

February 22, 2010

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of )  
 )  
NORTHERN STATES POWER COMPANY ) Docket Nos. 50-282-LR/ 50-306-LR  
 )  
(Prairie Island Nuclear Generating Plant, )  
Units 1 and 2) )

NRC STAFF'S ANSWER TO NORTHERN  
STATES POWER COMPANY'S PETITION FOR INTERLOCUTORY  
REVIEW OF AN ORDER ADMITTING A SAFETY CULTURE CONTENTION

INTRODUCTION

Pursuant to 10 C.F.R. §§ 2.341(b)(3) and (f)(2), the Staff of the U.S. Nuclear Regulatory Commission ("NRC Staff") hereby files an answer to Northern States Power Company's ("NSP") Petition for Interlocutory Review of an Order Admitting a Safety Culture Contention ("Petition"). In the Petition, NSP argues that, in this proceeding governing license renewal for the Prairie Island Nuclear Generating Plant ("PINGP"), the Atomic Safety and Licensing Board ("Board") erroneously admitted a contention on safety culture that is beyond the scope of this proceeding and that lacked an adequate basis.<sup>1</sup> NSP claims that this error will affect the basic structure of the proceeding in a pervasive and unusual manner and cause NSP irreparable injury.<sup>2</sup>

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<sup>1</sup> Northern States Power Company's Petition for Interlocutory Review of an Order Admitting a Safety Culture Contention ("Petition"), at 10-18 (Feb. 12, 2010) (Agency Document Access & Management System ("ADAMS") Accession No. ML100431198).

<sup>2</sup> *Id.* at 23-24.

Consequently, NSP asks the Commission to grant interlocutory review and reverse the Board's decision admitting the safety culture contention.<sup>3</sup>

For the reasons discussed below, the NRC Staff supports NSP's argument that the Commission should grant interlocutory review because the Board's error regarding scope will have a pervasive and unusual effect on the structure of this proceeding. In contrast, the NRC Staff believes that NSP has not shown that the Board's error in admitting a contention that lacks an adequate basis will have a pervasive and unusual effect on this proceeding. Moreover, the NRC Staff disagrees with NSP's additional claim that the Commission should grant interlocutory review because the Board's errors will have an irreparable impact on NSP.<sup>4</sup>

## DISCUSSION

### I. Standard of Review

The regulation at 10 C.F.R. § 2.341(f)(2) describes the circumstances in which the Commission may grant a petition for interlocutory review. The Commission will grant a petition for interlocutory review when a party demonstrates that the issue on appeal "[t]hreatens the party adversely affected by it with immediate and serious irreparable impact."<sup>5</sup> Alternatively, the Commission will grant a petition for interlocutory review when a party demonstrates that an

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<sup>3</sup> *Id.* at 25.

<sup>4</sup> The NRC Staff disagrees with NSP's claim that the Board's errors regarding basis and scope will have an irreparable impact on NSP. The Commission has consistently held that burdens similar to those NSP will face in litigating the new safety culture contention do not constitute an irreparable impact. *See, e.g., Entergy Nuclear Operations, Inc.* (Indian Point Nuclear Generating Units 2 and 3), CLI-09-6, 69 NRC 128, 135 (2009). While the Staff does not believe that NSP meets the irreparable impact prong of the standard, the Staff believes that the Commission should still grant interlocutory review under the unusual and pervasive effect prong of 10 C.F.R. § 2.341(f)(2).

<sup>5</sup> 10 C.F.R. § 2.341(f)(2)(i).

issue on appeal “[a]ffects the basic structure of the proceeding in a pervasive or unusual manner.”<sup>6</sup>

II. Argument

A. The NRC Staff Supports NSP’s Argument that the Board’s Error in Admitting a Contention Outside the Scope of License Renewal Proceedings Will Have a Pervasive and Unusual Effect on this Proceeding

In its order, the Board rephrased and admitted a contention from the Prairie Island Indian Community (“PIIC”).<sup>7</sup> As admitted, the contention reads,

PINGP’s safety culture is not adequate to provide the reasonable assurance required by 10 C.F.R. § 54.29(a)(1) that PINGP can manage the effects of aging during the requested period of extended operation.<sup>8</sup>

NSP responds, “The Board’s Order disregards the Commission’s pronouncements and directives and instead dramatically expands the scope of review in this license renewal proceeding to encompass a duplicative review of compliance and operational issues subject to continuous oversight by the NRC.”<sup>9</sup>

NSP summarizes the Commission’s previous explanations of the rationale underlying the limited scope of license renewal proceedings.<sup>10</sup> When it promulgated its regulations governing license renewal, the Commission determined that “with the exception of age related degradation unique to license renewal[,] its existing regulatory processes are adequate to ensure that the licensing bases of currently operating plants provide and maintain an adequate

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<sup>6</sup> 10 C.F.R. § 2.341(f)(2)(ii).

<sup>7</sup> Order (Narrowing and Admitting PIIC’s Safety Culture Contention, at 14 (January 28, 2010) (unpublished) (ADAMS Accession No. ML100280537) (“Order”).

<sup>8</sup> *Id.*

<sup>9</sup> Petition at 10.

<sup>10</sup> *Id.* at 11-15.

level of safety.”<sup>11</sup> As a result, the proper focus of license renewal is “on the potential impacts of an additional 20 years of nuclear power plant operation, not on everyday operational issues.”<sup>12</sup>

The Commission explained that this limited scope avoids a review of operating issues that would “duplicate the Commission’s ongoing reviews of operating reactors.”<sup>13</sup>

NSP notes that the Commission’s regulations reflect this carefully structured scope of license renewal. Specifically, 10 C.F.R. § 54.30 states,

(a) If the reviews required by § 54.21 (a) or (c) show that there is not reasonable assurance during the current license term that licensed activities will be conducted in accordance with the [current licensing basis (“CLB”)], then the licensee shall take measures under its current license, as appropriate, to ensure that the intended function of those systems, structures or components will be maintained in accordance with the CLB throughout the term of its current license.

(b) The licensee's compliance with the obligation under Paragraph (a) of this section to take measures under its current license is not within the scope of the license renewal review.

Thus, the Commission’s regulations indicate that operating and compliance issues are outside the scope of license renewal proceedings. Licensees have an obligation to take appropriate actions to respond to current operating and compliance issues as they arise under their current licensing basis. As NSP states, if an intervenor has concerns with a plant’s operating issues, “its remedy would not be a narrowly focused license renewal hearing, but a citizen’s petition under 10 C.F.R. § 2.206.”<sup>14</sup>

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<sup>11</sup> *Id.* at 12 (citing Nuclear Plant License Renewal, 56 Fed. Reg. 64,943, 64,946 (Dec. 13, 1991)).

<sup>12</sup> *Id.* at 10 (quoting *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-04-36, 60 NRC 631, 637-38 (2004)) (citations omitted).

<sup>13</sup> *Id.* at 11 (quoting *Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-01-17, 54 NRC 3, 7 (2001) (internal quotations omitted)).

<sup>14</sup> *Id.* (quoting *Millstone*, CLI-04-36, 60 NRC at 638).

NSP indicates that “the safety culture contention admitted by the Board seeks a broad inquiry into [NSP’s] compliance history and safety culture that would duplicate in many respects the Commission’s ongoing oversight and regulatory process.”<sup>15</sup> Thus, NSP states, “this matter *is not within the scope of the license renewal review*” and cites 10 C.F.R. § 54.30(b).<sup>16</sup> Moreover, NSP argues that this error will affect the proceeding “in a pervasive and unusual manner” because “it would vastly expand the scope of license renewal reviews and proceedings beyond that which is intended by the Commission.”<sup>17</sup> NSP concludes by asking the Commission to grant interlocutory review of the Board’s ruling on PIIC’s new safety culture contention and to “reverse that ruling in its entirety.”<sup>18</sup>

The NRC Staff supports NSP’s argument that the safety culture contention is outside the scope of this proceeding and the Board’s error in admitting the contention will have a pervasive and unusual effect on the proceeding. NSP has demonstrated that the Board’s ruling effectively permits PIIC to raise a contention challenging current compliance issues at PINGP in contravention of the Commission’s regulations. As NSP notes, PIIC has remedies to address its concerns with the safety culture at PINGP. Namely, PIIC could file a petition under 10 C.F.R. § 2.206 to raise concerns with the current performance of PINGP. Because the Board’s error will dramatically expand the scope of this proceeding by allowing PIIC to explore compliance issues that are ordinarily excluded from a hearing intended to address license renewal, the NRC Staff agrees with NSP that the Commission should grant interlocutory review on that basis.

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<sup>15</sup> *Id.* at 15.

<sup>16</sup> *Id.* at 16.

<sup>17</sup> *Id.* at 23.

<sup>18</sup> *Id.* at 25.

B. NSP Has Not Shown that the Board's Error in Admitting a Contention that Lacks an Adequate Basis Will Have an Unusual and Pervasive Effect on this Proceeding

NSP also argues that the new safety culture contention should not have been admitted because it lacked a sufficient basis to demonstrate a genuine dispute over the NRC's ability to make a determination of reasonable assurance that NSP will manage the effects of aging during the period of extended operations.<sup>19</sup> The NRC Staff agrees that the new safety culture contention lacks a sufficient basis and originally opposed the admission of the contention on that ground.<sup>20</sup> However, the lack of basis argument does not meet the regulatory standard for interlocutory review at 10 C.F.R. § 2.341(f)(2)(ii). NSP has not shown how the safety culture contention's lack of basis will affect the basic structure of the proceeding in a pervasive or unusual manner.

As Commission precedent makes clear, the erroneous admission of a contention does not, by itself, affect the basic structure of a proceeding.<sup>21</sup> Rather, the "basic structure standard is meant to address disputes over the very nature of the hearing in a particular proceeding."<sup>22</sup> It is not apparent how the lack of basis to demonstrate a genuine dispute, by itself, could affect the basic structure of the proceeding in a pervasive or unusual manner, and NSP has not argued that it will.

Instead, NSP focuses on the effect of the error, which is to broaden the scope of the proceeding. But, this argument is more appropriately directed toward the Board's error in

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<sup>19</sup> Petition at 18-22.

<sup>20</sup> NRC Staff's Answer in Opposition to Prairie Island Indian Community's Submission of a New Contention on the NRC Safety Evaluation Report, at 17-19 (Dec. 3, 2009) (ADAMS Accession No. ML093370771).

<sup>21</sup> *Indian Point*, CLI-09-6, 69 NRC 128, 137.

<sup>22</sup> *Exelon Generating Company, LLC* (Early Site Permit for the Clinton ESP Site), CLI-04-31, 60 NRC 461, 468 (2004).

admitting a contention outside of the limited scope of license renewal. A comparison of the two errors reveals why one has a pervasive effect on these proceedings and the other does not. The Board's error in admitting the safety culture contention without an adequate basis only results in an extra contention. But, the Board's error in finding that the safety culture contention was within this proceeding's scope transforms the very nature of this proceeding. It reshapes this proceeding from a limited review of NSP's aging management program into a wide ranging inquiry into NSP's past and present compliance with its licensing basis. Thus, although both of the Board's errors led to its decision to admit the safety culture contention, only its erroneous determination of this proceeding's scope affected the very nature of this proceeding. In contrast, the Board's admission of a safety culture contention without a factual basis simply led to an erroneous contention admissibility ruling. Consequently, that aspect of the Board's error will not have an unusual and pervasive impact on these proceedings and thus cannot serve as the basis for Commission interlocutory review.

CONCLUSION

For the reasons set forth above, the NRC Staff supports NSP's request that the Commission grant interlocutory review on the grounds that the Board's error in admitting a contention that is outside the scope of this proceeding will have a pervasive and unusual effect on the structure of this proceeding. However, the NRC Staff believes that NSP has failed to show that the Board's error in admitting a contention that lacked an adequate basis will have a pervasive and unusual effect on this proceeding.

Respectfully submitted,

**/Signed (electronically) by/**

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Dated at Rockville, Maryland  
this 22nd day of February 2010



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NUCLEAR MANAGEMENT COMPANY, LLC ) Docket Nos. 50-282-LR/ 50-306-LR  
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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "NRC STAFF'S ANSWER TO NORTHERN STATES POWER COMPANY'S PETITION FOR INTERLOCUTORY REVIEW OF AN ORDER ADMITTING A SAFETY CULTURE CONTENTION," dated February 22, 2010, have been served upon the following by the Electronic Information Exchange, this 22nd day of February, 2010:

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