

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of:)	
)	
)	Docket No.: 40-9075-MLA
POWERTECH (USA), INC.)	
)	Date: October 14, 2014
(Dewey-Burdock In Situ Uranium Recovery)	
Facility))	
_____)	

**POWERTECH (USA), INC.'S RESPONSE TO CONSOLIDATED INTERVENORS AND
OGLALA SIOUX TRIBE MOTION FOR EXTENSION OF TIME**

By this Response, Powertech (USA), Inc. (Powertech) hereby submits this Response to Consolidated Intervenors' (CI) and the Oglala Sioux Tribe's (Tribe) Motion for Extension of Time to review information ordered to be disclosed by the Atomic Safety and Licensing Board (Licensing Board). By way of background, Powertech made this information available at its Edgemont office starting on September 12, 2014, and on that date also shipped DVDs of digitized borehole log data to all parties, which have been acknowledged as received by all parties. Powertech also issued an electronic transmission of the take permit application, a United States Bureau of Land Management (BLM) letter regarding requests for additional information (RAI) on its Plan of Operations application, and a draft avian monitoring plan. This electronic transmission was also sent to the Licensing Board's clerk so that copies of such documents may become part of the record. Since the required information for disclosure was issued or made available by Powertech on September 12, 2014, the Licensing Board's Order for a thirty (30) day

timeframe for CI and the Tribe to file supplemental testimony would expire on October 14, 2014.¹

The standard for an extension of time request is located at 10 CFR § 2.307(a) where the Commission has stated that:

“the time fixed or the period of time prescribed for an act that is required or allowed to be done at or within a specified time, may be extended or shortened either by the Commission or the presiding officer for good cause....”

10 CFR § 2.307(a).

The Commission has expressly advised the Licensing Boards to see that the licensing process moves along at an expeditious pace, consistent with the demands of fairness, and the fact that a party has personal or other obligations or fewer resources than others does not relieve the party of its hearing obligations. *See Texas Utilities Generating Co. (Comanche Peak Steam Electric Station, Units 1 and 2)*, LBP-82-18, 15 NRC 598, 599 (1982). The Commission discourages extensions of deadlines, absent extreme circumstances, for fear that an accumulation of seemingly benign deadline extensions will in the end substantially delay the outcome of the case. *See Hydro Resources, Inc. (Crownpoint Uranium Project)*, CLI-99-1, 49 NRC 1 (1999).

The Commission’s Rules of Practice specifically contemplate the potential for the levying of additional evidentiary argument based on the disclosure of additional data and/or information after the conduct of an evidentiary hearing. These rules are located at 10 CFR § 2.326 entitled *Motions to reopen* which states:

“(a) A motion to reopen a closed record to consider additional evidence will not be granted unless the following criteria are satisfied:

(1) The motion must be timely. However, an exceptionally grave issue may be considered in the discretion of the presiding officer even if untimely presented;

¹ The Licensing Board’s 30 day timeframe would expire on October 12, 2014; however, October 12, 2014, is a Sunday and October 13, 2014, is a federal holiday. Thus, the final deadline for supplemental testimony is October 14, 2014.

(2) The motion must address a significant safety or environmental issue; and

(3) The motion must demonstrate that a materially different result would be or would have been likely had the newly proffered evidence been considered initially.”

10 CFR § 2.326(a)(1-3).

Once the record has closed, issues may be litigated directly only if standards for late-filed contentions and reopening the record are met. *Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 & 2), ALAB-728, 17 NRC 777, 807 (1983), *review denied*, CLI-83-32, 18 NRC 1309 (1983). If this were not the case, Licensing Board proceedings would have no discernible end and no initial decisions would ever be rendered. *Compare Hydro Resources, Inc.* (Crownpoint Uranium Project), CLI-06-01, 63 NRC 1, 5-6 (2006) (finding that keeping license proceedings open for the entire life of the license so intervenors would have a continuing, unrestricted opportunity to raise charges of noncompliance would transmogrify license proceedings into open-ended enforcement actions). However, as this Licensing Board has noted on several occasions, the requirement of mandatory disclosures is ongoing which indicates that the Commission’s Rules of Practice anticipate the potential for disclosure of data and/or information after the close of an administrative record and the potential for motions to re-open such record. *See* 10 CFR § 2.336.

CI and the Tribe contend that they have demonstrated good cause for an almost three (3) month extension to review the data disclosed by Powertech on September 12, 2014, on DVD or in paper form made available at its Edgemont office pursuant to the Licensing Board’s Order dated September 8, 2014. First, the Motion claims that “good cause” is demonstrated based on the Declaration of Dr. Hannan LaGarry that his particular circumstances, including his occupational duties, prevent him from reviewing the paper logs within the allotted 30 day review timeframe and from reviewing them anywhere but in Rapid City, South Dakota. Dr. LaGarry’s

Declaration specifically notes several occupational-specific issues that require him to have the requested time extension and re-location of the disclosed data to Rapid City, including items such as obtaining permission from the Oglala Lakota College's Vice-President for Instruction and his Department Chair. LaGarry Declaration at 2, ¶ 7. In that same paragraph, Dr. LaGarry notes that "[l]eave from my job is out of the question, as my expertise at the college is unique and no replacement is available." *Id.*

While CI and the Tribe continue to assert that these particular circumstances warrant an almost three (3) month extension of time, the issues raised by Dr. LaGarry appear to fit within the aforementioned *Texas Utilities Generating Co.* case's discussion of "personal" obligations,² which do not constitute sufficient grounds for an extension of time. Dr. LaGarry's personal occupational obligations should not be the root cause for a substantial extension of time when both CI and the Tribe should be well-aware of the Commission-approved methodology for continuing review of the disclosed data and for re-opening the record prior to the Licensing Board's Initial Decision. *See* 10 CFR § 2.326(a).

Second, CI and the Tribe claim that Powertech's "own conduct" resulted in prejudice to them regarding review of the disclosed data, as they claim Powertech withheld the data from them. Powertech strenuously objects to this argument, as there was no deliberate act to withhold the data from CI or the Tribe. As noted previously, Powertech's license application dated August, 2009, which is a part of the record of decision (ROD) and the administrative record, specifically referenced the use of "thousands" of exploration drill holes for which there was a suite of down-hole electric logs. *See e.g.*, Powertech License Application, Environmental Report Section 3.3.2 (Powertech Exhibit APP-040-A at 95); *see also* Technical Report Section 2.6.2

² In contrast, CI and the Tribe cite to "weather events and health issues" as indicators of "good cause" from a 2012 Federal Register notice. These references do not apply in the instant case as Dr. LaGarry is not pleading such issues as evidence of "good cause."

(Powertech Exhibit APP-021-A at 147). Powertech's responses to NRC Staff's RAIs also included several references to such borehole logs. *See e.g.*, Powertech Responses to Requests for Additional Information on the Environmental Report, RAI WR-2.1 (Powertech Exhibit APP-050 at 66); *see also id.*, RAI WR-6 (Powertech Exhibit APP-050 at 73); Powertech Responses to Requests for Additional Information on the Technical Report, RAI P&R-6, which notes: "Based on Powertech's borehole and geophysical logs for more than 3,000 exploratory holes, the Fuson Shale is continuous and no less than 20 feet thick throughout the entire project area" (Powertech Exhibit APP-016-B at 50).³ NRC Staff's ROD also contains numerous references to the thousands of boreholes and logs identified in the license application and used to reach the ROD's final conclusions. *See* NRC Staff Exhibit-008-A-1 at 189, 2nd Paragraph; *see also* NRC Staff Exhibit NRC-134 at 65, 2nd Paragraph). Additionally, Powertech's press release dated July 16, 2014 (Tribe Exhibit OST-019), which the Tribe relied on in its July 22, 2014, cross-examination motion, provided the parties with adequate notice that newly acquired Energy Fuels Resources (EFR) logs either were or would soon be in Powertech's custody and control. Powertech also accelerated the terms of its purchase agreement for acquisition of the remainder of the EFR logs to ensure that CI and the Tribe had access to *all* requested data on September 12, 2014. The mandatory disclosure regulations at 10 CFR § 2.336(a)(2)(i) specifically state that:

"A copy, or a description by category and location, of all documents and data compilations in the possession, custody, or control of the party that are relevant to the contentions, **provided that if only a description is provided of a document or data compilation, a party shall have the right to request copies of that document and/or data compilation.**"

10 CFR § 2.336(a)(2)(i) (emphasis added).

³ Page 5 of the Motion references that it took Powertech six (6) years to evaluate the logs previously in its possession. This fact is irrelevant to the instant Motion, because Powertech made the existence of these logs known in its license application (since 2009), and CI and the Tribe were more than capable of requesting copies of or access to the data at that time.

As evidenced by the multiple references to previously existing borehole logs in its license application and the ROD, as well as the complete administrative record, Powertech provided more than adequate descriptions of these borehole logs prior to the filing of this Motion. Thus, CI and the Tribe essentially waited until the eve of the administrative hearing to request copies of (or access to) these borehole logs, most of which were identified over five (5) years ago. Further, Powertech presented reasonable arguments to the Licensing Board and all parties that these data did not meet 10 CFR § 2.336's standard for "relevance." None of these actions described above can be classified as resulting in prejudice by Powertech's "own conduct." Indeed, it provides further evidence that an extension of time is not warranted here as Intervenors' "own conduct" resulted in this last-minute request to review these data.

On the contrary, the Motion offers no explanation of CI and the Tribe's "own conduct" in attempting to review the disclosed data in Powertech's Edgemont office. The Motion offers no explanation as to why CI and the Tribe's designated expert spent only portions of three (3) days over a thirty (30) day disclosure period reviewing the logs. While the Motion attempts to characterize the paper logs as critical to their review by citing Powertech's expert testimony from the evidentiary hearing, CI and the Tribe make no attempt to justify why they have not scheduled an additional visit(s) to the Edgemont office since September 14, 2014. Indeed, according to the attached affidavit of Frank Lichnovsky, Powertech's Chief Geologist, Dr. LaGarry did not take the opportunity to review the majority of the data available, including specifically geophysical logs and maps, during his three-day visit and, in Powertech's estimation, this does not amount to a "meaningful review." Furthermore, there is no evidence provided in the Motion or in Dr. LaGarry's Declaration showing how his review conducted to date or how additional, future review and analysis of the disclosed data is relevant to Contentions 2 and 3. Thus, it is difficult

to demonstrate “good cause” for an extension of time when no reasonable effort is made to review disclosed data and no argument is provided as to why the disclosed data will be relevant to Contentions 2 and 3.

CI and the Tribe’s failure to show “good cause” is augmented by the fact that the Motion and Dr. LaGarry’s Declaration provide evidence only of a cursory inventory and very limited review of the disclosed data, which is contrary to the express statements of the Licensing Board at the evidentiary hearing. On the final day of the August 19-21, 2014, hearing, the Licensing Board made it clear that this review period was not to be used merely to inventory the available data, but to determine whether it would support the parties’ positions relative to Contention 3:

“In the first sitting with the representative [data], the portions they have document[ed], and with the electronic data, they will be able to see whether this is a treasure trove of new information that will support your position, in which case I would hear from you within three weeks.”

August 21, 2014, Hearing Transcript at 1321, lines 15-20.

Without any specific supporting evidence proffered by CI or the Tribe, the Motion and supporting Declaration appear to serve as nothing more than an attempt to delay final resolution of these proceedings. In fact, specific statements in the Motion attempt to make the amount of data appear as large as possible, including mischaracterizing 16,000 separate digital files as separate datum, even though Powertech explained to OST and CI in an email dated September 22, 2014, that there are several file types associated with each log and that the text files can be opened and read with commonly available programs such as Microsoft Word and Notepad. After a complete review of the unique text files on the DVD, Powertech has concluded that there are approximately 3,075 logs on the disk. *See* Affidavit of Elizabeth Scheinost. This number is a far cry from the 16,000 separate digital files alleged in the Motion.

Then, the Motion claims that “[n]o meaningful index of the nature, dates, or content of the files was provided.” Motion at 3. This statement omits several key pieces of information such as the fact that the DVD contains an index file as received from EFR and the fact that Powertech personnel were available in its Edgemont office to provide assistance, yet were never asked by Dr. LaGarry how to open the digitized files. *See* Affidavit of Frank Lichnovsky at ¶ 6. Further, there is nothing in the Commission’s Rules of Practice that requires Powertech to present such data in a format requested by any other party, and it is not incumbent upon Powertech to do CI or the Tribe’s work for them. Powertech provided the digitized well log data to all parties on DVDs that contained exact copies of the two CDs acquired from EFR, which is supported by the attached Affidavit of Elizabeth Scheinost, Powertech’s Licensing and Environmental Compliance Engineer, who oversaw the production and distribution of the DVDs. Further, with regard to the geophysical logs already in Powertech’s possession prior to acquiring the EFR data, it is important to point out that these are in the same format that was used by Powertech to prepare the application and, to the extent that a limited number of logs were provided with the license application and RAI responses, by NRC Staff to perform their detailed technical review of the license application.

The Motion also claims that the review proposed to be conducted by Dr. LaGarry should result in Powertech moving the non-electronic data from its Edgemont office to an office in Rapid City. Initially, this would result in an undue expense for Powertech, because it would be forced to secure an office at its own expense to provide Dr. LaGarry the requested twenty four (24) days of review time over the next two to three months. Powertech does not currently have a Rapid City office and neither does its counsel for the State of South Dakota hearings, whose office is located in Belle Fourche, South Dakota. Therefore, Powertech would be forced to

spend the financial resources necessary to transfer the data and the personnel necessary to supervise review of the confidential business information⁴ from Edgemont to Rapid City and to either return the data to Edgemont after each day's review or to rent the office space for at least three months. Further, it is worth noting that Dr. LaGarry's residence and work location (Chadron, Nebraska according to CI Exhibit INT-004 at 1) is closer to Edgemont (80 miles) than to Rapid City (103 miles). Thus, the Motion's request to move the data to Rapid City lacks "good cause" on its face.

The Motion's statements that Dr. LaGarry would be required to review *all* the disclosed logs are both unreasonable and unnecessary. Standard practice for review of such logs would be to select representative samples of such logs (particularly with respect to the concerns raised by CI and the Tribe in Contention 3) considering that there were dozens of logs submitted to NRC Staff in Powertech's license application that has become part of the ROD. *See* Powertech Exhibit APP-016-G at 5-13; *see also* Powertech Exhibit APP-016-J through APP-016-L. Further, Dr. LaGarry's Declaration mischaracterizes the number of logs acquired from EFR as encompassing 27 ½ boxes. *See* LaGarry Declaration at ¶ 5. As stated in Frank Lichnovsky's Affidavit at ¶ 8, only 18 boxes of the EFR data contain geophysical logs, which were the primary focus of the concerns raised by CI and the Tribe with respect to Contention 3.

CI and the Tribe's Motion also claims that Powertech has demonstrated no prejudice to its licensing process as a result of this requested time extension. Powertech notes that it has not been given an appropriate forum to address this prejudice until the submission of this Response. The prejudice to Powertech lies in the fact that the remaining permits, authorizations, and hearings for the Dewey-Burdock ISR Project are being held up, as other federal and State

⁴ It is important to note that the transfer of confidential business information to office space not in the care and custody of Powertech for review is not in the best interest of maintaining the information's confidentiality.

agencies are awaiting final decisions from the Licensing Board. The State of South Dakota has placed the remainder of its hearings on hold, where members of CI have repeatedly argued that it should stay such hearings until NRC renders a final decision. These delays potentially could result in months or even years of additional time added to the licensing/permitting process and, thus, are prejudicial considering that the Project site must still be constructed prior to operations, but construction cannot begin until these licenses/permits are obtained.

CI's and the Tribe's Motion provides additional evidence supporting the argument offered above. For example, the Motion states that the disclosed data includes "five (5) standard file cabinets full of bore hole logs." Motion at 3. These file cabinets contain the borehole logs referenced throughout Powertech's license application, RAI responses, and the entire ROD. CI and the Tribe were presented with ample notice that Powertech possessed the data in these file cabinets as far back as 2009 and 2010 and never requested copies of or access to that information.

Lastly, the Motion makes reference to the fact that the disclosed data are relevant to both Contentions 2 and 3. Powertech contests this assertion for a number of reasons. First, with respect to the disclosed logs, the Licensing Board already has stated in its September 8, 2014 Order, that the administrative record would remain open for CI and the Tribe to offer supplemental testimony and/or amend its arguments on Contention 3 and not on Contention 2:

"The parties shall further have the right to file additional testimony and exhibits to supplement, support or otherwise bolster their arguments related to Contention 3, based on the newly disclosed well logs. Any supplemental testimony or additional exhibits based on these newly disclosed well logs shall be filed within 30 days of their availability to the parties. Accordingly, the Board will hold the record open on Contention 3."

September 8, 2014, Post Hearing Order at 13.

Second, neither the Motion nor Dr. LaGarry's Declaration offer any substantive argument that the disclosed logs contain any information relevant to Contention 2 on adequacy of data on baseline groundwater quality. Dr. LaGarry's Declaration states that he reviewed "an array of digital borehole data, minilogs, handwritten drillers' notes, and full-sized electronic logs" but nowhere mentions groundwater quality data. *See Dr. LaGarry Declaration at ¶3.*

Third, Page 2 of the Motion makes the statement that "Powertech witnesses also testified to the relevancy of this information to the water quality issues involving Contention 2." Motion at 2. However, this statement takes Powertech expert witness Errol Lawrence's testimony completely out of context. Mr. Lawrence stated at Page 948 of the Day 2 (August 20, 2014) hearing transcript that one could look at "order of magnitude changes in water quality based off that for conductivity." This statement is further clarified by Powertech expert witness Hal Demuth's testimony on Pages 951-952 of the Day 2 transcript that states one would need a porosity log to calculate salinity, which Powertech does not have and, therefore, "we can't make that calculation from especially these logs." Thus, the Motion's argument that the requested extension of time should apply to Contention 2 should be dismissed.

For the reasons discussed above, Powertech respectfully requests that the Licensing Board deny CI and the Tribe's Motion and close the administrative record on all admitted contentions as of October 14, 2014.

Respectfully Submitted,

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

Dated: October 14, 2014

Anthony J. Thompson, Esq.
Christopher S. Pugsley, Esq.
Thompson & Pugsley, PLLC
1225 19th Street, NW
Suite 300
Washington, DC 20036
COUNSEL TO POWERTECH

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of:)	
)	
)	Docket No.: 40-9075-MLA
POWERTECH (USA), INC.)	
)	Date: October 14, 2014
)	
(Dewey-Burdock In Situ Uranium Recovery)	
Facility))	
_____)	

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing **“POWERTECH (USA), INC.’S RESPONSE TO CONSOLIDATED INTERVENORS AND OGLALA SIOUX TRIBE MOTION FOR EXTENSION OF TIME”** in the above captioned proceeding have been served via the Electronic Information Exchange (EIE) this 14th day of October 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
accord with 10 C.F.R. § 2.304(d)/
Christopher S. Pugsley, Esq.**

Anthony J. Thompson, Esq.
Christopher S. Pugsley, Esq.
Thompson & Pugsley, PLLC
1225 19th Street, NW
Suite 300
Washington, DC 20036
COUNSEL TO POWERTECH

Dated: October 14, 2014