

December 3, 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 ANSWER
OPPOSING THE PIIC’S LATE-FILED CONTENTION**

I. INTRODUCTION

Northern States Power Company, a Minnesota corporation (“NSPM”), hereby answers opposing the admission of the new contention submitted by the Prairie Island Indian Community (“PIIC”) on November 23, 2009.¹ Contrary to its claims, the PIIC’s contention is not based on new information in the NRC Staff’s October 16, 2009 Safety Evaluation Report (“SER”), but instead relies on information that has been publicly available for months. Further, the PIIC has made no attempt to address the standards in 10 C.F.R. § 2.309(c) for admission of a late-filed contention. That alone is sufficient grounds to reject the PIIC’s contention.

In addition, the PIIC’s new contention fails to meet the NRC’s standards in 10 C.F.R. § 2.309(f)(1) for admissibility. The new contention impermissibly challenges the NRC’s Staff’s safety evaluation, fails to challenge any specific aging management programs described in NSPM’s application, and seeks to litigate operational performance issues beyond the scope of a license renewal proceeding. The PIIC also misstates the implications of the Reactor Oversight Performance (“ROP”) assessment and inspection findings related to Prairie Island, and thus fails

¹ Prairie Island Indian Community’s Submission of a New Contention on the NRC’s Safety Evaluation Report (Nov. 23, 2009) (“PIIC Submission”).

to provide information showing the existence of any genuine, material dispute. Each of these failures too is sufficient grounds to reject the PIIC's contention.

Finally, the PIIC does not submit any motion or request for leave to file such contentions, as required by 10 C.F.R. § 2.309(f)(2) and the Licensing Board's February 18, 2009 Scheduling Order. Further, the PIIC made no attempt to consult with the parties before seeking to introduce additional contentions. It thus failed to comply with 10 C.F.R. § 2.323(b).

II. Background

NSPM, formerly Nuclear Management Company, LLC, submitted the application for renewal of Operating License Nos. DPR-42 and DPR-60 for the PINGP Units 1 and 2 to the NRC on April 11, 2008. On June 17, 2008, the Nuclear Regulatory Commission ("NRC" or "Commission") published a Notice of Opportunity for Hearing ("Notice") regarding this Application. 73 Fed. Reg. 34,335 (June 17, 2008). The Notice permitted any person whose interest may be affected to file a request for hearing and petition for leave to intervene within 60 days of the Notice, and directed that any petition must set forth the specific contentions sought to be litigated. *Id.* at 34,335-36.

On August 18, 2008, the PIIC petitioned to intervene and alleged eleven separate contentions. On December 5, 2008, the Licensing Board granted the PIIC's request and admitted seven contentions. Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 and 2), LBP-08-26, 68 N.R.C. 905 (2008).²

² Six of those contentions have since been resolved, while a motion to dismiss the last is pending before the Board.

Thereafter, the Licensing Board issued a Scheduling Order³ reflecting the agreement of the parties that (1) any new or amended contentions would be submitted together with the request for leave to file such contentions;⁴ and (2) any new or amended contentions on new data or conclusions in the draft SEIS or SER would be filed within 30 days after issuance of the document from which the contentions arose. Consistent with this agreement, the Scheduling Order provided that such a motion and proposed contention shall be deemed timely under 10 C.F.R. § 2.309(f)(2)(iii) if it is filed within 30 days of the date when the document on which it is based first becomes available, and that pursuant to 10 C.F.R. § 2.323(c), answers to any new or amended contentions are due within 10 days after service of the contentions.

On June 4, 2009, the NRC Staff issued the Safety Evaluation Report with Open Items Related to the License Renewal of Prairie Island Nuclear Generating Plant Units 1 and 2 (“SER with Open Items”) (ADAMS Accession No. ML091550014). That SER resolved all safety issues relevant to the application with the exception of three open items identified in the report. Id. at iii, 1-7 to 1-9. One of the open items related to assessing and managing any effects of leakage that has occurred in the refueling cavity of each unit. Id. at 1-8 to 1-9, 3-142 to 3-143. The SER with Open Items discussed the information that had been presented on this issue in NSPM responses to NRC requests for information (“RAIs”) dated December 5, 2008 (ADAMS Accession No. ML083440689) and April 6, 2009 (ADAMS Accession No. ML091120351), as well as information presented at a public meeting on March 2, 2009 (ADAMS Accession No.

³ Licensing Board Memorandum and Order (Prehearing Conference Call Summary and Initial Scheduling Order) (Feb. 18, 2009) at 4.

⁴ The specific agreement of the parties stated that “any motions for new or amended contentions on new data or conclusions in the draft SEIS or SER would be filed within 30 days after issuance of the document from which the new contention arises.” Letter from D. Lewis to ASLB (Feb. 6, 2009) (ADAMS Accession No. ML090370961) (emphasis added).

ML090630545), but kept this item open while the Staff evaluated this information. Id. The PIIC did not file any contentions based on information presented in the SER with Open Items.

The Advisory Committee on Reactor Safeguards (“ACRS”), Subcommittee on License Renewal, met on July 7, 2009, to review NSPM’s application, the Staff’s SER with Open Items, and associated documents. Transcript, ACRS Subcommittee on License Renewal for the Prairie Island Generating Station (July 7, 2009) (“ACRS Tr.”) (ADAMS Accession No. ML092180127). The open item related to cavity leakage, the actions that NSPM had previously taken to manage this leakage, NSPM’s root cause evaluation, the results of related inspections showing no degradation, NSPM’s plans for permanent repairs, the results of a conservative evaluation to bound the effect of any degradation that might have occurred, and the commitments that NSPM had made in response to the NRC RAIs were discussed extensively. ACRS Tr. at 47-81.⁵ A representative of the PIIC attended the meeting, but the PIIC did not submit any additional contentions following this meeting.

On October 16, 2009, the NRC Staff issued the final Safety Evaluation Report Related to the License Renewal of Prairie Island Nuclear Generating Plant Units 1 and 2 (“Final SER”) (ADAMS Accession No. ML092890209). The Final SER summarized the additional information on the refueling cavity leakage issue that had been provided by NSPM in June 24, 2009 (ADAMS Accession No. ML091800018) and August 7, 2009 (ADAMS Accession No. ML092360408) responses to follow-up RAIs, and closed the open item on the basis of this previously provided information. Final SER at 1-8 to 1-9, 3-142 to 3-149. As reflected in the Final SER, NSPM had committed in its RAI responses to remove concrete from Sump C (a low point in containment) to inspect the containment vessel in order to provide assurance that either

⁵ NSPM’s Presentation Slides are appended at the end of the ACRS Transcript.

the vessel has not experienced any significant degradation, or any existing degradation will be documented and reviewed for structural impacts prior to the period of extended operation. The Staff noted that, in 2008, 150 UT measurements were taken of the containment vessel in the area of the expected leak path and grout was removed from Sump B to inspect the containment vessel, and neither inspection revealed signs of degradation. In addition, NSPM had committed in its RAI responses to inspect the exposed reinforcement during the excavation of Sump C. Further, NSPM had committed to obtain concrete samples from locations known to have been wetted by borated water and to test them for compressive strength and perform a petrographic examination, as well as performing petrographic examinations on any sample pieces removed from Sump C which are suitable for examination. The Staff noted that observed white deposits, which could be signs of possible concrete interaction with the leakage, are minimal and only indicate a possibility of negligible concrete material loss. No indications of significant washout or dissolution of the concrete have been observed. Id. at 3-148 to 3-149. In addition, NSPM's RAI responses had addressed NSPM's plans for permanently fixing the leakage. Id. at 3-143, 3-148, 3-149.

On October 29, 2009, the Licensing Board held a telephone conference with the parties to discuss various scheduling matters. Based on difficulty that the PIIC reported in obtaining the Final SER, the Licensing Board agreed to extend the deadline to November 23, 2009 for filing new or amended contentions "based on new information contained in the final SER."⁶

On November 23, 2009, the PIIC submitted one new contention, ostensibly based on the NRC's Safety Evaluation Report. The PIIC's proposed contention alleges:

⁶ Licensing Board Order (Conference Call Summary and Scheduling Order) (Nov. 4, 2009) at 3.

Contrary to the conclusion in the Safety Evaluation Report (SER), the Community does not believe that “the requirements of 10 CFR 54.29(a) have been met.” Due to recent significant non-compliances with NRC regulations, as well as the applicant’s failure to address a known potentially serious safety problem identified in the SER, the Community does not believe that there is any justification for a reasonable assurance determination by the NRC that the applicant will “...manag[e] the effects of aging during the period of extended operation on the functionality of structure and components” as required by 10 CFR 54.29(a)(1).

PIIC Submission at 4.

III. Standards for Late-Filed Contentions

Under the NRC’s Rules of Practice, contentions in an NRC proceeding must be submitted within sixty days after the NRC Staff publishes a notice of the proposed action in the Federal Register (unless the notice specifies some longer period). 10 C.F.R. § 2.309(b)(3). In this proceeding, the Notice of Opportunity for Hearing was published on June 17, 2008 and required the PIIC to submit its contentions by August, 18, 2008. As 10 C.F.R. § 2.309(f)(2) provides, contentions must be based on documents or other information available at the time the petition is to be filed, such as the application, supporting safety analysis report, environmental report or other supporting document filed by an applicant or licensee, or otherwise available to a petitioner. The Commission has explained,

our contention admissibility and timeliness rules require a high level of discipline and preparation by petitioners, “who must examine the publicly available material and set forth their claims and the support for their claims at the outset.” “There simply would be ‘no end to NRC licensing proceedings if petitioners could disregard our timeliness requirements’” and add new contentions at their convenience during the course of a proceeding based on information that could have formed the basis for a timely contention at the outset of the proceeding. Our expanding adjudicatory docket makes it critically important that parties comply with our pleading requirements and that the Board enforce those requirements.

AmerGen Energy Co., LLC (Oyster Creek Nuclear Generating Station), CLI-09-7, 69 N.R.C.

235, 271-72 (2009) (footnotes omitted).

Under the NRC rules of practice, there is no right to file additional contentions based on the Staff's safety evaluation. Indeed, in promulgating the rules in their current form, the Commission explicitly stated:

The Commission also declines to adopt the thrust of the suggestions to allow free amendment and addition of contentions based upon new information such as the SER. . . . The adequacy of the applicant's license application, not the NRC staff's safety evaluation, is the safety issue in any licensing proceeding, and under longstanding decisions of the agency, contentions on the adequacy of the SER are not cognizable in a proceeding. . . . If information in the SER bears upon an existing contention or suggests a new contention, it is appropriate for the Commission to evaluate under § 2.309(c) the possible effect that the admission of amended or new contentions may have on the course of the proceeding.

69 Fed. Reg. 2,182, 2,202 (Jan. 14, 2004) (citations omitted).

Thus, under the NRC rules, a new safety contention may be filed after the initial filing only by leave of the presiding officer, upon a showing that:

- (i) The information upon which the amended or new contention is based was not previously available;
- (ii) The information upon which the amended or new contention is based is materially different than information previously available; and
- (iii) The amended or new contention has been submitted in a timely fashion based on the availability of the subsequent information.

10 C.F.R. § 2.309(f)(2). Further, as the Commission indicated in promulgating the current rules, a new contention based on the SER must also satisfy the NRC criteria for late-filed contentions in 10 C.F.R. § 2.309(c).

10 C.F.R. § 2.309(c) requires balancing of eight factors.⁷ These eight factors are:

⁷ While some Licensing Boards have held that the late-filing criteria in 10 C.F.R. § 2.309(c) do not apply where a party has met the timeliness factors for a new or amended contention in 10 C.F.R. § 2.309(f)(2), NSPM respectfully submits that those Licensing Board decisions have overlooked the Commission's explicit statement in promulgating its rules that: "If information in the SER bears upon an existing contention or suggests a new contention, it is appropriate for the Commission to evaluate under § 2.309(c) the possible effect that the admission of amended or new contentions may have on the course of the proceeding." 69 Fed. Reg. at 2,202 (emphasis added). Thus, sections 2.309(c) and 2.309(f)(2) should not be interpreted as being mutually

- (i) Good cause, if any, for the failure to file on time;
- (ii) The nature of the requestor's/petitioner's right under the Act to be made a party to the proceeding;
- (iii) The nature and extent of the requestor's/petitioner's property, financial or other interest in the proceeding;
- (iv) The possible effect of any order that may be entered in the proceeding on the requestor's/petitioner's interest;
- (v) The availability of other means whereby the requestor's/petitioner's interest will be protected;
- (vi) The extent to which the requestor's/petitioner's interests will be represented by existing parties;
- (vii) The extent to which the requestor's/petitioner's participation will broaden the issues or delay the proceeding; and
- (viii) The extent to which the requestor's/petitioner's participation may reasonably be expected to assist in developing a sound record.

In weighing these factors, whether good cause exists for failure to file on time is given the most weight. State of New Jersey (Department of Law and Public Safety), CLI-93-25, 38 N.R.C. 289, 296 (1993). If the petitioner cannot demonstrate good cause for lateness, petitioner's demonstration on the other factors must be particularly strong in order to justify admission of the contention. Comanche Peak, CLI-92-12, 36 N.R.C. at 73; Dominion Nuclear Connecticut, Inc. (Millstone Nuclear Power Station, Units 2 and 3), CLI-05-24, 62 N.R.C. 551, 565 ("If a petitioner cannot show good cause, then its demonstration on the other factors must be 'compelling.'") (footnote omitted).

exclusive. Rather, the timeliness requirements in 10 C.F.R. § 2.309(f)(2) should be interpreted as elaborating upon the showing that must be made to satisfy the good cause criterion in 10 C.F.R. § 2.309(c)(1). Indeed, the provisions in Section 2.309(f)(2) merely codify the case law interpreting the good cause prong of the late-filing factors. Compare Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-92-12, 36 N.R.C. 62, 69-73 (1992); Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Unit 2), CLI-93-4, 37 N.R.C. 156, 164-65 (1993). Moreover, the Commission's citations in Dominion Nuclear Connecticut, Inc. (Millstone Nuclear Power Station, Units 2 and 3), CLI-04-36, 60 N.R.C. 631, 636 n.5 (2004), equate sections 2.309(f)(2) and 2.309(c)(1). Similarly, Florida Power & Light Co. et al., (Calvert Cliffs, et al.), CLI-06-21, 64 N.R.C. 30, 33-34 (2006) suggests that both should be addressed.

Finally, even if a petitioner satisfies the requirements of 10 C.F.R. § 2.309(f)(2) and 10 C.F.R. § 2.309(c), it must also demonstrate that its new contention satisfies the standards for admissibility in 10 C.F.R. § 2.309(f)(1)(i)-(vii). Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station), CLI-93-12, 37 N.R.C. 355, 362-63 (1993). 10 C.F.R. § 2.309(f)(1) requires the petition to:

- (i) Provide a specific statement of the issue of law or fact to be raised or controverted;
- (ii) Provide a brief explanation of the basis for the contention;
- (iii) Demonstrate that the issue raised in the contention is within the scope of the proceeding;
- (iv) Demonstrate that the issue raised in the contention is material to the findings the NRC must make to support the action that is involved in the proceeding;
- (v) Provide a concise statement of the alleged facts or expert opinions which support the requestor's/petitioner's position on the issue and on which the petitioner intends to rely at hearing, together with references to the specific sources and documents on which the requestor/petitioner intends to rely to support its position on the issue; and
- (vi) Provide sufficient information to show that a genuine dispute exists with the applicant/licensee on a material issue of law or fact. This information must include references to specific portions of the application (including the applicant's environmental report and safety report) that the petitioner disputes and the supporting reasons for each dispute, or, if the petitioner believes that the application fails to contain information on a relevant matter as required by law, the identification of each failure and the supporting reasons for the petitioner's belief.

10 C.F.R. § 2.309(f)(1)(i)-(vi). Nuclear Management Company's Answer to the Prairie Island Indian Community's Petition to Intervene (Sept. 12, 2008) provides a further discussion of these standards, which will not be repeated here.

IV. The PIIC's Contention Is Untimely and Does Not Meet the Standards in 10 C.F.R. §§ 2.309(f)(2) or 2.309(c)

The PIIC's new contention should be denied because the PIIC has satisfied neither the standards in 10 C.F.R. § 2.309(f)(2) nor the standards in 10 C.F.R. § 2.309(c). While the PIIC attempts to style its contention as one challenging the Staff's conclusion in the SER (which, as discussed later, is impermissible in itself), the PIIC's claims really rely on an assessment of operational performance and inspection reports that have been available for months.

The PIIC asserts that its contention is based on material found in the SER with regard to the leakage of borated water from the PINGP Units 1 and 2 refueling cavities and on certain non-compliances with NRC regulations. PIIC Submission at 4. With respect to the leakage from the refueling cavities, the PIIC admits that it was "brought to public attention in late 2008."⁸ Id. Thus, the PIIC has known of this issue for a year. Further, this issue was discussed in the SER with Open Items issued by the NRC Staff in June, 2009. See SER with Open Items at 3-142 to 3-143. The refueling cavity leakage was also discussed (1) at an NRC meeting on March 2, 2009, which the PIIC's representative Mr. Chip Cameron attended;⁹ (2) in an NRC License Renewal Inspection Report dated March 27, 2009, and in an NRC Audit Report dated April 21, 2009 (ADAMS Nos. ML090860804, ML090850009), both of which the PIIC received; (3) in responses to NRC Requests for Information dated December 5, 2008, April 6, 2009, June 24, 2009, and August 7, 2009 (ADAMS Accession Nos. ML083440689, ML091120351, ML091800018, ML092360408), copies of all of which were provided to the PIIC's General Counsel, Mr. Mahowald, at the time of filing; and (4) in the July 7, 2009 ACRS Subcommittee

⁸ In point of fact, this leakage has been publicly disclosed in previous inspection reports.

⁹ NRC Summary of Meeting Held on March 2, 2009 Between the U.S. Nuclear Regulatory Commission Staff and Northern States Power Company, Minnesota, Representatives to Discuss Prairie Island Nuclear Generating Plant Units 1 and 2 License Renewal Application (Apr. 6, 2009) (ADAMS Accession No. ML090930026).

Meeting, which Mr. Cameron attended. In sum, the PIIC has been aware and completely informed of this issue for many months.

Moreover, the PIIC does not refer to any information in the Final SER that was not previously available in these other sources. In fact, the only portion of the Final SER dealing with the refueling cavity leakage that the PIIC actually discusses is a statement that the NRC Staff had three concerns related to the leakage: (1) the leaking borated water may contact the containment vessel and remain in contact with the vessel between outages, (2) the leaking borated water may contact the concrete reinforcement and cause degradation, and (3) the leaking borated water may react with the concrete and cause degradation. PIIC Submission at 6, citing Final SER at 3-148. The first and third of these concerns were clearly stated in the SER with Open Items issued on June 4, 2009. SER with Open Items at 3-143 (“It appears to the staff that water could accumulate at the bottom of the liner and the area could remain wetted after refueling outages. . . . The staff needs the applicant to explain in greater detail . . . the possibility of calcium hydroxide . . . leaching from the concrete. . . . The staff . . . needs an explanation of whether the or not the liner and concrete remain wetted after refueling outages, and if so how this will be managed by the AMP in the period of extended operation.”) The Staff’s concern with the potential effect on concrete reinforcement (i.e., rebar) was clearly identified in the Staff’s RAIs issued on June 10, 2009 (at page 2, paragraph (f)) and NSPM’s June 24, 2009 Response (in Enclosure 1 at 9). ADAMS Accession Nos. ML091540412, ML091800018. Thus, the PIIC’s sole reference to the SER contains no information that is new or materially different from the information previously available. Indeed, with respect to the refueling cavity leakage, the discussion in the Final SER closes the previous open item on the basis of commitments provided

in the NSPM's prior RAI responses. That discussion cannot create grounds for a new contention. See Oyster Creek, CLI-09-7, 69 N.R.C. at 273-74.

None of the other references in the PIIC's new contention meets the 30-day timeliness requirement agreed to by the parties and memorialized in the Board's February 18, 2009 Scheduling Order. The PIIC's representative attended the July 7, 2009 ACRS Subcommittee meeting to which the PIIC refers on pages 5 and 7 of its Submission, and thus the PIIC has been aware of the information that was discussed (including the questions by ACRS members) for over 4 ½ months. The NRC Mid-Cycle Performance Review and Inspection Plan (ADAMS Accession No. ML092440367), to which the PIIC refers on page 7 of its Submission, was issued on September 1, 2009, with a copy sent to the PIIC. The White findings on which that Performance Assessment is based are in fact discussed in NRC letters dated January 27, 2009 and February 20, 2009. See PIIC Submission at 10 nn. 23, 24. The additional White finding to which the PIIC refers on page 10 of its submission was discussed in an NRC letter dated September 3, 2009. See id. at 10 n.25. Finally, the NRC Inspection Report which the PIIC cites on page 11 of its Submission was issued on September 25, 2009 (ADAMS Accession No. ML092680208). Thus, even the most recent reference is two months old – twice the period set by the Board as the test for timeliness. Moreover, the PIIC was on the distribution list for every one of these documents.

In addition to not satisfying the standards in 10 C.F.R. § 2.309(f)(2), the PIIC has also not satisfied the standards for a late-filed contention in 10 C.F.R. § 2.309(c). As previously discussed, the Commission has stated that, “[i]f information in the SER bears upon an existing contention or suggests a new contention, it is appropriate for the Commission to evaluate under § 2.309(c) the possible effect that the admission of amended or new contentions may have on the

course of the proceeding.” 69 Fed. Reg. at 2,202 (emphasis added). Thus, NSPM submits that the PIIC must address both sets of standards. Moreover, even if this Licensing Board were to hold that 10 C.F.R. § 2.309(c) does not apply if the standards in 10 C.F.R. § 2.309(f)(2) are met (as some other licensing boards have done), the PIIC would still be obligated to address the section 2.309(c) factors because it has clearly not met the Section 2.309(f)(2) test.

Here, the PIIC has not made any attempt to address the factors in 10 C.F.R. § 2.309(c). The failure to address these factors by itself warrants denial of the contention. Baltimore Gas & Electric Co. (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), CLI-98-25, 48 N.R.C. 325, 347 (1998) (“[T]he Commission has itself summarily dismissed petitioners who failed to address the five factors for a late-filed petition.”) (footnote omitted); Boston Edison Co. (Pilgrim Nuclear Power Station), ALAB-816, 22 N.R.C. 461, 465-66 (1985) (“[G]iven its failure even to address the . . . lateness factors, [a] [late] intervention petition [is] correctly denied because it [is] untimely.”). “[T]he burden of persuasion on the lateness factors is on the tardy petitioner and . . . in order to discharge that burden, the petitioner must come to grips with those factors in the petition itself.” Id. at 466 (footnote omitted). “Late petitioners properly have a substantial burden in justifying their tardiness.” Nuclear Fuel Services, Inc. (West Valley Reprocessing Plant), CLI-75-4, 1 N.R.C. 273, 275 (1975). “[T]he late petitioner must address each of [the] five factors and affirmatively demonstrate that, on balance, they favor permitting his tardy admission to the proceeding.” Duke Power Co. (Perkins Nuclear Station, Units 1, 2 and 3), ALAB-615, 12 N.R.C. 350, 352 (1980) (quoting Nuclear Fuel Services, supra).

V. The PIIC’s New Contention Does Not Meet NRC Standards for Admissibility

The PIIC’s new contention is inadmissible not only because it is untimely, but also because it fails to meet the standards for admissibility set forth in 10 C.F.R. § 2.309(f)(1). The

PIIC's contention impermissibly challenges the NRC Staff's evaluation rather than demonstrating any genuine dispute with the application, seeks to litigate operational issues beyond the scope of the proceeding, and is unsupported by information demonstrating any genuine dispute with the NRC Staff's reasonable assurance finding.

A. The Contention Impermissibly Challenges the Staff's Evaluation and Fails to Demonstrate Any Dispute with the Application

The PIIC's new contention is inadmissible because it seeks to challenge the NRC Staff's assessment, rather than demonstrating a specific dispute with the application. On its face, the Contention challenges "the conclusion in the Safety Evaluation Report. . . that the requirements of 10 CFR 54.29(a) have been met." PIIC Submission at 4. The PIIC makes this focus perfectly clear in its Submission. "The Community challenges the NRC Staff determination that 'reasonable assurance' exists." Id.

The Commission's rules do not permit contentions challenging the NRC Staff's safety evaluation.

Apart from NEPA issues, which are specifically dealt with in the rule, a contention will not be admitted if the allegation is that the NRC staff has not performed an adequate analysis. With the exception of NEPA issues, the sole focus of the hearing is on whether the application satisfies regulatory requirements, rather than the adequacy of the NRC Staff performance.

54 Fed. Reg. 33,168, 33,171 (Aug. 11, 1989) (footnote omitted), citing Pacific Gas & Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-728, 17 N.R.C. 777, 807, review declined, CLI-83-12, 18 N.R.C. 1309 (1983).

The adequacy of the applicant's license application, not the NRC Staff's safety evaluation, is the safety issue in any licensing proceeding, and under longstanding decisions of the agency, contentions on the adequacy of the [content of the Safety Evaluation Report] are not cognizable in a proceeding.

69 Fed. Reg. at 2,202 (emphasis added; citation omitted). As the Commission has therefore held, “[t]he NRC has not, and will not, litigate claims about the adequacy of the Staff’s safety review in licensing adjudications.” AmerGen Energy Co, LLC (Oyster Creek Nuclear Generating Station), CLI-08-23, 68 N.R.C. 461, 476 (2008). Thus, a contention challenging the adequacy of the Staff’s SER is inadmissible. U.S. Army (Jefferson Proving Ground Site), LBP-06-27, 64 N.R.C. 438, 456 (2006).

In keeping with this focus, the NRC rules require that a contention “must be based on documents or other information available at the time the petition is filed, such as the application, supporting safety analysis report, environmental report, and other supporting document filed by the applicant or licensee, or otherwise available to a petitioner.” 10 C.F.R. § 2.309(f)(2). To be admissible, the contention must “show a genuine dispute exists with the applicant/licensee on a material issue of law or fact.” 10 C.F.R. § 2.309(f)(1)(vi) (emphasis added). “This information must include references to the specific portions of the application . . . that the petitioner disputes and the supporting reasons for each dispute. . . .” Id.

Here, neither the PIIC Submission nor the accompanying Declaration contains a single reference to the application. They do not identify any portion of the application that the PIIC disputes, contrary to Section 2.309(f)(1)(vi).

The Commission’s pleading standards are to be enforced rigorously. “[I]f any one . . . is not met, a contention must be rejected.” Arizona Public Service Co. (Palo Verde Nuclear Generating Station, Unit Nos. 1, 2 and 3), CLI-91-12, 34 N.R.C. 149, 155 (1991) (citation omitted). A licensing board is not to overlook a deficiency in a contention or assume the existence of missing information. Id.

B. The Contention Impermissibly Seeks to Raise Operational Performance Issues Beyond the Scope of the Proceeding

The PIIC's new contention is also inadmissible because it seeks to raise operational performance issues that are outside the scope of a license renewal proceeding. Thus, the proposed contention fails to satisfy 10 C.F.R. § 2.309(f)(1)(iii), which requires that the PIIC demonstrate that its contention is within the scope of the proceeding.

The rules in 10 C.F.R. Part 54 are intended to make license renewal a stable and predictable process. 60 Fed. Reg. at 22,461, 22,462, 22,463, 22,485 (May 8, 1995). As the Commission has explained, “[w]e sought to develop a process that would be both efficient, avoiding duplicative assessments where possible, and effective, allowing the NRC Staff to focus its resources on the most significant safety concerns at issue during the renewal term.” Florida Power & Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-01-17, 54 N.R.C. 3, 7 (2001). “License renewal reviews are not intended to ‘duplicate the Commission’s ongoing reviews of operating reactors.’” Id. (citation omitted). To this end, the Commission has confined 10 C.F.R. Part 54 to those issues uniquely determined to be relevant to the public health and safety during the period of extended operation, leaving all other safety issues to be addressed by the existing regulatory processes. 60 Fed. Reg. at 22,463. This scope is based on the principle established in the rulemaking proceedings that, with the exception of the detrimental effects of aging and a few other issues related to safety only during the period of extended operation, the existing regulatory processes are adequate to ensure that the licensing bases of currently operating plants provide and maintain an adequate level of safety. 60 Fed. Reg. at 22,464, 22,481-82. Consequently, license renewal does not focus on operational issues because these issues “are effectively addressed and maintained by ongoing agency oversight, review, and enforcement.” Millstone, CLI-04-36, 60 N.R.C. at 638 (footnote omitted).

In promulgating its license renewal rules, the Commission specifically explained that license renewal proceeding should not include a compliance review duplicating the Commission's ongoing compliance oversight:

Both the licensees' programs for ensuring safe operation and the Commission's regulatory oversight have been effective in identifying and correcting plant-specific noncompliances with the licensing bases. These programs will continue to be implemented throughout the remaining term of the operating license, as well as the term of any renewed license. In view of the comprehensiveness, effectiveness, and continuing nature of these programs, the Commission concludes that license renewal should not include a new, broad-scoped inquiry into compliance that is separate from and parallel to the Commission's ongoing compliance oversight activity.

56 Fed. Reg. 64,943, 64,952 (Dec. 13, 1991).¹⁰

The PIIC's proposed new contention impermissibly seeks just such a broad scope inquiry into NSPM's compliance that would duplicate the Commission's ongoing oversight. This impermissible focus is clear on the basis of the contention itself, which challenges reasonable assurance "due to the recent significant non-compliances with NRC regulations." PIIC Submission at 4. In discussing the purported bases for its contention, the PIIC states that its primary concern is applicant's "deficient performance" (*id.* at 5), questions NSPM's "safety culture" (*id.* at 11), and seeks "a third party assessment of safety culture as described in Section 10.02 of NRC Inspection Manual Chapter 305" (*id.* at 14). Chapter 305 of the NRC Inspection

¹⁰ The Commission indicated that there would be two situations where specific allegations of non-compliance might be relevant to a license renewal proceeding, but neither of these situations is applicable here.

[A]llegations that the implementation of a licensee's proposed actions to address age-related degradation . . . has or will cause noncompliance with the plant's current licensing basis during the period of extended operation, or that the failure of the licensee to address age-related degradation . . . in a particular area has or will cause such noncompliance during the period of extended operation would be valid subjects for contention, since the claim essentially questions the adequacy of the licensee's program to address age-related degradation....

56 Fed. Reg. at 64,952 n.1. Here, the PIIC has made no allegation that NSPM's Structures Monitoring Program (or any other aging management program) has caused or will cause non-compliance with the current licensing basis during the period of extended operation. Similarly, the PIIC has made no allegation that any failure by NSPM to address age-related degradation in any particular area has caused or will cause non-compliance with the current licensing basis during the period of extended operation.

Manual is the NRC procedure governing the Reactor Oversight Process. Thus, the PIIC is clearly seeking to duplicate this ongoing oversight process in this proceeding; and in so doing, the PIIC is impermissibly attacking the Commission's determination that, because of the comprehensiveness, effectiveness, and continuing nature of the NRC's oversight programs, license renewal should not include such a duplicative review.

In the same vein, a challenge to an applicant's Quality Assurance Program (of which the Corrective Action Program is a part) is beyond the scope of license renewal. AmerGen Energy Co., LLC (Oyster Creek Nuclear Generating Station), LBP-06-22, 64 N.R.C. 229, 253 (2006) ("[T]he Commission made clear in its 1995 Statement of Consideration that a licensee's quality assurance program is excluded from license renewal review."¹¹ An applicant's Quality Assurance Program is part of the current licensing basis ("CLB") unaffected by aging, and the scope of license renewal does not include issues related to the a plant's CLB that "already [are] monitored, reviewed, and commonly resolved as needed by ongoing regulatory oversight." Id., citing Turkey Point, CLI-01-17, 54 N.R.C. at 8. Likewise, human performance issues are beyond the scope of a license renewal proceeding. Duke Energy Corp. (McGuire Nuclear Stations, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), LBP-02-4, 55 N.R.C. 49, 114-18 (2002).

C. The Contention Is Not Supported by Information Demonstrating a Genuine Dispute on a Material Issue

Finally, even if a licensee's operational performance and compliance history were within the scope of a license renewal proceeding, which as discussed above they are not, the PIIC's new

¹¹ The Statement of Considerations provides, "the portion of the CLB than can be impacted by the detrimental effects of aging is limited to the design-bases aspects of the CLB. All other aspects of the CLB, e.g., quality assurance, physical protection (security), and radiation protection requirements, are not subject to physical aging processes that may cause non-compliance with those [design-bases] aspects of the CLB." 60 Fed. Reg. at 22,475.

contention would still be inadmissible because it is not supported by information demonstrating the existence of a genuine, material dispute, as required by 10 C.F.R. § 2.309(f)(1)(vi). The PIIC's basic claim is that the results of the NRC's ROP assessment for Prairie Island and related inspection findings negates reasonable assurance that NSPM will implement its aging management programs. The documents and findings to which the PIIC refers do not provide requisite support for such a claim. Indeed, if the NRC Staff's performance assessment and inspection findings implied that reasonable assurance of compliance with NRC requirements does not exist, the NRC would have already ordered Prairie Island shut down.

It is well established that, in determining the admissibility of a contention, licensing boards are to "carefully examine[]" documents provided in support of a contention to determine whether they "supply an adequate basis for the contention." See, e.g., Dominion Nuclear North Anna, LLC (Early Site Permit for North Anna ESP Site), LBP-04-18, 60 N.R.C. 253, 265 (2004); Virginia Electric & Power Co. (Combined License Application for North Anna Unit 3), LBP-08-15, 68 N.R.C. 294, 334 & n.207 (2008). A document put forth by a petitioner as the basis for a contention is subject to Board scrutiny, both as to the portions that support the petitioners' assertions and those that do not. See, e.g. Yankee Atomic Electric Co. (Yankee Nuclear Power Station), LBP-96-2, 43 N.R.C. 61, 90 & n.30, rev'd in part on other grounds, CLI-96-7, 43 N.R.C. 235 (1996). See also id. at 88-89 (rejecting a contention where the document referenced by petitioner on its face failed to establish a disputed material issue).

On their face, none of the documents on which the PIIC relies demonstrates performance deficiencies that would negate a reasonable assurance finding. In particular, the Mid-Cycle Performance Review and Inspection Plan, on which the PIIC bases much of its argument, indicates that Prairie Island is in the second column (the Regulatory Response column) of the

Action Matrix, signifying that because of two white inspection findings (low to moderate safety significance) in different cornerstones, increased NRC oversight is appropriate. Twenty-three units other are in this category.¹² Prairie Island is not in the Degraded Cornerstone Column, where NRC Inspection Manual Chapter 305 indicates that the NRC may request an independent assessment of safety culture. See NRC Inspection Manual Chapter 305 at 21-22. Prairie Island is not in the Multiple/Repetitive Degraded Cornerstone Column, where a “license is expected to perform a third-party assessment of their safety culture. Id. at 22. And Prairie Island is not in the most serious “Unacceptable Performance” column where continued plant operation is not permitted. Id. at 24. As the NRC Inspection Manual indicates, it is this last Unacceptable Performance column that “represents situations in which the NRC lacks reasonable assurance that the licensee can or will conduct its activities to ensure protection of the public health and safety.” Id. Therefore, on its face, the Mid-Cycle Performance Review and Inspection Plan does not support the PIIC’s claims that NSPM’s performance either warrants a third party assessment of safety culture or negates a reasonable assurance finding.¹³

Further, none of the white inspection findings on which the Mid-Cycle Performance Review is based relate to aging management. In addition, none of those findings relate to NSPM’s Corrective Action Program, or any other attribute of aging management programs.¹⁴

¹² See http://www.nrc.gov/NRR/OVERSIGHT/ASSESS/actionmatrix_summary.html.

¹³ It should be noted that all Performance Indicators for Prairie Island Units 1 and 2 are Green. See http://www.nrc.gov/NRR/OVERSIGHT/ASSESS/PRAI1/prai1_chart.html; http://www.nrc.gov/NRR/OVERSIGHT/ASSESS/PRAI2/prai2_chart.html. Green Performance Indicators represent acceptable performance in which cornerstone objectives are fully met and likewise have little or no impact on safety. See <http://www.nrc.gov/NRR/OVERSIGHT/ASSESS/#section1>. NSPM recognizes and is committed to addressing the cross-cutting issue in the area of human performance. This answer should not be construed as minimizing the importance that NSPM places on such improvement, but rather merely indicates that the PIIC’s exaggerated view of the NRC’s findings is unfounded.

¹⁴ The PIIC refers to NRC Information Notice 2009-11(ADAMS Accession No. ML0912400390), which relates to one of the white inspection findings on which the Mid-Cycle Performance Assessment is based, and quotes seven

Similarly, the Biennial Problem Identification and Resolution Inspection Report does not support the PIIC's claim that reasonable assurance of compliance is lacking. That Inspection Report concludes that the corrective action program at Prairie Island is functional. Letter from J. Giessner to M. Schimmel, Prairie Island Nuclear Generating Plant, Units 1 and 2, NRC Biennial Problem Identification and Resolution Inspection Report (Sept. 25, 2009), Encl. at 1 (ADAMS Accession No. ML092680208). While NSPM recognizes that performance improvement is warranted, as reflected by the improvement program that NSPM has committed to implement (id.), the NRC inspection report on its face provides no basis for the PIIC's suggestion that NSPM will not implement its aging management programs.

Finally, the discussion in the Final SER and ACRS Transcript do not support the PIIC's suggestion that NSPM ignored the refueling cavity leakage. The PIIC quotes very selectively from the ACRS Transcript to suggest that NSPM did nothing to address this issue for years, whereas as shown below, these documents in fact show that NSPM employed a number of sealing methods (such a strippable coatings and caulking) to prevent this leakage during refueling, and decided to make permanent repairs because these methods were not always successful. Moreover, when leakage did occur, NSPM took measures to verify that degradation had not occurred (such as removing concrete and taking 150 UT measurements when such leakage occurred in 2008). See Final SER at 3-142.

In an attempt to suggest that this leakage has been occurring longer than it has, the PIIC first asserts that NSPM assumes that the leakage has been going for the entire life of the plant.

causal factors for component mis-positioning in a manner that misleadingly suggests that these all causal factors apply to Prairie Island. See PIIC Submittal at 12-13. The discussion of the causal factors in NRC Information Notice 2009-11 related to mis-positioning events at numerous plants. See NRC Information Notice 2009-11 at 2, citing the events listed in ADAMS at Accession No. ML091610448.

PIIC Submission at 5, citing ACRS Tr. at 48. At that page of the transcript, NSPM explained that it had performed an evaluation that determined that containment vessel corrosion would not be more than 10 mils, and that this evaluation assumed that leakage may have been occurring over the entire plant life, even though there was no evidence of leakage prior to 1987. See ACRS Tr. at 72. That NSPM made this conservative assumption to calculate the maximum possible effect in no way signifies that this leakage in fact occurred prior to 1987.

The PIIC then omits portions of NSPM's responses to questions by ACRS members Barton and Abdel-Khalik in order to imply that NSPM took no action to prevent leakage from occurring in the past. See PIIC Submission at 7. In response to Mr. Barton's question as to why NSPM has now decided to fix the leakage, NSPM explained:

MR. SKOYEN: Well, we had, as I mentioned earlier, we had tried a number of sealing methods. Given the inconsistency of performance, we determined that we could no longer rely on that to eliminate this leakage.

We were successful during our unit 1 outage in the spring of 2008, the sealing on that unit. We had less success in the fall. We didn't see leakage for approximately 10 days, but after 10 days, we did see leakage into our ECCS.

MR. ECKHOLT: We had some difficulty. We couldn't remove the nuts and get the caulking under them for that outage so --

MR. SKOYEN: That is a concern as well because that's a stainless to stainless interface. There is a concern for galling and repeated removal.

ACRS Tr. at 64. In response to Mr. Abdel-Khalik's question, NSPM responded:

MR. WADLEY: Well, we've tried a number of different methods to solve the problem. Performing the root cause evaluation provided some additional insights that we didn't -- we tried to do a fix, quick fix, with caulk and strippable material.

This approach is a more rigorous approach to a deeper understanding of what we're dealing with so I think we have a better solution.

ACRS Tr. at 75-76.

Finally, the PIIC refers to page 69 of the ACRS Transcript for the proposition that applicant still cannot identify the exact source of the leak. At that page, NSPM stated: “We have high confidence that this is the most probable location of the leak.” ACRS Tr. at 69.

In sum, while the PIIC has artfully woven incomplete and selective quotations with exaggerated or inapplicable references, it has not provided information demonstrating a “genuine dispute” with the NRC Staff’s reasonable assurance finding. Those documents identified by the PIIC show an NRC inspection and oversight process that is working to identify and require correction of performance issues in a manner maintaining reasonable assurance of safe operation. In essence, contrary to the principles the license renewal rules are based, the PIIC’s contention simply ignores the effectiveness of the Commission's inspection and enforcement programs. See Louisiana Energy Services, L.P. (Claiborne Enrichment Center), CLI-97-15, 46 N.R.C. 294, 306-07 (1997) (“in the end, NRC inspections and enforcement action go a long way toward ensuring compliance with our requirements”). The PIIC has provided no documentation showing that NSPM is likely to violate the license renewal requirements; and its unsupported speculation that NSPM will contravene the NRC rules is not an adequate basis for a contention. GPU Nuclear, Inc. (Oyster Creek Nuclear Generating Station), CLI-00-06, 51 N.R.C. 193, 207 (2000) (absent documentary support that an applicant is likely to violate NRC regulations, “this agency has declined to assume that licensees will contravene our regulations”), citing Curators of the University of Missouri, CLI-95-8, 41 N.R.C. 386, 400 (1995); Northern Indiana Public Service Co. (Bailly Generating Station, Nuclear-1), ALAB-207, 7 A.E.C. 957, 958 (1974); Virginia Electric & Power Co. (North Anna Power Station, Units 3 and 4), LBP-74-56, 8 A.E.C. 126, 148 (1974).

VI. Conclusion

For all of the reasons stated above, the PIIC's new contention should be rejected.

Respectfully Submitted,

/Signed electronically by David R. Lewis/

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Dated: December 3, 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, Units 1 and 2))	ASLBP No. 08-871-01-LR
)	

CERTIFICATE OF SERVICE

I hereby certify that copies of “Northern States Power Company’s Answer Opposing the PIIC’s Late Filed Contention,” dated December 3, 2009, was provided to the Electronic Information Exchange for service on the individuals listed below, this 3rd day of December, 2009.

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