UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

William J. Froehlich, Chairman
Dr. Gary S. Arnold
Dr. Thomas J. Hirons

In the Matter of Northern States Power Co. (formerly Nuclear Management Company, LLC) (Prairie Island Nuclear Generating Plant, Units 1 and 2)	Docket Nos. 50-282-LR and 50-306-LR ASLBP No. 08-871-01-LR January 16, 2009

ORDER
(Denying Motion for Reconsideration of LBP-08-26 Regarding Contention 5 and Alternative Motion to Refer the Issue to the Commission)

On December 5, 2008, the Licensing Board issued a Memorandum and Order (LBP-08-26), which, inter alia, admitted the Prairie Island Indian Community (PIIC)'s Contention 5.[1] Contention 5, as proposed by PIIC and as admitted by the Licensing Board, states, "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."[2] On December 15, 2008, Northern States Power Company (Applicant) filed a motion for reconsideration of LBP-08-26 regarding Contention 5 or, in the alternative, for referral to the

[1] Northern States Power Co. (Prairie Island Nuclear Generating Plant), LBP-08-26, 68 NRC __, __ (slip op. at 33) (Dec. 5, 2008).

[2] Id.

Commission.[3] On January 5, 2008, a response in support of Applicant's motion was filed by NRC Staff[4] and a response in opposition to the motion was filed by PIIC.[5]

Applicant filed its motion for reconsideration pursuant to 10 C.F.R. § 2.323(e), which requires "a showing of compelling circumstances, such as the existence of a clear and material error in a decision, which could not reasonably have been anticipated, that renders the decision invalid." Applicant argues that the Licensing Board erred in admitting Contention 5 because the NRC rules do not require a license renewal applicant to provide an environmental justice analysis.[6] Therefore, Applicant reasons, the LRA cannot be considered deficient for failing to include such an analysis.[7] Rather, the responsibility to perform this analysis falls on the NRC Staff when it prepares the Environmental Impact Statement (EIS),[8] and Applicant need not submit any more than the demographic data it detailed in the ER, nor must Applicant undertake an analysis or evaluation of impacts. Finally, Applicant argues that the Board erred in admitting Contention 5 as a "placeholder" for a possible later challenge to the EIS.[9] In Applicant's view, the appropriate time for challenging an environmental justice analysis is after issuance of the

[3] Northern States Power Company's Motion for Reconsideration of LBP-08-26 Regarding Contention 5 or, in the Alternative, for Referral to the Commission (Dec. 15, 2008) [hereinafter Northern States Motion for Reconsideration].

[4] NRC Staff 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 (Jan. 5, 2009) [hereinafter NRC Staff's Response to Motion for Reconsideration].

[5] 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 (Jan. 5, 2009) [hereinafter PIIC Response to Motion for Reconsideration].

[6] Northern States Motion for Reconsideration at 1.

[7] Id. at 4.

[8] Id.

[9] Id. at 6.

EIS. At that time, Applicant insists, such a contention would not face any risk of being characterized as "late-filed" and subject to stricter admissibility standards.[10]

NRC Staff agrees with Applicant that the legal standard for reconsideration has been met.[11] It argues that the Board's decision is "contrary to the Commission's Policy Statement on Environmental Justice and Commission precedent," and that it "misconstrues the Commission's regulations in 10 C.F.R. Parts 2 and 51."[12] Under the Commission's EJ Policy Statement, NRC Staff argues, "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.'"[13] According to NRC Staff, "[i]t is not an applicant's responsibility to undertake this analysis and there is no statutory or regulatory requirement for an applicant to do so."[14] Moreover, NRC Staff faults the Board for relying on 10 C.F.R. § 51.45(c) in concluding that Applicant must analyze environmental justice impacts,[15] since "the statement in § 51.45(c) refer[s] only to *data* (i.e., information), not *analysis* of such data."[16] NRC Staff concludes that "[b]ecause [Applicant] is not required to undertake an

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[10] Id. at 4-5.

[11] NRC Staff Response to Motion for Reconsideration at 3.

[12] Id.

[13] Id. at 4 (quoting Policy Statement on the Treatment of Environmental Justice Matters in NRC Regulatory and Licensing Actions, 69 Fed. Reg. 52,040, 52,044 (August 24, 2004) [hereinafter EJ Policy Statement]).

[14] Id.

[15] The Board disputes this reading of our holding on Contention 5. In fact, we did not conclude that "Applicant must analyze environmental justice impacts." Rather, we found that "the Commission is ultimately responsible for evaluating impacts on minority groups," and that "10 C.F.R. § 51.45(c) requires Applicant to assist the Commission with that evaluation." Prairie Island, LBP-08-26, 68 NRC at __ (slip op. at 34) (emphasis added).

[16] Id. at 5.

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."[17]

PIIC opposes the motion for reconsideration, arguing that there are no "compelling circumstances" that would justify the grant of Applicant's motion.[18] PIIC supports the Board's finding on Contention 5 that an applicant has an obligation to perform an analysis of environmental justice issues in the ER.[19] "This obligation," PIIC explains, "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."[20] Finally, PIIC maintains that Applicant's motion does not raise a "significant and novel legal issue" that would require referral to the Commission.[21]

No party argues that Applicant has addressed the potential impacts of license renewal on low-income or minority populations. Nor does any party contend that the EIS in this case need not contain an environmental justice review.

A. Standards Governing Reconsideration and Referral to the Commission

Section 2.323(e) of the Commission's rules of practice specifies the requirements for a reconsideration motion. As a threshold matter, a motion for reconsideration "must be filed within ten (10) days of the action for which reconsideration is requested."[22] Further, a motion may not be filed without leave from the Board, and it may be granted only (1) "upon a showing of

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[17] Id. at 6.

[18] PIIC Response to Motion for Reconsideration at 1.

[19] Id. at 2. Again, the Board disputes this reading of our holding on Contention 5. See supra note 15.

[20] Id. at 5.

[21] Id. at 7.

[22] 10 C.F.R. § 2.323(e).

compelling circumstances, such as the existence of a clear and material error in a decision," (2) "which could not have reasonably been anticipated," and (3) "that renders the decision invalid."[23] In the 2004 amendments to its rules of practice, the Commission expanded on the meaning of "compelling circumstances:"

> This standard, which is a higher standard than the existing case law, is intended to permit reconsideration only where manifest injustice would occur in the absence of reconsideration, and the claim could not have been raised earlier. In the Commission's view, reconsideration should be an extraordinary action and should not be used as an opportunity to reargue facts and rationales which were (or should have been) discussed earlier.[24]

Clearly, the Commission has laid out a high standard by which motions for reconsideration are to be judged. As the Commssion has stated, "[w]e . . . do not grant motions for reconsideration lightly."[25] With regard to the "clear and material error" requirement, the Commission has explained that "a 'clearly erroneous' finding is one that is not even plausible in light of the record viewed in its entirety."[26] Thus, in ruling on a reconsideration request, the Commission stated that it does "not lightly revisit our own already-issued and well-considered decisions" and does so "only if the party seeking reconsideration brings decisive new information to our attention or demonstrates a fundamental Commission misunderstanding of a key point."[27]

If the Board denies the motion for reconsideration, Applicant asks us to refer the issue to the Commission for guidance. Section 2.323(f)(1) of the Commission's regulations authorizes us to certify an issue to the Commission in two rare circumstances: (1) if "prompt decision is

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[23] Id.

[24] Changes to Adjudicatory Process, 69 Fed. Reg. 2182, 2207 (Jan. 14, 2004).

[25] See Pacific Gas and Electric Co. (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), CLI-06-27, 64 NRC 399, 400-01 (2006).

[26] Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-5-19, 62 NRC 403, 411 (2005).

[27] Louisiana Energy Services, L.P. (National Enrichment Facility), CLI-04-35, 60 NRC 619, 622 (2004).

necessary to prevent detriment to the public interest or unusual delay or expense," or (2) if the Board "determines that the decision or ruling involves a novel issue that merits Commission review at the earliest opportunity."[28]

B. Discussion

Applicant's motion for reconsideration fails to approach, much less meet, the high standard the Commission set in 10 C.F.R. § 2.323(e). There are no "compelling circumstances" that would justify the grant of Applicant's motion, nor is there any part of the Board's decision "which could not have been reasonably anticipated." Moreover, granting reconsideration is not necessary to undo any "manifest injustice." Contention 5 challenges the sufficiency of Applicant's environmental justice analysis in the environmental report (ER). Because NRC Staff's EIS is required to include an environmental analysis, and because Applicant's ER, serving as a surrogate for the EIS, provides no such analysis, it was reasonable and appropriate for the Board to admit Contention 5. Indeed, the Commission's rules suggest that, at this stage of the proceeding, all of Petitioner's challenges under the National Environmental Policy Act (NEPA), including environmental justice challenges, should be directed at the ER.[29] Therefore, environmental justice issues fall squarely within the scope of a license renewal proceeding, and the question before this Board becomes when, not if, environmental justice issues should be considered.

To begin, the Commission has clearly articulated the importance of environmental justice. In 2004, the Commission stated its commitment as part of its NEPA review process to strive to reach the environmental justice goals described in Executive Order 12898.[30] The

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[28] 10 C.F.R. § 2.323(f)(1).

[29] See Id. § 2.309(f)(2) (stating that "[o]n issues arising under the National Environmental Policy Act, the petitioner shall file contentions based on the applicant's environmental report.")

[30] EJ Policy Statement at 52,041-42.

Commission previously noted in reviewing environmental justice claims that "[a]dverse impacts that fall heavily on minority and impoverished citizens call for particularly close scrutiny."[31] The Commission went on to explain the process by which environmental contentions should be raised:

> Although the NRC Staff bears the ultimate burden of demonstrating that environmental issues have been adequately considered, intervenors must file their environmental contentions as soon as possible, even before issuance of the EIS, if the contested issue is addressed in the applicant's ER. To the extent that the [Final] EIS may differ from the ER, an intervenor is provided a second opportunity to file contentions on environmental issues.[32]

Based on this analysis, the Board has identified two ways of addressing Contention 5, both of which lead us to admit the contention. The first approach is grounded in the language of 10 C.F.R. § 2.309 (f)(2), which states, "On issues arising under the National Environmental Policy Act, the petitioner shall file contentions based on the applicant's environmental report." This language makes clear that the Applicant's ER, at this stage of the proceeding, is to be treated as a surrogate for the EIS. However, it does not make clear to what degree it is to be treated as such a surrogate. On the one hand, a petitioner might examine the regulations and try to establish precisely how much of the environmental information the applicant is responsible for, how much environmental information the NRC Staff is responsible for, and then treat the ER as surrogate for just that portion of the information for which the applicant is responsible. On the other hand, a petitioner may view the Applicant's ER as a surrogate for the entire EIS and file contentions on any aspect of the ER that does not meet the requirements that NEPA

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[31] Louisiana Energy Services, L.P. (Claiborne Enrichment Center), CLI-98-3, 47 NRC 77, 106 (1998).

[32] Id. at 89 (emphasis added) (citations omitted). Although the Commission in this case was interpreting a pre-2004 rule, 10 C.F.R. § 2.714(b)(2)(iii), the Commission's analysis still applies under the current rule, 10 C.F.R. § 2.309(f)(2). Indeed, both versions of the rule contain the same essential language: "[o]n issues arising under the National Environmental Policy Act, the petitioner shall file contentions based on the applicant's environmental report." Furthermore, both versions of the rule allow the intervenor to "amend those contentions or file new contentions if there are data or conclusions in the NRC draft or final environmental impact statement … that differ significantly from the data or conclusion in the applicant's documents."

imposes on the EIS. It is far from clear in the regulations which approach should be followed for any particular set of circumstances, or if there is a reasonable middle ground.

In LBP-08-26, the Licensing Board accepted the latter interpretation. We admitted Contention 5 under the assumption that Applicant's ER acts as a surrogate for the entire EIS, which NRC Staff will eventually prepare. We interpreted Contention 5 to allege that the EIS, in its current form as Applicant's ER, is deficient in not including an environmental justice analysis. Now it is NRC Staff's responsibility to provide such an analysis in its EIS. Once the EIS is issued, Applicant may find it appropriate to file a motion to dismiss or a motion for summary disposition of Contention 5. By the same token, PIIC may file new or amended contentions based on any information in the EIS that "differ[s] significantly" from the ER.[33]

The second approach to Contention 5 requires an examination of Applicant's responsibilities concerning the contents of an ER. The Commission's regulations at 10 C.F.R. § 51.45(c) provide that the ER "should contain sufficient information to aid the Commission in development of an independent analysis."[34] The Commission's independent analysis includes an environmental justice review, whose purpose is to insure that the Commission "considers and publicly discloses environmental factors peculiar to minority or low-income populations that may cause them to suffer harm disproportionate to that suffered by the general population."[35] Section 51.45(c), therefore, requires that an applicant provide the Commission with the information it needs to identify any disproportionate environmental impacts on minority communities. Of course, what constitutes "sufficient information to aid the Commission" is not

[33] 10 C.F.R. § 2.309(f)(2).

[34] NRC Staff insists that 10 C.F.R. § 51.53(c)(3)(ii) provides an "exclusive" list of analyses required in the ER, and thus Sections 51.53(c)(3)(ii) "takes precedence over the more general regulation at § 51.45(c)." NRC Staff Response to Motion for Reconsideration at 4-5. We disagree. We note that Section 51.45(c) speaks to information required in the ER, not analyses. It is entirely reasonable for this Board to conclude that the Commission expects the Applicant to provide information separate and apart from the analyses required by Section 51.53(c)(3)(ii).

[35] System Energy Resources, Inc. (Early Site Permit for Grand Gulf ESP Site), CLI-05-4, 61 NRC 10, 13 (2005).

always clear. In the present case, Applicant has complied with the letter of Regulatory Guide 4.2S1 and identified PIIC as an adjacent minority population. But, of course, a Regulatory Guide is by no means an official interpretation of Commission rules. In Contention 5, PIIC alleges that, even though Applicant has complied with the Regulatory Guide, it still has not provided enough information to assist the Commission with its analysis. Specifically, PIIC argues that the ER does not "adequately acknowledge" the Indian Community or identify those characteristics of PIIC that would help the Commission to perform its environmental justice review.[36] Thus, Contention 5 raises a genuine, material dispute with the Application, and the Board was not "clearly erroneous" in finding it admissible.

C. Conclusions

After considering the arguments set forth in Applicant's motion and the responses thereto, the Board denies Applicant's motion for reconsideration or referral because it does not meet the rigorous standards set forth in 10 C.F.R. §§ 2.323(e) and (f)(1). It fails to articulate any "clear and material error" in LBP-08-26, and it fails to identify any "compelling circumstances" requiring us to grant reconsideration. Furthermore, the Board's admission of Contention 5 imposes no "manifest injustice" on any party to this proceeding. On the contrary, it alerts the parties to PIIC's concern that issues of environmental justice receive full and proper consideration. The Board trusts that NRC Staff will conduct a thorough environmental justice review in its EIS. And upon issuance of that EIS, motions for summary disposition, as well as any motions to amend or add new environmental justice contentions, will be entertained.

Further, Applicant has not shown that granting this motion is necessary "to prevent detriment to the public interest or unusual delay or expense."[37] Hence, a referral to the Commission is unwarranted.

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[36] 10 C.F.R. § 51.45(c).
[37] 10 C.F.R. § 2.323(f)(1).

For the foregoing reasons, we deny, in all respects, Northern States' Motion for Reconsideration Regarding Contention 5 and the Alternative Motion for Referral to the Commission.

It is so ORDERED.

THE ATOMIC SAFETY
AND LICENSING BOARD[38]

/RA/

William J. Froehlich, Chairman
ADMINISTRATIVE JUDGE

/RA/

Dr. Gary S. Arnold
ADMINISTRATIVE JUDGE

/RA/

Dr. Thomas J. Hirons
ADMINISTRATIVE JUDGE

Rockville, Maryland
January 16, 2009

[38] Copies of this order were sent this date by the agency's E-Filing system to counsel for (1) Applicant, Northern States Power Company, (2) Petitioner, Prairie Island Indian Community, and (3) NRC Staff.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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)	)	
	)	
(License Renewal)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LB ORDER (DENYING MOTION FOR RECONSIDERATION OF LBP-08-26 REGARDING CONTENTION 5 AND ALTERNATIVE MOTION TO REFER THE ISSUE TO THE COMMISSION) have been served upon the following persons by Electronic Information Exchange.

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[Original signed by R. L. Giitter]
Office of the Secretary of the Commission

Dated at Rockville, Maryland
this 16th day of January 2009