

STATE OF SOUTH DAKOTA MINERALS & MINING PROGRAM
DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES
BOARD OF MINERALS AND ENVIRONMENT

IN THE MATTER OF THE LARGE
SCALE MINE PERMIT APPLICATION
OF POWERTECH (USA) INC.

**OBJECTION TO POWERTECH'S MOTION
TO ALLOW NARRATIVE TESTIMONY**

The Clean Water Alliance CWA, by and through its attorney, hereby objects to the Motion of Powertech To Allow Narrative Testimony (hereinafter, "Motion").

In its Motion, Powertech fails to state what testimony of what witness it proposed to present in narrative form. This makes a response by this Intervenor and a determination by the Board of propriety more difficult. Therefore, the CWA objects in general to such a procedure being utilized in these proceedings.

In support of its Motion, Powertech sites no South Dakota case law supporting the use of narrative form testimony, but merely the similarity between SDCL 1-26-19(1) and Federal Rule of Evidence 611(a) as to the authority of a "court" to "exercise reasonable control over the mode and order of examining witnesses." See, Powertech's Motion, p. 1. It then cites decades old Seventh Circuit U.S. Court of Appeals criminal cases, *United States v. Pless*, 982 F.2d

1118, 1123 (7th Cir. 1992) and *United States v. Garcia*, 625 F.2d 162, 169 (7th Cir. 1980), as well as a District Court, not Court of Appeals case of *In re Air Crash Disaster at Stapleton Int'l, Denver, Colorado*, 720 F.Supp. 1493 (D.Colo. 1989), as authority.

While these cases lend some support that in “some respects,” the use of narrative form testimony “may well be preferable,” [*Pless*, 982 F.2d at 1123], the cases reveal the limited nature and circumstances in which such testimony was utilized in those cases and not considered reversible error.

In *Pless*, a methamphetamine conspiracy case, the Court of Appeals found no “undue prejudice” in the prosecution’s question during cross-examination of the Defendant to “just tell the story” about an “untrue story that he had told to a chemical distributor,” which resulted in a “few sentences” of a narrative answer. *Ibid*, 982 F.2d at 1123. Powertech has not indicated whether it intends to elicit narrative answers constituting a few sentences or whether it proposes a more lengthy version. A more lengthy version would make cross-examination prejudicially more difficult due to the absence of a question and answer format which would specifically help frame issues for which evidence is being given. It would also create a greater likelihood that the narrative would stray beyond the bounds of pertinency and materiality resulting in increased time being wasted with

the making and arguing of objections thereto.

In *Garcia*, a murder and illegal conveyance of a weapon in prison prosecution, the prosecutor asked an FBI agent in charge of the respective criminal investigation, during direct-examination “Why?” he had visited the prison as part of his investigation. The agent responded with a relatively short narrative which took up some two pages of the entire trial transcript. Since the narrative given was outside “the bounds of pertinency and materiality,” it was struck from the record. *Ibid*, 625 F.2d at 169. At best, the case stands for the propriety of the use of limited narrative testimony where to do otherwise, the proceedings would “substantially” and “unnecessarily” lengthen a trial. *Ibid*. Powertech has made no showing how the use of question and answer examination of any particular witness would substantially and unnecessarily lengthen these highly important proceedings so as to make any use of such narrative the best form for the receipt of evidence by this Board.

Finally, in *In re Air Crash Disaster*, summary deposition testimony was allowed for limited witnesses in two categories to avoid delay under Federal Rule of Evidence 611(a): The first was a plaintiff’s witness for an unavailable witness under Federal Rule of Evidence 804(a). The second was in the presentation of otherwise “corroborative” witness testimony of a key witnesses, thereby

“lessening the delay of repetitive testimony.” Of particular note for this Board was the District Court’s reasoning that: “Because the applicability of summary testimony is tempered by the Court’s preference for oral testimony in court, the parties were neither requested nor allowed to present the testimony of key witnesses in summary form.” *Ibid.* As Powertech has not indicated what witness(es) it requests to use narrative testimony, whether the witness is or is not a key witness, a showing that the witness is unavailable and that opposing parties have had an opportunity for meaningful prior examination of the witness on this testimony, that it proposes to use deposition summaries to simply corroborate key witness testimony and avoid corroborative/repetitive testimony, the case is in apposite.

Furthermore, the deposition summaries permitted in *In re Air Crash Disaster* were “agreed to” by the attorneys for opposing parties and “[o]pposing counsel [were] given an opportunity to review the summary and the deposition for accuracy.” *Ibid.*, 720 F.Supp. at 1504. No summary has been provided by Powertech of the proposed narrative testimony and none has been agreed to upon such disclosure and review.

This case involves important proceedings before this Board regarding the first ISL uranium mine and mill in the Inyan Kara formation of the Black Hills and

any time reasonably spent on presenting and questioning material evidence relevant to the issues in these proceedings could not possibly involve undue delay. Powertech has previously indicated that it expects the presentation of its evidence to take three days. How much time prior to cross-examination and with what witness and regarding what testimony would be saved by the use of any narrative form answers remains unanswered.

For all these reasons and absent any such specificity as planned use of narrative testimony provided by Powertech, the Motion should be denied.

Dated this 17 day of August, 2013.

Respectfully submitted:



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Attorney for Clean Water Alliance

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MINERALS & MINING PROGRAM

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

IN THE MATTER OF THE LARGE
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OBJECTION AND RESPONSE TO POWERTECH'S MOTION IN LIMINE

The Clean Water Alliance CWA, by and through its attorney, hereby objects to the Motion of Powertech In Limine (hereinafter, "Motion").

Powertech, by its Motion, seeks to bar unnamed Intervenors from presenting and this Board considering evidence it describes as "inadmissible hearsay," contrary to SDCL §§19-16-1(relevancy) and 4 (hearsay). Certainly the Rules of Evidence applies, as does §19-16-40, the "Residual exception."

§19-16-40 states:

A statement not specifically covered by §§ 19-16-5 to 19-16-8, inclusive, or §§ 19-16-9 to 19-16-34, inclusive, but having equivalent circumstantial guarantees of trustworthiness, is not excluded by § 19-16-4, if the court determines that:

- (A) The statement is offered as **evidence of a material fact**;
- (B) The statement is **more probative** on the point for which it is offered **than any other evidence which the proponent can procure** through reasonable efforts; and
- (C) The general purposes of chapters 19-9 to 19-18, inclusive, and the **interests of justice will best be served** by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the

adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant. (Emphasis added).

Dated this 18 day of September, 2013.

Respectfully submitted,



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Attorney for Clean Water Alliance

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JOINING MOTION RESPONSES OF
BLACK HILLS WILD HORSE SANCTUARY

The Clean Water Alliance, by and through its attorney, and Liliias Jarding, "A" Status Participant, hereby join the responses and arguments, reasoning and authority therein, submitted to the Board of Minerals and Environment by the Black Hills Wild Horse Sanctuary, Susan Watt and Dayton Hyde, including:

1. Response to Powertech's Motion to Allow Narrative Testimony;
2. Response to Powertech's Motion in Limine.

Dated this 11th day of September, 2013.

Respectfully Submitted,



BRUCE ELLISON
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Attorney for Clean Water Alliance

Dated this 11th day of September, 2013.



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

**IN THE MATTER OF THE LARGE
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OF POWERTECH (USA) INC.**

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CERTIFICATE OF SERVICE

It is hereby certified that a true and correct copy of the Clean Water Alliance's Objection to Powertech's Motions to Allow Narrative Testimony and to Motion in Limine, together with CWA's Joing Motion Responses of Wild Horse Sanctuary were mailed, US postage paid to:

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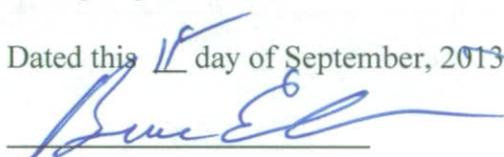
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Dated this 15 day of September, 2013.



A handwritten signature in blue ink, appearing to read "Bene El", is written over a horizontal line.