

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

Before the Atomic Safety and Licensing Board

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

**NORTHERN STATES POWER COMPANY’S ANSWER OPPOSING 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**

Northern States Power Company, a Minnesota corporation (“NSPM”), submits its Answer opposing the Prairie Island Indian Community’s Motion for Leave to File a New Contention After the Issuance of the NRC’s Continued Storage of Spent Fuel Final Rule (October 20, 2014) (“Motion”). The Motion should be denied for failure to meet the NRC requirements for contention admissibility in that it challenges an NRC regulation without meeting the waiver requirements for such a challenge, seeks to raise an issue outside the scope of the proceeding, and fails to provide an adequate basis.

I. BACKGROUND

On December 20, 2012, the Atomic Safety and Licensing Board (“Board”) granted the Prairie Island Indian Community’s (“PIIC”) request for hearing, holding waste confidence contentions in abeyance and admitting three contentions. *Northern States Power Co.* (Prairie Island Nuclear Generating Plant Independent Spent Fuel Storage Installation), LBP-12-24, 76 N.R.C. 503 (2012). The Board subsequently ordered that any new or amended contentions on new data would be timely if filed within 30 days of when new and material information became

available or was otherwise obtained by, or provided to, PIIC, whichever is sooner. Amended Initial Scheduling Order (Feb. 1, 2013) at 7. On September 19, 2014, the NRC issued its Continued Storage Rule (“CSR”) and NUREG-2157, Generic Environmental Impact Statement for Continued Storage of Spent Nuclear Fuel (“GEIS” or “NUREG-2157”).¹ On October 20, 2014, PIIC timely filed its Motion requesting admission of a “New Contention 1,” directly and impermissibly challenging the NRC’s generic determinations in the CSR and GEIS and otherwise failing to meet the NRC’s standards for admitting contentions. On October 27, 2014, PIIC filed a petition in the U.S. Court of Appeals for the D.C. Circuit challenging the CSR and the GEIS. Petition for Judicial Review of Administrative Agency Action, *Prairie Island Indian Community v. NRC*, No. 14-1212 (D.C. Cir. Oct. 27, 2014).

II. STANDARDS FOR CONTENTION ADMISSIBILITY

A proponent of a contention must demonstrate that its contention satisfies the standards for admissibility in 10 C.F.R. § 2.309(f)(1)(i)-(vii) and may not challenge NRC’s rules. 10 C.F.R. § 2.335(a). Under 10 C.F.R. § 2.309(f)(1)(iii), a contention is only admissible if it addresses matters within the scope of the proceeding. The prohibition on challenging NRC rules is particularly important here since the Commission has recently conducted rulemaking, with extensive public participation,² to generically define the environmental impacts of long term storage of spent nuclear fuel. The Commission has generically determined that the environmental impacts of continued storage of spent fuel beyond the licensed life for operation of a reactor are those impacts identified in NUREG-2157. *See* 10 C.F.R. § 51.23(a). Licensees do not need to consider these impacts in their environmental reports for ISFSIs and the NRC’s

¹ Continued Storage of Spent Nuclear Fuel, 79 Fed. Reg. 56,238 (Sept. 19, 2014).

² *See Calvert Cliffs 3 Nuclear Project, LLC* (Calvert Cliffs Nuclear Power Plant, Unit 3) *et. al*, CL-14-08, 80 N.R.C. ____ (slip op. at 11 n.35)(Aug. 26, 2014).

Environmental Assessment for an ISFSI license renewal shall consider the impacts in NUREG-2157. 10 C.F.R. § 51.23(b). “This means that NUREG-2157 provides the determinations of the environmental impacts of continued storage to be used in site-specific environmental reviews” and “[n]o additional analysis of the impacts of continued storage is required.”³ The Commission has made clear that “[t]hese generic determinations will not be revisited and may not be challenged in individual licensing proceedings without the grant of a waiver under 10 CFR 2.335.”⁴ Thus, contentions raising issues regarding the impacts of continued storage are outside the scope of this proceeding and do not meet the contention admissibility standard in 10 C.F.R. § 2.309(f)(1)(iii). *See also Calvert Cliffs*, CLI-14-08, slip op. at 9.⁵

Also among the admissibility requirements of 10 C.F.R. § 2.309(f)(1) are that the proponent must demonstrate that the issue raised is material to a finding that the NRC must make; provide a concise statement of alleged facts or expert opinions supported by sources and documents; and demonstrate that the contention provides sufficient information to show that a genuine issue exists with the licensee on a material issue of fact or law. 10 C.F.R. § 2.309(f)(1)(iv), (v), and (vi). The failure of a contention to comply with any one of the admissibility requirements is sufficient grounds for dismissing the contention. *Arizona Public Service Co.* (Palo Verde Nuclear Generating Station, Unit Nos. 1, 2, and 3), CLI-91-12, 34 N.R.C. 149, 155-56 (1991).

³79 Fed. Reg. at 56,243.

⁴*Id.* “As a result of this rulemaking, what may not be considered in those proceedings – due to the generic determination in 10 CFR 51.23(a) – are the environmental impacts of continued storage of spent fuel beyond the licensed life for the operation of the reactor contained in NUREG-2157.” *Id.*

⁵ As the Commission noted in its August 26, 2014 Order dismissing pending continued storage contentions, “we concluded that the impacts of continued storage will not vary significantly across sites; the impacts of continued storage at reactor sites, or at away-from-reactor sites, can be analyzed generically.” *Calvert Cliffs*, CLI-14-08, slip op. at 9. The Commission further concluded 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.” *Id.*

III. NEW CONTENTION 1 DOES NOT MEET NRC ADMISSIBILITY STANDARDS

A. PIIC's New Contention 1 Impermissibly Challenges NRC Rules and is Outside the Scope of this Proceeding

PIIC's New Contention 1 is a facial challenge to NRC's generic determinations in the CSR and GEIS, which absent a waiver, is not allowed in a licensing proceeding. 10 C.F.R. § 2.335(a). It also impermissibly raises long term storage issues, which the Commission has determined are outside the scope of this proceeding, and should be dismissed. 10 C.F.R. § 2.309(f)(1)(iii); *Calvert Cliffs*, CLI-14-08, slip op. at 9.

It is well established that licensing boards "should not accept in individual license proceedings contentions which are (or are about to become) the subject of rulemaking by the Commission." *Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 N.R.C. 328, 345 (1999). Likewise, a contention that seeks to litigate a generic determination established by Commission rulemaking is "barred as a matter of law." *Pacific Gas & Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), LBP-93-1, 37 N.R.C. 5, 29-30 (1993). On its face, New Contention 1 violates this well established principle.

PIIC asserts that the NRC's analysis in the CSR and GEIS has not fulfilled its federal trust responsibility. Motion at 4. First, PIIC states that the "[CSR] and GEIS fail to assess the impacts of a reasonably foreseeable event and its potentially catastrophic impacts on the Community, its homeland and its people." *Id.* Second, PIIC states that the NRC's safety determinations in the CSR and GEIS fail "to analyze a loss of controls" and fail to "analyze the cost of these controls and the cost impact on long-term viability." *Id.* at 6. These direct challenges to the CSR and GEIS are prohibited in individual adjudications by 10 C.F.R. §

2.335(a) absent a waiver by the Commission. As discussed in Section IV, PIIC has not met the standards of 10 C.F.R. § 2.335(d) for the Board to certify the matter to the Commission.

PIIC contends that the NRC Staff in its site-specific environmental assessment (“EA”) must assess the alleged reasonably foreseeable event missing from the GEIS, i.e., the loss of institutional controls, the costs of institutional controls, and the cost impact on the long term viability of these institutional controls. However, these issues are outside the scope of this proceeding because they are continued storage issues. The CSR states that NUREG-2157 contains the NRC’s generic determination of the environmental impacts of continued storage of spent fuel beyond the licensed life for operation of a reactor and that these are the determinations that the NRC Staff is to use in its site-specific EA. NUREG-2157 generically determined that the most reasonably foreseeable assumption is that institutional controls will continue.⁶ It also provides cost estimates for these institutional controls.⁷ While PIIC may disagree with the Commission-approved analysis in the GEIS, these issues are continued storage issues, addressed in the CSR and GEIS, and thus are outside the scope of this proceeding. They should therefore be dismissed. 10 C.F.R. § 2.309(f)(1)(iii).

PIIC provides no legal support for its position that the NRC’s federal trust responsibility requires non-compliance with, or waiver of, the Commission’s generally applicable regulations. PIIC’s claim that the NRC must do more than comply with existing statutes to meet its federal trust responsibility is unsupported by law. While the Supreme Court has long recognized the

⁶ NUREG-2157, Vol. 1, at 1-16.

⁷ PIIC’s assertion is that the GEIS does not address the costs associated with permanent on-site storage. However, NUREG-2157, Vol. 1, at xxix, states that such costs were added to the final GEIS based on public comments. These continued storage costs are included in Chapter 2 of the GEIS. *See e.g.*, NUREG-2157 at 2-17 describing the cost estimate to design, license, and construct an ISFSI.

“distinctive obligation of trust incumbent upon the Government in its dealing with [Indian Tribes],” *United States v. Mitchell*, 463 U.S. 206, 225 (1983), this trust does not impose a duty to take action beyond complying with generally applicable statutes and regulations. *Shoshone-Bannock Tribes v. Reno*, 56 F.3d 1476, 1482 (D.C. Cir.1995); *Morongo Band of Mission Indians v. FAA*, 161 F.3d 569, 574 (9th Cir. 1998). Nor does this trust obligation dictate that third party land (such as the NSPM ISFSI) be regulated in the best interest of Indian Tribes. *Gros Ventre Tribe v. United States*, 469 F.3d 801, 813 (9th Cir. 2006), *cert. denied*, 552 U.S. 824 (2007).

More importantly, the NRC’s federal trust responsibility does not justify the NRC's *non-compliance* with its regulations. In fact, the Supreme Court has consistently held that “[t]he trust obligations of the United States to the Indian tribes are established and governed by statute.” *United States v. Jicarilla Apache Nation*, 131 S. Ct. 2313, 2316 (2011). Furthermore, in fulfilling its statutory duties, the Government acts not as a private trustee, but pursuant to its sovereign interest in the execution of federal law and the applicable statutes and regulations control. *Id.* at 2324-25.⁸ Here, the PIIC is requesting the NRC, not to *fulfill* its applicable regulatory duties, but to *ignore* the generally applicable CSR and to ignore its longstanding procedural rule that prevents challenging rules in adjudications. Because there is no legal basis for this request, this contention must be dismissed. 10 C.F.R. § 2.309(f)(1)(vi).

⁸ “When ‘the Tribe cannot identify a specific, applicable, trust-creating statute or regulations that the Government violated,...neither the Government’s ‘control’ over [Indian Assets] nor common-law trust principles matter.’” *Id.* at 2325 citing *United States v. Navajo Nation*, 556 U.S. 287, 302 (2009). The Government assumes Indian trust responsibility only to the extent it expressly accepts those responsibilities by statute. *Jicarilla Apache Nation*, 131 S. Ct. at 2325.

B. The Assertion that the Continued Storage GEIS Failed to Assess a Foreseeable Event of Loss of Institutional Controls Is Unsupported by Facts and Law

1. The Claim that Loss of Institutional Controls is a Foreseeable Event that is Not Evaluated is Unsupported by Facts

PIIC's New Contention 1 must be dismissed because it fails to address material in the application, fails to raise an issue material to this proceeding, and fails to provide any documentation or expert testimony. 10 C.F.R. § 2.309(f)(1)(iv)-(vi). The PIIC claims that the CSR and GEIS failed to assess "a reasonably foreseeable event" i.e., "failed barriers" which are maintained by "institutional controls."⁹ This assertion fails on two counts. First, the GEIS qualitatively assesses the impact of failed barriers maintained by institutional controls. Further analysis would not be material to this proceeding. 10 C.F.R. § 2.309(f)(1)(iv), (vi). Second, PIIC provides no factual support for its assertion that this failed barrier scenario is reasonably foreseeable. 10 C.F.R. § 2.309(f)(1)(v).

Although the GEIS reasonably assumed that institutional controls (*e.g.*, the continued regulation of spent fuel) would continue,¹⁰ the NRC in response to public comments nonetheless added an analysis of the "highly speculative" scenario where institutional controls are lost.¹¹ NUREG-2157 qualitatively describes the impacts of loss of institutional controls, concluding that "in the event of a permanent loss of institutional controls, the resulting consequences to the environment across nearly all resource areas would be clearly noticeable and destabilizing,"

⁹ Motion at 4-5. NUREG-2157 defines institutional controls as actions taken by an institution (*e.g.*, a government, corporation, or other entity) for long-term site management and control of radioactive waste. Institutional controls at storage facilities include controlling site access, implementation of aging management programs, performing maintenance or remedial actions, monitoring, and controlling or remediating releases. NUREG-2157, Vol. 1, at 11-12 – 11-13.

¹⁰ NUREG-2157, Vol. 1, at 1-16.

¹¹ *Id.* at B-26 - B-31.

which equates to a LARGE impact.¹² Given this conclusion, PIIC's assertion that the NUREG-2157 analysis must be more complete is not material to this proceeding because it would not make a difference to the outcome of this proceeding.¹³ More detailed calculations to show that the impact is LARGE will not make a difference to the GEIS conclusions, will therefore not make a difference to the outcome of this proceeding, and thus should be dismissed. 10 C.F.R. § 2.309(f)(1)(iv), (vi).

To attack the GEIS's conclusions, PIIC relies on voting comments of NRC Chairman Macfarlane, where she opines that a "complete analysis" would have analyzed the impact of radionuclides on the local environment that would occur if the barriers maintained by institutional controls failed.¹⁴ However, the Chairman's comments do not support PIIC's contention that this scenario is "reasonably foreseeable." While the Chairman stated that she did not fully approve of the final GEIS because it failed to fully address a loss of institutional controls, she acknowledged that this is a "worst case scenario" not required to be analyzed under NEPA.¹⁵ She advocated for a "complete analysis" of this worst case scenario because this environmental review was "unique and unprecedented."¹⁶ Since Chairman Macfarlane's statements do not support the claim that loss of institutional controls is "reasonably foreseeable," the Contention lacks adequate basis. *See, e.g., Philadelphia Electric Co. (Limerick Generating*

¹² *Id.* at B-31 and 1-23 – 1-24. The GEIS also explains that a temporary loss of institutional controls would be similar to the impacts from accidents that are discussed in the GEIS. *Id.* at B-30.

¹³ The Commission has defined a "material" issue as meaning one where "resolution of the dispute would make a difference in the outcome of the licensing proceeding." 54 Fed. Reg. 33,168, 33,172 (Aug. 11, 1989).

¹⁴ Motion at 5.

¹⁵ "While I acknowledge that NEPA does not require consideration of worse case scenarios, I find that this is a unique and unprecedented review." Chairman Macfarlane's Comments on SECY-14-0072, "Proposed Rule: Continued Storage of Spent Nuclear Fuel," at 3 (ADAMS Accession No. ML14238A157) (Aug. 26, 2014) ("Chairman's Comments"). "I believe the agency should present a complete analysis of indefinite storage, including the full range of potential impacts from the worst case scenario." *Id.* at 4.

¹⁶ Chairman's Comments at 3.

Station, Units 1 and 2), ALAB-804, 21 N.R.C. 587, 593, 594 (1985) (because cited document “does not support the point for which it is urged,” the contention lacks a “cognizable basis”). PIIC provides no other support for its claim that this scenario is “reasonably foreseeable,” and thus New Contention 1 lacks adequate basis, and must be dismissed. 10 C.F.R. § 2.309(f)(1)(v). Similarly, the Contention fails to show that a genuine dispute exists on a material issue of fact, which also requires the contention’s rejection. 10 C.F.R. § 2.309(f)(1)(vi).

2. The Assertion that there Remains a Question Regarding How to Assure Funding Over the Long Term and Indefinite Scenarios is Unsupported by Law

PIIC asserts that the NRC’s analysis fails to analyze the costs of “institutional controls including funds for replacement of ISFSI and the development and operation of a [dry transfer system]” and the cost impact on long term viability of these institutional controls.¹⁷ Furthermore, PIIC contends that the “the question remains as to how to assure funding over the long term and indefinite term storage scenarios.”¹⁸ NRC regulations require reactor licensees to submit a spent fuel management plan, which addresses funding for spent fuel management prior to the time that DOE takes possession of the fuel. 10 C.F.R. § 50.54(bb). And, as a matter of law, DOE is responsible for providing funding for the costs of long term storage. Furthermore, the State of Minnesota has statutes requiring the accrual of funds to cover these costs. Thus, PIIC’s Contention must be dismissed because it fails to provide sufficient information showing that a genuine issue of fact or law exists with the application. 10 C.F.R. § 2.309(f)(1)(vi).

As required by the Nuclear Waste Policy Act, all nuclear utilities entered into the Standard Contract for Disposal of Spent Nuclear Fuel and/or High Level Radioactive Waste, 10

¹⁷ Motion at 6.

¹⁸ *Id.*

C.F.R. Part 961, which obligated DOE to begin disposing their spent nuclear fuel by January 31, 1998. DOE breached that contractual obligation, a breach of all nuclear utilities' contracts. *Maine Yankee Atomic Power Co. v. United States*, 225 F.3d 1336, 1341-42 (Fed. Cir. 2000). As a result, all nuclear utilities are entitled to recover damages caused by DOE's breach, damages which are "sufficient to place the injured party in as good a position as it would have been had the breaching party fully performed." *Indiana Mich. Power Co. v. United States*, 422 F.3d 1369, 1373 (Fed. Cir. 2005). As long as DOE's breach continues and the utility continues to suffer damages, the utility is entitled to recover the resulting costs.¹⁹ Damages payments, whether through settlement or litigation, come from the U.S. Treasury's Judgment Fund. Unless PIIC wants to posit that the U.S. Government will fail to pay its obligations, clearly an unreasonable assumption that need not be part of a NEPA or Atomic Energy Act ("AEA") analysis, the availability of funds to maintain spent fuel on site as long as DOE's breach continues is not subject to question. Thus, PIIC has shown no genuine issue of law or fact with the application. Therefore, this Contention must be dismissed. 10 C.F.R. § 2.309(f)(1)(vi).

Furthermore, the State of Minnesota Public Utilities Commission ("MPUC") regulates accrual of funds to cover decommissioning costs, including the costs for storing spent nuclear fuel prior to the time that DOE takes the spent fuel. The Minnesota Legislature has directed NSPM to include in its decommissioning fund filing a cost analysis assuming that spent nuclear fuel will be stored onsite for 60, 100, and 200 years.²⁰ Based on this analysis, the MPUC

¹⁹ In 1998, NSPM sued the United States for damages caused by DOE's breach. *See Northern States Power Co. v. United States*, 78 Fed. Cl. 449 (2007). In 2011, the Government and NSPM entered into a settlement agreement for prior damages and establishing a process for NSPM to submit claims for future damages as they are incurred.

²⁰ Minn. Stat. § 216B.2445. *See also* Order Approving Nuclear Decommissioning Plan and Modifying Refund Plan, Minnesota Public Utilities Commission, Docket Nos. E-002/M-11-939 and E-002/M-11-807 (Dec. 4, 2012) at 2, available at

determines how much funds are accrued annually from rate payers to cover these costs.²¹ NSPM submits an update to the MPUC on a triennial basis, which allows the MPUC to periodically reassess funding status and the reasonableness of the assumptions supporting decommissioning funding accruals. In its last Order approving NSPM's decommissioning plan, the MPUC ordered that NSPM include the costs for switching out the dry cask storage units at 50 years in its next update.²²

PIIC has provided no legal basis, documentation or expert testimony to support its contention that there remains a question regarding how costs for continued storage will be assured over the long term. Thus, its contention must be dismissed. 10 C.F.R. § 2.309(f)(1)(i) & (v).

C. PIIC's Assertion that NRC Has Omitted Findings Required by the Atomic Energy Act Is Unsupported by Facts or Law

In two short sentences, PIIC asserts that "findings required by the Atomic Energy Act (AEA) for relicensing the PI ISFSI," in particular that the PI ISFSI license renewal "will be [in] accord with the common defense and security," have been omitted. Motion at 11. However, nowhere in its statement of basis does PIIC identify a "finding required by the AEA" that is missing. The only possible reference is to "safety determinations" related to "institutional controls" and the costs of these institutional controls and a reference to Chairman Macfarlane's statement "not[ing] that safety and security of spent fuel are inextricably linked with sufficient financial resources." Motion at 6. Thus, New Contention 1 should be dismissed because it is

<https://www.edockets.state.mn.us/EFiling/edockets/searchDocuments.do?method=showPoup&documentId=%7B7C6A31F3-97C6-4BF9-B087-8492EB26A90C%7D&documentTitle=201212-81360-01> .

²¹ *Id.*

²² *Id.* at 9-10.

vague and fails to raise a material issue of law with the application. 10 C.F.R. §§ 2.309(f)(1)(iv), (vi); *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-01-24, 54 N.R.C. 349, 359-60 (2001) (admissible contentions “must explain, with specificity, particular safety or legal reasons requiring rejection of the contested [application].”). In addition, PIIC provides no legal support for its assertion that such safety determinations are required by the AEA.

NRC regulations require licensees to maintain security, to implement aging management plans during renewed license periods, to have spent fuel management plans, be financially qualified to carry out the activities of the license, as well as a host of other requirements to ensure the safety of continued storage.²³ PIIC seems to assert that a licensee will contravene these NRC regulations and that the NRC will suddenly fail to enforce these AEA requirements. PIIC has identified no basis for such an assumption. PIIC has provided no support for the claim that licensees in general, or NSPM in particular, will fail to follow NRC regulations.²⁴ And, the Commission has long held that, absent evidentiary support, “the agency has declined to assume that licensees will contravene our regulations.” *GPU Nuclear, Inc.* (Oyster Creek Nuclear Generating Station), CLI-00-6, 51 N.R.C. 193, 207 (2000). Thus, New Contention 1 should be rejected because it fails to provide sufficient information showing that a material issue of fact or law exists with the application and fails to provide adequate basis, and because PIIC has not provided any documentation or expert testimony. 10 C.F.R. § 2.309(f)(1)(v)-(vi).

²³ See, e.g., 10 C.F.R. §§ 72.180, 72.42(a)(2), 50.54(bb), 72.22(e), and 72.30. These are just some of the institutional controls relied on to ensure continued safe storage of used nuclear fuel.

²⁴ To the extent that PIIC is challenging NSPM’s financial qualifications, including its ability to fund spent fuel management, this issue is not timely because it should have been raised at the time that NSPM submitted its application.

IV. PIIC Has Not Demonstrated Special Circumstances Supporting a Waiver of the Continued Storage Rule

10 C.F.R. § 2.335(b) provides that a party may petition to waive application of a Commission rule or regulation in a particular proceeding by showing that “special circumstances with respect to the subject matter of the particular proceeding are such that the application of the rule or regulation (or a provision of it) would not serve the purposes for which the rule or regulation was adopted.” The alleged special circumstances that PIIC asserts are (1) the trust obligation owed it by the NRC; (2) the alleged long term risks associated with indefinite storage, as reflected in the Chairman’s comments; (3) the fact that the request is for a waiver of a “PROCEDURAL” rule; (4) PIIC’s proximity to the PI ISFSI, which PIIC claims warrants a “harder NEPA review;” (5) the decision in *New York v. NRC*, 681 F.3d471 (D.C. Cir. 2012); (6) there is no hope for an interim centralized storage facility or a repository; and (7) DOE has no “reasoned” scheme on how priorities will be set for moving spent fuel from operating reactors. Motion at 13-14; Declaration of Philp R. Mahowald (Oct. 20, 2014) at 1-2. None of these circumstances support a waiver of NRC rules in this proceeding.

The Commission has established a four factor test for applying 10 C.F.R. § 2.335(b). “The waiver petitioner must meet all four factors, demonstrating that: (i) the rule’s strict application would not serve the purpose for which it was adopted; (ii) there are ‘special circumstances’ 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) a waiver of the rule is necessary to reach a ‘significant safety problem.’” *Entergy Nuclear Generation Co.* (Pilgrim Nuclear Power Station), CLI-12-6, 75 N.R.C. 352, 364-65 (2012), *review denied sub nom. Massachusetts v. NRC*, 708 F.3d 63 (1st Cir. 2013).

PIIC's waiver request fails to meet the Commission's criteria and must be denied. The purpose of the CSR is to "preserve the efficiency of the NRC's licensing process by adopting into the NRC's regulations the Commission's generic determinations of the environmental impacts of the continued storage of spent nuclear fuel storage" beyond the reactor's licensed life. 79 Fed. Reg. 56,239. As described in Section III. A., these generic determinations include the issues raised in PIIC's New Contention 1, i.e., loss of institutional controls and costs of these institutional controls.²⁵ And PIIC recognizes, these determinations specifically apply to an ISFSI license proceeding. Motion at 2. In fact, the Prairie Island ISFSI is referenced in NUREG-2175 in multiple locations.²⁶ Also as previously discussed, the federal trust responsibility cannot provide a basis for asserting that the purpose of the rule would not be met by applying it to the PI ISFSI because the Government fulfills its trust duties by executing federal law, not by waiving federal law. *Jicarilla Apache Nation*, 131 S. Ct. at 2324-25. Thus the application of the Commission's generic determination to the Prairie Island ISFSI serves the purpose for which it was passed and PIIC has not met the first factor for a waiver.

PIIC's remaining asserted bases for its waiver request do not meet the second factor for waiving a rule because these alleged "special circumstances" were considered either explicitly or implicitly in the rulemaking proceeding. Chairman Macfarlane's statements were made generically in the context of the CSR rulemaking proceeding and were implicitly rejected by the remaining Commissioners. The Commission did not provide for any lesser showing for waiver of the CSR because it was a "procedural" rule, as alleged by PIIC, and thus this circumstance was implicitly considered. PIIC's proximity to the PI ISFSI is explicitly recognized in the

²⁵ See NUREG-2175, Vol. 1, at xxix.

²⁶ See e.g., NUREG-2175 at 3-4, 4-28, G-15.

GEIS.²⁷ The D.C. Circuit decision was the impetus for the CSR and GEIS.²⁸ And the likelihood of interim centralized storage, a geologic repository and the DOE's scheme for removing fuel from facilities are implicitly recognized in the fact that the GEIS analyzes long term and indefinite storage onsite at reactors.²⁹ Further, these alleged special circumstances are not unique to the PI ISFSI and thus, they do not meet the third factor for a waiver. Even "proximity to a nuclear power facility" or ISFSI is "hardly unique."³⁰ Finally, the "highly speculative" analysis of loss of institutional controls has been addressed in the GEIS and thus there is no significant safety issue to be addressed. For all of these reasons, PIIC has not made the *prima facie* showing required by 10 C.F.R. § 2.335(b) to support waiving the CSR and GEIS in this proceeding.

V. Conclusion

For all of these reasons, New Contention 1, impermissibly challenging the Commission's generic determinations in the CSR in this proceeding, should be dismissed.

Respectfully Submitted,

/Signed electronically by Jay E. Silberg /

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Dated: November 14, 2014

²⁷ NUREG-2157, Vol. 1, at 3-10 ("Prairie Island Indian Community is located immediately next to the Prairie Island Nuclear Generating Plant and is the closest minority population and American Indian Community to spent fuel storage pools and an ISFSI").

²⁸ NUREG-2157 at i.

²⁹ NUREG-2157, Vol. 1 at iii.

³⁰ *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Stations, Units 2 and 3), CLI-05-24, 62 N.R.C. 551, 562 (2005).

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Northern States Power Company's Answer Opposing 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 has been served through the E-Filing system on the participants in the above-captioned proceeding, this 14th day of November 2014.

/Signed electronically by Kimberly A. Harshaw/

Kimberly A. Harshaw