March 18, 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 IN OPPOSITION TO THE NRC STAFF'S MOTION FOR LEAVE TO SUPPLEMENT ITS PETITION FOR INTERLOCUTORY REVIEW

The Atomic Safety and Licensing Board ("Board") issued an Order[1] on January 28, 2010, admitting a new contention filed by the Prairie Island Indian Community ("Community" or "PIIC") on November 23, 2009.[2] 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 filed an Answer opposing these petitions on the grounds that they do not meet the criteria for interlocutory review in 10 C.F.R.

[1] Order, (Narrowing and Admitting PIIC's Safety Culture Contention) (January 28, 2010) (unpublished) (Agency Document Access and Management System ("ADAMS") Accession No. ML 100280537 ("Order").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] 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, ADAMS Accession No. ML100431768.

§ 2.341(f)(2)(ii).[4] The Staff now moves to supplement its original petition for interlocutory review, requesting that the Commission review the Staff's petition under 10 C.F.R. § 2.311, in addition to reviewing it under Section 2.341(f)(2).[5] The Community opposes this motion on the basis that interlocutory review under 10 C.F.R. 2.311, both on its face and by Commission case law, is applicable to issues arising out of initial entry into the proceeding and is not applicable to mature proceedings, such as this one, where the initial entry issues of standing and admissible contentions were decided long ago.

I. SECTION 2.311 IS NOT APPLICABLE

Section 2.311 provides that an order of a presiding officer may be appealed to the Commission in regard to a "request for hearing" or a "petition to intervene." For appeals by a petitioner, the Commission case law on Section 2.311 has limited its use to cases where the petitioner has been refused entry into the case. With respect to an appeal by an applicant or the staff, an appeal under Section 2.311(c) can only be granted if the request and/or petition should have been wholly denied. Answering this question requires a determination of whether the petitioner has standing and has submitted at least one admissible contention. See Yankee Atomic Electric Co. (Yankee Nuclear Power Station), CLI-05-15, 61 NRC 365, 371 (2005).

By the literal wording of the two interlocutory provisions – Section 2.311 is limited to a "request for hearing" and a "petition to intervene," while Section 2.341

[4] 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 (February 22, 2010).

[5] 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 (March 8, 2010) ("NRC Staff Motion").

provides for appeals of "decisions and actions of a presiding officer" – Section 2.341 is the appropriate vehicle for appeal of decisions after the initial determination of entry into the proceeding has been made. The Commission case law supports this conclusion. As the staff noted in its motion, "The Commission has held, 'As a general matter, contentions filed after the initial petition are not subject to appeal pursuant to section 2.311.'"[6] The Licensing Board decision regarding the Community's entry into the proceeding – standing and admission of contentions – was made in 2008.[7] The Board admitted seven contentions, six of which were resolved by the parties and the seventh of which the Board dismissed as moot. The Licensing Board decision currently challenged by the Staff under Section 2.311 occurred well after the initial petition.

Notwithstanding the weight of precedent on the appropriate use of Section 2.311, the Staff argues that the Licensing Board decision on the Community's safety culture contention falls into "recognized exceptions to this rule for new contentions in certain circumstances."[8] The Staff concludes from this case that Section 2.311 should apply to any situation where the Commission review of a Licensing Board order would effectively dispose of the case.[9] Contrary to the Staff's argument, however, the instant case does not fall into the so-called "recognized exception" in South Texas Project.

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[6] NRC Staff Motion at 4 (citing 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)).
[7] Northern States Power Co. (formerly Nuclear management Co., LLC) (Prairie Island Nuclear Generating Plant, Units 1 and 2), LBP-08-26, 68 NRC 905 (2008).
[8] NRC Staff Motion at 4 (citing South Texas Project, CLI-09-18, 70 NRC ___ (slip op. at 4)).
[9] Of course, the Commission's review of the Board's Order admitting PIIC's Safety Culture contention would not dispose of the entire case unless it were to also address the Community's appeal of the Board's Order denying the admission of PIIC's new SEIS contentions, an appeal which is not ripe until the end of the case. Indeed, granting the NRC Staff's Motion would require piecemeal appeals the rules were designed to avoid.

South Texas Project does not support the Staff's argument that Section 2.311 can be used as a basis for interlocutory review of the remaining contention in this proceeding. As a threshold matter, South Texas Project is factually and procedurally distinguishable from the instant case. South Texas Project involved "the applicability of 10 C.F.R. § 2.311(d)(1) . . . where a Board has ruled only partially on an *initial* petition to intervene." South Texas Project, CLI-09-18, 70 NRC ___ (slip op. at 2) (emphasis added). It involved applicant's effort to file an appeal pursuant to Section 2.311(d) prior to the Board's ruling on both the *original* contentions and new contentions that were filed "*in advance of a full Board ruling on the original contentions*." South Texas Project, CLI-09-18, 70 NRC ___ (slip op. at 5) (emphasis added). Here, the issues of the Community's standing and the admissibility of its original contentions were decided long ago. Accordingly, the general rule that Board decisions involving contentions filed after the initial petition are not subject to appeal pursuant to Section 2.311 should apply here. The instant case does not fall into what the Staff termed the "recognized exceptions" on the use of Section 2.311.

Extending the Staff's logic demonstrates the deleterious affect that application of Section 2.311 to mature proceedings would have on the Commission's hearing process. If the Community's three environmental contentions would have been found admissible by the Board, the Staff, under the reasoning in its motion, would have been able to file a Section 2.311 motion to have the Commission review all four Community contentions on the basis that Commission action would be able to "dispose of the case in its entirety." The Community believes that the use of Section 2.311 for contentions admitted late in a proceeding would threaten the integrity of the Commission's hearing process by

snatching cases away from a licensing board merely because the Staff disagrees with the Board's decision.[10] As the Commission noted in Louisiana Energy Services, "[R]outine ruling[s] on contention admissibility are usually not occasions to exercise our authority to step into Licensing Board proceedings and undertake interlocutory review." Louisiana Energy Services, L.P. (National Enrichment Facility), CLI-05-21, 62 NRC 538, 539 (2005) (quoting Exelon Generation Co., LLC (Early Site Permit for Clinton ESP Site), CLI-06-24, 60 NRC 461, 466 (2004)). The Commission already provides for review of Board decisions for extraordinary circumstances – not through Section 2.311 – but through Section 2.341 for cases where a licensing board decision would affect the basic structure of the proceeding in a pervasive or unusual manner or threaten the party adversely affected by it with serious and irreparable impact. The Staff and the applicant have already availed themselves of this provision and the Commission's decision should be confined to the Section 2.341 criteria.

II. THE BOARD DID NOT MAKE AN ERROR OF LAW IN ADMITTING THE COMMUNITY'S SAFETY CULTURE CONTENTION

The Community agrees with the Staff that the other parties should have an opportunity to respond to the Staff's additional arguments if the Commission grants the Staff's request to supplement its petition. The Community ought not be required to respond to substantive arguments that have yet to be permitted by the Commission. If the Commission were to grant the Staff's request to supplement its petition, the Community intends to supplement its Answer to the Petition on additional grounds that the Staff cannot meet the "error of law" standard required by Section 2.311.

[10] Indeed, granting an appeal pursuant to Section 2.311 under circumstances such as these would create procedural asymmetry and inconsistency in NRC proceedings.

However, the Community must note here, in the face of the staff arguments on "error of law" presented in the staff motion, that it does not believe that the "error of law" standard would be met. The Community's contention would not, as asserted by the Staff, require the applicant to prove that it will comply with the Aging Management Program during the period of extended operation. The Community simply seeks to ensure that the applicant has a safety culture adequate to provide confidence that the applicant will be able to implement the Aging Management Program. In addition to finding that the Community filed its petition in a timely manner, the Board also found that the Safety Culture Contention satisfied all of the six contention admissibility criteria in 10 CFR 2.309(f)(1).[11]

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 safety culture contention is buttressed by the NRC's white enforcement and crosscutting decline in human performance findings. This is sufficient information to form the basis for the admission of the safety culture contention. If a weak safety culture jeopardizes the ability of the applicant to implement the aging management program effectively, the time to address this is before the license renewal is granted. With twenty years more of operation at issue, the time to address safety culture is now. The Community believes that this is fully in keeping with all of the recent concern that the Commission has given to safety culture.

[11] *Supra* note 1.

In regard to the Board's re-casting of the Community's contention, the Board's action was based on what was obviously the Community's concern expressed in its original petition on the contention. It is hardly turning an inadmissible contention into an admissible contention. The Staff cites the recent Commission decision in Crow Butte Resources, Inc. (North Trend Expansion Area), CLI-09-12, 69 NRC 535 (2009), in support for its argument that the Board in this case replaced an inadmissible contention with an admissible one. However, in Crow Butte, the Commission faulted the Board for failing to specify which bases for the contentions were admissible and which were not. It is not apparent to the Community how the language cited by the Staff in its motion[12] has any relevance to the reformulation of contentions, as opposed to a straightforward discussion by the Commission on the admissibility of a contention as not being within the scope of the license application. The Board in the instant case merely clarified the obvious and clear thrust of the Community's safety culture contention.

III. CONCLUSION

For the foregoing reasons, the Staff's motion for leave to supplement its petition for interlocutory review should be denied.

Respectfully Submitted,

/*Signed electronically by Philip R. Mahowald*/

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[12] NRC Staff Motion, Enclosure A at 6.

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CERTIFICATE OF SERVICE

I hereby certify that copies of "Prairie Island Indian Community's Answer in Opposition to NRC Staff's Motion for Leave to Supplement its Petition for Interlocutory Review," dated March 18, 2010, was provided to the Electronic Information Exchange for service on the individuals listed below, this 18th day of March, 2010.

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