

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) August 12, 2014

Oglala Sioux Tribe’s Response to the Board’s August 8, 2014 Order

Intervenor Oglala Sioux Tribe (“OST” or “Tribe”) hereby submits this Response to the Board’s August 8, 2014 Order directing “all parties to this proceeding to file legal memoranda on two issues. First, addressing the relevance of the newly acquired data to Contention 3 and second, whether the data is subject to mandatory disclosure in this proceeding as defined in 10 C.F.R. § 2.336(a).” August 8, 2014 Order at 2.

Procedural Irregularities and Objections

The Tribe notes at the outset its objections to the irregular and non-compliant procedure giving rise the August 8, 2014 Order. Specifically, the Board issued an unambiguous Order on August 6, 2014 specifically finding “[t]he data purchased by Powertech and described in Exhibit OST-019 is relevant to the issues in Contention 3, is similar to other TVA data referenced in the testimony of a number of expert witnesses scheduled to be heard at the upcoming evidentiary hearing, and is subject to the mandatory disclosure as described in 10 C.F.R. § 2.336(a).” August 6, 2014 Order at 4. The August 6, 2014 Order further required “Powertech shall respond to this Order within 3 days, concerning when this data will be disclosed to the parties.” *Id.* at 5.

Instead of responding in any document captioned and filed in a manner meeting the requirements of NRC regulations¹, Powertech instead submitted an informal email dated August 7, 2014 and directed “to Members of the Licensing Board Panel.” (Attached as Exhibit OST-020). This email purported to “request clarification on what is required of the company within the three day period identified” in the August 6, 2014 Order. Exhibit OST-020 at 1. However, the email went on to discuss at length what purports to be substantive reasons why Powertech believes the Board’s August 6, 2014 Order was in error and why the Board should reconsider its ruling and provide for legal briefing on the issues resolved in the Board’s August 6, 2014 Order – most notably the relevance of the subject data to the contentions properly raised by the Tribe and Consolidated Intervenors. *Id.*

Apart from the technical non-compliance with NRC procedural rules regarding filing and service discussed above, the email request for reconsideration results in prejudice to the Tribe for its further failures to comply with NRC procedural rules. Specifically, the request for reconsideration and further briefing was not made in the form of a motion as required by 10 C.F.R. § 2.323(2)(b) (“a motion must be made in writing, state with particularity the grounds and the relief sought, be accompanied by any affidavits or other evidence relied on, and, as appropriate, a proposed form of order.”). Further, “a motion **must be rejected** if it does not include a certification by the attorney or representative of the moving party that the movant has made a sincere effort to contact other parties in the proceeding and resolve the issue(s) raised in

¹ For instance, 10 C.F.R. § 2.304(a) requires that “[e]ach document filed in an adjudication to which a docket number has been assigned must contain a caption setting forth the docket number and the title of the proceeding and a description of the document (e.g., motion to quash subpoena)”; § 2.304(c)(1) requires “an electronic document must be signed using a participant’s or a participant representative’s digital ID certificate.” Further, 10 C.F.R. § 2.305(c) requires that “[s]ervice must be made electronically to the E-Filing system”; § 2.305(c)(4) requires that “[e]ach document served...upon a participant to the proceeding must be accompanied by a signed certificate of service.”

the motion, and that the movant's efforts to resolve the issue(s) have been unsuccessful.”

Id.(emphasis added). No such certification appeared in the email motion because no conferral or contact of any kind occurred with respect to Powertech's requests. The failure to comply with these specific and binding rules denied the Tribe any opportunity to confer on the motion, or to respond to the motion, as contemplated by the rules. 10 C.F.R. §§ 2.323(b), (c).

Perhaps most egregious is the failure to comply with the provisions of 10 C.F.R. § 2.323(e) specifying the requirements for making a motion for reconsideration. These requirements state that “[m]otions for reconsideration may not be filed except upon leave of the presiding officer or the Commission, upon a showing of 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). Powertech failed to even cite to these requirements in its motion.²

The result of this non-compliant motions practice is to have denied the Tribe the ability to oppose the motion for reconsideration based on the legal criteria set forth in the applicable regulations, including 10 C.F.R. § 2.323(e). The Tribe was thereby denied its rightful procedural due process and is prejudiced by the inability to respond and the further Board's granting of Powertech's out of compliance motion for reconsideration and reversal of its previous ruling that “[t]he data purchased by Powertech and described in Exhibit OST-019 is relevant to the issues in Contention 3, is similar to other TVA data referenced in the testimony of a number of expert witnesses scheduled to be heard at the upcoming evidentiary hearing, and is subject to the mandatory disclosure as described in 10 C.F.R. § 2.336(a).” August 6, 2014 Order at 4.

² The failure to “ensure that their arguments and assertions are supported by appropriate and accurate references to legal authority and factual basis” constitutes a violation of 10 C.F.R. § 2.323(d).

The Tribe further objects to the process being employed with respect to the briefing on whether the subject data is relevant, as it appears from Powertech's email motion that its representatives have reviewed the majority of the data and are preparing to "inform" the Board "of what the substance of the data is and how it relates to what was submitted in the Powertech's (sic) license application." Exhibit OST-020 at 1. This process leaves Powertech in sole control of the data and denies the Tribe any ability to effectively rebut Powertech's assertions as to what the data contains or represents.³ This is particularly problematic given that the Board has denied the Tribe's Motion for Cross-Examination, potentially precluding the Tribe from even attempting to challenge Powertech's representations as to what is contained in the subject data package.

Lastly, the Tribe notes with most serious concern that Powertech's email to the Board attempts to chastise the Tribe for having "never previously asked for borehole logs that Powertech used to generate the isopach maps, structure contour maps, etc regarding site stratigraphy in its application materials." OST-020 at 1. However, as the Board is no doubt aware, under a proceeding such as the present matter being conducted under Subpart L, "a party may not seek discovery from any other party or the NRC or its personnel, whether by document production, deposition, interrogatories or otherwise." 10 C.F.R. § 2.1203(d). *See also* 10 C.F.R. § 2.336(g)(generally prohibiting discovery in lieu of mandatory disclosure requirements).

Rather, to the extent these other borehole logs have not been disclosed, it appears from Powertech's email motion that additional relevant information and data has been withheld by Powertech throughout this proceeding. From the onset of this contested proceeding, Powertech has been under a strict requirement to, "without further order or request from any party, disclose

³ This preclusion applies not only to the Consolidated Intervenors as well, but also the Board, who without disclosure of the data will also not be in any position to effectively cross-examine Powertech representatives with respect to the nature or contents of the data.

and provide: . . . (2)(i) 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....” 10 C.F.R. § 2.336(a)(emphasis added). Powertech’s admission that these logs were used to “generate the isopach maps, structure contour maps, etc” serves as an admission as to their relevancy to, at minimum, Contentions 2 and 3 in this proceeding. NRC precedent confirms these broad disclosure requirements and the potential sanctions for failure to comply:

In the same vein, mandatory disclosures (in lieu of discovery), which apply to subpart L proceedings, are wide-reaching, requiring parties (other than the NRC Staff) to provide, among other things, a copy or description of ‘all documents and data compilations in the possession, custody and control of the party that are relevant to the contentions.’ And the Board may impose sanctions on parties who fail to comply, including dismissal of the relevant contention or of the application itself.

In re Crow Butte Res., Inc., 69 N.R.C. 535, 572-573 (N.R.C. 2009)(citations omitted). *See* 10 C.F.R. § 2.336(e). The Tribe requests that the Board expand its inquiry into not only the newly acquired data evidenced by Exhibit OST-019, but also the data asserted to not have been disclosed as evidenced by Exhibit OST-020, as well as any other additional data or information that Powertech may be in possession or control of that it has not yet disclosed.

The Newly Acquired Data is Relevant to Contentions 2 and 3

NRC precedent bearing on the “relevancy” standard in 10 C.F.R. § 2.336 demonstrates that the standard is not a high one, and that the disclosure requirements of the NRC regulations are specifically designed to be “wide-reaching”:

The regulation makes clear that each party must make the mandatory disclosures automatically without the need for a party to file a discovery request. As to the scope of this obligation, the Commission has recently affirmed that “mandatory disclosures ... which apply to Subpart L proceedings, are wide-reaching.” *Crow Butte Resources, Inc.* (North Trend Expansion Project) CLI-09-12, 69 NRC 535, 572 (2009).

In the Matter of Progress Energy Florida, Inc. (Levy County Nuclear Power Plant, Units 1 and 2), LBP-10-23, 72 N.R.C. 692, 701 (2010). Indeed, this case further holds that the relevance test in NRC proceedings is even more broad than that applicable in federal court:

The *Federal Rules of Evidence* (FRE) provide some useful guidance. The FRE state that “‘Relevant evidence’ means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” Fed. R. Evid. 401.

...

[T]he relevance standard of 10 C.F.R. §2.336 is even more flexible than the relevance standard of Fed. R. Evid. 401. First, although the FRE are not mandated for NRC adjudicatory proceedings, the Commission has endorsed the use of the FRE as guidance for the Boards, with the express proviso that Boards must apply the Part 2 rules with *greater flexibility* than the FRE. See 69 Fed. Reg. at 2187; 10 C.F.R. § 2.319(d). Second, 10 C.F.R. § 2.336 is a *discovery* regulation, and the rules are clear that the scope of discovery is broader than the scope of admissible *evidence*. See 10 C.F.R. § 2.705(b)(1) (“It is not a ground for objection [to discovery] that the information sought will be inadmissible at the hearing if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.”). See also Fed. R. Civ. P. 26(b)(1). Third, the Commission has stated that the mandatory disclosures in Subpart L proceedings encompass a “wide range of information.” 69 Fed. Reg. at 2194.

Id. at 705-706(emphasis in original).

Based on this broad standard, the newly acquired data is relevant, at minimum, to both Contention 2 and Contention 3. The August 6, 2014 Board Order provides a concise analysis of the relevance of the data to Contention 3, pointing out the competing testimony of the various expert witnesses, including most prominently the Tribe’s witness Dr. Moran, that make specific reference to the historic exploration boreholes and oil test wells to which this new data unequivocally relates. August 6, 2014 Board Order at 1-4. The Tribe expressly adopts and reiterates this well-reasoned discussion produced by the Board as ample evidence of the relevance of the data under the NRC’s “wide-ranging” relevance standard.

Importantly, the August 6, 2014 Board Order cites to Powertech’s own words included in its press release dated July 16, 2014 (Exhibit OST-019) which admit that “[t]his 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.” August 6, 2014 Board Order at 4. The Tribe asserts that this “quality” information that assists in planning of wellfields or provides any information on the existing characteristics of the hydrogeology or water quality, or even the location of historic boreholes, is relevant to the both Contention 2 and Contention 3 as this evidence may demonstrate facts that make it more probable that the existing baseline hydrogeological and water quality data and analysis is not sufficient (Contention 2) and that the existing hydrogeological data and analysis does not adequately demonstrate the ability to contain mining fluids (Contention 3).

The Transcript from the August 5, 2014 pre-hearing conference also supports a relevance determination. In that proceeding, NRC Staff openly admitted that this is the type of data that it would expect to receive and to “review carefully” with respect to the project. August 5, 2014 Transcript at 663, lines 6-7, lines 13-14. NRC Staff further concedes that the issue of additional information not incorporated into the Staff’s safety review and Final Supplemental Environmental Impact Statement (FSEIS) has been a longstanding issue in the case. *Id.* at lines 2-3. The fact that NRC Staff believes that it has “sufficient” evidence now to make its determinations under NRC regulations and NEPA is not determinative. *Id.* at lines 20-24. This argument by NRC Staff is not credible as it improperly negates any possibility that the data may affect its analysis – before it has even seen or reviewed it.

In short, the representations of Powertech and NRC Staff, combined with the prominent arguments within the admitted contentions addressing this very type of missing hydrogeologic data, demonstrate that this newly acquired data meets the test for relevance as having “any tendency to make the existence of any fact that is of consequence to the determination of the

action more probable or less probable than it would be without the evidence.” *In the Matter of Progress Energy Florida, Inc.* (Levy County Nuclear Power Plant, Units 1 and 2), LBP-10-23, 72 N.R.C. 692, 705 (2010).

The Data is Subject to the Mandatory Disclosure Requirements of 10 C.F.R. § 2.336(a)

As discussed, 10 C.F.R. § 2.336(a) requires disclosure of “all documents and data compilations in the possession, custody, or control of the party that are relevant to the contentions....” 10 C.F.R. § 2.336(a)(2)(i). There is no dispute that the data at issue is in the possession, custody, or control of Powertech. *See* Exhibit OST-020 at 1 (admitting that Powertech currently has access to this data, although not all, but will have all such data “sometime in September”). Further, the duty of disclosure in 10 C.F.R. § 2.336 “is continuing” and only “ends when the presiding officer issues a decision resolving the contention, or at such other time as may be specified by the presiding officer or the Commission.” 10 C.F.R. § 2.336(d). Lastly, as discussed above and expressly held by this Board in the August 6, 2014 Board Order, the data is relevant to Contention 2 and Contention 3. Thus, the subject data meets all the criteria of 10 C.F.R. § 2.336 and is subject to the mandatory disclosure requirements.

Conclusion

For the foregoing reasons, the Board should reaffirm its August 6, 2014 ruling regarding the relevancy of the subject data to Contention 3, and should further find the data relevant as an initial matter to Contention 2. Based on this relevancy determination, the Board should find the data subject to the disclosure requirements of 10 C.F.R. § 2.336(a).

Respectfully Submitted,

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Dated at Lyons, Colorado
this 12th day of August, 2014

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Response to the August 8, 2014 Board Order in the captioned proceeding were served via the Electronic Information Exchange (“EIE”) on the 12th day of August 2014, and via email to those parties for which the Board has approved service via email, which to the best of my knowledge resulted in transmittal of same to those on the EIE Service List for the captioned proceeding.

/s/ signed electronically by _____

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