

September 24, 2018

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 Facility))

NRC STAFF'S RESPONSE TO ORDER DATED
AUGUST 30, 2018

The U.S. Court of Appeals for the District of Columbia Circuit recently issued a decision in *Oglala Sioux Tribe v. NRC*,¹ in which the court reviewed one aspect of the Commission's decision in CLI-16-20.² Specifically, the court held that the NRC violated the National Environmental Policy Act (NEPA) when, following the NRC's self-identification of a "significant deficiency" in the agency's NEPA analysis of Powertech's license application, the NRC applied an "irreparable harm" standard in determining whether the license should be suspended or vacated.³ The court remanded the case to the Commission for further proceedings consistent with the opinion. Pursuant to the August 30, 2018 order issued by the Secretary of the Commission, the Staff herein provides its views as to how the agency should respond to the remand.

¹ 896 F.3d 520 (D.C. Cir. 2018).

² *Id.* at 526–27. The court concluded that the Commission's decision in CLI-16-20 "as a whole, is not final." *Id.* at 527. But the court took review, under the collateral order doctrine, of one ruling contained in CLI-16-20—the decision to leave the Powertech license in effect. *Id.* at 527–30. See *Powertech (USA), Inc.* (Dewey-Burdock In Situ Uranium Recovery Facility), CLI-16-20, 84 NRC 219, 245 (2016).

³ *Id.* at 538–39.

The court found that the Commission's decision to leave Powertech's license in effect absent a showing of irreparable harm was, under the circumstances, inconsistent with NEPA. But, in so ruling, it did not decide that the Commission "may never leave in place a license that its Staff previously issued but that the Commission later finds NEPA-deficient," nor "that there are no protective conditions the Commission might impose that would justify leaving a license in place during an administrative remand intended to cure a NEPA deficiency."⁴ Further, in deciding to remand the case to the Commission rather than to suspend or vacate Powertech's license, the court found it significant that the Tribe will not, "for now," suffer harm from the continuing effectiveness of the license.⁵ The license is not currently (and to date, has never been) in use; the court noted Powertech's representation that it is unable to move forward with licensed activities as a result of a South Dakota permitting requirement barring construction until the NRC satisfies NEPA.⁶

For adjudicatory efficiency and regulatory clarity, the Commission should leave Powertech's license in effect until the Atomic Safety and Licensing Board issues its ruling on two pending motions for summary disposition. As the Commission is aware, the Staff and the Oglala Sioux Tribe have each sought summary disposition of the sole outstanding contention in this proceeding, Contention 1A.⁷ Briefing is now complete on those motions, which remain pending before the Board.⁸ The Board's ruling on these motions will provide information

⁴ *Id.* at 538.

⁵ *Id.*

⁶ *Id.*; see Order (Granting in Part and Denying in Part Request to Take Judicial Notice) (Jan. 9, 2018) (unpublished) (ADAMS Accession No. ML18009A776).

⁷ See NRC Staff's Motion for Summary Disposition of Contention 1A (Aug. 17, 2018) (ML18229A343); Oglala Sioux Tribe's Motion for Summary Disposition (Aug. 17, 2018) (ML18229A341).

⁸ See Powertech (USA) Inc's Response in Support of NRC Staff Motion for Summary Disposition of Contention 1A (Aug. 31, 2018) (ML18243A458); NRC Staff's Response to Oglala Sioux Tribe's Motion for Summary Disposition of Contention 1A (Sept. 21, 2018) (ML18264A234); Powertech (USA) Inc.'s Response in Opposition to the Oglala Sioux Tribe's Motion for Summary Disposition of Contention 1A (Sept. 21, 2018) (ML18264A266); Oglala Sioux Tribe's Response in Opposition to NRC Staff's Motion for

relevant to resolving the question posed here by the Commission and, indeed, potentially render it unnecessary.

If the Board grants the Staff's motion for summary disposition of Contention 1A, and terminates the adjudication, the Board necessarily will have found that the Staff has complied with NEPA. In that scenario, because the factual predicate for the court's remand would no longer exist, it would be unnecessary to further assess whether to suspend the effectiveness of the license. If, by contrast, the Board grants the Tribe's motion for summary disposition, its stated rationale for doing so will encompass a broader factual record developed since the Commission's decision in CLI-16-20. Either circumstance has the potential to materially alter the factual basis underlying the court's ruling in *Oglala Sioux Tribe v. NRC*. For these reasons, it would be appropriate for the Commission to allow the license to continue in effect until the Board has resolved the pending motions. Further, allowing Powertech's license to continue in effect for this limited period of time is consistent with the court's remand; the court declined to immediately suspend the effectiveness of the license on the ground that the interests of the Tribe will not be harmed in the near term by the leaving the license in place—a circumstance that will not change during the pendency of this adjudication.

If the Board does not grant the Staff's motion for summary disposition, suspending the effectiveness of, or otherwise conditioning, the license may well be an appropriate remedy, pending the ultimate resolution of Contention 1A. To determine whether to take such action, the Commission should consider the totality of the facts and circumstances presented in this case. Consistent with the court's ruling, the Commission would have the opportunity to consider and weigh, among other factors, the significance of the remaining NEPA deficiency, the prospects for its timely resolution, the potential disruptive consequences to the parties (including

Summary Disposition of Contention 1A (Sept. 21, 2018) (ML18264A346); see also Order (Establishing Procedures for Filing Motions for Summary Disposition), at 7 (Jul. 19, 2018) (unpublished) (ML18200A329).

consequences for Powertech in light of its representations both about economic harm and its inability to move forward with licensed activities until the contention is resolved), the nature of the cultural-resource protections that the license imposes on Powertech, and the public interest.⁹

Respectfully submitted,

/Signed (electronically) by/
Emily Monteith
Emily Monteith
Counsel for the NRC Staff

Dated at Lisle, Illinois
this 24th day of September, 2018.

⁹ See *Oglala Sioux Tribe*, 896 F.3d at 538; *Allied-Signal, Inc. v. NRC*, 988 F.2d 146, 150–51 (D.C. Cir. 1993); see also *Pub. Employees for Environmental Responsibility v. Hopper*, 827 F.3d 1077, 1084 (D.C. Cir. 2016) (vacating EIS but not project lease or regulatory approvals based on “particularized analysis of the violations that have occurred, the possibilities for relief, and any countervailing considerations of public interest, including the social and economic costs of delay”) (internal quotation marks omitted) (quoting *NRDC v. NRC*, 606 F.2d 1261, 1272 (D.C. Cir. 1979)).

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CERTIFICATE OF SERVICE

Pursuant to 10 C.F.R. § 2.305, I hereby certify that copies of the “NRC Staff’s Response to Order Dated August 30, 2018” in this proceeding have been served via the Electronic Information Exchange (EIE), the NRC’s E-Filing System, this 24th day of September, 2018. Counsel for the Staff served those representatives exempted from filing through the EIE with copies of its update by electronic mail, also on September 24, 2018.

***/Signed (electronically) by/
Emily Monteith***

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