

**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: September 24, 2018
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**POWERTECH (USA), INC'S RESPONSE TO COMMISSION INQUIRY 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 (DC Circuit). This pleading is intended to provide the Commission with Powertech's views on the appropriate legal standard for the instant case, given that the final remaining admitted contention is currently the subject of pending summary disposition motions from two (2) of the litigants in this proceeding. However, Powertech will also provide the Commission with its view on what legal standards should be applied should the Commission choose to implement the DC Circuit's mandate. For the reasons discussed below, Powertech respectfully submits that the proper legal standards to be applied can be found in existing Commission case law dealing with stays of the effectiveness of licenses and the fact-specific nature of the instant proceeding.

I. BACKGROUND AND PROCEDURAL HISTORY

Given that the administrative record of this proceeding involved multiple decisions from the Atomic Safety and Licensing Board (Licensing Board), two (2) petitions for review to the Commission, and one (1) appeal to the DC Circuit, Powertech incorporates its previous background and procedural history discussion by reference with the following additions.

In 2015, after a prolonged litigation and public hearing at which expert testimony was received, the Licensing Board issued LBP-15-16¹ where it was determined that, amongst other conclusions, Contentions 1A and 1B related to NEPA and the NHPA respectively should be sustained on behalf of the Oglala Sioux Tribe (hereinafter the “Tribe”) and the Consolidated Intervenor (hereinafter “CI”). Powertech and NRC Staff both appealed this determination to the Commission and, in CLI-16-20,² the Commission determined that the Licensing Board’s determinations on these two admitted contentions should be sustained. CLI-16-20 included a dissenting opinion from now-Chairman Svinicki in which she stated that the Licensing Board overruled the Advisory Council on Historic Preservation (ACHP), and that information needed to address the alleged deficiencies in the Final Supplemental Environmental Impact Statement (FSEIS) were not “reasonably available” and which would have concluded the proceeding, as NRC Staff would have possessed enough information to have produced an adequate FSEIS and the National Historic Preservation Act (NHPA) also would have been satisfied. Subsequent to the issuance of CLI-16-20, the Licensing Board granted an NRC Staff motion for summary disposition of Contention 1B concluding that the NRC Staff’s Tribal consultation process had

¹ See *In the Matter of Powertech (USA), Inc.* (Dewey-Burdock ISR Project), LBP-15-16, 81 NRC 618 (2015), *aff’d* CLI-16-20, 84 NRC 219 (2016).

² See *In the Matter of Powertech (USA), Inc.* (Dewey-Burdock ISR Project), CLI-16-20, 2016 NRC LEXIS 36 (2016).

satisfied the NHPA. *See In the Matter of Powertech (USA), Inc.* (Dewey-Burdock ISR Project), LBP-17-09, 86 NRC 167 (2017).

After the Commission issued CLI-16-20 in 2016, the Tribe appealed the Commission's determination to the DC Circuit. For purposes of this submission, the relevant portion of the DC Circuit's opinion, issued on July 20, 2018, addresses the finding by the Licensing Board regarding Contention 1A. In its opinion, the DC Circuit found that the *procedural* defect identified by the Licensing Board and upheld by the Commission with respect to historic and cultural resources for the Tribe was significant enough to require remand of the issue to NRC (i.e., the Commission) for further proceedings in accordance with its decision. *See generally Oglala Sioux Tribe v. U.S. Nuclear Regulatory Commission and United States of America*, No. 17-1059, slip op. (July 20, 2018). While the Court did make this finding, it did not give specific direction to the Commission as to how to decide whether, in light of the specific facts of the instant proceeding, the identified *procedural* defect should result in Powertech's license being stayed or vacated. More specifically, the DC Circuit specifically stated:

“To be clear, today we hold only that, once the NRC determines there is a significant deficiency in its NEPA compliance, it may not permit a project to continue in a manner that puts at risk the values NEPA protects simply because no intervenor can show irreparable harm. We do 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. That is, we do not decide that there is no version of a harmless error rule that the Commission may apply.”

Oglala Sioux Tribe, No 17-1059, slip op. at 32-33.

On August 17, 2018, both NRC Staff and the Tribe filed motions for summary disposition of Contention 1A based on their different perspectives. On August 31, 2018, Powertech filed a motion in support of NRC Staff's motion and no supporting motions for the Tribe were submitted. On September 21, 2018, Powertech and NRC Staff filed a response in opposition to

the Tribe's motion, and the Tribe filed a response in opposition to NRC Staff's motion. Now, the Commission has invited all parties to offer its views on what actions should be taken and what legal standards apply to implementation of the DC Circuit's opinion.

II. APPLICABLE LEGAL STANDARDS

It is Powertech's legal position that the standard to be applied when considering the DC Circuit's remand instruction starts with the well-understood principle for staying the effectiveness of a license. As a general matter, NRC regulations at 10 CFR § 2.1213 set forth the appropriate standard for determining whether a stay of the effectiveness of an NRC license or licensing action should be granted or denied. More specifically, 10 CFR § 2.1213(d) sets forth the standard for a stay to be considered by the Licensing Board:

- “(1) Whether the requestor will be irreparably injured unless a stay is granted;
- (2) Whether the requestor has made a strong showing that it is likely to prevail on the merits;
- (3) Whether the granting of a stay would harm other participants; and
- (4) Where the public interest lies.”

10 CFR § 2.1213(d) (2014).

Since no one of these four (4) factors is dispositive, a greater showing on one of the factors may lead to the need for less of a showing on the others. *See Cleveland Electric Illuminating Company* (Perry Nuclear Power Plant, Units 1 and 2), ALAB-820, 22 NRC 743, 746 n. 8 (1985). But, while this is the case, certain stay factors are considered to be more important, the most important of which is irreparable injury. *See Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), CLI-90-3, 31 NRC 219, 258 (1990). It is the established rule that a party is not ordinarily granted a stay of an administrative order without an appropriate showing of irreparable harm. *Permian Basin Area Rate Cases*, 390 U.S. 747, 773 (1968). A party must reasonably demonstrate, and not merely allege, irreparable harm. *Philadelphia Electric Co.*

(Limerick Generating Station, Units 1 and 2), ALAB-814, 22 NRC 191, 196 (1985), *citing Duke Power Co.* (Catawba Nuclear Station, Units 1 & 2), ALAB-794, 20 NRC 1630, 1633-35 (1984).

The second critical factor, a strong showing of a likelihood of success on the merits, requires more than a mere listing of the possible grounds for reversal. *Toledo Edison Co.* (Davis-Besse Nuclear Power Station, Units 1, 2, and 3), ALAB-385, 5 NRC 621 (1977). A party's expression of confidence or expectation of success on the merits is too speculative and is also insufficient. *Philadelphia Electric Co.* (Limerick Generating Station, Units 1 and 2), 22 NRC 191, 196 (1985), *citing Metropolitan Edison Co.* (Three Mile Island Nuclear Station, Unit 1), CLI-84-17, 20 NRC 801, 804-805 (1984) (finding that confidence or expectation of success on the merits of an appeal was too speculative). If an intervenor fails to properly demonstrate irreparable harm, then it must show that a reversal of NRC Staff's licensing decision is "not merely likely, but a *virtual certainty*." *Cleveland Electric Illuminating Co.* ALAB-820, 22 NRC at 746 n. 8 (emphasis added). This case is instructive in light of the DC Circuit's opinion directing the Commission to consider whether there is a showing of irreparable harm and, if unable to be made, the procedural NEPA defect can fall under a "no harm, no foul" scenario. It is instructive because the Tribe has been unable to show irreparable harm and, then, must show that reversal of NRC Staff's licensing decision is a virtual certainty. Indeed, the DC Circuit's July 20, 2018, decision stated that such a reversal is unlikely in the instant case:

"But we have not been given any reason to expect that the agency will be unable to correct those deficiencies, and we are concerned the disruptive consequences of vacating the license while the agency proceeds to satisfy NEPA."

Oglala Sioux Tribe, No.17-1059, slip op. at 33.

The current summary disposition motion submitted by NRC Staff is intended to resolve the *procedural* defect discussed by the DC Circuit by demonstrating that the provisions of 40 CFR §

1502.22 allowing satisfaction of NEPA when information is “unavailable,” especially considering that a literature search has not yielded anything material requiring a supplement of the FSEIS. A grant of this motion by the Licensing Board will cure this deficiency.

Further, the DC Circuit questioned whether a showing of irreparable harm can be made without an adequate survey of the Tribe’s cultural resources. *See id.* slip op. at 28. NRC Staff’s August 17, 2018, summary disposition motion submitted to the Licensing Board provides insight into this evaluation. The DC Circuit also opines on the safeguards the Commission can impose on a license to maintain it in place while a NEPA deficiency is addressed:

“Nor do we decide 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”

Id.

The instant case is a good example of such a scenario as Powertech’s license, like all other *in situ* uranium recovery (ISR) licenses issued by NRC Staff, have a standard license condition requiring identification of historic and/or cultural properties during site development and immediate cessation of activities in that area until the property can be adequately assessed and potential impacts mitigated or eliminated. *See e.g.*, Powertech Materials License SUA-1700, License Condition 9.8. Further, the Dewey-Burdock project is the subject of a 36 CFR § 800.12 programmatic agreement, which is the most rigorous form of joint historic and cultural resource assessment in an ongoing project, part of which includes additional, future tribal consultation and participating parties and multiple agencies including the Bureau of Land Management (BLM). Thus, it is critical for the Commission to review the FSEIS for this license, as well as applicable license conditions and factor the additional safeguards imposed by NRC Staff on project development activities. This will offer better clarity as to whether there is either an inability to

show irreparable harm or that irreparable harm simply will not be suffered by the Tribe during project development.³

Further, the Commission should also take into account additional facts associated with the licensing of Powertech's ISR project, including permits and authorizations required to be obtained from the United States Environmental Protection Agency (EPA) and the State of South Dakota. As noted in previous pleadings submitted by Powertech and oral hearings conducted by the Licensing Board and represented to the DC Circuit during oral argument, the State awaits action by both NRC and EPA to continue its large-scale mine permit and water rights administrative proceedings, which were stayed pending these two outcomes. These factors weigh heavily on an evaluation of the DC Circuit's mandate on remand, as they are instructive as to whether a "no harm, no foul" finding can be made. Indeed, the DC Circuit relied on this representation when delivering its decision:

"Powertech has further represented that a South Dakota permitting requirement independently bars it from moving forward with construction on the site until the NRC completes its compliance with NEPA."

Id. at 34.

Another instructive case to consider is the DC Circuit's recent January 19, 2018, decision in *Strata Energy*,⁴ where the Court found that application of a "no harm, no foul" approach can be applied to licenses issued despite the allegations of potential NEPA defects. The *Strata*

³ If an when the Commission decides to evaluate "irreparable harm" in the instant case, it should also consider the financial harm to Powertech stemming from a stay or vacatur of its license, which was expressly recognized by the DC Circuit:

"we are concerned about the disruptive consequences of vacating the license while the agency proceeds to satisfy NEPA...And it [Powertech] has represented to the court that its stock price 'would plummet' if the license were 'suspended, vacated, or revoked.'"

Oglala Sioux Tribe, No. 17-1059 slip op. at 34.

⁴ *Natural Resources Defense Council and Powder River Basin Resource Council v. U.S. NRC and the United States of America*, No. 16-1298, (January 19, 2018).

Energy case dealt with alleged NEPA defects associated with groundwater contamination and migration, which is perhaps the most compelling issue for ISR projects requiring the most stringent analysis. In that case, the Licensing Board unilaterally imposed a license requirement increasing the scope of well plugging and abandoning at the Ross ISR project site, even without a formal supplementation of the project's FSEIS. On appeal, the DC Circuit found that this action on a much more significant NEPA factor (i.e., groundwater protection) did not represent a NEPA deficiency warranting staying or vacating of its license. *See NRDC*, No-16-1298 slip op. at 21. This case provides a good substantive comparison when evaluating the DC Circuit's decision. In summary, even if the Licensing Board were to deny NRC Staff's motion on summary disposition, the license should be left in place and effective as nothing can proceed without additional authorizations and adequate safeguards exist to ensure protection of potentially unidentified historic or cultural resources.

Powertech also suggests that the Commission consider its doctrine on mootness when considering when and if to conduct proceedings in line with the DC Circuit's directive on remand. Generally, a case will be moot when the issues are no longer "live," or the parties lack a cognizable interest in the outcome. It is possible that the Licensing Board may rule on NRC Staff's August 17, 2018, motion for summary disposition and, if granted, will result in termination of the proceeding before the Licensing Board, as all admitted contentions will have been resolved. While aggrieved parties would continue to maintain their rights to petition the Commission for review of such a ruling, the need to implement the DC Circuit's mandate on remand will become moot. Thus, Powertech asserts that the Commission should refrain from any action on the DC Circuit mandate on remand until such time as the Licensing Board has reviewed and ruled upon NRC Staff's motion for summary disposition.

III. CONCLUSION

For the reasons described above, 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: September 24, 2018

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing **“POWERTECH (USA) INC’S RESPONSE TO COMMISSION INQUIRY ON LEGAL STANDARDS ”** in the above-captioned proceeding have been served via the Electronic Information Exchange (EIE) this 24th 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: September 24, 2018

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