

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)
)
NUCLEAR MANAGEMENT COMPANY, LLC) Docket Nos. 50-282-LR/ 50-306-LR
)
(Prairie Island Nuclear Generating Plant) ASLBP No. 08-871-01-LR
Units 1 and 2)

NRC STAFF'S RESPONSE SUPPORTING NORTHERN STATES POWER COMPANY'S
MOTION TO STRIKE PORTIONS OF THE PRAIRIE ISLAND INDIAN COMMUNITY'S REPLY

INTRODUCTION

Pursuant to 10 C.F.R. § 2.323(c), the Staff of the Nuclear Regulatory Commission ("NRC Staff" or "Staff") hereby files its response in support of the Motion to Strike¹ by Northern States Power Company, a Minnesota corporation ("NSPM" or "Applicant").² For the reasons presented by the Applicant, the Atomic Safety and Licensing Board ("Board") should strike the new arguments and supporting declaration proffered by the Prairie Island Indian Community ("PIIC" or "Petitioner").

BACKGROUND

This proceeding addresses NSPM's application to renew its operating license for Prairie Island Nuclear Generating Plant, Units 1 and 2 ("PINGP").³ On May 6, 2008, the NRC

¹ "Northern States Power Company's Motion to Strike Portions of the Prairie Island Indian Community's Reply" ("Motion") filed September 29, 2008.

² Formerly the two reactors were operated by Nuclear Management Company, LLC ("NMC"). On September 22, 2008, the NRC transferred the operating licenses to Northern States Power Company.

³ Letter from Michael D. Wadley, Site Vice President, Prairie Island Nuclear Generating Plant (continued. . .)

published a notice of receipt of the PINGP license renewal application ("LRA").⁴ On June 17, 2008, the NRC published a notice of acceptance for docketing and notice of opportunity for hearing on the LRA.⁵ In accordance with the NRC E-Filing rule, PIIC filed a Petition for Leave to Intervene,⁶ to which the Staff and Applicant filed timely answers.⁷ PIIC filed a reply to these answers, which included a new supporting declaration and new arguments.⁸ In its Reply, PIIC responded to an issue the Staff raised regarding standing.⁹ Reply at 4, n.1. The Applicant filed

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Units 1 and 2, Nuclear Management Company, LLC, dated April 11, 2008, transmitting application for license renewal for Prairie Island Nuclear Generating Plant Units 1 and 2, operating licenses DRF-42 and DPR-60, respectively, ADAMS Accession No. ML081130666.

⁴ "Nuclear Management Company, LLC; Notice of Receipt and Availability of Application for Renewal of Prairie Island Nuclear Generating Plant, Units 1 and 2 Facility Operating Licenses Nos. DPR-42 and DPR-60 for an Additional 20-Year Period," 73 Fed. Reg. 25,034 (May 6, 2008). The NRC filed a corrected notice on May 27, 2008, in which it corrected the date of receipt of the application and the accession number for the application in the ADAMS document system. "Nuclear Management Company, LLC; Correction to Notice of Receipt and Availability of Application for Renewal of Prairie Island Nuclear Generating Plant, Units 1 and 2. Facility Operating Licenses Nos. DPR-42 and DPR-60," 73 Fed. Reg. 30,423 (May 27, 2008).

⁵ "Nuclear Management Company, LLC, Prairie Island Nuclear Generating Plant, Units 1 and 2; Notice of Acceptance for Docketing of the Application and Notice of Opportunity for Hearing Regarding Renewal of Facility Operating License Nos. DPR-42 and DPR-60 for an Additional 20-Year Period," 73 Fed. Reg. 34,335 (June 17, 2008).

⁶ "Prairie Island Indian Community's Notice of Intent to Participate and Petition to Intervene" ("Petition"), filed August 18, 2008.

⁷ "NRC Staff's Answer to the Prairie Island Indian Community's Petition for Leave to Intervene" ("Staff's Answer"), filed September 12, 2008; and "Nuclear Management Company's Answer to Prairie Island Indian Community's Petition to Intervene" ("Applicant's Answer"), filed September 12, 2008.

⁸ "Prairie Island Indian Community's Reply to Nuclear Management Company's and the NRC's Answers to Prairie Island Indian Community's Petition to Intervene" ("Reply"), filed September 19, 2008.

⁹ In its Answer, the Staff noted that in a prior proceeding PIIC was asked to file an affidavit from a Tribe official authorizing the Tribe's participation in the proceeding and representation by counsel of record. Staff's Answer at 6. PIIC responded that the prior proceeding was "prosecuted by outside legal counsel on behalf of the Community," and that the Petition in this proceeding was filed by PIIC's in-house General Counsel. *Id.* (emphasis added). In lieu of a Tribe official expressly authorizing participation, PIIC filed an affidavit by its legal representative, the General Counsel, that states that PIIC approved and

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its Motion to Strike on September 29, 2008.

DISCUSSION

I. Legal Standard for Reply's Content

A reply to an intervention petition answer may not raise new arguments, new contention bases or new issues in an attempt to cure a defective petition. See *Louisiana Energy Services, L.P.* (National Enrichment Facility), CLI-04-25, 60 NRC 223, 224-225 (2004), *reconsideration denied*, CLI-04-35, 60 NRC 619 (2004); *Nuclear Management Co.* (Palisades Nuclear Plant), CLI-06-17, 63 NRC 727, 732 (2006). The Commission requires strict adherence to contention admissibility standards, demanding discipline and preparedness on the part of petitioners. *LES*, CLI-04-25, 60 NRC at 224-225. Given that contentions must be based on documents or other information available at the time the petition is filed, 10 C.F.R. § 2.309(f)(2), untimely attempts to amend a defective, original petition are to be rejected as failing to satisfy the late-filing factors in 10 C.F.R. §§ 2.309(c) and (f)(2). See *Palisades*, CLI-06-17, 63 NRC at 732. A practice that would allow petitioners to use “reply briefs to provide, for the first time, the necessary threshold support for contentions . . . would effectively bypass and eviscerate [the Commission’s] rules

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authorized the filing of the Petition. Mahowald Declaration II, dated September 19, 2008.

It appears, however, that contrary to PIIC’s statement in its Reply, PIIC was represented by in-house counsel in the prior proceeding. The petition for intervention on file in the prior proceeding was signed by Lenor A. Scheffler, Supervising Assistant General Counsel, and Joseph M. Paiement, Assistant General Counsel, Attorneys for PIIC. ADAMS Accession No. ML062270255. These two attorneys held themselves out as in-house counsel for PIIC. Thus, in both the prior proceeding and the instant proceeding, it appears that the petitions were filed by in-house counsel for PIIC.

In the prior proceeding, the Board found that this filing by in-house counsel was insufficient and requested PIIC file an affidavit by a Tribe official authorizing participation and representation by counsel. The Staff respectfully submits that a similar order may be appropriate in this proceeding as well. Here, there is no authorizing statement from a Tribe official.

governing timely filing, contention amendment, and submission of late-filed contentions.” *LES*, CLI-04-35, 60 NRC at 623. Further, raising new claims in a reply unfairly deprives other participants of an opportunity to rebut the claims. *Palisades*, CLI-06-17, 63 NRC at 732.

Petitioners may not use a reply to reinvigorate thinly supported contentions. *LES*, CLI-04-25, 60 NRC at 224. Nor may petitioners “initially file vague, unsupported, and generalized allegations and simply recast, support or cure them later.” *LES*, CLI-04-35, 60 NRC at 622. Although petitioners are not required “to prove their case, or to provide an exhaustive list of possible bases,” they are required to provide “sufficient alleged factual or legal bases to support the contention, and to do so at the outset.” *Id.*; see also *Dominion Nuclear Connecticut, Inc.* (Millstone Power Station, Unit 3) CLI-08-17, 68 NRC ___, (Aug. 13, 2008) (slip op. at 7-8 n. 27).

In applying these standards, Boards have struck, or declined to consider, new information and argument offered in a reply. *E.g. Entergy Nuclear Vermont Yankee, LLC, and Entergy Nuclear Operations, Inc.* (Vermont Yankee Nuclear Power Station), LBP-06-20, 64 NRC 131, 198-199 (2006); *PPL Susquehanna, LLC* (Susquehanna Steam Electric Station, Units 1 and 2), LPB-07-04, 65 NRC 281, 301-302 (2007).

II. NSPM’s Motion to Strike

The motion filed by NSPM asks the Board to strike portions of PIIC’s Reply on the grounds that the Reply impermissibly seeks to supplement PIIC’s prior contentions by providing a new declaration and raising additional claims. Motion at 1.

A. Contention 1 (Historical and Archaeological Resources)

In its original Petition, PIIC asserted that NSPM’s conclusion that refurbishment activities would have no effect on historic or archaeological resources was deficient because it did not describe with sufficient specificity the area in which the refurbishment activity would be

conducted. Petition at 5.¹⁰

In its Motion to Strike, NSPM identified four new claims by PIIC in connection with this contention and asserts that these four claims are impermissible and should be stricken from the Reply. Motion at 8. The four claims NSPM seeks to strike are as follows:

- (1) the original surveys prior to construction failed to identify two archaeological and cultural sites;
- (2) the construction of the cooling towers impacted two archaeological and cultural sites;
- (3) because the surveys are faulty, there can be no assurance that the construction work for the steam generator replacement will take place in an area that is already disturbed; and
- (4) additional survey work is needed before the construction begins.

Id.

The Staff agrees with NSPM that the first three claims are new and impermissible and should be stricken and they are addressed below. The fourth claim, that “additional survey work is needed,” Reply at 9, reiterates a claim that the Staff believes PIIC made in its petition, Petition at 9-10. Therefore, the Staff does not view PIIC’s claim for additional survey work as a new claim.

With respect to the first three claims, a review of the record in this matter demonstrates that these claims are, in fact, new. In its Petition, PIIC complained that NSPM failed to identify, with sufficient specificity, the land that would be affected by its steam generation replacement construction. Petition at 8. NSPM responded that it had identified the land that would be

¹⁰ PIIC also asserted that NSPM’s application was deficient because it did not address the effect of a proposed expansion of the independent spent fuel storage installation (“ISFSI”) on historical and archaeological resources. *Id.* at 9. NSPM Motion to Strike does not address the ISFSI claim and, thus, it is not discussed here.

affected by the construction and that the construction site will be located on land that was previously disturbed and has little or no archaeological significance. Thus, NSPM argued, more specificity regarding the location of construction was immaterial. Applicant's Answer at 12-13. For its part, the Staff responded that PIIC's contention "does not explain why more specificity is required and thus does not provide the required 'supporting reasons' for its belief that more information is required." Staff's Answer at 15 (emphasis added). Accordingly, the Staff asserted that the contention was inadmissible for failure to raise a material dispute. *Id.*

In its Reply, PIIC finally provides supporting reasons for its belief that more information is required. It asserts for the first time that NSPM's historical and archaeological surveys are inadequate because they failed to identify two historic and archaeological sites. Reply at 5-7. These two sites were discovered in connection with construction of a drainage channel and the cooling towers. *Id.* Because the existing surveys are inadequate, PIIC argues that there can be no assurance that the steam generator replacement construction will have little or no impact on historical and archaeological resources. *Id.* at 8-9

The Applicant argues that these claims could have been raised in the original Petition and should be stricken from the Reply. Motion at 8. The Staff agrees with NSPM that raising these claims now in the Reply constitutes an impermissible expansion of the scope of the contention. See *LES*, CLI-04-24, 60 NRC at 224-225. PIIC's failure to put forward these supporting arguments in the first instance was the basis for the Staff's position that the contention was inadmissible. Staff's Answer at 15. Accordingly, the Staff supports NSPM's Motion to Strike with respect to the first three claims identified above.

B. Contention 3 (Endangered and Threatened Species)

NSPM seeks to strike portions of PIIC's Reply regarding Contention 3. Contention 3 asserted that the information and analysis in the Applicant's Environmental Report (ER) on endangered and threatened species was inadequate and incomplete and did not comply with 10

C.F.R. § 51.53(c)(3)(ii)(E). Petition at 14. NSPM seeks to strike on the grounds that the Reply raises new claims. In its Reply, PIIC asserts that NSPM failed to attach a Clean Water Act section 316(b) report to its ER. Reply at 13. PIIC also proffers new arguments based on the "Migratory Bird Treaty" and statements by the Fish and Wildlife Service concerning transmission line strikes. Reply at 14. Because PIIC did not raise these claims in its original Petition, it cannot raise them here. See *Palisades*, CLI-06-17, 63 NRC at 732. Accordingly, the Staff supports NSPM's motion to strike these portions of PIIC's Reply.

C. Contention 4 (Health Impacts)

In its Petition, PIIC acknowledged that the Commission had concluded that radiation exposure during the license renewal period is outside the scope of review, but that "new and significant" information required the Commission to reconsider that conclusion. Petition at 20. In its Reply, PIIC raises the issue of tritium releases from Prairie Island for the first time and seeks more detailed monitoring and disclosure from NSPM regarding these releases. Reply at 17-18. In support, PIIC cites Prairie Island reports going back to 1995. *Id.* NSPM correctly identifies these as claims that should have been raised in PIIC's original filing and which should not be allowed at this stage. Motion at 9. See *Vermont Yankee Nuclear Power Station*, LBP-06-20, 64 NRC at 152. Accordingly, the Staff supports NSPM's motion to strike these portions of PIIC's Reply.

D. Contention 6 (Containment Coatings)

In its Petition, PIIC asserted that "containment coatings should be included in the scope of license renewal, and the applicable aging effects should be appropriately managed." Petition at 27. PIIC put forward no expert opinion in support of the contention. In its Reply, PIIC proffers the Declaration of Christopher Grimes ("Grimes Declaration") and raises a new claim: that NSPM's license renewal application is deficient because it does not include an aging management program that would ensure that debris resulting from a design-basis accident

would be bounded by the assumptions in Generic Letter 2004-02. Reply at 20-21. NSPM moves to strike the declaration and the claim. Motion at 11. Because the declaration constitutes new support for the contention and because the claim raises a new argument, the Staff agrees with NSPM that the declaration and claim should be stricken. See *LES*, CLI-04-35, 60 NRC at 623.

E. Contention 7 (Embrittlement)

In support of its contention regarding embrittlement of the reactor vessel and internals, PIIC submits the Grimes Declaration. Reply at 21. PIIC also asserts, in its Reply, that NSPM's program for managing the effects of aging of reactor vessel internals and its surveillance capsule program are not sufficiently detailed. *Id.* at 21-22. The Grimes Declaration constitutes a new basis for the contention and the Staff agrees with NSPM that it should be stricken. See *LES*, CLI-04-35, 60 NRC at 623. The claims that PIIC raised in its Reply regarding the sufficiency of the aging management program ("AMP") for reactor vessel internals and surveillance capsules constitute new arguments.

Originally, PIIC claimed that "the applicant has not presented any experiments or analysis to justify that the embrittled RPV internal structures will not fail and that a coolable geometry will be maintained". Petition at 29. In their Reply, PIIC asserts that the application is deficient because it includes a "commitment to develop and implement a PWR Vessels Internal Program". Reply at 21. This new argument regarding a "commitment" is materially different from the previous argument, which was limited to the lack of "experiments or analysis" and this new "commitment" argument should be stricken. See *Palisades*, CLI-06-17, 63 NRC at 732. With respect to the surveillance capsules, PIIC originally asserted that "[i]t is not clear whether PINGP Units 1 & 2 have adequate standby surveillance capsules to support the calculated fluence projections". Petition at 29. In its Reply, PIIC changed its argument from a specific concern about the number of capsules to a claim that the "LRA does not provide . . . an

adequate description of the program that will rely on saved capsules”. Reply at 22. The Staff agrees with NSPM that this new claim should be stricken. See *Millstone*, CLI-08-17, slip op. at 7-8 n.27.

F. Contention 8 (Nickel Alloy Components)

In Contention 8, PIIC asserts that NSPM’s AMP for primary stress corrosion cracking does not comply with 10 C.F.R. § 54.21(a)(3) because (1) the commitment in the LRA to “do whatever the NRC tells them to do does not demonstrate the effectiveness of an [AMP]” and (2) the AMP does not “address all ten elements of an effective [AMP]”. Petition at 31. In their Answers, the Staff and Applicant both argued that the Petitioner had provided no factual basis or expert opinion for this contention. Staff’s Answer at 39; Applicant’s Answer at 41. In its Reply, PIIC has now provided a declaration from an expert to “supplement the factual basis” for this contention. PIIC Reply at 22; Grimes Declaration at 7 (¶ 13). This declaration, an impermissible attempt to provide threshold support for a contention where that support should have been introduced when the petition was filed, cannot be introduced in a reply brief. See *Palisades*, CLI-06-17, 63 NRC at 732; *LES*, CLI-04-35, 60 NRC at 623.

The PIIC Reply also makes several new assertions, based on the Grimes Declaration, with regard to this contention. Specifically, PIIC asserts that “if the adequacy of the [AMP] depends on the interim inspection requirements, the applicant must show how these requirements demonstrate the adequacy of the [AMP],” and that “the operating experience described in [the LRA] is too vague to determine whether the existing inspection program [sic]”. *Id.* at 22-23. Because these new assertions impermissibly expand the Petitioner’s original arguments and the scope of the original contention, the Staff agrees with NSPM that they should be stricken. See *Palisades*, CLI-06-17, 63 NRC at 732.

G. Contention 9 (Buried Components)

In response to PIIC’s original Contention 9, both the Staff and the Applicant argue that

the contention lacks sufficient factual support or expert opinion. Staff's Answer at 44; Applicant's Answer at 51-52. In its Reply, PIIC supplies an expert affidavit to "supplement the factual basis" of this contention. PIIC Reply at 23; Grimes Declaration at 7-8 (¶ 14). The Grimes Declaration should be stricken because it is an impermissible attempt to provide new support for a contention. See *Palisades*, CLI-06-17, 63 NRC at 732; *LES*, CLI-04-35, 60 NRC at 623.

Furthermore, the Grimes Declaration alleges, with regard to the PINGP "Buried Piping and Tanks Inspection Program," that "[s]ignificant degradation could already exist in those buried components and systems for which the program applies," and that "[t]he LRA does not explain how the proposed program satisfies the elements of an effective aging management program." Grimes Declaration at 7-8 (¶ 14). PIIC did not assert these claims in its original petition. Because these claims impermissibly expand PIIC's original arguments and the scope of the original contention, the Staff agrees with NSPM that they should be stricken. See *Palisades*, CLI-06-17, 63 NRC at 732.

CONCLUSION

The Applicant's September 29, 2008 Motion to Strike demonstrates that the Reply filed by PIIC impermissibly included new arguments and support for its contentions. Accordingly, the Applicant's motion should be granted, with the exception of the claim regarding additional survey work as noted above in Contention 1.

/Signed (electronically) by/
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/Executed in accord with 10 C.F.R. § 2.304(d)/

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Units 1 and 2)

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "NRC STAFF RESPONSE SUPPORTING NORTHERN STATES POWER COMPANY'S MOTION TO STRIKE PORTIONS OF THE PRAIRIE ISLAND INDIAN COMMUNITY'S REPLY," dated October 9, 2008, have been served upon the following by the Electronic Information Exchange, this 9th day of October, 2008:

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