

October 26, 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 ANSWER TO CONFEDERATED TRIBES' CONTENTIONS RELATING TO THE LOW RAIL TRANSPORTATION LICENSE AMENDMENT

Applicant Private Fuel Storage L.L.C. ("Applicant" or "PFS") hereby submits its answers to the Confederated Tribes' "Contentions . . . Relating to the Low Rail License Amendment," filed October 14, 1998 ("CT Rail Cont.").¹ For the reasons set forth below, PFS respectfully submits that the Tribes' Contentions should be denied in their entirety for failure to meet the requirements for pleading contentions set forth in 10 C.F.R. § 2.714 and that Contentions J through M should be denied for failing to meet the requirements for late filed contentions.

A. Confederated Tribes' Contention I

In Contention I, Confederated Tribes adopt and restate the contentions filed by the State of Utah ("State") on September 29, 1998 relating to the Low Corridor Rail Trans-

¹ On August 28, 1998, PFS filed an amendment to the license application which (1) moved the rail spur from the Skull Valley road corridor to a corridor running from Low, Utah running along the western side of Skull Valley to the Skull Valley Reservation (the "Low Corridor"), and (2) moved the Intermodal Transfer Point ("ITP") 1.8 miles west of its original location.

portation License Amendment.² CT Rail Cont. at 1. This contention must be dismissed for the same reasons that the State's contentions concerning the Low Corridor rail amendment must be dismissed.³ Moreover, even if the State's contentions are not dismissed, Confederated Tribes should not be allowed to incorporate the State's contentions by reference because such wholesale incorporation by reference is contrary to the specificity and other pleading requirements of the NRC's rules of practice as amended in 1989.⁴ In the event the State's contentions are not dismissed and the Board does not bar the Tribes' incorporation by reference, the State should be designated the "lead" party on the contentions subsumed under Contention I and should be assigned to perform all the functions that the Board has assigned to lead parties on other contentions sponsored by more than one party in this proceeding. See Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-98-7, 47 NRC 142, 182, 242-43 (1998) (hereinafter "LBP-98-7, 47 NRC at ___").

B. Confederated Tribes Contention J

In Contention J, Confederated Tribes assert that the Environmental Report ("ER") "fails to provide adequate consideration to the potential fire hazards and the impediment to response to wild fires associated with constructing and operating the proposed rail line in the Low corridor." CT Rail Cont. at 2. Confederated Tribes adopt the "points raised

² "State of Utah's Contentions Relating to the Low Rail Transportation License Amendment," filed September 29, 1998.

³ See "Applicant's Answer to State of Utah's Contentions Relating to the Low Rail Transportation License Amendment," dated October 14, 1998 (hereinafter "PFS Answer").

⁴ See "Applicant's Answer to Petitioners' Contentions" at 18-20, dated Dec. 24, 1997.

by the State in its Supplemental Contentions,” id., and assert in addition that trains on the rail line would be “particularly vulnerable to damage and injury from . . . fires,” because of the trains’ slow speed and “[t]he location and 26 mile length of the train tracks.” Id.

This contention, similar to the State’s contentions on train-related fires, must be dismissed for failure to meet the five-part test for the admission of late-filed contentions. 10 C.F.R. § 2.714(a)(1)(i-v); see PFS Answer at 2-4. The most important criterion of this five-part test is good cause for late filing. See LBP-98-7, 47 NRC at 208. As set forth in PFS’s Answer, this five-part test, including the requirement for good cause, must be satisfied even if the document upon which the contention is predicated was not available before the deadline for the filing of contentions. Duke Power Company (Catawba Nuclear Station, Units 1 and 2), CLI-83-19, 17 NRC 1041, 1045 (1983). If a late-filed contention is predicated upon the availability of a document, a petitioner will not have good cause unless the contention, among other things, is “wholly dependent” upon the content of the newly available document. Id. at 1043-44.

Like the State, Confederated Tribes lack good cause for their late filing of Contention J because they knew when the application was filed in June 1997 that PFS was considering building a rail line to transport spent fuel casks to the ISFSI. See ER, Rev 0 at 4.4-1 to 6 (describing rail spur alternative for transporting casks to the ISFSI). The only difference concerning the rail line, between the application as docketed and the application as amended, is that the rail line is now 5-10 miles west of where it would have been if built as initially planned. See ER, Rev 1 at Figure 2.1-1; ER, Rev 0 at 4.4-1. Any fire

hazards or impediments to fire fighting caused by the rail line or danger posed to the rail line from wildfires would have existed with the rail line as initially planned.

Accordingly, Confederated Tribes possessed the necessary information based on the initial application to file a contention asserting that the rail spur alternative proposed by PFS had the potential to start or impede the fighting of wildfires. Yet the Confederated Tribes raised no issue concerning the potential for the rail line to either cause or impede the fighting of wildfires or for wildfires to pose a threat to trains on the rail line.⁵ Thus, there is no good cause for the late filing.

The Confederated Tribes' reliance on "the points raised by the State in its Supplemental Contentions," see CT Rail Cont. at 2, does not demonstrate good cause because those points do not provide good cause for the State's late filing of its contentions. See PFS Answer at 2-4. Moreover, the Confederated Tribes' simple reference to "points raised by the State" is too vague to establish good cause. Florida Power & Light Company (St. Lucie Plant, Unit No. 2), LBP-81-28, 14 NRC 333, 344 (1981) ("it is [petitioner's] burden to allege with particularity its good cause for late filing"); cf. Texas Utilities Electric Company (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-92-12, 36 NRC 62, 72 (1992) (vague allegations cannot constitute good cause).⁶

⁵ See Statement of Contentions on Behalf of The Confederated Tribes of the Goshute Reservation and David Pete, dated November 23, 1997 ("CT Cont."). The Tribes raised a contention concerning, in part, the effect of wildfires on the ISFSI, see id. at 4 (Contention B), as did Castle Rock and the State, but that is a distinctly different factual issue in that it does not concern fires started by PFS's rail line, the impediment to fighting fires that the rail line may or may not pose, or the effect of fires on the environment.

⁶ Confederated Tribes also cite the State's contentions as bases for Contentions K and L. See CT Rail Cont. at 3-4. Similar to Contention J, those references do not demonstrate good cause for late filing because they are equally vague.

Similarly, the Confederated Tribes' assertions that "[t]he location . . . of the train tracks" creates "the potential for new and additional wildfire ignition causes and locations" and makes rail transportation "particularly susceptible to damage," see CT Rail Cont. at 2, are too vague to establish good cause. It is unclear whether the Confederated Tribes are referring to the Low Corridor or Skull Valley as a whole. Moreover, even if the statements are intended to refer solely to the Low Corridor, Confederated Tribes point to no facts or expert opinion to suggest that the Low Corridor would be more susceptible to wildfires and related damage to trains than the originally proposed Skull Valley Corridor.⁷ Such unsupported assertions cannot supply good cause.⁸

Thus, Contention J is not dependent, much less wholly dependent, on the license application amendment as claimed by the Confederated Tribes. The Tribes could have filed this contention with specificity based on the June 1997 original application, and therefore lack good cause for late filing. Because Confederated Tribes do not "make a compelling showing on the other four factors," LBP-98-7, 47 NRC at 208, Contention J must be dismissed.⁹

⁷ Furthermore, as PFS showed in its answer to the State, the map of wildfires in Skull Valley from the Utah Statewide Fire Assessment Fire History (1986-1996) attached to Castle Rock's contentions indicates that the incidence of wildfires is lower in the Low Corridor than along Skull Valley Road. See PFS Answer at 3-4 n.3.

⁸ See Jersey Central Power & Light Company (Oyster Creek Nuclear Generating Station), LBP-77-58, 6 NRC 500, 509-11 (1977); Long Island Lighting Company (Jamesport Nuclear Power Station, Units 1 and 2), LBP-75-37, 2 NRC 23, 25 (1975).

⁹ With respect to factors two and four, regarding other means to protect and other parties to represent the Confederated Tribes' interest, they can make any information that they possess concerning the potential for the rail spur to cause or to impede the fighting of wildfires available to the NRC Staff for the Staff to utilize in the EIS process. Further, factors two and four are accorded less weight than factors three and five. LBP-98-7, 47 NRC at 208. Factor three, sound record development, weighs against admission, in

Contention J must also be dismissed for failing to meet the Commission's pleading requirements. First, the Confederated Tribes' allegations that the "proposed rail line creates the potential for new and additional wildfire ignition causes and locations" and that PFS's trains would be "particularly vulnerable to damage and injury" from wildfires, CT Rail Cont. at 2, are entirely unsupported by citation to fact or expert opinion. Further, Confederated Tribes completely ignore the fire prevention steps taken by PFS as well as its evaluation of transportation accidents, see ER, Rev. 1 at 4.4-9, § 5.2, and provide no bases whatsoever to challenge the adequacy of the ER. Hence, the contention must be dismissed for lack of basis and failure to show a genuine dispute of material fact.¹⁰

that the Confederated Tribes identify no witnesses or testimony regarding the contention and make only the vaguest assertion regarding their ability to contribute. Vermont Yankee Nuclear Power Corporation (Vermont Yankee Nuclear Power Station), ALAB-919, 30 NRC 29, 41 (1989). Factor five, delaying the proceeding or broadening issues, weighs against admission, in that contentions were admitted almost six months ago and the issue of wildfires potentially caused by the rail transportation of casks is, as noted in footnote 5, factually distinct from any other issue in the proceeding. See South Carolina Electric and Gas Company (Virgil C. Summer Nuclear Station, Unit 1), ALAB-642, 13 NRC 881, 891 (1981); compare LBP-98-7, 47 NRC at 209. Thus, its admission would broaden the issues to be litigated in this proceeding and potentially extend the proceeding. Moreover, the late admission of this contention could cause delay by requiring the parties, at this late date less than five months before the general cut-off of discovery, to locate experts and to conduct and complete discovery on its issues by March 1, 1999. But for the lateness of this contention, such could have been done in parallel with that being done for the issues originally admitted. Finally, the Confederated Tribes' claim that any delay or broadening of the issues is outweighed by the significance of the issues, CT Rail Cont. at 6, is misplaced, in that such balancing under factor five is prohibited by Commission case law. Commonwealth Edison Company (Braidwood Nuclear Power Station, Units 1 and 2), CLI-86-8, 23 NRC 241, 248 (1986).

¹⁰ To the extent that Contention J seeks to rely on "the points raised by the State in its supplemental Contentions" regarding potential fire hazards and impediments to fire fighting for bases, the Board should dismiss the Contention for lack of specificity and for failure to allege a claim with sufficient particularity. 10 C.F.R. § 2.714(b)(2); Duke Power Company (Catawba Nuclear Station, Units 1 and 2), ALAB-687, 16 NRC 460, 468 (1982) (petitioner may not file a "vague, unparticularized contention"); LBP-98-7, 47 NRC at 180. Further, the contention should also be dismissed on substantive grounds for the same reasons that State Contention HH should be dismissed. See PFS Answer at 4-8. The Board should likewise dismiss Contentions K and L to the extent Confederated Tribes also vaguely refer to the State's Contentions as bases for those contentions. See CT Rail Cont. at 3-4. Absent dismissal, the Board should deem Confed-

Second, the contention seeks to litigate the environmental effects and apparently the safety as well of transporting spent fuel by rail from the nation's nuclear reactors to the ISFSI. Thus, it must also be dismissed for impermissibly challenging the Commission's regulations and generic determinations regarding the environmental effects and safety of spent fuel transportation (upon which the ER expressly relies). LBP-98-7, 47 NRC at 190-91, 200-01; see ER, Rev. 1 at § 5.2.

C. Confederated Tribes Contention K

In Contention K, the Confederated Tribes assert that the ER is inadequate in that it “fails to account for the costs associated with the construction, maintenance, operation, and decommissioning of the rail line and the costs associated with the ultimate removal of the stored fuel at the end of the lease.” CT Rail Cont. at 3.

This contention must be dismissed for being late filed. Like Contention J, the late filing of Contention K lacks good cause because it is not based on new information. Nowhere do Confederated Tribes show that the costs of construction, maintenance, and operation (or the other costs referred to in Contention K¹¹) would be any different for the Low Corridor rail line than they would have been for a rail line paralleling Skull Valley road as initially proposed by PFS. See id. at 3-4. Thus, Contention K, like Contention J, is not dependent, much less wholly dependent, on the license application amendment and must be dismissed.

erated Tribes' adoption of the State bases as duplicative of Contention I and should consolidate them therewith. See LBP-98-7, 47 NRC at 242-43.

¹¹ As discussed subsequently in the text, the other alleged costs of decommissioning the rail line and removing spent fuel from the ISFSI are irrelevant.

Contention K must also be dismissed for failure to show that a genuine dispute exists with PFS on a material issue of law or fact in that it completely ignores relevant material in the Application. LBP-98-7, 47 NRC at 181. Contrary to the Confederated Tribes' assertion, PFS has addressed the cost of construction, maintenance, and operation of the rail line. Rail line construction cost is included in the capital cost of the ISFSI. See ER, Rev. 1 at Table 7.3-1. Maintenance and operating costs are included in the operating costs of the ISFSI. See id.¹² PFS does not plan to remove the rail line at the end of the life of the ISFSI, id. at 4.6-3, so there are no decommissioning costs associated with the rail line itself. Further, the Board has already dismissed the Tribes' claim -- previously raised in their Contention A -- that the cost of spent fuel removal must be included as part of the decommissioning costs for the ISFSI. See CT Cont. at 2-3; Prehearing Tr. at 410, 416-17; LBP-98-7, 47 NRC at 234.¹³

Thus, contrary to the Confederated Tribes' claim, PFS has assessed the appropriate costs associated with the rail line. Confederated Tribes have provided no facts or expert opinion to show that PFS's assessment is inadequate in any aspect. See Florida Power and Light Company (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-90-16, 31 NRC 509, 521 n.12 (1990). Therefore, Contention K must be dismissed.

¹² Moreover, PFS has evaluated the environmental impacts and related costs associated with the rail line and has determined that they will be negligible. See ER, Rev. 1 at §§ 2.3.3, 4.4; id. at Table 7.3-1.

¹³ Pursuant to statute, such costs will be borne by the Department of Energy, not the Applicant. Indiana Michigan Power Company v. DOE, 88 F.3d 1272, 1273 (D.C. Cir. 1996) (citing the Nuclear Waste Policy Act, 42 U.S.C. §§ 10222(a)(5)(B), 10131(a)(5)); see 10 C.F.R. § 961.11 (DOE standard contract).

D. Confederated Tribes Contention L

In Contention L, the Confederated Tribes, like the State in its contentions, claim that “[t]he intermodal transfer point (ITP), under the proposed ‘Amendment,’ becomes a temporary storage facility which requires a separate and additional license.” CT Rail Cont. at 4. To support Contention L, the Confederated Tribes cite “the points raised by the State in its Contention B-1” and also assert that various other factors will allegedly increase the likelihood that “materials will be stored at the ITP for potentially extended periods of time.” Id. This contention must be dismissed for being late without good cause, for lack of basis, and for impermissibly challenging Commission regulations.

First, there is no good cause for the late filing of this contention because, like Contentions J and K, it is not based on new information. The allegations in Contention L are just as pertinent to the ITP as described in the original Application as they are to the ITP described in the Application as amended. The only change made to the ITP was its location -- it is now slated to be 1.8 miles west of its original location. See ER, Rev. 1 at 3.2-5. The Confederated Tribes make no attempt to show that their factors (or the State’s points in its Contention B-1) relate to this change in location, see CT Rail Cont. at 4, and therefore this contention must be dismissed. See also PFS Answer at 17-20.

Second, Contention L must also be dismissed for a complete lack of factual basis. Confederated Tribes provide neither a single fact nor any expert opinion to show that the factors they cite will have any effect on the likelihood that materials will be stored at the ITP for potentially extended periods of time. See CT Rail Cont. at 4. Hence the contention is wholly speculative and must be dismissed. See LBP-98-7, 47 NRC at 180.

Third, as already held by the Board in dismissing bases 2 and 3 of the State's Contention B, Contention L must be dismissed for "impermissibly challeng[ing] the Commission's regulations or rulemaking-associated generic determinations, including the provisions of 10 C.F.R. Part 71 governing transportation of spent fuel from reactor sites to the PFS facility." LBP-98-7, 47 NRC at 184. The Commission has determined in those regulations and associated generic determinations that spent nuclear fuel can be transported safely notwithstanding the factors cited by Confederated Tribes.¹⁴

E. Confederated Tribes Contention M

The Confederated Tribes assert in Contention M that "[t]he proposed rail line will increase hazards to the public." CT Rail Cont. at 5. As bases for the contention, the Confederated Tribes, in addition to a vague general reference to "issues raised earlier by the Goshute Tribe in its first set of Contentions," assert (1) that "the placement of a slow-moving train on a track running parallel to the interstate highway will increase the vulnerability of the train and its cargo to terrorist attack" and (2) that "running the line parallel to the Interstate will increase the possibility of exposure by the traveling public to the potential dangers stemming from accidental or intentionally released radiation." Id.

This contention must be dismissed for several reasons. First, similar to Utah V and OGD C, previously rejected by the Board, Contention M impermissibly challenges NRC regulations and associated generic rulemaking determinations and is beyond the scope of this proceeding. See LBP-98-7, 47 NRC at 199-201, 227-28. The radiological conse-

¹⁴ See also "Applicant's Answer to Petitioners' Contentions" at 297-310, 635-36, dated Dec. 24, 1997.

quences of spent fuel transportation, including accidents, have been generically determined by the Commission in Table S-4, see 10 C.F.R. § 51.52, cited in ER, Rev. 1 at § 5.2, and, as previously determined by the Board, are therefore not subject to challenge in this proceeding. Likewise, terrorism and sabotage against the transportation of spent fuel are outside the scope of the Commission's environmental regulations and beyond the scope of this proceeding, Philadelphia Electric Company (Limerick Generating Station, Units 1 and 2), ALAB-819, 22 NRC 681, 697-98, 701 (1985); they are addressed generically by the Commission's and the Department of Transportation's regulations. See 10 C.F.R. §§ 71.5, 73.37; Pacific Gas and Electric Company (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-653, attached to CLI-82-12, 16 NRC 53, 74 (1982).¹⁵

Second, as with the previous contentions, Contention M is completely devoid of any basis. The general allusion to "the issues raised earlier by the Goshute Tribe" (see CT Rail Cont. at 5), lacking any further elucidation, is impermissibly vague and provides no basis for the contention. Further, Confederated Tribes present no facts or expert opinion whatsoever to support the alleged vulnerability of PFS's trains to terrorism or the asserted increased possibility of public exposure to radiation. Thus, Contention M is based on pure speculation and must be dismissed.

Third, Confederated Tribes lack good cause for the late filing of Contention M because, like previous contentions, it is not based on new information. "[T]he issues raised earlier by the Goshute Tribe in its first set of Contentions," whatever reference may be

¹⁵ See also "Applicant's Answer to Petitioners' Contentions" at 506-10, dated Dec. 24, 1997.

meant, clearly are not new. Moreover, the hazards allegedly arising from the proximity of the Low Corridor rail line to Interstate 80 are not new because the rail line as initially proposed along the Skull Valley road would also have run near -- and indeed crossed under -- Interstate 80 at its northernmost end. See ER, Rev. 0 at Figure 2.1-1. Confederated Tribes have made no attempt to show that any difference in the rail line's proximity to the interstate between the Application as initially filed and as amended is significant. Thus, the Tribes' assertions based on the proximity of the rail line to Interstate 80 do not provide good cause for late filing. See Cleveland Electric Illuminating Company (Perry Nuclear Power Plant, Units 1 & 2), LBP-83-38, 18 NRC 61, 64 (1983).

F. Confederated Tribes Contention N

In Contention N, the Confederated Tribes claim that "[t]he 'Amendment' fails to provide adequate notice to the public of the changes, which are substantial." CT Rail Cont. at 5. In the contention's bases, Confederated Tribes assert that the "sweeping set of changes" the Applicant has made to the application require the "Applicant . . . to 're-publish the Application' in the Federal Register 'so that the public will have notice of the nature of the license being sought' and not be denied 'due process.'" Id. at 5-6.

This contention must be dismissed for failure to controvert the application and for impermissibly challenging Commission regulations. LBP-98-7, 47 NRC at 179, 181.

First, the claim that the Amendment "fails to provide adequate notice" does not controvert the application, either as docketed or as amended, as required by the Commission's regulations for the proper pleading of contentions. See 10 C.F.R. § 2.714(b); LBP-98-7, 47 NRC at 181. Thus, the contention must be dismissed.

Second, the contention impermissibly challenges Commission regulations by advocating requirements greater than those imposed by the regulations. The Commission's regulations do not require publication of a notice of opportunity for hearing for amendments to a previously filed license application, such as the amendment filed here. Rather, such notice is required only for the initial license application and for amendments to a previously issued license. See 10 C.F.R. § 72.46(a) & (b)(1).¹⁶ Nor has due process been denied either to the Confederated Tribes, which has received the amendment and filed contentions challenging it, or to the public at large, for the license sought by the application remains the same.¹⁷ Therefore, this contention must be dismissed

Respectfully submitted,



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Dated: October 26, 1998

¹⁶ Moreover, the Confederated Tribes' claim that the sweeping set of changes mandate "that the Applicant proceed to republish the Application" impermissibly asks the Board to require the Applicant to perform a function of the Commission.

¹⁷ Further, Confederated Tribes have no standing to raise the due process claims of the public at large, for even if proved, publication of a notice of opportunity for hearing for the general public with respect to the amendment would not redress any injury to Confederated Tribes. See Yankee Atomic Electric Company (Yankee Nuclear Power Station), CLI-96-1, 43 NRC 1, 6 (1996).

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CERTIFICATE OF SERVICE

I hereby certify that copies of the "Applicant's Answer to Confederated Tribes' Contentions Relating to the Low Rail Transportation License Amendment," dated October 26, 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 26th day of October 1998.

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