

**UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION**

**BEFORE THE ATOMIC SAFETY AND LICENSING BOARD**

In the Matter of:	)	
	)	
	)	Docket No.: 40-9075-MLA
POWERTECH (USA), INC.	)	
	)	Date: March 2, 2010
(Dewey-Burdock In Situ Uranium Recovery	)	
Facility)	)	
_____	)	

**RESPONSE TO OGLALA SIOUX TRIBE MOTION FOR EXTENSION OF TIME TO  
FILE A REQUEST FOR HEARING**

Powertech (USA), Inc. (Powertech), by its undersigned counsel of record, hereby submits this Response to the Oglala Sioux Tribe of the Pine Ridge Indian Reservation’s (the “Tribe”) Motion for Extension of Time to File a Request for a Hearing regarding Powertech’s license application for a new combined source and 11e.(2) byproduct material license to construct and operate an in situ leach uranium recovery (ISR) facility in Custer and Fall River Counties in the State of South Dakota. For the reasons discussed below, Powertech opposes any extension of time to file a request for a hearing based on non-sensitive but unclassified non-safeguards information (SUNSI) and asserts that the Tribe has failed to satisfy the Commission’s criteria for an extension of time set forth in 10 CFR § 2.307(a). Therefore, Powertech respectfully requests that the Office of the Secretary of the Commission or the Presiding Officer, if so designated, deny the Tribe’s request for a ninety day extension of time to file a request for a hearing.

## **I. PROCEDURAL HISTORY**

By letter dated February 23, 2010, the Tribe submitted a request for a ninety day extension to Powertech's NRC Staff Project manager, Mr. Ronald Burrows. After receipt of this request, on February 25, 2010, counsel for Powertech, the Tribe, and NRC Staff conducted a telephone conference in which the issue of this proposed extension was discussed. On this telephone conference, NRC Staff indicated that it did not believe that good cause existed for a ninety day extension but that it would not oppose an extension of fifteen days. On February 26, 2010, after conferring with Powertech representatives, counsel for Powertech sent an e-mail transmission to counsel for the Tribe indicating that it would oppose any extension for filing a request for a hearing for any contentions not related to SUNSI information. Then, that same day, the Tribe submitted its Motion for Extension of Time that is the subject of this Response. Based on that Motion, Powertech hereby submits this Response and respectfully requests that the Commission's Office of the Secretary or the Presiding Officer, if so designated, deny the Tribe's request for a ninety day extension of time to file a request for a hearing.

## **II. ARGUMENT**

In its February 26, 2010, Motion for Extension of Time, the Tribe cites four (4) factors that allegedly necessitate the need for a ninety day extension: (1) the Tribe's expert claims a review of Powertech's license application is not possible due to the "state of the application;" (2) the Tribe's counsel believes it is necessary to coordinate contentions based on non-SUNSI information with contentions based on SUNSI information; (3) the Tribe's need for coordination with the Tribal government on any non-SUNSI and SUNSI-based contentions; and (4) the Tribe's recent act to retain new counsel. For the reasons discussed below, Powertech asserts that

none of these four factors should result in a ninety day extension of time for filing a request for a hearing.

As a general proposition, the Commission's legal standards for granting an extension of time to file a request for a hearing can be found at 10 CFR § 2.307(a) which states:

“Except as otherwise provided by law, the time fixed or the period of time prescribed for an act that is required or allowed to be done at or within a specified time, may be extended or shortened either by the Commission or the presiding officer for good cause, or by stipulation approved by the Commission or the presiding officer.”<sup>1</sup>

Indeed the Final Rule associated with the revisions to the Commission's adjudicatory procedures notes that, “under § 2.307 of the final rule...a presiding officer may shorten or lengthen the time required for filing for good cause. This provision expressly allows a presiding officer to set deadlines for filing, such as the filing of contentions.”<sup>2</sup> Given that Powertech does not stipulate to the Tribe's Motion, the requirement of “good cause” is the only factor to be evaluated by the Commission or the Presiding Officer, if so designated.

The standard for “good cause,” while not specifically defined by regulation, has been discussed by Licensing Boards in the context of late filed petitions for intervention.<sup>3</sup> According to these discussions, the burden of showing good cause is on the petitioner seeking the extension.<sup>4</sup> The Licensing Board has stated that a party seeking an extension must state in detail what “unavoidable and extreme circumstances” warrant an extension.<sup>5</sup> The Commission's

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<sup>1</sup> 10 CFR § 2.307(a) (2010).

<sup>2</sup> See United States Nuclear Regulatory Commission, *Changes to the Adjudicatory Process*, 69 Fed. Reg. 2182, 2186 (January 14, 2004).

<sup>3</sup> See e.g., *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-05-24, 62 NRC 551, 564 (2005); see also *Private Fuel Storage, LLC* (Independent Spent Fuel Storage Installation), CLI-00-2, 51 NRC 77, 79 (2000); *Boston Edison Co.* (Pilgrim Nuclear Power Station), ALAB-816, 22 NRC 461, 468 n. 27 (1985).

<sup>4</sup> Compare *Detroit Edison Co.* (Enrico Fermi Atomic Power Plant, Unit 2), LBP-82-96, 16 NRC 1408, 1432 (1982).

Statement of Policy on Conduct of Adjudicatory Proceedings notes that “parties to a proceeding...are expected to adhere to the time frames specified in the Rules of Practice in 10 CFR Part 2 for filing....”<sup>6</sup> This Policy Statement also notes that extensions of time are only warranted by “unavoidable and extreme circumstances.”<sup>7</sup>

Based on the requirement that “unavoidable and extreme circumstances” be demonstrated to satisfy the “good cause” standard, Powertech asserts that none of the Tribe’s four cited factors should result in an extension of time to file a request for a hearing based on non-SUNSI information. First, the Tribe’s expert, Dr. Moran, claims that the Powertech license application materials “are quite disorganized, often with little consistency between the various documents, and frequently presenting information and interpretations in a technically inadequate manner.”<sup>8</sup> In the event that the Tribe chooses to allege that the Powertech license application is technically inadequate, it is free to do so in its hearing request.<sup>9</sup><sup>10</sup> Additionally, Dr. Moran’s letter is dated February 23, 2010, a mere thirty days from the deadline for filing non-SUNSI-based contentions in this proceeding. While it is not clear when the Tribe retained Dr. Moran, his letter demonstrates that he was retained after forty seven days of the timeframe for requesting a hearing already had lapsed. Had the Tribe retained Dr. Moran sooner, then this factor likely

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<sup>5</sup> See *Duke Energy Corporation* (Catawba Nuclear Station, Units 1 and 2), 2003 NRC LEXIS 176 (2003) citing United States Nuclear Regulatory Commission, *Statement of Policy on Conduct of Adjudicatory Proceedings*, 48 NRC 18 (1998).

<sup>6</sup> United States Nuclear Regulatory Commission, *Statement of Policy on Conduct of Adjudicatory Proceedings*, 48 NRC at 21.

<sup>7</sup> *Id.*

<sup>8</sup> Tribe Motion, Letter from Dr. Robert E. Moran at 1.

<sup>9</sup> Powertech notes for the record that it vehemently disagrees with Dr. Moran’s statements regarding the technical inadequacy of its license application and will offer expert testimony in the event that a contention is filed to that effect.

<sup>10</sup> It is important to note that NRC Staff has deemed Powertech’s license application as acceptable for detailed technical and environmental review; thus, Dr. Moran’s statements that the document is technically inadequate are not consistent with the facts.

would not be at issue. Powertech and NRC Staff should not be held responsible for the Tribe's decision to retain Dr. Moran so late in this proceeding.

Further, the Tribe contends that it has not had physical access to paper copies of Powertech's license application and that the lack of "regular access to computer technology or high speed internet service" and the cost of copying the license application is too large of a burden to meet.<sup>11</sup> This factor does not satisfy the Commission's standards for "good cause" or unavoidable and extreme circumstances." While it asserts that these issues have prevented "meaningful public access to the materials [license application]....," the Tribe had no problem requesting that NRC Staff provide it with paper copies on the aforementioned February 25, 2010, telephone conference.<sup>12</sup> Had the Tribe availed itself of this opportunity closer to the date of issuance of the notice of opportunity for a hearing, then the Tribe would not be able to offer this as grounds for "good cause." Given that the Tribe could have requested paper copies of the license application well in advance of the February 25, 2010, telephone conference, Powertech asserts that the Tribe's first factor cannot satisfy the "unavoidable and extreme circumstances" test. Thus, given that this circumstance was not "unavoidable," the Commission should determine that the Tribe's allegations about the state of Powertech's license application fail to justify a ninety day extension of time.

Second, the Tribe contends that it has not yet been allowed access to SUNSI information and that the need to coordinate its non-SUNSI-based contentions with its SUNSI based contentions is "good cause" for an extension of time. The Tribe claims that the approval and

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<sup>11</sup> *Id.*

<sup>12</sup> While not directly applicable to 10 CFR § 2.307(a) standards for extension of time, the Licensing Board has found in the past that it will not accept a petitioner's claim of excuse for late intervention where the petitioner failed to uncover and apply publicly available information in a timely manner. *See Kansas Gas and Electric Co.* (Wolf Creek Generating Station, Unit 1), LBP-84-17, 19 NRC 878, 886 (1984), *citing Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), LBP-83-42, 18 NRC 112, 117, *aff'd* ALAB-743, 18 NRC 38 (1983).

issuance of a protective order for access to SUNSI is necessary to coordinate the formulation of contentions.<sup>13</sup> However, the Tribe fails to provide any reason why the alleged need to coordinate constitutes “unavoidable and extreme circumstances.” The Commission’s February 29, 2008, amendment to its 2004 Final Rule expressly contemplates conduct by the Office of the Secretary to “issue orders establishing procedures and timelines for submitting and resolving requests for” SUNSI....”<sup>14</sup> This delegation of authority to the Secretary culminated in a policy that entitles potential intervenors an additional twenty-five days from actual access to SUNSI to file contentions based on such information. This practice has been employed by potential intervenors in other materials license proceedings under 10 CFR Part 2 since its inception in 2008 and, as such, cannot be viewed as “unavoidable and extreme circumstances.” Thus, Powertech asserts that this factor cannot constitute grounds for a ninety day extension of time.

Third, the Tribe contends that the Tribal Government’s need to coordinate and act on proposed contentions is “good cause” for an extension of time. The Tribe also states that coordination with the Tribal Government is necessary since “[t]he issues raised by the proposed project involve sensitive matters to the Tribe...”<sup>15</sup> This factor does not satisfy the Commission’s standard for “good cause” as it is evident that issues rising to the level of potential contentions would involve matters that are “sensitive” to a specific party. Further, the Tribal Government has been given the same amount of time (sixty days) to coordinate on potential non-SUNSI based contentions as has been given to other parties in similar cases.<sup>16</sup> Given that the Commission engaged in a rulemaking to revise its adjudicatory procedures and to allot sixty days

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<sup>13</sup> *Id.*

<sup>14</sup> 73 Fed. Reg. 10978 (February 29, 2008).

<sup>15</sup> Tribe Motion at 3.

<sup>16</sup> *Compare Detroit Edison Co.* (Fermi Unit 3), 69 NRC 80, 82 (February 17, 2009) (noting that “coordinating action among volunteers and large public interest organizations does not demonstrate a showing of special circumstances amounting to good cause).

for review and submission of non-SUNSI-based contentions, the Tribe cannot claim they do not have an opportunity for a “careful and meaningful review” of Powertech’s license application.<sup>17</sup> Thus, the Commission should determine that the Tribe’s third factor provides insufficient grounds for a ninety day extension of time.

Fourth, the Tribe contends that retaining new counsel demonstrates “good cause” for an extension of time. However, the Tribe has not substituted “new” counsel in this proceeding; but rather, the Tribe has submitted notices of appearance for additional counsel while not withdrawing any existing counsel. Based on this, the Tribe cannot avail itself of any relief with respect to this factor because its current counsel could have prepared adequate non-SUNSI-based contentions prior to adding additional counsel. The notices of appearance adding rather than replacing the Tribe’s roster of legal counsel provides no explanation of why ninety days are required for reviewing the Powertech license application when NRC regulations only permit sixty days from the notice of an opportunity for a hearing.<sup>18</sup> Further, given that the Tribe still maintains counsel who was available at the start of the sixty day period for filing hearing requests, there is no reason that current counsel could not effectively brief new counsel on potential non-SUNSI-based contentions. The substitution of counsel should not be viewed by the Commission as an “unavoidable and extreme circumstance.”

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<sup>17</sup> Compare *id.* at 82 (stating that the public availability of a license application when a Federal Register notice was published which allotted potential intervenors five months to prepare and submit contentions served as ample opportunity for review of a license application).

<sup>18</sup> See 10 CFR § 2.309(b)(3).

**III. CONCLUSION**

For the reasons discussed above, Powertech respectfully requests that the Office of the Secretary of the Commission or the Presiding Officer, if so designated, deny the Tribe's request for a ninety day extension of time to file a request for a hearing.

Respectfully submitted,

**/Signed (electronically) by/  
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Dated: March 2, 2010