

February 20, 2009

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

APPLICANT’S REPLY BRIEF
REGARDING MISCELLANEOUS CONTENTION K

I. INTRODUCTION

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

II. DISCUSSION

In the course of this proceeding, Petitioners have not demonstrated the existence of any issue that would call into question the NRC’s authority to issue a license to Crow Butte or

¹ See “Petitioners’ Brief Re: Misc. Contention K – Foreign Ownership,” dated January 21, 2009 (“Pet. Brief on K”); “Intervenors’ Response To Applicant And NRC Staff Re: Misc. Contention K – Foreign Ownership,” dated February 10, 2009.

renew the existing license. This is not surprising, as the NRC has previously reviewed and approved the ownership structure of Crow Butte, including the role of Cameco. Although Petitioners continue to assert that it is *per se* inimical to the common defense and security to permit a foreign parent of a U.S. licensee, their position is not supported by the Atomic Energy Act (“AEA”), the NRC’s regulations, or NRC precedent. In short, the NRC’s regulatory framework permits foreign ownership of a source material licensee.

Although Petitioners argue that the Commission should impose additional restrictions on Crow Butte or create new regulations that prohibit foreign ownership, they do not base their claims on any specific aspect of the License Renewal Application at issue. They do not assert that the management structure or programs identified in Chapter 5 of the LRA are deficient to protect the common defense and security or public health and safety. They do not show that the proposed activities will violate NRC regulations or license commitments regarding recordkeeping or decisionmaking. They simply “wish” that the AEA or NRC regulations were different. If the Petitioners believe that the regulatory framework should be changed, they should file a petition for rulemaking with the Commission, but they may not challenge the structure of the NRC’s regulatory scheme in an individual licensing proceeding. Accordingly, the Board should find, as a matter of law, that there is no prohibition on foreign ownership of a source material licensee and that Petitioners’ challenges raise a generic issue that is best addressed by the Commission as a matter of policy.

In their briefs on foreign ownership issues, Petitioners make a variety of arguments that lack a basis in law or fact. Below, we address their arguments and show that, contrary to their assertions, issuance of a renewed license to Crow Butte is not prohibited as a result of Crow Butte having a foreign grandparent. We also show that Petitioners have raised no

issues regarding foreign ownership within the scope of the license renewal application or this proceeding.

A. Crow Butte Has Accurately Described Its Ownership Structure

Petitioners argue that Crow Butte is attempting to conceal “something else” by using the word “held” rather than “owned” when describing the relationship between Cameco US Holdings and Cameco Corporation. Pet. Response on K at 4.² The use of different terminology (“held” versus “owned”) was not intended to imply that a different relationship exists in the context of the ownership of Crow Butte, and both terms are commonly and interchangeably used.³ Cameco Corporation owns Cameco US Holdings.

In their brief, Petitioners also argue that Crow Butte’s statements regarding 52% U.S. ownership in Cameco are “either incorrect, misleading or an admission of Cameco’s violation of applicable Canadian law.” Petitioners base their claim on Cameco’s corporate charter, which they mistakenly assert requires that no more than twenty-five percent of Cameco be owned by non-Canadians. The Petitioners’ conclusion is in error, as they fail to understand the actual limitations which are clearly explained in the document cited by Petitioners. Cameco’s 2007 Annual Information Form states (at 6) that “[i]n 2002, Cameco’s articles were amended ... to increase the limit on aggregate non-resident ownership voting rights from 20% to 25%.” The twenty-five percent limit is therefore on *voting rights*, and not ownership generally.

² For example, corporations are sometimes described as “closely-held corporations,” “privately-held corporations,” or “publicly-held corporations.” A corporation that is held by another entity is owned by that entity.

³ In this regard, the language in the amendment to the license renewal application is identical to information regarding ownership structure that was previously provided to the parties and Licensing Boards in both the license renewal and North Trend Expansion proceedings.

The voting structure is also explained in detail elsewhere in the Annual Information Form. The text notes that “the votes attaching to securities of Cameco held, beneficially owned or controlled, directly or indirectly, by all non-residents together, and cast at any meeting of shareholders of Cameco will be counted or pro-rated so as to limit the counting of those votes to not more than 25% of the total number of votes cast by the shareholders at that meeting.” *Id.* at 133. Thus, contrary to statements by Petitioners, ownership of Cameco by non-residents is not limited to 25%, and Crow Butte has not misled the Board or admitted a violation of Canadian law. As with many of their other arguments, Petitioners supposed “violations” are nothing more than activities permitted in the normal course of business.

B. The AEA Does Not Prohibit Issuance of a Renewed License to Crow Butte

Petitioners also argue that Crow Butte’s “legal analysis fails to include the PH&S factors of Section 40.32(d), a proper analysis of AEA Section 62 or any reference to AEA Section 69.” Pet. Response on K at 7. Although AEA provides the statutory framework for the Commission’s regulatory program, the Commission implements that framework by developing regulations. *See* AEA § 63(b) (“The Commission shall establish, by rule, minimum criteria for the issuance of specific or general licenses for the distribution of source material depending on the degree of importance to the common defense and security or to the health and safety of the public.”). The Commission’s regulations in 10 C.F.R. Part 40 expressly incorporate the language and intent of both Section 62 and Section 69 of the AEA.

Specifically, like Section 62 of the AEA, 10 C.F.R. § 40.3 states that “[a] person subject to the regulations in this part may not receive title to, own, receive, possess, use, transfer, provide for long-term care, deliver or dispose of . . . any source material after removal from its place of deposit in nature, unless authorized in a specific or general license issued by the

Commission under the regulations in this part.” And, like Section 69 of the AEA, 10 C.F.R. § 40.32(d) states that a source material license will be approved if it will not be inimical to the common defense and security or to the health and safety of the public. .

The Commission has established its regulatory program governing the licensing of source materials (10 C.F.R. Part 40) pursuant to its authority under Chapter 7 of the AEA (Sections 61 through 69). Consequently, compliance with the Commission’s regulations satisfies the AEA. Any challenges to the structure of Part 40, such as the arguments made by Petitioners, are impermissible challenges to Commission regulations and cannot be made as part of an adjudicatory proceeding. The fact remains, Petitioners have not shown any basis to conclude that the renewed license would be inimical to common defense and security and public health and safety under 10 C.F.R. § 40.32(d).

C. Crow Butte Has Fully Complied With NRC Regulations For License Transfers

Petitioners also argue that “Applicant puts great weight on the belated 1998 notification to the NRC Staff under Section 40.46.” Pet. Response on K at 12. Placing great weight on the notice and subsequent NRC acceptance of the change in ownership is only natural as those documents demonstrate full compliance with NRC regulations. Petitioners also provide no support for their characterization that the notification was “belated.” The NRC Staff reviewed Crow Butte’s notice, which was made prior to completion of the transaction. There was nothing “late” about the submission or NRC acceptance.

The NRC Staff also found that Crow Butte provided all of the information that it was required to provide, and permitted the transfer.⁴ The NRC permitted the license transfer

⁴ See Ltr. from J. Holonich, NRC, to S Collings, Crow Butte, “Change in Corporate Ownership” (June 5, 1998) (ADAMS Accession No. 9806120319) (“Change in Corporate Ownership Letter”); see also Information Notice 89-25, “Unauthorized

because it had no effect on the day-to-day management and operation of the company, and did not impair Crow Butte's ability to comply with NRC regulations or the requirements in SUA-1534. *See* Change in Corporate Ownership Letter. The NRC noted that, with the change in ownership, Crow Butte would maintain the same fundamental organization structure, responsibilities, and qualifications and did not plan to change the organization, facility location, current operating and emergency procedures, or personnel. The NRC also noted that records would continue to be maintained as required under NRC regulations and in SUA-1534 and that there would be no change in the use or storage of any material on site. Finally, the NRC explained that no modification to the existing surety would be necessary. Petitioners have pointed to no regulatory or statutory provision that would have required Crow Butte to provide any other notices or any additional information to the NRC.⁵

D. License Renewal Is Not Inimical to Common Defense and Security or Public Health and Safety

Although Petitioners continue to argue that issuance of the license to Crow Butte is inimical to the common defense and security and public health and safety, Petitioners have not pointed to any portion of the application that they allege is deficient. Chapter 5 is devoted to explaining the management and organization structure of the project. Specific roles and responsibilities include the following:

- The Board of Directors has the ultimate responsibility and authority for radiation safety and environmental compliance for Crow Butte. LRA at 5-1.

Transfer Of Ownership Or Control Of Licensed Activities,” dated March 7, 1989. IN 89-25 identifies the information that a licensee must provide to the NRC before a planned transfer of ownership or control.

⁵ Moreover, this proceeding is concerned solely with the adequacy of the LRA currently before the NRC Staff. Any issues regarding past compliance with NRC regulations is outside the scope of the contention and this proceeding.

- The President is empowered by the Board of Directors to have the responsibility and authority for the radiation safety and environmental compliance programs at the Crow Butte Facility. *Id.*, at 5-3.
- The President is directly responsible for ensuring that CBR personnel comply with industrial safety, radiation safety, and environmental protection programs as established in the Environmental, Health, and Safety Management System (“EHSMS”) Program. *Id.*
- The President has the responsibility and authority to terminate immediately any activity that is determined to be a threat to employees or public health, the environment, or potentially a violation of state or federal regulations. *Id.*
- The Mine Manager is responsible for implementing any industrial and radiation safety and environmental protection programs associated with operations. *Id.*
- The Mine Manager is authorized to immediately implement any action to correct or prevent hazards. *Id.*
- The Mine Manager has the responsibility and the authority to suspend, postpone, or modify, immediately if necessary, any activity that is determined to be a threat to employees, public health, the environment, or potentially a violation of state or federal regulations. *Id.*
- The Manager of Health, Safety, and Environmental Affairs reports directly to the Mine Manager and supervises the Radiation Safety Officer (“RSO”) to ensure that the radiation safety and environmental monitoring and protection programs are conducted in a manner consistent with regulatory requirements. *Id.*

The EHSMS Program formalizes Crow Butte’s approach to environmental, health, and safety management to ensure consistency across its operations. The EHSMS Program uses a series of standards that align with specific management processes and sets out the minimum expectations for performance. LRA at 5-8. The standards consist of management processes that include assessment, planning, implementation (training, corrective actions, safe work programs, and emergency response), checking (auditing, incident investigation, compliance management, and reporting), and management review. *Id.* Written operating procedures have

been developed for all process activities including those involving radioactive materials for the Crow Butte Project. *Id.*, at 5-9. Where radioactive material handling is involved, pertinent radiation safety practices are incorporated into the operating procedure. Additionally, written operating procedures have been developed for non-process activities including environmental monitoring, health physics procedures, emergency procedures, and general safety. *Id.* EHSMS Program Volume VIII, *Emergency Manual*, provides the Crow Butte emergency action plan for responding to a transportation accident involving a radioactive materials shipment. *Id.*, at 5-29. The Emergency Manual also provides instructions for proper packaging, documentation, driver emergency and accident response procedures, and cleanup and recovery actions. Spill response is also addressed in EHSMS Program Volume VIII, *Emergency Manual*. Crow Butte is also required to maintain certain records and make certain reports to the NRC. *See, e.g.*, 10 C.F.R. §§ 40.60, 40.61. These records must be available for NRC inspection. 10 C.F.R. § 40.62.

Finally, Crow Butte utilizes a performance-based approach to the management of the environment and employee health and safety, including radiation safety. A Safety and Environmental Review Panel (“SERP”) determines compliance with various conditions in Crow Butte’s license. LRA, at 5-11. The SERP is responsible for monitoring any proposed change in the facility or process, making changes in procedures, and conducting tests or experiments not contained in the current license. As such, the SERP is responsible for ensuring that any such change does not diminish the essential safety or environmental commitments of Crow Butte. Further, the SERP must document its findings, recommendations, and conclusions in a written report. *Id.*, at 5-13. All SERP reports and associated records of any changes must be maintained through termination of the license and are subject to NRC inspection and audit at any time. *Id.* Moreover, Crow Butte must submit an annual report to the NRC regarding SERP decisions.

Petitioners have not shown that the specific management, organizational, or programmatic aspects of the project, as described in the License Renewal Application, are inadequate to protect the common defense and security or public health and safety. Petitioners raise concerns regarding a future, hypothetical applicant (or licensee) rather than challenge the specific application at issue in this proceeding. Petitioners arguments are nothing more than a general fear that a domestic licensee (with a foreign grandparent) cannot be trusted to follow regulations of any kind. At bottom, Petitioners are challenging the basic structure of the NRC's regulatory program in Part 40, which does not prohibit export of uranium or preclude issuance of source material licenses to entities with ultimate foreign owners. As such, their concerns are beyond the scope of this contention and this proceeding and, instead, must be addressed with the Commission as a matter of policy or through the rulemaking process.

CONCLUSION

For the foregoing reasons, neither the AEA nor NRC regulations prohibit the ultimate foreign ownership of Crow Butte, and there is no genuine dispute that Cameco's ultimate ownership of Crow Butte does not impact or endanger the common defense or security. Accordingly, the Board should resolve Miscellaneous Contention K in favor of the Applicant.

Respectfully submitted,

/s/ signed electronically by
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Dated at San Francisco, California
this 20th day of February 2009

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CERTIFICATE OF SERVICE

I hereby certify that copies of “APPLICANT’S REPLY BRIEF REGARDING MISCELLANEOUS CONTENTION K” in the captioned proceeding have been served via the Electronic Information Exchange (“EIE”) this 20th day of February 2009, which to the best of my knowledge resulted in transmittal of the foregoing to those on the EIE Service List for the captioned proceeding.

/s/ signed electronically by _____

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