

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))	November 1, 2014

**REPLY TO NRC STAFF AND POWERTECH RESPONSES TO MOTION TO ADMIT
ADDITIONAL EXHIBITS FILED ON BEHALF OF THE OGLALA SIOUX TRIBE**

Pursuant to 10 C.F.R. § 2.323(c), Intervenor Oglala Sioux Tribe (“Tribe”) hereby submits this Reply to the Powertech (USA) Inc. (“Powertech”) and NRC Staff responses to the Tribe’s Motion to Admit Additional Exhibits. As discussed in the Tribe’s Motion for Leave to File Reply submitted October 30, 2014, the Tribe believes this Reply is necessary due to the novel and inapposite arguments put forth by Powertech and NRC Staff, as well as in order to respond to new testimony submitted by the parties.

At issue is the admissibility of two basic categories of evidence: Category 1) documents and data disclosed to the parties pursuant to the Board’s September 8, 2014 Order, which included voluminous borehole data and maps, a July 8, 2014 letter to Powertech from the U.S. Bureau of Land Management (“BLM”), and a Take permit application submitted by Powertech to the U.S. Fish and Wildlife Service (“FWS”) along with Powertech’s avian monitoring plan; and Category 2) two documents recently published by the U.S. Environmental Protection Agency (“EPA”) relating the EPA’s review of the Dewey-Burdock site for clean up under the Comprehensive Environmental Response, Compensation, and Recovery Act (“CERCLA”): a) an announcement by the EPA that it had completed a Preliminary Assessment under CERCLA at

the Dewey-Burdock site, and b) the Preliminary Assessment itself. See OST-025 (announcement); OST-026 (Preliminary Assessment).

In conferral on the Tribe's October 14, 2014 Motion, both Powertech and NRC Staff stated an unqualified lack of objection to any of the evidence contained in Category 1) above. However, in its Response, while conceding that it offered and confirmed no objection whatsoever, Powertech now attempts to complain that the Tribe failed to "offer supplemental testimony on how these documents pertain to any of the admitted contentions and does not offer the Licensing Board any foundation for making any factual or legal determinations within the scope of any such contentions." Powertech Response at 7. The Board should flatly reject Powertech's attempt at such gamesmanship. As was the established practice at the hearing, an expressly stated lack of any objection satisfies for admissibility. Indeed, the Board admitted hundreds of exhibits based on a stated lack of objection from each party. Powertech's assertion that, even absent any objection, somehow the Tribe must provide supplemental expert testimony and an argument on the merits of the case as to the "factual and legal determinations within the scope of any such contentions" is wholly baseless. The Board's post-hearing orders set forth a schedule for arguments on the merits, and the Tribe should not be held to this novel standard, asserted by Powertech without any reference to any applicable caselaw or regulatory authority.¹

Similarly, Powertech makes a non-sensical argument that the Tribe should be prohibited from any reference to the already-ruled-as-relevant BLM and FWS/avian monitoring plan

¹ The only authority referenced in Powertech's Response are two dated cases that deal with the much heightened standard for re-opening the record, rather than admissibility. See Powertech at 6 (citing *Louisiana Power and Light Co.*, (Waterford Steam Electric Station, Unit 3), ALAB-812, 22 NRC 5 21 n.16, 42-43 (sic) (1985); *Pacific Gas and Electric Co.*, (Diablo Canyon Nuclear Power Plant, Units 1&2), ALAB-775, 19 NRC 1361, 1366-67 (1984). The Board should reject such

documents because “they do not pertain to Contention 3, which is the only contention left open for additional testimony per the Licensing Board’s October 22, 2014, (sic) Order.” Powertech Response at 7. Again, without any applicable authority, Powertech appears to be making a Motion in Limine to exclude evidence already found by the Board to be relevant. See September 8, 2014 Post-Hearing Order. The Board should reject this apparent attempt to exclude evidence without a properly-filed Motion. In any case, Powertech’s argument is baseless as the deadline for substantive arguments on the merits of the case is yet to come – and thus the Tribe reserves every right to use any of the evidence in this proceeding as part of its merits arguments.

Regarding the EPA documents that make up Category 2), both Powertech and NRC Staff informed the Tribe for the first time after the Tribe’s submission of its October 14, 2014 Motion that each party may present some objection to the admissibility of the EPA documents. In their respective responses, Powertech and NRC Staff object to the EPA documents on grounds of relevance (Powertech and NRC Staff) and materiality (Powertech). As discussed herein, all of the documents sought to be admitted by the Tribe are admissible.

10 C.F.R. § 2.337(a) states that the Board is to admit evidence that is “relevant, material, and reliable.” “Relevance” is the same term that the NRC Rules use in 10 C.F.R. § 2.336 pertaining to mandatory disclosures. *Gustafson v. Alloyd Co., Inc.*, 513 U.S. 561, 562, 115 S.Ct. 1061, 1063 (1995)(confirming “[t]he normal rule of statutory construction that identical words used in different parts of the same Act are intended to have the same meaning.”) See also, *In the Matter of Safety Light Corporation* (Bloomsburg, Pennsylvania Site), 61 N.R.C. 53, 63 n.8 (January 24, 2005); *In the Matter of Virginia Electric and Power Company D/B/A Dominion Virginia Power and Old Dominion Electric Cooperative* (North Anna Power Station, Unit 3), 68 N.R.C. 294, 309-310 (August 15, 2008).

As this Board has repeatedly addressed, NRC precedent bearing on the “relevancy” standard in the rules demonstrates that the standard is not a high one, and that the relevancy test of the NRC regulations are specifically designed to be “wide-reaching.” *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).

Id. at 705-706(emphasis in original). This specific reference in the applicable NRC case law to 10 C.F.R. § 2.319(d) is telling in that the referenced subsection deals directly with the admissibility of evidence (as opposed to disclosure) under the “relevance” standard.

Instead of applying the proper standard as set out above, both Powertech and NRC Staff continue their attempts in this proceeding to persuade this Board to adopt a much higher standard for relevance. For instance, Powertech argues that the Tribe must offer “substantive argument demonstrating that there are deficiencies in NRC’s ROD or any of its decision documents” or “supplemental testimony showing how these documents will be relevant to any of the admitted contentions.” Powertech Response at 8. Similarly, NRC Staff argues that despite identifying that the EPA documents evidence gaps in its FSEIS analysis, the Tribe must “explain why such gaps show any deficiency in the Staff’s analysis under the National Environmental Policy Act

(NEPA).” NRC Staff Response at 2. These arguments conflate the test for relevance with an argument on the merits. Under the applicable relevance standard, the Tribe is not required to prove that the proffered exhibit independently “demonstrates” deficiencies in the NEPA analysis. Rather, that is the Tribe’s charge with respect to the merits briefing.

Here, all parties recognize that the EPA documents rely on, analyze, and interpret the very same surface and ground water quality data upon which the Application and the NRC Staff FSEIS were based. The EPA PA makes specific findings that “[s]ampling results indicate an observed release to groundwater has occurred at the site” resulting in contamination of local water wells within the hydrological structures and aquifers at the site, and that additional sampling and data collection is warranted to determine the extent of, and hydrogeologic pathways for, existing and future contamination. Exhibit OST-26 at 30.

As the Tribe explained in its Motion, these analyses, findings, and interpretations are relate to the Tribe’s Contention 2 dealing with adequacy of baseline water quality analysis, Contention 3 dealing with hydrogeological confinement, and Contention 6 dealing with the adequacy of mitigation measures for the project – in this case, specifically as they relate to mitigation designed to protect against water quality impacts. Given the relatively low bar for a relevancy finding, this documents should be admitted. The Tribe will provide the substantive arguments at the appropriate time, Powertech and NRC Staff can counter, and the Board is free to give what weight it will to those arguments at that time.

Powertech (but not NRC Staff) makes the additional argument that the EPA documents are not “material” under the admissibility standard. Powertech Response at 8. As its basis, Powertech asserts, without authority or reference to other precedent, that the Tribe is somehow required to provide expert testimony in order for the Board to find the evidence “material” to the

proceeding. Powertech then engages in a litany of merits-based arguments that it claims shows the lack of materiality. Powertech Response at 8-10. For instance, Powertech takes issue with a perceived lack of “substantive argument demonstrating” deficiencies in the FSEIS. Powertech Response at 8. Powertech also argues that the data analysis and findings by EPA are not “material” simply because the analysis was performed pursuant to the EPA’s CERCLA authority. Powertech Response at 9-10. Powertech fails to explain how this distinction has any impact on the EPA analysis or the fact that the EPA analysis relates directly to the baseline and background water quality and hydrogeological conditions at the site. Lastly, Powertech makes the puzzling argument that because the EPA used the same data as was used in the Application and FSEIS, it somehow is not “material.” Powertech Response at 9. To the contrary, the fact that EPA used the same data only goes to reinforce both relevance and materiality as it relates here. If Powertech believes that additional data it submitted to NRC Staff contravenes the EPA’s findings, that is an argument to be made on the merits, but does not warrant exclusion of the EPA analysis entirely.

Simply put, the EPA analysis and findings are relevant and material because they deal with the same data that is at issue in this NRC proceeding and relate directly to the issues of the adequacy of the existing water quality, hydrogeologic conditions, and mitigation analyses that form the basis of the Tribe’s contentions in this proceeding. NEPA requires a “hard look”; the Tribe has alleged a lack of that “hard look”; and the EPA analysis bears on whether that “hard look” was accomplished. Of course, whether consideration of the EPA analysis, combined with all of the remaining evidence in the case, will ultimately result in a finding on the merits of compliance with NEPA is a determination that the Board can make only upon full legal and factual consideration after substantive briefing.

Based on the forgoing, the Tribe requests that the Board rule in favor of admissibility of each of the documents/data contained in both Category 1) and Category 2), as described in the Tribe's Motion and in this Reply.

Respectfully Submitted,

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Dated at Lyons, Colorado
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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Reply in the captioned proceeding were served via the Electronic Information Exchange (“EIE”) on the 1st day of November, 2014, 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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