

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

Before the Atomic Safety and Licensing Board

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

CERTIFICATE OF SERVICE

I hereby certify that copies of the Applicant's Response To State Of Utah's Request For Admission Of Late-Filed Amended Utah Contention Q were served on the persons listed below (unless otherwise noted) by e-mail with conforming copies sent by U.S. mail, first class, postage prepaid, this 6th day of August 1999.

G. Paul Bollwerk III, Esq., Chairman
Administrative Judge
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
e-mail: GPB@nrc.gov

Dr. Jerry R. Kline
Administrative Judge
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
e-mail: JRK2@nrc.gov and kjerry@erols.com

Dr. Peter S. Lam
Administrative Judge
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
e-mail: PSL@nrc.gov

* Susan F. Shankman
Deputy Director, Licensing & Inspection
Directorate, Spent Fuel Project Office
Office of Nuclear Material Safety &
Safeguards
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Office of the Secretary
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
Attention: Rulemakings and Adjudications
Staff
e-mail: hearingdocket@nrc.gov
(Original and two copies)

Catherine L. Marco, Esq.
Sherwin E. Turk, Esq.
Office of the General Counsel
Mail Stop O-15 B18
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555
e-mail: pfscase@nrc.gov

John Paul Kennedy, Sr., Esq.
Confederated Tribes of the Goshute
Reservation and David Pete
1385 Yale Avenue
Salt Lake City, Utah 84105
e-mail: john@kennedys.org

Diane Curran, Esq.
Harmon, Curran, Spielberg &
Eisenberg, L.L.P.
1726 M Street, N.W., Suite 600
Washington, D.C. 20036
e-mail: dcurran@harmoncurran.com

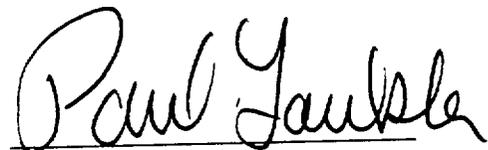
* Adjudicatory File
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001

Denise Chancellor, Esq.
Assistant Attorney General
Utah Attorney General's Office
160 East 300 South, 5th Floor
P.O. Box 140873
Salt Lake City, Utah 84114-0873
e-mail: dchancel@state.UT.US

Joro Walker, Esq.
Land and Water Fund of the Rockies
2056 East 3300 South, Suite 1
Salt Lake City, UT 84109
e-mail: joro61@inconnect.com

Danny Quintana, Esq.
Skull Valley Band of Goshute Indians
Danny Quintana & Associates, P.C.
68 South Main Street, Suite 600
Salt Lake City, Utah 84101
e-mail: quintana@xmission.com

* By U.S. mail only


Paul A. Gaukler

August 6, 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.)
)
(Private Fuel Storage Facility))

Docket No. 72-22-ISFSI

**APPLICANT'S RESPONSE TO STATE OF UTAH'S REQUEST FOR
ADMISSION OF LATE-FILED AMENDED UTAH CONTENTION Q**

Applicant Private Fuel Storage L.L.C. ("Applicant" or "PFS") hereby responds to the "State of Utah's Request for Admission of Late-Filed Amended Utah Contention Q," filed July 22, 1999. ("State's Request"). The State's Request should be denied, first, for failing to meet the requirements for late filed contentions, and second, for failing to meet the Commission's contentions requirements set forth in 10 C.F.R. § 2.714.

I. BACKGROUND

As part of its June 1997 License Application, PFS included the results of its cask vendors' analyses of vertical drops and tipover events. See Safety Analysis Report ("SAR") at 8.2.6 (rev. 0). Based on the license application, the State filed a contention (Contention Q) which alleged, in part, that PFS did not adequately identify the "most vulnerable fuel" analyzed in a cask drop, and that PFS did not address lifting accidents. In its April 22, 1998 decision, the Board rejected the contention in its entirety, stating that the contention and its bases

fail to establish with specificity any genuine material dispute; impermissibly challenge the Commission's regulations or rulemaking-associated ge-

neric determinations; lack materiality; lack adequate factual or expert opinion support, and/or fail properly to challenge the PFS application.

Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation) LBP-98-7, 47 NRC 142, 195 (1998).

Starting in February 1998, the State's expert, Dr. Marvin Resnikoff, whose declaration supports the State's Request, began an exchange of letters with the Spent Fuel Project Office¹ concerning the methodology developed by the Lawrence Livermore National Laboratory ("LLNL")² for analyzing the impacts of a cask drop on fuel integrity. As discussed in more detail below, the topic of Dr. Resnikoff's letters to the NRC Staff was how the LLNL report addressed the fuel pellet weight and the effects of irradiated fuel cladding, the precise issues that underlie the State's Amended Contention Q.

On May 21, 1999, the Spent Fuel Project Office issued Interim Staff Guidance 12 – Buckling of Irradiated Fuel Under Drop Conditions ("ISG-12"), which recommended that the analysis of cask drop accidents include consideration of the effects of irradiated fuel cladding and pellet weight. ISG-12. On July 22, 1999, the State filed its Request, seeking admission of a contention based on the Staff's recommendations in ISG-12. Specifically, the contention alleges that PFS is required to perform a revised analysis of fuel integrity for a vertical drop event that incorporates pellet weight and irradiated fuel cladding, and has failed to do so.

¹ See Letter from M. Resnikoff to C. Haughney, dated February 27, 1998 (attached as Exhibit 1).

² In October 1987, LLNL released the report "Dynamic Impact Effects on Spent Fuel Assemblies", UCID-21246, that developed methodologies for analyzing the impacts of cask drops on spent fuel.

II. ARGUMENT

The State's late-filed Amended Contention Q should not be admitted first, because it does not satisfy the NRC's requirements for late-filed contentions, and second, because it seeks to require PFS to perform an analysis that is properly within the scope of the rulemaking for Holtec's certificate of compliance which, moreover, has already been performed by Holtec.

A. The State's Request to File Amended Contention Q Is Unjustifiably Late

The State must demonstrate that a balancing of the five factors set forth in 10 C.F.R. § 2.714(a)(1)(i)-(v) supports admission of its late-filed contention. LBP-98-7, 47 NRC at 167. Since the State has failed to do so, its request for the admission of Amended Contention Q must be denied.

1. The State Lacks Good Cause

The first and most important factor in determining the admissibility of a late-filed claim is a showing of good cause. The State lacks good cause here because, through its expert Dr. Resnikoff, the State was aware of the LLNL methodology of analyzing cask drops, and the fact that the methodology did not address pellet weight and cladding embrittlement, almost 17 months before this contention was filed.³

The State nonetheless claims it has good cause for its late-filed contention because of the Staff's recent issuance of ISG-12. However, the State has provided no explanation why its contention is dependent on information contained within ISG-12 or

³ Dr. Resnikoff copied his February 27, 1998 letter to Denise Chancellor, the State's Assistant Attorney General and Connie Nakahara of the Utah Division of Environmental Quality. See Exhibit 1.

why its concerns about the LLNL methodology could not have been raised prior to the issuance of ISG-12.

The State's familiarity with the concerns that ISG-12 addresses is evidenced by Dr. Resnikoff's dialogue with the Staff and the State's comments on the Holtec HI-STAR 100 storage cask. In Dr. Resnikoff's February 27, 1998 letter to the NRC, he specifically questions the LLNL methodology's use of "non-irradiated fuel assemblies" and its failure to "take into account the weight of the fuel itself." Exh. 1 at 2. When the Staff responded that it had evaluated his concerns for a horizontal drop accident,⁴ Dr. Resnikoff again wrote the Staff, stating they "did not fully address [his] concerns" and requested that they further evaluate the effects of irradiation and pellet weight on the fuel integrity during a drop event.⁵ The State's prior knowledge of the LLNL report and the concerns addressed by the Staff in ISG-12 is further illustrated by the State's March 26, 1999 comments on the rulemaking for Holtec's HI-STAR 100 certificate of compliance.⁶ In its comments, the State, with the assistance of Dr. Resnikoff, specifically questions Holtec's reliance on the LLNL methodology, and the methodology's failure to address the impacts of irradiated cladding and pellet weight. Exh. 4 (State's Comments) at 2-6.

As the Commission has clearly determined, intervenors cannot simply wait for a new NRC Staff issuance in order to justify a contention when the information supporting the contention has previously been publicly available. See Duke Power Co. (Catawba

⁴ Letter from M. Delligatti to M. Resnikoff, dated November 19, 1998 (attached as Exhibit 2).

⁵ Letter from M. Resnikoff to M. Delligatti, dated December 31, 1998 (attached as Exhibit 3).

⁶ Letter from D. Chancellor to Secretary, NRC, dated March 26, 1999 ("State's Comments") (attached as Exhibit 4).

Nuclear Station, Units 1 and 2), CLI-83-19, 17 NRC 1041, 1048 (1983). Here, the information supporting the contention was not only publicly available, but directly attributable to the State and its expert witness.

The State lacks good cause because it has offered no explanation which justifies, or even explains, its 17 month delay in filing this contention. Where good cause is lacking, a compelling showing must be made with respect to the other four factors, which, as discussed below, the State has not done.

2. The Other Factors Do Not Justify Admission of the Late-Filed Contention

Of the remaining four factors, the third and fifth factors are to be accorded more weight than the second and fourth factors, which concern the protection of the petitioner's asserted interest by other means or parties. LBP-98-7, 47 NRC at 207-209.

While the State interests may not be represented by another party in the PFS proceeding, it certainly has other means available to protect its interests, namely, the rulemaking associated with the certificate of compliance for the Holtec HI-STORM 100 storage cask.⁷

As evidenced by its filing of copious comments for the rulemaking for the HI-STAR 100 storage canister, the State is well aware of the certificate of compliance rulemaking process and can represent its interests in those proceedings. See Exh. 4 (State's Comments).

The State has offered no explanation for why its interests cannot be fully insured through this process.

⁷ The comment period for the HI-STORM cask has not yet opened but the Staff has issued a Preliminary Draft Safety Evaluation Report to Holtec and is expected to publish the Draft Safety Evaluation Report and a notice of opportunity for comment in the Federal Register this fall. See Proposed Schedule provided by NRC Staff at December 11, 1998 Pre-hearing Conference.

The State's position on the third factor, the development of a sound record, is inconsistent with its argument that it has good cause for its late-filed contention. If Dr. Resnikoff "has [the] considerable expertise in technical issues regarding the storage and degradation of spent nuclear power plant fuel" to contribute to the development of a sound record (State's Request at 8), then he surely could have formulated this contention without waiting for the Staff to issue ISG-12. Otherwise, the State's ability to contribute is questionable and suggests that it was merely waiting for the Staff to develop new issues that could be used to prolong and delay these proceedings. In any event, the State has not provided a summary of Dr. Resnikoff's expected testimony, which weighs against the admission of the contention. Private Fuel Storage, LBP-98-7, 47 NRC at 208-209.

Finally, contrary to the State's assertion, admission of the contention will certainly broaden and inevitably delay this proceeding by expanding its scope to include a contention that has already been dismissed by the Board and thus is not the subject of any existing contention.

In sum, the remaining four factors weighed together militate against granting the State's late-filed motion, and therefore clearly do not make the compelling showing required to overcome the State's lack of good cause.

B. The State's Amended Contention is Inadmissible

In its basis for Amended Contention Q contention, the State refers to the section of the PFSF SAR in which PFS discusses Holtec's analysis of spent fuel integrity under the design basis vertical and horizontal accelerations for the HI-STORM storage cask system, State's Request at 4, and then contends that PFS must perform a revised analysis

consistent with ISG-12, despite the fact that PFS never performed the fuel integrity analysis for the HI-STORM design basis accelerations, but simply described in the SAR the Holtec analysis and results. The State's contention that PFS must perform the ISG-12 analysis must be rejected because (1) the proper forum for raising concerns regarding the adequacy of Holtec's analysis of fuel integrity under design basis accelerations is the rulemaking for the cask's certificate of compliance, and (2) Holtec has already performed a revised analysis per the recommendations of ISG-12 which show that the fuel will maintain its integrity under the design basis accelerations for the HI-STORM cask.⁸

The State's contention is inadmissible in that it "impermissibly challenge[s] the Commission's regulatory scheme provisions, or rulemaking-associated generic determinations, which establish a separate cask design approval process" LBP-98-7, 47 NRC at 186. As the Board has previously recognized, generic issues concerning the adequacy of the vendors' designs are to be addressed in the separate rulemaking proceedings for the certification of the casks, not the licensing of the PFSF. *Id.*⁹ The issue of the integrity of the fuel assemblies under cask design drop conditions is a generic one, and the State has not claimed, or even offered an example, of how the conditions at PFS are unique. Thus, if the State does have concerns with Holtec's analysis of fuel integrity under design bases accelerations for its casks, the proper forum for raising them is the rule-

⁸ PFS will be amending its SAR to reflect the new, revised Holtec analysis as part of an amendment to its license application which is currently planned to be filed during the latter part of August.

⁹ See also *Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation)*, LBP-98-10, 47 NRC 288, 295 (1998).

making for the HI-STORM 100 certificate of compliance.¹⁰ The State's attempt to raise this generic design issue as part of this proceeding is unwarranted and the Contention should be dismissed.

The Contention must also be dismissed because it fails to present a genuine dispute of material fact in that Holtec has already performed a revised analysis per ISG-12. In ISG-12, the Staff recommends that any analysis using the LLNL methodology should be redone using "the irradiated material properties" of the fuel cladding and "the weight of the fuel pellets," or alternatively, a more sophisticated "analysis of fuel integrity which considers the dynamic nature of the drop accident and any restraints on fuel movement resulting from cask design." ISG-12. The sole basis of the State's contention is that neither of the alternative analyses recommended by ISG-12 has been done. State's Request at 5. In fact, however, in Revision 7.0 to the Topical Safety Analysis Report ("TSAR") for HI-STORM 100 (filed under letter dated June 8, 1999), Holtec includes a revised analysis of fuel integrity under drop conditions that incorporates these recommendations. See HI-STORM TSAR, Section 3.5 (Rev. 7.0) (attached as Exhibit 5). Specifically, the revised analysis is based on irradiated fuel cladding materials and includes the weight of the fuel pellets. Id. at 3.5-2-3. In this analysis, Holtec concludes that the integrity of the fuel cladding will not be compromised by the design basis deceleration loading of 45g (which assures that the fuel cladding can withstand the design basis cask drop). Id. at 3.5-19. Thus, Holtec has performed an analysis per ISG-12,

¹⁰ Indeed, as noted above, both Dr. Resnikoff and the State have raised similar issues in context of the rulemaking proceeding for the HI-STAR 100 cask storage system.

claimed to be lacking by Amended Contention Q,¹¹ and therefore the Contention must be dismissed for lack of factual basis and for failing to present a genuine dispute of material fact.¹²

The State also contends, incorrectly, that the revised analysis must be performed for the Intermodal Transfer Point (“ITP”) and “during transport on either rail or highway.” State’s Request at 7. As in its original Contention Q, the State’s attempt to extend the contention to transportation related issues clearly exceeds the scope of this proceeding. The Notice of Opportunity for a Hearing in this case delineated the scope of the proceeding to include only the consideration of “an application . . . for a materials license, under the provisions of 10 CFR Part 72, . . . to possess spent fuel and other radioactive materials associated with spent fuel storage in an [ISFSI] located on the Skull Valley Goshute Indian Reservation” 62 Fed. Reg. 41,099 (1997). Because transportation of spent fuel is governed by 10 CFR Part 71, and not Part 72, this part of the State’s contention must be rejected, just as the Board rejected the identical claim in the original Contention Q.

¹¹ The State cannot simply ignore Holtec’s analysis or claim that it was unaware of its existence. The State has an “ironclad obligation to examine the publicly available documentary material” Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), LBP-83-8A, 17 NRC 282, 285 (1983). Its failure to fulfill this obligation cannot justify the admission of a factually baseless contention.

¹² The State’s discussion of “the concept of multiple confinement,” State’s Request at 5-6, does not refute the authority cited at pages 209-210 in Applicant’s December 24, 1997 Answer to Petitioner’s Contentions, in particular the quotation from the proposed rule (51 Fed Reg. 19,106, 19,108 (1986) which explicitly provides that the “canister could act as a replacement for the cladding.” Indeed, the PFS accident dose calculation assumes, in accordance with NRC Staff guidance, a 100% fuel cladding failure. See PFSF SAR at § 8.2.7.2. Thus, the argument set forth at pages 209-210 in Applicant’s December 24, 1997 Answer (that the contention must be dismissed because, even if proven, it would not entitle the State to relief) constitutes another bases as well for the dismissal of Amended Contention Q.

Moreover, the State's attempt to extend this contention to transportation and the ITP is based on the misconception that the 10 and 18 inch cask maximum lift heights for the storage casks apply to the transportation, the same misconception the State made in its original contention. During transportation and at the ITP the spent fuel will be inside a certified transportation cask – not a storage cask – and configured and handled in accordance with its certificate of compliance under 10 C.F.R. Part 71. As such, the transportation cask will be fitted with impact limiters and certified to withstand a drop of 30 feet. 10 C.F.R. § 71.73(c)(1). Thus, a drop of 10 or 18 inches could have no impact on fuel integrity in a certified transportation cask.

III. CONCLUSION

For the foregoing reasons, Applicant respectfully requests that the Board deny Utah's request to admit its late-filed, amended Contention Q:

Respectfully submitted,



Jay E. Silberg
Ernest L. Blake, Jr.
Paul A. Gaukler
SHAW PITTMAN
2300 N Street, N.W.
Washington, DC 20037
(202) 663-8000
Counsel for Private Fuel Storage L.L.C.

August 6, 1999