

February 4, 2014

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)
)
Northern States Power Company)
)
Prairie Island Nuclear Generating Plant)
)
(Independent Spent Fuel Storage))
)

Docket No. 72-10-ISFSI-2
ASLBP No. 12-922-ISFSI-MLRBD01

PRAIRIE ISLAND INDIAN COMMUNITY’S RESPONSE TO
NSPM’S MOTION TO STRIKE PORTIONS OF PIIC’S REPLY

The Prairie Island Indian Community (“PIIC”) responds to Northern States Power Company’s (“NSPM”) motion to strike portions of PIIC’s Reply in support of its motion to admit new and amended contentions.¹ The challenged statements represent permissible amplification of the facts and arguments set forth in PIIC’s motion to admit new and amended contentions.² Accordingly, NSPM’s Motion to Strike should be denied in its entirety.

NSPM relies on the Commission decisions in *USEC, Inc. (American Centrifuge Plant)*, CLI-06-9, 63 N.R.C. 433, 439 (2006), for the proposition that a reply may not contain new arguments of factual bases that were not raised in either the petition or the answers. PIIC is mindful of Commission precedent that a reply must be narrowly focused on the legal or logical arguments presented in an answer, and that a reply may not be used as a vehicle to raise new arguments or claims not found in the original contention or to cure an otherwise deficient contention. Commission precedent is also clear that it is appropriate for a reply to include, and

¹ Northern States Power Company’s Motion to Strike Portions of Prairie Island Indian Community’s Reply (Jan. 28, 2014).

² Prairie Island Indian Community Motion to Admit New and Amended Contentions After Issuance of NRC’s Draft Environmental Assessment (Dec. 12, 2013).

for the Board to consider, a response to the “legal, logical, and factual arguments presented in the answers, so long as new issues are not raised,” as well as information from a reply that “legitimately amplified” issues presented in the original pleading. *See PPL Susquehanna* (Susquehanna Steam Electric Station, Units 1 and 2), 65 N.R.C. 281, 301-02 (2007). PIIC’s reply contains appropriate arguments that logically flow from, and are narrowly focused on, the legal or logical arguments presented in the original motion supporting EA Contention 2, and the NRC Staff or NSPM responses on the issues of cumulative impacts on cultural resources or the concerns about high burnup fuel (“HBF”).³ The PIIC does not believe that any portions of its reply should be removed from Board consideration and opposes NSPM’s motion to strike those portions of its reply identified by NSPM in its motion.

Contrary to NSPM’s assertion, the PIIC has not raised new arguments or new legal theories in its reply. The PIIC Reply was a plain and simple response to the issues raised in the NRC Staff Response and NSPM Answer to PIIC’s motion to admit new and amended contentions. The substance of PIIC’s reply, logically reframed by necessity to address the arguments made by NRC Staff and NSPM in its responses, were contained in PIIC’s original motion. NSPM should not enjoy the luxury of being able to raise arguments against a PIIC contention and then protest a response that logically flows from those arguments.

PIIC’s motion to admit new and amended contentions focused on what PIIC perceived as deficiencies in the cumulative impacts analysis in the NRC’s Draft EA. In reply to the NRC

³ PIIC, in its original petition to intervene, first raised concerns about the deficient analysis in NSPM’s Environmental Report on the potential adverse cumulative impacts on cultural resources associated with the PI ISFSI expansion and the storage of high burnup fuel. PIIC sought leave to file new and amended contentions after the NRC issued its Draft EA because, among other things, PIIC believed that the NRC’s Draft EA failed to adequately address those deficiencies.

Staff and NSPM arguments against the validity of PIIC's proffered contentions, PIIC suggested methods to cure the deficiencies in the NRC Staff cumulative impact analysis, including, for example, making the Cultural Resources Management Plan ("CRMP") a condition of the license or adding a license condition that would prohibit 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. Following on the arguments raised in its answer to PIIC's motion to admit new and amended contentions,⁴ NSPM in its motion to strike again correctly points out in its motion that there is an existing commitment *for the PINGP Units 1 and 2 license renewal* to maintain and implement the CRMP to protect significant historical, archaeological, and cultural resources that may exist on the site.⁵ PIIC simply addressed NSPM's CRMP argument in its reply: the same type of commitment made for the PINGP Units 1 and 2 license renewals should be made for the PI ISFSI license renewal. Making that commitment (which NSPM readily acknowledges it was willing to do for PINGP Units 1 and 2 license renewal) a license condition

⁴ See, e.g., Northern States Power Company's Answer Opposing Prairie Island Indian Community's Motion to Admit New and Amended Contentions (Jan. 13, 2014) at 8 ("The Draft EA noted that NSPM has implemented the Cultural Resources Management Plan ("CRMP") 'to manage and ensure the protection of archaeological and cultural resources at the PINGP Units 1 and 2,' described the contents and use of the CRMP, and noted NSPM's commitment to maintain and implement the CRMP as long as NSPM owns or controls the plant site.") (citing Draft EA at 4-11).

⁵ See NSPM Motion at 2, n.4 ("NSPM would like to bring to the Board's attention that NSPM has an existing Prairie Island Nuclear Generating Plant license renewal commitment to maintain and implement the CRMP to protect significant historical, archaeological, and cultural resources that may exist on the site." (citing 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).

for the PI ISFSI is appropriate, and doing so would avoid any potential for such a commitment to be forgotten or neglected, particularly if NSPM no longer owns or controls the PI ISFSI site.⁶

With regard to the high burnup fuel (“HBF”) issue raised by NSPM in its motion to strike, PIIC did elaborate on the fact that information on the performance of HBF is not only lacking for the longer term (beyond twenty years) but also appears to be based solely on limited short term experiments and analysis for the period less than twenty years. The NRC Staff apparently feels comfortable with HBF storage for twenty years or less, but the Staff nonetheless will rely on continued testing programs and interim monitoring of HBF as actual “time-in-storage” goes on.⁷ PIIC, in its motion to admit new and amended contentions, and in its reply, was simply identifying the lack of data on HBF performance, and the consequent need for concern and caution. Significantly, the NRC Staff response also called into question the EA’s choice of the preferred alternative as 40-year storage. This is not a new and impermissible basis, argument or factual claim, and NSPM’s motion to strike this language should be denied.

⁶ PINGP Units 1 and 2’s extended licenses will expire in 2033 and 2034, respectively. NSPM is seeking a 40-year extension for the PI ISFSI license until 2053. PIIC seeks confirmation that NSPM’s CRMP commitment cannot and will not expire during any renewal term for the PI ISFSI.

⁷ See, NRC Staff Response to Prairie Island Indian Community Motion to Admit New and Amended Contentions After Issues of NRC’s Draft Environmental Assessment (Jan. 13, 2014) at 11-12.

CONCLUSION

For the foregoing reasons, NSPM's motion to strike portions of PIIC's reply should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing **Prairie Island Indian Community's Response to NSPM's Motion to Strike Portions of PIIC's Reply**, dated February 4, 2014, was provided to the Electronic Information Exchange for service on the individuals listed below, this 4th day of February, 2014.

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