

February 20, 2009

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	
	)	
CROW BUTTE RESOURCES, INC.	)	Docket Nos. 40-8943
	)	
(License Renewal for the In Situ Leach	)	ASLBP No. 08-867-08-OLA-
Facility, Crawford, Nebraska)	)	BD01

NRC STAFF'S REPLY TO INTERVENORS' RESPONSE TO NRC  
STAFF'S BRIEF REGARDING MISCELLANEOUS CONTENTION K

In accordance with the Atomic Safety and Licensing Board's ("Board") Order of January 8, 2009,<sup>1</sup> the NRC staff ("Staff") tenders this reply to "Intervenors' Response to Applicant and NRC Staff re: Misc. Contention K – Foreign Ownership," filed February 10, 2009.<sup>2</sup> For the reasons set forth below, the Staff avers that the arguments raised by the Consolidated Intervenors (formerly Consolidated Petitioners) in response to "NRC Staff's Brief in Response to Consolidated Petitioners' Miscellaneous Contention K"<sup>3</sup> should be disregarded by the Board due to the following errors: (1) the Consolidated Intervenors misconstrue and misstate the Staff's position regarding the scope of the 10 C.F.R. § 40.32(d) analysis pertinent to this proceeding; (2) the Intervenors misread Commission precedent regarding the same; (3) the Intervenors erroneously state that "[t]here is no meaningful

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<sup>1</sup> Initial Scheduling Order, at 3 (Jan. 8, 2009).

<sup>2</sup> Intervenors' Response to Applicant and NRC Staff re: Misc. Contention K – Foreign Ownership (Feb. 10, 2009) ("Intervenors' Response").

<sup>3</sup> NRC Staff's Brief in Response to Consolidated Petitioners' Miscellaneous Contention K (Jan. 21, 2009) ("Staff's Brief").

opportunity to intervene in a Part 110 export licensing proceeding<sup>4</sup>; and (4) the issues raised by the Intervenor are insufficient to revisit the NRC's prior consideration and approval of Cameco's controlling interest in CBR.

### BACKGROUND

In their petition for intervention and request for hearing,<sup>5</sup> the Consolidated Petitioners presented the following as Miscellaneous Contention K ("Misc. Contention K"):

Lack of Authority to Issue License to US Corporation which is 100% owned, controlled and dominated by foreign interests; voidability of mineral and real estate leases due to Nebraska Alien Ownership Act.<sup>6</sup>

On November 21, 2008, the Board issued its decision regarding the Consolidated Petitioners' Petition, in which the Board granted, in part, the request for hearing and petition for intervention of the Consolidated Petitioners.<sup>7</sup> With regard to Misc. Contention K, the Board stated that "while there is no absolute prohibition on NRC issuing a license for an ISL mine in the U.S. to a foreign corporation," NRC regulations nonetheless "require the NRC Staff to take into consideration whether or not renewing Crow Butte's license would be inimical to the common defense and security or the public health and safety."<sup>8</sup> In light of what the Board considered to be a genuine dispute of material fact between the parties, the Board admitted Consolidated Petitioners' Misc. Contention K "as it relates to foreign ownership."<sup>9</sup> The Board ordered the parties to submit briefs on the merits with respect to

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<sup>4</sup> Intervenor's Response at 16.

<sup>5</sup> Request for Hearing and Petition for Leave to Intervene (July 28, 2008) ("Petition").

<sup>6</sup> *Id.* at 36.

<sup>7</sup> Memorandum and Order (Ruling on Hearing Requests), LBP-08-24, 67 NRC \_\_\_\_ (slip op. at 82) (Nov. 21, 2008).

<sup>8</sup> *Id.* at 73-74 (*citing* 10 C.F.R. § 40.32(d)).

<sup>9</sup> *Id.*

Misc. Contention K.<sup>10</sup> On January 21, 2009, the parties timely filed briefs regarding Misc. Contention K.<sup>11</sup> Shortly thereafter, the parties filed responses to the briefs of each other.<sup>12</sup> In accordance with the Board's directions, the Staff herein replies to the Intervenors' Response.

### ARGUMENT

The Staff avers that the arguments raised by the Consolidated Intervenors in response to Staff's Brief should be disregarded by the Board due to the following errors: (1) the Consolidated Intervenors misconstrue and misstate the Staff's position regarding the scope of the 10 C.F.R. § 40.32(d) analysis pertinent to this proceeding; (2) the Intervenors misread Commission precedent regarding the same; (3) the Intervenors erroneously state that "[t]here is no meaningful opportunity to intervene in a Part 110 export licensing proceeding"<sup>13</sup>; and (4) the issues raised by the Intervenors are insufficient to revisit the NRC's prior consideration and approval of Cameco's controlling interest in CBR.

I. The Consolidated Intervenors Misconstrue and Misstate the Staff's Position Regarding the Scope of the 10 C.F.R. § 40.32(d) Analysis Pertinent to this Proceeding.

According to the Consolidated Intervenors, the Staff in its Brief re: Misc. Contention K "states that the [common defense and security] issues are not 'directly connected' with the instant license renewal proceeding, and as such, are not cognizable in this proceeding."<sup>14</sup> That was not the Staff's assertion. Rather, the Staff's position is that the concerns raised by

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<sup>10</sup> *Id.* at 74-75.

<sup>11</sup> Petitioners' Brief Re: Misc. Contention K – Foreign Ownership (Jan. 21, 2009); Applicant's Brief Regarding Miscellaneous Contention K (Jan. 21, 2009); Staff's Brief.

<sup>12</sup> Intervenors' Response; Applicant's Response to Petitioners' Brief Regarding Miscellaneous Contention K (Feb. 10, 2009); NRC Staff's Response to Consolidated Petitioners' Brief re: Miscellaneous Contention K (Feb. 10, 2009).

<sup>13</sup> Intervenors' Response at 16.

<sup>14</sup> *Id.* at 19 (internal citations omitted; emphasis in original).

the Consolidated Intervenor's in relation to Misc. Contention K *pertaining to hypothetical exports of source material* are not litigable as part of the 10 C.F.R. § 40.32(d) analysis pertinent to the instant proceeding because this proceeding for a Part 40 source material license would not authorize the export of any source material.<sup>15</sup>

In response to the Consolidated Intervenor's argument that it would be inimical to common defense and security "to grant a foreign company a license to mine and export yellowcake uranium" because it "takes the yellowcake outside of US legal restrictions,"<sup>16</sup> the Staff posited in its Brief that this argument concerning potential exports is not relevant to the instant proceeding because the license renewal sought by the Applicant would not grant it the authority to export source material.<sup>17</sup> As therein stated by the Staff, "[a] 10 C.F.R. Part 110 export licensing proceeding is, both substantively and procedurally, a separate and distinct proceeding from the instant proceeding involving a 10 C.F.R. Part 40 domestic source material license renewal application."<sup>18</sup> In support of its argument, the Staff noted that "the Commission has made it clear that in order to be litigable, alleged risks to common defense and security must *directly flow* from the actions or matters sought to be licensed."<sup>19</sup> Thus, the Staff averred that "[a]s this proceeding for a Part 40 source material license would not authorize the export of source material, risks to common defense and security *associated with the export of the source material* are not cognizable in this proceeding."<sup>20</sup>

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<sup>15</sup> See Staff's Brief at 9-11.

<sup>16</sup> Petition at 50.

<sup>17</sup> Staff's Brief at 9-10.

<sup>18</sup> *Id.* at 10.

<sup>19</sup> *Id.* (emphasis added) (citing *Curators of the Univ. of Missouri*, CLI-95-1, 41 NRC 71, 165 (1995); *Kerr-McGee Corp.* (West Chicago Rare Earths Facility), CLI-82-2, 15 NRC 232, 238 n.3 (1982)).

<sup>20</sup> *Id.* (emphasis added).

This is not to say that there are no potential risks to common defense and security that might have hypothetically, if raised by the Intervenor, been litigable as part of the 10 C.F.R. § 40.32(d) analysis pertinent to this proceeding—just that the concerns actually raised by the Consolidated Intervenor in the context of Misc. Contention K (*i.e.*, concerns regarding hypothetical exports of source material) are not within that cognizable set.<sup>21</sup>

II. The Consolidated Intervenor Misread Commission Precedent Regarding the Scope of the 10 C.F.R. § 40.32(d) Analysis.

As noted, the Staff argued in its Brief re: Misc. Contention K that risks to common defense and security associated with the export of source material, such as those raised by the Consolidated Petitioner as part of Misc. Contention K, are not cognizable in this proceeding because such risks do not directly flow out the matter under consideration in this Part 40 license renewal application.<sup>22</sup> In support of this argument, the Staff referenced and discussed two Commission cases, *Curators of the University of Missouri* and *Kerr-McGee Corporation*.<sup>23</sup> The Consolidated Intervenor state that neither support the legal proposition proposed by the Staff in its Brief.<sup>24</sup> Each case is addressed in turn.

A. *Kerr-McGee*.

The Consolidated Intervenor distinguish between the finding of the Commission in *Kerr-McGee*, “which involve[d] no concern over the import or export of nuclear materials,

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<sup>21</sup> In this regard, the Commission has held that the phrase “inimical to the common defense and security” refers to “the safeguarding of special nuclear material; the absence of foreign control over the applicant; the protection of Restricted Data; and the availability of special nuclear material for defense needs.” *Florida Power & Light Co.* (Turkey Point Nuclear Generating Units No. 3 and No. 4), 4 AEC 9, 12-13 (1967).

<sup>22</sup> See Staff’s Brief at 9-11.

<sup>23</sup> *Id.* at 10-11 (*emphasis added*) (*citing Curators*, CLI-95-1, 41 NRC at 165-66; *Kerr-McGee*, CLI-82-2, 15 NRC at 238 n.3).

<sup>24</sup> See Intervenor’s Response at 15-16, 19-20.

common defense and security considerations under section 40.32(d) [were] not implicated,”<sup>25</sup> and the present case, wherein the “Intervenors have asserted a substantial concern about export of source material...”<sup>26</sup> However, the Intervenors misconstrue the Commission’s reasoning. The Commission’s decision stands for the proposition that the nature and scope of the specific licensing action under review in the proceeding did not include import/export of materials and their impact on defense and security. The point is not, as the Intervenors suggest, that *since no concerns were raised*, common defense and security considerations were not implicated.<sup>27</sup> The implication presented by the Intervenors’ reading of the case is that if the import/export concerns had been raised in *Kerr-McGee* they would have been within the scope of the proceeding.<sup>28</sup> That is incorrect. Following the Intervenors’ reading of the decision, a petitioner could expand the lawful scope of a proceeding simply by raising issues pertaining to matters that are, as a legal or regulatory matter, outside of the scope of that proceeding. That is not what the Commission intended.

B. *Curators of the University of Missouri.*

The Commission, in *Curators of the University of Missouri*, held that in order to be litigable, a specific common defense and security risk must be “reasonably related to, and would arise as a direct result of,” the specific matters covered by the license at issue.<sup>29</sup> The Intervenors distinguish between the *Curators of the University of Missouri*, in which the

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<sup>25</sup> *Kerr-McGee*, CLI-82-2, 15 NRC at 238 n.3. The license amendment would have allowed Kerr-McGee to demolish certain buildings at one of its sites and to receive onsite, as temporary storage, a small quantity of mill tailings containing thorium from other sites in Chicago. *Id.* at 235.

<sup>26</sup> Intervenors’ Response at 16.

<sup>27</sup> *See id.*

<sup>28</sup> *See id.*

<sup>29</sup> *Curators*, CLI-95-1, 41 NRC at 165.

Commission found that the University's proposed research did not "lead 'directly' to nuclear weapons proliferation," but rather was "many steps removed from even the possibility of proliferation,"<sup>30</sup> and the present case in which "there are not ... multiple rounds of research intervening between this proceeding and any export licensing proceeding or transfers of material outside the U.S., nor are such transfers at all speculative, given that the Applicant has stated that export licenses have been obtained in the past."<sup>31</sup> While CBR has been listed as a supplier on export licenses in the past,<sup>32</sup> that does not disturb the fact that a Part 40 domestic source material licensing action is, both substantively and procedurally, a separate and distinct process from a Part 110 export licensing action. To consider matters related to hypothetical future exports of uranium in the instant proceeding would be to improperly conflate the regulatory framework established by the Commission for the resolution of export licensing issues under Part 110 with the regulatory framework for license renewal issues under Part 40.<sup>33</sup>

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<sup>30</sup> *Id.*

<sup>31</sup> Intervenor's Response (*citing* Memorandum and Order (Ruling on Foreign Ownership and Arsenic Contentions and Other Pending Matters), LBP-09-01, 68 NRC \_\_\_\_ (slip op. at 32) (Jan. 27, 2009)).

<sup>32</sup> CBR has been listed as a supplier on export licenses in the past. Both licenses were issued to RSB Logistic Services, Inc. License No. XSOU8798 was issued on March 5, 2004, which expired on December 31, 2008. That license authorized RSB Logistics Services, Inc. to ship natural uranium to Canada for conversion and back to the United States for further processing. Prior to that, RSB Logistics held an export license, No. XSOU8744, which expired in 2004. Crow Butte Resources, Inc. was listed as a supplier on that license as well.

<sup>33</sup> The Consolidated Intervenor's refer to *Curators of Univ. of Missouri* as a "pre-9/11 case." Intervenor's Response at 19. However, the Intervenor's do not explain in what manner that alters the fundamental dynamic between Parts 40 and 110, as discussed above, as separate and distinct processes.

III. The Consolidated Intervenors Erroneously State that there is no Meaningful Opportunity to Intervene in a Part 110 Export Licensing Proceeding.

The Consolidated Intervenors posit that “[t]here is no meaningful opportunity to intervene in a Part 110 export licensing proceeding.”<sup>34</sup> However, the Commission has established a process by which members of the public may petition for a hearing on an application for a specific export license.<sup>35</sup> The fact that the Consolidated Intervenors might not be able to demonstrate standing in specific instances is not a reason to adjudicate as part of this proceeding for a 10 C.F.R. Part 40 license renewal issues and concerns specific to a 10 C.F.R. Part 110 export licensing proceeding. The scope of each proceeding is set in the notice of hearing by the Commission.<sup>36</sup> The scope of the instant license renewal proceeding may not properly be expanded beyond the scope set by the Commission based on the assertions of the Intervenors that they may not get an opportunity to litigate the matter in hypothetical future proceedings.<sup>37</sup>

IV. The Issues Raised by the Consolidated Intervenors are Insufficient to Revisit the NRC’s Prior Consideration and Approval of Cameco’s Controlling Interest in CBR.

The Consolidated Intervenors argue that the NRC’s prior regulatory approval of Cameco’s controlling interest in CBR “is not dispositive, binding or even relevant to this proceeding” because the NRC failed to secure “full information,” as required by 10 C.F.R. §

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<sup>34</sup> Intervenors’ Response at 16.

<sup>35</sup> See 10 C.F.R. §§ 110.82, 110.84.

<sup>36</sup> See *General Public Utilities Nuclear* (Three Mile Island Nuclear Station, Unit No. 1), ALAB-881, 26 NRC 465, 476 (1987) (“It is well settled that NRC licensing boards and administrative law judges do not have plenary subject matter jurisdiction in adjudicatory proceedings. Agency fact finders are delegates of the Commission who may exercise jurisdiction only over those matters the Commission specifically commits to them in the various hearing notices that initiate the proceedings.”).

<sup>37</sup> See Notice of Opportunity for Hearing, Crow Butte Resources, Inc., Crawford, NE, 73 Fed. Reg. 30,426 (May 27, 2008).



40.46, before approving the transfer of ownership.<sup>38</sup> According to the Intervenor, the 1998 letter documenting NRC's approval of Cameco's controlling interest in CBR does not discuss issues "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."<sup>39</sup> However, while the Intervenor alleges that such missing information should have been material to the NRC, the Intervenor fails to demonstrate such materiality; the Intervenor does not show how such information calls in question the validity of the NRC's prior approval of Cameco's controlling interest in CBR. Without demonstrating the materiality thereof, the Intervenor should not be permitted to revisit the consideration of whether Cameco's controlling interest in CBR is inimical to common defense and security. To do so would improperly disregard the NRC's prior approval of Cameco's controlling interest in CBR without cause.<sup>40</sup>

### CONCLUSION

In light of the foregoing, the Board should reject the arguments in Consolidated Intervenor's Response because (1) the Consolidated Intervenor misconstrues and misstates the Staff's position regarding the scope of the 10 C.F.R. § 40.32(d) analysis pertinent to this proceeding; (2) the Intervenor misreads Commission precedent regarding the same; (3) the Intervenor erroneously states that there is no meaningful opportunity to intervene in a Part 110 export licensing proceeding; and (4) the issues raised by the Intervenor are insufficient to revisit the NRC's prior consideration and approval of Cameco's controlling interest in CBR.

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<sup>38</sup> See Intervenor's Response at 13-14.

<sup>39</sup> *Id.*

<sup>40</sup> *Cf. Virginia Electric and Power Co. (North Anna Nuclear Power Station, Units 1 and 2), ALAB-584, 11 NRC 451, 463-65 (1980).*

**Executed in Accord with 10 CFR 2.304(d)**

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

Dated at Rockville, Maryland  
This 20<sup>th</sup> day of February, 2009

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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(License Renewal for the In Situ Leach	)	ASLBP No. 08-867-08-OLA-
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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "NRC STAFF'S REPLY TO INTERVENORS' RESPONSE TO NRC STAFF'S BRIEF REGARDING MISCELLANEOUS CONTENTION K" in the above captioned proceeding have been served via the Electronic Information Exchange ("EIE") this 20<sup>th</sup> 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 above captioned proceeding.

**Executed in Accord with 10 CFR 2.304(d)**

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