

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)
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Docket No. 40-9075-MLA  
ASLBP No. 10-898-02-MLA-BD01  
August 12, 2019

ORDER

(Denying Oglala Sioux Tribe Motion to Strike)

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 facility in Custer and Fall River Counties, South Dakota.<sup>1</sup> On April 29, 2019, this Board granted the NRC Staff's motion to set a schedule for an evidentiary hearing to resolve the only remaining contention, Contention 1A, pertaining to the NRC Staff's obligation under the National Environmental Policy Act (NEPA) to assess the impacts to Native American cultural, religious, and historical resources.<sup>2</sup>

Thereafter, in accordance with the schedule established in the Board's April 29 order, the parties submitted various prehearing filings.<sup>3</sup> The NRC Staff submitted its prefiled direct

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<sup>1</sup> 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).

<sup>2</sup> Licensing Board Order (Granting NRC Staff Motion and Scheduling Evidentiary Hearing) (Apr. 29, 2019) at 4 (unpublished) [hereinafter Board Order Granting Hearing].

<sup>3</sup> *Id.* at 7–8 (app. A). The one exception to this schedule was the NRC Staff's prefiled reply testimony and reply position statement, which were submitted in accordance with a schedule

testimony and initial position statement on May 17, 2019.<sup>4</sup> The Oglala Sioux Tribe and Consolidated Intervenors submitted prefiled response testimony and response position statements on June 28, 2019.<sup>5</sup> The NRC Staff submitted its prefiled reply testimony and reply position statement on July 17, 2019.<sup>6</sup> On August 2, 2019, the Oglala Sioux Tribe filed a motion to strike.<sup>7</sup> No other party filed a motion in limine. On August 9, 2019, the NRC Staff and Powertech filed responses in opposition to the Oglala Sioux Tribe's motion to strike.<sup>8</sup>

## I. LEGAL STANDARD

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."<sup>9</sup> It thus is within a presiding officer's

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revision approved by the Board. See Licensing Board Order (Providing Case Management Information Regarding Exhibits) (July 8, 2019) at 3 (unpublished).

<sup>4</sup> NRC Staff's Initial Statement of Position on Contention 1A (May 17, 2019); Prefiled Ex. NRC-176, Prefiled Direct Testimony of NRC Staff (May 17, 2019) (refiled on May 21, 2019, as NRC-176-R) [hereinafter NRC Staff Direct Testimony].

<sup>5</sup> Oglala Sioux Tribe's Response Statement of Position (June 28, 2019) [hereinafter OST Statement of Position]; Prefiled Ex. OST-042, Decl. of Kyle White (June 28, 2019) (refiled on July 12, 2019, as OST-042-R); Prefiled Ex. OST-043, Decl. of Dr. Kelly Morgan (June 28, 2019) (refiled on July 12, 2019, as OST-043-R); Prefiled Ex. OST-045-R, Decl. of Dr. Craig Howe (June 28, 2019) (refiled on July 12, 2019, as OST-045-R); Consolidated Intervenors' Response Position Statement (June 28, 2019); Prefiled Ex. INT-023, Affidavits – Testimony re: Oglala Lakota Cultural Resources (June 28, 2019). In addition, while licensee Powertech did not provide any prefiled testimony, it did timely submit an initial position statement. See [Powertech] Initial Statement of Position Regarding Contention 1A (May 22, 2019).

<sup>6</sup> NRC Staff's Reply Statement of Position (July 17, 2019); Prefiled Ex. NRC-225, NRC Staff's Reply Testimony (July 17, 2019).

<sup>7</sup> Oglala Sioux Tribe's Motion to Strike (Aug. 2, 2019) [hereinafter OST Motion to Strike]. This motion is deemed timely filed. It was served on all parties by email on the date it was due but was not docketed by the NRC's Electronic Information Exchange (EIE) until August 3, 2019, due to technical problems with the EIE. Further technical problems with the EIE system delayed service of the pleading to the NRC Staff until August 5, 2019 and to the members of the Board until August 8, 2019.

<sup>8</sup> NRC Staff's Answer in Opposition to Oglala Sioux Tribe's Motion to Strike (Aug. 9, 2019) [hereinafter NRC Staff Answer]; Powertech (USA), Inc.'s Response to the Oglala Sioux Tribe's Motion to Strike (Aug. 9, 2019) [hereinafter Powertech Answer].

<sup>9</sup> 10 C.F.R. § 2.337(a).

power to strike proffered evidentiary material, on motion or on the presiding officer's own initiative, which is irrelevant, immaterial, unreliable, duplicative or cumulative.<sup>10</sup> A licensing board "normally has considerable discretion in making evidentiary rulings."<sup>11</sup> A motion to strike or a motion in limine is the appropriate mechanism for a party to seek to prohibit the admission of such irrelevant or otherwise evidentiarily incompetent information.<sup>12</sup>

## II. ANALYSIS

As a threshold matter, the Commission rules require:

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 the motion, and that the movant's efforts to resolve the issue(s) have been unsuccessful.<sup>13</sup>

The Oglala Sioux Tribe's motion to strike does not contain the required certification and both the NRC Staff and Powertech state that they were not contacted by the Tribe to resolve the issues raised in the motion.<sup>14</sup> Therefore, on this basis alone, the Oglala Sioux Tribe's motion can be denied.

The Oglala Sioux Tribe's motion does raise three bases that it asserts provide reason for the Board to exclude, in whole or in part, NRC Staff prefiled testimony and exhibits. We address each in turn, albeit concluding that each is insufficient to support granting the relief requested.

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<sup>10</sup> 10 C.F.R. § 2.319(d)–(e); see also Private Fuel Storage, L.L.C. (Indep. Spent Fuel Storage Installation), LBP-05-20, 62 NRC 187, 228 (2003).

<sup>11</sup> Duke Energy Corp. (Catawba Nuclear Station, Units 1 & 2), CLI-04-21, 60 NRC 21, 27 (2004).

<sup>12</sup> Private Fuel Storage, LBP-05-20, 62 NRC at 228.

<sup>13</sup> 10 C.F.R. § 2.323(b).

<sup>14</sup> NRC Staff Answer at 2; Powertech Answer at 2.

A. Rehabilitation of NEPA Analysis Through Post-Hoc Testimony

First, the Oglala Sioux Tribe asserts that “a final NEPA document may not be supplemented or rehabilitated by information, testimony, or other evidence not included in the final supplemental environmental impact statement (FSEIS) itself.”<sup>15</sup> Specifically, the Tribe relies on 40 C.F.R. § 1502.22 to establish that all information must be contained or referenced in the environmental impact statement (EIS).<sup>16</sup> Because the NRC Staff has not issued a supplement to its FSEIS that includes the information outlined in some of the Staff’s prefiled testimony and exhibits, the Tribe asks that this evidentiary material be excluded from the hearing as falling outside the scope of the FSEIS.<sup>17</sup>

The Commission has held that while “our longstanding policy is that the NRC, as an independent regulatory agency, is not bound by those portions of [the Council on Environmental Quality’s (CEQ’s)] NEPA regulations that, like section 1502.22, have a substantive impact on the way in which the Commission performs its regulatory functions” such regulations can be considered as guidance.<sup>18</sup> We thus may consider 40 C.F.R. § 1502.22, but do not find it necessary to exclude any Staff prefiled testimony or exhibits on the basis alleged by the Oglala Sioux Tribe.

The Tribe made a similar argument in its response to the Staff’s motion to convene an evidentiary hearing and in the Tribe’s response position statement, further insisting in that statement that the Board “need not proceed to hearing” at all because the NRC Staff had not created an updated NEPA document.<sup>19</sup> The Board recognizes that the Oglala Sioux Tribe does

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<sup>15</sup> OST Motion to Strike at 2.

<sup>16</sup> Id. at 3.

<sup>17</sup> Id. at 5–6.

<sup>18</sup> Pac. Gas & Elec. Co. (Diablo Canyon Nuclear Plant, Units 1 & 2), CLI-11-11, 74 NRC 427, 444 (2011) (internal quotations omitted).

<sup>19</sup> OST Statement of Position at 2, 5–8; see Oglala Sioux Tribe’s Response in Opposition to NRC Staff’s Motion to Set Schedule for Evidentiary Hearing (Apr. 18, 2019) at 10–18.

not believe this hearing should proceed. As we noted in granting the Staff's motion to proceed to a hearing, however, we decline to take that action.<sup>20</sup> We likewise decline to grant the motion to strike on that basis.

B. Federal Rule of Evidence 408

Second, the Oglala Sioux Tribe moves to strike NRC Staff "emails, letters, testimony, and transcript [quotations]" that "characterize negotiations between representatives of the Oglala Sioux Tribe and NRC Staff" because they are contrary to Federal Rule of Evidence (FRE) 408. FRE 408(a) states that evidence of (1) "furnishing, promising, or offering – or accepting, promising to accept or offering to accept – a valuable consideration in compromising or attempting to compromise the claim;" or (2) "conduct or a statement made during compromise negotiations about the claim" is not admissible "either to prove or disprove the validity or amount of a disputed claim."<sup>21</sup> The policy purpose of this rule is to encourage settlement.<sup>22</sup>

Similar to the circumstance with the CEQ's NEPA regulations, while the Federal Rules of Evidence do not control in agency adjudications, Boards may look to those rules for guidance.<sup>23</sup> In this instance, however, the Board finds that FRE 408 does not apply to this situation. While this case has been pending with the Board following the Commission's affirmance of the Board's ruling on Contention 1A in LBP-15-16, no settlement offer or compromise negotiations occurred that would require the invocation of FRE 408. Rather, the parties engaged in a years-long series of conversations and consultations meant to establish a process for the NRC Staff to meet its statutory duties under NEPA. In its motion, the Tribe repeatedly mischaracterizes this

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<sup>20</sup> See Board Order Granting Hearing at 4.

<sup>21</sup> Fed R. Evid. 408(a)(1)–(2).

<sup>22</sup> See Fed. R. Evid. 408, Notes of Comm. on Judiciary, Senate Report No. 93-1277.

<sup>23</sup> See S. Cal. Edison Co. (San Onofre Nuclear Generating Station, Units 2 & 3), ALAB-717, 17 NRC 346, 365 n.32 (1983).

Board as a “mediator” between the Tribe and the NRC Staff.<sup>24</sup> The Board has never placed itself in the position of mediator and, on the contrary, has clearly stated to the parties that under the agency’s rule of practice they must jointly seek appointment of a settlement judge if they wish to engage in settlement negotiations of the type that would be encompassed by FRE 408.<sup>25</sup> For this reason, we conclude that FRE 408 does not apply.

Moreover, even if we were to find that FRE 408 does apply, this situation falls within the ambit of an exception recognized in FRE 408(b). The Board does not intend to consider the NRC Staff’s proffered emails, letters, testimony, and transcript to “prove or disprove the validity or amount of a disputed claim,” but rather “for another purpose.” This hearing is intended to consider 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 related matter of the reasonableness of the NRC Staff’s determination that the information it seeks to obtain from the site survey is unavailable.<sup>26</sup> Consideration of such information in the context of such a factual dispute is a permissible exception under FRE 408(b).<sup>27</sup>

### C. Reliability of Nickens Report

Third, the Oglala Sioux Tribe moves to strike prefiled exhibit NRC-196, the report compiled by NRC Staff contractor Dr. Paul Nickens, because it allegedly “lacks sufficient

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<sup>24</sup> See OST Motion to Strike at 6–8 (using phrases like “Board-mediated efforts,” “chances of the Board mediating,” and “[t]he Board certainly expanded its role into mediator.”).

<sup>25</sup> See, e.g., LBP-18-05, 89 NRC at \_\_\_ n.255 (slip op. at 48 n.255) (“As previously suggested at a number of the telephone conferences with the Board and in LBP-17-9, the parties may submit a joint motion to request the appointment of a Settlement Judge to conduct settlement negotiations to assist in the resolution of this dispute pursuant to 10 C.F.R. § 2.338, and pursue that avenue in an attempt to reach a settlement and dismissal of the contention.”).

<sup>26</sup> Board Order Granting Hearing at 3.

<sup>27</sup> See, e.g., Westchester Specialty Ins. Servs. v. U.S. Fire Ins. Co., 119 F.3d 1505, 1512–13 (11th Cir. 1997) (settlement agreement was properly admitted “for the permissible purpose of resolving a factual dispute about the meaning of the settlement agreement”).

reliability.” The Tribe has qualms with the qualifications of the “contractors who conducted these activities” and the fact that “the contractor” Dr. Nickens will not be present at the hearing for cross-examination.<sup>28</sup> However, the Tribe goes on to concede that the report may have some value “[i]f considered at all” as proof that the “NRC Staff did not approach its NEPA duties or its negotiations with the Tribe in good faith.”<sup>29</sup>

As the Oglala Sioux Tribe acknowledges in its motion, prefiled exhibit NRC-196 may be helpful in assessing the NRC Staff’s progress, or lack thereof, towards resolving Contention 1A. It was referred to by the NRC Staff’s project manager Diana Diaz-Toro in her prefiled direct testimony, NRC-176-R.<sup>30</sup> If the Tribe has concerns about the reliability of the document or credibility of its creators, the Tribe will have opportunities to submit proposed questions at the hearing for the Board to ask NRC Staff witness Diana Diaz-Toro.

### III. CONCLUSION

For the foregoing reasons, the Oglala Sioux Tribe’s motion to strike is denied.

It is so ORDERED.

FOR THE ATOMIC SAFETY  
AND LICENSING BOARD

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William J. Froehlich, Chairman  
ADMINISTRATIVE JUDGE

Rockville, Maryland

August 12, 2019

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<sup>28</sup> OST Motion to Strike at 9.

<sup>29</sup> Id. at 10.

<sup>30</sup> NRC Staff Direct Testimony at 17, 43.

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

In the Matter of )  
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)

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing **ORDER (Denying Oglala Sioux Tribe Motion to Strike)** 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 (Denying Oglala Sioux Tribe Motion to Strike)**

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[Original signed by Clara Sola \_\_\_\_\_]  
Office of the Secretary of the Commission

Dated at Rockville, Maryland,  
this 12<sup>th</sup> day of August 2019