

July 22, 2014

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))	

NRC STAFF'S MOTION IN LIMINE

I. Introduction

The NRC Staff moves for the Board to exclude the Consolidated Intervenors' testimony on Contentions 4 and 6. The Staff also moves for the Board to exclude certain testimony from the Consolidated Intervenors' on Contentions 2 and 3. In addition, the Staff moves for the Board to exclude a narrow portion of the testimony of Dr. Robert Moran, one of the Consolidated Intervenors' and the Oglala Sioux Tribe's joint witnesses, on Contentions 2 and 3. The Staff's motion is supported by Commission precedent, and granting the motion will focus the hearing on the issues that are raised by the admitted contentions.¹

II. Applicable Law

In a hearing, "[o]nly 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." 10 C.F.R. § 2.337(a). "[O]n motion or on the presiding officer's own initiative," the Board may strike or restrict "any portion of a written presentation or a response to a written question that is irrelevant, immaterial, unreliable, duplicative or cumulative." 10 C.F.R. §§ 2.319(d), 2.319(e).

¹ Consistent with 10 C.F.R. § 2.323(b), the Staff consulted with the other parties on the issues raised in this motion. Counsel for Powertech stated that his client supports the substance of the Staff's motion. Counsel for the Oglala Sioux Tribe and the Consolidated Intervenors stated that their clients oppose the Staff's motion.

As explained below, the Staff's motion is supported by three principles rooted firmly in Commission precedent.

A. An Intervenor May Not Submit Evidence on Another Intervenor's Contention

Under longstanding NRC precedent, an intervenor may not introduce testimony or exhibits on another intervenor's contentions. *Northern States Power Co.* (Prairie Island Nuclear Generating Plant, Units 1 and 2), ALAB-244, 8 AEC 857, 863, 869 n.17 (1974), *aff'd in pertinent part*, CLI-75-1, 1 NRC 1 (1975). *See also Houston Lighting and Power Co.* (South Texas Project, Units 1 and 2), ALAB-799, 21 NRC 360, 383 (1985) ("An intervenor may ordinarily conduct cross-examination and submit proposed legal and factual findings on contentions sponsored by others. But that does not elevate the intervenor's status to that of a co-sponsor of the contentions.") Under this precedent the Board has, for example, denied the New Mexico Environment Department's and Attorney General's requests to participate on other parties' contentions. *Louisiana Energy Servs., L.P.* (National Enrichment Facility), CLI-04-35, 60 NRC 619, 626 (2004). In the present case, the Board recently applied this precedent in dismissing Contention 14 based on the withdrawal of that contention by the Oglala Sioux Tribe, the sponsoring party. Order (Granting Request to Withdraw and Motion to Dismiss Contentions 14A and 14B) (July 15, 2014) (citing *South Texas*, ALAB-799, 21 NRC at 383). The Board rejected the Consolidated Intervenor's attempt to submit testimony and exhibits on Contention 14, noting that they had not followed NRC procedures for adopting the contention. *Id.* at 2 n.4.

B. The Board Should Not Consider Evidence Outside the Scope of the Admitted Contentions

NRC hearings are limited to the scope of the admitted contentions. If an intervenor submits testimony or exhibits that are outside the scope of the contentions, the Board must exclude the evidence. *See, e.g., Southern Nuclear Operating Co.* (Early Site Permit for Vogtle ESP Site), CLI-10-5, 71 NRC 90, 100 (2010) (agreeing with the Staff that the licensing board

had properly excluded the intervenors' testimony and exhibits that were outside the scope of the admitted contention). As the Commission explained in *Vogtle*:

The scope of a contention is limited to issues of law and fact pled with particularity in the intervention petition, including its stated bases, unless the contention is satisfactorily amended in accordance with our rules. Otherwise, NRC adjudications quickly would lose order. Parties and licensing boards must be on notice of the issues being litigated, so that parties and boards may prepare for summary disposition or for hearing. Our procedural rules on contentions are designed to ensure focused and fair proceedings.

Id. at 100–01 (internal footnotes omitted).

In another recent decision, the Commission again emphasized that an intervenor should not be allowed to use its testimony to expand the scope of an admitted contention:

We have long required contention claims to be set forth “with particularity,” stressing that it “should not be necessary to speculate about what a pleading is supposed to mean.” Our proceedings would prove unmanageable—and unfair to the other parties—if an intervenor could freely change an admitted contention “at will as litigation progresses,” “stretching the scope of admitted contentions beyond their reasonably inferred bounds.” “Petitioners must raise and reasonably specify at the outset their objections to a license application.”

Entergy Nuclear Operations, Inc. (Pilgrim Nuclear Power Station), CLI-12-01, 75 NRC 39, 55–56 (2012) (internal citations omitted).

C. A Party Must Demonstrate that Its Witness is Qualified to Testify on Matters within the Scope of the Contention

In order to testify on technical issues in an NRC hearing, a witness must be competent to give an expert opinion and state adequately the factual basis for his or her opinion. *Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), LBP-05-04, 61 NRC 71, 81 (2005). “A witness may qualify as an expert by knowledge, skill, experience, training, or education to testify [i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue.” *Duke Energy Corp.* (Catawba Nuclear Station, Units 1 and 2), CLI-04-21, 60 NRC 21, 27–28 (2004) (internal quotation marks omitted, alteration in original). The party sponsoring the witness bears the burden of demonstrating that its witness is qualified to serve as an expert. *Id.* at 27.

III. Discussion

Based on the Commission precedent summarized above, the Board should exclude the Consolidated Intervenors' testimony and exhibits on Contentions 4 and 6. The Board should also exclude the testimony of Dr. Robert Moran, a joint witness of the Consolidated Intervenors and the Oglala Sioux Tribe, to the extent he argues that the Staff's use of license conditions to obtain additional information on water quality and hydrogeology is a *de facto* violation of the National Environmental Policy Act (NEPA). In addition, the Board should exclude the testimony of the Consolidated Intervenors' witness Susan Henderson on Contention 2, except to the extent she addresses possible contamination from the Black Hills Army Depot. Finally, for Contention 3, the Board should exclude the testimony of the Consolidated Intervenors' witnesses Susan Henderson, Dayton Hyde, Dr. Donald Kelley, and Linsey McLean.

A. The Board Should Exclude the Consolidated Intervenors' Evidence on Contentions 4 and 6

For Contention 4, the Consolidated Intervenors argue that the FSEIS does not adequately address groundwater consumption. The Consolidated Intervenors refer to the testimony of Dr. Moran, which the Oglala Sioux Tribe submitted as evidence (Ex. OST-001). Initial Statement at 8. The Consolidated Intervenors go further, however, citing the testimony of Susan Henderson (Ex. INT-007), Marvin Kammera (Ex. INT-011), and Dayton Hyde (Ex. INT-012) as support for their position. *Id.* This is impermissible, because Contention 4 is not one of the Consolidated Intervenors' contentions. *Prairie Island*, ALAB-244, 8 AEC at 863, 869 n.17; *South Texas*, ALAB-799, 21 NRC at 383; *Louisiana Energy Services*, CLI-04-35, 60 NRC at 626. In fact, the Board specifically rejected the Consolidated Intervenors' Contention F, which challenged the analysis of groundwater consumption in Powertech's application. *Powertech (USA) Inc.* (Dewey-Burdock In Situ Uranium Recovery Facility), LBP-10-16, 72 NRC 361, 408, 444 (2010). The Consolidated Intervenors did not later file a new contention on this issue in response to either the Staff's Draft Supplemental Environmental Impact Statement (DSEIS) or

Final Supplemental Environmental Impact Statement (FSEIS). Nor did they follow NRC procedures for adopting or co-sponsoring Contention 4. 10 C.F.R. § 2.309(f)(3).

For Contention 6, the Consolidated Intervenor's state that they "adopt the evidence, authority, and argument" of the Oglala Sioux Tribe. Initial Statement at 9. They also refer to testimony from Peggy Detmers concerning the presence of whooping cranes in the Dewey-Burdock area. Initial Statement at 10 (citing Ex. INT-010). As with Contention 4, however, Contention 6 is not the Consolidated Intervenor's contention. The Oglala Sioux Tribe submitted Contention 6, and the Consolidated Intervenor's have not followed NRC procedures for co-sponsoring or adopting the Tribe's contention. Accordingly, the Board should not accept Ms. Detmers' testimony and supporting exhibits (Exs. INT-010b through INT-010q) to the extent they address mitigation measures.²

In conclusion, the Board should exclude the Consolidated Intervenor's testimony and exhibits on Contentions 4 and 6. While the Consolidated Intervenor's may submit argument and proposed findings on these contentions, the evidence they have submitted is inadmissible in the hearing. *South Texas*, ALAB-799, 21 NRC at 383.

B. The Board Should Exclude Certain Testimony on Contentions 2 and 3 as Outside the Scope of the Contentions

As admitted by the Board, Contention 2 alleges that the FSEIS lacks information needed to adequately determine baseline water quality. *Powertech*, LBP-10-16, 72 NRC at 424.

Contention 3 alleges that the FSEIS fails to adequately characterize the Dewey-Burdock site

² *Prairie Island*, ALAB-244, 8 AEC at 869 n.17; *Louisiana Energy Servs.*, CLI-04-35, 60 NRC at 626. Although the Consolidated Intervenor's refer to Ms. Detmers' testimony when stating their position on Contention 6, Ms. Detmers does not specifically mention mitigation measures in her testimony (Ex. INT-010). If Ms. Detmers testifies during the oral portion of the hearing, however, the Board should not consider any testimony she offers on Contention 6.

and offsite hydrogeology to ensure confinement of fluids used during uranium recovery operations. *Id.* at 426.³

For Contention 2, the Oglala Sioux Tribe relies on the testimony of Dr. Moran (Exs. OST-001 and OST-018). Initial Statement at 19–21, Rebuttal Statement at 19–21. The Consolidated Intervenor also cite Dr. Moran’s testimony, along with the testimony of Susan Henderson (Ex. INT-007). Initial Statement at 4–5.

For Contention 3, both Intervenor cite the testimony of Dr. Moran. Tribe’s Initial Statement at 22–26, Tribe’s Rebuttal Statement at 22–26, Consolidated Intervenor’s Initial Statement at 5–6. The Consolidated Intervenor also cite the testimony of Dr. Hannan LaGarry (Exs. INT-013 and INT-020), along with the testimony of Susan Henderson (Ex. INT-007), Dr. Donald Kelley (Ex. INT-008), Dayton Hyde (Ex. INT-012), and Linsey McLean (Ex. INT-014a). Initial Statement at 6–8.

Consistent with Commission precedent, the Board should exclude certain portions of Dr. Moran’s testimony on Contentions 2 and 3. For Contention 2, the Board should also exclude certain portions of Ms. Henderson’s testimony. For Contention 3, the Board should exclude entirely the testimony of Ms. Henderson, Dr. Kelley, Mr. Hyde, and Ms. McLean.

1. Contentions 2 and 3: The Board Should Exclude Dr. Moran’s Testimony that the Staff’s Use of License Conditions to Gather Additional Data Violates NEPA

Dr. Moran argues that the Staff violated NEPA by including a license condition requiring Powertech to submit additional hydrological data before beginning operations in specific wellfields. Ex. OST-001 (Dr. Moran’s Initial Testimony) at Section II.C.2 (page 17) and Section III.E.2 (page 22); Ex. OST-018 (Dr. Moran’s Rebuttal Testimony) at Section A.2 (pages 2–4). For example, Dr. Moran states:

³ While Contentions 2 and 3 originally challenged the information in Powertech’s application, through the Board’s rulings these contentions migrated to the FSEIS. Memorandum and Order (Ruling on Proposed Contentions Related to the Final Supplemental Environmental Impact Statement), LBP-14-5 (April 28, 2014).

I have reviewed the opening written testimony of Mr. Lawrence (APP-037), Mr. Demuth (APP-013), and Mr. Fritz (APP-046) and it appears each confirms that the license conditions approved by NRC Staff allow a delay in the gathering of detailed hydrogeological data and water quality testing until after NRC license approval and National Environmental Policy Act (NEPA) analysis is complete. The confirmation of delayed gathering provides further support for my opinion that the data are inadequate to establish a hydrogeological and water quality baseline for the aquifers that would be impacted by the Dewey-Burdock Project.

Ex. OST-018 at 2. Dr. Moran argues that Powertech needed to provide this information at the pre-license stage, so that the Staff could consider the information during its NEPA review. *Id.* at 4.

The Board should exclude Dr. Moran's testimony on whether the Staff's use of a license condition to gather additional data violates NEPA. Dr. Moran is referring to License Condition 10.10, "Hydrologic Test Packages," which requires Powertech to submit 11 specific types of information to the NRC at least 60 days before injecting lixiviant in any wellfield. Ex. NRC-012 at 8–9. The Staff's use of a license condition to gather this additional hydrological data is supported by Commission precedent. The Commission addressed this issue specifically in *Hydro Resources*, rejecting the very argument Dr. Moran offers here:

Given the prescriptive nature of the license conditions and their applicable procedures or methodologies, and the hearing opportunity accorded to the intervenors to challenge the adequacy of those procedures, we find reasonable the Presiding Officer's conclusion that the intervenors' hearing rights are not violated by these license conditions. Further, as the Presiding Officer stated, "verification by the NRC Staff that a licensee complies with preapproved design or testing criteria 'is a highly technical inquiry not particularly suitable for hearing.'"

. . . .

Waiting until after licensing (although before mining operations begin) to establish definitively the groundwater quality baselines and upper control limits is, as the Presiding Officer stated, "consistent with industry practice and NRC methodology," given the sequential development of in situ leach well fields. The site-specific data to confirm proper baseline quality values, and confirm whether existing rock units provide adequate confinement cannot be collected until an *in situ* leach well field has been installed, a point described by the NRC staff's expert.

Hydro Resources, Inc. (P.O. Box 777, Crownpoint, New Mexico 87313), CLI-06-01, 63 NRC 1, 5–6 (2006) (footnotes omitted).

Based on *Hydro Resources*, the Board should exclude Dr. Moran's testimony to the extent he argues that the Staff's use of License Condition 10.10 to gather additional data is a *de facto* violation of NEPA. See 10 C.F.R. § 2.319(e) (authorizing the Board to restrict testimony that is irrelevant or immaterial to the issues within a contention). Excluding this testimony will focus Contentions 2 and 3 on the issues that are legitimately in dispute between the parties. For example, in Contention 2, Dr. Moran argues that Powertech's procedures for evaluating baseline water quality were flawed, and that these flaws render the Staff's analysis in the FSEIS inadequate (Ex. OST-011 at 16–18). In Contention 3, Dr. Moran argues the FSEIS insufficiently considers faults, fractures, breccia pipes, abandoned wells and boreholes, and other features that could provide hydrogeologic connections between aquifers (Ex. OST-001 at 18–26). Excluding Dr. Moran's testimony that the Staff's use of License Condition 10.10 to gather additional data is necessarily a violation of NEPA will keep the hearing focused on the merits of these other claims.

2. Contention 2: The Board Should Exclude Ms. Henderson's Testimony Except to the Extent She Discusses Possible Contamination from the Black Hills Army Depot

As admitted by the Board, Contention 2 claims that the Staff did not adequately evaluate the baseline quality of groundwater that may be affected by the Dewey-Burdock Project. In her testimony Ms. Henderson addresses numerous other issues, including geological features in the Dewey-Burdock area (*e.g.*, unplugged boreholes), the possible migration of contaminants as a result of uranium recovery operations, whether the Environmental Protection Agency (EPA) and South Dakota state agencies should grant Powertech an exemption from the Safe Drinking Water Act, Powertech's ownership structure, and nuclear security (Ex. INT-007 at 4–7). These issues are all outside the scope of Contention 2. Accordingly, the Board should exclude her testimony on these issues.

The only area of Ms. Henderson's testimony that arguably relates to Contention 2 is her statement that operations at the Black Hills Army Depot may have contaminated local water

supplies (Ex. INT-007 at 2). Even here the connection between her testimony and Contention 2 is tenuous, because she does not address the FSEIS and explain how her statements call into question the analysis in that document. Because this portion of Ms. Henderson's testimony arguably relates to Contention 2, however, and because Ms. Henderson's experience as former Chair of the Restoration Advisory Board for the Black Hills Army Depot might qualify her to testify on the extent of contamination from that site, the Staff is not moving to exclude this limited portion of her testimony on Contention 2.

3. Contention 3: The Board Should Exclude the Testimony of Ms. Henderson, Mr. Hyde, Dr. Kelley, and Ms. McLean

Contention 3 challenges the adequacy of hydrogeological information in the FSEIS. In addition to citing the testimony of Dr. Moran and Dr. LaGarry, the Consolidated Intervenors rely on the testimony of four other witnesses: Susan Henderson (Ex. INT-007), Dr. Donald Kelley (Ex. INT-008), Dayton Hyde (Ex. INT-012), and Linsey McLean (Ex. INT-014). Initial Statement at 7. The Consolidated Intervenors also cite a PowerPoint presentation intended to accompany Ms. McLean's testimony (Ex. INT-014a).

The testimony of Dr. Kelley and Ms. McLean falls entirely outside the scope of Contention 3, as does Ms. McLean's PowerPoint presentation. Dr. Kelley's testimony addresses toxic effects related to exposure to heavy metals. Ms. McLean's testimony and presentation address safety concerns related to using land application or settlement ponds for disposal of wastewater, reclamation of lands used during uranium recovery operations, and toxicity from bioaccumulation of heavy metals. None of this evidence relates to whether in the FSEIS the Staff adequately considered Powertech's ability to prevent fluids from migrating outside the aquifers in which it plans to operate.⁴ Accordingly, the Board should exclude it from the hearing. *Vogtle*, CLI-10-5, 71 NRC at 100; *Pilgrim*, CLI-12-01, 75 NRC at 55–56.

⁴ The Board's rulings on Contention 3 make clear that the contention is limited to whether the Staff adequately analyzed hydrogeological information relevant to assessing *groundwater* impacts, not surface water impacts. See, e.g., Memorandum and Order (Ruling on Proposed Contentions Related to the Final

The vast majority of the testimony from Ms. Henderson and Mr. Hyde also falls outside the scope of Contention 3. As stated above, Ms. Henderson raises issues such as whether the EPA and South Dakota state agencies should grant Powertech an exemption from the Safe Drinking Water Act, Powertech's ownership structure, and nuclear security (Ex. INT-007). Mr. Hyde discusses potential contamination of the Cheyenne River from surface spills and leaks at the Dewey-Burdock site, along with general concerns over uranium extraction (Ex. INT-012). All of these issues are unrelated to whether the Staff adequately analyzed the hydrogeology of the aquifers in which Powertech plans to operate. Because these arguments are outside the scope of Contention 3, the Board should not consider them in ruling on the contention. *Vogtle*, CLI-10-5, 71 NRC at 100; *Pilgrim*, CLI-12-01, 75 NRC at 55–56.

C. For Contention 3, the Board Should Exclude the Testimony of Ms. Henderson, Mr. Hyde, Dr. Kelley, and Ms. McLean Because the Consolidated Intervenors Have Not Shown that these Witnesses Have Expertise Relevant to the Contention

In their testimony, Ms. Henderson and Mr. Hyde also refer to certain geological features in southwestern South Dakota. Ms. Henderson states that the Dewey-Burdock area is replete with open pit mines and unplugged boreholes (Ex. INT-007 at 4). She also states that she is concerned Powertech's uranium recovery activities could mobilize contaminants associated with the Black Hills Army Depot (Ex. INT-007 at 5). Mr. Hyde states, "The land here is highly fractured and there is no way the mining companies can guarantee that the Inyan Kara, the Madison, and the other major aquifers will not become polluted and unusable to Man and animals." (Ex. INT-012 at 3). While the testimony of Ms. Henderson and Mr. Hyde on these issues is very general and does not challenge the FSEIS specifically, the issues they raise at least relate to the subject of Contention 3.

Supplemental Environmental Impact Statement), LBP-14-5, ("To the extent the Intervenors have concerns with the adequacy of the hydrogeologic analysis necessary to show adequate confinement and potential impacts to *groundwater*, this is already an issue set for hearing.") (emphasis added).

Nonetheless, the Board should exclude Ms. Henderson's and Mr. Hyde's testimony on Contention 3. The Consolidated Intervenors have not shown that Ms. Henderson and Mr. Hyde have scientific, technical, or other specialized knowledge enabling them to provide expert opinions on matters of hydrogeology. *Catawba*, CLI-04-21, 60 NRC at 27–28. While the Staff recognizes that Ms. Henderson and Mr. Hyde are both long-time residents of southwestern South Dakota with important interests in the region, the Consolidated Intervenors have not demonstrated how their testimony will assist the Board in resolving the technical issues within Contention 3. For that reason, the Board should exclude Ms. Henderson's and Mr. Hyde's testimony on this contention. *MOX*, LBP-05-04, 61 NRC at 81.

Nor have the Consolidated Intervenors shown that Dr. Kelley or Ms. McLean has expertise on the hydrogeological issues within Contention 3. Even if the Board finds their testimony within the scope of this contention, it should still exclude the testimony on that basis. *Catawba*, CLI-04-21, 60 NRC at 27–28; *MOX*, LBP-05-04, 61 NRC at 81. Neither Dr. Kelley's Statement of Professional Qualifications (Ex. INT-009) nor Ms. McLean's testimony (Ex. INT-014) demonstrates that they have expertise relevant to Contention 3.

In conclusion, the Consolidated Intervenors have the burden of showing that their witnesses are qualified to testify on the technical issues within Contention 3. *Catawba*, CLI-04-21, 60 NRC at 27. They have not carried that burden with respect to the testimony of Ms. Henderson, Mr. Hyde, Dr. Kelley, and Ms. McLean. The Board should therefore exclude the testimony of these witnesses on Contention 3.

VII. Conclusion

The Board should exclude the portions of the Consolidated Intervenors' and the Oglala Sioux Tribe's testimony and exhibits identified above.

Respectfully submitted,

*/Signed (electronically) by/
Michael J. Clark
Michael J. Clark
Counsel for the NRC Staff*

*/Signed (electronically) by/
Patricia A. Jehle
Patricia A. Jehle
Counsel for the NRC Staff*

Dated at Rockville, Maryland
This 22nd day of July 2014

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)	Date: July 22, 2014
Facility))	

CERTIFICATE OF SERVICE

Pursuant to 10 C.F.R. § 2.305, I certify that counsel for the NRC Staff served copies of the Staff's Motion in Limine via the NRC's Electronic Information Exchange (EIE) on July 22, 2014. Counsel for the Staff served those representatives exempted from filing through the EIE with copies of its Motion in Limine by electronic mail, also on July 22, 2014.

***/Signed (electronically) by/
Patricia A. Jehle***

Patricia A. Jehle
Counsel for the NRC Staff
U.S. Nuclear Regulatory Commission
Mail Stop O-15 D21
Washington, DC 20555-0001
(301) 415-8366
Patricia.Jehle@nrc.gov