

October 16, 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 RESPONSE TO REQUEST FOR EXTENSION OF TIME**

**I. Introduction**

The U.S. Nuclear Regulatory Commission (NRC) Staff responds to the motion for an extension of time that the Oglala Sioux Tribe and the Consolidated Intervenors (collectively “the Intervenors”) filed on October 9, 2014.<sup>1</sup> The Intervenors ask the Board to extend the deadline for submitting evidence addressing the well log data that Powertech disclosed on September 12, 2014. Under the Board’s post-hearing order, motions to admit new evidence based on the well log data were due October 14, 2014.<sup>2</sup> The Intervenors ask the Board to extend that deadline until January 9, 2015, which would require extending the Board’s deadline by 87 days.<sup>3</sup>

The Board should deny the Intervenors’ motion for an 87-day extension of time. The Staff does not oppose the Board granting the Intervenors a brief extension of time to prepare testimony addressing the well log data. The Board and the other parties should not have to wait until January 2015, however, to learn whether the Intervenors will even be submitting testimony

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<sup>1</sup> Oglala Sioux Tribe and Consolidated Intervenors’ Motion to Extend Deadline for Submission of Testimony and Amend or File New Contentions (October 9, 2014).

<sup>2</sup> Post Hearing Order (September 8, 2014) at 13, 19.

<sup>3</sup> Motion at 5.

on that data. Because the Intervenors failed to provide any testimony on the well log data by the October 14, 2014 deadline set by the Board, and because the Intervenors' expert cannot even state definitively whether he will be available to review the data further, the Board should deny the Intervenors' requested extension of time. If the Intervenors are able to review the well log data further, and if they believe there is significant new information to present to the Board, they can file a motion under 10 C.F.R. § 2.326 to reopen the hearing record.

## II. Legal Standard

The Board may extend a filing deadline for good cause. 10 C.F.R. § 2.307(a). In deciding whether a party has shown good cause for extending a filing deadline, the Board must consider whether there are special circumstances, such as weather events or health issues, warranting an extension. *Detroit Edison Co. (Fermi Unit 3)*, CLI-09-04, 69 NRC 80, 82 (2009); *Amendments to Adjudicatory Process Rules and Requirements*, 77 Fed. Reg. 46,562, 46,572 (Aug. 3, 2012). In reaching its decision, the Board must consider not only why a party cannot meet the filing deadline, but *how long* an extension the party is requesting. See *Fermi*, CLI-09-04, 69 NRC at 82 (denying request for a 90-day extension of time). The Board must also consider that a party's personal obligations or limited resources do not relieve the party of its hearing obligations. *Wisconsin Elec. Power Co. (Point Beach Nuclear Plant, Unit 1)*, ALAB-696, 16 NRC 1245, 1261 n.29 (1982); *Texas Utilities Generating Co. (Comanche Peak Steam Electric Station, Units 1 & 2)*, LBP-82-18, 15 NRC 598, 599 (1982).<sup>4</sup>

Even where the Board denies a party's request for an extension of time, the party is not entirely foreclosed from presenting additional evidence to support its position. Under the NRC's

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<sup>4</sup> See also *Fermi*, CLI-09-04, 69 NRC at 82 ("But many, if not most, groups that seek to intervene in NRC proceedings are organizations that rely on volunteers and must draft contentions while also balancing other obligations. Consequently, Petitioners have shown no special circumstances amounting to good cause for an extension.").

rules, a party can move to reopen a closed hearing record and have the Board consider additional evidence. 10 C.F.R. § 2.326. A party can move to reopen the record based on either a safety or environmental issue. 10 C.F.R. § 2.326(a)(2). If the motion relates to a contention previously in controversy during the hearing, the moving party need not meet the additional requirements for new or amended contentions in order for the Board to grant its motion. 10 C.F.R. § 2.336(d). Although the standard for reopening the record is high—the moving party “must demonstrate that a materially different result would be or would have been likely had the newly proffered evidence been considered initially”—the Commission has emphasized that a Board must not keep the record open so that a party can avoid having to meet this standard. *See Virginia Elec. & Power Co.* (Combined License Application for North Anna Unit 3), CLI-12-14, 75 NRC 692, 700 (2012) (“While our rule governing motions to reopen sets a high standard—focusing on the timeliness, seriousness, and materiality of the new claim—it by no means prohibits hearings on significant new safety or environmental issues. The very purpose of having the reopening rule is to make sure that petitioners have an opportunity to raise serious issues after the close of the record.”) (footnote omitted).

### **III. Discussion**

The Intervenors rely on the declaration of Dr. Hannan LaGarry to support their extension request.<sup>5</sup> Dr. LaGarry is one of the Intervenors’ experts on hydrogeology, and during the recent hearing he provided written and oral testimony on several contentions, including Contentions 2 and 3. Dr. LaGarry states that, based on his preliminary review of Powertech’s well log data, he believes the data “are likely to be highly relevant to Contentions 2 and 3 and may provide a sufficient number of data points for me to create stratigraphic cross sections and geologic maps that support the Oglala Sioux Tribe and Consolidated Intervenors’ position that there is a lack of adequate containment.” Declaration at ¶ 9. Dr. LaGarry states that, to complete his review of

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<sup>5</sup> Declaration of Dr. Hannan LaGarry (October 9, 2014).

the well log data, he will need an additional 48 days if he is working alone, and 24 days if he has the help of two student assistants. *Id.* at ¶¶ 7, 8. Dr. LaGarry also states, however, that completing this review “assumes that my research appointment is redirected to this task” and that he has “asked for, but not yet received, approval for this activity.” *Id.*

Dr. LaGarry’s declaration does not show special circumstances warranting an 87-day extension of time. As Dr. LaGarry acknowledges, the Intervenors could complete their review of the well log data in as little as 24 days, and up to 48 days if Dr. LaGarry is working alone. The Staff therefore would not oppose an extension of up to three weeks to submit testimony.<sup>6</sup> The Intervenors’ need for additional time to complete their review, however, results wholly from the personal obligations of Dr. LaGarry and his assistants or from the Intervenors’ inability to find other qualified personnel to review the well logs. These are factors that the Commission has found insufficient to warrant granting an extension of time as lengthy as the Intervenors seek here. *Fermi*, CLI-09-04, 69 NRC at 82.

The Board should also consider that the Intervenors base their request for an 87-day extension of time on the assumption that Dr. LaGarry needs to conduct a complete review of the well logs in order to determine how the logs support the contentions in the hearing. In their prefiled and oral testimony, however, the Intervenors focused on specific aspects of the Dewey-Burdock hydrogeology about which they are concerned. The Intervenors fail to explain why they need 117 days—the original 30-day period plus an 87-day extension—to determine what the logs say about their areas of particular concern. As the Staff demonstrated in its testimony filed on October 14, 2014, the 30-day period allotted by the Board was sufficient to review the well logs most relevant to determining whether certain geologic features mentioned by the Intervenors during the hearing are present at the Dewey-Burdock site. *See, e.g.*, Ex. NRC-158

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<sup>6</sup> A three-week extension of the initial 30-day review period would bring Dr. LaGarry’s available review time—the initial review period plus the extension—to 51 days.

at A.6 (last paragraph), A.7 (discussion under “Analysis of Closely Spaced Drill Hole Logs”), A.9, A.10.

The Staff would also emphasize that right now it is unclear if Dr. LaGarry will even be able to continue reviewing the well log data. Declaration at ¶¶ 7, 8. If Dr. LaGarry is able to continue his review but there is a delay in him receiving approval of this activity, the delay will cut into his review time. This will likely result in another request for the Board to extend the filing deadline for testimony. In other words, although the Intervenors seek an 87-day extension of time, they do not in fact appear to know precisely how much time they will need to submit testimony.

The Staff respectfully submits that, under these circumstances, the Board should deny the Intervenor’s request for an 87-day extension of time. If Dr. LaGarry can continue reviewing the well log data, and if he finds information that the Intervenors believe significantly affects the conclusions in the Final Supplemental Environmental Impact Statement, the Intervenors can move to reopen the hearing record.<sup>7</sup> This approach avoids a substantial delay in the outcome of the hearing,<sup>8</sup> and it is consistent with recent Commission precedent emphasizing that the

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<sup>7</sup> In their motion, the Intervenors state that “NRC Staff counsel 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.” Motion at 4. To clarify, the Staff’s position is that, if the Board grants an extension of time and the Intervenors file testimony within the extended period, the Intervenors would not need to file a motion to reopen the record. If the Board does not grant an extension, or if the Intervenors seek to file testimony after any extended deadline, the Intervenors *would* need to move to reopen the record. In that case, if the Intervenors identified significant new information bearing on the Staff’s analysis in the FSEIS, the Staff would not oppose a motion to reopen the record, and in fact the Staff would be required to independently update the FSEIS under 10 C.F.R. § 51.92. This is not to say, however, that the Staff would necessarily agree with the Intervenors that any newly identified information is “significant.”

<sup>8</sup> See *Hydro Resources, Inc.* (2929 Coors Road Suite 101, Albuquerque, NM 87120), CLI-99-1, 49 NRC 1, 1 (1999) (stating that Commission policy “discourages extensions of deadlines, absent extreme circumstances, for fear that an accumulation of seemingly benign deadline extensions will in the end substantially delay the outcome of the case.”).

“very purpose of having the reopening rule is to make sure that petitioners have an opportunity to raise serious issues after the close of the record.”<sup>9</sup>

#### **IV. Conclusion**

The Board should deny the Intervenors’ motion for an extension of time to submit testimony on the well log data Powertech disclosed on September 12, 2014.

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 16<sup>th</sup> day of October 2014

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<sup>9</sup> *North Anna*, CLI-12-14, 75 NRC at 700. The Staff acknowledges that the procedural posture in *North Anna* differed slightly from the present case, because in *North Anna* the Board had resolved all contentions before it. Nonetheless, *North Anna* highlights that a Board should not refuse to close the record out of concern that it will deny an intervenor the opportunity to raise serious issues. See *id.* at 700 (“The very purpose of having the reopening rule is to make sure that petitioners have an opportunity to raise serious issues after the close of the record.”).

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CERTIFICATE OF SERVICE

Pursuant to 10 C.F.R. § 2.305, I certify that counsel for the NRC Staff served copies of the NRC Staff's Response to the Intervenors' Extension Request via the NRC's Electronic Information Exchange (EIE) on October 16, 2014. Counsel for the Staff served those representatives exempted from filing through the EIE with copies of its letter by electronic mail, also on October 16, 2014.

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

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