

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

Before the Atomic Safety and Licensing Board

In the Matter of)	
)	Docket No. 72-10-ISFSI-2
Northern States Power Co.)	
)	
(Prairie Island Nuclear Generating Plant,)	ASLBP No. 12-922-01-ISFSI-MLR-
Independent Spent Fuel Storage Installation)))	BRD01

**NORTHERN STATES POWER COMPANY’S MOTION TO STRIKE PORTIONS
OF PRAIRIE ISLAND INDIAN COMMUNITY’S REPLY**

Northern States Power Company (“NSPM”) hereby moves to strike bases for one of the Prairie Island Indian Community’s (“PIIC”) amended contentions which PIIC improperly set forth for the first time in its Reply.¹ The Commission has long held that a reply may not contain new arguments or factual bases that were not raised in either the petition or the answers. USEC, Inc. (American Centrifuge Plant), CLI-06-9, 63 N.R.C. 433, 439 (2006) (“The Commission will not permit, in a reply, the filing of new arguments or new legal theories that opposing parties have not had the opportunity to address.”) (citing Louisiana Energy Services, L.P. (National Enrichment Facility), CLI-04-25, 60 N.R.C. 223, 225 (“In Commission practice, and in litigation practice generally, new arguments may not be raised for the first time in a reply brief”), reconsideration denied, CLI-04-35, 60 N.R.C. 619 (2004). See also Sequoyah Fuels Corp., CLI-94-4, 39 N.R.C. 187, 189 n.1 (1994).

PIIC’s Reply contravenes the Commission’s black-letter precedent. Specifically, PIIC adds to its basis for EA Contention 2 that the NRC Staff’s cumulative impact analysis is deficient because it should require license conditions 1) incorporating Northern States Power Company’s

¹ Prairie Island Indian Community’s Reply On Motion to Admit New and Amended Contentions, (Jan. 23, 2014)(“Reply”).

(“NSPM”) Cultural Resource Management Plan (“CRMP”) and 2) prohibiting NRC approval of any excavations supporting an ISFSI expansion that “will adversely affect or have an impact on cultural or historical resources at the site of the expansion.”² Nowhere in PIIC’s Motion³ does PIIC even mention the CRMP let alone imposing it as a license condition.⁴ Nor does PIIC’s Motion mention a license condition prohibiting NRC approval of future expansion that may have an impact on archaeological resources. PIIC’s EA Contention 2 simply alleged that the NRC Staff should require an archaeological survey as a license condition. If PIIC believed that the CRMP, which is described in the Draft Environmental Assessment, should be a license condition, it was obligated to raise that issue in its Motion. Likewise, its Motion should have asserted that a license condition include a prohibition on NRC’s approval of certain excavations. It is not proper for a party to hide its arguments for its reply, thus depriving the other party of its opportunity to respond.

Similarly, PIIC raises a new basis for its EA Contention 2 regarding high burnup fuel (“HBF”) – “for storage *less than 20 years*, the Staff may need to factor into its EA any reasonably foreseeable impacts from special treatment or unique features of the HBF during storage (e.g., radiation exposures from special inspections or increased monitoring, potential off-normal releases from HBF storage that might not occur for low burnup stored fuel).”⁵ In its Motion, the portion of PIIC’s EA Contention 2 related to HBF was specifically limited to “the potential site-

² Reply at 4 and 8.

³ Prairie Island Indian Community Motion to Admit New and Amended Contentions After Issuance of NRC’s Draft Environmental Assessment (Dec. 12, 2013)(“Motion”).

⁴ NSPM would like to bring to the Board’s attention that NSPM has an existing Prairie Island Nuclear Plant license renewal commitment to maintain and implement the CRMP to protect significant historical, archaeological, and cultural resources that may exist on the site. See Generic Environmental Impact Statement for License Renewal of Nuclear Plants, Supplement 39, Regarding Prairie Island Nuclear Plant, Units 1 and 2, Final Report, NUREG-1437, at 4-39 (New Commitment Number 39) and Safety Evaluation Report Related to the License Renewal of Prairie Island Nuclear Generating Plant Units 1 and 2, NUREG-1960, at A-9.

⁵ Reply at 9 (emphasis added).

specific environmental impacts of HB[F] having to remain on site indefinitely” due to the alleged “practical difficulties of getting fuel off the reactor site.”⁶ In its reply, PIIC impermissibly attempts to transform its long-term storage contention by adding a new basis i.e., alleged unevaluated environmental impacts from high burnup fuel for storage less than 20 years.

Thus, in accordance with 10 C.F.R. § 2.323, NSPM moves to strike those portions of PIIC’s Reply.⁷ PIIC’s Reply impermissibly includes new bases, new arguments, and new factual claims without satisfying the standards for late-filed contentions. Because PIIC included this new information in its Reply for the first time, the Board should strike it.⁸

Respectfully Submitted,

/Signed electronically by Jay E. Silberg /

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Dated: January 28, 2014

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⁶ Motion at 7.

⁷ NSPM has included as Attachment 1 the relevant pages of PIIC’s reply with NSPM’s proposed strikeouts.

⁸ In accordance with 10 C.F.R. § 2.323(b), counsel for NSPM certifies that they made sincere effort to contact the other parties in this proceeding on January 27, 2014, to explain to them the factual and legal issues raised in this motion, and to resolve those issues to the extent practicable, and certifies that these efforts to avoid this motion have been unsuccessful. During the parties’ consultations, counsel for PIIC stated that PIIC opposes NSPM’s motion. Counsel for the Staff stated that the Staff takes no position on this motion.

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing “Northern States Power Company’s Motion to Strike Portions of Prairie Island Indian Community’s Reply” has been served through the E-Filing system on the participants in the above-captioned proceeding this 28th day of January.

/Signed electronically by Kimberly A. Harshaw/

Kimberly A. Harshaw

conclusion was that any impacts on cultural resources would be adequately addressed in any future NRC license application review for the expanded ISFSI, as well as by the operation of NSPM's Cultural Resource Management Plan ("CRMP").

In response, the PIIC is appreciative of the NRC entering into the cooperating agency agreement. However, the PIIC must highlight any deficiencies that might still be found in the resulting Draft EA. Although the Staff purported to consider the cumulative impacts on cultural resources of the ISFSI expansion in the Draft EA, it did not actually evaluate any potential impacts. Rather it stated that future NRC licensing reviews and NSPM's CRMP would suffice to address any potential future impacts. PIIC does not believe that this "wait and see" approach fulfills the requirements of NEPA's cumulative impacts analysis, either under NRC or Federal case law. In addition, the CRMP ~~is not a condition of NSPM's license.~~ It is primarily in the control of NSPM. PIIC is usually notified after the fact about any cultural resources implications. For example, PIIC had no input whatsoever into the archaeological investigation in support of the PI ISFSI license renewal application. We received the report after the work had been completed. If PIIC had been consulted, we would have requested that the consultant look at the likely ISFSI expansion area, as NSPM had already been granted a Certificate of Need by the Minnesota Public Utilities Commission. This is at the heart of PIIC's concern in these contentions. There is no guarantee that PIIC will be involved before anything is undertaken by NSPM that could affect cultural resources. Irreversible damages to important cultural sites that have occurred in the construction of PINGP do not make PIIC comfortable with a "wait and see" approach, nor with relying on NSPM's procedures. PIIC notes that it does not doubt the sincerity and commitment of NSPM's staff. However, the expansion area needs to be

investigated before any renewal is granted ~~and the CRMP must be made a condition of the NSPM's license.~~

The Staff cited the Commission's decision in *McGuire* for the proposition the NRC would not have to include the ISFSI expansion in its cumulative impact analysis. However, a reading of *McGuire* not only demonstrates the facts of that case were completely different than the instant situation, but, based on the Commission's reasoning in the *McGuire* case, it also supports the conclusion that the ISFSI expansion must be considered in the cumulative impacts analysis. The *McGuire* case involved a license application from Duke Energy to renew the licenses for four power reactors. The contention offered by an intervener in the case asserted that the possible use of MOX fuel in the reactors should be considered as a cumulative impact in the NRC Environmental Impact Statement on the license renewal. The Commission found that the possible future action must at least constitute a "proposal" – i.e., "ripeness" – and must in some way be interrelated with the licensing action under consideration – i.e., a "nexus." *McGuire*, 55 NRC at 294-97. In terms of the ripeness criterion, the Commission stated that it ultimately boils down to what constitutes a "proposal." The future action must be a concrete or reasonably certain project, not projects that are "merely contemplated." The Commission was not aware of any of Duke's future MOX fuel plans and the only evidence of those plans was a Duke contract for the delivery of MOX fuel some six and a half years in the future. The Commission found that any number of events, including international events, could happen that would render the use of MOX fuel as unnecessary. The use of MOX fuel was dependent on a number of factors entirely outside of Duke's control. Thus, there was no "ripeness." In terms of the nexus criterion, the Commission reasoned that there must be some interdependence between the Duke license renewal and any future fuel-related amendment application. On this issue, the

to File New Contentions and Denying Their Admission (Feb. 25, 2001) at 7). The thrust of the contention here is that NRC must take the hard look and discuss mitigative measures now or condition future actions. Under the Commission's EJ guidance, this will serve to "take care to mitigate or avoid special impacts." PIIC does not believe that the Staff discussed the full and logical mitigative measures. ~~If the CRMP sufficiently addresses mitigative measures for future actions, it should be a condition of the instant license renewal. PIIC believes that the NRC should impose a license condition on any renewal granted for the ISFSI that any expansion of the ISFSI that requires excavation of land and additional construction shall not be approved by the NRC if it will adversely affect or have an impact on cultural or historical resources at the site of expansion. This would be in addition to, or could include, the statement that NSPM's CRMP is a condition of the license.~~

PIIC's Contention 2 also asserts that the Draft EA fails to analyze the cumulative impacts of the potential difficulties of being able to remove HBF from the ISFSI site, resulting in the possibility that such fuel might have to remain on site indefinitely. As noted *supra*, the issue here is not the safety of the transport *per se*, but rather the fact that the HBF would need to remain in storage onsite at PINGP if the fuel could not be transported off site. PIIC notes that the Staff did not challenge this part of the contention on basis and specificity or timeliness arguments of new or amended contentions. The Staff does argue that this portion of the amended contention is objectionable because the Staff is not required under NEPA to wait for information that is currently unavailable with regard to the safety and possible environmental impacts of long-term storage and eventual transportation of HBF, but may proceed to complete its environmental assessment now and rely on the soon-to-be-completed safety analysis, as well as future activities (studies on long-term storage of HBF; future transport cask certifications) and

existing regulations (requiring a demonstration of safety, clad integrity etc.) to address problems in the longer term. The Staff argues that any potential environmental impacts from HBF beyond what has been analyzed for low-burn up fuel is “remote and speculative” and need not be considered in the EA now. *See* Staff Response at 9-12.

The Staff’s assertions have direct implications for the preferred alternative in the Draft EA, which supports the 40-year renewal requested by NSPM. The 20-year renewal alternative was rejected. From a safety perspective, the Staff’s argument implies that licensing must be limited to what we can now reasonably predict. Thus, the Staff’s argument, in effect, supports only a limited extension of the ISFSI license to 20 years, not the 40-year term requested by NSPM. This seems to undermine the Staff’s choice in the Draft EA of the 40-year renewal period as the preferred alternative, and instead supports the rejected alternative of a 20-year renewal term. While the Staff states that there is no evidence to suggest that HBF cannot be safely stored beyond 20 years, there clearly is no hard evidence that HBF *can* be safely stored beyond 20 years. From a cumulative environmental impact perspective, if the Staff’s safety review allows HBF storage beyond 20 years in this case, it must automatically mean that the environmental impacts of such storage are not remote and speculative but are reasonably predictable and they must, in turn, be factored into the cumulative impact analysis for the current action. ~~In addition, even for storage less than 20 years, the Staff may need to factor into its EA any reasonably foreseeable impacts from special treatment or unique features of the HBF during storage (e.g., radiation exposures from special inspections or increased monitoring, potential off-normal releases from HBF storage that might not occur for low burnup stored fuel).~~

In regards to the HBF issue, NSPM argues that this is really a Waste Confidence issue and should be held in abeyance pending Waste Confidence completion. Although the Staff did