

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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

NRC STAFF'S MOTION FOR LEAVE TO SUPPLEMENT ITS PETITION FOR
INTERLOCUTORY REVIEW OF ATOMIC SAFETY AND LICENSING BOARD DECISION
ADMITTING LATE-FILED AND OUT OF SCOPE SAFETY CULTURE CONTENTION

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March 8, 2010

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INTRODUCTION

Pursuant to 10 C.F.R. § 2.323, the Staff of the U.S. Nuclear Regulatory Commission ("Staff") requests that the Commission grant leave to the Staff to supplement its petition for interlocutory review ("Petition")¹ of the Atomic Safety and Licensing Board's ("Board") January 28, 2010, Order.² That Order admitted a new contention ("safety culture contention") filed by the Prairie Island Indian Community ("PIIC") on November 23, 2009.³ As set forth below, since the Staff filed its Petition, the Board has issued an order dismissing all of PIIC's pending environmental contentions.⁴ Consequently, the newly admitted safety culture contention is the

¹ 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) (Agency Document Access & Management System ("ADAMS") Accession No. ML100431768) ("Petition").

² Order (Narrowing and Admitting PIIC's Safety Culture Contention) (Jan. 28, 2010) (unpublished) (ADAMS Accession No. ML100280537) ("Order").

³ Prairie Island Indian Community's Submission of a New Contention on the NRC Safety Evaluation Report (Nov. 23, 2009) (ADAMS Accession No. ML093270615).

⁴ Order (Granting Motion for Leave to File New Contentions and Denying Their Admission) (Feb. 25, 2010) (unpublished) (ADAMS Accession No. ML100560382).

only remaining contention in this proceeding, and the Commission's decision on this appeal could be dispositive of the proceeding. While the arguments advanced in the Staff's Petition for granting interlocutory review under 10 C.F.R. § 2.341(f)(2) remain valid, this appeal should be considered under 10 C.F.R. § 2.311, the provision that normally governs potentially dispositive appeals of contention admissibility rulings. Thus, the Staff requests that the Commission grant the Staff leave to supplement its brief to also address the review standards of 10 C.F.R. § 2.311. The Staff has enclosed its proposed Supplement as "Enclosure A."

PROCEDURAL HISTORY

The Staff's Petition summarized the relevant procedural history preceding that filing.⁵ Since that time, Northern States Power Company ("NSP" or "Applicant") has filed a similar petition for interlocutory review,⁶ and the parties have filed answers to both petitions and replies to the answers.⁷ Significantly for this motion, on February 25, 2010, the Board entered an order denying admission of three new environmental contentions previously submitted by PIIC.⁸ As a result, the new safety culture contention is the sole remaining contention in this proceeding.

⁵ Petition at 2-3.

⁶ Northern States Power Company's Petition for Interlocutory Review of an Order Admitting a Safety Culture Contention (Feb. 12, 2010) (ADAMS Accession No. ML100431198).

⁷ NRC Staff's Answer to Northern States Power Company's Petition for Interlocutory Review of an Order Admitting a Safety Culture Contention (Feb. 22, 2010) (ADAMS Accession No. ML100540288); Northern States Power Company's Answer Supporting NRC Staff Petition for Interlocutory Review (Feb. 22, 2010) (ADAMS Accession No. ML100540291); Prairie Island Indian Community's Answer to the NRC Staff's and Northern States Power Company's Petitions for Interlocutory Review of the Atomic Safety and Licensing Board Decision Admitting the Community's Contention on Safety Culture (Feb. 22, 2010) (ADAMS Accession No. ML100540292); Northern States Power Company's Reply to Answers to Its Petition for Interlocutory Review (Mar. 1, 2010) (ADAMS Accession No. ML100601334); NRC Staff's Reply to Prairie Island Indian Community's Answer to the Staff's Petition for Interlocutory Review (Mar. 1, 2010) (ADAMS Accession No. ML100601332).

⁸ Order (Granting Motion for Leave to File New Contentions and Denying Their Admission) (February 25, 2010) (unpublished) (ADAMS Accession No. ML100560382).

DISCUSSION

I. Legal Standards for Interlocutory Review

As noted above, the Staff initially petitioned for interlocutory review under 10 C.F.R. § 2.341(f)(2)(ii). That section provides that the Commission may grant interlocutory review at the request of a party if the issue for which the party seeks review “affects the basic structure of the proceeding in a pervasive or unusual manner” or threatens a party with irreparable injury. This is an extraordinary remedy limited to board orders that fundamentally alter the scope and conduct of a proceeding or that cannot be ameliorated on review.⁹

The Commission has developed a separate process for interlocutory review of board orders dispositively ruling on requests for hearing or petitions to intervene at 10 C.F.R. § 2.311. This standard only requires the appellant to identify “an error of law or abuse of discretion” on the part of a board.¹⁰ As the Commission has observed, 10 C.F.R. § 2.341(f)(ii) presents “far more rigorous standards” than 10 C.F.R. § 2.311.¹¹

II. The Commission Should Consider this Petition for Interlocutory Review Under 10 C.F.R. § 2.311

Pursuant to 10 C.F.R. § 2.311, the applicant or Staff may appeal a decision of the Board when that party contends that a “request for hearing or petition to intervene should have been wholly denied.” In discussing the predecessor of § 2.311, the Commission noted that an order appealable under this section “must dispose of the entire petition so that a successful appeal by

⁹ *Exelon Generation Company* (Early Site Permit for the Clinton ESP Site), CLI-04-31, 60 NRC 461, 465, 467 (2004).

¹⁰ *Dominion Nuclear Connecticut, Inc.* (Millstone Power Station, Unit 3), CLI-08-17, 68 NRC 231, 234 (2008).

¹¹ *Yankee Atomic Electric Company* (Yankee Nuclear Power Station), CLI-05-15, 61 NRC 365, 371 n.7 (2005).

a nonpetitioner will terminate the proceeding as to the appellee petitioner.”¹² In contrast, “challenges to the admissibility of less than all admitted contentions must abide the end of the case.”¹³ The Commission explained that its regulatory scheme “reflects the Commission’s general policy to minimize interlocutory review.”¹⁴ Elsewhere, the Commission has elaborated that it generally “disfavor[s] interlocutory, piecemeal appeals.”¹⁵

The Commission has held, “As a general matter, contentions filed after the initial petition are not subject to appeal pursuant to section 2.311.” But, the Commission has also recognized exceptions to this rule for new contentions in certain circumstances.¹⁶ Thus, the Commission permitted a party to appeal a board’s ruling on new contentions under Section 2.311 when those contentions were filed before the board ruled on the initial petition to intervene.¹⁷ The NRC Staff contends that the Commission should conduct a similar review in this case.¹⁸

¹² *Duke Energy Corp.* (Catawba Nuclear Station, Units 1 and 2), CLI-04-11, 59 NRC 203, 207 (2004). The Commission has noted that “Section 2.311 continues unchanged the provision in former § 2.714a that limits interlocutory appeal of rulings on requests for hearings and petitions to intervene to those that grant or deny a petition to intervene.” Changes to Adjudicatory Process, 69 Fed. Reg. 2,182, 2,223 (Jan. 14, 2004).

¹³ *Pa’ina Hawaii, LLC* (Material License Application), CLI-06-13, 63 NRC 508, 509 n.3 (2006) (internal quotations omitted).

¹⁴ Policy on Conduct Of Adjudicatory Proceedings; Policy Statement, CLI-98-12, 48 N.R.C. 18, 23 (1998).

¹⁵ *South Texas Project Nuclear Operating Company* (South Texas Project, Units 3 and 4), CLI-09-18, 70 NRC ___ (Sept. 23, 2009) (slip op. at 4).

¹⁶ See *id.* at 4-5.

¹⁷ *Id.*

¹⁸ The NRC Staff notes that, in the opposite situation, where a board’s ruling results in the dismissal of all of an intervenor’s remaining contentions after the board has initially ruled on contention admissibility, the intervenor may appeal to the Commission under 10 C.F.R. § 2.341(b), which presents a standard of review that is similar to the 10 C.F.R. § 2.311 standard of review. *Duke Energy Corporation* (McGuire Nuclear Station, Units 1 & 2, Catawba Nuclear Station, Units 1 and 2), CLI-03-17, 58 NRC 419, 422 (2003) (interpreting 10 C.F.R. § 2.786, the predecessor to § 2.341(b)). Granting other parties a similar avenue of appeal would maintain procedural symmetry and consistency in NRC proceedings.

In normal circumstances, granting review of a board's ruling on a new contention would result in precisely the type of piecemeal litigation the Commission seeks to avoid. Typically, intervenors are only in a position to file new contentions when one contention is already pending before the board. Should the Commission review those contentions, the result would not be dispositive because the Commission's ruling on the new contention would not impact the proceedings on the admitted contention. But, this case presents unique circumstances. Here, the Board has already dismissed all other admitted and proffered contentions. Consequently, the new safety culture contention is the only contention at issue. Should the Commission rule in the NRC Staff's favor, the ruling would effectively dispose of the case.

Therefore, the rationale that underlies 10 C.F.R. § 2.311 applies with equal force to the present situation. Normally, the Commission will not consider interlocutory reviews absent extraordinary circumstances. But, pursuant to 10 C.F.R. § 2.311, the Commission will depart from its normal practice and consider interlocutory reviews of a board's initial contention admissibility rulings when the Commission's review could be dispositive. This situation presents that very scenario. The Board has made a contention admissibility ruling, and the Commission's review of that ruling could be dispositive. As a result, the NRC Staff believes that Commission review under 10 C.F.R. § 2.311 better comports with the Commission's overall regulatory structure than Commission review under 10 C.F.R. § 2.341(f)(2).

III. The Commission Should Permit the Staff to Supplement its Petition to Address the Standard of Interlocutory Review for Appeals Under 10 C.F.R. § 2.311

If the Commission decides to consider this appeal under 10 C.F.R. § 2.311, the Staff requests an opportunity to supplement its Petition for Interlocutory Review. While the arguments in the Staff's Petition still provide ample justification for overturning the Board's admission of the safety culture contention, the standard of review under 10 C.F.R. § 2.311 is

more lenient for a petitioner than the standard of review under 10 C.F.R. § 2.341(f)(2).¹⁹ As a result, the Staff believes that additional errors by the Board that did not justify interlocutory review under 10 C.F.R. § 2.341(f)(2) may nevertheless support interlocutory review under 10 C.F.R. § 2.311. Specifically, the NRC Staff would supplement its Petition by demonstrating that the Board committed legal error in admitting a contention that lacked an adequate basis and reformulating an inadmissible contention into an admissible one.²⁰ Moreover, in light of the lower standard of review under 10 C.F.R. § 2.311, the Board errors previously identified by the Staff in its Petition now provide a more compelling justification for interlocutory review. Naturally, if the Commission grants the Staff's request to supplement its Petition, the Staff believes the other parties to this proceeding should have an opportunity to respond to the additional arguments.

IV. The Staff's Motion to Supplement Its Petition for Interlocutory Review Is Timely

Pursuant to 10 C.F.R. § 2.323, a party must make a motion "no later than ten (10) days after the occurrence or circumstance from which the motion arises." The Staff's supplementary arguments arose from the Board's order denying admission of the new environmental contentions that were pending at the time. The Staff could not have included these arguments in its Petition because they would not have demonstrated that the Board's errors had a pervasive and unusual effect on this proceeding and therefore would not have warranted interlocutory review under 10 C.F.R. § 2.341(f)(2). Now that the safety culture contention is the only remaining contention in this proceeding, these arguments are appropriately addressed under 10 C.F.R. § 2.311. Therefore, the Staff's motion to supplement is timely because the

¹⁹ See *supra* Part I.

²⁰ *Crow Butte Resources, Inc.* (North Trend Expansion Project), CLI-09-12, 69 NRC 535 (2009).

Staff has filed it within ten days of the Board's order, the event from which these arguments arise.

CONSULTATION

In accordance with 10 C.F.R. § 2.323(b), counsel for the Staff discussed this motion with counsel for the other parties in this proceeding. Counsel for NSP supports this motion. Counsel for PIIC reserved taking a position on the motion pending review of the motion's contents.

CONCLUSION

For the reasons set forth above, the Staff respectfully requests that the Commission grant the Staff's request to supplement its Petition with the Supplement contained in Enclosure A.

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INTRODUCTION

The Staff of the NRC ("Staff") hereby supplements its Petition for Interlocutory Review¹ to address the legal errors in the January 8, 2010 Order ("Order") of the Atomic Safety and Licensing Board ("Board"). The Order improperly modified and admitted a new contention filed by the Prairie Island Indian Community ("PIIC") in the Prairie Island Nuclear Generating Plant ("PINGP") license renewal proceeding.² Furthermore, as the Staff argued in its original Petition for Interlocutory Review, the contention raises issues outside the scope of this proceeding and was not timely filed. In addition, the Board erred in reformulating an inadmissible contention into an admissible one, and the contention lacks a basis in fact and thus does not meet the

¹ NRC Staff's Petition for Interlocutory Review of Atomic Safety and Licensing Board Decision Admitting Late-Filed and Out of Scope Safety Culture Contention (February 12, 2010) (Agency Document Access & Management System ("ADAMS") Accession No. ML100431768) ("Petition").

² Order (Narrowing and Admitting PIIC's Safety Culture Contention) at 8 (Jan. 28, 2010) (unpublished) (ADAMS Accession No. ML100280537) ("Order").

requirements of 10 C.F.R. § 2.309(f)(1)(vi). For these reasons, admission of the contention constituted error and, pursuant to 10 C.F.R. § 2.311, the Commission should reverse.

DISCUSSION

I. The Standard for Review

In cases where, as here, a decision will dispose of all of the contentions at issue and thus determine whether or not there will be a hearing, the Commission applies a straightforward “error of law or abuse of discretion” standard. As the Commission wrote in the *Oyster Creek* license renewal matter, “[w]e regularly affirm Board decisions on the admissibility of contentions where the appellant points to no error of law or abuse of discretion.”³

II. The Contention Raises Issues Beyond the Scope of this Proceeding and Was Untimely Filed and Is, Therefore, Inadmissible.

In its initial Petition, the Staff argued that the Commission should overturn the Board’s decision to admit the safety culture contention under 10 C.F.R. § 2.341(f)(2)(ii). To make that showing, the Staff demonstrated that the Board’s decision was based on legal errors that would have a pervasive and unusual effect on the proceeding.⁴ As discussed above, the Commission applies an “error of law” standard to appeals under 10 C.F.R. § 2.311. Thus, under § 2.311, the legal errors identified by the staff in its initial Petition provide sufficient grounds for the Commission to overturn the Board’s Order admitting the safety culture contention regardless of whether the errors had a pervasive and unusual impact on the proceeding.⁵

³ *Amergen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-06-24, 64 NRC 111, 121 (2006), (internal quotations omitted). See *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-04-36, 60 NRC 631, 637 (2004) (citing *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-00-21, 52 NRC 261, 265 (2000)).

⁴ Petition at 1.

⁵ To be clear, the Staff maintains that the arguments that it submitted in its Petition, that the Order will have a pervasive and unusual effect on the basic structure of this proceeding, still provide sufficient

Specifically, the Staff identified two legal errors underlying the admission of the safety culture contention: (1) the contention expands the scope of license renewal proceedings by requiring the applicant to prove it will comply with the terms of its aging management programs (“AMPs”) during the period of extended operation;⁶ and (2) the contention is based on information that had been publicly available for months and the contention was, therefore, untimely filed and, therefore, inadmissible.⁷ For these two reasons alone, admission of the contention is contrary to long-standing, well-established precedent and constituted error. Thus, these bases provide adequate grounds under 10 C.F.R. § 2.311 for the Commission to reverse the Board’s order admitting the safety culture contention.

III. Modification of the Contention to Render It Admissible Constituted Reversible Error

The Board erred in reformulating PIIC’s safety contention in order to find it admissible.⁸ While a board may recast a contention “for purposes of clarity, succinctness, and a more efficient proceeding,” it may do so only *after* it has determined that the contention as originally submitted was admissible.⁹ When it inferred a basis for a contention, recast and admitted it, the board in *Palo Verde* explained that it viewed its role as construing the intent of the contention

grounds to overturn the Order.

⁶ Petition at 6-11.

⁷ *Id.* at 18-19.

⁸ The Board actually expanded the scope of PIIC’s contention by recharacterizing it as a safety culture contention. *Compare* Prairie Island Indian Community’s Submission of a New Contention on the NRC Safety Evaluation Report, at 5-6 (Nov. 23, 2009) (ADAMS Accession No. ML093270615) (“PIIC Safety Contention”) *with* Order at 8.

⁹ *Andrew Siemaszko*, CLI-06-17, 63 NRC 708, 720-21 (2006) (*quoting Virginia Electric and Power Co.* (North Anna Power Station, Units 1 and 2), LBP-84-40A, 20 NRC 1195, 1199 (1984)) (emphasis added).

and its bases and then applying the substantive requirements for contention admissibility.¹⁰ But this puts the cart before the horse. As the Commission explained when it reversed the Board in *Palo Verde*,

while the Board may appropriately view Petitioners' support of its contention in a light that is favorable to the Petitioner, it cannot do so by ignoring the requirements set forth in 10 C.F.R. § 2.714(b)(92)(i), (ii) and (iii). These sections demand that all petitioners provide an explanation of the bases for the contention, a statement of fact or expert opinion upon which they intend to rely, and sufficient information to show a dispute with the applicant on a material issue of law or fact. If any one of these requirements is not met, a contention must be rejected.¹¹

A board "must not redraft an inadmissible contention to cure deficiencies and thereby render it admissible. Such an action would be tantamount to raising a new issue *sua sponte* without the required prior permission from the Commission."¹²

PIIC's safety contention, as originally submitted, challenged the Staff's ability to find reasonable assurance that the Applicant would manage the effects of aging.¹³ PIIC based the contention on two instances of the Applicant's non-compliance with safety regulations. In addition, PIIC cited the Applicant's failure to arrest the leakage of borated water associated with refueling activities.¹⁴ The Staff objected to admission of the contention on the grounds that it

¹⁰ *Arizona Public Service Co.* (Palo Verde Nuclear Generating Station, Unit Nos. 1, 2 and 3), LBP-91-19, 33 NRC 397, 401 (1991).

¹¹ *Arizona Public Service Co.* (Palo Verde Nuclear Generating Station, Unit Nos. 1, 2 and 3), CLI-91-12, 34 NRC 149, 155-56 (1991)

¹² *Siemaszko*, CLI-06-17, 63 NRC at 720-21.

¹³ PIIC Safety Contention at 4, 5, 13, and 14.

¹⁴ PIIC Safety Contention at 4-5.

challenged the adequacy of the Staff's license renewal review and raised current operating issues and, therefore, raised issues outside the scope of the proceeding.¹⁵

The Board recast the contention as a challenge to the adequacy of the Applicant's aging management program as described in the application rather than the Staff's review of the application.¹⁶ The Board acknowledged that the "wording of the contention may suggest otherwise," but concluded that it "would make little sense for this Board to construe PIIC's contention as a challenge to the [Staff's] SER ("Safety Evaluation Report")."¹⁷ Accordingly, the Board modified and admitted the contention as an allegation that the Applicant's "safety culture is not adequate to provide the reasonable assurance required by 10 C.F.R. § 54.29(a)(1) that [the Applicant] can manage the effects of aging during the requested period of extended operation."¹⁸ By re-writing the contention to address the Staff's objection, the Board turned an inadmissible contention into a purportedly admissible one and thereby committed error.

In the recent *Crow Butte* case, the Commission reversed a similar action by a board and wrote "a board should not add material not raised by a petitioner in order to render a contention admissible."¹⁹ The Commission rejected the contention, finding further that "the Board's reformulation of [the contentions] admitted certain bases that do not meet our contention

¹⁵ NRC Staff's Answer in Opposition to Prairie Island Indian Community's Submission of a New Contention on the NRC Safety Evaluation Report (December 3, 2009) at 13-17 (ADAMS Accession No. ML093580208).

¹⁶ Order at 8, 10.

¹⁷ *Id.* at 10.

¹⁸ *Id.* at 8.

¹⁹ *Crow Butte Resources, Inc.* (North Trend Expansion Project) CLI-09-12, 69 NRC 535, 553 (2009).

admissibility standards.”²⁰ Those bases included current operating issues, which the Commission ruled as out of scope.²¹ The Commission stated:

Petitioners’ claim that prior [*in situ* leach] uranium recovery – implicitly, Crow Butte’s existing operation – has led to past contamination is not within the scope of this license application for a new operation in a different area. License amendment proceedings are not a forum to address past violations or accidents that have no direct bearing on the proposed amendment.²²

Like the *Crow Butte* board, the Board in this proceeding erred when it replaced an inadmissible basis (challenge to the Staff’s review), with a potentially admissible one (challenge to the license renewal application). And again, like the admission of the recast contentions in *Crow Butte*, the error was compounded by the admission of a basis that is outside the scope of this proceeding – current operating issues. Adjudicatory proceedings, including license renewal and license amendment proceedings, are limited in scope.²³ As the Commission held in *Crow Butte*, this proceeding should not be used to address issues that are out of scope and should not be used as “a forum to address past violations or accidents that have no direct bearing on the proposed [action].”²⁴

²⁰ *Id.*

²¹ *Id.* at 557, 560.

²² *Id.* at 560.

²³ *Tennessee Valley Authority* (Watts Barr Nuclear Plant, Unit 1, Sequoyah Nuclear Plant, Units 1 and 2, Browns Ferry Nuclear Plant, Units 1, 2 and 3), CLI-04-24, 60 NRC 160, 204 (2004).

²⁴ The incidents that PIIC highlighted as the basis for its contention, and the safety culture that the recast contention stems from, have no direct bearing on license renewal. As the Staff explained in its Petition at 9-10, the appropriate inquiry is whether the aging management program the Applicant has proposed is sufficient to provide reasonable assurance that age-related degradation for passive systems, structures, and components will be addressed, not whether the Applicant can be trusted to implement the program. As the Commission has held, “the license renewal applicant’s use of an aging management program identified in the GALL Report constitutes reasonable assurance that it will manage the targeted aging effect during the renewal period.” *Amergen Energy Company, LLC* (Oyster Creek Nuclear Generating Station), CLI-08-23, 68 NRC 461, 468 (2008). The Board’s inclusion of the generic concept of safety culture expands the definition of passive systems, structures, and components to cover human

IV. The Contention Is Inadmissible for Lack of Basis.

As recast by the Board, the safety culture 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.²⁵

Even assuming this inquiry was within the scope of the proceeding, the contention would not meet the admissibility requirements of 10 C.F.R. § 2.309(f)(1)(vi). The contention lacks sufficient information to demonstrate a genuine dispute on a material issue of law or fact. The information supporting the safety culture contention is either not the type of information that can prevent a reasonable assurance finding, or the information is mere assertion.

The safety culture contention alleges that the PINGP safety culture is inadequate to offer reasonable assurance that Northern States Power Company ("NSP" or "Applicant") will comply with the terms of its AMPs during the period of extended operation.²⁶ To demonstrate the inadequate safety culture, the contention relies on several NRC inspection findings describing incidents of non-compliance on the part of the Applicant. But, given the quantity and magnitude of these inspection findings, they are not the type of violations that can cause the NRC to be unable to find reasonable assurance. Indeed, in promulgating the license renewal regulations, the Commission specifically envisioned that license renewal applicants might not be fully compliant with their licensing bases. "The Commission cannot conclude that its regulation of

performance issues.

²⁵ Order at 14.

²⁶ Should the NRC renew PINGP's operating license, the terms of the AMPs will be implemented in the licensing basis for PINGP. 10 C.F.R. § 54.33(b).

operating reactors is 'perfect' and cannot be improved, that all safety issues applicable to all plants have been resolved, or that all plants have been and at all times in the future will operate in perfect compliance with all NRC requirements."²⁷ Thus, only instances of non-compliance that are of sufficient magnitude and pervasiveness could support an NRC finding of no reasonable assurance that an Applicant will comply with the terms of its AMPs during the period of extended operation. Such instances have not been identified here.

Violations that lead to the Staff's inability to find reasonable assurance that the plant will operate in conformity with its licensing basis will result in the Staff placing the plant in the Unacceptable Performance Column (Column 5) of its Action Matrix.²⁸ If the Staff places a plant in the Unacceptable Performance Column, the NRC will issue a shutdown order for that plant.²⁹ Examples of unacceptable performance include: "[m]ultiple significant violations of the facility's license, technical specifications, regulations, or orders;" "multiple safety-significant examples where the facility was determined to be outside of its design basis;" or "[a] pattern of failure of licensee management controls to effectively address previous significant concerns."³⁰ Previously, the NRC has issued a shutdown order to the Three Mile Island license holder for lack of reasonable assurance after the incident at that plant.³¹ Additionally, the NRC Staff

²⁷ *Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-01-17, 54 NRC 3, 10 (2001) (*quoting* Nuclear Power Plant License Renewal, 56 Fed. Reg. 64,943, 64, 945 (Dec. 13, 1991)).

²⁸ NRC Inspection Manual, Manual Chapter 0305, Operating Reactor Assessment Program, at 26 (Dec. 24, 2009) (Agency Document Access & Management System ("ADAMS") Accession No. ML093421300).

²⁹ *Id.*

³⁰ *Id.*

³¹ *Metropolitan Edison Co.* (Three Mile Island Nuclear Station, Unit No. 1), CLI-79-8, 10 NRC 141, 142-43 (1979).

issued a shutdown order to D.C. Cook in light of electrical fire concerns arising from research following the Brown's Ferry incident.³²

The inspection findings underlying the safety culture contention, while important, do not rise to the level of significance that preclude a finding of reasonable assurance. Specifically, the NRC Staff's inspections at PINGP found a "failure of the turbine driven auxiliary feedwater pump to operate subsequent to a valid start signal," and a radioactive material shipment that "did not conform to the applicable Department of Transportation regulatory requirements."³³ Another finding involved the Applicant's "failure to design the component cooling water system such that it would be protected from the impact of a high energy line break, seismic, or tornado events."³⁴ The contention also rests on an inspection report that found "the corrective action program at Prairie Island was functional, but implementation was lacking in rigor resulting from inconsistent and undesirable results."³⁵ While the Staff does not minimize the importance of these findings, they do not rise to the level of the violations that have previously resulted in the

³² *Petition for Emergency and Remedial Action*, CLI-78-6, 7 NRC 400, 410, 417, 420-21 (1978).

³³ Letter from K. Steven West, Director, Division of Reactor Projects, NRC, to Mark A Schimmel, Site Vice President (Acting), PINGP, NSP, Mid-Cycle Performance Review and Inspection Plan – Prairie Island Nuclear Generating Plant, Unit 1 and 2, at 1 (September 1, 2009) (ADAMS Accession No. ML092440367).

³⁴ Letter from Mark A. Satorius, Regional Administrator, NRC, to Mark A. Schimmel, Acting Site Vice President, PINGP Units 1 and 2, NSP, Final Significance Determination for a White Finding and Notice of Violation; NRC Inspection Report 05000306/2009013; Prairie Island Nuclear Generating Plant, Units 2, at 1, (Sep. 3, 2009) (ADAMS Accession No. ML092450624).

³⁵ Letter from John B. Giessner, Chief, Branch 4, Division of Reactor Projects, NRC to Mark A Schimmel, Site Vice President, PINGP, NSP, Prairie Island Nuclear Generating Plant, Units 1 and 2, NRC Biennial Problem Identification and Resolution Inspection Report 05000282/2009009; 05000306/2009009, Enclosure, at 1 (Sep. 25, 2009) (ADAMS Accession No. ML092680208).

NRC's inability to find reasonable assurance.³⁶ As a result, these findings do not provide sufficient support for the safety culture contention.³⁷

In addition, the safety culture contention relies on the issues surrounding the reactor refueling cavity leakage identified in the SER. PIIC asserted that the Applicant's attempts to identify and fix the source of the leakage called into question the Applicant's ability to effectively implement its AMPs during the period of extended operation at PINGP.³⁸ But, PIIC never stated with any specificity how or why those attempts were inadequate.³⁹ While PIIC may have been dissatisfied with the results of the Applicant's efforts, PIIC never pointed to a deficiency in the process leading to those results.⁴⁰ Instead, PIIC and its expert relied on a series of selective quotations from the ACRS meeting to support its assertion that the Applicant's behavior reflected "deficient performance and dereliction of its obligations to promptly and effectively correct deficient conditions."⁴¹

³⁶ In addition, these issues do not relate to the degradation of a passive systems, structure or component as a result of aging. The feedwater pump is an active component; the shipment issue reflects a deficiency in human performance; and the design issue is not the result of aging.

³⁷ In the past, the Commission has considered contentions similar to the safety culture contention outside the context of Part 54 license renewal. *E.g. Georgia Institute of Technology* (Georgia Tech Research Reactor), CLI-95-12, 42 NRC 111, 118 (1995); *Georgia Power Company, et al.* (Vogtle Electric Generating Plant, Units 1 and 2), CLI-93-16, 38 NRC 25, 31 (1993). Such contentions have focused on management integrity. *Georgia Tech*, CLI-95-12, 42 NRC at 120. But these cases involved allegations far more serious than those at issue here. *Id.* at 118-22.

³⁸ PIIC Safety Contention at 5.

³⁹ Furthermore, PIIC never identified any deficiency in the AMPs themselves for passive systems, structures or components within the scope of license renewal and never identified any specific deficiency regarding the AMPs for structures involved in the refueling cavity leakage.

⁴⁰ PIIC Safety Contention at 5-6.

⁴¹ *Id.* at 5-7; Declaration of Christopher I. Grimes, at 6 (Nov. 23, 2009) (ADAMS Accession No. ML093270617). Ultimately, the ACRS concluded that the Applicants "inspections, evaluations, and commitments are adequate to address the refueling cavity leakage issue." ACRS, Report on the Safety Aspects of the License Renewal Application for the Prairie Island Nuclear Generating Plant, Units 1 and 2 (Dec. 10, 2009) (ADAMS Accession No. ML093420316).

The Board found that because NRC precedent does not require an intervenor to “ ‘prove its case at the contention admissibility stage,’ ” PIIC had produced adequate support for its contention.⁴² While an intervenor need not prove its case under the Commission’s standards for contention admissibility, “[m]ere ‘notice pleading’ is insufficient under these standards.”⁴³ As a result, “bare assertions and speculation are not enough to trigger an adversary hearing.”⁴⁴ PIIC and its expert have expressed conclusory statements that the Applicant’s attempts to identify and fix the leak were inadequate. To support this claim, PIIC has pointed to the results of the Applicant’s efforts. But, even though the focus of the safety culture contention is the very process by which NSP operates PINGP, PIIC has not produced any evidence or argument showing how or why the Applicant’s efforts were inadequate. Thus, the refueling cavity leakage issue does not provide sufficient support for PIIC’s safety culture contention.

Therefore, the safety culture contention is not supported by “sufficient information” to demonstrate a genuine issue of material fact.⁴⁵ As discussed above, the safety culture contention asserts that in light of the deficient safety culture at PINGP, the Applicant cannot demonstrate with reasonable assurance that it will implement the terms of its AMPs during the period of extended operation.⁴⁶ But, the information underlying this contention is either not the type of information that can prevent a finding of reasonable assurance or it is mere assertion without adequate support. While the NRC has identified violations at PINGP in recent months,

⁴² Order at 13 (*quoting Yankee Atomic Elec. Co.* (Yankee Nuclear Power Station), CLI-96-07, 43 NRC 235, 249 (1996)).

⁴³ *Fansteel, Inc.* (Muskogee, Oklahoma Site), CLI-03-13, 58 NRC 195, 203 (2003).

⁴⁴ *GPU Nuclear, Inc.* (Oyster Creek Nuclear Generating Station), CLI-00-6, 51 NRC 193, 208 (2000).

⁴⁵ 10 C.F.R. § 2.309(f)(1)(vi).

⁴⁶ Order at 8.

these violations are plainly of a different order of magnitude than those that have previously resulted in the NRC being unable to find reasonable assurance that a licensee will comply with the terms of its licensing basis. With respect to the reactor refueling cavity leakage issue, PIIC and its expert have made conclusory statements that the Applicant's attempts to identify and fix the leak were inadequate. But such statements are insufficient support for a contention. Consequently, the safety culture contention lacks a sufficient basis, and the Board committed legal error in finding it admissible.

CONCLUSION

For the foregoing reasons, the Staff submits that the Atomic Safety and Licensing Board's January 28, 2010 Order constituted error and should be reversed under the 10 C.F.R. § 2.311 standard of review.

Respectfully submitted,

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Dated in Rockville, Maryland
this 8th day of March, 2010

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "NRC Staff's Motion for Leave to Supplement Its Petition for Interlocutory Review of Atomic Safety and Licensing Board Decision Admitting Late-Filed and Out of Scope Safety Culture Contention" as well as "Enclosure A (Supplement to NRC Staff's Petition for Interlocutory Review of Atomic Safety and Licensing Board Decision Admitting Late-Filed and Out of Scope Safety Culture Contention) dated March 8, 2010, have been served upon the following by the Electronic Information Exchange, this 8th day of March, 2010:

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