

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	
	)	
POWERTECH (USA) INC.,	)	Docket No. 40-9075-MLA
	)	
(Dewey-Burdock In Situ Uranium Recovery	)	
Facility)	)	

NRC STAFF'S OPPOSITION TO PETITIONER THEODORE EBERT'S  
MOTION FOR THE BOARD TO CONVENE A TRADITIONAL LAKOTA CEREMONY

The Nuclear Regulatory Commission (NRC) Staff responds to Petitioner Theodore P. Ebert's motion, filed July 16, 2010, asking the Board to issue an order convening the Board, the Applicant, Powertech (USA) Inc., and the Staff at a conference where a traditional Lakota ceremony will take place.<sup>1</sup> According to Mr. Ebert, the ceremony will help resolve differences between the Petitioners, Powertech and the Staff concerning issues in dispute in this proceeding. Motion at 2. Mr. Ebert asks that the Board select the form of the ceremony, as well as its time, date and place. Motion at 1–2. The Staff opposes Mr. Ebert's motion because convening such a ceremony falls outside the Board's adjudicatory role.

First, the Board does not need to convene a ceremony to discharge its responsibilities in this proceeding. Mr. Ebert's filed his hearing request on March 8, 2010,<sup>2</sup> and that request is pending before the Board. At this point, the only differences between Mr. Ebert, Powertech and the Staff that are relevant to this proceeding are those reflected in Mr. Ebert's hearing request and the answers from Powertech and the Staff. In his petition Mr. Ebert argues he should be

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<sup>1</sup> Mr. Ebert proposes that the Board select one of three traditional Lakota ceremonies: *Inipi* (Sweat Lodge), *Hunkapi* (Making of Relations) or *Canupa* (Peace Pipe). Motion at 3. Although the ceremonies have different elements, each of the ceremonies involves prayers, songs and drums. *Id.*

<sup>2</sup> "Consolidated Request for Hearing and Petition for Leave to Intervene" (March 8, 2010). The Consolidated Petitioners include five individuals other than Mr. Ebert, as well as two organizations.

granted a hearing. In the answers to Mr. Ebert's petition, Powertech and the Staff argue he should not. To resolve these differences, the Board must apply the regulations in 10 C.F.R. Part 2, "Rules of Practice for Domestic Licensing Proceedings and Issuance of Orders." More specifically, the Board must evaluate Mr. Ebert's hearing request by applying the criteria for evaluating standing in 10 C.F.R. § 2.309(d) and the criteria for evaluating contentions in 10 C.F.R. § 2.309(f).<sup>3</sup> If Mr. Ebert cannot meet these criteria, his hearing request must be denied; if he can, it must be granted. The relief Mr. Ebert seeks through his motion, a Board-ordered traditional Lakota ceremony, therefore has no relevance to the issues presently before the Board. Because such a ceremony would in no way assist the Board in discharging its present responsibilities, and because using a ceremony as an aid to decisionmaking would in fact be preempted by the specific procedures set forth in 10 C.F.R. § 2.309, the Board should reject Mr. Ebert's motion.

To the extent Mr. Ebert's motion is directed at resolving differences beyond those reflected in his hearing request and Powertech's and the Staff's responses, the Staff respectfully submits that those differences are outside the scope of the proceeding before this Board. In his motion, Mr. Ebert does not specify the exact nature of his dispute with the Applicant or the Staff.<sup>4</sup> Accordingly, Mr. Ebert's concerns may very well be broader than the issues involved in this proceeding—for example, Mr. Ebert may be opposed to uranium recovery operations generally. In that case, any attempt by the Board to convene a ceremony would involve the

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<sup>3</sup> See 10 C.F.R. § 2.309(a) ("... the Atomic Safety and Licensing Board designated to rule on the request for hearing and/or petition for leave to intervene, will grant the request/petition if it determines that the requestor/petitioner has standing . . . and has proposed at least one admissible contention[.]").

<sup>4</sup> See Motion at 2 ("Though I am in disagreement with [Powertech's] venture. . . ."). See also Motion at 5 ("In light of the current nature of the dispute between the parties and the lack of understanding between the Petitioners, on the one hand, and the Applicant and the NRC Staff, on the other hand, it would promote the interests of a just and fair hearing to grant the Motion and issue the requested Order.").

Board in issues outside the scope of this proceeding, and the Board would be acting outside its adjudicatory role.

Counsel for Mr. Ebert argues that the Board has the authority to order participation in a traditional Lakota ceremony under 10 C.F.R. § 2.319(r). Motion at 4. Under this section, a presiding officer or a Board<sup>5</sup> in a proceeding can “take any other action consistent with the Act, this chapter, and 5 U.S.C. 551–558.” The authority granted by § 2.319(r) is insufficient, however, for the Board to order participation in a non-adjudicatory ceremony such as that proposed by Mr. Ebert. The NRC’s regulations make clear that the Board’s role is an *adjudicatory* role. See 10 C.F.R. § 2.321(a) (“In proceedings for granting, suspending, revoking, or amending licenses or authorizations as the Commission may designate, *the Atomic Safety and Licensing Board shall perform the adjudicatory functions that the Commission determines are appropriate.*”) Indeed, all the specific examples of the Board’s authority described in subparts (a) through (q) of § 2.319, such as ordering depositions and issuing decisions, are adjudicatory in nature. Because convening a traditional Lakota ceremony is not an adjudicatory function, under 10 C.F.R. § 2.321(a), it is a function outside the authority of the Board.<sup>6</sup>

Further, even if the Board could order Powertech and the Staff to attend certain ceremonies not directly related to adjudicatory matters, the particular type of ceremony requested by Mr. Ebert raises concerns. Because prayer is involved in each of the three

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<sup>5</sup> Under § 2.321(c), an “Atomic Safety and Licensing Board has the duties and may exercise the powers of a presiding officer as granted by § 2.319.”

<sup>6</sup> Convening a traditional Lakota ceremony would thus be inconsistent with 10 C.F.R. § 2.321(a), which states that the Board “shall perform the *adjudicatory* functions that the Commission determines are appropriate.” (Emphasis added.) Because convening a ceremony would be inconsistent with § 2.321(a), it is not an action authorized by § 2.319(r), which states that the “other actions” a Board may take must be “consistent with . . . this chapter[.]”

alternative ceremonies proposed at page 3 of Mr. Ebert's motion, it would appear to be impermissible for the Board to convene such a ceremony.<sup>7</sup>

The Staff would emphasize that it does not object to Mr. Ebert inviting individuals to attend a traditional Lakota ceremony. Rather, the Staff objects to Mr. Ebert asking the Board to convene or compel participation in the ceremony. For reasons stated above, such action would be outside the Board's adjudicatory role and contrary to law.

Respectfully submitted,

*/Signed (electronically) by/  
Patricia A. Jehle*

Patricia A. Jehle  
Counsel for the NRC Staff

Dated at Rockville, Maryland  
this 26<sup>th</sup> day of July, 2010

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<sup>7</sup> The Staff is confident that, if the Board were to convene a traditional Lakota ceremony, it would make every effort to avoid conflict with the Free Exercise and Establishment Clauses of the First Amendment, Title VII of the Civil Rights Act of 1964, and other applicable laws. The Staff respectfully suggests, however, that such conflicts are unavoidable. For example, if the Board ordered individuals to attend a Lakota ceremony involving prayer, this would appear to be inconsistent with the Establishment Clause, which prohibits the Government from providing preference to one or another religion. Such an order may also raise the issue of what the Board should do with individuals who elect not to participate in, or attend, the ceremony. Further, ordering individuals to participate in such a ceremony may create the impression that participation in a Lakota ceremony is part and parcel of the process by which this case will be adjudicated. This would also violate the Establishment Clause. See *Lee v. Weisman*, 505 U.S. 577, 586–587 (1992) (“The principle that government may accommodate the free exercise of religion does not supersede the fundamental limitations imposed by the Establishment Clause, which guarantees at a minimum that a government may not coerce anyone to support or participate in religion or its exercise, or otherwise act in a way which ‘establishes a [state] religion or religious faith, or tends to do so.’”) (quoting *Lynch v. Donnelly*, 465 U.S. 668, 678 (1984)). See also *Guidelines on Religious Exercise and Religious Expression in the Federal Workplace* (Presidential Release) (August 14, 1997) at Section 1 (explaining that federal officials are generally forbidden from ordering others to participate in ceremonies that are fundamentally and clearly religious in nature).

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In the Matter of	)	
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POWERTECH (USA) INC	)	Docket No. 40-9075-MLA
	)	ASLBP No. 10-898-02- MLA-BD01
	)	
(Dewey-Burdock In Situ Uranium Recovery	)	Date: July 26, 2010
Facility)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of the "NRC STAFF'S OPPOSITION TO PETITIONER THEODORE EBERT'S MOTION FOR THE BOARD TO CONVENE A TRADITIONAL LAKOTA CEREMONY" in this proceeding have been served via the Electronic Information Exchange (EIE) this 26<sup>th</sup> day of July 2010, 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.

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Patricia A. Jehle  
Counsel for the NRC Staff