

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

Before Administrative Judges:

William J. Froehlich, Chair
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

January 12, 2015

ORDER

(Ruling on Confidentiality of Exhibits OST-029 through OST-041)

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. By Order issued September 8, 2014, the parties were afforded an opportunity to file motions to admit additional testimony/exhibits based on information the Board ordered Powertech to disclose as part of its Mandatory Disclosure requirement.¹ All parties signed an amended Protective Order prior to receiving these mandatory disclosures.²

^{*} Dr. Richard F. Cole did not participate in this ruling. Dr. Cole passed away on December 11, 2014.

¹ Post Hearing Order (Sept. 8, 2014) at 10–12 (unpublished).

² Order (Granting Joint Motion to Amend Protective Order) (Sept. 12, 2014) (unpublished). See also Memorandum and Order (Protective Order Governing the Disclosure of Sensitive Unclassified Non-Safeguards Information (SUNSI)) (Mar. 5, 2010) (unpublished).

On November 21, 2014, the Oglala Sioux Tribe sought to admit exhibits OST-029, OST-030, OST-031, OST-032, OST-033, OST-034, OST-035, OST-036, OST-037, OST-038, OST-039, OST-040 and OST-041 as additional exhibits/testimony relevant to Contention 3.³ The Oglala Sioux Tribe filed these exhibits as non-public documents, but argued that these exhibits should be ruled public and placed in the public files associated with this proceeding.⁴ Powertech did not oppose admission of these exhibits, but did oppose their public release.⁵

On December 10, 2014, the Board admitted exhibits OST-029 through OST-41 as non-public exhibits, stating that they would remain non-public until the Board ruled on whether they did in fact contain proprietary or confidential information.⁶ The Board directed the parties to file memoranda on this issue, referencing 10 C.F.R. § 2.390, which encompasses the Freedom of Information Act (FOIA) exemptions from public disclosure, as well as instructions for private entities submitting potentially non-public information to the NRC.⁷ Memoranda on these issues were received from the Oglala Sioux Tribe, the NRC Staff and Powertech on December 19, 2014.

Licensing boards operate under the presumption that all hearings and associated documents are public record,⁸ and the NRC as a whole is required by FOIA to make records

³ Oglala Sioux Tribe Motion to Admit Additional Testimony and Exhibits (Nov. 21, 2014).

⁴ “The Tribe does not believe or concede that Dr. LaGarry’s testimony, the borehole logs, or the driller’s notes can qualify as confidential under federal laws applicable to these proceedings.” Id. at 2.

⁵ “Powertech does not contest the admission of Dr. LaGarry’s supplemental testimony and the proffered borehole log documents into evidence as confidential business information.” Powertech (USA), Inc. Response to the Oglala Sioux Tribe’s November 21, 2014, Motion to Admit Additional Testimony and Exhibits (Dec. 4, 2014) at 3.

⁶ Order (Admitting Additional Exhibits, Closing the Record on Contention 3 and Setting Briefing Dates) (December 10, 2014) at 6 (unpublished).

⁷ Id.

⁸ See 10 C.F.R. § 2.328.

available to the public unless a record falls into one of FOIA's specifically enumerated exemptions from disclosure.⁹ Licensing boards may, however, withhold documents from public disclosure if they involve restricted data, defense information, safeguards information, or meet one or more FOIA exemptions.¹⁰ Under FOIA, records which contain both exempt material and non-exempt material should be released if requested after the exempt portions have been redacted.¹¹ Here, the Powertech well log data submitted by the Oglala Sioux Tribe as exhibits OST-029 through OST-041 may qualify for non-disclosure under FOIA exemption 4 which protects confidential commercial information,¹² or FOIA exemption 9 which protects geological and geophysical information and maps which concern wells.¹³

In the December 19, 2014 memoranda, none of the parties asserted that exhibit OST-029, the supplemental testimony of Dr. Hannan LaGarry, must remain non-public.¹⁴

The Oglala Sioux Tribe argues that exhibits OST-030 through OST-041 should also be publicly disclosed. First, the Oglala Sioux Tribe argues that by voluntarily publicly releasing

⁹ Shaw Group Inc. (NRC Investigation Case No. 2-2013-001), CLI-13-5, 77 NRC 223, 228 (2013).

¹⁰ See Atomic Energy Act § 181; 10 C.F.R. § 2.390. See also 5 U.S.C. § 552(a)–(b).

¹¹ “Any 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.” 5 U.S.C. § 552(b)(9).

¹² 10 C.F.R. § 2.390(a)(4).

¹³ 10 C.F.R. § 2.390(a)(9).

¹⁴ “Powertech does not take a position on the non-public status of Tribe Exhibit OST-029.” Powertech (USA), Inc. Response to the Atomic Safety and Licensing Board’s Request for Argument on Potential Non-Public Status of Oglala Sioux Tribe’s Exhibits (Dec. 19, 2014) at 1–2 [hereinafter Powertech Public Disclosure Memorandum]. “Dr. LaGarry’s testimony (Ex. OST-029) should be made publicly available.” NRC Staff’s Response to Board’s December 10, 2014 Order (Dec. 19, 2014) at 7 [hereinafter NRC Staff Public Disclosure Memorandum]. “With respect to Dr. LaGarry’s testimony contained in Exhibit OST-029, there is no basis to withhold that testimony.” 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 (Dec. 19, 2014) at 10 [hereinafter OST Public Disclosure Memorandum].

extensive borehole logs and geophysical information in its application, Powertech “waived any protection for the late-released information.”¹⁵ Second, the Oglala Sioux Tribe asserts that Powertech has not pled substantial competitive injury with sufficient detail to meet the requirements of FOIA exemption 4.¹⁶ Finally, the Oglala Sioux Tribe argues that “the right of the public to be fully apprised” of the bases for and effects of Powertech’s proposed action outweighs any non-disclosure claims.¹⁷

The NRC Staff’s memorandum opposes public disclosure of exhibits OST-030 through OST-041. The NRC Staff argues that exhibits OST-030 and OST-041, both electronic logs, are protected under FOIA exemption 4 as proprietary and confidential information explicitly mentioned in Powertech affidavits, and under FOIA exemption 9 as directly containing geophysical data.¹⁸ Exhibits OST-031 through OST-040 are drillers’ notes, and the NRC Staff takes no position on whether FOIA exemption 4 would restrict their public release.¹⁹ The NRC Staff does, however, believe that FOIA exemption 9 may prevent the public release of drillers’ notes, as they provide data about the geological characteristics of specific drill holes.²⁰ The NRC Staff does not agree with the Oglala Sioux Tribe that voluntary release of some information in the application mandates that all information must be publicly released, as this ‘late-released’ material is more specific and technical than the information included in the publicly available application.²¹

¹⁵ OST Public Disclosure Memorandum at 5, 9–10.

¹⁶ Id. at 6.

¹⁷ Id. at 11–12.

¹⁸ NRC Staff Public Disclosure Memorandum at 4–5.

¹⁹ Id. at 5.

²⁰ Id. at 5–6.

²¹ Id. at 7–8.

Powertech opposes public release of exhibits OST-030 through OST-041. Arguing that the exhibits contain proprietary information, Powertech refers to previously supplied affidavits which declared that the information in these exhibits had been obtained at significant cost, is not publically available, and is of the type of data typically maintained as confidential for financial purposes.²² If publicly disclosed, Powertech alleges it would lose the value of this log data in a potential future transaction.²³ In balancing the public interest to publically disclosing the log data, Powertech argues that NRC and EPA oversight of the project adequately protects the public interest, which would not be appreciably increased through public release of the log data.²⁴ Finally, Powertech states that exhibits OST-030 through OST-041 all contain geologic and geophysical data, and thus are also protected from disclosure by FOIA exemption 9.²⁵

Having reviewed the parties' disclosure memoranda, the Board orders that exhibits OST-030 through OST-041 remain in the non-public file associated with the Powertech proceeding. The Board finds that a plain language reading of FOIA exemption 9²⁶ intends the exclusion from public disclosure of information such as the well log data contained in exhibits OST-030 through OST-041. At the evidentiary hearing, before ruling on the relevance of this well log data, the Board heard extensive testimony from witnesses who all agreed that the data, obtained from exploratory wells, contained valuable geological information.²⁷ As such, this information is

²² Powertech Public Disclosure Memorandum at 6–7.

²³ Id. at 5.

²⁴ Id.

²⁵ Id. at 6.

²⁶ 10 C.F.R. § 2.390(a)(9) (withholding from disclosure “geological and geophysical information and data, including maps, concerning wells”).

²⁷ “Where a log becomes valuable is when you have a lot of logs and then you can start to correlate them and demonstrate the continuity of your deposits, whether there are any breaks in that, basically the geologic dip.” Tr. at 933 (Lawrence). “The development of the geologic and hydrogeologic models are dependent largely on the logs, primarily the geologic model.” Tr. at

protected from public disclosure by FOIA exemption 9, and the Board need not undertake a FOIA exemption 4 analysis. The Board also declines to weigh the balance for and against public disclosure, as the well logs fall firmly in a category of document designated by Congress for non-disclosure.

Finally, though Powertech publicly released some well log data in its application, this does not mean the company is now bound to release all other log data it possesses. In support of such a release, the Oglala Sioux Tribe cites cases which refer to releases when “identical information” and “substantially equivalent” data already existed in the public domain.²⁸ In this proceeding, some well log data were contained in Powertech’s application and released to the public. The well logs at issue here contain different data, not “identical information.” To the extent the Oglala Sioux Tribe can demonstrate Powertech has previously disclosed data it now seeks to keep non-public, the Board will review these instances, and release any previously-released information.²⁹

936 (Lawrence). “These logs will tell you, especially when interpreted together, a great deal about the rock types, the depths at which the formations occur . . . whether there are currents, flow areas, fractures.” Tr. at 940 (Moran).

²⁸ Oglala Sioux Tribe Public Disclosure Memorandum at 9.

²⁹ Supra note 11.

Board Order

The Board orders exhibit OST-029 be placed in the public file, and exhibits OST-030 through OST-041 remain in the non-public file associated with the Powertech proceeding.

It is so ORDERED.

FOR THE ATOMIC SAFETY
AND LICENSING BOARD

/RA/

William J. Froehlich, Chair
ADMINISTRATIVE JUDGE

Rockville, Maryland
January 12, 2015

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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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 (Ruling on Confidentiality of Exhibits OST-029 through OST-041)** have been served upon the following persons by Electronic Information Exchange, and by electronic mail as indicated by an asterisk.

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

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Rockville, Maryland
January 12, 2015