

February 18, 2009 (3:22am)

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**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

BEFORE THE COMMISSION

In the Matter of)	Docket No. 40-8943
CROW BUTTE RESOURCES, INC.)	ASLBP No. 07-859-03-MLA-BD01
(In Situ Leach Facility, Crawford, Nebraska))	February 17, 2009

INTERVENORS' ANSWER TO NRC STAFF APPEAL FROM LBP-09-01

Intervenors (formerly Petitioners in this matter) hereby respectfully submit this Answer to NRC Staff's appeal filed February 6, 2009, pursuant to 10 CFR Sections 2.311(a), and 2.341(c)(2).¹

INTRODUCTION

On January 27, 2009, the Atomic Safety and Licensing Board ("Board") issued LBP-09-01 admitting Contention E concerning foreign ownership and allowed the Arsenic contention filed September 22, 2008 (the "Arsenic Contention") to be litigated as part of the previously admitted Contention B in this proceeding. It would be inappropriate for the Commission to accept review, and if it did, such action by the Commission would itself be subject to being set aside as arbitrary, capricious, an abuse of discretion and not in accordance with law.

APPLICABLE STANDARD FOR REVIEW

The proper standard for review is found in Section 706 of the Administrative Procedure Act, which provides that the agency action, in this case, the Board's rulings, may be set aside if found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance

¹ With the intervening President's Day holiday, this filing is made on February 17, 2009.

with law.”² Such a finding would be made by a federal court reviewing the agency action. Further, the Commission has expressed its “general unwillingness to engage in ‘piecemeal interference in ongoing Licensing Board proceedings’.”³ NRC Staff fails to discuss the standards to be applied by the Commission in determining whether to exercise its discretion to accept this interlocutory appeal, or the standard(s) of review to be used by the Commission in the event that discretion is exercised to allow the appeal. Rather, NRC Staff attempts to re-argue the merits in its appeal without addressing the applicable standards for appellate review. As a result, the appeal is defective and must be denied.

ARGUMENT

A. Interlocutory Review Is Not Available.

NRC Staff seeks interlocutory appeal under Sections 2.311(a), and 2.311(c).⁴ Neither Applicant nor NRC Staff has alleged that any immediate or serious irreparable impact would occur if the appeal is denied or any other basis for interlocutory review. Applicant is not prejudiced because it continues operations in the existing mining area under SUA-1534 prior to the North Trend amendment. There is ample time for the Board to review the information resulting discovery, hear arguments, review briefing, complete its legal determinations, render a final decision in the case, and for Applicant and NRC Staff to take up appeals in due course. The

² 5 USC §706(2) (emphasis added).

³ Exelon Generation Co., LLC (Early Site Permit for the Clinton ESP Site), CLI-04-31, 60 NRC 461, 466 (2004) [quoting, Duke Cogema Stone & Webster (Savannah River Mixed Oxide Fuel Fabrication Facility), CLI-02-7, 55 NRC 205, 213 (2002)]; see, also, Shaw AREVA MOX Services (Mixed Oxide Fuel Fabrication Facility), CLI-09-02, 68 NRC ____ (slip. op. text surrounding footnote 21) (Feb. 2, 2009).

⁴ NRC Brief at 1.

NRC Staff simply does not assert any grounds for interlocutory review.⁵ Accordingly, an interlocutory appeal should be denied.

B. Even if the Commission Reviewed the Board, Reversal Would Be Contrary to the Administrative Procedure Act.

Contrary to the NRC Staff assertions, the decision of the Board was well-reasoned and factually supported by a substantial record: the Petition, Petitioners' permissible pleadings, replies and responses to Applicant's and NRC Staff pleadings,⁶ a site visit and oral argument. The Board made its decision based on its knowledge of the case. Nothing in LBP-09-01 is arbitrary or capricious, constitutes an abuse of discretion or is otherwise not in accordance with applicable law. Merely because NRC Staff believes that its arguments should have prevailed does not sustain an appeal in the absence of reversible error.

C. The Board's Findings Were Not Reversible Error.

The Board's legal analysis and conclusions were extensive, were not an abuse of discretion and are not otherwise not in accordance with applicable law.⁷ The grounds for reversal suggested by NRC Staff do not constitute reversible error.⁸

⁵ NRC Staff asserts a variety of errors and potential problems, none of which would justify interlocutory review or a finding of reversible error. For example, "[f]ollowing 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." NRC Brief at 15. Even if such were true, it would not be reversible error or justify interlocutory review.

⁶ See LBP-09-01 at 22 (footnote 73) and at 26 (footnote 88).

⁷ LBP-09-01 at 4-16.

⁸ NRC Staff Brief at 8-9; (reversal would be based on (1) "misapplication of the Commission precedent on standing and [(2)] the Petitioners' failure to satisfy the Commission's strict standards for admissibility of contentions.") Nonetheless, the question on appeal is whether the Board in deciding otherwise acted in an arbitrary or capricious way, abused its discretion or is not otherwise in accordance with applicable law

D. The NRC Staff Mis-Characterizes “Materiality” Standard of Section 40.9(a).

NRC Staff proposes a novel standard of materiality⁹ that deviates from established federal law standards of materiality¹⁰ to the effect that information is material if a reasonably prudent decisionmaker would consider it important in making a licensing decision.¹¹

E. The Board Properly Accepted Permissibly Responsive Arguments.

NRC Staff argues that the Board should have limited its ruling on the facts pled in the initial Reference Petition.¹² The Board specifically evaluated these arguments and found that all of Intervenor responses were proper responses to the legal, logical and factual arguments presented by the answers, no new issues were raised, and that the late-filing criteria of §2.309c)(f)(2) did not apply.¹³ The Board’s ruling on this was well-reasoned and supported by cited cases that were on point and such is not reversible error.

F. The Board Properly Accepted Intervenor’s Logical Fact Based Arguments.

NRC Staff argues that it was error for the Board to find that the Petitioners had satisfied the contention pleading requirements.¹⁴ The NRC Staff has failed to allege that such error, if any, was reversible. Because there is ample legal support for the Board’s acceptance of

– none of which is shown by Applicant.

⁹ NRC Staff at 10.

¹⁰ Rules for establishing materiality under federal law are well-established by the Supreme Court under the securities laws, *see TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438 (1976), (“[a]n omitted fact is material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote,” and “there must be a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the ‘total mix’ of information made available”; *see also Basic Inc. v. Levinson*, 485 US 224, 231-232 (1988).

¹¹ In this instance, the ‘decisionmaker’ is both the licensing authority as well as the public when making a decision as to whether to file for intervention. *See LBP-09-01* at 25, footnote 85.

¹² NRC Brief at 11.

¹³ *See LBP-09-01* at 22 (footnote 73) and at 26 (footnote 88).

¹⁴ NRC Staff Brief at 12-13.

Intervenors' logical fact based argument, the Board did not abuse its discretion and its findings were in accordance with applicable laws.¹⁵

G. 1998 NRC Approval Under Section 40.46 of Stock Transfer Does Not Preclude Foreign Ownership Issues in This Proceeding.

NRC Staff argues without legal citation that because the change of ownership associated with Cameco's acquisition of Applicant was previously accepted by the NRC Staff in 1998 under Section 40.46, "the Board engages in an unwarranted reconsideration of the NRC's past regulatory approval of Cameco's controlling interest in CBR."¹⁶ The 1998 transfer occurred after Cameco had already acquired about 1/3 of Applicant's common stock in its 1995/1996 purchase of Geomex. Under Commission precedent,¹⁷ Cameco should have disclosed that purchase because such a large shareholding carries with it substantial shareholder rights that were under foreign control. In any case, when it was time for Cameco to acquire Uranerz, USA, Inc. as the second stage of the planned 'creeping acquisition', the NRC Staff was informed and, in reliance on Mr. Collings' May 13, 1998 representations, NRC Staff approved the stock transfer.¹⁸

There was no analysis of inimicality in 1998 demonstrated by either Applicant or NRC Staff. The 1998 Collings letter does disclose the prior purchase of 1/3 of Applicant in

¹⁵ Fansteel, Inc. (Muskogee, Oklahoma Site), CLI-03-13, 58 NRC 195, 203 (2003). See also Duke Energy Corp. Inc. (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 342 (1999) (Expert support is not required for admission of a contention; a fact-based argument may be sufficient on its own.).

¹⁶ NRC Staff Brief at 18-19.

¹⁷ Such as that related to AEA Section 103d rulings discussed in Petitioners Brief re: Misc. Contention K (Renewal) (January 21, 2009), Cameco at least would have been aware of Commission precedent because an ex-Commissioner James Curtiss was its lawyer and serves on its Board of Directors and would have been familiar with such precedent and presumably conveyed his advice and recommendations based thereon.

¹⁸ See NRC Staff Brief at 19, footnote 78 (emphasis added).

1995/1996, does not state the impacts of foreign ownership of 90% of Applicant's stock, the identity of Cameco executives based in Canada having authority over the management of Applicant or the extent to which records related to the mine or Applicant would be kept outside the United States, whether decisions related to Applicant would be made outside the United States and whether the United States regulators would have jurisdiction over persons and records located outside the United States. All of the foregoing issues is material in that a reasonably prudent licensing decisionmaker would consider it important in making a licensing decision and the public would consider important in deciding whether to oppose. A Section 40.46 approval (such as that given by the NRC Staff in 1998) is only as good as the quality of the information upon which such approval is based. The Regulation refers to "after securing full information" which is an admonishment both to the NRC Staff and also a statement of the level and quality of information which must be disclosed to support a valid approval. Because the 1998 disclosure failed to provide 'full information' to the NRC Staff, the 1998 approval is not dispositive, binding or even relevant to this proceeding.

Finally, without citation and completely contrary to Section 40.32(d), NRC Staff proposes a new standard, that in light of the 1998 approval, "Petitioners need to have alleged something more...than the sheer fact of CBR's foreign ownership in order to present a claim of inimicality."¹⁹

¹⁹ Id. at 19; NRC Staff continues its argument that if Petitioners are able to raise inimicality issues, "it would have the inevitable effect of improperly disregarding the NRC's prior approval – a decision the Board is not entitled to make without cause" with comparison to Virginia Electric and Power Co. (North Anna Nuclear Power Station, Units 1 and 2), ALAB-584, 11 NRC 451, 463-65 (1980). Nothing in that case supports NRC Staff's proposition but rather the case stands for the proposition that the Commission will not stay proceedings when it had already decided at the level of the Commission itself that in proceedings of similar type as the one at issue need not be stayed.

H. This License Renewal Conveys Key Legal Rights Enabling Export Under Part 110 by a Licensed Exporter.

NRC Staff argues that inimicality considerations are not pertinent because export of the uranium mined at the proposed North Trend facility would not be authorized by the license amendment.²⁰ Applicant actually proposes to export uranium mined at its North Trend facility and possessed under License SUA-1534, as proposed to be amended, by shipping such uranium as an authorized 'supplier' via an export shipper which has an Export License under Part 110.²¹ The Applicant tells the shipper where to ship the Uranium and when to pick it up. The shipper does not have title to the Uranium that it ships. The export shipper would not be allowed to pick up the Uranium from a person that did not possess a valid source materials license and, in fact, the export shipper is required to update the NRC Staff as to the identity of its supplier customers. All this means that the License amendment at issue in this proceeding conveys the legal rights of possession and use of the Uranium which is a precursor to the export shipment of the uranium under an export license.

NRC Staff cites Curators of the University of Missouri for a creative new proposition, not found in the case itself or in the AEA, that inimicality issues are not cognizable unless risks to common defense and security directly flow from the actions or matters sought to be licensed.²² In Curators of Univ. of Missouri, the intervenors complained of a series of hypothetical events that were so attenuated from reality that the board found that they were not within the scope of

²⁰ NRC Brief at 13.

²¹ See NRC Staff Brief at 14, footnote 59.

²² NRC Brief at 13-14.

the proceeding.²³ First, Curators of Univ. of Missouri was a pre-9/11 case that involved license amendments to conduct certain research which was itself many steps removed from even the possibility of nuclear proliferation.²⁴ As noted by the Board, Curators of Univ. of Missouri is highly distinguishable because of there are not multiple rounds of research intervening between this proceeding and any export proceeding, nor are such transfers speculative as Applicant stated that export licenses have been obtained for its Uranium in the past and it appears that this will continue into the future.²⁵ For the foregoing reasons, Curators of Univ. of Missouri may not be relied on for the purposes and to the extent relied upon by NRC Staff in any persuasive way.

NRC Staff also cites²⁶ to dicta in a footnote in a 27 year-old Commission decision, Kerr-McGee Corporation (West Chicago Rare Earths Facility), CLI-82-2, 15 NRC 232, 238 n.3 (1982), which says:

In granting this and subsequent amendments to Kerr-McGee's 10 CFR Part 40 license, NRC regulations require that the NRC staff consider if: [reciting Section 40.32]. It should be noted, however, that in this instance, which involves no concern over import or export of nuclear materials, common defense and security considerations under section 40.32(d) are not implicated.²⁷

First, NRC Staff mischaracterizes this isolated dicta in a footnote from long ago as if it represents a long-standing and often applied Commission principle.²⁸ In McGee, there was absolutely zero concern about import or export of nuclear materials, the inimicality considerations were not implicated. Such is not our case because Intervenors have asserted a

²³ Curators of the University of Missouri, CLI-95-1, 41 NRC 71, 165 (1995) (“purely speculative grounds”).

²⁴ Id.

²⁵ LBP-09-01 at 32-34.

²⁶ NRC Brief at 15.

²⁷ Kerr-McGee Corporation (West Chicago Rare Earths Facility), CLI-82-2, 15 NRC 232, 238 n.3 (1982).

²⁸ NRC Brief at 13-14.

substantial concern about Applicant's export of source material. Further, there is no meaningful opportunity to intervene in a Part 110 export licensing proceeding; therefore, due process militates against excluding these issues from this proceeding.²⁹

I. NRC Staff Does Not Appeal or Question Board's Recommendation That Commission Order Subpart G Procedures Applied In this Proceeding.

Notably, unlike Applicant in its Notice of Appeal and Brief, the NRC Staff does not seek to appeal or question the Board's recommendation that the Commission order Subpart G procedures in this proceeding.

CONCLUSION

For all the foregoing reasons, the Commission should refuse to review the Board's decision in LBP-09-01 and deny NRC Staff's appeal.

Dated this 17th day of December, 2008.

Respectfully submitted,

/s/ - signed electronically

DAVID FRANKEL
Attorney for Consolidated Petitioners
PO Box 3014
Pine Ridge, SD 57770
308-430-8160
Arm.legal@gmail.com

²⁹ See discussion in LBP-09-01 at 30 and 33-34.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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

CERTIFICATE OF SERVICE

I hereby certify that copies "INTERVENORS' ANSWER TO NRC STAFF'S APPEAL FROM LBP-09-01" in the above captioned proceeding has been served on the following persons by electronic mail as indicated by a double asterisk (**); on this 17th day of February, 2009:

Judge Ann Marshall Young, Chair * **
Atomic Safety and Licensing Board Panel
U. S. Nuclear Regulatory Commission
Washington, DC 20555-0001
E-Mail: Ann.Young@nrc.gov

Mrs. Johanna Thibault * **
Board Law Clerk
Atomic Safety and Licensing Board Panel
U. S. Nuclear Regulatory Commission
Washington, DC 20555-0001
E-mail: Johanna.Thibault@nrc.gov

Judge Fred W. Oliver * **
10433 Owen Brown Road
Columbia, MD 21044
E-mail: FWOLIVER@verizon.net

Office of the Secretary * **
Attn: Docketing and Service
U.S. Nuclear Regulatory Commission
Washington, DC 20555
E-mail: Hearing.Docket@nrc.gov
(original & 2 copies)

Judge Richard F. Cole * **
Atomic Safety and Licensing Board Panel
U. S. Nuclear Regulatory Commission
Washington, DC 20555-0001
E-mail: Richard.Cole@nrc.gov

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

Crow Butte Resources, Inc. **
Attn: Stephen P. Collings
141 Union Blvd., Suite 330
Lakewood, CO 80228
E-mail: steve_collings@cameco.com

Debra White Plume **
P. O. Box 71
Manderson, SD 57756
E-mail: LAKOTA1@gwtc.net

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

Catherine Marco, Esq.
Catherine.Marco@nrc.gov

Brett M.P. Klukan, Esq.
Brett.Klukan@nrc.gov

Shahram Ghasemian, Esq.
Shahram.Ghasemian@nrc.gov

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

Mark D. McGuire, Esq. **
McGuire and Norby
605 South 14th Street, Suite 100
Lincoln, NE 60508
E-Mail: mdmsjn@alltel.net
mdmsjn@windstream.net

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

EIE Service List:

lcarter@captionreporters.com
ejduncan@winston.com
rl1@nrc.gov
nsg@nrc.gov
elj@nrc.gov
Linda.lewis@nrc.gov
esn@nrc.gov
ogcmailcenter@nrc.gov

Thomas Kanatakeniate Cook **
1705 S. Maple Street
Chadron, NE 69337
E-mail: icook@indianyouth.org

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

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

Elizabeth Maria Lorina, Esq. **
Law Office of Mario Gonzalez
522 7th Street, Suite 202
RapidCity, SD 57701
E-mail elorina@gnzlawfirm.com

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

Shane C. Robinson, Esq. **
2814 E. Olive St.
Seattle, WA 98122
E-mail: shanecrobinson@gmail.com

cmp@nrc.gov
matthew.rotman@nrc.gov
tpr@nrc.gov
csisco@winston.com
sxg4@nrc.gov
mxw6@nrc.gov
rfe1@nrc.gov
Bmk1@nrc.gov
clm@nrc.gov
jrt3@nrc.gov
axw5@nrc.gov
dx8@nrc.gov
fx01@nrc.gov
alberto@treatycouncil.org
amy@nrc.gov

Respectfully submitted,

/s/

David Frankel
P. O. Box 3014
Pine Ridge, SD 57770
308-430-8160
E-mail: arm.legal@gmail.com

Hearing Docket

From: David Cory Frankel [davidcoryfrankel@gmail.com]
Sent: Wednesday, February 18, 2009 3:22 AM
To: MDMSJN@alltel.net; belli4law@aol.com; jakefro@aol.com; slmbttsag@bbc.net; LAKOTA1@gwtc.net; TCOOK@indianayouth.org; Ashley Prange; Ann Young; Hearing Docket; Johanna Thibault; Karen Valloch; Richard Cole; Secy; SherVerne Cloyd; Bruce McIntosh; fwoliver@verizon.net; OCAAMAIL Resource; steve_collings@cameco.com; TrSmith@winston.com; Catherine Marco; Molly Barkman; Marc A. Ross (marcr@rocktheearth.org); Harold S. Shepherd (waterlaw@uci.net); Elizabeth M. Lorina (elorina@gnzlawfirm.com); Mario Gonzalez; Shane Robinson; Brett Klukan; Tom Ballanco; Shahram Ghasemian; mdmsjn@windstream.net; lcarter@captionreporters.com; ejduncan@winston.com; Rebecca Glitter; Nancy Greathead; Emile Julian; Linda Lewis; Evangeline Ngbea; OGCMailCenter Resource; Christine Pierpoint; Matthew Rotman; Tom Ryan; csisco@winston.com; Shahram Ghasemian; Megan Wright; Richard Cole; Brett Klukan; Catherine Marco; Johanna Thibault; Andrew Welkie; Don Frye; Frederick Oliver; alberto@treatycouncil.org; Ann Young; Tom Ryan
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Dear All,

Attached for filing are Intervenors Answer to Applicant Notice of Appeal and related COS, and Intervenors Answer to NRC Staff Notice of Appeal and related COS.

Sincerely,

David Frankel
Counsel for Intervenors
POB 3014
Pine Ridge, SD 57770
308-430-8160
Arm.legal@gmail.com

Received: from mail1.nrc.gov (148.184.176.41) by OWMS01.nrc.gov
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Wed, 18 Feb 2009 00:24:04 -0800 (PST)

Return-Path: <davidcoryfrankel@gmail.com>

Received: from ?192.168.1.101? (66-233-92-76.mau.clearwire-dns.net

[66.233.92.76]) by mx.google.com with ESMTPS id

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Subject: Transmitting documents in Docket No. 40-8943 - ASLBP No.
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From: David Cory Frankel <davidcoryfrankel@gmail.com>

To: <MDMSJN@alltel.net>, <belli4law@aol.com>, <jakefro@aol.com>,

<slmbttsag@bbc.net>, <LAKOTA1@gwtc.net>, <TCOOK@indianyouth.org>, Ashley

Prange <Ashley.Prange@nrc.gov>, Ann Young <Ann.Young@nrc.gov>, HearingDocket

<Hearing.Docket@nrc.gov>, Johanna Thibault <Johanna.Thibault@nrc.gov>, Karen

Valloch <Karen.Valloch@nrc.gov>, Richard Cole <Richard.Cole@nrc.gov>, SECY

<SECY@nrc.gov>, SherVerne Cloyd <SherVerne.Cloyd@nrc.gov>, Bruce McIntosh

<buffalo.bruce@panhandle.net>, <fwoliver@verizon.net>,

<OCAAMAIL.Resource@nrc.gov>, <steve_collings@cameco.com>,

<TrSmith@winston.com>, <Catherine.Marco@nrc.gov>, Molly Barkman
<Molly.Barkman@nrc.gov>, "Marc A. Ross (marcr@rocktheearth.org)"
<marcr@rocktheearth.org>, "Harold S. Shepherd (waterlaw@uci.net)"
<waterlaw@uci.net>, "Elizabeth M. Lorina (elorina@gnzlawfirm.com)"
<elorina@gnzlawfirm.com>, Mario Gonzalez <gnzlaw@aol.com>, Shane Robinson
<shaneerobinson@gmail.com>, <Brett.Klukan@nrc.gov>, Tom Ballanco
<harmonicengineering1@mac.com>, Shahram Ghasemian
<Shahram.Ghasemian@nrc.gov>, <mdmsjn@windstream.net>,
<lcarter@captionreporters.com>, <ejduncan@winston.com>, <rll@nrc.gov>,
<nsg@nrc.gov>, <elj@nrc.gov>, <Linda.lewis@nrc.gov>, <esn@nrc.gov>,
<ogcmailcenter@nrc.gov>, <cmp@nrc.gov>, <matthew.rotman@nrc.gov>,
<tpr@nrc.gov>, <csisco@winston.com>, <sxg4@nrc.gov>, <mxw6@nrc.gov>,
<rfc1@nrc.gov>, <Bmk1@nrc.gov>, <clm@nrc.gov>, <jrt3@nrc.gov>,
<axw5@nrc.gov>, <dxfs@nrc.gov>, <fxo1@nrc.gov>, <alberto@treatycouncil.org>,
<amy@nrc.gov>, <tom.ryan@nrc.gov>

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