

November 10, 1998

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)
)
PRIVATE FUEL STORAGE, LLC) Docket No. 72-22-ISFSI
)
(Independent Spent)
Fuel Storage Installation))

NRC STAFF'S RESPONSE TO
"OHNGO GAUDADEH DEVIA'S CONTENTIONS
RELATING TO THE LOW RAIL TRANSPORTATION LICENSE AMENDMENT"

INTRODUCTION

Pursuant to the Atomic Safety and Licensing Board's "Order (Schedule for Additional Contentions Responses)," dated November 3, 1998, and 10 C.F.R. § 2.714(c), the NRC Staff ("Staff") hereby files its response to "Ohngo Gaudadeh Devia's (OGD) Contentions Relating to the Low Rail Transportation License Amendment" ("OGD Rail Contentions"), filed November 2, 1998.¹ For the reasons set forth below, the Staff submits that the contentions should be rejected.

BACKGROUND

In its "Memorandum and Order (Ruling on Motions to Suspend Proceeding and for Extension of Time to File Contentions)," dated October 17, 1997, the Licensing Board extended the time for filing contentions until November 24, 1997. In accordance with that Order, on or about November 24, 1997, contentions were filed by OGD and other petitioners for leave to

¹ This response is filed pursuant to a four-page extension of the page limit established by the Licensing Board. See "Order (Granting Page Limit Extension Motions), dated November 10, 1998.

intervene in this proceeding, to which the Staff and Applicant Private Fuel Storage L.L.C. ("PFS" or "Applicant") then responded. By Memorandum and Order dated April 22, 1998, the Licensing Board ruled on the admissibility of those contentions, including certain contentions concerning the Applicant's transportation of spent fuel to its site and use of the Rowley Junction Intermodal Transfer Point (ITP). See *Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation)*, LBP-98-7, 47 NRC 142 (1998), *as modified*, LBP-98-10, 47 NRC 288 (1998).

On August 28, 1998, the Applicant submitted a revision to its license application which, *inter alia*, proposed a new rail spur corridor to be located on the western side of Skull Valley, and a new location for the ITP, located approximately 1.8 miles west of the ITP that was proposed initially.² Contentions concerning the revised application were filed by the State of Utah on September 29, 1998, and by the Confederated Tribes of the Goshute Reservation on October 14, 1998;³ and responses to those contentions were then filed by the Applicant⁴ and Staff.⁵ On November 2, 1998, OGD filed the instant Rail Contentions, in which they advanced their own set

² Letter to Director, Office of Nuclear Material Safety and Safeguards, NRC, from John D. Parkyn, Chairman, PFS, dated August 28, 1998.

³ See "State of Utah's Contentions Relating to the Low Rail Transportation License Amendment" ("Utah Rail Contentions"), dated 1998; and "Contentions of the Confederated Tribes of the Goshute Reservation Relating to the Low Rail License Amendment," dated October 14, 1998 ("CT Rail Contentions").

⁴ See "Applicant's Answer to State of Utah's Contentions Relating to the Low Rail Transportation License Amendment," dated October 14, 1998; and "Applicant's Answer to Confederated Tribes' Contentions Relating to the Low Rail Transportation License Amendment," dated October 26, 1998.

⁵ See "NRC Staff's Response to State of Utah's Contentions Relating to the Low Rail Transportation License Amendment," dated October 14, 1998; and "NRC Staff's Response to Contentions of the Confederated Tribes of the Goshute Reservation Relating to the Low Rail License Amendment," dated October 26, 1998.

of ten contentions concerning the revised application. The Staff's views with respect to the admissibility of OGD's Rail Contentions are as follows.

DISCUSSION

A. The OGD Rail Contentions Fail to Satisfy Established Commission Requirements for Late-Filed Contentions.

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). *Sacramento Municipal Utility Dist. (Rancho Seco Nuclear Generating Station)*, CLI-93-12, 37 NRC 355, 363 (1993); *PFS, LBP-98-7*, 47 NRC at 183. The relevant factors are:

- (i) Good cause, if any, for failure to file on time.
- (ii) The availability of other means whereby the petitioner's interest will be protected.
- (iii) The extent to which the petitioner's participation may reasonably be expected to assist in developing a sound record.
- (iv) The extent to which the petitioner's interest will be represented by existing parties.
- (v) The extent to which the petitioner's participation will broaden the issues or delay the proceeding.

10 C.F.R. § 2.714(a)(1). While a balancing of these factors is required, where a petitioner fails to show good cause for filing its contentions late, it must make a compelling showing that the other factors weigh in its favor in order for its late contentions to be admitted. *See, e.g., PFS, LBP-98-7*, 47 NRC at 208.

The Licensing Board's Order of October 17, 1997, required contentions to be filed by November 24, 1997. Contentions submitted after that date -- such as the instant contentions, filed

one year later -- are late-filed. OGD states that the revised application was not published in the *Federal Register* or other media, and that it did not receive notice of the revised application until "approximately the first few days of October 1998." OGD Rail Contentions at 2. However, OGD fails to address the criteria governing the admission of late-filed contentions. For this reason alone, its contentions should be rejected. *See, e.g., Duke Power Co.* (Perkins Nuclear Power Station, Units 1, 2 and 3), ALAB-615, 12 NRC 350, 352-53 (1980).

Moreover, a review of OGD's Rail Contentions demonstrates that OGD has not identified any information in the revised application that it needed to draft its contentions, that was not available earlier. Rather, the contentions raise general matters concerning the transportation of spent fuel to PFS' facility, and could have been raised one year ago in connection with PFS' original application. The original application indicated that PFS planned to construct and operate an ITP at Rowley Junction and to construct a railroad spur to connect the ISFSI to the Union Pacific railroad mainline in Skull Valley. *See* original Environmental Report (ER), §§ 3.2.1.4. and 4.4. The revised application describes new locations for the rail spur and ITP, but generally does not raise any issue that would not apply as well to the rail spur alternative contained in the original application. *Compare* original ER § 4.4 (indicating that a rail spur is to be installed "parallel to the existing Skull Valley Road" and "adjacent" thereto, with a feasibility study to be performed to determine "on which side of [the] Road the track will be located"), *with* revised ER § 4.4 (indicating that the rail spur is to be installed "from the mainline on the south side of Interstate 80 at Low" to the ISFSI). While the revised application describes a new location for the rail spur, that location does not differ materially from the original rail spur proposed to be located in Skull Valley. Inasmuch as the instant contentions do not depend upon any information

unique to the new locations and could have been written based on the original application, good cause has not been shown for the late filing of these contentions.

A balancing of the other factors specified in 10 C.F.R. § 2.714(a)(1) weighs against the admission of these contentions. With respect to factor two, other means do not appear to be available to protect OGD's interest with respect to the issues raised in their contentions; this factor, therefore, favors the admission of OGD's contentions. With respect to factor four, OGD's interest could be represented by the State of Utah, inasmuch as the State has raised generally similar issues in its Low Rail Contentions, among others; therefore, to the extent that the State's contentions are admitted, this factor would weigh against admission of the contentions.⁶ More significantly, with respect to factor three, OGD has not identified any experts upon whom it intends to rely, and has not provided a summary of what those experts would say in support of the contentions. OGD has failed to demonstrate that its participation may be expected to assist in developing a sound record, and this factor therefore weighs against the admission of the contentions. *See Braidwood*, CLI-86-8, 23 NRC at 246; *PFS*, LBP-98-7, 47 NRC at 208-09. With respect to factor five, the admission of these contentions will inevitably broaden the issues and delay the proceeding, and this factor therefore weighs against the contentions' admission.

In sum, the Staff submits that OGD has failed to establish good cause for the late filing of these contentions, and has not shown that a balancing of the factors specified in 10 C.F.R. § 2.714(a)(1) favors admission of the contentions. OGD's Rail Contentions should therefore be rejected.

⁶ Factors two and four, of course, carry less weight than the other factors specified in the regulation. *See Commonwealth Edison Co.* (Braidwood Nuclear Power Station, Units 1 and 2), CLI-86-8, 23 NRC 241, 245 (1986); *PFS*, LBP-98-7, 47 NRC at 208.

B. OGD's Rail Contentions Fail to Satisfy the Commission's Requirements Governing the Admissibility of Contentions.

The Staff's views with respect to the admissibility of OGD's Rail Contentions are set forth below. For the reasons described herein, the Staff submits that the contentions fail to satisfy the Commission's requirements governing the admissibility of contentions and should be rejected.

OGD Contention Q.

In acting on the proposed license and amendments prior to completing an Environmental Impact Statement (EIS) as required by the National Environmental Policy Act (NEPA), the NRC has made irretrievable commitments of resources resulting in severe prejudice to the EIS process. In particular, the present procedure employed for the PFS license and license amendments prejudices the NRC's ability to fairly assess alternatives to the proposed PFS facility and the transportation of high level spent fuel.

Staff Response:

OGD fails to provide any basis whatsoever in support of this contention, other than a citation to the National Environmental Policy Act (NEPA) and certain regulations promulgated by the Council on Environmental Quality at 40 C.F.R. §§ 1506.1, 1502.2(f), 1502.2(g). OGD Rail Contentions at 2. OGD fails to explain its assertion that the Commission has "acted" on the license application and "has made irretrievable commitments of resources resulting in severe prejudice to the EIS process," nor does it provide any basis for its claim that "the present procedure . . . prejudices the NRC's ability to fairly assess alternatives to the proposed PFS facility and the transportation of high level spent fuel." In the absence of any supporting basis, OGD Contention Q fails to satisfy 10 C.F.R. § 2.714(b)(2), and should be rejected.

OGD Contention R.

OGD and its members will be adversely impacted by the routine operation of the Low rail spur and will be seriously impacted by any transportation-related accidents.

Staff Response:

In support of this contention, OGD simply recites, almost *verbatim*, the assertions it made previously in OGD Contention P -- which the Licensing Board expressly rejected in LBP-98-12.⁷

In rejecting these assertions, the Licensing Board stated as follows:

Inadmissible in that the contention and its supporting bases fail to establish with particularity any genuine dispute; lack adequate factual or expert opinion support; and/or fail properly to challenge the PFS application. . . . Moreover, to the extent this contention seeks consideration of "psychological stress" as an environmental impact under NEPA, it does not have a cognizable basis. *See Metropolitan Edison Co. [v. People Against Nuclear Energy]*, 460 U.S. [766,] 772-79 [1983].

PFS, LBP-98-7, 47 NRC at 233-34; *see* 10 C.F.R. § 2.714(b)(2)(ii)-(iii). As in the case of its Contention P, OGD has failed to set forth any facts or expert opinion in support of this contention; failed to cite to any specific portion of the (revised) application which it contends is deficient; failed to describe with particularity any genuine dispute of material fact with the Applicant; and, insofar as it asserts the issue of "fear," raised a concern that is not cognizable under NEPA. For these reasons, as summarized by the Licensing Board in LBP-98-7, *supra*, OGD Contention R should be rejected.

OGD Contention S.

OGD and its members are adversely effected [sic] by the potential sabotage of spent nuclear fuel during transportation along the proposed rail spur.

Staff Response:

In support of this contention, OGD states only as follows: "PFS and the NRC have failed to adequately evaluate the possibility of sabotage and the impacts associated with sabotage along the

⁷ *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, at 36-37 ("OGD Initial Contentions").

proposed rail spur." OGD Rail Contentions at 3. OGD failed to set forth any facts or expert opinion in support of this contention; failed to cite to any specific portion of the revised application which it contends is deficient; and failed to describe with particularity any genuine dispute of material fact with the Applicant. In addition, inasmuch as the contention concerns the risk of terrorism in transportation, OGD raises a matter that is governed by the Commission's regulations in 10 C.F.R. Part 71 and constitutes an impermissible challenge to the Commission's generic determination that compliance with its design requirements provides adequate safety assurance during transportation. *See PFS, LBP-98-7, 47 NRC at 227-28 (rejecting OGD Contention C, which raised similar concerns regarding the risk of terrorism during transport).*⁸ Accordingly, OGD Contention S should be rejected.

OGD Contention T.

OGD and its members are adversely affected by the failure of PFS and/or the NRC to fully evaluate the potential failure of the flat bed rail cars that will transport the spent nuclear fuel along the rail spur.

Staff Response:

OGD provides a one-paragraph statement of this contention, in which it asserts that PFS' Safety Analysis Report (SAR) incorrectly "notes that flat bed rail cars are not important to safety," and "improperly relies on the integrity of the shipping cask as the means of maintaining all safety functions." OGD Rail Contention at 3-4, citing SAR § 4.5.5.2. OGD then asserts (*Id.* at 4):

Malfunctions or accidents involving the rail cars will have an impact on the environment and may have impacts on human health depending upon the nature of the accident. For example, should a mechanical breakdown stall a rail convoy of casks along the rail spur the situation would create greater opportunity for sabotage,

⁸ *See also, "NRC Staff's Response to Contentions . . .,"* dated December 24, 1997, at 80 and n.66 (citing, in response to OGD Contention C, generic determinations by the Commission as to the adequacy of its transportation regulations).

impacts from repair activities, potential for human error in moving casks, and similar effects that have not been fully considered by PFS.

The portion of the SAR that is of concern to OGD states as follows: "The flat bed railcars are classified as not Important to Safety since spent fuel safety functions are maintained by the shipping cask." Revised SAR, § 4.5.5.2, at 4.5-5. This statement -- which also appeared in the original application's SAR (thus demonstrating the contention's lateness) -- is consistent with the Commission's requirements in 10 C.F.R. Part 71, which rely on the use of NRC-approved shipping packages to assure protection of the public health and safety. OGD has failed to set forth any facts or expert opinion in support of its assertion that this portion of the application is deficient, and failed to set forth with particularity any genuine dispute of material fact with the Applicant. *See* 10 C.F.R. § 2.714(b)(2)(ii)-(iii). In addition, insofar as the contention raises the risk of terrorism in transportation, the contention constitutes an impermissible challenge to the Commission's generic determination that compliance with its design requirements provides adequate safety assurance during transportation. *See, e.g., PFS, LBP-98-7, 47 NRC at 227-28.* Accordingly, OGD Contention T should be rejected.

OGD Contention U.

OGD and its members are adversely affected by potential fires caused by or enhanced by rail activities.

Staff Response:

In support of this contention, OGD asserts that a fire could have a devastating impact on the land, wildlife, and people living nearby, in view of the region's limited vegetation. OGD Rail Contentions at 4. OGD further asserts that while the Applicant's Environmental Report "acknowledged the possibility of range fires and proposes a plan to allow fire equipment access, the report does not discuss the impacts of creating the buffer zone or the impacts of a fire. PFS

ER § 4.4.8." *Id.* OGD, however, fails to provide any facts or expert opinion in support of its assertions; fails to provide any basis to challenge the adequacy of the proposed buffer zone or the Applicant's assessment of the rail spur's environmental impacts; and fails to show the existence of a genuine dispute of material fact concerning this matter. Accordingly, this contention should be rejected. *See* 10 C.F.R. § 2.714(b)(2)(ii)-(iii).

OGD Contention V.

OGD and its members are adversely affected by the potential human health and environmental safety problems associated with any type of failure of the casks that may be used to ship spent nuclear fuel to the proposed PFS facility along the proposed rail spur.

Staff Response:

In support of this contention, OGD asserts that PFS proposes to store at its site "a new generation of casks that have not been subjected to any significant physical testing or durability demonstrations," which undermines the Applicant's and Commission's reliance on Table S-4 for assessing the potential impacts of transportation to the facility. OGD Rail Contentions at 5. OGD further asserts that "without some significant field test data, reliance on the proposed shipping casks is misplaced and violates public health and safety and environmental protection standards." *Id.* In making these assertions, OGD appears to reiterate portions of OGD Contentions C and I,⁹ which the Licensing Board previously rejected. *PFS*, LBP-98-12, 47 NRC at 227-28, 230. In any event, OGD fails to provide any facts or expert opinion in support of these assertions; fails to provide any basis to challenge the adequacy of the Applicant's Environmental Report or the

⁹ *See* OGD Initial Contentions, at 7 (Contention C) (asserting that the cask design fails to provide adequate protection against radiation releases during transportation), and 22 (Contention I) (asserting that the cask design is unsafe, untested and has not been certified for transportation, and that an Environmental Impact Statement cannot be prepared until the cask design is certified).

applicability of Table S-4, and fails to show the existence of a genuine dispute of material fact.

Accordingly, this contention should be rejected. *See* 10 C.F.R. § 2.714(b)(2)(ii)-(iii).

OGD Contention W.

OGD and its members are adversely affected by potential human errors, accidents, and/or other malfunctions involving the 1) loading of shipping casks, 2) transportation of shipping casks to a railhead, and 3) transportation of shipping casks via rail, including the proposed rail spur to the proposed PFS facility.

Staff Response:

In support of this contention, OGD asserts that 10 C.F.R. § 51.52, Summary Table S-4, "does not adequately contemplate any of the issues mentioned in this contention, and that "complete reliance on Table S-4 to assess potential [sic] fails to satisfy requirements for protection of public health and the environment." OGD Rail Contentions at 5. OGD fails to provide any facts or expert opinion in support of these assertions, fails to provide any basis to challenge the adequacy of the Applicant's Environmental Report or the applicability of Table S-4, and fails to show the existence of a genuine dispute of material fact.¹⁰ Accordingly, this contention should be rejected. *See* 10 C.F.R. § 2.714(b)(2)(ii)-(iii).

OGD Contention X.

OGD and its members are adversely affected by the failure of PFS and/or the NRC to assess environmental justice issues caused by the proposed amendment to transport high level spent nuclear fuel into the Skull Valley area via rail spur.

Staff Response:

In support of this contention, OGD asserts that it and its members "are discriminatorily and disproportionately impacted by the plan to transport high level spent nuclear fuel into the Skull Valley area," and that the PFS facility and rail spur "would not be proposed for communities

¹⁰ The Licensing Board has previously accepted a contention challenging the applicability of Table S-4, where an adequate basis was presented. *See PFS*, LBP-98-7, 47 NRC at 199-201, 227-28 (admitting portions of Utah Contention V, but rejecting OGD Contention C).

that are wealthy, more densely populated, and predominately white." OGD Rail Contentions at 5. OGD further incorporates by reference "the analysis provided in OGD Contention O." *Id.* at 6.

The Licensing Board has admitted environmental justice issues for adjudication in this proceeding, in admitting OGD Contention O. *PFS*, LBP-98-7, 47 NRC at 233. While OGD now seeks to supplement those issues with an assertion concerning the rail spur, it fails to provide any facts or expert opinion in support of those assertions, fails to specify any particular portion of the Environmental Report that is deficient, and fails to show the existence of a genuine dispute of material fact. *See* 10 C.F.R. § 2.714(b)(2)(ii)-(iii). Further, to the extent that OGD seeks to raise an issue of discriminatory intent or motivation, it fails to present a cognizable basis under NEPA. *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-98-13, 48 NRC 26, 36 (July 30, 1998), *citing Louisiana Energy Services, L.P.* (Claiborne Enrichment Center), CLI-98-3, 47 NRC 77, 101-06 (1998) Accordingly, this contention should be rejected.

OGD Contention Y.

OGD and its members are adversely affected by the taking and use of lands proposed for the construction and operation of the proposed rail spur because they will be deprived of the opportunity to utilize these lands for grazing animals.

Staff Response:

In support of this contention, OGD states that "at least one OGD member currently utilizes Reservation land designated for the rail spur to graze horses," and asserts that PFS failed to adequately assess the rail spur's potential impact on grazing. OGD's assertion concerning its member's use of Reservation land for grazing is supported by an affidavit by Margene Bullcreek, dated November 2, 1998, who states, *inter alia*, that she owns nine horses that graze on the land where the rail spur will be built (Bullcreek Affidavit, at 1).

Notwithstanding these assertions, OGD has failed to specify any portion of the Applicant's Environmental Report that it contends is deficient, nor has it provided any reason to believe that the Applicant's explicit discussion of the rail spur's effect on grazing in Skull Valley (revised ER § 4.4.1, at 4.4-2) and on ecological resources (*Id.*, § 4.4.2), is deficient. The contention therefore fails to satisfy 10 C.F.R. § 2.714(b)(2)(iii). Further, the contention does not dispute the Applicant's description of the small area of land that is impacted by the rail spur and the large amount of similar land in Skull Valley (*see* revised ER § 4.4.1 at 4.4-2), and the contention therefore fails to describe a significant environmental impact that requires consideration under NEPA or a genuine dispute of material fact with the Applicant. Accordingly, this contention should be rejected.

OGD Contention Z.

The construction and operation of the proposed rail spur will permanently damage the historically and culturally significant trail used by the Goshute and others who used the area planned for the Low Corridor Rail Spur to travel through the Skull Valley region.

Staff Response:

In support of this contention, OGD asserts that "oral history indicates that Goshute people used the area designated for the rail spur as a travel corridor and for hunting," in support of which it cites the affidavit of Margene Bullcreek, dated November 2, 1998. OGD Contentions at 6. OGD further asserts that § 4.4.8 of the Environmental Report "discusses a modest review of cultural resources, but failed to assess whether significant artifacts exist in the area proposed for the rail spur." *Id.*

These assertions fail to support the admission of this contention. While Ms. Bullcreek's affidavit raises the possibility that land proposed for the rail spur "may" contain cultural or

historic artifacts, or that burial grounds may exist there, she also states that she does not know if any artifacts or burial sites do, in fact, exist there (Bullcreek Affidavit at 1). OGD has not presented any facts or expert opinion to challenge the Applicant's reliance on a Class I cultural resource survey, conducted in May 1998, which concluded "there is only a low probability of encountering archeological or historic sites in the proposed rail spur corridor or ITP area" (revised ER at 4.4-8); nor has OGD presented any basis to challenge the Applicant's statements that a Class III cultural resource survey will be performed in the rail spur corridor area, and that any necessary mitigative measures will be implemented (*Id.* at 4.4-9). OGD's speculative assertions do not show that a genuine dispute exists with the Applicant on a material issue of fact, and do not support an admissible contention under 10 C.F.R. § 2.714(b)(2)(ii)-(iii). *PFS*, LBP-98-7, 47 NRC at 180-81. Accordingly, this contention should be rejected.

CONCLUSION

For the reasons set forth above, the Staff submits that OGD's Rail Contentions should be rejected as untimely and as failing to satisfy the Commission's requirements governing the admissibility of contentions.

Respectfully submitted,



Sherwin E. Turk
Counsel for NRC Staff

Dated at Rockville, Maryland
this 10th day of November 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-ISFSI
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Fuel Storage Installation))

CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S RESPONSE TO 'OHNGO GAUDADEH DEVIA'S CONTENTIONS RELATING TO THE LOW RAIL TRANSPORTATION LICENSE AMENDMENT'" in the above captioned proceeding have been served on the following through deposit in the Nuclear Regulatory Commission's internal mail system, or by deposit in the United States mail, first class, as indicated by an asterisk, with copies by electronic mail as indicated, this 10th day of November, 1998:

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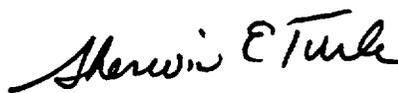
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