

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of:

POWERTECH (USA), INC.

(Dewey-Burdock In Situ Uranium Recovery
Facility)

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) Docket No.: 40-9075-MLA
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) Date: September 2, 2014
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**POWERTECH (USA), INC. MOTION FOR RECONSIDERATION OF THE
LICENSING BOARD'S AUGUST 20, 2014 RULING ON RELEVANCY FOR
MANDATORY DISCLOSURES**

On August 6, 2014, the Atomic Safety and Licensing Board (Licensing Board) issued an Order declaring that borehole logs and other data identified in the Oglala Sioux Tribe's (Tribe) Exhibit OST-019 are "relevant" under 10 CFR § 2.336's standard for mandatory disclosures in response to an oral request from Consolidated Intervenor's (CI) counsel during a pre-hearing telephone conference devoted to scheduling procedural matters. Accordingly, Powertech (USA), Inc. (Powertech) submitted an electronic request for clarification of the Licensing Board's Order stating that it would benefit from legal briefing on the issue. By Order dated August 8, 2014, the Licensing Board directed all parties to submit legal memoranda on this issue. On August 12, 2014, Powertech submitted its response to this directive.

At the August 20, 2014 portion of the evidentiary hearing, the Licensing Board held additional oral argument on this issue and ruled that the borehole logs identified in Exhibit OST-019 are "relevant" specifically to Contention 3. Then, on August 21, 2014, the Licensing Board directed all parties to confer and develop a schedule for disclosure of the data and information

and further briefing on the disclosed data and information. While it continues to proceed with appropriate disclosure of this data and information per the Licensing Board's direction, by this Motion, Powertech seeks reconsideration of this ruling by the Licensing Board. Per 10 CFR § 2.323(b), Powertech has conferred with all parties on this Motion. Both CI and the Tribe object to this Motion. NRC Staff has no objection to this Motion.

I. LEGAL STANDARD OF REVIEW

Under Commission legal precedent and policy statements, motions for reconsideration may not be filed except upon leave of the Board/Presiding Officer and must show "compelling circumstances, such as the existence of a clear and material error in a decision, which could not have reasonably been anticipated, that renders the decision invalid." 10 CFR § 2.323(e). These standards for reconsideration are to be strictly applied and such motions should not be granted lightly. *Pac. Gas & Elec. Co.* (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), CLI-06-27, 64 NRC 399, 400-01 (2006); *see also* Changes to Adjudicatory Process, 69 Fed. Reg. 2,182, 2,207 (January 14, 2004) (motions for reconsideration should be considered "only where manifest injustice would occur in the absence of reconsideration"). A motion for reconsideration may only succeed if it presents "decisive new information"¹ or points to "an overlooked controlling decision or principle of law, or a factual clarification."² A properly supported motion for reconsideration should identify errors or deficiencies in the Licensing Board's determination(s) indicating the questioned ruling overlooked or misapprehended (1) some legal principle or decision that should have controlling effect; or (2) some critical factual

¹ *La. Energy Servs, L.P.*, (National Enrichment Facility), CLI-04-35, 60 NRC 619, 622 (2004).

² *Pacific Gas & Elec. Co.* (Diablo Canyon Power Plant Independent Fuel Storage Installation), CLI-06-27, 64 NRC 399, 401 n.6, *quoting* *Dominion Nuclear Conn, Inc.* (Millstone Nuclear Power Station, Unit 2), CLI-03-18, 58 NRC 433, 434 (2003).

information. *See Private Fuel Storage, LLC* (Independent Spent Fuel Storage Installation), LBP-00-31, 52 NRC 340, 342 (2000).

II. ARGUMENT

On August 20, 2014, the Licensing Board determined that the materials identified in Exhibit OST-019 are “relevant” to Contention 3 regarding evaluation of adequate data to demonstrate the ability to contain fluid migration. *See In the Matter of Powertech (USA), Inc.* (Dewey-Burdock ISR Project), August 20, 2014, Transcript at 966. Thus, the scope of this Motion is strictly limited to whether the data and information referenced in Exhibit OST-019 are “relevant” to Contention 3 under 10 CFR § 2.336.³

The primary focus of this Motion is how the requested data and information are “relevant” to Contention 3. Powertech asserts that the Licensing Board erred in its ruling that this data and information are relevant, as it overlooked existing Commission precedent regarding what may be challenged in this proceeding. As discussed at the evidentiary hearing, the proper scope of admitted contentions is whether the record of decision (ROD) was adequate to support an initial licensing action (i.e., issuance of NRC License No SUA-1600 to Powertech). In order to properly evaluate the issue of relevancy, the Licensing Board must take into account the Commission’s regulatory program for ISR facilities under its endorsed performance-based licensing program and prior Commission precedent in the *Hydro Resources, Inc.* administrative litigation.

The critical issue in the Motion is whether the Licensing Board’s August 20, 2014 ruling on “relevancy” for mandatory disclosures under 10 CFR § 2.336 is consistent with past

³ It has been argued by both CI and the Tribe that the data and information referenced in Exhibit OST-019, and as acquiesced to by Powertech in the Tribe’s Motion dated August 16, 2014, regarding borehole log data and location maps is relevant to other Contentions. However, based on the language of the Licensing Board’s August 20, 2014 ruling, it is confined to Contention 3.

Commission precedent, specifically, the decision rendered by the Licensing Board and endorsed by the Commission in the *Hydro Resources, Inc.* administrative litigation regarding the types of data and information subject to litigation in a proceeding on an initial licensing decision.

Typically, pursuant to NUREG-1569 which is entitled to special weight as Commission guidance, an ISR license applicant for an initial operating license submits *limited* groundwater data and information to allow NRC Staff to properly evaluate characterization of a proposed ISR project site. Regardless of whether data and/or information may be deemed “helpful” to supporting a contention, for purposes of an initial ISR licensing decision, it is understood that “while there ‘will always be more data that could be gathered,’” agencies ‘must have some discretion to draw the line and move forward with decisionmaking.’”⁴ Indeed, as stated in Powertech’s initial statement of position at Page 39:

“Reviewers should keep in mind that the development and initial licensing of an in situ leach facility is not based on comprehensive information. This is because in situ leach facilities obtain enough information *to generally locate the ore body and understand the natural systems involved*. More detailed information is developed as each area is brought into production....[R]eviewers should ensure that sufficient information is presented to reach only the conclusion necessary for initial licensing.”

See NUREG-1569 at 2-2; *see also* Powertech Exhibit APP-037 at ¶ A.26.

Based on this language and consistent with the *Entergy* case cited above, Powertech suggests that NRC Staff determined that no further data were required for evaluation of fluid migration controls or subsurface features such as faults or fractures. Therefore, no other data are relevant to NRC Staff determining whether Powertech’s license application and ROD satisfied Commission regulations, which is the only relevant question in this proceeding.

The Licensing Board’s consideration of Contention 3 is limited to whether per NUREG-1569 guidance and prior Commission precedent with ISR licenses, Powertech’s data submitted

⁴ *Entergy Nuclear Generation Co.* (Pilgrim Nuclear Power Station), CLI-10-11, 71 NRC 287, 315 (2010) (footnote omitted).

through its license application documents and responses to requests for additional information (RAI) satisfy 10 CFR Part 40, Appendix A, Criterion 7's requirement for "complete baseline" groundwater data. NUREG-1569, which embodies the Commission's requirements for site characterization of a proposed ISR project site pursuant to Criterion 7, is further discussed in the *Hydro Resources, Inc.* administrative litigation in CLI-06-01 where the Commission declined to take review of the Licensing Board's decision in LBP-05-17:

"The intervenors argue that the Presiding Officer erred when he approved four license conditions that will allow particular determination to be made post-licensing. These license conditions require, prior to injecting lixiviant into a well field, to...(3) conduct groundwater pump tests to assure that aquitards provide adequate confinement layers for the Westwater Canyon aquifer at Section 17, Unit 1, and Crownpoint...and (4) test for fractures that could serve as conduits for groundwater contamination."⁵

See In the Matter of Hydro Resources, Inc. (Crownpoint Uranium Project), CLI-06-01, 63 NRC 1, 3 (January 11, 2006).

In that case, the intervenors' challenge on appeal was whether their hearing rights under the AEA were violated, as they believed that they were entitled to challenge the data and information associated with these four (4) license conditions.

On appeal, the Commission properly summed up intervenors' argument:

"More specifically, they claim that these license conditions 'leave room for the exercise of judgment or discretion by HRI in establishing baseline groundwater quality, UCLs [upper control limits], and whether the Westwater [aquifer] is vertically confined and free of fractures.' They claim a right to an adjudicatory hearing on future determinations that may be made under these license conditions."

Id. at 4 (emphasis added).

The Commission affirmed the Licensing Board's findings that intervenors' were not entitled to a hearing on the data devoted to post-licensing determinations of adequate confinement and the identification of site-specific fractures in a given wellfield by stating:

⁵ The items discussed in these two license conditions resemble the substance of the Tribe's data requests in the instant case.

“The intervenors are correct that “[p]ost-hearing resolution [of licensing issues] must not be [employed] to obviate the basic findings prerequisite to a license, including a reasonable assurance that the facility can be operated without endangering the health and safety of the public.” *But here the basic findings on groundwater protection necessary for a licensing decision have been made. The Presiding Officer in LBP-05-17 found reasonable assurance that groundwater at the Section 17, Unit 1, and Crownpoint sites will be adequately protected. He reviewed extensive data submitted by HRI and the NRC staff, including preliminary pump test data, and data from HRI’s exploration drill holes and geophysical logs, as well as intervenor arguments challenging that data.* Based upon information in the record, he concluded that the Westwater Aquifer is confined at the Section 17, Unit 1 and Crownpoint sites, and that drinking water supplies will be adequately protected.”

Id. (emphasis added).

Based on this review, the Commission concluded:

“Given the prescriptive nature of the license conditions and their applicable procedures or methodologies, *and the hearing opportunity accorded to the intervenors to challenge the adequacy of those procedures*, we find reasonable the Presiding Officer’s conclusion that the intervenors’ hearing rights are not violated by these license conditions.”

Id. at 5 (emphasis added).

As shown above, the Commission’s review of LBP-05-17 in CLI-06-01 speaks directly to the instant case. This decision goes to the heart of the matter, which is that this Licensing Board’s decision on “relevance” of additional borehole data not considered by NRC Staff in its initial licensing decision is inconsistent with *Hydro Resources, Inc.* and leaves the record open-ended such that the NRC licensing process can have no clear end.

Here, the Tribe has requested access to data and information associated with development of site-specific wellfields and to be used within the scope of the *procedures* proposed by Powertech and approved by NRC Staff for fully assessing subsurface conditions within each wellfield post-license issuance. As discussed in CLI-06-01, the *procedures* associated with the post-license issuance development of wellfields, including the assessment of confinement and subsurface features such as faults, are free to be challenged by an intervening party, but not the data itself:

“The intervenors have had the opportunity to challenge the adequacy of the groundwater related information submitted by HRI and the NRC staff, as well as the methodology of procedures that will be used during the operational stages of mining to assure that groundwater quality remains protected.”

Hydro Resources, Inc., 63 NRC at 6 (emphasis added).

While the Tribe has consistently argued that the 10 CFR § 2.336 standard for relevance is “wide reaching,” such a standard cannot reach far enough to encompass data that have been ruled by the Commission to not be subject to hearing under the AEA. Indeed, the Commission in CLI-06-01 noted how allowing constant challenges to this type of data and information, which is exactly what the Licensing Board would be permitting should it allow additional argument and testimony on the requested data and information, would result in unending delays to intervening parties’ challenges:

“as the Presiding Officer found, ‘[t]his argument, if accepted, would transmogrify license proceedings into open-ended enforcement actions: that is, licensing boards would be required to keep license proceedings open for the entire life of the license so intervenors would have a continuing, unrestricted opportunity to raise charges of noncompliance.’”

Id. at 5, quoting *Hydro Resources, Inc.*, LBP-05-17, 62 NRC at 94.

Since this information has been ruled by the Commission to be outside the hearing rights of an intervening party, Powertech fails to see how this legal principle for the Commission’s ISR regulatory program is not applicable to whether the requested data and information are “relevant” to Contention 3. It stands to reason that if such data and information *cannot be litigated* in an ISR licensing proceeding, how can they be relevant to an admitted contention in this proceeding? The Tribe (as well as CI) are free to, and already have, challenged the adequacy of the data and information submitted by Powertech and approved by NRC Staff for Contention 3, and such argument is properly before the Licensing Board. But, by allowing post-license issuance data and information that was not used to support the initial licensing decision to enter the record and by stating that it does not want to close the record until this data and

information are disclosed, reviewed, and potentially challenged, the Licensing Board would essentially be committing the error identified by the Commission in CLI-06-01. Powertech asserts that disclosure of these data and information would be inconsistent with the Commission's explicit ruling and would result in a clear error of law. Thus, Powertech respectfully requests that the Licensing Board rescind its previous ruling and deny the Tribe and CI access to any data identified in Exhibit OST-019.

Respectfully Submitted,

**/Executed (electronically) by and in
accord with 10 C.F.R. § 2.304(d)/
Christopher S. Pugsley, Esq.**

Dated: September 2, 2014

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing **“POWERTECH (USA), INC.’S
MOTION FOR RECONSIDERATION OF THE LICENSING BOARD AUGUST 20, 2014
RULING ON RELEVANCY FOR MANDATORY DISCLOSURES”** in the above captioned proceeding have been served via the Electronic Information Exchange (EIE) this 2nd day of September 2014, which to the best of my knowledge resulted in transmittal of the foregoing to those on the EIE Service List for the above captioned proceeding.

Respectfully Submitted,

**/Executed (electronically) by and in
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Christopher S. Pugsley, Esq.**

Dated: September 2, 2014

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