

March 16, 2009

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

Before the Atomic Safety and Licensing Board

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

**NORTHERN STATES POWER COMPANY'S
MOTION TO DISMISS PIIC CONTENTION 1 AS MOOT**

I. INTRODUCTION

Pursuant to 10 C.F.R. § 2.323, Applicant Northern States Power Company, a Minnesota corporation (“NSPM”), hereby moves to dismiss as moot the Prairie Island Indian Community (“PIIC”)’s Contention 1, relating to the discussion of historic and archaeological resources in the Environmental Report (“ER”). NSPM moves this Atomic Safety and Licensing Board (the “Board”) to dismiss PIIC Contention 1 because NSPM has amended the ER to include the information whose omission was the basis for the Contention.

II. PROCEDURAL BACKGROUND

On April 11, 2008, NSPM, formerly Nuclear Management Company, LLC, submitted to the NRC the application for renewal of Operating License Nos. DPR-42 and DPR-60 for the Prairie Island Nuclear Generating Plant (“PINGP”) Units 1 and 2. On August 18, 2008, PIIC filed its “Notice of Intent to Participate and Petition to Intervene” (“PIIC Petition”), alleging eleven separate contentions. The PIIC Petition included Contention 1, which claimed that “[t]he analysis of historical and archaeological resources in Section 4.1.6 of the Environmental Report (pages 4-54 to 4-56) is incomplete because it does not contain information sufficient to make an

accurate assessment of whether any historic or archaeological properties will be affected by the proposed license renewal and does not comply with 10 C.F.R. 51.53(c)(3)(ii)(K).” PIIC Petition at 5.

Both NSPM and the NRC Staff filed answers opposing the admission of this contention.¹ In reply to these answers, the PIIC stated with respect to Contention 1, “[n]o map is provided of the site identifying where the [Steam Generator Replacement] activities or construction will occur...the Community believes the applicant has an obligation to develop a cultural resources protection plan based upon an on-site cultural resources survey.” Prairie Island Indian Community’s Reply to Nuclear Management Company’s and the NRC’s Answers to the Prairie Island Indian Community’s Petition to Intervene (“PIIC Reply”) (Sep. 19, 2008) at 5 and 9.

The Board heard oral arguments regarding PIIC’s Petition and the admissibility of its contentions, including Contention 1, on October 29, 2008. The Board issued its Memorandum and Order (“LBP-08-26”) on December 5, 2008, admitting PIIC Contention 1 in the following amended form:

The ER in the LRA does not provide an adequate analysis of historical and archaeological resources that may be affected by the proposed license renewal. The LRA does not include information concerning pitfalls that could adversely affect the plan to avoid damage to Historical and Archaeological Resources.

LBP-08-26 at 22.

On March 4, 2009, NSPM filed an amendment to the ER, augmenting the original ER’s discussion of the archaeological, historical, and cultural resources within and around the PINGP property and providing additional information about the NSPM actions to identify and protect

¹ Nuclear Management Company’s Answer to the Prairie Island Indian Community’s Petition to Intervene (Sep. 12, 2008); NRC Staff’s Answer to the Prairie Island Indian Community’s Petition for Leave to Intervene (Sep. 12, 2008).

such resources. The amendment also provided an updated list of Preliminary License Renewal Commitments, including four new Preliminary Commitments regarding the identification and protection of archaeological, historical, and cultural resources within and around the PINGP site. This ER amendment is attached hereto as Exhibit A.² The ER amendment moots PIIC Contention 1 as admitted by the Board, and that Contention should, therefore, be dismissed.

III. PIIC CONTENTION 1 SHOULD BE DISMISSED AS MOOT

A. When an Applicant Cures an Alleged Omission in the Application which Served as the Basis for a Contention, the Contention is Rendered Moot

Where “ a contention is ‘superseded by the subsequent issuance of licensing-related documents’ ...the contention must be disposed of or modified.” Duke Energy Corp. (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-28, 56 N.R.C. 373, 382 (2002) (internal citations omitted). Where “a contention alleges the omission of particular information or an issue from an application, and the information is later supplied by the applicant or considered by the Staff in a draft EIS, the contention is moot.” McGuire, 56 N.R.C. at 383.

As will be discussed below, PIIC Contention 1 has been rendered moot by the submission of NSPM’s ER amendment. This Board should, therefore, dismiss PIIC Contention 1.

B. PIIC Contention 1 Alleged the Omission of Information from the ER

The original PIIC Contention 1 alleged a number of omissions from the ER and the Board admitted the Contention on that basis. PIIC Contention 1 as originally asserted, and as amended by the Board, alleged that the ER improperly omitted information about the identification and protection of archaeological, historical and cultural resources in and around the

² “Revisions to Environmental Report Regarding Application for Renewed Operating Licenses” (March 4, 2009).

PINGP site. The heading of the Contention makes clear that it is a contention alleging omissions from the ER; it states that “[t]he analysis of historical and archaeological resources in Section 4.1.6 of the Environmental Report (Pages 4-54 to 4-56) is *incomplete* because it does not contain information sufficient to make an accurate assessment of whether any historic or archaeological properties will be affected.” PIIC Petition at 5 (emphasis added). PIIC Contention 1 alleged four specific omissions from the ER.³

First, PIIC Contention 1 alleged that the ER improperly omitted a description of the “qualifications or expertise” of the Environmental Coordinator responsible for determining whether proposed land-disturbing activities will potentially affect archaeological, historical or cultural resources. PIIC Petition at 8. The Board remarked on this contended omission, stating that PIIC “states that it disapproves of Applicant’s ‘Excavation and Trenching Controls’ program to protect historic resources because it grants authority to an Environmental Coordinator whose qualifications are not specified.” LBP-08-26 at 18 (citing PIIC Petition at 8). The Board elaborated that, “[i]n essence, PIIC has made the assertion that, in order to ‘aid the Commission in development of an independent analysis,’ Applicant’s ER should also include any pitfalls to its plan to protect cultural resources. As pointed out by the PIIC in its Petition, these pitfalls include the fact[] that...the Environmental Coordinator’s qualifications are not known.” LBP-08-26 at 21 (citing 10 C.F.R. § 51.45(c)).

Second, PIIC alleged that the ER was deficient for failing to disclose “where construction activities for the steam generator replacement project will occur...More specificity is needed to

³ In addition to the four specific claims discussed below, the original PIIC Contention 1 also alleged that the ER improperly omitted a discussion of “the expansion of the Independent Spent Fuel Storage Installation (‘ISFSI’) at the PINGP site.” PIIC Petition at 9. This claim – “those portions of Contention 1 that refer to the ISFSI expansion as a potential source of archaeological destruction” – was explicitly rejected by the Board as outside the scope of the license renewal proceeding. LBP-08-26 at 21-22.

identify precisely where on the *previously disturbed lands* these construction activities will take place.” PIIC Petition at 8 (emphasis in original). More elaboration was provided in the PIIC Reply, which asserted that a map should be provided in the ER identifying the areas where the steam generator replacement activities will occur. PIIC Reply at 5-6 (“No map is provided of the site identifying where the activities or construction will occur...The Community needs assurance that the Unit 2 Steam Generator Replacement activities will be confined to previously disturbed areas of the site. It is the applicant’s responsibility to provide sufficient information in its ER to confirm its conclusion on whether there will be significant impacts on historic or archaeological resources”). The Board characterized this as a claim of omission, stating that “Petitioner also faults Applicant for failing to identify exactly where refurbishment activities, such as the steam generator replacement project, will occur.” LBP-08-26 at 18 (citing PIIC Petition at 8). The Board also remarked that the fact “that the location of refurbishment activities is not adequately specified,” was a pitfall that PIIC asserted should be included in NSPM’s ER. LBP-08-26 at 21.

Third, PIIC Contention 1 claimed that the ER was deficient for lacking a plan to conduct a field assessment for potential archaeological and cultural resources at the PINGP site, prior to the undertaking of any construction activity. The PIIC Petition asserted that NSPM needs “to do a ‘field assessment’ of these potential [archaeological and historic] resources, even in previously disturbed areas, before any construction activity is undertaken at the site.” PIIC Petition at 7. The PIIC reiterated in its Reply that it is “imperative for the applicant to conduct a field investigation of the site to determine where areas of traditional cultural property might exist. This would be the pre-requisite to ensuring that future site activities would avoid any of these areas.” PIIC Reply at 6. The Board also recognized PIIC Contention 1 to claim that NSPM “has an obligation to perform a thorough field assessment before undertaking any construction

activity,” and that the ER was deficient for omitting such a field assessment. LBP-08-26 at 18 (citing PIIC Petition at 7). The Board found that the last of the pitfalls that PIIC asserted should have been included in the ER was the fact “that existing surveys are imperfect, [and] that land identified as ‘previously disturbed’ may still contain historic sites.” LBP-08-26 at 21.

Finally, the last omission from the ER alleged by PIIC Contention 1 is a “‘cultural resources protection plan,’ based on an on-site cultural resources survey.” PIIC Petition at 9. As alleged by PIIC, such a plan “would, among other things: identify previously discovered cultural resources areas, as well as those areas on the PINGP site that have a high potential for the discovery of cultural resources; identify any construction and other activities that may occur because of renewal of the license...and ensure that these activities do not take place on or near the cultural resources areas by designating them as ‘no construction zones.’ It is only though [sic] such a survey and plan that the NRC will have the information necessary from the applicant to ensure that its responsibilities under the National Historic Preservation Act will be met.” PIIC Petition at 10. In its Reply, PIIC further contended that “the applicant has an obligation to develop a cultural resources protection plan based upon an on-site cultural resources survey.” PIIC Reply at 9. The Board summarized the PIIC’s allegations of omissions as an argument that the ER “fails to provide adequate assurance that cultural properties and artifacts, central to the core beliefs and value system of the Community, will be protected during the relicensing period.” LBP-08-26 at 18 (citing PIIC Petition at 6).

C. Each of the Items PIIC Contention 1 Alleged Was Omitted from the ER Is Included in NSPM’s ER Amendment

The ER amendment filed by NSPM on March 4, 2009, contains information directly addressing each of the omissions alleged by PIIC Contention 1 and, therefore, renders that

Contention moot. In response to the first omission alleged by PIIC Contention 1, the ER amendment includes a commitment that NSPM will revise its procedures for protecting archaeological, cultural and historic resources “to identify sensitive areas and provide guidance for ground-disturbing activities. The procedures will be revised to include drawings and illustrations to assist users in identifying culturally sensitive areas, and pictures of artifacts that are prevalent in the area of the PINGP site. The revised procedures will also require training of the Site Environmental Coordinator and other personnel responsible for proper execution of excavation or other ground-disturbing activities.” Exhibit A, Enclosure 1 at 2 (Change 2, Section 4.16.1); see also Exhibit A, Enclosure 2 at 14-15 (Preliminary Commitment Number 37). The topics on which the Site Environmental Coordinator will receive training include “the review of cultural ‘exclusion areas’ on the plant site...artifact identification, situations which would require notification of the State Archaeologist or other technical resource, and the stop-work process.” Exhibit A, Enclosure 1 at 2 (Change 2, Section 4.16.1). Moreover, in addition to committing to provide training to the Site Environmental Coordinator, NSPM has also “retained a qualified archaeologist for consultation on an as-needed basis,” with whom NSPM will consult “prior to conducting any ground-disturbing activity in any area designated as undisturbed and in any disturbed area that is described as potentially containing archaeological resources.” Exhibit A, Enclosure 1 at 6 (Change 2, Section 4.16.2); see also Exhibit A, Enclosure 2 at 15-16 (Preliminary Commitment Number 40).

The ER amendment addresses the second omission alleged in PIIC Contention 1 by specifying the anticipated location of the construction activities for the steam generator replacement project. It states that “[t]he Unit 2 SGR project is currently expected to be contained within the areas shown on Figure 4.16-1, which limits activities to previously

disturbed areas...If NSPM later identifies any changes in the expected footprint or facilities that would affect either undisturbed areas or areas identified as having archaeological resources potential, NSPM will consult with a qualified archaeologist and perform additional surveys of such areas prior to any ground-disturbing activities.” Exhibit A, Enclosure 1 at 3 (Change 2, Section 4.16.1). Figure 4.16-1, a map of the PINGP site, identifies each of the areas to be potentially impacted by the anticipated PINGP Unit 2 steam generator replacement project; it therefore satisfies the demands made in the PIIC Petition and PIIC Reply. Exhibit A, Enclosure 1 at 4 (Change 2, Section 4.16.1).

The ER amendment further commits to the performance of a field assessment to identify potential archaeological, cultural, or historic resources. It explains that “NSPM is implementing additional efforts to identify, define, and protect the cultural resources present at the facility. Primarily, NSPM [sic] will conduct a Phase I Reconnaissance Field Survey of the disturbed areas within the Plant’s boundaries. In addition, NSPM will conduct Phase I field surveys of areas of known archaeological sites to precisely determine their boundaries. NSPM will use the results of these surveys to designate areas for archaeological protection.” Exhibit A, Enclosure 1 at 5 (Change 2, Section 4.16.2); see also Exhibit A, Enclosure 2 at 15 (Preliminary Commitment Number 38). The ER amendment provides significant details about the field assessment, including that the “Phase I Reconnaissance Field Survey will consist of a 100 percent pedestrian survey of disturbed areas at close transects (maximum of 5 meters). There will be no shovel testing, although areas will be identified as candidates for shovel testing. Soil probes will be used to identify disturbed or undisturbed soil horizons. Surveys will identify areas and the degree and type of disturbance. Findings from the field surveys will be documented using photographs, written descriptions, and sketch maps, as needed. Site layout drawings will be

prepared to aid employees in identifying archaeological ‘exclusion areas’ to be aware of during planning for excavation activities and will be integrated into the revised procedures discussed in Section 4.16.1.” Exhibit A, Enclosure 1 at 5 (Change 2, Section 4.16.2). This field assessment moots the third claim of omission in PIIC Contention 1.

Finally, the ER amendment includes a description of the Cultural Resources Management Plan (CRMP), which is already under development by NSPM. As demanded by PIIC, the CRMP will be “based on an on-site cultural resources survey,” because the information about archaeological, cultural, and historic resources obtained through the field assessment will be integrated into it. PIIC Petition at 9; See Exhibit A, Enclosure 1 at 5 (Change 2, Section 4.16.2). The very purpose of the CRMP is to protect the “significant historical, archaeological, and cultural resources that may currently exist on the Plant site.” Exhibit A, Enclosure 1 at 5-6 (Change 2, Section 4.16.2); see also Exhibit A, Enclosure 2 at 15 (Preliminary Commitment Number 39). In addition to the field assessment of such resources, in “connection with the preparation of the CRMP, NSPM will conduct botanical surveys to identify culturally and medicinally important species on the Plant site, and incorporate provisions to protect such plants into the CRMP.” Exhibit A, Enclosure 1 at 6 (Change 2, Section 4.16.2). NSPM plans to finalize the CRMP by the end of 2010, prior to period of extended operation. Exhibit A, Enclosure 1 at 6 (Change 2, Section 4.16.2). The description of the CRMP moots the last—and perhaps most significant—omission alleged by PIIC Contention 1.

D. The ER Amendment Has Rendered PIIC Contention 1 Moot

PIIC Contention 1 alleged that several items of information related to the protection of archaeological and cultural resources at the PINGP site were improperly omitted from the ER. In the ER amendment, NSPM has specifically addressed, and included information regarding,

each of the omissions alleged in PIIC Contention 1. Thus, “the contention of omission, as originally proffered, [has] indeed [been] rendered moot by” NSPM’s submission to the NRC of its ER amendment. AmerGen Energy Co., LLC (License Renewal for Oyster Creek Nuclear Generating Station), CLI-08-28, 68 N.R.C. ___, slip op. at n.72 (Nov. 6, 2008); see also McGuire, 56 N.R.C. at 382-83. Because the challenges raised by PIIC Contention 1 have been rendered moot by NSPM’s ER amendment, PIIC Contention 1 should be dismissed.

IV. CONCLUSION

For the reasons stated above, the Board should grant NSPM’s Motion to Dismiss PIIC Contention 1 as Moot.

CERTIFICATION

As required by 10 C.F.R. § 2.323(b), counsel for NSPM certifies that he has consulted with the other parties in a sincere effort to resolve the issues raised in this motion.

Respectfully Submitted,

/Signed electronically by David R. Lewis/

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Dated: March 16, 2009

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CERTIFICATE OF SERVICE

I hereby certify that copies of “Northern States Power Company’s Motion to Dismiss PIIC Contention 1 as Moot” dated March 16, 2009, was provided to the Electronic Information Exchange for service on the individuals listed below, this 16th day of March, 2009.

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