



UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D.C. 20555-0001

December 16, 2021

Mr. John M. Mays
Chief Operating Officer
Powertech (USA) Inc.
P.O. Box 448
Edgemont, SD 57735

SUBJECT: POWERTECH (USA) INC., AZARGA URANIUM CORP., AND ENCORE ENERGY CORP. U.S. NUCLEAR REGULATORY COMMISSION REVIEW AND DECISION ON THRESHOLD DETERMINATION REQUEST

Dear Mr. Mays:

I am responding to your letter, dated November 30, 2021, in which Powertech (USA) Inc. (Powertech), Azarga Uranium Corp. (Azarga), and enCore Energy Corp. (enCore). requested the U.S. Nuclear Regulatory Commission's (NRC) determination that a proposed interim transaction between Azarga and enCore, as described in the November 30, 2021, letter, does not constitute a transfer of control of Powertech's material license, SUA-1600, for which prior written NRC consent would be required under Section 184 of the Atomic Energy Act of 1954, as amended (AEA) and NRC regulations (Agencywide Documents Access Management System [ADAMS] Accession No. [ML21334A413](#)).

We have completed our review of your request (enclosed). The NRC staff has determined that the subject interim transaction does not involve a transfer, direct or indirect, of materials license SUA-1600 under Section 184 of the AEA and Title 10 of the *Code of Federal Regulations* (10 CFR) 40.46. Therefore, NRC's consent is not required for the interim transaction described in your November 30, 2021, letter. NRC approval is required prior to completion of the final transaction described in your October 8 (ADAMS Accession No. [ML21286A770](#)) and November 30, 2021, letters. The NRC anticipates reaching a decision on this final transaction by February 1, 2022.

In accordance with 10 CFR 2.390(d) of the NRC's "Agency Rules of Practice and Procedure," a copy of this letter will be available electronically for public inspection in the NRC Public Document Room or from the Publicly Available Records component of NRC's ADAMS. ADAMS is accessible from the NRC Web site at <http://www.nrc.gov/reading-rm/adams.html>.

J. Mays

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If you have any questions regarding this letter, please contact Ronald Burrows at (301) 415-6443 or by e-mail to Ronald.Burrows@nrc.gov or Ron Linton at (301) 415-7777 or by e-mail to Ron.Linton@nrc.gov.

Sincerely,

A handwritten signature in black ink, appearing to read 'ABR', with a horizontal line extending to the right.

Signed by Roberts, Ashley
on 12/16/21

Ashley B. Roberts, Deputy Director
Division of Decommissioning, Uranium Recovery
and Waste Programs
Office of Nuclear Materials Safety
and Safeguards

Docket No. 040-09075

License No. SUA-1600

Enclosure: As stated

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EVALUATION OF AND THRESHOLD DETERMINATION ON AN INTERIM TRANSACTION
BETWEEN POWERTECH (USA) INC., AZARGA URANIUM CORP., AND
ENCORE ENERGY CORP.

I. Introduction

Powertech (USA) Inc. (Powertech), a South Dakota corporation, holds a U.S. Nuclear Regulatory Commission (NRC) materials license issued under Title 10 of the *Code of Federal Regulations* (10 CFR) Part 40. Powertech is 100% directly owned and controlled by Azarga Uranium Corp. (Azarga), a corporation based in British Columbia, Canada.

On October 8, 2021, Powertech requested NRC's written approval of proposed indirect transfer of control of Powertech's license as detailed in a September 7, 2021, definitive agreement between enCore Energy Corp. (enCore) and Azarga (Agencywide Documents Access Management System [ADAMS] Accession Nos. [ML21286A770](#), [ML21312A026](#), [ML21320A271](#)). On November 30, 2021, Powertech, Azarga, and enCore (collectively, the Parties) supplemented their October 8, 2021, request (ADAMS Accession No. [ML21334A413](#)). In their November 30, 2021, letter, the Parties requested NRC's threshold determination that an interim transaction would not constitute a transfer of control of the Powertech license. Section 184 of the Atomic Energy Act of 1954, as amended (AEA), and NRC's regulations in 10 CFR 40.46 require the NRC's written consent prior to the direct or indirect transfer of control of NRC licenses.

Based on the description of the interim transaction contained in the November 30, 2021, letter, the NRC has determined that the interim transaction does not constitute a transfer of control of the Powertech license, as detailed in the evaluation below. Therefore, NRC's prior written consent under Section 184 of the AEA and 10 CFR 40.46 is not required for the interim transaction.

II. Interim Transaction

Prior to finalization of the final transaction, enCore and Azarga will engage in an interim transaction. This interim transaction is structured to allow for a change of ownership of Powertech but also provides limitations that ensure that no change of control occurs until the final transaction has been approved by the NRC and finalized by the Parties. This interim transaction will not involve any change in the management of Azarga and Powertech. Powertech's current officers will remain in their respective positions until the NRC has provided written approval of and the Parties have completed the final transaction. The interim transaction is to take place no later than December 31, 2021.

The interim transaction would still permit Azarga's shareholders to exchange their common shares of Azarga for common shares of enCore as defined in the definitive agreement. However, to limit control of the NRC license by enCore, which would otherwise have control as the ultimate parent company of Powertech, the Parties entered into an interim transaction. According to the November 30, 2021, request, this interim transaction will not permit any change in the management of either Azarga or Powertech, and enCore will not exercise control over Azarga's or Powertech's Board of Directors, until NRC's written approval of the final transaction. The pertinent parts of the interim transaction provide that:

Section 1.4 enCore agrees that it will not directly or indirectly exercise any voting, nomination, appointment, or similar rights (including to pass a resolution without a shareholder vote) attached to Azarga or Powertech (the "Transferred Entities"), except to:

- a) appoint as a director of a Transferred Entity a person nominated in writing by the Transferred Entity, but only if and to the extent that, absent such appointment, the Transferred Entity would have no directors at the time of such appointment;
- b) appoint as a director of a Transferred Entity a person approved by the board of the Transferred Entity;
- c) remove any director who, in the opinion of enCore (acting reasonably), has engaged in a material breach of his or her fiduciary (or similar directors') duties to a Transferred Entity;
- d) pass or vote on any resolution of a Transferred Entity to the extent such resolution has been approved unanimously by the board of the Transferred Entity;
- e) pass or vote on any annual or similarly recurring resolution of a Transferred Entity required by applicable law to be passed in connection with the ongoing solvency or standing of the Transferred Entity;
- f) pass or vote on a resolution of a Transferred Entity reasonably necessary either (i) to give effect to or otherwise consummate the Transaction; or (ii) for a Transferred Entity or enCore to perform its obligations under the Agreement.

Section 1.5 enCore agrees that it will not direct, influence, or exercise any control over SUA-1600 or activities occurring under or governed by SUA-1600. There are currently no licensed activities occurring under SUA-1600 and the Parties agree no licensed activities will take place until such time that: (i) the NRC approves the License Transfer Application; and (ii) Powertech has provided decommissioning funding assurances to the satisfaction of the NRC, as required by SUA-1600.

Section 1.6 enCore agrees that it will not enter into any legally binding commitment with respect to any activities listed in sections 1.4 and 1.5 above.

In the November 30, 2021, letter, the Parties state that:

the public stock transfer does not by itself result in a change in control of Azarga (or an indirect change in control of the Powertech) because this share exchange does not change the "actual or potential control over a license"¹ as a result of the Operating Control Restrictions. After all, "[c]ontrol of a license is in the hands of the person or persons who are empowered to decide when and how that license will be used."² (footnotes in original).

III. Regulatory Framework

Section 184 of the AEA provides that:

No license granted hereunder...shall be transferred, assigned or in any manner disposed of, either voluntarily or involuntarily, directly or indirectly, through

¹ *Safety Light Corp.* (Bloomsburg Site Decommissioning and License Renewal Denials), LBP-95-9, 41 NRC 412, 451 (1995)[.]

² *Safety Light Corp.* (Bloomsburg Site Decontamination), ALAB-931, 31 NRC 350 n.46 (1990).

transfer of control of any license to any person, unless the Commission shall, after securing full information, find that the transfer is in accordance with the provisions of this Act, and shall give its consent in writing.

The regulation at 10 CFR 40.46, "Inalienability of licenses," incorporates the requirements of Section 184 into NRC regulations governing source material licenses.

IV. Evaluation

The NRC's guidance on materials license transfers is contained in NUREG-1556, Volume 15, Rev. 1, "Consolidated Guidance About Materials Licenses: Guidance About Changes of Control and About Bankruptcy Involving Byproduct, Source, or Special Nuclear Materials Licenses," dated June 2016. While this guidance provides examples of transfers of control, the NRC evaluates all transfers of control on a case-by-case basis. The guidance provides that:

[c]ontrol over licensed activities can be construed as the authority to decide when and how that license (licensed material and/or activities) will be used. A change of ownership may be an example of a change of control, depending on whether the authority over the license has transferred from one person to another. The transfer of stock or other assets is not necessarily a change of control. The central issue is whether the entity that has the right to exercise authority over the license has changed.

In *Safety Light Corp. (Bloomsburg Site Decontamination)*,³ the Atomic Safety and Licensing Appeal Board⁴ explained that "control is to be found in the person or persons who, because of ownership or authority explicitly delegated by the owners, possess the power to determine corporate policy and thus the direction of the activities under the license."⁵ The extent to which a subsidiary's day-to-day operations are actually supervised by the parent company is irrelevant to determining whether there has been a transfer of control of a license.⁶ The Appeal Board deduced that "control of a license is in the hands of the person or persons who are empowered to decide when and how that license will be used."⁷

Safety Light involved the transfer by the licensee's parent company of its entire interest in the licensee to three officers of the licensee. The Appeal Board found "no room for reasonable doubt" that this sale constituted a transfer of control. The full right of *Safety Light's* prior parent

³ *Id.* at 367.

⁴ The Atomic Safety and Licensing Appeal Panel had provided mandatory administrative appellate review of initial decisions of presiding offers in agency adjudication. The Commission abolished the Panel in 1991, but its decisions still carry precedential weight. See Final Rule, [Procedures for Direct Commission Review of Presiding Officers](#), 56 Fed.Reg. 29,403 (June 27, 1991); Final Rule, [Interim Procedures for Agency Appellate Review](#), 55 Fed.Reg. 42,944 (Oct. 24, 1990); Proposed Rule, [Options and Procedures for Direct Commission Review of Licensing Board Decisions](#), 55 Fed.Reg. 42,947 (Oct. 24, 1990).

⁵ 31 NRC at 367.

⁶ *Id.* at 367, n. 53.

⁷ *Id.* at 364-65, n. 46.

company to control the license “became vested in the new owners.”⁸ “[A]s possessors of the authority that accompanies 100% ownership of a corporation,” the parent company and its owners and senior management “necessarily could exercise, if they so desired, the ultimate decisional authority on all matters pertaining to the use of the license.”⁹

In accordance with *Safety Light*, the Parties have structured the interim transaction to ensure that an indirect transfer of control does not occur. The NRC has evaluated the interim transaction and determined that it does not constitute a transfer of control because the interim transaction prohibits enCore from exercising the authority that it would otherwise have over Powertech.

V. Determination

Based on the description of the interim transaction contained in the Threshold Determination Request, the statements the Parties made in its November 30, 2021, letter, and the evaluation provided above, the NRC has determined that the interim transaction does not constitute a transfer of control of the Powertech licenses.

Therefore, NRC’s prior written consent under Section 184 of the AEA and 10 CFR 40.46 is not required for the interim transaction. The NRC’s determination is subject to the statements that the Parties made in its November 30, 2021, letter that they would not exercise their reserved rights in a manner that would constitute control over the Powertech license or licensed activities and would provide the NRC with prior written notice and an accompanying explanation if they choose to exercise any reserved right.

⁸ *Id.* at 365.

⁹ *Id.* at 366.

Powertech (USA) Inc., Dewey-Burdock Project, NRC Review and Decision on Threshold Determination Request from Powertech(USA) Inc., Azarga Uranium Corp. and enCore Energy Corp. DATE December 16, 2021

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