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September 14, 2000
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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 STATE OF UTAH'S
MOTION TO AMEND CONTENTION UTAH LL

INTRODUCTION

Pursuant to 10 C.F.R. §§ 2.714(c), and the Atomic Safety and Licensing Board's ("Board") "Order (Schedule for Responses to Motion to Amend Late-Filed Contention Utah LL)," dated September 11, 2000, the staff of the Nuclear Regulatory Commission ("Staff") hereby responds to the "State of Utah's Reply to Applicant's and Staff's Responses to Late-Filed Contentions Utah LL Through OO and Motion to Amend Contention Utah LL," dated September 7, 2000 ("State Reply"). The State Reply includes a motion to amend the basis for its proposed late-filed Contention LL ("Motion to Amend"). State Reply at 2, 5-6. For the reasons discussed below, the Staff submits that the Motion to Amend should be denied as untimely, and that any new basis stated therein is inadequate to warrant the admission of late-filed proposed Contention LL, Subpart 1. As further set forth below, the State Reply appears to improperly include other new bases and reformulations of late-filed Contentions LL-OO which the State fails to identify as new, and these late-filed revisions of the State's contentions should be rejected.

BACKGROUND

On or about June 16, 2000, the NRC Staff and three cooperating federal agencies issued their Draft Environmental Impact Statement ("DEIS") concerning PFS' application

for an NRC license and related federal agency approvals.¹ On August 2, 2000, approximately three years following the commencement of this proceeding, and 45 days following its June 19 receipt of the DEIS, the State filed the “State of Utah’s Request for Admission of Late-Filed Contentions Utah LL Through OO (Relating to the DEIS’s analysis of spent fuel transportation risks) (“Late-Filed Request”).²

On August 30, 2000, the Applicant and Staff submitted their responses to the State’s late-filed contentions LL-OO.³ The State then sought an opportunity to reply to the Staff’s Response and the Applicant’s Response, arguing that “a reply is needed in order to ensure that the Board has a complete record for making a decision” on the complex issues involved here. “State of Utah’s Motion for Leave to Reply to Applicant’s and Staff’s Responses to Late-Filed Contention LL Through OO” (Aug. 31, 2000). The State’s Motion for Leave to Reply indicated that neither the Staff nor the Applicant objected to its request, and the Licensing Board then granted that motion. “Order (Granting Motion for Leave to Reply and Permitting Additional Filings on Impact of CLI-00-13),” dated September 1, 2000.

As set forth above, the State Reply -- which included the State’s Motion to Amend -- was filed on September 7, 2000, 36 days after it first submitted its Late-Filed Request and approximately 80 days following the issuance of the DEIS. As set forth below, the State’s

¹ NUREG-1714, “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” (June 2000) (“DEIS”).

² The State subsequently notified the Board and parties that a footnote and a phrase should be removed from its Late-Filed Request. “Notification of Errata to State of Utah’s Request for Admission of Late-Filed Contentions Utah LL Through OO (Relating to the DEIS’s analysis of spent fuel transportation risks),” dated August 8, 2000 (“State’s Errata”).

³ See “NRC Staff’s Response to State of Utah’s Request for Admission of Late-Filed Contentions Utah LL Through OO,” dated August 30, 2000 (“Staff Response”); and “Applicant’s Response to State of Utah’s Request for Admission of Late-Filed Contentions Utah LL Through OO” (“Applicant’s Response”), dated August 30, 2000.

reply seeks to introduce new information in support of its contentions, and attempts to reformulate its contentions to raise new issues which were not raised in its initial filing. For these reasons, as more fully set forth below, the Staff respectfully submits that the State's Motion to Amend, and the State's new bases and issues raised in support of late-filed Contentions LL-OO are impermissibly late and should be rejected.

DISCUSSION

I. Legal Standards for Late-Filed Contentions and Admission of Contentions.

The criteria to be considered when determining the admissibility of a late-filed contention, or basis offered in support thereof, are set forth at length in the Staff's Response (at 6-8), and will not be reiterated herein. In brief, late-filed contentions must satisfy 10 C.F.R. § 2.714(a)(1)(i)-(v), which requires that a balancing of five specified factors supports the admission of the late-filed contention or basis therefor. The first factor, good cause for lateness, carries the most weight in the balancing test. *See State of New Jersey* (Department of Law and Public Safety), CLI-93-25, 38 NRC 289, 295 (1993). Absent a showing of good cause, a petitioner must make a compelling showing that the remaining factors outweigh the lack of good cause for the untimely filing. *Id.* Finally, in addition to showing that a balancing of the five factors favors intervention, a petitioner must also meet the requirements for setting forth a valid contention, as stated in 10 C.F.R. § 2.714(d)(2). *See Staff Response at 12-14.*

As relevant here, the Board is not to accept uncritically the assertion that a document or other factual information or an expert opinion supplies the basis for a contention. In the case of a document, the Board should review the information provided to ensure that it does indeed supply a basis for the contention. *See Vermont Yankee Nuclear Power Corp.* (Vermont Yankee Nuclear Power Station), ALAB-919, 30 NRC 29, 48 (1989), *vacated in part on other grounds and remanded*, CLI-90-4, 31 NRC 333 (1990); *see*

also *Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), LBP-96-2, 43 NRC 61, 90 (1996) (a document put forth by an intervenor as the basis for a contention is subject to scrutiny both for what it does and does not show).

II. The Motion to Amend Contention LL, Subpart 1, Should be Denied Because The State Has Not Satisfied the Commission's Standards for Late Filing.

As described in the Staff's Response, while Late-Filed Contention LL asserted that 14 of the 19 reactors allegedly owned by PFS' members lack direct rail access, the document proffered by the State in support of that assertion (*i.e.*, the U.S. Department of Energy's Draft Environmental Impact Statement for the Yucca Mountain repository)⁴ did not provide factual support therefor. See Staff Response at 15-19. Faced with this discrepancy, the State now concedes that the Yucca Mountain DEIS on which it had relied does not support that figure (State Reply at 5); and it asserts that an earlier DOE document which had been omitted from its filing due to a "clerical error" provides the necessary support for this part of the contention, which is attached as Exhibit 2 to its Reply (hereinafter referred to as the "New Basis Document").⁵

With respect to its New Basis Document, the State does not discuss the late-filing criteria in any detail. Rather, the State asserts only that the omission of the New Basis Document from its Late-Filed Request resulted "from a clerical error." *Id.* at 6. The State goes on to excuse its error "given the length and complexity of the contentions." *Id.* Significantly, the State does not identify when it discovered the omission and does not claim

⁴ "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" (DOE, July 1999) ("Yucca Mountain DEIS").

⁵ The State describes this document as the "Concept of Operation for the Multi-Purpose Canister System dated September 30, 1993. The title page of Exhibit 2, however, indicates that this document is properly entitled "Operational Throughput for the Multi-Purpose Canister System," TRW Environmental Safety Systems Inc. (Rev. 0, Sept. 30, 1993).

that it took prompt action to remedy its error. In contrast, the State made an effort to correct other errors in its Late-Filed Request, by submitting an “Errata” statement on August 8, 2000. The State provides no explanation as to why it failed to identify this “clerical error” in its Late-Filed Request then, nor does it offer any demonstration of good cause to delay its request for consideration of the New Basis Document until filing its “Reply” on September 7, 2000. In addition, the State makes no showing on the other late-filed factors whatsoever.

In sum, the State has failed to establish good cause for the late filing of its New Basis Document. Further, the State’s lack of good cause for late filing of the New Basis Document is not overcome by a “compelling” showing that the other factors specified in 10 C.F.R. § 2.714(a)(1) favor its admission. *State of New Jersey* (Department of Law and Public Safety’s Requests Dated October 8, 1993), CLI-93-25, 38 NRC 289, 296 (1993). For these reasons, the Staff submits that the Motion to Amend should be denied as untimely.

III. Application of the Commission’s Standards for Admission of Contentions to the New Basis Document.

Should the Board determine to grant the Motion to Amend despite its untimeliness, and to consider the New Basis Document, the Staff submits that this document fails to support the admission of Contention LL, Subpart 1, and that this portion of the contention should therefore be rejected for the reasons set forth below and in the Staff’s Response.

The State proposes Contention LL, Subpart 1, as follows:

The DEIS fails to comply with 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, . . . [t]he 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.

Late-Filed Request at 9.

Relying on its New Basis Document, the State reasserts its previous argument that only 5 of the 19 reactors allegedly owned by the PFS members are likely to ship spent fuel to the PFS facility via rail, without needing intermodal transfer from the reactor to a rail line. State Reply at 5.⁶ The State believes that “[t]he important consideration is that the State has relied on a reasonably accurate number.” *Id.*; emphasis added. The State, however, is incorrect in claiming that its New Basis Document supports this claim. A review of that document demonstrates that it lists seven reactors owned by PFS members (Hatch Units 1 and 2; Prairie Island Units 1 and 2; and San Onofre Units 1, 2, and 3), not five as claimed by the State, as being expected to ship spent nuclear fuel (SNF) by rail.

Moreover, the New Basis Document identifies only six reactors (D.C. Cook, Units 1 and 2; Farley, Units 1 and 2; and Vogtle, Units 1 and 2) as expected to use heavy-haul transport to the railhead, with four reactors (Oyster Creek; St. Lucie, Unit 2; and Turkey Point, Units 3 and 4) identified as expected to transport SNF via barge to a railhead, and five reactors (Indian Point, Units 1 and 2; La Crosse; Monticello; and St. Lucie, Unit 1) expected to ship SNF by truck.⁷ In contrast, Late Filed Contention Utah LL assigned a heavy-haul truck dose for reactor-to-railhead transport for any reactor that lacked direct rail access -- thus disregarding the lower dose that would result if barge transport was utilized,

⁶ The State continues to assert that PFS members own 19 reactors, despite clear information that this is incorrect. In the Staff Response, the Staff recited the 20 reactors which were listed in the PFS DEIS that were owned by PFS members at the time the DEIS transportation analysis was performed. See Staff Response at 16, n.13. Subsequent to the completion of the DEIS analysis, PFS membership changed, with the result that 22 reactors were then owned by PFS members -- as is correctly indicated in the Applicant's Response (at 14 and n.14).

⁷ Upon inspection of the Yucca Mountain DEIS, it is evident that this refers to transportation of SNF by legal-weight truck for the full distance from the reactor to its ultimate destination. See Yucca Mountain DEIS, Tables J-6 and J-12. The Yucca Mountain DEIS and the New Basis Document match with respect to the five reactors identified as shipping SNF by legal weight truck.

as is set forth in the New Basis Document. See Staff Response at 17; Yucca Mountain DEIS at 73.

Further, it is important to recognize that the State's New Basis Document is a DOE document dating from 1993 -- and more recent DOE information on this subject is available in the Yucca Mountain DEIS, which the State relied upon until now. Indeed, the information in the Yucca Mountain DEIS on these issues was prepared by TRW (see Yucca Mountain DEIS at J-19) -- and TRW was the author of the 1993 New Basis Document. Significantly, DOE chose not to refer to the New Basis Document in the Yucca Mountain DEIS.

Finally, in one important respect, the Yucca Mountain DEIS directly contradicts the New Basis Document. Table J-12 of the Yucca Mountain DEIS -- the State's original basis for Contention LL, Subpart 1 -- clearly identifies thirteen of the PFS-member-owned reactors as "commercial sites with direct rail access." The State fails to address this fact, nor does it attempt to calculate exposures based on the numbers provided in its New Basis Document. The New Basis Document, therefore, does not form an adequate basis for Contention LL, Subpart 1.⁸

In sum, the documentation relied on by the State (the Yucca Mountain DEIS and the New Basis Document) shows that the State's calculations are replete with errors. Rather than relying on "reasonably accurate" numbers (State Reply at 5), the State's calculations contain numerous factual errors or unsupported assumptions. The State has failed to

⁸ Rather than relying on the New Basis Document, the State calculates exposures based on what it claims the Applicant and Staff have "conceded," namely, that 9 of the 22 reactors owned by PFS members will require some form of intermodal transfer. See State Reply at 7. The State is wrong; the Staff does not concede that SNF will ultimately be transported from these nine reactors via intermodal transfer. Rather, the Staff's Response merely assumed, *arguendo*, that the State was correct, and recited information contained in the document proffered by the State (*i.e.*, the Yucca Mountain DEIS), in order to show that the State lacked factual support for its assertions. The Staff did not address the merits of the contention, such as by introducing new facts contained in other documents, since that would be improper at this pleading stage. See Staff Response at 16-18.

establish an adequate basis for Contention LL, Subpart 1, and this subpart of the contention should therefore be rejected.

IV. Other New Bases and Reformulations of the Contentions In The State's Reply Should Be Rejected.

Although styled as a “reply” to the Applicant’s and Staff’s responses, the State’s Reply is improperly loaded with numerous new assertions, bases, and reformulations of its late-filed contentions LL-OO, with respect to which the State has altogether failed to address the Commission’s standards for late filing. These new additions, interpretations, and reformulations of its contentions should be recognized as such, and rejected as untimely revisions of the late-filed contentions.⁹

For example, with respect to proposed Contention MM, Subpart 1, the State appears to abandon its quarrel with the Staff’s application of the INTERLINE code in the DEIS (Late-Filed Request at 14), and recasts its argument in terms of the “internal consistency” of the Staff’s analysis (State Reply at 11). As for proposed Contention MM, Subpart 2, the State now declares that the “crux” of its argument is that the “Modal Study” included consideration of accidents excluded from the “Saricks study”, resulting in the Staff’s using a conditional probability of Category 6 accidents that is too low (*id.* at 14-16). The assertion that the Modal Study includes accidents omitted from consideration in the Saricks study, however, is completely absent from the Late-Filed Request.

With respect to Contention MM, Subpart 3, the State appears to abandon its previous arguments in which it compared the release fraction for CRUD with that for eleven other radionuclides (listed in Table D-4 of the DEIS) inside the fuel. Late-Filed Request

⁹ The State often claims that one or another party “misunderstands” its contentions, and it then proceeds to “clarify” what the contention means, or it seeks to explain the “crux” of the contention. These claims often introduce new issues which had not been raised in the State’s original Late-Filed Contentions.

at 18-19. Rather, the State is now “assuming that the particulate release fraction used for Cobalt-60 by the Staff and the Applicant was used for the Cobalt-60 contained in the fuel assemblies and not in the CRUD[.]” *Id.* at 20. This argument is totally missing from the Late-Filed Request (see Late-Filed Request at 19-20).

Finally, with respect to proposed Contention OO, the State now claims that the DEIS should “define what is the maximum credible accident and provide the appropriate analysis.” State Reply at 24 (emphasis added). In the Late-Filed Request, however, the State focused on “a severe rail accident in an average urban area,” without ever indicating whether it had in mind credible or incredible accidents. Late-Filed Request at 23. Further, the State now argues that the DEIS should include an economic analysis of “the risks and consequences of a severe but foreseeable transportation accident” (State Reply at 25), it appears to be making a new argument with respect to proposed Contention OO -- but thereby recasts Proposed Contention OO to appear virtually identical to the economic issue raised in Contention Utah NN.¹⁰

The State does not acknowledge that it is asserting new contentions or new bases, as set forth above. Rather, the State has filed a “reply” which introduces new bases for contentions raised in its Late-Filed Request, without addressing the late-filing standards of 10 C.F.R. § 2.714. The State had an ample opportunity to formulate its DEIS-related contentions, and could have supported its contentions with appropriate bases in a timely

¹⁰ The State’s Reply demonstrates why petitioners are required to identify the accident scenario that forms the basis for its contention and the causative mechanism for that accident. See Staff Response at 31-36. Without such bases for a contention, it is simply not possible for the other parties to know what it is that they are expected to litigate. Further, under Commission practice, other parties are entitled to a fair chance to defend and to be told at the outset, with clarity and precision, what arguments are being advanced and what relief is being requested. See *Kansas Gas and Electric Co.* (Wolf Creek Generating Station, Unit No. 1), ALAB-279, 1 NRC 559, 576 (1975). The State has not done so here.

manner, when it submitted its Late-Filed Request on August 2, 2000. The State has not shown good cause for filing new bases and reformulations of its contentions at this time. Accordingly, pursuant to 10 C.F.R. § 2.714(a)(1), the new bases and reformulations of the State's late-filed contentions should be rejected.

CONCLUSION

Based upon the foregoing, the Staff submits that the Motion to Amend should be denied, and the new bases and reformulations of the State's Late-Filed Contentions, contained in the State's Reply, should be rejected.

Respectfully submitted,

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Dated at Rockville, Maryland
this 14th day of September 2000.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)
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PRIVATE FUEL STORAGE L.L.C.) Docket No. 72-22-ISFSI
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Fuel Storage Installation))

CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S RESPONSE TO STATE OF UTAH'S MOTION TO AMEND CONTENTION UTAH LL" in the above captioned proceeding have been served on the following through deposit in the NRC's internal mail system, with copies by electronic mail, as indicated by an asterisk, or by deposit in the U.S. Postal Service, as indicated by double asterisk, with copies by electronic mail this 14th day of September, 2000:

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