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OFFICE OF SECRETARY  
RULEMAKINGS AND  
ADJUDICATIONS STAFFUNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION  
ATOMIC SAFETY AND LICENSING BOARD PANELBefore 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

February 10, 2009

**INTERVENORS' ANSWER OPPOSING SUMMARY DISPOSITION OF MISC.  
CONTENTION G – CONCEALMENT OF FOREIGN OWNERSHIP**

Pursuant to LBP-08-24, as amended by the Board's December 9, 2008 Order, as described in Paragraph D at page 4 of the Board's Initial Scheduling Order dated January 8, 2009, and 10 C.F.R. §2.1205(b), Intervenor (formerly Consolidated Petitioners in this matter) hereby submit this Answer opposing Applicant's Motion for Summary Disposition of Miscellaneous Contention G. Incorporated herein is Intervenor's Statement of Material Facts As To Which Genuine Disputes Exist in support of this Answer pursuant to 10 C.F.R. §2.1205(b) and 10 C.F.R. §2.710(a)<sup>1</sup>.

**INTRODUCTION**

In LBP-08-24, the Board admitted Petitioners' Miscellaneous Contention G as it pertains to concealment of foreign ownership and Miscellaneous Contention K as it pertains to 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>2</sup> The Board found that "[t]he portion of Consolidated Petitioners' Miscellaneous Contention G

<sup>1</sup> Hereinafter "Intervenor's Statement of Material Facts in Dispute."

<sup>2</sup> LBP-08-24 at 62-68, 70-75 and 83.

that we admit (whether Crow Butte must disclose its alleged foreign ownership in its License Renewal Application) raises a substantive legal issue not heretofore briefed: “Whether the foreign ownership of an applicant must be disclosed in each and every source materials license renewal application.”<sup>3</sup> For the reasons discussed below, Intervenors submit that the answer to the foregoing question is yes, the foreign ownership of an applicant must be disclosed in each and every source materials application, including every license renewal application.

### **APPLICABLE STANDARDS**

1. The Board Need Not Consider Applicant’s Motion Unless It Would Serve To Expedite the Proceeding. The Board need not consider Applicant’s Motion unless the disposition of Misc. Contention G would “serve to expedite the proceeding if the motion is granted.” 10 C.F.R. §2.710(d)(1). Intervenors submit that Applicant’s intentional concealment of its foreign ownership (covered by Misc. Contention G) is inextricably connected to the lack of authority of the NRC to issue a source materials license to a foreign owned company (covered by Misc. Contention K). Indeed, the Board in this proceeding ordered the parties to brief these related issues together and on the same timeline.<sup>4</sup> The Board in the Expansion Proceeding also found that the two issues are bound up in Contention E in that case.<sup>5</sup> It was Applicant’s choice to bi-furcate these

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<sup>3</sup> LBP-08-24 at 68.

<sup>4</sup> LBP-08-24 at 83.

<sup>5</sup> See LBP-09-01 at 25-26 (“[i]f 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 2

issues but the Board is not obligated to do so.

Section 2.710(d)(1) is very clear that the Board only needs to consider Applicant's Motion if it would serve to expedite the proceeding if the motion is granted. Applicant has made no showing as to how granting Applicant's Motion would serve to expedite the proceeding and has therefore failed to meet whatever burden it has as the moving party. Intervenor submits that Misc. Contention G and Misc. Contention K are so intertwined that there is no expediency found in terminating Misc. Contention G. Therefore, the Board should exercise its discretion under Section 2.710(d)(1), simply refuse to consider Applicant's Motion and deny Applicant's Motion.

2. Applicable Rules Concerning Summary Disposition. In the event that the Board decides to consider Applicant's Motion under Section 2.710(d)(1), then the Commission's rules governing summary disposition apply and such rules are analogous to Rule 56 of the Federal Rules of Civil Procedure. In re Commonwealth Edison Co. (Braidwood Nuclear Power Station, Units 1 and 2), 23 NRC 414, 417, citing Alabama Power Co. (Joseph M. Farley Nuclear Power Plant, Units 1 and 2), ALAB-182, 7 AEC 210, 217 (1974). In operating license proceedings, the burden of proof with respect to summary disposition is upon the applicant-movant, who must demonstrate the absence of any genuine issue of material fact. Id., citing Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-443, 6 NRC 741, 753 (1977). And, in determining whether a motion for summary disposition should be granted, the record must be viewed in the light most favorable to the opponent of such a motion, the

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countries other than Canada, and alleged motivation of the Canadian owners to put their own profits above environmental and health concerns in the U.S.”)

evidence of the non-movant is to be believed and all justifiable inferences are to be drawn in his favor. Id., citing Dairyland Power Cooperative (LaCrosse Boiling Water Reactor), LBP-82-58, 16 NRC 512, 519 (1982); Anderson v Liberty Lobby, Inc. 477 US 242, 255 (1986) citing Adickes v. S.H. Kress & Co., 398 US 144, 158-159 (1970). In addition, the burden is placed on the moving party to establish both the absence of a genuine issue of material fact and that such party is entitled to judgment as a matter of law. Advanced Medical Systems, Inc., CLI-93-22, 38 NRC 98, 102 (1993); Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986).

If the proponent of the motion fails to make the requisite showing, the Board must deny the motion even if the opposing party chooses not to respond or its response is inadequate. Advanced Medical Systems at 102. To preclude summary disposition, when the proponent has met its burden, the party opposing the motion may not rest upon “mere allegations or denials,” but must set forth specific facts showing that there is a genuine issue. Id. Bare assertions or general denials are not sufficient.<sup>6</sup> Id.

Although the opposing party does not have to show that it would prevail on the issues, it must at least demonstrate that there is a genuine factual issue to be tried. Id. The opposing party must controvert any material fact properly set out in the statement of

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<sup>6</sup> Contrary to Applicant’s assertions, there is no obligation on a party to “pinpoint each of the Applicant’s stated material facts which they genuinely dispute.” See Applicant Motion at 2. The quotation taken out of context from Commonwealth Edison Co. (Braidwood Nuclear Power Station, Units 1 and 2), 23 NRC 414, 420 (1986) in a proceeding in which substantial discovery had taken place is actually “[w]ere the hearing not impending, we would have Intervenor’s file a further document pinpointing each of Applicant’s stated material facts which they genuinely dispute and setting forth the basis for their belief that the facts are not as stated. Under the circumstances, we have done the best we can in determining which material facts are genuinely in dispute because they are realistically opposed by Intervenor’s and have not been reasonably established through reliable evidence.”) (Parenthetical omitted.)

material facts that accompanies a summary disposition motion or that fact will be deemed admitted. Id. at 103. The United States Supreme Court has observed:

As to materiality, the substantive law will identify which facts are material. Only disputes facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted.

That is, while the materiality determination rests on the substantive law, it is the substantive law's identification of which facts are critical and which facts are irrelevant that governs.

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We observed further that “[i]t is true that the issue of material fact required by Rule 56(c) to be present to entitle a party to proceed to trial is not required to be resolved conclusively in favor of the party asserting its existence; rather, all that is required is that sufficient evidence supporting the claimed factual dispute be shown to require a jury or judge to resolve the parties' differing versions of the truth at trial.” Anderson v Liberty Lobby, Inc. 477 US 242, 248-249 (1986).

Intervenors must raise more than a ‘metaphysical doubt.’ Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986). In Matsushita, the United States Supreme Court found that to survive a motion for summary judgment, respondents had to establish that there is a genuine issue of a material fact as to whether there was an illegal conspiracy where the Court found no motive for a conspiracy. Id. at 586. When the moving party has carried its burden, the non-movant opponent must “do more than simply show that there is some metaphysical doubt as to the material facts.” Id. The Matsushita Court found that:

the absence of any plausible motive to engage in the conduct charged is highly relevant to whether a “genuine issue for trial” exists within the meaning of Rule 56(e). Lack of motive bears on the range of permissible conclusions that might be drawn from ambiguous evidence: if petitioners had no rational economic motive to conspire, and if their conduct is consistent with other, equally plausible explanations, the conduct does not give rise to an inference of conspiracy.

In sum, in light of the absence of any rational motive to conspire, neither petitioners' pricing practices, nor their conduct in the Japanese market, nor their agreements respecting prices and distribution in the American market, suffice to create a "genuine issue for trial. Id. at 596-597.

Unlike Matsushita where there was no motive alleged to create plausibility for purposes of establishing a genuine issue, in this case, there is sufficient motive asserted (and factual materials submitted to support such motive) for concealment, namely, to avoid regulatory oversight and analysis of the foreign ownership issues raised in Misc. Contention K, the foreign ownership issues under the Nebraska Alien Ownership Act described in the Petition, and possibly to avoid antitrust review under AEA Section 105 and the Sherman Antitrust Act and the Hart-Scot Rodino Act.

In Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2),<sup>7</sup> a higher degree of probative evidence was required to oppose a motion for summary disposition because declarations by responsible state officials had been filed in the case which provided substantial support for applicant's position concerning the state's plans that were at issue in that case and due to such corroboration of applicant's position, to avoid summary disposition intervenors in that case had to present contrary evidence that was so 'significantly probative' as to create a material factual issue. The higher degree of probative evidence is not required in this case because there has been no such corroboration of Applicant's statements. Therefore, Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2) is distinguishable from the instant case where Applicant has not filed any supporting affidavits and bases the its entire Motion on the December 16<sup>th</sup> amendment to the LRA and a summarily stated assertion of mootness that lacks analysis. None of this supports a finding that Applicant has met its burden.

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<sup>7</sup> CLI-92-8, 35 NRC 145, 154 (1992); Applicant Motion at 3.

Intervenors concur with Applicant that evidence in support of or opposition to a motion for summary disposition can include: “filings in the proceeding, depositions, answers to interrogatories, and admissions on file, together with the statements of the parties and the affidavits,” and that all factual material in the administrative record may be used by pointing it out to the Licensing Board. See 10 C.F.R. § 2.710(d); Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). However, Applicant asks the Board to create a new burden for Intervenors when it says that “[i]dentifying such material, however, is an obligation of the party, not the Licensing Board.” Applicant Motion at 3 indirectly citing Barge v. Anheuser-Busch, Inc., 87 F.3d 256, 260 (8th Cir. 1996). Barge is an employment discrimination case in which the nonmoving party failed to make out a *prima facie* case and failed respond to the motion for summary judgment. The court found in dicta that there was no obligation of the court to “plumb the record in order to find a genuine issue of material fact.” Id. at 258. Accordingly, there is no legal support for Applicant’s proposition that there is an affirmative obligation on the part of Intervenors to identify factual material that lies in the record. Further, such an interpretation would run afoul of the Supreme Court and NRC precedent discussed above and would be arbitrary and capricious. As a result, Applicant’s assertions in that regard must fail.

3. Doctrine of Mootness. Applicant urges the Board to apply the doctrine of mootness.<sup>8</sup> The doctrine of mootness may be applied where a contention is merely an omission of particular information and the information is later supplied. See Duke Energy Corp. (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear State, Units 1 and 2), CLI-02-28, 56 NRC 373, 382-383 (2002); see also USEC, Inc. (American Centrifuge Plant), CLI-06-09, 63 NRC 433 (2006). In Duke Energy Corp., intervenors’ contention “merely alleged that there was new, significant information (a Sandia study) that Duke should have taken into account” in a SAMA cost-benefit analysis. Id. at 379.

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<sup>8</sup> Applicant’s Motion at 5-6.

The only new information in the Sandia study that was relevant to Duke's SAMA analysis consisted of conditional containment failure probabilities found by the study and the study itself incorporated long-available data concerning SBO frequency estimates, among other things. After the contention was admitted, the applicant's environmental report was superseded by draft SEISs which used the Sandia study containment failure probabilities leading to a claim of mootness. Thereafter, intervenors sought to challenge the SBO frequency used by Duke in its SAMA analysis under the original contention (notwithstanding the Board's encouragement to file an amended contention) despite the fact that the original contention made no attempt to identify, analyze, or otherwise discuss any SBO frequency information in the SAMA analysis or to compare any SBO information from the Sandia study to SBO information in the SAMA analysis. The Commission found in Duke Energy Corp. that:

There is, in short, a difference between contentions that merely allege an "omission" of information and those that challenge substantively and specifically how particular information has been discussed in a license application. Where a contention alleges the omission of particular information or an issue from an application, and the information is later supplied by the applicant or considered by the Staff in a draft EIS, the contention is moot. Id. at 382-383 (emphasis in original).

Similarly, in USEC, Inc. (American Centrifuge Plant),<sup>9</sup> the Commission found a contention to be moot when it was based solely on an omission from an environmental report that was cured by an applicant response to a RAI or by the NRC Staff in the form of an environmental impact statement.

Where, as here, Misc. Contention G challenges substantively and specifically how particular information (that relating to ownership and control by foreign interests) has

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<sup>9</sup> CLI-06-09, 63 NRC 433, 444 (2006).

been discussed in the license application, neither Duke Energy Corp. nor USEC, Inc. would support a finding of mootness. See also LBP-09-01 at 25-26.

A finding of mootness under Duke Energy Corp. and USEC, Inc. would have been appropriate had a contention been admitted concerning the missing page 3-22 referred to in the Petition and subsequently supplied by Applicant after the start of this proceeding. Intervenor's acknowledge that the missing information in page 3-22 was supplied by Applicant and that, therefore, any contention based solely on the failure to disclose page 3-22 was mooted under Duke Energy Corp. and USEC, Inc. However, because Misc. Contention G is intertwined with Misc. Contention K and because it involves substantive issues of fact and law identified in the Statement of Material Facts in Dispute, it would be inappropriate to make a finding of mootness with respect to Misc. Contention G.

This is especially so when the December 16, 2008 amendment to the LRA that is referred to in Applicant's Motion itself fails to disclose the required information, namely, that Applicant is owned by a corporation that is owned by Cameco Corporation. Rather, even after Applicant's amendment purportedly to correct the deficiency, the LRA states that Applicant is owned by a corporation which is '**held**' by Cameco Corporation. The word "held" is not the same as the word "owned." Therefore, on its face the amendment fails to cure the omission and does not support Applicant's Motion. Accordingly, rather than moot the contention, the amendment raises more questions than it answers.

#### **MATERIAL FACTS**

There is no dispute that Applicant is 100% foreign owned, controlled and dominated and the same as been admitted by Applicant in this proceeding. LBP-08-24 at

64. In 1995/1996, Geomex, a major shareholder (32%) of Applicant, was acquired by Cameco<sup>10</sup> and, in 1998, Uranerz, the other major shareholder (58%) of Applicant was acquired by Cameco.<sup>11</sup> In 1998, after Cameco had acquired a 90% controlling interest in Applicant, it reported it to the NRC.<sup>12</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.<sup>13</sup>

The curious timing of Applicant's filings is that the license renewal application for 1998-2008 was filed in 1997 and later in 1998, the Section 40.46 notification was filed re: the Uranerz stock purchase. It is likely that there was never a proper inimicality review under Section 40.32(d) in 1997/1998 because the license renewal application had already been accepted and reviewed by the NRC Staff prior to the disclosure of the foreign ownership and control and there were no public intervenors at that time. By that measure, Applicant's concealment of its foreign ownership was extremely effective to delay public knowledge of and opposition to the foreign ownership.

A review of Applicant's Statement of Material Facts attached to Applicant's Motion reveals that the LRA, as amended, still fails to state that Applicant is owned by

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<sup>10</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>11</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>12</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>13</sup> Petition at 15-16.

Cameco Corporation which is a foreign corporation. The LRA as amended states that Applicant is owned by a Nevada corporation which is 'held' by Cameco Corporation. See Applicant Statement of Material Facts at ¶4(e); See also Intervenors' Statement of Material Facts in Dispute at ¶4(e), ¶5, ¶6, and ¶7. In addition, Applicant's Statement of Material Facts fails to mention the other facts that are in dispute in this matter, raised by Intervenors in the record as set forth in the highlighted text in Intervenors' Statement of Material facts in Dispute at ¶1, ¶2, ¶3, ¶4(e), ¶5, ¶6, ¶7, ¶8, ¶9, ¶10 and ¶11.

### ARGUMENT

Intervenors included Misc. Contention G in the Petition as follows:

**Contention G: Failure to Disclose in violation of 40.9. There are several instances of intentional, reckless or negligent failures to disclose, including:**

(1) **Concealment<sup>14</sup> of Foreign Ownership, as described herein.**

The phrase "as described herein" refers to the other portions of the Petition that refer to concealment of foreign ownership, including the information incorporated by reference at page 5 of the Petition (ML081760301 & ML081570141); ¶2, ¶3, ¶4, ¶11, ¶12 at pages 15-16 and 18-19 of the Petition, Misc. Contention G at page 32 of the Petition, and with regard to Misc. Contention K and discussion of foreign ownership and shareholdings of Crow Butte Resources, Inc., at pages 36-60 of the Petition.<sup>15</sup>

Based on this, it is clear that Misc. Contention G is more than merely a contention of omission of one particular piece of information which, if supplied, could lead to a

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<sup>14</sup> Defined as: 1 : to prevent disclosure or recognition of <conceal the truth> 2 : to place out of sight <concealed himself behind the door>; <http://www.merriam-webster.com/dictionary/Concealment>

<sup>15</sup> Further amplification was provided in Petitioners Response to Answers at 64-66.

finding of mootness. Rather, Misc. Contention G involves specific facts alleged to be omitted, specific motives for the omission to include concealment of facts from regulators that go to the essence of the authority of the NRC to issue the license in question and possible consequences and impacts of such failure to disclose and/or concealment.

A. Concealment of Foreign Control - 'Cameco Loophole' Is Inimical. 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<sup>16</sup>. Concealment of the foreign ownership 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 international non-proliferation efforts.<sup>17</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. All this makes Misc. Contention G more than merely an omission of a particular piece of information that can be simply cured as Applicant would like.

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

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<sup>16</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.

<sup>17</sup> See Building a Corporate Nonproliferation Ethic, at footnote 67 in Petitioners Brief re: Misc. Contention K (January 21, 2009).

radiological device (“RDD” or “Dirty Bomb”).<sup>18</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 including those posed by issuing source materials licenses to potentially foreign-owned and controlled entities.

B. Applicant Has Failed to Meet Its Burden. Applicant has failed to meet its burden that there is an absence of a genuine issue of material fact and that Applicant is entitled to judgment as a matter of law. It failed to adequately amend the LRA to show that a foreign corporation owns the corporation that owns Applicant. It failed to provide any meaningful argument concerning whether the contention should be mooted and why under the applicable cases. Applicant failed to acknowledge any obligation for an applicant generally to disclose the citizenship of the ultimate parent of a proposed licensee in order for the NRC Staff to make a proper determination under Section 40.32 and the AEA.

Because the Board must view the record and all justifiable inferences in favor of Intervenor, in a light most favorable to them, it is clear that Applicant has failed to meet its burden. Therefore, the Board must deny the Applicant’s Motion. See Advanced Medical Systems at 102.

C. Intervenors Have Made a Showing Of Genuine Issues Of Material Fact. If Applicant were found to have met this burden, Intervenor would then be required to

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<sup>18</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>.

make a showing beyond mere allegations, general denials or bare assertions, but Intervenor would not need to show that it would prevail on the issues. Rather, Intervenor would need only demonstrate that there is at least one genuine factual issue to be tried.

The Intervenor has controverted one or more material facts stated in Applicant's Statement of Material Facts as described in Intervenor's Statement of Material Facts in Dispute. In doing so, Intervenor has raised much more than a 'metaphysical doubt.' Intervenor has shown Applicant's motive for concealment which allows reasonable inferences to be drawn at this stage of the proceeding which support a finding of the existence of a genuine issue of material fact – namely, that Applicant intentionally concealed the foreign ownership, control and domination of its management by foreign interests by virtue of 100% indirect stock ownership by Cameco Corporation, a Canadian corporation, of Applicant in order to avoid regulatory problems such as those posed by the lack of authority of the NRC to issue licenses to foreign owned companies and potential problems under federal antitrust laws or the Nebraska Alien Ownership Act.

Intervenor is not required to provide any evidentiary matter in opposition to Applicant's Motion. Cleveland Elect. Illum. Co. (Perry Nuclear Power Plant, Units 1 and 2), 6 N.R.C. 741, 754 (1977). "[W]here the evidentiary matter in support of the motion does not establish the absence of a genuine issue, summary judgment must be denied *even if no opposing evidentiary matter is presented.*' [emphasis in original noted as 'added by the Supreme Court in Adickes v. Kress & Co., *supra*, 398 U.S. at 159'.]"

Cleveland Elect. Illum. Co. at 754.

Although not required, Intervenor has provided a large amount of factual information which has not been disputed by Applicant and which is summarized above in the “Relevant Facts” Section and stated specifically in Intervenor’s Statement of Material Facts in Dispute. This factual material demonstrates that there are genuine issues of material fact in dispute in this case concerning the concealment of the foreign ownership of Applicant. At a minimum, this factual material demonstrates that there is no absence of a genuine issue and that Applicant is not entitled to judgment as a matter of law. Accordingly, Intervenor has met their burden in opposing Applicant’s Motion.

D. Consequences of Accepting ‘Cameco Loophole’ Are Potentially Severe.

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 182 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 involving nuclear material, other radioactive substances or their associated facilities.”<sup>19</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>20</sup> The WMD

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<sup>19</sup> A. Nilsson, footnote 78 *infra*, at 9.

<sup>20</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 15

Commission Report also notes the shortcomings in Congressional oversight of nonproliferation where IAEA inspections are required under the AEA.<sup>21</sup>

A full and complete analysis of the nuclear security risks requires strict compliance with the “disclosure of citizenship” requirements of AEA Section 182 as well as a complete analysis of the implications of foreign ownership, control and influence (“FOCI”)<sup>22</sup> on the common defense and security and on the health and safety of the public. The concerns of nuclear security are now paramount. The immediate detection and prevention of any form of nuclear threat is required to maintain our national security. Detection requires full disclosure.

Intervenors 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

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Arabia; failure to properly review the nuclear cooperation agreements between Russia or India.

<sup>21</sup> Id.

<sup>22</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 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.

we face in 2009 and rapidly evolving and adapting networks of illicit procurement and nuclear smuggling.

As a matter of pure legal analysis, however, there is absolutely no distinction between the ability to use the Cameco Loophole by 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.

“[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.

E. Concealment of Foreign Ownership Is Inimical to Public Health and Safety.

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. 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.

Intervenors note that AEA Section 105 provides that nothing in the AEA relieves

any person from regulation under anti-trust laws.<sup>23</sup>

F. Relevance of Non-Proliferation Treaty. The Non-Proliferation Treaty has failed to keep up with the ever-evolving methods of nuclear smugglers and illicit procurement networks.<sup>24</sup> 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 the activity is not inimical.

The concerns of nuclear security<sup>25</sup> are now paramount in the post-9/11, post A.Q. Kahn nuclear proliferation. The immediate detection and prevention of any form of nuclear threat is required to maintain our national security. These are described by the International Atomic Energy Agency (“IAEA”) as well as US National Nuclear Security Administration (“NNSA”):

IAEA:

1. Acquisition by non--State actors or State actors of nuclear material for 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>26</sup>

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<sup>23</sup> 42 USC §2135.

<sup>24</sup> Indeed, it was a Canada’s gift of a research reactor that gave India the technology used to create the plutonium it used to become a nuclear power in 1974 – in one of the worst cases of nuclear proliferation the world has ever known. See Uranium: A Discussion Guide – Questions and Answers, Section B.6 at [http://www.ccnr.org/nfb\\_uranium\\_0.html](http://www.ccnr.org/nfb_uranium_0.html)

<sup>25</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 to Petitioners Brief re: Misc. Contention K (January 21, 2009), at 9.

<sup>26</sup> Id. at 3.

NNSA:

One of the gravest threats the United States and the international community face is the possibility that terrorists or rogue nations will acquire nuclear weapons or other weapons of mass destruction (WMD). Their continued pursuit of these weapons, along with related technologies, equipment, and expertise, increases the urgency of NNSA's efforts to:

- \* Detect nuclear and radiological materials, and WMD-related equipment;
- \* Secure vulnerable nuclear weapons and weapons-usable nuclear and radiological materials;
- \* Dispose of surplus weapons-usable nuclear and radiological materials.

NNSA, through its Office of Defense Nuclear Nonproliferation, works closely with a wide range of international partners, key U.S. federal agencies, the U.S. national laboratories, and the private sector to detect, secure, and dispose of dangerous nuclear and radiological material, and related WMD technology and expertise.<sup>27</sup>

It is clear that detection is facilitated by full and complete disclosures concerning foreign ownership as well as the identities of foreign decision makers and persons with access to Restricted Information who may be located in a foreign country. Detection and investigation of nuclear threats is obviously made easier by full and complete disclosure of the foreign interests that may have ownership or control over an Applicant.<sup>28</sup>

Intervenors respectfully suggest that in order to succeed in detecting and investigating undeclared nuclear activities both: (1) foreign ownership and control must be disclosed in all source materials license applications; and (2) foreign ownership, control and domination of an applicant should be found to be inimical to CD&S and PH&S in all cases.

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<sup>27</sup> [http://nnsa.energy.gov/nuclear\\_nonproliferation/index.htm](http://nnsa.energy.gov/nuclear_nonproliferation/index.htm)

<sup>28</sup> See also the NNSA report entitled "International Safeguards: Challenges and Opportunities for the 21<sup>st</sup> Century" stating that "the lessons of Iraq, Iran, North Korea, and Libya suggest that safeguards, to be effective, must also succeed in detecting or investigating undeclared nuclear activities, including certain weaponization and illicit procurement activities that may indicate noncompliance." At [http://nnsa.energy.gov/nuclear\\_nonproliferation/nuclear\\_safeguards.htm](http://nnsa.energy.gov/nuclear_nonproliferation/nuclear_safeguards.htm)

G. US National Interest Served By Requiring Disclosure of Identity of Ultimate Parent.

Finally, as noted in the Amicus Brief filed by the International Indian Treaty Council in connection with Misc. Contention K, the United States has a national interest of ascertaining the ultimate responsible party owning mining operations so as to comply with the international obligations of the United States in the event that the mining operations are found to infringe or violate the rights of indigenous people. This is another reason why it is a compelling governmental interest to require strict compliance with AEA Section 182 and NRC Regulation 40.9(a) as it pertains to the requirement that the foreign ownership of the ultimate parent and control persons of an applicant for a source materials license be disclosed in each and every application.

**CONCLUSION**

The foregoing shows that Intervenors have met their burden that there are one or more genuine issues of material fact in dispute in this case concerning the concealment of the foreign ownership of Applicant. At a minimum, Intervenors have shown that there is no absence of a genuine issue and that Applicant is not entitled to judgment as a matter of law. On the contrary, Applicant has failed to make any showing that Applicant's Motion should be considered under Section 2.710(d)(1) as to how it would serve to expedite this proceeding and Applicant has failed to meet its burden that there is an absence of a genuine issue of a material fact and that it is entitled to relief as a matter of law. Accordingly, Intervenors have met their burden in opposing Applicant's Motion and

Applicant has failed to meet its burden in propounding the motion.

For all the foregoing reasons, the Board should deny Applicant's Motion for Summary Disposition of Miscellaneous Contention G.

Dated this 10<sup>th</sup> day of February, 2009.

Respectfully submitted,

/s/ - electronically signed

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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

February 10, 2009

**INTERVENORS' STATEMENT OF MATERIAL FACTS  
AS TO WHICH GENUINE DISPUTES EXIST**

Pursuant to 10 C.F.R. §2.1205(b) and 10 C.F.R. §2.710(a), Intervenors hereby submit, in support of its Answer Opposing Summary Disposition of Miscellaneous Contention G, this statement of material facts as to which Intervenors contend that there are genuine issues to be heard:<sup>1</sup>

1. Crow Butte filed its license renewal application on November 27, 2007. **Cameco planned the 'creeping acquisition' of shares of common stock of Crow Butte Source Materials License SUA-1534 in order to minimize disclosure in connection with the 1998 renewal of such License.<sup>2</sup> Cameco's creeping acquisition commenced with a 1996 purchase of just under 1/3 of Crow Butte's common stock through its purchase of Geomex.<sup>3</sup> Crow Butte filed its 1998 renewal in 1997 after Cameco acquired just under 1/3 control but failed to disclose Cameco's large stock purchase in the 1998 renewal.<sup>4</sup> While the 1998 renewal was pending, Crow Butte**

<sup>1</sup> For purposes of convenience, Intervenors make this statement with reference to the paragraphs listed in the Statement of Material Facts filed by Applicant Crow Butte Resources, Inc. ("Applicant" or "Crow Butte") in support of its motion for summary disposition of Miscellaneous Contention G (**with Intervenors' additions highlighted in bolded underlined text**).

<sup>2</sup> See Petitioners Response to Applicant and NRC Staff Answers to Petition (September 3, 2008) (ML082661069) (hereinafter "Petitioners Response to Answers") at 7-9.

<sup>3</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; Petition at 5.

<sup>4</sup> See Petitioners Response to Answers at 7.

**notified the NRC Staff that Cameco had proposed to purchase 57.69% of Crow Butte through its purchase of Uranerz USA, Inc. which would bring its ownership to 90% as of 1998.<sup>5</sup> In 2007, Crow Butte filed a license renewal application in which it concealed that it is 100% owned, controlled and dominated by a foreign corporation called Cameco Corporation in violation of AEA Section 182 and 10 C.F.R. §40.9(a).**

2. On July 28, 2008, Consolidated Petitioners submitted Miscellaneous Contention G, which argued that Crow Butte failed to disclose its alleged foreign ownership in its license renewal application. **Intervenors argue that Applicant intentionally concealed its foreign ownership after Cameco Corporation secretly acquired just under 1/3 control of Crow Butte in 1995/1996 in a concealed transaction, acquired 90% control of Crow Butte in 1998 at which time it disclosed its ownership in Crow Butte and acquired 100% control of Crow Butte in 2000.<sup>6</sup> Intervenors further argue that AEA Section 182 requires a corporate applicant to include the jurisdiction of incorporation, the citizenship of its directors and principal officers and whether it is owned, controlled or dominated by an alien, a foreign corporation or a foreign government.<sup>7</sup>**

3. In its Memorandum and Order dated November 21, 2008, the Licensing Board found Miscellaneous Contention G “admissible as a contention of omission insofar as it claims Crow Butte failed to disclose in its License Renewal Application that it is owned and controlled by a foreign corporation.” LBP-08-24, \_\_ NRC \_\_, slip op. at 67. **The Board found that Consolidated Petitioners have identified a genuine dispute of material law regarding the required contents of an application for a Part 40 license with particular emphasis on the “citizenship” requirement identified in section 182 of the AEA.<sup>8</sup>**

4. On December 16, 2008, Crow Butte revised Section 1.2, page 1-2, of its November 27, 2007 license renewal application to expand the discussion of the ownership of Crow Butte. The revision included the following information:

a. The land (fee and leases) of the Crow Butte facility is owned by Crow Butte Land Company, a Nebraska corporation. All of the officers and directors of Crow Butte Land Company are U.S. Citizens.

b. Crow Butte Land Company is owned by Crow Butte Resources, Inc., which is a licensed operator of the facility.

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<sup>5</sup> Id.; 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) 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.”) incorporated in Petition at p5.

<sup>6</sup> Petition at 15-16.

<sup>7</sup> See LBP-08-24 at 65.

<sup>8</sup> Id. at 66.

c. Crow Butte Resources, Inc., which does business as Cameco Resources, is also a Nebraska company. All of its officers are U.S. citizens, as are 2/3 of its directors.

d. Crow Butte Resources, Inc., is owned by Cameco US Holdings, Inc., which is a U.S. corporation registered in Nevada. For Cameco US Holdings, 3/4 of the officers are U.S. citizens, as are 2/3 of the directors.

e. Cameco US Holdings, Inc., is held by Cameco Corporation, a Canadian corporation. **Intervenors submit that 'held' is not the same as 'owned'.**

f. Cameco Corporation is publicly traded on both the Toronto and New York Stock Exchanges.

**5. The December 16<sup>th</sup> Amendment to the LRA does not say that Crow Butte is owned and controlled by a foreign corporation; it says that Crow Butte is owned by Cameco US Holdings, Inc. which is "held" by Cameco Corporation.**

**6. The LRA, as amended, still fails to disclose that Crow Butte is owned and controlled by Cameco Corporation which is a foreign corporation.**

**7. The substantive legal issue identified by the Board remains unresolved: "Whether the foreign ownership of an applicant must be disclosed in each and every source materials license renewal application."**<sup>9</sup>

**8. Crow Butte management takes instructions from persons outside the United States, meetings take place outside the United States and minutes of such meetings and related records are kept outside of the United States.**<sup>10</sup>

**9. Intervenors dispute the factual and legal ramifications of Cameco's ownership and control of Crow Butte including the fundamental question of the ability to assure compliance with NRC rules, environmental and health issues being secondary to "foreign profits," future exports of Uranium, and inimicality to the national interest related to Cameco's business relationships with other countries such as Kazakhstan**<sup>11</sup>.

**10. Problems created by Applicant's foreign ownership include: (1) lack of jurisdiction over foreign decision-makers, (2) lack of jurisdiction over foreign assets to pay under-collateralized restoration costs, (3) skape-goating of US managers of**

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<sup>9</sup> LBP-08-24 at 68.

<sup>10</sup> See LBP-09-01 at 25-26 ("We note that it came out in our site visit 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 the United States.")

<sup>11</sup> See Petition at 15-16 (with reference to www.cameco.com); and at 18-19 (yellowcake from Crow Butte mine for foreign use and no assurance that Crow Butte yellowcake will not be used for nuclear weapons of foreign country or terrorists despite Canada being a signatory to the Non-Proliferation Treaty).

the mine for acts by foreign decision-makers, and (4) reckless disregard by foreign owners of the US public health and safety which has led to intentional concealment of the foreign ownership at the start of Cameco's creeping acquisition of Applicant and two year delay in disclosing Cameco's ownership to the NRC Staff (timed to avoid public disclosure in the 1998 renewal application filed in 1997 prior to the disclosure of Cameco's ownership and control) thereby delaying examination of this foreign ownership issue until now.<sup>12</sup>

11. Intervenors maintain that Crow Butte's failure to disclose foreign ownership was intentional in light of the lack of authority of the NRC to issue a license to a foreign owned company (as described in Miscellaneous Contention K) and in light of historical issues concerning illegal foreign ownership involving Crow Butte, the Nebraska Attorney General and Intervenor Western Nebraska Resources Council both which show Crow Butte's motive to conceal foreign ownership.<sup>13</sup>

Dated this 10<sup>th</sup> day of February, 2009.

Respectfully submitted,

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<sup>12</sup> See Expansion Proceeding July 23 Hearing Transcript at 457-458, at 460-461, at 462-463, at 573-576, and at 577-579, and Petitioners Response to Answers at 9.

<sup>13</sup> See May 23 Brief and Attachments on Contention E in Expansion Proceeding (ML081760301 & ML081570141), specifically the matters referred to in the 1989 McGuire Letter, 1989 NE Attorney General Letter to DEC, 1989 NE Attorney General Press Release, July 22, 1989 and August 11, 1989 Letters to NE Attorney General, 1990 McGuire Letter, and January 29, 1990 NE Attorney General Letter to DEC; all of which documents are included in the attachments at ML081570141.

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

February 10, 2009

CERTIFICATE OF SERVICE

I hereby certify that copies "INTERVENORS ANSWER OPPOSING APPLICANT'S MOTION FOR SUMMARY DISPOSITION RE: MISCELLANEOUS CONTENTION G WITH STATEMENT OF MATERIAL FACTS IN DISPUTE ATTACHED" in the above captioned proceeding has been served on the following persons by electronic mail as indicated by a double asterisk (\*\*); on this 10<sup>th</sup> day of February, 2009:

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## Nancy Greathead

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**Subject:** Docket No. 40-8943 - ASLBP No. 08-867-02-OLA-BD01  
**Attachments:** Intervenors Answer Opposing Summary Disposition Contention G 02102009.pdf; Intervenors Statement of Material Facts in Dispute 02102009.pdf; (Renewal) EIE conformed COS Misc Cont G 02102009.PDF

Hello,

Attached are Intervenors Answer Opposing Applicant's Motion for Summary Disposition of Misc. Contention G and attached Statement of Material Facts in Dispute, and related COS.

Sincerely,

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Received: from ?192.168.1.102? (66-233-92-76.mau.clearwire-dns.net  
[66.233.92.76]) by mx.google.com with ESMTPS id  
k2sm21501914rvb.6.2009.02.10.21.45.49 (version=TLSv1/SSLv3  
cipher=RC4-MD5); Tue, 10 Feb 2009 21:46:50 -0800 (PST)

User-Agent: Microsoft-Entourage/11.4.0.080122

Date: Tue, 10 Feb 2009 19:45:36 -1000

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

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