

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) August 16, 2014

**Oglala Sioux Tribe’s Motion to Enforce Mandatory Disclosure Duties
Under 10 C.F.R. § 2.336**

Intervenor Oglala Sioux Tribe (“OST” or “Tribe”) hereby submits this Motion pursuant to 10 C.F.R. § 2.323 to remedy a breach of the mandatory disclosure duties by compelling disclosure of documents and data in the control or possession of the applicant that have come to the attention of the Tribe only in recent days. As discussed herein, the Tribe contends each of these documents and data collection are relevant to admitted contentions, but have not been disclosed despite the mandatory disclosure duties applicable to this Subpart L proceeding. 10 C.F.R. § 2.336(a).

Specifically, the Tribe seeks production of borehole data referenced in Powertech’s August 7, 2014 email motion to the Board. Exhibit OST-020 at 1 (attached). Further, the Tribe seeks several other documents, the existence of which was made known to the Tribe on August 14, 2014 through a disclosure made by the applicant pursuant to Canadian securities laws. *See* Exhibit OST-021 (Powertech Management Discussion and Analysis dated August 11, 2014)(attached). Examples in this latter category, referenced in Exhibit OST-021 include: “a take permit application was submitted to U.S. Fish and Wildlife Service in January 2014” and correspondence with BLM, including “a July 8, 2014 letter from BLM that requested additional information on the Company’s Plan of Operations,” and any responses thereto.

The Tribe conferred with the parties to this case pursuant to 10 C.F.R. § 2.323(b). Counsel for NRC Staff states that with regard to the borehole data referenced in the August 7, 2014 email motion, NRC Staff is unclear what data Powertech is referring to or whether those logs have been disclosed, and as a result takes no position pending clarification by Powertech. Regarding the take permit application, NRC Staff opposes the Tribe's motion as it is not yet clear how that document is relevant to the Tribe's contentions. As to the BLM correspondence, NRC Staff states that it is unsure as of the time of conferral whether the Staff received the letter or what its contents are, and thus takes no position. Counsel for Powertech opposes the Tribe's motion. Counsel for Consolidated Intervenors states that Consolidated Intervenors support the Tribe's Motion.

10 C.F.R. § 2.336 Requires Disclosure of Relevant Materials

As this proceeding is being conducted under 10 C.F.R. subpart L, 10 C.F.R. § 2.336 governs all discovery and disclosure of documents related to this proceeding. Section 2.336(a) requires "all parties . . . without further order or request from any party . . . disclose and provide . . .(2)(i) a copy, or a description by category and location, of all documents and data compilations in the possession, custody, or control of the party that are relevant to the contentions. . . ." 10 C.F.R. § 2.336(a)(2)(i).

NRC precedent bearing on the "relevancy" standard in 10 C.F.R. § 2.336 demonstrates that the standard is not a high one, and that the disclosure requirements of the NRC regulations are specifically designed to be "wide-reaching":

The regulation makes clear that each party must make the mandatory disclosures automatically without the need for a party to file a discovery request. As to the scope of this obligation, the Commission has recently affirmed that "mandatory disclosures ...

which apply to Subpart L proceedings, are wide-reaching.” *Crow Butte Resources, Inc.* (North Trend Expansion Project) CLI-09-12, 69 NRC 535, 572 (2009).

In the Matter of Progress Energy Florida, Inc. (Levy County Nuclear Power Plant, Units 1 and 2), LBP-10-23, 72 N.R.C. 692, 701 (2010). Indeed, this case further holds that the relevance test in NRC proceedings is even more broad than that applicable in federal court:

The *Federal Rules of Evidence* (FRE) provide some useful guidance. The FRE state that “‘Relevant evidence’ means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” Fed. R. Evid. 401.

...

[T]he relevance standard of 10 C.F.R. §2.336 is even more flexible than the relevance standard of Fed. R. Evid. 401. First, although the FRE are not mandated for NRC adjudicatory proceedings, the Commission has endorsed the use of the FRE as guidance for the Boards, with the express proviso that Boards must apply the Part 2 rules with *greater flexibility* than the FRE. *See* 69 Fed. Reg. at 2187; 10 C.F.R. § 2.319(d). Second, 10 C.F.R. § 2.336 is a *discovery* regulation, and the rules are clear that the scope of discovery is broader than the scope of admissible *evidence*. *See* 10 C.F.R. § 2.705(b)(1) (“It is not a ground for objection [to discovery] that the information sought will be inadmissible at the hearing if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.”). *See also* Fed. R. Civ. P. 26(b)(1). Third, the Commission has stated that the mandatory disclosures in Subpart L proceedings encompass a “wide range of information.” 69 Fed. Reg. at 2194.

Id. at 705-706(emphasis in original).

Borehole Data Referenced in Powertech’s August 7, 2014 Email Motion

In its August 7, 2014 email motion, in its attempt to argue that the Board should not find the hydrogeological information referenced in Exhibit OST-019 relevant, Powertech stated:

CI and the Tribe have made no showing how such logs will assist them with Contention 3 and never previously asked for borehole logs that Powertech used to generate the isopach maps, structure contour maps, etc (sic) regarding site stratigraphy in its application materials.

Exhibit OST -020 at 1.

Through this email, Powertech concedes that it has in its possession, custody, or control, but has not disclosed, data compilations (i.e., borehole logs) that the company used to generate components of its hydrogeological analysis (i.e., isopach maps, structure contour maps) submitted to NRC Staff. This analysis of the undisclosed data became the basis for NRC Staff's baseline hydrogeological analysis in its Final Supplemental Environmental Impact Statement (FSEIS). Because the Tribe's Contention 2 and Contention 3 challenge both Powertech's and NRC Staff's hydrogeological analysis and assessment of the site, this data is relevant to both of these contentions. As a result, this borehole data should have been disclosed by the applicant. Powertech's assertion that the Tribe "never asked for" this data is irrelevant, as the disclosure requirements of 10 C.F.R. § 2.336 explicitly apply without any necessity for any party to make any type of request. 10 C.F.R. § 2.336(a).

Take Permit Application Submitted to U.S. Fish and Wildlife Service in January 2014

Powertech's recently posted quarterly Management Discussion and Analysis, dated August 11, 2014, references a take permit application submitted to U.S. Fish and Wildlife Service in January 2014. Exhibit OST-021 at 4. To the Tribe's knowledge, and upon information and belief, this take permit application involves impacts to federally protected wildlife and potential mitigation measures, but the application has not been disclosed in this proceeding.

Also upon information and belief, the take permit application submission to the U.S. Fish and Wildlife Service was made under the Bald and Golden Eagle Protection Act (16 U.S.C. 668-668c). This Act requires a permit to be applied for where activities are conducted which may result in a "take" as defined under the Act. 16 U.S.C. § 668(a). "Take" is defined broadly so as

to include “pursue, shoot, shoot at, poison, wound, kill, capture, trap, collect, molest or disturb” without regard to intention to do so. 16 U.S.C. § 668c.

The U.S. Fish and Wildlife Service regulations that implement the Bald and Golden Eagle Protection Act provide for the issuance of permits that allow a “take” as defined under the Act. Importantly, the implementing regulations for the Bald and Golden Eagle Protection Act require the permittee to demonstrate to the agency that it has “avoided and minimized impacts to eagles to the extent practicable” 50 C.F.R. § 22.26(f)(5).

The Tribe’s Contention 6 challenges the lack of adequate analysis of mitigation measures in the FSEIS. Among the mitigation planning the Tribe addresses in the context of Contention 6 is impacts to wildlife, and specifically to avian wildlife species. Thus, any plans or measures the applicant has proposed or is representing will meet its obligation to show it has “avoided and minimized impacts to eagles to the extent practicable” under the U.S. Fish and Wildlife Service regulations is relevant to the Tribe’s Contention 6.

Powertech Exhibit APP-071 is a wildlife monitoring report dated July 2, 2014 and submitted to the State of South Dakota. This report references Powertech’s submission of a “non-purposeful take permit” to the U.S. Fish and Wildlife Service, and in connection therewith, also references an “Avian Monitoring and Mitigation Plan (Avian Plan)” as part of Powertech’s submittal to the Fish and Wildlife Service in the take permit application. Exhibit APP-071 at 1. The Tribe’s Opening and Rebuttal Statements specifically challenge the failure of NRC Staff to provide complete information with respect to avian mitigation in the FSEIS. OST Opening Statement at 34; OST Rebuttal Statement at 32. Thus, based on this showing, the Take Permit Application is relevant to the Tribe’s contentions under the “wide-ranging” relevance standard applicable to this proceeding and must be disclosed.

July 8, 2014 Letter from BLM Requesting Information on the Company's Plan of Operations and any Responses Thereto

Powertech's recently posted quarterly Management Discussion and Analysis, dated August 11, 2014, references a July 8, 2014 letter from the Bureau of Land Management (BLM) requesting additional information on the applicant's mining plan of operations (MPO) filed with that agency. The Powertech Management Discussion and Analysis also discloses that Powertech "anticipates it will submit of its (sic) response in August 2014." OST-021 at 4.

To the Tribe's knowledge neither of these documents have been disclosed in this proceeding. Thus, like NRC Staff, the Tribe is without sufficient knowledge to know precisely what the July 8, 2014 letter discusses or what information it contains. However, given the BLM's overriding obligation to "prevent unnecessary or undue degradation" to, and otherwise protect, public land resources from mining activities (*see* 43 U.S.C. § 3809.420), it is possible, if not probable, that the letter references protection of cultural resources (Contention 1A), baseline conditions of and/or measures for protection of aquifers (Contention 2 and Contention 3), analysis of water quantity issues (Contention 4), or development or implementation of mitigation measures (Contention 6). In any case, given the "wide-ranging" relevance test applicable to the disclosure requirement contained in 10 C.F.R. § 2.336(a), the Tribe contends this correspondence from BLM is likely to fall within Powertech's disclosure requirements.

As part of the conferral process, Powertech asserted that it had not yet responded to the BLM's July 8, 2014 letter seeking additional information. However, the Tribe seeks an order from this Board mandating that when such response is submitted, that it also be disclosed, based on the same showing discussed *supra*.

Conclusion

The Tribe contends that each of the documents or data compilations referenced herein are relevant to the admitted contentions and subject to mandatory disclosure by Powertech under 10 C.F.R. § 2.336(a). The Tribe therefore requests an Order from the Board requiring such disclosure. To the extent these documents or data compilations were not previously disclosed and present new information, the Tribe asserts that is allowed an opportunity to review the material for possible additional contentions pleading. To the extent the Board finds that Powertech has not complied with the disclosure requirements to a degree that warrants such action, the Tribe request the Board consider sanctions against Powertech, which could include invalidation of the license and denial of the application, as provided for in 10 C.F.R. § 2.336(e)(1).

Respectfully Submitted,

/s/ Jeffrey C. Parsons

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Attorneys for Oglala Sioux Tribe

Dated at Lyons, Colorado
this 16th day of August, 2014

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Motion to Enforce Mandatory Disclosures in the captioned proceeding were served via the Electronic Information Exchange (“EIE”) on the 16th day of August 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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