

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

Before Administrative Judges:

William J. Froehlich, Chairman  
Dr. Mark O. Barnett  
G. Paul Bollwerk, III

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 09, 2018

ORDER

(Granting in Part and Denying in Part Request to Take Judicial Notice)

Pursuant to 10 C.F.R. § 2.337(f), a licensing board “may take official notice of any fact which a court of the United States may take judicial notice or of any technical or scientific fact within the knowledge of the Commission as an expert body.”<sup>1</sup> In accordance with Rule 201 of the Federal Rules of Evidence, such facts include matters that are “generally known within the . . . court’s territorial jurisdiction,”<sup>2</sup> or that “can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.”<sup>3</sup>

On December 11, 2017, Powertech (USA), Inc. (Powertech) filed a request that the Board take official notice of six documents found in the public record.<sup>4</sup> Powertech asserts that

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<sup>1</sup> 10 C.F.R. § 2.337(f)(1).

<sup>2</sup> Fed. R. Evid. 201(b)(1).

<sup>3</sup> Id. 201(b)(2); see also Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-91-2, 33 NRC 61, 75 (1991) (noting that the Commission may take official notice of facts that are “capable of immediate and accurate determination by resort to easily accessible sources of indisputable accuracy” (quoting Gov’t of Virgin Islands v. Gereau, 523 F.2d 140, 147 (3d Cir. 1975), cert. denied, 424 U.S. 917 (1976))).

<sup>4</sup> Powertech (USA), Inc.’s Request to Take Judicial Notice (Dec. 11, 2017) [hereinafter

these documents support its position that the United States Environmental Protection Agency (EPA), the United States Department of Interior's Bureau of Land Management (BLM), and certain state agencies, are awaiting the resolution of Contention 1A before issuing Powertech permits for the construction and operation of its Dewey-Burdock facility, thereby causing Powertech to suffer financial harm.<sup>5</sup> Powertech requests the Board take judicial notice of the following:

1. A November 5, 2013 order issued by South Dakota's Department of Environment and Natural Resources (South Dakota DENR), Board of Minerals and Environment (BME) continuing the contested hearing on Powertech's application for a large scale mining permit until (a) the NRC and EPA have ruled and set the federal surety, and (b) the South Dakota DENR, Water Management Board (WMB) has decided allocation rights;<sup>6</sup>
2. An April 7, 2011 letter from the BLM to the NRC;<sup>7</sup>
3. A November 25, 2013 order issued by the South Dakota DENR WMB granting Powertech's motion to continue the administrative hearing until (a) the NRC has issued a source and byproduct material license and determined financial assurance; and (b) the EPA has made aquifer exemption determinations, issued underground injection control permits, and determined financial assurance;<sup>8</sup>

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Powertech's Judicial Notice Request].

<sup>5</sup> Id. at 1–2.

<sup>6</sup> Id., attach. 1, In the Matter of Powertech (USA), Inc. Application for Large Scale Mining Permit (Dewey-Burdock Project), DENR Board of Minerals and Environment (Nov. 5, 2013) (unpublished).

<sup>7</sup> Id., attach. 2, Letter from Marian M. Atkins, South Dakota Field Manager, BLM, to Larry W. Camper, Director, Division of Waste Management and Environmental Protection, NRC Office of Federal and State Materials and Environmental Management Programs (Apr. 7, 2011).

<sup>8</sup> Id., attach. 3, In the Matter of Water Permit Applications 2685-2 and 2686-2, Powertech (USA),

4. An undated letter from BLM to Powertech;<sup>9</sup>
5. A summary of notes taken from a December 17, 2014 meeting with the EPA Region 8 Regional Administrator regarding the proposed Dewey-Burdock project;<sup>10</sup> and
6. A January 20, 2017 EPA National Historic Preservation Act draft compliance and review document for the proposed Dewey-Burdock project.<sup>11</sup>

Powertech argues that these documents show that until the NRC resolves the pending contention (1) EPA is delaying its decision on whether or not to grant Powertech the Underground Injection Control Permits required under the Safe Drinking Water Act;<sup>12</sup> (2) South Dakota DENR is delaying granting a South Dakota Large Scale Mining Permit, South Dakota Water Rights Permits, and a Groundwater Discharge Plan;<sup>13</sup> and (3) BLM is delaying its approval of a Plan of Operation.<sup>14</sup>

On December 31, 2017, Consolidated Intervenor submitted an opposition to Powertech's request that the Board take judicial notice of the documents.<sup>15</sup> Consolidated

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Inc., DENR Water Management Board (Nov. 25, 2013) (unpublished).

<sup>9</sup> Id., attach. 4, Letter from Chip Kimball, South Dakota Field Manager, BLM, to Richard E. Blubaugh, Powertech (USA), Inc. (undated).

<sup>10</sup> Id., attach. 5, Summary of Notes from RA Meeting with Powertech on the Proposed Dewey Burdock Uranium Project in South Dakota (Dec. 17, 2014).

<sup>11</sup> Id., attach. 6, EPA, National Historic Preservation Act, Draft Compliance and Review Document for the Proposed Dewey-Burdock In-Situ Uranium Recovery Project (Jan. 20, 2017).

<sup>12</sup> See id. at 3–5.

<sup>13</sup> See id. at 5–7.

<sup>14</sup> See id. at 7–8.

<sup>15</sup> Consolidated Intervenor Opposition to Applicant Request to Take Judicial Notice (Dec. 31, 2017) [hereinafter Consolidated Intervenor's Opposition]. Although the Oglala Sioux Tribe expressed an interest in responding, Tr. at 1254–55, no such answer was filed.

Intervenors consent to the Board taking notice of (1) the November 5, 2013 South Dakota DENR BME order; (2) the April 7, 2011 letter from BLM to the NRC; (3) the November 25, 2013 South Dakota DENR WMB order granting Powertech's motion to continue; and (4) the undated letter from BLM to Powertech.<sup>16</sup> However, it objects to the Board taking notice of (1) the summary of notes of the December 17, 2014 meeting 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 accuracy cannot be reasonably questioned"; and (2) any arguments Powertech sets forth in its motion because "[n]one of such information constitutes a technical or scientific fact that is within the knowledge of the Commission . . . [or] is of a kind that may be judicially noticed by a federal court under [Fed. R. Evid.] 201(b)."<sup>17</sup> On January 9, 2018, Powertech filed a reply to Consolidated Intervenors' opposition, asking that we (1) take official notice of the summary of notes of the December 17, 2014 meeting; and (2) decline to act on Consolidated Intervenors' request that certain portions of its pleading should not be considered by the Board in this proceeding.<sup>18</sup>

We agree with Consolidated Intervenors that, consistent with Fed. R. Evid. 201(b) and 10 C.F.R. § 2.337(f), we cannot take notice of Powertech's arguments in its motion regarding the significance of any of the documents it has identified.<sup>19</sup> Second, we decline to take notice of the summary of notes of the December 17, 2014 meeting because the summary of notes is not

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<sup>16</sup> Consolidated Intervenors' Opposition at 3.

<sup>17</sup> Id. at 4.

<sup>18</sup> Licensee Powertech (USA), Inc.'s Reply to Consolidated Intervenors' Opposition to Notice Pleading at 1–3 (Jan. 9, 2018).

<sup>19</sup> See Ohio Valley Envtl. Coal. v. Aracoma Coal Co., 556 F.3d 177, 216 (4th Cir. 2009) (declining to take notice of permit decision documents and other exhibits because the party seeking notice sought "notice of its own interpretation of the contents of those documents" and not just notice of their existence); United States v. S. Cal. Edison, 300 F. Supp. 2d 964, 974 (E.D. Cal. 2004) ("A court may not take judicial notice of one party's opinion of how a matter of public record should be interpreted.").

an official agency issuance nor do we know its author. We do, however, take official notice of the existence of the five remaining documents attached to Powertech's motion "for the purpose of determining what statements are contained therein," but we do not take notice of "the truth of the contents, or any party's assertion of what the contents mean."<sup>20</sup> These five documents, unlike the summary of notes, are either official issuances of administrative agencies or are letters whose authors and recipients are known.

It is so ORDERED.

FOR THE ATOMIC SAFETY  
AND LICENSING BOARD

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William J. Froehlich, Chairman  
ADMINISTRATIVE JUDGE

Rockville, Maryland

January 09, 2018

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<sup>20</sup> S. Cal. Edison, 300 F. Supp. at 974. Although Consolidated Intervenor argued that the Board should only take official notice of four of the documents attached to Powertech's motion, it made no specific argument as to why we should not take notice of the January 20, 2017 EPA National Historic Preservation Act, draft compliance and review document. We conclude that, unlike the summary of notes for the December 17, 2017 meeting, the draft compliance and review document is a public record prepared by an administrative body, and thus we may take judicial notice of it. See United States v. 14.02 Acres of Land More or Less in Fresno Cty., 547 F.3d 943, 955 (9th Cir. 2008) ("Judicial notice is appropriate for records and 'reports of administrative bodies.'" (quoting Interstate Nat. Gas Co. v. S. Cal. Gas Co., 209 F.2d 380, 385 (9th Cir.1954)); Menominee Indian Tribe of Wis. v. Thompson, 161 F.3d 449, 456 (7th Cir. 1998) ("Judicial notice of historical documents, documents contained in the public record, and reports of administrative bodies is proper."); see also Yankee Atomic Elec. Co. (Yankee Nuclear Power Station), CLI-96-7, 43 NRC 235, 261 n.21 (1996) (taking official notice of publicly available documents filed in the docket of a Federal Energy Regulatory Commission proceeding).

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

In the Matter of	)	
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	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing **ORDER (Granting in Part and Denying in Part Request to Take Judicial Action)** 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

**ORDER (Granting in Part and Denying in Part Request to Take Judicial Action)**

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[Original signed by Clara Sola \_\_\_\_\_]  
Office of the Secretary of the Commission

Dated at Rockville, Maryland  
this 9<sup>th</sup> day of January, 2018