

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) October 9, 2014

Oglala Sioux Tribe and Consolidated Intervenors’ Motion to Extend Deadline for Submission of Testimony and Amend or File New Contentions

Intervenor Oglala Sioux Tribe (“OST” or “Tribe”) and Consolidated Intervenors (“CI”) hereby submit this Motion pursuant to 10 C.F.R. §§ 2.307 and 2.323 for an extension of time to submit testimony associated with substantial new information and data disclosed by the applicant Powertech (USA) Inc. pursuant to Board Order, and to file any new or amended contentions based thereon.

10 C.F.R. § 2.307 allows that “the time fixed or the period of time prescribed for an act that is required or allowed to be done at or within a specified time, may be extended or shortened by the Commission or the presiding officer for good cause, or by stipulation approved by the Commission or presiding officer.” 10 C.F.R. § 2.307(a).

The Federal Register Notice most recently adopting the 10 C.F.R. Part 2 regulations demonstrates that the authority of the Board to extend deadlines under 10 C.F.R. § 2.307 is broad and that showing “good cause” is not a particularly high standard:

It should be emphasized that the weather events and health issues described in this paragraph are examples that might satisfy the “good cause” standard in § 2.307. The presiding officer will ultimately determine on a case-by-case basis whether a participant has demonstrated good cause for a § 2.307 request to extend a filing deadline.

77 Fed.Reg. 46562, 46572 (Aug. 3, 2012). See also, *In the Matter of Amergen Energy Company, LLC* (Oyster Creek Nuclear Generating Station), 66 N.R.C. 327, 370 (December 18, 2007)(recognizing that availability of necessary staff and “voluminous record” are appropriate bases upon which to grant an extension of time); *In the Matter of Excelon Generation Company, LLC* (Clinton, North Anna, and Grand Gulf ESP Sites), 2004 WL 1398230 (N.R.C.)(June 3, 2004)(granting motion for extension, rejecting any applicability of an “unavoidable and extraordinary circumstances test” for an extension under 10 C.F.R. § 2.307).

In this case, as demonstrated herein and based on the attached Declaration of Dr. Hannan LaGarry, the Tribe and Consolidated Intervenors have met the good cause standard and are entitled to a reasonable extension of time to file supplemental testimony and any new or amended contentions based on the newly disclosed borehole data and maps. As discussed at the hearing and confirmed by the attached Declaration, Dr. LaGarry’s initial review of the data recently disclosed by Powertech verifies that significant time and resources will be required to review this voluminous amount of data.¹ Further, Dr. LaGarry confirms that the data is relevant to both Contentions 2 and 3.² See Declaration of Dr. Hannan LaGarry at ¶ 9; August 20, 2014 Hearing Transcript at page 940, line 3 – page 942, line 11; page 947, line 15 – page 955, line 17. Notably, Powertech witnesses also testified to the relevancy of this information to the water quality issues involving Contention 2. See August 20, 2014 Hearing Transcript at Page 947, line 19 – page 948, line 6.

¹ During the hearing, the Board instructed the Tribe and CI to proceed with an expert review of the newly-disclosed data and to inform the Board of the amount of time that would be necessary to conduct a meaningful review. August 21, 2014 Hearing Transcript at page 1321, line 11 – page 1322, line 24.

²The Tribe and Consolidated Intervenors reserve the right to assert that the data is relevant to other contentions based on full review of the disclosed data.

On September 12, 2014, Powertech announced it had made available at its office in Edgemont a substantial and large amount of newly disclosed data. The data at issue includes some twenty-five (25) boxes, plus five (5) standard file cabinets full of bore hole logs, maps, and other geological data. Additionally, on September 13, 2014 the Tribe received a DVD containing in excess of 16,000 separate digital files of various formats and sizes purporting to be digitized borehole data acquired from Energy Fuels. No meaningful index of the nature, dates, or content of the files was provided and no information was provided as to the file types from which the files were generated or what programs were used to create or open the files. The parties have engaged in a preliminary discussion of how to ensure the disclosed electronic data is in “reasonably usable form” but have not yet fully conferred on how to best resolve this issue. Fed.R.Civ.Pro. 34(b)((2)(E)(ii).

On September 13 and 14, 2014, the Tribe’s and CI’s expert, Dr. Hannan LaGarry, traveled to Edgemont to begin an initial review of the scope of the data made available for review in Edgemont in order to provide a realistic estimate of the time it would take for him to perform a competent review and analysis of the information. Additionally, upon receiving the electronic data and commencing a review, on September 18, 2014 counsel for the Tribe sent an email to counsel for Powertech requesting additional information as to the nature and content of the digital files. Specifically, counsel requested information on whether any indexes of the thousands of files existed and what computer programs the files were created with or through which they could be accessed. On September 22, 2014, counsel for Powertech sent an email relaying the applicant’s responses.

On September 26, 2014, with the information provided by counsel for Powertech on September 22, 2014, and after Dr. LaGarry had conducted an initial review of both the electronic

files and the scope of the physical files located in Edgemont, counsel for the Tribe sent an email to all counsel seeking conferral on a schedule that would allow Dr. LaGarry and his staff to conduct a reasonable review of all of the disclosed data, both electronic and physical, and requesting that the files be made available in Rapid City, which would significantly expedite Dr. LaGarry's review and minimize the costs of travel to do the review. On September 30, 2014, counsel for Powertech responded, but only to seek additional specifics as to days of the week and other details related to the Tribe's proposed schedule for Dr. LaGarry and his staff to review and analyze the data. Counsel for the Tribe responded the next day, on October 1, 2014, providing the requested detail. Only on October 6, 2014, did counsel for Powertech respond to the Tribe's conferral, and only with blanket opposition to any additional time for an expert to review the data and refusing without explanation any requests to make the data available in any location other than Edgemont.

Based on conferral, counsel for NRC Staff stated that NRC Staff does not oppose an extension of up to three weeks for the Tribe and CI to submit a motion for additional testimony related to the newly disclosed data. NRC Staff counsel also stated it would also not oppose a motion from intervenors at the end of their proposed extension period for a re-opening of the hearing record, to the extent the intervenors' expert review identifies additional issues associated with the data. Further, NRC Staff requested that if any additional time be allowed, it be for review and testimony related only to the newly disclosed geological data – so as to allow briefing and Board resolution of any contentions not related to the geological data to move forward as soon as possible.

As described in the attached Declaration of Dr. Hannan LaGarry, a meaningful review of this extensive amount of data would, at a minimum, take him and his team approximately

twenty-four (24) full days of review. However, the availability of his staff would be dependent on the material being available for review in Rapid City. As discussed, counsel for the Tribe requested Powertech's position on this matter, and was told Powertech objected – but no substantive or practical reason for this position was provided. Assuming the parties or the Board can resolve this issue so as to ensure an expedited review, given Dr. LaGarry's pre-existing commitments and obligations, his team could conduct the review up to three full days per week. Including the necessary time to prepare a scientifically competent analysis of the data and prepare testimony, along with allowance for contingencies of potential weather-related travel difficulties, intervening holidays, and other exigencies such as possible sickness, an approximate 12 week work schedule is proposed. As a result, the Tribe and CI request an extension up to and including **January 9, 2014** for the submission of additional testimony and any potential amended or new contentions supported by the newly disclosed data.

The testimony at the hearing strongly supports this minimum time necessary to conduct an adequate review of the massive amount of relevant data newly-disclosed by Powertech. Indeed, Powertech's own witness at the hearing, Mr. Lawrence, testified that it has taken Powertech's experts in excess of six years to collate and analyze the partial data set on which the SER and application (and subsequently, the FSEIS) were based. Specifically, Mr. Lawrence testified that:

I know Dr. Moran thinks a couple of guys could knock out something pretty quickly. These maps have been in progress for about six years by a geologist who has spent most of his life working this data and understands these types of formations and these types of roll-front deposits very well. But it's not something that's very easy to do. It takes a full time dedicated geologist to develop this information. That's why the NRC, they only review portions of that, particularly in areas that are contentious or in this particular instance they also wanted to see the Fuson isopach map. They requested the data and generated their own maps and were able to reasonably replicate what Powertech has done.

Hearing Transcript, August 20, 2014, page 954, line 23 – page 955, line 11.

Further, discussion among the Board members and witnesses confirmed the time and effort-intensive review that is necessary in order to competently analyze the type of borehole logs at issue in this case:

JUDGE COLE: For comparison purposes with other logs would the digitized be a much easier way to compare them?

MR. LAWRENCE: Not necessarily. I know most people who are skilled at correlating logs typically will still slide logs, you call it. You place them side by side and adjust them and see where your zones are lining up.

JUDGE COLE: You just roll out the papers and compare them?

MR. LAWRENCE: Yes. I've tried to do it electronically on some programs. I find it frustrating. I go back to the paper.

Hearing Transcript, August 20, 2014, page 956, line 17 – page 957, line 4.

Dr. LaGarry's attached Declaration further confirms these aspects. Specifically, Dr. LaGarry testifies that side by side review of the physical logs is required and that this manual review of the files in each box is necessary in order to allow for detailed and complete review. Declaration of Dr. Hannan LaGarry at ¶ 4. As was stated at the hearing, the Tribe and CI believe that Powertech's own conduct - withholding the relevant data while under a duty of full disclosure - is the source of any prejudice that may arise from any delay in the proceedings occasioned by the need for the review of this data, based on the company's failure to disclose the data previously. Importantly, Powertech has identified no prejudice that would flow from allowing adequate time for review of information that has been in Powertech's possession, at least in part, since prior to the hearing. By contrast, a denial of a reasonable opportunity for the Tribe and CI to adequately review the voluminous data disclosed will cause prejudice to intervenors by effectively depriving the intervenors the ability to meaningfully prosecute their case.

Based on the foregoing and the attached Declaration, the Tribe and CI submit that Dr. LaGarry's initial review has revealed that the newly disclosed data is relevant to the Contentions 2 and 3 and that the proposed timeline in the present motion provides the minimum time necessary to conduct a scientifically competent review of the voluminous amount of newly-disclosed data. Therefore, the Tribe and CI request that unless a compelling reason exist this Board order the documents be made available in Rapid City, South Dakota and also grant an extension of time up to and including January 9, 2014 for the parties to submit supplemental testimony and any new or amended contentions as pertains to this data. This resolution will allow the remainder of the contentions to proceed towards resolution, while ensuring a reasonable opportunity for the parties to complete the record on Contentions 2 and 3.

Respectfully Submitted,

/s/ Jeffrey C. Parsons

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Attorneys for Oglala Sioux Tribe

Dated at Lyons, Colorado
this 9th day of October, 2014

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Motion to Extend Deadline in the captioned proceeding were served via the Electronic Information Exchange (“EIE”) on the 9th day of October 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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