

August 12, 2014

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
)	ASLBP No. 10-898-02-MLA-BD01
(Dewey-Burdock In Situ Uranium Recovery)	
Facility))	

NRC STAFF'S RESPONSE TO BOARD'S AUGUST 8, 2014 ORDER

On July 22, 2014, the Oglala Sioux Tribe moved for cross-examination of several Powertech witnesses. In support of its motion, the Tribe submitted Exhibit OST-019, a Powertech press release dated July 16, 2014. In the press release, Powertech states that it has entered into an agreement with Energy Fuels to purchase data concerning the Dewey-Burdock Project. According to the press release:

The data being acquired consists of historical drill hole logs and maps prepared by the Tennessee Valley Authority from the 1970's and 1980's when the Dewey Burdock uranium deposit was originally discovered as well as digitized data generated from this work. This data is expected to assist Powertech's planning of wellfields for the Dewey Burdock uranium property by providing additional quality data to complement Powertech's existing database.

In its cross-examination motion, the Tribe asked that the Board allow it to "conduct cross-examination to establish events surrounding the undisclosed 'additional quality data' and Powertech's witnesses knowledge and use of the data."

On August 1, 2014, the Board denied the Tribe's motion, finding the "proposed subject matter sought to be explored to be beyond the scope of the admitted contentions in this proceeding." Nonetheless, during an August 5, 2012 prehearing teleconference, counsel for both the Oglala Sioux Tribe and the Consolidated Intervenors (collectively, the "Intervenors") argued that the data Powertech is in the process of acquiring appear directly relevant to the

issues raised in Contention 3. As admitted by the Board, Contention 3 alleges that the Staff's Final Supplemental Environmental Impact Statement (FSEIS) lacks sufficient information on whether Powertech will be able to prevent uranium recovery fluids from migrating outside the production zone at the Dewey-Burdock site.

On August 8, 2014, the Board directed the parties to address two issues concerning the data Powertech is in the process of acquiring: first, whether the data are relevant to Contention 3; and second, whether the data are subject to mandatory disclosure in this proceeding as defined in 10 C.F.R. § 2.336(a).

The Staff has reviewed Powertech's July 16, 2014 press release. As stated in the attached affidavit,¹ however, the Staff has not received any of the data referred to in the press release. Nor has it communicated with Powertech regarding the data. In other words, the Staff knows nothing about the data beyond what Powertech states in the press release.

To answer the Board's first question, regardless of what the data are, they do not appear to be relevant to the version of Contention 3 set for hearing. In Contention 3 the Intervenors claim that the Staff did not adequately evaluate the hydrogeology in the Dewey-Burdock area because, among other deficiencies, the FSEIS lacked complete data on the TVA's exploratory boreholes in the area. This is an issue to which the parties directed their prefiled testimony and statements of position. To the extent Powertech is now acquiring additional data on TVA boreholes—the July 16, 2014 press release does not, in the Staff's view, provide enough information to determine precisely what data Powertech is acquiring—it could potentially move for summary disposition of this basis within Contention 3. These data could also potentially be used by the Intervenors as a basis for amending an existing contention or filing a new contention. While the newly acquired data might support various procedural steps that could result in the Board *modifying* Contention 3, however, they do not appear to be relevant to whether the analysis in the FSEIS is sufficient.

¹ Affidavit of Ronald Burrows.

Regarding the Board's second question, under 10 C.F.R. § 2.336(a) a party other than the Staff must provide:

A copy, or a description by category and location, of all documents and data compilations in the possession, custody, or control of the party that are relevant to the contentions, provided that if only a description is provided of a document or data compilation, a party shall have the right to request copies of that document and/or data compilation[.]

As stated above, the data Powertech is in the process of acquiring do not appear to be relevant to the current version of Contention 3. Thus—again, taking into account the uncertainty over what the data actually are—it is not clear that § 2.336(a) requires Powertech to disclose or assert a privilege for the data.

Finally, the Staff would note that, although a party other than the Staff must disclose or assert a privilege for documents “relevant to the contentions,” the Staff’s disclosure obligations are broader. Under § 10 C.F.R. § 2.1203(b), the Staff must include in its hearing file updates “any correspondence between the applicant/licensee and the NRC that is relevant to the proposed action.” Furthermore, in the present case the Staff has agreed to provide mandatory disclosures under the pre-2012 version of § 2.336(b), which required the Staff to disclose or assert a privilege for all documents providing support for, or opposition to, the proposed action.²

² Transcript of October 4, 2012 Telephone Conference at 494.

If the Staff receives additional data from Powertech, it will apply these standards in determining whether the data must be disclosed to other parties.³

Respectfully submitted,

*/Signed (electronically) by/
Michael J. Clark
Michael J. Clark
Counsel for the NRC Staff*

*/Signed (electronically) by/
Patricia A. Jehle
Patricia A. Jehle
Counsel for the NRC Staff*

Dated at Rockville, Maryland
this 12th day of August 2014

³ The Staff will also enter the data into the NRC's Agencywide Documents Access Management System (ADAMS), regardless of whether the record in this proceeding has closed.

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AFFIDAVIT OF RONALD BURROWS

I, Ronald Burrows, do hereby state as follows:

1. I am employed as a Senior Health Physicist in the Nuclear Regulatory Commission's Office of Federal and State Materials and Environmental Management Programs, Division of Waste Management and Environmental Protection, Decommissioning and Uranium Recovery Licensing Directorate. Among my responsibilities, I serve as Project Manager for Powertech (USA) Inc.'s application for a license to be used in connection with the proposed Dewey-Burdock uranium recovery facility. In this capacity, I am managing the preparation of the NRC Staff's hearing file and mandatory disclosures in connection with Powertech's application pursuant to 10 C.F.R. § 2.336(b).

2. I have reviewed Exhibit OST-019, which is a Powertech press release dated July 16, 2014.

3. I hereby certify that to the best of my knowledge, the newly acquired data referred to in Powertech's July 16, 2014 press release has not been received by the NRC Staff. I have not reviewed the data, nor have I been in communication with Powertech regarding the data. To the best of my knowledge, no other employee assigned to the Dewey-Burdock review has been in communication with Powertech regarding the data.

4. Because I have not reviewed the data referred to in Powertech's July 16, 2014 press release, I am unable to state whether, if the NRC Staff receives the data at some later date, it would identify the data in its hearing file updates or mandatory disclosures.

5. I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information, and belief.

Executed in Accord with 10 CFR 2.304(d).
Ronald Burrows
Senior Health Physicist
Office of Federal and State Materials and
Environmental Management Programs
U.S. Nuclear Regulatory Commission
Mail Stop: T8-F20
Washington, DC 20555
Phone: 301-415- 6443
Ronald.Burrows@nrc.gov

Executed in Rockville, MD
this 12th day of August, 2014

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(Dewey-Burdock In Situ Uranium Recovery Facility))	Date: August 12, 2014

CERTIFICATE OF SERVICE

Pursuant to 10 C.F.R. § 2.305, I certify that counsel for the NRC Staff served copies of the Staff's Response to Board's August 8, 2014 Order via the NRC's Electronic Information Exchange (EIE) on August 12, 2014. Counsel for the Staff served those representatives exempted from filing through the EIE with copies of its Response by electronic mail, also on August 12, 2014.

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

Patricia A. Jehle
Counsel for the NRC Staff
U.S. Nuclear Regulatory Commission
Mail Stop O-15 D21
Washington, DC 20555-0001
(301) 415-8366
Patricia.Jehle@nrc.gov