

**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
)	
(Dewey-Burdock In Situ Uranium Recovery Facility))	Date: October 24, 2014
)	
_____)	

**POWERTECH (USA), INC. RESPONSE TO OGLALA SIOUX TRIBE AND NRC STAFF
SUPPLEMENTAL TESTIMONY AND EXHIBITS**

I. INTRODUCTION

Pursuant to the Licensing Board’s Post-Hearing Order dated September 8, 2014, Powertech (USA), Inc. (Powertech) respectfully submits this Response to the Oglala Sioux Tribe (hereinafter the “Tribe”) and NRC Staff Supplemental Testimony and Exhibits regarding information disclosed by Powertech on September 12, 2014. These disclosures were offered pursuant to 10 CFR § 2.336 and the aforementioned Licensing Board September 8, 2014, Post-Hearing Order. The data and documents disclosed on September 12, 2014, encompassed all aspects of the Licensing Board’s September 8, 2014, Post-Hearing Order and included: (1) borehole log data in Powertech’s possession prior to the original submission of its February 25, 2009, United States Nuclear Regulatory Commission (NRC) license application, which was granted on April 8, 2014, by NRC Staff; (2) all borehole log data and maps acquired from Energy Fuels (USA) Resources, Inc.; (3) a July 8, 2014 letter from the United States Bureau of Land Management (BLM) regarding Powertech’s application for a Plan of Operations for the Dewey-Burdock *in situ* leach uranium recovery (ISR) Project (hereinafter the “Project”); (4) a

Take permit application filed by Powertech in January, 2014 with the United States Fish and Wildlife Service (FWS) for bald eagles; and (5) Powertech's *draft* avian monitoring plan for the Project.

On October 14, 2014, NRC Staff submitted a Motion to Admit Testimony and Exhibits regarding these disclosures. In that Motion, NRC Staff specifically notes that:

“Powertech’s recent disclosures largely support, and in no way contradict, the Staff’s findings in the FSEIS. These disclosures fail to support the Intervenor’s contentions, and they serve only to confirm that when preparing the FSEIS the Staff complied with the National Environmental Policy Act.”

NRC Staff Motion at 2.

The same day, the Tribe filed a Motion to Admit Additional Exhibits but did not file any additional supplemental testimony. The Tribe’s Motion consists of a three (3) page document with claims that the submitted supplemental exhibits support specific points offered previously. The Tribe’s Motion also did not offer any supplemental argument or testimony showing why the documents encompassed under Nos. 3-5 on page 1 *supra*. should result in modification of NRC’s record of decision (ROD) for the Project. The Consolidated Intervenor (hereinafter “CI”) have not offered any supplemental argument, testimony or exhibits on the recently disclosed data or documents.

Consultation with other parties yielded the result that there is no objection to the submission of the Tribe’s Categories 1 and 2 sets of exhibits already deemed relevant by the Licensing Board, with both Powertech and NRC Staff maintaining their right to object to the two (2) newly offered Category 3 exhibits based on relevance but not on timeliness. Powertech supports admission of the supplemental argument and testimony/exhibits offered by NRC Staff in its October 14, 2014, Motion. As will be shown below, Powertech concurs with the findings of NRC Staff in its supplemental testimony in that the recently disclosed data and documents do

not, in any way, contradict the findings in NRC's Safety Evaluation Report (SER) or Final Supplemental Environmental Impact Statement (FSEIS). Powertech further objects to the admission of the Tribe's Category 3 documents as not relevant to the admitted contentions and for lack of supporting testimony or any argument linking specific aspects of the proposed exhibits to previously offered pre-filed position statements, pre-filed written testimony or testimony offered at the August 19-21, 2014, evidentiary hearing.

II. ARGUMENT

For purposes of this Response, Powertech will offer its argument and testimony as follows: (1) NRC Staff's supplemental testimony and proffered exhibits; (2) the Tribe's Category 1 and 2 proffered exhibits; and (3) the Tribe's Category 3 proffered exhibits.

A. NRC Staff's Supplemental Testimony and Exhibits

Powertech has reviewed NRC Staff's supplemental testimony and exhibits and concurs with its findings. In addition to concurring with the statements in this supplemental testimony, Powertech also offers additional supplemental testimony of Mr. Frank Lichnovsky, Powertech's Chief Geologist, and Mr. Errol Lawrence of Petrotek Engineering, both of whom previously served as witnesses in this proceeding. Pursuant to 10 CFR § 2.337(a) and given that the attached supplemental testimony is directly in response to previously offered supplemental testimony and from reliable, qualified witnesses,¹ Powertech respectfully requests that the Licensing Board admit it into evidence as Powertech Exhibit APP-072.

While this supplemental testimony addresses several portions of NRC Staff's supplemental testimony, as well as issues raised during the course of this evidentiary hearing as referenced in NRC Staff's supplemental testimony, Powertech deems it appropriate to highlight a

¹ Mr. Lawrence's curriculum vitae already has been admitted into evidence into this proceeding as Powertech Exhibit APP-038. Mr. Lichnovsky's curriculum vitae is attached to this Response and labeled as Powertech Exhibit APP-073.

few key issues. First, Mr. Lichnovsky concurs with NRC Staff's development of spot-check analysis of randomly selected digital and paper drill hole logs in areas of the Tribe's expressed concerns and within the areas previously evaluated by Powertech in its license application and NRC Staff in its ROD to evaluate the thickness of the Fuson Shale. Mr. Lichnovsky states that NRC Staff's analysis "agrees very well with the license application" in that NRC Staff's determination of the range of Fuson Shale thickness of twenty-two (22) to seventy-two (72) feet comports with Powertech's analysis of twenty (20) to eighty (80) feet in the revised Technical Report (TR). *See* Powertech Exhibit APP-072 at 3, ¶ A.5. Mr. Lichnovsky also concurs with NRC Staff's Exhibits NRC-158, 168, and 169, as they pertain to the Fuson Shale, noting that the fence diagrams constructed by NRC Staff overlap portions of the cross sections submitted in Powertech's approved license application and also do not show the presence of faulting. *See id.* at 3, ¶ A.6.a. Mr. Lawrence also reviewed NRC Staff's analysis in these exhibits and concurs that the Fuson Shale's elevation and thickness are consistent across the evaluated Project areas and do not exhibit any evidence of faults that would substantially affect groundwater flow. *See id.* at 4, ¶ A.6.b.

Second, Mr. Lichnovsky concurs with NRC Staff's review of borehole log data with respect to the potential for breccia pipes and/or collapse features at the Project site. In his testimony, Mr. Lichnovsky confirms NRC Staff's conclusions that evaluation of additional borehole logs and other disclosed data, including a fence diagram (NRC Exhibit NRC-172) constructed across the location of an alleged sinkhole, provide "no evidence of discontinuity in the Fuson Shale or other geologic units that would indicate a breccia pipe." Powertech Exhibit APP-072 at 5, ¶ A.9. Mr. Lawrence concurs with Mr. Lichnovsky's and NRC Staff's opinion and reiterates from his pre-filed testimony that "there is extensive evidence against the presence

of faults, fractures or breccia pipes in the license area that would substantially affect groundwater flow,” including potentiometric surface differences, water quality differences, and evaluation of the historical and recent pump test results. *Id.* at 5, ¶ A.10.

Powertech also has reviewed NRC Staff’s supplemental testimony regarding additional documents including the aforementioned BLM letter, “take” permit application, and *draft* avian monitoring plan, and concurs with the statements offered therein. Powertech also adds that the FSEIS assumes that Powertech will comply with applicable State and federal regulations and permits associated with wildlife protection, and the *draft* avian monitoring plan and “take” permit application are evidence that Powertech is indeed complying with this requirement. With respect to these two (2) documents, Powertech notes that the mitigation measures described in the “take” permit application and draft avian monitoring plan are consistent with those measures discussed in the FSEIS and reflect proven, state-of-the-art wildlife protection measures used in the Project region for decades. For example, Powertech commits in the *draft* avian monitoring plan to use current Avian Power Line Interaction Committee (APLIC) recommendations for overhead power line construction to reduce the possibility of electrocution and collision for avian species. *See* Tribe Exhibit OST-023 at 26. As discussed by Powertech’s expert witness Ms. Gwynn McKee during the evidentiary hearing, the FSEIS references’ use of the APLIC recommendations as a potential mitigation measure. *See* Powertech Hearing Transcript at 1282-1283.

With respect to the BLM letter, the information requested by the agency is consistent with a more specific level of project planning than typically occurs prior to the preparation and finalization of an FSEIS or issuance of an NRC license (e.g., barbwire fence specifications for big game passage, power line construction standards, etc.). These items are generally described

in the FSEIS, such as where it recommends that Powertech follow APLIC recommendations for power line construction. *See* Tr. at 1283, lines 5,7-17 (McKee, citing Ex. NRC-008-B-1 at 76); *see also* Tr. at 1283-1284 (Yilma, citing Ex. NRC-008-A-2 at 89). The FSEIS also describes how Powertech will enclose wellfields with fences to restrict and control access. *See* Ex. NRC-008-A-2 at 5.

Based on these items and the additional testimony of Messrs. Lichnovsky and Lawrence proffered for admission into evidence as Powertech Exhibits APP-072, Powertech concludes that NRC Staff's supplemental testimony submitted October 14, 2014, is in accord with Powertech's conclusions in its license application and in the ROD. Therefore, Intervenor's allegations continue to lack substance and should be dismissed.

B. Tribe's Category 1 and 2 Proffered Exhibits

The Commission's Rules of Practice at 10 CFR § 2.337(a) set forth the standard for admissible evidence for this proceeding. As stated in Part 2.337(a):

“Only *relevant, material, and reliable* evidence which is not unduly repetitious will be admitted. Immaterial or irrelevant parts of an admissible document will be segregated and excluded so far as is practicable.”

10 CFR § 2.337(a) (emphasis added).

In order to comply with the requirement for “relevant, material, and reliable” evidence, a movant should cite to specific portions of the exhibits and explain the points or purposes which the exhibits serve. *See Louisiana Power and Light Co.*, (Waterford Steam Electric Station, Unit 3), ALAB-812, 22 NRC 5, 21 n.16, 42-43 (1985); *see also Pacific Gas & Electric Co.*, (Diablo Canyon Nuclear Power Plant, Units 1 & 2), ALAB-775, 19 NRC 1361, 1366-67 (1984), *aff'd sub. nom. San Luis Obispo Mothers for Peace v. NRC*, 751 F.2d 1287 (D.C. Cir. 1984), *aff'd on reh'g en banc*, 789 F.2d 26 (1986).

While Powertech has informed the Tribe that it does not object to admission of the exhibits associated with borehole logs, it is important to note that the Motion does not make any attempt 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. Thus, while it did not object to the admission of these exhibits during consultation with the parties, Powertech does note that such exhibits do not satisfy the Part 2.337(a) standards for admissible evidence based on the written submission provided by the Tribe, which Powertech was not in possession of at the time of consultation.

Further, Powertech also notes that the Motion does not even mention review of the documents identified as Nos. 3-5 above. The Tribe's failure to even identify these documents in its Motion should render their relevance to this proceeding moot. Thus, Powertech objects to any future attempt to include these documents in this proceeding as 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, Order.

C. Tribe's Category 3 Proffered Exhibits

The Tribe's Motion contains no supplemental testimony from any of their previously identified witnesses and makes no attempt to link the two (2) documents identified for admission into the record to any of the arguments offered by CI or the Tribe. These documents include a United States Environmental Protection Agency (EPA) report entitled *Preliminary Assessment Report Regarding the Darrow/Freezeout/Triangle Uranium Mine Site* (proffered Tribe Exhibit OST-026) and an accompanying EPA announcement on this report (proffered Tribe Exhibit OST-025). The portion of the Motion devoted to Category 3 documents merely makes vague

and ambiguous statements regarding the need to perform certain analytical procedures during the formulation of the FSEIS. Tribe Motion at 3. However, CI and the Tribe make no attempt to identify particular portions of the Category 3 documents that support these particular statements nor do they offer any supplemental testimony showing how these documents will be relevant to any of the admitted contentions. The Tribe also does not demonstrate how the Category 3 documents are “material” to this proceeding, because they offer no testimony in support of the use of these documents. Thus, Powertech objects to the admission of these documents based on the legal standard for admissible evidence in 10 CFR § 2.337(a) and the case law cited above.

Further, even if the Licensing Board determines that the Category 3 documents constitute admissible evidence, CI and the Tribe’s Motion offer no substantive argument demonstrating that there are deficiencies in NRC’s ROD or any of its decision documents. As stated in previous pleadings, the Commission is not required to sift through portions of the record unaided in order to discern what argument an intervenor offers. *Compare Hydro Resources, Inc.*, CLI-01-4, 53 NRC 31, 46 (2001). The intervenor bears responsibility for any misunderstanding of its claims. *See Hydro Resources, Inc.*, CLI-01-4, 53 NRC 31, 46 (2001). Thus, since the Motion fails to point to any specific evidence in these documents, Powertech respectfully requests that the Licensing Board deny this portion of the Tribe’s Motion.

Additionally, Powertech offers the following items supporting the statement that these documents have no “material” relevance to the admitted contentions. For example, the Motion claims that “[t]he EPA documents evidence the type of analysis and conclusions that should have been conducted by Powertech and NRC Staff.” Motion at 3, 3rd ¶. The Motion fails to account for the fact that the only data used in the report were collected by Powertech in support of its license application. Indeed, the EPA announcement on the report states, “[t]he PA [Preliminary

Assessment] considered existing environmental data collected by Powertech for the proposed Dewey-Burdock In-Situ Uranium Recovery Project.” Tribe Proffered Exhibit OST-25 at 1. The report itself also references the TR prepared by Powertech in support of its license application as the source of the data “used for this PA to evaluate conditions at the Site.” Tribe Proffered Exhibit OST-026 at 8. Further, the report does not even contain the most current site-specific data used in Powertech’s license application. Indeed, the report does not provide updated air sampling data, as it references the previous range of ambient exposure rate measurements summarized in Powertech’s 2009 TR (114 to 323 millirems per year), as opposed to Powertech’s updated 2011 request for additional information (RAI) responses and the FSEIS, which showed that ambient exposure rate measurements were 91 to 123 millirems per year and indeed lower than in the EPA report. *Compare* Tribe Proffered Exhibit OST-026 at 29 and Powertech Exhibit APP-016-D at 53; *see also* NRC Staff Exhibit NRC-008-A-1 at 281. These factors demonstrate that the report falls short of the requirements for “materiality” under 10 CFR § 2.337(a).

In addition, the Motion claims that these documents support alleged “data gaps” in Powertech and NRC Staff’s analyses; however, this allegation fails to account for several items already identified in previously admitted evidence in this proceeding. While “data gaps” are identified in Section 8 of the report, the Motion fails to acknowledge that these are related to whether further Comprehensive Environmental Remediation, Compensation, and Liability Act (CERCLA)² investigation is required for a potential Superfund listing and not to whether the affected environmental is described or assessed adequately for the Project. All of these identified factors and the failure of the Motion to demonstrate relevance or materiality under 10

² It is important to note that AEA-licensed operations such as the possession and use of source and 11e.(2) byproduct material are specifically exempted from CERCLA regulation. *See* 42 U.S.C. § 2210.

CFR § 2.337(a) demonstrate that these proffered exhibits should not be admitted as evidence in this proceeding.

III. CONCLUSION

For the reasons discussed above, Powertech respectfully requests that the Licensing Board find that the September 12, 2014, disclosed data and documents should not result in any modification to NRC's ROD in support of the Project's NRC license, including but not limited to, NRC's SER and FSEIS. Powertech also respectfully requests that the Licensing Board deny the Tribe's Motion to admit the two (2) Category 3 documents based on a lack of relevance and failure to offer any argument or testimony linking such documents to previously offered pre-filed position statements, pre-filed written testimony or testimony offered at the August 19-21, 2014, evidentiary hearing.

Respectfully Submitted,

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

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Dated: October 24, 2014

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing **“POWERTECH (USA), INC. RESPONSE TO OGLALA SIOUX TRIBE AND NRC STAFF SUPPLEMENTAL TESTIMONY AND EXHIBITS”** in the above captioned proceeding have been served via the Electronic Information Exchange (EIE) this 24th 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)/
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Dated: October 24, 2014