

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
September 8, 2010

ORDER

(Granting In Part and Denying in Part Motion for Clarification)

On August 5, 2010, this Board issued a memorandum and order¹ granting the hearing requests of Consolidated Intervenor² and the Oglala Sioux Tribe (Tribe). We admitted three of the contentions proffered by Consolidated Intervenor and four of the contentions set forth by the Tribe.

On August 17, 2010, the NRC Staff filed a pleading entitled Motion for Clarification Regarding Scope of Admitted Contentions.³ In its motion, the Staff requests that the Board (1) clarify which bases it intended to admit for six of the seven contentions, and (2) affirm that the

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

² On August 17, 2010, the Board issued an order confirming the election made by Consolidated Intervenor, wherein Mr. David Frankel elected to be represented by Aligning for Responsible Mining (ARM) and Ms. Susan Henderson decided to proceed in her individual capacity. Licensing Board Order (Accepting Elections Regarding Representation) (Aug. 17, 2010) (unpublished). Accordingly, Consolidated Intervenor now consist of Susan Henderson, Dayton Hyde, and ARM.

³ Motion for Clarification Regarding Scope of Admitted Contentions (Aug. 16, 2010) [hereinafter Motion for Clarification].

scope of the admitted contentions is limited to the bases pled. In addition, the Staff asks the Board to clarify its recommended approach to the Tribe's Contention 7 and to correct a typographical error in the Board's restatement of Consolidated Intervenor's Contention E. The Staff indicates that Powertech supports the motion in full, Consolidated Intervenor's support only that part of the motion regarding the typographical error, and the Oglala Sioux Tribe "opposes the Staff's motion to the extent it seeks to narrow the scope of the admitted contentions, but takes no position" on the request to correct the typographical error.⁴

On August 26, 2010, Powertech filed an answer expressing support for the Staff's motion and adding five further "points of emphasis."⁵ Neither Consolidated Intervenor's nor the Oglala Sioux Tribe availed themselves of the opportunity to file an answer to the Staff's motion. Nonetheless, on September 1, 2010, Consolidated Intervenor's filed a motion for leave to file a reply to Powertech's answer.⁶

To begin, the Board grants the NRC Staff's motion to the extent it identifies typographical errors in the Board's August 5 memorandum and order. As the Staff points out, in restating Consolidated Intervenor's Contention E, the Board inadvertently referred to "Section 40.31(d)" of the NRC's regulations instead of "Section 40.32(d)."⁷ We regret any confusion caused by this error, and we hereby restate Contention E as follows:

Contentions E – The lack of adequate confinement of the host Inyan Kara aquifer makes the proposed operation inimical to public health and safety in violation of Section 40.32(d). Further, Applicant's failure to describe faults and fractures between aquifers, through which the groundwater can spread

⁴ Id. at 13 n.10.

⁵ Response to NRC Staff's Motion for Clarification (Aug. 26, 2010) at 1.

⁶ Consolidated Intervenor's Unopposed Motion for Leave to Reply to Applicant's Response to NRC Staff Motion for Clarification (Sept. 1, 2010). Because the instant order contains our final ruling on the NRC's Staff's motion, Consolidated Intervenor's motion for leave is now moot. We assure the parties, however, that our present ruling is in no way informed by the "additional points of emphasis" set forth in Powertech's answer.

⁷ Motion for Clarification at 13.

uranium, thorium, radium 226 and 228, arsenic, and other heavy metals, violates Section 51.45(c) and (e).

In addition, we grant the Staff' motion to the extent it questions our analysis of the Tribe's Contention 7.⁸ As the Staff points out, our reference to a mandatory hearing in this case was in error, as mandatory hearings are not conducted in materials proceedings such as this. The NRC Staff is also correct when it states that the Tribe will have recourse if the Staff issues a license to Powertech that does not include a condition concerning the 11e.(2) disposal plan. As the Staff explains, "[i]n the event the Staff failed to include a necessary license condition regarding an 11e.(2) disposal plan, the Tribe could challenge the Staff's action in the same manner it could challenge perceived deficiencies in the SER or SEIS; that is, the Tribe could submit a late-filed contention based on Powertech's license."⁹

We deny the NRC Staff's motion in all other respects. In particular, we reject the notion that this Board should have explicitly admitted or denied each individual basis or factual assertion offered in support of each contention.¹⁰ The NRC Staff's arguments in this regard demonstrate a misunderstanding of the Commission's regulations and the case law interpreting them. Accordingly, we provide a brief summary of the law on contention admissibility.

An admissible contention must: (1) provide a specific statement of the legal or factual issue sought to be raised; (2) provide a brief explanation of the basis for the contention; (3) demonstrate that the issue raised is within the scope of the proceeding; (4) demonstrate that the issue raised is material to the findings the NRC must make to support the action that is involved in the proceeding; (5) provide a concise statement of the alleged facts or expert opinions that support the petitioner's position and on which the petitioner intends to rely at the hearing, including references to the specific sources and documents on which the petitioner intends to

⁸ Id. at 12-13.

⁹ Id. at 13.

¹⁰ Id. at 3-11.

rely; and (6) provide sufficient information to show that a genuine dispute exists on a material issue of law or fact, including references to specific portions of the application that the petitioner disputes or, if the application is alleged to be deficient, the identification of such deficiencies and the supporting reasons for this allegation.¹¹

Prior to 2004, petitioners in Subpart L materials proceedings were not required to proffer specific contentions, but only to identify broad “areas of concern.”¹² This all changed in 2004 when the Commission amended the NRC’s procedural rules. The regulations now require petitioners to set forth specific contentions in their intervention petitions in order to “focus litigation on concrete issues and result in a clearer and more focused record for decision.”¹³ Petitioners must provide “a clear statement as to the basis for the contentions and the submission of . . . supporting information and references to specific documents and sources that establish the validity of the contention.”¹⁴ Contentions that do not meet the six criteria of 10 C.F.R. § 2.309(f)(1) must be rejected.¹⁵

In its motion for clarification, the NRC Staff faults the Licensing Board for admitting contentions without clearly identifying which bases were admissible and which were not. The Staff asks the Board to “clarify which of the specific bases in the contentions are admitted for litigation.”¹⁶ We do not find such a clarification to be necessary or appropriate. Licensing boards are in the business of admitting and denying contentions according to whether they meet

¹¹ 10 C.F.R. § 2.309(f)(1).

¹² See Changes to Adjudicatory Process, 69 Fed. Reg. 2182, 2201 (2004).

¹³ Id. at 2202.

¹⁴ Progress Energy Carolinas (Shearon Harris Nuclear Power Plant, Units 2 and 3), CLI-09-08, 69 NRC 317, 323 (2009) (quoting USEC, Inc. (American Centrifuge Plant), CLI-06-09, 63 NRC 433, 437 (2006)).

¹⁵ Id. at 324 (citing Ariz. Pub. Serv. Co. (Palo Verde Nuclear Generating Station, Units 1, 2, and 3), CLI-91-12, 34 NRC 149, 155-56 (1991)).

¹⁶ Motion for Clarification at 1.

the six criteria at 10 C.F.R. § 2.309(f)(1). We are not required to rule on the admissibility of each and every basis or factual assertion offered in support of a contention. While an admissible contention must contain a brief explanation of the basis, along with supporting facts or expert opinion, we need not explicitly reject every alternative basis or factual assertion that a petitioner might put forth. Indeed, such an exercise would be premature at the contention admissibility stage of a proceeding.

The Commission has confirmed, “[u]nder our contention rule, Intervenors are not being asked to prove their case, or to provide an exhaustive list of possible bases, but simply to provide sufficient alleged factual or legal bases to support the contention, and to do so at the outset.”¹⁷ Similarly, an order by a Licensing Board at the contention admissibility stage need only state the contention as admitted and confirm that the six criteria of 10 C.F.R. § 2.309(f)(1) have been met. It need not isolate and weigh which of the myriad of alleged facts or which portions of the expert opinion may ultimately prove the contention.

In its motion, the NRC Staff seems to conflate two distinct subsections of 10 C.F.R. § 2.309(f)(1) – subsections (ii) and (v). Merging these subsections injects confusion and distorts the standard to be applied at the contention admissibility stage. Section 2.309(f)(1)(ii) requires that the petition include a “brief explanation of the basis” for the contention. In other words, the petitioner must explain the rationale or theory behind the contention in order “to put the other parties on notice as to what issues they will have to defend against or oppose.”¹⁸ A petitioner who provides a brief explanation of the rationale underlying a contention satisfies 10 C.F.R. § 2.309(f)(1)(ii).

To satisfy 10 C.F.R. § 2.309(f)(1)(v) a petitioner must provide a “concise statement of the alleged facts or expert opinion which support the requestor’s/petitioner’s position” together

¹⁷ La. Energy Servs., LP, CLI-04-35, 60 NRC 619, 623 (2004).

¹⁸ Southern Nuclear Operating Co. (Early Site Permit for Vogtle ESP Site), LBP-08-02, 67 NRC 54, 73 (citing Pub. Serv. Co. of N.H. (Seabrook Station, Units 1 and 2), ALAB-899, 28 NRC 93, 97 (1988)).

with “references to the specific sources and documents” on which the petitioner intends to rely to support its position. “However, the petitioner is not required to provide an exhaustive discussion in its proffered contention, so long as it meets the Commission’s admissibility requirements.”¹⁹ A petitioner may bring forth additional evidence at the hearing stage supportive of a contention that was previously admitted.

It is true, as the NRC Staff points out, that “supporting material provided by a petitioner . . . is subject to Board scrutiny.”²⁰ Certainly, “[t]he Board is not to accept uncritically the assertion that a document or other factual information or an expert opinion supplies the basis for a contention.”²¹ We carefully considered all supporting facts and expert opinions and admitted only those contentions that we found to be sufficiently supported. At this stage of the proceeding, however, our responsibility is merely to identify those contentions that meet the admissibility criteria. In due course, we will receive testimony on all the disputed issues, hold an evidentiary hearing, and make an informed ruling on the merits of each contention. Now is not that time.

The Commission’s decision in Crow Butte,²² on which the Staff so heavily relies, dealt with a scenario far distinct from the one at hand. In Crow Butte, where the Board was faced with a “muddled pro se petition” containing “several diffuse claims,” the Board reorganized the claims into two separate contentions – one safety and one environmental.²³ Under those unique circumstances, the Commission faulted the Board for failing “to specify which bases

¹⁹ Pa’ina Hawaii, LLC (Materials License Application), LBP-06-04, 63 NRC 99, 108 (2006).

²⁰ Motion for Clarification at 9 (quoting USEC, Inc. (American Centrifuge Plant), LBP-05-28, 62 NRC 585, 596-97 (2005)).

²¹ Id. at 8 (quoting Private Fuel Storage, LLC (Independent Spent Fuel Storage Installation), LBP-98-07, 47 NRC 142, 181 (1998)).

²² Crow Butte Res., Inc. (North Trend Expansion Project), CLI-09-12, 69 NRC 535 (2009).

²³ Progress Energy Fla., Inc. (Combined License Application, Levy County Nuclear Power Plant, Units 1 and 2), CLI-10-02, 71 NRC ___, ___ (slip op. at 5-6) (Jan. 7, 2010).

were admissible and which were not, and which applied to each admitted contention.”²⁴ In contrast, in the instant proceeding, all petitioners are represented by counsel and each proffered specific contentions to be considered by the Board. Although the Board did opt to narrow some of the contentions, we did not significantly reorganize the petitioners’ claims. Thus, the parties are not “left without a clear roadmap,”²⁵ as they were in Crow Butte, and we need not clarify which bases apply to each admitted contention.

Ultimately, the NRC Staff’s motion, styled as a motion for clarification, asks the Board to reconsider its rulings on contention admissibility.²⁶ For example, with respect to the Tribe’s Contention 1, the Staff “respectfully submits that, for at least several of the bases in Mr. Mesteth’s affidavit, the requisite factual support is lacking.”²⁷ Accordingly, the Staff asks us to “review Mr. Mesteth’s claims to verify whether the factual information upon which he relies forms a basis for the admitted contention.”²⁸ We see no reason to revisit the factual support proffered in support of Contention 1 – or any other contention. Having already ruled on the admissibility of every contention, we leave all factual issues to be resolved on the merits at the appropriate time in this proceeding.

²⁴ Crow Butte, CLI-09-12, 69 NRC at 553-54.

²⁵ Levy County, CLI-10-02, 71 NRC at ___ (slip op. at 6).

²⁶ If the NRC Staff had chosen to style its motion as a motion for reconsideration, it would have had to demonstrate “compelling circumstances, such as the existence of a clear and material error in [the] decision, which could not have reasonably been anticipated, that renders the decision invalid.” 10 C.F.R. § 2.323(e). The Staff makes no attempt to demonstrate such “compelling circumstances,” nor do we believe such circumstances exist here.

²⁷ Motion for Clarification at 9.

²⁸ Id.

In sum, the Board grants the NRC Staff's motion only with respect to the specific errors identified in our analyses of Contentions E and 7. In all other respects, the Staff's motion for clarification is denied.

It is so ORDERED.

FOR THE ATOMIC SAFETY
AND LICENSING BOARD²⁹

/RA/

William J. Froehlich, Chairman
ADMINISTRATIVE JUDGE

Rockville, Maryland
September 8, 2010

²⁹ Copies of this order were sent on this date by the agency's E-Filing system to the counsel/representatives for (1) Consolidated Intervenor; (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 Board **ORDER (Granting in Part and Denying in Part Motion for Clarification)**, dated September 8, 2010, have been served upon the following persons by Electronic Information Exchange.

U.S. Nuclear Regulatory Commission
Atomic Safety and Licensing Board (ASLB)
Mail Stop T-3F23
Washington, DC 20555-0001

William J. Froehlich, Chair
Administrative Judge
wjf1@nrc.gov

Richard F. Cole
Administrative Judge
richard.cole@nrc.gov

Mark O. Barnett
Administrative Judge
mark.barnett@nrc.gov

Anthony C. Eitrem, Esq., Chief Counsel
ace1@nrc.gov
Megan Wright, Law Clerk
megan.wright@nrc.gov

U.S. Nuclear Regulatory Commission
Office of Commission Appellate Adjudication
Mail Stop O-16C1
Washington, DC 20555-0001
OCA Mail Center
ocaamail@nrc.gov

U.S. Nuclear Regulatory Commission
Office of the Secretary of the Commission
Rulemakings & Adjudications Staff
Mail Stop O-16C1
Washington, DC 20555-0001
hearingdocket@nrc.gov

U.S. Nuclear Regulatory Commission
Office of the General Counsel
Mail Stop O-15 D21
Washington, DC 20555-0001
Catherine Scott, Esq.
clm@nrc.gov
Michael Clark, Esq.
mjc1@nrc.gov
Brett Klukan, Esq.
brett.klukan@nrc.gov
Patricia Jehle, Esq.
patricia.jehle@nrc.gov

OGC Mail Center:
OGCMailCenter@nrc.gov

POWERTECH (USA) INC., DEWEY-BURDOCK IN SITU RECOVERY FACILITY
DOCKET NO. 40-9075-MLA

ORDER (Granting in Part and Denying in Part Motion for Clarification)

Counsel for the Applicant (Powertech)
Thompson & Pugsley, PLLC
1225 19th Street, NW, Suite 300
Washington, DC 20036
Christopher Pugsley, Esq.
cpugsley@athompsonlaw.com
Cynthia L. Seaton, Paralegal
cseaton@athompsonlaw.com
Anthony J. Thompson, Esq.
ajthompson@athompsonlaw.com

Counsel for the Oglala Sioux Tribe
Western Mining Action Project
P. O. Box 349
Lyons, CO 80540
Jeffrey C. Parsons, Esq.
wmap@igc.org

Counsel for the Oglala Sioux Tribe
Energy Minerals Law Center
1911 Main Avenue, Suite 238
Durango, CO 81301
Travis E. Stills, Esq.
stills@frontier.net

Consolidated Intervenor
Aligning for Responsible Mining (ARM)
P.O.B. 3014
Pine Ridge, SD 57770
David Frankel, Esq., Legal Director
arm.legal@gmail.com

Counsel for Consolidated Intervenor
(Susan Henderson and Dayton Hyde)
David Frankel, Esq.
P.O.B. 3014
Pine Ridge, SD 57770
arm.legal@gmail.com

Counsel for Consolidated Intervenor
(Susan Henderson and Dayton Hyde)
Law Office of Bruce Ellison
P.O. Box 2508
Rapid City, SD 57709
Bruce Ellison, Esq.
belli4law@aol.com
Roxanne Andre, Paralegal
roxanneandre@yahoo.com

Counsel for Consolidated Intervenor
(Dayton Hyde)
Thomas J. Ballanco, Esq.
945 Traval Street, #186
San Francisco, CA 94116
harmonicengineering1@mac.com

Co-Counsel for Consolidated Intervenor
Aligning for Responsible Mining
1570 Eppinger Boulevard
Chadron, NE 80229
Grace Dugan, Esq.
dugan@wavecom.net

[Original signed by Linda D. Lewis]
Office of the Secretary of the Commission

Dated at Rockville, Maryland
this 8th day of September 2010.