

January 5, 2009

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	
	)	
NORTHERN STATES POWER CO.	)	Docket Nos. 50-282-LR
	)	50-306-LR
(Prairie Island Nuclear Generating Plant,	)	
Units 1 and 2)	)	ASLBP No. 08-871-01-LR
	)	

**PRAIRIE ISLAND INDIAN COMMUNITY’S RESPONSE IN OPPOSITION TO  
NORTHERN STATE POWER COMPANY’S MOTION FOR  
RECONSIDERATION OF LBP-08-26 REGARDING CONTENTION 5  
OR, IN THE ALTERNATIVE, FOR REFERRAL TO THE COMMISSION**

**I. INTRODUCTION**

On December 12, 2008, the Northern States Power Company (“Applicant”) submitted a Motion for Reconsideration pursuant to 10 C.F.R. 2.323(e) challenging that portion of the Atomic Safety and Licensing Board (“Board”) Memorandum and Order (LBP-08-26) admitting the Prairie Island Indian Community’s (“Community”) Contention 5 on environmental justice. The Community opposes this Motion. The criteria in 10 C.F.R. 2.323(e) for considering such a motion for reconsideration are a showing of “compelling circumstances, such as the existence of ‘a clear and material error’ in a decision, which could not reasonably be anticipated, that renders the decision invalid.” The Community does not believe that there are any “compelling circumstances” that would justify the grant of the Applicant’s motion. In the rulemaking that established the test of “compelling circumstances,” the Commission explained that it was “adopting this ‘higher standard’ to permit reconsideration only where manifest

injustice would occur in the absence of reconsideration, and that the claim could not have been raised earlier.”<sup>1</sup> The test for reconsideration is applied strictly and reconsideration is not undertaken lightly.<sup>2</sup> The amended regulation’s “clear and material error” standard is a high standard: “a ‘clearly erroneous’ finding is one that is not even plausible in light of the record viewed in its entirety.”<sup>3</sup> The Applicant has not met this high standard.

There is no “clear and material error” in the Board’s decision on environmental justice. It is difficult to conceive how the Board’s decision on environmental justice could be termed as one that “could not have been reasonably anticipated.” The fundamental nature of the Community’s Contention 5, and of the Board’s decision, was the obligation of the Applicant under the Nuclear Regulatory Commission’s (“NRC”) regulations to provide sufficient data on and to perform an analysis of environmental justice issues in its Environmental Report (“ER”). We will elaborate on the Applicant’s obligations in this regard in Section II of this Response. Furthermore, the Applicant cannot now try to diffuse the basis of the Board’s decision on the Applicant’s environmental justice responsibilities by construing it as one of mistakenly applying the requirements for late filed contentions. We will elaborate on this aspect of the Motion in Section III of this Response. In addition to its Motion for Reconsideration, the Applicant also suggested that the Board might want to refer these issues to the Commission under 10 C.F.R. 2.319(l) and 2.323(f). The Board’s finding on Contention 5 that an applicant has an obligation – as with other environmental issues – to perform an evaluation of

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<sup>1</sup> Changes to the Adjudicatory process, Statement of Considerations, 69 Fed.Reg. 2182, 2207 (January 14, 2004).

<sup>2</sup> *Pacific Gas and Electric Co.* (Diablo Canyon Power Plant Spent Fuel Storage Installation), CLI-06-27, 62 NRC 399, 400 n.5 (2006).

<sup>3</sup> *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-5-19, 62 NRC 403, 411 (2005).

potential environmental justice impacts in the ER does not raise a “significant and novel legal issue” that would require referral to the Commission. However, because the Applicant, in its Motion, raised the implication that the consideration of site-specific environmental justice issues is in some way truncated by the Category 1 generic determinations in Appendix B to Subpart A of 10 C.F.R. Part 51, the Community will discuss those issues in Section IV of this Response.

## **II. AN APPLICANT’S ENVIRONMENTAL JUSTICE RESPONSIBILITIES**

In finding that the Community has stated an admissible contention, the Board noted that while the Commission is ultimately responsible for evaluating impacts on minority groups, “nonetheless, 10 C.F.R. 51.45(c) requires the Applicant to assist the Commission with that evaluation.”<sup>4</sup> Furthermore, the Board noted that “[s]ection 51.45(c) instructs that an ‘environmental report should contain sufficient data to aid the Commission in its development of an independent analysis.’ Undoubtedly, this ‘data’ includes information that might aid the Commission in its analysis on environmental justice.”<sup>5</sup> To amplify on the Board’s reasoning, the Community can find no rationale for treating the Applicant’s responsibility to provide data on environmental justice any differently from the Applicant’s responsibility to provide data on the many other areas considered in the of the environmental review. In fact, the Commission has long recognized that issues, later characterized as “environmental justice,” should be evaluated

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<sup>4</sup> *Northern States Power Co.* (Prairie Island Nuclear Generating Plant, Units 1 and 2), LBP-08-26, 68 NRC \_\_\_, \_\_\_ (slip.op. at 34) (December 5, 2008).

<sup>5</sup> *Id.* In another recent license renewal case, the Licensing Board found that, in reference to a proffered environmental justice contention, “...Petitioners...may properly raise contentions seeking corrections of significant omissions from the Applicant’s ER.” *Entergy Nuclear Operations, Inc.* (Indian Point Nuclear Generating Units 2 and 3), LBP-08-13, 68 NRC \_\_\_, \_\_\_ (slip.op. at 200) (July 31, 2008).

within the ambit of the traditional environmental impacts evaluated as part of the NRC National Environmental Policy Act (“NEPA”) process. In its Policy Statement on Environmental Justice (“Policy Statement”), the Commission stated:

It is the Commission’s view that the obligation to consider and assess disproportionately high and adverse impacts on low income and minority populations as part of its NEPA review was not created by the [Executive Order (“E.O.”) 12898, “Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations”]. Rather it is the Commission’s view that the E.O. reminded agencies that such an analysis is appropriate in its normal and traditional NEPA review process.<sup>6</sup>

The NRC staff guidance on the preparation of environmental impact statements for license renewals for reactors recognizes that an applicant has a responsibility to provide an analysis of environmental justice issues.<sup>7</sup> As the Commission noted in the response to the public comments submitted on the draft Policy Statement, “[t]his policy statement ... seeks to clarify the Commission’s environmental justice policy, by, among other things, combining NRR and NMSS guidance to provide a consolidated agency view.<sup>8</sup> In other words, even though reactor licensing may be different than the licensing of materials activities, the concept of environmental justice expressed in NRC staff guidance should

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<sup>6</sup> Policy Statement on the Treatment of Environmental Justice Matters in NRC Regulatory and Licensing Actions, 69 Fed. Reg. 52040, 52044 (August 24, 2004). Note that the Commission’s Policy Statement was issued several years after the promulgation of Table B-1 of Subpart A to 10 C.F.R Part 51. The summary of the findings on environmental protection for the license renewal of nuclear power plants in Table B-1 of Subpart A to 10 C.F.R. Part 51 are based on the information contained in the Generic Environmental Impact Statement for the License Renewal of Nuclear Power Plants (U.S. Nuclear Regulatory Commission, NUREG-1437, May, 1996). As noted in Footnote 6 to Table B-1, Environmental Justice was not addressed in NUREG-1437 because the guidance on implementing Executive Order 12898 on environmental justice was not available prior to the issuance of NUREG-1437.

<sup>7</sup> Preparation of Supplemental Environmental Reports for Applications to Renew Nuclear Power Plant Operating Licenses, Regulatory Guide 4.2S1, Supplement 1 to Regulatory Guide 4.2, U.S. Nuclear Regulatory Commission (September 2000).

<sup>8</sup> Policy Statement on the Treatment of Environmental Justice Matters in NRC Regulatory and Licensing Actions, 60 Fed. Reg. 52040, 52042 (August 24, 2004).

be should be unitary on common points. In this regard, it is instructive that the NRC staff guidance on the preparation of environmental reviews in the materials licensing area states that the ER should include “...a discussion of the methods used to identify and quantify impacts on low-income and minority populations, the location and significance of any environmental impacts..., and any additional information pertaining to mitigation.”<sup>9</sup> This section of the guidance proceeds to list seven areas of information on potential environmental justice that the Applicant should provide in the ER, including a description of cumulative impacts to low-income and minority populations.<sup>10</sup>

In summary, it is clear from the NRC regulatory framework, as the Board found, that the Applicant has a responsibility to provide information and perform an analysis of potential impacts relevant to environmental justice in its ER. This obligation includes providing information and performing an analysis of any potential disproportionate impacts on low-income or minority groups, such as the Prairie Island Indian Community. As the Applicant recognized in its Motion, the NRC staff “bears the ultimate burden of demonstrating that environmental issues have been adequately considered.”<sup>11</sup> However, the Applicant has the **initial** responsibility to provide the information and analysis to

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<sup>9</sup> Environmental Review Guidance for Licensing Actions Associated with NMSS Programs, NUREG 1748, Section 6.411, page 6-25 (U.S. Nuclear Regulatory Commission, August 2003).

<sup>10</sup> In particular, the areas of information include: an assessment (qualitative or quantitative, as appropriate) of the degree to which each minority or low-income population is disproportionately receiving adverse human health or environmental impacts and an assessment (qualitative or quantitative, as appropriate) of the significance or potential significance of such environmental impacts on each low-income and minority population [Significance is determined by considering the disproportionate exposure, multiple-hazard, and cumulative hazard conditions].

<sup>11</sup> Northern States Power Company’s Motion for Reconsideration of LBP-08-26 Regarding Contention 5 or, in the Alternative, for Referral to the Commission at 4 (December 15, 2008).

allow the NRC to meet this ultimate responsibility. While there can be legitimate inquiry into whether an applicant has provided sufficient information to meet this initial responsibility, in the case of the Prairie Island license renewal, this Applicant has provided no analysis of the potential impacts on low-income or minority populations.

### **III. THE APPLICANT’S FOCUS ON LATE FILED CONTENTIONS**

Based on the requirements found in the NRC regulations, the Board has found that the Applicant has an obligation to address environmental justice in the ER. The Applicant, however, chooses to focus on that part of the Board’s rationale that discusses late filed contentions. Applicant’s argument fails to meet the high standard of “clear and material” error required by 10 C.F.R. 2.323(e). Nevertheless, the Community appreciates the Board’s general recognition of a petitioner’s “Catch-22” dilemma under NRC regulations, i.e., being required to challenge the Applicant’s ER at the initial contention stage in order to participate in the hearing, but then facing the prospect that a proffered contention will be rejected on the basis that any deficiencies in the Applicant’s ER can be remedied later, in the development of the NRC EIS. While there can be legitimate inquiry into whether an applicant has provided sufficient information to meet its initial responsibility for an environmental justice analysis, in the case of the Prairie Island license renewal, this Applicant has provided no analysis of the potential impacts on low-income or minority populations. Consequently, according to Applicant’s argument, the development of the entire analysis of potential impacts would need to await the NRC EIS. The Community does not intend, as stated in the Applicant’s Motion, for this to

serve as a mere “placeholder” for a later challenge to the NRC staff EIS.<sup>12</sup> This serious omission in the Applicant’s ER must be addressed now.

#### **IV. THE APPLICANT’S SUGGESTED REFERRAL TO THE COMMISSION**

Although the Community respectfully recognizes the need in some instances for the Commission to address “novel issues that merit Commission review at the earliest opportunity,”<sup>13</sup> this is not such a case. The Board finding on Contention 5 simply recognizes the obligation of an applicant to address potential environmental justice impacts in its ER. However, if there were such a referral, the Community is concerned that it might not have an opportunity to comment on the Applicant’s argument that the consideration of site-specific environmental justice issues is in some way truncated by the Category 1 generic determinations in Appendix B to Subpart A of 10 C.F.R. Part 51. Once the requirement for an applicant to perform an analysis of potential impacts to low-income and minority populations has been established, as it has here, the starting point for determining the scope of an environmental justice inquiry can be found in the NRC staff instructions for performing an environmental justice review. In those instructions, the staff looks to “whether there are disproportionately high and adverse human health or environmental effects to minority or low income populations.”<sup>14</sup> The NRC staff explores whether there are there radiological or other health effects significant or above generally accepted norms or whether the radiological or other health effects occur in groups affected by cumulative or multiple adverse exposures from environmental hazards.

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<sup>12</sup> *Id.* at 8.

<sup>13</sup> 10 C.F.R. 2.323(f).

<sup>14</sup> Procedural Guidance for Preparing Environmental Assessments and Considering Environmental Issues, LIC-203, Revision 1, at D-10, (U.S. Nuclear Regulatory Commission, May 24, 2004, ADAMS Accession No: ML03355003).

These are the type of issues that are of concern to the Community. The NRC staff instruction is an acknowledgement that when a site-specific issue such as environmental justice is involved, then all potential impacts should be evaluated, even though some generic category 1 issues are implicated.

**V. CONCLUSION**

For the reasons set forth above, the Community respectfully requests that Applicant's Motion be denied in its entirety.

January 5, 2009

Respectfully submitted,

*/Signed (electronically) by Philip R. Mahowald/*

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**CERTIFICATE OF SERVICE**

I hereby certify that copies of “PRAIRIE ISLAND INDIAN COMMUNITY’S RESPONSE IN OPPOSITION TO NORTHERN STATE 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, has been served upon the following by the Electronic Information Exchange, this 5th day of January, 2009:

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