UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of:	)	
	)	Docket No.: 40-9075-MLA
POWERTECH (USA), INC.	)	
	)	Date: May 26, 2015
(Dewey-Burdock In Situ Uranium Recovery Facility)	)	
	)	

BRIEF OF POWERTECH (USA), INC. PETITION FOR REVIEW OF LBP-15-16

I. INTRODUCTION

Pursuant to 10 CFR § 2.1212 and 2.341(b)(4), the licensee Powertech (USA), Inc. (Powertech) hereby submits this Petition for Review of the Atomic Safety and Licensing Board's (Licensing Board) Partial Initial Decision in LBP-15-16[1] dated April 30, 2015, regarding Powertech's United States Nuclear Regulatory Commission (NRC)-licensed Dewey-Burdock *in situ* leach uranium recovery (ISR) project in the State of South Dakota. This administrative proceeding involved seven (7) admitted contentions, two (2) of which were decided by the Licensing Board in a manner adverse to Powertech and NRC Staff (Contentions 1A and 1B). Additionally, the Licensing Board *sua sponte* added a license condition to Powertech's NRC License SUA-1600 pursuant to its decision resolving Contention 3 in favor of Powertech and NRC Staff. For the reasons discussed below, Powertech respectfully requests that the Commission grant its Petition for Review and reverse the Licensing Board's findings with respect to Contentions 1A and 1B and order that the additional license condition prescribed under Contention 3 be removed from Powertech's NRC license.

[1] *See Powertech (USA), Inc.* (Dewey-Burdock ISR Project), LBP-15-16, 81 NRC __ (April 30, 2015) (slip op.).

II. BACKGROUND AND PROCEDURAL HISTORY

Pursuant to the Commission's 10 CFR Part 40 and Appendix A uranium recovery regulatory program and associated guidance, Powertech submitted a license application for the Dewey-Burdock ISR Project to NRC for its review and approval on February 25, 2009.

After its 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. On March 12, 2010, the Commission established the Licensing Board. On March 8, 2010, and April 6, 2010, Consolidated Intervenors (CI) and the Oglala Sioux Tribe (hereinafter the "Tribe") submitted requests for a hearing and proposed contentions. On August 5, 2010, the Licensing Board issued LBP-10-16[2] in which CI and the Tribe each were granted standing to intervene and several contentions for both parties were admitted.

On March 18, 2013, NRC Staff issued its Safety Evaluation Report (SER) detailing the analyses and conclusions of its safety review for all resource areas for the Project which stated that, absent an environmental concern to the contrary, Powertech's requested license should be issued.[3] On January 29, 2014, NRC Staff issued the Final Supplemental Environmental Impact Statement (FSEIS) which recommended that, absent a safety-related concern to the contrary, Powertech's requested license should be issued.[4] On April 8, 2014, NRC Staff issued notice to the Licensing Board that it had issued Powertech NRC License No. SUA-1600, stating that "the Staff finds that the application complies with the Atomic Energy Act and the NRC's regulations…."[5] The final record

[2] *See Powertech (USA), Inc.*, (Dewey-Burdock ISR Project), LBP-10-16, 72 NRC 361, (August 5, 2010).
[3] *See* Exs. NRC-134 and NRC-135.
[4] *See* Exs. NRC-008-A & 008-B.
[5] *See* ML14098A492.

of decision (ROD) included a Programmatic Agreement (PA),[6] which was the culmination of the National Historic Preservation Act (NHPA)[7] Section 106 compliance process under 36 CFR Part 800 *et seq.* for which NRC served as the lead agency. The ROD included statements confirming successful conclusion of the Section 106 process as follows:

> "NRC's agreement to this protocol, and its willingness to continue to collaborate with the consulting tribes and other consulting parties as Dewey-Burdock is implemented, is the appropriate next step. Accordingly, we have signed the PA to conclude the Section 106 review process. We appreciated the efforts of NRC staff to negotiate an outcome that balances project goals and historic preservation concerns."

Ex. NRC-018-D at 1

> "We understand that the Standing Rock Sioux Tribe (SRST) has objections to the level of effort required by the NRC for the identification of historic properties of religious and cultural significance to tribes that may be affected by this undertaking. However, based on the background documentation, the issues addressed during consultation, and the processes established in the PA, the ACHP has concluded that the content and spirit of the Section 106 process has been met by NRC."

Ex. NRC-031 at 3

> "Execution of this PA by the NRC, BLM, SD SHPO, ACHP, and Powertech and the implementation of its terms is evidence the NRC and BLM have taken into account the effects of this Undertaking on historic properties and afforded the ACHP an opportunity to comment."

Ex. NRC-018-A at 14.

On August 19-21, 2014, the Licensing Board held an evidentiary hearing on the seven admitted contentions in Rapid City, South Dakota. On January 9, 2015, all parties submitted proposed findings of fact and conclusions of law to the Licensing Board. On January 29, 2015, all parties submitted replies to the previously submitted proposals.

On April 30, 2015, the Licensing Board issued LBP-15-16 in which five (5) of the seven (7) admitted contentions were resolved in favor of Powertech and NRC Staff. However, Contentions 1A

[6] The PA and associated correspondence from the ACHP was executed by the Advisory Council on Historic Preservation (ACHP)[6] on April 7, 2014 and signed by NRC Staff, BLM, the South Dakota State Historic Preservation Office (SHPO) and Powertech. *See* Exs. NRC-018-A-(18-H).
[7] *See* 16 U.S.C. § 470.

and 1B were resolved in favor of CI and the Tribe with the Licensing Board attempting to retain jurisdiction over future actions pursuant to its ruling, including monthly status updates from NRC Staff on actions conducted in accordance with LBP-15-16. Additionally, although the Licensing Board ruled in favor of Powertech and NRC Staff on Contention 3, it added a license condition *sua sponte* to Powertech that also is subject to this Petition. Powertech respectfully requests that the Commission grant this Petition for Review of LBP-15-16 and reverse the Licensing Board's findings on Contentions 1A and 1B and the amendment of Powertech's license under Contention 3.

III. STANDARD OF REVIEW

As a general matter, the Commission conducts review in response to a petition for review filed pursuant to 10 C.F.R. § 2.341 (formerly § 2.786). In determining whether to grant a petition for review of a Licensing Board Order, the Commission gives due weight to the existence of a substantial question with respect to the considerations set forth in 10 C.F.R. § 2.341(b). The Commission may, as a matter of discretion, grant review of Licensing Board orders based on whether a "substantial question" exists in light of the following considerations:

(1) A finding of material fact is clearly erroneous or in conflict with a finding as to the same fact in a different proceeding;
(2) A necessary legal conclusion is without governing precedent or is a departure from or contrary to established law;
(3) A substantial and important question of law, policy or discretion has been raised;
(4) The conduct of the proceeding involved a prejudicial procedural error; or
(5) Any other consideration which the Commission may deem to be in the public interest.

10 C.F.R. § 2.341(b) (formerly § 2.786(b)(4)); *see also Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-05-16, 62 NRC 1, 3 (2005).

Licensing Board findings may be rejected or modified if, after giving the Licensing Board's decision the probative force it intrinsically demands, the record compels a different result. *See e.g., General Public Utilities Nuclear Corp.* (Three Mile Island Nuclear Station, Unit 2), ALAB-926, 31 NRC 1, 13-14 (1990).

IV. ARGUMENT

As a preliminary matter, the Licensing Board states in LBP-15-16 that "[t]he Licensing Board retains jurisdiction over the final resolution of Contentions 1A and 1B." LBP-15-16 at 114. However, as stated by the Commission in *Virginia Electric and Power Company*, a Licensing Board's resolution of all contentions in a given proceeding is tantamount to an initial decision resulting in termination of the proceeding. In that case, the Commission supported this determination by stating,

> "The courts of appeals have repeatedly approved our practice of closing the hearing record after resolution of the last 'live' contention, and of holding new contentions to the higher 'reopening' standard."

CLI-12-14, 75 NRC 692 (June 7, 2012), *citing N.J. Envtl. Fedn v. United States NRC*, 645 F.3d 220, 232-33 (3d Cir. 2011); *State of Ohio v. Nuclear Regulatory Comm'n*, 814 F.2d 258, 262-64 (6th Cir. 1987); *Oystershell Alliance v. U.S. Nuclear Regulatory Comm'n*, 800 F.2d 1201, 1207-08, 255 U.S. App. D.C. 176 (D.C. Cir. 1986).

Further, administrative orders generally are final and appealable if they impose an obligation, deny a right, or fix some legal relationship as a consummation of the administrative process. *Sierra Club v. NRC*, 862 F.2d 222, 225 (9th Cir. 1988). In the instant case, the Licensing Board specifically states that Contentions 1A and 1B were "resolved" in a manner adverse to Powertech and NRC Staff and identified its perceived flaws in NRC Staff's compliance with the National Environmental Policy Act (NEPA)[8] and the NHPA. LBP-15-16 at 112. Indeed, under LBP-15-16, the Licensing Board imposes an obligation on NRC Staff to open a "government-to-government" consultation solely with the Tribe and, by implication, imposes an obligation on Powertech, as a consulting party and proprietor of access to the Project site, to provide such access to the Tribe for site identification purposes. Based on this language and the fact that the Licensing Board articulated legal interpretations of NEPA and the NHPA and applied such interpretations to NRC Staff's actions represents a final decision on compliance and, thus, should be subject to a direct appeal under 10

[8] *See* 42 U.S.C. § 4321-4347.

C.F.R. § 2.341.[9] Thus, the Licensing Board should have terminated the proceeding and should not have retained jurisdiction over future actions by any parties to this proceeding. Also, due to the immediate short-term, and potentially long-term harm to Powertech due to this ruling as noted below, Powertech respectfully requests expedited review of this appeal.

In LBP-15-16, the Licensing Board stated that it considered Contentions 1A and 1B together due to "the intertwined nature" of such contentions and their substance. LBP-15-16 at 22. Thus, Powertech will address the Licensing Board's Contentions 1A and 1B determinations sought to be reversed under the relevant statutes and regulations of the NHPA and NEPA jointly.

A. Contentions 1A and 1B: National Historic Preservation Act Issues

In LBP-15-16, the Licensing Board offers a legally and factually incorrect and inconsistent opinion on the nature of the NHPA Section 106 process as conducted by NRC Staff, the resulting site surveys designed to identify any properties of religious and cultural significance to the tribes, and the aforementioned PA. The Licensing Board states "[w]ith respect to identifying historic properties, the NRC Staff has complied with the NHPA requirement to make a good faith and reasonable effort to identify properties that are eligible for inclusion in the National Register of Historic Places within the

[9] Even if the Commission agrees that the Licensing Board can retain jurisdiction over Contentions 1A and 1B, Powertech asserts that the Commission should grant review under the standard for interlocutory appeals. *See* 10 C.F.R. § 2.341(f). Under Part 2.341(f)(2), the Commission may grant interlocutory review, absent a referral or certification from a Presiding Officer, if:

> (i) Threatens the party adversely affected by it with immediate and serious irreparable impact which, as a practical matter, could not be alleviated through a petition for review of the presiding officer's final decision; or
> (ii) Affects the basic structure of the proceeding in a pervasive or unusual manner.

Powertech believes that the argument presented below demonstrates that the licensee is adversely affected by the ruling in that two (2) agencies with permitting authority for the Project, the United States Environmental Protection Agency (EPA) and the State of South Dakota Department of Environment and Natural Resources (SDDENR) have indicated they will not finalize permitting decisions until the NRC administrative proceeding is finally resolved. Further, the Licensing Board's attempt to retain jurisdiction will prejudice both Powertech and NRC Staff by subjecting its actions to direct Board oversight. Thus, the Commission should, in the alternative, grant interlocutory review under 10 C.F.R. § 2.341(d)(4)(iv).

Dewey-Burdock ISL project area." LBP-15-16 at 38. The Licensing Board further states that, with respect to satisfying ACHP's requirement to make a reasonable and good faith effort, "the Staff used…four of the five methodologies specified in ACHP regulations…[t]he only methodology that the Staff did not use was oral history interviews. We find that these efforts satisfy the NHPA with respect to historic properties."[10] *Id.* However, despite recognizing that NRC Staff complied with the NHPA's reasonable and good faith effort standard, the Licensing Board found that "the *consultation* process between the NRC Staff and the Oglala Sioux Tribe was inadequate" (i.e., Contention 1B). *Id.* at 42 (emphasis added). It appears that the Licensing Board has reached a conclusion, based on its final recommended remedy for compliance, that:

> "The Oglala Sioux Tribe is both a consulting party and an Intervenor in this proceeding. It is entitled to a meaningful, face to face, government-to-government consultation session with the NRC Staff regarding this specific project."

Id.

In this portion of LBP-15-16, the Licensing Board intimates that the only solution to its perceived defect with NRC Staff's compliance with the NHPA Section 106 process is to ensure that the Tribe is able to identify resources of cultural, religious, and/or historical significance, despite recognizing that the Tribe has refused to accept invitations to participate in site surveys for that purpose. LBP-15-16 at 112. It is Powertech's position that the Licensing Board has raised a substantial question of compliance with the NHPA and its implementing regulations and has committed a clear error of law with respect to NRC Staff's level of compliance during the Section 106 process.

Regulations promulgated by the ACHP for use by federal agencies when evaluating historic resources are found at 36 CFR Part 800 *et seq.* More specifically, when evaluating new ISR operating license applications, NRC Staff follows the four (4) step process for historic resource

[10] These four of five methodologies included background research, consultation, field investigations, and field surveys.

reviews articulated in 36 CFR Part 800, Subpart B.[11] Step one (36 CFR § 800.3) involves the identification of interested/consulting parties with whom the lead agency will consult during the Section 106 consultation process. These consulting parties typically include the SHPO, federally recognized tribes, local governments, applicants for federal licenses, and others with a demonstrated interest in the effects on historic properties.

Step two (36 CFR § 800.4) involves the identification of historic properties in consultation with the consulting parties with the lead agency required to exercise a *reasonable and good faith effort* to identify such properties per 36 CFR § 800.4(b)(1).[12] This step involves the delineation of the area of potential effect (APE), the review of existing information on properties within the APE, and, if necessary, additional identification of properties based on field studies and information from the consulting parties. As part of this identification effort and as is the case with ISR projects, ACHP regulations permit this identification effort to be phased by providing for future identification phases under the provisions of a PA as ISR projects are, by their nature, phased projects. *See* 36 CFR § 800.4(b)(2). The phased identification process for ISR projects has been endorsed by the Commission in the *Hydro Resources, Inc.* litigation.[13] Step two also involves determining whether the identified resources are eligible for inclusion on the National Register of Historic Places (NRHP) per 36 CFR § 800.4(c).

Step three (36 CFR § 800.5) involves determining whether the federal undertaking will adversely affect any NRHP-eligible properties. The lead agency, in consultation with consulting parties, will determine whether adverse effects are present that need to be resolved or render a determination of no adverse effect. The determination of potential adverse effects also is permitted

[11] *See* Ex. NRC-015 entitled *Dewey-Burdock ISR Project Summary of Tribal Outreach* discusses all NRC Tribal outreach efforts.
[12] *See* Ex. NRC-047 entitled *Meeting the Reasonable and Good Faith Identification Standard in Section 106 Review*.
[13] *See e.g., In the Matter of Hydro Resources, Inc.* (Crownpoint Uranium Project), CLI-06-11, 63 NRC 483 (September 16, 2005).

to be conducted in a phased manner. *See* 36 CFR § 800.4(a)(3). Section 106 agreement documents such as PAs represent an ongoing responsibility for Powertech and NRC Staff where potential effects cannot be fully determined prior to an undertaking's approval. *See* 36 CFR § 800.14(b)(1)(ii).

Step four involves the resolution of adverse effects in accord with 36 CFR § 800.6. Adverse effects are resolved using agreement documents such as memoranda of agreement (MOA) or PAs. In the instant case, a PA was finalized and signed by *mandatory* signatories including NRC, BLM, the South Dakota SHPO, and the ACHP.[14] For the Dewey-Burdock PA, ACHP participation to lead to a resolution of adverse effects was solicited and its execution of the PA indicates that NRC has met the statutory requirements for the Section 106 compliance process, including the "government-to-government" consultation component. *See* Powertech Exhibit APP-001 at 14, ¶ A.43 *citing* NRC Staff Exhibit NRC-018-A at 14.

Initially, as stated above, the Licensing Board's finding in LBP-15-16 (Page 38) that NRC Staff complied with the NHPA Section 106 reasonable and good faith effort standard is entirely *inconsistent* with its conclusion (Page 42) that "the consultation process between the NRC Staff and the Oglala Sioux Tribe was inadequate." Compliance with the entirety of the NHPA Section 106 process is contingent on making a reasonable and good faith effort for each of the four (4) NHPA Section 106 steps. It is internally inconsistent to conclude that NRC Staff satisfied the reasonable and good faith effort standard under the NHPA but then to conclude that consultation was insufficient for only one (1) of the identified consulting parties. This conclusion would then suggest that every aspect of NRC's NHPA Section 106 process could be flawed, including the PA which was approved by the ACHP and the South Dakota SHPO and was developed with the Tribe as a consulting party.[15] But, again the Licensing Board found that NRC Staff satisfied the reasonable and good faith effort standard; therefore, the Licensing Board cannot conclude that the standard for a

[14] The PA also was signed by Powertech, who as the applicant was an invited signatory.
[15] *See e.g.*, NRC Staff Proposed Findings of Fact at 7-8, ¶¶ 2.36-2.37.

Section 106 process was satisfied but then also conclude that the *consultation* component thereof under the NHPA was insufficient.[16]

The Tribe was identified as a consulting party, along with twenty-two (22) other tribes, *and each tribe was treated in the same manner* with respect to communications and meetings.[17] Nowhere in 36 CFR Part 800 or in the 10 CFR Part 51 regulations cited by the Licensing Board does the NHPA or its regulations require that a Native American tribe that is both a consulting party *and a litigant* be afforded special treatment.[18] Such a proposition would be discriminatory on its face against the other 22 tribes involved as consulting parties and the Licensing Board's conclusion that the Tribe should receive special treatment as a consulting party *and a litigant* (intervenor) would be inconsistent, on its face with the concept of according *all* Native American tribes with equal access to consultation with NRC under the NHPA. *See* LBP-15-16 at 42. Indeed, in the initial stages of the Section 106 process, the consulting tribes specifically told Powertech's experts, who testified at the evidentiary hearing, that they did not want individual meetings with the agency, because such meetings with tribes who have shared interests in a particular project would be equivalent to a "divide and conquer" strategy.[19]

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[16] It is important to note that NEPA has no consultation requirement on historic and cultural resources. Thus, it can only be under the NHPA that a defect of ineffective consultation can be identified.

[17] *See* Tr. at 771, lines 8-12 (Yilma).

[18] The Licensing Board's reference to the American Indian Religious Freedom Act (AIRFA) and Executive Order 13007 are equally unavailing. AIRFA protects access to sacred sites, repatriation of sacred objects held in museums, freedom to worship through ceremonial and traditional rites, and use and possession of objects considered sacred. AIRFA requires federal agencies to eliminate interference with the free exercise of Native religion and to accommodate access to and use of religious sites to the extent practicable. The Dewey-Burdock Project is located almost entirely on private land (with the balance BLM-administered federal land that is not accessible by public thoroughfares) and there is no access for religious purposes and no information in the record shows that religious practices occur on such land or that access has been requested or denied.

Executive Order 13007 also does not apply here because it focuses on management of federal land and there is no evidence in the record that any religious ceremonial use of BLM-administered federal land within the project area has been identified or that access to the lands for religious purposes has been requested or denied.

[19] *See* Tr. at 863-864 (Dr. Sebastian).

In addition, the use of the term "meaningful" to characterize government-to-government consultation with a consulting party is nowhere to be found in the aforementioned regulations and is not supported in LBP-15-16 by any statutory/regulatory provision or Commission precedent. Indeed, it appears that the Licensing Board's attempt to distinguish between the characterizations of consultation as "reasonable" versus "meaningful" is not part of the NHPA statutory framework or regulatory regime.[20] Given that the ACHP is charged with interpreting and implementing the NHPA, LBP-15-16 does not rest on any legal foundation to determine that NRC's level of effort here was insufficient because it should be left to the expert agency for determination. Thus, the Licensing Board committed a clear error of law when it substituted its judgment for ACHP's by stating that NRC's consultation efforts with the Tribe were inadequate in the face of the signed PA recognizing ACHP's finding that the reasonable and good faith effort was satisfied.

The Licensing Board also erred when stating that NRC Staff did not engage in sufficient government-to-government consultation with respect to obtaining Tribe input on Step 2 of the Section 106 process for identifying Tribe-related historic and cultural properties. The Licensing Board appears to conclude that NRC Staff must obtain information directly, face-to-face from the Tribe to satisfy its NHPA consultation responsibilities. This is apparent in the Licensing Board's recommendation that the only way to satisfy such concerns absent a motion for summary disposition is to obtain a settlement agreement between the Tribe, NRC Staff, and Powertech on these matters. *See* LBP-15-16 at 114. However, the Licensing Board's decision completely ignores critical facts in the administrative record that indicate that consultation was conducted in a government-to-government manner as prescribed in the NHPA and that the Tribe was adequately consulted by NRC Staff under the NHPA and bears the burden of responsibility for any alleged breakdown in consultation.

[20] *See* 36 C.F.R. Part 800 *et seq.*; *see also* Exs. NRC-047-048.

First, NRC Staff witnesses testified that they consulted with those representatives that the tribes deemed appropriate to contact. *See* Tr. at 777-778 (Yilma) ("it's because we are communicating with those representatives that the tribes deemed appropriate for us to contact for cultural resources type information."). NRC Staff witnesses further testified that they copied tribal leaders in written communications between NRC Staff and tribal historic preservation officers (THPO). *Id.* Regardless of the characterization of "government-to-government" by the Tribe's witness at the evidentiary hearing as consisting of communication between the Tribe's President and the President of the United States, United States Senators or their staff,[21] it is commonplace for a lead agency to identify appropriate agency personnel and for such personnel to represent the agency and its policies. There is no universal regulatory or guidance-based definition for "government-to-government," as it is left up to the lead agency to determine its procedures for consulting with tribes.[22] The Licensing Board also errs when stating that "quantity does not necessarily equate with meaningful or reasonable consultation" (LBP-15-16 at 41), because the combination of letters, meetings, and webinars all were facilitated by NRC personnel and showed a legitimate and flexible progression towards the tribal field surveys and subsequent reports submitted and evaluated in the FSEIS and used to finalize the PA.[23] These government-to-government consultation actions also occurred over a period of five (5) years.[24]

More specifically, the Licensing Board's identification and criticism of specific government-to-government consultation instances represent a clear factual error and an error of law when

[21] *See* Tr. at 781 (CatchesEnemy) ("if our tribal president is at the table, then so should President Obama); *see also* Tr. at 849-850 (Redmond: discussing Senate staff); Tr. at 851 (Chairman Froehlich).
[22] *See* Ex. APP-063 (Dr. Sebastian) at 12, ¶ A.23.
[23] For example, it should be noted that originally it was proposed that site surveys would only include the APE (approximately 2,500 acres), but negotiations between NRC, Powertech, and the consulting parties opened up the entire license area (approximately 10,000 acres) for such surveys. *See* Tr. at 873-874 (Yilma).
[24] *See* NRC Staff Ex. NRC-015; consultation efforts included three face-to-face meetings, including a June 2011 meeting at the Pine Ridge Reservation, and February 2012 and May 2013 meetings in Rapid City, South Dakota.

interpreting the NHPA's reasonable and good faith standard. LBP-15-16 states that the March 14-15, 2012 meeting scheduled for the Tribes and NRC to meet to discuss scopes of work for site identification resulted in no meeting and, instead, "a series of telephone conference calls and an exchange of letters and email" ensued. LBP-15-16 at 26-27. The Licensing Board fails to note that this meeting was cancelled because the Tribes did not submit the draft scopes of work, which were to be the subject of the March, 2012 meeting, despite indicating that they would do so at the February 14-15, 2012 face-to-face meeting, and NRC Staff did not receive such submissions until June 29, 2012. *See* Ex. NRC-018-B at 17-18. Those submissions were considered to be inadequate due to a lack of information on duration, number of personnel or cost. *Id.* NRC did not receive any proposals with costs until three (3) months later on September 27, 2012, and this cost proposal was approximately five (5) to fifteen (15) times greater than the costs reported for similar survey efforts for federal projects in the northern Plains region. *Id.* at 19.

The Licensing Board also mischaracterizes NRC Staff's attempts to obtain Tribe participation in the April-May, 2013 field surveys for historic properties of religious and cultural significance to the Tribe. The Tribe was invited to participate in the field surveys and initially accepted the offer;[25] however, the Tribe later changed its mind and declined to participate.[26] The Licensing Board states that the Tribe objected to the terms of the site survey proposal on March 22,

[25] *See* Ex. NRC-001 at 12, ¶ A1.11, *citing* Exs. NRC-146-147.

[26] The Tribe's failure to participate in the site survey and then its subsequent attempt to question the viability of the site identification effort is tantamount to being excluded from challenging an order pursuant to a rulemaking that a party did not participate in at the requisite time. While the case dealt with rulemaking and not NHPA Section 106 processes, as stated in *Gage v. U.S. Atomic Energy Com.*:

> "Because the activists were not a "party" to the rule-making, the court lacked jurisdiction. Moreover, an extensive factual record would be required to consider the activists' claims and their abstinence from the rule-making process precluded the compilation of a record adequate for judicial review of the specific claims they presented. Besides, the activists had alternative remedies, including petitioning the AEC for the promulgation of expanded rules."

479 F.2d 1214 (D.C. Cir. 1973).

However, here the Tribe was indeed a party, and they still did not participate in the "open site" field surveys deemed appropriate by the ACHP.

2013, and that "[d]espite these objections from the Oglala Sioux Tribe, the field survey of the Dewey-Burdock site began on April 1, 2013." LBP-15-16 at 30-31. However, the Licensing Board apparently fails to recognize that NRC Staff did not receive the Tribe's objection letter until May 7, 2013, which was well after the site surveys were underway. *See* Ex. NRC-018-B at 21, fn 9. The Tribe's letter also was addressed to EPA and not NRC and did not reach NRC until well after the site surveys had begun. *Id.* LBP-15-16 also ignores the fact that NRC Staff's announcement in December, 2012 that it intended to pursue an alternative open site survey approach (LBP-15-16 at 30) was preceded by over one (1) year of negotiation with the consulting parties regarding an appropriate approach to site identification.[27] While the Licensing Board levies some blame on the Tribe for the breakdown in the negotiations, they fail to note that the only site survey cost proposal from the Sioux tribes received by NRC Staff up to that point would have cost approximately four (4) million dollars;[28] nevertheless, the Licensing Board generally referred to the cost as "patently unreasonable." LBP-15-16 at 42. Lastly, LBP-15-16 also ignores the fact that NRC was attempting to address the Tribe's objections on the satisfaction of the "government-to-government" consultation by trying to hold direct consultations with the Tribe.[29] This effort to schedule direct consultation began in November 2009, when NRC staff tried to schedule a meeting with Tribe but were told the Tribe did not have availability to meet. *See* Tr. at 771 (Yilma).[30] It continued when NRC Staff hosted an information gathering meeting at the Pine Ridge Reservation in June 2011 at the request of

[27] *See* Ex. NRC-018-B at 13-23 (identification and preservation of historic properties of religious and cultural significance to the tribes was discussed at the June, 2011 consultation meeting, and NRC Staff sent a letter to all consulting tribes in October, 2011, indicating that it would undertake studies and surveys to identify such properties.

[28] *See* Tr. at 807 where it is discussed that the Tribe's proposal was close to one (1) million dollars, but was only for the identified APE (approximately ¼ of the license area) and was not for the entire license area which was the subject of the "open site" surveys.

[29] LBP-15-16 also fails to note that the Tribe was invited to and, at first, accepted an invitation to walk over the entire 10,000 acre project site area with the Licensing Board itself, NRC Staff, and Powertech and BLM representatives, as well as other interested parties, and once again refused to participate.

[30] *See also* Ex. NRC-018-B at 14, fn. 3.

the tribes and hosted a face-to-face meeting in February, 2012 in Rapid City, South Dakota.[31] *See* Ex. NRC-018-B at 16-17. NRC Staff also attempted to conduct direct consultations with the Tribe when, after receiving in May 2013 the Tribe's objection letter to the field survey, NRC Staff subsequently hosted a meeting in Rapid City on May 23, 2013, which the Tribe did not attend. *Id.* at 21-22. Each of the meetings hosted by NRC Staff and all communications performed by NRC Staff meet the requirements for "government-to-government" consultation.[32] Thus, the Licensing Board erred when finding that NRC did not engage in adequate government-to-government consultation.

The Licensing Board errs when concluding that NRC Staff did not engage in appropriate consultation with the Tribe, in that the designated agency for interpretation and implementation of the NHPA and promulgation of appropriate regulations and guidance under this statute, the ACHP, executed the PA, indicating that NRC Staff's efforts satisfied the reasonable and good faith standard. Ex. NRC-031 at 3 shows that the ACHP determined that NRC Staff's efforts satisfied the reasonable and good faith standard and *satisfied the content and spirit of the NHPA Section 106 process*.

The Licensing Board also errs in stating that, "the Board is not able to decide definitively which party or specific actions led to the impasse preventing an adequate tribal cultural survey (LBP-15-16 at 41)."[33] It is not within the Licensing Board's purview to determine whether the site surveys

[31] It should be noted that the Tribe attended both of these meetings and did participate in these and other consultation efforts, including development of the PA. The fact that the Tribe chose not to participate in the "open site" field surveys does not indicate that they were not consulted.

[32] This conclusion is consistent with the actions performed by NRC at the initial stage of the NHPA Section 106 process. NRC initially identified Powertech's consultants, with several years of experience in the Section 106 process, as the primary points of contact for development of site identification efforts. However, the tribes refused to consult with Powertech's representatives and insisted on dealing directly with agency personnel. This request was accommodated by NRC Staff through all of its consultation efforts.

[33] The Licensing Board also mischaracterizes the consultation process when it states that "the NRC Staff/tribal consultation process broke down…." LBP-15-16 at 40. The consultation process never "broke down," as it continued through the development and execution of the PA and will continue going forward as all consulting parties are entitled to continue consultation on all efforts under the PA as the project develops. Further, it was never anticipated that all identified tribes would even participate in the Section 106 process and, indeed, many had no interest in or merely indicated that they would like to be kept informed of what occurred during the process and what will occur under the PA.

were adequate based on the complaint of a consulting party that first accepted but then declined to participate.[34] The ACHP execution of the PA demonstrates that NRC satisfactorily completed all steps of the NHPA Section 106 process, meeting the reasonable and good faith effort standard for identification of historic properties potentially eligible for listing on the NRHP, including those of cultural and religious significance to the tribes. This determination is evidenced by the ACHP letter noting that, because of a lack of consensus as to how the identification effort would be effectuated, NRC adopted the "open site" survey approach, in which all tribes has equal opportunity to participate and a number of consulting tribes chose to do so. *See* Ex. NRC-018-D at 1. ACHP's specific reference to the site identification approach employed by NRC Staff, in conjunction with its conclusion that NRC had met the requirements of the NHPA and 36 CFR Part 800, clearly indicates that the ACHP found the "open site" approach adequate. Accordingly, the Commission should defer to the ACHP's determination that NRC satisfied the reasonable and good faith effort standard for consultation and for identification of historic properties.[35]

B. Contentions 1A and 1B: National Environmental Policy Act Issues

In LBP-15-16, the Licensing Board concluded that "the FSEIS has not adequately addressed the environmental effects of the Dewey-Burdock project on Native American cultural, religious and historic resources." LBP-15-16 at 40. The Licensing Board bases its conclusion on the statement that "additional analyses as to how the Powertech project may affect the Sioux Tribes' cultural, historical, and religious connections with the area" are needed before NEPA's "hard look" standard can be satisfied. *Id.* Essentially, the Licensing Board found that "[t]he field surveys conducted in 2013 by members of seven tribes and the three sets of findings submitted do not satisfy" the 10 CFR § 51.71(b) requirement to include "an analysis of significant problems and objections raised by…any

[34] *See* Ex. NRC-001 at 12, ¶ A 1.11, *citing* Exs. NRC-146-147.
[35] It is important to note again that all consulting parties, including the Tribe, are entitled to consult with respect to future site identification under the PA, as well as development of mitigation plans for addressing potential adverse effects to such sites. *See* Ex. NRC-018-A.

affected Indian tribes and by other interested persons." *Id.* at 39-40. The Licensing Board then stated that additional government-to-government consultation solely with the Tribe would remedy the deficiency. *Id.* at 112. It is Powertech's position that the Licensing Board's decision on this issue represents a substantial question of law, as it is not based on any requirement under NEPA and is based on clear errors of fact and law and should be reversed.

For purposes of compliance with NEPA, the Commission implemented 10 CFR Part 51 regulations governing environmental reviews of proposed major federal actions, such as Powertech's license application. As an independent regulatory agency, the Commission is not required to comply with portions of CEQ regulations that have some substantive impact on the manner in which the Commission performs its primary regulatory responsibilities.

For environmental reviews, NRC Staff is required to take a "hard look" at the potential environmental impacts of a proposed action under NEPA. This "hard look" requirement is tempered by a "rule of reason" that requires agencies to address only impacts that are reasonably foreseeable—not remote or speculative. If an admitted contention alleges that an environmental review document such as an SEIS is inadequate, "the 'rule of reason' by which NEPA is to be interpreted provides that agencies need not consider 'remote and speculative' risks or 'events whose probabilities they believe to be inconsequentially small.'"[36] NEPA analyses often must rely upon imprecise and uncertain data, particularly when forecasting future technological developments, which should be judged on their reasonableness. When faced with uncertainty, NEPA only requires "reasonable forecasting." In short, NEPA allows agencies "to select their own methodology as long as that methodology is reasonable."[37] NRC Staff's environmental review is deemed to be adequate unless NRC Staff "has failed to take a 'hard look' at significant environmental questions –i.e., the Staff has unduly ignored

[36] *Vermont Yankee Nuclear Power Corp.* (Vermont Yankee Nuclear Power Station, ALAB-919, 30 NRC 29, 44 (1989) (citation omitted).
[37] *See The Lands Council v. McNair*, 537 F.3d 981, 1003 (9th Cir. 2008) (finding that an EIS need not be based on the "best scientific methodology available").

or minimized pertinent environmental effects."[38] Further, "NEPA gives agencies broad discretion to keep their inquiries within appropriate and manageable boundaries."[39] As stated by the Commission, although "there 'will always be more data that could be gathered,'" agencies 'must have some discretion to draw the line and move forward with decisionmaking.'"[40]

In order to properly understand the Licensing Board's decision and its NEPA implications, it is important to understand that LBP-15-16 identifies the lack of identification of places of cultural, historical or religious significance to the Tribe as a NEPA failure. Indeed, the Licensing Board states that, "[b]ecause the cultural, historical, and religious sites of the Oglala Sioux Tribe have not been adequately catalogued, the FSEIS does not include mitigation measures sufficient to protect this Native American tribe's cultural, historical, and religious sites that may be affected by the Powertech project." LBP-15-16 at 40. The Licensing Board narrows its ruling by stating, "[w]ithout additional analysis as to how the Powertech project may affect the Sioux Tribes' cultural, historical, and religious connection with the area, NEPA's hard look requirement has not been satisfied…." *Id.* Essentially, the Licensing Board has tied its entire NEPA analysis of the FSEIS and the ROD solely to the need for the Tribe to have participated in the "open site" survey and site identification effort. However, Powertech asserts that the Licensing Board has committed an error of law when interpreting NEPA's "hard look" requirement.

Initially, Powertech recognizes that the NHPA and NEPA are separate and distinct statutes and that satisfaction of the "reasonable and good faith" effort under the NHPA does not *necessarily* result in the satisfaction of NEPA. However, as stated above, the Licensing Board has specifically tied its decision that the NEPA "hard look" requirement was not satisfied to the fact that NRC Staff

[38] *See Duke Energy Corp.* (McGuire Nuclear Station, Units 1 & 2; Catawba Nuclear Station, Units 1 & 2), CLI-03-17, 58 NRC 419, 431 (2003) (discussing what an intervenor must allege, with adequate support, to litigate a NEPA claim).
[39] *Louisiana Energy Servs, L.P.*, CLI-98-3, 47 NRC 77, 103 (internal citation omitted).
[40] *Entergy Nuclear Generation Co.* (Pilgrim Nuclear Power Station), CLI-10-11, 71 NRC 287, 315 (2010) (footnote omitted).

did not satisfy the NHPA Section 106 process by not obtaining site identification information through consultation with the Tribe and including that information in the FSEIS. Thus, Powertech incorporates its arguments in Section IV(A) above into this argument by reference. The fact that NRC Staff does not have the authority to force the Tribe or any other consulting party to participate in the "open site" field survey site identification process and that the Tribe first accepted and then voluntarily declined to participate in such effort, while seven (7) tribes chose to do so, demonstrates that the FSEIS did not require the information and analysis that the Licensing Board states would satisfy the NEPA "hard look" requirement. Therefore, the FSEIS is compliant with NEPA and the Licensing Board's ruling should be reversed.

In addition to the arguments noted above, the Licensing Board claims that there are "a variety of reasons" that the FSEIS does not contain site identification information and analysis on properties of cultural, religious or historical significance to the Tribe. LBP-15-16 at 39-40. This statement is incorrect as there is only one reason that this information and analysis is not present in the FSEIS. Had the Tribe not reversed its position on the "open site" survey site identification opportunity and voluntarily refused to participate, the information the Licensing Board references from that opportunity deemed adequate by seven tribes and that, as stated above, was deemed adequate by the ACHP for site identification efforts, could have been present in the FSEIS.[41] Indeed, the Licensing Board even levies some of the blame for this on the Tribe as the initial proposal for a scope of work to perform site identification was approximately four (4) million dollars,[42] which the Licensing Board deemed to be "patently unreasonable." The Tribe also delayed for a period of seven (7) months the submission of a scope of work for site identification and refused to even negotiate on an

[41] The Licensing Board incorrectly states that only four (4) tribes participated in the field survey process and that none were Sioux tribes. *See* LBP-15-16 at 34-35. In fact, seven (7) tribes participated in the field surveys, including two (2) Sioux tribes—the Crow Creek Sioux Tribe and the Santee Sioux Tribe. *See* Ex. NRC-018-B at 11.
[42] *See* Footnote 28 *infra.*

alternative scope of work and did not consult on possible alternatives to site identification.[43] NRC Staff spent in excess of one (1) year attempting to find an approach to site identification that was satisfactory to *all* the tribes, that would be commensurate with similar identification efforts carried out for other federal undertakings in the region, and that did not unreasonably burden the license applicant.[44] However, the Licensing Board continues to advocate that the defect in the FSEIS is the lack of information from the Tribe, which five (5) years of "government-to-government" multi-consulting party (including tribes) consultation efforts, three (3) separate approaches to site identification (i.e., ethnographic studies which the tribes rejected, scopes of work for site identification which resulted in "patently unreasonable" financial demands from the Sioux Tribes, and the "open site" survey approach which was deemed adequate by ACHP and seven (7) tribes, of which two were Sioux tribes),[45] several tribal site surveys with accompanying reports, and several attempts to negotiate directly with the Tribe could not produce. Since NEPA only requires that the federal agency to take a "hard look" and must have been shown to have "unduly ignored or minimized pertinent environmental effects,"[46] the Licensing Board erred as it did not show that NRC Staff, in any way, "ignored" the Tribe or "minimized" the potential effects on the Tribe's properties, as NRC Staff cannot force the Tribe to participate in site identification.[47] It stands to reason that NRC Staff cannot ignore or minimize consideration of information on these properties/resources in the FSEIS that it never received due to the recalcitrance of the Tribe. Thus, NRC Staff performed its

[43] *See* Ex. NRC-018-B at 17-20; *see also* Tr. at 792-793 (Dr. Sebastian).
[44] *See* Footnote 24 *infra.*
[45] The Licensing Board also fails to note that Powertech's expert witness' non-profit foundation's (SRIF) ethnographic report was included in the review. *See* Powertech's Proposed Findings of Fact at 46, ¶ 10.29, *citing* Ex. NRC-151 at 5-7, ¶ A1.4 and Ex. NRC-001 at 4-5, 8-10, ¶¶ A1.2, A1.5-A1.6.
[46] *See Duke Energy Corp.* (McGuire Nuclear Station, Units 1 & 2; Catawba Nuclear Station, Units 1 & 2), CLI-03-17, 58 NRC at 431.
[47] The Licensing Board apparently attaches special significance to the Tribe's ties to the Project area but, as testified to by NRC Staff witness Yilma at the evidentiary hearing, the State SHPO informed NRC that it needed to consult with all of the tribes equally as, at one time or another, all of these tribes had historical ties to the Project area. *See* Tr. at 775.

duties under 10 CFR Part 51 for Powertech's FSEIS with respect to assessment of cultural and historic resources.

NEPA also does not require that complete information must be used to evaluate potential environmental impacts, but rather that there is a limit to how much information is needed and an acknowledgement that more data can always be gathered.[48] This legal maxim is on point with the Licensing Board's determination and the fact that additional information can be gathered through continued site identification, evaluation, and mitigation through the PA, ongoing consultation efforts in which the Tribe is entitled to participate. From issuance of the DSEIS to the finalization of the ROD, NRC Staff continuously supplemented its historic and cultural resources information and analysis using a variety of information sources, including but not limited to submitted tribal survey reports. As stated above, the Tribe had ample opportunity to participate in the site identification effort and to prepare and submit a report and even accepted the invitation before voluntarily refusing to participate.[49] Further, NRC Staff did attempt to pursue an avenue where ethnographic studies would have been used to gather information on significant properties and, in fact, considered a summary ethnographic study prepared by SRI Foundation in its analysis. *See* Ex. NRC-151 at 5-7, ¶ A1.4. However, the Licensing Board found that the FSEIS was deficient because it did not carry out additional, tribe-specific ethnographic studies,[50] while *ignoring* the fact that the tribes chose not to pursue this option at the first NRC-sponsored meeting and that NRC Staff testified that they "used a wide-ranging body of data in identifying historic properties, developing the cultural resources impact determination, and making NRHP-eligibility determinations….." *Id*. Thus, NRC Staff complied with NEPA by considering and evaluating all available information or information that reasonably

[48] *See Entergy Nuclear Generation Co.* (Pilgrim Nuclear Power Station), CLI-10-11, 71 NRC at 315 (2010) (footnote omitted); *see also Louisiana Energy Servs, L.P.*, CLI-98-3, 47 NRC at 103 (internal citation omitted).
[49] *See* Ex. NRC-001 at 12, ¶ A1.11, *citing* Exs. NRC-146-147.
[50] *See* LBP-15-16 at 40, fn. 219.

could be obtained from the tribes and other relevant sources when preparing its FSEIS and completing its NHPA Section 106 process.

It is also critical to note that CEQ regulations encourage agencies to "integrate" their environmental impact statement preparation with other statutes such as the NHPA:

> "To the fullest extent possible, agencies shall prepare draft environmental impact statements concurrently with and integrated with environmental impact analyses and related surveys and studies required by the Fish and Wildlife Coordination Act (16 U.S.C. 661 *et seq.*), the National Historic Preservation Act of 1966 (16 U.S.C. 470 *et seq.*), the Endangered Species Act of 1973 (16 U.S.C. 1531 *et seq.*), and other environmental review laws and executive orders."[51]

While the Licensing Board notes that NRC separated the NHPA Section 106 and the NEPA SEIS preparation process, this does not mean that the reviews were not integrated in accordance with CEQ regulations. Indeed, all of the information obtained through the NHPA Section 106 process from its inception was included, as it became available and assessed, in the DSEIS, the FSEIS, and the final ROD. This procedure followed by NRC Staff is consistent with CEQ regulations and should be sufficient to satisfy NEPA.

C. Contention 3: Imposition of Additional License Condition on Historic Borehole Plugging

In LBP-15-16, the Licensing Board resolved Contention 3 in favor of Powertech and NRC Staff but, *sua sponte,* added an additional license condition: "Prior to conducting tests for a wellfield data package, the licensee will attempt to locate and properly abandon all historic drill holes located within the perimeter well ring for the wellfield." LBP-15-16 at 73, 113. The Licensing Board further states that it "did not find any such explicit condition in the license." *Id.* at 73. The imposition of this license condition is a clear error of fact, as Powertech already will be required to address potential impacts from historical boreholes under existing license conditions, and it issued a ruling on a subject that was not properly before the Licensing Board in this proceeding.

[51] 40 C.F.R. § 1502.25(a).

First, when evaluating a license application under the AEA, NRC Staff is empowered to act in one of three ways: (1) approve in full; (2) approve with conditions; or (3) deny. NRC Staff approved Powertech's proposed licensing action and will impose additional conditions, but approval of a license application with conditions does not mean that a licensee is only subject to its license conditions; but rather, the licensee is required to comply with all commitments in its license application, its request for additional information (RAI) responses, and any other part of the ROD. *See* Ex. NRC-012 at License Condition 9.2. With that said, the Licensing Board erred when imposing this license condition, as Powertech already committed to properly plug and abandon or otherwise mitigate historical or licensee-drilled boreholes *in the event they pose a potential impact to recovery solution containment*. Indeed, Powertech's TR RAI responses show that such a commitment was made: "Powertech commits to properly plugging and abandoning or mitigating any of the following [including historical wells and exploration holes, holes drilled by Powertech for delineation and exploration, and any wells failing MIT] *should they pose the potential to impact the control and containment of well field solutions within the project area*." *See* Ex. APP-016-B at 55 (emphasis added).[52] The question of whether there are any improperly plugged boreholes that potentially could impact the control and containment of wellfield solutions will be determined through pump testing and other procedures described below. Thus, the Licensing Board fails to acknowledge Powertech is already committed to this type of borehole/historical well plugging in the license issued by NRC Staff.

Second, a Licensing Board is only empowered to offer rulings on matters properly before it and is restricted from *sua sponte* raising issues not raised by the parties.[53] Pursuant to 10 C.F.R. §

[52] License Condition 9.2 specifically requires Powertech to conduct operations in accordance with the commitments in the June 28, 2011, TR RAI response (Accession No. ML112071064).
[53] A Licensing Board has the power to raise *sua sponte* any significant environmental or safety issue in operating license hearings, although this power should be used sparingly in operating license cases. *See* 10 C.F.R. § 2.340(a); *see also Consolidated Edison Co. of N.Y.*, (Indian Point Nuclear Generating Units 1, 2 & 3), ALAB-319, 3 NRC 188, 190 (1976).

2.340(a) (formerly § 2.760a) and a Commission memorandum, a Licensing Board may raise a safety issue sua sponte when sufficient evidence of a serious safety matter has been presented that would prompt reasonable minds to inquire further.[54]

In the instant case, the relevant issue under Contention 3 was the potential for recovery solution migration from site wellfields due to improperly plugged and/or abandoned boreholes. It did not, however, include argument on criteria or conditions for locating and plugging *all* historical or licensee drilled boreholes/wells within wellfield areas during the course of the phased development of the Project. None of the argument or testimony pertained to plugging and abandoning *all* boreholes prior to the commencement of licensed operations in a given wellfield. Furthermore, the wording of the license condition appears to be contrary to the standard procedures proposed by the licensee to ensure proper plugging and abandoning of such boreholes, as necessary, because it suggests that those activities be conducted "prior to conducting tests" for a wellfield data package, which includes pump testing or a primary method for determining whether any historical boreholes or wells cause communication with overlying or underlying aquifers. As testified by Powertech expert witnesses, pump testing is one of several commitments Powertech has made to identify improperly plugged and abandoned boreholes that could impact wellfield-specific operations.[55] There is no evidence offered by the Licensing Board that this rises to the level of a "serious safety or environmental issue," as it was not raised by the parties and was addressed through a Powertech commitment and an NRC safety (SER)[56] and environmental (FSEIS) review. Thus, the Licensing Board committed a clear error of law and fact when imposing this condition as its substance was not

[54] *See Wis. Elec. Power Co.*, (Point Beach Nuclear Plant, Units 1 & 2), LBP-82-24A, 15 NRC 661, 664 (1982) (finding that the regulations limiting the Board's authority to raise *sua sponte* issues restrict its right to consider safety, environmental or defense matters not raised by parties).
[55] *See* Powertech Ex. APP-037 (Lawrence) at 26, ¶ A.60, *citing* Powertech Ex. APP-016-B at 55-57. In addition to pump testing, other methods include use of historical records, evaluating color infrared imagery, performing field investigations, and performing potentiometric surface evaluation.
[56] It is important to note that neither CI nor the Tribe ever challenged the findings of NRC Staff's safety review or its SER.

properly before it and, unwittingly, is inconsistent with standard ISR industry practices.[57] Thus, the license condition should be removed from NRC License No. SUA-1600, and Powertech should be held to its previous license commitment noted above.

IV. CONCLUSION

For the reasons discussed above, Powertech respectfully requests that the Commission grant this Petition for Review of LBP-15-16 and reverse the Licensing Board's findings on Contentions 1A and 1B. Furthermore, the Commission should order the Licensing Board to remove the additional license condition under Contention 3.

Respectfully Submitted,

/Executed (electronically) by and in accord with 10 C.F.R. § 2.304(d)/
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Dated: May 26, 2015

[57] The Licensing Board also copied the license condition from Strata Energy Inc.'s license SUA-1601 without considering site-specific differences between the Dewey-Burdock Project and Strata's Ross ISR Project; these include flowing artesian conditions at Dewey-Burdock, which make it easier to identify improperly plugged boreholes, and documentation that historical TVA boreholes were plugged in accordance with State regulations. *See* Powertech Proposed Findings of Fact at 87-88, ¶¶ 10.153 through 10.154.

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 26, 2015
(Dewey-Burdock In Situ Uranium Recovery Facility)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "**BRIEF OF POWERTECH (USA), INC. PETITION FOR REVIEW OF LBP-15-16**" in the above captioned proceeding have been served via the Electronic Information Exchange (EIE) this 26th day of May 2015, 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)/
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