

**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: May 23, 2010
	)	
(Dewey-Burdock In Situ Uranium Recovery	)	
Facility)	)	

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**APPLICANT POWERTECH (USA) URANIUM CORPORATION'S RESPONSE TO  
CONSOLIDATED PETITIONERS' REQUEST FOR LEAVE TO FILE A NEW  
CONTENTION BASED ON SUNSI MATERIAL**

**I. INTRODUCTION**

Pursuant to 10 C.F.R. § 2.309(h), Powertech (USA) Uranium Corporation (hereinafter “Powertech” or the “Applicant”) hereby submits this response to an April 30, 2010, Request for Leave to File a New Contention Based on sensitive unclassified non-safeguards information (SUNSI)<sup>1</sup> Material submitted by counsel for Theodore P. Ebert, Susan Henderson, Liliac C. Jones Jarding, Gary Heckenlaible, David Frankel, Dayton Hyde, the Clean Water Alliance (CWA), and Aligning for Responsible Mining (ARM) (collectively the “Petitioners”) (hereinafter the “Request”) regarding Powertech’s license application to construct and operate a proposed in situ leach uranium recovery (ISR) project in Custer and Johnson counties in the State of South Dakota (hereinafter the “Dewey Burdock ISR project”). For the reasons discussed

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<sup>1</sup> It is important to note that Petitioners were denied access to SUNSI materials by the United States Nuclear Regulatory Commission (NRC) Staff submitted by Powertech in its Dewey-Burdock license application and that the materials to which Petitioners refer are materials made publicly available by NRC Staff with redactions of SUNSI items from such materials.

below, Powertech respectfully requests that the Licensing Board determine that Petitioners' new contention is not admissible pursuant to 10 C.F.R. § 2.309(f)(1).

## **II. BACKGROUND AND PROCEDURAL HISTORY**

On February 25, 2009, Powertech submitted a license application for an Atomic Energy Act of 1954, as amended (hereinafter the "AEA"), combined source and 11e.(2) byproduct material license to construct and operate its proposed Dewey-Burdock ISR project in South Dakota. After completing its ninety day acceptance review, NRC Staff determined that Powertech's Dewey-Burdock license application required additional data and information prior to docketing for detailed technical and environmental review. As a result, on June 19, 2009, Powertech voluntarily withdrew its license application pending re-submission of the required additional data and information. On August 10, 2009, Powertech re-submitted its Dewey-Burdock license application with the additional data and information requested by NRC Staff. Powertech's re-submission of its license application provided additional data and information on some specific items such as breccias pipes, the Morrison Formation, deep-disposal well option, and existing wells within the proposed Dewey-Burdock ISR site area; however, this re-submission was not materially different from its initial license application submittal. After completion of a second ninety day acceptance review, NRC Staff determined that Powertech's Dewey-Burdock license application was acceptable for detailed technical and environmental review and was docketed.

After Powertech's Dewey-Burdock license application was made publicly available, on January 5, 2010, NRC Staff issued a Federal Register notice providing interested stakeholders and other members of the public with an opportunity to request a hearing on the application and

to request access to SUNSI associated with the license application.<sup>2</sup> On January 15, 2010, counsel for Petitioners submitted a request for access to SUNSI documentation. After reviewing this request, NRC Staff determined that Petitioners were not entitled to access to the SUNSI documentation. On February 26, 2010, Petitioners submitted a motion for a ninety (90) day extension of time to file their Request based on a number of factors including a lack of time to review the Dewey-Burdock license application. On March 3, 2010, both Powertech and NRC Staff filed responses in opposition to Petitioners' motion and, on March 5, 2010, the Commission determined that Petitioners were not entitled to an extension of time.

On March 8 and 9, 2010, Petitioners submitted their Request to the Commission. On March 12, 2010, the Commission established an Atomic Safety and Licensing Board Panel (Licensing Board) and referred Petitioners Request to the Licensing Board. In response to Petitioners' Request, on April 12, 2010, Powertech and NRC Staff submitted their Responses to Petitioners' Request. On April 19, 2010, Petitioners submitted a Reply to Powertech's and NRC Staff's Responses. Then, on, April 30, 2010, Petitioners' submitted a new contention related to the aforementioned historic and cultural resource information which they received from NRC Staff on April 1, 2010. In response to this new contention, Powertech hereby submits this Response and respectfully requests that the Licensing Board determine that Petitioners' new contention is not admissible pursuant to 10 C.F.R. § 2.309(f)(1) and, accordingly, the new contention should be rejected.

### **III. STATEMENT OF LAW**

As Petitioners' pleading that is the subject of this Response deals only with a newly proffered contention, Powertech offers the following statement of law applicable to such contention.

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<sup>2</sup> See 75 Fed. Reg. 467 (January 5, 2010).

In materials licensing proceedings such as the instant case, Petitioner must proffer at least one admissible contention pursuant to 10 C.F.R. § 2.309(f)(1). Part 2.309(f)(1) mandates that Petitioner must satisfy each of the following requirements:

“A request for hearing or petition for leave to intervene must set forth with particularity the contentions sought to be raised. For each contention, the request or petition must:

- (i) Provide a specific statement of the issue of law or fact to be raised or controverted;
- (ii) Provide a brief explanation of the basis for the contention;
- (iii) Demonstrate that the issue raised in the contention is within the scope of the proceeding;
- (iv) Demonstrate that the issue raised in the contention is material to the findings the NRC must make to support the action that is involved in the proceeding;
- (v) Provide a concise statement of the alleged facts or expert opinions which support the requestor’s/petitioner’s position on the issue and on which the petitioner intends to rely at hearing, together with references to the specific sources and documents on which the requestor/petitioner intends to rely to support its position on the issue; and
- (vi) Provide sufficient information to show that a genuine dispute exists with the applicant/licensee on a material issue of law or fact. This information must include references to specific portions of the application (including the applicant’s environmental report and safety report) that the petitioner disputes and the supporting reasons for each dispute, or, if the petitioner believes that the application fails to contain information on a relevant matter as required by law, the identification of each failure and the supporting reasons for the petitioner’s belief.”

10 C.F.R. § 2.309(f)(1).

The application of these six contention admissibility factors is “strict by design.” *Dominion Nuclear Conn., Inc.*, (Millstone Nuclear Power Station, Units 2 & 3), CLI-01-24, 54 NRC 349, 358 (2001). The failure to satisfy each of the six contention admissibility factors results in grounds for dismissal of a particular contention. *Private Fuel Storage LLC* (Independent Fuel Storage Installation), CLI-99-10, 49 NRC 318, 325 (1999). In other words, as stated by the

Commission, “[i]f any one of these requirements is not met, a contention must be rejected.” *Arizona Public Service Co.* (Palo Verde Nuclear Generating Station, Units 1, 2, and 3), CLI-91-12, 34 NRC 149, 155 (1991).

The Commission’s standards for admissible contentions do not permit filing “‘a vague, unparticularized contention,’ unsupported by affidavit, expert, or documentary support.” *N. Atl. Energy Serv. Corp.* (Seabrook Station, Unit 1), CLI-99-6, 49 NRC 201, 219 (1999), *quoting Balt. Gas & Elec. Co.* (Calvert Cliffs Nuclear Power Plant), CLI-98-25, 48 NRC 325, 349 (1998). 10 C.F.R. § 2.309(f)(1)(i) states that a petitioner must submit proposed contentions that provide a “specific statement of the issue of law or fact to be raised or controverted.” 10 C.F.R. § 2.309(f)(1)(i). Admissible contentions must state “with specificity” safety or legal reasons for why the application in question must be rejected. *Millstone*, CLI-01-24, 54 NRC at 359-60. Thus, in the case where a petitioner offers nothing more than “generalized suspicions, hoping to substantiate them later,” such proposed contentions should be rejected. *Duke Energy Corp.* (McGuire Nuclear Station Units 1 & 2; Catawba Nuclear Station, Units 1 & 2), CLI-03-17, 58 NRC 419, 424 (2003) *quoting Duke Energy Corporation* (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC at 328, 337-339. (1999).

As stated in 10 C.F.R. § 2.309(f)(1)(iii), admissible contentions must be within the scope of the proceeding as defined by the Federal Register notice offering an opportunity for a hearing. *See Florida Power and Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 & 4), CLI-00-23, 52 NRC 327, 329 (2000). Pursuant to 10 C.F.R. § 2.309(f)(1)(vi), an admissible contention must present a genuine dispute with the applicant on a material issue of law or fact, and any contention failing to satisfy this requirement can be dismissed. *See Sacramento Mun. Util. Dist.* (Rancho Seco Nuclear Generating Station), LBP-93-23, 38 NRC 200, 247-248 (1993), *review*

*declined*, CLI-94-2, 39 NRC 91 (1994). Failure to support a contention with adequate factual information and expert opinions requires that the contention be rejected. *See Arizona Public Service* (Palo Verde Nuclear Generating Stations, Unit Nos. 1, 2, and 3), 34 NRC 149, 155 (1991).

10 C.F.R. § 2.309(f)(1)(vi) states that a petitioner is required to “provide sufficient information to show...a genuine dispute...with the applicant...on a material issue of law or fact.” 10 C.F.R. § 2.309(f)(1)(vi) (2010). It is a petitioner’s responsibility to specifically state how a license application is inadequate and to “explain why the application is deficient.” *See United States Nuclear Regulatory Commission, Final Rule, Rules of Practice for Domestic Licensing Proceedings—Procedural Changes in the Hearing Process*, 54 Fed. Reg. 33168, 33,170 (August 11, 1989); *see also Palo Verde*, CLI-91-12, 34 NRC at 156

Mere speculation and bare assertions alleging that a matter should be considered will not suffice to allow the admission of a proffered contention. *See Fansteel, Inc.*(Muskogee, Oklahoma Site), CLI-03-13, 58 NRC 195, 203 (2003). The Licensing Board is not required to make assumptions of fact that favor Petitioner when they fail to provide the required support for their contentions. *See Georgia Tech*, (Georgia Tech Research Reactor), LBP-95-6, 41 NRC 281, 305 April 26, 1995). In addition, information offered by Petitioner to support a contention requires an explanation of its significance in order to be sufficient to admit such contention. *Fansteel*, CLI-03-13, 58 NRC at 204.

With respect to the scope of this proceeding as defined in the January 5, 2010 Federal Register notice and notice of opportunity for a hearing, it is limited to Powertech’s license application to construct, operate, restore, and decommission an ISR project site at the proposed Dewey-Burdock site and to recover uranium from wellfields located at that site. *See 75 Fed. Reg.*

467. Thus, admissible contentions must be strictly limited to issues that are relevant to Powertech's proposal. *See Yankee Atomic Elec. Co.* (Yankee Nuclear Power Station), CLI-98-21, 48 NRC 185, 204 (1998), and any contention falling outside the scope of this proceeding should be rejected. *See Portland Gen. Elec. Co.* (Trojan Nuclear Plant), ALAB-534, 9 NRC 287, 289-290, n.6 (1979).

#### IV. RELEVANT STATUTORY AND REGULATORY AUTHORITIES

For purposes of this Section, Powertech hereby incorporates Section III(C) of its April 12, 2010, Response to Petitioners' Request and Section IV of its May 3, 2010 Response to Petitioner the Oglala Sioux Tribe's Petition to Intervene/Request for a Hearing by reference, with emphasis on the following.

NRC's NUREG-1569 discusses two different phases of proposed ISR projects: (1) Chapter 2, *Site Characterization* and (2) Chapter 5, *Operations*. Such "phasing" is equally applicable to issues such as historic and cultural resources and financial assurance. The *Site Characterization* phase involves a reasonably comprehensive analysis of geographic and topographic maps and drawings that identify the proposed ISR site and its relationship to, *inter alia*, geologic, hydrologic, historical and archaeological *features* etc. *See* NUREG-1569 at 2-1, 2-5, & 2-17. However, NUREG-1569 specifically notes that:

"[r]eviewers should keep in mind that the development and initial licensing of an *in situ* leach facility is *not based on comprehensive information....reviewers should not expect that information needed to fully describe each aspect of all the operations will be available in the initial application.*"

*Id.* at 2-1 & 2-2 (emphasis added).

The pre-licensing *Site Characterization* phase of ISR projects is designed to provide *general* information regarding the location of an ISR-amenable ore body, the techniques or procedures to be used to recover the uranium, the procedures to be used to protect public health and safety and

the environment or other relevant resources (e.g., historic and cultural resource inventories), and financial assurance cost estimates for the proposed ISR project for the first year after active operations begin. This phase is not, however, designed to provide detailed site-specific geologic and hydrologic data and analyses regarding such critical items as pre-operational baseline water quality, well field design, UCLs, and the entire monitor well system that require extensive future actions *after* a license is issued and a proposed project begins its “phased” development. Indeed, license applicants are not permitted to engage in such operational activities until after the requested license is issued pursuant to NRC Staff’s current interpretation of 10 C.F.R. § 40.32(e).

On the other hand, the post-licensing *Operations* phase of ISR projects, which Powertech’s proposed Dewey Burdock ISR project has not yet reached, requires detailed site-specific data and analyses for items such as the location of initial well fields to determine pre-operational baseline water quality in the recovery zone and at monitor wells, to establish UCLs used to identify potential excursions, and to assess whether such well fields, piping or other equipment or processes will impact identified or unidentified environmental or historic and cultural resources. For example, Powertech’s *Operations* phase undoubtedly will require, by license condition and licensee commitment, the cessation of any site activities and the conduct of a cultural resources evaluation if previously undetected historic or cultural properties are discovered during the development and construction of wellfields. Thus, per NUREG-1569, “phasing” is an essential and integral component of *all aspects* of ISR projects.

With respect to historic and cultural resources, a “phased” approach imposing an *ongoing* responsibility to protect such resources<sup>3</sup> has been endorsed by the Commission as an appropriate

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<sup>3</sup> As stated by the Board in *Hydro Resources*, “HRI’s license contains a condition...that (1) prohibits HRI from performing any construction or development activities at any site until the NRC Staff has completed

methodology for ISR project licensing. The Commission’s approach, as set forth in *Hydro Resources*, concludes that “phased identification” of such resources is appropriate for ISR projects due to their “phased development.” In any event, the responsibility is not *static* but rather *ongoing* that a licensee is required to continuously monitor for previously unidentified historic and cultural resources during all phases of such projects until final license termination. See *Hydro Resources, Inc.* (Crownpoint Uranium Project), 63 NRC 483, 487-488. This approach is also consistent with current National Historic Preservation Act (NHPA) requirements at 36 CFR § 800(b)(2) which specifically authorize the use of “phased identification” for projects that involve “large land areas” or where “access to properties are restricted.” This authorization also allows agencies to use “phased identification” when such process is specifically “provided for in...the documents used by an agency official to comply with the National Environmental Policy Act...” 36 CFR § 800.4(b)(2). Companies seeking to license ISR projects often are engaged by relevant agency officials in a Memorandum of Agreement (MOA) that sets forth the parameters for evaluation of historic and cultural resources for a proposed ISR project. However, while “phased identification” is permitted in these circumstances, “an agency official shall proceed with the identification and evaluation of historic properties” when the remaining aspects of the proposed undertaking are refined. *Id.*

In the case of proposed ISR projects, “[t]he agency official may also defer final identification and evaluation of historic properties if it is specifically provided for in a memorandum of agreement executed pursuant to § 800.6...” . In the case of ISR projects, NRC

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an appropriate NHPA review for that site, and (2) ensures the protection of any newly discovered cultural artifacts....In order to ensure that no unapproved disturbance of cultural resources occurs, any work resulting in the discovery of previously unknown cultural artifacts shall cease. The artifacts shall be inventoried and evaluated in accordance with 36 C.F.R. Part 800, and no disturbance shall occur until the licensee has received written authorization to proceed....” See *Hydro Resources*, (Crownpoint Uranium Project), 62 NRC 442, 454 (2005).

is the agency involved in the protection of identified and unidentified historic and cultural resources and it is NRC Staff's responsibility to engage in appropriate consultation with other entities or officials and not that of a license applicant. As stated in *Crow Butte Resources*, "the agency must make a 'reasonable and good faith effort to identify any Indian tribes...that might attach religious and cultural significance to historic properties in the area of potential effects and invite them to be consulting parties.'" *Crow Butte Resources* (North Trend Expansion), 2009 WL 1864004, \*19 (2009). Thus, as the Commission concluded in *Crow Butte Resources*, the conduct or lack thereof of "staff consultations" has nothing to do with the "deficiency in the application." *Id.* at \*20.

## V. ARGUMENT

### A. **Petitioners' New Contention Regarding Alleged Violations of 10 C.F.R. §§ 40.9, 51.45 and 51.60 For Failure to Provide Analyses of Subsurface Testing for Historic and Cultural Resources**

In their newly filed contention, Petitioners allege that Powertech's Dewey-Burdock license application does not comply with 10 C.F.R. §§ 40.9 and 51.45, because it "does not provide analyses that are adequate, accurate, and complete in all material respects to demonstrate that cultural and historic resources...are identified and protected pursuant to Section 106 of the National Historic Preservation Act." Petitioners' Request at 1-2. As a result of this factor, Petitioners allegation that "the Application fails to comply with Section 51.60 because its Environmental Report does not provide analyses that are adequate, accurate and complete in all material respects concerning archaeological sites and materials...." *Id.* at 2. These allegations are the result of, according to Petitioners, the need to "show that sub-surface testing was performed in order to demonstrate that archaeological sites...are properly identified, evaluated and protected and to show that it has submitted a proper analytic discussion under Sections 51.45

and 51.60.” *Id.* These allegations are insufficient to support an admissible contention under 10 C.F.R. § 2.390(f)(1).

Initially, Petitioners’ contention does not allege a material dispute of law that can satisfy the Commission’s requirement for admissible contentions under 10 C.F.R. § 2.309(f)(1)(vi). As stated in Powertech’s April 12, 2010, Section 40.9 of the Commission’s regulations for materials licenses such as the one requested by Powertech states that, “information provided to the Commission by an applicant for a license...shall be complete and accurate in all material respects.” *See* 10 C.F.R § 40.9(a) (2010). This regulation does not, however, create an independent obligation for an applicant to submit specific information in its application, such as subsurface testing as alleged by Petitioners. Thus, given portions of their new contention are focused on the alleged inadequacy of the historic and cultural evaluations offered by Powertech, any such portions of the new contention cannot find relief in Section 40.9(a).

Petitioners also rely on 10 C.F.R. §§ 51.45<sup>4</sup> and 51.60 in support of its contention. As in their March 8 and 9, 2010 Request, Petitioners’ allegations here misread the meaning of Part 51.45. Part 51.45 addresses the types of information required for an environmental report and Part 51.45(e) merely requires that adverse information known to the applicant be included in an applicant’s environmental report. Nowhere in this regulation does it specify the types of or the extent to which such adverse information should be disclosed. Indeed, Part 51.45(b)(1) states that potential impacts on the environment should be discussed “in proportion to their significance” and Part 51.45(b)(2) states that it should include any adverse impacts that cannot be avoided if the proposal is implemented. *See* 10 C.F.R. §§ 51.45 (b)(1 & 2) (2010). Thus, Part 51.45(b-d) provide parameters for information that should be submitted in an environmental

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<sup>4</sup> Petitioners’ new submission only cites once to two specific subsections of Section 51.45 in support of its new contention: Sections 51.45(c & d). The remainder of Petitioners’ bases for the new contention is allegedly supported by a broad reliance on 10 C.F.R. Part 51.45.

report but do not prescribe any sort of “technical adequacy” requirement. The parameters in these subsections only describe the categories of potential impacts that a license applicant should address in an environmental report. In this new contention, Petitioners offer no support for how Section 51.45 requires Powertech to submit its historic and cultural resource evaluation of the proposed Dewey-Burdock ISR site in the manner in which Petitioners allege.

Section 51.60 also does not afford Petitioners any relief. Section 51.60 merely sets forth the Commission’s requirement that an applicant for a materials license such as the license requested by Powertech must submit an environmental report in accordance with 10 C.F.R. § 51.45 parameters:

“(b) As required by paragraph (a) of this section, each applicant shall prepare an environmental report for the following types of actions:...

- (1) Issuance or renewal of a license or other form of permission for:...
- (ii) Possession and use of source material for uranium milling or production of uranium hexafluoride pursuant to part 40 of this chapter.”

10 C.F.R. § 51.60(b)(1)(ii).

Based on its plain language, Section 51.60 merely establishes a requirement for the filing of an environmental report with a materials license application. Since Powertech submitted an environmental report with its Dewey-Burdock license application, Petitioners’ new contention cannot demonstrate that Powertech violated Section 51.60.

With respect to Petitioners’ specific allegations in this new contention, Powertech responds as follows:

**Paragraph 2:** Paragraph 2 alleges that Powertech historic and cultural resource report as prepared by the Archaeology Laboratory of Augustana College (Augustana) “is merely an inventory of sites based on previously existing information; as such it lacks analytical content.” Petitioners’ Request at 3. As a result, “[t]he Augustana Report is not an evaluative report of the

cultural resources in the area as Applicant has characterized it and which would be required to satisfy Sections 51.45 (c) and (d).” *Id.* at 3-4. These allegations are, on their face, incorrect and appear to reflect the fact that Petitioners and their expert, Dr. Redmond, have not read the entire aforementioned Augustana Report. This report is based on a one hundred percent intensive pedestrian survey of 10,310.97 acres plus an additional 1,300 acres at Powertech’s proposed Dewey-Burdock ISR site. Some two hundred plus sites were identified, most of which were newly recorded, and information was updated for previously recorded sites that were relocated. Sites with some physical integrity in the immediate area were evaluated while those with small amounts of intact soil were recommended for further evaluation. Without physical integrity (i.e., where site area is completely eroded/deflated or has bedrock, gravel or shale surfaces), the site cannot be evaluated as there is no potential for significant buried artifacts or other resources.<sup>5</sup> As stated in *Duke Power*:

“[A]n intervention petitioner has an *ironclad obligation* to examine the *publicly available documentary material pertaining to the facility in question* with sufficient care to enable [the petitioner] to uncover any information that could serve as the foundation for a specific contention. Stated otherwise, neither Section 189a. of the [Atomic Energy] Act nor section [2.309] of the Rules of Practice permits the filing of a vague, unparticularized contention, followed by an endeavor to flesh it out through discovery against the applicant or staff.”

*See* 16 NRC 460, 468 (1982), *vacated in part on other grounds*, CLI-83-19, 17 NRC 1041 (1983) (emphasis added).

Given that a plain reading of the Augustana Report demonstrates that Petitioners have failed to account for substantial portions of its data and analyses, this portion of Petitioners’ new contention does not demonstrate that a genuine dispute of material fact exists and, thus, it does not satisfy 10 C.F.R. § 2.309(f)(1)(vi) and should be rejected.

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<sup>5</sup> *See* Augustana Report, Volume III, Section 7.3.1, Documented Archaeological Properties, pp. 7.10-7.11, Contract Series No. 216.

Further, while narrowly focusing their new contention on the Augustana Report, Petitioners do not account for other portions of Powertech’s Dewey-Burdock license application that provide analyses. Indeed, Powertech’s license application contains extensive analyses of historic and cultural resources based on the aforementioned, comprehensive archaeological report prepared by Augustana College. More specifically, Sections 3.8 and 4.10 of the Environmental Report directly address the affected environment and potential impacts related to historic and cultural resources. Thus, any claim that Powertech’s *license application*, and not just the Augustana Report, lacks analytical content should be rejected as failing to dispute the data and conclusions offered in the license application.

**Paragraph 4:** In Paragraph 4, Petitioners allege that, “[t]here were a number of sites that were found to be unevaluated and needing further work....These unknowns must be resolved in order for the Application to be in compliance with Sections 51.45, 51.60 and 40.9.” Petitioners’ Request at 4. Petitioners’ allegations do not offer a genuine dispute of law with respect to the alleged failure to resolve these “unknowns.” Petitioners do not identify any portion of Sections 40.9, 51.45, 51.60 that require Powertech to submit information regarding or conduct additional activities to resolve potential historic and cultural “unknowns” at a proposed ISR site as envisioned by Petitioners. As noted above, the NHPA and ACHP regulations as interpreted by the Commission in HRI specifically endorse a “phased” approach to NHPA Section 106 compliance. The aforementioned Augustana Report specifically recommends that an unevaluated site that may be subject to disturbance be evaluated pursuant to “phased” NHPA Section 106 compliance procedures which are reflected in Paragraph 2 of Powertech’s MOA with the South Dakota State Archaeologist. The Augustana Report addresses sites that may be

impacted in the next five (5) years,<sup>6</sup> and it cannot be read to imply that unevaluated sites are ineligible for listing on the NRHP. Indeed, the report specifically states that such sites are “potentially eligible.”<sup>7</sup> Thus, this portion of the new contention does not satisfy the Commission’s requirements for admissible contentions, as it does not offer a genuine dispute of law. *See* 10 C.F.R. § 2.309(f)(1)(vi).

**Paragraphs 3 & 5:** In Paragraph 3, Petitioners state that “[n]one of the sites which ALAC [Augustana] determined were ineligible for inclusion [in the National Register of Historic Places] were the subject of sub-surface testing.” Petitioners’ Request at 4. Then, in Paragraph 5, Petitioners allege that the lack of subsurface testing on “unevaluated sites” is insufficient to be in compliance with 10 C.F.R. §§ 51.45, 51.60, and 40.9. *See* Petitioners’ Request at 4. As stated above, Section 51.45 does not impose any adequacy requirements on Powertech to provide a historic and cultural resource evaluation in the manner in which Petitioners prescribe in their new contention. Further, Powertech’s Dewey-Burdock license application specifically references locations where subsurface testing was conducted. *See e.g.*, Augustana Report, Addendum 1, Volume I, Evaluative Testing Report; Addendum 2, Volume I; Additional Survey Report; Sections 27, 31, and 34, T6S, R1 E and Sections 4, 5, and 14, T7S, R1E (2008) (ADAMS Accession Nos. ML100670483, ML100670485, ML100670466, ML100670472, and ML100670474). However, as noted above, no subsurface testing is conducted at sites where there is a lack of physical integrity from erosion/deflation, bedrock, gravel or shale indicating that there is no potential for significant buried artifacts or other resources. Thus, the contention

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<sup>6</sup> Augustana Report, Table 7.8, p. 7.14, Volume III and Table 7.10, pp. 7.20-7.21 regarding sites needing further evaluation.

<sup>7</sup> *Id.* at Abstract of Archaeological Contract Series No. 216 (“The National Register eligibility status of remaining 87 archaeological sites and the bridge could not be definitively ascertained within the scope of this Level III evaluation. *Additional evaluation is recommended for the sites in a phased approach as the project develops.*”).

must be rejected because it fails to dispute the data and conclusions offered by Powertech in its Dewey-Burdock license application, and it fails to allege a genuine dispute of law. *See* 10 C.F.R. § 2.309(f)(1)(vi). In addition, Section 51.60 also does not prescribe the need for the submission of subsurface testing with a historic and cultural resource analyses. Thus, this portion of the new contention should be rejected. *See id.*

Further, Petitioners do not offer any allegation as to how Powertech's historic and cultural resource evaluation violates 10 C.F.R. § 40.9. Powertech's license application contains extensive data and analyses regarding historic and cultural resources and, as stated above, Section 40.9 does not create an independent obligation for a license applicant to include specific information in its license application such as subsurface testing. Thus, this portion of Petitioners' new contention cannot find relief in Section 40.9.

## **VI. CONCLUSION**

For the reasons discussed above, Powertech respectfully requests that the Licensing Board determine that Petitioners' new contention is not admissible pursuant to 10 C.F.R. § 2.309(f)(1) and, accordingly, the new contention should be rejected.

Respectfully submitted,

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

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Dated: May 23, 2010

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**CERTIFICATE OF SERVICE**

I hereby certify that copies of the foregoing “**APPLICANT POWERTECH (USA) URANIUM CORPORATION’S RESPONSE TO CONSOLIDATED PETITIONERS’ REQUEST FOR LEAVE TO FILE A NEW CONTENTION BASED ON SUNSI MATERIAL**” in the above-captioned proceeding have been served via the Electronic Information Exchange (EIE) this 23rd day of May 2010, which to the best of my knowledge resulted in transmittal of the foregoing to those on the EIE Service List for the above captioned proceeding.

Respectfully Submitted,

**/Executed (electronically) by and in  
accord with 10 C.F.R. § 2.304(d)/  
Christopher S. Pugsley, Esq.**

Dated: May 23, 2010

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