

**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: January 9, 2018
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**LICENSEE POWERTECH (USA), INC.'s REPLY TO CONSOLIDATED
INTERVENORS' OPPOSITION TO NOTICE PLEADING**

Powertech (USA), Inc. (Powertech), by its undersigned counsel of record, hereby submits this Reply to Consolidated Intervenor's Opposition to Notice Pleading in the above-captioned matter. On December 11, 2018, Powertech submitted a pleading providing information to the Atomic Safety and Licensing Board (the "Board") (regarding statements made during a November 16, 2018, status telephone conference hearing). In response, on December 31, 2018, Consolidated Intervenor (CI) submitted a response opposing some portions of Powertech's pleading. In its response, CI did not oppose selected portions of Powertech's pleading. *See Consolidated Intervenor's Response* at 3. CI also argues that portions of Powertech's pleading should not be considered by the Board in this proceeding. *See id.* at 4.

Powertech disputes CI's argument that certain portions of its pleading should be stricken from the record for several reasons. First and foremost, Powertech's pleading was offered not as an effort to submit facts under 10 CFR § 2.337(f)(1); but rather, it was submitted in direct response to a request from the Board for information pertaining to how delays in other permitting

processes are a result of the lack of a final conclusion of this proceeding *and* how that impacts Powertech's ability to function as a company/licensee. For example, during the November 16, 2017, telephone conference hearing, the Board specifically requested that Powertech provide information to inform the Board regarding delays in permitting processes due to the Board's continuing evaluation of this proceeding. As stated by Judge Bollwerk in the November 16, 2017, hearing transcript in response to Powertech's counsel stating that there were delays in the process, especially associated with the State of South Dakota, that have led to a sense of urgency in completing the Board's process: "if there's something like that in the record, I would certainly like to see it." November 16, 2017, Hearing Transcript at 1186.

Indeed, Powertech's counsel stated at the November 16, 2017, telephone conference/hearing that "what we will do is file it as a request for the Board to take judicial notice of what the entity has or has said in formal correspondence."¹ *See id.* at 1223. Powertech has sought through the pleading in question to have this information included in the record. It was necessary to offer as much information as possible, so the Board can properly understand how the permitting processes have proceeded and currently stand at this time. CI claims that portions of Powertech's pleading should not be admitted because it does not comply with the Federal Rules of Evidence (FRE), which the Board and the Commission are not subject to in adjudicatory proceedings at this agency. For example, CI claims that the "Summary of Notes" dated December 17, 2014 should not be considered as they are not in conformance with FRE 201(b)(2), because they are not official minutes, the identity of the preparer is unknown and, therefore, they are not capable of being accurately and readily determined from sources whose

¹ In addition, Powertech also notes that CI did not file its pleading in the time accorded by the Board on the December 12, 2018, telephone conference/hearing and asks that the Board take this into consideration when considering CI's response to Powertech's pleading.

accuracy cannot reasonably be questioned. However, this “Summary of Notes” is posted on the Environmental Protection Agency’s (“EPA”) website and forms part of the public record and EPA’s official administrative record. Thus, these notes provide exactly the type of information requested by the Board. *See* https://www.epa.gov/sites/production/files/2017-03/documents/summary_of_notes_from_regional_administrator.pdf.

Further, CI alleges that Powertech’s statements should be subject to “reasonable dispute,” but fails to offer any basis for a “reasonable dispute” as to why the information is inaccurate. While CI claims they cannot authenticate certain notes cited by Powertech, they do not cite any information that shows they are false. Given that the cited information provided by Powertech is part of a federal agency’s (e.g., EPA) *public* administrative record and that CI was not part of these discussions, they are not in a position to opine on this matter. The information offered is the best available to the licensee, because it is an applicant to these agencies for permits and authorizations and it forms part of EPA’s public administrative record, so its validity should not be in question.

CI also does not account for 10 CFR § 2.319(d) which authorizes a Presiding Officer to “[r]ule on offer of proof and receive evidence. In proceedings under this part, strict rules of evidence do not apply to written submissions.” *See* 10 CFR § 2.319(d). This effectively refutes CI’s claim on its reference to the FRE. *Compare* CI December 31, 2017, Response at 3-4. Powertech’s pleading offers the information requested per the Board’s request and illustrates how the delays caused by the current status of this proceeding have caused and continue to cause harm to the licensee. The transcript of the November 16, 2017, telephone conference hearing shows that the Board was interested in why there is a sense of urgency in resolving Contention 1A, which is what the substantive content of Powertech’s pleading demonstrated. Powertech’s

pleading focuses exclusively on this matter which, based on the Board's November 16, 2017 inquiry, was adequately addressed.

CI also notes in its pleading "that the DENR Water Board Order dated November 25, 2013, was in response to and granting Powertech's own motion in that proceeding." CI Response at 3. Though already stated in its initial pleading, Powertech reiterates that it requested that the DENR Water Board grant its motion upon receiving the Board of Minerals and Environment (BME) Order dated November 5, 2013, stating that both NRC and EPA processes must be completed before the BME's process would recommence.

In conclusion, Powertech has provided the information requested by the Board during the November 16, 2017, telephone conference/hearing. CI's request to deny admittance of the information provided, which was requested by the Board, should be denied.

Respectfully Submitted,

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

Dated: January 9, 2018

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing **“LICENSEE POWERTECH (USA), INC.’s
REPLY TO CONSOLIDATED INTERVENORS’ OPPOSITION TO NOTICE
PLEADING”** in the above captioned proceeding have been served via the Electronic
Information Exchange (EIE) this 9th day of January 2018, 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 or via electronic mail where appropriate.

Respectfully Submitted,

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

Dated: January 9, 2018

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