

November 14, 2014

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)
)
NORTHERN STATES POWER CO.) Docket No. 72-10-ISFSI-2
)
(Prairie Island Nuclear Generating Plant) ASLBP No. 12-922-01-ISFSI-MLR-BD01
Independent Spent Fuel Storage Installation))

NRC STAFF'S ANSWER TO PRAIRIE ISLAND INDIAN
COMMUNITY'S MOTION FOR LEAVE TO FILE A NEW CONTENTION AFTER
ISSUANCE OF THE NRC'S CONTINUED STORAGE OF SPENT FUEL FINAL RULE

INTRODUCTION

Pursuant to 10 C.F.R. § 2.309(i)(1) and the Atomic Safety and Licensing Board's Amended Initial Scheduling Order,¹ the NRC Staff hereby files its response to the motion for leave to submit a new contention filed by the Prairie Island Indian Community in the State of Minnesota (PIIC).² PIIC's motion proposes a new contention challenging the NRC's Final Rule on the Continued Storage of Spent Nuclear Fuel (Continued Storage Rule). For the reasons discussed below, the NRC Staff opposes the admission of the new contention.

BACKGROUND

In 2012, the U.S. Court of Appeals for the District of Columbia Circuit found that the NRC failed to comply with the National Environmental Policy Act (NEPA) in issuing its 2010 update to the Waste Confidence Decision and accompanying Temporary Storage Rule.³ In response to the court's ruling, the NRC decided to not issue licenses dependent upon the Decision and

¹ Order (Amended Initial Scheduling Order) at 7 (Feb. 1, 2013) (unpublished).

² Prairie Island Indian Community's Motion for Leave to File a New Contention After Issuance of the NRC's Continued Storage of Spent Fuel Final Rule (Oct. 20, 2014) (Motion).

³ *New York v. NRC*, 681 F.3d 471 (D.C. Cir. 2012); see generally Final Rule: Consideration of Environmental Impacts of Temporary Storage of Spent Fuel After Cessation of Reactor Operation, 75 Fed. Reg. 81,032 (Dec. 23, 2010); Waste Confidence Decision Update, 75 Fed. Reg. 81,037 (Dec. 23, 2010).

Rule, pending completion of action on the remanded proceeding.⁴ On August 26, 2014, the Commission issued an order lifting its suspension of final licensing decisions,⁵ based on the issuance of a generic environmental impact statement (GEIS) and a revised rule codifying its generic determinations regarding the environmental impacts of continued spent fuel storage beyond a reactor's licensed operating life.⁶ In addition, the Commission directed the Boards in various licensing proceedings (including the instant proceeding)⁷ to reject the waste confidence contentions pending before them.⁸ On September 19, 2014, the NRC published the final Continued Storage Rule and supporting GEIS in the *Federal Register*.⁹ On October 20, 2014, the Continued Storage Rule became final.

DISCUSSION

I. PIIC's New Contention

PIIC proposes New Contention 1:

The Continued Storage Rule and GEIS Fail to Satisfy the NRC's Federal Trust Responsibility to Assess and Mitigate the Potential Impacts on the PIIC, Its People, and Its Land.¹⁰

⁴ *Calvert Cliffs 3 Nuclear Project, LLC & Unistar Nuclear Operating Services, LLC* (Calvert Cliffs Nuclear Power Plant, Unit 3), CLI-12-16, 76 NRC 63, 67 (Aug. 7, 2012).

⁵ *Calvert Cliffs 3 Nuclear Project, LLC, & Unistar Nuclear Operating Services, LLC* (Calvert Cliffs Nuclear Power Plant, Unit 3), CLI-14-08, 80 NRC __ (Aug. 26, 2014) (slip op.).

⁶ See NUREG-2157, *Generic Environmental Impact Statement for Continued Storage of Spent Nuclear Fuel* (Aug. 2014) (ADAMS Accession No. ML14188B749) (GEIS) (NUREG-2157). The Final Report of NUREG-2157 is available in two volumes at ADAMS Accession No. ML14196A105 and ML14196A107 (Sept. 2014).

⁷ See Order (Dismissing Waste Confidence-Based Contentions in Accordance with CLI-14-08) (Oct. 2, 2014) (unpublished).

⁸ *Calvert Cliffs*, CLI-14-08, 80 NRC __ (slip op. at 10).

⁹ Generic Environmental Impact Statement for Continued Storage of Spent Nuclear Fuel, 79 Fed. Reg. 56,263 (Sept. 19, 2014); Continued Storage of Spent Nuclear Fuel, 79 Fed. Reg. 56,238 (Sept. 19, 2014) (Final Rule). The rule became effective on October 20, 2014. 79 Fed. Reg. at 56,238.

¹⁰ Motion at 2.

In support of its new contention, PIIC argues that the NRC has failed to fulfill its trust responsibility in its analysis and conclusions in the Continued Storage Rule and GEIS in two respects. First, PIIC alleges the Continued Storage Rule and GEIS fail to analyze the potential failure of barriers maintained by institutional controls and its potential impacts on PIIC.¹¹ Second, PIIC states the GEIS's analysis of funds for replacement Independent Spent Fuel Storage Installations (ISFSI) and the development and operation of a Dry Transfer System (DTS) fails to analyze a potential loss of institutional controls and the cost of these controls, including the costs associated with permanent on-site storage.¹²

At the outset, the Staff maintains its position that the NRC, as a regulatory agency, fulfills its trust responsibility by complying with all relevant federal statutes.¹³ The NRC exercises its trust responsibility in the context of the Atomic Energy Act of 1954, as amended, (AEA) and NEPA, and affords Indian tribes and their members equal rights as the public under those statutes.¹⁴ As elaborated upon below, the Staff respectfully asserts that the new contention represents an impermissible challenge to the subject of an NRC general rulemaking. Moreover, even if the Board were to grant PIIC a waiver to challenge the Continued Storage Rule, PIIC's new contention fails to meet NRC's contention admissibility requirements.

A. PIIC's Waiver Request to Challenge the Continued Storage Rule

¹¹ Motion at 4.

¹² Motion at 6.

¹³ See NRC Staff Response to Prairie Island Indian Community Motion to Admit New and Amended Contentions After Issuance of NRC's Draft Environmental Assessment (Jan 13, 2014) at 14.

¹⁴ Cf. *Skokomish Tribe of Indians v. FERC*, 121 F.3d 1303, 1309 (9th Cir. 1997) (stating that FERC was required to exercise its trust responsibility in the context of the Federal Power Act and properly declined to provide the tribe "greater rights than they otherwise have under the FPA and its implementing regulations."). The Staff acknowledges that the Board has admitted Contention 3 regarding the Staff's trust responsibility with respect to its NEPA obligation to evaluate the cumulative impacts on cultural and historic resources at the site. See *Northern States Power Co. (Prairie Island Nuclear Generating Plant, Independent Spent Fuel Storage Installation)*, LBP-14-06, 80 NRC __ (Apr. 30, 2014) (slip op. at 30).

PIIC's new contention is plainly a challenge to the Continued Storage Rule and supporting GEIS.¹⁵ Accordingly, PIIC seeks a waiver to challenge 10 C.F.R. § 51.23(a) based on *New York v. NRC*, 681 F.3d 471 (D.C. Cir. 2012), which struck down the NRC's revised Waste Confidence Decision and revised Temporary Storage Rule based on the Commission's failure to evaluate the probability and consequences of failing to establish a permanent common repository.¹⁶ Based on the *New York* decision, PIIC believes that the necessary safety and environmental review for an ISFSI license renewal would be "artificially truncated by application of the [GEIS]."¹⁷ Accordingly, PIIC petitions the Commission to allow the safety and environmental review of the Prairie Island ISFSI license renewal application "to fully consider the requisite time frame in which deficiencies in the storage of spent fuel may be revealed."¹⁸

Contentions that are the subject of general rulemaking by the Commission may not be litigated in individual license proceedings without a waiver.¹⁹ The Commission's waiver standard is stringent by design, as the Commission has discretion to transact its business broadly, through rulemaking, or case-by-case, through adjudication.²⁰ To set aside a

¹⁵ See Motion at 13-14; Declaration of Philip R. Mahowald (Oct. 20, 2014). The GEIS is incorporated by reference into 10 C.F.R. § 51.23(a).

¹⁶ Declaration of Philip R. Mahowald (Oct. 20, 2014) at 1.

¹⁷ *Id.* at 2.

¹⁸ *Id.*

¹⁹ *Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 345 (1999) (quoting *Potomac Electric Power Co.* (Douglas Point Nuclear Generating Station, Units 1 and 2), ALAB-218, 8 AEC 79, 85 (1974)); 10 C.F.R. § 2.335(a); see GEIS at 1-7 ("Requiring the NRC to prepare site-specific discussions of generic issues, like those associated with continued storage, would result in the considerable expenditure of public, NRC, and applicant resources. Further, licensing boards could be required to hear nearly identical issues in each proceeding on these generic matters. Adopting the generic impacts of continued storage in a rule, on the other hand, allows the NRC and the participants in its licensing proceedings to focus their limited resources on site-specific issues that are unique to each licensing action.").

²⁰ See *Exelon Generation Co., LLC* (Limerick Generating Station, Units 1 and 2), CLI-13-07, 79 NRC 199, 207 (citing *Balt. Gas & Electric Co. v. Natural Res. Def. Council*, 462 U.S. 87, 101 (1983)).

Commission rule or regulation in an adjudicatory proceeding, a petitioner must demonstrate that:

- (i) the rule's strict application would not serve the purposes for which it was adopted;
- (ii) special circumstances exist that were not considered, either explicitly or by necessary implication, in the rulemaking proceeding leading to the rule sought to be waived;
- (iii) those circumstances are unique to the facility rather than common to a large class of facilities; and
- (iv) waiver of the regulation is necessary to reach a significant safety problem.²¹

As discussed in the GEIS, the NRC considered evaluating the environmental impacts of continued storage in individual site-specific reviews.²² The Commission's Order lifting the suspension on final licensing decisions underscored this consideration, noting that "[a]s part of the analysis underpinning the GEIS [] the NRC concluded that the impacts of continued storage will not vary significantly across sites," and that "the impacts of continued storage at reactor sites, or at away-from-reactor sites, can be analyzed generically."²³ The Commission noted that the court of appeals in *New York* endorsed this generic approach.²⁴ Finally, the Commission noted that "[b]ecause these generic impact determinations have been the subject of extensive public participation in the rulemaking process, they are excluded from litigation in individual proceedings."²⁵ This exclusion squarely applies to PIIC's new contention in the context of this proceeding.

²¹ See *Limerick*, CLI-13-07, 78 NRC at 207-08 (citing *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-05-24, 62 NRC 551, 559-60 & nn.29-34 (2005)).

²² See GEIS at 1-6 to 1-9 (discussing, among other things, review of impacts on a site-specific basis, preparation of a GEIS whose findings could be used in individual licensing reviews without the binding effect of a rule, or preparation of a policy statement).

²³ *Calvert Cliffs*, CLI-14-08, 80 NRC __ (slip op. at 9).

²⁴ *New York*, 681 F.3d at 480 ("[W]e see no reason that a comprehensive general analysis would be insufficient to examine on-site risks that are essentially common to all plants.").

²⁵ *Calvert Cliffs*, CLI-14-08, 80 NRC __ (slip op. at 9).

Further, PIIC's request does not meet the Commission's requirements for a waiver.²⁶

PIIC's request does not explain why the effects of the Continued Storage Rule are unique to the Prairie Island ISFSI as opposed to other ISFSI sites, nor does it discuss whether the NRC's licensing action in this case would implicate a significant safety problem. Rather, the waiver request relies on PIIC's immediate proximity to the ISFSI and its unique relationship to the federal government via the trust responsibility. These points do not amount to a sufficient justification to litigate the Continued Storage Rule and GEIS in this individual licensing proceeding.

B. Contention Admissibility Requirements

It is well established that contentions must comply with the contention admissibility requirements set forth in 10 C.F.R. § 2.309(f)(1). In accordance with 10 C.F.R. § 2.309(f)(1), an admissible contention must:

- (i) provide a specific statement of the legal or factual issue sought to be raised;
- (ii) provide a brief explanation of the basis for the contention;
- (iii) demonstrate that the issue raised is within the scope of the proceeding;
- (iv) demonstrate that the issue raised is material to the findings the NRC must make to support the action that is involved in the proceeding;
- (v) provide a concise statement of the alleged facts or expert opinions, including references to specific sources and documents, that support the petitioner's position and upon which the petitioner intends to rely at the hearing;
- (vi) . . . provide sufficient information to show that a genuine dispute with the Applicant exists with regard to a material issue of law or fact, including references to specific portions of the application that the petitioner disputes, or in the case when the application is alleged to be deficient, the identification of such deficiencies and supporting reasons for this belief

²⁶ See 10 C.F.R. § 2.335(b); *supra* note 21.

The Commission has emphasized that the rules on contention admissibility are “strict by design.”²⁷ “Mere ‘notice pleading’ does not suffice.”²⁸ “Failure to comply with any of these requirements is grounds for [the dismissal of a] contention.”²⁹

PIIC’s contention “challenges the omission of the required NEPA analysis and of findings required by the Atomic Energy Act (AEA) for relicensing the PI ISFSI.”³⁰ PIIC provides that the AEA specifically requires that the NRC make a finding that the proposed license renewal will be in “accord with the common defense and security and will provide adequate protection to the health and safety of the public.”³¹ However, PIIC has not demonstrated that its new contention is within the scope of this proceeding, as required by 10 C.F.R. § 2.309(f)(1)(iii).

PIIC’s new contention interprets the AEA to require the NRC to make a specific finding regarding long-term continued storage prior to renewing the ISFSI license. However, the AEA does not require the NRC to make explicit findings regarding the ultimate disposal of spent fuel extending beyond the license term. Licensing decisions —such as the one in this case— are made under a regulatory framework that already addresses health and safety of the public.³² Indeed, NRC’s regulations require that, prior to approving a license for an ISFSI, the NRC must have “reasonable assurance that . . . [t]he activities authorized by the license can be conducted without endangering the health and safety of the public and [licensed] activities will be

²⁷ *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-01-24, 54 NRC 349, 358 (2001), *pet. for reconsideration denied*, CLI-02-01, 55 NRC 1 (2002).

²⁸ *Amergen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-06-24, 64 NRC 111, 119 (2006) (internal quotation omitted).

²⁹ *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-9-10, 49 NRC 318, 325 (1999).

³⁰ Motion at 11.

³¹ *Id.* (citing 42 U.S.C. § 2232(a)).

³² The Commission’s regulations address both management of spent fuel (in 10 C.F.R. Parts 72, 50 and 52) as well as disposal of spent fuel (in 10 C.F.R. Parts 60 and 63).

conducted in compliance with the applicable regulations of this chapter.”³³ Further, the NRC may not issue a license “if, in the opinion of the Commission, the issuance of a license ... would be inimical to the common defense and security or to the health and safety of the public.”³⁴

The Continued Storage GEIS fulfills the NRC’s NEPA obligations to examine the environmental impacts of the continued storage of spent nuclear fuel. However, the AEA does not require the NRC to make a safety finding regarding the ultimate disposal of spent fuel in individual licensing actions.³⁵ Therefore, the scope of the NRC’s regulatory authority for licenses issued under the AEA is limited to the proposed activities that would be authorized by the requested license. PIIC’s contention does not relate to any specific findings the NRC must make in renewing an ISFSI license and, as a result, is outside the scope of this adjudicatory proceeding.³⁶

In addition, PIIC’s new contention fails to raise a genuine dispute on a material issue of law or fact as required by 10 C.F.R. § 2.309(f)(1)(vi). PIIC avers that its new contention raises a genuine dispute regarding “whether the NRC should renew the license for the PI ISFSI for up to 40 years.”³⁷ PIIC argues that “[u]nless and until the NRC cures the deficiencies caused by the failure to perform the required NEPA analysis and include AEA-required safety findings, this dispute will remain alive.”³⁸ PIIC states, generally, that any Environment Assessment (EA) with

³³ 10 C.F.R. § 72.40(a)(13).

³⁴ See 42 U.S.C. § 2133 (2005); 10 C.F.R. § 72.40(a)(14).

³⁵ The Commission has a longstanding policy of only licensing reactors if wastes generated by the reactor can be disposed of safely when necessary. See Denial of Petition for Rulemaking, 42 Fed. Reg. 34,391 (July 5, 1977). The Commission explicitly interpreted the AEA to not require any specific findings regarding sent fuel disposal prior to reactor licensing, but assured the public that the Commission, as a matter of policy, would not issue licenses if it believed spent fuel could not be disposed of in due course. See Consideration of Environmental Impacts of Temporary Storage of Spent Fuel After Cessation of Reactor Operation, 75 Fed. Reg. 81,032, 81,032-33 (Dec. 23, 2010) (Final Rule).

³⁶ 10 C.F.R. § 2.309(f)(1)(iii).

³⁷ Motion at 12.

³⁸ Motion at 12.

a finding of no significant impact based on the Continued Storage Rule and GEIS would suffer the same deficiencies as those identified by the court in *New York*.³⁹ According to PIIC, any Final EA that makes a finding of no significant impact based on the generic findings in the Continued Storage Rule and GEIS, would be “fatally defective.”⁴⁰

The Staff’s Draft EA supporting its review of the Prairie Island ISFSI license renewal was published for comment prior to the Continued Storage Rule and GEIS and contains a draft finding of no significant impact.⁴¹ The Draft EA acknowledges the D.C. Circuit’s remand of the Waste Confidence Rule and notes that the updated rule and supporting Generic EIS (GEIS) will provide the necessary NEPA analyses.⁴² The Continued Storage Rule requires the impact determinations in the GEIS (*i.e.*, NUREG–2157) to “be considered” in the Staff’s environmental assessments. Accordingly, the Staff’s Final EA is required to consider the analysis featured in the GEIS.⁴³

PIIC does not identify relevant sections in the license renewal application filed by Northern States Power Co. or in the Staff’s Draft EA to allege an insufficiency or omission.⁴⁴ Rather, PIIC generically challenges the legal basis of future long-term storage and disposal licensing decisions that the NRC has not yet made. An admissible contention “must raise a genuine dispute with the license application” to demonstrate that a material issue for hearing

³⁹ Motion at 9.

⁴⁰ Motion at 11.

⁴¹ See Proposed License Renewal of the Prairie Island Independent Spent Fuel Storage Installation (Draft environmental assessment and finding of no significant impact; request for comment), 78 Fed. Reg. 69460 (Nov. 19, 2013); Draft Environmental Assessment for the Proposed Renewal of U.S. Nuclear Regulatory Commission License No. SNM–2506 for Prairie Island Independent Spent Fuel Storage Installation (Draft EA) (ADAMS Accession No. ML13205A120).

⁴² See Draft EA at vi, 4-1, 4-2, 4-26, 4-27.

⁴³ See 10 C.F.R. § 51.23(b).

⁴⁴ The Staff has not yet completed its Final EA, which is expected to be complete in February, 2015. See NRC Staff’s Updated Status Report of Safety and Environmental Review Schedule (Oct. 1, 2014).

exists.⁴⁵ Accordingly, PIIC's new contention does not provide the requisite showing that a genuine dispute exists with the applicant on a material issue of law or fact.⁴⁶

CONCLUSION

For the reasons discussed above, the NRC Staff opposes the admission of PIIC's contention regarding the Continued Storage Rule and GEIS.

Respectfully submitted,

/RA/

Christopher C. Hair
Counsel for the NRC Staff

Dated in Rockville, Maryland
this 14th day of November, 2014

⁴⁵ *Entergy Nuclear Generation Co. and Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), CLI-12-15, 75 NRC 704, 709 (2012).

⁴⁶ 10 C.F.R. § 2.309(f)(1)(vi).

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CERTIFICATE OF SERVICE

Pursuant to 10 C.F.R § 2.305, I hereby certify that copies of the foregoing "NRC STAFF'S ANSWER TO PRAIRIE ISLAND INDIAN COMMUNITY'S MOTION FOR LEAVE TO FILE A NEW CONTENTION AFTER ISSUANCE OF THE NRC'S CONTINUED STORAGE OF SPENT FUEL FINAL RULE" in the above-captioned proceeding have been filed through the E-Filing system this 14th day of November 2014.

/Signed (electronically) by/

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