

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

Date: August 26, 2014

On August 16, 2014, the Oglala Sioux Tribe (the “Tribe”) filed a motion to compel production of certain identified documents, including (1) borehole data referenced in Powertech (USA), Inc.’s (Powertech) electronic mail message to the Atomic Safety and Licensing Board (License Board) dated August 7, 2014 (Tribe Exhibit OST-020); (2) a “take” permit application submitted to the United States Fish and Wildlife Service (FWS) dated January of 2014; (3) correspondence with the United States Bureau of Land Management (BLM) dated July 8, 2014, requesting additional information and a response to same not yet filed; and (4) an avian monitoring and mitigation plan. At the previously held evidentiary hearing, Consolidated Intervenor (CI) indicated they joined in this motion. On August 20, 2014, the Licensing Board ruled from the bench that previously requested electronic logs were “relevant” under 10 CFR § 2.336 and should be disclosed by Powertech. In light of this ruling and the Tribe’s motion, Powertech respectfully submits this response.

I. BOREHOLE DATA AND LOGS

As stated on August 20, 2014 at the evidentiary hearing, while maintaining its objection to the Licensing Board's finding of "relevance," Powertech consents to the Tribe's request for borehole logs referenced in its August 7, 2014 electronic message to the Licensing Board. As of this day, Powertech has circulated a proposal for disclosure of this data and information for counsel's consideration. By way of summary, Powertech has proposed to implement a protective order to preserve the confidential nature of this information, as well as that of the previously ruled upon newly acquired data, and also has agreed to produce CD copies of any and all digitized data associated with the two sets of data and information requested. These CDs are proposed to be overnight delivered to addresses designated by other counsel. Powertech also will make any and all data and information associated with these requests, including paper or Mylar logs and location maps, available in its Edgemont office beginning tomorrow, August 27, 2014, at 8 a.m., assuming the protective order is in place. Powertech respectfully requests that, upon agreement between the parties on inspection of the data, the Licensing Board implement a schedule similar to that discussed at the evidentiary hearing on August 21, 2014.

Powertech also has attached a copy of an affidavit executed by Mr. John Mays, Chief Operating Officer of Powertech, that satisfies appropriate confidentiality requirements at 10 CFR § 2.390(a)(4) designating all data and information associated with the requests for borehole data and logs as confidential business information.

II. ADDITIONAL DOCUMENTS REQUESTED BY THE TRIBE

In order to be relevant to the admitted contentions, the identified data or documents must provide the Tribe, CI, and/or NRC Staff with information pertaining to the affirmative demonstration by Powertech and NRC Staff that it has adequately satisfied NRC requirements

for an initial licensing decision and issuance of NRC License No. SUA-1600. Indeed, the current Federal Rule of Evidence defines “relevant evidence” as “(a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action.” Fed. R. Evid. 401 (2011). Powertech does not believe that any of these documents meet the 10 CFR § 2.336 standard for “relevance.”

A. “TAKE” PERMIT APPLICATION

With respect to the non-purposeful “take” permit application, Powertech does not believe the application meets the 10 CFR § 2.336 standard for “relevance.” Initially, Powertech believes that any and all information included in the permit application is already available in the current NRC record of decision (ROD). Many of the measures described in the FSEIS for avian protection (e.g., FSEIS Section 4.6.1.1.1.2) are the same as, or comparable to, those described in the non-purposeful “take” permit application (e.g., use of timing restrictions and/or disturbance buffers to protect active nest sites, consolidating facilities where practicable, using current APLIC recommendations for power line construction to protect birds from electrocution and collision, etc.). Thus, these matters are already in the public domain in the FSEIS and either were or could have been challenged in the proceeding by now. As stated in previously identified case law, “NEPA gives agencies broad discretion to keep their inquiries within appropriate and manageable boundaries.”¹ As stated by the Commission, although “there ‘will always be more data that could be gathered,’” agencies ‘must have some discretion to draw the line and move forward with decisionmaking.’”² Thus, since this document essentially provides no new information, it should not require disclosure.

¹ *Louisiana Energy Servs, L.P.*, CLI-98-3, 47 NRC at 103 (internal citation omitted).

² *Entergy Nuclear Generation Co. (Pilgrim Nuclear Power Station)*, CLI-10-11, 71 NRC 287, 315 (2010) (footnote omitted).

Next, as stated in the very first sentence of the permit application cover page: “A Federal permit for non-purposeful take of eagles authorizes disturbance or other take of eagles where the take is not the purpose of the activity and is necessary to protect an interest in a particular locality.” So the permit itself is not a “mitigation” measure, though all permittees will be required to avoid and minimize the potential for take to the degree practicable. Further, the non-purposeful eagle “take” permit application is an application for a permit from FWS that is currently under review by FWS; therefore, its contents are considered draft and are subject to change at the discretion of the reviewing agency (FWS). Thus, since Contentions 14A and 14B were dismissed and this permit application is not, in and of itself, a mitigation measure, Powertech sees no “relevance” to currently admitted contentions; as it does not have any consequence on the aspects of the issued NRC license and adds no new information to the proceeding that could potentially impact currently admitted contentions.

B. LETTER FROM UNITED STATES BUREAU OF LAND MANAGEMENT AND RESPONSE NOT YET FILED

With respect to the requested BLM correspondence requesting additional information from Powertech and any subsequently filed response thereto, Powertech fails to see the relevance of these documents to the NRC licensing process or any admissible contention. Initially, the July 8, 2014 correspondence requesting additional information has no relevance to the NRC licensing process or the admitted contentions as it, in and of itself, provides no substantive information to any party regarding what is currently in the record in this proceeding. This correspondence is merely a compilation of questions that BLM has asked Powertech to supplement its administrative record for the potential issuance of a BLM Plan of Operations (POO). Simply

referencing the questions asked by BLM is evidence of nothing associated with any of the admitted contentions.

Further, BLM is a federal agency with a separate statutory mandate for activities undertaken on federal lands from NRC's statutory mandate under the Atomic Energy Act of 1954, as amended (AEA). BLM also was a cooperating agency on NRC Staff's development of the Final Supplemental Environmental Impact Statement (FSEIS) and offered considerable input on the resource area-specific assessment performed by NRC Staff, including but not limited to land use (FSEIS Section 4.2), geology and soils (FSEIS Section 4.4), vegetation (FSEIS Section 4.6), and mitigation of potential impacts on these resource areas. It is unlikely that the release of the July 8, 2014 letter and any responses thereto would provide any party with additional information on any admitted contentions. If CI or the Tribe seeks to challenge anything in the BLM process, they are free to do so in an appropriate venue outside of this proceeding. However, this document requested by the Tribe does not present any new information either supporting or refuting their admitted contentions and, thus, does not meet the 10 CFR § 2.336 standard for "relevance," as it provides no new information on the admitted contentions and is of no consequence to the substance of the admitted contentions.

C. AVIAN MONITORING PLAN

With respect to the requested avian monitoring plan, the draft plan is a working document at this time. No aspects of its language or procedures have been finalized. As is the case with the "take" permit application, many of the measures described in the FSEIS for avian protection are the same as, or comparable to, those proposed in the draft avian plan. For the same reasons discussed for the "take" permit, these matters are already in the public domain in the FSEIS and either were or could have been challenged in the proceeding by now. Further, as stated by NRC

Staff in their written testimony, “NEPA does not require that all of the mitigation measures an agency specifies in an EIS be in final form.” Thus, as noted in the case law citation above, Powertech does not see this document as relevant to this proceeding under 10 CFR § 2.336.

NRC Staff also directly addresses the avian plan in their written testimony, where they state that considering requirements by other federal, State, and local agencies as part of the analysis process is in keeping with, and encouraged by, the Council on Environmental Quality’s (CEQ) regulations at 40 CFR §§ 1502.16(h) and 1505.2(c). *See* NRC Staff Exhibit NRC-001 at ¶ A 6.17. The avian plan is a State, not an NRC, requirement and will become part of Powertech’s State of South Dakota Large Scale Mine Permit when finalized. But, the only relevance to this proceeding is whether an avian plan pursuant to State requirements is part of the FSEIS development process and how it would address potential impacts to avian species and not its substance. Thus, Powertech does not believe that the draft avian plan meets the 10 CFR § 2.336 standards for “relevance,” as it does not have any consequence on the aspects of the issued NRC license and adds no new information to the proceeding that could potentially impact currently admitted contentions.

Further, Powertech believes the most effective way to address the issues associated with disclosure of these documents would be via *in camera* review by the Licensing Board. Powertech is willing to submit these documents via the EIE for *in camera* review if the Licensing Board deems it appropriate. Powertech notes that NRC Staff’s August 26, 2014, response indicated this would be the course of action, and Powertech concurs. As of the filing of this response, NRC Staff has concurred with Powertech’s suggestion. No response to an

electronic message regarding this issue has been received from CI or the Tribe, but this suggestion does not constitute a formal motion.

Respectfully submitted,

**/Signed (electronically) by/
Christopher S. Pugsley, Esq.**

Dated: August 26, 2014

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