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)	)	
	)	

REPLY OF THE OGLALA SIOUX TRIBE REGARDING CONTENTIONS FOLLOWING ISSUANCE OF FINAL SUPPLEMENTAL ENVIRONMENTAL IMPACT STATEMENT

I. INTRODUCTION

NRC Staff and Powertech both argue that each of the Tribe's already admitted contentions should be excluded from this proceeding. In doing so, however, both parties misapply the "migration tenet", inappropriately attempt to convert the contention response into a motion for summary disposition, repeatedly argue the merits of the contentions, ignore evidence submitted and referenced by the Tribe, and fail to support the technical bases for their arguments. Regardless, each of the Tribe's contentions admitted at the ER and DSEIS stage "migrate" forward and have already been properly set for hearing in this matter. Further, to the extent NRC Staff or Powertech assert any new information to call the migration tenet into question, the Tribe has addressed that new information through expert testimony and overcome the "minimal" standard to show a material issue of fact exists as to the adequacy of the NRC Staff's NEPA analysis. With regard to the new contentions submitted by the Tribe based on the FSEIS, the Tribe has met the admissibility standards and these contentions should be admitted for hearing.

A. Contentions of Adequacy and Omission

Importantly, neither NRC Staff nor Powertech contest the Tribe's explicit argument demonstrating the nature of its contentions as containing contentions of adequacy. Statement of

Contentions of the Oglala Sioux Tribe Following Issuance of Final Supplemental Environmental Impact Statement at 5. As a result, NRC Staff and Powertech cannot avail themselves of the relative ease of dismissal that comes with contentions solely of omission. *See Entergy Nuclear Vermont Yankee, LLC, and Entergy Nuclear Operations, Inc.* (Vermont Yankee Nuclear Power Station), 50-271-OLA, 62 N.R.C. 429, 431 (2005)("The Commission has stated that '[w]here a contention alleges the omission of particular information or an issue from an application, and the information is later supplied by the applicant … the contention is moot.' *Duke Energy Corporation* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-28, 56 NRC 373, 383 (2002)'"). In any case, as discussed below, there is no basis to dismiss already-admitted contentions at this stage in the proceeding, absent a motion for summary disposition.

B. Applicability of the "Migration Tenet"

Throughout their responses, NRC Staff and Powertech misapprehend the "migration tenet" and the *in para materia* test. Both NRC Staff and Powertech rely heavily on the assertion that each of the Tribe's previously admitted contentions do not "migrate" from the admitted ER and DSEIS contentions. However, these repeated assertions are made without providing meaningful legal or factual analysis. Rather, a review of NRC precedent as applied to this case demonstrates that the FSEIS is not so substantially different from the DSEIS to preclude application of the migration tenant.

In fact, the approach taken by NRC Staff and Powertech undermines the purpose of the "migration tenet". According to NRC precedent, the reason for the tenet is to "obviate[e] the need to file and litigate the same contention up to three times -- once against the ER, once against the DEIS, and one final time against the FEIS." *Detroit Edison Company* (Fermi Nuclear

Power Plant, Unit 3), LBP-12-23, 76 N.R.C. 445, 471 (2012), *quoting Louisiana Energy Servs., L.P.* (Claiborne Enrichment Center), CLI-98-3, 47 NRC 77, 84 (1998); *Duke Energy Corp.*, CLI-02-28, 56 NRC at 383 n.44; *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-01-23, 54 NRC 163, 172 n.3 (2001). However, NRC Staff's and Powertech's arguments and approach throughout this proceeding, including in the current Responses on the FSEIS contentions, have forced the Tribe to do exactly that – litigate the admissibility of these contentions three times. The Board should not condone and encourage these tactics.

As an initial matter, neither NRC Staff nor Powertech provide any detailed analysis of the migration tenet. Rather, NRC Staff cites to two cases (Powertech cites none) in the introductory portion of its Response that simply repeat the basic premise of the tenet, then goes on to make conclusory statements that the migration tenet is inapplicable to each of the Tribe's contentions, with the exception of Contention 2, which NRC Staff does not oppose migrating to the FSEIS. NRC Staff Response at 18. According to NRC Staff and Powertech, so long as the FSEIS includes any additional discussion of an issue, the migration tenet is rendered inapplicable. However, this is not the test applicable to NRC proceedings, and both Responses therefore lack a basis in law.

Established NRC precedent confirms that, contrary to the positions put forward by NRC Staff and Powertech, simply including some additional discussion of an issue in a subsequent environmental document does not negate the migration tenet. For instance, in *Detroit Edison Company* (Fermi Nuclear Power Plant, Unit 3), LBP-12-23, 76 N.R.C. 445 (2012), cited by but not discussed NRC Staff, the Board specifically acknowledged additional information included in a subsequent environmental document, yet held that migration still applied because, despite the new information, "the issue raised by Intervenors remains the same -- whether the discussion

of mitigation is sufficient to satisfy the requirements of NEPA." 76 N.R.C. at 471. That is precisely the issue at stake for each of the contentions for which NRC Staff's Response improperly seeks dismissal of admitted contentions via opposition to their migration forward.

Further, in *Progress Energy Florida, Inc.* (Levy County Nuclear Power Plant, Units 1 and 2), LBP-11-1, 73 N.R.C. 19 (2011), the Board held that the migration tenet may be defeated by new analysis or changes to the proposed action only where that new data or analysis is "so different from the information [in the prior document] … that the [new document] … dispenses with and moots the issues raised in the original contention and requires (if the intervenor wishes to continue) that the intervenor file a new or amended contention…." *Id*. at 26. In that case, the Board specifically held that even where NRC Staff included additional conditions on the project (as is argued by NRC Staff and Powertech here), these changes "do[] not dispose of the issue of whether the analysis as a whole is adequate under NEPA." *Id*. at 25.

This Board has also confirmed these holdings in prior rulings in the present case. In its decision admitting contentions on the DSEIS, this Board made several proper and relevant recitations of the "migration tenet" standard, rejecting and perhaps anticipating the precise arguments made by NRC Staff and Powertech here - that "new" information was presented in the DSEIS thus defeating a previously admitted contention. The Board properly alerted NRC Staff and Powertech that the standard is whether the Tribe was raising the "same concern":

> The Consolidated Intervenors and the Oglala Sioux Tribe are presenting the same concern that was raised regarding Powertech's ER (and that was admitted as a contention) as a concern regarding the DSEIS. Thus it is not necessary to raise a new or amended contention because, as the Board has explained, if the "new" contention raises the same concern admitted at the initial stage of the proceeding, its admissibility need not be relitigated and redecided at each step of the NEPA process, namely the issuances of the DSEIS and the FSEIS. This contention is not new; it is merely the continuation of an admitted concern with the application. To the extent the intervenors have concerns with

> the adequacy of the hydrogeologic analysis necessary to show adequate confinement and potential impacts to groundwater, this is already an issue set for hearing. Once again, in accord with § 2.316, for efficiency and to clarify this concern, the Board combines the multiple iterations of this contention into a single contention for hearing as set forth in Appendix A to this order.

Memorandum and Order (Ruling on Proposed Contentions Related to the Draft Supplemental Environmental Impact Statement), LPB-13-09, at 24; *accord, id*. at 27 ("To the extent the "new" contention raises the same concern admitted at the initial stage of the proceeding, it need not be repeated to remain a viable contention. Accordingly, the Oglala Sioux Tribe's concerns with the adequacy of the analysis of groundwater quantity impacts is already an issue set for hearing."). Neither response addresses NRC precedent of the previous ruling of this Board.

These rulings all confirm that the NRC Staff and Powertech arguments against the migration tenet in this proceeding are misplaced, and that both have again construed the migration tenet entirely too narrowly and in a manner not supported by NRC precedent. Where the proper migration tenant standards have been announced by the Board, but ignored by Powertech and NRC Staff, neither the Board nor the Oglala Sioux tribe should be required to expend resources tediously reviewing each already-admitted contention again under the general contention admissibility standards. As a result, this Board can dispense with much of the analysis which NRC Staff and Powertech invite the Board to engage.

C. NRC Staff Improperly Seeks to Convert its Response into a Motion for Summary Disposition

Throughout its brief, and for each contention except Contention 2, NRC Staff argues that the contention at issue should be dismissed. However, NRC Staff has not yet filed any motion for summary disposition on the admitted contentions, and may not at all, and the Board should reject its attempt to have these admitted contentions summarily dismissed on the sole basis of its

Response. Indeed, as stated in its contention filing, the Tribe chose to address the already-admitted contentions in an abundance of caution to ensure that issues identified in the FSEIS were unarguably within the scope of the already-admitted contentions. Tribe's Statement of Contentions at 4, 15. NRC Staff and Powertech did not make any arguments as to the scope of the contentions, and have already lost litigation over the admissibility of contentions once, if not twice (for those contentions that migrated from the ER).

Given their admitted status, the only way for NRC Staff or Powertech to now have these contentions dismissed prior to a hearing is to prevail on a motion for summary disposition. Only through such a motion can NRC Staff and Powertech properly argue the inapplicability of the "migration tenet" such that it precludes further consideration of these contentions. This is confirmed by the ironic fact that had the Tribe forgone any contention filing on the FSEIS, and stood pat on the contentions already-admitted, neither Powertech nor NRC Staff would have had the opportunity to file a Response. Simply put, the only proper mechanism to have already-admitted contentions dismissed is on the basis of a summary disposition motion. Otherwise, the Tribe is forced to do exactly what the "migration tenet" was designed to avoid, require repeated litigation over the mere admissibility of a contention.

The result here should be that each admitted contention migrates as requested based on a Board ruling that "amendment is unnecessary." *Detroit Edison Company* (Fermi Nuclear Power Plant, Unit 3), LBP-12-23, 76 N.R.C. 445, 471 (2012). The Board also should reject the efforts of NRC Staff and Powertech to transform their responses into motions for summary disposition arguing mootness, as the NRC's regulations provide specific requirements for such motions. *Id*. (also denying summary disposition motions). The present licensing hearing is subject to Subpart L and the regulations contain a summary disposition provision that incorporates the standards set

out in Subpart G. 10 C.F.R. § 2.1205(c). Both provisions require "a short and concise statement of material facts for which the moving party contends that there is no genuine issue to be heard." *Id*. § 2.1205(c). Neither NRC Staff nor Powertech provided the requisite statement of allegedly undisputed material facts, and both must fail under the standards applicable to a duly filed summary disposition motion.

D. NRC Staff repeatedly argues the merits of the contentions

Although discussed with regard to each contention below, it is relevant to point out that to the extent either NRC Staff or Powertech attempt to argue the merits of the contention in the context of instant dispute, the Board should ignore those arguments. This Board has encountered this propensity of both NRC Staff and Powertech to engage in such tactics before, and properly rejected them. *See* Memorandum and Order (Ruling on Petitions to Intervene and Requests for Hearing), LBP-10-16, at 57; Memorandum and Order (Ruling on Proposed Contentions Related to the Draft Supplemental Environmental Impact Statement), LPB-13-09, at 38, 41.

As NRC precedent makes abundantly clear, the contention pleading stage is not the proper place for arguments on the merits:

> a petitioner need not prove its contentions at the admissibility stage, as boards do not adjudicate disputed facts at this juncture. The factual support required for an admissible contention is "a minimal showing that material facts are in dispute." The necessary factual support "need not be in affidavit or formal evidentiary form and need not be of the quality necessary to withstand a summary disposition motion."

Exelon Nuclear Texas Holdings, LLC (Victoria County Station Site), LBP-11-16, 73 N.R.C. 645, 655 (2011) *quoting Gulf States Utilities Co*. (River Bend Station, Unit 1), CLI-94-10, 40 N.R.C. 43, 51 (1994)("What is required is 'a minimal showing that material facts are in dispute, thereby demonstrating that an 'inquiry in depth' is appropriate.'").

Contention 1A: **Failure to Meet Applicable Legal Requirements Regarding Protection of Historical and Cultural Resources.**

NRC Staff argues that Contention 1A does not migrate to the FSEIS because NRC Staff allowed some tribal representatives onto the project area to conduct some surveys. NRC Staff Response at 13-14. As discussed, contention pleading is not the proper place for NRC Staff to reargue admissibility, as this contention has been admitted and set for hearing. In any case, NRC Staff is wrong.

NRC Staff's Response admits that the Staff went forward with allowing these surveys only after abandoning an approach that would have included "an appropriate methodology" for such surveys, and instead deferred without any analysis to "the methodology best suited" to individual tribes. NRC Staff Response at 4.[1] Instead, the NRC Staff's Response confirms that the cultural resources analysis in the FSEIS continues to suffer from the precise inadequacy identified from the Tribe's first contention filing in this case and carried forward ever since – a lack of any scientifically defensible cultural resources survey of the site. *See* Petition to Intervene and Request for Hearing of the Oglala Sioux Tribe at 12-13; List of Contentions of the Oglala Sioux Tribe Based on the Draft Supplemental Environmental Impact Statement at 4-5, 9.

Thus, the basis for the already-admitted contention "remains the same" and these additional, scientifically unverified surveys do not "dispose of the issue of whether the analysis as a whole is adequate under NEPA." *See Detroit Edison Company* (Fermi Nuclear Power Plant,

[1] The Tribe takes umbrage at the apparent assertion that having some Indians come out to the site to conduct whatever review they see fit is somehow representative of all Indians, and particularly the Oglala Sioux. Meaning no disrespect to these tribes, this approach smacks of a gross ignorance and insensitivity to the differing cultures evident between tribes, such that what one particular tribe may find significant may not register at all with another. This goes directly to the point that the Tribe has raised from the outset – that a competent scientifically valid survey must be conducted, as required by NEPA.

Unit 3), LBP-12-23, 76 N.R.C. 445, 471 (2012); *Progress Energy Florida, Inc.* (Levy County Nuclear Power Plant, Units 1 and 2), LBP-11-1, 73 N.R.C. 19, 25-26 (2011) discussed *supra.* As a result, the Declaration of Wilmer Mesteth remains relevant as basis for this contention and the migration tenet applies. NRC Staff also wholly ignores the other evidence provided by the Tribe in the form of letters from Oglala Sioux President Brewer as well as representatives from the Standing Rock Sioux Tribe, which specifically detail the problems associated with NRC Staff's review of cultural resource impacts. Attached as Exhibit 2 to Statement of Contentions of the Oglala Sioux Tribe Following Issuance of Final Supplemental Environmental Impact Statement.

The remainder of the NRC Staff and Powertech Responses constitute improper arguments on the merits of the contention, or attempts to simply re-litigate admissibility issues that have already been determined by this Board. This includes NRC Staff's argument that NRC policy allows exclusion of a cultural resources impact analysis and analysis of mitigation measures in an FSEIS. NRC Staff Response at 15.[2] Powertech's arguments also go to the merits, although it is apparent that Powertech misapprehends the NHPA and NEPA requirements, arguing that NEPA is somehow satisfied so long as NRC Staff show compliance with NHPA – which the Tribe also contests, but in the context of Contention 1B. Powertech Response at 9. These issues are addressed in detail in the Tribes concurrently filed motion for summary disposition of NEPA issues in Contentions 1A and 6.

Lastly, NRC Staff argues that its unsigned, uncompleted, draft Programmatic Agreement (PA) should have been fully addressed by the Tribe in order to keep this contention alive. NRC Staff Response at 15-16. However, the NEPA component of this contention is based on the

[2] NRC Staff openly admits that "[t]he FSEIS does not contain all of the Staff's analysis regarding cultural resources, however, particularly since the Staff separated the NHPA and NEPA processes in November 2013." NRC Staff Response at 14.

material available in the FSEIS, which did not include the PA. *See South Fork Band Council v. BLM*, 588 F.3d 718, 726 (9th Cir. 2009)("A non-NEPA document … cannot satisfy a federal agency's obligations under NEPA."). Indeed, the FSEIS is replete with references to the incomplete and unfinalized nature of the PA, stating "[a]t this time, consultation on the evaluation and effects determination of historic properties is ongoing with all consulting parties, including interested tribes. The outcome of this consultation effort will be included in the programmatic agreement." FSEIS at 3-94. *See also* FSEIS at 1-16 ("NRC and SD SHPO staff also discussed the possibility of entering into a programmatic agreement or memorandum of agreement, pursuant to Section 106, with all consulting parties to set forth procedures and mitigation measures to preserve existing historic and cultural resources at the proposed Dewey-Burdock ISR Project site. The NRC staff continue to consult with the SD SHPO to evaluate the effects of the proposed project on historic and cultural resources."); FSEIS at E-186 ("The NRC staff is currently developing a PA with all consulting parties to develop measures to avoid, minimize, or mitigate sites that could be impacted such as those listed in Tables 4.9-1 and 4.9-3."); FSEIS at E-190 ("Consultation continues on what mitigation measures should be implemented to protect historic properties. Consultation on programmatic agreement between NRC, SD SHPO, BLM, ACHP, interested Native American tribes, the applicant, and other interested parties is being developed in accordance with 36 CFR 800.14(b)(2)."); FSEIS at E-197 ("Currently the parties are discussing development of a programmatic agreement in accordance with 36 CFR 800.14(b)(2). The agreement will outline the mitigation process for affected resources identified at the site pursuant to 36 CFR 800.8(c)(1)(v)."); FSEIS at E-200 ("Potential impacts to sites of religious or cultural significance to tribes will be reduced through mitigation

strategies developed during Section 106 consultations and the preparation of a programmatic agreement.").

Thus, the FSEIS failed to include an analysis of the PA or any associated details, but rather simply referred to the fact that the PA would come forward in the future to provide detail absent from the FSEIS. To expect the Tribe to fully analyze a PA document for contentions on an FSEIS when that document was not included in the FSEIS and where NRC Staff also failed to analyze that document in the FSEIS is unreasonable. NRC Staff made the deliberate decision to separate the NHPA process and NEPA process which appears to have resulted in the failure to review the cultural resources in the FSEIS. NRC Staff cannot blame the Tribe for this ill-advised course.

In any case, with respect to admissibility issues presented as opposition to the migration of Contention 1A, this Board has held that NRC Staff cannot require intervenors to speculate as what will be the result of an ongoing process based on draft documents: "[t]he Board does not expect intervenors to raise a concern regarding each portion of the process, but instead notes that, in situations such as this, intervenors need not file a contention until all relevant parts of a process are completed." Memorandum and Order (Ruling on Proposed Contentions Related to the Draft Supplemental Environmental Impact Statement), LPB-13-09, at 77.

The Tribe respectfully submits that Contention 1A migrates as requested, and requests a Board ruling that "amendment is unnecessary." *Detroit Edison Company* (Fermi Nuclear Power Plant, Unit 3), LBP-12-23, 76 N.R.C. 445, 471 (2012).

Contention 1B: Failure to Involve or Consult All Interested Tribes as Required by Federal Law.

Similar to Contention 1A, NRC Staff and Powertech argue that Contention 1B also does not migrate to the FSEIS. However, as before, this contention involves "the same concern" and "the issue raised by Intervenors remains the same." Further, the analysis included in the FSEIS is not "so different from the information [in the prior document] … that the [new document] … dispenses with and moots the issues raised in the original contention…." *See* cases cited *supra*. Again, NRC Staff and Powertech resort to attempts to either re-litigate admissibility of this contention (Powertech Response at 11), or argue the merits of the case (NRC Staff Response at 17). The Board should decline to engage in either approach, as this contention has already been admitted, and as of this filing, no motion for summary disposition has been filed. The proper time to make such merits or contention dismissal arguments is in such a motion, or in the context of the hearing.

In addition to these improper approaches, NRC Staff fails to mention or address the letters submitted by Oglala Sioux Tribe President Brewer and the Standing Rock Sioux Tribe laying out in detail the problems with the NRC Staff's approach to consultation. Attached as Exhibit 2 to Statement of Contentions of the Oglala Sioux Tribe Following Issuance of Final Supplemental Environmental Impact Statement. Overall, the lengthy and detailed discussion of these letters and other legal and factual bases for this Contention provided in the Tribe's FSEIS contention filing demonstrate the ongoing controversy associated with NHPA consultation, such that serious issues of fact and law remain disputed appropriate for further inquiry during the hearing process.

The Tribe respectfully submits that Contention 1B migrates as requested, and requests a Board ruling that "amendment is unnecessary." *Detroit Edison Company* (Fermi Nuclear Power Plant, Unit 3), LBP-12-23, 76 N.R.C. 445, 471 (2012).

Contention 2: Failure to Include Necessary Information for Adequate Determination of Baseline Ground Water Quality

NRC Staff concedes that "the information underlying the Staff's analysis of baseline conditions is similar to the information in the DSEIS. … The Staff therefore does not oppose Contention 2 migrating to the FSEIS." NRC Staff Response at 18. This welcome concession should resolve this issue for purposes of the Board's analysis here. NRC Staff makes substantive argument about what law applies to its analysis of baseline, referencing its belief that any requirements from 10 C.F.R. Part 40 are not germane to an environmental contention, but that argument is substantive in nature and is more properly reserved for the merits portion of this case. *See* NRC Staff Response at 18-19.[3]

Powertech contends that the FSEIS does include new information, but cites merely to additional text in the FSEIS that merely constitutes NRC Staff's legal position that Staff believes it complied with NRC policies regarding collection of baseline data. Powertech Response at 12. This is not new information. Powertech also cites to a reference in the FSEIS to geochemical data collected by the United States Geological Survey at the project site. *Id*. However, Powertech fails to disclose the FSEIS' forthcoming admission that:

> However, NRC believes—and USGS has acknowledged (Johnson, 2011)—that the reactive transport simulations require further refinement using site-specific conditions

[3] Notably, however, Powertech opts to provide an extensive discussion of the requirements of 10 C.F.R Part 40, which, while irrelevant to the Board's review of contention admissibility as improperly within the realm of an argument on the merits, evidences the applicant's apparent belief that these requirements are relevant and properly within the scope of this contention. *See* Powertech Response at 13-15.

> before being used to predict groundwater quality during and after uranium ISR activities at a specific site. These refinements would include information on current groundwater conditions, the ISR process (e.g., the chemistry of lixiviants), flow velocities, and solid-phase geochemistry (mineralogy and reducing capacity) of the producing formation. **To date, USGS has not published any reactive transport simulation results using Dewey-Burdock site-specific information that could be used in assessing the environmental impacts at the proposed project site.**

FSEIS at E-143 (emphasis supplied). Thus, this data is not relevant, and certainly not material, to this contention.

The Tribe respectfully submits that Contention 2 migrates as requested, and requests a Board ruling that "amendment is unnecessary." *Detroit Edison Company* (Fermi Nuclear Power Plant, Unit 3), LBP-12-23, 76 N.R.C. 445, 471 (2012).

Contention 3: Failure to Include An Adequate Hydrogeological Analysis To Assess Potential Impacts to Groundwater

NRC Staff argues that Contention 3 does not migrate to the FSEIS because of the inclusion of a new report evaluating the hydraulic conditions at the site. NRC Staff Response at 19. Powertech, however, argues that the report, dated February 2012, many months prior to the issuance of the DSEIS was incorporated into the DSEIS. Powertech Response at 15-16. In fact, Powertech argues that the Tribe's Contention 3 should be rejected at this point because "there is no materially different information in the FSEIS to warrant admission of Contentions 2 and 3." Powertech Response at 16. The conflicting arguments regarding the "newness" of the report aptly demonstrate the gamesmanship both parties appear to be employing with respect to this process, and toward the Tribe's admitted contentions in particular. Either way, neither argument is sufficient to dismiss the Tribe's Contention 3 at this stage in the proceedings.

To the extent Powertech is right, which appears more likely, given the specific citations to the DSEIS that it provides where it contends the DSEIS (published in November 2012) does

incorporate the its February 2012 hydrological study, the contention unambiguously migrates to the FSEIS. *See* discussion of the "migration tenet" in *Detroit Edison Company* (Fermi Nuclear Power Plant, Unit 3), LBP-12-23, 76 N.R.C. 445, 471 (2012); *Progress Energy Florida, Inc.* (Levy County Nuclear Power Plant, Units 1 and 2), LBP-11-1, 73 N.R.C. 19, 25-26 (2011), *supra.*

For its part, NRC Staff's argument is bereft of any demonstration that the DSEIS failed to take into consideration any of this of the hydrological study in the DSEIS. Although the Tribe's search for "Petrotek" in the DSEIS failed to produce any mention of the report in the text of the document or relevant references, the Powertech citations do appear to reference the subject of hydrological models. Thus, given the references provided by Powertech, it does appear that the DSEIS reviewed the model and incorporated it into its analysis, albeit without referencing it with the specificity used in the FSEIS. As such, the Tribe's critique of the hydrogeological study in the DSEIS remains the same and migrates to the FSEIS.[4]

Concluding (apparently erroneously) that it never considered or reviewed the February 2012 hydrological model in the DSEIS, NRC Staff launches an argument that the Tribe has failed to substantiate its contention. Frankly, NRC's argument is difficult to follow, beginning with the premise that the 2012 model was not included in the DSEIS, then criticizing Dr. Moran for specifically addressing the frailties of 2012 model in his Second Supplemental Declaration, but not the FSEIS sections that do reference the Petrotek study. NRC Staff Response at 19 (referencing Dr. Moran's Second Supplemental Declaration at ¶¶ 51-56. NRC Staff then admits

[4] Notably, in the FSEIS response to comments on issues related to confinement and fluid migration, NRC Staff repeatedly state that "no change was made to the SEIS" based on those comments. See e.g., FSEIS at E-30 to 31, E-150.

that the Tribe's contention filing on the FSEIS does discuss these FSEIS portions which rely on the 2012 model. *Id*.

Again, contention pleading in this process should not be reduced to such "gotcha" maneuvers. The fact is that Dr. Moran specifically addressed the inadequacies of the 2012 model and the Tribe's contention pleading points to those portions of the FSEIS which rely on that flawed model. Ironically, the critique leveled by Dr. Moran is consistent with the critique embodied in his prior declaration in this case. *Compare* Supplemental Declaration of Dr. Robert Moran at ¶¶ 33-49. Thus, while Dr. Moran's and the Tribe's critiques of the NRC Staff analysis of the hydrogeology have remained the same, NRC Staff attempts to have this contention improperly dismissed in this pleading context (despite twice being ruled admissible), are based on nothing more than re-naming the basis for the NRC Staff analyses.

The remainder of the NRC Staff's argument is unabashedly focused on the merits of the case, making substantive arguments as to why it thinks the Tribe's assertions of NEPA violations are wrong. NRC Staff at 20-21. One exception is NRC Staff's argument that the Tribe should have raised this contention in April 2012, when NRC Staff included the February 2012 Petrotek model by name in its hearing file update. NRC Staff Response at 21. The Board has already dealt this this same argument at the DSEIS stage, albeit at that time it was raised by Powertech. There the Board squarely rejected Powertech's attempt to make a strikingly similar timeliness argument, holding that it would be "patently unreasonable to require an intervenor, or potential intervenor, to divine what use the information collected by NRC Staff will or will not serve in a [NEPA document]." Memorandum and Order (Ruling on Proposed Contentions Related to the Draft Supplemental Environmental Impact Statement), LPB-13-09, at 20. *See also id*. at 28 ("[Intervenors] are not required to file their contentions on information or studies that are

published in the period between the date for initial contentions and the date the DSEIS is published."). The Board should similarly dispense with NRC Staff's timeliness argument here.

The Tribe respectfully submits that Contention 3 migrates as requested, and requests a Board ruling that "amendment is unnecessary." *Detroit Edison Company* (Fermi Nuclear Power Plant, Unit 3), LBP-12-23, 76 N.R.C. 445, 471 (2012).

Contention 4: Failure to Adequately Analyze Ground Water Quantity Impacts

NRC Staff argues that Contention 4 does not migrate to the FSEIS because "the FSEIS contains substantial new information relevant to the Tribe's claims," including "water balance information for the Dewey-Burdock Project." NRC Staff Response at 21. Powertech, on the other hand, contends that "Contention 4 should be rejected as showing no new or materially different information." Powertech Response at 17. Thus, again, the Board (and the Tribe) is in the position of having to figure out which of these diametrically-opposed arguments could be correct. In this case, the Tribe believes NRC Staff presents a modestly more sensical position.

In its ruling on the DSEIS contentions, the Board characterizes Contention 4 as one of omission. Memorandum and Order (Ruling on Proposed Contentions Related to the Draft Supplemental Environmental Impact Statement), LPB-13-09, at 25. Thus, arguably, this contention would be rendered moot upon a filing of a motion for summary adjudication because, as noted by NRC Staff, the FSEIS does include some additional information that appears to portray some type of water usage information the absence of which formed the basis for DSEIS Contention 4. However, the contention involves the "same concern" raised in the previously-admitted contention and thus migrates forward, albeit with an expanded scope as set forth in the Tribe's FSEIS contention pleading.

For purposes of Contention 4, however, based on Dr. Moran's Second Supplemental Declaration and the Tribe's discussion of the issue in its contention filing, the Tribe has properly expanded this contention into one of inadequacy, and in an abundance of caution, has set forth the requisite requirements for an amended contention. The Tribe's discussion includes 1) a specific statement of the issue of law or fact, 2) a brief explanation of the basis for the contention, 3) a demonstration that the issue is material, 4) an expert opinion supporting the position, and 5) sufficient information to show that a genuine dispute exists. *See* 10 C.F.R. § 2.309(f)(1). The Tribe also demonstrates compliance with the requirements of 10 C.F.R. § 2.309(c)(2) because, as the NRC Staff admits, the information appeared for the first time in the FSEIS, is materially different from the DSEIS discussion, and is timely submitted as an FSEIS contention in compliance with the Board's scheduling order.

While NRC Staff fails to identify which of these elements is lacking, it argues that the information which Dr. Moran finds lacking is "impossible to obtain at the pre-licensing stage of an ISR project." NRC Response at 22. Presumably, this argument falls into the fifth element, equating to an argument that no genuine dispute exists. However, NRC Staff fails to provide any support for this argument, whether in the form of a legal citation or any expert or other scientific opinion demonstrating this alleged fact (impossibility). As such, its entire defense to this contention is purely based on the lay argument of counsel. Given this lack of technical or expert support, the Board should find this defense unavailing. At most, this argument could be considered a possible defense on the merits of the contention – inappropriately raised at this stage of the proceedings.

As it stands, Dr. Moran provided an expert opinion with specific references to the FSEIS, the data presented therein, along with scientific literature that together demonstrate, at least for

contention pleading purposes, a genuine dispute. *See* Moran Second Suppl. Decl. at ¶ 32 (emphasis in original)("[The FSEIS] lacks basic components of a water balance, including detailed, measured data for volumes of water entering the system and losses (e.g. volumes of ground water available in the various aquifers, evaporation from land-application facilities, volumes under-going UIC injection, etc.), and *fails to calculate an actual balance.*").

The Tribe respectfully submits that Contention 4 migrates and expands as requested, and requests a Board ruling that "amendment is unnecessary." *Detroit Edison Company* (Fermi Nuclear Power Plant, Unit 3), LBP-12-23, 76 N.R.C. 445, 471 (2012). In the alternative, the Tribe requests a ruling that it has successfully amended Contention 4.

Contention 6: Failure to Adequately Describe or Analyze Proposed Mitigation Measures

NRC Staff argues that Contention 6 does not migrate because "the FSEIS's discussion of mitigation measures is not essentially the same as that in the DSEIS. In the FSEIS the Staff further discusses many of the mitigation measures identified in the DSEIS. The Staff also identifies new mitigation measure that we not included in the DSEIS." NRC Staff Response at 23. Apart from the fact that NRC Staff fails to specifically identify any of these new mitigations, or how the discussions differ, this is a prime example of NRC Staff misapprehending the nature of the migration tenet. As held by this Board and others as discussed *supra*, the test is whether the contention raises the "same concern", whether "the issue raised by Intervenors remains the same," and whether the analysis included in the FSEIS is "so different from the information [in the prior document] … that the [new document] … dispenses with and moots the issues raised in the original contention…." None of these tests are met by the NRC Staff's allegation that some additional discussion of mitigation is included in the FSEIS.

This is especially true for the component of the Tribe's contention alleging that for the overwhelming majority of impacts disclosed, the FSEIS fails to address, discuss, or analyze the effectiveness of these proposed mitigation measures, as required by NEPA. *See Neighbors of Cuddy Mountain v. U.S. Forest Service*, 137 F.3d 1372, 1380-81 (9th Cir. 1998)("The [agency's] broad generalizations and vague references to mitigation measures … do not constitute the detail as to mitigation measures that would be undertaken, and their effectiveness, that the [agency] is required to provide."). *See also South Fork Band Council v. Dept. of Interior*, 588 F.3d 718, 728 (9th Cir. 2009). NRC Staff's Response does not identify anywhere in the FSEIS where effectiveness is addressed, or even allege that the FSEIS does anything to address the effectiveness of mitigation arguments raised by the Tribe and previously admitted as within the scope of Contention 6. Rather, NRC Staff puts forth a merits argument contending that applicable case law allows it to complete an FSEIS without this information. For Powertech's part, it asserts that an analysis of the effectiveness of mitigation is not only not required, but outside the scope of these proceedings – despite the black-letter NEPA caselaw identified by the Tribe requiring such analyses. Powertech Response at 18-19. As a result, any argument that FSEIS discussion dispenses with this contention should be rejected on its face.

NRC Staff asserts that new discussion in Chapter 4 of the FSEIS includes the requisite analyses, but this amounts to an improperly timed argument on the merits. In any case, as specifically alleged by the Tribe in its FSEIS contention filing, the mitigation discussions in FSEIS Chapter 4 consist largely of plans to develop mitigation in the future. Examples include:

- FSEIS 4-151("Potential noise-related impacts to active raptor nest sites will continue to be mitigated by adherence to timing and spatial restrictions within specified distances of active raptor nests as determined by appropriate regulatory agencies (e.g., FWS, SDGFP,

and BLM) and by following an FWS-approved raptor monitoring and mitigation plan (Powertech, 2009a).")

- FSEIS at 4-57 (relying on the issuance of a National Pollution Discharge Elimination Standards (" NPDES") permit to specify mitigation measures and BMPs to prevent and clean up spills. The applicant has not yet submitted an application for an NPDES permit to SDDENR.)
- FSEIS 4-130 ("The applicant identified other [air impact] mitigation measures it will implement (see Table 6.2-1); however, these other measures are not incorporated in the calculation of the revised emissions inventory.")
- FSEIS at 4-136 ("Without additional consideration (e.g., incorporation of additional mitigation into the emission inventory), NRC will characterize the initial modeling results for the peak year concentrations as a LARGE impact.")
- 4-177 ("Potential impacts to previously recorded archaeological and tribal sites identified during the tribal cultural surveys will be reduced through mitigation strategies developed during NHPA Section 106 consultations. As discussed in SEIS Section 1.7.3.5, consultation involving NRC, the applicant, SD SHPO, BLM, and interested Indian tribes is being conducted to determine what measures can be used to avoid, minimize, or mitigate adverse impacts to historic properties that may be impacted by site activities. Before beginning construction activities at the proposed project site, an agreement between NRC, SD SHPO, BLM, ACHP, interested Native American tribes (tribal government or designated THPO), the applicant, and other interested parties will be developed in accordance with 36 CFR 800.14(b)(2).)

- FSEIS at 4-177 ("The agreement will outline the mitigation process for each affected resource identified at the site pursuant to 36 CFR 800.6. Therefore, potential impacts to previously recorded archaeological sites and newly discovered tribal sites identified during tribal cultural surveys are not anticipated.").
- FSEIS at 4-211 to 212 ("Potential impacts to sites of religious or cultural significance to tribes will be reduced through mitigation strategies developed during Section 106 consultations.")

This list is not comprehensive, but demonstrates the extent to which the FSEIS defers or lacks analysis of mitigation measures and their effectiveness for resources such as water quality, cultural resources, wildlife, and air quality. Given this, NRC Staff's argument that somehow Chapter 4 of the FSEIS "dispenses with and moots" the concerns raised in the previously-admitted contention is without merit.

The Tribe respectfully submits that Contention 6 migrates as requested, and requests a Board ruling that "amendment is unnecessary." *Detroit Edison Company* (Fermi Nuclear Power Plant, Unit 3), LBP-12-23, 76 N.R.C. 445, 471 (2012).

Contention 9: Failure to Consider Connected Actions

NRC Staff argues that Contention 9 does not migrate to the FSEIS "because in the FSEIS the Staff presents revised analyses that are directly relevant to Contention 9." NRC Staff Response at 26. Powertech contends that Contention 9 "should not be admitted" because "[a]s stated in Powertech's previous pleadings, the DSEIS was issued for public comment and agencies such as South Dakota DENR and EPA filed official public comments addressing a variety of issues including groundwater protection." Powertech Response at 19. Powertech goes on to argue that because the Tribe fails to "show how the FSEIS differs from the impact analysis

offered by Powertech in previously submitted documents or by NRC Staff in the DSEIS" the contention should be dismissed. Powertech Response at 19-20. Neither of these explanations address the proper test for migration, nor show how the FSEIS "dispenses with and moots" the contention.

With regard to Powertech's argument, the company appears to entirely gloss over the fact that this contention is already admitted to this proceeding. The fact that the DSEIS was subject to public comment does not affect the already-admitted status of this contention. Lastly, according to Powertech, nothing has changed between the DSEIS and FSEIS – thus, in effect Powertech does not dispute the migration tenet with regard to this contention.

As to NRC Staff's argument, the Staff simply puts forth a laundry list of sections in the FSEIS that it contends it altered between the DSEIS and FSEIS. NRC Staff Response at 25. However, NRC Staff fails to explain or give any indication whatsoever how these changes alter the dynamic upon which Contention 9 was admitted previously where the DSEIS deferred to the EPA and South Dakota permitting processes without conducting the necessary NEPA review of the impacts associated with the permits required from those agencies.

Again, the fact that NRC Staff contends that it included additional discussion in the FSEIS related to impacts from the project does not suffice to defeat the migration tenet. Otherwise, the tenet would have no meaning, as Staff could simply alter language, include some additional discussion, regardless of its substance, and require intervenors to do exactly what the migration tenet was designed to avoid (and what Powertech and NRC Staff have effectively forced the Tribe to do here) – fully litigate the admissibility of a contention three times. *Detroit Edison Company* (Fermi Nuclear Power Plant, Unit 3), LBP-12-23, 76 N.R.C. 445, 471 (2012).

The remainder of the NRC Staff's argument is a thinly-veiled attempt to re-litigate the precise issues that were resolved in the prior round of contentions pleading, as NRC Staff does not rely on any analysis in the FSEIS that differs from the DSEIS. NRC Staff Response at 26-27. In fact, NRC Staff argues that the Tribe's contention pleading on this issue "ignores almost the entirety of the FSEIS." NRC Staff Response at 26. This argument obviously overstates the issue, and ignores the fact that this contention is admitted . NRC Staff does not address the Tribe's specific references to the FSEIS that carry forward the same issues upon which this contention was admitted previously.

NRC Staff does not contest that in making its determination that impacts from the use of Class V underground waste injection wells is "small", the FSEIS, like the DSEIS defers to the fact that "EPA will evaluate the suitability of the formations proposed for Class V well injection. Class V injection disposal will be allowed only when the applicant demonstrates liquid waste can be isolated safely in a deep aquifer." FSEIS at 4-34. *See also* FSEIS at 4-45 ("EPA will evaluate the suitability of the formations proposed for Class V well injection."), 4-69, 5-27, 5-33 to 34 (all relying without analysis on EPA's UIC Class V permitting). NRC similarly continues to defer to a future EPA analysis related to the UIC Class III well permitting process and Subpart W radon controls, and to the South Dakota state processes. FSEIS at 6-6 (relying on EPA review of Class III permit as mitigation); E-71 ("To ensure compliance with 40 CFR Part 61, Subpart W, the applicant may need to acquire an approval from EPA prior to commencing operations in any wellfield. NRC does not have a similar requirement for ISR facilities. However, if NRC were to grant Powertech a license based on the satisfactory compliance of NRC's regulatory requirements, Powertech is still responsible for obtaining other federal, state, and local permits or approvals, as necessary before commencing operations."); 4-42 ("The NPDES permit sets limits

on the amount of pollutants entering ephemeral drainages that may be in hydraulic communication with alluvial aquifers at the site. The NPDES permit will also specify mitigation measures and BMPs to prevent and clean up spills. The applicant has not yet submitted an application for an NPDES permit to SDDENR."); 4-71 (same); 1-26 ("SDDENR would coordinate with SDGFP to mitigate the potential effects of surface impoundments on wildlife; mitigation measures discussed included the use of netting and fencing to protect wildlife and implementing protocols to assess the effects of wastewater constituents on wildlife.").

Because these same issues that gave rise to the admissibility of Contention 9 at the DSEIS stage remain in the FSEIS, the Board should decline NRC Staff's invitation to affirmatively dismiss this contention based on a response to a subsequent pleading document. If NRC Staff feels this already-admitted contention is subject to dismissal, it should follow the proper procedure of seeking summary dismissal.

In any case, because the issue is still extant in the FSEIS, the discussion set forth by the Tribe with respect to the FSEIS in its FSEIS contention pleading is sufficient to pass the admissibility test, as before.

The Tribe respectfully submits that Contention 9 migrates as requested, and requests a Board ruling that "amendment is unnecessary." *Detroit Edison Company* (Fermi Nuclear Power Plant, Unit 3), LBP-12-23, 76 N.R.C. 445, 471 (2012).

Contention 14 and FSEIS Contention 1: Failure to Adequately Review Impacts on Wildlife and Fails to Comply with Migratory Bird Treaty Act, and Bald and Golden Eagle.

With regard to Contention 14A, NRC Staff correctly cites to a letter from the U.S. Fish & Wildlife Service that confirms that agency's concurrence with NRC Staff's no effect determination for federally threatened, endangered or candidate species. NRC Staff Response at

28. As such, should either party desire summary disposition, the Tribe is willing to confer with NRC Staff to confirm whether a stipulation to dismiss this admitted contention is appropriate. However, the Tribe contends that dismissal of this already-admitted contention based on a Response to a subsequent contention pleading is not proper or allowed by NRC contention pleading rules.

Regarding Contention 14B, NRC Staff asserts that the Tribe "provides no basis for keeping this contention in the hearing." NRC Staff Response at 29. However, the Tribe is not required to affirmatively re-assert every contention that has already been admitted to the proceeding. Although the Tribe has addressed some of its already-admitted contentions in an effort to ensure the proper scope of these arguments is preserved, it was not incumbent upon the Tribe to do so in every instance. If NRC Staff believes that the basis for a contention is no longer present based on a revision to the NEPA documents or other factors, a summary disposition motion is the proper course of action. As this Board currently (as of the date of this filing), does not have such a motion before it, nor the proper filings to substantiate such a motion (i.e., statement of material facts), dismissal at this stage is not appropriate.

Regarding FEIS Contention 1, the Tribe concedes that the Migratory Bird Treaty Act (MTBA) and Bald and Golden Eagle Protection Act do not impose consultation requirements on NRC. Further, the mitigation components for the species affected under these acts are already encompassed under the Tribe's already-admitted Contention 6. Thus, the Tribe withdraws FEIS Contention 1.

The Tribe respectfully submits that Contention 14 is subject to the migration tenant. *Detroit Edison Company* (Fermi Nuclear Power Plant, Unit 3), LBP-12-23, 76 N.R.C. 445, 471 (2012).

FSEIS Contention 2: Inadequate Analysis of Direct, Indirect, and Cumulative Impacts of Disposal of Solid 11e.(2) Byproduct Material or the Reasonable Alternatives to Transportation and Disposal at the White Mesa Facility

NRC Staff argues that "the Tribe does not identify any information that differs materially from the information available when the Staff issued the DSEIS." NRC Staff Response at 32. NRC Staff also argues that the Tribe has failed to challenge relevant portions of the GEIS related to the disposal of 11(e)(2) byproduct material. *Id*. at 33. Powertech also subscribes to the argument that the Tribe shows "no new or materially or significantly different information." Powertech Response at 22. Powertech adds an argument regarding timeliness, arguing that this NEPA contention should have come upon the issuance of a draft license to Powertech. *Id*. at 23. Lastly, Powertech takes issue with the Tribes' assertion that the White Mesa Mill is not currently licensed to take the subject waste. *Id*. at 23.

Regarding the issue of new information, the Tribe asserts that while the DSEIS posited that White Mesa was a potential site of disposal, the FEIS goes much further, indicating that the White Mesa Uranium Mill near the White Mesa Ute Community in Utah is now the designated site for disposal of more than 300 cubic yards of 11e.(2) byproduct generated annually by not just the proposed Powertech Facility but also other ISL facilities in the region. FSEIS at 2-53. This information was not available in the DSEIS and thus forms the basis for a new contention, as this scope of disposal activity is significantly more than the disposal from only the Dewey-Burdock proposal that the DSEIS anticipated. The scale of impact associated with making White Mesa, Utah the regional disposal site for ISL facilities in Wyoming and South Dakota is not on par with that referenced in either the GEIS or DEIS. This issue is especially prominent given NEPA's requirement, as discussed in the Tribe's FSEIS contention pleading, that an EIS analyze the cumulative impacts associated with any one federal action. Thus, the change from

just Powertech sending waste to White Mesa to effectively designating it as the regional disposal center is truly significant, and as of yet unanalyzed, new information.

Powertech's timeliness argument that somehow the Tribe should have raised this issue back in 2012 ignores the fact that the FSEIS for the first time dramatically expands the scope of the White Mesa waste disposal plan. This issue was not, and likely could not, be addressed in the draft licensing document. Further, such an argument runs afoul of this Board's repeated holding that it is "patently unreasonable to require an intervenor, or potential intervenor, to divine what use the information collected by NRC Staff will or will not serve in a [NEPA document]." Memorandum and Order (Ruling on Proposed Contentions Related to the Draft Supplemental Environmental Impact Statement), LPB-13-09, at 20. *See also id*. at 28.

Lastly, Powertech's argument that regarding the scope of the White Mesa Mill license is an issue on the merits of this contention. The proposition that the White Mesa Mill license may allow receive some types of ISL wastes does not mean that the Powertech wastes can be accepted along with the region's ISL wastes. In fact, the FSEIS states that "however, in accordance with its license, it must obtain approval from Utah Department of Environmental Quality (UDEQ) to bury ISR waste." FSEIS at 3-116. This statement indicates that there is a dispute regarding whether or not the White Mesa Mill is currently authorized to serve as a disposal facility for Wyoming and South Dakota and capable of accepting Powertech wastes. This is an issue properly resolved via hearing.

The Tribe respectfully submits that FSEIS Contention 2 is timely filed and admissible.

FSEIS Contention 3: Failure to Provide NEPA Comment Opportunity for Impacts Associated with Air Emissions

NRC Staff and Powertech argue that the Tribe's FSEIS Contention 3 does not state a viable contention despite conceding that the air impact analysis was updated with significant new information. NRC Staff Response at 33-34; Powertech Response at 23-24. Rather, both parties argue that the updated air analysis did not present a "seriously different picture of the environmental impact" and thus does not require any public comment opportunity. *Id*. However, as discussed in the Tribe's FSEIS contention pleading, the lack of an opportunity for the public to review and comment on significant changes to the analysis violates NEPA, and thus the Tribe has presented a viable contention.

The Tribe respectfully submits that FSEIS Contention 3 is timely filed and admissible.

III. CONCLUSION

For the foregoing reasons, the Tribe has demonstrated that there is no need for the Tribe to re-litigate Contentions 1A, 1B, 2, 3, 6, 9, and 14B in this proceeding, as these contentions migrate from already admitted contentions in this proceeding. Further, the Tribe would entertain conferral on a stipulation to dismiss Contention 14A and hereby withdraws proposed FSEIS Contention 1. The Tribe asserts that it has set forth an adequate basis to admit proposed FSEIS Contentions 2 and 3 and they are admissible. Lastly, the Tribe suggests that the Board affirmatively specify that the contentions previously admitted in this proceeding that migrate forward are neither "new nor amended" contentions and are not subject to later summary disposition motions. Otherwise, the Tribe is concerned that, despite the April 11, 2014 deadline for all summary disposition motions on previously admitted contentions, NRC Staff and Powertech may file summary disposition on migrated contentions at the Board's established May

16, 2014 deadline for summary disposition motions that should be limited to the potentially newly admitted contentions – FSEIS Contentions 2 & 3, possibly existing Contention 4, and any new or amended contentions requested by Consolidated Intervenors.

Respectfully Submitted,

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Dated at Lyons, Colorado
this 11th day of April, 2014

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)	)	
	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Statement of Contentions in the captioned proceeding were served via the Electronic Information Exchange ("EIE") on the 11th day of April 2014, and via email to those parties for which the Board has approved service via email, 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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