

May 7, 2010

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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
)	

PIIC’S ANSWER TO NSPM’S MOTION REGARDING SCOPE OF DISCLOSURES FOR THE PIIC’S SAFETY CULTURE CONTENTION

I. Introduction

While Northern States Power Company, a Minnesota corporation (“NSPM”) apparently did not consider the Prairie Island Indian Community’s (“PIIC”) response to its disclosure proposal “productive,” from PIIC’s perspective the parties are in substantial agreement on a significant portion of NSPM’s disclosure proposal, subject to minor clarifications or qualifications that PIIC endeavored to communicate to NSPM. Prior to the pre-hearing conference call on April 13, 2010, PIIC communicated its concerns to NSPM that its disclosure proposal was far too narrow from PIIC’s perspective. PIIC subsequently proposed modifications to broaden the scope of disclosure to include relevant documents related to the potential alleged deficiencies in PINGP’s safety culture. From PIIC’s perspective, the parties’ remaining disagreement regarding the scope of disclosure obligations on PIIC’s safety culture contention essentially boils down to legitimate questions regarding the relevant time period for certain disclosures, and whether (and to what extent) certain documents and information that NSPM claims are highly confidential, “self-evaluative,” or “self-critical” should be disclosed by NSPM

in these proceedings. Before addressing in Section VI what PIIC considers to be the parties' remaining disagreement, PIIC will briefly discuss PIIC's Safety Culture Contention, as narrowed and admitted by the Board (Section II), the scope of disclosure (Section III), the provisions of NSPM's disclosure proposal with which PIIC agrees (Section IV), and NSPM's "voluntary" disclosures and requested limitations (Section V). As discussed more fully below, the areas of disclosure upon which the PIIC and NSPM agree (which were previously communicated to NSPM) should significantly narrow the remaining disputed issues raised in NSPM's motion that require the Board's determination.

II. PIIC's Admitted Contention Regarding Safety Culture

On January 28, 2010, the Board issued an Order (Narrowing and Admitting PIIC's Safety Culture Contention) ("Order") admitting PIIC's Safety Culture Contention, narrowed by the Board as follows:

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.

Id. at 8.

III. The Permissible Scope of Disclosures

As the Board has held, parties in NRC adjudications are generally entitled to obtain, through discovery and other pretrial activities, "the fullest possible knowledge of the issues and facts before trial." In the Matter of David Geisen, LBP-06-25, 64 N.R.C. 367, 376 (quoting Hickman v. Taylor, 329 U.S. 495, 501 (1947)). "The basic philosophy underlying this requirement is that 'prior to trial every party to a civil action is entitled to the disclosure of all relevant information in the possession of any person.'" Geisen, 64 N.R.C. at 375-76 (quoting Wright, Miller and Marcus, Federal Practice and Procedure, § 2001 (2d ed. 1994)). 10 C.F.R. §

2.336(a)(2)(i) and (ii) state that parties are required to disclose and provide documents and data compilations “that are relevant to the contentions.” And as the Board has further stated, the “relevance” concept in discovery refers to the “universal understanding of that concept . . . that shapes the scope and definition of discoverable evidence in both the federal courts and our adjudications.” Geisen, 64 N.R.C. at 390 n.102 (citations omitted). Materials are “relevant” if they appear “reasonably calculated to lead to the discovery of admissible evidence.” Id. (citing 10 C.F.R. § 2.705(b)(1)). While Geisen specifically discussed “relevance” in the context of discovery pursuant to 10 C.F.R. §§ 2.705(b)(1) and 2.709, and the current proceeding involves general discovery pursuant to 10 C.F.R. § 2.336, PIIC believes, per Geisen, that there is no reason that the universal concept of “relevance” should not also apply here.

As set forth more fully below in Section IV and V, and subject to the discussion in Section VI, PIIC is willing to limit the scope of discovery to relevant documents and materials that fall within the four bases for PIIC’s Safety Culture Contention set forth on page 6 of NSPM’s Motion. However, PIIC further believes that the two categories of proposed “voluntary” disclosures set forth on page 7 of NSPM’s motion are clearly relevant to PIIC’s admitted Safety Culture Contention, particularly to the extent such information specifically relates to the four bases set forth on page 6 of NSPM’s Motion, and should be fully disclosed by NSPM. PIIC also disagrees with NSPM’s request to shield from disclosure all Employee Concern Records, all reports of the Institute for Nuclear Power Operations, and all records identifying what specific employees have said in voluntary interviews or surveys conducted as part of safety culture assessments.

IV. Agreed Upon Disclosure Proposals

The areas of disclosure with which the PIIC agrees with NSPM (and which were previously communicated to NSPM) should significantly narrow the remaining disputed issues raised in NSPM's motion requiring the Board's determination. With only minor modifications as noted below, PIIC agrees with NSPM (as previously communicated to NSPM), that documents relevant to PIIC's Safety Culture Contention would include documents relating to the following bases:

- The alleged failure to correct the PINGP refueling cavity leakage of borated water from Units 1 and 2;¹
- The placement of PINGP into the "Regulatory Response" column of the NRC Reactor Oversight Process Action Matrix, as described in the August 20, 2009 NRC Mid-Cycle Performance Review and Inspection Plan for PINGP Units 1 and 2, due to two "White" findings (one for mis-positioning of the turbine driven auxiliary feedwater valves (EA-08-272 and EA-09-004) and one for a radioactive material shipment from PINGP not conforming to regulations (EA-08-349), and the NRC's identification of a crosscutting issue in the area of human performance at PINGP;
- A preliminary White finding on the design of the component cooling water system (EA-09-167);
- The concerns raised regarding NSPM's Corrective Action Program in NRC Biennial Problem Identification and Resolution Inspection Report (Sept. 25, 2009);

V. NSPM's Proposed Additional "Voluntary" Production and Limitations

PIIC may disagree with NSPM on whether NSPM's proposed additional disclosures are "voluntary"² rather than within the scope of discovery because they are "relevant to the

¹ PIIC substantially agrees with this item (as communicated to NSPM), but merely seeks to add clarifying information included in NSPM's disclosure proposal.

² See NSPM Motion at 6-7.

contention[]”³ as pled, but PIIC agrees with NSPM’s proposal to produce additional documents (as previously communicated to NSPM), with only minor modifications as noted:

- Any surveys, self assessments, audits, or third party assessments of safety culture at PINGP conducted in or after 2008;⁴
- Any policies, program descriptions, procedures, and training modules that NSPM uses to instill safety culture at PINGP.

With regard to NSPM’s proposed discovery limitations, PIIC is in substantial agreement with the proposed limitations, subject to the following modifications (as previously communicated to NSPM):

- A. A party need not identify or produce any document that has been served on all of the other parties ~~to~~ during this proceeding;⁵
- B. If a document exists in both hard copy and electronic formats, a party may produce the electronic copy only;
- C. The Parties may limit mandatory discovery disclosures to final documents they develop, and need not include drafts (including comments on drafts, resolutions of comments, draft transmittals, or similar documents);⁶

³ See 10 C.F.R. 2.336(2)(i) and (ii).

⁴ As discussed more fully below in Section VI, PIIC disagrees with NSPM’s argument to only provide such documents going back to 2008. Indeed, among other things, PIIC specifically based its contention on “material found in the SER in regard to the leakage of borated water from the PINGP Units 1 and 2 since 1998.” See Order (Narrowing and Admitting PIIC’s Safety Culture Contention) at 2; PIIC’s Submission of a New Contention on the NRC Safety Evaluation Report (Nov. 23, 2009) at 4.

⁵ PIIC questioned the proposal as worded by NSPM and merely seeks to clarify that it applies to documents served on all of the parties during these proceedings, and not, for example, documents that may have been served on one party, but not all parties (i.e., any relevant documents served on the NRC by NSPM as a licensee that may not have been served on PIIC as a party to these proceedings).

⁶ As set forth below in Section VI, PIIC believes that NSPM should also disclose drafts (including comments on drafts, resolution of comments, draft transmittals, or similar documents) that specifically relate to identifying, correcting, and/or resolving the deficiencies alleged in the four bases set forth on page 6 of NSPM’s Motion.

- D. The NRC Staff will identify all documents required by 10 C.F.R. §§ 2.336(b) and 2.1203 by providing the accession numbers for the documents in the Agency Wide Documents Access Management System (“ADAMS”). With the exception of any NSPM-created or produced document, ~~No~~ no Party is required to produce documents available via the NRC’s website or ADAMS;⁷ and
- E. The Parties waive the requirement to produce a privilege log, pursuant to 10 C.F.R. §§ 2.336(a)(3) and (b)(5).⁸

VI. Additional Categories of Relevant Documents and Information That NSPM Should Be Required to Disclose.

As set forth above in Sections IV and V, PIIC agrees with a significant portion of NSPM’s disclosure proposals. PIIC believes, however, that a few of NSPM’s proposals are too narrow and would withhold from disclosure documents and information that are clearly relevant to PIIC’s admitted Safety Culture Contention and related to the bases identified on page 6 of NSPM’s Motion. As noted and redlined above in Sections IV and V, PIIC believes that NSPM’s disclosure proposal should be modified as follows:

- Any surveys, self assessments, audits, or third party assessments of safety culture at PINGP conducted in or after ~~2008~~ 1998;

PIIC specifically based its contention on “material found in the SER in regard to the leakage of borated water from the PINGP Units 1 and 2 since 1998.” *See* Order (Narrowing and Admitting PIIC’s Safety Culture Contention) at 2; PIIC’s Submission of a New Contention on the NRC

⁷ 10 C.F.R. § 2.336(1)(2)(iii) allows a party to disclose documents that are publicly available on the NRC’s website by identifying the location, the title and page reference to the relevant document. PIIC respectfully disagrees with what appears to be NSPM’s effort to avoid disclosure of relevant documents it has created or generated that are also available on the NRC’s website or ADAMS. NSPM is in a far better position to disclose its own relevant documents.

⁸ As communicated to NSPM, PIIC agrees to waive this requirement for PIIC’s Safety Culture Contention.

Safety Evaluation Report (Nov. 23, 2009) at 4. Accordingly, relevant surveys, self assessments, audits, or third party assessments of safety culture at PINGP conducted in or after 1998 should be disclosed, especially any such surveys, audits or assessments that relate to the leakage of borated water from the PINGP Units 1 and 2 since 1998. Moreover, while many of the non-compliances on which PIIC based its contention occurred in 2008 and 2009, any surveys, audits or assessments conducted prior to 2008 and 2009 would be relevant if the same or similar non-compliances had been previously identified or discussed, if the same or similar non-compliances were recurring problems, or if the same or similar non-compliances were not rectified once identified and discussed in prior surveys, audits or assessments. For example, if the mis-positioning of auxiliary feedwater valves was a repeated or recurring problem in prior years, surveys, audits or assessments identifying this problem would be relevant to PIIC's Safety Culture Contention.

In addition to the proposed modifications to NSPM's disclosure proposals noted and redlined above in Sections IV and V, PIIC also believes NSPM should disclose the following documents and information to the extent they are relevant to PIIC's Safety Culture Contention and related to the bases for the contention identified on page 6 of NSPM's motion:

- Any policies, program descriptions, and procedures for assigning employee performance awards.

PIIC also believes that NSPM has failed to state a compelling reason to completely exempt from disclosure: (1) all Employee Concerns Program ("ECP") Records; (2) all reports of the Institute for Nuclear Power Operations ("INPO Reports"); and (3) all records identifying what specific employees have said in voluntary interviews or surveys conducted as part of safety

culture assessments. *See* NSPM Motion at 10.⁹ As a threshold matter, NSPM is only required to disclose those records that are relevant to PIIC’s admitted Safety Culture Contention. In doing so, NSPM can certainly identify documents as privileged or protected pursuant to Section 2.336(a)(3), which provides that NSPM shall disclose “[a] list of documents otherwise required to be disclosed for which a claim of privilege or protected status is being made, together with sufficient information for assessing the claim of privilege or protected status of the documents.” 10 C.F.R. § 2.336(a)(3).

As communicated to NSPM, PIIC understands the concerns about the public disclosure of the ECP Records, INPO Reports, and specific employee statements. While these documents may contain confidential or even highly confidential information, such information need not be *publicly* disclosed in order for NSPM to fulfill its disclosure obligations in this proceeding. Indeed, the Board entered a Protective Order (Governing Non-Disclosure of Certain Documents Claimed to be Proprietary) dated March 24, 2009 which would prevent the unauthorized public disclosure of confidential or proprietary information. Other than its claim that such information is highly confidential or otherwise protected from disclosure under a “self-evaluative” or “self-critical analysis,” NSPM fails to state any rationale for why such information could not be disclosed and produced to the parties pursuant to the Board’s Protective Order without *public* disclosure of the information. Mindful that the scope of disclosure relates to *disclosure* and not actual *production*, and that the Board’s Protective Board implements procedures regarding the disclosure, production and use of appropriately designated documents, the Board should require NSPM to disclose relevant ECP Records, INPO Reports and employee statements. Appropriate

⁹ While item 3 was not included in NSPM’s disclosure proposal as a category of documents to be exempted from disclosure, the considerations and arguments for or against their disclosure overlap with those considerations and arguments for or against the disclosure of items 1 and 2.

use of redactions (for specific employee names or other information), restrictions of access, restrictions on use and other measures detailed in the Protective Order provide all necessary protections against the unauthorized use and public disclosure of confidential or proprietary information.¹⁰ *See, e.g., In the Matter of Pacific Gas and Electric Company (Diablo Canyon Nuclear Power Plant, Units 1 and 2)*, LBP-93-13, 38 N.R.C. 11, 16 (July 19, 1993) (allowing production of INPO report subject to access and use restrictions set forth in protective order); *In the Matter of Pacific Gas and Electric Company (Diablo Canyon Nuclear Power Plant, Units 1 and 2)*, 1993 WL 315519 (August 3, 1993) (allowing production of INPO report subject to access and use restrictions set forth in protective order); *Geisen*, 64 N.R.C. at 387 (stating that with an appropriate protective order in place, parties must carry a heavy burden to show they are still entitled to withhold otherwise-discoverable documents) and 394-95 (stating that a protective order that limits disclosures to those involved in the litigation with a need to know “would largely diminish, if not entirely eliminate, the potential harm from the disclosure”).

NSPM’s claim that any and all documents within these three broad categories of ECP Records, INPO Reports, and specific employee statements would fall within a “self-evaluative” or “self-critical” privilege exempting them from disclosure is far too overbroad. NSPM failed to cite a single case supporting such broad and sweeping exclusions of whole categories of documents in the context of this case. Even assuming, *arguendo*, that such privileges might apply to particular records, statements, or reports in this case, excluding relevant information on the basis of such challenges requires consideration of specific facts and circumstances – i.e. the specific statements and the relevant facts and circumstances surrounding the statements – to

¹⁰ Indeed, NSPM is planning to conduct a safety culture audit beginning in June. PIIC assumes that at least some of these broad categories of documents NSPM seeks to exclude entirely from these proceedings would be made available for the safety culture audit.

determine whether such a privilege would apply. Again, the Board's Protective Order provides appropriate procedures for the disclosure, production, review and use of such information.

Accordingly, the Board should reject NSPM's overbroad attempt to exclude from disclosure all ECP Records, all INPO Reports, and all specific employee statements in interviews and surveys conducted as part of safety culture assessments.

Respectfully Submitted,
/Signed electronically by Philip R. Mahowald/

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Dated: May 7, 2010

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NUCLEAR REGULATORY COMMISSION**

Before the Atomic Safety and Licensing Board

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Units 1 and 2))	

CERTIFICATE OF SERVICE

I hereby certify that copies of “PIIC’s Answer to NSPM’s Motion Regarding Scope of Disclosures for the PIIC’s Safety Culture Contention,” dated May 7, 2010, was provided to the Electronic Information Exchange for service on the individuals listed below, this 7th day of May, 2010.

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