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: August 31, 2018
	)	
(Dewey-Burdock In Situ Uranium Recovery Facility)	)	

POWERTECH (USA) INC'S RESPONSE IN SUPPORT OF NRC STAFF MOTION FOR SUMMARY DISPOSITION OF CONTENTION 1A

I. INTRODUCTION

Pursuant to 10 C.F.R. § 2.1205, Powertech (USA), Inc. (hereinafter referred to as "Powertech" or the "Licensee") hereby submits this response in support of the United States Nuclear Regulatory Commission (NRC) Staff's (hereinafter "NRC Staff") Motion for Summary Disposition of one final admitted contention regarding Powertech's NRC License No. SUA-1600 (the "Motion"). For the reasons discussed below, Powertech supports NRC Staff's Motion and respectfully requests that the Licensing Board grant NRC Staff judgment as a matter of law on admitted Contention 1A in this proceeding.

II. BACKGROUND AND PROCEDURAL HISTORY

On February 25, 2009, Powertech submitted a license application for an Atomic Energy Act of 1954, as amended (hereinafter the "AEA"), combined source and 11e.(2) byproduct material license to construct and operate its proposed Dewey-Burdock In-Situ Recovery (ISR) project in South Dakota. After the Dewey-Burdock license application was made publicly available, on January 5, 2010, NRC Staff issued a Federal Register notice providing interested

stakeholders and other members of the public with an opportunity to request a hearing on the application and to request access to sensitive unclassified non-safeguards information (SUNSI) associated with such application.[1] On March 8th and 9th, 2010, and April 6, 2010, Consolidated Intervenors (CI) and the Oglala Sioux Tribe (the "Tribe") respectively submitted requests for a hearing including proposed contentions for admission to such a hearing. On April 12 and May 3, 2010, Powertech and NRC Staff respectively submitted responses to CI's and the Tribe's requests and argued that most, if not all, of the proffered contentions were not admissible under NRC regulations at 10 CFR Part 2.309.

On August 5, 2010, the Licensing Board issued LBP-10-16[2] in which CI and the Tribe each were granted standing to intervene and several contentions for both parties were admitted. On November 26, 2012, NRC Staff issued the DSEIS for the proposed Dewey-Burdock project. By rule, CI and the Tribe were entitled to thirty days to file new or amended contentions. In compliance with this opportunity and after receiving an extension from December 31, 2012 to January 25, 2013, both CI and the Tribe filed requests to admit several new or amended contentions. On March 11, 2013, Powertech and NRC Staff filed responses to the CI and Tribe pleadings. On March 25, 2013, CI and the Tribe filed replies to these pleadings. Then, on July 22, 2013, the Licensing Board issued a decision admitting certain new or amended contentions for various reasons and denying others.[3]

On March 20, 2013, NRC Staff issued its final Safety Evaluation Report (SER) for the proposed Dewey-Burdock ISR project (ML13052A182) and found that, "issuance of the license will not be inimical to the common defense and security or to the health and safety of the

[1] *See* 75 Fed. Reg. 467 (January 5, 2010).
[2] *See In the Matter of Powertech (USA), Inc.* (Dewey-Burdock ISR Project), LBP-10-16, 72 NRC 361 (2010).
[3] *See In the Matter of Powertech (USA), Inc.* (Dewey-Burdock ISR Project), LBP-13-9, 78 NRC 37 (2013).

public." SER at 1. On January 29, 2014, the Final Supplemental Environmental Impact Statement (FSEIS)[4] was issued recommending that, absent a safety-related issue to the contrary, Powertech's requested license should be issued. On April 8, 2014, NRC issued Powertech's requested license (NRC License No. SUA-1600) and the Record of Decision (ROD).

After it reviewed all administrative materials and pleadings offered by all parties, the Licensing Board issued LBP-15-16[5] where it was determined that, amongst other conclusions, Contentions 1A and 1B related to NEPA and the NHPA respectively should be sustained on behalf of the Tribe and CI and that the FSEIS required supplementation. Powertech and NRC Staff both appealed this determination to the Commission and, in CLI-16-20,[6] the Commission determined that the Licensing Board's determinations on these two admitted contentions should be sustained. As will be discussed in greater detail in this pleading, CLI-16-20 included a dissenting opinion from now-Chairman Svinicki in which she stated that information needed to address the alleged deficiencies in the FSEIS were not "reasonably available" and the Licensing Board overruled the Advisory Council on Historic Preservation (ACHP), which would have concluded the proceeding, as NRC Staff would have possessed enough information to have produced an adequate FSEIS. Subsequent to the issuance of CLI-16-20, the Licensing Board granted an NRC Staff motion for summary disposition of Contention 1B concluding that the NRC Staff's Tribal consultation process had satisfied the NHPA. *See In the Matter of Powertech (USA), Inc.* (Dewey-Burdock ISR Project), LBP-17-09, 86 NRC 167 (2017).

[4] *See generally* United States Nuclear Regulatory Commission, NUREG-1910, *Generic Environmental Impact Statement for In-Situ Leach Uranium Milling Facilities,* Supplement 4 (2014).
[5] *See In the Matter of Powertech (USA), Inc.* (Dewey-Burdock ISR Project), LBP-15-16, 81 NRC 618 (2015), *aff'd* CLI-16-20, 84 NRC 219 (2016).
[6] *See In the Matter of Powertech (USA), Inc.* (Dewey-Burdock ISR Project), CLI-16-20, 2016 NRC LEXIS 36 (2016).

For the remainder of this section, Powertech concurs with NRC Staff's recitation of the facts associated with Contention 1A other than to note that, on appeal by Powertech to the Commission, while Chairman Svinicki voted in favor of denial of interlocutory review, she also noted that Contention 1A should have been resolved almost two (2) years ago. *See In the Matter of Powertech (USA), Inc.*, (Dewey-Burdock ISR Project), CLI-18-07, slip op. at (Chairman Svinicki, Additional Views) (2018). By this response, Powertech respectfully requests that the Licensing Board grant NRC Staff's motion for summary disposition of Contention 1 A.

III. STATEMENT OF LAW

Under NRC regulations for this proceeding, parties are permitted to file summary disposition to address issues prior to and during the conduct of a Subpart L administrative hearing. Under 10 CFR § 2.1205(c), the Licensing Board may consider motions for summary disposition using criteria outlined in 10 CFR Part 2, Subpart G which states, "[t]he presiding officer need not consider a motion for summary disposition unless its resolution will serve to expedite the proceeding if the motion is granted." *See* 10 CFR § 2.710(d)(1). In motions for summary disposition, a moving party must make a showing that (1) there is "no genuine issue as to any material fact," and (2) "the moving party is entitled to a decision as a matter of law." *See e.g., Entergy Nuclear Operations, Inc.* (Indian Point Nuclear Generating Units 2 and 3), CLI-11-14, 74 NRC 801, 805-806 (2011). In a summary disposition motion, the moving party also must provide a "short and concise statement of material facts for which the moving party contends that there is no genuine issue to be heard." *See* 10 CFR § 2.1205(a). After a moving party submits its motion, the Licensing Board may summarily dispose of arguments within such motion if the opposing party cannot make a showing that there is a genuine issue of material fact. *See*

Advanced Medical Systems, Inc. (One Factor Row, Geneva, Ohio), CLI-93-22, 38 NRC 98, 102 (1993).

For purposes of NRC Staff's Motion and this Response, it is important to also set forth the following legal standards for summary disposition of a Contention related to a NEPA review, some of which have been included in NRC Staff's Motion. First, it is well-understood that the NEPA "hard look" standard requires application of a "rule of reason" requiring that an agency such as NRC only provide "[a] reasonably thorough discussion of the significant aspects of the probable environmental consequences…." *Warm Springs Dam Task Force v. Gribble*, 621 F.2d 1017, 1026-1027 (9th Cir. 1980). When faced with uncertainty, NEPA only requires "reasonable forecasting." In short, NEPA allows agencies "to select their own methodology as long as that methodology is reasonable."[7] Consistent with Chairman Svinicki's dissent in CLI-16-20 and later statements in CLI-18-07, NEPA's rule of reason also allows for environmental reviews to be considered complete even when there is incomplete or unavailable information. 40 CFR § 1502.22.

Powertech concurs with NRC Staff's references to Council on Environmental Quality ("CEQ") discussions regarding costs associated with obtaining what may have been determined

[7] *See The Lands Council v. McNair*, 537 F.3d 981, 1003 (9th Cir. 2008) (finding that an EIS need not be based on the "best scientific methodology available"). Powertech expert Dr. Lynne Sebastian, a former State Historic Preservation Officer (SHPO) and member of the ACHP who recused herself from the Council for this proceeding, with extensive experience, testified that NRHP and ACHP guidance makes it clear that each tribe or other traditional community will have its own views on appropriate methods of identification and NRC Staff did not try to impose a uniform set of methods on identification of places of religious and cultural significance:

> "NRC did not try to impose a uniform set of methods on the identification of properties of religious and cultural significance. Instead, the agency made the assumption that each tribe would know best how to identify the properties of significance to their people and offered all of the tribes the opportunity to come to the project area, with financial and logistical support from the applicant, and carry out whatever identification activities were deemed culturally appropriate by that tribe."

See Powertech Ex. APP-063 at 7, ¶ A.9.

to be incomplete or unavailable information in that the costs must not be exorbitant. Especially important to this proceeding and as stated by NRC Staff, CEQ has stated that the term "overall costs" is inclusive not only of financial resources, but also delays of time and need for additional personnel. *See* NRC Staff Motion at 13, *citing* 51 Fed. Reg. 15618, 15,622 (April 25, 1986). Powertech concurs with the remainder of the legal and regulatory precedent cited by NRC Staff.

IV. ARGUMENT

As a general matter, Powertech concurs with each of NRC Staff's arguments in support of a grant of summary disposition with the following additions and points of emphasis.

A. Pursuant to Accepted National Environmental Policy Act Precedent, Information Regarding the Tribe's Historic and Cultural Resources at the Dewey-Burdock Site Should Properly Be Classified as Unavailable

First, information associated with the Tribe's input on historic and cultural resources at the Dewey-Burdock site should properly be considered unavailable and, thus, should be considered adequate to summarily dispense with Contention 1A. Typically, agencies such as NRC will use the NHPA Section 106 Tribal consultation process to obtain the type of information that is claimed by the Tribe to be missing from the FSEIS. This is consistent with what many Native American Tribes believe, including the Tribe in the administrative record, that only members of the particular Tribe can identify such resources and, accordingly as noted above, there can be no generally accepted "best scientific methodology" for obtaining this information for an FSEIS.

As of the date of this submission, the Tribe has been offered three (3) formal opportunities to consult with NRC Staff so that such information could be made readily available, assessed, and then discussed in the FSEIS. The initial opportunity came when NRC Staff commenced its Section 106 process following determination that the NRC License

application was complete. Consistent with typical practice, NRC Staff attempted to complete the Section 106 process and the FSEIS on parallel paths and in a timely manner. As part of this process and in an attempt to obtain the relevant information for the FSEIS, NRC Staff offered Native American Tribes the opportunity to conduct an "open site survey" in which they may walkover the Dewey-Burdock site and identify historic and cultural resources using whatever methodology they choose. As stated by NRC Staff in Statement of Materials Facts #1, the Tribe announced it would participate but then subsequently withdrew.

Then, after the Commission issued CLI-16-20 in 2016, NRC Staff made a second attempt to engage the Tribe in a field survey. On May 31, 2017, the Tribe rejected this second attempt and offered several reasons for such rejection, including the use of a skilled contractor, coordination of different Lakota Sioux Tribes, the use of tribal elders for a survey to better inform it, and to conduct the survey when ground visibility was optimum. *See* NRC Staff Statement of Material Facts at 2, #3(A-D).

After NRC Staff's motion for summary disposition of Contention 1A was rejected by the Licensing Board, NRC Staff developed a third approach to obtaining the relevant information for the FSEIS addressing the four (4) concerns identified by the Licensing Board in LBP-17-9 and the Tribe in its May 31, 2017 letter. On April 11, 2018, Powertech sent a letter to all parties stating that it had agreed to NRC Staff's proposal and would provide the needed reimbursement and site access and support. *See* NRC Staff Statement of Material Facts at 14-15, #42(A-D). All parties were then in agreement on the proposed approach, and NRC Staff commenced its process. However, despite Powertech, NRC Staff and consultants engaged by NRC Staff being available to conduct the proposed approach, Powertech understands that the Tribe, in the eleventh hour, proposed a new, fundamentally incompatible approach to the agreed-upon

process, which would result in increased costs and time. As a result, on July 2, 2018, NRC Staff informed the Tribe their new proposal was "fundamentally incompatible with implementation of the selected approach." NRC Staff Statement of Material Facts at 23, #65(A). Then, on July 12, 2018, NRC Staff informed the other identified tribes that it was foregoing any further efforts to obtain additional information. *Id.* at 24, #67. The efforts by NRC Staff on the initially agreed to third approach to which the Tribe acknowledged responded to its concerns, represents a reasonable effort to obtain the relevant information and, under NEPA case law, is adequate to satisfy the statute's requirements. *See e.g.*, 40 CFR 1502.22; *see also* NRC Motion for Summary Disposition at 20, fn. 95, *citing Town of Winthrop v. FAA*, 535 F.3d 1 (1st Cir. 2008)

The set of facts described above represent three attempts to obtain the relevant information for the FSEIS over a period of more than eight (8) years and, if implemented as modified by the Tribe's latest proposal, the process would extend at least another year with no guarantee that the Tribe would not attempt to attach more requirements even if their latest proposal was accepted. After the first attempt conducted by NRC Staff and as stated above, Chairman Svinicki agreed that the information was not "reasonably available." 2006 NRC LEXIS at 100.

> ("This approach is facially inconsistent with our precedent, Federal case law, and the CEQ regulations, which recognize that in some instances information relevant to an EIS will not be reasonably available and direct the agency to proceed in accord with NEPA's rule of reason in the face of such lacunae.")

After the second attempt was rejected by the Tribe, on appeal by Powertech, Chairman Svinicki specifically noted that this process should have been completed almost two (2) years prior. *See* CLI-18-7, slip. op. at (Chairman Svinicki) (Additional Views).

> ("As expressed in my earlier dissent with respect to Contention 1A, instead of considering the Staff's argument that it could not reasonably obtain the information it

> acknowledged was missing, the Board invalidated the FSEIS simply because the information was missing in the first place….*Because the Board applied the legal standards to Contentions 1A and 1B incorrectly, the Board's decision should have been overturned with respect to those two contentions and the proceeding terminated at that time. Now, almost two years later, this proceeding remains ongoing*") (emphasis added).

Now after a third attempt, which significantly expanded the scope and cost of the previous approaches, has been rejected, the Tribe again has sought to add even more requirements that will expand this cost-prohibitive effort based on financial and human resources and time delays. Further, there is no indication that acceptance of the Tribe's additional concerns would actually end the process as the Tribe previously had agreed to NRC Staff's third proposed approach. As the scope of the suggested approaches expand by orders of magnitude in terms of information to be obtained and time and cost, it becomes apparent that there is no end in sight for capping the level of such information and time and cost. Thus, as cited by NRC Staff, the Commission in *Pilgrim* has found that NEPA is not adequately based on the rule of reason if it requires the use of almost infinite resources. *See* NRC Staff Motion for Summary Disposition at 12, fn. 48, *citing Entergy Nuclear Generation Co. and Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), CLI-10-11, 71 NRC 287, 315, (2010), *quoting NRDC v. Hodel*, 865 F.2d 288, 294 (D.C. Cir. 1988).

After all of the extensive efforts by NRC Staff to select an approach that would have adequately obtained sufficient information for supplementing the FSEIS, it is appropriate for the Licensing Board to classify this information as unavailable. It appears to be logical that these three instances of an inability to obtain this information despite good faith efforts by NRC Staff (which also happens to be the standard that the ACHP concluded NRC Staff satisfied with respect to Contention 1B) and the emergence of additional Tribe-suggested requirements that would render a fourth approach exorbitant with no guarantee of closure represent that such

information is not reasonably available. Under existing NEPA legal precedent cited above, the Licensing Board should now determine that NRC Staff is entitled to judgment as a matter of law on Contention 1A.

B. Under Existing CEQ Guidelines, The Latest Proposal from the Tribe to Obtain Relevant Information for the FSEIS is Now Legally Cost-Prohibitive

Second, as noted above and cited by NRC Staff, CEQ guidelines allow for the selection of a "reasonable" approach, but where the overall costs are exorbitant and/or the methodology to obtain it is unknown, 40 CFR § 1502.22 prescribes a specific roadmap for discussing such factors in an EIS. *See* NRC Staff Motion for Summary Disposition at 13, *citing* 40 CFR § 1502.22. Consistent with CEQ guidelines regarding a definition of "overall costs," previous filings by Powertech have detailed the cost-prohibitive nature of the third selected approach including expenditures associated with NRC fees, including consultant costs, maintenance of the company through investment capital, and human resources, which has since been constructively rejected by the Tribe.

However and despite this position, in its April 11, 2018 letter, Powertech stated that it would agree to the selected third proposal and requested that action be taken as soon as possible. *See* NRC Staff Statement of Material Facts at 42 (A-D). Now, as discussed by NRC Staff in its Motion, the Tribe seeks to add a significant amount of work to the scope of the third proposed, and now rejected, approach which will increase the "overall program costs" in a manner that would fall within the realm of "exorbitant." Indeed, NRC Staff's motion for summary disposition states that the cost associated with the Tribe's proposal appears to be at least three (3) times the cost of the previously offered Makoche Wawopi proposal that the Licensing Board previously stated was "patently unreasonable" in its Partial Initial Decision of April 2015. *See* NRC Staff Statement of Material Facts at 59(A-J) & 62(A-C). In addition, the Tribe's proposal

would result in further NRC fees, including NRC contractor costs, that Powertech would be responsible for and would also be required to raise significantly more investment capital due to the delay of the process into the next season or beyond with no given end in sight. Given that CEQ guidelines state that "overall costs" should be interpreted "in light of overall program needs," the Licensing Board should determine that the costs of any further actions under the Tribe's new proposal are "exorbitant" and not sustainable. Therefore, based on this, NEPA has been satisfied and NRC Staff is entitled to a judgment as a matter of law based on its Statement of Material Facts.

C. NRC Staff's Submission of Material Facts is Accurate

In this supportive motion, Powertech intends to incorporate NRC Staff's Statement of Material Facts and arguments thereto into its motion.

Respectfully submitted,

/Signed (electronically) by/
Christopher S. Pugsley, Esq.

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Dated: August 31, 2018

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: August 31, 2018
(Dewey-Burdock In Situ Uranium Recovery Facility)	

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing **"POWERTECH (USA) INC'S RESPONSE IN SUPPORT OF NRC STAFF MOTION FOR SUMMARY DISPOSITION OF CONTENTION 1A"** in the above-captioned proceeding have been served via the Electronic Information Exchange (EIE) this 31st day of August 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.

Respectfully Submitted,

/Executed (electronically) by and in accord with 10 C.F.R. § 2.304(d)/
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