

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

BEFORE THE COMMISSION

In the Matter of:

POWERTECH (USA), INC.

(Dewey-Burdock In Situ Uranium Recovery
Facility)

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) Docket No.: 40-9075-MLA
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) Date: October 19, 2018
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POWERTECH (USA), INC.'S RESPONSE TO PLEADINGS ON LEGAL STANDARDS

Powertech (USA), Inc. (Powertech), by its undersigned counsel of record, hereby submits this Response to the United States Nuclear Regulatory Commission's (the "Commission") inquiry on legal standards regarding the appropriate standard to be applied to the combined source and 11e.(2) byproduct material license granted to Powertech by the Nuclear Regulatory Commission (NRC) Staff on remand from the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit). This pleading is intended to provide the Commission with a response to the pleadings submitted on September 24, 2018, by both the NRC Staff and the Oglala Sioux Tribe (hereinafter the "Tribe). It is Powertech's position that the standards outlined in its September 24, 2018, response to the Commission's August 30, 2018, Order sets forth the appropriate standards that should be followed when and if the Commission deems it appropriate to address the D.C. Circuit's decision.

Initially, as argued by both Powertech and NRC Staff, the proceedings at the Atomic Safety and Licensing Board (hereinafter "Licensing Board") level are at a critical stage where motions for summary disposition are being entertained to resolve Contention 1A, the sole

remaining contention and the subject of the D.C. Circuit decision. As cited by both Powertech and NRC Staff, the D.C. Circuit decision specifically did not decide the issue of whether the Commission “may never leave in place a license that its Staff previously issued but that the Commission later finds NEPA [National Environmental Policy Act] deficient.” *See Oglala Sioux Tribe v. NRC*, 896 F.3d 520, 538 (July 11, 2018). Given the potential resolution of this remaining contention, which would effectively negate the D.C. Circuit’s upholding of the Licensing Board’s and the Commission’s finding that there was a NEPA violation when completing the Dewey-Burdock Final Supplemental Environmental Impact Statement (FSEIS), it would be prudent for the Commission to delay action on the D.C. Circuit’s decision until such time as the Licensing Board has had the opportunity to rule on the pending summary disposition motions, which have been before the Licensing Board for close to a month.

The Tribe states that there is no evidence in the record that the setting aside of Powertech’s license would cause a disruptive effect. Such an assessment would be contrary to the findings of the D.C. Circuit that stated, “we are concerned about the disruptive consequences of vacating the license while the agency proceeds to satisfy NEPA...” *Id.* Powertech has stated repeatedly during arguments in pleadings before all three (3) aforementioned adjudicatory bodies that the company would suffer significant financial harm as a result of the setting aside of the license. Further, the recently completed merger involving Powertech’s parent company, Azarga Uranium Corp., as referenced by the Tribe in its filings does not change this. Indeed, Powertech has repeatedly argued that even NRC Staff’s previous proposal to resolve Contention 1A was “cost-prohibitive” and that the ongoing litigation with these matters bars the project from moving forward to complete required regulatory approvals with other agencies, including the State of South Dakota Department of Environment and Natural Resources (SD DENR), the United States

Environmental Protection Agency (EPA), and the Bureau of Land Management (BLM) that are necessary to commence site development and operations. This factor is further amplified by the fact that this financial harm continues to be incurred by Powertech *even with the license still in place*, as work continues for over eight (8) years to complete issues related to NEPA with repeated attempts by NRC Staff to resolve these issues. Nowhere in their argument does the Tribe demonstrate that Powertech would not suffer significant financial harm but to say that a “refashioned and merged publicly traded company that ultimately controls Powertech” negates that harm. This is not true, because post-merger, the Dewey-Burdock project continues to represent the new company’s initial development property and none of the new company’s assets are currently generating any cash flow. The new company must continue to raise financial resources from capital markets to continue the permitting effort, which already has been extremely protracted. Any change in the status of the company’s license for the Dewey-Burdock project would result in financial harm to the company, as represented to the D.C. Circuit.

The Tribe claims that setting aside the license would also result in allowing “NRC Staff to consider various alternative, mitigation measures, and potential license conditions based on a clean slate and informed by a lawful NEPA analysis.” Tribe Response at 3. This statement seemingly suggests that NRC Staff completely throw out its prior NEPA analysis and start over again. It is inconceivable that NRC Staff would have to “re-invent the wheel” where the Licensing Board already had determined that the Tribe bore some of the blame for the NEPA deficiency. Further, there already exists historic and cultural resource analyses in the FSEIS and the only remaining item dealt with the previously identified and agreed-upon NRC Staff approach, which the Tribe agreed to and then subsequently sought to change. Further, NRC Staff engaged a contractor to prepare a literature review report and provided said report to the

identified Native American Tribes, including the Tribe, invited to participate in the previously agreed-upon approach as background information for the proposed field survey effort. The information described in the literature and field observations reports developed by the selected contractor does not provide a basis for NRC Staff to alter its evaluation regarding the potential impacts to historic and cultural resources or its FSEIS conclusions. This information is not materially different from information already assessed by NRC Staff in the FSEIS and no new information about sites of historic, cultural or religious significance to these Tribes.

Accordingly, the information obtained by NRC Staff during the implementation of this portion of the previously agreed-upon approach does not materially affect the FSEIS' impact analysis and, as such, does not require further NRC Staff action.

Also, the Tribe's statement that NRC Staff can consider additional mitigation measures and license conditions falls short in that it completely ignores the existing license conditions for unanticipated discoveries during site development, the requirement for implementation of appropriate mitigation measures subject to NRC pre-operational inspection and, most importantly, the oft-mentioned programmatic agreement (PA). The Tribe, as well as other parties, are permitted to participate in the activities associated with the PA, which will provide the highest level of scrutiny moving forward and, ultimately, proper treatment of historic and cultural resources.

Moreover, no harm to historic or cultural resources will occur until EPA, BLM, and the State of South Dakota complete their work on other permits and authorizations. Even with the multitude of safeguards currently in place for Powertech's license, which have been found to be more than adequate in past licensing decisions, the Tribe's claim of potential harm is not ripe for consideration, because no actions towards site development are permitted to take place at this

time. Further conditioning of the license or a stay of the effectiveness of said license represents nothing more than a waste of time and resources and the only party to be harmed by such action would be Powertech.

Lastly, the Tribe's final claim that the Commission should consider a broad-based rulemaking to address the larger issue raised by the D.C. Circuit regarding the Commission's practice of maintaining a license despite a potential NEPA violation. This claim has no bearing on the instant case as this is a license-specific inquiry and, as noted by the D.C. Circuit, there can be circumstances where maintenance of a license can be sustained despite a NEPA violation. The instant case is one of those examples.

Therefore, for the reasons described above and as stated in its September 24, 2018 submission, Powertech respectfully requests that the Commission strongly consider the legal standards and additional information offered in this pleading when and if the Commission decides to conduct proceedings to implement the DC Circuit's decision. However, at the present

time, Powertech asserts that the Commission should await a ruling from the Licensing Board on NRC Staff's motion for summary disposition which, if granted, would cure the NEPA *procedural* defect discussed in the DC Circuit's decision.

Respectfully Submitted,

**/Executed (electronically) by and in
accord with 10 C.F.R. § 2.304(d)/
Christopher S. Pugsley, Esq.**

Dated: October 19, 2018

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**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing **“POWERTECH (USA) INC’S RESPONSE TO PLEADINGS ON LEGAL STANDARDS”** in the above-captioned proceeding have been served via the Electronic Information Exchange (EIE) this 21st day of September 2018, which to the best of my knowledge resulted in transmittal of the foregoing to those on the EIE Service List for the above captioned proceeding.

Respectfully Submitted,

**/Executed (electronically) by and in
accord with 10 C.F.R. § 2.304(d)/
Christopher S. Pugsley, Esq.**

Dated: October 19, 2018

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