January 5, 2009

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	
	)	
NORTHERN STATES POWER COMPANY	)	Docket Nos. 50-282-LR/ 50-306-LR
	)	
(Prairie Island Nuclear Generating Plant, Units 1 and 2)	)	

NRC STAFF'S RESPONSE IN SUPPORT OF NORTHERN STATES POWER COMPANY'S MOTION FOR RECONSIDERATION OF LBP-08-26 REGARDING CONTENTION 5, OR IN THE ALTERNATIVE, FOR REFERRAL TO THE COMMISSION

INTRODUCTION

The Staff of the U.S. Nuclear Regulatory Commission ("Staff") herewith responds in support of the motion ("Motion") filed by Northern States Power Company ("NSPM" or the "Applicant") seeking reconsideration by the Atomic Safety and Licensing Board (the "Board") of its December 5, 2008 decision in LBP-08-26[1] admitting the Prairie Island Indian Community's ("PIIC") Contention 5.

BACKGROUND

In its Notice of Intent to Participate and Petition to Intervene ("Petition"), PIIC proffered Contention 5, which reads as follows:

> Applicant's environmental report contains a seriously flawed environmental justice analysis that does not adequately assess the impacts of the PINGP on the adjacent minority population.

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[1] *Northern States Power Co.* (Prairie Island Nuclear Generating Plant, Units 1 and 2), LBP-08-26, 68 NRC ___ (December 5, 2008) (slip op.) ("LBP-08-26").

Petition at 24. The Staff opposed admission of Contention 5 on the grounds that it failed to provide facts or expert opinions linking renewal of the Prairie Island Nuclear Generating Plant ("PINGP" or "Prairie Island plant") license to any significant adverse environmental impact.[2] PIIC appeared to claim that higher than expected cancer rates among Native Americans constituted a significant adverse environmental impact.[3] However, as the Staff pointed out, PIIC did not establish a nexus between the cancer rate data and the Prairie Island plant.[4]

The Applicant opposed admission of Contention 5 on the grounds that it constituted an impermissible challenge to the Nuclear Regulatory Commission's ("NRC") regulations and its determination that the offsite radiological impacts of continued operations of nuclear power plants are small for all plants.[5] In addition, the Applicant asserted that the contention was unsupported and that it failed to raise a genuine material issue because the Applicant is not required to provide an environmental justice ("EJ") analysis.[6] Like the Staff, the Applicant argued that PIIC had failed to link the cancer rate data with the Prairie Island plant.[7]

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[2] NRC Staff's Answer to the Prairie Island Indian Community's Petition for Leave to Intervene at 31-32 (September 12, 2008) ("Staff's Answer").

[3] Petition at 24-25.

[4] Staff's Answer at 32.

[5] Nuclear Management Company's Answer to the Prairie Island Indian Community's Petition to Intervene at 31 (September 12, 2008) ("NSPM Answer")

[6] *Id*. at 31-32.

[7] *Id.* at 33-34.

On December 5, 2008, the Board issued a Memorandum and Order that, *inter alia*, admitted Contention 5.[8] Ten days later, on December 15, 2008, NSPM filed its Motion for Reconsideration.

DISCUSSION

I. Applicable Legal Standards

The Commission's regulations state that a motion for reconsideration must show "compelling circumstances, such as the existence of a clear and material error in a decision, which could not have reasonably been anticipated, that renders the decision invalid." 10 C.F.R. § 2.323(e). This strict standard is met when a party establishes an error in a decision "based upon an elaboration or refinement of an argument already made, an overlooked controlling decision or principle of law, or a factual clarification." *Pacific Gas and Electric Co*. (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), CLI-06-27, 64 NRC 399, 401 n.6, quoting *Dominion Nuclear Connecticut, Inc*. (Millstone Nuclear Power Station, Unit 2), CLI-03-18, 58 NRC 433, 434 (2003). A motion for reconsideration should not present "new theses or arguments, except to the extent it attempts to address a presiding officer's ruling that could not reasonably have been anticipated." *Private Fuel Storage, L.L.C*. (Independent Spent Fuel Storage Installation), LBP-01-38, 54 NRC 490, 493 (2001).

II. Reconsideration Is Appropriate

The legal standard for reconsideration is met in this instance. The Board's decision is contrary to the Commission's Policy Statement on Environmental Justice[9] and Commission precedent, and misconstrues the Commission's regulations in 10 C.F.R. Parts 2 and 51. These clear and material errors constitute compelling circumstances which make reconsideration

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[8] LBP-08-26, slip op. at 34-35.

appropriate. Therefore, as discussed more fully below, the Staff supports NSPM's Motion and respectfully submits that the Board should reconsider its ruling and find Contention 5 inadmissible or refer the question to the Commission.

A. The Applicant Is Not Required to Perform an EJ Analysis

The Commission's EJ Policy Statement "sets forth the criteria for admissible contentions in this area within the NEPA context and consistent with the Commission's regulations in 10 CFR Part 2." 69 Fed. Reg. at 52,042. It explains that "[t]he basis for admitting EJ contentions in NRC licensing proceedings stems from the *agency's* NEPA obligations." *Id*. at 52,046. Accordingly, it focuses its discussion on potential contentions that are based on environmental impact statements and environmental assessments *prepared by the NRC*. *Id*. at 52,044-48.

Under the Commission's EJ Policy Statement, it is the responsibility of the *NRC* to assess whether "disproportionate and adverse impacts of a proposed action [will] fall heavily on a particular community." *Id*. at 52,044. It is not an applicant's responsibility to undertake this analysis and there is no statutory or regulatory requirement for an applicant to do so. Motion at 3-4; NSPM Answer at 31-32; Final Official Transcript of October 29, 2008 Oral Argument ("Tr.") at 98 (Simon).

The regulations track the EJ Policy Statement. The "required analyses" that an applicant must provide in its environmental report ("ER") are listed in 10 C.F.R. § 51.53(c)(3)(ii)(A)-(L). As the Applicant pointed out in its Motion, that list does not include environmental justice. *See*

(. . .continued)

[9] Policy Statement on the Treatment of Environmental Justice Matters in NRC Regulatory and Licensing Actions, 69 Fed. Reg. 52,040 (August 24, 2004) ("EJ Policy Statement").

Motion at 3. Furthermore, the plain language of § 51.53(c)(3)(ii), which states that "the required analyses *are as follows*," indicates that the subsequent list of required analyses is exclusive. *Id*. at § 51.53(c)(3)(ii) (emphasis added).

The only regulatory provision that the Board cites in its decision is the last sentence of 10 C.F.R. § 51.45(c), which states that "[t]he [ER] *should* contain sufficient *data* to aid the Commission in its development of an independent analysis." 10 C.F.R. § 51.45(c) (emphasis added). The Board infers from this statement that such data "includes information that might aid the Commission in its analysis of environmental justice." LBP-08-26, slip op. at 34 n. 179. However, both the Board's inference and the statement in § 51.45(c) refer only to *data* (i.e., information), not *analysis* of such data.[10] Thus, it is improper to infer from § 51.45(c) that an *EJ analysis* is required in the ER.

In addition, 10 C.F.R. § 51.45(c) is a general requirement. In contrast, 10 C.F.R. § 51.53(c)(3)(ii) contains *specific* requirements for environmental analyses. Rules of interpretation dictate that the more specific regulation, in this case § 51.53(c)(3)(ii), takes precedence over the more general regulation at § 51.45(c). *See, e.g*., *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. ___, 127 S.Ct. 2339, 2348 (2007) (where a specific regulation and a general regulation appear to be in conflict, the specific regulation governs).

Other than the general language at 10 C.F.R. § 51.45(c), the Board did not cite any other regulation to support its conclusion that the Applicant was required to analyze EJ impacts. In fact, at oral argument, the Board implicitly acknowledged that there is no such requirement.[11]

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[10] Moreover, the statement in § 51.45(c) does not *require* the Applicant to provide data, nor does it specify any particular data to be provided.

[11] The Staff is referring to the Board's question to Petitioner: "But that additional information, that's not part of the Reg Guide or any regulation or requirement; is that correct?" Tr. at 101. The (continued. . .)

See Tr. at 101. Likewise, PIIC did not cite any regulation to support its assertion, *see* PIIC Reply at 18-19; Tr. at 97, 101 (Mahowald), instead relying on a non-binding regulatory guide[12] which merely states that "[t]he ER should include" certain information "to assist the staff in its environmental justice review."[13] RG 4.2S1 at 4.2-S-51. Therefore, the Board erred in finding that the Applicant was required to analyze EJ impacts and thus erred in concluding that Contention 5 was admissible.

B. The Board Improperly Admitted Contention 5 as a Contention of Omission.

The Board admitted Contention 5 as a contention of omission that "alleg[ed] that Applicant has failed to address the [EJ] impacts of license renewal on the [PIIC]." LBP-08-26, slip op. at 35. As discussed in Section II.A *supra*, an applicant is not required to include such an analysis in its ER. Because NSPM is not required to undertake an analysis of EJ impacts, its failure to do so will not support a contention of omission and the admission of the contention on this basis was error.

The Board also stated that "PIIC contends that, by strictly complying with [RG 4.2S1], Applicant has identified the minority populations surrounding PINGP in a way that essentially

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(. . .continued)

Petitioner responded that the "additional information" being referred to is "a better specification of what the impact or the impacts actually are . . . to fulfill the [EJ] requirement." *Id*. (Mahowald).

[12] Regulatory Guide 4.2, Supplement 1, *Preparation of Supplemental Environmental Reports for Applications to Renew Nuclear Power Plant Operating Licenses* (September, 2000) ("RG 4.2S1").

[13] Specifically, RG 4.2S1 requests information, by census tract/block, on "the composition of minority and low-income persons within 80 km of the plant." RG 4.2S1 at 4.2-S-51. RG 4.2S1 does not, as PIIC has asserted, make clear "that the NRC Staff expects the applicant to analyze environmental justice issues." PIIC Reply at 19. On the contrary, RG 4.2S1 clearly states that "[t]he NRC staff will perform the environmental justice review. . . ." RG 4.2S1 at 4.2-S-51.

averages out, or dilutes, the [PIIC]."[14] LBP-08-26, slip op. at 34-35. On its face, this is not a contention of omission; rather, it is a contention asserting insufficiency. It is the Staff's position that the Applicant's submission with respect to the demographic information provided in the ER is fully sufficient.

According to the EJ Policy Statement, the purpose of providing demographic information is to *identify the presence* of minority or low-income populations.[15] The means by which such populations are identified is immaterial because there is no regulatory requirement to use a particular methodology.[16] Furthermore, Commission precedent holds that as long as an ER, on its face, is "sufficiently accurate" to inform the NRC and the public of the presence of a minority or low-income community, the purpose of the demographic information in the ER has been fulfilled, and no litigable, material issue exists with regard to the method used. *See System Energy Resources, Inc*. (Early Site Permit for Grand Gulf ESP Site), CLI-05-4, 61 NRC 10, 17, 19-20 (2005).

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[14] PIIC did not raise this issue; the Board raised it. Tr. at 100. The Petitioner's contention focused instead on alleged disproportionate *impacts* of license renewal on the Community. *See* Petition at 24-25; PIIC Reply at 18-19, Tr. at 15, 101, 159-161 (Mahowald). PIIC's contention should not have been expanded to include allegations of defects in the demographic information when PIIC did not originally raise the issue. *See USEC*, *Inc*. (American Centrifuge Plant), CLI-06-10, 63 NRC 451, 457 (2006), citing *Arizona Public Service Co*. (Palo Verde Nuclear Generating Station, Units 1, 2, and 3), CLI-91-12, 34 NRC 149, 155 (1991) (boards may not infer bases for contentions that the petitioner has not articulated); *Commonwealth Edison Co*. (Zion Nuclear Power Station, Units 1 and 2), CLI-99-4, 49 NRC 185, 194 (1999), petition for review denied, *Dienethal v. NRC*, 203 F.3d 52 (D.C. Cir. 2000).

[15] The EJ Policy Statement provides that the numeric criteria recommended by the Staff (and endorsed by the Commission) are used "*to determine the presence* of a minority or low-income population." (emphasis added). 69 Fed. Reg. at 52,048.

[16] The regulations state only that the ER "should contain sufficient data to aid the Commission." *See* 10 C.F.R. § 51.45(c). RG 4.2S1 provides guidance as to the data that an Applicant should provide. RG 4.2S1 at 4.2-S-51. The NRC EJ Policy states that the numeric criteria in staff guidance are a "*starting point for staff to use* when . . . identifying low-income and minority communities . . . .") (emphasis added). 69 Fed. Reg. at 52,046.

In the instant case, the Board found that the Applicant had complied with RG 4.2S1. LBP-08-26, slip op. at 34. At oral argument, the Applicant stated that, although it had followed the NRC methodology, the PIIC was not included in Table 2.5-2 of the ER because the PIIC fell within two adjacent census block groups and thus did not meet the NRC's numeric criteria. Tr. at 99-100 (Lewis). Nevertheless, the Applicant identified the PIIC as a minority population in the ER and provided its location with respect to PINGP. *Id*. at 100 (Lewis); *see* ER at 2-23, 2-64. Therefore, the failure to identify the PIIC through application of the NRC numeric criteria did not cause a "significant omission" that supports an admissible contention. *See Grand Gulf*, CLI-05-4, 61 NRC at 13.

C. The Board Improperly Admitted Contention 5 as a "Placeholder" to Avoid Subjecting Petitioner to "More Stringent Admissibility Standards."

In admitting Contention 5, the Board stated that "NRC regulations require the Petitioner to raise [NEPA contentions] as challenges to Applicant's [ER]," and "[i]f Petitioner were to delay and submit contentions on NEPA topics . . . after issuance of the EIS [environmental impact statement], they would likely be characterized as 'late-filed contentions,' subject to much more stringent admissibility requirements." LBP-08-26, slip op. at 35. The Board misinterpreted the Commission's regulations in concluding that any subsequent NEPA contentions would be subject to more stringent admissibility requirements. Specifically, 10 C.F.R. § 2.309(f)(2), which addresses new and amended contentions, states that

> "*[o]n issues arising under [NEPA]*, the petitioner shall file contentions based on the applicant's [ER]. *The petitioner may amend those contentions or file new contentions if there are data or conclusions in the NRC draft or final [EIS] . . . that differ significantly from the data or conclusions in the applicant's documents*. *Otherwise*, contentions may be amended or new contentions filed after the initial filing only with leave of the presiding officer upon a showing [that the three listed criteria have been met].

10 C.F.R. § 2.309(f)(2) (emphasis added). Thus, if data or conclusions in the draft or final supplemental EIS ("SEIS") differ significantly from data or conclusions in the ER, a petitioner

may file new or amended NEPA contentions without obtaining leave of the presiding officer and without showing that the three criteria listed at the end of § 2.309(f)(2) have been satisfied.[17] As the Applicant stated in its Motion, because the ER contains no EJ analysis, any EJ analysis in the Staff's SEIS will differ significantly from the Applicant's ER. *See* Motion at 5. Therefore, any valid contention that PIIC raises with regard to the Staff's EJ analysis will meet the requirements of § 2.309(f)(2).

Likewise, 10 C.F.R. § 2.309(c), which addresses nontimely filings, would not present an inappropriate barrier to a future contention based on the Staff's SEIS and may not even be applicable in the circumstances posited here. As the Applicant has noted, several licensing boards have held that § 2.309(c) does not apply when a petitioner can satisfy the requirements of § 2.309(f)(2). *See* Motion at 5-6. Moreover, if a new or amended contention is based on the Staff's SEIS, good cause for failure to file on time would exist as long as the new or amended contention is filed within a reasonable time after issuance of the SEIS. *See Yankee Atomic Electric Co*. (Yankee Nuclear Power Station), CLI-96-7, 43 NRC 235, 255 (1996). Good cause is the "first and foremost factor" in deciding whether to admit a late-filed contention under 10 C.F.R. § 2.309(c). *Commonwealth Edison Co*. (Braidwood Nuclear Power Station, Units 1 and 2), CLI-86-8, 23 NRC 241, 244 (1986).

Finally, the Staff agrees with the Applicant that the EJ contention is premature. Unless and until a material dispute can be raised with the Staff's EJ analysis, a contention based on the Staff's yet-to-be-performed analysis is speculative, and fails to raise a genuine dispute with the

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[17] The Statement of Considerations for the 2004 changes to 10 C.F.R. Part 2 explains that the Commission intended, pursuant to § 2.309(f)(2), to allow admission of new or amended environmental contentions as long as the petitioner makes the requisite showing and the contentions are submitted "promptly after the NRC's environmental documents are issued." *See* Changes to Adjudicatory Process; Final Rule, 69 Fed. Reg. 2,182, 2,221 (January 14, 2004).

license renewal application. The regulations and case law preclude the Board from admitting such a "placeholder" contention. *See* 10 C.F.R. § 2.309(f)(1)(vi); *see also Duquesne Light Co*. (Beaver Valley Power Station, Unit 2), LBP-84-6, 19 NRC 393, 406 (1984) (stating that "[u]ntil [the Staff's EIS] is issued and its contents known, any treatment of it is speculative, premature and does not provide a basis for an admissible contention"); 69 Fed. Reg. at 2,190 (stating that proceedings are to be "focused on real, concrete issues").

CONCLUSION

For the reasons set forth above, the Staff respectfully submits that Northern States Power Company's Motion for Reconsideration of LBP-08-26 Regarding Contention 5 or, in the Alternative, for Referral to the Commission should be granted.

Respectfully submitted,

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/Executed in accord with 10 C.F.R. § 2.304(d)/
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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 Units 1 and 2	)	ASLBP No. 08-871-01-LR-BDOI
	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "NRC STAFF'S RESPONSE IN SUPPORT OF NORTHERN STATES POWER COMPANY'S MOTION FOR RECONSIDERATION OF LBP-08-26 REGARDING CONTENTION 5, OR IN THE ALTERNATIVE, FOR REFERRAL TO THE COMMISSION," dated January 5, 2009, have been served upon the following by the Electronic Information Exchange, this 5th day of January, 2009:

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