UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Gregory B. Jaczko, Chairman
Kristine L. Svinicki
George Apostolakis
William D. Magwood, IV
William C. Ostendorff

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

CLI-10-27

MEMORANDUM AND ORDER

This proceeding stems from Northern States Power Company's (Northern States) application for a twenty-year renewal of its licenses to operate Units 1 and 2 of the Prairie Island Nuclear Generating Plant (Prairie Island). The Prairie Island Indian Community (PIIC) opposes the application. Following the Staff's issuance of its Safety Evaluation Report (SER),[1] PIIC submitted a new contention questioning whether Prairie Island's safety culture was sufficiently strong to ensure effective aging management during the twenty-year period of extended operation.[2] The Licensing Board admitted a narrowed version of the contention.[3] Both the Staff

[1] Safety Evaluation Report Related to the License Renewal of Prairie Island Nuclear Generating Plant Units 1 and 2 (Oct. 16, 2009) (ML092890209).

[2] *Prairie Island Indian Community's Submission of a New Contention on the NRC Safety Evaluation Report* (Nov. 23, 2009) (New Contention). PIIC's new contention is supported by an expert affidavit. *See Declaration of Christopher I. Grimes* (Nov. 23, 2009) (Grimes Declaration), attached to the New Contention. PIIC's "Safety Culture" contention is the sole remaining contention at issue in this adjudication.

and Northern States filed interlocutory appeals challenging the Board's order.[4] We deny the interlocutory appeals but nevertheless take review of the Board's decision on our own motion, reverse that decision, and terminate this adjudication.

I. BACKGROUND

A. "Safety Culture" Contention

PIIC has submitted a new contention asserting that the safety culture at Prairie Island was insufficiently strong to merit the Staff's finding, required under 10 C.F.R. § 54.29(a), of a "reasonable assurance" that the applicant will manage the effects of aging during the period of extended operation.[5] Specifically, the new contention argued that:

> Contrary to the conclusion in the . . . SER . . ., [PIIC] 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, [PIIC] 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).[6]

PIIC also offered the following description of the primary concern underlying its new contention: the "applicant's deficient performance and dereliction of its obligations to promptly and effectively correct deficient conditions call into question the applicant's ability to effectively implement the aging management program during the period of extended operation."[7]

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[3] Order (Narrowing and Admitting PIIC's Safety Culture Contention) (Jan. 28, 2010) (Board Order) (unpublished).

[4] *Northern States Power Company's Petition for Interlocutory Review of an Order Admitting a Safety Culture Contention* (Feb. 12, 2010) (Northern States Petition); *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) (Staff Petition).

[5] New Contention at 4 (referring to SER at p. 6-1).

[6] *Id.* at 4 (internal quotation marks omitted).

[7] *Id.* at 5.

In support, PIIC directed the Board's attention to examples cited in the SER of asserted "poor safety culture" from at least as early as 1998 to 2008, to "significant non-compliances" with our regulations in both 2008 and 2009,[8] and to an NRC finding that Northern States' implementation of its Corrective Action Program for Prairie Island was "lacking in rigor, resulting in inconsistent and undesirable results."[9]

As to timeliness, when it filed the new contention, PIIC stated simply that its contention was timely because the information on which it is based was not available when it submitted its initial petition, and that the new information was materially different from information previously available.[10] In its reply, PIIC argued that the SER provided for the first time the final pieces of information that, together with earlier deficiencies, displayed a pattern of a poor safety culture.[11]

As support for this contention, PIIC argued that a poor safety culture relates directly to the following four elements of an effective aging management program, as set forth in the NRC's Standard Review Plan for License Renewal:

7. Corrective actions, including root cause determination and prevention of recurrence, should be timely.

8. Confirmation process should ensure that preventive actions are adequate and that appropriate corrective actions have been completed and are effective.

9. Administrative controls should provide a formal review and approval process.

10. Operating experience should provide objective evidence to support the conclusion that the effects of aging will be managed adequately so that

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[8] *Id.* at 4-6.

[9] *Id.* at 11 (citing Inspection Report 05000282/2009009;05000306/2009009, U.S. Nuclear Regulatory Commission (Sept. 25, 2009), at 1 (ML102160771)).

[10] *Id.* at 4-5.

[11] *See Prairie Island Indian Community's Reply to NRC Staff's Answer and Northern States Power Company's Answer in Opposition to the Community's New Contention on the NRC Safety Evaluation Report* (Dec. 10, 2009) (PIIC Reply), at 3.

> the structure and component intended function(s) will be maintained during the period of extended operation.[12]

PIIC directed the Board's attention to several disparate issues related to the plant. One issue concerned "the leakage of borated water from the . . . refueling cavities" – an issue addressed in the SER, where the Staff concluded that the refueling cavities had been leaking since at least as early as 1998[13] and perhaps for the entire life of the plant.[14]

PIIC also cited several instances associated with findings made as part of the Regulatory Oversight Process. Principally, PIIC referenced NRC Information Notice 2009-11, and a related inspection "White" finding.[15] Information Notice 2009-11 discussed an event at Prairie Island Unit 1, where an auxiliary feedwater pump was rendered inoperable by a mispositioned valve. The Information Notice identified several factors that either caused mispositioning events, or led to their remaining undetected. PIIC also directed the Board's attention to two other "White" findings, regarding public radiation safety and mitigating systems.[16] PIIC denied, however, that it was focusing on the operational aspects of these

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[12] New Contention at 12 (citing NUREG-1800, Rev. 1, Standard Review Plan for License Renewal (Sept. 2005), at p. A.1-8 (ML052110007)); Grimes Declaration at 11.

[13] New Contention at 4 (citing SER at p. 3-142). *See also* Grimes Declaration at 4-5.

[14] New Contention at 5-7.

[15] *Id.* at 12-13 (referring to NRC Information Notice 2009-11: Configuration Control Errors (July 7, 2009) (ML091240039), and Notice of Violation, EA-08-272 (Jan. 27, 2009) (turbine-driven auxiliary feedwater pump) (ML102160763).

A "Green" inspection finding indicates that the deficiency in licensee performance has a very low risk significance and has little or no impact on safety. By contrast, "White," "Yellow," and "Red" inspection findings indicate increasingly serious safety problems. "White" findings denote a "low to moderate" safety significance. NUREG-1649, Rev. 4, Reactor Oversight Process (Dec. 2006), at 6 (ML070890365).

[16] *See* Notice of Violation, EA-08-349 (May 6, 2009) (public radiation safety, shipment of radioactive materials) (ML091270080); Notice of Violation, EA-09-0167 (Sept. 3, 2009) (mitigating systems, component cooling water system) (ML092450624).

problems. In particular, it claimed specifically that Northern States' poor management of the refueling cavity issue was "a culminating symptom of a weak safety culture."[17]

Taking these events together, PIIC concluded that "the NRC cannot legitimately find that there is reasonable assurance" under section 54.29(a)(1).[18] PIIC later clarified that its contention "goes to the viability of the Applicant's License Renewal Application" as well as to "the conclusions in the NRC Staff's Safety Analysis [*sic*] Report."[19]

PIIC did not request that the NRC reject the application due to asserted safety culture problems. Rather, it asked that the Commission "direct the applicant to conduct a third party assessment of safety culture" and thereafter that the Commission "address what corrective actions by the applicant are necessary before the renewal should be granted."[20]

Both the Staff and Northern States opposed admission of the new contention.[21] Both made substantively similar arguments. First, the information upon which PIIC relies was available months prior to the SER's issuance, and the SER contained no information that was either new or different from that previously available.[22] Second, the contention impermissibly challenged the adequacy of the Staff's SER rather than Northern States' application.[23] Third,

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[17] PIIC Reply at 6.

[18] New Contention at 14.

[19] PIIC Reply at 5-6. *See also id.* at 7.

[20] New Contention at 14; Grimes Declaration at 12-13.

[21] *NRC Staff's Answer in Opposition to Prairie Island Indian Community's Submission of a New Contention on the NRC Safety Evaluation Report* (Dec. 3, 2009) (Staff Answer); *Northern States Power Company's Answer Opposing the PIIC's Late-Filed Contention* (Dec. 3, 2009) (Northern States Answer).

[22] *See* Northern States Petition at 5, 8 n.18; Staff Petition at 15-22; Northern States Answer at 10-13; Staff Answer at 5-10.

[23] *See* Northern States Petition at 5; Northern States Answer at 14-15; Staff Answer at 11-13.

the contention raised issues that fall outside the scope of a license renewal proceeding.[24] And fourth, the information upon which the contention is based did not present a genuine dispute of material fact.[25]

B. Board Order

The Board concluded that the contention was timely because it was filed by the deadline that the Board had set for new contentions that were based on the SER.[26] It likewise concluded that the information contained in the SER was not previously available and was materially different from previously available information. Here, the Board reasoned that, while the safety issues to which PIIC refers date back to 2008, the contention is premised on what PIIC perceives to be a pattern of deficiencies at Prairie Island – a "history . . . outlined for the first time in the . . . SER."[27] The Board rejected the Staff's and Northern States' argument that all the individual pieces of information were available to PIIC and that it therefore could have filed its contention earlier.[28] Instead, the Board concluded that, prior to the SER's issuance, PIIC lacked "the full spectrum of information necessary to formulate its contention."[29] According to the Board, "none of those events, by itself, fully captured the scope of PIIC's concerns related to

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[24] *See* Northern States Petition at 1-2, 5-6, 8, 9-18; Staff Petition at 6-15; Northern States Answer at 16-18; Staff Answer at 13-17.

[25] *See* Northern States Petition at 6, 8, 18-22; Northern States Answer at 18-23; Staff Answer at 17-19.

[26] Board Order at 5. Because of this timeliness finding, the Board concluded that it did not need to consider whether the contention also would satisfy the requirements for nontimely filings found in 10 C.F.R. § 2.309(c). *Id.* at 7-8.

[27] Board Order at 6. *See also* PIIC Reply at 3, 4.

[28] Board Order at 6. The Board quotes with approval another Board's statement that it was "not impressed with arguments suggesting that, in order to raise a timely contention, a party must piece together disparate shreds of information that, standing alone, have little apparent significance." *Id.* (quoting *U.S. Department of Energy* (High Level Waste Repository), LBP-09-29, 70 NRC __ (Dec. 9, 2009) (slip op. at 12)).

[29] Board Order at 6.

safety culture."[30] For these reasons, the Board concluded that PIIC's contention was timely filed.

The Board then turned to the issue of the contention's admissibility. It admitted the contention, but narrowed it to read: "[Prairie Island's] safety culture is not adequate to provide the reasonable assurance required by 10 C.F.R. § 54.29(a)(1) that [Prairie Island] can manage the effects of aging during the requested period of extended operation."[31] In admitting this narrowed version, the Board addressed three objections from the Staff and Northern States.

The first objection was that the contention fails to raise a genuine material dispute. The Staff and Northern States argued that the contention challenges the SER rather than the application, and that we have expressly barred such challenges in adjudicatory proceedings.[32] The Board acknowledged that the contention explicitly challenged the "reasonable assurance" finding in the Staff's SER, but nonetheless concluded that PIIC intended to challenge the adequacy of Northern States' aging management plan as described in the license renewal application. To the extent PIIC was challenging the SER, the Board refused to consider the challenge. But to the extent PIIC was challenging the application, the Board concluded that PIIC raised a genuine material dispute.[33]

Next, the Board rejected the argument that PIIC's contention raised operational issues that were outside the scope of this proceeding. The Board acknowledged that the contention appears to raise current operating issues, but it concluded that a close reading of the contention reveals that it was treating those operating issues as indications of a safety culture too weak to

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[30] *Id.* at 6-7.

[31] *Id.* at 8.

[32] *See id.* at 9 (citing Northern States Answer at 14-15, Staff Answer at 11-13, and Final Rule, Changes to Adjudicatory Process, 69 Fed. Reg. 2182, 2202 (Jan. 14, 2004)).

[33] *Id.* at 10.

ensure the effectiveness of Northern States' aging management plan.[34] The Board accepted PIIC's argument that "safety culture is an essential component of an effective [aging management plan],"[35] and specifically is necessary to achieve an effective aging management plan.[36]

Finally, the Board disagreed with the Staff's and Northern States' argument that the contention was factually unsupported. The Board concluded that the reports, transcripts, expert declaration, and other documents provided factual support for the "Safety Culture" contention sufficient to justify its admission.[37]

Both Northern States and the Staff sought timely interlocutory review of the Board's Order.

II. DISCUSSION

A. THE INTERLOCUTORY APPEALS

Northern States and the Staff seek interlocutory review under 10 C.F.R. § 2.341(f)(2).[38] Although we find that the grounds asserted by the appellants do not fit within the confines of our rules for interlocutory review, we believe that the issues raised by the Staff go to the very heart of our long-standing position that license renewal proceedings should be limited in scope.[39] Like the issues for which we granted interlocutory review in *Vermont Yankee*, the issues here

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[34] *Id.* at 11.

[35] *Id.*

[36] *Id.* at 11-12. *See supra* note 12.

[37] Board Order at 14.

[38] *See* Staff Petition at 1, 5-15; Northern States Petition at 22-24.

[39] The Staff argues that the "Safety Culture" Contention fundamentally addresses operational rather than aging-related issues and therefore falls outside the scope of license renewal review, and that its admission, if upheld, could open the floodgates to an endless stream of new operating-issue contentions under the guise of "safety culture." *See* Staff Petition at 13.

are "significant," have "potentially broad impact," and "may well recur in the likely license renewal proceedings for other plants."[40] We therefore deny the interlocutory appeals, but exercise our inherent supervisory authority over adjudications to take *sua sponte* review of the Board Order.

B. ADMISSIBILITY OF "SAFETY CULTURE" CONTENTION

1. Requirements for Admissibility of New or Amended Contentions

The appellants argue that the Board should not have admitted the "Safety Culture" contention. These arguments rely upon two sets of regulatory requirements – for the admissibility of contentions generally and for the admission of contentions filed once the time for filing initial intervention petitions has passed. Our general regulation governing contention admissibility provides that the proponent of a contention must:

> (1) Provide a specific statement of the issue of law or fact to be raised or controverted . . . ;
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> (2) Provide a brief explanation of the basis for the contention;
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> (3) Demonstrate that the issue raised in the contention is within the scope of the proceeding;
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> (4) Demonstrate that the issue raised in the contention is material to the findings the NRC must make to support the action that is involved in the proceeding;
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> (5) 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 at the 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; and
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> (6) Provide sufficient information to show that a genuine dispute exists with the applicant on a material issue of law or fact. This information must

[40] *Entergy Nuclear Vermont Yankee, LLC* (Vermont Yankee Nuclear Power Station), CLI-07-1, 65 NRC 1, 5 (2007).

> include reference to specific portions of the application that the petitioner disputes and the supporting reasons for each dispute.[41]

In addition, our regulation governing the admissibility of non-timely contentions requires the proponent of such a contention to show that:

> (1) The information upon which the amended or new contention is based was not previously available;
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> (2) The information upon which the amended or new contention is based is materially different than information previously available; and
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> (3) The amended or new contention has been submitted in a timely fashion based on the availability of the subsequent information.[42]

2. Contention Improperly Expands Scope of License Renewal Proceeding

Both Northern States and the Staff argue that the Board erred in admitting PIIC's contention, given that it brings into this license renewal proceeding operational issues that are already addressed by existing NRC regulatory processes.[43] We agree. We stated unambiguously in our License Renewal Rule that "license renewal should not include a new, broad-scoped inquiry into compliance that is separate from and parallel to [our] ongoing compliance oversight activity."[44] We specifically indicated that other broad-based issues akin to safety culture[45] – such as operational history, quality assurance, quality control, management

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[41] 10 C.F.R. § 2.309(f)(1)(i)-(vi) (regarding contention admissibility). Subsection (vii) of § 2.309(f)(1) applies only to proceedings arising under 10 C.F.R. § 52.103(b), and therefore is inapplicable here.

[42] 10 C.F.R. § 2.309(f)(2)(i)-(iii).

[43] *See* Northern States Petition at 1-2, 5-6, 9-18; Staff Petition at 6-15.

[44] Final Rule, Nuclear Power Plant License Renewal, 56 Fed. Reg. 64,943, 64,952 (Dec. 13, 1991) (License Renewal Rule), *revised*, 60 Fed. Reg. 22,461 (May 8, 1995) (Revised License Renewal Rule).

[45] We define safety culture broadly. *See*, *e.g.*, Draft Safety Culture Policy Statement: Request for Public Comments, 74 Fed. Reg. 57,525, 57,525 (Nov. 6, 2009) (Draft Safety Culture Policy Statement) (defining the term as "that *assembly of characteristics, attitudes, and behaviors* in organizations and individuals which establishes that as an overriding priority, nuclear safety and security issues receive the attention warranted by their significance" (emphasis added; footnote (continued . . .)

competence, and human factors – were beyond the bounds of a license renewal proceeding.[46] This is because these *conceptual* issues fall outside the bounds of the passive, safety-related *physical* systems, structures and components that form the scope of our license renewal review.[47]

Likewise, in our Revised License Renewal Rule, we explicitly rejected a comment that we should analyze "whether there was any condition, act or practice that occurred during the period of initial licensing that would affect the period of extended operation."[48] Yet PIIC's contention would necessitate just such an analysis – the contention is based on compliance history that is retrospective by its very nature.

In large part, the references upon which PIIC relies involve ongoing operational matters that are appropriately addressed under the Staff's ongoing regulatory oversight process. The citations provided by PIIC here reflect no more than a collection of fundamentally routine inspection findings and regulatory determinations – to permit these to form the basis for a "safety culture" contention could result in a potentially never-ending stream of mini-trials on

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omitted)); Policy Statement on the Conduct of Nuclear Power Plant Operations, 54 Fed. Reg. 3424, 3425 (Jan. 24, 1989) ("the phrase safety culture refers to a *very general matter*, the personal dedication and accountability of all individuals engaged in any activity which has a bearing on the safety of nuclear power plants" (emphasis added)).

[46] *See*, *e.g.*, License Renewal Rule, 56 Fed. Reg. at 64,959 (operational history, quality assurance, quality control, human factors), 64,967 (training of operators); 64,968 (financial qualifications).

[47] *See Entergy Nuclear Generation Co.* (Pilgrim Nuclear Power Station), CLI-10-14, 71 NRC __ (June 17, 2010) (slip op. at 5) ("In developing the renewal regulations, the Commission concluded that the 'only [safety] issue' where the regulatory process may not adequately maintain a plant's current licensing basis involves the potential 'detrimental effects of aging on the functionality of certain systems, structures, and components [SSCs] in the period of extended operations'" (quoting Revised License Renewal Rule, 60 Fed. Reg. at 22,464)). *Id.* (passive SSCs only). We explained the reasons underlying these limits in *Pilgrim*, *id.*, 71 NRC at ___ (slip op. at 4-8).

[48] 60 Fed. Reg. at 22,485.

operational issues, in which the applicant would be required to demonstrate how each issue was satisfactorily resolved.[49]

This is not to say that the issue of safety culture is not of paramount importance. We recognize the importance of establishing and maintaining a strong safety culture, and the consideration of safety culture is part of our mission to protect the public health and safety. As we recently stated in the *Pilgrim* license renewal proceeding, "[t]he regulatory process continually reassesses whether there is a need for additional oversight or regulations to protect public health and safety."[50] Although (as in *Pilgrim*) not necessary for this decision, we note that the NRC has taken, and continues to take, measures to include the monitoring of safety culture in its oversight programs and internal management processes.[51]

As we stated in *Millstone*, our license renewal proceedings focus "on the potential impacts of an additional 20 years of nuclear power plant operation, not on everyday operational issues"[52] – even those that might be age-related.[53] "Those issues are effectively addressed and

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[49] And as the Staff correctly observes, to permit a safety culture contention on the grounds articulated by PIIC would open the door to a potentially unending series of revised contentions, which could be proffered upon each new inspection report, notice of violation, etc. *See* Staff Petition at 13, 15.

[50] *See Pilgrim*, CLI-10-14, 71 NRC __ (slip op. at 18).

[51] *See*, *e.g.*, Draft Safety Culture Policy Statement, 74 Fed. Reg. at 57,526; NRC Regulatory Issue Summary 2006-13, "Information on the Changes Made to the Reactor Oversight Process to More Fully Address Safety Culture" (July 31, 2006) (ML061880341); NRC Regulatory Issue Summary 2005-18, "Guidance for Establishing and Maintaining a Safety Conscious Work Environment" (Aug. 25, 2005) (ML052220239); Statement of Policy, Freedom of Employees in the Nuclear Industry to Raise Safety Concerns Without Fear of Retaliation, 61 Fed. Reg. 24,336 (May 14, 1996).

[52] *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-04-36, 60 NRC 631, 637-38 (2004) (footnote and internal quotation marks omitted).

[53] *Pilgrim*, CLI-10-14, 71 NRC __ (slip op. at 5) ("The aging management review for license renewal does not focus on all aging-related issues").

maintained by ongoing agency oversight, review and enforcement."[54] To the extent PIIC believes that the Staff has overlooked facts indicating an inadequate safety culture at Prairie Island as a general matter – separate and apart from license renewal – then PIIC's remedy is to direct the Staff's attention to the supporting facts via a petition for enforcement action under 10 C.F.R. § 2.206.[55] Indeed, if a stakeholder is of the view that immediate action is needed to remedy an ailing safety culture at Prairie Island or at any facility, then that matter should be brought immediately to the attention of the agency via section 2.206. Here, for example, PIIC's request for a third-party assessment of the plant's safety culture *now* seems fundamentally a concern that relates to current operations at the plant, as opposed to how it might operate during the period of extended operation.

We do not mean to underestimate the importance of the findings upon which PIIC relies, or to suggest that Prairie Island has a flawless safety record. We merely conclude that, taken as a whole, and in view of the SER, PIIC has not demonstrated a sufficient foundation for a "safety culture" contention.[56]

3. PIIC's Contention Is Untimely

Though we conclude that the Board should have dismissed the contention as beyond the scope of the proceeding, there is another basis for denial of the contention. Appellants

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[54] *Millstone*, CLI-04-36, 60 NRC at 638 (footnote and internal quotation marks omitted).

[55] *Id.*; *Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-01-17, 54 NRC 3, 23, 24 n.18 (2001).

[56] The Staff also argues that the original contention impermissibly challenges the adequacy of the Staff's SER rather than Northern States' application. *See* Staff Petition at 3. On this point, the Staff is correct. The contention, as originally worded by PIIC, inappropriately focused on the Staff's review of the application rather than upon the errors and omissions of the application itself. Such challenges are not permitted in our adjudications. *See*, *e.g.*, *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Unit 3), CLI-09-5, 69 NRC 115, 123 n.39 (2009); Final Rule, Changes to Adjudicatory Process, 69 Fed. Reg. 2182, 2202 (Jan. 14, 2004). But this matter is not before us; the contention, as reformulated and admitted by the Board, properly excludes PIIC's challenge to the Staff review.

argue that the information on which PIIC relies has been available for months (and, in one instance, eleven years) prior to both the Staff's October 16, 2009, SER and PIIC's November 23, 2009, "Safety Culture" Contention, that the SER contained no information that was either new or materially different from that previously available, and that these two facts render the contention fatally untimely.[57]

We agree. The Board fundamentally erred in concluding that the SER provided the final "piece of the puzzle" that allowed PIIC to formulate an admissible contention. The Board concluded that PIIC's contention was not based on specific new facts ("any single event or any single piece of information") but rather on "the history of [Northern States'] 'deficient performance and dereliction of its obligations to promptly and effectively correct deficient conditions'" – a "history . . . outlined for the first time in the . . . SER."[58] The Board stated that it would not expect PIIC to "piece together" mere "fragments" or "shreds of information" and that, therefore, PIIC's delay in filing its contention until the issuance of the SER was justified.[59]

We do not find that there are grounds present in today's case that support admission of a new contention. Based on our review of the record, we see no indication that the SER added a "last piece" of information or in any way addressed the "safety culture" at Prairie Island. Rather, the SER merely compiled and organized certain pre-existing information regarding one issue raised by PIIC – the refueling cavity leakage issue – into a single document.

The relevant discussion is located in SER section 3.0.3.2.17. The section discusses the Structures Monitoring Program (an aging management program), ultimately concluding that the program is consistent with the associated generic aging management program. As part of its consideration of the program, the SER describes in detail the chronology of events associated

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[57] *See*, *e.g.*, Northern States Petition at 5, 8 n.18; Staff Petition at 18-19.

[58] Board Order at 5-6 (quoting New Contention at 5).

[59] *Id.* at 6-7.

with the reactor refueling cavity leakage issue, which was the subject of requests for additional information and, ultimately, licensee commitments.[60] The SER discussion simply reflects the discovery, chronology, and resolution of a technical issue over the course of the license renewal review, as well as measures that will be taken to address the issue during the period of extended operation. The SER nowhere addresses the other facts on which PIIC relies in its "Safety Culture" Contention, and, indeed, does not discuss safety culture as a general matter. In our view, neither SER section 3.0.3.2.17 nor the SER as a whole articulates a "reasonably apparent" foundation for a safety culture contention.

Given that the SER does not provide support for PIIC's contention, we are left to consider whether the contention is otherwise timely. We find that it is not. As explained below, the remaining information on which PIIC relies was already available to it at least two months prior to PIIC's submission of its new contention.

It is undisputed that the individual documents upon which PIIC relies to support its new contention have been in the public domain for some time. Regarding the refueling cavity leakage issue, PIIC states that it relies upon "material found in the SER in regard to the leakage of borated water from the . . . refueling cavities" since at least as early as 1998[61] and perhaps for the entire life of the plant.[62] PIIC acknowledges, however, that this information was publicly available in late 2008.[63] Moreover, insofar as PIIC is relying upon the SER's discussion of the

[60] *See* SER at pp. 3-141 to 3-149, 1-8 to 1-9.

[61] *See* New Contention at 4 (citing SER at p. 3-142); Grimes Declaration at 4-5.

[62] New Contention at 5-7.

[63] *Id.* at 4.

history of the refueling cavity leakage issue, nearly all of this information had been included previously in the Staff's SER with Open Items issued 5½ months earlier.[64]

PIIC also relies upon three "White" findings of regulatory noncompliance. The Staff, however, had issued the Notices of Violation that were premised upon these findings on January 27, May 6, and September 3, 2009 – 10, 6½, and 2½ months prior to the filing date of PIIC's new contention.[65] In addition, PIIC cites a September 25, 2009, inspection report discussing the Corrective Action Program (CAP) in place at Prairie Island,[66] as well as the

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[64] Staff Petition at 22 & n.69. *Compare* SER at § 3.0.3.2.17, pp. 3-141 to 3-149 (*Operating Experience*) *with* Division of License Renewal, Office of Nuclear Reactor Regulation, Safety Evaluation Report with Open Items Related to the License Renewal of Prairie Island Nuclear Generating Plant, Units 1 and 2 (June 4, 2009), at § 3.0.3.2.17, pp. 3-142-to 3-143 (*Operating Experience*) (ML091550014) (SER with Open Items).

The final SER did contain some information that had not been available when the SER with Open Items was issued on June 4, 2009. Specifically, the Final SER summarized additional information submitted by the applicant on June 24 and August 7, 2009, in response to a June 10, 2009 request for additional information. *See* SER at pp. 1-8 to 1-9 and 3-342 to 3-349. But these documents were available 5, 3½, and 5½ months, respectively, prior to the filing of PIIC's new contention.

Also, the information in the SER with Open Items was the focus of extensive discussions at the July 7, 2009 meeting of the Subcommittee on License Renewal of the Advisory Committee on Reactor Safeguards (ACRS), held 4½ months prior to the filing of the new contention. Transcript, ACRS, Subcommittee on the Plant License Renewal for the Prairie Island Nuclear Generating Station (July 7, 2009), at 47-81 (ML092180127).

[65] *See* New Contention at 4, 10. PIIC specifically relies upon Notice of Violation, EA-08-272 (Jan. 27, 2009) (turbine-driven auxiliary feedwater pump) (ML102160763); Notice of Violation, EA-08-349 (May 6, 2009) (Shipment of radioactive materials) (ML091270080); and Notice of Violation, EA-09-0167 (Sept. 3, 2009) (component cooling water system) (ML092450624).

[66] New Contention at 11; Grimes Declaration at 10 (citing Inspection Report 05000282/2009009; 05000306/2009009 (Sept. 25, 2009), at 1 ("Inspectors continued to have concerns with the performance of the corrective action program") (ML102160771)). Following a 24-day inspection, NRC inspectors concluded, among other things, that "the corrective action . . . program at Prairie Island was functional, but implementation was lacking in rigor[,] resulting in inconsistent and undesirable results." Inspection Report, *supra*, at 1. The inspectors commented that the 2007 biennial problem identification and resolution inspection had criticized program implementation, that plant management had initiated an improvement effort, but that performance had nevertheless declined further. Although yet another improvement plan was "in progress," it had not been fully implemented and effective at the time the inspectors prepared their Inspection Report. *Id.*

Staff's identification of cross-cutting issues regarding Human Performance.[67] The document upon which PIIC relies for its cross-cutting issues argument was a September 1, 2009 letter, written 2½ months prior.[68]

It is clear that a contention based on these documents – all of which were available well before the SER issued – would be untimely, absent a discussion in the SER that would make "reasonably apparent" a foundation for such a contention.[69] As discussed above, we find no such discussion there.

The Board's ruling would effectively allow a petitioner or intervenor to delay filing a contention until a document becomes available that collects, summarizes and places into context the facts supporting that contention.[70] To conclude otherwise would turn on its head the regulatory requirement that new contentions be based on "information . . . *not previously*

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[67] New Contention at 9-11.

[68] New Contention at 10-22 (citing Letter from K. Stephen West, Director of Reactor Projects, U.S. Nuclear Regulatory Commission to Mark A. Schimmel, Site Vice President (Acting), Prairie Island Nuclear Generating Plant (Sept. 1, 2009)) (ML092440367).

[69] *See* Order (Conference Call Summary and Scheduling Order) (Nov. 4, 2009), at 3 (unpublished) (providing a 30-day timeframe for the filing of new or amended contentions after issuance of the latter of the draft Supplemental Environmental Impact Statement or SER with Open Items)); Memorandum and Order (Prehearing Conference Call Summary and Initial Scheduling Order) (Feb. 18, 2009), at 4 (unpublished) (same). *See generally Duke Power Co.* (Catawba Nuclear Station, Units 1 and 2), CLI-83-19, 17 NRC 1041, 1043 (1983) ("the unavailability of … documents does not constitute a showing of good cause for admitting a late-filed contention when the factual predicate for that contention is available from other sources in a timely manner"); *Philadelphia Electric Co.* (Limerick Generating Station, Units 1 and 2), ALAB-828, 23 NRC 13, 21 (1986) (an intervenor cannot establish good cause for filing a late contention when the information on which the contention is based was publicly available "for some time" prior to the filing of the contention).

[70] *Cf. Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Unit 3), CLI-09-5, 69 NRC 115, 126 (2009) (to show good cause for the late filing of a contention, "a petitioner must show that the information on which the new contention is based was *not reasonably available to the public*, not merely that the petitioner recently found out about it" (emphasis in original)).

available."[71] Further, such an interpretation is inconsistent with our longstanding policy that a petitioner has an "iron-clad obligation to examine the publicly available documentary material . . . with sufficient care to enable it to uncover any information that could serve as the foundation for a specific contention."[72] As we recently held in *Oyster Creek*:

> [O]ur contention admissibility and timeliness rules require a high level of discipline and preparation by petitioners, who must examine the publicly available material and set forth their claims and the support for their claims at the outset. There simply would be no end to NRC licensing proceedings if petitioners could disregard our timeliness requirements and add new contentions at their convenience during the course of a proceeding based on information that could have formed the basis for a timely contention at the outset of the proceeding. Our expanding adjudicatory docket makes it critically important that parties comply with our pleading requirements and that the Board enforce those requirements.[73]

By permitting PIIC to wait for the Staff to compile all relevant information in a single document, the Board improperly ignored PIIC's obligation to conduct its own due diligence. We find that the contention is impermissibly out of time.

III. CONCLUSION

Based upon the reasons set forth above, we *deny* the interlocutory appeals, *reverse the* Board Order, and *terminate* this adjudicatory proceeding.

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[71] 10 C.F.R. § 2.309(f)(2)(i) (emphasis added). Here, the SER contained no facts that were previously unavailable to PIIC. Nor, in our view, does the SER address the existing cumulative facts in such a way as to create new information previously inaccessible to PIIC.

[72] *Sacramento Municipal Utility District* (Rancho Seco Nuclear Generating Station), CLI-93-3, 37 NRC 135, 147 (1993) (internal quotation marks and footnote omitted). *Accord Shaw Areva MOX Services, LLC* (Mixed Oxide Fuel Fabrication Facility), CLI-09-2, 69 NRC 55, 65 n.47 (2009); *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2), CLI-02-28, 56 NRC 373, 386 (2002); *Turkey Point*, CLI-01-17, 54 NRC at 24-25.

[73] *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-09-7, 69 NRC 235, 271-72 (2009) (footnotes and internal quotation marks omitted).

IT IS SO ORDERED.[74]

For the Commission

[NRC SEAL]

/RA/

Annette L. Vietti-Cook
Secretary of the Commission

Dated at Rockville, Maryland,
this 30th day of September, 2010.

[74] Commissioner Apostolakis did not participate in this matter.

Chairman Gregory Jaczko, Dissenting:

I disagree with the majority's decision to overturn the Board's contention admissibility finding. Our procedures provide the parties with mechanisms to correct errors by seeking reconsideration and to avoid unnecessary evidentiary hearings by seeking summary disposition. Our procedures do not allow parties to seek interlocutory Commission review except in extraordinary circumstances, such as when a Board decision fundamentally alters the scope or conduct of a proceeding. Those circumstances are not present here. The possibility that a hearing will be conducted on a contention we may later find inadmissible is simply not a legitimate grounds for seeking Commission review under our present regulatory scheme. As we consider changes to our adjudicatory procedures, I believe the Commission should obtain public comment on a proposal to allow appeals of contention admissibility decisions. But until such appeals are permitted, I believe we should allow hearings to proceed as provided in our rules and, therefore, would not take review of the contention admissibility ruling at this time.

Commissioner Kristine L. Svinicki, Concurring

My dissenting colleague argues that the Commission should not have taken review of the Board's contention admissibility decision because our interlocutory review standards have not been satisfied. In many respects, this argument parallels a dissenting opinion in a previous matter before the Commission (involving the *Vermont Yankee* license renewal), to which Commissioners McGaffigan and Merrifield responded in a concurring opinion.[75] I have studied the parallelisms of the dissent in that case, and find that I agree with the concurring opinion's views. I will not repeat those views here, but like Commissioners McGaffigan and Merrifield, I respectfully disagree with my dissenting colleague's position that the Commission should not have taken review of this matter.

As explained in today's decision, I agree that the grounds for review advanced by Northern States and the Staff do not satisfy our interlocutory review standards. However, taking review of this matter as an exercise of the Commission's inherent supervisory authority over adjudications is appropriate to ensure consistency with our license renewal rules. In this instance, the Board's admission of this contention is fundamentally at odds with the well-established limited scope of license renewal proceedings. Moreover, consistent with our Policy Statement on the Conduct of Adjudicatory Proceedings, the Commission is obliged to ensure that our licensing proceedings are conducted efficiently and fairly. In my opinion, allowing the continued litigation of this contention would lead to the unnecessary expenditure of time and resources on an issue not germane to the proposed action.

[75] *Vermont Yankee*, CLI-07-1, 65 NRC at 8-9.

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 COMMISSION MEMORANDUM AND ORDER (CLI-10-27) have been served upon the following persons by Electronic Information Exchange.

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

Dated at Rockville, Maryland
this 30th day of September 2010.