

March 19, 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
RESPONSE IN OPPOSITION TO PRAIRIE ISLAND INDIAN COMMUNITY'S
MOTION FOR PROTECTIVE ORDER AND NON-DISCLOSURE AGREEMENT
REGARDING PROPRIETARY DOCUMENTS**

I. INTRODUCTION

Pursuant to 10 C.F.R. § 2.323(c), Northern States Power Company, a Minnesota corporation (“NSPM”), respectfully opposes the version of the protective order proposed in “Prairie Island Indian Community’s Motion for Protective Order and Non-Disclosure Agreement Regarding Proprietary Documents” (“PIIC Motion”). While the Prairie Island Indian Community (“PIIC”) largely agrees with the Protective Order submitted by NSPM,¹ the PIIC Motion requests that the Atomic Safety and Licensing Board (the “Board”) establish a specially designated category of proprietary documents. i.e., “Highly Confidential – Attorneys’ Eyes Only” that would be disclosed only to NSPM’s attorneys and “independent experts” “on a need-to-know basis to first ascertain whether the requested information would impact the SAMA analysis or Site Restoration Study methodology.” PIIC Motion at 2. The requested limitation in the distribution of the produced documents, and the suggestion that there be threshold reviews

¹ See NSPM Motion for Protective Order and Non-Disclosure Agreement Regarding Proprietary Documents) (March 9, 2009), and PIIC Motion at 1 and Exhibit A thereto.

beyond those that are part of the normal disclosure process, are unwarranted and unnecessary. Therefore, the PIIC Motion should be denied.

II. PROCEDURAL BACKGROUND

On April 11, 2008, NSPM, formerly Nuclear Management Company, LLC, submitted the LRA to the NRC for the 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 2, which claimed that “the Severe Accident Mitigation Alternatives (SAMA) analysis does not accurately reflect decontamination and clean up costs associated with a severe accident at the Prairie Island site and, therefore, the SAMA analysis underestimates the cost of a severe accident and is not in compliance with 10 C.F.R. § 51.53(c)(3)(ii)(L).” PIIC Petition at 11.

As part of that contention, the PIIC asserted that the SAMA analysis should account for the cultural and economic impacts of a severe accident, including the effects on the Treasure Island Casino and Resort and the unique property values of the land surrounding the PIIC. See Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 and 2), LBP-08-26, 68 N.R.C. ___, slip op. at 23 (Dec. 5, 2008) (“LBP-8-26”), citing Petition at 13. The PIIC further asserted that the SAMA analysis currently under-represents the real value of PIIC’s property adjacent to the plant. Id.

The Board found that the PIIC's allegations provided adequate support for an admissible contention. Id. at 24. The Board specifically referred to the PIIC's allegations that the ER undervalues the land occupied by the Indian Community. Id. at 24-25.²

Because Contention 2 places in controversy the accuracy of the economic inputs for the PIIC property in NSPM's SAMA analysis, NSPM informed the PIIC that it will need information on the income and value of the PIIC properties to address this contention and is not aware of any source other than the PIIC for this information. The PIIC has confirmed that this information is not publicly available and is kept confidential. For that reason, NSPM alerted the Board and parties to this issue during the scheduling conference call on February 5, 2009 and promptly prepared a draft protective order and non-disclosure agreement modeled after similar agreements found acceptable by all parties in other proceedings. Compare, e.g., Entergy Nuclear Operations, Inc. (Vermont Yankee Nuclear Power Station), Order (Jan. 12, 2007). NSPM provided to the parties an initial draft of this agreement on February 5, 2009, and a slightly revised draft to the parties on February 6, 2009. Following issuance of the Board's February 18, 2009 Memorandum and Order (Prehearing Conference Call Summary and Initial Scheduling Order) requiring that the parties to file any proposed protective order by February 17, 2009,³ NSPM prepared a proposed joint motion which it transmitted to the parties along with the proposed protective order on February 20, 2009. NSPM was, however, unsuccessful in obtaining agreement from the other parties. Counsel for the NRC Staff requested changes that would require the PIIC to provide proprietary information to the NRC Staff upon request without

² As recast by the Board, Contention 2 states: "The SAMA analysis in the LRA does not accurately reflect the site restoration costs for the area surrounding the PINGP, including the PIIC and its associated Treasure Island complex. The Site Restoration Study methodology should be used to develop more appropriate input for the analysis." Id. at 25.

³ By Order (Granting Request for Extension of Time) dated February 27, 2009, the Board extended the deadline for submitting a proposed protective order until March 9, 2009.

execution of the Non-Disclosure agreement, which was not acceptable to the PIIC. In addition, the PIIC provided changes to NSPM that would only allow NSPM's counsel and experts unaffiliated with NSPM to have access to PIIC proprietary information. Because it deemed these restrictions unreasonable, NSPM filed its motion seeking the protective order in the form that it had proposed to the parties. NSPM Motion for Protective Order and Non-Disclosure Agreement Regarding Proprietary Documents) (March 9, 2009). Later that day, the PIIC filed its Motion.

By Memorandum and Order of March 16, 2009, the Board directed NSPM and PIIC to negotiate a mutually agreeable protective order and a non-disclosure statement and report to the Board no later than March 20, 2009 whether or not an agreement has been reached. NSPM and the PIIC met and had constructive discussions on March 18, 2009, and NSPM is hopeful that an agreement will soon be reached that will resolve certain disclosure concerns. As answers to the PIIC's Motion are due today, NSPM provides the following answer reflecting its current position.

III. ARGUMENT

NSPM respectfully submits that the PIIC's modification of the Protective Order proposed by NSPM is not reasonable or necessary. The PIIC's proposal to make financial information relevant to Contention 2 available only to "NSPM's Outside Legal Counsel (and independent experts) on a need-to-know basis" (PIIC Motion at 2) would unreasonably deprive NSPM counsel of the ability to elicit the assistance of NSPM personnel in preparing the company's case for the hearing on Contention 2, and would prevent as well NSPM management from fulfilling its responsibility to review, provide input into, and ultimately approve the work product developed by its counsel and outside experts. Such restrictions are also unnecessary, because under the terms of the Protective Order and Non-Disclosure agreement – both as proposed by

NSPM and as modified by the PIIC – any individual receiving proprietary information shall hold such information in confidence, shall not disclose it to anyone except in accordance with the Protective Order, and shall use it “only for purposes of this proceeding.” Non-Disclosure Agreement, Attachment A to PIIC Protective Order, at 1. Those limitations on the use of disclosed proprietary information are binding on the NSPM staff and management personnel who sign the non-disclosure agreement and receive the proprietary information.

The PIIC Motion suggests that its proposed limitation on access applies “to first ascertain whether the requested information would impact the SAMA analysis or Site Restoration Study methodology.” PIIC Motion at 2. However, the proposed restrictions in the PIIC’s proposed protective order would limit all disclosure of PIIC proprietary information to NSPM’s outside counsel and unaffiliated experts (i.e. there is no provision in the PIIC’s proposal for any distribution of proprietary information to an NSPM employee at any time),⁴ and under the PIIC’s proposed protective order even the disclosure to NSPM’s outside counsel and unaffiliated experts would be limited to persons determined in some unspecified way as having a need to know. See PIIC Proposed Protective Order, ¶ 5. While NSPM does not object to limiting disclosure to persons with a need to know, NSPM should determine who has a need know, not the PIIC. Otherwise, the PIIC would in effect be able to veto NSPM’s selection of counsel and experts.

⁴ The PIIC appears to suggest that its document disclosure are limited to those that “impact” the analysis. While this issue goes to the sufficiency of the PIIC’s disclosures, and not to the protection applicable to disclosed documents, it is clear that the NRC rules require disclosure of “relevant” documents (see 10 C.F.R. § 2.336(a)(2)(i)), not just those which the PIIC thinks may impact the analysis. NSPM recognizes that the wording of the contention as admitted creates some question as to the relevance of information on the actual PIIC income and property values, because the Contention as worded could be construed as being limited to use of the Site Restoration Study methodology, which in fact includes no method of calculating effects on income or property values specific to the PIIC. If the PIIC is willing to stipulate or the Board clarifies that Contention 2 is limited to whether use of the decontamination costs from the Site Restoration Study would affect the SAMA analysis, the need for confidential information on income and property values could be avoided.

The PIIC Motion cites to a Protective Order entered by the Atomic Safety and Licensing Board in the MOX proceeding, Shaw-Areva Mox Services (Mixed Oxide Fuel Fabrication Facility), Order (Adopting Protective Order) (December 31, 2008) (“MOX Order”) as authority for its proposed restrictions. The MOX Order does not support the PIIC’s argument. The situation that led to that order differs from that herein in three significant respects. First, it was proposed by agreement of the parties through a joint motion that was merely adopted by the Board. MOX Order at 1. No such agreement exists here. Second, the materials covered by the MOX Order include not only proprietary commercial information, but sensitive unclassified non-safeguards information (“SUNSI”) whose unauthorized disclosure might harm the public interest, warranting very strict limits in its distribution. Id. at 2. Third, and most significantly, the order in the MOX proceeding recognizes that access to the information should be granted to an individual “who has responsibility for the direction of the litigation, or is a legal or technical advisor or otherwise necessary for the preparation of materials for this proceeding.” Id. at 4. Thus, the NSPM officials and employees that the PIIC would bar from access to proprietary information herein would qualify to receive even more sensitive information in the MOX proceeding.

The PIIC’s proposal is also inconsistent with the NRC rules. 10 C.F.R. § 2.336 requires disclosures to the parties. See, e.g., 10 C.F.R. § 2.336(a)(2)(i) (“a party shall have the right to request copies of [any identified] document and/or data compilation.”), NSPM is the party, not its outside counsel or outside experts. Further, the PIIC’s proposal is fundamentally at odds with its own contention. In essence, Contention 2 alleges that NSPM’s SAMA analysis, performed to support the environmental review under the National Environmental Policy Act (“NEPA”) should have used financial information specific to the PIIC. NEPA, however, does not require

environmental analyses to use information that is not reasonably available. See, e.g., 40 C.F.R. § 1502.22 (CEQ regulation on incomplete or unavailable information). If the PIIC's financial information is unavailable to NSPM because the PIIC will not disclose it to NSPM, then there is no longer any basis for challenging the adequacy of NSPM's SAMA analysis under NEPA, and those portions of Contention 2 relating to property values and income should be dismissed.

While NSPM therefore believes that prohibiting disclosure to any NSPM employee, as the PIIC proposed, is inappropriate, NSPM is willing to limit disclosure of PIIC proprietary information to four NSPM employees (in addition to outside counsel and consultants unaffiliated with NSPM). NSPM is willing to agree that confidential financial information obtained under the protective order will not be disclosed to any NSPM employees other than the following individuals all of whom have direct responsibility for the license renewal project:

Charles Bomberger, Vice President, Nuclear Projects

Kenneth Albrecht, General Manager, Major Projects - Nuclear

Eugene Eckholt, Project Manager, License Renewal Project

James Holthaus, Environmental Project Manager

Coupled with the protection provided by NSPM's proposed Protective Order and Non-Disclosure Agreement, this limited distribution would adequately protect the PIIC's confidential information while allowing NSPM management to fulfill its responsibilities to review and accept any analyses performed for it.

NSPM is continuing to consider additional measures to be responsive to the PIIC's concerns and proposals, and will provide a further report to the Board tomorrow in accordance with the Board's March 16, 2009 Memorandum and Order.

IV. CONCLUSION

For all the reasons stated above, NSPM respectfully requests that the PIIC Motion be denied and that the Board approve the Protective Order and Non-Disclosure Agreement Regarding Proprietary Documents submitted by NSPM on March 9, 2009.

Respectfully Submitted,

[Electronically signed by David R. Lewis]

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Dated: March 19, 2009

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CERTIFICATE OF SERVICE

I hereby certify that a copy of “Northern States Power Company’s Response in Opposition to Prairie Island Indian Community’s Motion for Protective Order and Non-Disclosure Agreement Regarding Proprietary Documents,” dated March 19, 2009, was provided to the Electronic Information Exchange for service on the individuals listed below, this 19th day of March, 2009.

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