

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

William J. Froehlich, Chairman
Dr. Gary S. Arnold
Dr. Thomas J. Hirons

In the Matter of

Northern States Power Co.

(Prairie Island Nuclear Generating Plant, Units
1 and 2)

Docket Nos. 50-282-LR and 50-306-LR

ASLBP No. 08-871-01-LR-BD01

May 13, 2010

ORDER
(Defining Scope of Disclosure)

On April 30, 2010, Applicant Northern States Power Company (NSPM) filed a motion with the Atomic Safety and Licensing Board (Board) requesting direction on the appropriate scope of document disclosure on the Prairie Island Indian Community's (PIIC's) contention admitted on January 28, 2010.¹ NSPM states that such direction is necessary because for nearly a month the parties have been unable to agree upon a reasonable scope of disclosure for this contention. NSPM requests that the Board provide direction by May 14, 2010, so that the parties will have sufficient time to comply with the June 18 deadline for mandatory disclosures.² On May 7, 2010, PIIC filed its answer to the NSPM motion.³

¹ NSPM Motion Regarding Scope of Disclosures for the PIIC's Safety Culture Contention (Apr. 30, 2010) [hereinafter NSPM Motion]; see Licensing Board Order (Narrowing and Admitting PIIC's Safety Culture Contention) (Jan. 28, 2010) [Order Admitting Contention].

² NSPM Motion at 2.

³ PIIC's Answer to NSPM's Motion Regarding Scope of Disclosures for the PIIC's Safety Culture Contention (May 7, 2010) [hereinafter PIIC Answer].

I. Background

This dispute concerns the scope of mandatory disclosures for a contention proffered by PIIC on November 23, 2009, and admitted by the Board, in modified form, on January 28, 2010.

The original contention submitted by PIIC read as follows:

Contrary to the conclusion in the Safety Evaluation Report (SER), the Community does not believe that “the requirements of 10 CFR 54.29(a) have been met.” Due to recent significant non-compliances with NRC regulations, as well as the applicant’s failure to address a known potentially serious safety problem identified in the SER, the Community does not believe that there is any justification for a reasonable assurance determination by the NRC that the applicant will “. . . manag[e] the effects of aging during the period of extended operation on the functionality of structure and components” as required by 10 CFR 54.29(a)(1).

The Board narrowed and admitted the PIIC contention 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.

In its order admitting the contention, the Board ruled that it would be litigated under the procedures of 10 C.F.R. Part 2, Subpart L.⁴ Under the Commission’s rules of practice and procedure at 10 C.F.R. § 2.336(a), in lieu of formal discovery, all parties to a Subpart L proceeding, other than the NRC Staff, are required to disclose and provide, inter alia, the following:

(2)(i) A copy, or a description by category and location, of all documents and data compilations in the possession, custody, or control of the party that are relevant to the contentions, provided that if only a description is provided of a document or data compilation, a party shall have the right to request copies of that document and/or data compilation, and

(ii) A copy (for which there is no claim of privilege or protected status), or a description by category and location, of all tangible things (e.g., books, publications and treatises) in the possession, custody or control of the party that are relevant to the contention.

(iii) When any document, data compilation, or other tangible thing that must be disclosed is publicly available from another source, such as at the NRC Web site, <http://www.nrc.gov>, and/or the NRC Public Document Room, a sufficient disclosure would be the location, the title and a page reference to the relevant document, data compilation, or tangible thing.

⁴ Order Admitting Contention at 15.

(3) 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.⁵

The above described materials are required to be disclosed within 30 days of the issuance of the order granting a request for hearing or petition to intervene,⁶ and within 14 days of any order ruling on new or amended contentions.⁷ In the instant case, to facilitate settlement and at the request of the parties, this Board issued an order delaying initial disclosures related to PIIC's Safety Culture Contention until June 18, 2010, and requiring the parties to update those disclosures on the last business day of each month thereafter.⁸ The Board further advised that "[i]f the parties remain unable to agree upon the scope of mandatory disclosures, they are directed to file their motions for Board intervention in time for disclosures to go forward by the June 18 deadline."⁹ As noted above, NSPM filed such a motion on April 30, 2010, to which PIIC filed an answer on May 7, 2010.

II. NSPM's Argument

To begin, NSPM points to Commission case law confirming that "the scope of a contention is limited to its bases."¹⁰ NSPM concludes, therefore, that the scope of PIIC's

⁵ As noted in NSPM's motion, and confirmed in PIIC's answer, the parties previously agreed to waive the requirement to produce a privilege log. NSPM Motion at 8 n.5; PIIC Answer at 6 n.8. The parties were still required, however, to provide a list of any documents withheld as proprietary. As ordered by the Board, supra Section V.E, the provisions of 10 C.F.R. § 2.336(a)(3) and (b)(5) shall apply in this proceeding going forward.

⁶ 10 C.F.R. § 2.336(a).

⁷ 10 C.F.R. Part 2, Appendix B.II, Model Milestones for Hearings Conducted Under 10 CFR Part 2, Subpart L.

⁸ See Licensing Board Memorandum and Order (Summarizing Prehearing Conference Call and Amending Hearing Schedule) (Apr. 20, 2010).

⁹ Id. at 3.

¹⁰ NSPM Motion at 4 (citing Entergy Nuclear Generation Co. & Entergy Nuclear Ops., Inc. (Pilgrim Nuclear Power Station), CLI-10-11, 71 NRC __, __ (slip op. at 28) (Mar. 26, 2010)).

contention should be limited to the bases PIIC provided in proffering it. Those bases, as described by NSPM, are:

- The alleged failure to correct the PINGP refueling cavity leakage;
- 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 substantive crosscutting issue (“SCCI”) in the area of human performance at PINGP;
- A preliminary White finding on the design of the component cooling water system (EA-09-167); and
- The concerns raised regarding NSPM’s Corrective Action Program in NRC Biennial Problem Identification and Resolution Inspection Report (Sept. 25, 2009).

According to NSPM, under 10 C.F.R. § 2.336(a)(2), mandatory disclosures need not extend beyond documents and material “relevant” to these four bases. Nonetheless, NSPM does agree to provide certain additional “voluntary” disclosures “as a courtesy to the PIIC in recognition of the PIIC’s interest in a robust safety culture at PINGP.”¹¹ Those additional disclosures consist of “(a) any surveys, self assessments, audits, or third party assessments of safety culture at PINGP conducted in or after 2008, other than reports of the Institute for Nuclear Power Operations (‘INPO Reports’); and (b) the policies, program descriptions, procedures, and training modules that NSPM uses to instill safety culture at PINGP.”¹² NSPM considers 2008 to be a “reasonable” cutoff year for its “voluntary” disclosures in light of two considerations: PINGP underwent a management change in 2008, and two of the non-compliances cited by PIIC in its contention occurred in 2008. Finally, NSPM contends that three categories of documents should be excluded from disclosures altogether: “(1) Employee Concerns Program (‘ECP’) records, (2) INPO Reports, and (3) records identifying what specific employees have said in voluntary interviews or surveys conducted as part of safety culture assessments.” Applicant characterizes these documents as “highly confidential,” and perhaps even privileged,

¹¹ Id. at 7 (internal footnotes omitted).

¹² Id.

and expresses concern “with the potential chilling effect if [these] very sensitive types of documents are considered relevant and are required to be disclosed.”¹³

III. PIIC Response

In its answer to NSPM’s motion, PIIC asserts that “the parties are in substantial agreement on a significant portion of NSPM’s disclosure proposal subject to minor clarifications or qualifications.”¹⁴ PIIC explains that it 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.”¹⁵ PIIC takes issue, however, with NSPM’s efforts to limit the scope of its additional “voluntary” disclosures. First, PIIC suggests that the cutoff year for such disclosures should be 1998, rather than 2008.¹⁶ Second, PIIC insists that NSPM should disclose “[a]ny policies, program descriptions, and procedures for assigning employee performance awards.”¹⁷ Finally, PIIC argues that “NSPM has failed to state a compelling reason” to exempt from disclosure all ECP Records, INPO Reports, and records of voluntary employee interviews, to the extent they are relevant to PIIC’s contention.¹⁸ PIIC cites to a 1993 case in which a licensing board authorized production of an INPO Report and suggests that this Board could require NSPM to produce such documents subject to a protective order.¹⁹

¹³ Id. at 10-11.

¹⁴ PIIC Answer at 1.

¹⁵ Id. at 3. Those four bases are reproduced above, infra Section II.

¹⁶ PIIC requests approximately 12 years of document disclosure, PIIC Answer at 5-7, while NSPM wishes to provide disclosure for only the past two years, NSPM Motion at 7.

¹⁷ PIIC Answer at 7.

¹⁸ Id.

¹⁹ Id. at 8-9 (citing Pac. Gas & Elec. Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), LBP-93-13, 38 NRC 11, 16 (1993)).

IV. Analysis

When the Board admitted PIIC's Safety Culture Contention, we declined to read the contention as a challenge to NSPM's safety culture. Rather, the Board interpreted the contention as one alleging that NSPM's aging management programs for the license renewal period are inadequate. Specifically, we concluded that PIIC raised a factual question as to whether NSPM's safety culture is adequate to support the additional burden of aging management programs. In admitting the contention, the Board considered the declaration of PIIC expert Christopher Grimes, in which he stated that characteristics of a strong safety culture are similar to aspects of an effective aging management program.²⁰ This statement, we determined, supported PIIC's assertion that a weak safety culture undermines Applicant's ability to implement effective aging management programs.

As factual support for its contention, PIIC cited to at least three independent occurrences at the plant that allegedly indicate a weak safety culture at PINGP. The first occurrence was the longstanding leakage of the refueling cavity.²¹ The second involved "failure of the PINGP staff to adequately control the position of a normally open valve necessary for a turbine driven auxiliary feed pump to operate."²² The third incident cited was a "White finding [that] involved a radioactive material shipment from PINGP that did not conform to applicable regulations."²³ These three occurrences comprised much of the factual support proffered in support of PIIC's contention, as is required by 10 C.F.R. § 2.309(f)(1)(v).²⁴ They did not, however, define the

²⁰ Prairie Island Indian Community's Submission of a New Contention on the NRC Safety Evaluation Report [hereinafter PIIC Contention], Declaration of Christopher I. Grimes (Nov. 23, 2009) ¶¶ 22-24.

²¹ PIIC Contention at 4-6.

²² Id. at 10.

²³ Id.

²⁴ 10 C.F.R. § 2.309(f)(1)(v) states that an intervenor must:

Provide a concise statement of the alleged facts or expert opinions which support the requestor's/petitioner's position on the issue and on which the petitioner intends to rely

basis or the scope of the contention. In suggesting that these occurrences form the bases of PIIC's contention, and therefore the extent of mandatory disclosures, Applicant apparently misunderstands the scope of PIIC's contention, as narrowed by the Board.²⁵ These occurrences do not limit the contention's scope, but rather serve as examples illustrating the alleged inadequacy of PINGP's safety culture. It is PINGP's inadequate safety culture – not the illustrative facts underlying it – that forms the basis of PIIC's contention. As the Commission has explained, Intervenor need not provide all supporting facts for a contention in the original submission:

Under our contention rule, Intervenor are not being asked to prove their case, or to provide an exhaustive list of possible bases, but simply to provide sufficient alleged factual or legal bases to support the contention, and to do so at the outset.²⁶

As noted above, Intervenor are entitled to disclosure of all documents and data compilations in the possession, custody, or control of the Applicant that are relevant to the contention. Moreover, as PIIC points out in its answer, "parties in NRC adjudications are generally entitled to obtain . . . 'the fullest possible knowledge of the issues and facts before trial.'"²⁷ "The basic philosophy underlying this requirement is that 'prior to trial every party to a

at hearing, together with references to the specific sources and documents on which the requestor/petitioner intends to rely to support its position on the issue.

²⁵ Both Applicant and Intervenor provide a list of four bulleted items, which describe five operational occurrences, and erroneously refer to them as bases for the contention. NSPM Motion at 6; PIIC Answer at 4. In our order admitting PIIC's contention, we made reference to three of the five operational occurrences and properly referred to them as factual support for the contention basis. Order Admitting Contention at 9. Applicant and Intervenor have agreed, with some exceptions, to limit mandatory disclosures to these five illustrative factual occurrences supporting PIIC's Safety Culture Contention.

²⁶ La. Energy Servs., L.P. (National Enrichment Facility), CLI-04-35, 60 NRC 619, 623 (2004).

²⁷ PIIC Answer at 2 (quoting Geisen, LBP-06-25, 64 NRC 367, 376 (quoting Hickman v. Taylor, 329 U.S. 495, 501 (1947))).

civil action is entitled to the disclosure of all relevant information in the possession of any person.”²⁸

Under 10 C.F.R. § 2.336(2), NSPM’s mandatory disclosures would legally include all documents and materials relevant to PIIC’s contention, which alleges that PINGP’s safety culture is inadequate to provide reasonable assurance of effective aging management during the license renewal period. As such, NSPM might be required to disclose such documents as Licensing Event Reports, Corrective Action Reports, Internal QA audits, NRC audits and inspections, and other self assessments. According to their submissions, the parties have agreed – with a few exceptions – to limit disclosures to those materials relevant to the occurrences cited in support of PIIC’s Safety Culture Contention, which are set forth on page 6 of NSPM’s motion.²⁹ However, we agree with PIIC’s view that this does not encompass the entire body of “relevant” material. Thus, we find that the following additional materials are relevant to PIIC’s contention and subject to disclosure:

- Any surveys, self assessments, audits, or third party assessments of safety culture at PINGP conducted in or after 1998.³⁰ This includes any ECP records, INPO reports, and all records identifying what specific employees have said in voluntary interviews or surveys conducted as part of safety culture assessments.³¹

²⁸ Id. at 2 (quoting Geisen, 64 NRC at 375-76 (quoting Wright, Miller and Marcus, Federal Practice and Procedure, § 2001 (2d ed. 1994))).

²⁹ NSPM Motion at 6; PIIC Answer at 3.

³⁰ To explain why we selected 1998 as a cutoff year, we note first that corporate culture is typically slow to change. Thus, events that occurred some years ago may still be indicative of current safety culture weakness. Furthermore, as PIIC notes in its answer, events that reoccur over time may themselves indicate a weak safety culture. See PIIC Answer at 7. We are not convinced that the recent NSPM management change, absent a change-out of all PINGP personnel, makes 2008 a reasonable cutoff date for disclosures, as NSPM suggests in its motion. See NSPM Motion at 7. On the other hand, events that occurred more than 12 years ago have limited, if any, relevance to PINGP’s current safety culture. Given that PIIC’s contention refers to the leakage of borated water since 1998, see PIIC Contention at 4, we chose 12 years as a reasonable compromise between an unduly burdensome disclosure extending across the life of the plant and the Intervenor’s need to access relevant information.

³¹ NSPM argues that requiring disclosure of INPO Reports and similar documents may have a chilling effect upon NSPM or other licensees who may wish to pursue self improvement through audits. See NSPM Motion at 10. We find, however, that INPO Reports are clearly “relevant” to PIIC’s Safety Culture Contention and, unless they are otherwise subject to a recognized privilege, they must be disclosed pursuant to 10 C.F.R. § 2.336(a)(2). Documents may be

- Any policies, program descriptions, procedures, and training modules that NSPM uses to instill safety culture at PINGP.
- Any policies, program descriptions, and procedures for assigning employee performance awards.

V. Board Order

To clarify apparent disagreements between PIIC and NSPM, the Board orders that:

A. A party need not identify or produce any document that has been served on all of the other parties during this proceeding;

B. If a document exists in electronic format, a party need only produce the electronic copy;

C. The parties may limit mandatory disclosures to final documents, with one exception. The parties must disclose drafts of documents (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). No party is required to produce documents available via the NRC’s website or ADAMS;³² and

E. If a party seeks to withhold documents as privileged or otherwise protected, it must provide a privilege log, pursuant to 10 C.F.R. §§ 2.336(a)(3) and (b)(5).

redacted to the extent that personal identifying information (e.g., employee names on EPC records) need not be disclosed.

³² Under 10 C.F.R. § 2.336(2)(iii), parties other than the NRC Staff may disclose documents that are publicly available on the NRC’s website by identifying the location, the title, and page reference to the relevant document.

F. In addition to the documents that NSPM has agreed to provide to PIIC, specific documents and material that must be made available to Intervenors are:

1. All surveys, self assessments, audits, or third party assessments of safety culture at PINGP conducted in or after 1998. This includes INPO reports, ECP records and records identifying what specific employees have said in voluntary interviews or surveys conducted as part of safety culture assessments. Safety culture assessments are not limited to those related to the illustrative factual occurrences supporting PIIC's Safety Culture Contention set forth on page 6 of NSPM's Motion.

2. Policies, program descriptions, and procedures for assigning employee performance awards.

VI. Protective Order

As noted above, PIIC seeks and NSPM resists the disclosure of (1) ECP Records; (2) INPO Reports; and (3) records identifying what specific employees have said in voluntary interviews or surveys conducted as part of safety culture assessments.³³ The Board has determined that many of these records and reports are relevant to PIIC's contention and are therefore subject to disclosure. If NSPM still insists upon withholding these documents, it must produce a privilege log listing all "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."³⁴ Alternatively, the parties are free to use the existing March 24, 2009 Protective Order issued in this case or propose a new Protective Order to govern the disclosure of documents which NSPM claims to be confidential, highly confidential, self-evaluative, or self-critical.

³³ PIIC Answer at 7-8; NSPM Motion at 10.

³⁴ 10 C.F.R. § 2.336(a)(3).

VII. Conclusion

Mandatory disclosure is the sole source of discovery to an Intervenor in a Subpart L proceeding. The Commission's regulations require the parties to disclose, inter alia, "all documents and data compilations in the possession, custody, or control of the party that are relevant to the contentions."³⁵ In this case, NSPM is ordered to disclose all documents and materials related to the admitted contention as clarified in this order. Initial discovery was to begin on February 12, 2010 – 14 days after this Board admitted PIIC's new contention. Now, three months later it must move forward expeditiously.

It is so ORDERED.

THE ATOMIC SAFETY
AND LICENSING BOARD³⁶

/RA/

William J. Froehlich, Chairman
ADMINISTRATIVE JUDGE

/RA/

Dr. Gary S. Arnold
ADMINISTRATIVE JUDGE

/RA, by Edward R. Hawkens, for/

Dr. Thomas J. Hirons
ADMINISTRATIVE JUDGE

Rockville, Maryland
May 13, 2010

³⁵ Id. § 2.336(a)(2).

³⁶ Copies of this order were sent this date by the agency's E-Filing system to counsel for all parties.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LB ORDER (DEFINING SCOPE OF DISCLOSURE) have been served upon the following persons by Electronic Information Exchange.

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DOCKET NOS. 50-282 AND 50-306-LR
LB ORDER (DEFINING SCOPE OF DISCLOSURE)

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[Original signed by Evangeline S. Ngbea]
Office of the Secretary of the Commission

Dated at Rockville, Maryland
this 13th day of May 2010.