

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 1, 2014

ORDER

(Ruling on Motions in Limine: Motions to Strike and for Cross-Examination)

This proceeding arises from an application submitted by Powertech (USA), Inc. (Powertech) to the U.S. Nuclear Regulatory Commission (NRC) requesting a license to construct and operate a proposed In-Situ Uranium Recovery (ISR) facility in Custer and Fall River Counties, South Dakota.¹ All parties, the applicant Powertech, the NRC Staff, and intervenors the Oglala Sioux Tribe and Consolidated Intervenors submitted prefiled direct testimony and position statements on June 20, 2014, and answering testimony and statements on July 15, 2014. On July 22, 2014 all parties to this proceeding filed various procedural motions in advance of the August 19-21 evidentiary hearing on the contentions currently at

¹ Powertech (USA), Inc.'s Submission of an Application for a Nuclear Regulatory Commission Uranium Recovery License for its Proposed Dewey-Burdock In Situ Leach Uranium Recovery Facility in the State of South Dakota (Feb. 25, 2009) (ADAMS Accession No. ML091030707).

issue.² Powertech filed a motion in limine, and a motion to strike.³ The Oglala Sioux Tribe filed a motion to strike⁴ and a motion for cross-examination.⁵ Consolidated Intervenors⁶ and the NRC Staff⁷ each filed a motion in limine. On July 29, 2014 all parties filed responses.⁸

I. MOTIONS TO STRIKE OR EXCLUDE

At an evidentiary hearing, “only relevant, material, and reliable evidence which is not unduly repetitious will be admitted. Immaterial or irrelevant parts of an admissible document will be segregated and excluded so far as is practicable.”⁹ It is within a presiding officer’s power to strike evidence, on motion or on his own initiative, which is irrelevant, immaterial, unreliable, duplicative or cumulative.¹⁰ A Board “normally has considerable discretion in making evidentiary rulings.”¹¹ A motion to strike is the appropriate mechanism for seeking the removal

² See Notice of Evidentiary Hearing, 79 Fed. Reg. 42,836, 42837 (July 16, 2014).

³ Powertech (USA), Inc. Motions in Limine, Motion for Cross-Examination, and Motion to Strike/Exclude (July 22, 2014).

⁴ Oglala Sioux Tribe’s Motion to Strike (July 22, 2014).

⁵ Oglala Sioux Tribe’s Cross Examination Motion (July 22, 2014).

⁶ Consolidated Intervenors’ Motion in Limine (July 22, 2014).

⁷ NRC Staff’s Motion in Limine (July 22, 2014).

⁸ Powertech (USA), Inc. Response to NRC Staff’s, Consolidated Intervenors’ and the Oglala Sioux Tribe’s Motions in Limine, Motion for Cross-Examination, and Motion to Strike/Exclude (July 29, 2014); NRC Staff’s Response to Prehearing Motions (July 29, 2014); Oglala Sioux Tribe’s Consolidated Response to Powertech and NRC Staff Motions in Limine and Strike/Exclude (July 29, 2014); Consolidated Intervenors’ Response to Powertech and NRC Staff Motions in Limine and to Strike/Exclude (July 29, 2014).

⁹ 10 C.F.R. § 2.337(a).

¹⁰ 10 C.F.R. § 2.319(d)–(e). See also Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-05-20, 62 NRC 187, 228 (2003).

¹¹ Duke Energy Corp. (Catawba Nuclear Station, Units 1 and 2), CLI-04-21, 60 NRC 21, 27 (2004).

of information that is “irrelevant,” or in an affidavit that contain technical arguments based on questionable competence.¹²

The evidentiary hearing in this case is limited to the admitted contentions. As such, only testimony which is within the scope of an admitted contention, relevant to the admitted contention and within the scope of the sponsoring witness’ expertise will be permitted. Statements of counsel, opening statements, oral and written arguments by counsel, and pleadings in general, are not evidence and are not part of the evidentiary record upon which a decision can be based. Thus, they are not the proper subject of a motion to strike and will be considered by the Board as argument, not evidence. Statements of positions are not evidence. The admissibility standards of 10 C.F.R. § 2.337(a) do not apply and statements of positions are not subject to evidentiary challenge.

At the contention admissibility stage, NRC regulations do not oblige intervenors “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.”¹³ Consistent with the NRC’s “dynamic licensing process” and the fact that license applications are frequently amended after they are initially filed,¹⁴ the amendment of contentions is expressly permitted by NRC regulations.¹⁵ Nevertheless, the Commission has cautioned against allowing “distinctly new complaints to be added at will as litigation progresses, [and thereby] stretching

¹² Independent Spent Fuel Storage Installation, LBP-05-20, 62 NRC at 228 (2003).

¹³ Louisiana Energy Servs, L.P. (National Enrichment Facility), CLI-04-35, 60 N.R.C. 619, 627 (2004) (“To permit any party to the proceeding to take an active role regarding any contention without regard to whether that party made any attempt to adopt that contention would seriously undermine the efficacy of [2.309(f)(3)].”).

¹⁴ Curators of the Univ. of Missouri (TRUMP-S Project), CLI-95-08, 41 NRC 386, 395 (1995).

¹⁵ See 10 C.F.R. § 2.309(f)(2).

the scope of admitted contentions beyond their reasonably inferred bounds.¹⁶ Testimony which is within the reasonably inferred bounds of an admitted contention will be heard, testimony beyond the reasonable scope of an admitted contention will be struck.

The Board will address each of the requests made in the motions in limine, filed on July 22, 2014.

A. Powertech

1. Powertech requests that the Licensing Board exclude further argument on the NRC Staff's Safety Evaluation Report (SER) and its analyses and conclusions. --- The Board DENIES this request because it does not specify which witness or which portions of a witness' testimony or exhibits contain argument on the NRC Staff's SER. There is no indication in the Powertech motion as to what testimony Powertech seeks to strike. To the extent this request refers to argument of counsel, such argument is not evidence and hence not the proper subject of a motion to strike. Further, a party cannot use a motion in limine to prevent another party from raising an argument sometime in the future.

2. Powertech also seeks to exclude all portions of pre-trial submissions and preclude any further argument regarding Contention 14A and 14B. --- The Board DENIES this request because material already in the record of this proceeding remains in the record. However, the Board GRANTS this request in part, to the extent that Contentions 14A and 14B have been withdrawn there will be no further evidence taken nor a decision rendered on these contentions by the Board.

¹⁶ Entergy Nuclear Generation Co. & Entergy Nuclear Operations, Inc. (Pilgrim Nuclear Power Station), CLI-10-11, 71 NRC 287, 309 (2010) (emphasis added); see also Licensing Board Memorandum and Order (Ruling on Motion for Summary Disposition of NYS-26/26A/Riverkeeper TC-1/1A (Metal Fatigue of Reactor Components) and Motion for Leave to File New Contention NYS-26B/Riverkeeper TC-1B) (Nov. 4, 2010) at 6 (unpublished) ("the regulations [do not] require a petitioner to submit all possible bases at the contention admissibility juncture of the proceeding, as long as all are within the scope of what is admitted by the Board.")

3. Powertech seeks to exclude all portions of pre-trial submissions and preclude any further argument in any form from Consolidated Intervenorors regarding Contentions 4, 6, and 9, based on a failure to follow Commission regulations regarding co-sponsoring or adopting admitted contentions proffered by another party. --- The Board GRANTS in part, this request. Contentions 4, 6, and 9 were proposed by the Oglala Sioux Tribe. These contentions have not been adopted by the Consolidated Intervenorors in conformance with 10 C.F.R. § 2.309(f)(3), therefore the Consolidated Intervenorors may not proffer or co-sponsor evidence or, at this late date, adopt the Oglala Sioux Tribe's contentions. The Board DENIES in part, the request "that the Licensing Board . . . preclude any further argument in any form from CI regarding Contentions 4, 6, and 9, based on a failure to follow Commission regulations regarding co-sponsoring or adopting admitted contentions proffered by another party." Although Consolidated Intervenorors may not present evidence on Contentions 4, 6 and 9 they are parties to this proceeding. As an admitted party to the proceeding, the Consolidated Intervenorors may make argument, suggest questions for the Board to ask, and otherwise participate as a party to this proceeding.¹⁷

4. Powertech moves to strike certain witnesses' testimony and exhibits in their entirety and portions of other witnesses' testimony and exhibits:

a. Exhibit INT-005: Powertech moves to strike Exhibit INT-005 which is entitled Professional Qualifications of Dr. Richard Abitz for failure to submit any pre-trial testimony and/or supporting affidavit as required by the Board's June 2, 2014 Case Management Order.

¹⁷ Houston Lighting & Power Co. (South Texas Project, Units 1 and 2), ALAB-799, 21 NRC 360, 383 (1985) ("An intervenor may ordinarily conduct additional cross-examination and submit proposed factual and legal findings on contentions sponsored by others. But that does not elevate the intervenor's status to that of a co-sponsor of the contentions.").

--- The Board GRANTS this request because there is no pre-filed testimony from Dr. Abitz. Because there is no prefiled testimony from Dr. Abitz, the statement of his professional qualifications is irrelevant.

b. Exhibit INT-002: Powertech moves to strike Exhibit INT-002 entitled October 31, 2009 Report from Dr. Richard Abitz to Coloradoans Against Resource Destruction for a variety of reasons. --- The Board would ordinarily grant this request because Dr. Abitz will not be a witness in this proceeding, but we note that Dr. Moran has reviewed this report¹⁸ and to some degree may have relied upon its findings to support his position in this case. For that reason the Board DENIES the request to strike Exhibit INT-002. To the extent witness Moran relies upon this report it is relevant to the proceeding. Cross examination of Dr. Moran may be necessary to determine the amount of his reliance upon Dr. Abitz's work. The Board notes, however, that the exhibit does not include the required affidavit as specified in our Case Management Order and 10 CFR § 2.1207(a)(1). A supporting affidavit must be provided if this material is to be moved into evidence.

c. Exhibit INT-008: Powertech seeks to strike the entirety of Exhibit INT-008 entitled Opening Testimony of Dr. Donald Kelley for a variety of reasons. --- The Board DENIES this request because the testimony is within the reasonably inferred bounds of Contention 3.¹⁹ Powertech also moves to strike Exhibit INT-009 entitled Statement of Qualifications of Dr. Kelley.²⁰ This request is also DENIED. The Board notes, however, that the exhibit does not include the required affidavit as specified in our Case Management Order and

¹⁸ OST-001 at 2.

¹⁹ See LBP 10-16, 72 NRC 361, 404-07 (2010) (ruling on intervenor contentions and referencing a possible threat of groundwater contamination).

²⁰ Powertech (USA), Inc. Motions in Limine, Motion for Cross-Examination, and Motion to Strike/Exclude at 11 n.4 (July 22, 2014).

10 C.F.R. § 2.1207(a)(1). A supporting affidavit must be provided if this material is to be moved into evidence.

d. Exhibit INT-014: Powertech seeks to strike the entirety of Exhibit INT-014 entitled Opening Written Testimony of Linsey McLean. Powertech alleges this testimony does not contain any supporting evidence for claims regarding hydrogeological opinions offered in the testimony nor is there any attempt to provide expert qualifications demonstrating that this testimony should be accepted by the Licensing Board. --- The Board DENIES this request because the challenges Powertech raise go to the weight to be accorded this testimony not its admissibility. Ms. McLean's credentials are a part of Exhibit INT-014, appearing at pages 13 through 16. Powertech correctly observes that Exhibit INT-014 does not include the required affidavit as specified in our Case Management Order and 10 CFR §2.1207(a)(1). A supporting affidavit must be provided if this material is to be moved into evidence.

e. Exhibit INT-010: Powertech seeks to strike the entirety of Exhibit INT-010 entitled Opening Written Testimony of Peggy Detmers. --- The Board GRANTS this request. Exhibit INT-010 addresses previously dismissed Contentions 14A and 14B. It does not, as Consolidated Intervenors argue, relate to Contention 3 involving failures to contain fluid migration and potential groundwater impacts, nor does it add anything to the record on the issue of mitigation measures. Consolidated Intervenors' argument that this testimony addresses Contention 6 involving mitigation measures is unavailing as Contention 6 is a contention advanced by the Oglala Sioux Tribe and it has not been adopted by the Consolidated Intervenors. Ms. Detmers' Exhibits INT-010a through INT-010q are also struck from the record for the reasons set forth above.²¹

f. Exhibit INT-011: Powertech seeks to strike several portions of Exhibit INT-011 entitled Opening Written Testimony of Marvin Kammera. Powertech disagrees with certain

²¹ It is not clear to the Board that Exhibit INT-010q was ever filed by Consolidated Intervenors.

statements in the testimony, and alleges that the material is unsupported, or not within the scope of an admitted contention. --- The Board DENIES this request. The testimony will be given the weight it deserves in the hearing but we find it is sufficiently related to the admitted contentions that it will not be struck from the record at this time.

g. Exhibit INT-020: Powertech seeks to exclude portions of Exhibit INT-020 entitled Dr. Hannan LaGarry Rebuttal Testimony. Powertech disagrees with Dr. LaGarry's interpretation of the Table on page 6 of Powertech's Exhibit APP-015-A. --- The Board DENIES this request, as the interpretation of the Table is within the scope of an admitted contention. Powertech also seeks to strike a hyperlink at page 4 of the testimony because the contents of the hyperlink were not submitted as evidence. --- The Board GRANTS this portion of Powertech's request. The Board provided an opportunity for the Consolidated Intervenors to refile testimony and include any linked material.²² Consolidated Intervenors did not do so.

h. Exhibit INT-012: Powertech seeks to strike portions of Exhibit INT-012 entitled Affidavit of Dayton Hyde. Powertech challenges the opinions of Mr. Hyde as to whether the land is highly fractured, the ability to extract uranium safely, and the history of accidents and spills. --- The Board DENIES this request. As a landowner in the area Mr. Hyde may have relevant information on these subjects as they relate to the admitted contentions. The weight to be accorded his opinions will be determined at the hearing but material facts are in dispute on genuine issues, so striking the testimony would not be proper at this time.

i. Exhibit OST-001: Powertech seeks to strike all aspects of Exhibit OST-001 entitled Opening Testimony of Dr. Robert Moran associated with allegations on the adequacy of baseline surface water quality. Powertech alleges baseline surface water quality is not within the scope of the admitted contentions which relate to groundwater quality. --- The Board

²² Order (Rejecting Filings, Directing Compliance with Case Management Order and Providing Opportunity for Resubmission of Rejected Materials) at 3 (July 16, 2014) (unpublished).

DENIES this request. Contention 3 deals with hydrogeological information in the FSEIS and the ability to contain fluid migration. The possibility of fluid migration to surface water is within the scope of the admitted contention. Powertech also requests that the Licensing Board strike Consolidated Intervenor's Rebuttal Statement of Position reference to Exhibit INT-023 as it was not submitted as evidence. The Board GRANTS this request.

j. Exhibit INT-007: Powertech seeks to strike all of Exhibit INT-007 entitled Opening Testimony of Susan Henderson for failure to demonstrate that the witness has the relevant expert credentials to opine on the safety/environmental issues identified in her testimony. --- The Board DENIES this request. As a landowner in the area Ms. Henderson may have relevant information on these subjects as they relate to the admitted contentions. The weight to be accorded her opinions will be determined at the hearing but material facts are in dispute on genuine issues, so striking the testimony would not be proper at this time.

B. NRC Staff

1. The NRC Staff urge the Board to exclude the Consolidated Intervenor's testimony and exhibits on Contentions 4 and 6. As decided in paragraph A.3 above, Consolidated Intervenor's witnesses may not testify on Contentions 4, 6, and 9. Therefore, to the extent witnesses Henderson, Hyde, and Kammera address Contention 4, their testimony is struck. Their testimony as to Contentions 2 and 3 remains in the record and will be subject to cross-examination. Witness Detmers' testimony and exhibits are struck in their entirety.²³

2. The NRC Staff also move to exclude certain portions of the testimony of Dr. Robert Moran, a joint witness of the Consolidated Intervenor and the Oglala Sioux Tribe, to the extent he argues that the Staff's use of license conditions to obtain additional information on water quality and hydrogeology is a de facto violation of the National Environmental Policy Act

²³ See supra para. A.4.e striking witness Detmers' exhibits INT-010a through INT-010q.

(NEPA). This request is DENIED at this time. This is a legal question and a ruling on this matter will be deferred until after the evidentiary hearing.

3. The NRC Staff move to strike the testimony of the Consolidated Intervenor's witness Susan Henderson on Contention 2, except to the extent she addresses possible contamination from the Black Hills Army Depot. As decided above, Ms. Henderson is a landowner who may have relevant information related to Contentions 2 and 3. The weight to be accorded her opinions will be determined at the hearing but material facts are in dispute on genuine issues, so striking the testimony would not be proper at this time.

4. The NRC Staff move to exclude for Contention 3, the entirety of the testimony of the Consolidated Intervenor's witnesses Susan Henderson, Dayton Hyde, Dr. Donald Kelley, and Linsey McLean. The Board DENIES this request. Contention 3 deals with hydrogeological information in the FSEIS, the ability to contain fluid migration and the potential impacts to groundwater. The testimony presented appears to be related to surface water and potential toxicity. Arguably, it is within the scope of admitted Contention 3. The relevance and the weight to be accorded this testimony will be determined at the hearing.

C. Oglala Sioux Tribe and Consolidated Intervenor's

1. The Oglala Sioux Tribe seeks to strike portions of NRC Staff and Powertech testimony, claiming that it includes analysis and information that supports the Final Supplemental Environmental Impact Statement (FSEIS), but was not included in the FSEIS itself. The Tribe asks the Board to strike this material under the theory that a FSEIS cannot be supplemented or rehabilitated by information not included in the FSEIS, and so this material goes beyond the scope of NEPA. The Tribe points to a nonexclusive list of examples that it wishes to be struck from the record in NRC-001, APP-003, APP-005, APP-010, APP-064, APP-053, and APP-070.

The NRC Staff and Powertech oppose this motion. The NRC Staff claims that the Tribe's conclusion only stands once the NRC has completed a final agency action, which will not be achieved until after this hearing is complete. Powertech argues that its testimony is not

intended to supplement the FSEIS, but instead serves to explain why the FSEIS does not need supplementation.

2. The Consolidated Intervenors seek to limit and exclude Powertech's witness testimony where technical witnesses offer legal opinions or conclusions. Specifically, Consolidated Intervenors move to strike numerous instances in APP-001, the Testimony of Lynne Sebastian, and APP-037, the Testimony of Errol Lawrence.

The NRC Staff and Powertech oppose Consolidated Intervenors' motion. The NRC Staff submits that there is a connection between each witness' experience and testimony, and that the Board will ensure the testimony carry weight only to the extent it is supported by other evidence in the record. Powertech claims that its witnesses are not offering legal opinions, but instead their own interpretations of regulations and agency guidance in support of Powertech's counsel's legal opinions.

3. Board Ruling

By stating that the NRC Staff and Powertech have submitted information which is beyond the scope of what can be considered when reviewing an FSEIS document, the Oglala Sioux Tribe argues that information immaterial to the hearing has been submitted. The Consolidated Intervenors also argue that Powertech has submitted immaterial information, as the legal opinions and conclusions offered by technical witnesses is not of consequence to the outcome of this proceeding.

When immaterial information is submitted for inclusion in the record, it is proper for a Board to strike such filings.²⁴ While Boards often make these materiality decisions before an evidentiary hearing, this is not "an ironclad requirement in administrative proceedings where no

²⁴ 10 C.F.R. § 2.319(e).

jury is involved.”²⁵ Where a single decisionmaker, the Board, is first ruling on what information will comprise the record, and then relying on this record to make its decision, there is no compelling need to rule on the materiality of the challenged testimony before the hearing begins. In our proceeding there is no jury which the Board must keep unaware of potentially prejudicial evidence.

The Board therefore defers its ruling on the disputed portions of the NRC Staff and Powertech exhibits. The Board will be better able to resolve the disputes surrounding the Oglala Sioux Tribe and Consolidated Intervenor motions upon consideration of the full evidentiary record.

II. MOTION FOR CROSS-EXAMINATION

As a general guideline, “the scope of cross-examination and the parties that may engage in it . . . are committed to the discretion of the officers presiding at the hearing.”²⁶ Commenting on the Subpart L hearing rules, which will be in effect during this proceeding, the Commission stated that they were “designed to shift most questioning of witnesses from parties to the Board itself,” and that cross-examination “should be reserved for cases where the Board determines that it is truly necessary to develop a sound record.”²⁷

Regardless, “if the presiding officer determines that cross-examination by the parties is necessary to ensure the development of an adequate record for decision” then cross-

²⁵ Pub. Serv. Co. of N.H. (Seabrook Station, Units 1 and 2), ALAB-520, 9 NRC 48, 50 n.2 (1979) (“Normally a determination on materiality will precede the admission of an exhibit into evidence (at least where materiality is questioned). But we do not regard this to be an ironclad requirement in administrative proceedings where no jury is involved; in this instance, the determination can be safely left to a later date without prejudicing the interests of any party.”).

²⁶ Pub. Serv. Co. of Ind. (Marble Hill Nuclear Generating Station, Units 1 & 2), ALAB-461, 7 NRC 313, 316 (1978).

²⁷ Entergy Nuclear Operations, Inc. (Indian Point, Units 2 and 3), CLI-12-18, 76 NRC 371, 375 (2012).

examination shall be allowed.²⁸ Before the Board can make this determination, a party must first file a motion requesting permission to conduct cross-examination, accompanied by a cross-examination plan with the specified required information.²⁹

A. Oglala Sioux Tribe

The Oglala Sioux Tribe timely filed both a motion requesting permission to conduct cross-examination and submitted a cross examination plan in-camera to the Board. The Oglala Sioux Tribe states, “cross-examination is sought with regard to events and witness credibility, motive, and/or intent involving newly revealed “additional quality data” relevant to the Dewey-Burdock Project that Powertech did not include in its application or disclose during these proceedings.” The Board finds the proposed subject matter sought to be explored to be beyond the scope of the admitted contentions in this proceeding and therefore DENIES the Oglala Sioux Tribe’s motion for cross-examination.

It is so ORDERED.

THE ATOMIC SAFETY
AND LICENSING BOARD
/RA/

William J. Froehlich, Chair
ADMINISTRATIVE JUDGE
/RA/

Richard F. Cole
ADMINISTRATIVE JUDGE
/RA/

Mark O. Barnett
ADMINISTRATIVE JUDGE

Rockville, Maryland
August 1, 2014

²⁸ 10 CFR § 2.1204(b)(3).

²⁹ 10 CFR § 2.1204(b)(1).

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of)
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(Dewey-Burdock In Situ Recovery Facility))
)

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing **Order (Ruling on Motions in Limine: Motions to Strike and for Cross-Examination)** have been served upon the following persons by Electronic Information Exchange, and by electronic mail as indicated by an asterisk*.

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DOCKET NO. 40-9075-MLA

Order (Ruling on Motions in Limine: Motions to Strike and for Cross-Examination)

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Rockville, Maryland
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