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MINERALS & MINING PROGRAM

STATE OF SOUTH DAKOTA  
DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES  
BOARD OF MINERALS AND ENVIRONMENT

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IN THE MATTER OF THE APPLICATION OF  
POWERTECH (USA) INC. FOR A LARGE  
SCALE MINING PERMIT (Dewey-Burdock  
Project) (designated Permit No. 480).

POWERTECH'S  
MOTION TO ALLOW NARRATIVE  
TESTIMONY

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Powertech (USA) Inc. ("Powertech") hereby moves Hearing Chair Rex Hagg for entry of an order allowing testimony in narrative form during the hearing in this matter. This motion is made on the grounds and for the reasons set forth below.

SDCL 1-26-19(1) states that in agency contested cases, "[t]he rules of evidence as applied under statutory provisions and in the trial of civil cases in the circuit courts of this state . . . shall be followed." Rule 611(a) of the South Dakota Rules of Evidence provides:

The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to:

- (1) Make the interrogation and presentation effective for the ascertainment of the truth;
- (2) Avoid needless consumption of time; and
- (3) Protect witnesses from harassment or undue embarrassment.

SDCL 19-14-18.

South Dakota Rule of Evidence 611(a) is almost identical to Rule 611(a) of the Federal Rules of Evidence, which states:

**(a) Control by the Court; Purposes.** The court should exercise reasonable control over the mode and order of examining witnesses and presenting evidence so as to:

- (1) make those procedures effective for determining the truth;
- (2) avoid wasting time; and
- (3) protect witnesses from harassment or undue embarrassment.

In *United States v. Pless*, 982 F.2d 1118 (7th Cir. 1992), the court applied Fed.R.Evid. 611(a) to the issue of whether or not it was proper to allow testimony in narrative form. The court held:

On such evidentiary matters we give special deference to the trial court, reversing the district judge's decision to admit testimony only where there has been a clear abuse of discretion (*United States v. Allen*, 930 F.2d 1270, 1273 (7th Cir. 1991) ). That is not at all the case here: Fed.R.Evid. 611(a) provides district judges with authority to allow testimony in narrative form rather than as answers to specific questions (see 3 Jack Weinstein and Margaret Berger, *Weinstein's Evidence* ¶ 611[01], at 611-19-611-20 (1991)), and we ourselves have said that "[t]here is . . . nothing particularly unusual, or incorrect, in a procedure of letting a witness relate pertinent information in a narrative form as long as it stays within the bounds of pertinency and materiality" (*United States v. Garcia*, 625 F.2d 162, 169 (7th Cir. 1980)). Indeed, both *Weinstein's Evidence* and *Garcia* suggest that the narrative may well be the preferable form in some respects.

*Pless* at 1123.

In *In re Air Crash Disaster at Stapleton Int'l., Denver, Colorado, on November 15, 1987*, 720 F.Supp.1493 (D. Colo. 1989), the court also applied Fed.R.Evid. 611(a) to allow narrative testimony of deposition summaries to be used, and noted that due to "the efficient application of summary testimony techniques, and elongated trial days, a trial estimated to extend over a six week period was completed in less than three weeks." *In re Air Crash Disaster at Stapleton Int'l. Airport* at 1504 (footnote omitted).

The hearing in the instant matter is scheduled for two weeks, and the parties have identified numerous expert and lay witnesses. Allowing testimony in narrative form will be efficient and will avoid needless consumption of time, and will still be effective for the ascertainment of the truth.

Dated this 6<sup>th</sup> day of September, 2013.

BENNETT, MAIN & GUBBRUD, P.C.  
Attorneys for Powertech

By Max Main  
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POWERTECH'S  
MOTION IN LIMINE

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Various parties have identified legislative committee hearing records, city council meeting records, printouts from advocacy web sites, newspaper articles, and records, reports, statements, or data compilations of **nonpublic** entities as potential exhibits. If such documents are offered to prove the truth of any matter asserted therein, they are inadmissible hearsay and should be excluded. SDCL §§19-16-1 and 4.

In addition, the documents raise authentication and relevancy issues that will need to be addressed, depending on which of the documents are actually offered into evidence. SDCL 19-17-1 and SDCL 19-12-2.

Dated this 6<sup>th</sup> day of September, 2013.

BENNETT, MAIN & GUBBRUD, P.C.  
Attorneys for Powertech

By



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**CERTIFICATE OF SERVICE**

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I, MAX MAIN, as one of the attorneys for Powertech (USA) Inc., do hereby certify that on the 6th day of September, 2013, I caused the original of the following documents:

- 1. POWERTECH'S MOTION TO ALLOW NARRATIVE TESTIMONY;**
- 2. POWERTECH'S MOTION IN LIMINE; and**
- 3. CERTIFICATE OF SERVICE,**

to be filed with:                      Mike Cepak  
   Minerals & Mining Program - DENR  
   Foss Building  
   523 E. Capitol Ave.  
   Pierre, SD 57501-3182

and full, true and complete copies of said documents to be served upon the following named persons at their last known mailing addresses, as follows:

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CUSTER, SD 57730

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by depositing the same in the United States Mail in Belle Fourche, South Dakota with first class postage thereon fully prepaid, in envelopes addressed as above.

  
MAX MAIN