

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 29, 2019

ORDER

(Granting NRC Staff Motion and Scheduling Evidentiary Hearing)

On April 3, 2019, the Nuclear Regulatory Commission Staff (NRC Staff) filed a motion to set a schedule for an evidentiary hearing in the above-captioned proceeding.¹ Responses to the NRC Staff's motion were filed on April 17, 2019, by licensee Powertech USA, Inc. (Powertech) and the NRC Staff,² and on April 18, 2019, by intervenor Oglala Sioux Tribe.³ The Licensing Board conducted an all-parties telephone conference call on April 23, 2019, where issues raised by the NRC Staff's April 3, 2019 motion were aired.⁴

¹ [NRC Staff] Motion to Set Schedule for Evidentiary Hearing (Apr. 3, 2019) [hereinafter NRC Staff Motion].

² [Powertech] Response to NRC Staff's Motion for Evidentiary Hearing (Apr. 17, 2019); NRC Staff Response to the Board's April 5, 2019 Order (Apr. 17, 2019). The NRC Staff's response was authorized by the Board to permit the NRC Staff to answer two questions about which the Board indicated it wished to have party responses. See Licensing Board Order (Setting Procedures to Address Motion to Set Schedule for Evidentiary Hearing) (Apr. 5, 2019) at 2 n.6 (unpublished).

³ Oglala Sioux Tribe's Response in Opposition to NRC Staff's Motion to Set Schedule for Evidentiary Hearing (Apr. 18, 2019) [hereinafter Oglala Sioux Tribe Response]. Although Consolidated Intervenors did not file a responsive pleading, the NRC Staff reported that Consolidated Intervenors opposed the motion. See NRC Staff Motion at 2.

⁴ Tr. at 1628–73.

I. Background

The Oglala Sioux Tribe first raised its concern about the protection of cultural and religious resources in a proposed contention filed in 2010.⁵ This contention challenged the adequacy of the NRC Staff's assessment of the impacts to Native American cultural, religious, and historical resources from Powertech's Dewey-Burdock In Situ Uranium recovery facility. Pursuant to the National Environmental Policy Act (NEPA), the NRC Staff issued its Draft Supplemental Environmental Impact Statement (DSEIS) on November 26, 2012, and its Final Supplemental Environmental Impact Statement (FSEIS) on January 29, 2014. The Board then held an evidentiary hearing in Rapid City, South Dakota, from August 19–21, 2014, on this contention and six other admitted contentions.⁶ On April 30, 2015, the Board issued a Partial Initial Decision on the merits of those contentions.⁷ As relevant to this contention (now Contention 1A), the Board found that the NRC Staff failed to fulfill its NEPA obligation because the FSEIS did "not contain an analysis of the impacts of the project on the cultural, historical, and religious sites of the Oglala Sioux Tribe...."⁸ The Board concluded that "[w]ithout additional analysis as to how the Powertech project may affect the Sioux Tribes' cultural, historical, and religious connections with the area, NEPA's hard look requirement ha[d] not been satisfied, and potentially necessary mitigation measures ha[d] not been established."⁹ The Commission affirmed the Board's Partial Initial Decision.¹⁰

On October 30, 2018, the Licensing Board issued LBP-18-5, which denied both the Oglala Sioux Tribe's and NRC Staff's motions for summary disposition of Contention 1A.

⁵ Petition to Intervene and Request for Hearing of the Oglala Sioux Tribe (Apr. 6, 2010) at 12–17.

⁶ LBP-15-16, 81 NRC 618, 633 (2016).

⁷ Id. at 708–11.

⁸ Id. at 655.

⁹ Id.

¹⁰ CLI-16-20, 84 NRC 219 (2016).

LBP-18-5 presented the parties with the choice to either resume efforts to implement the site survey approach that had been previously agreed-upon by all parties (March 2018 Approach) or proceed to an evidentiary hearing.¹¹ On November 30, 2018, the NRC Staff informed the Board that it chose to renew its efforts to implement the March 2018 approach.¹² In periodic status calls, the parties reported to the Licensing Board regarding their progress on efforts to implement the March 2018 Approach.¹³ At the March 21, 2019 teleconference, the NRC Staff announced that “the staff has not the reasonable expectation of agreement with the tribe on this matter” and that “the appropriate way to document this inability to reach an agreement would probably be on the record of an evidentiary hearing.”¹⁴ The NRC Staff’s April 3, 2019 motion requests an evidentiary hearing to resolve the disputed issues of fact as to the reasonableness of the NRC Staff’s proposed draft methodology for the conduct of a site survey to identify sites of historic, cultural, and religious significance to the Oglala Sioux Tribe and the reasonableness of the NRC Staff’s determination that the information it seeks to obtain from the site survey is unavailable.¹⁵

II. Ruling on Motion

Although a licensing board can identify a deficiency in the NRC Staff’s NEPA analysis that requires correction, it generally cannot direct the NRC Staff on a particular approach to rectify that deficiency.¹⁶ Nor can a board require the NRC Staff to continue to negotiate with a

¹¹ See LBP-18-5, 89 NRC 95, 134–37 (2018).

¹² Letter from Lorraine Baer, NRC Staff Counsel, to Licensing Board (Nov. 30, 2018) (ADAMS Accession No. ML18334A295).

¹³ Tr. at 1460–1517 (Dec. 6, 2018); Tr. at 1518–54 (Jan. 29, 2019); Tr. at 1555–1627 (Mar. 21, 2019); Tr. at 1628–73 (Apr. 23, 2019).

¹⁴ Tr. at 1619–20.

¹⁵ See LBP-18-5, 89 NRC at 128–30.

¹⁶ See, e.g., Carolina Power and Light Co. (Shearon Harris Nuclear Power Plant, Units 1, 2, 3 and 4), CLI-80-12, 11 NRC 514 (1980) (explaining that adjudicatory boards do not have authority to “direct the staff in performance of their administrative functions”); Duke Energy Corp. (Catawba Nuclear Station, Units 1 & 2), CLI-04-6, 59 NRC 62 (2004) (“[L]icensing boards

party that may have some role in the NRC Staff's efforts to meet its statutory obligations under NEPA. Here, the NRC Staff has concluded that further negotiation as to a methodology to resolve this contention is unlikely to be successful and has moved to proceed to an evidentiary hearing. The NRC Staff states:

the hearing should resolve the disputed issues of fact as to the reasonableness of the NRC Staff's proposed draft methodology for the conduct of a site survey to identify sites of historic, cultural, and religious significance to the Oglala Sioux Tribe, and the reasonableness of the NRC Staff's determination that the information it seeks to obtain from the site survey is unavailable.¹⁷

Up until very recently the NRC Staff had been pursuing a negotiated resolution to obtain the data missing from the EIS in this case. Now, apparently having reached what it considers a firm impasse with the Oglala Sioux Tribe in that negotiation process, the NRC Staff has decided to proceed to an evidentiary hearing regarding the circumstances associated with the absent information's accessibility. Cognizant of the agency's obligation to ensure the NEPA-required "hard-look" is taken or a legally sufficient explanation is placed in the record as to why the information required for such a "hard look" is missing from the EIS and was not reasonably available,¹⁸ the NRC Staff has requested authority to proceed to an evidentiary hearing. Given the deference we generally must accord the NRC Staff in its choice of how to address identified NEPA deficiencies,¹⁹ the motion to set a schedule for an evidentiary hearing is granted.

do not sit to correct NRC Staff misdeeds or to supervise or direct NRC Staff regulatory reviews."); Offshore Power Systems (Floating Nuclear Power Plants), ALAB-489, 8 NRC 194 (1978) (clarifying the extent of NRC Staff's "independent responsibility for preparing impact statements").

¹⁷ NRC Staff Motion at 2.

¹⁸ See Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 350 (1989); 40 C.F.R. § 1502.22.

¹⁹ In its response to the NRC Staff's motion, the Oglala Sioux Tribe raised the issue of whether the NRC Staff is required, prior to any hearing, to issue an SEIS explaining its conclusion as to why the cultural resources information being sought is unavailable. See Oglala Sioux Tribe Response at 10–18. During the telephone conference, the NRC Staff indicated it considers the appropriate way to document this conclusion is in the context of its evidentiary hearing submissions, Tr. at 1636, although the prospect seemingly exists that, if issued in draft for comment contemporaneously with the NRC Staff's initial evidentiary hearing submissions, such

III. Hearing Procedures

Pursuant to 10 C.F.R. § 2.312, the Atomic Safety and Licensing Board hereby provides notice that it will hold an evidentiary hearing under 10 C.F.R. Part 2, Subpart L procedures to receive oral testimony and exhibits in this proceeding.²⁰ Parties to this proceeding shall provide evidentiary submissions in support of or in opposition to the merits of the disputed issues of fact.

An evidentiary hearing is established to resolve the disputed issues of fact as to the reasonableness of the NRC Staff's proposed draft methodology for the conduct of a site survey to identify sites of historic, cultural, and religious significance to the Oglala Sioux Tribe, and the reasonableness of the NRC Staff's determination that the information it seeks to obtain from the site survey is unavailable. The evidence presented should address the criteria in 40 C.F.R. §1502.22 pertaining to incomplete or unavailable information.

The schedule for the submission of prepared testimony and other procedural dates leading up to the evidentiary hearing is attached as Appendix A to this Order.²¹

The Board will take oral testimony beginning on Wednesday, August 28, 2019, at 10:00 a.m. MDT and continue daily as necessary through Friday, August 30, 2019, at 5:00 p.m. MDT.

The evidentiary hearing will take place at the Hotel Alex Johnson, 523 Sixth Street, Rapid City, South Dakota 57701.

Members of the public and media are welcome to attend and observe the evidentiary hearing, which may involve technical, scientific, legal, and regulatory issues and testimony.

a supplement could be finalized prior to the scheduled beginning of the hearing, potentially resolving that concern altogether.

²⁰ Although Powertech suggested that the hearing be held using only written submissions, Tr. at 1658–60; see 10 C.F.R. § 2.1208, given such a request can only be entertained if there is unanimous consent of the parties, see id. § 2.1206, the objection of Consolidated Intervenors to this proposal, Tr. at 1662, precludes its further consideration.

²¹ In the near term, the Licensing Board will amend its June 2, 2014 case management information Order in this case to provide the parties with updated procedures for marking their proposed exhibits. See Licensing Board Order (Providing Case Management Information) (June 2, 2014) (unpublished).

Participation in the hearing will be limited to the parties, their lawyers, and witnesses. Please be aware that security measures may be employed at the entrance to the facility, including searches of hand-carried items such as briefcases or backpacks. No signs, banners, posters, or other displays will be permitted in the hearing room.²² Also, in line with the Board's previous notice,²³ no firearms will be permitted in the hearing room.

It is so ORDERED.

THE ATOMIC SAFETY
AND LICENSING BOARD

/RA/

William J. Froehlich, Chairman
ADMINISTRATIVE JUDGE

/RA/

Dr. Mark O. Barnett
ADMINISTRATIVE JUDGE

/RA/

G. Paul Bollwerk, III
ADMINISTRATIVE JUDGE

Rockville, Maryland
April 29, 2019

²² See Procedures for Providing Security Support for NRC Public Meetings/Hearings, 66 Fed. Reg. 31,719 (June 12, 2001).

²³ Atomic Safety and Licensing Board; Notice (Regarding Weapons at Atomic Safety and Licensing Board Proceedings), 79 Fed. Reg. 45,849 (Aug. 6, 2014).

APPENDIX A: SCHEDULE – Powertech USA, Inc. (Dewey-Burdock In Situ Uranium Recovery Facility) Proceeding

Event:	Date:
All Parties Status Conference	April 23, 2019
Evidentiary Hearing Schedule	
Position Statement/Prefiled Direct Testimony from NRC Staff	May 17, 2019
Response Position Statements/Prefiled Direct Testimony Supporting NRC Staff's Prefiled Direct Testimony	May 22, 2019
Response Position Statements/Prefiled Response Testimony Opposing NRC Staff's Prefiled Testimony and any Supporting Prefiled Testimony	June 28, 2019
Reply Position Statement/Prefiled Reply Testimony from NRC Staff	July 12, 2019
Proposed Cross-Examination Questions/Requests for Cross-Examination/In Limine Motions on Direct/Response/Reply Testimony Due	August 2, 2019
Responses to Requests for Cross-Examination and In Limine Motions on Direct/Response/Reply Testimony Due	August 9, 2019
Licensing Board Ruling on Requests for Cross-Examination and In Limine Motions	August 19, 2019
Evidentiary Hearing	August 28–30, 2019 ²⁴

²⁴ A final Board assessment regarding the length of the evidentiary hearing will await the receipt of the parties' direct, response, and reply testimony.

Proposed Findings of Fact/Conclusions of Law Due	September 27, 2019
Reply Findings of Fact/Conclusions of Law Due	October 11, 2019
Licensing Board Initial Decision	November 29, 2019

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NUCLEAR REGULATORY COMMISSION

In the Matter of)
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POWERTECH (USA) INC.) Docket No. 40-9075-MLA
(Dewey-Burdock In Situ Recovery Facility))
)

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing **ORDER (Granting NRC Staff Motion and Scheduling Evidentiary Hearing)** 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

ORDER (Granting NRC Staff Motion and Scheduling Evidentiary Hearing)

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[Original signed by Diane B. Garvin]
Office of the Secretary of the Commission

Dated at Rockville, Maryland,
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