

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSIONBEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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| 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 STRIKE EXHIBIT 1 TO APPLICANT'S RESPONSE TO
STATE OF UTAH'S SECOND REQUEST TO MODIFY
THE BASES OF LATE-FILED CONTENTION UTAH QQ

INTRODUCTION

Pursuant to 10 C.F.R. § 2.714(c) and the Licensing Board's "Order (Schedule for Motion to Strike Responses)," dated September 13, 2001, the NRC Staff ("Staff") hereby responds to the "State of Utah's Motion to Strike Exhibit 1 to Applicant's Response to State of Utah's Second Request to Modify the Bases of Late-Filed Contention Utah QQ" ("Motion"), dated September 12, 2001. For the reasons set forth below, the Staff submits that the State's Motion should be denied.

BACKGROUND

The Licensing Board in this proceeding has established a 15-page limit that generally applies to motions to admit late-filed contentions and any responses thereto.¹ This page length limitation applies generally to all contentions and responses thereto, unless extended by the Board.

On March 30, 2001, Private Fuel Storage, L.L.C. ("PFS" or "Applicant") submitted its License Application ("LA") Amendment No. 22, in which it updated its safety analysis report ("SAR")

¹ See "Memorandum and Order (Granting Page Limit Extension and Providing Additional Pages for Late-Filed Contention Motions)," dated February 9, 2000, at 2-3.

and other licensing documents to reflect new information it had obtained regarding seismic ground motion, the seismic design of the facility, and other matters. Several calculation packages relating to this amendment were submitted by PFS in April 2001.

Following its receipt of PFS's LA Amendment No. 22, on April 23, 2001, the State of Utah ("State") filed a request to extend this limit to 20 pages for "any contention it may file based on PFS's License Amendment No. 22 and supporting calculations," and for any response to such contentions that may be filed by other parties.² In accordance with the State's request, on April 26, 2001, the Licensing Board issued an Order establishing an exception to its 15-page limit, in which it provided the State and any responding parties a 20-page limit for "any contention" or response thereto that is "based on the PFS April 2001 geotechnical license application amendment and supporting calculations."³

On May 16, 2001, the State filed a request for the admission of late-filed Contention Utah QQ, in which it challenged the Applicant's revised use of soil-cement at the PFSF site and the seismic design of the facility, based in part on the calculation packages submitted by PFS in April 2001; the State's request totaled 20 pages plus attachments.⁴ Responses to Contention Utah QQ were filed on May 30, 2001, by the Staff and Private Fuel Storage, L.L.C. ("PFS" or "Applicant").⁵ Each of these responses to Contention Utah QQ totaled 20 pages; in addition, PFS filed various

² See "State of Utah's Request for Permission to File Late Filed Geotechnical Contentions Within Thirty Days of Receipt of Calculations Supporting License Amendment," dated April 23, 2001, at 4; emphasis added.

³ See "Memorandum and Order (Schedule for Late-Filed Submissions Regarding License Application Amendment and Page Limit Extension)," dated April 26, 2001, at 2; emphasis added.

⁴ See "State of Utah's Request for Admission of Late-Filed Contention Utah QQ (Seismic Stability)," dated May 16, 2001.

⁵ See (1) "NRC Staff's Response to 'State of Utah's Request for Admission of Late-Filed Contention Utah QQ (Seismic Stability)," dated May 30, 2001; and (2) "Applicant's Response to State of Utah's Request for Admission of Late-Filed Contention Utah QQ," dated May 30, 2001.

attachments to its response, including a 7-page table submitted as “Exhibit A” thereto (presenting a detailed “Summary of Claims Raised in Proposed Contention Utah QQ And Dates in Which Information Relating to Each Claim Was Presented to NRC”).⁶

On June 19, 2001, the State filed its first request to modify late-filed proposed Contention Utah QQ, based on PFS’s revision, on May 31, 2001, of two calculation packages it had submitted in April 2001 in support of LA Amendment No. 22: (a) Calculation No. 05996.02-G(B)-04, Rev. 8 (“Stability Analysis of Storage Pads”), and (b) Calculation No. 05996.02-G(B)-13, Rev. 5 (“Stability Analysis of the Canister Transfer Building Supported on a Mat Foundation”); responses to that request were filed by PFS and the Staff on July 3, 2001.⁷ PFS and the Staff filed their responses to the State’s first modification request on July 3, 2001.⁸

On August 23, 2001, the State filed its second request to modify proposed Contention Utah QQ, based, in part, on the Applicant’s recent revision of the calculations that underpinned the State’s First Modification Request.⁹ On September 7, 2001, PFS and the Staff filed their responses to the State’s Second Modification Request; as pertinent here, the Staff’s response totaled 20 pages, while the Applicant’s response totaled 15 pages plus attachments -- including a 3-page

⁶ As discussed below, the State did not oppose the filing of that Exhibit or assert that the Exhibit caused the Applicant’s response to Contention Utah QQ to exceed the 20-page limit for responses to contentions concerning the April 2001 license application amendment.

⁷ See “State of Utah’s Request to Modify the Bases of Late-Filed Contention Utah QQ in Response to Further Revised Calculations From the Applicant” (“First Modification Request”), dated June 19, 2001 (14 pages plus attachments).

⁸ See (1) “Applicant’s Response to State of Utah’s Request to Modify the Bases of Late-Filed Contention Utah QQ in Response to Further Revised Calculations From the Applicant,” dated July 3, 2001 (11 pages plus attachments); and (2) “NRC Staff’s Response to ‘State of Utah’s Request to Modify the Bases of Late-Filed Contention Utah QQ in Response to Further Revised Calculations From the Applicant,’” dated July 3, 2001 (16 pages).

⁹ See “State of Utah’s Second Request to Modify the Bases of Late-Filed Contention Utah QQ in Response to More Revised Calculations From the Applicant” (“Second Modification Request”), dated August 23, 2001 (13 pages plus attachments).

table submitted as "Exhibit 1" thereto, containing a detailed summary showing the "Prior History of Claims Raised in State's Second Request to Modify the Bases of Proposed Contention Utah QQ."¹⁰

On September 13, 2001, the State filed the instant motion to strike Exhibit 1 to the Applicant's response to the State's Second Modification Request, on the grounds that the exhibit caused the Applicant's response to exceed the Licensing Board's general 15-page limit for responses to contentions.

DISCUSSION

A. The Licensing Board's Order Establishing A 20-Page Limit for Contentions Relating to the Applicant's April 2001 License Application Amendment May Reasonably Be Construed to Apply to the State's Modification of Such Contentions.

As discussed above, the Licensing Board has extended the normal 15-page limit for contentions and responses thereto, in specific response to the State's request, so as to afford a 20-page limit for "any contention" or response thereto that is "based on the PFS April 2001 geotechnical license application amendment and supporting calculations." The Staff believes that this page limit applies as well -- or at a minimum may reasonably be construed to apply -- to any requests to modify such contentions and/or responses thereto. Thus, inasmuch as the State's second modification request relates to PFS's April 2001 license application amendment and calculations relating thereto, the Licensing Board's grant of the State's request to allow 20 page filings concerning "any" such matters would appear to allow a 20-page filing concerning the State's second request to modify Contention Utah QQ. Accordingly, the Applicant's response to the

¹⁰ See (1) "Applicant's Response to State of Utah's Request to Modify the Bases of Late-Filed Contention Utah QQ in Response to Further Revised Calculations From the Applicant," dated September 7, 2001 (15 pages plus attachments); and (2) "NRC Staff's Response to 'State of Utah's Second Request to Modify the Bases of Late-Filed Contention Utah QQ in Response to More Revised Calculations From the Applicant'" ("Staff Response"), dated September 7, 2001 (20 pages).

State's Second Modification Request does not exceed the Licensing Board's 20-page limit for such responses -- even if Exhibit 1 thereto is deemed to constitute part of the Applicant's response.¹¹

B. Exhibit 1 Does Not Constitute An Improper Expansion of the Applicant's Response.

Even if the Licensing Board determines that its Order of April 26 (which established a 20-page limit for any contentions or responses concerning the Applicant's April 2001 LA Amendment and its supporting calculations), does not apply to modifications of contentions which concern such matters, the State's request to strike Exhibit 1 to the Applicant's response for exceeding the 15-page limit (Motion at 1) should nonetheless be denied.

Significantly, Exhibit 1 to the Applicant's Response merely sets out an illustrative comparison showing where statements made in the State's Second Modification Request had also been raised in previous filings by the State -- thus directly supporting an assertion in the Applicant's Response that many of the issues were raised before and are duplicative (see Applicant's Response at 1-2, and Exhibit 1 at 1-3).¹² Thus, Exhibit 1 does not expand upon the arguments made in the Applicant's Response and does not raise new arguments beyond those advanced in that Response; accordingly, Exhibit 1 does not constitute the type of document that may be considered to improperly expand the Applicant's pleading in violation of the Licensing Board's general 15-page limit on responses to contentions. See, e.g., *Consolidated Edison Co. of New*

¹¹ As noted above, the Staff's response to the State's Second Modification Request was 20 pages in length, but the State has not moved to strike that response as violative of the applicable page limit. Under the Staff's interpretation of the Licensing Board's Order of April 26, set forth in the text above, the Staff's 20-page response to the State's Second Modification Request does not exceed the applicable page limit for contentions and responses relating to the Applicant's April 2001 license application amendment. Nonetheless, in the event that the Board determines that responses to the State's Second Modification Request were subject to a 15-page limit, the Staff is prepared to file, if necessary, a redacted version of its response of September 7, which deletes portions of the "Background" and "Legal Standards" sections and does not change the substantive portions of that filing.

¹² This comparison was made necessary by the State's repeated iteration of the same issues in both its earlier and current filings, in order to establish whether the statements in the State's Second Modification Request were proper and timely under 10 C.F.R. § 2.714(a).

York, et al. (Indian Point Nuclear Generating Units 1 and 2), CLI-01-19, 54 NRC ____ (Aug. 22, 2001) (incorporation by reference of previous filings); *Carolina Power & Light Co.* (Shearon Harris Nuclear Power Plant), CLI-01-11, 53 NRC 370, 393 (2001) (references to multi-page sections of earlier filings and supplementation with affidavits that include additional substantive arguments); *Hydro Resources, Inc.* (P.O. Box 15910, Rio Rancho, NM 87174), CLI-01-04, 53 NRC 31, 46 (2001) (citation to multi-page sections of earlier briefs).¹³

In sum, Exhibit 1 to the Applicant's Response constitutes an appropriate exhibit to that document and does not improperly extend the number of pages of that Response.

C. Exhibit 1 Does Not Present Factual Evidence That Is Unreliable.

In its Motion, the State further asserts that Exhibit 1 to the Applicant's response should be stricken, also, on the grounds that it improperly presents factual evidence that is unreliable (Motion at 3-4). This assertion is without merit. Exhibit 1 to the Applicant's response does not present any "factual evidence" upon which the Board is asked to rely, but only points the Board and other parties to other documents in which they may find certain statements which PFS asserts were made there. Rather than factual evidence, Exhibit 1 essentially constitutes a "guidepost" similar to a table of contents, showing the reader where it may turn to find a referenced statement. Such a document does not require a sponsoring witness, because whether PFS is correct in its assertion that a statement appears in a referenced document is readily verifiable by the reader simply by turning to the referenced document. Moreover, the State has provided no reason to believe that Exhibit 1 is incorrect, "unreliable" or "speculative" (*Id.* at 3-4). Accordingly, these assertions fail to support the State's motion to strike Exhibit 1.

¹³ Finally, the Staff notes that Exhibit 1 to the Applicant's Response to the State's Second Modification Request is quite similar to "Exhibit A" to the Applicant's response to the State's initial request to admit Contention Utah QQ," dated May 30, 2001, to which the State never objected. The State's failure to object to that five-page exhibit as an improper expansion of the Applicant's 20-page pleading to which it was attached, arguably may bar the State from asserting that such exhibits constitute an improper expansion of a pleading's permissible page length.

CONCLUSION

For the reasons set forth above, the Staff submits that the State's Motion to strike Exhibit 1 to the Applicant's response should be denied.

Respectfully submitted,

/RA/

Sherwin E. Turk
Counsel for NRC Staff

Dated at Rockville, Maryland
this 24th day of September, 2001

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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| (Independent Spent |) | |
| Fuel Storage Installation) |) | |

CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S RESPONSE TO STATE OF UTAH'S MOTION TO STRIKE EXHIBIT 1 TO APPLICANT'S RESPONSE TO STATE OF UTAH'S SECOND REQUEST TO MODIFY THE BASES OF LATE-FILED CONTENTION UTAH QQ," 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 24th day of September, 2001:

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