

February 22, 2010

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of)	
)	
Northern States Power Co.)	Docket Nos. 50-282-LR
)	50-306-LR
(Prairie Island Nuclear Generating Plant,)	
Units 1 and 2))	ASLBP No. 08-871-01-LR
)	

**PRAIRIE ISLAND INDIAN COMMUNITY’S ANSWER TO THE NRC STAFF’S
AND NORTHERN STATES POWER COMPANY’S PETITIONS FOR
INTERLOCUTORY REVIEW OF THE ATOMIC AND SAFETY LICENSING
BOARD DECISION ADMITTING THE COMMUNITY’S CONTENTION ON
SAFETY CULTURE**

The Atomic Safety and Licensing Board (“Board”) issued an Order¹ on January 28, 2010, admitting a new contention filed by the Prairie Island Indian Community (“Community” or “PIIC”) on November 23, 2009.² As affirmed by the Board, the contention was timely filed. On February 12, 2010, the NRC Staff (“Staff”) and the Northern States Power Company (“NSPM” or “Applicant”) filed petitions for interlocutory review of the Board’s Order, pursuant to 10 C.F.R. § 2.341(f)(2)(ii).³ The Community files this Answer requesting that the Commission deny the Staff’s and

¹ Order, (Narrowing and Admitting PIIC’s Safety Culture Contention) (January 28, 2010) (unpublished) (Agency Document Access and Management System (“ADAMS”) Accession No. ML 100280537) (“Order”).

² Prairie Island Indian Community’s Submission of a New Contention on the NRC Safety Evaluation Report (November 23, 2009) (ADAMS Accession No. ML093270615).

³ See NRC Staff’s Petition for Interlocutory Review of Atomic Safety and Licensing Board Decision Admitting Late Filed and Out of Scope Safety Culture Contention (Feb. 12, 2010) (“NRC Staff Petition”) and Northern States Power Company’s Petition for Interlocutory Review of an Order Admitting a Safety Culture Contention (Feb. 12, 2010) (“NSPM Petition”).

Applicant's petitions because they do not meet the criteria for interlocutory review in 10 C.F.R. § 2.341(f)(2)(ii). The Community will first provide a brief synopsis of its safety culture contention, with reference to the Order for the Board's reasoning in narrowing and admitting the contention. The Community will then address the criteria for interlocutory review in 10 C.F.R. § 2.341(f)(2)(ii) and demonstrate that the arguments made by the Staff and the Applicant do not meet these criteria. Accordingly, the Staff's and Applicant's petitions for interlocutory review should be denied in their entirety.⁴

I. THE COMMUNITY'S SAFETY CULTURE CONTENTION

The Community submitted a new contention on the Staff Safety Evaluation Report ("New Contention") on November 23, 2009, in accordance with the Licensing Board Order of November 4, 2009.⁵ In the November 4 Order, the Board directed that a proposed contention "shall be deemed timely under 10 C.F.R. § 2.309(f)(2)(iii) if it is filed within 30 days of the date on which the document on which it is based first becomes available."⁶ The document which provided the basis for the New Contention is the NRC's Safety Evaluation Report ("SER"). The Community believed that submitting its New Contention within thirty days of the SER was in accord with the procedure set forth by the Licensing Board. The Board agreed.⁷ It was the evaluation in the SER of the

⁴ The Community is also aware that the Staff and the Applicant have filed Answers to each others' Petitions, enabling them to file "reply briefs" to each others' Answers pursuant to 10 C.F.R. § 2.341(a)(3).

⁵ Licensing Board Order (Conference Call Summary and Scheduling Order) (Nov. 4, 2009) (unpublished).

⁶ *Id.* at 4.

⁷ *See* Order dated January 28, 2010 at 4-8. Rejecting Applicant and NRC Staff's argument that the contention could and should have been filed sooner, the Board held that "[n]ot until issuance of the SER did PIIC acquire the full spectrum of information necessary to formulate its contention." *Id.* at 6. "We would not expect PIIC to 'piece

refueling cavity leakage at the Applicant's facility that provided the final link in a series of deficiencies in the Applicant's safety performance that revealed the existence of a potentially serious weakness in the Applicant's safety culture. A weakness in the safety culture at a licensee or license applicant's facility can be revealed by a pattern of events over a period of time.⁸ The analysis of the refueling cavity leakage in the SER, and the corresponding deficiencies requiring additional commitments of the Applicant, brought all of the other inspection and enforcement problems of the Applicant into focus as demonstration of a weak safety culture in the context of license renewal.⁹ The existence of a weak safety culture at Applicant's facility undermines the Applicant's License Renewal Application and supporting Safety Analysis Report in terms of the Applicant's ability to manage the effects of aging during the period of extended operation.

The Community used the discussion of the refueling cavity leakage in the SER as the focal point for challenging the adequacy of the Applicant's License Renewal Application. It was the evaluation in the SER of the refueling cavity leakage at the Applicant's facility that provided the final link in a series of deficiencies in the Applicant's safety performance that revealed the existence of a potentially serious weakness in the Applicant's safety culture. The very nature of the Community's new safety culture contention goes directly to the viability Applicant's License Renewal Application and supporting Safety Analysis Report.

together' those 'shreds of information' and formulate its contention prior to the issuance of the final SER." *Id.* at 7.

⁸ See Draft Safety Culture Policy, U.S. Nuclear Regulatory Commission (74 Fed. Reg. 57525, 57527, November 6, 2009).

⁹ See Order at 6-7.

The Community is not focusing on the operational safety aspects of the refueling cavity leakage issue. Rather, the Community believes that the Applicant's treatment of the refueling cavity issue – i.e., knowing about a leak that has potential safety problems for a number of years, not notifying the NRC of this condition, and failing to fix the leak – as a culminating symptom of a weak safety culture. Indeed, the Community's belief as set forth in the New Contention is buttressed by the NRC's white enforcement and cross-cutting decline in human performance findings.

The Community acknowledges that it identified events and activities that are subject to NRC's inspection and enforcement program. Contrary to the NRC Staff's and NSPM's argument, however, invalidating a contention on the mere fact that the NRC should also be overseeing the event forming the basis of the contention would eliminate any possible contention seeking to ensure that a facility is operated safely. Indeed, the reason the Community asserted the New Contention was to ensure that the identified deficiencies are properly identified and adequately addressed in NSPM's aging management program, separate and apart from the NRC's inspection and enforcement program. The point of the Community's safety culture contention is that the Applicant's actions (or inactions) in regard to the refueling cavity leakage issue and the inspection and enforcement findings of the NRC reveal a weak safety culture which, as a cross-cutting issue, may adversely impact NSPM's aging management program. The deficiencies identified in the New Contention put the management of the aging management program as set forth in the Applicant's License Renewal Application in jeopardy.

In admitting the safety culture contention, the Board held that “PIIC’s contention is properly understood as an attack on Applicant’s AMP as described in the application,” and raises a genuine and material dispute with the application that is cognizable in the license renewal proceeding.¹⁰ As the Board held, the Community “does not directly challenge . . . operational issues. Rather, it treats them as indications of a weak safety culture – a safety culture too weak to ensure the effectiveness of Applicant’s AMP.”¹¹

II. THE PETITIONS FOR INTERLOCUTORY REVIEW

Both the Staff and the Applicant make similar arguments as to why the criterion in 10 C.F.R. § 2.341 (f)(2)(ii) for interlocutory review is satisfied. Both the Staff and Applicant contend that the Board’s ruling would affect the basic structure of the proceeding in a pervasive or unusual manner. The Staff and Applicant argue that the “pervasive and unusual effect on the proceeding” would result because the Board’s admission of the Community’s safety culture contention would require a duplicative review of NRC’s ongoing oversight activities of plant operational activities.¹² This, according to the Staff, is a “fundamental mischaracterization of the scope and nature of license renewal.”¹³ The Staff also suggests that the Board decision will have a pervasive and unusual affect on the proceeding because it opens the door to the filing of new and amended contentions contrary to the Commission’s procedural regulations.¹⁴ The Applicant, in addition to arguing that the Board’s decision meets the criterion in 10 C.F.R. § 2.341 (f)(2)(ii) for interlocutory review, argues that the Board’s decision meets

¹⁰ Order at 10. The Board found that the safety culture contention satisfied all of the six contention admissibility criteria in 10 C.F.R. § 2.309(f)(1).

¹¹ *Id.* at 11.

¹² *See* NRC Staff Petition at 8, 12-13; NSPM Petition at 6, 10-17.

¹³ NRC Staff Petition at 6.

¹⁴ *Id.* at 15.

the criterion in 10 C.F.R. § 2.341(f)(2)(i), which requires that Applicant demonstrate that the decision “[t]hreatens the party adversely affected by it with immediate and serious irreparable harm, which, as a practical matter, could not be alleviated through a petition for review of the presiding officer’s final decision.” Applicant claims that this would result because the Board’s admission of the contention would cause the Applicant to litigate a contention which is outside the scope of issues to be considered in a license renewal proceeding and would impose “significant and unwarranted burdens and disclosure obligations” on the Applicant.¹⁵ In addition to these arguments, the Applicant suggests, as an alternative to granting interlocutory review, that the Commission accept review of the safety culture contention as a matter of discretion under its inherent supervisory power over adjudicatory proceedings.¹⁶ The Community will address each of these claims in turn. While much of the Applicant’s Petition is devoted to re-arguing the substance of the safety culture contention, the Community relies on its synopsis above in Section I, and the Board’s Order narrowing and admitting the contention.

III. ARGUMENT

A. The Staff and Applicant Have Failed to Demonstrate That the Board’s Decision Affects the Basic Structure of the Proceeding in a Pervasive or Unusual Manner

10 C.F.R. § 2.341(f)(2)(ii) requires a party seeking interlocutory review to demonstrate that the issue, in this case the Board decision admitting the Safety Culture contention, affects the basic structure of the proceeding in a pervasive or unusual manner. The Commission does not favor interlocutory appeals. As the Commission stated in a recent case, “absent highly unusual circumstances, we consistently have declined to

¹⁵ NSPM Petition at 1-2.

¹⁶ *Id.* at 24.

conduct interlocutory review of contention admissibility decisions.” Entergy Nuclear Operations, Inc. (Indian Point, Units 2 and 3), CLI-09-6, 69 N.R.C. 128, 133 (2009). Interlocutory appeals have been disfavored “largely due to our general unwillingness to engage in “piecemeal interference in ongoing Licensing Board proceedings.” Exelon Generation Company, LLC (Early Site Permit for the Clinton ESP Site), CLI-04-31, 60 N.R.C. 461, 465 (citing Duke Cogema Stone & Webster (Savannah River Mixed Oxide Fuel Fabrication Facility), CLI-02-7, 55 N.R.C. 205, 213 (2002)).

In Amergen Energy Company, LLC (Oyster Creek Nuclear Generating Station), CLI-06-24, 64 N.R.C. 111 (2006), the Commission discussed its longstanding general policy disfavoring interlocutory review, stating that “[w]e grant review under the ‘pervasive and unusual’ effect standard ‘only in extraordinary circumstances.’” *Id.* at 119 (quoting Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-01-1, 53 N.R.C. 1, 5 (2001)). Furthermore, as the Commission noted in denying a motion for interlocutory review based on the denial of a contention, the admission or denial of a contention is a “routine interlocutory ruling not subject to immediate appellate review.” Private Fuel Storage L.L.C. (Independent Spent Fuel Storage Installation), CLI-00-02, 51 N.R.C. 77, 80 (2000).

The Staff and Applicant argue that the “pervasive and unusual effect on the proceeding” would result because the Board’s admission of the Community’s safety culture contention would require a duplicative review of NRC’s ongoing oversight activities of plant operational activities.¹⁷ This, according to the Staff, is a “fundamental mischaracterization of the scope and nature of license renewal.” The Staff and Applicant

¹⁷ See NRC Staff Petition at 8; NSPM Petition at 10.

both note that the license renewal process does not provide for a review of the adequacy of a plant's current licensing basis. Admission of the safety culture contention, according to the Staff, would open up the full gamut of operational provisions in a plant's current licensing basis to attack in the proceeding, thereby having a pervasive or unusual effect on the structure of the proceeding. According to the Staff, the assurance that an applicant's safety culture suffices to ensure compliance with the Aging Management Plan (AMP) would be redundant with the Staff oversight of the plant during the period of extended operation.

The Commission has not found legal error or the significance or novelty of the issues related to the admissibility of a contention to be grounds for granting interlocutory review on the pervasive or unusual effect on the structure of the proceeding criteria. *See Exelon Generation Company LLC* (Early Site Permit for the Clinton ESP Site), CLI-04-31, 60 N.R.C. 461, 467. In *Sacramento Municipal Utility District*, the Commission quoted a previous case to the effect that, "[t]he basic structure of an ongoing adjudication is not changed simply because the admission of a contention results from a licensing board ruling that is important or novel, or that may conflict with case law, policy, or Commission regulations." *Sacramento Municipal Utility District* (Rancho Seco Nuclear Generating Station), CLI-94-2, 39 N.R.C. 91, 94 (1994) (quoting *Long Island Lighting Co.* (Shoreham Nuclear Power Station), ALAB-861, 25 N.R.C. 129, 135 (1987)).

Cases that have granted interlocutory review of a Licensing Board decision on the basis that the Board decision would have a pervasive and unusual effect on the basic structure of a proceeding have involved actual structural impacts, none of which are present in this case, such as a decision to create a second licensing board, *Private Fuel*

Storage (Independent Spent Fuel Storage Installation), CLI-98-7, 47 N.R.C. 307 (1998), or questioning the structure of the Commission's two step licensing process, Duke Cogema Stone & Webster (Savannah River Mixed Oxide Fuel Fabrication Facility), CLI-02-7, 55 N.R.C. 205 (2002); Shaw Areva Mox Services, LLC (Mixed Oxide Fuel Fabrication Facility), CLI-09-2, 69 N.R.C. 55 (2009).

The Community does not believe the admission of its contention on safety culture will have a pervasive or unusual effect on the structure of the proceeding or open all operational activities in the PINGP current licensing basis to attack in the proceeding. The Community also does not believe that it duplicates the Staff oversight responsibilities in the period of extended compliance. The Community is concerned that there is evidence of a weak safety culture at PINGP, as noted in our original filings on this contention. Under 10 C.F.R. § 54.29 of the Commission's regulations, the Applicant must demonstrate that it will manage the effects of aging during the period of extended operation. There is no question that a weak safety culture could affect the Applicant's ability to adequately manage the effects of aging. The Staff suggests that the NRC's oversight responsibility during the period of extended operation will be able to remedy any deficiencies created by a weak safety culture. The Community does not understand the reluctance of the Staff to ascertain if the PINGP safety culture – a concept that seems of fundamental importance to the Commission – needs improvement. If a weak safety culture puts adequate implementation in doubt, why wait for a failure to correct it? To do otherwise would callously ignore a potential problem and leave it to NRC enforcement to correct it once something goes wrong in the future. If safety culture is not

important at this stage of a license renewal proceeding, then the entire concept of safety culture would be bankrupt.

The Community's safety culture contention is only a single contention. It is not an attack on every operational activity that is part of the PINGP current licensing basis. It is not a wide-ranging inquiry into the Applicant's conformance with its licensing basis, as claimed by the Staff. Even if it is ultimately deemed, upon final appellate review, to have been incorrectly admitted (which is unlikely), the Community fails to understand how it would undermine the structure of the proceeding. The Community does not believe that the Commission case law on the criteria in 10 C.F.R. § 2.341(f)(2)(ii) would justify this conclusion.

The Staff's second reason for asserting that the admission of the safety culture contention would have a pervasive or unusual effect on the structure of the proceeding is that it would open the door to the filing of new and amended contentions contrary to the Commission's procedural regulations. This Staff reasoning is based on the fact that they disagree with the Board's decision to find the Community's contention timely filed. According to the Staff, the Community should have been held to the standard for late filed contentions because the events on which the Community based its evidence of a weak safety culture were known at several points in the past. Once again, the Staff seems to misread the nature of the Community's contention. It was not until the Staff SER, and its elucidation of the refueling cavity leakage issue, that the entire pattern of events indicating a weak safety culture came into focus. Therefore, the Community's contention was filed in accordance with the Board's scheduling order. This was affirmed by the Board. In any event, the Community believes it is an exaggeration to claim that this

would have a pervasive and unusual effect on the structure of the proceeding. The timing issue is inextricably linked with the substance of the contention. There is no wave of “untimely” contentions waiting in the wings that would destroy the integrity of the Commission’s procedural regulations.

B. The Applicant Has Failed to Demonstrate that the Board’s Decision Will Threaten It With Immediate and Serious Irreparable Impact

The Applicant, in addition to arguing that the Board decision meets the criterion in 10 C.F.R. § 2.341 (f)(2)(ii) for interlocutory review, argues that the criterion in 10 C.F.R. § 2.341(f)(2)(i) is met because the Board’s decision “[t]hreatens the party adversely affected by it with immediate and serious irreparable harm, which, as a practical matter, could not be alleviated through a petition for review of the presiding officer’s final decision.” According to Applicant this would result because the Board’s admission of the contention would cause the Applicant to litigate a contention which is outside the scope of issues to be considered in a license renewal proceeding, and would impose “significant and unwarranted burdens and disclosure obligations” on the Applicant.¹⁸

Several Commission cases have considered and rejected the argument that the increased litigation burden caused by the allowance of a contention had a pervasive effect on the structure of the litigation. In a recent decision also involving the staff and applicant’s petitions for interlocutory review based on the argument that the admitted contention was outside the scope of license renewal, for example, the Commission denied a motion for interlocutory review based on the irreparable harm criterion, stating that “the uniform refusal to grant interlocutory review, even where a litigant claims ‘truly

¹⁸ See NSPM’s Petition at 1-2.

exceptional delay or expense’ is consistent with the overwhelming weight of authority supporting the proposition that ‘[t]he added delay and expense occasioned by the admission of [a] contention — even if erroneous — . . . does not alone . . . warrant interlocutory review.’” Entergy Nuclear Operations Inc. (Indian Point Units 2 and 3), 69 N.R.C. at 134. Furthermore, the Commission found that the research, discovery and disclosure obligations that may result from an admitted contention are “just the kind of burden that licensees and applicants voluntarily assume when filing applications with the Commission,” and that an applicant could also seek relief from the Board to modify unreasonable discovery demands. *Id.* at 136 (citing Pa’ina Hawaii, LLC, CLI-06-18, 64 N.R.C. 1, 5 (2006); Connecticut Yankee Atomic Power Co. (Haddam Neck Plant), CLI-01-25, 54 N.R.C. 368, 374 (2001); Consolidated Edison Co. of New York (Indian Point, Units 1 and 2), CLI 01-8, 53 N.R.C. 225, 229 (2001)). In fact, the Commission has “found no instance in this agency’s jurisprudence where either we or our boards have ruled that expenses of any kind constituted ‘irreparable injury.’” Indian Point at 135.

C. The Commission Should Reject Applicant’s Proposal for the Commission to Accept Review of the Substance of the Safety Culture Contention as a Matter of Discretion

As an alternative to granting interlocutory review, the Applicant proposes that the Commission accept review of the substance of the safety culture contention as a matter of discretion under its inherent supervisory power over adjudicatory proceedings. In response to this proposal, the Community would note the long line of cases that have found that “the Commission assigns considerable weight to the board’s view of whether the ruling merits immediate review. Licensing Boards are granted a great deal of discretion in managing the proceedings of cases before them. Generally, the Commission

has accepted ‘novel issues that would benefit from early review’ where the board, rather than a party, has found such review necessary and helpful.” Connecticut Yankee Atomic Power Company (Haddam Neck Plant), CLI-01-25, 54 N.R.C. 368, 374 (2001) (citing Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-00-13, 52 N.R.C. 23 (2000); Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI 01-12, 53 N.R.C. 459 (2001)); *see also* Exelon Generation, 60 N.R.C. 461, 466 and fn. 15. The Board did not refer the issue to the Commission and the Community does not believe that the Commission need accept review at this point in the proceeding.

The Applicant’s proposal for the Commission to consider the admissibility of the safety culture contention *sua sponte* is nearly identical to that made by the applicant and rejected by the Commission in another license renewal case, Entergy Nuclear Operations. In that case, the Commission found the applicant’s request to be “improper”:

[T]he Commission itself may exercise its discretion to review a licensing board’s interlocutory order if the *Commission* wants to address a novel or important issue However, the Commission’s decision to do so in any particular proceeding stems from its inherent supervisory authority over adjudications and *in no way implies that the parties have a right to seek interlocutory review on the same ground.*

Indian Point, CLI-09-06, 69 N.R.C. at 138 (citing Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant), CLI-00-11, 51 N.R.C. 297, 299 (2000) (first emphasis from Shearon Harris, second emphasis from Indian Point). “[T]he Board’s routine ruling on contention admissibility provides no occasion for us to invoke our inherent supervisory authority.” Indian Point, CLI-09-06, 69 N.R.C. at 138 (citing Clinton, CLI-04-31, 60 N.R.C. at 466).

IV. CONCLUSION

For the foregoing reasons, the Staff's and NSPM's petitions for interlocutory review should be denied.

Respectfully Submitted,

/Signed electronically by Philip R. Mahowald/

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Dated: February 22, 2010

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NUCLEAR REGULATORY COMMISSION**

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CERTIFICATE OF SERVICE

I hereby certify that copies of "Prairie Island Indian Community's Answer to NRC Staff's and Northern State Power Company's Petitions for Interlocutory Review of an Order Admitting a Safety Culture Contention," dated February 22, 2010, was provided to the Electronic Information Exchange for service on the individuals listed below, this 22nd day of February, 2010.

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