

**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
)	
(Dewey-Burdock In Situ Uranium Recovery Facility))	Date: November 7, 2014
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**POWERTECH (USA), INC. RESPONSE TO OGLALA SIOUX TRIBE MOTION FOR
LEAVE TO SUBMIT A REPLY AND REPLY BRIEF**

On October 30, 2014, the Oglala Sioux Tribe (Tribe) submitted a motion to the Atomic Safety and Licensing Board (Licensing Board) requesting leave to submit a reply brief to Powertech (USA), Inc.'s (Powertech) and the United States Nuclear Regulatory Commission (NRC) Staff's responses to the Tribe's motion to submit additional exhibits. The focus of the Tribe's instant motion is a request for leave to file a reply to Powertech's and NRC Staff's arguments on the admissibility of proposed Tribe Exhibits OST-025 and OST-026 pertaining to a United States Environmental Protection Agency (EPA) Preliminary Assessment of the Darrow/Freezeout/Triangle mine area. Further, on November 1, 2014, the Tribe submitted a reply to Powertech's and NRC Staff's responses without leave of the Licensing Board.

In prior consultation discussions and its responses to the Tribe's October 14, 2014, motion, Powertech opposed admission of these documents based on the Tribe's failure to offer argument or information demonstrating how these proposed exhibits are relevant to any of the admitted contentions. However, contrary to allegations by the Tribe that it submitted supplemental written testimony on this issue, the scope of Powertech's supplemental written

testimony filed on October 24, 2014, was limited to NRC Staff's analysis of TVA well log data (Powertech Exhibit APP-072). Powertech also supported NRC Staff's position through its argument that the EPA Preliminary Assessment documents have no relevance to the findings of NRC Staff in its final supplemental environmental impact statement for the Dewey-Burdock ISR Project (FSEIS).

As is well-understood in the Commission's Rules of Practice at 10 CFR Part 2, parties are not entitled to a right to reply to another party's answer to a motion. *See* 10 CFR § 2.323(c). The Licensing Board may grant a party the right to submit a reply brief "in compelling circumstances, such as where the moving party demonstrates that it could not reasonably anticipated the arguments to which it seeks leave to reply." *Id.*

The Tribe's sole grounds for asking for leave to file a reply to Powertech's and NRC Staff's responses is that it could not have reasonably anticipated the argument offered by Powertech and NRC Staff regarding the potential "relevance" of these two documents and the potential for admissibility as evidence in this proceeding under 10 CFR § 2.337. This argument lacks substance for several reasons. First, the "relevance" and admissibility of documents, data, and other information have been the subject of multiple motions and argument throughout this proceeding, especially within the last three (3) months. In previous motions, the Tribe and/or Consolidated Intervenors have claimed that documents and data such as borehole logs and other documents are "relevant" to the admitted contentions, which also is a fundamental requirement for admissibility as evidence under Part 2.337(a). *See* 10 CFR § 2.337(a). By submitting their motion to admit these documents, the Tribe should have been well-aware that Powertech and NRC Staff would cite to the above-noted regulatory provisions should they oppose such motion.

The Tribe argues that the “Board admitted hundreds of exhibits based on a stated lack of objection from each party.” Tribe Reply Brief at 2. Powertech concurs with NRC Staff that previously admitted exhibits were linked, either through position statements or written testimony, to the admitted contentions. No such link is offered in the Tribe’s instant motion and this failure was noted in Powertech’s response as grounds for not admitting the documents as evidence under Part 2.337(a).

Powertech also argues that the Tribe’s November 1, 2014, reply brief, which was filed without leave of the Licensing Board, fails to show why these documents should be admitted as evidence in this proceeding. As cited in NRC Staff’s November 4, 2014, response, the Tribe refers to the Preliminary Assessment’s language that states, “[s]ampling results indicate an observed release to groundwater...” as evidence for the Tribe to conclude that “additional sampling and data collection is warranted to determine the extent of, and hydrogeologic pathways for, existing and future contamination.” Tribe Reply Brief at 5, *citing* Preliminary Assessment¹ at 36. However, as NRC Staff states, the conclusions of the Preliminary Assessment address issues such as surface water, soil, and sediment and do not, in any way, form the basis for a new contention, nor does the Tribe appear to offer such documents as the basis for a new contention. Moreover, the currently admitted contentions (especially Contentions 2 and 3) specifically address gathering and analysis of “baseline” *groundwater* quality data and groundwater-based fluid migration and confinement. The Tribe previously offered no evidence that the documents were indeed linked to Contentions 2 and 3 and cannot now seek to add additional information to the record when that time has passed. Thus, the Tribe has failed to

¹ It is important to note that EPA’s Preliminary Assessment does not contain any final findings regarding site-specific conditions anywhere within or near the Dewey-Burdock ISR Project site. This report is merely a “desktop” assessment of whether additional investigation of site-specific resource areas is warranted for a potential Superfund.

show any relevance or materiality sufficient to warrant admission of these documents as evidence.

Additionally, the Tribe should not be permitted to circumvent the requirements for demonstrating that documents are admissible as evidence under Part 2.337(a). The Tribe made clear when the documents in question were brought to its attention and must follow the requirements for motions and admissible evidence, which is ten (10) days from the event that triggers the motion and a showing that the proffered documents satisfy Part 2.337(a) admissibility requirements. Further, as stated by NRC Staff, the only remaining filing on the Licensing Board's schedule is proposed findings of fact, for which there is no right to a response and/or reply in the Commission's Rules of Practice. *See* 10 CFR § 2.1209. Rather, the Tribe had every opportunity to provide a showing of admissibility in its previous submission and failed to do so. Based on the above-noted regulations, Powertech and NRC Staff will not have a legal right to respond to any offering of admissibility contained in the Tribe's proposed findings of fact. Accordingly, Powertech asserts that the Licensing Board should deny the Tribe's motion for leave and reject its reply brief. In addition, should the Licensing Board deem it appropriate to grant the Tribe's motion, Powertech respectfully requests additional time to offer substantive argument in response to the assertions raised by the Tribe in its motion.

Respectfully submitted,

/Signed (electronically) by/ Christopher S. Pugsley

Dated: November 7, 2014

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing **“POWERTECH (USA), INC. RESPONSE TO OGLALA SIOUX TRIBE MOTION FOR LEAVE TO SUBMIT REPLY BRIEF AND REPLY BRIEF”** in the above-captioned proceeding have been served via the Electronic Information Exchange (EIE) this 7th day of November 2014, 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.**

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Dated: November 7, 2014