

September 24, 2001

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

DOCKETED
USNRC

Before the Atomic Safety and Licensing Board

September 26, 2001 (3:20PM)

| | | | |
|---------------------------------|---|---------------------------|---------------------|
| In the Matter of |) | | OFFICE OF SECRETARY |
| |) | | RULEMAKINGS AND |
| PRIVATE FUEL STORAGE L.L.C. |) | Docket No. 72-22 | ADJUDICATIONS STAFF |
| |) | | |
| (Private Fuel Storage Facility) |) | ASLBP No. 97-732-02-ISFSI | |
| |) | | |

APPLICANT'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

I. INTRODUCTION

Applicant Private Fuel Storage L.L.C. ("Applicant" or "PFS") hereby responds to the State of Utah's ("State") "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," filed on September 12, 2001 ("Motion to Strike").¹ The State moves to strike Exhibit 1 on the grounds that: (1) it violates the Board's procedural directive regarding page limits; and (2) it is unreliable because it lacks a sponsoring declarant and refers to documents not in the record. Neither ground is legally or factually valid, and neither justifies the State's draconian request to strike the exhibit. Indeed, the State's Motion to Strike is wholly lacking in merit and should be denied.

¹ The Motion to Strike is directed at Exhibit 1 to "Applicant'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" dated September 7, 2001 ("PFS Response to Second Request"). Exhibit 1 to the PFS Response to Second Request ("Exhibit 1") is a table comprising five columns: (1) an index number; (2) a shorthand title of each of the twelve claims asserted by the State in its "Second Request to Modify the Bases of Late-Filed Contention Utah QQ in Response to More Revised Calculations from the Applicant" dated August 23, 2001 ("Second Request"); (3) a summary description of each such claim; (4) citations to the State's filings, if any, in which each such claim was previously asserted; and (5) a listing of relevant PFSF project documents relevant to each such claim. It is the material included in the fifth column that provides the focus for the State's Motion to Strike, which is however directed at the entire exhibit.

II. BACKGROUND

On May 16, 2001, the State filed a request to admit proposed Contention Utah QQ.² On May 30, 2001, Applicant filed a response to Proposed Utah QQ, opposing its admission.³ PFS's Response to Proposed Utah QQ included, as Exhibit A, a table listing the claims raised in Proposed Utah QQ and the date on which the design or analysis features challenged in each claim were first identified by PFS.⁴ Exhibit A was submitted for the convenience of the Board, as a way to provide a summary identification of relevant documents and sections thereof relating to the State's claims. On May 31, 2001, PFS issued revised seismic calculations in response to NRC Staff requests for additional information. On June 19, 2001, the State filed a request to modify the bases of Proposed Utah QQ based on the revisions PFS made to the calculations.⁵ On July 3, 2001, PFS filed a response in opposition to the State's First Request.⁶

On August 23, 2001, the State filed its Second Request, seeking once more to modify the bases of Proposed Utah QQ. The Second Request raises a dozen claims, most of which the State had already raised in Proposed Utah QQ, the First Request, and elsewhere. PFS filed its Response to Second Request on September 7, 2001, including Exhibit 1. As with Exhibit A to PFS's Response to Proposed Utah QQ, Exhibit 1 was submitted for the convenience of the Board to provide a summary identification of relevant documents and sections thereof relating to the claims in the Second Request. On September 12, 2001, the State filed its Motion to Strike against Exhibit 1.

² See State of Utah's Request for Admission of Late-Filed Contention Utah QQ (Seismic Stability), dated May 16, 2001 ("Proposed Utah QQ").

³ Applicant's Response to State of Utah's Request for Admission of Late-Filed Contention Utah QQ, dated May 30, 2001 ("PFS's Response to Proposed Utah QQ").

⁴ Exhibit A to PFS's Response to Proposed Utah QQ is entitled "Summary of Claims Raised in Proposed Contention Utah QQ And Dates in Which Information Relating to Each Claim Was Submitted to NRC." It is a table, analogous in format and content, to Exhibit 1. Exhibit A has not been challenged by the State.

⁵ 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 June 19, 2001 ("First Request").

⁶ 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 ("PFS's Response to First Request.")

III. LEGAL STANDARD

The standard for excluding evidence in Commission proceedings is set forth in 10 CFR §2.743(c), which states: “Only relevant, material, and reliable evidence which is not unduly repetitious will be admitted. Immaterial or irrelevant parts of an admissible document will be segregated and excluded so far as is practicable.” The regulations also provide that a hearing officer may “[s]trike argumentative, repetitious, cumulative, or irrelevant evidence.” 10 CFR § 2.757(b). A motion to strike is appropriate in situations where one of the circumstances cited in the regulations is present.⁷ Here, outside the alleged violation of the page limits set by the Board, the ground for the State’s Motion to Strike is the allegedly “unreliable” nature of Exhibit 1. Since the discussion below shows that the exhibit does not violate the page limits set by the Board and is not unreliable, there are no valid grounds for striking it.

IV. THE BOARD SHOULD DENY THE STATE’S MOTION TO STRIKE

The State asserts two bases for striking PFS’s Exhibit 1: 1) that the exhibit violates a previous order of the Board setting page limits on responses to contentions, and 2) that the exhibit presents “unreliable” “factual evidence.” Motion to Strike at 2-3. The State is wrong on both counts. It ignores the guidance provided by the Board regarding page limits and the consistent practice of the parties, all of which indicate that exhibits are not to be considered in the page count of a pleading. Likewise, the inclusion of an exhibit providing citations to relevant documents for the Board’s convenience does not make that exhibit “evidence” that could be subject to being stricken. Moreover, the State neither asserts nor provides any indication that the contents of the exhibit are inaccurate, and in any case the materials cited are in the possession of the Board so there is no possibility that the Board would be misled by any allegedly incorrect statements in the exhibit.

⁷ 10 CFR §§ 2.718(e) and 2.721(c) grant the Board to regulate the course of the proceeding. Such power would include the discretionary ability to strike pleadings that do not conform with the Board’s procedural orders.

A. USE OF AN EXHIBIT TO SUMMARIZE RELEVANT DOCUMENTARY CITATIONS DOES NOT VIOLATE THE PAGE LIMIT ON MOTIONS ESTABLISHED BY THE BOARD AND IS CONSISTENT WITH THE PAST PRACTICE OF THE PARTIES IN THIS PROCEEDING

The State asserts that Exhibit 1 is “a mechanism by which PFS has attempted to circumvent the Board’s Order that responses to contentions are limited to fifteen pages in length.” Motion to Strike at 2-3. This is an incorrect characterization of the purpose of the exhibit (described above) and a misstatement of the Board’s Order and the practice of the parties in this proceeding.

On February 9, 2000, the Board issued a Memorandum and Order (Granting Page Limit Extension and Providing Additional Pages for Late-Filed Contention Motions) (“Late Filed Contention Order”). In it, the Board set fifteen pages as the maximum length of a motion to admit a late-filed contention and any responses thereto. Late-Filed Contention Order at 2-3. The Board did not expressly state whether these page limits referred only to the text of the motion (or response), or to both the text and any attachments to the motion (or response).

Such clarification, however, was unnecessary because the Board had already indicated in a similar context that the page limits in motions and responses thereto do not include exhibits or attachments. On August 20, 1998, the Board issued a Memorandum and Order (Additional General Schedule Guidance and Informal Discovery Status Conference Schedule) (“August 1998 Order”) setting page limits for summary disposition motions. There, the Board clarified that the page limits applied only to the motion itself and not to attachments to the motion or accompanying statements of material facts. August 1998 Order at 7. The Board also established that the same restrictions would apply to responses to such motions. *Id.* Thus, the practice in this proceeding, as stated by the Board, is that attachments to motions (and to responses thereto) do not count towards the established page limits for the motions.

The State also ignores that the parties have as a matter of course attached explanatory exhibits to pleadings in this case, without this being deemed to violate the established page limits. The State has cited and included such exhibits in its own pleadings. For example, when the State filed its Contentions Relating to the Low Rail Transportation Corridor (“Low Rail Contentions”),

dated September 29, 1998, it included as attachments a map of the Cedar Mountains Wilderness Study Area (“WSA”) (attached to the pleading as Exhibit 2) and a letter from the PFS Project Manager to the Bureau of Land Management, dated September 21, 1998 (attached as Exhibit 4). Counting these “exhibits” as part of the contention would have resulted in exceeding the 20-page limit granted by the Board to the State for those contentions. See Order (Granting Motion to Exceed Page Limit), September 29, 2001.⁸ Despite the frequent use of exhibits to accompany filings, neither the Applicant nor the State has previously objected to the use of attachments to pleadings as being an effort to circumvent the page limits, or as being otherwise inappropriate.

B. THERE IS NO LEGAL OR FACTUAL BASIS FOR THE STATE’S MOTION TO STRIKE EXHIBIT 1

The State also seeks to justify its Motion by alleging that Exhibit 1 should be stricken because it presents “factual evidence” that is “unreliable.” Motion to Strike at 3-4. The State’s argument is without basis because Exhibit 1 is not “evidence,” nor is it unreliable.

As explained earlier, Exhibit 1 is not “evidence” and provides no facts upon which the Board is asked to rely other than the dates and citations of documents in which certain PFS analyses relating to the claims in the Second Request were performed. It was not provided to establish any substantive fact but was included only for the convenience of the Board and therefore is by definition not “unreliable.”

The sole basis advanced by the State for the alleged “unreliability” of Exhibit 1 is that it “does not have a sponsoring declarant.” Motion to Strike at 3. However, since the exhibit is intended only to provide references in summary fashion, for the convenience of Board, of documents already in the Board’s possession, it does not need a “sponsoring declarant.”

⁸ Another, recent instance in which the State included as attachments to a pleading materials which, if included in the text, would have exceeded the page limit was the State’s Request for Admission of Late-Filed Modification to Basis 2 of Contention Utah L, filed on November 9, 2000. In that filing, the State included as Exhibit 3 excerpts from statements in the Staff’s FSER. Had those statements being included in the text of the State’s filing, the fifteen-page limit for requests for admission of new contentions would have been exceeded.

The State's own practice in this proceeding confirms that such a "sponsoring declarant" is not needed for Exhibit 1. For example, as noted above, in its Low Rail Contentions the State attached two exhibits (a map of the Cedar Mountains WSA and a letter from the PFS Project Manager to the Bureau of Land Management) without any declarant to vouch for the authenticity and accuracy of the exhibits. Moreover, the State submitted those exhibits not as mere references but to establish substantive facts, *i.e.*, that the Cedar Mountains Wilderness Study Area is located parallel to, and to the west of, the Applicant's rail line, and that Applicant expects the Rowley Junction Intermodal Transfer Point to receive two shipments per week, with each shipment consisting of 1-3 transportation casks. See Low Rail Contentions at 10, 14-15. The State provided absolutely no support for these factual assertions other than the unsponsored exhibits – a far more substantive use of exhibits to pleadings than the mere citation of documents set forth in Exhibit 1.⁹

The State also fails to explain in which respects (other than the lack of a sponsoring declarant) the data provided in Exhibit 1 are "unreliable" or "speculative." In fact, for all its attacks against the document, the State does not cite a single instance in which the information included in the exhibit is alleged to be inaccurate.

The second part of the State's argument as to why Exhibit 1 is unreliable is that "a number of the documents relied by PFS in Exhibit 1 have not been introduced into evidence in this proceeding." *Id.* at 3-4. This is demonstrably not so. Every document cited in the last column of Exhibit 1 has been provided to the Board, either as part of PFS's Response to Second Request or in prior submittals. See Table 1 infra. Therefore, the exhibit is not unreliable, and to the ex-

⁹ Other examples of State pleadings that include "unsponsored" exhibits are the State of Utah's Response to Applicant's and NRC Staff's Pleadings on the Licensing Board's Authority to Issue a Final Initial Decision Prior to Issuance of the NRC Staff's Draft or Final EIS and SER dated January 7, 1998 (Exhibit 1 – Letter from Dept. of Interior, dated September 18, 1997); State of Utah's Motion to Amend Security Contentions dated December 17, 1998 (Exhibit 1 – Cooperative Law Enforcement Agreement Between Tooele County, the Bureau of Indian Affairs, and the Skull Valley Band of Goshute Indians; Exhibits 2 and 3 – Letters to and from Dianne R. Nielson and Tooele County, dated October 14, 1998 and Dec. 12, 1998); State of Utah's Request for Admission of Late-Filed Security Contention J dated April 13, 2001 (Exhibit 1 – Letter from Gov. Michael Levitt to L. Alma Mansell and Martin J. Stephens; Exhibit 2 – portions of Utah Senate Bill 81, S2).

tent there are alleged errors in the citations it includes, those can be identified by the Board by referring to the actual documents in its possession.

TABLE 1

Submittal to the Board of Documents Cited in Exhibit 1 of PFS Response to Second Request

| Exhibit 1 Item Reference | Document Citation in Exhibit 1 | How Cited Document Was Provided to the Board |
|---------------------------------|--|--|
| 1. | PFS Letter, Parkyn to NRC, LA Amendment 8, dated December 16, 1999 | The Board is co-copied on all License Application Amendments. |
| 2. | ESSOW No. 05996.02-G010, Rev. 0), dated January 31, 2001 | Relevant excerpts provided in Declaration of Paul J. Trudeau, dated September 6, 2001. |
| 2. | January 11, 2001 Letter from J. Cooper (Stone & Webster) to J. Parkyn (PFS) | Exhibit 5 to the Declaration of Paul J. Trudeau, dated September 6, 2001. |
| 3., 9., 10. | LA Amendment 13, June 23, 2000 | The Board is co-copied on all License Application Amendments. |
| 3., 9, 10. | Stone & Webster Calculation No. 05996.02-G(B)-04, Rev. 6, Stability Analyses of Storage Pad | Provided on May 30, 2001 as Attachment 1 to Exhibit A to PFS's Response to Proposed Utah QQ. |
| 4., 5., 6., 7., 8., 10. | Cask Storage Pad Stability Calculation No. 05996.02-G(B)-4, Rev. 4, dated September 3, 1999 | Exhibit 3 to the Declaration of Paul J. Trudeau, dated September 6, 2001. |
| 7., 8., 12. | Letter from Holtec, dated August 6, 2001 (submitted by PFS to the NRC under cover letter dated August 7, 2001) | Exhibit 4 to the Declaration of Paul J. Trudeau, dated September 6, 2001. |
| 10. | CTB Stability Calculation No. 05996.02-G(B)-13, Rev. 4 | Exhibit 4 to the Declaration of Paul J. Trudeau, dated July 7, 2001. |
| 10. | License Amendment 22, March 30, 2001 | The Board is co-copied on all License Application Amendments. |
| 11. | Holtec Report No. HI-971631, Multi-Cask Seismic Response at the PSF ISFSI, Rev. 0, dated May 19, 1997. | Submitted as part of calculation packages forwarded to the Board and the NRC Secretary per the Board's Order of March 9, 1998. |

In any event, to the extent that a filing by a party makes an incorrect or misleading reference to a document, or references a document that is not part of the record, the cure for the deficiency is not to strike the filing, but to supply the missing document or others that resolve the deficiency. Indeed, PFS was forced to do this in its response to the State's Second Request when the State mischaracterized a PFS document relating to the soil cement testing program. PFS pro-

vided or quoted other documents that corrected the State's mischaracterization. See PFS Response to Second Request at 8-10.¹⁰

Finally, the State claims that the Board may be unable to rule on the substance of the State's claims in the Second Request if the Board considers Exhibit 1, because the "documents relied on by PFS in Exhibit 1 have not been introduced into evidence in this proceeding," going as far as to argue that PFS has not introduced various revisions and sections of the Safety Analysis Report ("SAR") and should therefore be barred from referring to them. Motion to Strike at 3-4. However, as noted above, the Board has all relevant documents needed to rule on the substance of the State's claims. And, in the specific case of the SAR, that document is not only available to the Board for its review,¹¹ but has been cited consistently by counsel for both the State and PFS in pleadings throughout this proceeding.¹² The Board itself has referred to the SAR.¹³ The State's claim that the Board may be unable to do so is unfounded.¹⁴

¹⁰ If the State felt that it needed to provide documents to clarify or contradict the assertions in Exhibit 1, it could well request leave to file a reply to PFS's Response. See, e.g., 10 CFR § 2.743(a) (providing a party the right to present rebuttal evidence.) The State has in the past requested leave to file such replies with respect to PFS's responses to proposed contentions, and PFS has never opposed them (except, in one instance, on the issue whether an already scheduled oral reply would be sufficient).

¹¹ It is a matter of record that PFS serves SAR amendments on the Board.

¹² For example, in the Low Rail Contentions, the State cited as the source of its contentions "a significant license amendment dated August 28, 1998" filed by PFS. Low Rail Contentions at 1. That amendment, and a number of amended sections of the SAR, are repeatedly cited by the State in that pleading, yet they are not provided. See Low Rail Contentions at 1, 2, 14, 15, and 16. Other examples of the State's citation to the SAR and amendments thereto without providing the cited sections go all the way back to the start of this proceeding. See State of Utah's Motion to Suspend Licensing Proceedings Pending Establishment of a Local Public Document Room and Applicant's Submission of a Substantially Complete Application, and Request for Re-Notice of Construction Permit operating License Application (October 1, 1997); State of Utah's Contentions on the Construction and Operating License Application by Private Fuel Storage, LLC for an Independent Spent Fuel Storage Facility (November 23, 1997). Thus, the practice is not new and continues among all parties to the present.

¹³ The Board has access to the entire PFS License Application and has in the past cited portions thereof in its rulings. For example, the Board has cited sections of PFS's License Application that none of the parties cited in its Memorandum and Order (Granting in Part, Denying in Part, and Referring Ruling on Summary Disposition Motion Regarding Contention Utah E/Confederated Tribes F) (dated March 10, 2000) at 3-6.

¹⁴ The State's citation to the decision in Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-580, 11 NRC 227 (1980), is inapposite. The case merely stands for the principle that a Board cannot unequivocally determine whether a security plan complies with all Commission regulations without reviewing pertinent portions of the plan itself. No such situation exists here. To the contrary, in order to rule in favor of the State on its Motion, the Board would have to refrain from reviewing the cited licensing documents despite having them in its possession.

Equally unfounded is the State's argument that the Board cannot rely on certain documents cited in Exhibit 1, *i.e.*, a letter dated January 11, 2001 from the PFS Assistant Project Manager to the PFS Board Chairman and the Engineering Services Scope of Work ("ESSOW") for the soil cement testing program because those documents have not been introduced into the record of this proceeding. Motion to Strike at 4. However, the documents in question are discussed in the Declaration of Paul Trudeau in support of the PFS Response to Second Request¹⁵ and the letter is included as Exhibit 5 to that declaration. Thus, the infirmity alleged by the State – absence from the record of this proceeding – patently does not exist, since the materials are included in the very filing of which the State complains.

V. CONCLUSION

For the foregoing reasons, PFS submits that the State's ill-conceived Motion to Strike Exhibit 1 to PFS's Response to the State's Second Request to Modify Proposed Contention Utah QQ should be denied.

Respectfully submitted,



Jay E. Silberg
Ernest L. Blake, Jr.
Paul A. Gaukler
Matias F. Travieso-Diaz
SHAW PITTMAN LLP
2300 N Street, N.W.
Washington, DC 20037
Counsel for Private Fuel Storage L.L.C.

Dated: September 24, 2001

¹⁵ See Declaration of Paul J. Trudeau dated September 6, 2001 ¶¶ 11-15.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

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

CERTIFICATE OF SERVICE

I hereby certify that copies of the Applicant's Response to State of Utah's 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 was served on the persons listed below (unless otherwise noted) by e-mail with conforming copies by U.S. mail, first class, postage prepaid, this 24th day of September, 2001.

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

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

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

*Office of Commission Appellate
Adjudication
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001

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

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

John Paul Kennedy, Sr., Esq.
David W. Tufts, Esq.
Confederated Tribes of the Goshute
Reservation and David Pete
Durham Jones & Pinegar
111 East Broadway, Suite 900
Salt Lake City, Utah 84105
e-mail: dtufts@djplaw.com

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

*Richard E. Condit, Esq.
Land and Water Fund of the Rockies
2260 Baseline Road, Suite 200
Boulder, CO 80302

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

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

Joro Walker, Esq.
Land and Water Fund of the Rockies
1473 South 1100 East
Suite F
Salt Lake City, UT 84105
e-mail: lawfund@inconnect.com

Tim Vollmann, Esq.
Skull Valley Band of Goshute Indians
3301-R Coors Road, N.W.
Suite 302
Albuquerque, NM 87120
e-mail: tvollmann@hotmail.com

Paul EchoHawk, Esq.
Larry EchoHawk, Esq.
Mark EchoHawk, Esq.
EchoHawk PLLC
P.O. Box 6119
Pocatello, ID 83205-6119
e-mail: pechohawk@hollandhart.com

* By U.S. mail only



Paul A. Gaukler