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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING BOARD

LBP-00-16

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Before Administrative Judges:

G. Paul Bollwerk, III, Chairman
Dr. Jerry R. Kline
Dr. Peter S. Lam

In the Matter of

PRIVATE FUEL STORAGE, L.L.C.

(Independent Spent Fuel Storage Installation)

Docket No. 72-22-ISFSI

ASLBP No. 97-732-02-ISFSI

June 1, 2000

MEMORANDUM AND ORDER
(Denying Request for Admission of
Late-Filed Contention Utah JJ)

In a motion filed April 19, 2000, intervenor State of Utah (State) requests that the Licensing Board admit a new late-filed contention Utah JJ, Co-Seismic Fault Rupture. According to the State, this contention is related to previously admitted contention Utah L, Geotechnical, in which the State contests various aspects of the geotechnical analysis put forth by Private Fuel Storage, L.L.C., (PFS) in support of its 10 C.F.R. Part 72 application for authority to construct and operate an independent spent fuel storage installation (ISFSI) on the reservation of the Skull Valley Band of Goshute Indians in Skull Valley, Utah. This issue statement, the State declares, is intended to challenge the adequacy and scope of a recent PFS analysis of a possible co-seismic rupture of the Stansbury fault with the East and/or West faults in the general vicinity of the facility, which it asserts could have important safety implications because of the potential for underestimating the ground motion that the PFS ISFSI systems, structures, and components (SSCs) must withstand. Both PFS and the NRC staff

challenge the admission of this late-filed contention, asserting it fails to meet both the 10 C.F.R. § 2.714 admission standards governing late-filed contentions and contentions generally.

For the reasons set forth below, we deny the State's request for admission of late-filed contention Utah JJ.

I. BACKGROUND

In LBP-98-7, 47 NRC 142, 191, reconsideration granted in part and denied in part on other grounds, LBP-98-10, 47 NRC 288, aff'd on other grounds, CLI-98-13, 48 NRC 26 (1998), we admitted contention Utah L, which provides:

The Applicant has not demonstrated the suitability of the proposed ISFSI site because the License Application and [Safety Analysis Report (SAR)] do not adequately address site and subsurface investigations necessary to determine geologic conditions, potential seismicity, ground motion, soil stability and foundation loading.

In support of this contention, the State provided a number of different bases, including concerns about surface faulting, ground motion, subsurface soil characterization, and the potential presence of collapsible soils. See [State] Contentions on Construction and Operating License Application by [PFS] for an [ISFSI] (Nov. 23, 1997) at 80-95.

As we have described in some detail in our ruling today regarding a State attempt to admit a late-filed revised contention Utah L, see LBP-00-15, 51 NRC __, __ (slip. op. at 3-4) (June 1, 2000), while the current Part 72 standard for seismic analysis remains deterministic, in April 1999 PFS requested that the staff grant it an exemption to allow it to do a probabilistic seismic analysis along the line permitted for new 10 C.F.R. Part 52 power reactor applicants. As is also discussed in that decision, the State has various concerns about that exemption request, including a proposal to allow PFS to use a 2000-year recurrence interval in its probabilistic analysis.

Contention Utah JJ now proffered by the State declares as follows:

The Applicant's failure to comply with 10 CFR § 72.102 places undue risk on the public health, safety, and the environment because the Applicant's effort to assess the seismic hazard implications of possible co-seismic rupture of the Stansbury Fault with the East and/or West Fault is erroneous and incomplete.

[State] Request for Admission of Late-Filed Utah Contention JJ (Co-seismic Fault Rupture) (Apr. 19, 2000) at 5 [hereinafter State Request]. According to the State, its request for this additional seismic analysis-related contention was precipitated by Amendment No. 10 to the PFS license application, which the State received on March 20, 2000. This March 17, 2000 amendment added an Appendix 2G to Chapter 2 of the PFS SAR that included a probabilistic analysis for a Stansbury/East-West co-seismic rupture with a 2000-year return period. The State notes that the PFS SAR amendment was a follow-on to a February 23, 2000 PFS commitment resolution letter (received by the State on February 28, 2000) that, in turn, was a response to a February 11, 2000 staff telephone request to PFS for such a co-seismic analysis, the need for which, the State maintains, it first identified in August 1999 supplemental responses to PFS interrogatories.

According to the State, this analysis has several errors. First, there is an error in the SAR 2000-year return period ground motion computation. Additionally, the State asserts that the PFS co-seismic rupture analysis omitted the deterministic evaluation required under the existing regulatory scheme, including section 72.102(f)(1), as well as a 10,000-year return period ground motion computation required by an agency rulemaking plan under which the staff is to develop a Part 72 rule revision to permit probabilistic seismic analysis for ISFSIs. See State Request at 5-10.

Relative to the five late-filing factors of section 2.714(a)(1), the State maintains that filing its contention within thirty days of receiving Amendment No. 10 to the PFS application

established it has met the good cause factor. According to the State, the February 23, 2000 commitment resolution letter was too speculative to be a late-filed contention filing trigger. Relative to the other four factors, the State declares that the experience and qualifications of its expert, Dr. James C. Pechmann places factor three -- assistance in developing a sound record -- on the admissibility side of the five-factor balancing test. The same is true for factors two and four in that, according to the State, there are no other parties or forums in which the State's interests can be adequately protected. Finally, relative to factor five -- broadening or delaying the proceeding -- the State asserts that this factor does not weigh against admission because litigation on this issue can proceed along the same track as contention Utah L, which is still subject to a limited discovery window and has yet to go to hearing. See id. at 10-13.

PFS opposes the admission of this contention both as to the late-filing factors and the substantive standards governing contention admission. On the late-filing factors, PFS declares that the State lacked good cause under element one, given that the March 2000 Appendix 2G included everything that was in the February 23, 2000 commitment resolution letter, thus putting the State's filing some fifty days after the appropriate trigger date. Moreover, PFS asserts the purported failure of PFS to perform a 10,000-year return period analysis and a deterministic co-seismic analysis are clearly late issues, given the former argument could have been raised when PFS filed for an exemption in April 1999 and the latter could have been lodged in the State's original November 1997 contentions based on the PFS analysis in its June 1997 application. Also lacking, PFS declares, is the State's showing regarding the other two significant late-filing factors, three and five. Regarding the former, PFS asserts this element brings little to the admissibility side of the balance, given Dr. Pechmann's expert participation will do little to help resolve the insignificant computational error regarding the 2000-year return period analysis or the legal issue over the need to use a deterministic approach and a

10,000-year return period. Factor five support also is missing, PFS declares, because admission of this contention will inevitably broaden and delay the proceeding. See [PFS] Response to [State] Request for Admission of Late-Filed Utah Contention JJ (May 3, 2000) at 4-8.

On the matter of the contention's admissibility under the section 2.714(b), (d) requirements, PFS declares that the computational error was, by the State's own admission, immaterial and, in any event, was corrected in an April 24, 2000 errata to Appendix 2G, rendering this matter insufficient to support the contention's admission. As to the 2000-year return rate and deterministic analysis issues, PFS declares both immaterial given that there is no regulatory requirement imposing a 10,000-year return rate and staff action granting its exemption request could relieve PFS of any duty to perform a deterministic analysis. See id. at 8-10.

The staff, for its part, takes much the same approach. The staff likewise finds the February 23, 2000 commitment resolution letter provided sufficient information to act as the trigger point for the State's contention, rendering its filing fifty days later without good cause. Also irrelevant to the good cause showing, the staff asserts, are the State's reliance on the 10,000-year return rate issue and the State's purported reluctance to act on the commitment letter based on its fear that it would be wasting resources if it acted and there was a revised analysis in any subsequent license amendment. Factor three does not support the State either, the staff declares, because the State has not made any attempt to indicate what Dr. Pechmann will say to support the contention. Also problematic, the staff maintains, is factor five because the admission of this issue is likely to broaden the admitted seismic issue and thereby delay the proceeding. See NRC Staff's Response to "[State] Request for Admission of Late-Filed Utah Contention JJ (Co-seismic Fault Rupture)" (May 3, 2000) at 5-11.

The staff does not support admission of the contention relative to the section 2.714(b), (d) factors either. According to the staff, the purported error is conceded by the State to be insignificant for a 2000-year return rate computation, rendering it immaterial and thus no basis for admitting the contention. The staff also argues that the purported lack of a deterministic co-seismic analysis is immaterial because it has already concluded that using deterministic methodology for the peak ground acceleration values will exceed the PFS SAR proposed design values and the State has determined that the 10,000-year return period analysis would exceed the SAR proposed design value. See id. at 12-15.

II. ANALYSIS

To admit a late-filed contention, such as contention Utah JJ, a presiding officer must find that a balancing of the five factors set forth in 10 C.F.R. § 2.714(a)(1) supports such an action. The burden of proof relative to this analysis is on the contention's sponsor, who must affirmatively address all five factors and demonstrate that, on balance, they warrant overlooking the lateness of the contention. See, e.g., Baltimore Gas and Electric Co. (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), CLI-98-25, 48 NRC 325, 347 & n.9 (1998) (citing cases), aff'd, National Whistleblower Center v. NRC, 208 F.3d 256 (D.C. Cir. 2000). Moreover, even if the late-filed contention meets the section 2.714(a)(1) requirements, it must also satisfy the admissibility standards in section 2.714(b), (d), in order to receive merits consideration.

Good cause for the petitioner's late filing is the first, and most important, element of the section 2.714(a)(1) balancing process. In this instance, the State's contention has several different facets that require different analyses. For example, it seems apparent that the State's claim that the PFS SAR does not have an appropriate deterministic co-seismic analysis could have been made in August 1999 when the State raised the question about the need for a

co-seismic analysis with PFS and, as such, lacks good cause. The issue of the 10,000-year return rate also appears to lack good cause because the staff has not yet acted on the PFS probabilistic exemption request. See LBP-00-15, 51 NRC at _ (slip op. at 6-8) (dismissing late-filed revisions to contention Utah L as not ripe).

This leaves the matter of the alleged erroneous co-seismic calculation that was first put forth in the February 23, 2000 commitment letter and was later made a part of the PFS application as Appendix 2G in the March 17, 2000 Amendment No. 10. The State again takes the position that it was not required to act until PFS formally amended its license application, an assertion we previously have rejected. See LBP-99-43, 50 NRC 306, 313-14, petition for interlocutory review denied, CLI-00-02, 51 NRC __ (Mar. 3, 2000). In fact, as both PFS and the staff correctly note, a comparison of Appendix 2G submitted as part of Amendment No. 10 and the PFS February 23, 2000 commitment letter reveals that the substance of the former was in the latter. Consequently, the contention “trigger” date for this analysis was February 28, 2000, the date upon which the State alleges, without challenge from either PFS or the staff, that it received the commitment letter. This, in turn, means that the State took fifty-one days to lodge the contention.

In the context of this issue, fifty-one days is too long to provide good cause. As the State’s filing of its contention purportedly based on the Appendix 2G information indicates, notwithstanding the technical nature of the information, the State was able to prepare a contention within thirty days. As far as we can determine, there was nothing to preclude the State from doing so relative to the PFS commitment letter, other than its erroneous view that it

did not need to act until PFS formally amended its license application.¹ This misjudgement does not, in our view, provide the requisite good cause.

Without establishing good cause regarding the delay surrounding the State's filing of its contention, the State must make a compelling showing relative to the other four factors. See id. at 315. It has not done so, however. Factors two and four -- availability of other means to protect the petitioner's interest and extent of representation of petitioner's interest by existing parties -- do weigh in favor of the State, but they are accorded less weight in the balance than factors three and five. See id. As to factor three -- assistance in developing a sound record -- while the State has presented a witness with impressive credentials, it once again has failed to provide us with any specific information about what that witness would say in support of the contention, a showing that appears to fall short of the specificity that has been required by the Commission if this factor is to add any significant weight to the admissibility side of the late-filing balance.² Finally, in connection with factor five -- broadening the issues/delaying the proceeding -- while this factor does not provide a significant drag on admissibility given that there is still some limited time for discovery and the hearing on seismic issues has not yet been

¹ Although the State suggests that additional time was necessary to afford a adequate analysis of the technical information involved, it also indicates that because of resource constraints it apparently declined to initiate such an analysis until PFS actually amended its license application. See State Request at 11. Putting aside the fact that intervenors are expected to accept the financial and resource burdens that are part of the adjudicatory process, see Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), CLI-83-19, 17 NRC 1041, 1048 (1983), as we have already indicated, an application amendment is not necessarily the trigger point for contentions based upon applicant information submitted to the staff. Certainly, to come forward earlier based on the applicant information seems preferable to having a late-filed contention determined to lack good cause, particularly when an amendment or supplement based on subsequent application information generally would not be a prohibitive burden if the contention, based on the applicant's initial information submission to the staff, has a solid basis.

² In this regard, the State also notes that an additional witness, Dr. Walter Arabasz, may provide testimony on this issue, see State Request at 12, but likewise fails to provide any specific information regarding his testimony.

held, nonetheless it is not sufficient, even with the support afforded by the other factors, to provide the compelling showing necessary to overcome the lack of good cause for the contention's late admission.

Thus, finding that a balancing of the section 2.714(a)(1) factors does not support admission of this late-filed contention, we deny the State's request.³

III. CONCLUSION

By waiting to file its contention Utah JJ until thirty days after PFS amended its ISFSI application to incorporate a co-seismic analysis, rather than submitting that new issue statement promptly after PFS provided that same analysis to the NRC staff some three weeks earlier in an commitment resolution letter, the State has failed to establish the requisite good cause for filing the contention late. Nor has the State made a compelling showing that, on balance, the other four elements of the section 2.714(a)(1) late-filing analysis support

³ Although our ruling on the late-filing criteria means we need not reach the question of the contention's admissibility under the section 2.714(b), (d) criteria, based on our review of the parties' filings, we would have admitted only that portion of the contention challenging the lack of a deterministic co-seismic analysis. By the State's own admission, for the 2000-year return period co-seismic analysis, the erroneous calculation is immaterial in light of the corrective supplement. See State Request at 9. So too, the issue of the use of a 2000-year return period rather than a 10,000-year return period lacks materiality until the staff has definitively acted on the PFS exemption request. See LBP-00-15, 51 NRC at _ (slip op. at 6-8).

admission of the contention. Accordingly, the Board finds late-filed contention Utah JJ is not admissible.

For the foregoing reasons, it is this first day of June 2000, ORDERED, that the State's April 19, 2000 request to admit late-filed contention Utah JJ is denied.

THE ATOMIC SAFETY
AND LICENSING BOARD⁴

/RA/

G. Paul Bollwerk, III
ADMINISTRATIVE JUDGE

/RA/

Dr. Jerry R. Kline
ADMINISTRATIVE JUDGE

/RA/

Dr. Peter S. Lam
ADMINISTRATIVE JUDGE

Rockville, Maryland

June 1, 2000

⁴ Copies of this memorandum and order were sent this date by Internet e-mail transmission to counsel for (1) applicant PFS; (2) intervenors Skull Valley Band of Goshute Indians, Ohngo Gaudadeh Devia, Confederated Tribes of the Goshute Reservation, Southern Utah Wilderness Alliance, and the State; and (3) the staff.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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(Independent Spent Fuel Storage)
Installation))

Docket No. 72-22-ISFSI

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LB MEMORANDUM AND ORDER (DENYING REQUEST FOR ADMISSION OF LATE-FILED AMENDED CONTENTION UTAH JJ) (LBP-00-16) have been served upon the following persons by deposit in the U.S. mail, first class, or through NRC internal distribution.

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Docket No. 72-22-ISFSI
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(DENYING REQUEST FOR
ADMISSION OF LATE-FILED
AMENDED CONTENTION UTAH JJ)
(LBP-00-16)

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Dated at Rockville, Maryland,
this 1st day of June 2000