

RAS 2331

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING BOARD

LBP-00-27

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Before Administrative Judges:

G. Paul Bollwerk, III, Chairman
Dr. Jerry R. Kline
Dr. Peter S. Lam

In the Matter of

PRIVATE FUEL STORAGE, L.L.C.

(Independent Spent Fuel Storage Installation)

Docket No. 72-22-ISFSI

ASLBP No. 97-732-02-ISFSI

October 30, 2000

MEMORANDUM AND ORDER
(Denying Request to Admit Late-Filed Contention Utah KK)

In this 10 C.F.R. Part 72 proceeding concerning the application of Private Fuel Storage, L.L.C., (PFS) for a license to construct and operate an independent spent fuel storage installation (ISFSI) located on the reservation of the Skull Valley Band of Goshute Indians in Skull Valley, Utah, intervenor State of Utah (State) requests the admission of late-filed amended contention Utah KK, Military Training Impacts. With that contention, the State challenges the NRC staff's draft environmental impact statement (DEIS) for failing to assess adequately the proposed ISFSI's cumulative and socioeconomic impacts resulting from a purported loss of military operations area airspace. Both PFS and the staff oppose the State's request on a variety of grounds, including a failure to meet (1) the late-filing elements of 10 C.F.R. § 2.714(a)(1); and (2) the general admissibility requirements for contentions as set forth in section 2.714(b)(2), (d).

For the reasons set forth below, we deny the State's request to admit contention Utah KK, finding that a balancing of the five late-filing criteria of section 2.714(a)(1) do not support entertaining the contention.

I. BACKGROUND

PFS filed a license application for the proposed Skull Valley ISFSI in June 1997. See LBP-98-7, 47 NRC 142, 157, reconsideration granted in part and denied in part, LBP-98-10, 47 NRC 288, aff'd, CLI-98-13, 48 NRC 26 (1998). The PFS application, which consisted of a number of documents, included an environmental report (ER) addressing various issues relating to compliance with the requirements of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. § 4321. See 47 NRC at 157. As the ER noted, the proposed ISFSI site is located near several military facilities, including Hill Air Force Base (HAFB), the Utah Test and Training Range (UTTR), and the Dugway Proving Ground (DPG). See [State] Request for Admission of Late-Filed Utah Contention KK (Potential Impacts to Military Training and Testing and State Economy) (July 27, 2000) at 1-2 [hereinafter State Contention Request] ; [PFS] Response to [State] Request for Admission of Late-Filed Utah Contention KK (Aug. 10, 2000) at 2 [hereinafter PFS Response]. Although the PFS site is not situated directly in the UTTR, it is located beneath the airspace of the Sevier B military operating area (MOA), one of several such areas that border the edges of the UTTR and are located adjacent to restricted airspace. See PFS Response at 2. The Sevier B MOA is used for air-to-air combat training, weapons testing, and “flight ingress and egress to restricted airspace over the UTTR-DPG land mass.” State Contention Request at 2.

Pursuant to an October 1997 Board order, in late-November 1997 the State filed its safety and environmental contentions relating to the PFS application. See LBP-98-7, 47 NRC at 160-61 (1998). One of these contentions, Utah K, Inadequate Consideration of Credible Accidents, included safety concerns regarding credible accidents at the PFS facility caused by external events that could potentially occur as a result of the close proximity of military training

facilities. See id. at 190. In April 1998, a number of the State's safety-related contentions, including Utah K, as well as contentions challenging the PFS ER, were eventually admitted for litigation in the proceeding.¹ See id. at 247-48.

More than two years later, on June 12, 2000, the staff notified the Board and the parties to this proceeding that the DEIS relating to the PFS facility had been completed on June 9, 2000, and, if possible, copies of the DEIS would be distributed to the Board and the parties at the PFS ISFSI evidentiary hearing scheduled to begin on June 19, 2000, in Salt Lake City, Utah. See Letter from Robert M. Weisman, NRC Staff Counsel, to the Licensing Board (June 12, 2000). The staff then supplied the State with a copy of the DEIS on June 19 at the evidentiary hearing². See PFS Response at 3. The DEIS subsequently was made available to the public on June 23, 2000. See 65 Fed. Reg. 39,206 (2000). Thereafter, on July 27, 2000, the State requested the admission of late-filed contention Utah KK, Military Training Impacts, which provides:

The Draft Environmental Impact Statement fails to comply with the National Environmental Policy Act and 10 CFR §51.71(d) because it does not adequately assess the cumulative and socioeconomic impacts from loss of military operations area airspace use, including a reduction in military readiness and national security, and potential socioeconomic impacts to Utah communities that rely on employment and patrons of military agencies that use the Sevier B military operating area.

State Contention Request at 3. In responses filed August 10, 2000, both PFS and the staff contend that Utah KK should not be admitted in that it is (1) unjustifiably late, without a

¹ In fact, Utah K was consolidated with related contentions from other intervenors to form contention Utah K/Castle Rock 6/Confederated Tribes B, which subsequently was redesignated as contention Utah K/Confederated Tribes B when one of the sponsoring parties withdrew from this litigation. See LBP-99-6, 49 NRC 114, 121 (1999).

²The State contends it received the DEIS "on or about June 21, 2000." State Contention Request at 8. This inconsistency regarding the precise date of receipt of the DEIS has no bearing on the timeliness of the filing of contention Utah KK.

demonstration that the 10 C.F.R. § 2.714(a)(1) late-filing factors support its admission; and (2) unsupported by the necessary basis and does not demonstrate there is a dispute on a material issue of law or fact. See PFS Response at 5-15; NRC Staff's Response to "State of Utah's Request for Admission of Late-Filed Utah Contention KK (Potential Impacts to Military Training and Testing and State Economy)" (Aug. 10, 2000) at 4-16 [hereinafter Staff Response].

II. ANALYSIS

To justify a presiding officer's consideration of the "merits" of a late-filed contention, i.e., whether the contention fulfills the admissibility standards specified in 10 C.F.R. § 2.714, a party must demonstrate that a balancing of the five factors set forth in section 2.714(a)(1)(i)-(v) supports acceptance of the petition. The first and foremost factor in this appraisal is whether good cause exists that will excuse the late-filing of the contention. See Commonwealth Edison Co. (Braidwood Nuclear Power Station, Units 1 and 2), CLI-86-8, 23 NRC 241, 244 (1986). And relevant to our evaluation of that factor here, as we have noted previously (albeit in a somewhat different context), the good cause element has two components that impact on our assessment of the timeliness of a contention's filing: (1) when was sufficient information reasonably available to support the submission of the late-filed contention; and (2) once the information was available, how long did it take for the contention admission request to be prepared and filed. See LBP-99-3, 49 NRC 40, 46-48 (assessing late-filing factors relative to petition to intervene), aff'd, CLI-99-14, 49 NRC 361 (1999). Moreover, relative to the other four factors, in the absence of good cause there must be a compelling showing on the four remaining elements, of which factors two and four -- availability of other means to protect the petitioner's interest and extent of representation of petitioner's interest by other parties -- are to

be given less weight than factors three and five -- assistance in developing a strong record and broadening the issues/delaying the proceeding. See Braidwood, CLI-86-8, 23 NRC at 244-45.

In connection with factor one -- good cause for filing late -- the State asserts that it first became aware of the proposed ISFSI's potential impacts on the military as a result of a May 3, 1999 letter to Utah Governor Michael Leavitt from HAFB Vice Commander Ronald Oholendt. At the end of that month, it filed supplemental EIS scoping comments to inform the staff of those potential impacts. See State Contention Request at 8. The State argues that by taking these actions, it did not "idly" wait until the DEIS was published to make its concerns known, but adhered to the NEPA process by "timely making specific comments on the scope of the EIS," in the reasonable belief that the DEIS would address the cumulative and socioeconomic impacts of the proposed ISFSI. Id. at 8. Nor, according to the State, did it engage in any unreasonable delay in bringing its concerns to the attention of the Board. The State contends that because it received the DEIS during the June 2000 evidentiary hearings in Salt Lake City, it could not be expected to begin "copying and reviewing" the document until after the June 27 conclusion of the hearings. Id. Although acknowledging that it filed contention Utah KK more than thirty days from the date it contends it first received the DEIS, it nonetheless maintains that by filing the issue statement within thirty days of the conclusion of the evidentiary hearing it has provided the contention in a timely manner. See id. Additionally, the State argues that the Board should find good cause for admitting this contention as a result of the "national significance" of the issue in question. Id. at 8-9.

PFS argues that the State's filing of contention Utah KK on July 27, 2000, was thirty-four days after the June 23, 2000 date on which the DEIS was made public and, therefore, exceeded the thirty days allotted by the Board for the filing of DEIS-related late-filed contentions. See PFS Response at 6. Additionally, PFS contends that NRC precedent does

not support the State's argument that the ongoing evidentiary hearing tolled the thirty-day response period until the conclusion of the hearing. See id. at 6. Both PFS and the staff also argue that contention Utah KK is unjustifiably late because the State had the requisite information to raise that issue statement by May 1999, and probably as early as November 1997. See id. at 7-9; Staff Response at 7-9.

Recognizing that the staff would be issuing a DEIS and a final environmental impact statement (FEIS) relative to the PFS application that, in accordance with section 2.714(b)(2)(iii), could be the genesis of additional, late-filed contentions, in June 1998 the Board indicated that (1) the staff should notify the intervening parties and the Board of its intent to make these documents public at least fifteen days prior to their public issuance; (2) the staff should take steps to notify the intervenors of actual public release of these documents and their availability on an expedited basis; and (3) any late-filed contentions should be filed within thirty days of these documents being made available to the public. See Licensing Board Memorandum and Order (General Schedule for Proceeding and Associated Guidance) (June 29, 1998) at 4-5 (unpublished); see also LBP-00-07, 51 NRC 139, 143 n.1 (2000). The intent of the Board in setting these guidelines was twofold. First, we wished to ensure that intervening parties would have fifteen days prior to the public release of the DEIS and the FEIS during which to secure the availability of their experts to review the documents immediately upon release. In addition, the Board wanted to provide a thirty-day period for parties to prepare and file a response to those staff environmental submissions. See Licensing Board Memorandum and Order (General Schedule for Proceeding and Associated Guidance) (June 29, 1998) at 5 (unpublished).

The staff, however, did not adhere fully to these guidelines in that the intervenors were not provided with the full fifteen-day advance notification of the issuance of the DEIS.³ As a result, the thirty-day period for submission of intervenor late-filed contentions commenced on June 27, 2000 (i.e., fifteen days after notice was given by the staff that the DEIS was being made public), rendering filings made by July 27, 2000 timely. Thus, contention Utah KK was filed within the time allotted by direction of the Board for contentions relating to the DEIS.

This does not end the inquiry, however, for there is still the question of whether issuance of the DEIS was the appropriate trigger for the late-filing of contention Utah KK. In this regard we note that section 2.714(b)(2)(iii) provides in part:

On issues arising under the National Environmental Policy Act, the petitioner shall file contentions based on the applicant's environmental report. The petitioner can amend those contentions or file new contentions if there are data or conclusions in the NRC draft or final environmental impact statement, environmental assessment, or any supplements relating thereto, that differ significantly from the data or conclusions in the applicant's document.

This regulatory directive previously has been interpreted (and we think appropriately so) to mean that "as a matter of law, an intervenor must file contentions on the basis of an applicant's ER, and does not have good cause for delaying its filing until issuance of a Staff document unless it establishes that new or different data or conclusions are contained in the Staff environmental document." Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station), LBP-93-23, 38 NRC 200, 251 (1993), petition for review and motion for directed certification denied, CLI-94-2, 39 NRC 91 (1994); see Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), LBP-82-79, 16 NRC 1116, 1118 (1982)

³ A June 12, 2000 staff letter to the Board and the parties advising that the DEIS was going to be made public was received by the State only 11 days prior to the June 23, 2000 date on which the DEIS was actually made public. As a result, the full 15-day advance notification specified by the Board was not afforded to the State and the other intervening parties.

(contention based on draft environmental statement that contains no new information relevant to the contention lacks good cause for late filing). The State does not establish or even contend that the staff DEIS contains “new or different data or conclusions”; in fact, the State only asserts that certain concerns that were not dealt with in the ER have additionally not been dealt with in the DEIS. Indeed, it appears information was reasonably available to support contention Utah KK for a substantial period before the June 23, 2000 distribution of the DEIS. As is evidenced by the admitted portions of contention Utah K that relate to military training and testing, the State has been aware of the proposed PFS ISFSI’s location under the Sevier B MOA portion of the UTTR since the filing of its first contentions in November 1997. Additionally, by its own admission, in May 1999 the State had information regarding the “the significance of the potential impacts to the military” of the PFS facility by reason of the aforementioned May 1999 letter to Governor Leavitt. State Contention at 8. Finally, we do not find the State’s “national significance” argument a compelling contributor to good cause. See South Carolina Electric & Gas Co. (Virgil C. Summer Nuclear Station, Unit 1), ALAB-642, 13 NRC 881, 887 n.5 (1981).

An intervenor that awaits the publication of a DEIS or FEIS before filing a contention for which the intervenor has sufficient information does so “at its peril.” See Louisiana Energy Services, L.P. (Claiborne Enrichment Center), LBP-94-11, 39 NRC 205, 212 (1994). In this case, contention Utah KK could have been filed with the State’s initial environmental contentions challenging the PFS ER or, at the very latest, in the May 1999 time frame following the Oholendt letter. As a consequence, the State lacks the requisite good cause for its July 2000 submission of its concerns in connection with the staff’s issuance of the DEIS.

With the good cause factor thus placed in the balance against admission, the Board likewise finds that factors three and five -- assistance in developing a strong record and

broadening the issues/delaying the proceeding -- do not weigh in favor of admitting contention Utah KK. With regard to factor three, it has been observed that “when a petitioner addresses this criterion it should set out with as much particularity as possible the precise issues it plans to cover, identify its prospective witnesses, and summarize their proposed testimony.” Mississippi Power & Light Co. (Grand Gulf Nuclear Station, Units 1 and 2), ALAB-704, 16 NRC 1725, 1730 (1982). In this case, the State identifies its prospective witnesses and asserts the qualifications of each, but does little in the way of summarizing the witnesses’ planned testimony or identifying the matters the State wishes to address. As has been found in the past, when an intervenor does little more than identify affiants that support the contention, without providing any “real clue” about what they would say to support the contention, factor three provides little if any weight in favor of admitting the contention. See LBP-98-7, 47 NRC at 208-09.

In addition, factor five does not favor the admission of contention Utah KK either in that it would most certainly broaden the issues and delay the proceeding. Although there are some similarities between contentions Utah K and Utah KK, the safety issues relating to the occurrence of a potential accident identified in contention Utah K are significantly different from the concerns put forth in contention Utah KK regarding the environmental ramifications of the purported loss of military operations and airspace use that could potentially result from the construction of the proposed PFS ISFSI. Therefore, the issues in the proceeding would be broadened by the admission of this contention and the discovery and hearing time that would be required to litigate the broadened issues would almost certainly delay the proceeding.

As both PFS and the staff acknowledge, factors two and four -- availability of other means to protect the petitioner’s interests and extent of representation of petitioner’s interest by other parties -- do favor the admission of contention Utah KK. Yet, the support for admission provided by these factors, which are afforded less weight than factors three and five, does not

outweigh the previous three factors. As a result, because the section 2.714(a)(1) balancing process does not support the admission of late-filed contention Utah KK, we deny the State's request to admit this issue statement into this proceeding.⁴

III. CONCLUSION

Although filed within the Board-established deadline for the submission of late-filed contentions relating to the staff's June 2000 DEIS, the substance of late-filed contention Utah KK could have been raised long before issuance of that environmental document, thus placing the cardinal good cause factor on the "inadmissible" side of the section 2.714(a)(1) balance. This deficiency, in combination with the fact that of the four remaining factors, the two

⁴ Our ruling on the late-filing criteria means we need not reach the question of this contention's admissibility under the section 2.714(b), (d) standards. Nonetheless, we note that we would have admitted contention Utah KK, with the additional observation that late-filing factor three and the basis and specificity requirement of section 2.714(b) are not necessarily synonymous.

that are more heavily weighted also do not support admission, establishes that a balancing of the late-filing criteria of section 2.714(a)(1) compel the rejection of late-filed contention Utah KK.

For the foregoing reasons, it is this thirtieth day of October 2000, ORDERED, that the State's July 27, 2000 request for the admission of late-filed contention Utah KK is denied.

THE ATOMIC SAFETY
AND LICENSING BOARD⁵

/RA/

G. Paul Bollwerk, III
ADMINISTRATIVE JUDGE

/RA/

Dr. Jerry R. Kline
ADMINISTRATIVE JUDGE

/RA/

Dr. Peter S. Lam
ADMINISTRATIVE JUDGE

Rockville, Maryland

October 30, 2000

⁵ Copies of this memorandum and order were sent this date by Internet e-mail transmission to counsel for (1) applicant PFS; (2) intervenors Skull Valley Band of Goshute Indians, Ohngo Gaudadeh Devia, Confederated Tribes of the Goshute Reservation, Southern Utah Wilderness Alliance, and the State; and (3) the staff.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LB MEMORANDUM AND ORDER (DENYING REQUEST TO ADMIT LATE-FILED CONTENTION UTAH KK) (LBP-00-27) have been served upon the following persons by deposit in the U.S. mail, first class, or through NRC internal distribution.

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LB MEMORANDUM AND ORDER
(DENYING REQUEST TO ADMIT
LATE-FILED CONTENTION UTAH KK)
(LBP-00-27)

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[Original signed by Adria T. Byrdsong]

Office of the Secretary of the Commission

Dated at Rockville, Maryland,
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