

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)	)	

**PRAIRIE ISLAND INDIAN COMMUNITY’S RESPONSE OPPOSING
NSP’S MOTION TO DISMISS PIIC CONTENTION 5 AS MOOT**

I. INTRODUCTION

The Prairie Island Indian Community (“Community” or “PIIC”) opposes NSP’s Motion to Dismiss the Community’s Environmental Justice contention as moot. To the extent PIIC Contention 5, as reworded and admitted by the Board, is purely a contention of omission relating NSP’s failure to include an environmental justice analysis in its Environmental Report that adequately assessed the impacts of the PINGP on the PIIC as an adjacent minority population, NSP has not identified in its motion how, if at all, it has supplemented the Environmental Report to cure the omission. Alternatively, if NSP may rely solely on the environmental justice discussion in the NRC Staff’s Draft Supplemental Environmental Impact Statement (“EIS”) to cure NSP’s omission, then the Community reserves its right to file new or amended contentions based on the sufficiency of the environmental justice analysis in the EIS in accordance with the Board’s Order dated November 4, 2009, ML093080529.

II. BACKGROUND

The Board admitted the Community's environmental justice contention, as limited and reworded, as follows:

Contention 5 - 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.

Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 and 2), LBP-08-26, 68 N.R.C. 905, 949 (2008). The Community will defer to the Board as to whether Contention 5, as limited and reworded, is merely a contention of omission.

NSP has not supplemented its Environmental Report to cure the inadequate assessment of the impacts of the PINGP on the PIIC as an adjacent minority population.¹ In its motion, NSP merely relies on the discussion of environmental justice in the EIS as a cure to its omission addressed in PIIC Contention 5.

III. NSP'S ENVIRONMENTAL JUSTICE RESPONSIBILITIES ARE SEPARATE AND INDEPENDENT OF THE NRC STAFF'S ENVIRONMENTAL JUSTICE RESPONSIBILITIES.

Although NSP had not supplemented its Environmental Report to cure the inadequate assessment of the impacts of the PINGP on the PIIC as an adjacent minority population, it

¹ NSP's motion to dismiss the Community's Environmental Justice contention was filed 51 years after it first announced the construction of the new coal and natural gas fired "steam" plant on a site adjacent to the Community's reservation on Prairie Island. See "Huge Steam Power Plant to Be Constructed By Northern States on Prairie Island Site," Daily Republican Eagle, November 19, 1958. Then, as now, NSP made no reference to the Community or endeavored to identify benefits, if any, to the Community, much less the significant adverse impacts and costs the Community would experience disproportionately as a result of the PINGP's operation. For 51 years, NSP has touted the benefits of the PINGP's operation for the local and regional economy – jobs, reliable electricity, and the literally hundreds of millions of dollars in revenues, profits, and taxes that benefit the City of Red Wing, Goodhue County and the State of Minnesota. And for 51 years, NSP has refused to acknowledge that the Community receives none of those benefits or other adequate compensation for the disproportionate adverse impacts that the PINGP's operation has had and will continue to have on the Community.

nevertheless contends that the portions of the EIS discussing environmental justice cure that deficiency. As previously set forth in the Community's opposition to NSP's motion for reconsideration, NSP as the applicant has a separate responsibility to address environmental justice in its Environmental Report, and has failed to do so here.

In finding that the Community has stated an admissible contention, the Board noted that while the Commission is ultimately responsible for evaluating impacts on minority groups, "nonetheless, 10 C.F.R. 51.45(c) requires the Applicant to assist the Commission with that evaluation."² Furthermore, the Board noted that "[s]ection 51.45(c) instructs that an 'environmental report should contain sufficient data to aid the Commission in its development of an independent analysis.' Undoubtedly, this 'data' includes information that might aid the Commission in its analysis on environmental justice."³ To amplify on the Board's reasoning, the Community can find no rationale for treating the Applicant's responsibility to provide data on environmental justice any differently from the Applicant's responsibility to provide data on the many other areas considered in the of the environmental review.

In fact, the Commission has long recognized that issues, later characterized as "environmental justice," should be evaluated within the ambit of the traditional environmental impacts evaluated as part of the NRC National Environmental Policy Act ("NEPA") process. The NRC staff guidance on the preparation of environmental impact statements for license renewals for reactors recognizes that an applicant has a responsibility to provide an analysis of environmental justice issues.⁴ The NRC staff guidance on the preparation of environmental

² *Northern States Power Co.* (Prairie Island Nuclear Generating Plant, Units 1 and 2), LBP-08-26, 68 NRC 905, 931.

³ *Id.*

⁴ Preparation of Supplemental Environmental Reports for Applications to Renew Nuclear Power Plant Operating Licenses, Regulatory Guide 4.2S1, Supplement 1 to Regulatory Guide 4.2, U.S. Nuclear Regulatory Commission (September 2000).

reviews in the materials licensing area states that the environmental report should include "...a discussion of the methods used to identify and quantify impacts on low-income and minority populations, the location and significance of any environmental impacts..., and any additional information pertaining to mitigation."⁵ This section of the guidance proceeds to list seven areas of information on potential environmental justice that the applicant should provide in the environmental report, including a description of cumulative impacts to low-income and minority populations.⁶

Accordingly, NSP has a responsibility to provide information and perform an analysis of potential impacts relevant to environmental justice in its Environmental Report. This obligation includes providing information and performing an analysis of any potential disproportionate impacts on low-income or minority groups, such as the Prairie Island Indian Community. While the NRC staff must demonstrate that environmental issues have been adequately analyzed and considered, the applicant has the **initial** responsibility to provide the information and analysis to allow the NRC to meet this ultimate responsibility. Indeed, as the PIIC's closest neighbor, NSP would be in the best position to provide supplemental information for environmental justice analysis. NSP provided no analysis of the potential impacts on low-income or minority populations in its Environmental Report and failed to supplement the Environmental Report to provide any such analysis.

⁵ Environmental Review Guidance for Licensing Actions Associated with NMSS Programs, NUREG 1748, Section 6.411, page 6-25 (U.S. Nuclear Regulatory Commission, August 2003).

⁶ In particular, the areas of information include: an assessment (qualitative or quantitative, as appropriate) of the degree to which each minority or low-income population is disproportionately receiving adverse human health or environmental impacts and an assessment (qualitative or quantitative, as appropriate) of the significance or potential significance of such environmental impacts on each low-income and minority population [Significance is determined by considering the disproportionate exposure, multiple-hazard, and cumulative hazard conditions.].

IV. THE ENVIRONMENTAL IMPACT STATEMENT DOES NOT CURE AN OMISSION FROM THE ENVIRONMENTAL REPORT WHICH SERVED AS THE BASIS FOR AN ENVIRONMENTAL CONTENTION.

The Community respectfully disagrees with NSP that the draft EIS alone can cure NSP's environmental justice omissions. NSP cites two decisions to support its motion: 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); and AmerGen Energy Co., LLC (Oyster Creek Nuclear Generating Station), CLI-08-28, 68 N.R.C. 658, 676 n.72 (2008). Unlike here where NSP has failed to supplement its ER to supplement its flawed environmental justice analysis, in each of the decisions cited in NSP's motion the applicant provided supplemental information that was also considered by the Staff in the draft EIS. See Maguire, 56 N.R.C. at 382-83 (applicant provided supplemental analysis of the Sandia Study that was the basis of the contention of omission); Oyster Creek, 68 N.R.C. at 676 n. 72 (applicant later performed a confirmatory analysis that was the basis of the contention of omission). Because NSP failed to supplement its Environmental Report, NSP ought not be allowed to rely upon the NRC staff's environmental justice discussion to cure NSP's seriously flawed environmental justice in its Environmental Report.

Moreover, a new or amended contention is not always required to create a litigable issue statement relative to the substance of the NRC staff's DEIS where the original contention is initially framed as a challenge to the substance of an applicant's ER analysis. See Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation, LBP-01-26, 54 N.R.C. 199, 208 (2001)). Contrary to NSP's argument, the Community does not believe that merely referencing the Community in the SEIS and providing a platform for the Community to express its concerns about the SEIS (regardless of whether analyzed or adopted by the NRC staff) satisfy all environmental justice considerations. Mere words cannot fulfill the environmental justice

requirements to evaluate and mitigate the unique, disproportionate impacts the PINGP's continued operation will have on the Community. Indeed, although the Community's review of the draft EIS is ongoing, the Community will likely file new or amended contentions regarding the draft EIS's "seriously flawed environmental justice analysis that does not adequately assess the impacts of the PINGP on the adjacent minority population."

V. ALTERNATIVELY, THE COMMUNITY RESERVES ITS RIGHT TO FILE NEW OR AMENDED CONTENTIONS BASED ON THE SUFFICIENCY OF THE ENVIRONMENTAL JUSTICE ANALYSIS IN THE EIS.

Alternatively, if the Board agrees with NSP's argument that PIIC Contention 5 is purely a contention of omission that may be cured by the discussion of environmental justice in the EIS, the Community reserves its right to file new or amended contentions challenging the sufficiency of the environmental justice analysis in the draft EIS in accordance with the Board's November 4, 2009 Order. *See Maguire*, 56 N.R.C. at 383-84 (discussing filing of amended contentions challenging the sufficiency of the supplemental analysis). Likewise, if the Board determines that a change from the contention of omission as admitted to a contention based on the deficiency of the environmental justice analysis warrants an issue modification through a new or amended contention, then the Community also reserves its right to file new or amended contentions in accordance with the Board's Order dated November 4, 2009. *See PFS*, 54 N.R.C. at 208 ("[A] significant change in the nature of the purported NEPA imperfection, from one focused on a comprehensive omission to one centered on a deficient analysis of subsequently information, warrants such an issue modification.") (citing 10 C.F.R. § 2.714(b)(2)(iii)).

VI. CONCLUSION

For the foregoing reasons, NSP's motion to dismiss PIIC's Contention 5 as moot should be denied. Alternatively, if NSP may rely solely on the environmental justice discussion in the NRC Staff's Draft EIS to cure NSP's omission and render Contention 5 moot, or if the Board determines that a change from the contention of omission as admitted to a contention based on the deficiency of the environmental justice analysis warrants an issue modification through a new or amended contention, then the Community reserves its right to file new or amended contentions in accordance with the Board's Order dated November 4, 2009.

Respectfully Submitted,

/Signed electronically by Philip R. Mahowald/

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Dated: December 3, 2009

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CERTIFICATE OF SERVICE

I hereby certify that copies of “Prairie Island Indian Community’s Response Opposing NSP’s Motion To Dismiss PIIC’s Contention 5 As Moot,” 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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