless authorized by a general or specific license issued under [Part 110].”⁵⁶ The Commission has made it clear that in order to be litigable alleged risks to common defense and security must directly flow from the actions or

(. . .continued)

and possibly Iran unless there are Canadian regulations which restrict such sales.”).

⁵⁵ See 10 C.F.R. § 40.32(d).

⁵⁶ 10 C.F.R. § 110.5. With respect to the two types of licenses, general and specific, covered by Part 110,

a general license is effective without the filing of an application with the Commission or the issuance of licensing documents to a particular person. A specific license is issued to a named person and is effective upon approval by the Commission of an application filed pursuant to the regulations in [Part 110] and issuance of license documents to the applicant.

Id. at § 110.19(a). A person is permitted by Part 110 to use an NRC general license as authority to export nuclear material if the nuclear material is covered by one of the NRC general licenses described in 10 C.F.R. §§ 110.21 through 110.30. *Id.* at § 110.20(a). However, “[i]f an export ... is not covered by the NRC general licenses described in §§ 110.21 through 110.30, a person must file for a specific license in accordance with §§ 110.31 through 110.32.” *Id.* at § 110.20(a)(2).

matters sought to be licensed.⁵⁷ As this proceeding for a Part 40 source material license amendment would not authorize the export of source material, risks to common defense and security associated with the export of source material are not cognizable in this proceeding.⁵⁸ The Petitioners' claim regarding the risk associated with the export of uranium is at least one significant step removed from the instant license amendment application and, as such, the claim is not litigable in this proceeding.⁵⁹

In its Order, the Board dismisses the Staff's argument because the Board found (1) that the cases cited by the Staff were not relevant to the specific circumstances of this proceeding⁶⁰ and (2) that, according to the arguments made by the Staff, the Petitioners' concerns regarding the risks associated with exports of uranium "would never become 'ripe for concern,' because it appears that there is, essentially, as a practical matter, no way that [the Petitioners] could ever show standing in any export proceeding, except as a discretionary matter by the Commission."⁶¹ The Staff addresses each of these arguments in turn.

⁵⁷ See *Curators of the University of Missouri*, CLI-95-1, 41 NRC 71, 165 (1995); *Kerr-McGee Corp.* (West Chicago Rare Earths Facility), CLI-82-2, 15 NRC 232, 238 n.3 (1982).

⁵⁸ See 10 C.F.R. § 40.32(d).

⁵⁹ See *Curators*, CLI-95-1, 41 NRC at 165-66. CBR has been listed as a supplier on export licenses in the past. Both licenses were issued to RSB Logistic Services, Inc. License No. XSOU8798 was issued on March 5, 2004, which expired on December 31, 2008. That license authorized RSB Logistics Services, Inc. to ship natural uranium to Canada for conversion and back to the United States for further processing. Prior to that, RSB Logistics held an export license, No. XSOU8744, which expired in 2004. Crow Butte Resources, Inc. was listed as a supplier on that license as well. However, the fact that CBR has been listed as a supplier on export licenses in the past does not disturb the fact that a Part 40 domestic source material license amendment is, both substantively and procedurally, a separate and distinct proceeding from a Part 110 export licensing proceeding.

⁶⁰ LBP-09-01 at 29-32 (*referencing Curators*, CLI-95-1, 41 NRC at 163-66; *Kerr-McGee*, CLI-82-2, 15 NRC at 86, 88, 234-35, 238, 242).

⁶¹ *Id.* at 32-33 (*internal citations omitted*).

In support of the above mentioned argument, the Staff cited to two cases, *Kerr-McGee Corp.* and *Curators of the Univ. of Missouri*.⁶² The Board finds that each of the cases is distinguishable from the circumstances presented in this proceeding with regard to Contention E.⁶³ The Board distinguishes between the finding of the Commission in *Kerr-McGee*, “which involve[d] no concern over the import of export of materials, common defense and security considerations under section 40.32(d) [were] not implicated,”⁶⁴ and the present case, “involving as it does definite concerns that have been raised over foreign ownership and export of materials...”⁶⁵ However, the Board misconstrues the Commission’s reasoning. The Commission’s decision stands for the proposition that the nature and scope of the specific licensing action under review in the proceeding did not include import/export of materials and their impact on defense and security.. The point is not, as the Board suggests, that *since no concerns were raised*, common defense and security considerations were not implicated. The implication presented by the Board’s reading of the case is that if the import / export concerns had been raised in *Kerr-McGee* they would have been within the scope of the proceeding.⁶⁶ This is simply incorrect. Following the Board’s reading of the decision, a petitioner could expand the lawful scope of a proceeding simply by raising issues pertaining to matters that are, as a legal or regulatory matter, outside of the scope of that proceeding. That is simply not what the Commission intended.

⁶² *Curators*, CLI-95-1, 41 NRC at 165; *Kerr-McGee*, CLI-82-2, 15 NRC at 238 n.3.

⁶³ LBP-09-01 at 30-32.

⁶⁴ *Kerr-McGee*, CLI-82-2, 15 NRC at 238 n.3. The license amendment would have allowed Kerr-McGee to demolish certain buildings at one of its sites and to receive onsite, as temporary storage, a small quantity of mill tailings containing thorium from other sites in Chicago. *Id.* at 235.

⁶⁵ LBP-09-01 at 30.

⁶⁶ *See id.*

The Commission, in *Curators of Univ. of Missouri*, held that in order to be litigable, a specific common defense and security risk must be “reasonably related to, and would arise as a direct result of,” the specific matters covered by the license at issue.⁶⁷ The Board distinguishes between the *Curators of Univ. of Missouri*, in which the Commission found that the “University’s proposed research did not ‘lead ‘directly’ to nuclear weapons proliferation,’ but rather was ‘many steps removed from even the possibility of proliferation,’”⁶⁸ and the present case in which the Board finds that “there are not ... multiple rounds of research intervening between this proceeding and any export licensing proceeding or transfers of material outside the U.S., nor are such transfers at all speculative, given that Application has stated that export licenses have been obtained in the past.”⁶⁹ While CBR has been listed as a supplier on export licenses in the past, that does not disturb the fact that a Part 40 domestic source material license is, both substantively and procedurally, a separate and distinct proceeding from a Part 110 export licensing proceeding. To consider matters related to hypothetical future exports of uranium in the instant proceeding would be to improperly conflate the regulatory framework established by the Commission for the resolution of export licensing issues under Part 110 with the regulatory framework for license amendment issues under Part 40. In light of the foregoing, the Board erred in rejecting the Staff’s argument.

The Board also argues that if it “were to following the arguments of the NRC Staff ... Intervenors’ concerns would never become ‘ripe for concern,’ because it appears that there is, essentially, as a practical matter, no way that [the Petitioners] could ever show standing in any

⁶⁷ *Curators*, CLI-95-1, 41 NRC at 165.

⁶⁸ LBP-09-01 at 31 (*quoting Curators*, CLI-95-1, 41 NRC at 165).

⁶⁹ *Id.* at 32.

export proceeding, except as a discretionary matter by the Commission.”⁷⁰ The Board states that “[n]either Staff nor Applicant, in response to more than adequate opportunity to do so, has pointed us to any export case in which standing as of right was found for any petitioner, or otherwise shown how the current Intervenors or *any* petitioner might show standing as of right in any future export licensing proceeding.”⁷¹ Regardless of whether the Staff could produce any case in which a petitioner was found to have standing as a right in an export licensing proceeding, the Board’s reasoning that concerns regarding potential exports would never become ripe is incorrect and unfounded. The Commission has established a process by which members of the public may petition for a hearing on an application for a specific export license. The fact that the Commission may not grant standing to the Petitioners in any such instance is not a reason to adjudicate as part of this proceeding for a 10 C.F.R. Part 40 license amendment issues and concerns specific to a 10 C.F.R. Part 110 export licensing proceeding. The scope is set in the notice for hearing by the Commission.⁷² The scope of the instant license amendment proceeding may not properly be expanded beyond the scope set by the Commission based on the suspicions of the Board that the Petitioners may not get an opportunity to litigate the matter in hypothetical future proceedings.⁷³ If such were the case, the scope of an adjudicatory proceedings before a Atomic Safety and Licensing Board could be expanded beyond the

⁷⁰ LBP-09-01 at 32-33 (*internal citations omitted*).

⁷¹ *Id.* at 33 n.115.

⁷² See *General Public Utilities Nuclear* (Three Mile Island Nuclear Station, Unit No. 1), ALAB-881, 26 NRC 465, 476 (1987) (“It is well settled that NRC licensing boards and administrative law judges do not have plenary subject matter jurisdiction in adjudicatory proceedings. Agency fact finders are delegates of the Commission who may exercise jurisdiction only over those matters the Commission specifically commits to them in the various hearing notices that initiate the proceedings.”).

⁷³ See *Crow Butte Inc.; Establishment of Atomic Safety and Licensing Board*, 72 Fed. Reg. 71,448 (Dec. 17, 2007).

pertinent scope set by the Commission, and, as such, there would be, in effect, no limit on the scope of such proceeding.

4. In its Analysis of 10 C.F.R. § 40.32(d), the Board Engages in an Unwarranted Reconsideration of the NRC's Past Regulatory Approval of Cameco's Control of CBR.

The Staff does not dispute that the finding reflected in 10 C.F.R. § 40.32(d) applies to the instant license amendment proceeding. That section directs the NRC to evaluate whether “[t]he issuance of [a 10 CFR Part 40] license will not be inimical to the common defense and security or to the health and safety of the public...” The Staff also acknowledges that foreign ownership of the Applicant, in terms of its impact and significance, is one potential factor in the analysis of “inimicality to common defense and security.” In the context of reactor licensing, which is governed by a specific prohibition against foreign ownership, control, and domination,⁷⁴ the Commission has held that the phrase “inimical to the common defense and security” refers to, among other things, “the absence of foreign control over the applicant.”⁷⁵ However, as part of the § 40.32(d) analysis, the Board engages in an unwarranted reconsideration of the NRC’s past regulatory approval of Cameco’s controlling interest in CBR.

By letter dated May 13, 1998, in connection with its existing license, CBR notified the NRC of an upcoming change in the ownership of one of its shareholders and requested confirmation from the NRC that the notification met the requirements of 10 C.F.R. § 40.46.⁷⁶ In the letter, CBR informed the NRC that Cameco had agreed to purchase all of the shares of

⁷⁴ See 42 U.S.C. §§ 2133(d), 2134(d).

⁷⁵ *Florida Power & Light Co.* (Turkey Point Nuclear Generating Units No. 3 and No. 4), 4 AEC 9, 12 (1967)). The required finding of non-inimicality to the common defense and security may be based, in part, on the nation involved...” Final Standard Review Plan on Foreign Ownership, Control, or Domination, 64 Fed. Reg. 52,355, 52,357 (Sept. 28, 1999).

⁷⁶ Ltr. from Stephen P. Collings, President, Crow Butte Resources, to Joseph J. Holonich, Chief, Uranium Recovery Branch, NRC, at 1-3 (May 13, 1998) (ML081760219).

Uranerz U.S.A., which would, in effect, give Cameco a controlling interest in CBR.⁷⁷ By letter dated June 5, 1998, the NRC found “the proposed change in shareholder ownership to be acceptable” and thereby approved to the change in ownership.⁷⁸ In light of the NRC’s previous regulatory approval of Cameco’s controlling interest in CBR in connection with its existing license, the Petitioners need have alleged something more in this license amendment proceeding than the sheer fact of CBR’s foreign ownership in order to present a claim of inimicality to common defense and security. If the Petitioners could simply claim that CBR is foreign owned to reopen the consideration of whether Cameco’s controlling interest in CBR in inimical to common defense and security, it would have the inevitable effect of improperly disregarding the NRC’s prior approval of Cameco’s controlling interest in CBR—a decision the Board is not entitled in this proceeding to make without cause.⁷⁹

⁷⁷ *Id.* at 1-2.

⁷⁸ Ltr. from Joseph J. Holonich, Chief, Uranium Recovery Branch, NRC, to Stephen P. Collings, President, Crow Butte Resources (June 5, 1998) (ML081750330). The technical evaluation for the approval consisted of the following:

The NRC staff has reviewed CBR’s license transfer request against the requirements in 10 CFR Part 40, using staff guidance that addresses licensee applications involving changes in company ownership.

With the change in shareholder ownership, CBR has stated that it will maintain the same functional organization structure, responsibilities, and qualifications, as those currently in place at the Crow Butte facility. In addition, there are no planned changes in organization, facility location, equipment, current operating and emergency procedures, or personnel, as a result of this change in ownership. Records will continue to be maintained as required under NRC regulations and in SUA-1534. Also, there will be no change in the use or storage of any licensed material on site. Finally, no modification to the existing surety arrangement is necessary.

Therefore, based on its review, the NRC staff has no objection to the change in shareholder ownership of CBR.

Id. at 2-3.

⁷⁹ *Cf. Virginia Electric and Power Co.* (North Anna Nuclear Power Station, Units 1 and 2), ALAB-584, 11 NRC 451, 463-65 (1980).

CONCLUSION

In light of Staff's prior appeal of LBP-08-06,⁸⁰ and in light of the foregoing, the Staff respectfully requests that the Commission reverse LBP-08-06 and LBP-09-01 and terminate the proceeding.

Respectfully submitted,

Executed in Accord with 10 CFR 2.304(d)

Brett Michael Patrick Klukan
Counsel for the NRC Staff
U.S. Nuclear Regulatory Commission
Mail Stop O-15 D21
Washington, DC 20555-0001
(301) 415-3629
Brett.Klukan@nrc.gov

Dated at Rockville, Maryland
This 6th day of February, 2009

⁸⁰ See Staff's Appeal of LBP-08-06.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "NRC STAFF'S NOTICE OF APPEAL OF LBP-09-01, LICENSING BOARD'S ORDER OF JANUARY 27, 2009, AND ACCOMPANYING BRIEF" in the captioned proceeding have been served via the Electronic Information Exchange ("EIE") this 6th day of February 2009, which to the best of my knowledge resulted in transmittal of the foregoing to those on the EIE Service List for the captioned proceeding.

Executed in Accord with 10 CFR 2.304(d)

Brett Michael Patrick Klukan
Counsel for the NRC Staff
U.S. Nuclear Regulatory Commission
Office of the General Counsel
Mail Stop: O-15 D21
Washington, D.C. 20555-0001
(301) 415-3629
Brett.Klukan@nrc.gov