

Official Transcript of Proceedings

NUCLEAR REGULATORY COMMISSION

Title: Hearing ITMO Powertech USA, Inc.

Docket Number: 40-9075-MLA

DOCKETED
USNRC

September 30, 2010 12:30 pm

ASLBP Number: 10-898-02-MLA-BD01

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

Location: (teleconference)

Date: Thursday, September 23, 2010

Work Order No.: NRC-459

Pages 406-473

NEAL R. GROSS AND CO., INC.
Court Reporters and Transcribers
1323 Rhode Island Avenue, N.W.
Washington, D.C. 20005
(202) 234-4433

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

+ + + + +

ATOMIC SAFETY AND LICENSING BOARD

+ + + + +

PRE-HEARING CONFERENCE

-----x

IN THE MATTER OF: :

POWERTECH USA, INC. : Docket No. 40-9075-MLA

(Dewey-Burdock In Situ : ASLBP No. 10-898-02-

Uranium Recovery : MLA-BD01

Facility) :

-----x

Thursday, September 23, 2010

Via Teleconference

The above-entitled matter came on for
pre-hearing conference, pursuant to notice, at
1:00 p.m.

BEFORE:

WILLIAM J. FROELICH, Chairman, Administrative Judge

DR. RICHARD F. COLE, Administrative Judge

DR. MARK O. BARNETT, Administrative Judge

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 APPEARANCES:

2 On Behalf of ASLBP:

3 MICHAEL JAMES CLARK, ESQ.

4 PATRICIA A. JEHLE, ESQ.

5 Office of the General Counsel

6 Mail Stop - O-15 D21

7 U.S. Nuclear Regulatory Commission

8 Washington, D.C. 20555-0001

9 (301) 415-2011 (Clark)

10 (301) 415-8366 (Jehle)

11 mjcl@nrc.gov

12 patricia.jehle@nrc.gov

13
14
15 On Behalf of Powertech USA, Inc.:

16 CHRISTOPHER PUGSLEY, ESQ.

17 ANTHONY J. THOMPSON, ESQ.

18 of: Thompson & Simmons, PLLC

19 1225 19th Street, N.W., Suite 300

20 Washington, D.C. 20036

21 (202) 496-0780

22 cpugsley@athompsonlaw.com

23 ajthompson@athompsonlaw.com

24
25 **NEAL R. GROSS**COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

On Behalf of the Oglala Sioux Tribe:

GRACE DUGAN, ESQ.

of: The Gonzalez Law Firm

522 7th Street, Suite 202

Rapid City, South Dakota 57701

(605) 716-6355

dugan@wavecom.net

JEFFREY C. PARSONS, ESQ.

Western Mining Action Project

Post Office Box 349

Lyons, Colorado 80540

(303) 823-5738

FAX 823-5732

wmap@igc.org

TRAVIS E. STILLS, ESQ.

Energy Minerals Law Center

1911 Main Avenue, Suite 238

Durango, Colorado 81301

(970) 247-9334

FAX 382-0316

stills@frontier.net

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

On Behalf of Consolidated Intervenor:

DAVID FRANKEL, ESQ.

Legal Director

Aligning for Responsible Mining

Post Office Box 3014

Pine Ridge, South Dakota 57770

arm.legal@gmail.com

BRUCE ELLISON, ESQ.

of: Law Office of Bruce Ellison

Post Office Box 2508

Rapid City, South Dakota 57709

belli4law@aol.com

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

P-R-O-C-E-E-D-I-N-G-S

(1:00 p.m.)

JUDGE FROEHLICH: Good afternoon, parties.

We are conducting a telephone conference today in Docket 40-9075-MLA, the Powertech USA case of Dewey-Burdock In Situ Uranium Recovery Facility.

It's 1:00 here in Rockville, and it's Thursday, September 23, 2010.

This is Judge Froehlich, and with me in the room are Judge Cole, and our new law clerk Kristen Stoddard. And we are -- and by telephone we have Judge Barnett.

For the record, I wonder if at this point if we could have the parties identify themselves and any of their colleagues who are with them today.

Who is here for the Applicant, Powertech?

MR. PUGSLEY: Chris Pugsley, Your Honor, Washington, D.C., Thompson and Pugsley. Anthony Thompson, my partner, is also present. I'm not sure if he's on yet, but he will be.

JUDGE FROEHLICH: Mr. Thompson, are you with us?

(No response)

We'll record that as no at this point.

MR. PUGSLEY: Yes. He should be on

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 shortly, sir.

2 JUDGE FROEHLICH: Okay. And for the
3 Consolidated Intervenor? Mr. Frankel, are you with
4 us?

5 MS. DUGAN: Grace Dugan here.

6 JUDGE FROEHLICH: Oh, Grace. Yes. Will
7 you be representing the Consolidated Intervenor for
8 the purposes of this call today?

9 MS. DUGAN: Aligning for Responsible
10 Mining. I do expect David to appear.

11 JUDGE FROEHLICH: Okay.

12 MS. DUGAN: I'm going to have to leave
13 early.

14 JUDGE FROEHLICH: Hopefully, it will be
15 such that the timing will be that he will be here by
16 the time you have to depart.

17 MS. DUGAN: Yes.

18 JUDGE FROEHLICH: Mr. Parsons, are you
19 with us for the Oglala Sioux Tribe?

20 MR. PARSONS: I am. Thank you. And with
21 me, but not in the same room, but on the line I
22 believe, is Travis Stills.

23 MR. STILLS: Yes. Good morning, everyone.

24 JUDGE FROEHLICH: Good morning to you, and
25 good afternoon to everyone on the east coast.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 And for the NRC staff?

2 MR. FRANKEL: David Frankel joining.

3 MR. CLARK: Good afternoon, Your Honor.

4 This is Mike Clark for the NRC staff. I am at the
5 NRC's Region IV office in Arlington, Texas. My co-
6 counsel is at headquarters, so I will let her
7 introduce herself.

8 JUDGE FROEHLICH: Thank you, counselor.

9 MS. JEHLE: This is Patricia Jehle, and
10 with me is Ron Burrows, Project Manager for the staff.

11 JUDGE FROEHLICH: Thank you. Is there
12 anyone at this stage, any members of the press,
13 public, or representatives of -- for the parties on
14 the line with us?

15 MR. FRANKEL: David Frankel is present for
16 Consolidated Intervenorors. I just joined, Your Honor.

17 JUDGE FROEHLICH: Thank you, Mr. Frankel.
18 Is there anyone else?

19 (No response)

20 All right. Let us begin. This call is
21 being transcribed by the Court Reporter. Therefore,
22 I would ask that when you speak, please identify
23 yourself to assist in the preparation of this
24 transcript.

25 Members of the public and consultants to

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 the parties may listen to the proceedings, but only
2 counsel for the parties to the case may speak.

3 I just heard a beep. Is there someone new
4 who has just joined us?

5 MR. THOMPSON: Yes. This is Tony Thompson
6 from Powertech.

7 JUDGE FROEHLICH: Good afternoon, Mr.
8 Thompson.

9 MR. THOMPSON: How are you, sir?

10 JUDGE FROEHLICH: Good, thank you.

11 The purpose of this call is to discuss
12 matters relating to the management and the scheduling
13 of this case. The Commission's regulations require
14 the Board to develop a scheduling order to govern
15 these proceedings.

16 And in that regard, we issued an order on
17 August 13th, which identified a number of specific
18 items that we could discuss today. We're certainly
19 not limited to those items. But unless there is a
20 reason, perhaps voiced by someone on the line, I would
21 propose that we discuss those items in the order
22 listed in our August 13th order.

23 In that order, we specified and suggested
24 it would be helpful if the parties and the NRC staff
25 spoke among themselves prior to this conference, and

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 perhaps were able to designate a lead spokesman or
2 represent to the Board where there is agreement among
3 the parties. I would ask of the parties, have you had
4 such a meeting? And has a spokesperson been
5 designated?

6 MR. CLARK: Your Honor, for the NRC staff,
7 this is Mike Clark. We have consulted, primarily
8 through e-mail, given the number of attorneys
9 involved. One thing we did not reach agreement on was
10 any spokesperson. I guess I'd volunteer at this time
11 for that, if nobody has objections.

12 MR. PUGSLEY: Powertech doesn't object.

13 MR. FRANKEL: David Frankel for
14 Consolidated Intervenors. We don't object. Mr.
15 Clark, thank you for taking that role.

16 MR. PARSONS: On behalf of Sioux Tribe, we
17 would certainly be fine with Mr. Clark starting off.

18 JUDGE FROELICH: Great. Thank you. Mr.
19 Clark, would you care at this point to summarize any
20 kind of agreements or issues where the parties have
21 come to some understanding?

22 MR. CLARK: Your Honor, I think we are --
23 the parties are in substantial agreement on the vast
24 majority of the issues outlined in the scheduling
25 order. There is two areas where we might need to do

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 a little more work. Those relate mainly to the timing
2 of any new or amended contentions, and also to whether
3 there will be one hearing or separate safety and
4 environmental hearings.

5 There are also some minor issues that
6 might come up as we work through the issues outlined
7 in the scheduling order, but I believe -- and I
8 believe the other parties would agree -- that we are
9 in substantial agreement on most of the issues.

10 JUDGE FROELICH: Thank you, Mr. Clark.
11 And I commend the parties for discussing these matters
12 beforehand. I think it will help, you know, expedite
13 this case and make it certainly easier on the Board to
14 come up with an order scheduling the upcoming events,
15 given the parties have discussed this and have reached
16 at least some agreement.

17 Why don't we work our way through the
18 list. There are some that we I'm sure can move
19 through very quickly, and there's a few where we will
20 perhaps need some discussion. In our August 5th
21 memoranda and order, the LBP-10-16, seven contentions
22 were admitted. Three were proffered by the
23 Consolidated Intervenors, and four by the Sioux Tribe.

24 I'm taking, Mr. Clark, from your comment
25 that the separate hearings issue might be related to

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 categorization of those contentions between safety and
2 environmental. Is that -- was that a sticking point
3 among the parties?

4 MR. CLARK: That is part of it, Your
5 Honor. I think the parties all agree that there are
6 at least two contentions that have both safety and
7 environmental components. The Intervenor -- one
8 concern is how those particular components would be
9 addressed in any hearing.

10 JUDGE FROELICH: Okay. Now, I recognize
11 immediately that contention E, which was merged with
12 J, would be one that would potentially have both
13 safety and environmental concerns. What was the
14 second one in your discussions?

15 MR. CLARK: Contentions D and E. I think
16 the parties agree that, as admitted by the Board,
17 there is an environmental component to each
18 contention. So D and E would be the two.

19 For Contention K, and for the Tribe's
20 Contention 1, I think the overall view is those are
21 environmental contentions. For the Tribe's
22 Contentions 2 and 3, those are viewed as safety
23 contentions. And then, finally, Contention 4 is
24 viewed as an environmental contention.

25 I could restate that I guess, if it would

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 be easier to --

2 JUDGE FROEHLICH: It would be helpful
3 perhaps, if you, in the first instance, Counsel Clark,
4 would run through the seven contentions and denominate
5 them, at least from your perspective and to the extent
6 there is agreement among the parties, whether they are
7 environmental or safety, just as you did for K and 1
8 through 4.

9 MR. CLARK: Certainly.

10 JUDGE FROEHLICH: Thank you.

11 MR. CLARK: For D, primarily safety, but
12 with an environmental component. Likewise with the
13 Consolidated Intervenor's Contention E, primarily
14 safety, but again with an environmental component.
15 Consolidated Intervenor's Contention K would be an
16 environmental contention.

17 The Oglala Sioux Tribe's Contention 1
18 would also be an environmental contention. The
19 Tribe's Contention 2 would be a safety contention.
20 The Tribe's Contention 3 would be a safety contention.
21 And the Tribe's Contention 4, as admitted, would be an
22 environmental contention.

23 JUDGE FROEHLICH: Thank you. Would any of
24 the other parties care to be heard on the
25 categorization that Mr. Clark just read into the

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 record?

2 MR. FRANKEL: This is David Frankel for
3 Consolidated Intervenors, Your Honor.

4 JUDGE FROEHLICH: Yes, Mr. Frankel.

5 MR. FRANKEL: We concur with Mr. Clark's
6 categorization of our respective positions. The
7 Consolidated Intervenors just wanted to make clear
8 that this characterization should not prejudice my
9 client in the sense that -- and the way that Mr. Clark
10 has expressed it is acceptable to us in that we concur
11 there is an important environmental component.

12 And we don't want this designation or
13 characterization to have a later impact in scheduling
14 or hearing process, which either puts a cart before
15 the horse in a way or deprives us of an opportunity to
16 be heard properly on those environmental components
17 within the safety contentions.

18 JUDGE FROEHLICH: Okay. Thank you, Mr.
19 Frankel.

20 Anyone else on this first I guess broad
21 categorization?

22 MR. PARSONS: This is Jeff Parsons.
23 Similar to the Consolidated Petitioners, we feel that
24 Contentions 2 and 3, which the staff has recommended
25 be labeled or categorized as safety contentions, we

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 believe they also contain significant environmental
2 components.

3 And I think what Mr. Frankel is getting at
4 -- and I feel the same way -- is that to the extent
5 that the safety contentions will be -- or there is a
6 proposal or an argument to hear the safety contentions
7 prior to the finalization of the environmental impact
8 statement, we have real concerns with labeling them as
9 safety contentions, because the National Environmental
10 Policy Act, at least with respect to the Tribe's
11 Contentions 2 and 3, the National Environmental Policy
12 Act would require a thorough analysis of those issues
13 in the EIS.

14 And we feel strongly that to conduct a
15 hearing on those contentions prior to completion of
16 the environmental impact statement would prejudice --
17 and, as Mr. Frankel put it, I think what he was
18 referring to is putting the cart before the horse.
19 And so while we don't, in the abstract, have a concern
20 about how they are labeled, to the extent that --
21 again, to the extent that the hearing would be before
22 -- would be set before the finalization of the EIS, we
23 think that that's not appropriate.

24 JUDGE FROELICH: Okay. Anyone else care
25 to be heard on this first issue?

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 MR. PUGSLEY: Your Honor, Chris Pugsley
2 for Powertech. We would just like to note we concur
3 with the staff's classification.

4 JUDGE FROEHLICH: Okay. That brings us
5 sort of to two and how the initial classification may
6 affect the timing. Was there any consensus or
7 understanding among the parties as to the timing of
8 contentions which are labeled safety, and timing vis-
9 a-vis hearing them before, let's say, the
10 environmental report is out or before even the --
11 maybe perhaps the staff evaluation is out?

12 MR. CLARK: Your Honor, Mike Clark for the
13 staff. Your Honor, there was agreement that no
14 hearing should be held before the final SER is issued.
15 The staff's particular concern was with the views of
16 the staff's witnesses might not be fully formed by
17 that point. But there was general agreement that no
18 hearing should be held on the safety contentions prior
19 to the final SER being issued.

20 JUDGE FROEHLICH: Was there, Mr. Clark, or
21 any of the parties really, was there any discussion or
22 merit, at least among the view of the parties, to
23 holding the safety contention separate from or in
24 advance of the environmental?

25 MR. CLARK: Your Honor, that was an issue

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 discussed, and I believe that's one point where the
2 parties may not all be in agreement.

3 JUDGE FROEHLICH: Why don't you start and
4 give me your view, if you would, Mr. Clark.

5 MR. CLARK: The staff, Your Honor, can
6 support either -- either hearing. We are aware that
7 in other proceedings boards have taken both
8 approaches, have bifurcated hearings or also unified
9 hearings. The staff does not have a strong view on
10 either option.

11 We would, of course -- one thing, Your
12 Honor, I believe you'll be asking for dates, and those
13 dates may have -- may play a role in the Board
14 deciding how to schedule the hearings and whether to
15 split the hearings.

16 JUDGE FROEHLICH: I agree. I think those
17 dates will be critical, and will also probably help
18 inform the decision on that. Would anyone care to
19 give me the arguments for a bifurcated hearing where
20 safety would proceed the environmental portion?

21 MR. CLARK: Your Honor, again, Mike Clark
22 for the staff. In some cases I believe that can help
23 to focus the issues. And, obviously, the focus in a
24 safety hearing is on the NRC safety regulations,
25 primarily in Part 40, and in this case also in

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 Appendix A to Part 40.

2 So in some cases I believe it could result
3 in a more focused hearing, and also it could help, in
4 some cases, expedite proceedings because the Board
5 could be working on, and the parties likewise can be
6 working on the admitted safety contentions while the
7 staff is still preparing the final SEIS. So it could
8 be -- it could expedite the proceeding.

9 JUDGE FROEHLICH: It could. Okay. Anyone
10 else care to be heard on the timing safety vis-a-vis
11 environmental hearings?

12 MR. FRANKEL: Your Honor, David Frankel
13 for Consolidated Intervenor. Our position is that a
14 hearing on safety contentions should be commenced not
15 earlier than 90 days after the issuance of the final
16 SES, because, as noted by the staff, the strong
17 environmental components to contentions -- the two
18 that were listed, D and E, that those -- in order to
19 not prejudice the Consolidated Intervenor on
20 environmental issues, are going to be addressed in
21 that SES, we think the environmental and safety
22 contentions should be heard at the same time.

23 JUDGE COLE: Mr. Frankel, this is Judge
24 Cole. When you were you talking about the SER, you
25 mentioned the term SES. You meant SER?

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 MR. FRANKEL: I meant the final SEIS. In
2 other words, that the --

3 JUDGE COLE: Oh, that's the environmental
4 impact statement.

5 MR. FRANKEL: That's right.

6 JUDGE FROELICH: Okay. I think the
7 response that I'm hearing to question 2 as set forth
8 in the notice is that, in any event, the safety
9 contentions should not be heard prior to the staff
10 SER. And we'll come back to the utility of doing it
11 in a bifurcated manner or a unified manner as we move
12 further down and have -- and are informed by the dates
13 that the staff projects for the release of the two
14 documents.

15 Any discussions as to the Subpart N
16 procedures?

17 MR. CLARK: Again, this is Mike Clark for
18 the staff. Your Honor, the parties, we did discuss
19 those. At this time, all parties seem to agree that
20 written statements of position and written testimony
21 may be important in resolving the issues in the
22 admitted contentions. So, at this time, no party
23 would be willing to consent to Subpart N procedures.

24 JUDGE FROELICH: Okay. Thank you, Mr.
25 Clark. Has there been agreement -- I know that

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 initial disclosures have begun, and I did take a look
2 at the hearing docket on the EHD. I guess the parties
3 have agreed and there is a regularized schedule for
4 updating to the hearing schedule.

5 MR. CLARK: We have not agreed --

6 JUDGE FROEHLICH: Oh.

7 MR. CLARK: -- that -- formally -- we have
8 through our discussions agreed to something similar to
9 that used in Crow Butte -- in the Crow Butte
10 proceeding, Docket Number 40-8943, and that would be
11 to update disclosures and privilege logs by the first
12 business day of every month, so essentially every 30
13 days. And that would apply both to the parties'
14 mandatory disclosures and also the staff's hearing
15 file.

16 JUDGE FROEHLICH: I think that would be a
17 good idea. I guess Dr. Cole thought it was a good
18 idea in Crow Butte, and I think a first of the month,
19 you know, deadline for both would work well.

20 All right. How about any discussions
21 among the parties as to electronically stored
22 information and its accessibility?

23 MR. CLARK: Again, this is Mike Clark. We
24 discussed this somewhat, but the staff didn't really
25 have a well-formed position here, and I don't know if

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 we reached any agreement. I know the Consolidated
2 Intervenors had input on this issue, so maybe Mr.
3 Frankel can speak to this.

4 JUDGE FROEHLICH: Mr. Frankel?

5 MR. PARSONS: This is Jeff Parsons. It
6 appears that Mr. Frankel maybe has had a technical
7 issue and dropped off for a moment. I anticipate he
8 will probably be back on.

9 From the Tribe's perspective, in the
10 e-mail discussions we had, we agreed with Mr.
11 Frankel's position as essentially that electronically
12 stored information should be considered reasonably
13 accessible. We have not heard a reason why it
14 wouldn't be. It seems in this day and age, with so
15 much information being stored electronically, that
16 that would be fairly routine, but I would certainly be
17 interested if the Applicant or staff had a different
18 position.

19 JUDGE FROEHLICH: Is there anyone that has
20 any problems or issues with making all of the
21 electronically stored information available as part of
22 the disclosures in this proceeding?

23 MR. PUGSLEY: This is Chris Pugsley for
24 Powertech. I guess we were of the same view as the
25 staff, that we didn't have a clear position on this,

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 and I guess the reason we didn't have one was that we
2 were trying to understand exactly what was meant by --
3 what the Board was looking for here, in that -- is it
4 a statement that information that is in electronic
5 form is subject to mandatory disclosure? Or is it
6 that if it's electronically stored, you know, and
7 within a certain size limit or something? I'm just a
8 little confused, and any clarification anyone can
9 offer me would be greatly appreciated.

10 JUDGE FROEHLICH: If I may -- this is
11 Judge Froehlich. I think the intent of this -- of
12 this question that we put in the notice was that we
13 wanted to make sure that electronically stored
14 information would, to the extent possible, to the
15 maximum extent possible, be readily disclosed among
16 all of the parties in electronic form.

17 And I didn't know if in this case the type
18 of electronic information would be something that was
19 in a proprietary format or was not readily searchable,
20 or whatever it might be. And so I had hoped that the
21 parties would discuss among themselves what type of
22 data is electronically stored and how it would be made
23 available as part of the disclosure process.

24 MR. PUGSLEY: All right. Chris Pugsley
25 again. Thank you, Your Honor. I appreciate that.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 MR. ELLISON: Your Honor, this is Bruce
2 Ellison for Consolidated Intervenors. Is the Court
3 suggesting that -- or the Board suggesting that
4 perhaps we talk further with Mr. Pugsley about trying
5 to see what problems, if any, may exist in terms of
6 size, which was an issue that he had raised?

7 JUDGE FROEHLICH: Right. Ideally, I would
8 prefer if the parties would discuss this and come to
9 an agreement, again, with the spirit and the intent
10 being that, to the maximum extent possible,
11 electronically stored information is to be disclosed
12 and shared among the parties to the proceeding.

13 MR. PUGSLEY: This is Chris Pugsley again,
14 Your Honor. Mr. Ellison's point is well taken, and
15 certainly Powertech is more than open to discussions
16 with all other parties regarding what is the
17 appropriate approach for this requirement.

18 JUDGE FROEHLICH: Okay. Might I suggest
19 that at the conclusion of this call the parties
20 discuss this among themselves, or in additional
21 e-mails, and then one of you take it upon yourself to
22 file with the Board a statement stating the
23 understanding of the parties on electronically stored
24 information, and then the Board will incorporate that
25 into its order establishing the procedures for the

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 conduct of the case?

2 MR. FRANKEL: Your Honor, David Frankel.

3 I just wanted to let people know I got dropped for
4 about a minute, and I'm back.

5 JUDGE FROEHLICH: Welcome back, Mr.

6 Frankel. I think you were well represented by Mr.

7 Ellison and Mr. Parsons, and we have just been

8 discussing electronically stored information.

9 MR. FRANKEL: Thank you, Your Honor.

10 MR. PUGSLEY: Your Honor, Chris Pugsley

11 for Powertech. In response to your request, I

12 certainly can -- would like to confer with the other

13 counsel, and we certainly can set up a time for us to

14 talk about this. And if the other parties have no

15 objection, I have no problem filing something with the

16 Board on everyone's behalf, assuming they concur on

17 what I write.

18 MR. ELLISON: With that assumption, Mr.

19 Pugsley, I think -- this is Bruce Ellison -- I'm sure

20 that would be great.

21 JUDGE FROEHLICH: The next item related to

22 disclosure had to do with privileged information. As

23 I understood Mr. Clark's comment earlier, have any

24 issues -- are there any issues that are unresolved

25 relating to privilege or the compilation of privilege

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 logs?

2 MR. CLARK: Your Honor, this is Mike
3 Clark. I don't believe there are any issues. Are we
4 on -- can I just ask, are we on B3 now, Section B3?

5 JUDGE FROEHLICH: We don't need to go too
6 much out of order.

7 MR. CLARK: I think we are.

8 JUDGE FROEHLICH: Yes, we are. Thank you.
9 B3 to B4.

10 MR. CLARK: Okay, okay, B4. I think the
11 general agreement is, first, that the privilege logs
12 be submitted under the same schedule proposed for the
13 additional disclosures, which would be by the first
14 business day of every month. Second, that challenges
15 to privilege claims take the form of motions for
16 disclosure, which would be subject to the requirements
17 of 10 CFR 2.323. And, third, that any protective
18 order and non-disclosure agreement be modeled after
19 the SUNSI-related protective order and agreement that
20 the Board previously issued in this proceeding.

21 JUDGE FROEHLICH: Mr. Clark, do you
22 anticipate, based on the discussions with the other
23 parties, or the documents that you have seen, that
24 there will be a necessity to either amend or come up
25 with a new protective order?

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 MR. CLARK: Your Honor, I don't -- I don't
2 see it at this time, although obviously the staff has
3 the most claims of privilege. Our privilege logs are,
4 you know, longer than anybody else's. So to the
5 extent somebody is going to challenge a privilege, it
6 is mostly likely we'll be the ones who will be
7 challenged. So the staff does not anticipate filing
8 a motion for disclosure at this time.

9 JUDGE FROEHLICH: And the protective order
10 -- the protective order that was initially issued, I
11 believe by the Chief Judge in this case, is that a
12 protective order that we can continue to use for the
13 balance of this case? Or do you anticipate we will
14 need to make amendments or come up with a new
15 protective order or non-disclosure agreement?

16 MR. CLARK: It would need to be modified
17 slightly, because it refers to SUNSI, specifically the
18 cultural resources evaluation, but with slight
19 modifications. My personal view is it could be used
20 for the protective order otherwise in this proceeding.

21 JUDGE FROEHLICH: Thank you, Mr. Clark.

22 Does anyone else wish to be heard on any
23 of the disclosure items?

24 MR. FRANKEL: This is David Frankel, Your
25 Honor, for Consolidated Intervenors.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 JUDGE FROEHLICH: Yes, sir.

2 MR. FRANKEL: On this B4 -- and we concur
3 in what Mr. Clark said through this point on the
4 electronic disclosures and all of that, and the
5 monthly filings. This is solely on the issue of your
6 question concerning possible changes to the SUNSI-
7 related protective order.

8 That protective order, the Consolidated
9 Intervenors -- at the time we were Petitioners -- were
10 not involved -- I don't believe we were involved with
11 that, because the Tribe was the one that received
12 SUNSI information in their motion or request for SUNSI
13 information was granted and ours was not.

14 So we did not participate in negotiating
15 the terms of that, so, in general, I concur with Mr.
16 Clark that these sort of fairly usual protective order
17 and non-disclosure agreements, like what was issued in
18 Crow Butte, and like what was issued with SUNSI, but
19 with some opportunity to make appropriate changes to
20 the terms, and with some acknowledgement that the
21 Consolidated Intervenors did not participate in
22 crafting that prior SUNSI-related protective order, in
23 general it is our position that we would be open to
24 working out one that is, you know, typical and usual
25 and similar to the one that is in effect.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 So thank you for letting me put that on
2 the record, Your Honor.

3 JUDGE FROEHLICH: Thank you. Let's move
4 now to the time limits. There are a number of time
5 limits, and I believe one of the time limits was one
6 of the two items that you, Mr. Clark, had alluded to
7 early on, and that had to do with the timing of new
8 contentions.

9 Just a moment, before we get to that, the
10 first I guess issue among the time limits was the 45-
11 day rule for motions for summary disposition. Is that
12 acceptable to all, that we stick with that 45 days?

13 MR. CLARK: Your Honor, again, this is
14 Mike Clark. At this time, the parties' view is that
15 we should stick with that limit. And if it needs to
16 be revisited, perhaps after the final SER and final
17 SEIS are issued, it may be appropriate to revisit that
18 timeline in the future, but not at the present time.

19 JUDGE FROEHLICH: Okay. Thank you.

20 The second item was the time limits for
21 what would be designated a timely motion to file new
22 or amended contentions under 2.309 as to -- and non-
23 timely ones under 2.309(c). Generally, the boards
24 that I have been involved with, and the orders I have
25 seen, peg something in the neighborhood of 30 days as

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 a reasonable time to file new or amended contentions.
2 Was that number, or something close to that, discussed
3 among the parties, or is the nature of the timing of
4 new contentions somewhat broader?

5 MR. CLARK: Your Honor, 30 days I think is
6 the time we are all in agreement on. The slight
7 difficulty is the triggering event, what begins the
8 30-day period. The staff's view is that any new or
9 amended contention should be filed within 30 days of
10 when the moving party acquires information giving rise
11 to the new or amended contentions. And the
12 Consolidated Intervenor -- and I believe the Tribe --
13 also has a slightly different position, which I will
14 let them state.

15 JUDGE FROELICH: Are either Mr. Frankel
16 or Mr. Parsons -- could you give me your view on the
17 trigger?

18 MR. FRANKEL: David Frankel for
19 Consolidated Intervenor, Your Honor. We believe the
20 30 days should run from the date we actually receive
21 the information. We are concerned that items get
22 posted to ADAMS daily and regularly, and we don't have
23 the resources to, you know, be daily monitoring ADAMS.
24 And so if -- if the 30 days -- if a party wants the 30
25 days to run on us, we would like to be e-mailed that

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 information, so we know when the 30 days starts.

2 Of course, if we acquire information on
3 our own, or if it's something that gets published,
4 then there's 30 days from that date, but this notion
5 of acquiring information has been used against us in
6 other cases where sometimes parties have taken a
7 position that if it's in the NRC database online,
8 whether or not it's easy to find or even searchable
9 through ADAMS, we are held to have knowledge of it,
10 and the 30 days should start from that. So we are
11 looking for some fair, bright line that we can know
12 when the 30 days starts.

13 JUDGE FROEHLICH: Mr. Parsons, do you have
14 anything to add?

15 MR. PARSONS: Sure, Your Honor. We have
16 -- in looking at this proceeding, we suggested an
17 alternate tack. And it appears to me that there will
18 be opportunities or -- there will be opportunities for
19 submitting new contentions throughout the process.
20 That is, there will be information coming about
21 throughout the process. And I guess the concern is
22 one of judicial and party economy.

23 If there are multiple -- the prospect of
24 having multiple deadlines for new contentions, and
25 multiple hearings on those contentions, seems a bit

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 burdensome, particularly where we will have a final
2 environmental impact statement issued, and then an
3 opportunity at the end of that process to raise yet
4 more new contentions, should they arise.

5 And so the Tribe suggested -- and hasn't
6 -- and really put this out for discussion to the
7 parties, but hasn't received -- and there hasn't been
8 much time, but hasn't received much input from the
9 other parties, but one suggestion would be to provide
10 a date for the submittal of new contentions after the
11 final environmental impact statement is issued.

12 That would avoid the need for multiple
13 hearings in the interim, and it would also avoid the
14 situation where we go through all of the rigmarole,
15 all of the procedure to raise and brief and have a
16 hearing on new contentions, only to have the SER and
17 the final environmental impact statement, you know,
18 essentially moot those claims.

19 And so it's apparent that the parties will
20 have opportunities to comment on the environmental
21 impact statement, a draft as it is produced,
22 presumably, and so from the Tribe's perspective it is
23 not -- we are looking at this from a more practical
24 perspective. It doesn't make sense to raise new
25 contentions throughout the process.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS

1323 RHODE ISLAND AVE., N.W.

WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 Why not wait essentially until the end and
2 have one hearing where all new contentions are
3 litigated -- rather, admissibility is litigated, and
4 do it that way. It seems that that is a much more
5 efficient and practical schedule, and I would be
6 interested in any other party's thoughts on that, as
7 well as the Court's.

8 JUDGE FROEHLICH: Mr. Pugsley, from the
9 Applicant's perspective, could you give me your views
10 on the 30 days, the trigger, and the comments Mr.
11 Parsons just made?

12 MR. PUGSLEY: Your Honor, Chris Pugsley
13 for Powertech. I will start with Mr. Frankel's
14 comments. It is understandable the concern about --
15 well, obviously, Mr. Frankel acknowledges that if
16 there is information that they acquire on their own,
17 independent of an NRC document, or something other
18 than that, you know, we appear to be in agreement that
19 that's when the trigger starts.

20 With respect to documents that are NRC
21 documents, there might be -- there might be a way to
22 deal with that particular item by saying that if we
23 are up -- if the staff is updating -- and I defer to
24 Mr. Clark on this -- but if the staff is updating the
25 hearing file once a month, on the first of the month,

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 notification, which is -- by rule has to be sent to
2 all of the parties that this -- these documents have
3 been added to the hearing file, it seems that that
4 potentially might be the appropriate date when the
5 trigger runs, or when the time period starts running.

6 JUDGE FROEHLICH: Okay.

7 MR. PUGSLEY: With respect to Mr. Parsons'
8 comment, I understand -- we understand where he is
9 coming from on that, and I appreciate his efforts to
10 try and make this a more, you know, simplified
11 process. I would have to say, Your Honor, that he
12 really -- currently, the Applicant does not have a
13 position on his view, just because we have not had the
14 opportunity to consult with our client regarding that.

15 MR. THOMPSON: Although -- this is Tony
16 Thompson for Powertech. I would concur in one sense
17 with Mr. Parsons that, for example, with respect to a
18 draft EIS, the parties are going to -- the Intervenors
19 and others are going to have an opportunity to comment
20 on the draft. And it doesn't make sense to raise --
21 to me, it doesn't make sense to raise contentions on
22 a draft EIS that, as he said, could be resolved in the
23 final EIS.

24 JUDGE FROEHLICH: With that said, Mr.
25 Clark, could I hear from you?

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 MR. CLARK: Your Honor, first, regarding
2 Mr. Frankel's point, and also Mr. Pugsley's, I think
3 the staff could reach some agreement on the triggering
4 event. It sounds like Mr. Frankel acknowledges that
5 a new contention can be based on information they
6 receive from any source. It could be a University of
7 South Dakota study, it could be information from some
8 scientific study.

9 So a lot of that information the staff
10 does not control. So it wouldn't -- the staff's view
11 is it wouldn't be appropriate to make service of those
12 documents, the triggering event, because some
13 documents the staff may not even know about and not be
14 in a position to serve the Consolidated Intervenor.

15 For staff-generated documents, we wouldn't
16 oppose making the triggering event the inclusion in
17 the hearing file, which, as Mr. Pugsley noted, will be
18 transmitted electronically to the parties and to the
19 Board. So we -- for new staff generated documents, we
20 would not oppose the contention being timely if it's
21 filed within 30 days after the intervenors receive
22 notice that it has been added to the hearing file.

23 JUDGE FROEHLICH: And could I just follow-
24 up with a question for you, Mr. Clark, on that last
25 point? If the staff issued its SER or it's SDEIS in

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 the middle of the month, would your response -- your
2 last response give the parties from the middle of the
3 month until the first when it shows -- you know, when
4 it is actually added to the hearing docket, or actual
5 notice from the date it was issued, should it have
6 come out, let's say, on the fifth of the month?

7 MR. CLARK: That's a good point, Your
8 Honor. We would prefer the 30-day period running from
9 when they are served with the document and whether the
10 -- or when they are notified that the document is
11 available for review.

12 So in the case of the final SER, and also
13 I believe the draft and final SEISs, customarily the
14 staff will notify the other parties, and also the
15 Board, that those documents are available for review.
16 So, in that case, my view would be that it's
17 appropriate to start the 30-day period when the staff
18 makes that notification.

19 JUDGE FROEHLICH: And, Mr. Frankel, would
20 you care to respond to Mr. Clark's last comment that,
21 in relation at least to the SER and the environmental
22 documents, the 30 days would run from when you
23 received notice from the staff that those items were
24 available?

25 MR. FRANKEL: Thank you, Your Honor.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 David Frankel for Consolidated Intervenors. First, I
2 believe that this is consistent with my concern in our
3 discussion on the e-mail, and so I appreciate Mr.
4 Clark's and Mr. Pugsley's comments, and Mr. Thompson's
5 comments on this -- on Mr. Parsons' point.

6 I would not oppose -- we would not oppose
7 having 30 days from either the addition to the hearing
8 file or being electronically notified as to a specific
9 document and where it is located. Our concern is
10 mostly hard-to-find documents in a large ADAMS
11 database that might be added without our knowledge.

12 If we are notified of the specific
13 document and/or that something has been added to the
14 hearing file, we think it is fair and we would not
15 oppose, you know, undertaking the responsibility to
16 check those documents and have 30 days to file the new
17 or amended contention, Your Honor.

18 MR. PUGSLEY: And, Your Honor, Chris
19 Pugsley with Powertech again, if I may. I know at
20 least with respect to the draft and final supplemental
21 EIS/SEIS that it is NRC policy -- not just policy, but
22 by regulation they issue notice of the availability of
23 that document in the Federal Register. So I -- and
24 I'm not sure what the staff's policy is on the final
25 SER, but I know that those two draft and final SEISs

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 are typically noticed in the Federal Register.

2 MR. FRANKEL: David Frankel, Your Honor,
3 if I might. And, Mr. Pugsley, thank you for raising
4 the -- flagging the issue. Our view would be that
5 simply making a public notice in the Federal Register,
6 given the intricacies of our litigation relationships
7 here, is really not sufficient to put us on that 30
8 days' notice.

9 But if we are just sent an e-mail that
10 delivers us notice that that document has been
11 published, a link on where we can get it, then we have
12 been notified, and it is our responsibility to look at
13 it.

14 So I guess, you know, just to summarize,
15 I really -- I feel that in order to have a complete
16 chance at procedural due process and public
17 participation here, and with the ease of e-mail among
18 the parties, it would be no burden at all for either
19 the staff or Powertech to send e-mail to the other
20 parties and counsels to trigger the earlier date. And
21 if they fail to do that, that could be their choice,
22 in which case the later state it is going to be is
23 when it is added to the hearing file. So it is up to
24 them if they want to shorten it for a mid-month event.

25 JUDGE COLE: Mr. Frankel, this is Judge

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 Cole. Are you suggesting that you don't read the
2 Federal Register every day?

3 (Laughter)

4 MR. FRANKEL: Yes, Your Honor. I will
5 admit that.

6 JUDGE COLE: I had to ask.

7 JUDGE FROELICH: Okay. Anyone else care
8 to be heard on the timing -- the notice and trigger
9 dates on documents that would either be, you know,
10 published in the Federal Register, added to the
11 hearing docket, or I guess released with a separate
12 e-mail notice to the parties? Is there anyone else
13 who wants to state their views on the record on this
14 issue?

15 MR. PUGSLEY: Your Honor, Chris Pugsley
16 from Powertech again. I wanted to make sure that Mr.
17 Parsons didn't feel like we left out his view on when
18 the new contentions would start being required. I
19 just wanted to note that I know we are going to have
20 a discussion on a couple of items we discussed earlier
21 in this call, and I believe that it would be
22 appropriate for all of the parties to go and discuss
23 Mr. Parsons' point on the issue and then make that the
24 subject of our discussions.

25 JUDGE FROELICH: I think that's a good

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 idea.

2 MR. PARSONS: Thank you, Mr. Pugsley.
3 This is Jeff Parsons. I appreciate that.

4 JUDGE FROEHLICH: All right. Let's move
5 through our list on time-related issues, final list of
6 potential witnesses. I guess this is probably a
7 little premature, and in the meantime we will -- with
8 what is stated in the regs at 2.336(a)(1), am I
9 correct in that assumption?

10 MR. PUGSLEY: I believe so, Your Honor.

11 JUDGE FROEHLICH: Okay. And I guess,
12 likewise, for the fifth element having to do with the
13 use of Subpart G. This is probably a little premature
14 to discuss that item as well?

15 MR. CLARK: Your Honor, this is Mike
16 Clark. The parties' view was it would be appropriate
17 to, you know, file a motion under 10 CFR 2.323, if
18 that became an issue later on, if any party finds
19 Subpart G procedures may be appropriate, but that's
20 not something that needs to be addressed at this time.

21 JUDGE FROEHLICH: Okay. Then, let's move
22 on to one that I -- that there may have been
23 discussion among the parties, and that is the
24 opportunities for clarification, simplification,
25 according to 2.239(c)(1).

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 And if we look at the seven admitted
2 contentions, I would ask the parties, has there been
3 any discussion of merging or combining any of the
4 existing seven contentions or designating a lead
5 party, you know, among the Petitioners, among the
6 Intervenors, as to who will go forward, any ways to
7 economize on the existing contentions?

8 MR. CLARK: Again, this is Mike Clark.
9 That's not an issue that we discussed.

10 JUDGE FROELICH: Okay. I would ask that
11 the -- in the first instance that the Intervenors
12 discuss the potential for designating a lead party, or
13 combining any of the existing seven, and then bringing
14 that to the staff and the Applicant. And perhaps in
15 that letter to be drafted you can inform the Board if
16 there are, in your view, any opportunities to
17 economize and combine contentions.

18 MR. PUGSLEY: Your Honor, Chris Pugsley
19 for Powertech. We believe that's a good idea, and we
20 are certainly interested in getting you a full filing
21 regarding all of the issues we have to discuss. And
22 I guess I would ask Mr. Parsons and Mr. Frankel if
23 this is something the Board would be tasking you to
24 take the first look at.

25 And we realize you might require some time

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 to confer and decide on this, that I would defer to
2 both of you as to what would be an appropriate date
3 for all of us to get together and discuss these
4 issues.

5 MR. PARSONS: Thank you. This is Jeff
6 Parsons. I think you're right. Obviously, it is
7 incumbent upon Mr. Frankel and the other counsel for
8 Intervenors to take a fresh crack at that kind of
9 thing, considering they are contentions. We would be
10 happy to do so.

11 I have a conflict starting immediately
12 after this call through the weekend, but certainly
13 next week, early next week would be open for me to do
14 so.

15 MR. FRANKEL: David Frankel, Your Honor,
16 for Consolidated Intervenors. I support what Mr.
17 Parsons said. We do need a little bit of time to meet
18 and confer, and also to confer with our client, and
19 particularly, you know, there is a -- it is the end of
20 the fiscal year for the Tribe, I know, and a lot of --
21 it is hard possibly to confer with our clients as
22 quickly as we would like, but we will do so as quickly
23 as possible.

24 I also wanted to note that in our
25 consultations by e-mail all of the parties concurred

1 that we would support all and any reasonable steps to
2 clarify, simplify, or further specify the issues. We
3 would also all support additional teleconferences
4 between the Board and the parties to serve those
5 goals, and we are all open to consider other actions
6 proposed by the parties.

7 So there is general cooperation, even
8 among the adverse parties, to, as you say, Judge,
9 economize on the hearing.

10 JUDGE FROEHLICH: Okay. Thank you. Would
11 you please endeavor to initiate these conversations
12 and report to the Board, and we will follow up with
13 either an additional order or a followup conference
14 call, as appropriate.

15 Were there any other issues involving
16 timing issues in general that the Board -- that the
17 parties discussed and would care to report to the
18 Board?

19 MR. CLARK: This is Mike Clark. Nothing
20 I'm aware of, Your Honor.

21 MR. PUGSLEY: Your Honor, Chris Pugsley
22 from Powertech. I know we are trying to get through
23 these issues. I guess my question is, when you are
24 talking about timing, are we just talking about
25 procedural issues?

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 JUDGE FROEHLICH: Right. Just the
2 procedural timing, the elements that were 1 through --
3 C1 through C11 in the notice.

4 MR. PUGSLEY: Okay. Thank you, sir. I
5 was just trying to clarify.

6 JUDGE FROEHLICH: All right.

7 MR. FRANKEL: David Frankel for
8 Consolidated Intervenor. Your Honor, I think my
9 reading of our notes is that we have some outstanding
10 issues on C10 and C11. On C10, the staff made a --
11 stated a position, Powertech concurred, and the
12 Intervenor concurred, provided that there would be
13 opportunity to reply to responses. I'm not sure if
14 the Board wants us to go through that or just have
15 that stated in whatever communication goes back to the
16 Board.

17 And then, on C11, there was a staff
18 suggestion of a time limit of 10 days from the close
19 of testimony on a particular contention, and tying
20 these deadlines to particular testimony. Powertech
21 concurred, and Consolidated Intervenor concurred as
22 to concept, but would like 45 days so as to provide as
23 meaningful as possible opportunity to -- for a "cross-
24 examination-like testimony" that is consistent with
25 Subpart L, but of course not beyond Subpart L.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 So I wanted to flag those two issues and
2 see if the Board wanted us to discuss those now.

3 JUDGE FROEHLICH: I would like to discuss
4 and consider elements 10 and 11 before we move on to
5 the miscellaneous portion of the order. Mr. Clark,
6 would you respond to at least point 10 at this point?

7 MR. CLARK: Sure, Your Honor. What the
8 staff proposed, and what the other parties I believe
9 concurred, was that the Intervenor would file --
10 first, that testimony and statements of position would
11 be filed sequentially rather than simultaneously, and
12 that the Intervenor would go first.

13 The staff and Powertech would then have an
14 opportunity to respond to the initial statements of
15 position and testimony, and then the Intervenor would
16 have an opportunity to reply, to submit reply
17 statements of position and reply testimony.

18 We did not reach any agreement on the
19 timeframes applying to the testimony. We didn't
20 disagree. We just didn't get to the point where we
21 discussed specific timeframes. But what we all seemed
22 to agree on was a sequential briefing schedule.

23 JUDGE FROEHLICH: Okay. And that
24 sequential briefing schedule would begin with the
25 Intervenor, followed by the staff and the Applicant,

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 and conclude with the Intervenor?

2 MR. CLARK: That's correct.

3 JUDGE FROEHLICH: Was there any discussion
4 as to this order vis-a-vis the Applicant's ultimate
5 burden on this application?

6 MR. CLARK: We did not discuss that
7 specific point.

8 MR. FRANKEL: David Frankel for
9 Consolidated Intervenors. Yes, there was no
10 discussion of burdens of proof or those kind of
11 evidentiary matters.

12 JUDGE FROEHLICH: Okay. But this
13 proposal, Mr. Frankel, where the Intervenor leads off
14 and concludes, this was acceptable to your client?

15 MR. FRANKEL: Your Honor, we are -- we
16 will work with any procedural process that gives us an
17 opportunity to be heard, that does not shift otherwise
18 applicable burdens of proof or persuasion, and that
19 gives us a fair opportunity to reply to matters raised
20 in the responses.

21 As to going first or second, you know, we
22 went first to commence this proceeding and had a
23 difficult burden to get to where we are. I would be
24 open to having the Applicant and/or staff go first,
25 and we could respond, and they could reply. I'm a big

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 fan of what is good for the goose is good for the
2 gander, and a reply is fair with whoever goes first in
3 my view.

4 And then, quite frankly, the staff
5 proposed that Intervenor go first. Powertech
6 concurred. And it is not a big issue for us to fight
7 about, so we concurred, but we are open to going
8 second.

9 JUDGE FROEHLICH: All right. Mr. Parsons,
10 the order of filing, that's acceptable to your client?

11 MR. PARSONS: It is.

12 JUDGE FROEHLICH: Okay. Thank you.
13 Anyone else have any comments on point 10 at this
14 point?

15 MR. THOMPSON: Your Honor, this is Tony
16 Thompson. The only other comment I would make is that
17 in the past on occasions when a specific question has
18 been raised by a board, there have been simultaneous
19 filings in response to such questions. And that might
20 -- that's nothing that one could predict now, but
21 certainly that might make sense in that context. But
22 what is proposed here has been very typical of what
23 has gone forward in the past and makes sense to me.

24 JUDGE FROEHLICH: At least my position on
25 this -- and I haven't discussed this with the other

1 Board members -- if the parties are in agreement as to
2 this, you know, order and the sequence, then the Board
3 will go along with that. I just wanted to make sure
4 that the Intervenor are going into this with open
5 eyes.

6 MR. FRANKEL: David Frankel for
7 Intervenor, Your Honor. I wish I could be present to
8 see the -- your face with that expression. I'm not
9 quite sure how I should interpret it. We go into it
10 with -- it doesn't matter whether we go first or
11 second. And if the parties are aware -- if there is
12 somehow a diversion from the usual NRC proceedings in
13 this area, then I ask them, as a matter of fair play,
14 to disclose that right now. And if this is the way
15 it's done in some cases, and it's done other ways in
16 other cases, I'm happy with this.

17 Finally, to follow up on Mr. Thompson's
18 point, we don't object to simultaneous filings and
19 responses, if that is efficient or if that, in the
20 Board's view, is the best way to bring out the issues
21 for the Board, which is our purpose here. And so with
22 that I will conclude on this issue.

23 JUDGE FROELICH: Anyone else on the
24 simultaneous or sequential or the order that has been
25 proposed?

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 JUDGE COLE: This is Judge Cole. This
2 sequential order I thought pertained to the filing of
3 testimony. With respect to Board questions, he might
4 have a different set of rules, and simultaneous filing
5 would probably be the best way to go with Board
6 questions, although if the parties want to do it some
7 different way they can propose something to us and we
8 can change it.

9 MR. PUGSLEY: Your Honor, Chris Pugsley
10 for Powertech. I think you and Mr. Thompson are on
11 exactly the same page on that, that, yes, with respect
12 to Board questions it is certainly possible that
13 simultaneous filings would make a lot more sense.

14 But you are correct that our discussions
15 amongst the parties were limited to sequential filing
16 of statements of position and testimony.

17 JUDGE FROEHLICH: Okay.

18 MR. CLARK: This is Mike Clark. Your
19 Honor, the only point I would add is that -- I would
20 ask that for the initial filings, the initial
21 testimony, that each party be given at least 25 days.
22 Having filed prefiled written testimony recently, it
23 sometimes takes longer than anticipated.

24 JUDGE FROEHLICH: So noted. Thank you.
25 Was there discussion or a conclusion as to point 11.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 having to do with motions for cross-examination?

2 MR. CLARK: Your Honor, I would like to
3 address -- this is Mike Clark. I want to address Mr.
4 Frankel's point. I'm sorry for any confusion I caused
5 in my e-mail that I circulated. But the 10-day period
6 the staff was referring to wouldn't be a 10-day period
7 to submit testimony. It would be a 10-day period in
8 which the moving party could argue to the Board that
9 it should be allowed to conduct oral cross-examination
10 at the oral hearing.

11 So it would -- I believe from what I sent
12 Mr. Frankel got the impression that the 10-day period
13 would be a time period to submit cross-examination
14 testimony. But, in fact, the 10-day period that the
15 staff proposed is simply to ask the Board that the
16 parties be allowed to cross-examine a certain witness
17 at the oral hearing.

18 MR. FRANKEL: David Frankel for
19 Consolidated Intervenors, Your Honor. And thank you,
20 Mr. Clark, for that clarification. With that
21 clarification, I would withdraw that comment and we
22 are in basic concurrence. Ten days is enough time for
23 us to make a motion to the Board to seek cross-
24 examination, oral cross-examination, so thank you for
25 that.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 JUDGE FROEHLICH: So we have agreement
2 among all of the parties as to point 11. Ten days
3 suffices for the purpose of the motion for cross-
4 examination. Am I correct?

5 MR. CLARK: Your Honor, I believe that's
6 correct, but the 10-day period, we would ask that it
7 run from the close of testimony on a contention.
8 Otherwise, the motion may interfere with the parties'
9 response. In other words, a party would be both
10 responding to testimony and filing a motion to cross-
11 examine based on maybe the initial testimony, maybe
12 the responding testimony. So the staff at least would
13 support the 10-day period running from the close of
14 testimony on a contention.

15 JUDGE FROEHLICH: Do any of the parties
16 have any objection to Mr. Clark's statements that the
17 10 days would run from the last piece of testimony
18 filed on that contention?

19 MR. PUGSLEY: Chris Pugsley for Powertech.
20 No objection.

21 JUDGE FROEHLICH: For the Inventors or
22 Petitioners?

23 MR. FRANKEL: David Frankel for
24 Consolidated Intervenor. No objection.

25 MR. PARSONS: This is Jeff Parsons. Also

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 no objection.

2 JUDGE FROEHLICH: Okay. Thank you. Are
3 there any other concerns having to do with timing or
4 things that were in Section C of the order that we put
5 out on the 13th?

6 MR. PARSONS: Your Honor, I will just
7 note, only those issues we agreed to discuss further
8 amongst the parties.

9 JUDGE FROEHLICH: Right. Okay. Let's go
10 down to the final four issues, at least that the Board
11 had put forward for discussion at this conference.
12 One was whether a site visit would be appropriate or
13 useful, at least from the participants' perspective in
14 this case. Was there any discussion of that or --

15 MR. CLARK: This is Mike Clark. There was
16 discussion, and it -- it looks like everybody is in
17 agreement that a site visit could be beneficial.
18 Staff is open to a site visit, and I will let the
19 other parties state their views.

20 MR. PUGSLEY: Your Honor, Chris Pugsley
21 for Powertech. A suggestion here, given the
22 concurrence that a site visit might be beneficial, and
23 the fact that Mr. Frankel did note to us in his
24 response that we should schedule it at, obviously, a
25 mutually convenient and seasonally appropriate time,

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 which I completely understand.

2 MR. PARSONS: The window is closing.

3 (Laughter)

4 MR. PUGSLEY: My suggestion would be that,
5 given the fact that a site visit could -- you know, a
6 seasonally appropriate time is probably rapidly coming
7 to a close this year, that we agree in our -- in the
8 filing we are going to present to the Board in the
9 next couple of weeks that we designate a date by which
10 we should report back to the Board as to: a) the
11 preferred dates for a site visit, b) the parameters
12 for the visit, as in attendees, etcetera. And I would
13 request what the parties think of that.

14 MR. FRANKEL: David Frankel for
15 Consolidated Intervenor, Your Honor. I believe that
16 it was very beneficial to all parties and staff even,
17 and also the Judges in Crow Butte, to visit the site
18 and meet the people and see the exact land and
19 property and where the land runs and things like that.

20 And so I really appreciate that both the
21 staff and Powertech are open to that. If it were to
22 be this year, it would have to be within the next
23 probably four weeks. And then, if it were next year,
24 I'm sure any time starting in the spring would
25 probably work. Late spring might be preferred.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 And we are -- there is a -- leaving Crow
2 Butte there was a number of persons limit, around 20,
3 and that was sufficient for all of the parties and
4 counsel. And interested parts of our coalition, you
5 might say, are community people who are represented by
6 Alliance for Responsible Mining in this case to
7 attend.

8 And I would also note that in that case
9 the person limit had to do with the NRC regulations of
10 an operating facility, which necessarily apply. But
11 having said all of that, I know that our intervenors,
12 and local people also, are happy to have a welcoming
13 for the out-of-town people, you know, to walk through
14 the site and really understand better the Applicant's
15 plans.

16 JUDGE FROEHLICH: Anyone else care to be
17 heard on the site visit issue? I can state, at least
18 for myself, that seasonably appropriate would -- is a
19 good phrase and one that this Board will keep in mind.
20 Anyone else care to be heard on site visit?

21 MR. ELLISON: Yes, Judge, it's Bruce
22 Ellison. I -- something I want to mention about is,
23 you know, our weather -- we could get -- we could have
24 had snow already, and we could get snow into June.
25 And so I'm sure that, you know, Mr. Pugsley had

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 suggested that we sit and confer, and I think that's
2 a good idea.

3 But I also think that part of what we may
4 need to do is -- in the process is come up with some
5 alternate dates. I mean, we can usually see a big
6 weather pattern coming at least a few days in advance.
7 If we had to cancel, we could do that. But it could
8 be 60 degrees and sunny in the end of November, or we
9 could be under two feet of snow.

10 And the same would apply for tomorrow, or
11 it would apply for in the spring. So I think we just
12 need to develop something that would accommodate for
13 sudden changes in the weather, so that we can make
14 this happen reasonably expeditiously, and likely
15 successfully.

16 JUDGE FROEHLICH: Anyone site on site
17 visits?

18 MR. FRANKEL: David Frankel for the
19 Consolidated Intervenor. Just a note. I personally
20 don't --

21 JUDGE FROEHLICH: Is this Mr. Frankel?

22 MR. FRANKEL: Yes, sir.

23 JUDGE FROEHLICH: Okay.

24 MR. FRANKEL: With -- all the rental car
25 companies rent the four-wheel drives, and I found in

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 my practice the zone between November and February is
2 very risky to plan for, and even though Mr. Ellison
3 said there are fluctuations, people generally find it
4 not terribly difficult to function outdoors between
5 late March and October.

6 MR. ELLISON: And I would -- I don't
7 disagree. This is Bruce Ellison. I can make it work
8 whenever.

9 JUDGE FROEHLICH: Moving along, I guess
10 the next questions that I have are for Mr. Clark. I
11 wonder if you can enlighten the Board as to the
12 proposed dates for the SER and the EIS or any
13 information you might have that will help us in the
14 scheduling of events and the planning for this case
15 related to the issuance of these two documents.

16 MR. CLARK: Certainly, Your Honor. In
17 your scheduling order, the Board asked for the current
18 best good faith estimates, and that is what I have
19 right now. And, of course, I caution that these dates
20 may change, but they may change for reasons outside
21 the staff's control. So they are just the current
22 best estimates of the release dates of the various
23 documents.

24 For the draft supplemental environmental
25 impact statement, the draft SEIS, our current best

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 estimate is June 2011. For the final safety
2 evaluation report, the final SER, the current best
3 estimate is October 2011. And then, for the final
4 SEIS, the best estimate is January 2012.

5 JUDGE FROEHLICH: Could I task you, Mr.
6 Clark, to keep the Board and the parties apprised of
7 the best good faith estimates that the staff has of
8 these dates, and include that in your monthly
9 disclosures or a letter to the Board?

10 MR. CLARK: We would be happy to do that,
11 Your Honor.

12 JUDGE FROEHLICH: Thank you. Okay. This
13 is -- actually, this may be -- this is quite a ways in
14 the future, apparently now based on the dates -- the
15 best good faith estimate of dates for the
16 environmental and safety reports. Are there venues
17 that would be conducive and appropriate for our
18 evidentiary hearing? As you recall, we met for oral
19 argument in the City Council chambers in Custer. I
20 was wondering if there was a local or state courthouse
21 that might be a better venue for the evidentiary
22 hearing.

23 MR. ELLISON: Your Honor, this is Bruce
24 Ellison. There is a courthouse in Custer. It is
25 fairly small. The courtroom itself would be

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 sufficient, and court does not occur every day in
2 Custer, nor does it occur every day in Hot Springs.
3 There is a new courthouse that is going to be
4 constructed in Custer, but it is not going to be ready
5 -- it might be ready within a year.

6 In Hot Springs, it is an older courthouse.
7 There are certainly meeting areas, community centers,
8 which could also serve as potential venues as well,
9 both in Hot Springs and in Custer. But the
10 courtrooms, if they're available they would certainly
11 be -- that would give us enough room. They have -- it
12 is good space.

13 JUDGE FROEHLICH: Mr. Ellison, that
14 courthouse that you referred to in Custer, is that the
15 one that holds session on Tuesdays and Thursdays
16 generally each week?

17 MR. ELLISON: Yes, sir, that's correct.
18 And sometimes, because there is one -- there is one
19 day for Circuit Court, our felony court, and one day
20 for Magistrate Court. Sometimes there is an
21 additional day, but that is easily determined by the
22 clerks.

23 JUDGE FROEHLICH: Right. Any of the other
24 parties have any suggestions for us on a venue for the
25 evidentiary hearing?

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 MR. FRANKEL: David Frankel for
2 Consolidated Intervenors, Your Honor. I want to point
3 out that Hot Springs is a lot closer to some of the
4 Intervenors and also to representatives of the Oglala
5 Sioux Tribe. The Mueller Civic Center in Hot Springs
6 is an excellent venue, from our perspective. I'm not
7 sure if it meets all of the Board's requirements, but
8 it is used for public events quite often. It is a
9 nice facility.

10 It has audience seating and is -- it might
11 be a good choice, and we would also propose that
12 consideration be made if there are multiple hearings
13 or different opportunities for oral arguments, that --
14 to alternate between Custer and Hot Springs, because
15 this project does straddle Fall River and Custer
16 Counties, and we think it is appropriate to move
17 between the two as much as possible for the benefit of
18 the public.

19 JUDGE FROEHLICH: Any other suggestions
20 from any of the parties?

21 MR. PUGSLEY: Chris Pugsley for Powertech,
22 Your Honor. I guess the only other location I would
23 throw in there is Rapid City, just because I'm sure
24 that they have venues there appropriate to a hearing
25 of the type that we need to conduct, and that is kind

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 of the transportation center for the members of the
2 Board and staff and Powertech and anybody else who the
3 other parties might be bringing into town that way.
4 It is just something to have as a facility on your
5 list.

6 JUDGE FROELICH: Okay. Thank you. Thank
7 you. This completes the list that the Board had
8 prepared, but we do have all the parties and the Board
9 -- at this time, are there any other issues that any
10 of the parties or staff wishes to raise or to take
11 advantage of us all being together on the line?

12 MR. PUGSLEY: Chris Pugsley for Powertech,
13 Your Honor. Just to summarize all of the items that
14 we have to -- the parties still have to discuss, what
15 I'd like to propose is I am more than happy to send
16 out a communication to all the parties tomorrow
17 morning detailing the list of items that we have to
18 discuss to put into a filing to the Board, and welcome
19 everyone's comments on those, and also soliciting
20 appropriate days for -- dates and times for us to
21 convene.

22 So if other parties do not object, I'm
23 happy to do that tomorrow.

24 MR. PARSONS: This is Jeff Parsons. I
25 think that would be very helpful. I'll just have to

1 let you know, I'm actually heading out on a hunting
2 trip through the weekend and won't be back until
3 Monday. So I won't be able to respond until Monday.
4 And I didn't say that just to rub it in.

5 (Laughter)

6 MR. FRANKEL: David Frankel for
7 Consolidated Intervenors. First of all, good luck,
8 Jeff. Second, is the Board comfortable that -- and
9 the parties comfortable that we have fully explored
10 the issues in B4 that Consolidated Intervenors are in
11 opposition to bifurcating the hearings due to the
12 environmental components and the contentions being
13 labeled as safety contentions? That I believe the
14 staff stated its position and that Powertech stated a
15 position supportive of the staff's position.

16 But if there is any -- this is an
17 important issue for Intervenors. I want to make sure
18 that, at the end here, it didn't fall without a full
19 examination.

20 MR. PUGSLEY: Chris Pugsley for Powertech.
21 May I suggest that I believe, Mr. Frankel, that our
22 discussions on that issue have just begun, simply
23 because a lot of the items that the Board is directing
24 us to discuss, including potential merger of
25 contentions and structuring of when new or amended

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 contentions may be appropriately filed, I think we
2 might be in a very good position to complete our
3 discussions on that after we come to agreement on what
4 we will file before the Board, if you don't object.

5 MR. FRANKEL: David Frankel for
6 Consolidated Intervenors. Before I respond, I'm just
7 interested to know if the Board feels that all its
8 questions on this issue have been answered.

9 JUDGE FROEHLICH: Mr. Frankel, with the --
10 with the dates for the staff's -- with the safety
11 evaluation report and the SEIS, the fact that the
12 final SER and the final SEIS are both in the -- well,
13 one is October 2011, if I understood Mr. Clark
14 correctly, and the final EIS is in January 2012, that
15 may affect the utility of bifurcating or unifying the
16 hearing, especially in light of the overlap between
17 safety and environmental issues that are embedded in
18 the contentions that have been admitted.

19 Also, I guess the type of hearing and
20 whether it is bifurcated or segregated will depend on
21 whether there are any new contentions that are filed,
22 and I guess we'll just have to see -- see how that
23 plays out.

24 MR. CLARK: For the staff -- this is Mike
25 Clark. I just would like to raise one point. I know

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 there was some discussion about possibly deferring
2 contentions on the draft SEIS and having all
3 interested parties wait until the final SEIS is
4 published to file contentions. The staff would not be
5 in favor of that, mainly because we view contentions,
6 believe it or not, to the parties as important and
7 helpful to us in our review.

8 We understand that parties have the
9 opportunity to comment on the draft document.
10 Comments aren't necessarily the same as contentions.

11 Also, we view as highly important the
12 Board's rulings on any draft contentions. If
13 contentions are filed on the draft SEIS, the parties
14 will have to litigate the admissibility of those
15 contentions, and we will have the Board's input on --
16 as to what contentions are admissible, which
17 contentions aren't, and the reasons why.

18 That's information the staff can use to,
19 if necessary, revise the SEIS and produce a better
20 final SEIS. And for that reason staff would be
21 opposed to deferring contentions until the final SEIS
22 is published.

23 JUDGE FROEHLICH: Mr. Clark, when you're
24 saying deferring contentions, I didn't mean certainly
25 in anything I said to -- to prevent. In fact, I share

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 your view that if parties have concerns with the draft
2 supplemental environmental impact statement that they
3 file those contentions within 30 days of receipt of a
4 DSEIS, so that we would have any new contentions
5 relating to environmental issues before us.

6 JUDGE COLE: Yes. This is Judge Cole.
7 And we certainly wouldn't litigate the contentions
8 filed -- received on the basis of the DSEIS until
9 after the SSEIS is issued.

10 MR. CLARK: Understood, Your Honor. We
11 would not go to a hearing on those contentions until
12 after the final SEIS is issued. I understand that.

13 JUDGE FROELICH: All right. It is the
14 23rd of September. When should we expect a response
15 from the parties on the, you know, issues that you
16 need to discuss among yourselves? I believe I heard
17 something in the neighborhood of two or three weeks.
18 Is that reasonable?

19 MR. PUGSLEY: Your Honor, Chris Pugsley
20 for Powertech. I think the major contingency is going
21 to be, as you had directed the Consolidated
22 Intervenors and the Tribe, to discuss the lead person
23 on contentions, the lead party on contentions that is.
24 I guess that is really going to be the driving force,
25 so we probably -- that is probably a piece of

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 information we need to have first.

2 JUDGE FROEHLICH: So, then, I guess it
3 turns to Mr. Frankel and Mr. Parsons. When can you
4 get together, discuss the consolidation, potentially
5 any kind of streamlining among the admitted
6 contentions, and report to the staff and the
7 Applicant, so that they can be included in the
8 dialogue and prepare this letter that Mr. Pugsley
9 offered to draft?

10 MR. PARSONS: This is Jeff Parsons. I
11 would think we should be able to get our heads
12 together by the end of next week, if that's not too
13 short for Mr. Frankel and Mr. Ellison and Ms. Dugan.

14 MR. ELLISON: This is Bruce Ellison. If
15 we're going to do it the end of next week, how about
16 the following Monday, just to make sure that we have
17 enough time.

18 MR. FRANKEL: David Frankel for
19 Consolidated Intervenors. We can work with Mr.
20 Parsons the end of next week. We will make it a
21 priority to get together on that, as requested by the
22 Board, and provide an update, too, between ourselves.

23 I, at that time, may need to request some
24 time to confer with our clients if we need to, and
25 especially now has promised to pursue it diligently

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 and update the parties and the Board on what that
2 might entail. There is an election season going on at
3 Pine Ridge for October, and we just have to be mindful
4 of that reality.

5 MR. ELLISON: And that also, too -- this
6 is Bruce Ellison -- applies to Ms. Henderson, who is
7 very actively involved in the gubernatorial politics.

8 JUDGE FROEHLICH: Be that as it may, we
9 are not going to defer this response into November.
10 I would like to hear back from the parties in October,
11 so that we can move forward as a Board and set forth
12 a schedule and do the followup to this telephone
13 conference.

14 I'm looking for a date from you in October
15 for that summary of your discussions and those issues
16 with the parties.

17 MR. PUGSLEY: Chris Pugsley for Powertech,
18 Your Honor. I don't see why we can't respond in
19 October. I have -- again, you know, the driving force
20 for the contention -- so we are -- Powertech is in a
21 position to initiate discussions on these items.

22 You know, Mr. Ellison has stated that
23 perhaps a week from Monday for them to make sure they
24 have enough time to discuss that one particular issue,
25 Powertech is in a position to engage in discussions on

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

1 these items following that.

2 JUDGE FROEHLICH: I would just ask to get
3 a calendar in front of me. We'll pick a date where I
4 expect to hear from you, and then I think we will
5 conclude.

6 While I'm getting a calendar in front of
7 me, is there anything else that you wish to discuss
8 while we are all on the line?

9 JUDGE COLE: How about the 15th of
10 October?

11 MR. PUGSLEY: I was actually going to say
12 that we could try to -- I'm just looking at my
13 calendar here. I think the 15th of October is
14 reasonable.

15 MS. JEHLLE: Excuse me. This is Patricia.
16 Jehle for the staff.

17 JUDGE FROEHLICH: Yes.

18 MS. JEHLLE: I have one point that the
19 staff has asked me to raise that wasn't addressed in
20 the Board's order, and it concerns the staff filing in
21 the monthly disclosure of privileged documents. They
22 request that they be allowed to file only final
23 documents, final staff documents, rather than any
24 interim intra-branch documents. And this is similar
25 to the Crow Butte disclosure agreement that was

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 reached in Docket Number 40-8943.

2 Is there objection to Ms. Jehle's issue?

3 MR. PUGSLEY: Chris Pugsley for Powertech.

4 No objection.

5 MR. PARSONS: This is Jeff Parsons. I
6 don't think there is any objection as long as we are
7 clear that the -- any time period triggering date as
8 we discussed earlier would be upon the submittal into
9 the record and not, you know, the availability of the
10 document otherwise.

11 MS. JEHLE: Right. And, Mr. Parsons,
12 these would be privileged documents anyway. We just
13 would -- the staff would prefer not to have to create
14 the privileged list, the file -- we certainly are not
15 delaying filing of the actual documents, just the
16 privileged log.

17 JUDGE FROEHLICH: With that clarification,
18 is there any objection to Ms. Jehle's proposal?

19 MR. PUGSLEY: Chris Pugsley for Powertech.
20 No objection.

21 JUDGE FROEHLICH: Mr. Parsons?

22 MR. PARSONS: No objections.

23 JUDGE FROEHLICH: Thank you. All right.
24 I have a calendar. I think October 15th is the date
25 that we will set for the response of the parties. I

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 would hope that that letter will have as many of the
2 items that can be agreed upon unanimously as possible.
3 And to the extent you can't reach agreement on them,
4 please indicate that in the letter, and a sentence or
5 two for the positions of those parties that disagree
6 with the consensus, if there is such a thing,
7 consensus view in the document.

8 Anything further?

9 MR. CLARK: Your Honor, this is Mike
10 Clark. If the Board is in agreement with the issue
11 discussed in B1 disclosures --

12 JUDGE FROEHLICH: Yes.

13 MR. CLARK: -- would the parties be able
14 to get an oral ruling that the next disclosure date is
15 -- would be October 1st, next Friday? As it stands,
16 the next -- under the 14-day period established under
17 2.336, parties' disclosures are due Monday,
18 September 27th.

19 JUDGE FROEHLICH: The Board has no
20 objection to moving it to the first, and then
21 beginning on the first, you know, thereafter. Any of
22 the parties have any objection?

23 MR. PUGSLEY: No. Chris Pugsley,
24 Powertech. No objection.

25 MR. PARSONS: No objection. This is Jeff

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 Parsons.

2 JUDGE FROEHLICH: Okay. Mr. Frankel?

3 MR. ELLISON: We have no objection, Your
4 Honor. This is Bruce Ellison.

5 JUDGE FROEHLICH: Thank you. All right.
6 So the next disclosure will be on the first. It will
7 be regularized, and the first for months thereafter.

8 If there is nothing else, we will stand
9 adjourned, and I thank you all for your time.

10 (Whereupon, at 2:28 p.m., the proceedings
11 in the foregoing matter were adjourned.)

CERTIFICATE

This is to certify that the attached proceedings
before the United States Nuclear Regulatory Commission
in the matter of: Powertech USA, Inc.

Name of Proceeding: Hearing

Docket Number: 40-907-MLA

ASLBP Number: 10-898-02-MLA-BD01

Location: (teleconference)

were held as herein appears, and that this is the
original transcript thereof for the file of the United
States Nuclear Regulatory Commission taken by me and,
thereafter reduced to typewriting by me or under the
direction of the court reporting company, and that the
transcript is a true and accurate record of the
foregoing proceedings.



Tobias Walter
Official Reporter
Neal R. Gross & Co., Inc.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com