

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the matter of	)	
	)	
POWERTECH (USA) INC.	)	Docket No. 40-9075-MLA
	)	ASLBP No. 10-898-02-MLA-BD01
(Dewey-Burdock In Situ Uranium	)	
Recovery Facility)	)	

**CONSOLIDATED INTERVENORS’ RESPONSE TO POWERTECH AND  
NRC STAFF MOTIONS IN LIMINE AND TO STRIKE/EXCLUDE**

The Consolidated Intervenors (CI) hereby respond where necessary and appropriate to Powertech’s Motions in Limine and Motion to Strike/Exclude, and the similar Motions of the NRC Staff.

**1. Powertech’s Motion to Exclude Argument on Technical/Safety Analyses and Conclusions in NRC Staff’s Safety Evaluation Report (SER).**

Powertech seeks by its Motion to exclude “arguments” and “technical challenges” of the CIs and the Oglala Sioux Tribe (OST) regarding any analyses or conclusions offered in the NRC Staff’s SER, despite acknowledging the existence of a “safety component” in remaining Contentions 2 and 3. PT Motions In Limine, Motion for Cross Examination, and Motion to Strike/Exclude, p. 5 (hereinafter, PT Motion: \_\_”). Without citing any authority therefore, Powertech

apparently contends contentions not raised at the SER stage precludes argument and evidence by the CIs or the OST as to safety issues found relevant and admissible in Contentions 2 and 3 at the current FSEIS and Staff license issuance stage, and scheduled for adjudication in August, 2014.

In *Union of Concerned Scientists v. United States Regulatory Comm.*, 920 F.2d 50 (D.C. Cir. 1990), the Court of Appeals summarized the rule applicable and contrary to Powertech's position:

Intervenors who had raised issues in a timely fashion and who had been admitted to the hearing thus may incorporate as of right new evidence raised in the SER and the NEPA reports bearing on those issues.

*Ibid*, 920 F.2d at 52.

Since the Consolidated Intervenors timely and properly submitted and had admitted contentions challenging the NRC Staff analysis in the FSEIS, the issues raised by those Contentions are properly scheduled for adjudication in August, 2014.

The Motions to exclude evidence and arguments on technical/safety analyses and Conclusions of the NRC staff in the SER should be denied.

**2. Motions of Powertech and NRC Staff to Strike Pre-Trial Submissions and Preclude Argument from Consolidated Intervenors on Contentions**

#### **4, 6, and 9 For Failure to Co-Sponsor or Adapt.<sup>1</sup>**

In its Motions, Powertech (¶B(3) and NRC Staff (¶III(A)) seek to exclude “all portions of pre-trial submissions and preclude any further argument in any form from CI regarding Contentions 4, 6 and 9,” based upon the claimed failure to formally adopt or co-sponsor those contentions. PT Motion:6; Staff Motion:4-5.

10 C.F.R. §2.309(f)(3) states that adopting contentions of another party for purposes of presenting evidence and/or argument may be accomplished through joint designation of a representative to take the lead and act on their joint behalf. Contrary to the suggestion of Powertech, the transcript of the August 12, 2013 Telephone Conference involving the Board and all Parties, discussions by Counsel for OST and CIs regarding such designation of a lead party was placed on the record. Specifically, as relayed by Jeffrey Parson’s, Counsel for the OST, the Tribe would “take the lead” on Contentions 1A, 1B, 4, 9, 14A, and 14B. CIs would similarly take the lead on Contentions 2 and 3. Mr. Parsons made clear that it was the position of the respective Intervenors “that while one party is the lead on the contentions, the other party reserves the right to be heard while certainly avoiding any duplication.” Transcript of 8/12/13 Telephone Pre-Hearing,

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<sup>1</sup> Powertech’s Motion does not seek to exclude evidence and argument from CIs regarding Contentions 1A, 1B, 2, or 3.

“Dewey-Burdock in Situ Uranium Recovery Facility,” Docket No. 40-9075-MLA, ALSBP No. 10-898-02-MLA-BD01, Work Order No. NRC-159, pp. 508-509.

The substance of this aspect of the August 2013 Telephone Pre-Hearing was referenced during the February 12, 2014 Telephone Pre-Hearing. Transcript of 8/12/13 Telephone Pre-Hearing, “Dewey-Burdock in Situ Uranium Recovery Facility,” Docket No. 40-9075-MLA, ALSBP No. 10-898-02-MLA-BD01, Work Order No. NRC-590, p. 548 (Hearing was “to discuss the lead intervenor for the various admitted contentions...”). Also, Powertech failed to note that in its April 28, 2014 Order on the FSEIS contentions, the Board addressed CI’s arguments regarding “previously admitted Contention[ ]..4” and ruled such contentions of the OST and CI migrated “as an issue at the upcoming August 2014 Adjudication.”<sup>2</sup> April 28, 2014 Memorandum and Order, pp. 27-28.

CIs have noticed their intent to present witnesses supporting Contention 4 including named Intervenor Dayton Hyde - Black Hills Wild Horse Sanctuary and rancher, member of Clean Water Alliance, Marvin Kammera. CIs have further noticed the testimony of Peggy Detmers in part on Contention 6. No notice has been given that the CIs intend to introduce testimony regarding Contention 9.

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<sup>2</sup> This Ruling on FSEIS contentions also disproves NRC Staff’s argument (NRC Motion, pp. 4-5) that CI never raised Contention 4 in the FSEIS context.

However, as the NRC Staff noted in Motion: “An intervenor may ordinarily conduct cross-examination and submit proposed legal and factual findings on contentions sponsored by other.” *See*, NRC Staff Motion, p. 2 [*quoting, Houston Lighting and Power Co.* (South Texas Project, Units 1 and 2), ALAB-799, 21 NRC 360, 383 (1985)].

**3. PT Motion to strike INT-002, Report from Dr. Richard Arbitz.**

Powertech seeks in its Motion (p. 9) to strike the testimony of Dr. Richard Arbitz, a Report submitted by the CIs as INT-002, arguing that it was not referenced “in any of CI’s expert witness testimony and does not appear relevant due to this lack of reference.”

However, Powertech fails to recognize that Dr. Moran specifically references Dr. Arbitz in his initial testimony, and the Tribe specifically discusses this document in its FSEIS contention pleading at 15 (Exhibit OST-012). *See also* OST-012 at p. 97 (Moran Declaration discussing this document). Thus, the exhibit challenged by Powertech is relevant to Dr. Moran’s testimony proffered in this case.

The CIs respectfully submit that any dispute as to the Reports conclusions or Dr. Moran’s reliance upon can more properly be addressed on cross examination by the Board, as contemplated by the NRC Rules and this Board’s

Orders in this case.

**4. PT and Staff Motions to Strike INT-008: Opening Testimony of Dr. Donald Kelley**

PT and NRC Staff seek to strike the testimony of Dr. Donald Kelley as not in proper form. However, PT and staff provide no authority for the Motion striking this exhibit entirely based on this highly technical point and does not demonstrate (does not even attempt to show) any prejudice. The Motions also do not address any of the issues in the admitted contentions, and if it does, that they should now be disregarded as they were not addressed at the SER stage of the proceedings. PT Motion, pp. 9-10; Staff Motion:6. CIs respectfully contend that the Board can interview the witness at the hearing to determine any issues of reliability under 10 CFR §2.337(a).

As noticed in its Exhibit List, Dr. Kelley, a former forensic pathologist is a witness to the potential impacts on the human body of the ingestion of animals and/or plants containing heavy metals to be dissolved into the Inyan Kara aquifers as well as other mining related releases, leaks, or spills into water resource likely by Powertech's mining operations, as related to the safety issues in Contention 3.

The Motions should be denied.

## **5. PT and Staff Motions to Strike INT-14, Testimony of Linsey McLean**

PT seeks to strike the testimony of Bio-Chemist Linsey McLean, Exhibit INT-14, again due to form. PT Motion, p. 10. Again, PT provides no authority for its Motion striking this exhibit entirely based on this highly technical point and does not demonstrate (does not even attempt to show) any prejudice.

PT also claims the Exhibit should be stricken as it was not signed. PT Motion, p. 10. In making this claim, PT apparently fails to note that the testimony had an electronic signature and was made under penalties of perjury.<sup>3</sup> INT-14, p. 12. Additionally, the Board can interview the witness at the hearing to determine any issues of reliability under 10 CFR §2.337(a).

Furthermore, while much of Ms. McLean's testimony does involve issues contained in formerly admitted Contention 14, PT and Staff fail to note the remainder dealing with bio-accumulation of heavy metals in plants and animals through contamination of water resources likely from failures of Powertech and NRC Staff to propose proper mitigation measures.<sup>4</sup>

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<sup>3</sup> As with the other Exhibits electronically signed, each was done with the consent and approval of each respective witness after the witness reviewed their respective Exhibit and authorized the below-signed Counsel to electronically sign their name, or otherwise executed in accordance with 10 CFR §2.304(d). *See*, Exhibit NRC-151 (Affidavit of Po Wen Hsueh unsigned, reference below signature line to "Executed in accordance with 10 CFR §2.304(d)").

<sup>4</sup> It remains unclear to the below-signed Counsel why PT did not receive a copy of Exhibit INT-14a. A copy is being sent along with this Response.

The Motions to Strike Ms. McLean's testimony as to matters relevant to Contention 3 should be denied.

**6. PT and Staff Motions to Strike INT-010, Testimony of Peggy Detmers**

PT similarly seeks to strike the testimony of Wildlife Biologist Peggy Detmers, again due to form without citation to authority for its Motion striking this exhibit entirely based on this highly technical point, and without any demonstration to show any prejudice. PT Motion, p. 11. Further, as stated above regarding other similarly situated witnesses of CIs, the Board can interview the witness at the hearing to determine any issues of reliability under 10 CFR §2.337(a).

While noting that Ms. Detmer's included testimony regarding the dismissed Contentions 14A/B [PT Motion:12], PT and Staff [Motion:5] failed to note the notice provided in the statement in CI's Witness List describing her testimony as also relevant to Contention 3 related to issues involving failures to contain fluid migration and potential groundwater impacts, as well as Contention 6, involving failures related to propose mitigation measures.<sup>5</sup> The Board can question Ms. Detmers as to any aspect of her testimony and exhibits related to Contentions 3

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<sup>5</sup> PT asserts that it does not have a copy of Exhibit INT-10q, the IPOC Report referred to by Ms. Detmers. The below-signed Counsel at this point has no knowledge as to why a copy of that Exhibit was not sent to Counsel for PT but it accompanies this Response.

and 6.

**6. PT and Staff Motions to Strike INT-011, Testimony of Marvin Kammera**

PT similarly seeks to strike the testimony of South Dakota rancher Marvin Kammera, again due to form without citation to authority for its Motion striking this exhibit entirely based on this highly technical point, and without any demonstration to show any prejudice. PT Motion, p. 12. Further, as stated above regarding other similarly situated witnesses of CIs, the Board can interview the witness at the hearing to determine any issues of reliability under 10 CFR §2.337(a). Staff claims his testimony is irrelevant. Staff Motion:4.

Mr. Kammera is a western South Dakota rancher whose domestic and ranch water supply is the Inyan Kara aquifers. As he states in his testimony, the Family has already had to go through great cost to recently dig another well due to dropping water levels. He is also concerned about Powertech's plans to open a regional processing plant and process or at sites other than it's proposed D-B site. Such a regional plant would open the area to the west of his ranch to ISL mining and thus potentially impact his groundwater resources, as related to issues in Contentions 3 and 4.

The Motions to Strike should be denied.

**7. PT Motion to Strike INT-020, Rebuttal Testimony of Dr. LaGarry**

PT similarly seeks to strike the second full Paragraph on page 2 of the rebuttal testimony of Dr. Hannan LaGarry as it relates to periodic releases of water from storage ponds. Counsel for PT represent that Table 6 of Exhibit App-015-A related to such periodic releases from such ponds has been deleted and will not be part of any PT operation at the D-B site. PT Motion, p. 12-13.

While PT does not plan to engage in such periodic release, even if the Staff issued licence contained an express condition prohibiting such releases, the Cis respectfully contend that Dr. LaGarry's testimony remains relevant for the Board to appreciate problems associated with such periodic releases in reaching its ultimate decision whether to approve the license as issued or modified.

The Motion to Strike should be denied.

**8. PT and Staff Motions to Strike INT-012, Affidavit of Dayton Hyde**

PT and Staff move to strike certain portions of the Affidavit submitted of named Intervenor Dayton Hyde and the Black Hills Wildlife Sanctuary.

Particularly, PT does not like Mr. Hyde's reference to the fractured nature of the area that PT wants to ISL mine, the history at ISL mines of repeated excursions, spills, and leaks of mine solution and mine waste.

As stated in his Affidavit, the horses of the Wild Horse Sanctuary depends upon Cheyenne River and the Inyan Kara aquifers to sustain its existence. The Sanctuary is downstream from the Beaver and Pass Creek watersheds which flow through the proposed ISR mine sites and soon into the Cheyenne River. It is clear from evidence in the record that part of the Inyan Kara aquifers which flow initially southwest from the proposed ISR sites, then turn south, then east to flow below the southern portion of the Black Hills where the Wild Horse Sanctuary exists.

The CIs respectfully submit the Board will be able to question Mr. Hyde about the sources of his information raising concerns about the future of the Wild Horse Sanctuary if Powertech's proposed mines and processing plants are licensed to operate.

**10. PT and Staff Motions to Strike INT-007, Testimony of Susan Henderson**

PT and Staff seek by their Motions (PT:14; Staff:4,8) to "strike all aspects of CI Exhibit INT-007" due to questions about her credentials to give the opinions, perspectives, and concerns she raised in her Opening Testimony as a rancher whose cattle business depends on the Inyan Kara and Madison aquifers to operate, regarding baseline water quality issues and post-operational water quality

issues related, as stated on CI's Witness List, to Contentions 2 and 3.

The Board is quite capable of exploring her experiences and expertise include many years related to the water supply she feels is threatened by the NRC Staff issued license to Powertech, premised on the Staff issued, Powertech funded FSEIS.

PT and Staff further seek to exclude Intervenor-Henderson's testimony regarding concerns about the impact on the already leaching chemical and biological weapons stored at the Army's Igloo storage facility, outside Edgement. A segment of the aquifers PT wants to mine using oxidizing agents, flow under Igloo, as does the Wind Cave structure, prior to a portion of the Inyan Kara then flows east towards Ms. Henderson's ranch. The issues involving Igloo and the underlapping Wind Cave structure is very relevant to the Intervenor.

She is a named intervenor. She has been afforded intervenor status, like Intervenor Dayton Hyde, because there exists a plausible connection between the aquifers Powertech wants to mine for uranium (Inyan Kara) and water (Inyan Kara and Madison), and her and her ranch's water supply.

As with Mr. Hyde, Consolidated Intervenors respectfully submit, it is important that the Board hear the concerns and reasons for the concerns of those

people down flow and downstream from Powertech's proposed ISR mines, waste ponds, and processing plants, whose livelihoods and their existence on the land depended on the quantity and quality of the water currently available to them.

The Board, at the least, has the discretion, if not the propriety, to do so.

## **CONCLUSION**

For all the above argument, authority, and citations to the record, the Consolidated Intervenors respectfully request this Board deny each of the respective Motions to Strike or In Limine by Powertech and the NRC Staff.

Dated this 29<sup>th</sup> day of July, 2014.

Respectfully submitted,

/s/ Bruce Ellison

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