

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of)
)
POWERTECH (USA) INC.,) Docket No. 40-9075-MLA
)
(Dewey-Burdock In Situ Uranium Recovery) September 24, 2018
Facility))

**OGLALA SIOUX TRIBE’S RESPONSE TO
THE COMMISSION’S AUGUST 30, 2018 ORDER**

On August 30, 2018, the Nuclear Regulatory Commission (“NRC” or “Commission”) issued an Order inviting the parties in this proceeding to provide their views on how the agency should respond to the United States Court of Appeals for the District of Columbia’s ruling in *Oglala Sioux Tribe v. NRC*, 896 F.3d 520 (D.C. Cir. 2018). As acknowledged by the Commission, the D.C. Circuit Court held that the NRC violated the National Environmental Policy Act (NEPA) in connection with the NRC’s use of an irreparable harm standard when considering suspension or vacatur of Powertech’s license following the identification of a deficiency in the agency’s NEPA analysis. The D.C. Circuit Court declined to vacate Powertech’s license and instead remanded the case back to the Commission for further proceedings consistent with the Court’s opinion. The Commission’s Order requested that the parties focus on the question of what legal standard the NRC should use in evaluating whether to vacate Powertech’s license. The Oglala Sioux Tribe (“Tribe”) hereby provides its views in response to the Commission’s invitation.

The relevant standard starts with the Administrative Procedure Act (APA), 5 U.S.C. § 706. Under the APA, as set out by the *Oglala Sioux Tribe* opinion, “the reviewing court shall ... hold unlawful and set aside agency action ... found to be ... not in accordance with law” 896 F.3d at 536 *quoting* 5 U.S.C. § 706(2)(A). Thus, the APA creates a presumption in favor of setting aside the illegally-issued Powertech license.

However, the *Oglala Sioux Tribe* Court also observed that the presumptive APA relief – hold unlawful and set aside the license – is tempered by established federal court precedent as applied in *Allied-Signal, Inc. v. NRC*, 988 F.2d 146 (D.C. Cir. 1993). *Allied-Signal, Inc.* involved an agency rule and held that “[t]he decision whether to vacate depends on ‘the seriousness of the order’s deficiencies (and thus the extent of doubt whether the agency chose correctly) and the disruptive consequences of an interim change that may itself be changed.’” 988 F.2d at 151 (citations omitted).

Under the relevant APA standard, previous holdings in these proceedings, and the lack of competent evidence in the record of disruptive effect, the Commission should vacate the license pending the outcome of NRC Staff’s remedy of the established violations of NEPA. *Id.* Powertech and NRC Staff have identified no evidence in the administrative record of a disruptive effect that would flow from setting aside the license pending full NEPA compliance. There is only Powertech counsel’s representations during oral argument that Powertech might suffer economic harms. *Oglala Sioux Tribe*, 896 F.3d at 538. Indeed, there is no evidence in the administrative record, and none was presented in the recently completed briefing to the Atomic Safety and Licensing Board (“ASLB”), that setting aside the license would have a disruptive effect on Powertech’s stock price or NRC Staff. Further, the statements of Powertech’s counsel about a plummet in Powertech stock price now have no relevance in light of the newly

refashioned and merged publicly traded company that ultimately controls Powertech, and therefore the license. See www.azargauranium.com/azarga-uranium-and-urz-energy-complete-merger/ (last visited September 24, 2018).

Unlike the examination of the revocation of a license in the present matter, the Court in *Allied-Signal, Inc.* had found a serious deficiency in a rule of general application controlling how the Commission charged fees for its work, as it was unsupported by the administrative record. In contrast to the impact to a private party, *Allied Signal* found that the disruption *to the agency* that would be caused by vacating the agency action would be significant. *Id.* The *Allied Signal* case turned on the fact that setting aside the rule would force the Commission to refund all fees collected under the rule, without the possibility of recouping those monies if the rule was subsequently found to be supportable. *Id.* Here, the revocation of the license would have no agency-wide impact nor cause disruption to the agency.

Instead of disruption, setting aside the license allows the NRC Staff to consider various alternatives, mitigation measures, and potential license conditions based on a clean slate and informed by a lawful NEPA analysis. *Sierra Club v. Marsh*, 872 F.2d 497, 500 (1st Cir. 1989). (“[T]he harm at stake is a harm to the environment, but the harm consists of the added risk to the environment that takes place when governmental decisionmakers make up their minds without having before them an analysis (with prior public comment) of the likely effects of their decision upon the environment.”). Here, the fact that the license is based on a serious deficiency in the Commission’s compliance with NEPA with respect to its analysis of impacts to Native American cultural resources at the proposed Dewey-Burdock site is well established in the record and previous rulings. 896 F.2d at 536 (“[t]he seriousness of the NEPA deficiency is particularly clear here...”).

Thus, there is no evidence in the Commission’s administrative record that addresses any harm that would flow from a decision to vacate the Powertech license. As such, the Commission may properly deploy the presumptive APA remedy and set aside the license based on the existing rulings, findings, and evidentiary record.

Alternatively, should the Commission consider leaving the license in effect, any such decision should be preceded by briefing and an opportunity for the parties (through the ASLB or otherwise) to establish competent evidence on all *Allied Signal* considerations, especially Powertech and NRC Staff’s burden to demonstrate disruptive effect. The D.C. Circuit Court recognized that neither the Commission nor the ASLB “examined what the consequences would be for Powertech were its license vacated or suspended until the NRC completed its NEPA review. *See* NRC Order, 84 N.R.C. at 245 (J.A. 268); ASLB Initial Decision, 81 N.R.C. at 657-58 (J.A. 456-57). Nor did those orders examine the potential consequences for the Tribe.” 896 F.3d at 537. Once the evidentiary record is created and argument presented, the Commission may make a reasoned determination as to whether to set aside, suspend or otherwise affect the Powertech license during the pendency of the administrative proceedings.

Lastly, the D.C. Circuit found that “the issue here is not just what to do about a single agency error, but what to do about the validity of an NRC practice that permits NEPA-deficient licenses to remain in place unless an intervenor can show irreparable harm.” 896 F.2d at 537. The court also found that “the standard that the Commission applied in permitting Powertech’s license to remain in effect is inconsistent with NEPA....” *Id.* at 538. Thus, the Commission must address this larger, systemic flaw through a rulemaking proceeding, such that the Commission’s regulations are consistent with NEPA’s purposes and procedures.

Respectfully submitted this 24th day of September, 2018.

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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))

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing RESPONSE TO THE COMMISSION’S AUGUST 30, 2018 ORDER in the above-captioned proceeding were served via the Electronic Information Exchange (“EIE”) on the 24th day of September 2018, which to the best of my knowledge resulted in transmittal of same to those on the EIE Service List for the captioned proceeding.

/s/ signed electronically by _____

Jeffrey C. Parsons
Western Mining Action Project