

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))	October 30, 2014

**MOTION FOR LEAVE TO FILE A REPLY TO NRC STAFF AND POWERTECH RESPONSES
TO MOTION TO ADMIT ADDITIONAL EXHIBITS
FILED ON BEHALF OF THE OGLALA SIOUX TRIBE**

Pursuant to 10 C.F.R. § 2.323(c), Intervenor Oglala Sioux Tribe (“Tribe”) hereby submits this Motion for Leave to File a Reply to Responses filed by the Applicant Powertech (USA) Inc. (“Powertech”) and NRC Staff on October 24, 2014 to the Tribe’s Motion to Admit Additional Exhibits. Specifically, the Tribe seeks to reply to the objections made by Powertech and NRC Staff to the Tribe’s request to have admitted as exhibits in this proceeding two recent documents published by the U.S. Environmental Protection Agency (“EPA”) relating the EPA’s review of the Dewey-Burdock site for clean up under the Comprehensive Environmental Response, Compensation, and Recovery Act (CERCLA). The first is an announcement by the EPA that it had completed a Preliminary Assessment under CERCLA at the Dewey-Burdock site, and the other is the Preliminary Assessment itself. See OST-025 (announcement); OST-026 (Preliminary Assessment).

As required by the rules, counsel for the Tribe conferred with counsel for the other parties with respect to this Motion. Counsel for NRC Staff states that the Staff would take no position on the Tribe's proposed motion, except that, if the motion is granted, the Staff believes it should be allowed a brief period of time to respond to the Tribe's reply. Counsel for Powertech states

that the applicant opposes the Motion. Counsel for Consolidated Intervenors (“CI”) states that CI supports the Tribe’s Motion.

Under 10 C.F.R. § 2.323(c), a reply is appropriate where permitted by the presiding office and “in compelling circumstances, such as where the moving party demonstrates that it could not reasonably have anticipated the arguments to which it seeks leave to reply.” Such circumstances exist here. The Tribe submitted the EPA documents on October 14, 2014, having only come into possession of the Preliminary Assessment that very day. The Tribe submitted them immediately due to the Board’s established deadline set for all motions to admit additional exhibits. See September 8, 2014 Order at 19 (setting deadline for all motions to admit new evidence at thirty (30) days following the required disclosures). The Tribe attempted to confer with both NRC Staff and Powertech, but did not receive any response until after the Tribe’s Motion was filed. Subsequent to the filing of the Tribe’s Motion, NRC Staff and Powertech stated that neither party would object to timing if the document was filed within thirty (30) days of receipt, but may object on relevance.

The Tribe could not have anticipated the relevance arguments put forth by Powertech and NRC Staff, nor the new testimony submitted from both parties regarding the EPA documents. This is largely due to the nature of Powertech’s and NRC Staff’s arguments. Powertech repeatedly misstates the applicable standard, asserting that the documents should not be admitted unless the Tribe demonstrates as a substantive matter that they conclusively demonstrate a violation of NEPA. Powertech Response at 3, 8-10. NRC Staff makes the same error, conflating an argument on the merits of the contentions with an argument as to admissibility. NRC Staff Response at 2. Further, Powertech repeatedly asserts that the documents cannot be admitted by virtue of the fact that the Tribe did not provide expert testimony as their relevance. Powertech

Response at 2, 3, 10. Because they so misconstrue the applicable standard, these arguments are not logical and could not reasonably have been anticipated. Further, denying the Tribe an opportunity to reply would deny it the ability to respond to new expert testimony presented for the first time in Powertech's and NRC Staff's Responses.

The Tribe submits that a reply is warranted here to ensure the application in this proceeding of the proper standard for admissibility of evidence. The Tribe intends to demonstrate that it need not provide substantive arguments on the merits, nor expert testimony, in order to show relevance for admissibility of documentary evidence. Surely, the Tribe will provide the substantive arguments on the merits, but only at the proper time associated with final legal briefing on the contentions, as contemplated by this Board's September 8, 2014 Post-Hearing Order. The Tribe intends to provisionally file its Reply by the close of business on Friday, October 31, 2014.

Respectfully Submitted,

/s/ Jeffrey C. Parsons

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Dated at Lyons, Colorado
this 30th day of October, 2014

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Motion for Leave to File Reply in the captioned proceeding were served via the Electronic Information Exchange (“EIE”) on the 30th day of October 2014, which to the best of my knowledge resulted in transmittal of same to those on the EIE Service List for the captioned proceeding.

/s/ signed electronically by _____

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