

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
November 2, 2010

ORDER
(Supplementing Initial Scheduling Order)

On September 23, 2010, the Board convened a prehearing conference call to discuss case management and scheduling in the above-captioned docket.¹ On October 4, 2010, the Board issued an initial scheduling order directing the parties to update the Board on or before October 15, 2010 concerning various unresolved issues that were brought up during the prehearing conference call.² The following summarizes the issues addressed in the parties' response to the Board's order, and provides further directions regarding those issues.

A. Electronically Stored Information

In its October 4, 2010 order summarizing the prehearing conference call and issuing the initial scheduling order for this proceeding, the Board directed the parties to confer regarding the production of electronically stored information ("ESI") in this proceeding and to update the Board with the results of those discussions on or before October 15, 2010.³ Accordingly, on October

¹ See Licensing Board Order (Rescheduling Conference Call) (Aug. 31, 2010) at 1 (unpublished).

² See Licensing Board Order (Prehearing Conference Call Summary and Initial Scheduling Order) (Oct. 4, 2010) (unpublished) [hereinafter Initial Scheduling Order].

³ See *id.* at 3–4.

15, 2010, the parties filed a Joint Notice with the Board in which they stated that they had “no problems or concerns with the regulations as currently constituted” and that “production of ESI should proceed in normal course.”⁴ In the event that any disagreements should arise regarding the parties’ respective ESI production responsibilities, the parties acknowledged their obligation to confer before filing any motions to compel production and to “pursue amicable results.”⁵

In accordance with the agreement of the parties,⁶ the Board directs that mandatory disclosures and production of the hearing file in this proceeding shall include ESI. In implementing this requirement, the parties shall conduct a reasonable good faith search for all ESI that is subject to the mandatory disclosure and hearing file requirements. However, parties are not obligated to produce ESI that is not reasonably accessible due to undue burden or cost.⁷

The parties shall disclose all ESI in the same form as it exists in the party’s possession, custody, or control. Thus, ESI shall be produced in searchable electronic form to the same extent that the original ESI in that party’s possession, custody, or control was searchable.

B. Protective Order

On March 5, 2010, the Chief Administrative Judge of the Atomic Safety and Licensing Board Panel issued a Protective Order governing the disclosure of sensitive unclassified non-safeguards information (“SUNSI”) to the Oglala Sioux Tribe and its representatives in this

⁴ Joint Notice to Atomic Safety and Licensing Board Regarding Outstanding Scheduling Issues (Oct. 15, 2010) at 1 [hereinafter Joint Notice].

⁵ Id.

⁶ See id.

⁷ Cf. Fed. R. Civ. P. 16(b)(5) (scheduling order may provide “provisions for disclosure of electronically stored information”); 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.”).

proceeding.⁸ During the prehearing conference call on September 23, 2010, the parties indicated that they would be interested in using a protective order similar to the one issued on March 5, 2010 to govern the balance of this proceeding, but stated that they had not yet agreed upon such an order.⁹ Pursuant to the October 4, 2010 Board order, the parties conferred and determined that the March 5, 2010 Protective Order, which currently governs this proceeding, would be an appropriate model for drafting a protective order to govern the remainder of this proceeding.¹⁰

Because no party has sought to modify or amend the March 5, 2010 Protective Order, or proposed an alternative protective order, the existing Protective Order will remain in effect until further notice from the Board, pursuant to paragraph 2 of the Protective Order.¹¹ Should any party wish to modify or amend the Protective Order in the future, such a party may file a motion for amendment with the Board, in accordance with paragraph 10 of the Protective Order.¹² Furthermore, pursuant to paragraph 10 of the Protective Order, the Board retains its power to “alter or amend [the] Protective Order and resolve disputes.”¹³

C. Filing of New or Amended Contentions

During the September 23, 2010 prehearing conference call the parties indicated that they had discussed a timeline for the filing of timely new or amended contentions, but had not

⁸ Memorandum and Order (Protective Order Governing the Disclosure of Sensitive Unclassified Non-Safeguards Information (SUNSI)) (Mar. 5, 2010) (unpublished) [hereinafter Protective Order].

⁹ See Tr. at 429–31.

¹⁰ Joint Notice at 2.

¹¹ See Protective Order at 2 (“This Protective Order shall remain in effect until specifically terminated by the Atomic Safety and Licensing Board or the Commission.”).

¹² Id. at 3.

¹³ Id.

yet reached any final agreement on the issue.¹⁴ Counsel for the NRC Staff indicated that the filing of timely new or amended contentions should be governed by 10 C.F.R. § 2.309(f)(2), with the party sponsoring the new or amended contention being required to file the contention within thirty (30) days after receiving notice of the availability of the information supporting the contention.¹⁵ Counsel for the Consolidated Intervenors indicated that 10 C.F.R. § 2.309(f)(2) should govern the filing of new or amended contentions, but expressed concern about when exactly the thirty (30) day period for timely contentions under 10 C.F.R. § 2.309(f)(2)(iii) would begin to run.¹⁶ Counsel for the Oglala Sioux Tribe, however, proposed that instead of being bound by 10 C.F.R. § 2.309(f)(2), the parties should be given one date after the issuance of the FEIS before which all timely new or amended contentions must be filed.¹⁷

Pursuant to the Board's October 4, 2010 order, the parties again addressed proposed guidelines for the filing of timely new and amended contentions.¹⁸ The Applicant and NRC Staff stated that the existing procedures in 10 C.F.R. § 2.309(f)(2) should govern the filing of any new or amended contention, but also acknowledged the previously stated concerns of the Consolidated Intervenors concerning actual notice by indicating that they would be willing to accept a more lenient start date for when the thirty (30) day timeline for timeliness would begin to run under 10 C.F.R. § 2.309(f)(2)(iii).¹⁹ The Oglala Sioux Tribe and the Consolidated Intervenors, however, indicated that they were opposed to 10 C.F.R. § 2.309(f)(2) governing the

¹⁴ Tr. at 432–43.

¹⁵ See id. at 433, 439.

¹⁶ Id. at 433–34, 440–41.

¹⁷ Id. at 434–36. Counsel for the Applicant stated that the Applicant did not have a final position on the issue because he had not yet had the opportunity to fully discuss the issue with his client. Id. at 437. See also id. at 442.

¹⁸ Joint Notice at 2–4.

¹⁹ See id. at 2–3.

filing of timely new or amended contentions, and instead indicated their preference that contentions only be filed based on three major milestones—issuance of the Draft Environmental Impact Statement (“DEIS”), the Final Environmental Impact Statement (“FEIS”), or the Final Safety Evaluation Report (“SER”).²⁰

Based on the views expressed by the parties in both the prehearing conference call and the Joint Notice, the Board directs that a new or amended contention shall be deemed timely under 10 C.F.R. § 2.309(f)(2)(iii) if filed within thirty (30) days from the time that a party receives notice of the availability of the new and material information on which it is based. A party will be deemed to have received notice once: 1) the relevant information is communicated to the party intending to use it to formulate a new or amended contention (i.e. electronic transmission of the information to the relevant party), 2) the party has been provided with notice that the relevant information is publicly available on the NRC’s database, 3) the relevant information is included in a party’s mandatory disclosures or the hearing file on the first business day of the month, or 4) the party acquires the relevant information on its own, whichever is earlier.²¹ If filed thereafter, a proposed or amended contention shall be deemed nontimely under 10 C.F.R. § 2.309(c). If the movant is uncertain, it may file pursuant to both, and the accompanying motion should cover the three criteria of 10 C.F.R. § 2.309(f)(2) and the eight criteria of 10 C.F.R. § 2.309(c) (as well as the six criteria of 10 C.F.R. § 2.309(f)(1)).

However, with respect to new or amended contentions based on new and material information contained in the DEIS, the FEIS, or the SER, the new or amended contention shall

²⁰ See id. at 3.

²¹ The Board takes this opportunity, during Native American Heritage Month, to remind the NRC Staff of its increased notification commitments to Native American tribes as spelled out in the “U.S. Nuclear Regulatory Commission’s Strategy for Outreach and Communication with Indian Tribes Potentially Affected by Uranium Recovery Sites” (ADAMS Accession No. ML092110101), especially as it pertains to environmental review. See Presidential Proclamation—National Native American Heritage Month (October 29, 2010), <http://www.whitehouse.gov/the-press-office/2010/10/29/presidential-proclamation-national-native-american-heritage-month>.

be deemed timely under 10 C.F.R. § 2.309(f)(2), per the parties' agreement,²² as follows: 1) a new or amended contention based on new and material information contained in the DEIS shall be deemed timely if filed within forty-five (45) days of when the DEIS first becomes available, 2) a new or amended contention based on new and material information contained in the FEIS shall be deemed timely if filed within thirty (30) days of when the FEIS first becomes available, and 3) a new or amended contention based on new and material information contained in the SER shall be deemed timely filed if filed within thirty (30) days of when the SER first becomes available.

D. Simplification, Clarification, and Specification of the Issues

In its October 4, 2010 order, the Board directed the parties to confer regarding the possibility of consolidating overlapping contentions and appointing a lead party for those contentions in accordance with 10 C.F.R. § 2.329(c)(1), which allows for “[s]implification, clarification, and specification of the issues” during the prehearing conference.²³ On October 15, 2010, the parties stated in their Joint Notice that, while they remain open to the idea, they believed that such discussions regarding merging contentions would be premature at this time.²⁴ Instead, the parties suggested that the topic of combining contentions be revisited after the release of the FEIS.²⁵

While the Board believes that combining overlapping contentions would help to promote judicial economy pursuant to 10 C.F.R. § 2.329(c)(1), the Board agrees with the parties that discussions regarding merging contentions may be premature at this time. Accordingly, the Board will revisit this issue at a later date in this proceeding.

²² See Joint Notice at 4.

²³ Initial Scheduling Order at 7–8.

²⁴ Joint Notice at 4.

²⁵ See id.

E. Site Visit

In its October 4, 2010 order, the Board directed the parties to discuss potential dates and parameters for a proposed site visit and to report back to the Board with the results of those discussions on or before October 15, 2010.²⁶ The Board stated that upon receipt of such information it would then determine whether a site visit would be both beneficial and appropriate in this proceeding.²⁷ In their Joint Motion on October 15, 2010, the parties indicated that April or May of 2011 would be an appropriate time for such a site visit, but requested further guidance from the Board with regard to parameters and specific locations for the site visit.²⁸

After reviewing the issue, the Board finds that a site visit may be both beneficial and appropriate. The Board anticipates that if a site visit is scheduled that late spring or early summer, as suggested by the parties, would be an appropriate time.²⁹ Therefore, the Board plans to hold another prehearing conference call during the first quarter of next year to discuss with the parties the need for and parameters of a potential site visit.

It is so ORDERED.

FOR THE ATOMIC SAFETY
AND LICENSING BOARD³⁰

/RA/

William J. Froehlich, Chairman
ADMINISTRATIVE JUDGE

Rockville, Maryland
November 2, 2010

²⁶ Initial Scheduling Order at 11.

²⁷ See id.

²⁸ Joint Notice at 4–5.

²⁹ See id. at 4.

³⁰ Copies of this order were sent on this date by the agency's E-Filing system to the counsel/representatives for (1) Consolidated Intervenors; (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 (Supplementing Initial Scheduling Order)**, dated November 2, 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

ORDER (Supplementing Initial Scheduling Order)

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

Dated at Rockville, Maryland
this 2nd day of November 2010.