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STATE OF SOUTH DAKOTA
DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES
WATER MANAGEMENT BOARD

IN THE MATTER OF WATER PERMIT
APPLICATIONS 2685-2 AND 2686-2,
POWERTECH (USA) INC.

POWERTECH'S
RESPONSE TO WILD HORSE
SANCTUARY'S MOTION TO
DISCLOSE and REQUEST
FOR PROTECTIVE ORDER

IN THE MATTER OF THE 2012
GROUNDWATER DISCHARGE PLAN
APPLICATION SUBMITTED BY POWERTECH
(USA) INC.

This is Powertech's response to the Motion to Disclose filed by the Black Hills Wild Horse Sanctuary, Susan Watt and Dayton Hyde.

Powertech Uranium Corporation ("Powertech") is a publicly traded company on the Toronto Stock Exchange. As such, Powertech is subject to Canadian law and Canada's Personal Information Protection and Electronic Documents Act ("PIPEDA"). The undersigned attorney has been advised by Canadian counsel that this Act prohibits the disclosure of personal information (*i.e.* shareholder information) to third parties under most circumstances unless the shareholder consents¹. If personal shareholder information is wrongfully disclosed, Powertech faces possible monetary sanctions and civil lawsuits for violating PIPEDA. PIPEDA, 2000, ch.5 s. 1-50, S.C. 2000 (Can.)

Powertech is committed to conducting its business in conformance with the laws of the United States and the nation of Canada. The Motion to Disclose filed by Wild Horse Sanctuary ("WHS") places Powertech in the center of a conflict between the laws of Canada and the Rules of Civil Procedure for the State of South Dakota. In an effort to comply with South Dakota's discovery procedures, Powertech provided shareholder information to legal counsel for WHS only after a very stringent confidentiality agreement was negotiated. WHS counsel now seeks to publicly disclose this protected personal shareholder information to his clients and the public.

WHS argues that Canada's laws should not be followed in these proceedings. But Courts have held that when a conflict such as this arises, each case should be evaluated on an individual basis and Courts should recognize and comply with foreign laws, such as PIPEDA, when appropriate. *Affordable Healthcare, LLC v. Protus IP Solutions Inc.*, 2009 WL 975150.

¹ The Privacy Commissioner of Canada has opined that an order of a foreign court cannot compel disclosure of personal information. www.priv.gc.ca/media/nr-c/2004/sub-usapa-04818-e.asp.

The United States Supreme Court wrote,

American Courts, in supervising pretrial proceedings, should exercise special vigilance to protect foreign litigants from the danger that unnecessary, or unduly burdensome, discovery may place them in a disadvantageous position . . . [W]e have long recognized the demands of comity² in suits involving foreign states, either as parties or as sovereigns with a coordinate interest in the litigation. American Courts should therefore take care to demonstrate due respect for any special problem confronted by the foreign litigant on account of its nationality or the location of its operations and for any sovereign interests expressed by a foreign state.

Societe Nationale Industrielle Aerospatiale v. U.S. Dist. Court for Southern Dist. of Iowa, 482 U.S. 522, 546, 107 S.Ct. 2542, 96 L.Ed.2d 461 (1987).

Good cause exists for denying the Motion to Disclose.

Powertech is committed to conducting its business in conformance with the laws of the State of South Dakota, the United States and the nation of Canada. However, Powertech and its employees face possible monetary sanctions and civil lawsuits if this personal shareholder information is publicly disclosed.

By enacting PIPEDA, Canada clearly expressed its national interest in protecting personal information from public disclosure. "PIPEDA also does not distinguish between the privacy interests of Canadians and Americans." *AGV Sports Group Inc. v. Protus IP Solutions Inc.*, 2010 WL 1529195.

There is no legitimate need for public disclosure of this personal shareholder information. Mr. Hickey's clients do not have a need to know this personal shareholder information. The shareholder information is not germane to the issues before this Board. The potential harm to Powertech and its shareholders far exceeds any alleged benefit of disclosure. Disclosure of this information may seriously impact the interests of individuals who are not parties to this proceeding; *i.e.* Powertech's shareholders. The Motion to Disclose should be denied.

² "Comity refers to the spirit of cooperation in which a domestic tribunal approaches the resolution of cases touching the laws and interests of other sovereign states." *Societe Nationale Industrielle Aerospatiale v. U.S. Dist. Court for Southern Dist. of Iowa*, 482 U.S. 522, 544, 107 S.Ct. 2542, 96 L.Ed.2d 461 (1987).

REQUEST FOR PROTECTIVE ORDER

In the alternative, if WHS counsel seeks to disclose this personal information to his clients or the public, a protective order should be entered requiring WHS counsel to comply with the following procedures:

1. WHS must request an *in camera* hearing prior to any disclosure;
2. WHS must identify the witness who will testify about the personal shareholder information it wishes to disclose;
3. WHS must identify exactly what personal shareholder information it wishes to disclose;
4. WHS must demonstrate that the identified personal shareholder information is "relevant evidence"³ that is germane to an issue before the Board or that his client has a legitimate need to know the identified personal shareholder information; and
5. WHS must demonstrate that the probative value of disclosing the personal shareholder information outweighs any potential prejudice to Powertech or its shareholders.

These procedures will allow the chairman to determine what, if any, disclosure is appropriate. Furthermore, these procedures will help preserve the interests of Canada in protecting personal information without interfering with the interests of this Board in considering relevant evidence.

"American courts should . . . take care to demonstrate due respect for any special problem confronted by the foreign litigant on account of its nationality or the location of its operations." *Id.* Because this situation could not be avoided by Powertech and was not self imposed, it is appropriate to require WHS counsel to follow these simple procedures

³ "Relevant evidence" is defined by SDCL 19-12-1 as evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

before disclosing personal shareholder information to his clients or the public in these proceedings.

WHEREFORE, Powertech requests that the Motion to Disclose be denied. In the alternative, a protective order should be issued requiring WHS legal counsel to follow simple procedures before disclosing any personal shareholder information to his clients or the public.

Powertech also requests that the Motion to Disclose be considered *in camera*.

Dated this 12th day of September, 2013.

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