

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

William J. Froehlich, Chairman
Dr. Richard F. Cole
Dr. Mark O. Barnett

In the Matter of

POWERTECH USA, INC.

(Dewey-Burdock
In Situ Uranium Recovery Facility)

Docket No. 40-9075-MLA

ASLBP No. 10-898-02-MLA-BD01

October 22, 2014

ORDER

(Granting in Part Motion to Extend Deadline)

Background

On August 16, 2014, the Oglala Sioux Tribe filed a motion¹ seeking disclosure of certain new data referred to by Powertech in an August 7, 2014 email² and other documents referenced in a filing required by Canadian securities laws.³ The Oglala Sioux Tribe alleged Powertech had failed to disclose borehole/electronic data logs, a take permit application that was “submitted to U.S. Fish and Wildlife Service in January 2014 and correspondence with BLM, including a July

¹ Oglala Sioux Tribe’s Motion to Enforce Mandatory Disclosure Duties Under 10 C.F.R. § 2.336 (Aug. 16, 2014) [hereinafter OST Motion to Enforce Disclosure].

² RE: NRC Proceeding “Powertech USA 40-9075-MLA,” Email from Christopher Pugsley, Powertech Counsel, to Licensing Board Judges (Aug. 7, 2014); see also Powertech Uranium (Azarga Uranium) Enters into Data Purchase Agreement for Dewey-Burdock Project (July 16, 2014) (Ex. OST-019).

³ Powertech Management Discussion and Analysis (Aug. 11, 2014) (Ex. OST-021).

8, 2014 letter from BLM that requested additional information on the Company's Plan of Operations, and any responses thereto."⁴

On August 19, 20 and 21, 2014, the Board held an evidentiary hearing at the Hotel Alex Johnson in Rapid City, SD concerning seven contentions raised by the Oglala Sioux Tribe and the Consolidated Intervenors.⁵ At the hearing the Board heard argument from counsel and asked each party's geologic witnesses questions regarding the relevancy of Powertech's newly acquired data logs.⁶ The Board then ruled that the data logs were relevant to Contention 3 and that an "opportunity for this data to be viewed by all parties to the case" must be given by Powertech in order for it to fulfill its mandatory disclosure duties.⁷

On August 26, 2014, the NRC Staff and Powertech both submitted written responses to the Tribe's August 16 motion. Regarding the data logs, the Staff stated that it believed Powertech had already offered to make this data available.⁸ Powertech's response stated that it had proposed a protective order to preserve the confidential nature of the information and had agreed to produce CD copies of any and all digitized data.⁹

In a post hearing Order ruling on this dispute, the Board reiterated its conclusion that the logs were relevant and must be made available to the intervenors and the NRC Staff

⁴ OST Motion to Enforce Disclosure at 1.

⁵ Notice of Evidentiary Hearing, 79 Fed. Reg. 42,836 (July 23, 2014).

⁶ Tr. at 880–966.

⁷ Tr. at 967.

⁸ NRC Staff's Response to Oglala Sioux Tribe's August 16, 2014 Motion (Aug. 26, 2014) at 1.

⁹ Powertech (USA), Inc. Response to Oglala Sioux Tribe's Motion for Mandatory Disclosures (Aug. 26, 2014) at 2. After "consent[ing] to the Tribe's request for borehole logs," *Id.* at 2, Powertech filed a Motion for Reconsideration in which it attempted to narrow the scope of the proceeding, and argued that effectively no data other than that reviewed by the NRC Staff could be relevant to the admitted contentions in this proceeding. Powertech (USA), Inc. Motion for Reconsideration of the Licensing Board's August 20, 2014 Ruling on Relevancy for Mandatory Disclosures (Sept. 2, 2014) at 3.

immediately and also concluded that the take permit, the avian plan documents, and the BLM correspondence were relevant to various contentions and must also be disclosed by Powertech.¹⁰ The Board held the record open pending supplemental testimony or additional exhibits based on the newly disclosed materials to “be filed within 30 days of their availability to the parties.”¹¹ The Board also ordered that upon disclosure the parties submit a Joint Notice of Disclosure to the Board indicating that all materials had been disclosed.¹²

On September 12, 2014 Powertech emailed all parties and the Board’s law clerk¹³ copies of the draft avian management plan, the take permit, and BLM correspondence; also representing that “the Joint Update to the Board on disclosure will be filed as soon as counsel can confer.”¹⁴ On October 9, 2014, not having received an update, the Board again ordered the parties to file a status report on the disclosure of the data logs.¹⁵ The same day, the Oglala Sioux Tribe and Consolidated Intervenors submitted a motion to extend the deadline for filing new contentions.¹⁶ On October 14, 2014 the parties submitted status reports on Powertech’s disclosures, agreeing that Powertech made all data ordered to be disclosed available on

¹⁰ Post Hearing Order (Sept. 8, 2014) at 7–8, 11–12 (unpublished).

¹¹ Id. at 13.

¹² Id. at 19.

¹³ Before this email was sent the Board granted a Joint Motion to Amend Protective Order to Include Documents to be Disclosed under September 10, [sic] 2014 Licensing Board Order (Sept. 11, 2014). Order (Granting Joint Motion to Amend Protective Order) (Sept. 12, 2014) (unpublished).

¹⁴ Disclosure of Non-Confidential Documents, Email from Christopher Pugsley, Powertech Counsel, to All Counsel (Sept. 12, 2014).

¹⁵ Order (Requiring Status Report on Outstanding Mandatory Disclosures) (Oct. 9, 2014).

¹⁶ Oglala Sioux Tribe and Consolidated Intervenors’ Motion to Extend Deadline for Submission of Testimony and Amend or File New Contentions (Oct. 9, 2014) [hereinafter Motion to Extend].

September 12, 2014.¹⁷ As a result, the deadline to submit motions to admit additional testimony/exhibits was October 14, 2014.

The Motion to Extend relies on a Declaration by Dr. Hannan LaGarry which asserts that the intervenors will require significantly more time and resources to review the newly disclosed data.¹⁸ Intervenors request that the Board 1) order the documents be made available in Rapid City, and 2) grant a filing deadline extension until January 9, 2015.¹⁹ Powertech²⁰ and the NRC Staff²¹ both responded to intervenors' extension request.

Legal Standard

10 C.F.R. § 2.307(a) provides that a filing deadline "may be extended or shortened either by the Commission or the presiding officer for good cause, or by stipulation approved by the Commission or the presiding officer." Good cause in this section is not explicitly defined. This section was established by Amendments to Adjudicatory Process Rules and Related Requirements, 77 Fed. Reg. 46,561, in which it is made clear that "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."²²

¹⁷ Powertech (USA), Inc., NRC Staff, and Oglala Sioux Tribe Update on Status of Mandatory Disclosures (Oct. 14, 2014) at 2; CI Update on Status of Mandatory Disclosures (Oct. 14, 2014) at 2.

¹⁸ Motion to Extend, Decl. of Dr. Hannan LaGarry ¶¶ 7–8.

¹⁹ Motion to Extend at 2, 7. The Oglala Sioux Tribe filed a motion to admit OST-022 through OST-026 on October 14, 2014, and a filing extension is only sought concerning the data logs. Oglala Sioux Tribe Motion to Admit Additional Exhibits (Oct. 14, 2014).

²⁰ Powertech (USA), Inc.'s Response to Consolidated Intervenors and Oglala Sioux Tribe Motion for Extension of Time (Oct. 14, 2014) [hereinafter Powertech Response].

²¹ NRC Staff's Response to Request for Extension of Time (Oct. 16, 2014) at 1.

²² 77 Fed. Reg. 46,561, 46,572 (Aug. 3, 2012).

Board Ruling

In striving to conduct a fair hearing, the Board seeks to avoid unnecessary delays and move as expeditiously as possible towards resolution of this proceeding.²³ However, the expeditious completion of a proceeding must be pursued “while still ensuring that hearings are fair and produce an adequate record for decision.”²⁴

At the evidentiary hearing, when discussing the timing of review of the newly disclosed material, the Board encouraged an efficient review with “a response back to the Board as quickly as possible, because we do need to close the record.”²⁵ In the Board’s Post Hearing Order, intervenors were given 30 days from the time of disclosure to submit motions to admit additional testimony/exhibits.²⁶ Dr. LaGarry’s October 9, 2014 declaration states that after a partial review, the newly disclosed data “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.”²⁷ Dr. LaGarry states that a thorough review of the data will take him at least 24 and up to 48 more days to complete,²⁸ and intervenors ask for an extension until January 9, 2015.²⁹

²³ Hydro Resources, Inc. (2929 Coors Road, Suite 101, Albuquerque, NM 87120), CLI-99-1, 49 NRC 1, 3 (1999); see also Statement of Policy on Conduct of Adjudicatory Proceedings, CLI-98-12, 48 NRC 18, 19, 24 (1998).

²⁴ Statement of Policy, CLI-98-12, 48 NRC at 24.

²⁵ Tr. at 1323.

²⁶ Post Hearing Order (Sept. 8, 2014) at 19 (unpublished). The Board based this 30 day deadline on the timeframe for submission of new or amended contentions. Id. at 13.

²⁷ Motion to Extend, Decl. of Dr. Hannan LaGarry ¶ 9.

²⁸ Id. at ¶ 7–8.

²⁹ Motion to Extend at 7.

Powertech opposes any extension to the filing deadline, which it claims would submit the company to prejudice “in the fact that the remaining permits, authorizations, and hearings for the Dewey-Burdock ISR Project are being held up, as other federal and State agencies are awaiting final decisions from the Licensing Board.”³⁰ The NRC Staff opposes a three month extension as unnecessary, but suggests that it would not oppose a three week extension, which it argues is sufficient to review the most relevant well logs.³¹

An adequate record in a subpart L proceeding requires all parties have access to relevant documents. The disclosure requirement, 10 C.F.R. § 2.336(a)(2)(i), states that:

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, provided that if only a description is provided of a document or data compilation, a party shall have the right to request copies of that document and/or data compilation.

These disclosure requirements are mandatory. However, in this proceeding the Board has been forced to repeatedly rule that data it found relevant³² to Contention 3 must be disclosed.

Powertech initially argued that the data logs were not disclosed because they were not relevant.³³ In its response to the Motion to Extend, Powertech now argues that referencing electronic logs in its license application and press release supplied the required “description by

³⁰ Powertech Response at 9–10.

³¹ NRC Staff’s Response to Request for Extension of Time (Oct. 16, 2014) at 4. The NRC Staff reviewed all newly disclosed documents, and filed a motion to admit supplemental testimony and exhibits on October 14, 2014. NRC Staff’s Motion to Admit Testimony and Exhibits Addressing Powertech’s September 14, 2014 Disclosures (Oct. 14, 2014).

³² Powertech’s own witness, Mr. Errol Lawrence, APP-038, agreed that the electronic logs are, in the technical sense of the word, relevant: “Judge Barnett: [The electronic logs] would be part of something that would be relevant to helping you answer the question in Contention 3? Mr. Lawrence: Yes. They are and they have been used extensively.” Tr. at 937.

³³ “The data identified in Tribe Exhibit OST-019 are not at all relevant . . . and Powertech should not be required to disclose the data.” Powertech (USA), Inc.’s Response to Licensing Board Order Regarding Data Disclosure (Aug. 12, 2014) at 3.

category and location” of documents and data relevant to a contention.³⁴ Since Powertech did not believe this material was relevant at the time, what references it supplied to the newly disclosed data cannot have been intended to comply with the description requirement in 10 C.F.R. § 2.336(a)(2)(i). In addition, a section 2.336(a)(2)(i) ‘description’ requires more than mere mentions of documents in filings before the agency. A section 2.336(a)(2)(i) description should properly be a separate document, giving “a description by category and location” of all relevant documents and data in order to give all parties a meaningful chance to evaluate the documents and request copies needed for the adjudication.

Powertech’s compliance with 10 C.F.R. § 2.336(a)(2)(i) was incomplete. By not complying with mandatory disclosure requirements fully at the earlier stages of this proceeding, Powertech was ordered to disclose data logs at the hearing and after the cross examination of the geologic witnesses.

Despite the late stage of this adjudication, due to Powertech’s lack of full compliance with 10 C.F.R. § 2.336(a)(2)(i), an adequate record has not yet been formed. Without all parties having a reasonable amount of time to review all relevant documents, the Board cannot yet close the record. Due to the voluminous amount of data needed to be reviewed, the Board finds that good cause has been met and that fairness is best served by granting in part intervenors’ Motion to Extend.

Conclusion

Intervenors are granted a thirty day extension to file any additional testimony/exhibits on Contention 3. Intervenors have shown good cause for a partial extension, and the Board finds that a 30 day extension is reasonable under the circumstances presented. Intervenors will have until November 21, 2014 to submit additional testimony/exhibits on Contention 3. Any new

³⁴ Powertech Response at 4–6. Powertech attempts to equate references in the license application to the section 2.336(a)(2)(i) “description by category and location” requirement.”

contentions must be filed under the 10 C.F.R. § 2.309(c) and (f)(1) standards. Also balancing fairness to each party, the Board declines to order Powertech to make the physical logs available in Rapid City. The logs must continue to be made available in Edgemont, SD until November 21, 2014.

It is so ORDERED.

THE ATOMIC SAFETY
AND LICENSING BOARD

/RA/

William J. Froehlich, Chair
ADMINISTRATIVE JUDGE

/RA/

Richard F. Cole
ADMINISTRATIVE JUDGE

/RA/

Mark O. Barnett
ADMINISTRATIVE JUDGE

Rockville, Maryland
October 22, 2014

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of)
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POWERTECH (USA) INC.) Docket No. 40-9075-MLA
(Dewey-Burdock In Situ Recovery Facility))
)

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing **ORDER (Granting in Part Motion to Extend Deadline)** have been served upon the following persons by Electronic Information Exchange, and by electronic mail as indicated by an asterisk.

U.S. Nuclear Regulatory Commission
Atomic Safety and Licensing Board (ASLB)
Mail Stop T-3F23
Washington, DC 20555-0001

William J. Froehlich, Chair
Administrative Judge
william.froehlich@nrc.gov

Richard F. Cole
Administrative Judge
richard.cole@nrc.gov

Mark O. Barnett
Administrative Judge
mark.barnett@nrc.gov

Anthony C. Eitrem, Esq., Chief Counsel
anthony.eitrem@nrc.gov

Nicholas Sciretta, Law Clerk
nicholas.sciretta@nrc.gov

U.S. Nuclear Regulatory Commission
Office of Commission Appellate Adjudication
Mail Stop O-16C1
Washington, DC 20555-0001
OCA Mail Center
ocaamail@nrc.gov

U.S. Nuclear Regulatory Commission
Office of the Secretary of the Commission
Rulemakings & Adjudications Staff
Mail Stop O-16C1
Washington, DC 20555-0001
hearingdocket@nrc.gov

U.S. Nuclear Regulatory Commission
Office of the General Counsel
Mail Stop O-15 D21
Washington, DC 20555-0001
Mary Spencer, Esq.
mary.spencer@nrc.gov
Michael Clark, Esq.
michael.clark@nrc.gov
Patricia Jehle, Esq.
patricia.jehle@nrc.gov
Sabrina Allen, Paralegal
sabrina.allen@nrc.gov
OGC Mail Center:
OGCMailCenter@nrc.gov

POWERTECH (USA) INC., DEWEY-BURDOCK IN SITU RECOVERY FACILITY
DOCKET NO. 40-9075-MLA

ORDER (Granting in Part Motion to Extend Deadline)

Counsel for the Applicant (Powertech)
Thompson & Pugsley, PLLC
1225 19th Street, NW, Suite 300
Washington, DC 20036
Christopher S. Pugsley, Esq.
cpugsley@athompsonlaw.com
Cynthia L. Seaton, Paralegal
cseaton@athompsonlaw.com
Anthony J. Thompson, Esq.
ajthompson@athompsonlaw.com

Consultant to Applicant (Powertech)
WWC Engineering
1849 Terra Ave.
Sheridan, WY 82801
Jack Fritz
jfritz@wwcengineering.com

Counsel for the Oglala Sioux Tribe
Western Mining Action Project
P. O. Box 349
Lyons, CO 80540
Jeffrey C. Parsons, Esq.
wmap@iqc.org

Counsel for the Oglala Sioux Tribe
Energy & Conservation Law
1911 Main Avenue, Suite 238
Durango, CO 81301
Travis E. Stills, Esq.
stills@frontier.net

Counsel for Consolidated Intervenor
Aligning for Responsible Mining (ARM)
David Frankel, Esq.*
P.O.B. 3014
Pine Ridge, SD 57770
arm.legal@gmail.com

Counsel for Consolidated Intervenor
(Susan Henderson and Dayton Hyde)
Law Office of Bruce Ellison
P.O. Box 2508
Rapid City, SD 57709
Bruce Ellison, Esq.*
belli4law@aol.com
Roxanne Andre, Paralegal*
roxanneandre@yahoo.com

Counsel for Consolidated Intervenor
(Dayton Hyde)
Thomas J. Ballanco, Esq.*
945 Traval Street, #186
San Francisco, CA 94116
harmonicengineering@gmail.com

[Original signed by Clara Sola]
Office of the Secretary of the Commission

Rockville, Maryland
October 22, 2014