

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) July 29, 2014

**Oglala Sioux Tribe’s Consolidated Response to
Powertech and NRC Staff Motions in Limine and Strike/Exclude**

Intervenor Oglala Sioux Tribe (“OST” or “Tribe”) hereby submits this Consolidated Response to the Motions in Limine and Strike/Exclude filed by Powertech and NRC Staff on July 22, 2014. Powertech and NRC Staff seek to exclude certain arguments and portions of the testimony and exhibits in this case submitted by the Tribe. As discussed herein, however, the Board should reject each Motion.

NRC Staff’s Motion

NRC Staff seeks to exclude testimony submitted by Dr. Moran regarding Contention 2 and 3 dealing with license conditions that provide for the future gathering and submission of additional data after licensing and after all National Environmental Policy Act (NEPA) processes are complete. NRC Staff Motion in Limine at 6-8. However, in making its request, NRC Staff misconstrues the Tribe’s argument. Specifically, NRC Staff asserts that the Tribe argues that Dr. Moran argues “that the Staff’s use of License Condition 10.10 to gather additional data is a *de facto* violation of NEPA.” However, Dr. Moran does not offer such testimony. Rather, as cited and even quoted by NRC Staff, Dr. Moran opines that “delayed gathering [of data] provides further support for my opinion that the [existing] data are inadequate to establish a

hydrogeological and water quality baseline for the aquifers that would be impacted by the Dewey-Burdock Project.” NRC Staff Motion at 7 (*quoting* Ex. OST-018 at 2).

Nowhere in Dr. Moran’s testimony does the categorical assertion alleged by NRC Staff appear. Indeed, Dr. Moran’s testimony does not make legal assertions as to compliance with NEPA, but rather that the delay of gathering necessary and relevant information renders the NRC Staff’s truncated analysis inadequate and unsupportable as a matter of scientific integrity and competency. Thus, NRC Staff’s request that the Board exclude testimony that Dr. Moran never presents is merely an exercise in the theoretical. Read properly, and without NRC Staff’s straw-man argument, the legal argument NRC Staff attempts to exclude is properly articulated in the Tribe’s Statement of Position, and properly relies upon Dr. Moran’s expert testimony.

Further, as it did in opposing admitted contentions, NRC Staff attempts to prematurely argue the issue on the merits, contending that “[t]he Staff’s use of a license condition to gather this additional hydrological data is supported by Commission precedent.” NRC Staff Motion at 7 (*citing and quoting* Hydro Resources Inc., CLI-06-01, 63 NRC 1, 5-6 (2006)). NRC Staff is certainly entitled to make this argument on the merits, which the Tribe contests, but such a merits argument cannot masquerade as a Motion in Limine to strike competent evidence prior to the hearing.

Dr. Moran is entitled to consider and incorporate all facts associated with this case to form his opinions as to the scientific competence and integrity of the analysis performed by NRC Staff – as he has done. Certainly, if NRC Staff wishes the Board to explore this matter further at the hearing, it is welcome to submit potential cross-examination questions for the Board to consider. However, the Motion to Strike on this issue should be denied.

Powertech's Motion

Powertech makes a vague and nonspecific request for the Board to “exclude any and all arguments offered by CI and the Tribe regarding any analyses or conclusions offered in NRC Staff’s Safety Evaluation Report (SER)” and seeks to have its request broadly apply “equally to any technical/safety challenges offered by CI and the Tribe directly challenging the SER and any use of such analysis and conclusions in NRC Staff’s FSEIS or final license conditions.”

Powertech Motion at 5. Powertech asserts that this argument relates to the “safety” components of Contentions 2 and 3 and to the environmental contentions “that factor ‘safety-related’ items in the FSEIS’ analyses and conclusions (i.e., Contentions 2-4, 6).” Powertech Motion at 5.

Second, Powertech seeks to exclude specific portions of Dr. Moran’s Opening Testimony dealing with water quality problems associated with historic mining and also specific pages of one of the Tribe’s exhibits. Powertech Motion at 14.

Powertech’s first argument – that the Tribe may not in any way address the analyses and conclusions in the SER - has been directly addressed by the D.C. Circuit Court of Appeals, and rejected. In reviewing NRC procedural regulations, the Circuit Court correctly summarizes the applicable rule:

Intervenors who had raised issues in a timely fashion and who had been admitted to the hearing thus may incorporate as of right new evidence raised in the SER and the NEPA reports bearing on those issues.

Union of Concerned Scientists v. United States Nuclear Regulatory Comm., 920 F.2d 50, 52

(D.C. Cir. 1990). Thus, Powertech’s argument is without basis in the law.

Further, Powertech’s first request should be rejected because it amounts to an improper and untimely Motion for Summary Disposition. This Board has already rejected NRC Staff’s Motion for Summary Disposition related to the safety components of Contentions 2 and 3 and

Powertech failed to file any such motion. The Board should not now hear Powertech, under the guise of a Motion in Limine, try to preclude “any and all” argument as to the safety components of admitted contentions. Notably, Powertech fails to support its argument with any legal authority whatever. As is relevant here, the safety components of Contentions 2 and 3 were properly admitted based on inadequacies in the Application materials and were properly set for hearing. While Powertech is certainly within its rights to refer to the analyses in the SER and FSEIS as part of its argument on the merits, there is no basis to simply immunize these analyses from any challenge in the context of properly pled and admitted contentions.

With respect to the environmental contentions identified by Powertech (Contentions 2, 3, 4, 6), the company conflates the SER with the Final Supplemental Environmental Impact Statement (FSEIS). The Tribe has properly submitted and had admitted contentions challenging the NRC Staff analysis in the FSEIS, including the Contentions (2, 3, 4, and 6) singled out by Powertech in its Motion. Throughout the Draft FEIS and the Final SEIS, the Tribe has consistently maintained that the NRC Staff NEPA analysis was deficient with respect to baseline analysis (Contention 2), hydrogeological integrity (Contention 3), water usage (Contention 4), and mitigation measures (Contention 6). The fact that the SER may or may not address some of these issues is not determinative to the challenge to the FSEIS. Again, Powertech may cite to any analyses it believes supports its position, but it has offered no credible basis to dismiss these contentions outright, as requested.

Similarly, Powertech’s request to strike “all aspects” of Dr. Moran’s testimony “associated with allegations on the adequacy of baseline surface water quality” as not within the scope of the admitted contentions should be rejected. Powertech Motion at 14. A review of the Tribe’s pleadings on its contentions in this proceeding demonstrates that this issue has been

repeatedly raised. OST-012 at 68 (¶¶ 37-38); Id. at 81 (¶ 4)(“Some of these waters are already contaminated by past uranium exploration and mining, with little or no remediation required by any regulatory agency, which suggests a great deal about the future oversight. The D-B site contains numerous old uranium workings (shallow open-pit and underground), accumulations of various contaminated waste materials, 1000s of unplugged boreholes, which likely provide hydraulic connections between various waterbearing units.”); Id. at 90 (¶ 42)(“In addition, several sources (Smith, 2005, pg. 9; ER, pg. 3-106) report that the area contains historic shallow mine workings, both open pits and short tunnels that would provide additional flow pathways.”); Id. at 94 (¶ 57)(“ The D-B project area has been historically mined and thousands of exploration holes have been drilled within the properties. Hence, it is imperative that high-quality baseline data be supplied to evaluate the actual extent of past impacts to water resources, and the success of future containment or aquifer restoration.”); Id. at 102 (¶ 95)(“Clearly the water quality in many of these zones is no longer true baseline due to all of the historical drilling/mining in many of these areas. These activities would have altered the original geochemical and bacteriological conditions, leading to significant changes in the water quality.”). Thus, any argument that water quality issues associated with past uranium mining activities at the Dewey-Burdock site are not within the scope of the admitted contentions is baseless.

Lastly, Powertech’s argument that “Slides 2-9, 12, 18-20, and 22-31 from Tribe Exhibit OST-018” be excluded is also misplaced. Powertech Motion at 14. As an initial matter, Exhibit OST-018 is Dr. Moran’s Rebuttal Testimony and contains no slides. Assuming Powertech intended to address Exhibit OST-005, the Board should withhold any decision on relevance until it hears Dr. Moran’s in-person testimony and can judge for itself the relevance of the proffered exhibit.

Importantly, Powertech provides no basis for its limited selection of specific numbered slides it wishes to strike and provides no authority for its position that every individual page of every exhibit be specifically discussed in the pre-filed testimony of witnesses. Indeed, if that were the standard, a multitude of exhibits (and individual pages of exhibits) submitted by Powertech and NRC Staff in this proceeding would necessarily need to be struck as well. Notably, this document was disclosed to the parties and duly submitted into the hearing file in May of 2014 and Powertech provided no objection of any kind at that time. The Tribe asserts that the relevance and admissibility of the powerpoint presentation identified by Powertech will be made abundantly clear during the hearing. Powertech is certainly free to renew its motion at that time, when the company can provide a more substantiated basis for its objection, and the Board can assess the objection on its merits. Powertech's unsupported "request" to have these materials stricken from the record at this preliminary stage, without more, should be rejected.

Conclusion

For the foregoing reasons, the Board should deny both NRC Staff's and Powertech's Motions to strike testimony and exhibits submitted by the Tribe.

Respectfully Submitted,

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Dated at Lyons, Colorado
this 29th day of July, 2014

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Consolidated Response to Motions in Limine and Strike/Exclude in the captioned proceeding were served via the Electronic Information Exchange (“EIE”) on the 29th 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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