

July 19, 1999

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
)
(Independent Spent Fuel)
Storage Installation))

NRC STAFF'S RESPONSE TO APPLICANT'S
MOTION FOR SUMMARY DISPOSITION OF
UTAH CONTENTION G (QUALITY ASSURANCE)

INTRODUCTION

Pursuant to 10 C.F.R. §2.749(a), the NRC Staff ("Staff") herewith responds to "Applicant's Motion for Summary Disposition of Utah G" ("Motion"), filed on June 28, 1999, by Private Fuel Storage L.L.C. ("Applicant" or "PFS"). For the reasons set forth below and in the attached "Affidavit of Thomas O. Matula Concerning Contention Utah G (Quality Assurance), the Staff submits that all issues pertaining to the Applicant's quality assurance (QA) program have been addressed satisfactorily by the Applicant, and there no longer exists a genuine dispute of material fact with respect to Utah Contention G. Accordingly, the Staff therefore supports the Applicant's Motion and recommends that it be granted.

BACKGROUND

Contention Utah G ("Quality Assurance") was filed by the State of Utah on November 23, 1997. As admitted by the Licensing Board on April 22, 1998, the contention states as follows:

CONTENTION: The Applicant's Quality Assurance ("QA") program is utterly inadequate to satisfy the requirements of 10 C.F.R. Part 72, Subpart G.¹

The State presented various basis statements in support of this contention,² of which two issues (bases one and four) were admitted by the Board:

RULING: Admitted as supported by bases establishing a genuine material dispute adequate to warrant further inquiry, but limited to its bases one and four that assert a lack of detail in the PFS QA program description and a failure to demonstrate the independence of the PFS QA program. The contention's basis two regarding inadequate QA descriptions for PFS quality control over spent fuel canister packaging operations and materials and handling at originating reactor sites, shipping cask materials and construction, and welding on shipping casks and spent fuel canisters is inadmissible as impermissibly challenging the agency's regulatory program, standards, and/or rulemaking-associated generic determinations. . . . So too, the contention's basis three concerning inconsistency between the QA program description and the SAR is inadmissible as lacking materiality. . . .

LBP-98-7, 47 NRC at 188. Thus, two issues were admitted as part of this contention -- (1) the purported lack of detail in the PFS QA program description, and (2) PFS' alleged failure to demonstrate the independence of its QA program.

In its motion for summary disposition of Utah Contention G, PFS asserts that the two issues raised by the contention have been resolved, and that there is no longer any basis for litigation of the contention. Specifically, PFS states that under 10 C.F.R. §§ 72.24(n) and

¹ *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-98-7, 47 NRC 142, 188 (1998).

² "State of Utah's Contentions on the Construction and Operating License Application by Private Fuel Storage, LLC for an Independent Spent Fuel Storage Facility" ("Utah Contentions"), dated November 23, 1997, at 42-51.

72.140(c), it is required to provide a description of a QA program, including a discussion of how the provisions of Subpart G will be satisfied (Motion at 4-5); that Part 72 does not require a QA plan to contain the details of implementation or implementing procedures but, rather, focuses on an applicant's QA commitments (*Id.* at 5-6); that its QA program and commitments provide sufficient detail to satisfy 10 C.F.R. Part 72, Subpart G (*Id.* at 4, 6); and that any shortcomings identified by the State are immaterial (*Id.* at 6). Further, PFS states that its QA organization does possess sufficient independence to effectively implement its QA Program, including sufficient access to management to ensure resolution of quality concerns independent from cost and schedule considerations (*Id.* at 7); that the relationship between its Architect/Engineer (A/E) and its QA Committee is clearly defined (*Id.* at 7-8); that the SAR clearly defines organizational responsibilities of the QA Committee and other persons (*Id.* at 8-9); and that, consistent with the language in 10 C.F.R. § 72.144(d), unit managers are properly responsible to review their units' performance -- subject to independent audit by the PFS QA organization of the QA Program's implementation (*Id.* at 9-10). Finally, PFS asserts that the individual identified by the State of Utah as an expert in this area (Dr. Marvin Resnikoff) is not qualified by experience or training to serve as an expert witness in this area, as demonstrated by his deposition testimony (*Id.* at 3-4).

For the reasons set forth below and in the attached Affidavit of Thomas O. Matula, the Staff supports the Applicant's Motion and recommends that it be granted.

DISCUSSION

A. Legal Standards Governing Motions for Summary Disposition.

Pursuant to 10 C.F.R. §2.749(a), "[a]ny party to a proceeding may move, with or without supporting affidavits, for a decision by the presiding officer in that party's favor as to all or any

part of the matters involved in the proceeding. The moving party shall annex to the motion a separate, short, and concise statement of the material facts as to which the moving party contends that there is no genuine issue to be heard." In accordance with 10 C.F.R. §2.749(b), when a properly supported motion for summary disposition is made, "a party opposing the motion may not rest upon the mere allegations or denials of his answer; his answer by affidavits or as otherwise provided in this section must set forth specific facts showing that there is a genuine issue of fact."³ In addition, an opposing party must annex to its answer a short and concise statement of material facts as to which it contends there exists a genuine issue to be heard. 10 C.F.R. § 2.749(a). All material facts set forth in the moving party's statement will be deemed to be admitted unless controverted in the opposing party's statement. *Id.*⁴ Pursuant to 10 C.F.R. § 2.749(d), "[t]he presiding officer shall render the decision sought if the filings in the proceeding, depositions, answers to interrogatories, and admissions on file, together with the statements of the parties and the affidavit, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a decision as a matter of law."

³ *Accord, Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units I and 2), ALAB-841, 24 NRC 64, 93 (1986). General denials and bare assertions are not sufficient to preclude summary disposition when the proponent of the motion has met its burden. Advanced Medical Systems, Inc. (One Factory Row, Geneva, Ohio 44041), CLI-93-22, 38 NRC 98, 102 (1993). Although the opposing party does not need to demonstrate that it will succeed on the issues, it must at least demonstrate that a genuine issue of fact exists to be tried. Id.; Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), CLI-92-8, 35 NRC 145, 154 (1992) (to avoid summary disposition, the opposing party had to present contrary evidence that was so significantly probative as to create a material issue of fact).*

⁴ Pursuant to 10 C.F.R. § 2.749(c), if a party opposing the motion demonstrates in its affidavits that valid reasons exist why it cannot provide facts essential to oppose the motion, the presiding officer may deny the motion, order a continuance to permit affidavits to be obtained, or take such other action as may be appropriate.

The Commission has encouraged parties in its adjudicatory proceedings to seek summary disposition "on issues where there is no genuine issue of material fact so that evidentiary hearing time is not unnecessarily devoted to such issues." Statement of Policy on Conduct of Licensing Proceedings, CLI-81-8, 13 NRC 452, 457 (1981).⁵ Summary disposition has been recognized to provide "an efficacious means of avoiding unnecessary and possibly time-consuming hearings on demonstrably insubstantial issues." *Wisconsin Electric Power Co.* (Point Beach Nuclear Plant, Unit 1), ALAB-696, 16 NRC 1245, 1263 (1982); *Houston Lighting and Power Co.* (Allens Creek Nuclear Generating Station, Unit 1), ALAB-590, 11 NRC 542, 550 (1980).⁶

The Commission's summary disposition procedures have been analogized to Rule 56 of the Federal Rules of Civil Procedure. *See, e.g., Cleveland Electric Illuminating Co.* (Perry Nuclear Power Plant, Units 1 and 2), ALAB-443, 6 NRC 741, 753-54 (1977). The Commission, when considering motions for summary disposition filed pursuant to 10 C.F.R. § 2.749, generally applies the same standards that the Federal courts use in determining motions for summary judgment under Rule 56 of the Federal Rules. *Advanced Medical Systems*, 38 NRC at 102 (1993).

⁵ The Commission recently endorsed its earlier policy statement, but indicated that "Boards should forego the use of motions for summary disposition except upon a written finding that such a motion will likely substantially reduce the number of issues to be decided, or otherwise expedite the proceeding." *Statement of Policy on Conduct of Adjudicatory Proceedings*, CLI-98-12, 48 NRC 18, 20-21 (1998). The Staff submits that partial summary disposition of this contention will reduce the multiplicity of issues that require hearings in this proceeding, and will otherwise serve to expedite the proceeding.

⁶ It is well settled that an agency may ordinarily dispense with an evidentiary hearing where no genuine issue of material fact exists. *Veg-Mix, Inc. v. U.S. Dep't of Agriculture*, 832 F.2d 601, 607-08 (D.C. Cir. 1987).

Decisions arising under Rule 56 of the Federal Rules may thus serve as guidelines to the Commission's adjudicatory boards in applying 10 C.F.R. §2.749. *Perry*, 6 NRC at 754.

Under Rule 56 of the Federal Rules, the party seeking summary judgment has the burden of proving the absence of genuine issues of material fact. *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 157 (1970); *Advanced Medical Systems*, 38 NRC at 102. In addition, the record is viewed in the light most favorable to the party opposing the motion. *Poller v. CBS, Inc.*, 368 U.S. 464, 473 (1962); *Kerr-McGee Chemical Corp. (West Chicago Rare Earths Facility)*, ALAB-944, 33 NRC 81, 144 (1991). However, if the moving party makes a proper showing for summary disposition and the opposing party fails to show that there is a genuine issue of material fact, the District Court (or Licensing Board) may summarily dispose of all of the matters before it on the basis of the filings in the proceeding, the statements of the parties, and affidavits. Rule 56(e), Fed. R. Civ. P. *Accord, Advanced Medical Systems*, 38 NRC at 102; 10 C.F.R. § 2.749(d).

The Licensing Board in this proceeding has recently had occasion to rule upon a motion for summary disposition filed by PFS. See "Memorandum and Order (Granting Motion for Summary Disposition Regarding Contention Utah C), LBP-99-23, 49 NRC ___ (June 17, 1999). Therein, the Licensing Board succinctly summarized the standards governing the granting of summary disposition, as follows:

Under 10 C.F.R. § 2.749(a), (d), summary disposition may be entered with respect to any matter (or all of the matters) in a proceeding if the motion, along with any appropriate supporting material, shows that there is "no genuine issue as to any material fact and that the moving party is entitled to a decision as a matter of law." The movant bears the initial burden of making the requisite showing that there is no genuine issue as to any material fact, which it attempts to do by means of a required statement of material facts not at issue and any supporting materials (including

affidavits, discovery responses, and documents) that accompany its dispositive motion. An opposing party must counter each adequately supported material fact with its own statement of material facts in dispute and supporting materials, or the movant's facts will be deemed admitted. See Advanced Medical Systems, Inc. (One Factory Row, Geneva, Ohio 44041), CLI-93-22, 38 NRC 98, 102-03 (1993).

LBP-99-23, slip op. at 10.

As more fully set forth below, the Staff submits that summary disposition of this contention is appropriate in accordance with these established standards.

B. No Genuine Issue of Material Fact Remains Concerning Contention Utah G.

The Staff submits that there does not exist a genuine dispute of material fact with respect to this contention. While the State has contested the adequacy of the level of detail contained in the Applicant's QA Program, the Staff has determined that the level of detail provided by PFS is adequate -- as set forth in the NRC Staff Statement of Position on Contention Utah G, filed on June 15, 1999, which has been adopted in the attached Affidavit of Thomas O. Matula. *See Matula Aff. at 2; "NRC Staff's Statement of Its Position Concerning Group I Contentions" ("Statement of Position"), at 9-10.* Further, while the State challenges the independence of the PFS QA organization, the Staff has determined that the PFS QA Program provides sufficient independence for the QA organization, consistent with the requirements of 10 C.F.R. §§ 72.24(n) and 72.142 (Statement of Position, at 10-12).⁷ Finally, based on its review of the Applicant's QA

⁷ In addition, based on the deposition testimony of the State's designated witness (Dr. Resnikoff), it is apparent that the State lacks a qualified expert to support its views as to the adequacy of the Applicant's QA Program, in light of his lack of training and/or experience in evaluating QA organizations or procedures (*see Resnikoff Dep. at 75-76, 78-80, 83-84, 85-86, attached to Applicant's Motion*).

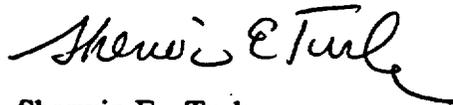
Program and related documents, the Staff has determined that the Statement of Material Facts attached to the Applicant's Motion is correct in all material respects (Matula Aff. at 2).⁸

Accordingly, the Staff submits that there does not exist any genuine issue of material fact with respect to Contention Utah G, and the Applicant is entitled to a decision in its favor on this contention as a matter of law.

CONCLUSION

For the reasons set forth above and in the attached Affidavit, the Staff supports the Applicant's motion for summary disposition of Utah Contention G, and recommends that it be granted.

Respectfully submitted,



Sherwin E. Turk
Counsel for NRC Staff

Dated at Rockville, Maryland
this 19th day of July 1999

⁸ As set forth in the attached Affidavit, the Staff has concluded that the Statement of Material Facts attached to the Applicant's Motion is correct, except in three respects: (a) as to Material Fact No. 13, the term "Project Director" should read "Project Manager," as set forth in SAR Figure 9.1-2; (b) as to Material Fact No. 14, it is unclear to the Staff from the QAPD description and Figure 9.1-3 that the operational QA organization will have an "interface" with the Safety Review Committee -- although this is not necessary, since the operational QA organization has direct access to the Chairman of the Board of Managers; and (c) no position is expressed by the Staff as to Material Fact No. 22 concerning the State of Utah's responses to PFS' discovery. As further stated in the attached Affidavit, none of these three matters affects the Staff's conclusion as to the adequacy of the PFS QA program and the independence of its QA organization (Matula Aff. at 2).

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PRIVATE FUEL STORAGE, L.L.C.) Docket No. 72-22-ISFSI
)
(Independent Spent Fuel)
Storage Installation))

AFFIDAVIT OF THOMAS O. MATULA
CONCERNING CONTENTION UTAH G
(QUALITY ASSURANCE)

I, Thomas O. Matula, having first been duly sworn, do hereby state as follows:

1(a). My name is Thomas O. Matula. I am employed as a Safety Inspection Engineer, in the Transportation and Storage Safety and Inspection Section, Spent Fuel Project Office, Office of Nuclear Materials Safety and Safeguards, U.S. Nuclear Regulatory Commission (NRC), in Washington, D.C. A statement of my professional qualifications is attached hereto.

2. This Affidavit is prepared in response to the "Applicant's Motion for Summary Disposition of Utah G" ("Motion"), filed on June 28, 1999, by Private Fuel Storage L.L.C. ("Applicant" or "PFS"), and the "Statement of Material Facts on Which No Genuine Dispute Exists" ("Statement of Material Facts") attached thereto.

3. As part of my official responsibilities, I reviewed the adequacy of the Applicant's quality assurance (QA) program, as set forth in its Safety Analysis Report (SAR), submitted with as its application for an Independent Spent Fuel Storage Installation (ISFSI), as revised, its QA

Program, its February 10, 1999, responses to the NRC Staff's second round of Requests for Additional Information, and its other QA program-related submittals. I am currently involved in preparing the related section of the NRC Staff's Safety Evaluation Report (SER).

4. As part of my official responsibilities, I also participated in preparing the "NRC Staff Position on Utah Contention G: Quality Assurance" ("Staff Position"), as set forth in the "NRC Staff's Statement of Its Position Concerning Group I Contentions," dated June 15, 1999 (Attachment, at 9-13). The statements set forth in the Staff Position concerning Utah Contention G accurately reflect my views concerning this contention.

5. Also as part of my official responsibilities, I have reviewed the Applicant's Motion and the attachments thereto, in which PFS seeks summary disposition of Utah Contention G. On the basis of my review of the Applicant's QA program, and the documents attached to the Applicant's Motion, I am satisfied that the Statement of Material Facts attached to the Applicant's Motion is correct, except in three respects: (a) as to Material Fact No. 13, the term "Project Director" should read "Project Manager," as set forth in SAR Figure 9.1-2; (b) as to Material Fact No. 14, it is unclear to me from the QAPD description and Figure 9.1-3 that the operational QA organization will have an "interface" with the Safety Review Committee, although this is not necessary since the operational QA organization has direct access to the Chairman of the Board of Managers; and (c) no position is expressed herein as to Material Fact No. 22 concerning the State of Utah's responses to PFS' discovery. None of these three matters affects my conclusion as to the adequacy of the PFS QA program and the independence of its QA organization.

6. I hereby certify that the foregoing is true and correct to the best of my knowledge, information and belief.

Thomas O. Matula
Thomas O. Matula

Subscribed and sworn to before me
this 19th day of July, 1999.

Circe E. Martin
Notary Public



My commission expires: March 1, 2003

Thomas O. Matula
Safety Inspection Engineer
Transportation and Storage Safety and Inspection Section
Spent Fuel Project Office
Office of Nuclear Material Safety and Safeguards
U.S. Nuclear Regulatory Commission

Education: B.S. Mechanical Engineering, Tri-State University, Angola, Indiana, 1970

Experience:

1995-Present Safety Inspection Engineer, U.S. Nuclear Regulatory Commission

Independently performs reviews of proposed quality assurance programs for use in the design, fabrication, maintenance, and use of shipping and storage containers to determine the program's technical adequacy and compliance with regulatory requirements.

Leads and participates in field evaluations, audits, and inspections of transportation package fabricators, distributors, suppliers, and spent fuel dry storage system suppliers. Independently develops and implements review protocol for use during site visits. Acts as team leader for site visits conducted to address complex issues as part of Office of Nuclear Material Safety and Safeguards Safety Inspection Program.

1991-1995 Quality Assurance Engineer, U.S. Nuclear Regulatory Commission

Assists in the review and evaluation of proposed quality assurance programs for use in the design, fabrication, maintenance, and use of shipping and storage containers to determine the program's technical adequacy and compliance with regulatory requirements.

Participates in field evaluations, audits, and inspections of transportation package fabricators, distributors, suppliers, and spent fuel dry storage system suppliers. Develops and implements review protocol for use during site visits. Acts as team leader for some of the site visits conducted as part of Office of Nuclear Material Safety and Safeguards Safety Inspection Program.

1989-1990 Director, Quality Assurance, Andrulis Research Corporation

Developed, implemented, and maintained a company-wide quality assurance program for information systems development and systems engineering. Established procedures, control processes, and verification methods to assure the delivery of high quality services and products. Developed and conducted training in quality assurance techniques to identify, correct, and avoid problems related to quality. Developed and implemented quality improvement programs in corporate support functions and field activities which focused on increasing product quality.

1987-1989 **Director, Product Assurance, Racal Communications Incorporated**

Developed, implemented, and maintained a quality assurance program for the design, manufacture, and testing of communication equipment for Government and commercial customers. Developed and upgraded procedures and practices to assure total compliance with all aspects of customer requirements. Initiated quality improvement programs through process control and personnel training.

1983-1987 **Manager, Quality Assurance, American Satellite Company**

Responsible for all quality assurance, quality control, and reliability functions for the design, manufacture, and installation, and maintenance of satellite communication systems. Developed and implemented critical policies, procedures, and programs in accordance with specifications and standards to assure conformance with customer requirements.

1982-1983 **Manager, Quality Assurance, Radiation Systems Incorporated**

Responsible for quality assurance and quality control functions for the design and manufacture of high technology antenna products for military applications, air traffic control, and commercial satellite communications.

1981-1982 **Quality Assurance Regional Manager, North American Van Lines**

Responsible for internal operation, field performance, and personnel training for independent sales agencies. Focused on increasing service quality and personnel productivity.

1980-1981 **Regional Sales Manager, North American Van Lines**

Responsible for increasing market share in a five-state region.

1978-1980 **Operations Manager, North American Van Lines**

Responsible for the execution of annual freight hauling programs.

1973-1978 **Manager, Quality Assurance, North American Van Lines**

Developed and implemented methods to assure compliance with Government regulations.

1970-1973 **Quality Control Engineer, International Telephone and Telegraph**

Responsible for assuring compliance with Government requirements in the manufacture of air traffic communications equipment.

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S RESPONSE TO APPLICANT'S MOTION FOR SUMMARY DISPOSITION OF UTAH CONTENTION G (QUALITY ASSURANCE)" 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 19th day of July, 1999:

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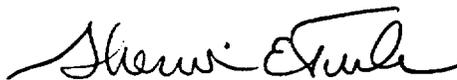
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