RAS X-116

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	Docket No. 40-8943
CROW BUTTE RESOURCES, INC. (License Renewal In Situ Leach Facility, Crawford, NE)	ASLBP No. 08-867-02-OLA-BD01
	February 20, 2009

INTERVENORS' REPLY TO RESPONSE OF NRC STAFF RE: MISC. CONTENTION K – FOREIGN OWNERSHIP

Pursuant to LBP-08-24, as amended by the Board's December 9, 2008 Order, as described in Paragraph C at page 3 of the Board's Initial Scheduling Order dated January 8, 2009, Intervenors (formerly Consolidated Petitioners in this matter) hereby submit this Reply to Response of NRC Staff concerning Misc. Contention K.

INTRODUCTION

In LBP-08-24, the Board admitted Petitioners' Miscellaneous Contention K as it pertains to foreign ownership: 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.[1] The Board found the need to make two legal determinations: (1) whether there is an absolute prohibition on foreign ownership under the Atomic Energy Act of 1954, as amended (the "AEA"); and (2) if there is no absolute prohibition, whether the issuance or renewal of a source materials license to a foreign-owned company would be inimical to the US national interest, the common defense and security ("CD&S"), or the

[1] LBP-08-24 at 70-75.

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health and safety of the public ("PH&S").[2]

The "ultimate burden of persuasion rests with Applicant, who seeks a licensing order"[3] to make a sufficient showing that the NRC is authorized to issue a source material license to a foreign-owned company and that the issuance of the renewal of SUA-1534 is in furtherance of the US national interest, not inimical to CD&S and not inimical to PH&S.[4] To the extent that NRC Staff is attempting to make Applicant's case, it faces the same burden as Applicant; and they are unable to meet its burden because there is no section of the AEA that authorizes the issuance of licenses to foreign persons and for the reasons described in Intervenors Brief re: Contention K, its Response to Applicant and NRC Staff, Reply to Applicant, and this Reply.

NRC Staff argues that there is no prohibition in the AEA and therefore, it must be allowed. Such argument is syllogistic and dangerous in light of the nuclear threats. The only reasonable construction of the AEA is that as a 'closed-field' law compared to an 'open-field' law, authority to grant a license may not be implied.

REPLY

A. Absence of Prohibition Does Not Mean Grant of Authority; Authority Required to Issue Licenses Rather Than Lack of Express Prohibition. NRC Staff believes that if the AEA does not expressly prohibit something, it should be allowed

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[2] Id. at 71, 73.

[3] Neither Applicant nor NRC Staff have disputed that Applicant bears the burden of persuasion.

[4] Florida Power & Light Co. (St. Lucie Plant, Unit No. 2), 14 NRC 1167, LBP-81-58 (1981); 1981 NRC Lexis 13, 17. See also Siegel v. Atomic Energy Commission, 400 F.2d 778, 784 (DC Cir. 1968) ("applicant for a license should bear the burden of proving the security.")

under the notion that "if it's not prohibited, it must be authorized."[5] There is no basis in law to support this notion.

The AEA is not a law that throws open the entire field of atomic energy to unregulated, free market activities except for specific enumerated prohibitions (such as would be the case if it said "everyone can possess uranium except people on Appendix B"). Rather, except for specific enumerated exceptions (such as when licensed), possession or use of uranium is expressly prohibited. This evidences a 'closed-field' law as compared to an 'open-field' law. Examples of such "open-field' laws are common where transactions are solely commercial and have no other policy considerations involved such as The Securities Act of 1933 ("1933 Act") and The Securities Exchange Act of 1934 ("1934 Act"), respectively.[6] Because such laws do not involve more than mere commercial activity, they confirm that except for transactions that require action (such as a filing or disclosure) under the 1933 Act or the 1934 Act, such transactions may go forward – i.e., if it's not prohibited or regulated, the transaction may go forward.[7]

Securities laws have a stated purpose to prohibit deceit and fraud in the sale of securities to the public and, in addition to investor protection, to promote efficiency, competition and capital formation.[8] In contrast, the AEA is based on the premise that atomic energy is such an awesome power that it must be treated specially and with more care than ordinary commercial transactions which may involve large sums but which do

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[5] See, e.g., NRC Staff Response at 5 ("Staff asserts that there is no prohibition contained in the AEA against the foreign ownership of in situ leach recovery facilities..")
[6] 15 USC §77a et seq. and 15 USC §78a et seq.
[7] See, e.g., Section 5 of the 1933 Act requiring registration unless an applicable exemption applies.
[8] See Section 2(b) of 1933 Act.

not have the capacity to cause as much harm as atomic energy if used improperly.[9] That is why the AEA contains Section 2012(a)-(e) providing for atomic energy to be regulated in the US national interest.[10] Further, while the securities laws require the regulation of activities to protect investors and promote competition and capital formation, the AEA clearly requires the regulation of activities to protect the US national interest, CD&S and PH&S ("source material must be regulated in the national interest and in order to provide for the common defense and security and to protect the health and safety of the public.")[11]

Based on the foregoing, it is clear that if an activity is one which the NRC is not authorized to regulate, it may not issue a license for such activity and such activity is prohibited without a license – therefore, such activity is prohibited (unless expressly authorized elsewhere.) Otherwise, the AEA would be emasculated and converted from a 'closed-field' law into an 'open-field' law, and the important distinctions in policy that derive from the unique qualities of atomic energy that separates atomic energy activities from other less-dangerous commercial activities would be eviscerated. Any such interpretation would undermine Congress' clearly expressed intent and would be invalid under Vogel Fertilizer, and Chevron.[12]

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[9] Indeed, this is not to understate the potential harm caused by financial wrongdoing; as the recent $50 Billion Maddof ponzi scheme is showing, it seems that the securities laws require tighter application even as 'open-field' laws.

[10] 42 USC §2012; in comparison, the securities laws are designed to protect a subset of the entire US population: financial investors, while the AEA is intended to protect the entire US population.

[11] Id.

[12] Unlike Applicant which denies the relevance of Chevron (Applicant Response at 3, n.3), NRC Staff does not deny the relevance of Chevron. See NRC Staff Response at 5.

B. The 1954 Act Did Not Repeal the 1946 Act; Congressional Intent from the 1946 Act Remains in Effect. NRC Staff differs with Intervenors in its interpretation of Congressional intent.[13] The basic Congressional intent concerning atomic energy did not change between 1946 and 1954.[14] The 1946 Act refers to the "paramount objective of assuring the common defense and security" and that atomic energy "be directed toward improving the public welfare."[15] The 1954 Act states that atomic energy is 'vital to the common defense and security' and that 'source material must be regulated in the national interest and in order to provide for the common defense and security and to protect the health and safety of the public.'[16] Both Acts have the same intentions with a focus – paramount and vital - on common defense and security.[17]

NRC Staff fails to point out any section of the 1954 Act that expressly repeals the 1946 Act. Indeed, the 1954 Act contains references to the 1946 Act and appears tailored to be read consistently with the 1946 Act - which would not be the case if the 1954 Act were intended to repeal the 1946 Act. For example, Section 68(c) of the 1954 Act provides an exception that "[n]otwithstanding the provisions of the Atomic Energy Act of 1946, as amended, and particularly section 5(b)(7) thereof...."[18]

Although Congress chose not to implement all of the foreign ownership and foreign government prohibitions of Section 7(c) of the 1946 Act in Section 69 of the

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[13] NRC Staff Response at 5-7.
[14] The expressions of Congressional intent are nearly identical in Section 1(a) of the 1946 Act and Section 2012 of the 1954 Act. See Intervenors (Petitioners) Brief re: Contention K (Jan. 21, 2009) at 25-26.
[15] Section 1(a) of 1946 Act.
[16] Section 2012 (a),(c),(d)(e) of the 1954 Act.
[17] None of these expressions of Congressional intent give rise to the assumption that Congress meant for CD&S factors to be made not 'cognizable' as argued by the NRC Staff in this case.
[18] Section 68(c) of the 1954 Act.

1954 Act (the way it did in Section 103d of the 1954 Act) does not mean that Congress abandoned its concerns about foreign ownership or its intentions to make paramount and vital the interests of CD&S and PH&S. The overall concerns of Congress in the 1946 Act and the 1954 Act make national welfare (or interest), CD&S and PH&S the paramount, most vital objectives. Further, nothing in the transition from the 1946 Act to the 1954 Act means that foreign ownership and control over source materials is not inimical to CD&S and/or PH&S. Intervenors acknowledge that Congressional intent concerning foreign ownership would have been more clear if Congress had included in Section 69 of the 1954 Act clear guidance as to what level of foreign ownership and control would be inimical. The Commission has grappled with the same question since the 1954 Act was passed, as reflected by the prior Commission decisions concerning Section 103d. Congress' failure to provide such clarity has led to the development of the Cameco Loophole and, specifically, Misc. Contention G and Misc. Contention K.

C. Persuasiveness of Prior Commission Decisions re: Foreign Ownership. Despite being issued prior to the events of September 11, 2001, Commission decisions concerning foreign ownership, control and domination of nuclear facilities under AEA 103d are extremely persuasive because they represent substantive legal analyses as of that point in time of nearly identical legal issues. Similarly, the NRC's SRP on Foreign Ownership, Control or Domination (1999)[19] is persuasive. Inimicality is inimicality. Things that factor into a determination of inimicality under AEA 103d or 104d (or the 1999 SRP) will also have the potential to factor into a determination of inimicality in this case based upon our facts under AEA 69 and Section 40.32(d). Intervenors have not

[19] 64 Fed. Reg. 52355 (September 28, 1999).

cited any of the Commission decisions as binding precedent that must be followed by the Board. Rather, Intervenors have raised these prior decisions as influential and persuasive in assisting the Board in making a complete analysis. Intervenors respectfully suggest that if a factor militates toward a finding of inimicality in a 103d case but is found not to militate toward inimicality in this proceeding, such a finding would seem arbitrary and capricious unless there were obvious factual and legal distinctions supporting a differing finding.

D. "Upsetting Prior Regulatory Approval" Not An Impermissible Challenge. NRC Staff states in three places in its Response that the concerns that Intervenors raise regarding foreign ownership "cannot upset the NRC's prior regulatory approval of Cameco's control of CBR."[20] Clearly, the NRC regulations do not supersede the AEA and no NRC Staff approval may contradict the AEA, as regulations and agency action must be consistent with the authorizing statute.[21] Therefore, it is entirely appropriate for Intervenors to challenge the extent to which a proposed licensing action is in conflict with any applicable NRC regulation or the AEA itself. Although 'cause' is not required, and there is no case cited by NRC Staff that supports finding such a requirement,[22] there is ample cause in this case due to the nondisclosure of the existence of foreign ownership, and the other matters described below.

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[20] NRC Staff Response at 4, 8 and 11. NRC Staff stops short of asserting that any part of Intervenors' arguments or contentions constitutes an 'impermissible challenge' under 10 CFR §2.335(a).

[21] A regulation "is not a reasonable statutory interpretation unless it harmonizes with the statute's 'origin and purpose.'" US v Vogel Fertilizer Co., 455 US 16, 26 (1982); see also LBP-08-24 at 71.

[22] Contrary to NRC Staff's assertions in its Response at 10, n. 40.

E. Section 40.46 Transfer Based On Less Than 'Full Information'; 1998 Approval Not Binding. Intervenors agree with Applicant that any transfer of control that did not comply with Section 40.46 (including the acquisition of "full information") would be contrary to NRC regulations and could result in enforcement actions.[23] In addition, if Applicant was complicit in the reason why NRC Staff did not acquire 'full information', it would be subject to an enforcement action together with responsible members of its management. Applicant would also have 'unclean hands' and could not be rewarded for its own concealment.

When Mr. Collings sent his May 13, 1998 letter notifying the NRC Staff of the proposed stock sale, he made certain representations that were accepted 'uncritically' by the NRC Staff which issued its approval based on such representations. Such representations do not constitute 'full information' that NRC Staff is required to obtain under Section 40.46.

There was no inimicality analysis done in 1998. The May 13, 1998 letter does not state the impacts of foreign ownership of 90% of Applicant's stock (or that prior to the purchase of Uranerz, Cameco had acquired Geomex and its 32%), 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, records

[23] Applicant Response at 11.

and assets located outside the United States.[24] Because the 1998 disclosure failed to provide 'full information' to the NRC Staff, and neither Applicant nor the NRC Staff has made a showing to the contrary, the 1998 approval is not dispositive, binding or even relevant to this proceeding.

F. Relationship of License to Export Rights. It is undisputed that a person without an effective source materials license may not use, possess or deliver source material in the United States.[25] One such 'use" while in possession of source material is to contract with a licensed export shipper to pickup Yellowcake from the facility, put it on the truck (i.e., deliver it) and ship it to an affiliate in Canada. It makes no difference that SUA-1534 does not itself authorize export if it authorizes the licensee to possess and 'use' (including the use that involves causes an export shipper to export on its behalf) the source material and if the source material could not be legally exported by a licensed exporter in the absence of a valid source materials license being held by the 'customer/supplier' of such licensed export shipper.[26] Accordingly, it is disingenuous to argue that this proceeding 'only authorizes the possession and use – not the export – of source material'[27] or that the license would not grant Applicant the 'authority' to export source material if issued, when one important 'use' of source material is to cause it to be picked up, i.e., delivered, loaded on a truck and shipped to an affiliate in Canada by a

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[24] Similarly, no disclosure was made concerning the dividend policy and how Applicant would keep its assets from flowing outside the US so that only nominal assets would be available to satisfy any under-collateralized clean-up costs.
[25] AEA Section 62 and 69.
[26] This point is not disputed by NRC Staff in its Response; rather than focus on this aspect of 'use,' however, NRC Staff is content to keep blinders on ignoring the fact that without the license renewal, Applicant would not be authorized to be listed as a customer/supplier by a licensed export shipper.
[27] Applicant Response at 7.

licensed export shipper such as RSB Logistics Services, Inc. under License XSOU8798.

G. Over-Compartmentalization of Issues Undermines Congressional Intent.

Applicant, and to a lesser extent NRC Staff, put great weight on a myopic view and compartmentalization of the issues to convince the Board that all these inter-connected issues are really totally separate issues that should be in a variety of separate licensing, and export proceedings.[28] Unfortunately, the effect of this compartmentalization would be that none of the issues ever get properly addressed because they are 'slipped through' each separate proceeding with the substantive issues falling through the cracks.

NRC Staff specifically argues without citation that Intervenors' concerns "are not cognizable in the context of this license renewal"[29] NRC Staff reaches this conclusion based on a very expansive reading of dicta in two prior cases, each of which are highly distinguishable from the instant case.[30] Nonetheless, NRC Staff maintains that CD&S risks are not cognizable in this proceeding because this Part 40 source material license renewal would not [itself] authorize the export of source material.[31]

Yes, it is technically correct that this license does not by itself authorize export but it does authorize delivery to the licensed export shipper. But, NRC Staff would have the Board choose to ignore the context and imagine that export issues, (and, therefore, in NRC Staff's view, CD&S risks) are not 'cognizable' – meaning they are supposed to be invisible to the Board in this case. Intervenors respectfully suggest that there is no way such an

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[28] See, e.g., NRC Staff Response at 10 and at n. 41 (Part 40 proceeding is a "separate and distinct proceeding from a Part 110 export license proceeding"); and Applicant Response at 3, n. 2 ("any issue with respect to past ownership changes would be an enforcement issue, not a present licensing issue"), at 4 (concerns 'best addressed through the rulemaking process"), at 7 (concerns properly addressed in context of NRC export program), and at 9 (issues should instead by taken up with the Commission through the rulemaking process or as part of export licensing proceeding).

[29] NRC Staff Response at 11.

[30] See, e.g., Curators of Univ. of Missouri and Kerr-McGee Corp. and discussion of same in Intervenors Response re: Contention K (filed February 10, 2009) at 15-16 and 19-20.

[31] NRC Staff Response at 11.

interpretation comports with the Congressional intent to put CD&S the paramount and vital objective of the AEA and is, therefore, violative of Vogel Fertilizer and Chevron.

Further, if the export related issues and inherent risks to CD&S are ignored based on the idea that there is another "separate and distinct action,"[32] then the public will be denied meaningful participation on both those issues because neither Applicant nor NRC Staff has made any showing that the Intervenors have a right of participation in a Part 110 proceeding or that a hearing in a Part 110 proceeding will be held as a matter of right, such as this proceeding, or may only be held in the discretion of the Commission.

Since Part 110 does not provide any meaningful public notice or opportunity to intervene as matter of right, to the extent export related issues pertaining to CD&S have been raised in this proceeding, to make such issues not 'cognizable' would conflict with AEA Section 2239(a)(1) (which allows any person who may be affected to intervene). Because Part 110 allows only discretionary intervention and not intervention as of right, any interpretation by this Board that deprives Intervenors of a chance to intervene (as a matter of right as under AEA Section 2239) on issues related to an admitted contention contradicts the AEA and must fail under Vogel Fertilizer and Chevron. Further, how can Intervenors' concerns be properly addressed in the context of the NRC's export program, when such export program has no process for public notice, public participation or public intervention except discretionary intervention ordered by the Commission on a case by case basis if the interests of the public require.

NRC would be shirking their responsibilities under Section 40.32(d) to do a proper inimicality analysis if CD&S were not 'cognizable' in any Part 40 source materials license proceeding – such an interpretation makes Section 40.32(d) vestigal. A complete inimicality analysis under Section 40.32(d) would have to conclude that

[32] NRC Staff Response at 10.

allowing foreign persons located outside the US to make management decisions that are material to the safe operation of the mine by Applicant and remain outside of US jurisdiction is inimical. Further, allowing Applicant to be operated with minimal assets (e.g., sending all Yellowcake to affiliates without consideration; upstreaming any profits; leaving only nominal operating assets within Applicant itself) means that if the surety bond/financial assurances in the Letter of Credit issued by Royal Bank of Canada to support SUA-1534 were insufficient to pay for decommissioning and water restoration, Cameco would have left Applicant with insufficient assets to satisfy the excess. With the rest of Cameco's assets outside of US jurisdiction, there would be no way to enforce Applicant's decommissioning and water restoration obligations against Cameco's assets. If the Yellowcake and profits had been kept in the US, the assets would have been available to satisfy any excess of the decommissioning restoration costs. Provisions to militate these elements of inimicality may be possible to implement and even enforce but not with full disclosure of foreign ownership in each source materials license application, full disclosure of all material facts related to inimicality, and mitigation of these factors through an effective negation action plan.

H. Generic Concerns; Merits Phase. NRC Staff arguments to the effect that Intervenors' concerns are generic may be relevant to admissibility but are not relevant at this merits phase of the proceeding.[33] Such contention admissibility arguments should be disregarded at this stage of the proceeding.[34] The Petition, prior pleadings, LBP-08-

[33] We are beyond contention admissibility challenges; see LBP-08-24 at 83, ¶E ("briefing on the merits with respect to...Misc. Contention K as so admitted.").
[34] NRC Staff Response at 4 ("generic concerns Petitioners raise regarding foreign ownership cannot upset the NRC's prior regulatory approval"), at 8 ("such generic concerns cannot upset the NRC's prior regulatory approval"), at 9 ("Petitioners need to

24, and the Board's December 9, 2008 and January 9, 2009 Orders speak for themselves as to the admissibility of the contention and refer to specific references to the LRA; and, most importantly, are clear that this is the merits phase on Misc. Contention K. Applicant has a burden and has failed to meet it.

In addition, contrary to Applicant's assertions that the LRA does not involve any critical infrastructure, export, or national security issues, the LRA expressly relates to a very large ISL uranium mine which produces U308 dried Yellowcake as part of Canadian company Cameco's integrated nuclear fuel business. The uranium mine itself is a part of "critical infrastructure" because of its dominance in the US domestic uranium market (with almost 1,000,000 pounds of U308 per year, the Crow Butte operation appears to represent the second largest US uranium operation behind Smith Ranch-Highland (owned by another Cameco subsidiary Cameco Resources formerly Power Resources, Inc.))[35] Critical infrastructure includes key energy assets such as the Crawford, NE mine.

I. NRC Staff Focuses on CD&S and Ignores PH&S. Intervenors note that in addition to the CD&S, which is discussed at times in the NRC Staff Response, inimicality must also be determined as to PH&S. Both factors CD&S and PH&S are expressly referenced in the AEA and Section 40.32(d). Accordingly, any arguments of the NRC Staff pertaining to CD&S (such as those related to export issues and Part 110, etc.) are irrelevant to PH&S factors. Therefore, it is clear that no showing has been made to meet the burden of Applicant/NRC Staff that foreign ownership and control of Applicant by

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allege something more than generic issues"), and at 11 ("generic concerns").

[35] To a large extent, Applicant's position that inimicality concerns are not implicated is based on an expansive reading of a footnote in dicta in Kerr McGee Corp. (West Chicago Rare Earths Facility), CLI-82-2, 15 NRC 232, 238, n.3 (1982); such position is not shared by the NRC Staff. See NRC Staff Response to Applicant's Brief re: Contention K (filed February 10, 2009) at 2, n. 4.

persons outside the jurisdiction of the US and outside jurisdiction of NRC regulations because they are outside the US, is not inimical. Accordingly, the burden has not been met and the issue of inimicality should be found in favor of Intervenors.

CONCLUSION

As noted by the Board in LBP-08-24, this issue is 'fatal' to Applicant's license renewal. Accordingly, the license renewal must be denied.

Dated this 20th day of February, 2009.

Respectfully submitted,

/s/ - electronically signed

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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 20, 2009

CERTIFICATE OF SERVICE

I hereby certify that copies "INTERVENORS' REPLY TO RESPONSE OF NRC STAFF RE: MISCELLANEOUS CONTENTION K" in the above captioned proceeding has been served on the following persons by electronic mail as indicated by a double asterisk (**); on this 20th day of February, 2009:

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RAS X-116

Hearing Docket

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Subject: Transmitting Document - Docket No. 40-8943 - ASLBP No. 08-867-02-OLA-BD01
Attachments: Intervenors Reply to Applicant Response re Contention K 02202009.pdf; (Renewal) EIE conformed COS Misc Cont K 02202009.pdf; Intervenors Reply to NRC Staff Response re Contention K 02202009.pdf; (Renewal) EIE conformed COS Misc Cont K NRC 02202009.pdf

Dear Parties and Counsels,

Attached for filing are:

Intervenors Reply to Applicant's Response re: Contention K, and related COS; and

Intervenors Reply to NRC Staff Response re: Contention K, and related COS.

Sincerely,

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(148.184.100.43) with Microsoft SMTP Server id 8.1.291.1; Fri, 20 Feb 2009
23:05:44 -0500
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Return-Path: <davidcoryfrankel@gmail.com>
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08-867-02-OLA-BD01
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