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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
OFFICE OF GENERAL INVESTIGATION
ADJUDICATION STAFF

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 RESPONSE TO STATE OF UTAH'S REQUEST FOR ADMISSION OF LATE-FILED CONTENTIONS UTAH LL THROUGH OO

Applicant Private Fuel Storage L.L.C. ("Applicant" or "PFS") hereby responds to the "State of Utah's Request for Admission of Late-Filed Contentions Utah LL through OO," filed August 2, 2000 ("State Req.").¹ Contentions LL through OO allege that the NRC Staff's Draft Environmental Impact Statement ("DEIS") for the Private Fuel Storage Facility ("PFSF")² is deficient for failing to assess certain aspects of the transportation of spent nuclear fuel. The State's request should be denied because Contentions LL through OO are lacking in good cause for late filing and for failing to meet the Commission's substantive standards for the admission of contentions.

¹ Consistent with the argument set forth by the State (see State Req. at 1 n.2), PFS interprets the page limit established for responses to late-filed contentions as permitting this 29 page response to the State's four late-filed contentions.

² Draft Environmental Impact Statement for the Construction and Operation of an Independent Spent Fuel Storage Installation on the Reservation of the Skull Valley Band of Goshute Indians and the Related Transportation Facility in Tooele County, Utah, U.S. Nuclear Regulatory Commission, Office of Nuclear Material Safety and Safeguards, NUREG-1714 (June 2000).

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I. BACKGROUND

In June 1997, PFS filed its license application. Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-98-7, 47 NRC 142, 157 (1998). The license application included an Environmental Report ("ER"). In November 1997, the State filed contentions on the application, including contentions regarding the transportation of spent fuel to the PFSF. In April 1998, the Atomic Safety and Licensing Board ("Licensing Board" or "Board") rejected all of the State's contentions regarding transportation as impermissible challenges to the Commission's regulation of the environmental impacts of spent fuel transportation, with the exception of part of Contention Utah V that questioned the impact of transportation casks heavier than those considered in the analysis underpinning the Commission's regulations. The NRC staff subsequently developed and issued a DEIS for the PFSF.

The State was hand-delivered a copy of the DEIS on June 19, 2000 during the PFSF evidentiary hearings in Salt Lake City.³ On June 23, 2000, the NRC Staff made the DEIS available to the public.⁴ In a June 1998 Memorandum and Order, the Licensing Board directed that any contentions based on the DEIS "should be submitted no later than thirty days" after the DEIS is "made available to the public." Memorandum and Order (General Scheduling for Proceeding and Associated Guidance) (June 29, 1998) at 5. The thirty day period established by the Board expired on July 24, 2000 (July 23, the thirtieth day, being a Sunday).

³ On a May 8, 2000 conference call with the Licensing Board, the NRC Staff had told the parties that the DEIS would be published in June. Tr. 1357, 1367-69. In a June 12, 2000 letter, the Staff had stated that the DEIS would be provided to the parties at the hearing on June 19. Letter from Robert M. Weisman, Counsel for NRC Staff (June 12, 2000). Although the State asserts that it was handed a copy of the DEIS "on or about June 21" (see State Req. at 24), the State in fact received the DEIS at the June 19 evidentiary hearing. See Tr. 1387 (June 19, 2000).

⁴ See 65 Fed. Reg. 39,206 (June 23, 2000) "Notice of Availability of Draft Environmental Impact Statement and Notice of Public Meetings for the Proposed Private Fuel Storage, L.L.C.; Independent Spent Fuel Storage Installation on the Reservation of the Skull Valley Band of Goshute Indians and the Related Transportation Facility in Tooele County, UT."

On August 2, 2000, nine days after the expiration of the thirty day period established by the Board, the State filed its request to admit four new late-filed contentions, Utah LL, Utah MM, Utah NN, and Utah OO, which seek to challenge the NRC Staff's DEIS for failing to assess certain aspects of cross-country transportation and reactor operations.

II. THE STATE'S REQUEST TO FILE CONTENTIONS LL THROUGH OO IS UNJUSTIFIABLY LATE

Utah LL through OO must be rejected as unjustifiably late. Contrary to the Board's express order that any new contentions based on the DEIS be filed within 30 days of its public availability, the four contentions were filed 40 days after the DEIS was made publicly available. Additionally, the information necessary for the State to have filed most of the contentions was available at the time that the license application was filed more than 3 years ago, and those portions of the contentions are unjustifiably late for that reason as well. Since the State provides no valid explanation for its lateness and makes no compelling showing with regard to the remaining four factors, the contentions should be rejected.

A. The State is Late Without Good Cause

1. The Contentions were Filed Well After the Board's Deadline for Contentions Without Requesting an Extension of Time

At the outset, the Licensing Board has clearly stated to the parties that "any contentions based on [the NRC Staff's DEIS] should be submitted no later than thirty days after [the] document[[is] made available to the public." Memorandum and Order (General Scheduling for Proceeding and Associated Guidance) (June 29, 1998) at 5; see Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-00-7, 51 NRC 139, 143 n.1 (2000). As noted above, this deadline expired on July 24, 2000. On August 2, 2000, 9 days after the expiration of the Board's deadline for filing timely contentions on the DEIS, the State filed four

DEIS-based contentions.⁵ The State's explanations do not establish good cause for late-filing. The State's explanation for its tardiness is that it "was fully occupied with evidentiary hearings and the limited appearance sessions before the Licensing Board from June 19 through June 27, 2000, [such that] the State could not reasonably be expected to commence copying and reviewing the DEIS until after the hearings concluded on June 27." State Req. at 24. The State's explanation rings hollow and spites Commission practice and precedent. Surely, people were available to "commence copying" the DEIS for the State while the hearing was underway. Moreover, Dr. Marvin Resnikoff, the State's consultant who "assisted in the preparation of the State of Utah's Request for Admission of Late-filed Contentions Utah LL through OO" and submitted the only declaration supporting the late-filed contentions (Declaration of Marvin Resnikoff at 1), was not involved with the June 19-27 evidentiary hearings.⁶ The State fails to provide any explanation why Dr. Resnikoff could not have begun reviewing the DEIS until after June 27.

Similarly unavailing is the claim that the State was "engaged in drafting Findings of Fact and Conclusions of Law for Utah Contentions E, R, and S, which the State filed on July 31." State Req. at 24. Again, the State fails to provide any connection between the development of these pleadings and Dr. Resnikoff, the sole declarant supporting the overdue contentions. There is no indication that Dr. Resnikoff had any involvement with the litigation of contentions Utah E, R, and S.

⁵ Moreover, the late-filed contentions were filed some 44 days after the State physically received the DEIS.

⁶ Dr. Resnikoff had been supporting contention Utah H, which the State withdrew on June 7, 2000, well before availability of the DEIS and the June 19-27 evidentiary hearings.

The State's excuses do not insulate the State from the burdens of litigation.⁷ Parties participating in NRC litigation must accept the burdens attendant upon such participation, including meeting filing deadlines.⁸ See Duke Energy Corporation (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 338-39 (1999). The Board's deadline for filing contentions was clear. The State missed that deadline by a substantial margin. The State's claim that it was burdened by litigation simply does not provide "good cause" for ignoring the Board's filing deadline.

2. Most of the Contentions Could Have Been Raised on the Applicant's Environmental Report Three Years Ago

NRC rules allow the filing of a new contention on the basis of the Staff's DEIS only "if there are data or conclusions in the [DEIS] . . . that differ significantly from the data or conclusions in the applicant's [ER]." 10 C.F.R. § 2.714(b)(2)(iii). The Board has explained the rule previously as follows:

the Commission has stated "a petitioner has an 'ironclad obligation' to examine the application, and other publicly available documents, with sufficient care to uncover any information that could serve as the foundation for a contention." Duke Energy Corp. (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 338 (1999). Further, participants in agency proceedings have been counseled to evaluate all available information at the earliest possible time to identify the potential basis for contentions and preserve their admissibility. See Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), CLI-83-19, 17 NRC 1041, 1050 (1983) (intervenors expected "to raise issues as early as possible"). And along this same line, a Licensing Board previously has indicated that where "a new contention purportedly is based on information contained in a document recently made publicly

⁷ Unlike a *pro se* intervenor, the State understands the burdens of litigation.

⁸ If the State believed, as of June 27 or shortly thereafter, that the hearing was going to cause it to be late but with good cause, the State could have requested an extension of time to file contentions based on the DEIS. See 10 C.F.R. § 2.711(a). The State, however, made no such request.

available, an important consideration in judging the contention's timeliness is the extent to which the new contention could have been put forward with any degree of specificity in advance of the document's release." LBP-98-29, 48 NRC 286, 292 (1998).

Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-99-43, 50 NRC 306, 307 (1999), review declined, CLI-00-2, 51 NRC 77 (2000). The Commission has explained that this standard applies with equal force to environmental contentions:

The rule [10 C.F.R. § 2.714(b)(2)(iii)] makes clear that to the extent an environmental issue is raised in the applicant's ER, an intervenor must file contentions on that document. The NRC staff in its DE[IS] . . . may well take a different position than the applicant. 10 CFR 2.714(b)(2)(iii) explicitly recognizes for environmental matters existing precedent regarding the right to amend or supplement contentions based on new information. The Commission wishes to emphasize that these amendments to § 2.714(b)(2)(iii) are not intended to alter the standards in § 2.714(a) of its rules of practice as interpreted by NRC caselaw, e.g., [Catawba], CLI-83-19, 17 NRC 1041 . . . , respecting late-filed contentions nor are they intended to exempt environmental matters as a class from the application of those standards.

Rules of Practice for Domestic Licensing Proceedings—Procedural Changes in the Hearing Process, Final Rule, 54 Fed. Reg. 33,168, 33,172 (1989) (emphasis added).

For these reasons, an intervenor has an obligation to raise issues based on the applicants' Environmental Report, and is not permitted to hold its concerns until the Staff completes its DEIS. Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station), LBP-93-23, 38 NRC 200, 251 (1993), review declined, CLI-94-2, 39 NRC 91 (1994). If an intervenor awaits the publication of a DEIS or FEIS before filing a contention for which the intervenor has sufficient information to do so, the intervenor does so "at its peril." See Louisiana Energy Services, L.P. (Claiborne Enrichment Center), LBP-94-11, 39 NRC 205, 212 (1994); cf. Commonwealth Edison Co. (Braidwood Nuclear Power Station, Units 1 and 2), CLI-86-8, 23

NRC 241, 245 (1986) (delaying the filing of a contention in the hopes of settling an issue without resort to litigation does not constitute good cause).

The discussion which follows demonstrates that the information necessary for the State to have filed most of these contentions was available at the time the license application was filed three years ago. Therefore, those portions of the contentions are unjustifiably late. Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-99-3, 49 NRC 40, 47, aff'd, CLI-99-10, 49 NRC 318 (1999).

Utah LL, Basis 1 asserts that the DEIS did not evaluate incident-free intermodal transfer near reactor sites and fuel handling and cask loading operations at or near the reactors. State Req. at 8-14. Like the DEIS, the Applicant's ER, filed in 1997, also did not include these impacts. See, e.g. ER § 4.7. The State could have raised its concerns regarding reactor fuel handling and cask loading operations when it filed its original contentions in 1997. In fact, the State did raise its concerns regarding intermodal transfers near reactor sites as a basis for its original Contention Utah V. As discussed below, this argument was rejected by the Board. The State's attempt to raise this issue now is far too late and wholly unjustified.

Utah LL, Basis 2 argues that the type of rail car trolley which PFS allegedly will use for its spent fuel cask car has a higher accident rate than the standard railcar. State Req. at 12-17. Neither the DEIS nor the ER indicates that PFS transportation equipment will use the type of rail car trolley which the State suggests has a higher accident rate. (The State cites nothing to support its unsubstantiated claim that "according to the Applicant, it intends to use. . . 3-axle

trolleys.”⁹) Therefore, the State could have filed a contention on PFS’ alleged rail car design three years ago. Furthermore, the only document relied on by the State, the letter from an official at the Transportation Technology Center, Inc. to PFS, dated June 16, 1998 (State Req., Ex. 2)¹⁰ was first made available to the State by PFS in discovery on September 25, 1998 (Third Production of Documents) and again on December 29, 1998 (Fifth Production of Documents). The State fails to present any good cause for waiting until August 2, 2000 to submit a contention based on this document.

Utah MM Basis 1 argues that the DEIS is inadequate since it uses the average rail accident rate, not the rail accident rate for specific rail lines that will be used. State Req. at 14-16. This issue could just as readily be raised with respect to the ER. The analysis of transportation accidents set forth in the ER, § 5.2, was also based on average rail accident rates and not the accident rates for the specific rail lines that would be used. The ER analysis was based on 10 C.F.R. § 51.52 and on Table S-4, as well as the subsequent analyses in NUREG-0170, NUREG/CR-4829 and the DOE Environmental Assessment for Yucca Mountain (DOE/RW-0073). Obviously, none of these analyses used “the rail accident rate for the specific rail lines that will be used” by PFS. Thus, the State’s issue could have been presented in 1997 and is today unjustifiably late.

Utah MM Basis 2 argues that the DEIS should have used the accident rates presented in the 1987 Modal Study, NUREG/CR-4829, rather than the lower accident rates in the 1994

⁹ As discussed in more detail below (see pp. 18-19 below), the State’s cited authority only criticizes a particular type of 3-axle trolley – the rigid, 3-axle freight car truck. PFS will not use that type of trolley and the State cites nothing to suggest that it will.

¹⁰ Although marked as “PFS Confidential Information”, we have been advised that the document need no longer be treated as confidential.

Argonne National Laboratory study. State Req. at 14-17. Since Table S-4, on which the ER transportation accident analysis was based, did not rely on the accident rates presented in the 1987 Modal Study (Table S-4 substantially predates the Modal Study; see 40 Fed. Reg. 1005 (1975)). The issue raised by this basis could just have readily been raised in 1997 based on the ER.

Utah NN is another contention that could have been filed based upon the ER. This contention challenges the DEIS' use of "latent cancer fatalities" to describe the potential transportation accident risk as "a numerical abstraction that has no factual content." State Req. at 20, 21. Although it is by no means clear what the State means by this latter phrase, the ER's description of the health effects of a transportation accident is no less a numerical abstraction. See ER § 5.2 (the risk of radiological effects "remains small"). This contention could have been filed three years ago based on the ER and is now untimely.

Utah OO claims that the DEIS does not address the economic risks or consequences of a transportation accident and presents an estimate, prepared by Dr. Resnikoff, that the costs of a severe rail accident in an average urban area would range from \$31.9 to \$313 billion. State Req. at 22, 23. Dr. Resnikoff's analysis purports to be based on two economic models, RADTRAN 4 and RADTRAN 5. The latter, and more recent, of the two models was publicly documented more than four years ago. See State Req. at 25 n. 15 (citing a 1996 Sandia National Laboratories report in which the State says RADTRAN 5 is "documented"). Thus, the State and Dr. Resnikoff could have prepared the same analysis three years ago to challenge the Environmental Report's coverage of the economic costs of transportation accidents. See ER 5.2 (no numerical estimate of radiological property damage; non-radiological property damage of \$96,000 over 40

years; radiological risk less than non-radiological risk). The contention is therefore untimely since it could just as easily have been filed three years ago based upon the ER.

Thus, the State lacks good cause for its late filing of Utah LL through OO.

B. The Lack of a Compelling Showing on the Other Factors Fails to Justify Consideration of the Late-Filed Contentions

“In the absence of good cause, the State must make a compelling showing that the remaining four section 2.714(a)(1) factors outweigh factor one so as to favor admission.” LBP-99-43, 50 NRC at 315 (emphasis added). The four remaining factors are: (ii) the availability of other means to protect the petitioner’s interest, (iii) the extent to which petitioner will assist in the development of a sound record, (iv) the extent to which the petitioner’s interest will be represented by other parties, and (v) the extent to which admitting the contention will broaden the issues or delay the proceeding. 10 C.F.R. § 2.714(a)(1). Of those factors, the third and fifth are to be accorded more weight than the second and fourth. LBP-98-7, 47 NRC at 207-209.

At the outset, factor five clearly weighs against admitting four new contentions, in that admitting them would undeniably broaden and likely delay the proceeding. The State’s contentions address broad-ranging aspects of the transportation of spent fuel and reactor operations that are not currently being litigated in this proceeding. Hence, Utah LL through OO represent a clear broadening of the issues. Furthermore, Utah LL through OO pose a substantial risk of delaying the proceeding in that they come after two and a half years of litigation and the completion of most document production and most formal written discovery. See South Carolina Electric and Gas Co. (Virgil C. Summer Nuclear Station, Unit 1), ALAB-642, 13 NRC 881, 888-89 (1981). The current trial schedule allows for only a limited window of additional

discovery on environmental contentions prior to the second phase of the evidentiary hearing.¹¹ Should Utah LL through OO be admitted, with the inevitable discovery requests and depositions, that discovery window may well have to be expanded and the hearing schedule delayed.

Factor two also fails to favor the State. The State clearly has other avenues to protect its interests with regard to DEIS's analysis of transportation. The NRC Staff has held multiple public comment meetings on the DEIS in which the State has participated. See 65 Fed. Reg. 39,206 (2000)(public comment meetings in Salt Lake City, Grantsville), 65 Fed. Reg. 49,029 (2000)(supplemental public comment meeting in Salt Lake City). The NRC has specifically requested written public comments on the DEIS through the Federal Register. 65 Fed. Reg. 39,206 at 39,207 (2000). The NRC must review and consider the public comments submitted on the DEIS in developing the final EIS. 10 C.F.R. § 51.91(a)(1); 65 Fed. Reg. at 39,207 ("To be certain of consideration, comments must be received by September 21 2000. Comments received after the due date will be considered if it is practical to do so, but the staffs of the cooperating agencies are able to assure consideration only for comment received on or before this date.") Moreover, as discussed in more detail later, a DEIS addressing nationwide spent fuel transportation is being prepared by the Department of Energy ("DOE"), with NRC as a commenting agency, in connection with the site recommendation decision for the Yucca Mountain repository.¹² The DOE's Yucca Mountain DEIS performs essentially an identical evaluation of spent fuel transportation. DOE/EIS-0250D, Appendix J, Transportation. The only

¹¹ Order (General Schedule Revision and Other Matters) (Feb. 2, 2000) Attachment A.

¹² DOE/EIS-0250D "Draft Environmental Impact Statement for a Geologic Repository for the Disposal of Spent Nuclear Fuel and High-Level Radioactive Waste at Yucca Mountain, Nye County, Nevada" (July 1999) ("Yucca Mountain DEIS"). See also Memorandum from Karen Cyr (General Counsel) to the Commissioners, The Nuclear Regulatory Commission's Process for Adopting the Department of Energy's Environmental Impact Statement for the Geologic Repository (June 9, 1999). Pursuant to § 114(f)(4) of the Nuclear Waste Policy Act, the NRC is required, to the extent practicable, to adopt the Yucca Mountain EIS. 42 U.S.C. § 10134(f)(4).

real difference between the Yucca Mountain DEIS and the PFSF DEIS is that the latter also addresses “the potential impact on the environment of the transportation of spent fuel ... within the region,” 10 C.F.R. § 72.108, in addition to the cross-country transportation analysis that duplicates the DOE/NRC effort for the Yucca Mountain repository. The DEIS for Yucca Mountain, with its analysis of cross-country spent fuel transportation, has already been provided for public review and comment. See, e.g., 64 Fed. Reg. 44,200 (1999). We believe that the State of Utah has already filed numerous comments on the transportation analysis in the Yucca Mountain DEIS. Thus, the State has several other means to protect its interests with regard to the analysis of cross-country spent fuel transportation.

Nor does the third factor provide strong support for the consideration of Utah LL through OO. While the State has provided a brief declaration from Dr. Resnikoff, as shown below the State’s pleading contains factual gaps that question the State’s ability to assist in development of a sound record.

While the State’s position may not be represented by another party (factor four), that factor carries less weight than the others. Thus, the four factors taken together militate against consideration of Utah LL through OO, and clearly fail to make the compelling showing required to overcome the State’s patent lack of good cause.

III. THE STATE’S LATE-FILED CONTENTIONS FAIL TO SATISFY THE COMMISSION’S PLEADING REQUIREMENTS

The State’s Request should also be denied because none of the four late-filed contentions satisfies the Commission’s pleading requirements for a litigable contention. We address contentions Utah LL through OO in the remainder of this section.

A. Contention Utah LL: Reactor Operations, Near-Reactor Intermodal Transfer, and Use of 3-Axle Maxson-Type Rail Cars

1. The Contention

Contention Utah LL asserts:

The DEIS fails to comply with the requirements of 10 CFR § 51.70 and NEPA in that it underestimates the risks posed by transportation of spent fuel to the PFS facility, because it ignores elements of the project which affect the transportation risks. Specifically:

1. The DEIS ignores the impacts of incident-free transportation that result from the loading of fuel and from the intermodal transfer from trucks to railheads near reactor sites;
2. The DEIS does not describe the type of railroad cars to be used for transporting casks to the PFS facility, or evaluate the accident risks posed by putting extremely heavy load on the rails.

State Req. at 9, 12.

2. Applicant's Response to the Contention

Contention Utah LL should be rejected in its entirety because neither of the two bases asserted by the State provide the support required for an admissible contention. In general, Utah LL attempts to litigate issues that have already been the subject of Commission rulemaking and prior EISs and attempts to litigate an issue outside the scope of this proceeding on the basis of a mistaken assumption.

Basis 1 – The DEIS ignores the impacts of incident-free transportation that result from the loading of fuel and from the intermodal transfer from trucks to railheads near reactor sites

Basis 1 asserts that “the DEIS ignores the impacts of incident-free transportation that results from the intermodal transfer from trucks to railheads near reactor sites.”¹³ State Req. at 9-10. The State’s concern in Basis 1 is that “among the 19 other reactors owned by PFS members, 14 do not have rail access and therefore would require intermodal transfer to move spent fuel from truck to rail.” Id. To this end, the State requests to litigate in this proceeding the impacts of cask handling during near-reactor-site intermodal transfer and heavy-haul transportation from the reactors to the intermodal transfer sites near these 14 reactors. Id. at 11-12. At no time does the State allege that any of these reactor sites are in the region of the PFSF. See id. at 10-13.

This basis should be rejected because it is based on a demonstrably false factual predicate. The State cites to a table from the Yucca Mountain DEIS to support its claim that 14 of 19 PFS member reactors do not have direct rail access, See State Req. at 11. That table, however, shows that there are 22 PFS member reactors, not 19,¹⁴ and that only 5 (Oyster Creek, St. Lucie 1 and 2 and Turkey Point 3 and 4), not 14, are listed as not having direct rail access in the table cited by the State. See DOE/EIS-0250D, App. J, Table J-12 at 4-5. The State fails to provide any explanation for the genesis of its numbers; moreover, the State’s incorrect reading of the table does not provide the necessary basis for a valid contention. Georgia Institute of Technology (Georgia Tech Research Reactor, Atlanta, Georgia), LBP-95-6, 41 NRC 281, 300, vacated in part and remanded on other grounds, CLI-95-10, 42 NRC 1, aff’d in part, CLI-95-12, 42 NRC 111 (1995).

¹³ The State concedes that the DEIS addresses intermodal transfer in the region of the PFSF (i.e., near Timpie, Utah), see id. at 12, and in this contention challenges only operations “near reactor sites.” See id. at 10, 11, 12.

¹⁴ Reactors owned by PFS members are as follows: Indian Point 1 and 2 (Consolidated Edison); Oyster Creek (GPU); Turkey Point 3 and 4 and St. Lucie 1 and 2 (Florida Power & Light); Prairie Island 1 and 2 and Monticello (Northern States Power); Cook 1 and 2 (Indiana Michigan Power); LaCrosse (Dairyland Power); San Onofre 1, 2 and 3 (Southern California Edison); Farley 1 and 2, Hatch 1 and 2 and Vogtle 1 and 2 (Southern Nuclear). See, generally, NUREG-1350, vol. 11, NRC Information Digest (1999).

Further evidence of Basis 1's lack of basis is the fact that its calculated population exposure, supposedly 6 times greater than that shown in the DEIS, was generated by "[a]ssuming a population density of 719 persons/km² along the heavy haul routes" near the reactors. State Req. at 11 (emphasis added). The State alleges, without citation or support that "[n]ear the reactors, population density is expected to be much greater" than the 1.3 persons/ km² along the heavy-haul route from Timpie to the PFS faculty. *Id.* From this speculation, the State then decides to use the 719 persons/ km² "default suburban population density in RADTRAN 4", again without any citation or support for choosing this value.¹⁵

Basis 1 should also be rejected (and indeed already has) as a challenge to NRC regulations. The State raised this same issue in its original contentions as Basis 3.C of contention Utah V. See Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-98-7, 47 NRC 142, 199-200 (1998). In Utah V, proposed Basis 3.C, the State alleged that

The Environmental Report ("ER") fails to give adequate consideration to the transportation-related environmental impacts of the proposed ISFSI in that: ...

3.c. The Applicant fails to address the environmental impacts of any necessary intermodal transfer required at some of the originating nuclear power plants due to lack of rail access or inadequate crane capability.

Id.; see also State of Utah's Contentions on the Construction and Operating License Application by Private Fuel Storage, LLC for an Independent Spent Fuel Storage Facility at 150-51 (Nov. 23, 1997). In opposing this contention, the Applicant argued that "[t]he State's assertion is beyond

¹⁵ Interestingly, Appendix A to State Req., the analysis by Dr. Resnikoff, cites a population density of 567 persons/ km² for Salt Lake City.

the scope of this proceeding, and is a direct challenge to NRC regulations.” Applicant’s Answer to Petitioner’s Contentions at 305-06 (Dec. 24, 1997) As explained therein, the Commission expressly considered in promulgating 10 C.F.R. Part 72 the extent to which the environmental impacts of the ISFSI must be considered in environmental analyses under 10 C.F.R. Part 72. Id. at 305. The Statement of Considerations for the final Part 72 rulemaking reflects that the environmental analysis “required for an ISFSI is an evaluation of the environmental impact of the ISFSI on the region in which it is located, including the transportation that is involved.” Id. at 305-06 (citing 45 Fed. Reg. 74,693, 74,695 (1980)) (emphasis added). The proposed contention on the “impacts at an originating nuclear power plant, which is outside ‘the region in which [the ISFSI] is located,’ must be dismissed as an impermissible attack on the Commission’s rules.” Id. at 306 (emphasis in original, citation omitted). Applicant argued that the contention was beyond the scope of this license proceeding because “[t]he concern raised by the State has been addressed in the initial 10 C.F.R. Part 50 licensing proceeding for each of the originating nuclear power plants.” Id. The Board concluded that Basis 3.C was inadmissible for, inter alia, impermissibly challenging the Commission’s regulations or rulemaking-associated determinations. Private Fuel Storage, LBP-98-7, supra, 47 NRC at 200-01.

Just like Basis 3.C of Utah V, Basis 1 of late-filed Utah LL is an impermissible collateral attack on the Commission’s regulations. For the same reasons that the Board rejected Basis 3.C. of Utah V almost three years ago, the Board should reject this issue raised again as Basis 1 of late-filed Utah LL.

Basis 1 should also be rejected for seeking to raise in this Part 72 proceeding issues relating to already-licensed nuclear power reactors. Basis 1 seeks to litigate radiation exposures received by “reactor personnel who load and seal the canisters and who transfer the canisters to a

transportation overpack.” State Req. at 10. Thus, the State would litigate in this ISFSI proceeding a contention challenging reactor fuel handling and cask loading operations performed by reactor personnel at the reactor site.

A request to litigate Part 50 reactor operations is clearly outside the scope of this proceeding. The operations challenged by the State have already been reviewed and approved by the NRC under the Part 50 operating licenses for the power reactors and have also been the subject of environmental impacts statements for each of those reactors. NEPA does not require the preparation of duplicative environmental reviews. Consumers Power Co. (Big Rock Point Nuclear Plant), ALAB-636, 13 NRC 312, 316 (1981) citing Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 and 2), ALAB-455, 7 NRC 41, 46 n.4 (1978)(NEPA does not require that the same ground be replowed).

Basis 2 – The DEIS does not describe the type of railroad cars to be used for transporting casks to the PFS facility, or evaluate the accident risks posed by putting extremely heavy load on the rails

In Basis 2, the State asserts that “[t]he DEIS is inadequate because it fails to address the contribution to accident risks caused by the proposed Maxson-type cars.” State Req. at 15.¹⁶ To support this claim, the State maintains that “according to the Applicant, it intends to use flat-bed rail cars with 3-axle trolleys (also known as ‘Maxson-type’ cars).” Id. at 12. The State, citing a letter to PFS from Peter C.L. Conlon, Director, Railway Technology Training, Transportation

¹⁶ No further information is provided to support the general statement in the title of Basis 2 regarding “putting extremely heavy loads on the rails.” See State Req. at 12. Thus, this general assertion must be rejected as wholly devoid of basis.

Technology Center, Inc.,¹⁷ then alleges that “Maxson-type trolleys can be expected to have a higher accident rate than the standard rail cars evaluated.” State Req. at 13.

Basis 2 should be dismissed as lacking an adequate basis. The State provides no basis for its assumption that the Applicant intends to use “Maxson-type cars”¹⁸ with “3-axle trolleys.”¹⁹ The State thus fails to establish a nexus between the 3-axle freight car truck design criticized in the Conlon letter and the PFS project. The State correctly cites the Conlon letter for the fact that rigid 3-axle freight car trucks have a higher probability of derailment. State Req. at 14; Ex. 2 to State Req. The Conlon letter makes clear that this criticism is aimed at the 3-axle freight car trucks, which have a higher probability of derailment because of their rigid nature. Applicant agrees with this criticism. Because of the rigid nature of those assemblies, PFS does not plan to use 3-axle freight car trucks for its spent fuel cask rail cars. The Conlon letter does not establish that PFS will use these type of 3-axle trucks. Nor does the State cite anything else to support this claim.²⁰ Without that nexus, Basis 2 fails because it provides no link between the 3-axle freight car trucks criticized in the Conlon letter and the PFS project.

While the PFS Safety Analysis Report states that PFS’ rail car design will use either “3-axle trucks” or “two sets of 2-axle trucks,” SAR § 4.5.5.2, nowhere does PFS state that it will use 3-axle freight car trucks, the type of 3-axle truck criticized in the Conlon letter. That letter

¹⁷ Letter from Peter C. L. Conlon, Director, Railway Technology Training, Transportation Technology Center, Inc. to PFS, dated June 16, 1998. (Exhibit 2 to State Req.) As indicated in the letter, Transportation Technology Center, Inc. is a subsidiary of the Association of America Railroads.

¹⁸ This statement incorrectly used the term “Maxson-type” cars. Maxson was a company that designed and built multiple types of rail cars. It was subsequently acquired by St. Louis Refrigerator Car Co., a subsidiary of Anheuser-Busch

¹⁹ The term “truck” as used in the Conlon letter and the term “trolley” used in the contention are synonymous.

²⁰ See, State Req. at 12 (“However, according to Applicant, it intends to use flat-bed rail cars with 3-axle trolleys (also known as ‘Maxson-type’ cars).”) No citation supports this statement.

cannot be read to criticize all types of 3-axle trucks. Indeed, Exhibit 2 explicitly suggest steerable 3-axle trucks as one design likely to be appropriate. State Req. at Exhibit 2, p. 2. For these reasons, the State has failed to establish a nexus between the PFSF and the rail car truck design criticized in the Conlon letter and has therefore failed to establish a basis for this part of Utah LL.

B. Contention Utah MM: Rail Accident Rates and CRUD

1. The Contention

Contention Utah MM asserts:

The DEIS does not comply with the requirements of NEPA or 10 CFR § 51.70 because it underestimates the risk of the most severe category of accident by understating both the probability and the consequences. Specifically:

1. The DEIS employs the average rail accident rate, not the rail accident rate for specific rail lines that will be used;
2. The probability of a severe accident is higher than estimated in the DEIS;
3. The DEIS underestimates the radiological consequences of a Severity Category 6 accident, by underestimating the release fraction for CRUD.

State Req. at 13-14, 17.

2. Applicant's Response to the Contention

Each of the three bases asserted by the State are addressed, in turn, below.

Basis 1 – The DEIS employs the average rail accident rate, not the rail accident rate for specific rail lines that will be used

Basis 1 asserts that the DEIS is in error because it uses the average rail accident rate for the country. Id. at 14. Instead of using average rail accident rate data, the State asserts that the DEIS should use “the accident rate for tracks actually taken.” Id.

The specific reactors that will ship fuel to the PFSF are not yet known. See PFSF License Application at 1-7 (specific customers of PFS not yet identified.) Similarly, because the specific shippers are not yet known, the rail routes that will be used are not yet known. The rail routes ultimately used will be selected in cooperation with the railroads when the specific shippers and shipment dates are selected. Because the specific shippers, routes, and distances are not known at this time, the DEIS reasonably assumes average rail conditions across the country. As the State acknowledges, the average rail accident rate takes into account all types of rail routes and conditions in the United States. Since there is no way to determine “the tracks actually taken,” there is no way to determine “the accident rate for tracks actually taken.” This basis therefore violates NEPA’s “rule of reason”²¹ by asking that the DEIS include information which is unknown and unknowable.

Nor does the State provide any basis to believe that the actual rail routes ultimately used for shipments to the PFSF will use tracks that will be below average. The State provides no sufficient basis to show that the average rail accident rate data is anything but a reasonable assumption for the DEIS. For example, the State criticizes the DEIS’ New York State rail route because it “does not follow a direct route across the state” (State Req. at 14) without any basis

²¹ See, e.g., Northern States Power Company (Prairie Island Nuclear Generating Plant), ALAB-455, 7 NRC 41, 48-49 (1978); NRDC v. Morton, 458 F.2d 827 (D.C. Cir. 1972).

for the existence of “a direct route across the state” or for the alleged non-conservatism of the route analyzed. Moreover, as the DEIS notes, the use of dedicated trains, as will be used for PFSF shipments, will result in accident rates well below the national average. DEIS at 5-35. Thus, the national average rail accident rate data used in the DEIS can be expected to be a conservative upper-bound estimate of the accident rates for actual rail shipments to the PFSF. By failing to take this into account, and by failing to provide any sufficient basis for its assertion that the use of average rail accident rate data is not appropriate for use in the DEIS, Basis 1 of Utah MM should be rejected for failure to provide a sufficient basis for a litigable contention.

Basis 2 – The probability of a severe accident is higher than estimated in the DEIS

Basis 2 of Utah MM attempts to challenge the rail accident rate used in the DEIS.²² The State asserts that the rail accident rate data used in the DEIS is too low because it is lower than that used in a 1987 study performed for NRC by Lawrence Livermore National Laboratory (“Modal Study”)²³. State Req. at 14-17. The DEIS used rail accident rate data from a 1994 Argonne National Laboratory study by Saricks and Kvitek (“ANL Study”)²⁴. Basis 2 asserts that the DEIS should have used the rail accident rate in the 1987 Modal Study rather than the rate in the 1994 ANL Study. State Req. at 14-17.

The 1987 Modal Study developed a rail accident probability rate of 1.19×10^{-5} accidents/train-mile (7.4×10^{-6} accidents/train-km). Modal Study at C-2; see also State Req. at

²² The State does not take issue with the DEIS assumption of 1.25×10^{-4} for the conditional probability of a Severity Category 6 accident or the DEIS estimate of 4.36×10^6 train-km for distance traveled. See State Req. at 15-16.

²³ Fischer et al. (Lawrence Livermore National Laboratory), Shipping Container Response to Severe Highway and Railway Accident Conditions, NUREG/CR-4829, 1987 (“Modal Study”).

²⁴ Saricks and Kvitek (Argonne National Laboratory), Longitudinal Review of State-Level Accident Statistics for Carriers of Interstate Freight, ANL/ESD/TM-68, 1994 (“ANL Study”).

15-16. This rail accident probability rate was based on rail accident data for the years 1975 to 1982. 1987 Modal Study at C-2. The DEIS uses the rail accident rate from the 1994 ANL Study. See DEIS at 5-35, D-7 (citing “Saricks and Kvitek 1994,” the ANL Study). In contrast to the 1975 to 1982 data used in the Modal Study, the ANL Study analyzes actual rail accident data from the years 1985 to 1988. ANL Study at 11. Based on this more recent data, the ANL Study shows a rail accident probability rate of 5.57×10^{-8} accidents/railcar-km. ANL Study at 36 (Table A.5b, “Total” accidents). With four railcars per train, DEIS at 5-35 (see also State Req. at 15-16), the ANL Study rate translates to an accident rate for PFS of 2.2×10^{-7} accidents/train-km. Thus, the rail accident probability rate used in the DEIS (2.2×10^{-7} accidents/train-km), which is based on data from 1985 to 1988, is lower than the rate used in the Modal Study (7.4×10^{-6} accidents/train-km), which is based on data from 1975 to 1982.

The State fails to explain why the DEIS was incorrect in using the more current accident rate data, other than it shows a somewhat lower accident rate than the older data in the Modal Study. Furthermore, the State fails to identify any problems with the data used in the ANL Study, and relied on by the DEIS. Rather, the State simply asserts, without justification, that the DEIS should have used the older data. The State’s assertion in Basis 2 that the NRC should reach back and use out-of-date accident data fails to provide a sufficient basis for an admissible contention, and should be rejected.

Basis 2 should also be rejected because it relies on an incorrect factual predicate. The State alleges that the DEIS “underestimates the likelihood of the occurrence of a Category 6 accident because it assumes that some of the accidents that will occur will be minor” while the database on which the DEIS relies “does not include specific minor accidents.” State Req. at 16. The State asserts without support that the ANL Study “carefully considers the DOT rail accident

database but generally eliminates accidents that are minor, such as grade crossing accidents, since these will not lead to a release from a shipping cask.” Id. at 16-17. However, the State provides no page citation, reference, or explanation to justify this assertion. See id. The ANL Study, in fact, includes “total, reportable railcar-accident involvements, by state, per unit of time.” ANL Study at 9. Nowhere does the study “generally eliminate[] accidents that are minor.” The ANL Study clearly states that its data source is “the annual *Accident/Incident Bulletin* compiled from carrier reports by the U.S. Department of Transportation’s (DOT’s) Federal Railroad Administration (FRA) Office of Safety” and includes “each accident, including the state of occurrence.” ANL Study at 11. An intervenor has an “iron-clad obligation” to research the publicly available documents. Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-99-43, 50 NRC 306, 307 (1999), review declined, CLI-00-2, 51 NRC 77 (2000), quoting Duke Energy Corp. (Oconee Nuclear Station 1, 2, 3), CLI-99-11, 49 NRC 328, 338 (1999). The State provides no reference or basis to support its assertion that some accidents have been screened out of the data used in the ANL Study. The Board should reject the State’s assertions in Basis 2 for failure to provide a sufficient basis to meet the Commission’s pleading requirements for an admissible contention.

Basis 3 - The DEIS underestimates the radiological consequences of a Severity Category 6 accident, by underestimating the release fraction for CRUD

In Basis 3 the State alleges that the DEIS underestimates the release of CRUD²⁵ from a transportation cask following a Severity Category 6 accident. State Req. at 21-22. The DEIS does not explicitly state a release fraction for CRUD for a Severity Category 6 accident. See

²⁵ CRUD consists of corrosion products deposited on the outside of the fuel cladding during reactor operations. DEIS at D-6.

DEIS at D-7 to 8. The State assumes that the DEIS must have used the same release fraction as that given in Table D.5 of the DEIS for particulates, i.e. 2.0×10^{-5} . State Req. at 21. The State maintains that a release fraction of 2.0×10^{-5} is too low for CRUD and asserts that the DEIS release fraction for a Severity Category 6 accident should be 100% (i.e., 100% of the CRUD is released from the transportation cask to the environment). Id. at 21-22.

There is no support for the State's assertion that the DEIS should assume that 100% of CRUD is released to the environment in a Severity Category 6 accident. Neither of the two documents identified by the State support its claim. First, the State states that SAND88-1358, Sandoval et al., "Estimate of Crud Contribution to Shipping Cask Containment Requirements" (January 1991), "assumed 100% of the CRUD would be spalled from fuel rods for all impact-related releases." State Req. at 19-20 (emphasis added). This statement, however, says nothing about releases of CRUD from a shipping cask to the environment, but only that 100% of the CRUD is spalled off the fuel rods into the cask interior²⁶. Likewise, the State erroneously claims that the Draft Environmental Impact Statement for the Yucca Mountain repository²⁷ "is based on default assumptions contained in the RISKIND computer code, which include a 100% release of CRUD in the event of a severe accident." State Req. at 19-20. In fact, the Yucca Mountain DEIS uses exactly the same 2.0×10^{-5} particulate release fraction for Severity Category 6 accidents (the topic of Basis 3) that the PFSF DEIS uses. Compare DEIS, Table D-4 with Yucca Mountain DEIS, App. J, Table J-21. Thus, neither of the two documents cited by the State

²⁶ SAND88-1358 in fact states that plate-out, plugging of leak paths, and gravitational settlement of spalled CRUD inside the shipping cask would limit the amount of CRUD available for release to the environment. SAND88-1358 at 7-12, 42-44.

²⁷ US Department of Energy, DOE/EIS-0250D, Draft Environmental Impact Statement for a Geologic Repository for the Disposal of spent Nuclear Fuel and high-Level Radioactive Waste at Yucca Mountain (July 1999) ("Yucca Mountain DEIS").

provides any support for the State's assertion that a 100% CRUD release fraction should be used for a Severity Category 6 accident. The State's assertion is therefore wholly without support and Basis 3 should thus be rejected for failure to provide a sufficient basis for an admissible contention under the Commission's pleading requirements.

Basis 3 should also be rejected since it is based upon an incorrect factual assumption. The State's argument on the appropriate release fraction that should be used for CRUD is based upon inferences that the State draws from the treatment by the DEIS and the Yucca Mountain DEIS of Cobalt-60, a component of CRUD. According to the State, the release fraction used in the DEIS "should be higher because it is found both inside and outside of the fuel. State Req. at 18-19 (original emphasis.) The State, however, provides no basis for the presence of any Cobalt-60 inside spent fuel. Since Cobalt-60 is not a fission product (see Chart of the Nuclides (General Electric Co.) at 26-27), it would not be expected to be found inside spent fuel in any significant amount. For the reasons set forth above, this factual inaccurate predicate is an additional reason to reject this Basis.

C. Contention Utah NN: Environmental Consequences of Maximum Credible Accident

1. The Contention

Contention Utah NN asserts:

The DEIS fails to comply with the requirements of 10 CFR § 51.70 and NEPA in that it does not describe or analyze the environmental impacts of a maximum credible accident.

State Req. at 20. The State identifies no separate bases for this contention.

2. Applicant's Response to the Contention

In Utah NN the State asserts that the DEIS does not include a description or analysis of “the environmental ... impacts of a maximum credible accident.”²⁸ Id. at 20. The State asserts that the DEIS fails to explain the health consequences for any of the six accident categories. Id. at 21.

The State's assertion that the DEIS does not address “how many people would get sick” and “how many people would die from radiological releases from a transportation accident” is without basis and should be rejected. Id. The State itself admits that the DEIS does, in fact, evaluate and report the impact of transportation accidents on human health in terms of latent cancer fatalities.²⁹ The State, however, complains that presenting the results in terms of likelihood of latent cancer fatalities is “a numerical abstraction that has no factual content.” Id. at 21. The fact is that the DEIS (Table 5.7) presents the annual expected latent cancer fatalities from potential accident risk during spent fuel transportation. The 2.12×10^{-3} projected latent cancer fatalities may be a very small number, but it is hardly a “numerical abstraction with no factual content.” The Commission typically presents human health impacts in terms of latent cancer fatalities. See, e.g., NUREG-0170, “Final Environmental Impact Statement on the Transportation of Radioactive Material by Air and Other Modes”, at 4-49, 5-34 (1977). Similarly, the Yucca Mountain DEIS also expresses human health impacts in terms of latent cancer fatalities. See Yucca Mountain DEIS, Summary at S-53. The State fails to propose any alternative to presenting the human health impacts from low levels of radiation. The State's

²⁸ While Utah NN also mentions “economic impacts” of transportation accidents, such impacts are the specific focus of Utah OO, below. Applicant therefore addresses “economic impacts” within the scope of contention Utah OO.

²⁹ The State fails to acknowledge that the DEIS also addresses potential non-radiological worker injuries and fatalities due to transportation (§5.7.1.1), injuries and fatalities to the public from non-radiological accidents (§5.7.1.2), and non-radiological latent health effects from air pollution due to transportation (§5.7.1.3).

allegation that the DEIS fails to provide information on how many people would “die” or “get sick” is should be rejected for insufficient basis. As for the State’s claim that the DEIS does not separately present the health consequences for each of the six accident severity categories, State Req. at 21, the State suggests no legal or logical basis why the small projected health risk (2.12×10^{-3} per year) must be subdivided among the severity categories.

D. Contention Utah OO: Economic Consequences of a Transportation Accident Involving a Radiological Release

1. The Contention

Contention Utah OO asserts:

The DEIS fails to comply with the requirements of 10 CFR § 51.70 and NEPA in that it does not address economic risks or consequences of a transportation accident.

State Req. at 22. The State identifies no separate bases for this contention.

2. Applicant’s Response to the Contention

In Utah OO the State asserts that the DEIS does not include “a discussion of the economic risks or consequences of a transportation accident involving spent fuel shipments to the PFS facility.” *Id.* at 22. The State argues that the DEIS must include information on the “costs of compensation for damages property and lost income, site characterization, demolition, transportation, waste disposal, and ecological restoration” resulting from a transportation accident. The State bases this argument on the provisions of 10 C.F.R. § 51.71(d) which,

according to the State, “require that a DEIS must include consideration of ‘economic benefits and costs’ of a proposed project.” State Req. at 22 (emphasis added).³⁰

Utah OO should be rejected for lack of basis. While the State claims the “it is beyond dispute that an accident involving a radiological release during transportation could have extremely large costs associated with it”, State Req. at 22, the only purported basis suggested by the State is Dr. Resnikoff’s Exhibit 3. The analysis, however, is on its surface fundamentally flawed. While Dr. Resnikoff purports to base the analysis primarily on assumptions that he takes from the DEIS, see Ex. 3 at 1 (citing to Table D-4 of the DEIS), in one significant respect he uses a key input of his own, i.e. release of “100% of the CRUD inventory”. Id. As shown above in our response to Utah MM, Basis 3, the State has failed to establish a basis for the 100% CRUD release assumption. As a result, its claim of undisputed extremely large costs, in addition to being totally inconsistent with Commission regulations,³¹ is lacking in basis and cannot support the admission of this contention.

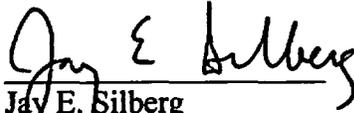
³⁰ Section 51.71(d) of 10 C.F.R. in fact states that a draft environmental impact statement “should also include consideration of the economic, technical and other benefits and costs of the proposed action.”

³¹ Summary Table S-4, 10 C.F.R. § 51.52(c), provides that the radiological effects of transportation accidents are “small”.

IV. CONCLUSION

For the foregoing reasons, the Applicant requests that the Board deny Utah's request to admit late-filed Contentions Utah LL through OO.

Respectfully submitted,



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Dated: August 30, 2000

**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 Applicant's Response to State of Utah's Request for Admission of Late-Filed Contentions Utah LL through OO 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 30th day of August 2000.

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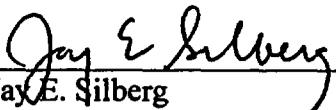
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