

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

William J. Froehlich, Chairman
Dr. Richard F. Cole
Dr. Mark O. Barnett

In the Matter of

POWERTECH (USA), INC.

(Dewey-Burdock In Situ Uranium Recovery
Facility)

Docket No. 40-9075-MLA

ASLBP No. 10-898-02-MLA-BD01

August 13, 2010

ORDER

(Scheduling Initial Telephone Prehearing Conference Call)

On August 5, 2010, the Licensing Board issued a memorandum and order¹ granting requests by several individuals and organizations (Consolidated Petitioners)² and the Oglala Sioux Tribe for a hearing and admitting seven of their contentions. These petitioners, now parties, challenge the application of Powertech (USA), Inc. for a license to construct and to operate a proposed in-situ leach uranium recovery facility in Custer and Fall River Counties, South Dakota. In the August 5, 2010 order, the Board determined that the procedures of 10 C.F.R. Part 2, Subpart L, will govern the hearing to be held on the contentions admitted in this case.³ In addition, pursuant to 10 C.F.R. §§ 2.336(a) and (b) and 2.1203(a), the parties and the NRC Staff must make their initial disclosures, and the NRC Staff must make available a hearing

¹ Powertech (USA), Inc. (Dewey-Burdock In Situ Uranium Recovery Facility), LBP-10-16, 72 NRC __ (slip op.) (Aug. 5, 2010).

² Consolidated Petitioners Susan Henderson, Dayton Hyde, David Frankel, Clean Water Alliance, and Aligning for Responsible Mining were found to have standing in this proceeding.

³ Powertech, LBP-10-16, 72 NRC at __ (slip op. at 85-86).

file, no later than thirty (30) days after the issuance of the August 5, 2010 order—i.e., no later than September 7, 2010.

The Licensing Board, in accordance with 10 C.F.R. §§ 2.329 and 2.332, is convening an initial scheduling conference call on Thursday, September 9, 2010, at 1:00 p.m. EDT. The purpose of the call is to discuss the parties' initial disclosures and other scheduling matters related to the conduct of this proceeding.

Prior to the conference call, the parties and the NRC Staff should familiarize themselves with the relevant procedural rules of 10 C.F.R. Part 2, including but not limited to 10 C.F.R. §§ 2.309(c) and (f), 2.310, 2.323, 2.329, 2.332, 2.333, 2.334, 2.338, all of Subpart L, and the model milestones set forth in Appendix B to Part 2.

Pursuant to 10 C.F.R. § 2.332(d), the Board will consider the NRC Staff's projected schedule for completion of its safety and environmental evaluations in developing the hearing schedule. Accordingly, the NRC Staff is directed to be prepared to state on the record its projected schedule for completion of such safety and environmental evaluations, including but not limited to its current best good faith estimate of the dates when it expects to issue the final safety evaluation report (SER) and the draft and final supplemental environmental impact statements (EIS).

In addition, the parties and the NRC Staff should be prepared to address the following matters at the initial scheduling conference call:

A. Contentions

1. Which admitted contentions should be viewed as safety contentions and which should be viewed as environmental contentions;

2. Whether hearings on any safety contentions should be commenced before publication of the NRC Staff's safety evaluation as permitted under 10 C.F.R. § 2.332(d);

3. Whether, pursuant to 10 C.F.R. § 2.310(h), the parties and the NRC Staff are currently willing to consent to handling of any specific contention under Part 2, Subpart N and, if not at this time, whether to establish a later time for reconsideration of this issue.

B. Disclosures

1. Suggested regularized time frames for the updating of mandatory disclosures under 10 C.F.R. § 2.336(d) and for the updating of the hearing file under 10 C.F.R. § 2.1203(c);

2. Establishment of an agreement concerning which electronically stored information will be considered reasonably accessible and thus subject to mandatory disclosure under 10 C.F.R. § 2.336 or production under 10 C.F.R. § 2.1203 (e.g., an agreement between the parties and the NRC Staff as to the nature and extent of their respective duties to conduct a reasonable search for their electronically stored information);⁴

3. Establishment of an agreement as to the form of the mandatory disclosure or production of electronically stored information (if no agreement can be reached, and the Board does not otherwise instruct, then electronically stored information shall be disclosed and produced in an electronic form that is readily searchable by commonly available computer programs);⁵

4. Whether any party or the NRC Staff intends to assert a privilege or protected status for any information or documents otherwise required to be disclosed herein and, if so, proposals for the submission of privilege logs under 10 C.F.R. § 2.336(a)(3) and (b)(5), procedures and

⁴ See Fed. R. Civ. P. 16(b)(3)(B)(iii) (scheduling order may “provide for disclosure or discovery of electronically stored information” (emphasis added)), 26(b)(2)(B) (“A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for discovery.” (emphasis added)).

⁵ See Fed. R. Civ. P. 34 (regarding the formats for the production of electronically stored information).

time limits for challenges to such assertions, and the development of a protective order and nondisclosure agreement.⁶

C. Time Limits

1. Suggestions for modifying the time limits set in 10 C.F.R. § 2.1205(a) to prevent motions for summary disposition from conflicting with the preparation by the parties, the NRC Staff, and the Board for the evidentiary hearing;
2. Suggested time limits for filing “timely” motions for leave to file new or amended contentions under 10 C.F.R. § 2.309(f)(2)(iii) and for defining “nontimely” filings under 10 C.F.R. § 2.309(c);
3. Specification of pleading rules for motions for leave to file new or amended contentions that reconcile 10 C.F.R. §§ 2.309(c), 2.309(f)(2), and 2.323 (motions and answers to motions) with 10 C.F.R. § 2.309(h) (answers and replies to contentions);
4. Suggested time limit for filing of the final list of potential witnesses for each contention pursuant to 10 C.F.R. § 2.336(a)(1);
5. Suggested time limit for any motion for the use of Subpart G hearing procedures for a particular contention based upon challenges to the credibility of a newly disclosed eyewitness pursuant to 10 C.F.R. § 2.310(d);⁷
6. Opportunities for the clarification, simplification, or specification of the issues in accordance with 10 C.F.R. § 2.329(c)(1);
7. The necessity or desirability of amending the pleadings in accordance with 10 C.F.R. § 2.329(c)(2);

⁶ See Entergy Nuclear Vermont Yankee, LLC (Vermont Yankee Nuclear Power Station), LBP-05-33, 62 NRC 828 (2005).

⁷ See Entergy Nuclear Vermont Yankee, LLC (Vermont Yankee Nuclear Power Station), LBP-04-31, 60 NRC 686, 703 (2004).

8. Opportunities to develop stipulations or admissions of fact in accordance with 10 C.F.R. § 2.329(c)(3);

9. Opportunities for the settlement of issues or contentions, including the utility of appointing a settlement judge pursuant to 10 C.F.R. § 2.338;

10. Whether the parties and the NRC Staff should be required to file their respective initial written statements of position and written testimony with supporting affidavits pursuant to 10 C.F.R. § 2.1207(a)(1) simultaneously or sequentially, and if sequentially, which party should file first;

11. Suggested time limits for the filing of motions for cross-examination under 10 C.F.R. § 2.1204(b).⁸

D. Miscellaneous

1. Whether a site visit would be appropriate and helpful to the Board in the resolution of the contentions;

2. Implications of the dates set forth by the NRC Staff for the issuance of the final SER and the draft and final supplemental EIS;

3. Suggested venues for holding the evidentiary hearing;

4. Any other procedural or scheduling matters that the Board may deem appropriate.

Prior to the conference call, the parties and the NRC Staff shall confer with one another for the purpose of discussing the foregoing procedural matters and, where possible, developing agreement, joint positions, or proposals. It would be helpful if, for the purpose of the conference call, the parties and the NRC Staff agreed upon a lead spokesperson for areas where they are in agreement. If disagreement occurs on a significant issue, the Board may call for the submission of briefs or separate written proposals on relevant issues after the prehearing conference call.

⁸ See Citizens Awareness Network v. United States, 391 F.3d 338, 353-54 (1st Cir. 2004); Vermont Yankee, LBP-04-31, 60 NRC at 710-11.

On or before September 2, 2010, counsel for each of the parties and the NRC Staff should contact Ashley Prange at (301) 415-0110 to obtain the telephone number and pass code for the September 9, 2010 initial prehearing conference call. Members of the public or media who wish to listen to this conference call may do so, and should contact Ms. Prange at the above number for the requisite information. The conference call is expected to last approximately 60 minutes.

It is so ORDERED.

FOR THE ATOMIC SAFETY
AND LICENSING BOARD⁹

/RA/

William J. Froehlich, Chairman
ADMINISTRATIVE JUDGE

Rockville, MD
August 13, 2010

⁹ Copies of this memorandum and order were sent this date by the agency's E-Filing system to the counsel/representatives for (1) Consolidated Petitioners; (2) the Oglala Sioux Tribe; (3) the NRC Staff; and (4) Powertech USA, Inc.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of)
)
POWERTECH (USA) INC.) Docket No. 40-9075-MLA
(Dewey-Burdock In Situ Recovery Facility)
Source Materials License Application))

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LB ORDER (SCHEDULING INITIAL TELEPHONE PREHEARING CONFERENCE CALL) dated August 13, 2010, have been served upon the following persons by Electronic Information Exchange.

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POWERTECH (USA) INC., DEWEY-BURDOCK IN SITU RECOVERY FACILITY
 DOCKET NO. 40-9075-MLA
 LB ORDER (SCHEDULING INITIAL TELEPHONE PREHEARING CONFERENCE CALL)

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[Original signed by R. Giitter]
 Office of the Secretary of the Commission

Dated at Rockville, Maryland
 this 13th day of August 2010.