

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

William J. Froehlich, Chairman
Dr. Gary S. Arnold
Dr. Thomas J. Hirons

In the Matter of

Northern States Power Co.

(Prairie Island Nuclear Generating Plant, Units
1 and 2)

Docket Nos. 50-282-LR and 50-306-LR

ASLBP No. 08-871-01-LR

January 5, 2010

ORDER

(Granting Motion to Dismiss PIIC Contention 5)

This proceeding concerns an application by Northern States Power Company (NSPM or Applicant) to renew its operating licenses for the Prairie Island Nuclear Generating Plant, Units 1 and 2 (PINGP), for an additional 20 years. On December 5, 2008, this Licensing Board granted a hearing request by the Prairie Island Indian Community (PIIC or Intervenor) and admitted seven of PIIC's contentions challenging NSPM's application.¹ Since then, Applicant and PIIC have resolved six of those contentions, such that only one contention – Contention 5 – remains at issue in this proceeding. On November 23, 2009, Applicant filed a motion to dismiss Contention 5 as moot.² The instant order sets forth the Board's ruling on that motion.

¹ Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 and 2), LBP-08-26, 68 NRC 905 (2008).

² Northern States Power Company's Motion to Dismiss PIIC Contention 5 as Moot (Nov. 23, 2009) [hereinafter Motion to Dismiss].

I. Background

Contention 5 alleges that “Applicant’s environmental report [ER] contains a seriously flawed environmental justice analysis that does not adequately assess the impacts of the PINGP on the adjacent minority population.”³ The Board identified Contention 5 as a “contention of omission,” meaning that the contention alleges an omission from Applicant’s ER.⁴ The Board noted that PIIC’s contention is more logically addressed to the NRC Staff – “the entity responsible for preparing the EIS [environmental impact statement] and complying with NEPA [National Environmental Policy Act].”⁵ However, PIIC was compelled to direct its contention at the Applicant because the Applicant’s ER “acts as a surrogate for the EIS during the early stages of a relicensing proceeding.”⁶

Ten days after the Board admitted Contention 5, Applicant moved the Board to reconsider its decision, or in the alternative to refer the issue to the Commission. As grounds for the motion, Applicant insisted that “the NRC rules do not require NSPM, as a license renewal applicant, to provide an environmental justice analysis.”⁷ The Board denied Applicant’s motion, expanding on the explanation offered in the initial ruling on Contention 5. “Because NRC Staff’s EIS is required to include an environmental analysis,” the Board explained, “and because Applicant’s ER, serving as a surrogate for the EIS, provides no such analysis, it was reasonable

³ Prairie Island, LBP-08-26, 68 NRC at 930.

⁴ Id. at 932.

⁵ Id. at 931.

⁶ Id. The ER’s role as a “surrogate” for the EIS flows from 10 C.F.R. § 2.309(f)(2) (stating that “[o]n issues arising under the National Environmental Policy Act, the petitioner shall file contentions based on the applicant’s environmental report”).

⁷ Northern States Power Company’s Motion for Reconsideration of LBP-08-26 Regarding Contention 5 or, in the Alternative, for Referral to the Commission (Dec. 15, 2008) at 3. On January 5, 2009, the NRC Staff filed a response in support of Applicant’s motion, and PIIC filed a response in opposition.

and appropriate for the Board to admit Contention 5.”⁸ The Board emphasized, however, that the responsibility now falls on the NRC Staff to provide an adequate discussion of environmental justice in the EIS. “Once the EIS is issued,” we explained, “Applicant may find it appropriate to file a motion to dismiss or a motion for summary disposition of Contention 5.”⁹

In accordance with that instruction, Applicant filed a motion to dismiss Contention 5 on November 23, 2009, ten days after the Staff’s draft supplemental EIS (DSEIS) became publicly available.¹⁰ In its motion, Applicant argues that the environmental justice analysis contained in the DSEIS – found at sections 2.3.10, 4.9.7, 4.11.5, 5.4, 8.1.6, 8.2.6, 8.3.6, and 8.6.6 – renders Contention 5 moot.¹¹ In support of this conclusion, Applicant emphasizes that “the DSEIS includes not only the environmental justice views of the NRC Staff, but also those of the PIIC as a cooperating agency.”¹² Thus, Applicant argues that the omission alleged by Contention 5 has been cured, and the Board should dismiss Contention 5 accordingly.

The NRC Staff supports Applicant’s motion to dismiss,¹³ but the Intervenor opposes it.¹⁴ According to PIIC, Contention 5 alleges an omission from the Applicant’s ER – not the Staff’s EIS – and only a supplement to the Applicant’s ER can cure that omission. Although PIIC

⁸ Licensing Board Order (Denying Motion for Reconsideration of LBP-08-26 Regarding Contention 5 and Alternative Motion to Refer the Issue to the Commission) (Jan. 16, 2009) at 6 (unpublished).

⁹ Id. at 8.

¹⁰ See Office of Nuclear Reactor Regulation, Generic Environmental Impact Statement for License Renewal of Nuclear Plants: Regarding Prairie Island Nuclear Generating Plant, Units 1 and 2 – Draft Report for Comment, NUREG-1437 (Supp. 39 Oct. 2009) (ADAMS Accession No. ML093170484).

¹¹ Motion to Dismiss at 3-4.

¹² Id. at 4.

¹³ Id.

¹⁴ Prairie Island Indian Community’s Response Opposing NSP’s Motion to Dismiss PIIC Contention 5 as Moot (Dec. 3, 2009) [hereinafter Opposition to Motion to Dismiss].

acknowledges that the Staff's DSEIS contains a discussion of environmental justice, PIIC insists that "the applicant has a separate responsibility to address environmental justice in its Environmental Report."¹⁵ Until the Applicant does so, PIIC argues, Contention 5 remains a viable contention, and the Board should not dismiss it.

II. Analysis

PIIC is correct that Contention 5 alleges an omission from Applicant's ER. In admitting Contention 5, we identified it "as a contention of omission and a timely challenge to Northern States' Application."¹⁶ At the same time, however, we did not lose sight of the legal framework governing environmental contentions. We emphasized that the NRC – not the Applicant – bears the ultimate responsibility for preparing an EIS and complying with the requirements of NEPA.¹⁷ Indeed, it is the NRC – not the Applicant – that must consider environmental impacts when deciding whether or not to renew NSPM's operating license for an additional 20 years. The Commission's regulations may require petitioners to direct their environmental contentions at the Applicant's ER,¹⁸ but the resolution of those contentions ultimately depends on the content of the EIS, prepared by the NRC Staff.

The Commission has elaborated on the proper handling of environmental contentions:

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 in the proceeding. The requirement that a petitioner raise NEPA contentions in response to the ER gives the Staff the opportunity to request additional information from the applicant and work to resolve any deficiencies as the Staff develops its own Environmental Impact Statement (EIS). If the EIS addresses the concerns alleged in the contention, the

¹⁵ Id. at 3.

¹⁶ Prairie Island, LBP-08-26, 68 NRC at 932.

¹⁷ Id. at 931.

¹⁸ See 10 C.F.R. § 2.309(f)(2).

original contention becomes moot and the intervenor must raise a new contention if it claims the EIS discussion is still inaccurate or incomplete.¹⁹

It is clear that the Commission confirmed in this statement that an applicant need not supplement its ER to cure a contention of omission. Rather, the NRC Staff can work with the applicant to cure the omission by including the omitted information in the EIS, without any change to the ER on the part of the applicant. In the instant case, the NRC Staff has done just that. The Staff has issued a DSEIS that contains a lengthy discussion of environmental justice, including the PIIC's views as a cooperating agency. If PIIC finds this discussion inadequate, it remains free to file new or amended contentions laying out those inadequacies. But Contention 5 itself – a contention of omission – has been rendered moot.

Still, PIIC insists that Contention 5 should remain a viable contention until Applicant supplements its ER. According to PIIC, “the applicant has the initial responsibility to provide the information and analysis to allow the NRC to meet [its] ultimate responsibility” under NEPA.²⁰ This argument, however, seems driven more by an historic conflict between PIIC and NSPM than by actual legal authority. PIIC expresses frustration with NSPM's long-standing “refusal” to acknowledge PIIC's presence in the shadow of the Prairie Island facility. For 51 years, PIIC states, the Applicant “has refused to acknowledge that the Community receives none of [the touted] benefits or other adequate compensation for the disproportionate adverse impacts that

¹⁹ Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-04-22, 60 NRC 125, 130 (2004) (citing Duke Energy Corp. (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-28, 56 NRC 373 (2002)). In McGuire/Catawba, the Commission held that “[w]here a contention alleges the omission of particular information or an issue from an application, and the information is later supplied by the applicant or considered by the Staff in a draft EIS, the contention is considered moot.” CLI-02-28, 56 NRC at 383. PIIC points out that, in the McGuire/Catawba case, “the applicant provided supplemental information that was also considered by the Staff in the draft EIS.” Opposition to Motion to Dismiss at 5. While this may be true, a careful reading of the case reveals that the Applicant did not need to supplement its ER to cure the alleged omission. Rather, consideration of the omitted information in the draft EIS would have been enough to render the contention moot.

²⁰ Opposition to Motion to Dismiss at 4.

the PINGP's operation has had and will continue to have on the Community."²¹ Nevertheless, this Board is bound by the Commission's regulations and pronouncements, and according to the Commission, an applicant need not supplement its ER to cure a contention of omission. As long as the NRC Staff produces an EIS that addresses the missing information, the omission is deemed cured, and the contention is rendered moot.

Our dismissal of Contention 5 does not preclude PIIC from submitting new or amended contentions based on data or conclusions in the DSEIS "that differ significantly from the data or conclusions in the applicant's documents."²² As such, PIIC remains free to raise any challenges to the adequacy of the Staff's environmental justice analysis. In our November 4, 2009 scheduling order, we expressly provided a 30-day opportunity for the filing of any such new or amended contentions.²³ As of December 14, 2009, when the 30-day period expired, PIIC had filed three new environmental contentions. The Board will consider the admissibility of those contentions in a subsequent order. At this point, if PIIC wishes to file any new or amended contentions based on the DSEIS, such contentions will be deemed non-timely, and PIIC will need to address the criteria for non-timely filings, found at 10 C.F.R. § 2.309(c).

III. Conclusion

For the foregoing reasons, the Board grants NSPM's motion to dismiss Contention 5 as moot. Although the dismissal of Contention 5 leaves no contentions remaining in this proceeding, it should not be construed as terminating this case. On the contrary, we retain

²¹ Id. at 2 n.1.

²² 10 C.F.R. § 2.309(f)(2).

²³ Licensing Board Order (Conference Call Summary and Scheduling Order) (Nov. 4, 2009) at 3 (unpublished).

jurisdiction to decide whether to admit PIIC's proposed new contentions, filed on November 23 and December 14, 2009.²⁴

It is so ORDERED.

THE ATOMIC SAFETY
AND LICENSING BOARD²⁵

/RA/

William J. Froehlich, Chairman
ADMINISTRATIVE JUDGE

/RA/

Dr. Gary S. Arnold
ADMINISTRATIVE JUDGE

/RA/

Dr. Thomas J. Hirons
ADMINISTRATIVE JUDGE

Rockville, Maryland
January 5, 2010

²⁴ See 10 C.F.R. § 2.318(a).

²⁵ Copies of this order were sent this date by the agency's E-Filing system to counsel for all parties.

DOCKET NOS. 50-282 AND 50-306-LR
LB ORDER (GRANTING MOTION TO DISMISS PIIC CONTENTION 5)

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[Original signed by Evangeline S. Ngbea]
Office of the Secretary of the Commission

Dated at Rockville, Maryland
this 5th day of January 2010