

February 10, 2009

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of:)	
)	Docket No. 40-8943
CROW BUTTE RESOURCES, INC.)	
)	ASLBP No. 08-867-02-OLA-BD01
(License Renewal))	

APPLICANT’S RESPONSE TO PETITIONERS’ BRIEF
REGARDING MISCELLANEOUS CONTENTION K

I. INTRODUCTION

In accordance with the November 21, 2008 Order of the Atomic Safety and Licensing Board, as amended by the Board’s December 9, 2008 Order and the January 8, 2009 Initial Scheduling Order, Crow Butte Resources, Inc. (“Crow Butte” or “Applicant”) hereby submits its response to Consolidated Petitioners’ briefing on Miscellaneous Contention K.¹ As is discussed further below, the statutory and regulatory arguments made by Consolidated Petitioners do not preclude issuance of a source material license to Crow Butte and do not create a question as to whether issuance of the renewed license would endanger the common defense and security. Accordingly, Miscellaneous Contention K should be resolved in favor of the Applicant.

II. DISCUSSION

In their brief Consolidated Petitioners provide a lengthy overview of the history of foreign investment in the United States, starting prior to World War I and continuing to the

¹ See “Petitioners’ Brief Re: Misc. Contention K – Foreign Ownership,” dated January 21, 2009 (“Pet. Brief on K”).

present. Pet. Brief on K at 4-15. Although interesting reading, the discussion has little direct bearing on this license renewal proceeding, which is focused on Crow Butte’s compliance with the Atomic Energy Act (“AEA”) and the Commission’s current regulations. The renewal application does not relate to the transfer of dual use equipment, does not involve special nuclear material (*i.e.*, enriched uranium or Restricted Data) or critical infrastructure, and does not authorize the import/export of nuclear materials. Instead, the instant proceeding relates solely to renewal of the existing license to mine source material at Crow Butte’s facility in Crawford, Nebraska. As discussed below, nothing in Petitioners’ brief calls into question the Commission’s authority to issue a renewed license to Crow Butte, and Petitioners further fail to demonstrate that the foreign ownership of the Applicant could have an impact on or endanger the common defense or security.

A. Petitioners Raise Issues That Are Outside the Scope of the Admitted Contentions and This Proceeding

In their brief Petitioners make clear the objective of the contention. Petitioners acknowledge that they do not consider Crow Butte to be a “bad actor” or to be involved in any illicit procurement network (*i.e.*, involved in nuclear smuggling). Petitioners instead argue that “export of Yellowcake outside US control is contrary to nuclear security.” Pet. Brief at K at 17; *see also id.* at 38 (“[T]he 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.”). Petitioners go on to state that “Applicant has attempted to create a loophole which is ripe for abuse by such bad

actors” and argue that this “loophole” needs to be fixed in order to foster nuclear security.² *Id.* Petitioners’ concerns therefore appear to be related primarily to the NRC regulations that expressly permit the export of uranium (pursuant to a license issued under 10 C.F.R. Part 110) and with the Commission’s regulations regarding ownership of source material, which do not prohibit ultimate foreign ownership of source material licensees.

Petitioners are challenging the basic structure of the NRC’s regulatory program, which does not prohibit export of uranium or preclude issuance of source material licenses to entities with ultimate foreign owners. *See* “Applicant’s Brief Regarding Miscellaneous Contention K,” dated January 21, 2009, at 5-8. By seeking to impose requirements beyond those set forth in the regulations, Petitioners are impermissibly challenging the Commission’s regulations. *See Long Island Lighting Company* (Shoreham Nuclear Power Station, Unit 1), CLI-87-12, 26 NRC 383, 395 (1987). Petitioners cannot attack applicable statutory and regulatory requirements in a licensing proceeding or challenge the basic structure of the Commission’s regulatory process. *See, e.g.,* 10 C.F.R. § 2.335(a).³ Their arguments on the contention are nothing more than generalized views of what applicable policies ought to be. *See*

² The supposed “loophole” is nothing more than an activity permitted by the NRC’s regulations. As noted in prior filings in this proceeding, Cameco’s purchase of a controlling interest in Crow Butte was also expressly approved by the NRC in a past licensing action. *See* Ltr. from Joseph Holonich, Chief, Uranium Recovery Branch, to Stephen Collings, Crow Butte Resources, dated June 5, 1998 (ADAMS Accession No. 9806120319). At this point, any issue with respect to past ownership changes would be an enforcement issue, not a present licensing issue.

³ The Petitioners’ references to *Chevron* are inapposite. *See* Pet. Brief on K at 24-25. The Hobbs Act provides for exclusive review of NRC orders involving “the issuance or modification of rules and regulations dealing with the activities of licensees.” *See* 28 U.S.C. § 2342(4); 42 U.S.C. § 2239(a)(1). The Hobbs Act further specifies that “[a]ny party aggrieved by the final order may, within 60 days after its entry, file a petition to review the order.” 28 U.S.C. § 2344. NRC regulations cannot be challenged in individual licensing proceedings.

Public Service Co. of N.H. (Seabrook Station, Units 1 and 2), LBP-82-76, 16 NRC 1029, 1035 (1982). These generic policy concerns — not tied to the specific licensing action at issue — are best addressed through the rulemaking process.⁴

In their brief, Petitioners also introduce new arguments that were not advanced in their original petition. For example, Petitioners argue, for the first time, that “the dominance of the Applicant’s ultimate parent over the U.S. uranium industry raises anti-trust concerns.” Pet. Brief on K at 4; *see also id.* at 30, 44. In addition to being beyond the scope of the proceeding, these issues were not part of Miscellaneous Contention K, as admitted, and therefore the Petitioners may not now raise those issues.

B. Prior Commission Decisions on Foreign Ownership Are Inapplicable to the Current Proceeding

Although the Petitioners discuss a series of Commission decisions relating to foreign ownership, none of the statutory or regulatory provisions involved in those cases has any bearing on this source material licensing proceeding. For example, the *SEFOR* case cited by Petitioners (Pet. Brief on K at 31) involved a power reactor subject to the limitation on foreign ownership, domination or control in AEA Section 104.d. *General Electric Co. & Southwest Atomic Energy Ass’n*, 3 AEC 99 (1966). The Cintichem example highlighted by Petitioners (*id.* at 31-32) also involved a research reactor subject to the ownership restrictions in Section 104.d.⁵ Likewise, the Babcock & Wilcox (“B&W”) example cited by Petitioners (*id.* at 32-33) related to

⁴ The Commission’s regulations authorize an interested party to petition for Commission rulemaking on a subject of interest to them outside of the adjudicatory process. *See* 10 C.F.R. § 2.802.

⁵ *See* Attachment to Letter from Chairman Palladino, NRC, to the Honorable Alan Simpson, Chairman, Subcommittee on Nuclear Regulation, United States Senate, dated September 22, 1983, OELD Legal Analysis, “Legal Questions of Foreign Control and Domination Raised by Proposed Transfer of Facility Operating License No. R-81 from Union Carbide Subsidiary “B” to Cintichem, Inc.”

compliance with AEA Section 104.d.⁶ AEA Section 104.d by its terms does not apply to source material licensees. In discussing the Exxon Nuclear example, the Petitioners actually acknowledge that, since the licenses were for nuclear materials and not for a reactor, the statutory prohibition against foreign ownership was not involved.⁷ *Id.* at 33. This is precisely the point that Crow Butte has been making — there is no restriction on foreign ownership of source material licensees.

Likewise, the guidance document cited by Petitioners does not prohibit foreign ownership of Crow Butte. Pet. Brief on K at 34-35. The NRC’s “Standard Review Plan on Foreign Ownership, Control, or Domination,” 64 Fed. Reg. 52355 (Sept. 28, 1999), is only “used by the staff to analyze applications for reactor licenses, or applications for the transfer of control of such licenses, with respect to the limitations contained in sections 103 and 104 of the Atomic Energy Act of 1954, as amended, and the Commission’s regulations in 10 CFR 50.38 against issuing a license for a production or utilization facility to an alien or an entity that is owned, controlled, or dominated by foreign interests” (emphasis added). The SRP has no applicability to Part 40 source material applicants or licensees.

C. Exported Uranium Is Not Free From Restrictions

Petitioners argue that “[o]nce exported, the Uranium concentrate is free of US restrictions or control.” Pet. Brief on K at 36. This is a gross misstatement of the statutory,

⁶ See Letter to J. MacMillan, B&W, from W. Dircks, NRC (Dec. 17, 1982).

⁷ Exxon Nuclear involved special nuclear material (*i.e.*, enriched uranium and plutonium, including weapons-grade material) as well as classified Department of Energy contracts and Restricted Data. The source material at Crow Butte is natural uranium oxide (U₃O₈) and cannot be converted into a form suitable for enrichment (*e.g.*, UF₆) at the Crow Butte facility, much less enriched. Further, Crow Butte does not possess any Restricted Data. See 42 U.S.C. § 2014 (defining “restricted data” as, for example, data involving atomic weapons or production of special nuclear material)

regulatory, and treaty-related requirements that apply to source material. For example, NRC export regulations state that the “re-transfer” of any nuclear material, including source material and special nuclear material produced from U.S.-origin source material, requires authorization by the Department of Energy unless the export to the new destination is authorized under a special or general license or an exemption from licensing requirements. 10 C.F.R. § 110.6(a).⁸ Thus, a comprehensive regulatory program — separate and apart from Crow Butte’s source material license — is already in place for tracking source material.

In addition, the export of source material is governed by numerous security and proliferation-related requirements. *See* 10 C.F.R. § 110.42. These requirements include, for example, the following: (1) IAEA safeguards as required by Article III(2) of the Nuclear Non-Proliferation Treaty will be applied with respect to any material proposed to be exported and to any special nuclear material used in or produced through the use thereof; (2) adequate physical security measures will be maintained with respect to such material or facilities proposed to be exported and to any special nuclear material used in or produced through the use thereof; and (3) no material proposed to be exported or previously exported and subject to the applicable agreement for cooperation, and no special nuclear material produced through the use of such material, will be used for any nuclear explosive device or for research on or development of any nuclear explosive device. *Id.* These requirements, among others, ensure that appropriate proliferation safeguards are in place.

⁸ *See, e.g.*, “Office of International Regimes and Agreements; Proposed Subsequent Arrangement,” 72 Fed. Reg. 8362 (Feb. 26, 2007). This notice, which was issued under the authority of AEA § 131, the “Agreement for Cooperation in the Peaceful Uses of Nuclear Energy between the United States and the European Atomic Energy Community (Euratom),” and the “Agreement for Cooperation in the Peaceful Uses of Nuclear Energy between the United States and Canada,” concerned the re-transfer of natural uranium from Canada to the United Kingdom for ultimate use as nuclear power reactor fuel in Japan.

At bottom, the export of source material is governed by a regulatory scheme (Part 110) that is separate and apart from the re-licensing of Crow Butte’s facility (under Part 40). The Petitioners concerns are properly addressed in the context of the NRC’s export program and not as part of the licensing of Crow Butte, which only authorizes the possession and use — not the export — of source material.

C. Petitioners’ Other Arguments Do Not Warrant Denial of Renewed License

Petitioners’ other arguments repeat the same errors discussed above regarding the export of source material. In their brief, Petitioners argue that 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.” Pet. Brief on K, at 40. Petitioners go on to ask “[i]f there were a shortage [of uranium], what would keep Cameco from diverting uranium and nuclear fuel from the global markets to exclusively serve Canada’s needs.” *Id.* This argument is unrelated to any finding that must be made in connection with this license renewal application. Moreover, based on the question, Petitioners appear to mistakenly assume that renewal of Crow Butte’s license will or could result in the export of source material. As discussed *supra*, Crow Butte is not authorized to export material. Any exports are governed by an export license under a separate and distinct approval process (Part 110). Material mined at Crow Butte is not necessarily exported to Canada or to anywhere else.⁹ Further, even if the uranium mined at Crow Butte is exported, the exports may occur at different points in the nuclear fuel cycle. And, the same material might subsequently be imported back into the United

⁹ For example, the uranium from Crow Butte could be sent directly to the UF₆ conversion facility in Metropolis, Illinois, and then to USEC’s enrichment plant in Kentucky. From there, the enriched uranium could be converted to fuel in South Carolina before being used in a U.S. power reactor.

States. For example, uranium from Crow Butte could be “exported” or “imported” at the following stages of the fuel cycle:

- Natural uranium sent to Metropolis, Illinois for conversion, then to Europe for enrichment, then back to U.S. for fuel fabrication and use in a reactor;
- Natural uranium sent to Metropolis, Illinois for conversion, then to Paducah, Kentucky for enrichment, then to Europe for fuel fabrication and use in a reactor;
- Natural uranium sent to Metropolis, Illinois for conversion, then to Paducah, Kentucky for enrichment, then to U.S. fuel fabrication facility, and then to Europe for use in a reactor;
- Natural uranium sent to Canada for conversion and then back to U.S. for enrichment, fuel fabrication, and use in a reactor; or
- Natural uranium sent to Canada for conversion and then to Europe for enrichment before coming back to the U.S. for fuel fabrication and use in a reactor.¹⁰

As these examples make clear, the party responsible for the “export” and the timing of the “export” may vary depending on the stage of the fuel cycle at which the export occurs. This is precisely the reason that the export of material involves a separate NRC approval.

Petitioners also argue 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 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.” Pet. Brief on K at 41-42. However, Petitioners provide no evidence or information to suggest that issuance of

¹⁰ See, e.g., Department of Energy, “Office of Nonproliferation Policy; Proposed Subsequent Arrangement,” 70 Fed. Reg. 9059 (Feb. 24, 2005).

a renewed license to Crow Butte would impact any of the asserted national interests. As discussed above, source material mined at Crow Butte is subject to transfer (and re-transfer) restrictions, does not involve technologies that are useful in weapons programs, and cannot be exported without another, separate license under 10 C.F.R. Part 110. Again, Petitioners are stating policy preferences which are outside the scope of this licensing proceeding. These policy issues should instead be taken up with the Commission through the rulemaking process or as part of an export licensing proceeding.

Petitioners also argue that “foreign owners ... have no loyalty to prevent the reckless, negligent, or intentional contamination of the environment by ISL mining” and that “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.” Pet. Brief on K at 43. These statements are nothing more than unfounded speculation and are not tied to the specific application at issue. Crow Butte (not Cameco) is the licensee and also the owner and operator of the project. Crow Butte is responsible for compliance with all applicable federal, state, and local laws, regulations, licenses, and permits. And, as discussed above, Crow Butte Resources is a Nebraska corporation (*i.e.*, a U.S. corporation) and all of its officers are U.S. citizens. *See* LRA, at 1-2. Crow Butte Resources is owned by another U.S. company, Cameco US Holdings. And, the organizational structure for Crow Butte, including identification of persons responsible for compliance, is laid out in Chapter 5 of the License Renewal Application. Petitioners have not provided any information to support their claims or contested the specific governance structure reflected in the license application.

Moreover, the mere fact that Petitioners have cast generalized, unsupported aspersions on the integrity of Crow Butte and its employees cannot support a contention. Crow Butte fully understands its obligations under its license and the NRC's regulations. Obviously, Crow Butte will comply fully with whatever requirements or conditions are imposed by the Commission.

Further, any suggestion that Crow Butte would intentionally withhold information or forge documents is wholly misplaced. The forging of regulatory documents would be a serious offense, subject to both civil enforcement proceedings and potentially criminal charges. *See, e.g.*, 10 C.F.R. §§ 40.10, 40.81, and 40.82.¹¹ To the extent that Petitioners are referring to a particular event, as the NRC Staff noted in its June 9, 2008 pleading in the separate North Trend Expansion proceeding,¹² the NRC addressed and resolved the (unfounded) concerns raised regarding alleged non-disclosures nearly 20 years ago.¹³ In any event, this proceeding is not the appropriate forum "to litigate historical allegations." *See Georgia Power Co. (Vogle Electric Generating Plant, Units 1 and 2)*, CLI-93-16, 38 NRC 25, 36 n.22 (1993). Petitioners arguments are nothing more than a general fear that a domestic licensee (with a foreign grandparent) cannot be trusted to follow regulations of any kind.

Petitioners also repeat prior statements that incorrectly suggest that yellowcake produced at Crow Butte can be taken outside of U.S. legal restrictions. *See* Pet. Brief on K at 44.

¹¹ However, any enforcement action would involve a separate agency action (*i.e.*, an enforcement order) and would not be part of this license renewal proceeding.

¹² "NRC Staff Response To Petitioners' Brief On Foreign Ownership And Subpart G," dated June 9, 2008.

¹³ *See* Ltr. from E. Hawken, NRC, to J. Peterson, dated June 23, 1989 (ADAMS Accession No. ML080740162); *see also*, Ltr. from R. Hall, NRC, to A. Ried, dated August 24, 1989 (ADAMS Accession No. 8910020257).

As Crow Butte explained in its January 20, 2009 brief on Miscellaneous Contention K, the restrictions mentioned in Cameco's Annual Information Form are commercial in nature and not related to proliferation (*i.e.*, they are intended to protect the market for domestic suppliers of uranium, such as Crow Butte). Thus, this reference in no way supports Petitioners' arguments.

Similarly, Petitioners wonder how the NRC would have an opportunity to secure full information regarding ownership "[i]f Applicant's corporate shares were secretly acquired." Pet. Brief on K at 45. As an initial matter, 10 C.F.R. § 40.46 states that no license may be transferred unless the Commission, after acquiring full information, finds that the transfer is acceptable and gives its consent in writing. *See* NRC Information Notice (IN) 89-25, "Unauthorized Transfer of Ownership or Control of Licensed Activities," dated March 7, 1989 (Accession No. ML031180579). Thus, any transfer of control that did not comply with Section 40.46 would be contrary to NRC regulations and could result in enforcement sanctions. More generally, in order to have an orderly regulatory scheme, the NRC must be able to rely on a licensee and its employees to comply with NRC requirements. There is simply no reason to question the renewal of Crow Butte's license on the basis that some future, hypothetical licensee might fail to comply with the NRC's regulations.

Finally, Petitioners' concerns regarding recordkeeping also have no basis in law or fact. Pet. Brief on K at 50. Again, all Crow Butte operations must be conducted in conformance with applicable laws, regulations, and requirements of the various regulatory agencies with oversight. For example, Crow Butte is required to maintain certain records and make certain reports to the NRC. *See, e.g.*, 10 C.F.R. §§ 40.60, 40.61. These records must be available for NRC inspection. 10 C.F.R. § 40.62. Further, Chapter 5 of the LRA describes the

individuals and programs with responsibility for various activities at Crow Butte. Petitioners have not asserted anywhere that this section of the application is inadequate or incomplete.

With respect to Petitioners' arguments regarding intentional contamination of the environment (Pet. Brief on K at 43), Crow Butte utilizes a performance-based approach to the management of the environment and employee health and safety, including radiation safety. A Safety and Environmental Review Panel ("SERP") determines compliance with various conditions in Crow Butte's license. LRA, at 5-11. The SERP is responsible for monitoring any proposed change in the facility or process, making changes in procedures, and conducting tests or experiments not contained in the current license. As such, the SERP is responsible for ensuring that any such change does not diminish the essential safety or environmental commitments of Crow Butte. Further, the SERP must document its findings, recommendations, and conclusions in a written report. *Id.*, at 5-13. All SERP reports and associated records of any changes must be maintained through termination of the license and are subject to NRC inspection and audit at any time. *Id.* Moreover, Crow Butte must submit an annual report to the NRC. Petitioners have introduced nothing to call into question the sufficiency or adequacy of Crow Butte's specific recordkeeping, reporting, or safety/environmental decisionmaking processes.

At bottom, Petitioners' complaints are generic in nature and not tied to any specific aspect of Crow Butte's license renewal application. As such, their concerns are beyond the scope of this proceeding and, instead, are best addressed with the Commission as a matter of policy or through the rulemaking process. The Petitioners have not shown that ultimate foreign ownership of a source material licensee is prohibited by the AEA or by NRC regulations. Further, the Petitioners have failed to provide any information to suggest that renewal of Crow

Butte's source material license would have an impact on or endanger the common defense or security of the United States, so as to bring into question the propriety of granting a renewed license.

CONCLUSION

For the all foregoing reasons, neither the AEA nor NRC regulations prohibit the ultimate foreign ownership of Crow Butte, and Cameco's ultimate ownership of Crow Butte does not impact or endanger the common defense or security. Accordingly, the Board should resolve Miscellaneous Contention K in favor of the Applicant.

Respectfully submitted,

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Dated at San Francisco, California
this 10th day of February 2009

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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)	Docket No. 40-8943
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CERTIFICATE OF SERVICE

I hereby certify that copies of "APPLICANT'S REPOSE TO PETITIONERS' BRIEF REGARDING MISCELLANOUS CONTENTION K" in the captioned proceeding have been served via the Electronic Information Exchange ("EIE") this 10th 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.

/s/ signed electronically by _____

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