

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

William J. Froehlich, Chairman
Dr. Mark O. Barnett
G. Paul Bollwerk, III

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

April 4, 2018

ORDER

(Scheduling Sixth Telephonic Conference Call)

In response to the Licensing Board's March 29, 2018 order requesting scheduling information for a telephonic conference with the parties,¹ representatives of the parties contacted the Board on April 2, 2018, regarding their availability. Based on the information provided, the teleconference is scheduled for April 6, 2018, at 1:30 P.M. Eastern Time. The Board anticipates that this conference will last no more than one and one-half hours.

The Board will establish a bridge line for this telephone conference, with three lines provided for each party.² In the near future, the Board's law clerk, Sarah Ladin, will contact the parties by email with the telephone number, passcode, and instructions on how to access the telephone conference. Listen-only telephone access will also be made available for members of the public. Members of the public who wish to listen to the conference should contact the

¹ Licensing Board Memorandum and Order (Requesting Information for Sixth Telephonic Conference Call) (Mar. 29, 2018) (unpublished).

² If any party requires additional lines, it should promptly contact Board law clerk Sarah Ladin at Sarah.Ladin@nrc.gov.

Board's law clerk at 301-415-5277 or Sarah.Ladin@nrc.gov for the necessary listen-only telephone access information.

On March 16, 2018, in letters to each of the parties, the NRC Staff announced that it had selected an approach to identify Lakota Sioux historic, cultural, and religious resources that has the potential to resolve Contention 1A (the March 2018 Approach). The NRC Staff requested Powertech and intervenor written responses to that approach by March 30, 2018. During a March 27, 2018 teleconference, neither Powertech nor the Oglala Sioux Tribe would commit to participating in the NRC Staff's March 2018 Approach, but indicated that they would provide the NRC Staff with a definitive response by, or a few days after, March 30, 2018.³ On March 30, Powertech and the Oglala Sioux Tribe provided their written responses to the March 2018 Approach.⁴ Neither provided the definitive response that the NRC Staff requested.⁵

For its part, Powertech did not definitively answer whether it would participate in the NRC Staff's March 2018 Approach, but, instead, stated that it "COULD agree to [the March 2018 Approach] IF"⁶ (1) "[t]he ASLB establishes enforceable timelines and repercussions for missed timelines and these are enforced against parties who fail to adhere to these timelines";⁷

³ Tr. at 1344, 1359–60, 1365–66. The Consolidated Intervenors indicated they, in general, viewed it favorably. Tr. at 1346.

⁴ Letter from John M. Mays, Chief Operating Officer, Azarga Uranium Corp., to Cinthya I. Román, Chief, Environmental Review Branch (Mar. 30, 2018) [hereinafter Powertech Response to March 2018 Approach]; Oglala Sioux Tribe's Response to NRC Staff's March 16, 2018 Cultural Resources Survey Proposal (Mar. 30, 2018) [hereinafter Oglala Sioux Tribe Response to March 2018 Approach].

⁵ Counsel for the NRC Staff specifically requested during the March 27 teleconference that responses to the March 2018 Approach be definitive, stating that, even if the NRC Staff received responses after March 30, 2018, "that will be acceptable as long as it is . . . a definitive response." Tr. at 1366.

⁶ Id. (emphasis in original).

⁷ Id. at unnumbered p. 3. It is unclear whether Powertech's first condition refers only to dates within the adjudicatory process or includes the scheduling dates proposed by the NRC Staff for its internal efforts to obtain the information to prepare the supplemental analysis to the Final

(2) “[t]he ASLB provide[s] confirmation that [C]ontention 1A will be satisfied through this process”;⁸ (3) “[t]he ASLB provide[s] confirmation that, should any Native American Tribe(s) participating in data collection choose not to participate in the NRC Staff approach, such lack of participation constitutes termination of their involvement in the remainder of this process and will not prevent the resolution of Contention 1A in favor of the NRC Staff and Powertech”;⁹ and (4) “NRC staff and contractor costs are not passed onto Powertech.”¹⁰ Additionally, Powertech has stated that it “may be able to agree to the reimbursement rates offered in the April, 2017 proposal” for participating Tribes, “[h]owever, the honoraria would only be payable on successful completion of all activities pertaining to the NRC Staff approach, in accordance with the timeline developed by the NRC Staff, and participating Native American Tribes agreeing not to seek an evidentiary hearing on the final product through a revised Contention 1A or appeal any decision of the Board on the resolution of [C]ontention 1A in favor of the NRC Staff and Powertech to any competent body, including, but not limited to, the NRC Commission.”¹¹

Likewise, the Oglala Sioux Tribe did not definitively answer whether it would participate in the March 2018 Approach. The Oglala Sioux Tribe did state that it was “committed to participating in the [March 2018 Approach],” but also stated that the “extent of the Tribe’s participation and its ability to successfully coordinate the participation of other Tribes” could be “significantly affect[ed]” by the NRC Staff’s decisions on certain details regarding the March

Supplemental Environmental Impact Statement, and, if the latter, it is also unclear the legal authority that would allow the Board to establish enforceable timelines relative to any NRC Staff-established environmental review schedule.

⁸ Id.

⁹ Id. So too, in the absence of legal authority provided by Powertech or some other party, it is not apparent how Powertech’s second and third demands are within the Board’s authority.

¹⁰ Id.

¹¹ Id. at unnumbered p. 4.

2018 Approach.¹² Specifically, the Oglala Sioux Tribe (1) raised its desire to be involved in the selection of the agency’s cultural resources contractor and finalizing the scope of work “to avoid potential conflicts of interest”;¹³ (2) restated that it objects to the lack of reimbursement for costs and Tribal staff time in the proposal, and noted that the NRC could reimburse the Tribe directly;¹⁴ and (3) reminded the NRC Staff that a methodology for the survey had not yet been determined and, while recognizing survey methodology is meant to be discussed in the future, indicated this remains a serious issue that must be resolved.¹⁵

In light of the parties’ written responses to the March 2018 Approach, the Board asks that for the upcoming telephone conference the NRC Staff come prepared to discuss how it plans to move forward. The NRC Staff’s March 2018 Approach appears to present a clear path forward to resolving Contention 1A. The Board recognizes, however, that the Oglala Sioux Tribe’s and Powertech’s responses may not have provided the NRC Staff with sufficient information to decide whether the NRC Staff can successfully implement the March 2018 Approach. We thus ask the NRC Staff to be prepared to address (1) whether the parties’ written responses have changed in any significant way the NRC Staff’s decision to implement the March 2018 Approach; and (2) if not, given the written responses, how the NRC Staff would intend to implement that approach. Moreover, we ask that the NRC Staff be ready to respond to each of the issues raised by Powertech and the Oglala Sioux Tribe. And, in that regard, the following questions seem particularly pertinent:

¹² Oglala Sioux Tribe Response to March 2018 Approach at 1.

¹³ Id. at 2. We note, however, that the Oglala Sioux Tribe also provides that this contractor selection/scoping concern is “not a bar to its participation.” Id.

¹⁴ Id. at 3.

¹⁵ Id. at 4. The Board appreciates that the Oglala Sioux Tribe has re-emphasized that it is committed to participating in the March 2018 Approach, but notes it remains unclear to what extent the Oglala Sioux Tribe’s participation would be compromised if the NRC Staff does not further address these three items to the Oglala Sioux Tribe’s satisfaction.

1. Will there be an opportunity for the Oglala Sioux Tribe to provide input on (a) the selection of a cultural resource contractor, and/or (b) finalizing the contractor's scope of work, and if not, why not?
2. What means are available to reimburse the Tribes for their participation in the March 2018 Approach?
3. What is the NRC Staff's response to Powertech's request that it not be charged for the costs of the NRC Staff's Full Time Equivalent (FTE) and contractor?
4. Is there precedent for the NRC Staff acceding to a license applicant or licensee request that it not be responsible for reimbursing the NRC Staff for the costs associated with the NRC Staff satisfying its statutory obligations, including expenses incurred by the NRC Staff to comply with its regulatory responsibilities under the National Environmental Policy Act?
5. Does the NRC Staff have any views regarding the three Board-related prerequisites posed by Powertech and, if so, what are they?
6. If the NRC Staff remains committed to implementing the March 2018 Approach, is the NRC Staff on track to meet the mid-April 2018 deadline to bring its contractor on board?

Powertech and the Oglala Sioux Tribe also must be prepared to provide clear and complete answers regarding the extent to which they intend to participate in the March 2018 Approach as detailed in the NRC Staff's March 16, 2018 letters to the parties, assuming there are no further provisions or guarantees from the NRC Staff or the Board. In particular, the Oglala Sioux Tribe should be prepared to answer the following:

1. If the Oglala Sioux Tribe is not allowed input regarding contractor selection and/or finalizing the scope of work for the contractor, how exactly would that “affect the extent of the Tribe’s participation”?¹⁶
2. If the Oglala Sioux Tribe is provided with neither reimbursement for its time and expenses nor an honorarium, how exactly would that “affect the extent of the Tribe’s participation”?
3. Are either of these items sufficiently critical that they will prevent the Oglala Sioux Tribe from participating in the March 2018 Approach entirely?

And for its part, Powertech should be ready to discuss these questions:

1. Is Powertech refusing to pay the expenses that might be incurred by the NRC Staff and subsequently billed to Powertech for the conduct of the field survey and other activities outlined in the March 2018 Approach?
2. If the NRC Staff proceeds with the March 2018 Approach, will Powertech decline to provide support for one or more of the seven field survey items set forth on pages 3 and 4 of the NRC Staff’s March 2018 Approach letters and, if so, which ones?

¹⁶ Oglala Sioux Tribe Response to March 2018 Approach at 2.

Finally, the Board anticipates that each of the parties, based on the responses to the questions above, will be prepared to advise the Board whether they intend to file a motion for summary disposition relative to Contention 1A on or before April 20, 2018, and/or take any other procedural step regarding that contention or the March 2018 Approach within the next 60 days.¹⁷

It is so ORDERED.

FOR THE ATOMIC SAFETY
AND LICENSING BOARD

/RA/

William J. Froehlich, Chairman
ADMINISTRATIVE JUDGE

Rockville, Maryland
April 4, 2018

¹⁷ See LBP-17-9, 86 NRC 167, 213 (2017). Alternatively, for instance, any party may consider filing a new or amended contention pursuant to 10 C.F.R. § 2.309(c)(4).

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NUCLEAR REGULATORY COMMISSION

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POWERTECH (USA) INC.) Docket No. 40-9075-MLA
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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing **ORDER (Scheduling Sixth Telephonic Conference Call)** have been served upon the following persons by Electronic Information Exchange, and by electronic mail as indicated by an asterisk.

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

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[Original signed by Clara Sola _____]
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Dated at Rockville, Maryland
this 4th day of April, 2018