UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	
POWERTECH (USA), INC., (Dewey-Burdock In Situ Uranium Recovery Facility)	Docket No. 40-0975-MLA ASLBP No. 10-898-02-MLA-BD01 July 22, 2014

CONSOLIDATED INTERVENORS' MOTION IN LIMINE

Pursuant to 10 CFR §2.323(a), Consolidated Intervenors file this[1] motion in limine to limit and exclude witness testimony proffered by Applicant where technical experts have offered opinions outside their area of expertise which are properly characterized as legal opinions or legal conclusions.

Legal Standards

Section 2.337(a) states that: "only relevant, material, and reliable evidence which is not unduly repetitious will be admitted. Immaterial or irrelevant parts of an admissible document will be segregated and excluded so far as is practicable." 10 CFR Section 2.337(a). There can be no doubt that witness testimony is inadmissible when it consists of non-lawyers rendering legal opinions or offering legal conclusions. This is because a non-lawyer is a lay person, not an expert, when he or she veers outside of his or her area of technical expertise to offer a legal opinion or legal conclusion.

A legal opinion is defined as a "[l]awful statement written by …[a] legal expert."

[1] Applicant Counsel opposes this motion, and neither NRC Staff Counsel nor OST Counsel have taken a position on this Motion.

Black's Law Dictionary Free Online Legal Dictionary 2nd Ed. (2014) ("What is LEGAL OPINION?".) Such is different than an Opinion of Counsel which is defined as "[a]n attorney's formal response to a client's legal situation. It consists of an analysis of the problem, reference to the laws that apply to the situation and the attorney's suggested solution." Black's Law Dictionary Free Online Legal Dictionary 2nd Ed. (2014) ("What is OPINION OF COUNSEL?".) When a technical expert offers his or her expert opinion in his or her field of expertise, it is called opinion evidence. See e.g., Black's Law Dictionary Free Online Legal Dictionary 2nd Ed. (2014) ("What is OPINION EVIDENCE?").

Consolidated Intervenors are not objecting to evidence proffered by Applicant consisting of witness testimony by experts when such statements consist of facts known by his or her own personal knowledge or consist of their expert opinions as to matters within the area of their expertise. Consolidated Intervenors are objecting to evidence proffered consisting witness testimony by experts[2] when such statements consist of legal opinions or legal conclusions. Such testimony is not relevant, material or reliable (and thus must be excluded under Section 2.337(a)), it is also wasteful and confusing and must be excluded from the record under the Federal Rules of Evidence.

Under Rule 401 of the Federal Rules of Evidence:

> Evidence is relevant if:
>
> (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and

[2] Lynne Sebastian and Errol Lawrence.

(b) the fact is of consequence in determining the action. F.R.E. Rule 401.

It is impossible to imagine how testimony that is outside the area of expertise of a witness could have any tendency to make a fact more or less probable. Accordingly, any such evidence is irrelevant and must be excluded under Section 2.337(a).

Further, Under Rule 602, a witness may not testify as to a matter of which he or she has no personal knowledge. F.R.E. Rule 602 (providing in pertinent part "[a] witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter….This rule does not apply to a witness's expert testimony under Rule 703.")

In the case of a witness offering an opinion outside his or her area of expertise, Rule 701 of the Federal Rules of Evidence would treat such witness as a lay witness and limit the testimony to an opinion that is:

> (a) rationally based on the witness's perception;
>
> (b) helpful to clearly understanding the witness's testimony or to determining a fact in issue; and
>
> (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702. F.R.E. 701.

However, when the proffered opinion is related to the ultimate issue in the proceeding, and where the witness has no legal training, it is hard to justify a finding that such opinion is 'rationally based on the witness's perception' or that it could be 'helpful' in any way.

Therefore, testimony like, "in my experience, it can take more than 2 years to complete an application" would be admissible but testimony like, "in my experience, this application complies with this certain federal regulation" would not be admissible.

Clearly, Rule 702 of the Federal Rules of Evidence allows for evidence by a technical expert within the field of his or her expertise, as follows:

> RULE 702. TESTIMONY BY EXPERT WITNESSES
>
> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:
>
> (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
>
> (b) the testimony is based on sufficient facts or data;
>
> (c) the testimony is the product of reliable principles and methods; and
>
> (d) the expert has reliably applied the principles and methods to the facts of the case. F.R.E. Rule 702.

Consolidated Intervenors do not object categorically to expert opinions on matters that are at ultimate issue in this proceeding and such would not be supported by Rule 704 of the Federal Rules of Evidence. However, where the proffered opinions are not within the area of expertise of the witness, Consolidated Intervenors do object. Further, we submit that it is preferable to have findings of fact made by the Board and not thrust upon the Board by experts' testimony.

Under Rule 403 of the Federal Rules of Evidence, even relevant evidence may be excluded if it would cause confusion or waste time. See F.R.E. Rule 403. Clearly, irrelevant testimony must be excluded under 10 C.F.R. Section 2.337(a).

LIST OF TESTIMONY THAT SHOULD BE EXCLUDED

Consolidated Intervenors submit that the following witness testimony by Applicant's witnesses falls outside their area of expertise and must be excluded from this proceeding because such testimony is irrelevant, immaterial, unreliable, confusing and a waste of time due to it being of the nature of legal opinions and/or legal conclusions made by non-lawyers, i.e., lay persons, as to legal matters that are ultimate issues in this proceeding:

APP-001 - TESTIMONY OF LYNNE SEBASTIAN

A.4 (p3-4) should be stricken and excluded in its entirety — Describing the purpose of Section 106 of NHPA is a legal conclusion. Saying that Section 2(l) of the laws does such and such or that the regulations of 36 CFR Part 800 do such and such are in and of themselves legal conclusions that should be stricken and excluded from this proceeding.

A.5 (p4) should be stricken and excluded in its entirety - the witness does not say what happens or happened in his or her experience but rather says what that law requires an agency 'must' do, is a legal opinion.

A.6 (p4) should be stricken and excluded in its entirety - the witness does not say what happens in his or her experience but rather says what activities a law requires be carried out. As such it is a legal opinion.

A.9 (p5) should be stricken and excluded in its entirety - the witness does not say what happened in his or her experience but rather says that the NRC process at issue in this case is in compliance with certain regulations. Such is a legal opinion made by a person who is not a lawyer which goes to an ultimate issue in this case and therefore is objectionable and must be excluded.

A.10 (p5) should be stricken and excluded in its entirety - the witness does not say what happens or happened in his or her experience but rather says what what a law (NHPA, NEPA) requires in connection with an SEIS under certain regulations (36 CFR 800.8(c). Such is clearly a legal opinion and has nothing to do with the witness' expertise as an anthropologist and historical preservation officer.

A.11 (p5) should be stricken and excluded in its entirety - the witness does not say what happens or happened in his or her experience but rather says that there is no legal requirement of any kind for a certain kind of activity. Such is clearly a legal opinion.

A.12 (p6) should be stricken and excluded in its entirety - the witness does not say what happens or happened in his or her experience but rather says that there is no legal requirement of any kind for a certain kind of activity. Such is clearly a legal opinion.

A.13 (p6) should be stricken and excluded in its entirety - the witness does not say what happens or happened in his or her experience but rather says that there is no legal requirement of any kind for a certain kind of activity. Such is clearly a legal opinion.

A.14 (p6), first sentence of A.14 should be stricken and excluded in its entirety - the witness does not say what happens or happened in his or her experience but rather says what the requirements are of a certain federal regulation. Such is clearly a legal opinion.

A.15 (p6), first sentence of A.15 should be stricken and excluded in its entirety - the witness does not say what happens or happened in his or her experience but rather says what the requirements are of a certain federal regulation. Such is clearly a legal opinion.

A.17 (p7), third paragraph of A.117 should be stricken and excluded in its entirety - the witness does not say what happens or happened in his or her experience but rather says what the requirements are of a certain federal regulation. Such is clearly a legal opinion.

A.33 (p11), first sentence of A.33 should be stricken and excluded in its entirety - the witness does not say what happens or happened in his or her experience but rather says what the requirements are of a certain federal regulation. Such is clearly a legal opinion.

A.38 (p12-13) should be stricken and excluded in its entirety - the witness does not say what happens or happened in his or her experience but rather says that the legal requirements for a certain kind of activity have been met. Such is clearly a legal opinion.

A.43 (p14), second and third sentences of A.43 should be stricken and excluded in its entirety - the witness does not say what happens or happened in his or her experience but rather says what the requirements are of a certain federal regulation. Such is clearly a legal opinion.

A.45 (p14), first sentence of A.45 should be stricken and excluded in its entirety - the witness does not say what happens or happened in his or her experience but rather says what the requirements are of a certain federal regulation. Such is clearly a legal opinion.

A.46 (p14) should be stricken and excluded in its entirety - the witness does not say what happens or happened in his or her experience but rather says that what the requirements are of a certain regulation. Such is clearly a legal opinion.

APP-037 - TESTIMONY OF ERROL LAWRENCE

A.7 (p5), second paragraph, second sentence, and third paragraph of A.7 should be stricken and excluded in its entirety - the witness does not say what happens or happened in his experience but rather says that certain data gathering satisfies legal requirements that are at ultimate issue in this case. Such is clearly a legal opinion.

A.8 (p5), should be stricken and excluded in its entirety - the witness does not say what happens or happened in his experience but rather says that the application complies with certain legal requirements - and that is an ultimate issue in this case. Such is clearly a legal opinion.

A.16 (p7), should be stricken and excluded in its entirety - the witness does not say what happens or happened in his experience but rather says that the application complies with certain legal requirements - and that is an ultimate issue in this case. Such is clearly a legal opinion.

CONCLUSION

For all the foregoing reasons, the Board should issue the order as requested by Consolidated Intervenors herein excluding the testimony listed above as being irrelevant to this proceeding or otherwise inadmissible.

Dated this *22nd* day of July, 2014.

Respectfully submitted,

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POWERTECH (USA) INC.,	)	Docket No. 40-9075-MLA
	)	
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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "CONSOLIDATED INTERVENORS' MOTION IN LIMINE" in the captioned proceeding were served via email per the Board's order in this matter, on the 22ND day of July, 2014, which to the best of my knowledge resulted in transmittal of same to those on the EIE Service List for the captioned proceeding.

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