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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

OFFICE OF SECRETARY
RULEMAKING AND
ADJUDICATION STAFF

In the Matter of)
)
PRIVATE FUEL STORAGE, L.L.C.)
)
(Independent Spent)
Fuel Storage Installation))

Docket No. 72-22-ISFSI

**NRC STAFF'S RESPONSE TO
"STATE OF UTAH'S REQUEST FOR ADMISSION OF
LATE-FILED BASES FOR UTAH CONTENTION S"**

INTRODUCTION

Pursuant to 10 C.F.R. § 2.714(c), and the Atomic Safety and Licensing Board's "Order (General Schedule Revision and Other Matters)," dated February 2, 2000 at 3, the staff of the Nuclear Regulatory Commission (Staff) hereby files its response to the "State of Utah's Request for Admission of Late-Filed Bases For Utah Contention S" (Late-Filed Bases), filed January 26, 2000. For the reasons set forth below, the State's Late-Filed Bases should be rejected.

BACKGROUND

The State of Utah's original Contention S ("Decommissioning"), as admitted by the Board and consolidated with a portion of Castle Rock contention 7, asserted that:

The decommissioning plan does not contain sufficient information to provide reasonable assurance that the decontamination or decommissioning of the ISFSI at the end of its useful life will provide adequate protection to the health and safety of the public as required by 10 C.F.R. § 72.30(a), nor does the decommissioning funding plan contain sufficient information to provide reasonable assurance that the necessary funds will be available to decommission the facility, as required by 10 C.F.R. § 72.22(b).

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Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-98-7, 47 NRC 142, 196-97, 255 (1998).¹

On December 15, 1999 (as corrected and reissued on January 4, 2000), the Staff issued its Safety Evaluation Report (SER) for the proposed Private Fuel Storage, L.L.C. (PFS) facility, with respect to systems not directly associated with the dry storage casks proposed for use at the facility. Chapter 17 of the SER, among other things, evaluated the Applicant's proposal for financing the decommissioning of its proposed facility. *See* SER at § 17.1.4. With respect to storage cask decommissioning, the Staff evaluated the Applicant's proposal to prepay the estimated cost for decommissioning each storage cask into an externalized escrow account prior to shipment of each spent fuel canister to the facility. *Id.* at 17-5; *see also*, PFS License Application, App. B ("Preliminary Decommissioning Plan"), § 5.1. The Staff noted that this proposal departs from the language of 10 C.F.R. § 72.30(c)(1), which indicates that prepayment should be made "prior to the start of operation" (SER at 17-5); however, the Staff determined that the Applicant's proposal is acceptable, and that an exemption would be granted, if necessary, to authorize implementation of the PFS proposal. The Staff stated as follows (*id.* at 17-5 - 17-6):

[T]he PFS proposal assures that (a) reasonable assurance of adequate funding to decommission the Facility will be provided prior to the commencement of operations . . . ; and (b) funding to decommission the casks will be provided prior to construction of each cask (*i.e.*, prior to commencement of any operations involving that cask), thus assuring that each cask that is constructed will be decommissioned. Accordingly, PFS' decommissioning funding plan provides reasonable

¹ The Licensing Board admitted Utah Contention S Bases 1, 2, 4, 5, 10, and 11, and Castle Rock Contention 7 Bases "c" and "f". *See* LBP-98-7, 47 NRC at 197, 215. Utah Basis 11 and Castle Rock Basis "f" have since been excluded from the contention. *See Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-99-6, 49 NRC 114, 121-22 (1999); LBP-99-39, 50 NRC 232, 238 (1999).

assurance that decontamination and decommissioning at the end of Facility operations will provide adequate protection of the public health and safety and satisfies 10 CFR 72.30(c). Although funding for decommissioning the casks will be provided prior to cask construction rather than prior to the commencement of Facility operations, since the decommissioning funding plan provides reasonable assurance of adequate funding, an exemption from strict compliance with the language in 72.30(c)(1) would be issued as part of the license, if necessary, to authorize implementation of the PFS plan.

On January 26, 2000, the State filed the instant request to amend the bases for Contention Utah S, in which it sought to add two new bases to the contention. These new bases generally assert that the Staff's proposed acceptance of the Applicant's proposal regarding the prepayment of the decommissioning of casks contravenes the requirements of 10 C.F.R. § 72.30(c)(1) (Basis 12), and that the Staff's proposal improperly grants to the Applicant an exemption from 10 C.F.R. § 72.30(c)(1) without a request from the Applicant and without meeting the standards for exemptions or rule waivers. Late-Filed Bases at 3. The Staff submits that these new proposed bases for Contention Utah S should be rejected, for the reasons set forth below.

DISCUSSION

I. Late-Filed Basis 12 Should Be Rejected Under 10 C.F.R. § 2.714(a)(1).

The legal standards governing the admission of late-filed contentions or additional bases therefor are set forth in the Staff's response to the State of Utah's request to admit additional bases for Contention Utah E, filed on February 4, 2000, and are incorporated herein by reference.²

² In sum, the criteria to be considered when determining the admissibility of a late-filed contention are set forth in 10 C.F.R. § 2.714(a)(1)(i)-(v); the proponent of a late-filed contention or basis must demonstrate good cause for its failure to file on time; where good cause is not shown to exist, the proponent must make a compelling showing that the other four factors specified in the regulation outweigh its lack of good cause for the untimely filing.

In the Staff's view, the State has failed to show good cause for the late filing of Basis 12, or that a balancing of the factors set forth in 10 C.F.R. § 2.714(a)(1) favors the admission of Basis 12.³ While the State contends that it has good cause for the late filing of its bases because it received the Staff's SER on December 27, 1999 and submitted its late-filed bases within 30 days thereafter (Late-Filed Bases at 6-7), this assertion is without merit with respect to Basis 12, in that the State could have raised this basis following its receipt of the PFS License Application -- long before the Staff issued its SER.⁴

Significantly, Late-Filed Basis 12 is not based on new information contained in the SER, but upon the Staff's evaluation of information that was provided long ago by PFS. While Basis 12 asserts that "the Staff's proposed acceptance" of the Applicant's decommissioning plan is in violation of § 72.30(c)(1), the basis really challenges the legal sufficiency of the Applicant's decommissioning

³ The Staff does not contend that the State's Basis 13 is untimely without good cause, in that the State could not have known prior to the issuance of the Staff's SER that the Staff would consider granting an exemption, if necessary, insofar as the Applicant's cask decommissioning plan constitutes a departure from strict compliance with the language of 10 C.F.R. § 72.30(c).

⁴ The Licensing Board has stated that in assessing a contention's timeliness, "the emphasis is on the substance and sufficiency of the information available to the contention's sponsor." *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-99-43, 50 NRC 306, 313 (1999). Where a new issue is asserted to be based upon information contained in a document that has recently been made available to the public, "an important consideration is the extent to which the new contention could have been put forward with any degree of specificity in advance of the document's release." *PFS*, LBP-98-29, 48 NRC 286, 292 (1998). The fact that the document at issue is the Staff's SER does not alter these basic precepts. See *Duke Power Co.* (Catawba Nuclear Station, Units 1 and 2), CLI-83-19, 17 NRC 1041, 1044, 1045 (1983) (the "institutional unavailability" of a licensing-related document, such as an SER, does not establish good cause for filing a contention late, if information was available early enough to provide the basis for the timely filing of that contention).

plan. The Applicant's proposal has not changed since the submittal of its License Application;⁵ and the Staff's SER does not provide any new information that was not previously available to the State. There is no reason why the State could not have filed this basis in November 1997, when it filed Contention S, and the State therefore has not demonstrated good cause for its untimely filing of Basis 12.

With respect to the other factors specified in 10 C.F.R. § 2.714(a)(1), the State has not made a compelling showing that those factors support the admission of late-filed Basis 12.⁶ With respect to factor three, whether the State's participation may be expected to assist in developing a sound record, this factor does not support the State in that the only issue raised is purely a legal issue, which a State witness could not address. Also, while the State asserts that "[m]any of the same issues in the new basis for Contention S are the same as those contained in Contention E" (Late-Filed Bases at 7), the State has not identified what those bases are or which issues are similar.

Finally, the fifth factor weighs against the admission of Basis 12, in that it would broaden the issues and cause delay in the proceeding. Discovery between the State and PFS on Contention Utah S has closed, and the State's window of discovery against the Staff on this contention will close on February 15, 2000; thus, the admission of this additional basis could result in a claim that additional discovery is required and/or the filing of an additional summary disposition motion. Accordingly,

⁵ See License Application, App. B ("Preliminary Decommissioning Plan"), and Chapter 5 ("Decommissioning Funding Plan") at § 5.1 (specifying that \$17,000 will "be deposited into an externalized escrow account prior to shipment of each spent fuel canister to the PFSF").

⁶ Regarding factors two and four, other means do not appear to be available to protect the State's interest with respect to the issues raised in the Late-Filed Bases, and the State's interest would not be represented by existing parties with respect to these issues; these factors, however, carry less weight than the three other factors specified in the regulation. PFS, LBP-98-7, 47 NRC at 208.

the State has not made a "compelling" showing that these four factors outweigh the State's lack of good cause for its late filing of Basis 12.

II. The Admissibility of Late-Filed Bases 12 and 13.

In the following discussion, the Staff addresses the admissibility of Late-Filed Bases 12 and 13. For the reasons set forth below, the Staff submits that Late-Filed Bases 12 and 13 should be rejected.

A. Late-Filed Basis 12.

Late-Filed Basis 12 for Utah Contention S asserts as follows:

Basis 12. The Staff's proposed acceptance (SER at 17-5, -6) of the Applicant's proposal to require payment of decommissioning costs at the time a cask is accepted for storage rather than before the start of operations is in violation of the requirements of 10 CFR § 72.30(c)(1).

Staff's Response

The Staff opposes the admission of this basis on the grounds that it (a) fails to provide sufficient information to show that a genuine dispute exists with the Applicant on a material issue of law or fact, and (b) even if proven, would be of no consequence because it would not entitle the State to relief. *See* 10 C.F.R. §§ 2.714(b)(2)(iii) and 2.714(d)(2)(ii). While the Applicant's proposal may not strictly comply with the language of the rule -- as the Staff, itself, noted in the SER -- the issuance of an exemption would eliminate any basis for Basis 12, and the State would therefore not be entitled to relief. Further, to the extent that this Basis asserts that the Staff's proposed acceptance of the Applicant's funding plan is "integral to matters that are the subject of Contention S" (Late-Filed

Bases at 8), Basis 12 constitutes a misdirected challenge to the adequacy of the Staff's review.⁷

Accordingly, Basis 12 should be rejected.

B. Late-Filed Basis 13.

Late-Filed Basis 13 for Utah Contention S asserts as follows:

Basis 13. The Staff's proposed acceptance (SER at 17-5, -6) of the Applicant's proposal to require payment of decommissioning costs at the time a cask is accepted for storage rather than before the start of operations improperly grants to the Applicant an exemption to 10 CFR § 72.30(c)(1), without a request by the Applicant and without meeting the standards for exemption under 10 CFR § 72.7 or the standards for rule waiver under 10 CFR 2.758.

Staff's Response

The Staff opposes the admission of this basis -- which, like Basis 12, essentially raises a legal issue -- on the grounds that it (a) constitutes an indirect attack on the Commission's regulations, and (b) fails to set forth sufficient information to show that a genuine dispute exists with the Applicant on a material issue of law or fact. *See* 10 C.F.R. §§ 2.758 and 2.714(b)(iii).

First, Basis 13 constitutes an indirect attack on the Commission's regulations in 10 C.F.R. § 72.7, which explicitly allows the agency to grant exemptions from the regulations in appropriate circumstances. *See* Late-Filed Bases at 4-5. While the State cites two cases in support of the proposition that an agency must comply with its own regulations (Late-Filed Bases at 4-5), neither of those cases suggests that an agency may not issue an exemption from otherwise applicable

⁷ It is well recognized that "a contention will not be admitted if the allegation is that the NRC Staff has not performed an adequate analysis." *See* "Rules of Practice for Domestic Licensing Proceedings -- Procedural Changes in the Hearing Process," 54 Fed. Reg. 33168, 33171 (1989). Similarly, it is well established that contentions may not proceed on the basis of challenges to the adequacy of the Staff's review. *Curators of the University of Missouri (TRUMP-S Project)*, CLI-95-8, 41 NRC 386, 395-96 (1995).

regulations -- particularly where, as here, the regulations contain explicit authority for such exemptions to be issued.⁸

Further, to the extent that Basis 13 asserts that the Staff may not issue an exemption absent a request from an applicant, the State's assertion lacks legal foundation. The regulations in 10 C.F.R. Part 72 specifically provide that "the Commission may, upon application by any interested person or upon its own initiative, grant . . . exemptions." 10 C.F.R. § 72.7 (emphasis added). The State's assertion that the Staff cannot grant an exemption from the regulations on its own initiative thus constitutes an impermissible attack on the Commission's regulations.⁹

Finally, while the State contends that the issuance of an exemption would be inappropriate in this case (Late-Filed Bases at 5-6), it has failed to provide information sufficient to demonstrate a genuine dispute of material fact with the Applicant, contrary to 10 C.F.R. § 2.714(b)(2)(iii). Despite

⁸ The State cites two cases for the proposition that an agency must comply with its own regulations. See Late-Filed Bases at 4-5, citing *Yakima Indian Nation v. FERC*, 746 F. 2d 466, 474 (9th Cir. 1984), cert. denied sub nom *Public Utility District of Chelan County, Washington v. Confederated Tribes and Bands of Yakima Indian Nation*, 471 U.S. 1116 (1985), and *National Family Planning and Reproductive Health Assoc. v. Sullivan*, 979 F. 2d 227, 234 (D.C. Cir. 1992). Neither of those cases is applicable here. In *Yakima*, the court found that the Federal Energy Regulatory Commission had violated its regulations by issuing a license without the submittal of a key report that was the sole method by which that agency satisfied a specific statutory obligation. See *Yakima* at 474-75. In this case, that is clearly not the situation. *National Family Planning* is similarly inapposite. There is no hint in that case that the agency had exemption authority; to the contrary, if the regulations had provided for an exemption, the outcome might have been different. See *National Family Planning* at 233 ("Nowhere in the Court's analysis was it ever suggested that the regulations might permit any implicit exception for doctors to counsel on abortion.").

⁹ In addition, while the State argues that the Licensing Board "is not authorized to grant exemptions from a rule, or even to acquiesce in arguments that would result in the rule's circumvention" (Late-Filed Bases at 5, citing *Gulf States Utilities Co. (River Bend Station, Unit 1)*, LBP-95-10, 41 NRC 460, 473 (1995), that argument is irrelevant. Neither the Applicant nor the Staff has requested that the Licensing Board grant an exemption or acquiesce in the rule's "circumvention." Rather, if an exemption is granted, it would be granted by the Commission, itself, as part of its licensing decision -- consistent with 10 C.F.R. § 72.7.

the State's reference to Dr. Sheehan's Declaration, the State's assertions are vague, speculative, and completely unsupported.¹⁰ Thus, while the State asserts that prepayment of the decommissioning costs of the casks does not provide assurance of adequate funding "because the cost per cask is based on a best case scenario," and that "variations from that scenario would be expected to result in substantial additional costs" (*id.* at 6), the State fails to provide any support for these assertions.¹¹

Similarly, while the State asserts that "PFS has made no provision for increasing its cost per cask" (Late-Filed Bases at 6), in fact, the License Application states that "[t]he escrow amount and the per canister fee will be reviewed and adjusted annually to account for inflation and any changes in the estimated cost of storage cask decommissioning."¹² In ignoring this information, the State fails to demonstrate a genuine dispute of material fact with the Applicant, contrary to 10 C.F.R. § 2.714(b)(2)(iii). Finally, while the State asserts that "decommissioning funds for waste received later in the facility's life would be inadequate" because "PFS will not have the benefit of the time-value of monies" (Late-Filed Bases at 6), the State fails to provide any factual basis for this view, and improperly fails to provide any information to dispute the Applicant's statement that the estimated decommissioning cost per canister would be adjusted annually. Rather, the State's assertion

¹⁰ While the State refers to Dr. Sheehan's Declaration at ¶ 7 (*see* Late-Filed Bases at 5, 6), Dr. Sheehan's Declaration merely refers back to the State's pleading. Such circular references "deprive[] the Board of the ability to make the necessary, reflective assessment of the opinion as it is alleged to provide a basis for the contention." *PFS*, LBP-98-7, 47 NRC at 181. Further, an expert's opinion that fails to provide the expert's underlying reasoning is inadequate. *Id.*

¹¹ Information provided by the Applicant, moreover, indicates that it did not utilize a "best case scenario" and that the actual cost of cask decommissioning is expected to be less than the estimate provided. *See* Letter from John Donnell to NRC, dated June 18, 1998.

¹² *See* License Application, App. B ("Preliminary Decommissioning Plan"), Chapter 5 ("Decommissioning Funding Plan"), at § 5.1.

constitutes "mere speculation," which does not provide a material basis for a contention. *PFS*, LBP-98-7, 47 NRC at 180. *See also Yankee Atomic Elec. Co. (Yankee Nuclear Power Station)*, CLI-96-7, 43 NRC 235, 259 (to be material, a contention must present some indication that an alleged flaw in a decommissioning plan will result in a shortfall of the funds actually needed for decommissioning).

CONCLUSION

For the reasons set forth above, the Staff submits that the State's Late-Filed Additional Bases 12 and 13 should be rejected.

Respectfully submitted,

Catherine L. Marco

Catherine L. Marco
Counsel for NRC Staff

Dated at Rockville, Maryland
this 9th day of February 2000

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S RESPONSE TO "STATE OF UTAH'S REQUEST FOR ADMISSION OF LATE FILES BASES FOR UTAH CONTENTION S" in the above captioned proceeding have been served on the following through deposit in the Nuclear Regulatory Commission's internal mail system, with copies by electronic mail, or by deposit in the United States mail, first class, as indicated by an asterisk, with copies by electronic mail, this 9th day of February, 2000.

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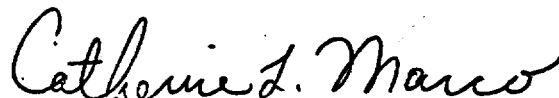
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