

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of:)	Docket No. 72-22-ISFSI
PRIVATE FUEL STORAGE, LLC)	ASLBP No. 97-732-02-ISFSI
(Independent Spent Fuel)	
Storage Installation))	October 26, 1998

**STATE OF UTAH'S REPLY TO APPLICANT'S AND
STAFF'S RESPONSES TO LOW RAIL CONTENTIONS**

I. INTRODUCTION

As permitted by the Board's Order dated October 16, 1998, the State of Utah hereby replies to Applicant's Answer to State of Utah's Contentions Relating to the Low Rail Transportation License Amendment (October 14, 1998) (hereinafter "Applicant's Answer") and NRC Staff's Response to State of Utah's Contentions Relating to the Low Rail Transportation License Amendment (October 14, 1998) (hereinafter "Staff's Response"). Contrary to their arguments, the State satisfies both the Commission's late-filed contention standard and the admissibility standard.

II. PROPOSED REWORDING OF CONTENTIONS

The State does not object to the Applicant's proposed rewording of the Contentions in Appendix A with the following modifications, which have been agreed to by the Applicant:

Contention HH: In subparagraph a. of reworded Contention HH, the word "specifically" should be changed to "such as."

Contention II: As reworded by the Applicant, the second subpart of this Contention regarding impacts on species is amended to clarify the potential impact on species as follows:

The ER fails to quantify the costs and sufficiently analyze the impacts of the construction and operation of the rail line on species in the rail corridor, **including species habitat, food base, mating and breeding habits, noise levels, and barriers to migration.**

III. THE STATE SATISFIES THE LATE-FILED CONTENTION STANDARD.

Both the Applicant and Staff argue that the State lacks good cause for its contentions because it has known since June of 1997 that the Applicant was considering building a rail line along Skull Valley Road to transport spent fuel casks to the ISFSI, and that the new location does not differ materially from the original proposal. Applicant's Answer at 3, 13; Staff's Response at 4. The argument is entirely without merit. It is clear from the language of the 1997 Environmental Report ("ER") that PFS originally intended to use truck transportation along Skull Valley Road as the sole means of transporting spent fuel from the main railroad line to the Private Fuel Storage Facility ("PFSF"), and considered rail transport to be merely "optional." ER at 2.1-3. *See also* ER at 4.4-1 ("A new railroad spur *may* be constructed by [PFS] to connect the PFSF directly to the Union Pacific Railroad mainline.") (emphasis added). At the stage when the license application was submitted, PFS had not even conducted a feasibility study for the rail spur. *Id.* The ER's description of the environmental impacts of the proposed rail corridor consisted of a few pages in Section 4.4.

In contrast, in submitting the August 1998 license amendment application for approval of the rail spur, PFS now characterizes rail shipments to the PFSF as "the preferred option." Letter from John D. Parkyn, PFS, to Director, NRC Office of Nuclear Materials Safety and Safeguards at 1 (August 28, 1998). Shipment by heavy haul truck has dropped to the status of a "viable

alternative” that is “still being considered.” *Id.* As represented in the cover letter, “most of the license amendment changes” (comprising a stack of paper about 1 inch high) involve revisions to the ER, Safety Analysis Report (“SAR”), and Emergency Plan, “which describe the interfaces and effects on the environment of the new rail corridor and ITP location.” *Id.*

Accordingly, the State reasonably relied on PFS’s own assertions, at the time it submitted its original application, to deduce that PFS was extremely unlikely to pursue a Skull Valley Road railroad spur, and that submitting contentions on that option would not constitute a wise use of the State’s resources. Now that the railroad spur has become the centerpiece of PFS’s transportation proposal, the State has good cause for evaluating the proposal and submitting contentions regarding it. This factor must weigh heavily in favor of admitting the issues.¹

Consumers Power Co. (Midland Plant, Units 1 and 2), LBP-82-63, 16 NRC 571, 589 (1982).

IV. THE STATE’S CONTENTIONS ARE ADMISSIBLE.

A. Contention HH

The NRC Staff concedes that a portion of Contention HH is admissible, regarding the

¹The Applicant also claims that the State has other means to protect its interest, by filing comments on the Draft Environmental Impact Statement. Applicant’s Answer at 5 note 4. It is well-established, however, that the Staff’s review is not an adequate substitute for full participation in a licensing hearing. Cincinnati Gas and Electric Co. (William H. Zimmer Nuclear Station), LBP-79-22, 10 NRC 213, 215 (1979). The Applicant concedes that the “development of a sound record” factor favors admission of Contention HH, although “weakly.” *Id.* In fact, the factor is quite strong: the State has submitted affidavits from two experts who support the contention. The State intends to present expert testimony by these, or similarly qualified experts. Finally, the Applicant’s argument that admission of the contentions would unduly broaden or delay the proceeding is not only unfounded, but unjustified. The issues raised by the State in these contentions are similar to other issues it has already raised. *See, e.g.,* Contentions R (Emergency Planning), K (Credible Accidents); DD (Ecology & Species). Moreover, this factor should be evaluated in light of the fact that the Applicant delayed submitting an application for the rail spur until this point in time. The State has no responsibility for the Applicant’s delay in completing its license application. Therefore it may not, in fairness, be penalized for it.

potential inability of four-wheel drive vehicles to cross the Low rail spur. Staff's Response at 11. Otherwise, both the Applicant and Staff oppose the admissibility of this contention. Their arguments are without merit.

Both the Applicant and Staff argue that the State has not met its burden with respect to the inadequacy of the ER's discussion of wildfires and mitigation measures. Applicant's Answer at 6-12, Staff's Response at 8-10. They contend that the State has failed to show why the proposed 40-foot buffer zone is inadequate to protect against railroad-caused wildfires. As discussed in the State's contentions, the Applicant has requested a 40-foot buffer from the Bureau of Land Management ("BLM"), but there is no guarantee that it will be obtained. Given the potentially significant impact of the buffer strip on wildlife in the area, it is not at all clear that it will be granted by the BLM. Therefore, in the absence of a validly issued permit for the buffer area, the State's concern must be admitted.

The Applicant also argues that the State has not demonstrated that the risk of range fires is significant. Mr. Schen's affidavit, however, refers to frequent and recurring wildfires in the area, and the ease with which the vegetation in the area ignites. Affidavit of David C. Schen at 3. The ER itself also states that the potential for range fires is "increased" by the proposed rail spur. *Id.* at 4.4-9.

The Applicant and Staff object to subpart b of the contention, regarding the potential for human activity to increase the risk of wildfires. They argue that the State fails to provide supporting documentation, and that the State is incorrect in its supposition that construction of the rail spur will increase human activity in the area. Staff's Response at 10, Applicant's Answer at 9. These claims are without merit. The license amendment application itself patently

demonstrates the likelihood of increased human activity in the area. As discussed in Section 4.4 of the ER, the rail spur will be 32 miles long and 40 feet wide. To reduce the potential for wildfires, the 40-foot corridor will be cleared of vegetation. *Id.*, § 4.4.8. Because PFS intends to maintain the 40-foot wide corridor free of vegetation, it will need to maintain the corridor in such a way as to permit regular access. Thus, this 32-mile long and 40-foot wide corridor along the railroad spur would provide a new source of vehicular and pedestrian access to the area of the desert which the spur would traverse. The Applicant's objection only serves to highlight the existence of a material factual dispute between the State and the Applicant, which warrants admission of this aspect of the contention.

The third basis of Contention HH raises the potential interference of the rail spur with local fire fighting activities. Although the Staff does not object, the Applicant charges that the State has provided insufficient basis and ignored information in the ER. Applicant's Answer at 11-12. In particular, the Applicant charges that the State ignores the assertion in the ER that the spur will be constructed close to grade so that it can be crossed more easily by emergency vehicles.

Contrary to the Applicant's assertion, the State did not ignore this portion of the ER, but responded directly to it. As Mr. Schen's affidavit states, it is his expert opinion that:

Even if the rail spur is constructed close to existing grade, fire fighting vehicles will be unable to climb up the vertical profile of the grade and rail, especially given the gross weight of the vehicle and water tank and also because the vehicle will be unable to get any traction from the ballasted rail bed.

Schen Affidavit, par. 13. Thus, the State has demonstrated a material dispute with the Applicant.

The Applicant also argues that the State has failed to demonstrate that the impediment posed by the rail spur to fire fighting activities would be significant. Contrary to the Applicant's argument, the significance of the wildfire threat is addressed in Mr. Schen's affidavit, which refers to "frequent" and "recurring" wildfires that move across the desert unless they are stopped by natural barriers such as irrigated areas or mudflats.² *Id.*, ¶¶ 8 and 9.

B. Contention II

The Applicant and Staff oppose admission of Contention II, which faults the ER for failing to adequately address the cumulative impacts and costs of the proposed rail spur. The Staff argues that the State has failed to identify any cumulative impacts of the rail spur proposal. Staff's Response at 13. As stated in the State's Contentions at 8, however, the impacts of the Low Rail Corridor must be considered in conjunction with the impacts of the PFSF. Rather than look at the cumulative impacts of both of these entities in their entirety, the ER examines them separately.

The Applicant and Staff also argue that in seeking quantification of the costs associated

²Both the Applicant and Staff object to Contention II's claim that fire fighters may be hesitant to respond to an emergency in the area of loaded spent fuel casks, on the ground that it contradicts the Commission's generic determination that offsite authorities and organizations may be relied on in the event of an emergency involving nuclear materials. Applicant's Answer at 12 note 9 and Staff's Response at 11, *citing* 10 C.F.R. §§ 72.32 and 50.47, Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), LBP-88-32, 28 NRC 667, 728-29, 749-50 (1988). Each of the authorities cited by the Applicant and Staff relate to offsite responses to nuclear emergencies, for which regulations require that information and/or training be provided. It is not necessarily the case that a fire fighter who is responding to a range fire which occurs in the area of the rail spur, but which is unrelated to the operation of the PFSF, will have received any such information or training. Moreover, the Staff's objections to Mr. Schen's qualifications on this issue are without merit. As a professional government fire fighter with many years of experience, Mr. Schen is highly qualified to testify on the expected behavior of fire fighters under various circumstances.

with the proposed rail spur, the State advocates stricter requirements than those imposed by the regulations. Applicant's Answer at 14, Staff's Response at 14. They would put the burden on the State of showing that the impacts of the rail spur are subject to quantification. That is not how the regulations are written, however. As provided in 10 C.F.R. § 51.45(c):

The analyses for environmental reports shall, *to the fullest extent practicable*, quantify the various factors considered. To the extent that there are important qualitative considerations or factors that cannot be quantified, those considerations or factors shall be discussed in qualitative terms.

(emphasis added). These regulations clearly put the burden on the license applicant of justifying the lack of any quantitative analysis of the environmental impacts of the proposed rail spur.³

B. Contention B-1

The Staff does not oppose this contention, subject to certain limitations. Staff's Response at 18-20. The Staff argues that certain statements in the basis are "speculative and unsupported." Staff's Response at 20. In particular, the Staff disputes the State's assertion that it should be assumed that the Applicant will have only one transportation unit available for transporting the casks from the Intermodal Transfer Point to the PFSF, and that a backup of casks at the ITP awaiting heavy haul transport is apparent. In arguing that the State's assertion is unsupported by any facts, the Staff misses the point: the SAR contains no factual information

³Contrary to the Staff's assertion at 14 and 17, the Appeal Board did not hold to the contrary in Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-123, 6 AEC 331, 350-51 (1973). In that case, *after* an evidentiary hearing, the Licensing Board specifically found that the environmental impacts of the project were not reasonably subject to quantification. Here, in contrast, there is no record of any attempt to quantify the environmental impacts of the proposed rail spur. It should also be noted that the Consumers Power case was decided before either the Council on Environmental Quality ("CEQ") or the NRC had promulgated their NEPA implementing regulations (1978 and 1974, respectively), which clearly require an attempt to quantify costs and benefits.

about the number of heavy haul trucks that will be available. Given PFS's failure to provide the information, it is reasonable for the State to make the conservative assumption that only one truck will be available.

V. CONCLUSION

For the foregoing reasons, the State's contentions regarding the Low rail spur should be admitted.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that copies of the State of Utah's Reply to Applicant's and Staff's Responses to Low Rail Contentions were served on the persons listed below by electronic mail (unless otherwise noted) with conforming copies by United States mail first class, this 26th day of October, 1998:

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