May 13, 1998

UNITED STATES OF AMERICA

NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

In the Matter of	)	
	)	
PRIVATE FUEL STORAGE L.L.C.	)	Docket No. 72-22
	)	
(Private Fuel Storage Facility)	)	ASLBP No. 97-732-02-ISFSI

APPLICANT'S RESPONSE TO NRC STAFF, STATE OF UTAH AND OGD MOTIONS FOR RECONSIDERATION AND CLARIFICATION

I. INTRODUCTION

Applicant Private Fuel Storage L.L.C. ("Applicant" or "PFS") hereby responds to the "NRC Staff's Motion for Partial Reconsideration of LBP-98-7," the "State of Utah's Motion for Clarification and Reconsideration of LBP-98-7," and the "Motion and Memorandum of Ohngo Gaudadeh Devia [OGD] Requesting Reconsideration of Contentions," all dated May 6, 1998. The Applicant supports the NRC Staff's Motion for Partial Reconsideration, which requests the Atomic Safety and Licensing Board ("Board") to reconsider its admission of Utah Contention B. The Applicant opposes both the State of Utah's ("State") and OGD's motions for reconsideration and clarification.

II. NRC STAFF'S MOTION FOR PARTIAL RECONSIDERATION

The "NRC Staff's Motion for Partial Reconsideration of LBP-98-7" ("Staff's Motion") requests the Board to reconsider its admission of Utah Contention B, regarding

the Intermodal Transfer Point ("ITP") at Rowley Junction, and the other Utah Contentions that are premised on the State's claim that the ITP must be licensed under 10 C.F.R. Part 72. The Applicant fully supports the Staff's Motion but wishes to make several clarifications and additional points in light of the Motion.

First, the Staff's Motion focuses on the ability of PFS to transport spent nuclear fuel and to operate the ITP as a contract carrier for reactor licensees shipping spent fuel to the Private Fuel Storage Facility ("PFSF") on the Skull Valley Reservation. Applicant fully agrees that it could act as a contract carrier for such reactor licensees under 10 C.F.R. § 70.20a. See "Applicant's Motion for Reconsideration and Clarification" ("Applicant's Motion") at 4, n. 2. That provision issues a general license to any person

> to possess . . . irradiated reactor fuel containing material of the types and quantities subject to the requirements of § 73.37 of this chapter, in the regular course of carriage for another or storage incident thereto . . . .

10 C.F.R. § 70.20a. Thus, PFS could act as a contract carrier for reactor licensees shipping fuel under the general license provided in 10 C.F.R. § 71.12, and if it were to undertake any responsibility for the transportation of spent fuel, including operation of the ITP, it would do so as a contract carrier. In no instance, however, would PFS' activities at the ITP be under its 10 C.F.R. Part 72 license for the PFSF because, as emphasized in Applicant's Motion, it would be performing solely transportation functions at the ITP involving spent fuel sealed in transportation casks regulated under 10 C.F.R. Part 71 and related Department of Transportation regulations.

Second, the Staff correctly notes that the License Application for the PFSF provides that the "transportation of the spent fuel shipping casks from the originating reactor to the PFSF will occur in accordance with 10 CFR 71 and the originating reactor's license . . . ." Staff's Motion at 6, n. 7, quoting License Application at 1-3. Thus, the Staff is correct in its observation that if PFS undertakes any role in the transportation of spent fuel from the originating reactor to the PFSF -- including the operation of the ITP -- it would do so as a contract carrier on behalf of the reactor licensee shipping spent fuel to the PFSF.

Third, although not directly discussed in the Staff's Motion, PFS would also be authorized to operate the ITP (as discussed in Applicant's Motion at 2-4) directly under the general license issued to Commission licensees in 10 C.F.R. § 71.12 for the transport of spent fuel by virtue of its 10 C.F.R. Part 72 license for the PFSF. See also Commonwealth Edison Company (Shipment of Irradiated Nuclear Fuel from West Valley, N.Y.), DD-83-14, 18 NRC 726, 731-32 (1983) (reactor licensees under 10 C.F.R. Part 50 authorized to transport spent fuel from West Valley facility to reactor sites under the general license provided by 10 C.F.R. § 71.12). In either instance, whether performed as a contract carrier for a licensee under 10 C.F.R. § 71.12 or directly under the general license in 10 C.F.R. § 71.12, the functions would be performed pursuant to the general license for transportation in 10 C.F.R. §71.12.

Fourth, under no circumstances would PFS possess spent fuel at the ITP (or elsewhere during the course of transportation) except as a contract carrier for other NRC

licensees under the general license provisions of 10 C.F.R. § 71.12. This activity as a contract carrier would not constitute either possession or receipt for storage because it would be for transportation functions regulated solely under 10 C.F.R. Part 71 and related Department of Transportation regulations. Both the License Application and the Safety Analysis Report ("SAR") are clear that PFS' possession of spent fuel for storage at the proposed ISFSI under the 10 C.F.R. Part 72 license occurs only upon receipt and acceptance of the spent fuel at the PFSF site on the Skull Valley Reservation and not before. See SAR at 1.4-2 ("The PFSF will accept delivery and perform receipt inspection of the spent fuel shipping casks at the PFSF"); see also License Application at 3-2. Thus, any contact by PFS with spent fuel during the course of transportation and prior to receipt of the spent fuel at the PFSF site on the Skull Valley Reservation would be under 10 C.F.R. Part 71 as set forth above. As reflected by the Staff's Motion, this dichotomy is wholly in accordance with the NRC's separate regulatory schemes for the transportation and storage of spent nuclear fuel set forth in 10 C.F.R. Part 71 and 10 C.F.R. Part 72, respectively.

III. UTAH'S MOTION FOR CLARIFICATION AND RECONSIDERATION

In the "State of Utah's Motion for Clarification and Reconsideration of LBP-98-7" ("State's Motion"), the State requests clarification of the Board's rationale for rejecting most of those contentions of the State which the Board did not admit and requests, as well, reconsideration with respect to the Board's denial of Utah Contention J, parts of

Utah Contention W and Utah Contention CC. The Applicant opposes the State's Motion as set forth below.

A. Request for Clarification of Rationale for Dismissing Contentions

The State alleges that LBP-98-7 "provides the State with insufficient notice of the Board's rationale for its decision to permit the State to precisely identify and dispute the errors made by the Board in applying the law to the specific facts of the State's contentions." State's Motion at 3-4. The State requests therefore the Board to "provide a complete and full elucidation of the basis of its ruling for rejecting" all or parts of 16 of its contentions and further requests "the Board to provide a ten day period for the parties to respond to any reissued order." Id. at 4-6. According to the State, absent such elucidation, each of the rulings would be arbitrary and capricious for failing to adequately articulate the factual and legal bases for the ruling. Id. at 3.

At the outset, Applicant believes that the State misconstrues the arbitrary and capricious standard as it applies to the Board's rulings. The Board has articulated the applicable standards for the admissibility of contentions (LBP-98-7, slip. op. at 45-55) and, with respect to each of the State's contentions that were rejected, the Board clearly identified those standards which the State failed to satisfy. Thus, the Board's "path may reasonably be discerned," which is all that is required under the arbitrary and capricious standard (assuming that the rationale and basis of the decision is not otherwise arbitrary and capricious). Motor Vehicle Manufacturers Association of the United States, Inc. v.

State Farm Mutual Automobile Insurance Co., 463 U.S. 29, 43 (1983), quoting Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc., 419 U.S. 281, 286 (1974).[1]

For example, with respect to the Board's rejection of parts of Utah Contention W, the Board set forth the basis for rejecting the admission of most of that contention as follows:

> Inadmissible as to paragraphs one and two, paragraph three as it relates to the PFS facility and paragraphs four, five, and six in that they and their supporting bases fail to establish with specificity any genuine dispute; lack adequate factual or expert opinion support; and/or fail properly to challenge the PFS application.

LBP-98-7, slip. op. at 86-87. The Board's rationale is obvious given the standards of admissibility set forth earlier in its decision and a review of the contention itself together with the arguments supporting and opposing admission of the contention. Neither the contention nor its bases identified any section of the Environmental Report which it claimed was deficient, which the Commission's rules lay down as a clear requirement for contention pleading. See infra (Applicant's Response to the State's Request for Reconsideration of Utah W). Thus, the Board properly rejected the contention for "fail[ing] properly to challenge the PFS application." Nor did the contention and its bases provide any factual basis to show any adverse environmental effects from the alleged

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[1] The Court in Bowman stated that "we can discern in the Commission's opinion a rational basis for its treatment of the evidence, and the 'arbitrary and capricious' test does not require more." 419 U.S. at 290. In the face of this Supreme Court precedent, the State acknowledges that "[a] court may uphold a decision if the agency's path may reasonably be discerned. . . ." State's Motion at 3 (citations and quotations omitted).

deficiencies, see id., and thus the Board also properly rejected the contention for "lack[ing] adequate factual or expert opinion support." By virtue of these two determinations, it is also clear that the State "fail[ed] to establish with specificity any genuine dispute" as required under the Commission's pleading rules.

Further, the State's claim that the Board improperly used "boilerplate language" in the denial of its contentions, citing Dickson v. Secretary of Defense, 68 F.3d 1396, 1404-05 (D.C. Cir. 1995) is misplaced. In that case, the court found that the agency board had "recited the facts alleged by petitioners, and then found that a waiver would not be in the interest of justice, [omitting] the critical step -- connecting the facts to the conclusion." 68 F.3d at 1405. Here, the Board has not simply stated the facts and then rejected the petitioners' contentions as was done in Dickson. Rather, it stated the specific grounds for rejecting each contention. Moreover, the language or grounds for rejecting each contention is not identical as suggested by the State, but is tailored with respect to each. For example, one of the grounds specified in rejecting parts of Utah Contention W (quoted above) -- "fail properly to challenge the PFS application" -- is not found in the so-called "boilerplate" formula set out in the State's Motion at 4. By the same token, one of the grounds set forth in the State's "boilerplate" formula -- "impermissibly challenge the Commission's regulations or rulemaking-associated generic determinations" -- is not to be

found among the stated grounds for rejecting parts of Utah Contention W. The Applicant thus believes that the Board's path is readily understandable.[2]

B. Request for Reconsideration of Utah Contention J

The State requests the Board to reconsider the admissibility of Utah Contention J. State's Motion at 6-10. In support of its request, the State both reargues bases already rejected by the Board without shedding new light on why they support admission of the contention and attempts to advance new bases in support of its position without attempting to establish good cause for late submittal.[3] The Board should therefore reject the State's request for reconsideration.

The Board rejected the admission of Contention J on two grounds. First, the Board found that the contention "impermissibly challenge[s] agency regulations or

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[2] Even if the Board decides to reformat its decision on those contentions complained about by the State, the Board should direct the parties to move forward with informal discovery and other prehearing procedures at the same time in order to minimize any delay in the proceeding.

[3] Late-filed contentions and bases are subject to the five-factor test set forth in 10 C.F.R. § 2.714(a)(1). Yankee Atomic Electric Company (Yankee Nuclear Power Station), LBP-96-15, 44 NRC 8, 24 (1996); Yankee Atomic Electric Company (Yankee Nuclear Power Station), CLI-96-7, 43 NRC 235, 255 & n.15 (1996); Houston Lighting and Power Company (Allens Creek Nuclear Generating Station, Unit 1), ALAB-565, 10 NRC 521, 523 n.11 (1979) (substantive alteration of contentions, such as provision of additional support, can only be done with leave of Board). Bases include "alleged facts or expert opinions" and supporting sources. Yankee Nuclear, CLI-96-7, 43 NRC at 248 (citing 10 C.F.R. § 2.714(b)(2)); see General Public Utilities Nuclear Corporation (Oyster Creek Nuclear Generating Station), LBP-96-23, 44 NRC 143, 163 n.16 (1996) (additional allegations of deficiencies in an analysis or application). The State's claims in its Motion regarding the discovery of defective or anomalous canisters and canister breaches are new bases not raised in the original Contention J (although the State did raise the issue of canister breaches in its reply). See "State of Utah Contentions on the Construction and Operating License Application by Private Fuel Storage, LLC for an Independent Spent Fuel Storage Facility" at 63-71, dated November 23, 1997 ("State's Contentions"). The State has not attempted to show good cause for late submittal and therefore they should be rejected. Further, the State has acknowledged that its claim that fuel must be retrievable under 10 C.F.R. § 72.122(l) is also a new basis not stated in the original contention, see Tr. at 211, for which Applicant contends good cause has not been shown.

rulemaking-associated generic determinations, including those concerning canister inspection and repair," and second the Board concluded that the contention "lack[ed] adequate factual information or expert opinion support." LBP-98-7, slip. op. at 66-67. The State attacks the former by claiming that the Board's conclusion that the contention "impermissibly challenge[s] agency regulations or rulemaking-associated generic determinations" is based on a single Federal Register citation in Applicant's Answer, 59 Fed. Reg. 65,898, 65,901 (1994). State's Motion at 8.

This argument is an obvious attempt by the State to set up a strawman for it to knock over for there are a host of citations to agency regulations or rulemaking associated generic determinations in Applicant's Answer[4] which establish that the contention "impermissibly challenge[s] agency regulations or rulemaking-associated generic determinations." These include:

- "In instances involving welded closures, the [NRC] [S]taff has previously accepted that no closure monitoring system is required." NUREG-1536, Standard Review Plan for Dry Cask Storage Systems, at 7-3 (January 1997). "Casks enclosed entirely by welding do not require seal monitoring." Id. at 7-4
- "The strength of [double-seal] welds meet[s] ASME Boiler and Pressure Vessel Code criteria." 58 Fed. Reg. 17,948, 17,953 (1993). "The primary reason for requiring the use of ASME section III instead of other standards is to ensure the confinement of [gaseous] fission products." 58 Fed. Reg. at 17,954; see also NUREG-1536 at 7-5.

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[4] See Applicant's Answer to Petitioner's Contentions at 122-25, 133-35, dated December 24, 1997 ("Applicant's Answer").

- "There are no known long-term degradation mechanisms which would cause the [welded] seal to fail within the design life of the [canister] . . . ." 59 Fed. Reg. at 65,902. See also 58 Fed. Reg. at 17,954.

- "Laboratory experiments [with stainless steels similar to that used in the canister] have indicated . . . [that] the expected corrosion would . . . not result in exceeding a corrosion depth of 0.0005 inches [over the 50-year design life of the canister]." 59 Fed. Reg. at 65,902; 58 Fed. Reg. at 17,954.

- There is no need to inspect the fuel cladding once a canister is filled with helium and sealed because the canister serves as a means of confinement in lieu of the cladding. 51 Fed. Reg. 19,106, 19,108 (1986) (Part 72, Proposed Rule) (citing NUREG-1092).

- The risk of penetration from the inside of a canister filled with helium and double-seal welded shut is so low that there is no need to inspect the canister for leaks or corrosion or to open it up to inspect the condition of the fuel. See 59 Fed. Reg. at 65,901.

- The NRC has determined that "for storage of spent fuel the cladding need not be maintained if additional confinement is provided . . . . the canister could act as a replacement for the cladding." 51 Fed. Reg. at 19,108 (citing NUREG-1092). If the cladding need not be maintained, it need not be inspected, and the fuel canister need not be opened.

- "[T]he NRC considers that other forms of [cask] monitoring, including periodic surveillance, inspection and survey requirements . . . during the use of canisters with seal weld closures can adequately satisfy NRC requirements." 59 Fed. Reg. at 65,902, 55 Fed. Reg. 29,181, 29,188 (1990) (Part 72, Statements of Consideration); see 58 Fed. Reg. at 17,954.

See Applicant's Answer at 122-25, 133-35. Thus, the State's attempt to attack a single citation as the entire basis of the Board's ruling that Utah Contention J "impermissibly challenge[s] agency regulations or rulemaking-associated generic determinations" is plainly without merit and must be rejected.

Further, the attacks levied by the State against the sole Federal Register citation which it references (and the other arguments made in its request for reconsideration) are without merit. First, the State claims that the citation is irrelevant because it merely provides that licensees need not inspect or monitor canisters for corrosion and does not address "situations following the discovery of defects or anomalies in canisters" which would require licensees to "inspect and maintain the canisters and spent fuel in order to restore them to a safe condition." State's Motion at 8.[5] The State's claim that PFS must have the capability to inspect, test and repair "defective canisters," id., is a new basis for Utah Contention J that must be rejected for lack of good cause. See n. 3, supra.

Moreover, such a contention would be rejected on the same two grounds as the Board has already rejected Contention J.[6] At the outset, the State has provided no factual

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[5] In support of this position, the State asserts that a canister at Palisades must be unloaded because of a record-keeping defect discovered with respect to the welds. State's Motion at 8 n. 2. However, the NRC Staff affirmatively determined that the cask at Palisades did not need to be unloaded and could be safely used to store spent fuel. The licensee had initially planned to unload the canister at its discretion, but has since deferred its unloading. See Northern States Power Company (Prairie Island Nuclear Plant and Independent Spent Fuel Storage Installation), DD-98-02, 63 Fed. Reg. 8703, 8708 n.4 (1998).

[6] The Board rejected OGD Contention E which raised analogous claims that a hot cell was required to unload spent fuel from defective canisters. See LBP-98-7, slip. op. at 131-32; see also Applicant's Answer at 521-26.

basis to show that it is likely that canisters loaded with fuel at the PFSF would contain anomalies or defects given the extensive QA programs required by the NRC for canister vendors and reactor licensees. See Applicant's Answer at 127-30 (Utah Contention I). Indeed, as discussed below, the NRC has made a generic determination that breach of confinement events at ISFSIs are not credible events. See 60 Fed. Reg. 32,430, 32,438 (1995) (Part 72, Statement of Consideration). Further, even assuming that defects in the canisters were "discovered," PFS would not be required to maintain a hot cell for the unloading and inspection of canisters and the inspection of fuel. In the context of a similar claim that a reactor licensee possessing an ISFSI needed to maintain space in its spent fuel pool in order to unload spent fuel storage casks from an on-site ISFSI, the Director, Office of Nuclear Reactor Regulation concluded that such a requirement was unnecessary, stating that:

> The design features of the cask, the unlikely nature of the events that may require unloading a cask, and the NRC Staff's judgment that Licensees could develop an alternate approach if a spent fuel pool could not support an immediate unloading of a cask have previously been cited as reasonable justification for not requiring Licensees to maintain a fixed reserve capacity in spent fuel pools.

Wisconsin Electric Power Company (Point Beach Nuclear Plant, Units 1 and 2), DD-97-9, 45 NRC 328, 333 (1997) (footnote omitted). By the same reasoning, the PFSF would not need to maintain a hot cell for such unloading.[7]

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[7] The Director went on to state that even if a cask design-basis event that would potentially degrade the cask or spent fuel were to occur, "the continued confinement of the radioactive materials within the

Second, the State asserts that the same, single Federal Register notice (59 Fed. Reg. at 65,901) to which it refers "anticipates that canister breaches may be discovered" and therefore PFS must have the capability to "transfer the fuel to an intact canister." State's Motion at 9. The State further asserts that this requires "inspection, testing and maintenance of canisters and the fuel within." Id. (citing Certificate of Compliance for Dry Spent Fuel Storage Casks, Certificate No. 1007 at A-2 (May 7, 1993) (VSC-24)). This claim again constitutes a new basis not set forth in the original contention and its bases for which good cause has not been established. See n.3, supra.

Further, as with the assertion of defective canisters, this assertion must also be rejected on the same grounds as the Board has rejected Contention J.[8] The NRC does not "anticipate" canister breaches such as that asserted here by the State. In the context of promulgating emergency planning rules for ISFSIs, the NRC stated that it "was not able to identify any design basis accident that would result in the failure of a confinement boundary." 60 Fed. Reg. at 32,438 (emphasis added). Rather, the NRC addressed a

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[canister] would afford the Licensee with ample time to develop corrective actions that would maintain safe storage conditions and minimize occupational exposures." Point Beach, DD-929, 45 NRC at 332; see also 55 Fed. Reg. at 29,188 (cask seal failure would not result in significant increase of radioactivity). The Director identified several alternatives that could be used to respond to hypothetical canister breach scenarios. These included "[t]emporary shielding, loading the affected [canister] into a spare [cask], placing the affected [canister] into the cask loading area . . . or other contingency actions could ensure safe storage conditions while the Licensee developed and implemented an approach to allow for the actual unloading of the [affected container]." Point Beach, DD-97-9, 45 NRC at 334. In fact, the Applicant has proposed just such measures for dealing with hypothetical canister breach scenarios. See; Applicant's Answer at 524-25. Contrary to the State's assertion, the Director's determination allowed flexibility in planning for recovery, and did not require licensees to make a "commitment to any particular method." See State's Motion at 10, n.5.

[8] The Board similarly rejected OGD Contention E which raised analogous claims for arguing that a hot cell was necessary. See LBP-98-7, slip. op. at 131-32; see also Applicant's Answer at 521-26.

hypothetical loss of confinement boundary (i.e., breach of both the canister and the cask) accident only "to provide a conservative bounding analysis of the threat to public health and safety." Id., quoted in Applicant's Answer at 524. Thus, the NRC has made a generic determination in the context of rulemaking that the breach of canister hypothesized by the State is not a design basis accident for purposes of ISFSI design.[9]

Third, the State asserts that the PFSF requires a hot cell to allow retrieval of the spent fuel in accordance with 10 C.F.R. § 72.122(l). The State has admitted that this is a new basis for Contention J for which Applicant contends good cause has not been shown. See n. 3, supra. Nevertheless, the PFSF will have the capability to unload a cask in the shielded cask transfer building. The NRC has determined that for canistered spent fuel, retrieval is satisfied by the ability to unload the canister from the storage cask. Point Beach, DD-97-9, 45 NRC at 332. Thus the fuel at the PFSF will be "readily retrievable," under section 72.122(l), in that it will be possible to safely move the fuel (in a canister) from a storage cask to a transportation cask (or, if necessary, from one transportation cask

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[9] Further, the Federal Register citation (59 Fed. Reg. at 65,901) concerning the NUHOMS cask system and the Certificate of Compliance for the VSC-24 cask system do not provide a factual basis to support the stated allegation that the PFSF design is inadequate because of the lack of a hot cell. Both the NUHOMS and VSC-24 cask systems are single-purpose cask systems, whereas the PFS cask systems are dual-purpose This means that the cask must be opened and the spent fuel must be unloaded from both NUHOMS and VSC-24 cask systems before the fuel can be transported off-site in a shipping cask. In contrast, PFS does not need to unload the canisters onsite; it will merely transfer the canisters from the storage casks to transportation casks before the fuel is moved. Because the fuel will not be unloaded from the canister at the PFSF, the PFSF does not require a hot cell. The contingency measures provided for by Applicant (see Applicant's Answer at 524-25) are sufficient to deal with hypothetical (but non-credible) canister breach scenarios. See Point Beach, DD-97-9, 45 NRC at 332.

to another) and thence away from the ISFSI. See Point Beach, DD-97-9, 45 NRC at 329-20, 332 (citing direct cask-to-cask transfer).

Finally, the State briefly refers to a host of arguments made in the context of its original contention to which Applicant has responded and on which the Board has already ruled. The State asserts that NRC regulations require PFS to be able to inspect the fuel cladding, because the cladding is a component important to safety and may serve as a confinement barrier, see State Motion at 8-9 & n.3;[10] that the ISFSI design is inadequate in that PFS proposes no design features to permit "onsite inspection and maintenance of canisters or cladding," but instead "merely proposes to send the fuel back to the originating nuclear plants," State's Motion at 10, and that shipping defective fuel or canisters is unsafe. Id. The State has not shed any new light on why these asserted bases support admission of this contention. They do not, as both argued by Applicant,[11] and as found by the Board.

In sum, the State has failed to advance any basis for the Board to reconsider the admission of Utah Contention J, and the Board should reject the State's request for reconsideration.

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[10] The State's assertion that the fuel cladding is a "safety component" at the PFSF is mistaken. See SAR at Table 3.4-1 (list of components important safety does not include fuel cladding). Moreover, the NRC regulations explicitly provide that a canister can be relied on as a substitute for cladding. 10 C.F.R. § 72.122(h)(1), see also 51 Fed. Reg. 19,106, 19,108 (1986).

[11] See Applicant's Answer at 134-35, 142-45, 524-25.

C. Request for Reconsideration of Utah Contention W

The State requests the Board to reconsider the admissibility of subparts 1, 3, 4, and 5 of Utah Contention W regarding alleged inadequacies in the Environmental Report ("ER"). State's Motion at 12. The State argues that the rejection of these subparts of Contention W is "inconsistent with other aspects of LBP-98-7" in which the State claims that the "Board accepted contentions asserting the same facts," specifically Utah Contentions K, L, M, and T.[12] Id. The State's request for reconsideration must be rejected, however, because of two fundamental flaws affecting these subparts which led the Board to reject them.

First, subparts 1, 3, 4, and 5 of Utah Contention W are fatally flawed because none of these contentions refers to any specific portion of the environmental report which it claims to be deficient. The Commission's pleading requirements clearly require that for a contention to be admissible the petitioner must provide:

> Sufficient information . . . to show that a genuine dispute exists with the applicant on a material issue of law or fact. This showing must include references to the specific portions of the application (including the applicant's environmental report and safety report) that the petitioner disputes and the supporting reasons for each dispute, or, if the petitioner believes that the application fails to contain information on a relevant matter as required by law, the identification of each failure and the supporting reasons for the petitioner's belief. On issues arising under the National Environmental Policy Act, the petitioner shall file contentions based on the applicant's environmental report.

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[12] Only part of Utah Contention T was admitted. See LBP-98-7, slip. op. at 80-81.

10 C.F.R. § 2.714(b)(2)(iii) (emphasis added). The State failed to make this required showing with respect to subparts 1, 3, 4, and 5 of Utah Contention W. See State's Contentions at 162-63. The State has provided no specific citations in these subparts where the ER is allegedly inadequate. Thus, these contentions were properly rejected for failing to comply with the Commission's regulations on the admissibility of contentions. This regulatory defect in the contentions was explicitly recognized in the prehearing conference. See, e.g., Tr. at 618-19.

The State, in requesting reconsideration, argues that it complies with the Commission's requirements because either (1) the ER refers to provisions in the SAR challenged by the State in one of the contentions (admitted by the Board) which are referenced in Utah Contention W; or (2) the contentions referenced in Utah Contention W (admitted by the Board) themselves cite to the ER. With respect to first point, because the ER references a provision of the SAR challenged by the State does not, ipso facto, establish a deficiency in the ER even assuming the SAR is deficient as challenged. Rather, the burden remains on the State to demonstrate a specific deficiency in the ER. For example, the general provisions of the ER referenced by the State with respect to subpart 1 of Utah Contention W (cumulative impacts) evaluate the potential environmental effects for a range of accidents, including a hypothetical breach of canister for which the ER evaluates the environmental impacts, including the impact on the surrounding population. ER at §§ 5.1.2 and 5.1.3. The State has identified no alleged deficiency in the ER -- as required by the Commission's pleading requirements -- even assuming it prevails in

establishing a deficiency in the SAR section challenged in Utah Contention K. Thus, as succinctly stated by counsel for the Staff at the prehearing conference:

> If the [safety] contention wins on a safety basis, that's enough to affect licensing. There is nothing in the environmental report that's been challenged. And therefore, as an environmental contention, it fails.

Tr. at 614.

With respect to the second point argued by the State, that other contentions referenced in Utah Contention W themselves cite to the ER, the State's Motion references two Contentions admitted by the Board, Utah Contentions M and T, which cite to the ER. The State's reference to Utah Contention M, however, must be rejected out-of-hand. While the State's Motion at 13 cites Utah M to support subpart 3 of Utah W, the contention does not reference or incorporate Utah M. See State's Contentions at 162-64. This is a bold attempt to interject a new basis for the contention and should be summarily rejected at this late date. [13]

Utah Contention T, referenced in subpart 4 of Utah W, challenges the applicant's "Assessment of Required Permits and Other Entitlements." See State's Contention at 131. The State's arguments on this contention largely involved legal issues regarding appropriate permitting authorities. See State's Reply at 74-83. The State's arguments regarding permit applicability do not, ipso facto, mean that the environmental impacts

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[13] See n. 3, supra.

potentially subject to permitting are not properly analyzed in the ER Although Utah Contention T mentioned alleged inadequacies with the ER's analysis of air and water pollution, it did not supply an adequate factual basis for those specific assertions. See Applicant's Answer at 318-21. Accordingly, subpart 4 of Utah Contention W must be rejected for lack of adequate basis even assuming its incorporation of Utah Contention T is sufficient to satisfy the requirement of 10 C.F.R. § 2.714(b)(2)(iii) quoted above.

Second, in addition to subpart 4 discussed above, subparts 1, 3, and 5 of Utah Contention W are also fatally flawed for lack of adequate factual basis. These subparts reference admitted Utah Contentions K, N, and L, all of which raise alleged deficiencies in the SAR. The State provided no factual basis in subparts 1, 3, and 5 of Utah Contention W to show that the alleged deficiencies in the SAR produce any environmental effects that have not been adequately addressed in the ER. See State's Contention at 162-63. The State's request for reconsideration discusses only the admission of these other Utah contentions addressing the SAR and fails to cure the underlying deficiencies with respect to Utah Contention W concerning the ER.

In sum, the admission of contentions Utah K, N, T, and L does nothing to cure the failure of subparts 1, 3, 4, and 5 of Utah Contention W to comply with the Commission's requirements on the admissibility of contentions.[14] Accordingly, the Board should reject

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[14] Applicant notes that subparts 1, 3, and 5 of Utah Contention W are also flawed in stating that the applicant "has not" evaluated the issues of cumulative impacts (Subpart 1), flooding (Subpart 3), and seismicity (Subpart 5). See State's Motion at 11; see also Tr. at 616 (State assertion that ER is silent on seismic issues). Contrary to the State's assertion, these issues are evaluated in the Environmental Report. See, e.g., ER §§ 4.1.7, 4.2.7 (cumulative impacts); 2.5.2, 5.1.2 (flooding); 5.1.2 (seismic/earthquake). A

the State's Motion to reconsider the admission of these contentions and uphold its order rejecting the admission of subparts 1, 3, 4, and 5 of Utah Contention W.[15]

D. Request for Reconsideration of Utah Contention CC

The State also requests the Board to reconsider the admissibility of Utah Contention CC which alleges that a "one-sided cost benefit analysis" was performed by the Applicant in the ER. State's Motion at 16-20. According to the State, the Board should reconsider the admissibility of Utah Contention CC in light of the Commission's recent decision in Louisiana Energy Services (Claiborne Enrichment Center), CLI-98-3 (April 3, 1998) ("LES"). Contrary to the State's arguments, however, the LES decision does not provide a basis for admitting Utah Contention CC.

First, the LES decision specifically addressed the balance and evenhanded treatment of costs in the context of evaluating the no-action alternative, focusing on the need for such treatment in order to assure the proper evaluation of alternatives under

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contention that mistakenly claims that the application failed to address a relevant issue in the application must be dismissed. See Georgia Power Company (Vogtle Electric Generating Plant, Units 1 and 2), LBP-91-21, 33 NRC 419, 424 (1991).

[15] The State makes a final broad-brush argument that because the agency must take a "hard look" at environmental consequences in preparing the EIS, Contention W should be admitted in its entirety. See State's Motion at 14-15. Under this facile legal analysis, any contention addressing the ER would automatically be admitted, regardless of whether it set forth any factual basis, which is plainly contrary to Commission pleading requirements. The Commission's regulations and long-standing practice show that there is no exemption or relaxation in the Commissions regulations on the standards of admissibility for contentions that address environmental issues under NEPA. Furthermore, the lack of NEPA contentions would not relieve the Staff from its independent responsibility to take a "hard look" at the environmental effects in its preparation of the EIS. See Tr. at 608-609. The cases cited by the State, such as Hughes River Watershed Conservancy v. Glickman, 81 F.3d 437, 443 (4th Cir. 1996), do not support the State's broad-brush assertion that unsupported NEPA contentions must be admitted, and do nothing to cure the underlying substantive deficiencies in Utah Contention W.

NEPA. Id at slip. op. 23-24. The subject of LES was not the NEPA cost-benefit analysis challenged in Utah Contention CC. Here, a contention regarding the proper evaluation of the no-action alternative (Utah Contention Z) has already been admitted by the Board and the substantive implications of LES for this proceeding will be addressed in the context of that contention.

Second, the Commission's decision in LES did not address the admissibility of contentions and has no bearing on whether the State, in Utah Contention CC, meets the standards governing the admissibility of contentions set forth in 10 C.F.R. § 2.714(b)(2). In this contention, among other deficiencies, the State (1) failed to provide a sufficient factual basis or expert opinion to support its claims; (2) ignored relevant information in the Application; and (3) failed to reference specific portions of the Application disputed or to otherwise show a genuine dispute on a material issue of law or fact. See Applicant's Supplemental Answer at 33-43. The State's Motion makes no effort to address these deficiencies. The contention was properly rejected by the Board for these same reasons. See LBP-98-7, slip. op. at 91.

The State has come forward with no other new arguments to support its assertions in Utah Contention CC, and the arguments that were originally submitted have already been rejected by the Board. The State continues to ignore the actual cost-benefit analysis in the Applicant's ER by arguing that "[n]one of the 'costs' discussed in ER § 7.3 relate to environmental costs." State's Motion at 18. This is absolutely untrue. Section 7.3 clearly states that "[t]he indirect costs, which are derived from socioeconomic and environmental

impacts of the facility, are minimal due to the remote location and small size of the actual storage area." ER at 7.3-1 (emphasis added). The socioeconomic and environmental costs summarized in this section are the result of the evaluation of socioeconomic and environmental impacts of the facility, as presented in Chapters 4 and 5 of the ER. The contention continues to fail to meet the fundamental requirement that it specify how the Application is inadequate. See Long Island Lighting Company (Shoreham Nuclear Power Station, Unit 1), LBP-82-75, 16 NRC 986, 993 (1982).

The State asserts that subpart 2 of its Contention CC, which references Utah Contentions H through P as examples, must be admitted since the Board has admitted Utah Contentions H, K, L, M, N, and O. See State's Motion at 18. These contentions address alleged deficiencies in the SAR and the fact remains, as set forth above with respect to Utah Contention W, supra, that the State fails to provide a factual basis in Utah Contention CC to show any adverse environmental effects which allegedly flows from the claimed deficiencies in the SAR. The State provides no factual basis in Utah Contention CC to show that the alleged deficiencies in the SAR produce any environmental effect that has not been adequately addressed in the ER. See State's Contention's at 178-179; State's Reply at 99-101; State's Motion at 16-20. Because the State's request for reconsideration discusses only the admission of Utah H, K, L, M, N, and O (the SAR contentions), and fails to cure the underlying deficiency in Utah CC, this contention should not be admitted regardless of the admission, in whole or in part, of Utah Contentions H, K, L, M, N, and O.

The State also argues that, since the Board accepted its "challenge to costs under Contentions E and S" based in part on an asserted lack of "sufficient detail," it "would be unreasonable for the Board to accept PFS's uncategorized and unsubstantiated costs as acceptable under NEPA." State's Motion at 18, n. 6. Utah Contentions E and S concern, however, Applicant's financial qualifications and have no bearing on the detail required for quantifying costs under NEPA. See Applicant's Supplemental Answer at 39-43.

In sum, the State has failed to come forward with any elaboration or additional argument why Utah Contention CC should be admitted and therefore its request for reconsideration must be denied.[16]

IV. OGD'S MOTION FOR RECONSIDERATION

In its "Motion and Memorandum of Ohngo Gaudadeh Devia [OGD] Requesting Reconsideration of Contentions," ("OGD's Motion"), OGD requests reconsideration with respect to the Board's denial of OGD Contentions B, J, and N.[17] For the reasons set forth below, the Applicant opposes the OGD's Motion.

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[16] As with respect to its request for reconsideration of Utah Contention W, the State cites Hughes River Watershed Conservancy, supra. However, as noted in the Applicant's response there, this case does not require the admission of an unsupported contention, such as Utah CC. Moreover, the substance of the holding in Huges River is wholly unrelated to any of the State's assertions in this Contention CC. In Hughes River, the analysis incorrectly "calculated gross, rather than net, recreation benefits." Hughes River, 81 F.3d at 447. Here, the State has not challenged the economic assumptions used in the Applicant's analysis.

[17] See "Ohngo Gaudadeh Devia's Contentions Regarding the Materials License Application of Private Fuel Storage in an Independent Spent Fuel Storage Installation," dated November 24, 1997 ("OGD's Contentions").

A. Request for Reconsideration of OGD Contention B

OGD's request for reconsideration of OGD Contention B fails to provide any reason for the Board to reconsider its rejection of that contention. OGD claims that the Board rejected this contention "because it determined that the [Applicant's Emergency Plan] is adequate under the relevant regulations." OGD's Motion at 2-3. According to OGD, the contention must be admitted because it has "asserted in Contention B" that "the plan does not meet the [regulatory] requirements" and that such an assertion of failure to meet the regulatory requirements is sufficient for the admission of the contention. OGD's Motion at 3.

OGD, however, misstates the bases for the Board's rejection of Contention B and would have the Board ignore the Commission's pleading requirements for the admissibility of contentions. The Board did not reject the contention because it found the Emergency Plan to be adequate, as claimed by OGD, but because OGD had failed to satisfy the Commission's pleading requirements for admissible contentions. The Board ruled that the contention was

> [i]nadmissible in that the contention and its supporting bases fail to establish with specificity any genuine dispute; impermissibly challenge the Commission's regulations or generic rulemaking-associated determinations; lack adequate factual or expert opinion support; and/or fail properly to challenge the PFS application.

LBP-98-7, slip op. at 128-29. OGD's claim that the contention should be admitted by virtue of its bald assertion that the plan is deficient ignores totally the requirements set forth in 10 C.F.R. § 2.714(b) for the admissibility of contentions as well as the reasons

given by the Board for its rejection of the contention. Accordingly, its request for reconsideration must be rejected

In its request for reconsideration, OGD makes three specific assertions of "failure to meet the regulatory requirements." The first two are identical to assertions raised in its initial contention, specifically, that (1) the PFSF Emergency Plan ("EP") must include a "commitment to" and a "means to" promptly notify offsite response organizations and request offsite assistance, and (2) that PFS "must comply with the Emergency Planning and Community Right to Know Act. OGD Motion at 3. OGD provides no further elaboration or argument beyond that provided in its original pleadings on why these two assertions provide a basis for the admission of the contention. See OGD's Contentions at 5-6. Because OGD's arguments with respect to these asserted deficiencies are identical to those the Board rejected in its decision, OGD's request for reconsideration should be denied.[18]

OGD's third assertion of failure to meet regulatory requirements -- that the Applicant must comply with emergency planning regulations with respect to the ITP (OGD's Motion at 3) -- constitutes an entirely new basis for OGD Contention B. See OGD Contentions at 5-6 (ITP not mentioned). OGD has come forward with no good

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[18] See also Applicant's Answer at 490-91 (OGD's assertion that the EP must include a "commitment to" and a "means to" promptly notify offsite response organizations and request offsite assistance ignores the fact that the EP contains such commitment and means); Applicant's Answer at 489-90 (OGD's assertion that PFS "must comply with the Emergency Planning and Community Right to Know Act ignores that the EP expressly provides that the PFSF will not possess any "extremely hazardous substances" in amounts greater than the threshold planning quantities of 40 C.F.R. § 355 to which that act would apply).

cause to support this late-filed basis and accordingly it must be rejected. See n. 3, supra. Furthermore, OGD's assertion is wholly non-specific and fails to provide any factual basis for believing that a material dispute exists between OGD and the Applicant. It does not discuss any specific regulation or portion of the EP, nor does it discuss any aspect of the ITP that would subject it to NRC emergency planning requirements under Part 72. Hence the assertion should be rejected for failing to meet the requirements of 10 C.F.R. § 2.714(b)(2) wholly apart from whether the Board, upon reconsideration, dismisses Utah Contention B.

B. **Request for Reconsideration of OGD Contention J**

OGD's request for reconsideration of OGD Contention J is deficient for essentially the same reasons as set forth above with respect to Contention B. OGD ignores that, in addition to rejecting OGD's claim of a special trust responsibility owed tribal members by the NRC in this proceeding, the Board also dismissed the contention for failing to meet the Commission's pleading requirements. Specifically, the Board found the contention inadmissible in that both the contention and its supporting basis "fail[ed] to establish with specificity any genuine dispute; lack[ed] adequate factual and expert opinion support; and/or fail[ed] properly to challenge the PFS application." LBP 98-7, slip op. at 135. OGD again fails to come forward with any new points in its request for reconsideration to show that its Contention J satisfies the Commission's pleading requirements and therefore its request must be rejected.

In its request for reconsideration, OGD asserts, as in its original Contention J, that "the environmental report [ER] does not adequately address the status of PFS's compliance with all permits, licenses and approvals required for the facility." OGD Motion at 4. It, however, cites to 10 C.F.R. § 51.45(d) as the asserted basis of non-compliance instead of 10 C.F.R. §§ 51.71(c) and (d) to which it cited as the basis of non-compliance in the original contention. See OGD's Contentions at 23. Again, OGD has come forward with no good cause to support this late-filed basis and accordingly it must be rejected.

Even assuming that OGD should be allowed to so amend its contention, the contention must still be dismissed for failing to meet the pleading requirements set forth in 10 C.F.R. § 2.714(b)(2). OGD claims that by pointing to the asserted failure to comply with 10 C.F.R. § 51.45(d) that it "has met its burden of establishing a genuine dispute and has properly challenged the PFS application." OGD's Motion at 4. That simply is incorrect. Both in its the original Contention J and in its Motion, OGD fails to point "the specific portions" of the ER which it claims are deficient, as required under 10 C.F.R. § 2.714(b)(2)(iii), and it ignores totally that Chapter 9 of the ER discusses the various federal and state permits that must be obtained before the ISFSI may become operational. See Applicant's Answer at 564-565. Nor has OGD come any closer to meeting the requirement for "a concise statement of the alleged facts or expert opinion which support the contention and on which the petitioner intends to rely in proving the contention at the hearing . . . ." 10 C.F.R. § 2.714(b)(2)(ii).

In short, OGD has failed to "make a minimal showing that material facts are in dispute" and has thus failed to demonstrate that an "inquiry in depth" is appropriate. Connecticut Bankers Ass'n v. Board of Governors, 627 F.2d 245, 251 (D.C. Cir. 1980). Thus, even if OGD were allowed to recast Contention J as a challenge to 10 C.F.R. § 51.45(d), its request for reconsideration must be rejected.

C. Request for Reconsideration of OGD Contention N

OGD's request for reconsideration of OGD Contention N is deficient for the same reasons as set forth above with respect to Contentions B and J. OGD again ignores that the Board not only rejected OGD Contention N because it "lack[ed] a litigable basis" concerning the purported trust responsibility but also because it "fail[ed] to establish with specificity any genuine dispute; lack[ed] adequate factual or expert opinion support; and/or fail[ed] properly to challenge the PFS application." LBP-98-7, slip op. at 138. Because OGD's request for reconsideration fails to show that it has raised any specific, genuine issue of material dispute, adequately supported by facts or expert opinion, OGD's request must be denied.

OGD asserts that the Applicant did not address in the license application the impact or the risks of the PFSF on the potential lowering of the water table or possible contamination of the water supply. OGD's Motion at 4-6. These assertions are, however, identical to those raised in the contention and which the Board rejected in its decision. See OGD's Contentions at 27. As set forth in Applicant's Answer, OGD's is mistaken because Applicant did discuss the potential of lowering the groundwater table in detail and

concluded that any drawdown of the Skull Valley aquifer will not extend beyond the PFSF site. See Applicant's Answer at 591. Similarly, Applicant addressed the possibility of a leak occurring that might contaminate the present water system and concluded that there is no leak accident that would cause contaminate material to flow into the ground, much less the ground water. Id. at 590. Thus, OGD's assertion that Applicant did not address these matters was properly rejected for being factually incorrect, see LBP-98-7, slip op. at 52, 138, and the present request for reconsideration based on the same mistaken assertions must be denied.[19]

OGD also asserts that the affidavits filed by its members in support of its Petition to Intervene which claim to rely on water on and near the reservation provide the required factual specificity to support the contention because it is reasonable to "anticipate that the facility's significant water needs . . . may adversely impact their water supply. OGD's Motion at 5. However, these affidavits were not cited as a factual basis in the original contention (see OGD's Contentions at 27), and OGD has not come forward with any good cause to show why it should be allowed to amend the contention at this late date. See n. 3, supra. Moreover, the affidavits merely express the members' fear of contamination of their water supply since they are located near the facility. They do not

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[19] OGD's submission also references the NRC's request for additional information ("RAI") on Section 2.5.1 of the SAR concerning withdrawal and use of water. See OGD's Motion at 5. Even assuming that OGD could amend its contention at this late date, the RAI cited by OGD does not provide any support for OGD's request for reconsideration. The RAI cited by OGD does not discuss or request information on either the "possibility of a leak" occurring from the PFSF or the "lowering of the present watertable," the bases raised in OGD Contention N. Compare OGD's Contentions at 27 with RAI 2-3 at p. SAR 2-1.

provide any explanation or factual support to show that there is a genuine dispute with the Applicant on a material issue of law or fact. Accordingly, even assuming OGD could rely upon them, OGD's assertion that there may be contamination of the present water supply would continue to be deficient for lack of factual basis.

In sum, OGD's bald assertions in OGD Contention N that there may be a lowering of the water table or contamination of the water supply was properly rejected by the Board and OGD's request for reconsideration must be denied.

V. CONCLUSION

For the foregoing reasons, the Applicant respectfully submits that the NRC's Motion for Partial Reconsideration should be granted and the Motions for Reconsideration and Clarification of the State and OGD should be denied.

Respectfully submitted,

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Dated: May 13, 1998

UNITED STATES OF AMERICA

NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

In the Matter of	)	
	)	
PRIVATE FUEL STORAGE L.L.C.	)	Docket No. 72-22
	)	
(Private Fuel Storage Facility)	)	ASLBP No. 97-732-02-ISFSI

CERTIFICATE OF SERVICE

I hereby certify that copies of the "Applicant's Response to NRC Staff, State of Utah and OGD Motions for Reconsideration and Clarification," dated May 13, 1998, were served on the persons listed below (unless otherwise noted) by e-mail with conforming copies by U.S. mail, first class, postage prepaid, this 13th day of May 1998.

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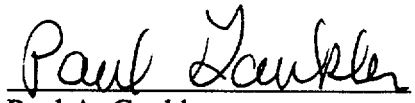

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