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)	)	December 19, 2014

Oglala Sioux Tribe's Memorandum of Law in Response to the Board's December 9, 2014 Order Regarding Public Disclosure of Admitted Testimony and Exhibits

Intervenor Oglala Sioux Tribe ("OST" or "Tribe") hereby submits this Response to the Board's Order dated December 9, 2014. In its December 9, 2014 Order, the Board acknowledged the Tribe's position regarding public disclosure of Exhibits OST-029 through OST-041, which were admitted via the same Order. December 9, 2014 Order (Admitting Additional Exhibits, Closing the Record on Contention 3 and Setting Briefing Dates), at 6. OST-029 is the Written Supplemental Testimony of Dr. Hannan LaGarry, and OST-030 through OST-041 are exhibits attached to that Testimony. The Board ruled that these exhibits "will remain non-public exhibits until the Board rules whether or not they contain proprietary or confidential information" under 10 C.F.R. § 2.390(b). Id. To aid the Board in resolving this issue, it directed the parties "to file Memoranda of Law on whether any or all of the Oglala Sioux Tribe exhibits filed on November 21, 2014, and admitted into evidence, should be accorded non-public status." Id.

The Tribe contends that none of the Exhibits OST-029 through OST-041 should be accorded non-public status. First, as described herein, the same fundamental geophysical information was voluntarily released by Powertech and NRC Staff before and during these

proceedings. Thus, Powertech has waived any legal basis to prevent public review of the Tribe's exhibits derived from the same information that Powertech submitted in its publicly available application materials. Second, Powertech has not demonstrated that the public disclosure of these exhibits is likely to cause substantial harm to its competitive position. Lastly, even should the Board find a likelihood of substantial harm to any asserted competitive position, the right of the public to be fully apprised as to the bases for and effects of the proposed action outweighs any concern for protection of that alleged competitive position. As a result, none of these admitted exhibits should be withheld from public disclosure.

Legal Standard of Review

As indicated by the Board, the governing standard for review of this issue is found at 10 C.F.R. § 2.390. This regulation provides a list of categories of information that are allowed to be withheld from public disclosure (10 C.F.R. § 2.390(a)), and provides a test for the Board to apply in determining whether in fact to withhold such information from the public (10 C.F.R. § 2.390(b)(3)). Notably, the regulation expressly puts all submitters of potentially commercial or financial information "on notice that it is the policy of the Commission to achieve an effective balance between the legitimate concerns for protection of competitive positions and the right of the public to be fully appraised as to the basis for and effects of licensing and rulemaking actions, and that it is within the discretion of the Commission" to withhold or publicly disclose such information. 10 C.F.R. § 2.390(b)(2).

Under 10 C.F.R. § 2.390(b)(1), the submitter of the information bears the burden of justifying any withholding through the filing of an affidavit from the owner of the information containing the specific basis and reasoning for withholding the information from public

disclosure. 10 C.F.R. § 2.390(b)(1)(ii); see also *Wisconsin Electric Power Company* (Point Beach Nuclear Power Plan, Units 1 and 2), LBP-81-62, 14 N.R.C. 1747, 1753-54 (1981)(recognizing that under the applicable regulations, the burden is on the party seeking confidentiality to demonstrate through affidavit the justification for withholding information from the public). Such an affidavit must address "with specificity the considerations listed in paragraph (b)(4)" of 10 C.F.R. § 2.390. 10 C.F.R. § 2.390(b)(1)(iii); see also, *Private Fuel Storage, L.L.C* (Independent Spent Fuel Storage Installation), CLI-05-01, Nuclear Reg. Rep. P 31470 (N.R.C.)(January 5, 2005), at 3(acknowledging the requirement that the party seeking non-disclosure address the relevant factors "with specificity").

Pursuant to 10 C.F.R. 2.390(b)(4), in making the determination required by paragraph (b)(3)(i) of that section, the Board considers:

> (i) Whether the information has been held in confidence by its owner;
>
> (ii) Whether the information is of a type customarily held in confidence by its owner and, except for voluntarily submitted information, whether there is a rational basis therefor;
>
> (iii) Whether the information was transmitted to and received by the Commission in confidence;
>
> (iv) Whether the information is available in public sources;
>
> (v) Whether public disclosure of the information sought to be withheld is likely to cause substantial harm to the competitive position of the owner of the information, taking into account the value of the information to the owner; the amount of effort or money, if any, expended by the owner in developing the information; and the ease or difficulty with which the information could be properly acquired or duplicated by others.

Lastly, even if the Board finds the submitter's affidavit to satisfy the 10 C.F.R. § 2.390(b)(4) criteria, it must also apply the balancing test contained in 10 C.F.R. § 2.390(b)(5):

> (5) If the Commission determines, under paragraph (b)(4) of this section, that the record or document contains trade secrets or privileged or confidential commercial or financial information, the Commission will then determine whether the right of the public to be fully apprised as to the bases for and effects of the proposed action outweighs the

> demonstrated concern for protection of a competitive position, and whether the information should be withheld from public disclosure under this paragraph.

The Nuclear Regulatory Commission has recognized the "scant jurisprudence" applying 10 C.F.R. § 2.390 to commercial or financial information, and acknowledged that this regulatory section "embodies the standards of Exemption 4 of the Freedom of Information Act (FOIA), so we look for guidance to the plentiful federal case law on that exemption." *Private Fuel Storage, L.L.C* (Independent Spent Fuel Storage Installation*),* CLI-05-01, Nuclear Reg. Rep. P 31470 (N.R.C.)(January 5, 2005), at 3.[1]

When information is voluntarily submitted for inclusion in the public record without first seeking confidential status, disclosure has occurred and confidential status, regardless of the exemption claimed, has been waived. *Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157, 174 (2004) ("once there is disclosure, the information belongs to the general public"). "Thus, once a submitter grants the government permission to loan or release the information to the public, there is no reason for Exemption 4 to apply because the submitter no longer intends the information to be "secret." *Herrick v. Garvey*, 298 F.3d 1184, 1193-1194 (10th Cir. 2002). Information in documents not "sealed, destroyed, or otherwise rendered unavailable" on publicly available federal website is "in the public domain and cannot therefore be exempt from production under FOIA." *CNA Holdings, Inc. v. United States DOJ*, 2008 U.S. Dist. LEXIS 38063, 17-19 (N.D. Tex. May 9, 2008).

Even where potentially protected, under the Atomic Energy Act's purposes, "[d]isclosure of proprietary information forming the bases of a decision on a licensing matter may facilitate

[1] The Commission in *Private Fuel Storage* addressed 10 C.F.R. § 2.790, but the Commission noted that "[e]ffective February 13, 2004, the Commission renumbered section 2.790 as section 2.390, but did not modify its language." Private Fuel Storage, L.L.C (*Independent Spent Fuel Storage Installation),* CLI-05-01, Nuclear Reg. Rep. P 31470 (N.R.C.)(January 5, 2005), n.5.

both informed administrative action and intelligent judicial review." *Westinghouse Electric Corp. v. United States Nuclear Regulatory Com.*, 555 F.2d 82, 92 (3d Cir. 1977).

Powertech has placed the information from borehole logs in the public domain

The Board need not inquire into the specific categories of information that may be withheld under the Atomic Energy Act and NRC regulations because Powertech and NRC Staff did not seek protection of the extensive borehole logs and geophysical information already submitted in support of the Powertech application. Given the voluntary public disclosure of this borehole data and information in the application material, Powertech thereby waived any protection for the late-released information. *Nat'l Archives & Records Admin. v. Favish,* 541 U.S. 157, 174 (2004) ("once there is disclosure, the information belongs to the general public"). By failing to seek protection when this information was submitted for public scrutiny, Powertech waived any ability to assert privilege.

Because Powertech did not seek protected status when filing its application materials, and because the borehole information has consistently been in the public domain, there is no basis to restrict the right of the public to review the borehole data and geophysical information that contradicts the information Powertech voluntarily placed in the public domain via the NRC docketing system. *Herrick v. Garvey*, 298 F.3d 1184, 1193-1194 (10th Cir. 2002)(waiver of privilege where information already in public domain).

There can be no question that NRC's hearing docket functions similar to a federal court docket in placing records in the public domain. *CNA Holdings, Inc. v. United States DOJ,* 2008 U.S. Dist. LEXIS 38063, 17-19 (N.D. Tex. May 9, 2008). NRC relied upon and released this information to the public in the application material and the NEPA analysis. During the

hearings, the same borehole data at issue here was projected onto the screen and discussed in open session. Only when the Tribe sought to use this information did Powertech assert a belated claim of privilege. At this stage in the proceedings, it is too late for Powertech to withdraw this information from the public domain. 10 CFR 2.390(c)(3)(upon request, a "document will be returned unless the information --(i) Forms part of the basis of an official agency decision, including but not limited to, a rulemaking proceeding or licensing activity.")

Although this matter can be resolved based solely on waiver and untimely request for secrecy, the request for nondisclosure for Exhibits OST-029 through OST-041 should be denied where the NRC regulations and FOIA Exemptions do not support secrecy.

There is no adequate demonstration of substantial competitive harm

Several aspects of FOIA Exemption 4 are relevant to the issue of whether the applicant has or can present a sufficient demonstration to meet its burden to keep the subject information non-public. For example, the federal courts echo the NRC regulatory requirement for detailed specificity in meeting the burden: "In order to show substantial competitive injury, [the applicant] must prove that it actually faces competition and that substantial competitive injury would likely result from disclosure." *Anderson v. Dept. of Health & Human Services*, 907 F.2d 936, 947 (10th Cir. 1990). See also, *Lee v. FDIC*, 923 F.Supp. 451, 455 (S.D.N.Y. 1996)(there must be "adequate documentation of the specific, credible, and likely reasons why disclosure of the document would actually cause substantial competitive injury."). "Conclusory and generalized allegations of substantial competitive harm … are unacceptable and cannot support an agency's decision to withhold requested documents.'" *State of Utah v. U.S. Dept. of the Interior*, 256 F.3d 967, 970 (10th Cir. 2001). See also, *Black Hills Alliance v. Forest Service*, 603

F.Supp. 117, 121 (D. S.D. 1984) quoting *Public Citizen Health Research Group v. F.D.A.*, 704 F.2d 1280, 1291 (D.C. Cir. 1983). In *Black Hills*, the court detailed the shortcomings of the agency's proffered affidavits:

> After carefully reviewing these affidavits the court is unable to conclude that defendants have met their burden of proof by specific factual or evidentiary material that (1) [the submitter] faces actual competition, and (2) [the submitter] would likely suffer substantial competitive harm. *Cf. Washington Post Co. v. U.S. Dept. of Health, Etc.*, 690 F.2d [252] at 269 [(D.C. Cir. 1982)]. They do not sufficiently apprise the court of the nature and extent of the competition in the mineral exploration industry, especially with respect to exploration on public lands, title to which lies in the United States.

603 F.Supp. at 121.

In this case, to date, no detailed affidavit has been submitted that meets the relevant standard for specificity. While the NRC regulations, at 10 C.F.R. § 2.390(b)(1)(ii), do provide the Commission with the discretion to waive the affidavit requirement, the Board should not do so without, at minimum, a detailed statement contained in the briefing that equates to the required demonstration. In addressing this issue in the past, the applicant has provided only the type of conclusory statements rejected by the federal courts.

For example, in its recently filed Response to the Oglala Sioux Tribe's November 21, 2014, Motion to Admit Additional Testimony and Exhibits, at 9, the applicant asserts only that it spent resources obtaining the data and considers the information valuable, but provides no demonstration as to any competitive harm:

> these borehole log data were purchased as a result of significant company financial expenditure and are data that are typically maintained as confidential for financial purposes. The borehole log data possessed and disclosed by Powertech, either from its own exploratory drilling or historical data in Powertech's possession prior to license application submission or acquired more recently from Energy Fuels Resources (EFR), was costly to obtain and has significant financial value that would be of great importance to any company attempting to develop the Dewey Burdock ISR Project.

The fact that the data has importance to the "company attempting to develop the Dewey Burdock ISR Project" does not provide the Board any information as to competitive harm, as the applicant is the only company that falls into that category. The applicant also goes on in that pleading to attempt to argue that the Tribe has somehow failed to meet its burden to keep the information confidential. This argument should be rejected by the Board, as it inappropriately seeks to shift its burden to the Tribe.

The applicant did provide with the same filing what it represented as "an appropriate 10 CFR § 2.390(a)(4) affidavit" signed by an employee of the applicant, but that document contains none of the required information and is instead, at best, a textbook example of conclusory and generalized allegations. Specifically, the document is a one-page document that contains no information as to any competitive harm instead only states the affiant's basic understanding that Powertech's exhibits have not yet been publicly disclosed. Affidavit of John Mays, Powertech Chief Operating Officer, dated December 4, 2014. Other statements filed by the applicant in the course of these proceedings, albeit not addressing the Tribe's exhibits at issue here, similarly rely on generalized assertions of harm, focusing on the fact that Powertech spent money for the data, but wholly failing to address the fact that a significant amount of the precise borehole data at issue here has already been released to the public through Powertech's application materials – rendering any claim of financial harm untenable.

The federal courts have held that where information is already in the public domain, a claim of confidentiality is not supportable. "Because materials such as these appear to be in the public domain, no meritorious claim of confidentiality can be made. See *C.N.A. Financial Corp. v. Donovan*, 830 F.2d 1132, 1154 (D.C. Cir. 1987)." *Anderson v. Dept. of Health and Human Services*, 907 F.2d 936, 952 (10th Cir. 1990). See also *Niagara Mohawk Power Corp. v. U.S.*

Dept. of Energy, 169 F.3d 16, 19 (D.C. Cir. 1999). "Public availability of information defeats an argument that the disclosure of the information would likely cause competitive harm." *National Community Reinvestment Coalition v. National Credit Union Administration*, 290 F.Supp.2d 124, 134 (D.D.C. 2003). "If identical information is truly public, then enforcement of an exemption [Exemption 4] cannot fulfill its purposes." *Niagara Mohawk*, 169 F.3d at 19.

Importantly, the D.C. Circuit further stated that withheld information that is "substantially equivalent to the data" that is publicly available loses any claim of confidentiality. Id. The fact that the withheld information was already in the public domain "would give victory to the plaintiff independent of whether Exemption 4 properly applies." *Herrick v. Garvey*, 298 F.3d 1184, 1193 (10th Cir. 2002). Once the submitter releases the allegedly "confidential" or "secret" information to the public, "FOIA creates an obligation for the government to release the documents." Id. at 1194.

In this case, the Final Supplemental Environmental Impact Statement (FSEIS) and Powertech submittals in response to NRC Staff requests for additional information contain information substantially equivalent to the data at issue here. For example, as was illustrated in detail at the hearing in August 2014 in Rapid City, the Powertech submittals contain graphs, charts, and borehole logs that provide substantially equivalent, if not identical, information. Indeed, in testimony to the Board, the applicant's witness Mr. Lawrence testified to the similarity between the information that was contained in the application materials and the information contained in the newly disclosed information from which the Tribe derived its exhibits: "The data that has been procured is similar to the data that's already been used. In fact, it's the exact same kind of data." August 20, 2014 Transcript at p. 929, lines 23-25. Mr. Lawrence went on to display and refer to examples of the "exact same" drill logs that are at issue here. Id. at p. 931,

line 15 through p. 932, line 18 (referring to Exhibit APP-016(b)). Similarly, Powertech witness Mr. DeMuth testified that some 1800 of these same borehole logs were used by NRC Staff in preparing the Safety Evaluation Report, none of which have been withheld from the public. Id. at p. 938, lines 2-13. The pre-hearing exhibits submitted by the applicant, with no claims of any confidentiality or privilege, include numerous such logs. See for example, Exhibits APP-016g, APP-016j, APP-016k, APP-016L, APP-016S, APP-016U, APP-017. Based on all of the already publicly-available drill hole log information and data, along with the applicant witness admissions that the currently withheld information is the "exact same", there is simply no basis to continue to withhold this information.

Similarly, with respect to Dr. LaGarry's testimony contained in Exhibit OST-029, there is no basis to withhold that testimony. The NRC Staff witnesses conducted their review of the same borehole logs at issue and submitted its testimony without any confidentiality restrictions. See Exhibit NRC-158. Further, NRC Staff witnesses reviewed Dr. LaGarry's testimony and submitted Answering Testimony, again without any confidentiality restrictions – even though this testimony discusses Dr. LaGarry's testimony in detail. See Exhibit NRC-175. The applicant submitted testimony in response to the NRC Staff witnesses' review of the borehole data, which was also not restricted in any way. See Exhibit APP-072. The applicant also discusses both Dr. LaGarry's testimony and its own witnesses testimony, including extensive quotations, in its December 4, 2014 Response to the Oglala Sioux Tribe's November 21, 2014, Motion to Admit Additional Testimony and Exhibits. These extensive quotes and discussions further serve to undermine the applicant's claims of any confidentiality in any of the testimony or exhibits submitted in this proceeding.

Lastly, given all of the already-publicly available information from the testimony and exhibits, the issue of segregation comes into play. Under FOIA Exemption 4, "[a]ny reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection." *Anderson v. Department of Health & Human Services*, 907 F.2d 936, 941 (10th Cir. 1990) citing *United States Dept. of Justice v. Julian,* 486 U.S. 1 (1988). "[T]he exemptions to the FOIA do not apply wholesale. An item of exempt information does not insulate from disclosure the entire file in which it is contained, **or even the entire page on which it appears**." *Arieff v. Department of the Navy*, 712 F.2d 1462, 1466 (D.C. Cir. 1983) (emphasis added). "The focus in the FOIA is information, not documents, and an agency cannot justify withholding an entire document simply by showing that it contains some exempted material." *Schiller v. NLRB*, 964 F.2d 1205, 1209 (D.C. Cir. 1992).

As applied here, at minimum, any portions of either the testimony of Dr. LaGarry, other witnesses, or the borehole logs themselves discussed or quoted from in any NRC Staff or applicant-filed document must be segregated out and disclosed. Given the extensive discussions contained in the already-public documents, however, the Tribe contends that this exercise will reveal that no such segregation is necessary, as all of the currently withheld documents, both borehole logs and testimony, are already fairly disclosed to the public and nothing should be withheld.

<u>The balancing test favors disclosure of all exhibits</u>

Even if the Board finds any justification for any non-disclosure based upon any applicant claim of confidentiality or competitive harm, the right of the public to be fully apprised as to the bases for and effects of the proposed action outweighs any concern for protection of any

competitive position asserted by the applicant. As it stands, substantial testimony and borehole data is already publicly-available. Indeed, the NRC Staff sought fit to release all of its testimony in whole, and Powertech released the majority of the "exact same" borehole information it feels supports its position through its Responses to Additional Information (see the Exhibit APP-016 series) – and now the applicant asks that only the Tribe's testimony and those borehole log exhibits outside of those Powertech chose to release be withheld from the public. This puts the public in the untenable position of only seeing one side of the testimony and borehole data – that supporting NRC Staff and the applicant. Because only one side of the data is being left open to the public, this skews the public perception of the case and inappropriately prevents the public from determining the basis for and effects of the proposed action.

Conclusion

For the foregoing reasons, the Board should find that no confidentiality attaches to any of the Exhibits OST-029 through OST-041. Further, also based on the foregoing, the Board should release the current protective order as it pertains to the applicant's newly-disclosed geological data in whole, and make all of the exhibits public, including all exhibits and testimony submitted based on the post-hearing disclosures by the applicant.

Respectfully Submitted,

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Dated at Lyons, Colorado
this 19th day of December, 2014

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NUCLEAR REGULATORY COMMISSION

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Response to the December 9, 2014 Board Order in the captioned proceeding were served via the Electronic Information Exchange ("EIE") on the 19th day of December 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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