

December 24, 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 NEW ENVIRONMENTAL CONTENTIONS**

**I. INTRODUCTION**

Northern States Power Company, a Minnesota corporation (“NSPM”), hereby answers opposing the Prairie Island Indian Community’s (“PIIC”) Motion for Leave to File New Contentions on NRC’s Draft Supplemental Environmental Impact Statement (Dec. 14, 2009) (“Motion”).<sup>1</sup> The PIIC’s Motion should be denied because the allegations in the three contentions are not based on new data or conclusions in the draft supplemental environmental impact statement (“DSEIS”), and are therefore untimely. Further, none of the contentions meet the Nuclear Regulatory Commission (“NRC” or “Commission”) standards for admissibility. Indeed, the second and third contentions as well as a portion of the first impermissibly challenge the NRC rules and are not within the scope of the proceeding, and none of the contentions is supported by requisite facts, expert opinion or references demonstrating the existence of a genuine material dispute.

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<sup>1</sup> The Motion that was filed on December 14, 2009 failed to include an exhibit referred to in Contention 1 as identifying the mitigation measures that are the subject of that Contention. Both NSPM and the NRC Staff informed the PIIC of this omission early on December 15. The PIIC did not respond to these messages on the 15<sup>th</sup>, but the next day it provided the missing exhibit by email without explanation to counsel for NSPM and the NRC Staff. The PIIC, however, has not served the exhibit through the Electronic Information Exchange, and NSPM is not aware whether it has ever been provided to the Board.

In particular, the PIIC's Contention 1 alleges that NSPM should implement all mitigation measures discussed in the DSEIS, but makes no showing (1) that the discussion of the corresponding impacts and mitigation measures in the DSEIS is significantly different from that in NSPM's Environmental Report ("ER") or (2) that the impacts in question would have a disproportionately high and adverse impact on the PIIC, which is the standard for environmental justice consideration. Indeed, the PIIC's own environmental justice analysis, included in the DSEIS because of the PIIC's participation as a cooperating agency, does not identify any environmental justice concern with the vast majority of the impacts it now seeks to challenge. In essence, Contention 1 appears to be using environmental justice as an excuse for raising untimely contentions addressing matters that have no relationship to environmental justice and could have been raised in the PIIC's original petition.

In Contentions 2 and 3, the PIIC seeks to litigate radiological health effects. With respect to these two contentions, not only does the PIIC fail to provide any information demonstrating that it would be subject to a disproportionately high and adverse impact, but it seeks to raise a topic that is barred by the generic determinations in the Commission's rules.<sup>2</sup>

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<sup>2</sup> The PIIC devotes the first seven pages of its Motion to a recitation of grievances dating back to the 1950's. Among this recitation, the PIIC alleges that it incurs substantial financial burdens for emergency response purposes (Motion at 7), that NSPM has refused to agree to long term health studies (*id.* at 5), and that NSPM has opposed efforts to implement the best available health physics monitoring technology (*id.* at 5-6). Because these claims are not part of the PIIC's new contentions, NSPM will not respond to all of the claims on the first seven pages of the PIIC's Motion, other than to register its general disagreement with the PIIC's characterizations. With respect to the three claims above, NSPM notes it provides the PIIC with \$2.25 million per year as part of a prior settlement. Of this amount, \$100,000 is designated for a health study, emergency management activities, and other PIIC purposes. As far as NSPM is aware, the PIIC has never used this money to conduct the health studies for which it was intended. However, the Minnesota Department of Health ("MDH") has conducted a study of cancer rates in Goodhue County. The study concluded that cancer incidence and mortality rates in Goodhue County were at or below statewide averages and that the rate of childhood cancers is also at or below the average. The study supports the conclusion of the MDH that there is no significant additional cancer risk associated with living near the Prairie Island Plant. The PIIC's claims concerning monitoring technology were recently addressed in a proceeding before the Minnesota Public Utility Commission ("MPUC"). Based on the evidentiary record in that proceeding, in which the PIIC participated, the Administrative Law Judge found:

## II. BACKGROUND

NSPM, formerly Nuclear Management Company, LLC, submitted 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 to the NRC on April 11, 2008. On June 17, 2008, the NRC 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 proffered eleven separate contentions. On December 5, 2008, the Licensing Board granted the PIIC’s request and admitted seven of those contentions. Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 and 2), LBP-08-26, 68 N.R.C. 905 (2008).<sup>3</sup>

Thereafter, the Licensing Board issued a Scheduling Order reflecting the agreement of the parties that, inter alia, any new or amended contention on new data or conclusions in the

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Xcel Energy has a comprehensive radiation environmental monitoring program in place at the Prairie Island Plant that meets the NRC’s radiation monitoring requirements. Xcel, the MDH, and the Wisconsin Department of Health Services perform extensive radiation monitoring in and around the Prairie Island Plant. The Community proposed that additional radiation monitoring be conducted as a condition of approval of Xcel’s applications. The equipment proposed for this monitoring is less sensitive than that used in Xcel’s monitoring program. There is no reasonable basis for conducting less sensitive monitoring than is already conducted around the Prairie Island Plant.

In the Matter of Northern States Power Co., MPUC Docket Nos. E-002/CN-08-509, -510, & -690, Findings of Fact, Conclusions of Law and Recommendations (Oct. 21, 2009) at 85-86 (Conclusion 33). This document may be retrieved at <http://www.puc.state.mn.us/puc/index.html>, by entering Document ID # 200910-43138-01 in Search E-Dockets. The MPUC has accepted and adopted the Administrative Law Judge’s findings, conclusions and recommendations. In the Matter of Northern States Power Co., MPUC Docket Nos. E-002/CN-08-509, -510, & -690, Order Accepting Environmental Impact Statement, and Granting Certificates of Need and Site Permit with Conditions (Dec. 18, 2009) (available at MPUC Search E-Dockets under Document ID # 200912-45206-03).

<sup>3</sup> Six of those contentions have since been resolved, while a motion to dismiss the last is pending before the Board. In addition, on November 23, 2009, the PIIC submitted a late-filed contention on human performance, the admissibility of which is also pending before the Board.

DSEIS would be deemed timely under 10 C.F.R. § 2.309(f)(2)(iii) if it is filed within 30 days of the date the document on which it is based first becomes available. Licensing Board Memorandum and Order (Prehearing Conference Call Summary and Initial Scheduling Order) (Feb. 18, 2009) at 4. The Scheduling Order also provides that answers to any new or amended contentions are due within 10 days after service of the contentions.

On November 13, 2009, the NRC published the DSEIS. Generic Environmental Impact Statement for License Renewal of Nuclear Plants, Supplement 39 Regarding Prairie Island Nuclear Generating Plant, Units 1 and 2, Draft Report for Comment (NUREG-1437, Supp. 39) (ADAMS Accession No. ML0931704840). As reflected in the DSEIS, the PIIC participated as a cooperating agency to produce a DSEIS that incorporates and reflects the PIIC's views in a number of areas, including environmental justice. *Id.* at 1-6.

On December 14, 2009, the PIIC submitted its Motion seeking leave to file three new contentions based ostensibly on the DSEIS, but omitted an exhibit identifying mitigation measures that its first new contention alleged should be implemented. The PIIC provided this missing exhibit to NSPM and the NRC Staff without explanation on December 16.

### **III. STANDARDS FOR CONTENTIONS**

#### **A. Timeliness**

Under the NRC's Rules of Practice, contentions must be based on documents or other information available at the time the petition is to be filed (10 C.F.R. § 2.309(f)(2)), which occurs at the outset of a proceeding (*id.*, § 2.309(b)). In particular, 10 C.F.R. § 2.309(f)(2) states, "On issues arising under the National Environmental Policy Act, the petitioner shall file contentions based on the applicant's environmental report." 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). “It is essential to efficient case management that intervenors file contentions on the basis of the applicant’s environmental report and not delay their contentions until after the Staff issues its environmental analysis.” Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-04-4, 59 N.R.C. 31, 45 (2004) (footnote omitted); see also Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-04-22, 60 N.R.C. 125, 130 (2004) (“Our contention pleading rule requires a petitioner to file NEPA contentions on the applicant’s ER so that environmental issues are raised as soon as possible”) (emphasis added). As a general matter, the NRC does not look with favor on new contentions filed after the initial filing. Dominion Nuclear Connecticut, Inc. (Millstone Nuclear Power Station, Units 2 and 3), CLI-04-36, 60 N.R.C. 631, 636 (2004).

The NRC rules do permit an intervenor to amend its environmental contentions or file new environmental contentions if there are data or conclusions in the NRC draft or final environmental impact statement that differ significantly from the data or conclusions in the applicant's documents. 10 C.F.R. § 2.309(f)(2). This standard does not occasion the raising of additional arguments that could have been raised previously. 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, 385-86 & n.61 (2002), citing Union of Concerned Scientists v. NRC, 920 F.2d 50, 55 (D.C.

Cir. 1990) (“we think it unreasonable to suggest that the NRC must disregard its procedural timetable every time a party realizes based on NRC environmental studies that maybe there was something after all to a challenge it either originally opted not to make or which simply did not occur to it at the outset”). For example, a late contention is properly denied where the only assertion is that certain concerns that were not dealt with in the ER have additionally not been dealt with in the DSEIS. Id. at n.61.

Rather, the filing of new contentions is permitted where information was not available early enough to provide the basis for the timely filing of that contention. Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), CLI-83-19, 17 N.R.C. 1041, 1045 (1983).<sup>4</sup> “[T]he unavailability of [NRC] documents does not constitute good cause for admitting a late-filed contention when the factual predicate for that contention is available from other sources in a timely manner.” Id. at 1043 (emphasis added). Further, the requirement that there be data or conclusions that “differ significantly” from those in the ER is analogous to the requirement that the information be “materially different” than information previously available. Exelon Generation Co., LLC, (Early Site Permit for Clinton ESP Site), LBP-05-19, 62 N.R.C. 134, 163 (2005).

If a new contention is not based on data or conclusions in the NRC draft or final environmental impact statement that differ significantly from the data or conclusions in the applicant's documents, the proponent must demonstrate that:

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<sup>4</sup> When the Commission first promulgated its rule permitting new contentions based on an environmental impact statement (then in section 2.714(b)(2)(iii) and now in section 2.309(f)(2)), the Commission emphasized that this provision was not intended to alter the standards for late-filed contentions or exempt environmental matters as a class from those standards, and specifically referred to Duke Power, CLI-83-19. 54 Fed. Reg. 33,168, 33,172 (Aug. 11, 1989), aff'd, Union of Concerned Scientists v. NRC, 920 F.2d 50 (D.C. Cir. 1990).

- (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). In addition, non-timely filings will not be entertained absent a determination that the contention should be admitted based on a balancing of the following factors:

- (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.

10 C.F.R. § 2.309(c)(2).<sup>5</sup> Late contentions that fail to address these criteria are subject to summary dismissal. Baltimore Gas & Elec. Co. (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), CLI-98-25, 48 N.R.C. 325, 347 & n.10 (1998).

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<sup>5</sup> Some licensing boards have held that the late-filing criteria in 10 C.F.R. § 2.309(c) do not apply if a new contention meets the timeliness requirements in 10 C.F.R. § 2.309(f)(2)(i)-(iii). NSPM respectfully submits that a contention should be considered non-timely under Section 2.309(c) if it does not meet the "Timing" requirements

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. Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-92-12, 36 N.R.C. 62, 73 (1992); 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).

## **B. Admissibility**

Even if a proponent of a new contention 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

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in 10 C.F.R. § 2.309(b). This issue is not presented here, however, because the PIIC has made no attempt to address either the criteria in 10 C.F.R. § 2.309(f)(2)(i)-(iii) or the criteria in 10 C.F.R. § 2.309(c).

sources and documents on which the requestor/petitioner intends to rely to supports 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). These requirements are discussed further below.

1. Contentions Must Be Within the Scope of the Proceeding and May Not Challenge NRC's Rules

As a fundamental requirement, a contention is only admissible if it addresses matters within the scope of the proceeding. 10 C.F.R. § 2.309(f)(1)(iii) requires that a petitioner demonstrate that the issue raised by each of its contentions is within the scope of the proceeding. Similarly, 10 C.F.R. § 2.309(f)(1)(iv) requires the petitioner to demonstrate that the issue raised in its contention is material to the findings that the NRC must make.

As a corollary, contentions challenging the NRC rules are barred and therefore beyond the permissible scope of any proceeding. 10 C.F.R. § 2.335. It is well established that a petitioner is not entitled to an adjudicatory hearing to attack generic NRC requirements or regulations. Duke Energy Corp. (Oconee Nuclear Station, Units 1, 2 and 3), CLI-99-11, 49 N.R.C. 328, 334 (1999). “[A] licensing proceeding . . . is plainly not the proper forum for an attack on applicable statutory requirements or for challenges to the basic structure of the Commission’s regulatory process.” Philadelphia Electric Co. (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-216, 8 A.E.C. 13, 20, aff’d in part on other grounds, CLI-74-32, 8 A.E.C. 217 (1974) (footnote omitted). Thus, a contention which collaterally attacks a

Commission rule or regulation is not appropriate for litigation and must be rejected. Potomac Electric Power Co. (Douglas Point Nuclear Generating Station, Units 1 and 2), ALAB-218, 8 A.E.C. 79, 89 (1974). A contention which “advocate[s] stricter requirements than those imposed by the regulations” is “an impermissible collateral attack on the Commission’s rules” and must be rejected. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-82-106, 16 N.R.C. 1649, 1656 (1982); see also Arizona Public Service Co. (Palo Verde Nuclear Generating Station, Units 1, 2, and 3), LBP-91-19, 33 N.R.C. 397, 410, aff’d in part and rev’d in part on other grounds, CLI-91-12, 34 N.R.C. 149 (1991). Likewise, a contention that seeks to litigate a generic determination established by Commission rulemaking is “barred as a matter of law.” Pacific Gas & Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), LBP-93-1, 37 N.R.C. 5, 29-30 (1993).

These fundamental limitations are particularly important here, because the Commission has conducted extensive rulemaking to resolve environmental issues generically and define those specific environmental issues that must be addressed in a license renewal proceeding. These rules – at 10 C.F.R. §§ 51.53(c), 51.71(d), 51.95(c), and Appendix B to Part 51 – are intended to produce a more focused and, therefore, more effective review. 61 Fed. Reg. 28,467 (June 5, 1996); Florida Power & Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-01-17, 54 N.R.C. 3, 11 (2001). To accomplish this objective, the NRC prepared a comprehensive Generic Environmental Impact Statement for License Renewal of Nuclear Plants (1996) (“GEIS”), NUREG-1437, and made generic findings in the GEIS, which it then codified in Appendix B to 10 C.F.R. Part 51 (Table B-1). Those issues that could be resolved generically for all plants are designated as Category 1 issues and are not evaluated further in a license renewal proceeding (absent waiver or suspension of the rule by the Commission based on new

and significant information). 61 Fed. Reg. at 28,468, 28,470 & 28,474; Turkey Point, CLI-01-17, 54 N.R.C. at 12. In particular, 10 C.F.R. § 51.71(d) provides that “[t]he draft supplemental environmental impact statement for license renewal prepared under § 51.95(c) will rely on conclusions as amplified by the supporting information in the GEIS for issues designated as Category 1 in appendix B to subpart A of this part.”<sup>6</sup> The remaining (i.e., Category 2) issues that must be addressed are defined specifically in 10 C.F.R. § 51.53(c). See generally, Turkey Point, CLI-01-17, 54 N.R.C. at 11-12.

The NRC’s generic Category 1 findings in 10 C.F.R. Part 51, Appendix B, Table B-1, may not be challenged in any adjudicatory proceeding absent a waiver of the rules. See 10 C.F.R. § 2.335; Entergy Nuclear Operations, Inc. (Vermont Yankee Nuclear Power Station & Pilgrim Nuclear Power Station), CLI-07-3, 65 N.R.C. 13, 17-18 & n.15, reconsideration denied, CLI-07-13, 65 N.R.C. 211 (2007), aff’d sub nom, Massachusetts v. NRC, 522 F.3d 115 (1st Cir. 2008); see also Turkey Point, CLI-01-17, 54 N.R.C. at 12. “The NRC’s procedural rules are clear: generic Category 1 issues cannot be litigated in individual licensing adjudications without a waiver.” Massachusetts v. NRC, 522 F.3d at 127.

## 2. Contentions Must Be Specific and Supported By a Basis Demonstrating a Genuine, Material Dispute

In addition to the requirement to address issues within the scope of the proceeding, a contention is admissible only if it provides:

- a “specific statement of the issue of law or fact to be raised or controverted;”
- a “brief explanation of the basis for the contention;”

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<sup>6</sup> Adjudicatory hearings in individual license renewal proceedings will share the same scope of issues as the NRC Staff review. Turkey Point, CLI-01-17, 54 N.R.C. at 10. Absent a Commission waiver under 10 C.F.R. § 2.758, “the scope of Commission review determines the scope of admissible contentions in a renewal hearing.” Id., quoting 60 Fed. Reg. at 22,482 n.2.

- a “concise statement of the alleged facts or expert opinions” supporting the contention together with references to “specific sources and documents on which the requestor/petitioner intends to rely to support its position on the issue;” and
- “sufficient information to show that a genuine dispute exists with the applicant/licensee on a material issue of law or fact,” which showing 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), (ii), (v) and (vi). The failure of a contention to comply with any one of these requirements is sufficient grounds for dismissing the contention. Palo Verde, CLI-91-12, 34 N.R.C. at 155-56.

These pleading standards governing the admissibility of contentions are the result of a 1989 amendment to 10 C.F.R. § 2.714, now Section 2.309, which was intended “to raise the threshold for the admission of contentions.” 54 Fed. Reg. at 33,168; see also Oconee, CLI-99-11, 49 N.R.C. at 334; Palo Verde, CLI-91-12, 34 N.R.C. at 155-56. The Commission has stated that the “contention rule is strict by design,” having been “toughened . . . in 1989 because in prior years ‘licensing boards had admitted and litigated numerous contentions that appeared to be based on little more than speculation.’” Dominion Nuclear Connecticut, Inc. (Millstone Nuclear Power Station, Units 2 and 3), CLI-01-24, 54 N.R.C. 349, 358 (2001), reconsideration denied, CLI-02-1, 55 N.R.C. 1 (2002) (citation omitted). The pleading standards are to be enforced rigorously. “If any one . . . is not met, a contention must be rejected.” Palo Verde, CLI-91-12, 34 N.R.C. at 155 (citation omitted). A licensing board is not to overlook a deficiency in a contention or assume the existence of missing information. Id.

The Commission has explained that this “strict contention rule” serves multiple purposes, which include putting other parties on notice of the specific grievances and assuring that full adjudicatory hearings are triggered only by those able to proffer at least some minimal factual and legal foundation in support of their contentions. Oconee, CLI-99-11, 49 N.R.C. at 334. By raising the threshold for admission of contentions, the NRC intended to obviate lengthy hearing delays caused in the past by poorly defined or supported contentions. Id. As the Commission reiterated in incorporating these same standards into the new Part 2 rules, “[t]he threshold standard is necessary to ensure that hearings cover only genuine and pertinent issues of concern and that issues are framed and supported concisely enough at the outset to ensure that the proceedings are effective and focused on real, concrete issues.” 69 Fed. Reg. at 2,189-90.

Under these standards, a petitioner is obligated “to provide the [technical] analyses and expert opinion” or other information “showing why its bases support its contention.” Georgia Institute of Technology (Georgia Tech Research Reactor, Atlanta, Georgia), LBP-95-6, 41 N.R.C. 281, 305, vacated in part and remanded on other grounds, CLI-95-10, 42 N.R.C. 1, aff’d in part, CLI-95-19, 42 N.R.C. 191 (1995). Where a petitioner has failed to do so, “the [Licensing] Board may not make factual inferences on [the] petitioner’s behalf.” Id., citing Palo Verde, CLI-91-12, 34 N.R.C. 149; see also Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-98-7, 47 N.R.C. 142, 180 (1998) (a “bald assertion that a matter ought to be considered or that a factual dispute exists . . . is not sufficient”; rather “a petitioner must provide documents or other factual information or expert opinion” to support a contention’s “proffered bases”) (citations omitted).

Further, admissible contentions “must explain, with specificity, particular safety or legal reasons requiring rejection of the contested [application].” Millstone, CLI-01-24, 54 N.R.C. at

359-60. In particular, this explanation must demonstrate that the contention is “material” to the NRC’s findings and that a genuine dispute on a material issue of law or fact exists. 10 C.F.R. § 2.309(f)(1)(iv), (vi). The Commission has defined a “material” issue as meaning one where “resolution of the dispute would make a difference in the outcome of the licensing proceeding.” 54 Fed. Reg. at 33,172 (emphasis added).

As observed by the Commission, this threshold requirement is consistent with judicial decisions, such as Conn. Bankers Ass’n v. Bd. of Governors, 627 F.2d 245, 251 (D.C. Cir. 1980), which held that:

[A] protestant does not become entitled to an evidentiary hearing merely on request, or on a bald or conclusory allegation that . . . a dispute exists. The protestant must make a minimal showing that material facts are in dispute, thereby demonstrating that an “inquiry in depth” is appropriate.

Id. (footnote omitted); see also Baltimore Gas & Elec. Co. (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), CLI-98-14, 48 N.R.C. 39, 41 (1998) (“It is the responsibility of the Petitioner to provide the necessary information to satisfy the basis requirement for the admission of its contentions . . .”). A contention, therefore, is not to be admitted “where an intervenor has no facts to support its position and where the intervenor contemplates using discovery or cross-examination as a fishing expedition which might produce relevant supporting facts.” 54 Fed. Reg. at 33,171.<sup>7</sup> As the Commission has emphasized, the contention rule bars contentions where petitioners have what amounts only to generalized suspicions, hoping to substantiate them later, or simply a desire for more time and more information in order to identify a genuine material

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<sup>7</sup> See also Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-687, 16 N.R.C. 460, 468 (1982), vacated in part on other grounds, CLI-83-19, 17 N.R.C. 1041 (1983) (“[A]n intervention petitioner has an ironclad obligation to examine the publicly available documentary material pertaining to the facility in question with sufficient care to enable [the petitioner] to uncover any information that could serve as the foundation for a specific contention. Stated otherwise, neither Section 189a. of the Act nor Section 2.714 [now 2.309] of the Rules of Practice permits the filing of a vague, unparticularized contention, followed by an endeavor to flesh it out through discovery against the applicant or staff”).

dispute for litigation. Duke Energy Corp. (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-03-17, 58 N.R.C. 419, 424 (2003).

Therefore, under the Rules of Practice, a statement “that simply alleges that some matter ought to be considered” does not provide a sufficient basis for a contention. Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station), LBP-93-23, 38 N.R.C. 200, 246 (1993), review declined, CLI-94-2, 39 N.R.C. 91 (1994). Similarly, a mere reference to documents does not provide an adequate basis for a contention. Calvert Cliffs, CLI-98-25, 48 N.R.C. at 348.

#### **IV. THE PIIC’S NEW CONTENTIONS ARE UNTIMELY AND DO NOT MEET NRC STANDARDS FOR ADMISSIBILITY**

##### **A. Contention 1 Is Untimely and Inadmissible**

Contention 1, which alleges that the NRC should require NSPM to adopt various measures identified in the DSEIS as having the potential to mitigate certain environmental impacts,<sup>8</sup> is inadmissible as untimely and because it fails to satisfy the basic standards for contention admissibility.

##### **1. Contention 1 is Untimely**

Contrary to the PIIC’s assertion (see Motion at 9), Contention 1 is largely unrelated to environmental justice and not based on data or conclusions which differ significantly from those which previously appeared in the ER. Rather, the PIIC appears to be using the DSEIS as a

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<sup>8</sup> The impacts that the PIIC contends should be mitigated are identified in Exhibit A of its Motion and are: (1) impacts to terrestrial resources from refurbishment activities, (2) impacts to threatened and endangered terrestrial species from refurbishment activities, (3) impacts to threatened and endangered aquatic resources from refurbishment activities, (4) impacts to air quality from refurbishment activities, (5) transportation impacts during refurbishment activities, (6) impacts to aquatic resources from impingement and entrainment during continued operation, (7) impacts to fish and shellfish due to heat shock during continued operation, (8) impacts to threatened and endangered aquatic species during continued operation, (9) impacts on public health from thermophilic microbiological organisms during continued operation, and (10) impacts of electric shock resulting from operations and associated transmission lines during continued operation.

pretext for challenging the discussion of all mitigation measures addressed in the DSEIS (1) without any showing that the discussion is part of the Staff's environmental justice analysis or that the impacts to which the mitigation measures relate will have a disproportionately high and adverse impact on the PIIC, and (2) without any showing that the discussion in the DSEIS differs significantly from that presented in the ER. For both these reasons, Contention 1 fails to meet the timeliness requirement of 10 C.F.R. § 2.309(f)(2).

The PIIC fails to identify any information in the DSEIS which can provide a basis for a claim that any environmental impacts discussed therein have a disproportionately high and adverse impact upon the PIIC, thus raising an environmental justice issue. Indeed, the PIIC's own Motion indicates that the Contention is not confined to impacts which relate to environmental justice, as it plainly states that the "NRC should require the Applicant to implement all of the mitigation strategies described in the draft SEIS."<sup>9</sup> Motion at 11 (emphasis added). It provides no support for any intended implicit claim that all of the environmental impacts for which the DSEIS describes mitigative measures relate to environmental justice.

The PIIC's description of the Dakota philosophy "based on the interconnection and unity of all forms of life," however sincere such philosophy may be, is not sufficient to render every impact discussed in the DSEIS and ER one which is related to environmental justice. See Motion at 2. The PIIC has not pointed to any connection between the impacts at issue and environmental justice. While it is true that the DSEIS specifically identifies the PIIC as a minority population for purposes of the agency's environmental justice responsibilities and acknowledges that "[b]ecause of its proximity to the plant and the uniqueness of the

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<sup>9</sup> Indeed, the string cite at footnote 9 and the DSEIS citations identified in Exhibit A to the Motion refer to every mitigation measure, regardless of the nature of impacts to which such measure relates, discussed in the DSEIS.

community...there may be the potential for disproportionate impacts to the PIIC” (DSEIS at 4-35 (emphasis added)), this recognition does not mean that every impact will – or even has the potential to – affect the PIIC in a disproportionately high and adverse manner. It certainly does not give the PIIC carte blanche to submit new contentions challenging impacts that were previously analyzed in the ER and for which the discussion in the DSEIS does not differ significantly from that contained in the ER. Otherwise, any minority or low-income population would be able to ignore with impunity the NRC requirement that it file its environmental contentions based on the applicant’s documents.

In addition, the PIIC has not met its affirmative burden to identify any data or conclusion in the DSEIS which differs significantly from that in the ER. It has not even made an attempt to do so. In fact, with respect to the ten impacts identified by the PIIC, the discussion in the DSEIS does not differ significantly from that which appeared in the ER. Indeed, in every instance, the PIIC could have challenged the discussion of mitigation measures based on the ER. Where, as here, the data or conclusions on which a proffered contention is based were available before the NRC Staff’s environmental impact statement, that is the point in time at which the contention must have been filed for it to be considered timely. Catawba, CLI-83-19, 17 N.R.C. at 1049.

With respect to the impact to terrestrial resources during refurbishment activities, for example, both the ER and DSEIS conclude that the impacts would be SMALL, and the analysis supporting that conclusion is largely identical. Compare DSEIS at 3-3 with ER at 4-22 to 4-23. In addition, the mitigation measure of using best management practices (of which using a silt fence to minimize sediment transport is a prime example)<sup>10</sup> which is identified in the DSEIS was

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<sup>10</sup> See, e.g., U.S. Environmental Protection Agency, Menu of Construction Best Management Practices (available at [http://cfpub.epa.gov/npdes/stormwater/menuofbmps/index.cfm?action=min\\_measure&min\\_measure\\_id=4](http://cfpub.epa.gov/npdes/stormwater/menuofbmps/index.cfm?action=min_measure&min_measure_id=4));

previously included in the ER. Compare DSEIS at 3-3 with ER at 4-28. The mitigation measure of “revegetation of cleared land remaining after completion of construction” identified in the DSEIS is not significantly new or changed information from that which appeared in the ER. DSEIS at 3-3. Although the ER did not specifically list this mitigation measure, it stated that no clearing of previously-undisturbed lands would be necessary for the refurbishment activities. ER at 3-16 & 4-28. Thus, there is unlikely to be any newly cleared land for which revegetation would be an appropriate mitigative technique.

For impacts to threatened and endangered terrestrial species during refurbishment activities, the conclusion that such impacts will be SMALL is the same and the supporting analysis nearly identical in both documents. Compare DSEIS at 3-4 with ER at 4-22 to 4-27. The DSEIS identifies two potential mitigation measures (undertaking the replacement outside of the peregrine falcon breeding season and minimizing activities that cause noise during midday hours), one of which was precisely included in the ER (the planned replacement of the steam generator outside of the falcon’s breeding season). See id. The second mitigation measure mentioned in the DSEIS was also implicitly considered in the ER, which stated that the falcons onsite are already accustomed to substantial noise from ongoing PINGP operations. ER at 4-22 to 4-23.

Regarding impacts to air quality from refurbishment activities, the DSEIS and ER contain virtually indistinguishable analyses and both determine that such impacts would be SMALL. Compare DSEIS at 3-5 to 3-6 with ER at 4-28 to 4-30. The mitigation measure of using best

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California Stormwater Quality Association, Construction Handbook of Best Management Practices (available at <http://www.cabmphandbooks.com/construction.asp>). Using silt fences to minimize sediment transport is the third mitigation measure identified in the DSEIS, in addition to the general use of best management practices and the revegetation of cleared land remaining after completion of construction.

management practices (including implementing a dust control plan) to minimize fugitive dust from construction is identified in both documents. See DSEIS at 3-6 with ER at 4-28 & 4-30. The DSEIS also identifies potential mitigation measures of using multi-person vans and implementing shift changes for the workforce to reduce the number of vehicles with emissions on the road at any given time. DSEIS at 3-6. Implementing shift changes was also identified in the ER as a potential mitigation measure for impacts upon transportation from refurbishment activities. See ER at 4-52. Although using multi-person vans was not discussed in the ER, its inclusion in the DSEIS does not constitute significantly different data which would trigger the ability of an intervenor to file new contentions.

With respect to the impacts upon aquatic resources from impingement and entrainment by the PINGP cooling water system during continued operation, the analysis and conclusion reached by each document is very similar. Compare DSEIS at 4-5 to 4-11 with ER at 4-12 to 4-18 (both concluded that such impacts would be SMALL). Moreover, although the DSEIS identified possible additional mitigative measures, it specifically noted that those identified measures were simply doing more of the mitigation measures currently employed at PINGP. DSEIS at 4-11.<sup>11</sup> Likewise, for impacts to fish and shellfish resources due to heat shock during continued operation, the ER and DSEIS each contain a nearly indistinguishable analysis and determine that such impacts would be SMALL. Compare DSEIS at 4-11 to 4-13 with ER at 4-19 to 4-21. Once again, the mitigation techniques identified in the DSEIS are to simply increase the degree of mitigation measures already employed at PINGP (and identified by reference in the

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<sup>11</sup> Id. (“PINGP 1 and 2 currently employ a number of mitigation measures, including using closed and helper cycle cooling, fine-mesh screens, and flow limitations. Additional mitigative measures that PINGP 1 and 2 could add include operating in closed cycle more often, using the fine-mesh screens for a longer period of time, reducing intake velocities, and operating under reduced intake flows”) (emphases added). The ER identified the same mitigative measures by reference. See ER at 4-14 & 4-18 (noting that such impacts are small and “warrant no mitigation beyond that already in place and required by the current NPDES permit”) (emphasis added).

ER). DSEIS at 4-13.<sup>12</sup> For each of these impacts, there is, therefore, no data or conclusion significantly changed from that which already appeared in the ER.

Regarding impacts to threatened and endangered aquatic resources, the ER and DSEIS contain very similar analyses<sup>13</sup> (which identify the Higgins eye pearl mussel as the species of most concern) and both reach the conclusion that such impacts would be SMALL. Compare DSEIS at 3-4 to 3-5 & 4-16 to 4-17 with ER at 4-27. With respect to the impacts upon such resources from continued operation, the DSEIS, just like the ER, identifies no mitigation measures other than those discussed elsewhere in the document. DSEIS at 4-17. The DSEIS does state that an “example of a mitigation measure that could reduce impacts to the aquatic threatened and endangered species during transport and offloading of the steam generators include ensuring that the barges do not approach the site of the Higgins eye relocation project.” DSEIS at 3-5. Although this mitigative technique in particular is not described in the ER, that document does make clear that the barges should not come into contact with the site of the Higgins eye pearl mussel relocation project, because the steam generators are to arrive by barge after “traveling up the Mississippi River” and the Higgins eye relocation project site is “approximately 0.5 mile up-river of the PINGP Intake Screenhouse.”<sup>14</sup> ER at 3-16 & 4-24 to 4-25 (emphases added).

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<sup>12</sup> Id. (“PINGP 1 and 2 currently employ a number of mitigation measures, including using closed and helper cycle cooling and flow limitations. Additional mitigative measures that PINGP 1 and 2 could add include operating in closed cycle more often and operating under reduced intake flows”) (emphases added). The ER identified the same mitigative measures by reference. See ER at 4-21 (concluding no further mitigation is necessary, considering limitations currently in NPDES permit).

<sup>13</sup> The DSEIS considers such impacts from refurbishment activities and the continued operation of PINGP separately, whereas the ER does not separate its analysis in such a manner.

<sup>14</sup> Notably, the ER also states that the route of the barges carrying the steam generators will be the same as the route taken for the 2004 replacement of PINGP Unit 1’s steam generators. At the time of that replacement, the Higgins eye relocation project was already located at its current site and, presumably, was not affected by the barges’ route. See ER at 3-16 (“Like the 2004 Unit 1 steam generator replacement, the steam generators would arrive by

For impacts on public health from thermophilic microbiological organisms during continued operation, both the DSEIS and ER conclude that the impact is SMALL. Compare DSEIS at 4-23 with ER at 4-31 to 4-33. While the ER states that such an impact does not warrant mitigation, it notes that regular monitoring of the river water is performed to ensure that the probability of the presence of microbiological organisms remains low and states that the “entire length of the discharge canal and adjoining portions of the Mississippi River are within the plant’s exclusion zone.” ER at 4-32 to 4-33. Similarly, the two mitigation measures identified in the DSEIS are to continue to maintain the current plant exclusion zone (something already being done by NSPM) and to perform “[p]eriodic monitoring for thermophilic microbiological organisms in the water and sediments in and near the discharge canal.” DSEIS at 4-23.

Regarding the impact of electric shock resulting from operation and associated transmission lines during continued operation, the ER and DSEIS contain a similar analysis and each concludes that such impacts would be SMALL. Compare DSEIS at 4-23 to 4-24 with ER at 4-34 to 4-36. Although the ER describes the surveillance and maintenance inspections which are already conducted on a regular basis, the DSEIS identifies a variety of measures which “include erecting barriers along the length of the transmission line to prevent unauthorized access to the ground beneath the conductors, installing road signs at road crossings, and raising the elevation of the lowest energized conductor to increase the distance between it and a potentially exposed individual directly beneath it.” DSEIS at 4-24. The identification of such mitigative measures, however, does not constitute data significantly different from that contained in the ER.

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barge after journeying from France and traveling up the Mississippi River”) & ER at 4-24 (noting that Higgins eye relocation site had organisms placed in 2003).

Certainly, the PIIC has not met its burden to identify and explain how any differences are material.

With respect to the transportation impacts during refurbishment, the conclusion presented in the DSEIS does differ slightly from that which was contained in the ER, but the difference is not significant and certainly does not provide an occasion for a contention that could have been raised in the PIIC's original petition. The DSEIS concludes that such impacts will be SMALL to MODERATE; whereas the ER, though acknowledging traffic issues may arise during the refurbishment activities, concluded such impacts would be SMALL. Compare DSEIS at 3-8 with ER at 4-52. Although the conclusion regarding the expected degree of impact differs slightly, the impact data and analysis in the ER and DSEIS is nearly identical. In any event, if the PIIC believed that transportation impacts of refurbishment (i.e., the Unit 2 steam generator replacement project) would impact the PIIC in a significant manner, then its original petition should have challenged NSPM's conclusion in the ER that the impacts would be SMALL. The PIIC did not. Moreover, the PIIC has actual knowledge of the transportation impacts from the Unit 1 steam generator replacement project that occurred in 2004, which was obviously available to it at the time that it filed its original petition based upon the ER.

The fact that the NRC Staff chose to categorize such impacts for the Unit 2 steam generator replacement activities as SMALL to MODERATE, instead of SMALL, provides no justification for the PIIC's failure to raise a timely contention based on the ER. Further, the ER describes the same possible mitigating measures of staggering shift schedules and using local police officials to direct traffic as are identified in the DSEIS. Id. If the PIIC thought that the discussion of these mitigation measures in the ER was inadequate, it could have challenged it in a contention based on the ER, but it elected not to do so. The only measure identified in the

DSEIS which is not also included in the ER is coordinating with the PIIC to establish additional mitigation measures. See DSEIS at 3-8. It is difficult to see how the NRC Staff's identification of this one additional mitigation measure could now render the DSEIS discussion inadequate.

As set forth above, although it purports to assert an environmental justice issue, the Contention alleges mitigation measures should be required for all impacts for which such measures are identified in the DSEIS. No support is provided in the Contention for any claim that the relevant impacts implicate environmental justice. Moreover, the data and conclusions for such impacts in the DSEIS do not differ noticeably, much less significantly, from those included in the ER.

Moreover, even if Contention 1 were based on new data or conclusions in the DSEIS, it would still not be considered timely, because the PIIC did not comply with the provision in the Board's Order requiring such a contention be filed within 30 days of the date on which the DSEIS became available. See Memorandum and Order (Prehearing Conference Call Summary and Initial Scheduling Order) (Feb. 18, 2009) at 4. While the PIIC filed its Motion on the last day of the deadline, it failed to include the Exhibit specifying the mitigation measures that are the subject of the Contention. See footnote 1, supra. Indeed, although the PIIC provided a copy of Exhibit A to NSPM and the Staff two days later, it is not clear that the exhibit has ever been properly filed or provided to the Board. Further, the PIIC has offered no explanation for its omission, raising the possibility that the exhibit was simply not prepared in time to be submitted with the Motion.

Nor does the PIIC make any showing that Contention 1 might be considered timely under the criteria in 10 C.F.R. § 2.309(f)(2)(i)-(iii), or that the standards for a late-filed contention in 10

C.F.R. § 2.309(c) are met. The failure to address these factors by itself warrants denial of the Contention. Calvert Cliffs, CLI-98-25, 48 N.R.C. at 347 (“[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) (citations omitted).

2. Contention 1 Fails to Meet the Admissibility Criteria of 10 C.F.R. § 2.309(f)(1)

In addition to being untimely, Contention 1 is inadmissible because it fails to meet the admissibility criteria of 10 C.F.R. § 2.309(f)(1). As a whole, the Contention fails to provide adequate support to demonstrate a genuine dispute with the applicant or Staff on a material issue. 10 C.F.R. § 2.309(f)(1)(v) & (vi).<sup>15</sup> In addition, portions of the Contention are outside the scope of the proceeding because they impermissibly challenge the Commission’s rules. 10 C.F.R. § 2.309(f)(iii) & 10 C.F.R. § 2.335.

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<sup>15</sup> As the Commission has indicated, when a new contention challenges the Staff’s environmental review documents, the proponent must demonstrate a genuine dispute with the Staff. See McGuire, CLI-02-28, 56 N.R.C. at 383.

First, the Contention simply fails to meet the standards required of an admissible environmental justice contention. The Commission has made clear that admissible contentions in the area of environmental justice “are those which allege, with the requisite documentary basis and support as required by 10 CFR Part 2, that the proposed action will have significant adverse impacts on the physical or human environment that were not considered because the impacts to the community were not adequately evaluated.” Policy Statement on the Treatment of Environmental Justice Matters in NRC Regulatory and Licensing Actions, 69 Fed. Reg. 52,040, 52,047 (Aug. 24, 2004) (emphasis added).<sup>16</sup> The PIIC has not provided any documentary basis or other support for such an allegation with respect to any one of the ten identified impacts.

In its Motion, the PIIC suggests that an impact raises issues of environmental justice so long as the effects of such impact “appreciably exceed the environmental impact on the larger community.” Motion at 12 (citation omitted). The PIIC neglects to acknowledge, however, that to demonstrate the existence of an environmental justice issue, an intervenor must provide the requisite evidence to support a showing that an impact, in addition to being disproportionate, has a high and adverse effect upon the applicable minority or low-income community. See Environmental Justice: Guidance Under the National Environmental Policy Act, Council on Environmental Quality (Dec. 10, 1997), at 26-27 (available at <http://ceq.hss.doe.gov/nepa/regs/ej/justice.pdf>) (“When determining whether environmental effects are disproportionately high and adverse, agencies are to consider [among other things]...[w]hether environmental effects are significant (as employed by [the National Environmental Policy Act (“NEPA”)]) and are or may be having an adverse impact on minority populations, low-income populations, or Indian tribes that appreciably exceeds or is likely to appreciably exceed those on the general population or

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<sup>16</sup> See also id. at 52,048 (“Contentions must be made in the NEPA context, must focus on compliance with NEPA, and must be adequately supported as required by 10 CFR Part 2”).

other appropriate comparison group”). The Commission has stated that the goals of an environmental justice analysis are “(1) [t]o identify and assess environmental effects on low-income and minority communities by assessing impacts peculiar to those communities; and (2) to identify significant impacts, if any, that will fall disproportionately on minority and low-income communities.” 69 Fed. Reg. at 52,048 (emphasis added). Indeed, as the Commission has held, it “only takes into account ‘disproportionate adverse effects’ of a project that peculiarly affect an environmental justice community and have some nexus to factors properly within the scope of NEPA.” System Energy Resources, Inc. (Early Site Permit for Grand Gulf ESP Site), CLI-05-4, 61 N.R.C. 10, 13 (2005).

In its Motion, the PIIC has not offered any support to show that the impacts listed in Exhibit A will have a disproportionately high and adverse impact upon the PIIC. No expert opinion, alleged facts, or reference to documents or other sources is provided which would suggest that the PIIC will be affected in a significant and detrimental manner from any one of the ten environmental impacts. In particular, it is unclear how impacts upon threatened and endangered species, for example, which have been determined to be SMALL by the NRC Staff, could be said to have disproportionately high and adverse effects upon the PIIC, and no evidence is offered in the Motion to support that claim. Nor is it evident how the effects of entrainment, impingement or heat shock would have a disproportionately high and adverse impact on the PIIC, because as the PIIC’s own analysis indicates, most PIIC members do not consume fish from the Mississippi River. DSEIS at 4-45. Because the PIIC has not provided any support for its allegation that the environmental impacts will have disproportionately high and adverse effects upon it, it has failed to demonstrate a genuine dispute with NSPM or the Staff, and the Contention must be rejected. 10 C.F.R. § 2.309(f)(1)(v) and (vi).

In fact, the PIIC's own environmental justice analysis in the DSEIS does not identify any environmental justice concern with nine of the ten impacts which it now claims must be mitigated.<sup>17</sup> See DSEIS at 4-41 to 4-45. Thus, even the PIIC's own analysis does not support this Contention.

Nor does the PIIC provide any support for its assertion that there is "one disproportionate impact specifically identified by the NRC that the [PIIC] believe is mischaracterized." Motion at 11. The PIIC states that it disagrees with the NRC's conclusion that there "exists no disproportionately high and adverse impacts to the PIIC," because the transportation impacts from the refurbishment activities were categorized as SMALL to MODERATE and could disproportionately impact the PIIC. Motion at 12, citing DSEIS at 4-39. The PIIC, however, fails to provide any alleged facts or expert opinion showing that transportation impacts upon the PIIC from refurbishment activities would be high or significant, as required by 10 C.F.R. § 2.309(f)(1)(v). The PIIC does not identify any references to specific sources and documents on which it intends to rely to support any such claim, as required by 10 C.F.R. § 2.309(f)(1)(v). Nor does the PIIC provide sufficient information to demonstrate a genuine material dispute, as required by 10 C.F.R. § 2.309(f)(1)(vi).

The PIIC does not allege that the categorization of the impact as SMALL to MODERATE is inadequate. Instead, it simply argues that because there is a potential for a moderate impact, this impact should have been considered as a disproportionately high and adverse impact affecting the PIIC, raising an environmental justice issue. See Motion at 12-13 &

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<sup>17</sup> Of the impacts identified in the PIIC's Exhibit A, only transportation impacts of refurbishment activities are identified in the PIIC's environmental justice analysis as disproportionately affecting the Indian Community; and with respect to that one issue, the PIIC's analysis makes no claim that this impact is high or that it should be mitigated. See DSEIS at 4-45.

n.33. The mere fact that an impact is determined to be small to moderate, however, does not necessitate a finding that it will be disproportionately high and adverse upon the PIIC. See, e.g., Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-02-20, 56 N.R.C. 147, 154 (2002), reconsideration denied, CLI-04-9, 59 N.R.C. 120 (2004) (“the executive order asks agencies to consider environmental justice implications only when disparate environmental effects are ‘high and adverse.’ Here, the [environmental impact statement] found the overall environmental impacts on reservation residents small or ‘small to moderate,’ a finding not now in dispute before the Board. There is no reason, therefore, to conclude that persons who fail to receive their desired share of the [Private Fuel Storage] lease money are suffering a ‘high and adverse’ environmental impact”) (footnotes omitted).

Other than briefly stating that it “does not believe that just because an impact has a short duration, that its impact will not be ‘high and adverse,’” the PIIC fails to address or dispute the analysis and reasoning provided in the DSEIS for the NRC Staff’s conclusion that the transportation impacts from refurbishment activities would not be disproportionately high and adverse on the PIIC.<sup>18</sup> See Motion at 12. And as already stated, the PIIC fails to provide any support for the allegation that the impact as described should be considered disproportionately high and adverse to the PIIC. It provides no facts, expert opinion, references, or other sources

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<sup>18</sup> For example, the DSEIS notes that the refurbishment activities would take place once, during a scheduled outage, over a relatively short period of time (80 days) and would involve only 750 temporary employees. DSEIS at 3-5, 3-6 & 3-8. In addition, the largest impact would only occur during shift changes. Id. at 3-8. The DSEIS specifically evaluated whether the impact “could have a disproportionate effect on the PIIC, and whether these effects could be considered adverse.” Id. at 4-39. The ER also provides that the increase in traffic could be approximately seven percent on Sturgeon Lake Road, and as much as twelve percent on a particular segment of County Road 18, assuming that all refurbishment employees would travel from the same direction. ER at 4-52.

indicating that the transportation impacts will be significant. Accordingly, the claim fails to give rise to an admissible contention.<sup>19</sup>

Indeed, the PIIC fails to address or dispute the analysis contained in the DSEIS for any of the identified impacts. In addition to not offering the requisite support to allege that environmental justice implications are raised by the impacts identified in the Motion, the PIIC fails to demonstrate a genuine dispute with NSPM or the Staff because it does not challenge the information and analyses contained in the DSEIS. Just as an intervenor must point to specific portions of the application which it disputes to demonstrate a genuine dispute with the applicant,<sup>20</sup> it must point to specific portions of the DSEIS which it disputes to demonstrate a genuine dispute with the NRC Staff.<sup>21</sup> The DSEIS does not identify any environmental justice concerns with the environmental impacts discussed therein.<sup>22</sup>

In addition, the PIIC fails to provide the requisite support to demonstrate a genuine dispute because it does not identify any requirement for the NRC Staff to mandate that an applicant implement all mitigation measures which may be identified in its DSEIS. The Contention refers to the Commission's policy statement on environmental justice and

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<sup>19</sup> Nor is there any validity to the PIIC's insinuation that NSPM will not implement appropriate measures to mitigate transportation impacts associated with the Unit 2 steam generator replacement project. NSPM's ER referred to measures that could be implemented, rather than those that will be implemented, only because the planning for this future project has not yet been completed. As the PIIC is well aware, NSPM has been willing to work with the PIIC to implement the identified types of measures to mitigate transportation impacts, as NSPM did in the previous Unit 1 steam generator replacement project, and as it is currently doing for a dredging project. However, to dispel any doubt and moot the PIIC's concerns, NSPM hereby commits that it will work with the PIIC to coordinate and implement appropriate measures to mitigate transportation impacts resulting from the Unit 2 steam generator replacement project, including (1) using NSPM's private access road for heavy duty truck traffic related to the project, so that it minimizes interference with traffic entering the PIIC casino and reservation property; (2) using local law enforcement to control traffic during PINGP shift changes; and (3) staggering the refurbishment work schedule if necessary.

<sup>20</sup> See 10 C.F.R. § 2.309(f)(1)(vi); see also Entergy Nuclear Vermont Yankee, L.L.C. (Vermont Yankee Nuclear Power Station), LBP-04-28, 60 N.R.C. 548, 576 (2004).

<sup>21</sup> McGuire, CLI-02-28, 56 N.R.C. at 383.

<sup>22</sup> Indeed, the DSEIS concludes that "there exists no disproportionately high and adverse impacts to the PIIC or any other minority or low-income populations from the" proposed action. DSEIS at 4-39.

specifically highlights the references in that statement to mitigation measures which may avoid disproportionately high and adverse impacts to minority or low-income populations. Motion at 9-10. However, as discussed above, the PIIC makes little attempt to show that the environmental impacts in question raise any legitimate environmental justice concerns. The PIIC does not provide factual or expert support to indicate that any of the impacts will be significant, much less disproportionately high and adverse. The PIIC's statement that it "believes" the NRC should require the mitigation measures and that "[a]ll of the impacts, regardless of their ranking by the NRC, are significant and unacceptable to the" PIIC is not sufficient to establish a genuine dispute. Motion at 11. Just as a statement that alleges some matter ought to be considered is insufficient to give rise to an admissible contention, a statement that an intervenor desires for the NRC to require some mitigation measure identified in its DSEIS does not provide a sufficient demonstration of a genuine dispute to give rise to an admissible contention. See Rancho Seco, LBP-93-23, 38 N.R.C. at 246.

NEPA imposes procedural requirements to ensure that agencies are fully informed and properly weigh environmental consequences when deciding whether to proceed with actions that may significantly affect the environment.<sup>23</sup> While NEPA requires that an environmental impact statement include a discussion of potential mitigation measures<sup>24</sup> because an "important ingredient of an [environmental impact statement] is the discussion of steps that can be taken to mitigate adverse environmental consequences," it does not impose any mandate that such

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<sup>23</sup> See, e.g., Grand Gulf ESP Site, CLI-05-4, 61 N.R.C. at 13 ("NEPA's twin goals are to inform the agency and the public about the environmental effects of a project"). The NRC's consideration of environmental justice occurs through the NEPA process. 69 Fed. Reg. at 52,043, 52,046 & 52,047.

<sup>24</sup> See, e.g., 69 Fed. Reg. at 52,042 ("if there are significant impacts to the minority or low-income population, it is then necessary to look at mitigative measures. The reviewer should determine and discuss if there are any mitigative measures that could be taken to reduce the impact") (quotation omitted; emphasis added); Environmental Standard Review Plan Supplement 1: Operating License Renewal (Oct. 1999) (NUREG 1555 Supplement 1), at 13 (ADAMS Accession No. ML003702019) ("Mitigation measures should be considered in proportion to the level of the impact when a potentially adverse impact is identified").

measures be required before the agency may proceed with the considered action. Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 351 (1989).<sup>25</sup>

The NRC Staff met the requirements of NEPA when it took a hard look at the environmental impacts discussed in its DSEIS and identified possible mitigation measures for such impacts. The PIIC itself expressly acknowledges that the Staff in the DSEIS considered and identified possible actions which could mitigate the environmental impacts discussed. See Motion at 11 (“The NRC has identified the impacts and the mitigating strategies”) & 12 (“The NRC also identifies several mitigating strategies to alleviate the impact of refurbishment”).

The Contention has not pointed to any requirement that the agency mandate the applicant perform any of those mitigation measures identified. The PIIC has also not made any showing that the Staff’s analysis in the DSEIS fails to comply with its obligations under NEPA. It has, therefore, failed to demonstrate a genuine material dispute with either NSPM or the Staff.

In addition to being inadmissible for failing to provide the support required to demonstrate a genuine dispute with NSPM or the Staff, portions of Contention 1 are inadmissible because they are outside the scope of the proceeding. Specifically, to the extent the PIIC argues in Contention 1 that mitigative measures should be required with regard to the impacts of impingement, entrainment, or heat shock upon aquatic resources from continued operation of PINGP, the Contention is outside the scope of the proceeding, contrary to 10 C.F.R. § 2.309(f)(1)(iii).

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<sup>25</sup> See also id. at 352 & 359 (“There is a fundamental distinction, however, between a requirement that mitigation be discussed in sufficient detail to ensure that environmental consequences have been fairly evaluated, on the one hand, and a substantive requirement that a complete mitigation plan be actually formulated and adopted, on the other...NEPA does not require a fully developed plan detailing what steps will be taken to mitigate adverse environmental impacts”); Louisiana Energy Services, L.P. (Claiborne Enrichment Center), CLI-98-3, 47 N.R.C. 77, 110 (1998) (Commission directed NRC to revise environmental impact statement to “include a discussion of possible mitigating measures,” without mandating that such measures be required of the applicant).

Section 511(c)(2) of the Federal Water Pollution Control Act (“Clean Water Act”), 33

U.S.C. § 1371(c)(2), provides:

Nothing in the National Environmental Policy Act of 1969 (83 Stat. 852) shall be deemed to (A) authorize any Federal agency authorized to license or permit the conduct of any activity which may result in the discharge of a pollutant into the navigable waters to review any effluent limitation or other requirement established pursuant to this chapter or the adequacy of any certification under section 1341 of this title; or (B) authorize any such agency to impose, as a condition precedent to the issuance of any license or permit, any effluent limitation other than any such limitation established pursuant to this chapter.

The Commission has specifically held that the statute does not permit the NRC to make an independent determination or look behind the National Pollution Discharge Elimination System (“NPDES”) permitting agency’s determinations. Entergy Nuclear Vermont Yankee, LLC (Vermont Yankee Nuclear Power Station), CLI-07-16, 65 N.R.C. 371, 387 (2007); see also Tennessee Valley Authority (Yellow Creek Nuclear Plant, Units 1 and 2), ALAB-515, 8 N.R.C. 702, 713 (1978) (“This Commission may not incorporate in licenses to build nuclear power plants conditions which, in actuality, call for a review of the adequacy of water quality requirements previously established by EPA...it is EPA’s duty, not the staff’s, to decide what discharges are permissible and to prescribe conditions to assure compliance including conditions on data and information collection and reporting. If the legislative history of Section 511(c)(2) makes anything clear, it is that second guessing of this kind is forbidden”) (quotations omitted). This holding conforms to judicial decisions which have also held that section 511(c) of the Clean Water Act requires the NRC to accept an NPDES permitting agency’s assessment of aquatic impacts (including appropriate mitigation measures) as dispositive and must not duplicate that assessment or perform its own independent review. See, e.g., New England Coal. on Nuclear Pollution v. NRC, 582 F.2d 87, 98 (1st Cir. 1978) (holding NRC “obeyed its [Clean Water Act]

duties by deciding to accept as dispositive EPA determinations concerning” aquatic impacts of a nuclear plant’s once through cooling system).<sup>26</sup>

The DSEIS refers specifically to the PINGP Clean Water Act § 316 demonstrations and the NPDES permit issued by the Minnesota Pollution Control Agency, expressly noting that it “is the responsibility of the [Minnesota Pollution Control Agency] to impose any restrictions or modifications to the cooling system to reduce the impact of [entrainment, impingement, and heat shock] under the NPDES permitting process.” DSEIS at 4-11 (regarding entrainment and impingement) & 4-13 (regarding heat shock). Although the DSEIS identifies that additional mitigation of the impacts could be achieved by performing the measures currently employed by PINGP to a greater degree or for more often, the NRC Staff is prevented from mandating NSPM perform measures beyond those already required by the Minnesota Pollution Control Agency in the NPDES permit. Thus, to the extent the PIIC alleges that the DSEIS is deficient because it does not require NSPM to adopt the mitigation measures identified therein, its claim cannot give rise to an admissible contention because it challenges the NRC’s rules and is outside the scope of the proceeding. 10 C.F.R. § 2.309(f)(1)(iii) & 10 C.F.R. § 2.335.

#### **B. Contention 2 Is Untimely and Inadmissible**

Contention 2, which questions whether the ER and the DSEIS “adequately address the adequacy of the monitoring for tritium in the groundwater,” (Motion at 13) should be rejected for multiple reasons. First and foremost, Contention 2 is inadmissible because it is beyond the scope of this proceeding and is a challenge to the license renewal rules. Contention 2 seeks to raise a

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<sup>26</sup> For this reason, 10 C.F.R. § 51.53(c)(3)(ii)(B) requires an applicant to assess the impact of entrainment, impingement and heat shock only if the applicant cannot provide a current Clean Water Act § 316(b) determination and, if necessary, Clean Water Act § 316(a) variance, or equivalent state permits and supporting documentation.

Category 1 environmental issue that cannot be raised absent a waiver of the rules by the Commission. Second, even if the Contention were within the scope of the proceeding (which it is not), it is untimely because it is not based on new data or conclusions in the DSEIS, but rather on the same information available in NSPM's documents, which have been available to the PIIC for some time. Further, the PIIC fails to address the criteria for admitting untimely contentions. Lastly, even if Contention 2 were within the scope of the proceeding, it would be inadmissible because it lacks any basis demonstrating the existence of a genuine material dispute and fails to provide the necessary factual basis for an admissible contention.

1. Contention 2 is Beyond the Scope of This Proceeding

Contention 2 is inadmissible because it is beyond the scope of this proceeding and is a challenge to the license renewal rules. Contention 2 represents a challenge to the scope of the environmental review specified in 10 C.F.R. §§ 51.53(c)(3)(i) and 51.71(d), and to the NRC's generic environmental findings in the GEIS and Appendix B to 10 C.F.R. Part 51. Offsite radiological impacts are Category 1 issues determined to have small effects, based on a generic finding in the GEIS.<sup>27</sup> 10 C.F.R. Part 51, App. B, Table B-1. As provided in 10 C.F.R. § 51.71(d), "[t]he draft supplemental environmental impact statement for license renewal prepared under § 51.95(c) will rely on conclusions as amplified by the supporting information in the GEIS for issues designated as Category 1 in appendix B to subpart A of this part."

As the Commission has held, radiological exposure from power reactor operation is a Category 1 issue, and such a contention is not litigable absent a waiver. Turkey Point, CLI-01-17, 54 N.R.C. at 12, 17; see also Massachusetts v. NRC, 522 F.3d at 127. The PIIC has not sought a waiver or made any attempt to address the requirements for a waiver set forth in 10

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<sup>27</sup> The PIIC itself recognizes that radiological exposure is a GEIS Category 1 issue. DSEIS Appendix A at A-103.

C.F.R. § 2.335(b). Nor has the PIIC identified any significant new information which might warrant such a waiver.<sup>28</sup>

Moreover, there is no merit to the PIIC's assertion that, because the NRC Staff has proposed to revise Table B-1 to make radionuclides released to groundwater a Category 2 issue, the Board should admit Contention 2. Motion at 14; see also Proposed Rule, Revisions to Environmental Review for Renewal of Nuclear Power Plant Operating Licenses, 74 Fed. Reg. 38,117, 38,135 (Jul. 31, 2009). NRC Staff's proposed rule is just that – proposed and not in effect. The current Table B-1 Category 1 finding for offsite radiological impacts is controlling here. Therefore, the Licensing Board cannot accept Contention 2 because the Category 1 determination still controls, and the rulemaking on whether to revise Table B-1 is still open.

Contention 2 is also beyond the scope of this proceeding and fundamentally inadmissible because its real focus is not on NSPM's and the NRC Staff's environmental analyses, but on the adequacy of NSPM's radiological monitoring program, which is beyond the scope of this proceeding. Among other things, PIIC contends that (1) "the leaks from plant operations [] have not been properly evaluated and/or corrected,"<sup>29</sup> (2) "additional monitoring wells [should be]

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<sup>28</sup> It should be noted that simply claiming significant new information is insufficient. As the Commission has held, "[a]djudicating Category 1 issues site by site based merely on a claim of 'new and significant information' would defeat the purpose of resolving generic issues in a GEIS." Vermont Yankee, CLI-07-3, 65 N.R.C. at 21.

<sup>29</sup> The PIIC ignores the NRC Staff's findings in a 2007 Inspection Report.

The inspectors reviewed the licensee's progress in investigating the cause of the seasonally elevated tritium levels in the water in a singular on-site monitoring well (P-10). The licensee conducted additional analysis of their on-site water monitoring program including a self-assessment and a hydrological review. Although there was not sufficient data to confirm a link or definitively exclude other potential sources, the licensee determined that the most likely contributor to the fluctuating tritium levels in the (P-10) well samples was radionuclide migration of discharges from the turbine building sump. The turbine building sump was a monitored effluent discharge pathway that, by plant design, may contain small but measurable amounts of tritiated water. The contents of the turbine building sump were routinely analyzed, characterized, and the radiological impact of any discharge to the land lock was evaluated in accordance with the Off-Site Dose Calculation Manual. The licensee continued to monitor and evaluate the analytical results from its on-site well water program relative to their groundwater protection initiative program. Anomalous sample results were assessed for radiological impact and identified findings were reported in the Annual Effluent Report. Based on the licensee's evaluation,

installed and sampled much more regularly than once a year,” (3) its drinking water should be monitored, and (4) “[a]dditional monitoring is needed.” Motion at 14-16. These (safety-related) claims are beyond the scope of this proceeding because monitoring for radiological releases is an operational issue not within the scope of license renewal proceedings. As stated by the licensing board in rejecting an analogous contention in the Monticello license renewal proceeding:

[The] contention asserts that “radiation monitoring at Monticello is not adequate” and calls for new monitoring techniques. Radiation monitoring programs, however, are subject to ongoing regulatory oversight . . . and, therefore, are beyond the scope of this proceeding.

Nuclear Management Co., LLC (Monticello Nuclear Generating Plant), LBP-05-31, 62 N.R.C. 735, 754 (2005) (emphasis added; footnote omitted); see also Entergy Nuclear Operations, Inc. (Pilgrim Nuclear Power Station), LBP-07-12, 66 N.R.C. 113, 130 n.81 (2007) (“monitoring of radiological releases, or determinations of how leakage could harm health or the environment, are not legitimately in dispute here, because they do not relate to aging and/or because they are addressed as part of ongoing regulatory processes”) (citation omitted).

Thus, radiological “monitoring is not proper subject matter for license extension contentions.”<sup>30</sup> Rather, the NRC addresses operational issues, such as leakage monitoring, with continuous oversight and enforcement. See Millstone, CLI-04-36, 60 N.R.C. at 638. Furthermore, as discussed above, “[l]icense renewal reviews are not intended to ‘duplicate the Commission’s ongoing reviews of operating reactors.’” Turkey Point, CLI-01-17, 54 N.R.C. at

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the continued onsite well monitoring program was in compliance with the Off-Site Dose Calculation Manual, this item is closed.

PINGP Units 1 and 2 NRC Integrated Inspection Report 05000282/2007002 and 05000306/2007002, Enclosure at 23 (ADAMS Accession No. ML071340358).

<sup>30</sup> Entergy Nuclear Generation Co. (Pilgrim Nuclear Power Station), Docket No. 50-293-LR, Unpublished Order (Denying Pilgrim Watch’s Motion for Reconsideration) at 5 (Jan. 11, 2008) (ADAMS Accession No. ML080110358).

7; see also Pilgrim, LBP-06-23, 64 N.R.C. at 274-77; 56 Fed. Reg. at 64,946; Monticello, LBP-05-31, 62 N.R.C. at 754.<sup>31</sup>

At bottom, Contention 2 seeks to raise issues wholly outside the scope of this license renewal proceeding and must be rejected.

2. Contention 2 is Untimely

Even if Contention 2 were within the scope of the proceeding, it should be rejected as untimely. Commission regulations permit new environmental contentions based on the DSEIS only if there are data or conclusions in the DSEIS that differ significantly from the data or conclusions in the applicant's documents. 10 C.F.R. § 2.309(f)(2). Here, the conclusions in the DSEIS and the data on which they are based are the same as that in the ER. NSPM's ER concluded that there is no new and significant information that would affect any Category 1 issue (ER at 5-3), and the bases for that conclusion included review of environmental assessments, monitoring reports and compliance history reports (*id.* at 5-2). While the DSEIS addresses Category 1 issues individually and discusses the Staff's review more specifically, it too concludes that there is no new and significant human health information (DSEIS at xv, 4-18) and bases that conclusion on NSPM's Radiological Environmental Monitoring Program ("REMP") reports (which include the results of NSPM's tritium monitoring program) and Annual

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<sup>31</sup> NSPM anticipates that on reply, the PIIC will try to argue that this Contention is admissible because it involves environmental justice. As discussed later in this Answer, Contention 2 does not come close to raising an admissible environmental justice concern. As a general matter (absent a Category 1 finding), an environmental justice contention would only be admissible if it alleges, with requisite documentary basis and support that is entirely absent from Contention 2, that the proposed action will have "significant adverse impacts on the physical or human environment" that were not considered because the impacts on the community were not adequately evaluated. 69 Fed. Reg. at 52,047-48 (emphasis added). Contention 2 makes no such showing. In any event, such an allegation (that the proposed action will have significant adverse impacts) would clearly be an attack on the NRC's Category 1 finding (that offsite radiological impacts are small for all plants). 10 C.F.R. § 2.335(a) prohibits such an attack by any means. In sum, even if PIIC had asserted that Contention 2 is an environmental justice issue, it would still fundamentally be an impermissible challenge to the NRC's generic conclusion that offsite radiological impacts are small for all plants.

Radioactive Effluent Release Reports. DSEIS at 4-18 to 4-20. Thus, there is no material difference.

Moreover, all of the data discussed in the DSEIS concerning tritium were publicly available before the PIIC intervened in this proceeding. The DSEIS discussion of the elevated tritium findings refers to and incorporates the discussion of the same findings contained in both the May 13, 2008 PINGP 2007 Annual REMP Report (ADAMS Accession No. ML081370083) and the May 13, 2007 PINGP 2006 Annual REMP Report (ADAMS Accession No. ML071350517). As discussed earlier, the Commission's standard for new contentions based on the Staff's environmental impact statement is not intended as an occasion to raise additional arguments that could have been raised previously. McGuire, CLI-02-28, 56 N.R.C. at 385-86 & n.61. Moreover, on its face, Contention 2 is claiming that both the ER and the DSEIS are deficient in failing to address tritium monitoring. A contention alleging that certain concerns that were not dealt with in the ER have additionally not been dealt with in the DSEIS is not timely. Id. If the PIIC believed that any of the data in the REMP reports justified a waiver of the NRC rules to require an assessment of radiological impacts, it should have submitted such a waiver request with its original intervention petition and contentions.

Having failed to demonstrate that any significant difference exists between NSPM's environmental documents and the DSEIS related to the tritium findings, PIIC also fails to demonstrate that Contention 2 meets the criteria under § 2.309(f)(2)(i)-(iii). First, the information on which Contention 2 is based has long been available to the PIIC, thus failing the requirement contained in § 2.309(f)(2)(i). Both the 2006 and 2007 REMP Reports identified this data. 2007 Annual REMP Report Appendix E at E-3 to E-5, E-9; 2006 Annual REMP Report Appendix E at E-3 to E-5, E-10. Furthermore, as it notes in the Motion (at 14), the PIIC's own

scoping comments for the DSEIS filed on September 22, 2008, specifically point to the discussion of the elevated tritium findings contained in the 2007 Annual REMP Report. DSEIS Appendix A at A-103 to A-106. Thus, all the information unquestionably was known to the PIIC in September 2008. Accordingly, the PIIC does not meet criterion 2.309(f)(2)(i).

Second, as previously discussed, the information in the DSEIS on which Contention 2 is based is precisely the same information contained in the PINGP Annual REMP Reports. The PIIC thus fails criterion 2.309(f)(2)(ii) (information not materially different).

Third, the PIIC fails to meet criterion 2.309(f)(2)(iii) because the concerns it raises here were not timely raised based on the availability of the information. The 2007 Annual REMP Report was available to the PIIC a full three months before its intervention petition was filed. Even if the PIIC were to claim that it could not have timely filed a contention based on the 2007 Annual REMP Report, it was still obliged to file a late-filed contention as soon as practicable after becoming aware of any purportedly new information. Nearly 15 months has passed since the PIIC submitted scoping comments referencing the 2007 Annual REMP Report and the identified tritium findings. It has waited far too long to file a contention on the same subject. Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-00-27, 52 N.R.C. 216, 223-25 (2000) (concluding that the substance of a contention could have been raised long before the issuance of an NRC Staff environmental document); Louisiana Energy Services, L.P. (Claiborne Enrichment Center), LBP-94-11, 39 N.R.C. 205, 212 (1994) (an intervenor that awaits the publication of an NRC Staff environmental document to file a contention for which it has sufficient information does so “at its peril”).

Contention 2 must also be rejected because the PIIC has not made any attempt to address the factors in 10 C.F.R. § 2.309(c). As previously discussed, the failure to address these factors by itself warrants denial of the Contention. See discussion at pages 23-24 supra.

3. Contention 2 Fails to Provide the Necessary Factual Basis and to Demonstrate a Genuine Dispute on Any Material Issue

Finally, even if Contention 2 were within the scope of this proceeding (which it is not) and even if it had been timely submitted (which it was not), it would still be inadmissible because it fails to meet the standards in 10 C.F.R. § 2.309(f)(1). Contention 2 fails to meet the requirements of 10 C.F.R. § 2.309(f)(1)(v) and (vi) to provide “alleged facts or expert opinion which support [the PIIC’s] position. . . together with references to the specific sources and documents on which petitioner intends to rely to support its position on the issue” and “to provide sufficient information to show that a genuine dispute exists with the applicant/licensee on a material issue of law or fact.”

The PIIC does not identify any source, reference, document, or expert opinion indicating that tritium is having any environmental impact on the Indian Community or any significant effect on the environment. Similarly, the PIIC does not identify any source, reference, document or expert opinion indicating that NSPM’s monitoring programs are inadequate, or that there are environmental impacts that warrant further monitoring. While the PIIC makes some factual allegations, none of the alleged facts supports the PIIC’s position that the DSEIS and ER are deficient, or that NSPM’s monitoring is inadequate.

As PIIC concedes, the identified elevated levels of tritium in wells P-10, MW-7, and MW-8 (which are all on-site and south of the plant – i.e., in the opposite direction from the PIIC’s reservation) are far below the EPA safe drinking water standard. Motion at 13, 16 & 17.

The NRC Staff concluded that “the tritium levels measured in the environmental samples were below applicable NRC reporting levels and EPA drinking water standards.” DSEIS at 4-20. All other tritium findings from other well samples, including several wells that NSPM monitors on the PIIC reservation, are “within the range of expected background tritium levels in shallow groundwater and surface water due to tritium concentrations measured in precipitation.” See, e.g., 2007 Annual REMP Report Appendix E at E-5. PIIC provides no information indicating that the risk from these very low tritium levels is any different than that discussed in the GEIS or the DSEIS. PIIC provides no real discussion of the tritium findings other than to suggest that more monitoring is needed. Nor does PIIC provide any expert opinion or other basis indicating that the risk from the tritium levels is anything but what is stated in the NRC Staff’s and NSPM’s environmental documents.<sup>32</sup>

And even if there were concern that the elevated tritium findings in the three onsite wells could pose some health risk (which there is not), PIIC offers no basis to contend that it could adversely impact its members. Sample wells P-10, MW-7, and MW-8 are located to the south-southwest of PINGP installations. 2007 Annual REMP Report Appendix E at E-11. The normal groundwater flow is to the southwest. ER at pp. 2-5 – 2-6. The PIIC is located north of the PINGP property line. ER at p. 2-2. Multiple sampling wells sit between those with elevated tritium findings and the PIIC site, (2007 Annual REMP Report Appendix E at E-11), none of which have registered elevated tritium findings. Id. at E-3; 2008 Annual REMP Report Appendix E at E-3. The PIIC nowhere explains how it might be adversely impacted from elevated tritium levels in wells to the south-southwest of the plant, with normal groundwater

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<sup>32</sup> The PIIC claims that “new and significant studies and analysis (discussed more fully below) raise significant concerns about the safety of even low dose exposure,” (Motion at 16), but fails to further discuss or provide any expert report on the purported new and significant studies.

flow to the southwest, when it sits north of the plant site, and no other sampling well between those with elevated tritium levels and the PIIC site have registered elevated tritium levels. Nor does the PIIC provide any expert opinion or any other basis indicating how the elevated tritium levels could adversely impact it.

Further, the PIIC ignores and fails to dispute pertinent portions of the NRC Staff's analysis in the DSEIS. The DSEIS explains that the Staff has reviewed historical data on radiological releases from PINGP, and the resultant dose calculations demonstrate that the doses to the maximally exposed individual were a small fraction of the NRC limits and standards including those in Appendix I to 10 C.F.R. Part 50. DSEIS at 4-18. The Appendix I limits are those set by the NRC to maintain doses "as low as reasonably achievable" ("ALARA"). The PIIC does not address this analysis and provides no explanation why further mitigation is necessary if the dose to the maximally exposed individual is being maintained below levels that are ALARA. It thus fails to demonstrate any genuine dispute with the DSEIS on a material issue.

To the extent that the PIIC may claim that it is raising an environmental justice concern, the PIIC fails to allege or make any showing that measured levels of tritium result in a high or adverse impact to it. As a general matter, an environmental justice contention would only be admissible if it alleges, with requisite documentary basis and support, that the proposed action will have "significant adverse impacts on the physical or human environment" that were not considered because the impacts on the community were not adequately evaluated. 69 Fed. Reg. at 52,047-48 (emphasis added). PIIC makes no claim that the elevated tritium findings are significantly adverse and provides no facts, expert opinion or other references or sources

demonstrating as much. Thus, there is no environmental justice issue and no genuine dispute here.

The PIIC asserts that NSPM must “[i]mplement, in full, each and every objective and criterion set forth in the [NEI] Groundwater Protection Initiative [“GPI”], NEI-07-07.” Motion at 18. Because the PIIC has made no showing that there is any significant environmental impact resulting from tritium, there is no basis supporting the need for mitigative measures. In any event, the PIIC fails to demonstrate, let alone assert, where, if at all, NSPM has failed to implement the GPI. Indeed, the nuclear industry committed to implement the GPI at all nuclear power plant sites by August 31, 2008.<sup>33</sup> Further, NSPM and NRC documents, including NRC inspection reports and NSPM procedures, indicate that it has been implementing aspects of the GPI since 2006.<sup>34</sup> Thus, the PIIC fails to demonstrate any genuine dispute on a material issue here.

With respect to the PIIC’s claims that NSPM must take other actions with respect to onsite liquid discharges and detection and monitoring of onsite contamination (Motion at 18), these issues are the subject of an ongoing NRC rulemaking and therefore would not be appropriate topics even if they were within the scope of the proceeding. In January 2008, the Commission issued a Proposed Rule on Decommissioning Planning.<sup>35</sup> Among other things, the

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<sup>33</sup> Summary of September 27, 2007, Category 2 Public Meeting with the Nuclear Energy Institute (NEI) to Discuss the Industry’s Implementation of the Ground Water Protection Initiative (ADAMS Accession No. ML072830139).

<sup>34</sup> Letter from Weinkam, E. J., Nuclear Management Company, to Richards, S. A., NRC, Subject: Groundwater Protection – Data Collection Questionnaire (ADAMS Accession No. ML062130102); PINGP Units 1 and 2 NRC Integrated Inspection Report 05000282/2007002 and 05000306/2007002, Enclosure at 23 (ADAMS Accession No. ML071340358) (“The licensee continued to monitor and evaluate the analytical results from its on-site well water program relative to their groundwater protection initiative program”); PINGP Offsite Calculation Dose Manual, Rev. 22 (Oct. 23, 2008) at 68-70 (ADAMS Accession No. ML091380427) (“the report is being submitted as part of NEI Enhanced Groundwater Protection Initiative”).

<sup>35</sup> Proposed Rule, Decommissioning Planning, 73 Fed. Reg. 3,812 (Jan. 22, 2008).

proposed rule would require licensees to “conduct their operations to minimize the introduction of residual radioactivity into the site, including subsurface soil and groundwater” and “survey certain quantities or concentrations of residual radioactivity, including subsurface areas.” 73 Fed. Reg. at 3,812. The NRC Staff has also prepared a draft Regulatory Guide to implement the provisions of the proposed rule. DG-4014, Radiological Surveys and Monitoring During Operations (Mar. 2009) (ADAMS accession no. ML090510015). Though the NRC Staff has requested Commission approval of a final rule (see SECY-09-0042 (Mar. 13, 2009)), the final rule has not yet been issued. Because the additional actions and requirements sought by PIIC are subject to a pending rulemaking, they cannot be raised here.<sup>36</sup>

In summary, Contention 2 is beyond the scope of this proceeding, untimely, and fails to raise a genuine dispute on a material issue of law or fact. Accordingly, Contention 2 must be rejected.

### **C. Contention 3 Is Untimely and Inadmissible**

The PIIC’s proposed Contention 3 is so vague that it does not satisfy any of the Commission’s standards for contention admissibility. The statement of the issue of law or fact is not specific. 10 C.F.R. § 2.309(f)(1)(i). There is virtually no explanation of the basis for the Contention. 10 C.F.R. § 2.309(f)(1)(ii). The issue, to the extent that NSPM can even determine what the issue is, is outside the scope of this proceeding and immaterial to the findings the Commission must make. 10 C.F.R. § 2.309(f)(1)(iii) & (iv). The PIIC has provided no concise statement of facts or expert opinion and no references to specific sources or documents. 10

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<sup>36</sup> Longstanding Commission precedent holds that “licensing boards should not accept in individual license proceedings contentions which are (or are about to become) the subject of general rulemaking by the Commission.” Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station), ALAB-655, 14 N.R.C. 799, 816 (1981), quoting Potomac Electric Power Co. (Douglas Point Station, Units 1 and 2), ALAB-218, 8 A.E.C. 79, 85 (1974).

C.F.R. § 2.309(f)(1)(v). Finally, the PIIC has failed to provide sufficient information to show that a genuine dispute exists. 10 C.F.R. § 2.309(f)(1)(vi). The failure of a contention to comply with any one of these requirements is sufficient grounds for dismissing the contention. Palo Verde, CLI-91-12, 34 N.R.C. at 155-56; see also McGuire, CLI-98-14, 48 N.R.C. at 41 (“It is the responsibility of the Petitioner to provide the necessary information to satisfy the basis requirement for the admission of its contentions . . .”). The PIIC has provided such a paucity of support for its Contention that NSPM can do little more than make a good faith guess as to the issue the PIIC is attempting to raise. As discussed below, even if any of NSPM’s guesses are correct, Contention 3 is untimely and fails to address the Commission’s admissibility requirements.

1. Contention 3 is Untimely

Contention 3 is untimely because it is not based on new information in the DSEIS. Contention 3 does not reference any data or conclusions in the DSEIS. The PIIC’s allegation that the DSEIS does not contain certain dose estimates that are also allegedly missing from the ER (see Motion at 18) does not qualify as new information for the purposes of satisfying 10 C.F.R. § 2.309(f)(2). As the Commission has explained, a late contention is properly denied where the only assertion is that certain concerns that were not dealt with in the ER have additionally not been dealt with in the DSEIS. McGuire, CLI-02-28, 56 N.R.C. at n.61.

2. Contention 3 is Outside the Scope of This Proceeding

Contention 3 is inadmissible because it represents a challenge to the scope of the environmental review specified in 10 C.F.R. § 51.53(c), and to the NRC’s generic environmental findings in the GEIS and Appendix B to 10 C.F.R. Part 51. Offsite radiological impacts (i.e., individual effects from other than disposal of spent fuel and high-level waste) are Category 1

issues determined to have small effects, based on a generic finding in the GEIS. 10 C.F.R. Part 51, App. B, Table B-1. Thus, as the Commission has held, radiological exposure from power reactor operation is a Category 1 issue, and such a contention is not litigable. Turkey Point, CLI-01-17, 54 N.R.C. at 17. Therefore, Contention 3 must be excluded from consideration in this proceeding.

The PIIC does not identify any new and significant information that would warrant reconsideration of the generic Category 1 finding. Further, the PIIC has made no request for a waiver necessary to litigate a Category 1 finding. See 10 C.F.R. § 2.335; Vermont Yankee, CLI-07-3, 65 N.R.C. at 17-18 & n.15. See also Turkey Point, CLI-01-17, 54 N.R.C. at 12. “The NRC's procedural rules are clear: generic Category 1 issues cannot be litigated in individual licensing adjudications without a waiver.” Massachusetts v. NRC, 522 F.3d at 127.

Nor does the PIIC make any suggestion that Contention 3 is an environmental justice contention. Nothing in the Contention relates in any way to the NRC Staff’s environmental justice analysis or any disparate impact on the PIIC. Even if the PIIC had asserted that Contention 3 is an environmental justice issue, it is still fundamentally an impermissible challenge to the NRC’s generic conclusion that offsite radiological impacts are small for all plants. Indeed, as a general matter (absent a Category 1 finding), an environmental justice contention would only be admissible if it alleges, with requisite documentary basis and support that is entirely absent from Contention 3, that the proposed action will have “significant adverse impacts on the physical or human environment” that were not considered because the impacts on the community were not adequately evaluated. 69 Fed. Reg. at 52,047-48 (emphasis added). Such an allegation (that the proposed action will have significant adverse impacts) is clearly an

attack on the NRC's Category 1 finding (that offsite radiological impacts are small for all plants).  
10 C.F.R. § 2.335(a) prohibits such an attack by any means.

3.       Contention 3 Includes No Basis or Expert Support and Does Not  
          Demonstrate a Genuine Dispute on a Material Issue

Contention 3 is entirely lacking in specificity, forcing NSPM to guess what arguments the PIIC is trying to make in order to respond to those hypothetical arguments. Such vagueness falls far short of the Commission's pleading requirements. For example, the PIIC alleges in Contention 3 that the DSEIS has failed to satisfy a requirement in "Subpart H of 40 C.F.R." that "dose estimates must be calculated from all cumulative doses for individuals residing within 3 kilometers." Motion at 19. The PIIC provides no further citation that would allow NSPM to determine the source of this alleged requirement.

NSPM has examined 40 C.F.R. and can only venture a guess that the PIIC is referring to 40 C.F.R. Part 61, Subpart H: National Emission Standards for Emission of Radionuclides Other Than Radon From Department of Energy Facilities, which contains a reference to 3 kilometers at 40 C.F.R. § 61.93(a). If that is the section that the PIIC intended to cite, then Contention 3 fails to raise a material issue, because Part 61 only applies to facilities owned or operated by the Department of Energy. 40 C.F.R. § 61.90.<sup>37</sup> Further, 40 C.F.R. § 61.93(a) does not require that dose estimates must be calculated from all cumulative doses for individuals residing within 3 kilometers – it merely says that if the maximally exposed individual lives within 3 kilometers of

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<sup>37</sup> Indeed, none of 40 CFR Part 61, which sets forth the Environmental Protection Agency's ("EPA") National Emissions Standards for Hazardous Air Pollutants ("NESHAPs"), applies to power reactors licensed by the NRC. Subpart I of Part 61, which contains no reference to 3 kilometers, once applied to NRC-licensed nuclear power reactors, but the EPA rescinded NESHAPs as it applied to these reactors in 1995. See National Emission Standards for Radionuclide Emissions From Facilities Licensed by the Nuclear Regulatory Commission and Federal Facilities Not Covered by Subpart H, 60 Fed. Reg. 46,206 (Sept. 5, 1995). The EPA determined that "the NRC program controlling air emissions of radionuclides from nuclear power reactors will assure that the resultant doses will consistently and predictably be below the levels which EPA has determined are necessary to provide an ample margin of safety to protect the public health." 60 Fed. Reg. at 46,206.

all sources of emissions in the Department of Energy facility, then the facility should use a certain type of EPA model to determine the dose.

There is a requirement in 40 C.F.R. Part 190 to maintain the combined dose from uranium fuel cycle operations below specified limits. 40 C.F.R. Part 190, however, makes no reference to 3 kilometers and does not have a Subpart H. NRC Health Physics Position 140 suggests that units within 8 kilometers would contribute to the 40 C.F.R. Part 190 limit. [See <http://www.nrc.gov/about-nrc/radiation/protects-you/hppos/hppos140.html>](http://www.nrc.gov/about-nrc/radiation/protects-you/hppos/hppos140.html). However, there are no other units within 8 kilometers of PINGP (indeed, the nuclear plant nearest to Prairie Island is over 80 miles away). Compliance with the Part 190 standards is assured by each plant's technical specifications, which require that an NRC licensee's radioactive effluent control program include limitations on annual dose or dose commitment to any member of the public due to releases of radioactivity and radiation from uranium fuel cycle sources conforming to 40 C.F.R. Part 190.<sup>38</sup> Thus, as discussed in the DSEIS, the REMP conducted by NSPM in the vicinity of PINGP measures cumulative radiological impacts. DSEIS at 4-50. The PIIC neither addresses nor challenges this discussion in the DSEIS.

In the same vein, the PIIC asserts that the "Community members who reside within 3 kilometers of the PINGP will be exposed to doses from multiple sources . . . ." Motion at 19. The PIIC does not specify, however, what sources besides PINGP would contribute to those

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<sup>38</sup> See, e.g., Generic Letter 89-01, "Guidance for the Implementation of Programmatic Controls for Radiological Effluent Technical Specifications in the Administrative Controls Section of the Technical Specifications and Relocation of Procedural Detail of RETS to the Offsite Dose Calculation Manual or to the Process Control Program" (Jan. 31, 1989), Encl. 3 at 3 (ADAMS Accession No. ML031140051).

doses. Apart from PINGP, NSPM does not know of any other sources<sup>39</sup> to which individuals residing within 3 kilometers of PINGP would be exposed.<sup>40</sup>

Because Contention 3 does not satisfy the Commission's timeliness or admissibility requirements, as discussed above, it must not be admitted.

## V. CONCLUSION

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

Respectfully Submitted,

/Signed electronically by David R. Lewis/

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Dated: December 24, 2009

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<sup>39</sup> If the PIIC's vague reference to other "multiple sources" in Contention 3 is intended to mean the PINGP Independent Spent Fuel Storage Installation ("ISFSI"), it should be noted that NSPM's REMP covers both Units 1 and 2 and the ISFSI. See, e.g., PINGP 2007 Annual REMP Report at 2. The ISFSI is also addressed in PINGP's Annual Radioactive Effluent Report and Offsite Dose Calculation Manual (although there are no effluents released from the ISFSI). See, e.g., 2007 Annual Radioactive Effluent Report and Offsite Dose Calculation Manual, Encl. 1. Thus, as the DSEIS correctly states, the REMP measures radiation and radioactive materials from all sources, and therefore measures cumulative radiological impacts. DSEIS at 4-50. Since the NRC relied on the REMP reports in concluding that there was no new and significant information which affected the Category 1 finding that radiological impacts are SMALL (DSEIS at 4-19), that conclusion encompasses any contribution from the ISFSI. It should also be noted that the impacts of onsite spent fuel storage, including both dry and pool storage, is a Category 1 issue in its own right. 10 C.F.R. Part 51, App. B, Table B-1.

<sup>40</sup> The PIIC states, "It does not appear that these worst case scenarios have been fully examined." Motion at 10. Apart from the PIIC's failure to identify any "multiple sources" that would contribute to any "worst case scenarios," it is well established that NEPA does not require worst case analysis. See, e.g., Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-02-25, 56 N.R.C. 340, 348-49 (2002), citing Robertson, 490 U.S. at 354 and Edwardsen v. U.S. Dept. of Interior, 268 F.3d 781, 785 (9th Cir. 2001).

**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 New Environmental Contentions,” dated December 24, 2009, was provided to the Electronic Information Exchange for service on the individuals listed below, this 24<sup>th</sup> day of December, 2009.

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