

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))

Oglala Sioux Tribe’s Cross Examination Motion

In accordance with 10 C.F.R. § 2.1207 and this Board’s Order of June 2, 2014, Intervenor Oglala Sioux Tribe (“OST” or “Tribe”) hereby submits this motion seeking leave to conduct cross examination of Powertech witnesses, including but not limited to, Mr. Demuth, Mr. Lawrence, and Mr. Fritz. Counsel for the Tribe conferred with the parties with respect to this Motion and NRC Staff states that it takes no position, while Powertech opposes the Motion.

Cross-examination is sought with regard to events and witness credibility, motive, and/or intent involving newly revealed “additional quality data” relevant to the Dewey-Burdock Project that Powertech did not include in its application or disclose during these proceedings. *See Ex. OST-019.*¹ A cross-examination plan is simultaneous filed with the Board, but is not served on the parties to the proceedings.

The First Circuit has confirmed the standard applicable to a cross-examination request in a Subpart L proceeding.

Cross-examination is not available as of right, although a party may request permission to conduct cross-examination that it deems "necessary to ensure the development of an adequate record for decision."

¹The Powertech press release (OST-19) was obtained from and is publicly available on the Canadian Securities Administrators’ System for Electronic Document Analysis and Retrieval (SEDAR) website: sedar.com/search/search_en.htm.

Citizens Awareness Network, Inc. v. United States, 391 F.3d 338 (1st Cir. 2004) *quoting* 40 C.F.R. § 2.1204. The Commission, in dicta examining the Commission’s rationale for its 2004 promulgation of the current regulation, has recognized that the Board has discretion to grant a motion for leave to cross examination in a Subpart L proceedings “where questions of witness credibility, motive, or intent are at issue.” In re Entergy Nuclear Operations, Inc., CLI-12-18, 76 N.R.C. 371, 376 (N.R.C. 2012)(upholding Board approval of party cross examination where “Board will rigorously oversee any cross-examination it allows and limit the cross-examination by all parties to supplemental and genuinely material inquiries, necessary to develop an adequate and fair record for decision.”).

The Commission’s analysis of Subpart L provides further explanation of the relevance of cross-examination in context of the mandatory disclosure requirements of Subpart L, under which the current proceeding is being conducted.

In our view, the Board overstated the supposed limitations of subpart L in conducting a hearing. Subpart L does, in fact, contemplate requests for cross-examination by the parties. Should a discrete issue be identified at or before the oral hearing that warrants cross-examination by the parties, subpart L allows any party to request it. [...]

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).

The present request seeks to conduct cross-examination involving data compilations that were recently acquired by Powertech, and which may or may not have been provided to Powertech consultants for review before during these proceedings. The underlying subject

matter is described by Powertech in a press release subject to penalties imposed by Canadian security laws.

[Powertech] has entered into a Transfer, Bill of Sale and Assignment Agreement dated May 9, 2014 (the “Data Purchase Agreement”) with Energy Fuels Resources (USA) Inc. (“Energy Fuels”), whereby the Company has agreed to purchase certain data (the “Data”) concerning the Dewey Burdock uranium property located in Fall River and Custer Counties, South Dakota from Energy Fuels.
[...]

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.

Id. at 1. As explained in Dr. Moran’s testimony, this data is not only relevant, it is critical to establish the subsurface environment and impacts, as well as for the company’s planning of wellfields highlighted in its press release. OST- 1, OST-18. Cross examination by the Tribe on the credibility and motivation of Powertech and its witnesses, as well as the events in question, are “necessary to ensure the development of an adequate record for decision.” Citizens Awareness Network, Inc. v. United States, 391 F.3d 338 (1st Cir. 2004) *quoting* 40 C.F.R. § 2.1204.

Without disclosing the full cross examination plan, it appears that Powertech may have taken steps to structure its acquisition of “additional quality data” to deny review by its witnesses, the parties, and this tribunal, which brings into question the veracity of Powertech witnesses’ conclusions regarding the voluminous and technical information presented by these proceedings. Depending upon the events that took place and the development of the record on cross-examination, “dismissal [...] of the application itself” might be an appropriate sanction. In re Crow Butte Res., Inc., 69 N.R.C. 535, 572-573 (N.R.C. 2009).

The Tribe's cross-examination plan relies on the input and expertise of Dr. Moran. Guided by Dr. Moran, the Tribe's attorneys are uniquely positioned to conduct cross-examination of Mr. Demuth, Mr. Lawrence, and Mr. Fritz regarding the "additional quality data" acquired by Powertech via an agreement struck on May 9, 2014, just after the license was issued in April 2014. Dr. Moran has the requisite technical expertise and is familiar with the omissions and inadequacies in the hearing record. The Tribe's attorneys, Mr. Parsons and Mr. Stills, have specialized training and significant experience in revealing the dealings of mining companies who seek permits and licenses.

Although the Board has been briefed, the Board does not have the detailed knowledge of the data, and data gaps, to conduct cross-examination on this issue. Further, the Board is an impartial tribunal that is not well positioned to both press and limit cross-examination that tests the credibility of Powertech, Powertech data, and Powertech's witnesses. As the Commission has stated when rejecting an applicant's appeal of approval of an intervener's cross-examination request, the role of the Board is to limit cross-examination in these circumstances. In re Entergy Nuclear Operations, Inc., CLI-12-18, 76 N.R.C. 371, 376 (N.R.C. 2012).

For the above reasons, the Tribe respectfully requests Board approval of the present request to conduct cross-examination to establish events surrounding the undisclosed "additional quality data" and Powertech's witnesses knowledge and use of the data.

Respectfully Submitted,

/s/ Jeffrey C. Parsons

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Attorneys for Oglala Sioux Tribe

Dated at Lyons, Colorado
this 22nd day of July, 2014

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Cross-Examination Motion in the captioned proceeding were served via the Electronic Information Exchange (“EIE”) on the 22nd day of July 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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