

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

NRC STAFF'S RESPONSE TO "STATE OF UTAH'S
REQUEST FOR ADMISSION OF LATE-FILED CONTENTION UTAH SS"

INTRODUCTION

Pursuant to 10 C.F.R. § 2.714(c), the staff of the Nuclear Regulatory Commission ("Staff") hereby responds to the "State of Utah's Request for Admission of Late-Filed Contention Utah SS," dated February 11, 2002 ("Late-Filed Request"). As discussed below, the Staff submits that Contention Utah SS (pertaining to the cost-benefit analysis) does not satisfy the Commission's standards for late-filing. Therefore, the State of Utah's ("State") request for admission of late-filed Contention Utah SS should be denied.

BACKGROUND

On June 25, 1997, Private Fuel Storage, L.L.C. ("PFS" or "Applicant"), filed an application for a license to possess and store spent nuclear fuel in an Independent Spent Fuel Storage Installation ("ISFSI") to be constructed and operated on the Skull Valley Goshute Indian Reservation in Skull Valley, Utah. The application included five documents: a license application, safety analysis report, emergency plan, physical security plan—and, as pertinent here, an Environmental Report ("ER").

On July 31, 1997, the Commission published in the *Federal Register* a Notice of Consideration and Notice of Opportunity for Hearing concerning the license application. See

62 Fed. Reg. 41,099 (1997). The Notice advised interested persons, *inter alia*, that petitioners for leave to intervene must file a list of contentions they wish to litigate no later than 15 days before the first prehearing conference scheduled in the proceeding.

In accordance with the Licensing Board's Orders in this proceeding, on or before November 24, 1997, numerous contentions were timely filed by various petitioners, including approximately 40 contentions filed by the State.¹ Many of these contentions challenged the adequacy of PFS' application and Environmental Report under the National Environmental Policy Act of 1969 ("NEPA"). In particular, as pertinent here, one proposed contention (Utah CC) challenged the adequacy of the Applicant's cost-benefit analysis.²

On or about June 16, 2000, the NRC Staff and cooperating federal agencies (the U.S. Bureau of Indian Affairs ("BIA"), U.S. Bureau of Land Management ("BLM"), and U.S. Surface Transportation Board ("STB")) issued their Draft Environmental Impact Statement ("DEIS") concerning PFS' application for an NRC license and its requests for related Federal agency actions, in accordance with their NEPA responsibilities.³ In the DEIS, the Staff analyzed, *inter alia*,

¹ By one count, the number of State contentions has since grown to almost 60 contentions.

² "State of Utah's Contentions on the Construction and Operating Licence Application by Private Fuel Storage, LLC, for an Independent Spent Fuel Storage Facility" ("Utah Contentions"), dated November 23, 1997, at 178-79. The Licensing Board rejected proposed Contention Utah CC because it failed to establish a genuine dispute, lacked adequate factual or expert support, and failed properly to challenge the PFS application. *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-98-7, 47 NRC 142, 204 (1998).

³ 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"); see *also*, "Notice of Availability of Draft Environmental Impact Statement and Notice of Public Meetings for the 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, Utah," 65 Fed. Reg. 39,206 (June 23, 2000).

the costs and benefits of the proposed PFS facility (“PFSF”).⁴ See DEIS, Chapter 8 (“Benefits and Costs of the Proposed Action”). The DEIS states that the detailed chain of logic for PFS’s assumptions and calculations is described in “Utility At-Reactor Spent Fuel Storage Costs For The Private Fuel Storage Facility Cost-Benefit Analysis Revision 2, ERI-2025-0001, April 2000 (“ERI Report”). DEIS, § 8.1.1. In this report, ERI provided PFS’s cost-benefit analysis, which explicitly presumed 40 years of SNF storage at the proposed PFSF. ERI Report at 12-16. The Staff’s analysis in the DEIS similarly reflected a 40 year storage period.

On January 11, 2002, the NRC Staff and cooperating federal agencies distributed their Final Environmental Impact Statement (“FEIS”) concerning PFS’ application for an NRC license and its requests for related Federal agency actions, in accordance with their NEPA responsibilities.⁵ The final analysis of the cost-benefit balance for the proposed PFSF is set forth in Chapter 8 of the FEIS. This final analysis differed from the analysis set forth in the DEIS, insofar as it imposed a constraint that SNF could be received at the proposed PFSF only during an initial 20-year period of operations. The Staff’s analysis, however, did not impose that constraint on the storage period. FEIS, Chapter 8; see FEIS, App. G, § G.3.19.2.5.

On February 11, 2002, following its receipt of the FEIS, the State filed the instant request for admission of late-filed Contention Utah SS, challenging various aspects of the cost-benefit analysis in the FEIS.

⁴ The Staff notes that it is solely responsible for the cost-benefit analyses set forth in both the DEIS and FEIS.

⁵ NUREG-1714, “Final 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” (December 2001) (“FEIS”); see *also*, “Notice of Availability of Final Environmental Impact Statement and Notice of Public Meetings for the 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,” 67 Fed. Reg. 2702 (Jan. 18, 2002).

For the reasons set forth below, the Staff respectfully submits that proposed late-filed Contention Utah SS should be rejected on the grounds that it is impermissibly late, and the State has not demonstrated that good cause and the other factors set forth in 10 C.F.R. § 2.714(a)(1) support its admission at this time.

DISCUSSION

I. Application of the Late-Filing Standards of 10 C.F.R. § 2.714.

A. Legal Standards for Late-Filed Contentions.

The criteria to be considered when determining the admissibility of a late-filed contention are set forth in 10 C.F.R. § 2.714(a)(1)(i)-(v), as follows:

- (i) Good cause, if any, for failure to file on time.
- (ii) The availability of other means whereby the petitioner's interest will be protected.
- (iii) The extent to which the petitioner's participation may reasonably be expected to assist in developing a sound record.
- (iv) The extent to which the petitioner's interest will be represented by existing parties.
- (v) The extent to which the petitioner's participation will broaden the issues or delay the proceeding.

It has long been held that 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.*; *Commonwealth Edison Co.* (Braidwood Nuclear Power Station, Units 1 and 2), CLI-86-8, 23 NRC 241, 244 (1986). The petitioner, as the proponent of the admission of its late-filed contentions, bears the burden of demonstrating that a balancing of these factors weighs in favor of their

admission. *Cf. Texas Utilities Electric Co.* (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-92-12, 36 NRC 62, 69 (1992).

Where a contention is based upon the publication of a licensing-related document (such as an FEIS), it is well established that the institutional unavailability of the document does not establish good cause for filing a contention late if information was publicly available early enough to provide the basis for the timely filing of that contention. *Duke Power Co.* (Catawba Nuclear Station, Units 1 and 2), CLI-83-19, 17 NRC 1041, 1045 (1983). Thus, it has been held that where a contention purportedly is based on the existence of a document recently made publically available, an important consideration in assessing good cause for lateness is the extent to which the contention could have been submitted prior to the document's availability. *See Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), ALAB-737, 18 NRC 168, 172 n.4 (1983); *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-98-29, 48 NRC 286, 292 (1998). 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); *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-99-43, 50 NRC 306, 313.

In evaluating the five lateness factors, two factors -- the availability of other means to protect the petitioner's interest and the ability of other parties to represent the petitioner's interest -- are less important than the other factors, and are therefore entitled to less weight. *Comanche Peak*, CLI-92-12, 36 NRC at 74. With respect to the third factor (the potential contribution to the development of a sound record), petitioners are to provide a "real clue about what they would say to support the contention beyond the minimal information they provide for admitting the contention." *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation) LBP-98-7, 47 NRC 142, 208-09 (1998).

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).

B. Contention SS Should Be Rejected as Late-Filed Without Good Cause.⁶

In its discussion of the late-filing criteria, the State asserts that it has good cause for filing its late-filed contention at this time, on the grounds that (a) “the FEIS presented a revised cost-benefit analysis based on three new assumptions, assumptions that were not part of the analysis previously prepared by the Applicant or included in its [ER]” (Late-Filed Request at 10), and (b) the State filed these contentions after receiving the Staff’s FEIS for the PFS facility, in accordance with the Licensing Board’s “Memorandum and Order” dated June 29, 1998, and the Board’s oral order of January 17, 2002, granting the State’s motion to permit it to file any FEIS-based contentions by February 11, 2002.⁷ Nowhere, however, does the State address the fundamental fact that the issues raised in proposed Contention Utah SS could have been raised sooner, without waiting for the Staff to publish its FEIS.

1. Basis 1, regarding a 20 year period of operations, is late without good cause

In its first basis for late-filed Contention Utah SS (“Basis 1”), the State asserts that “[t]he first new assumption used in the FEIS in the revised cost-benefit analysis is that ‘the benefits and cost of the proposed action’ must be ‘based on a 20-year license term.’” Late-Filed Request at 2. The problem with this statement is that, as reflected in the FEIS analysis, the phrase, “20-year license term” means that the proposed PFSF could receive SNF for 20 years; as further reflected in the FEIS, however, the Staff did not limit the storage period to 20 years in its cost-benefit analysis.

⁶ The Staff expresses no position herein with respect to whether Contention Utah SS sets for an admissible contention under 10 C.F.R. § 2.714(b).

⁷ “State of Utah’s Motion for an Extension of Time to File New or Modified Contentions Based on the Final EIS” (Jan. 16, 2002).

Thus, the only change in the analysis set forth in the FEIS with respect to the period of operations, as compared to the DEIS and the ER, is that the FEIS analysis is based on receipt of SNF for only 20 years. As set forth below, the Staff's cost-benefit analysis has always been based on the storage of SNF at the proposed PFSF for periods as long as 40 years, and the State could have proposed this contention long ago.

Simply stated, the State could have raised a contention on the period of operations presumed in the cost-benefit analysis when it filed its initial contentions in 1997 -- based on the ER, which, as submitted in 1997, stated that the cost-benefit analysis for the proposed ISFSI was conducted "assuming . . . a 40 year operating period." ER, Rev. 0, Chap. 7, at 7.7-2. However, proposed Contention Utah CC did not raise any issue with respect to the period of operations presumed for the proposed PFSF in PFS's cost-benefit analysis. In this regard, 10 C.F.R. § 2.714(b)(2)(iii) provides:

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 . . . that differ significantly from the data or conclusions in the applicant's document.

Accordingly, it has been held 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 that Staff environmental document." *Sacramento Municipal Utility District* (Rancho Seco Nuclear Generating Station), LBP-93-23, 38 NRC 200, 251 (1993). Accordingly, the State's assertions are unjustifiably late without good cause.

Similarly, the Staff's analysis in the DEIS reflected a 40 year storage period as set forth above. The State could have raised a contention on the period of operations presumed in the cost-benefit analysis in the DEIS in 2000, upon its issuance. Indeed, the State indicates that it "raised

the issue of the proper period of time on which to base cost-benefit analysis in its comments on the DEIS.” Late Filed Request at 4-5. The State did file several contentions on the DEIS, but did not propose a contention on this issue, as it clearly should have.⁸

Even if the State had some doubt about the assumptions regarding the storage period for SNF in the cost-benefit analysis, any doubt should have been removed with PFS’s submission of additional information to the Staff in November and December 2000.⁹ Indeed, PFS stated in its responses that “the purpose of this letter is to submit the results of additional cost-benefit analyses for the PFSF . . . assuming no spent fuel is received at the PFSF subsequent to 20 years of facility operation[.]” PFS Third RAI Response (Nov. 22) at 2. None of these documents indicates that there has been any change in the presumption that SNF would be stored at the proposed PFSF for up to 40 years. See *Oconee*, CLI-99-11, 49 NRC 328, 338 (1999).

In view of the foregoing, the State had ample opportunity to raise the issue regarding the period of operations in proposed late-filed Contention Utah SS, Basis 1, earlier in this proceeding. The State failed to do so. Therefore, the State has not demonstrated good cause for late filing of proposed Basis 1 for Contention Utah SS.

2. Basis 2, regarding a “breakeven capacity,” is late without good cause

The State claims that a “second new assumption used in the FEIS in the revised cost-benefit analysis . . . is the “breakeven capacity” of the proposed project.” Late Filed Request at 6. The State complains that the Staff’s analysis of breakeven capacity is flawed “for the same

⁸ See, e.g., “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 2, 2000.

⁹ See “Responses to Third Round EIS Request for Additional Information, Docket No. 72-22/TAC No. L22462, Private Fuel Storage Facility, Private Fuel Storage, L.L.C.,” at 2, and Enclosure 1, at 1 (Nov. 22, 2000)(“PFS Third RAI Response (Nov. 22)”); “Responses to Third Round EIS Request for Additional Information, Docket No. 72-22/TAC No. L22462, Private Fuel Storage Facility, Private Fuel Storage, L.L.C.,” at 2, and Enclosure at 3 (Nov. 15, 2000)(“PFS Third RAI Response (Nov. 15)”); “PFS Cash Flow Information, Docket No. 72-22/TAC No. L22462, Private Fuel Storage Facility, Private Fuel Storage, L.L.C.” (Dec. 4, 2000).

reason as the cost-benefit analysis itself [is flawed] – it assumes a 40 year storage period.” *Id.* For the same reasons the State lacks good cause for filing Basis 1 late, as set forth above, the State lacks good cause for filing Basis 2 late.

While the State claims that the “breakeven capacity” analysis is “new,” and therefore justifies the late filing of this portion of the contention, the asserted error the State identifies in that analysis is not new. Rather, the State asserts an error with respect to the “breakeven capacity” analysis that is identical to the claim asserted with respect to Basis I for the whole cost-benefit analysis, namely, that the Staff has chosen a 40 year storage period for the analysis. The State observes that, in commenting on the DEIS, it urged the Staff to rewrite the DEIS to “include an analysis of a small throughput scenario based on the volume capacity under the proposed license condition.”¹⁰ *Id.* at 7. However, in the absence of any information to the contrary, the State should have expected that the DEIS might not be revised by the Staff, such that any contention based on this alleged flaw should have been filed at least upon the State’s reading of the DEIS.

The Staff’s FEIS breakeven analysis simply utilized the same 40-year storage period assumption that was reflected in the DEIS analysis. If the State believed that the 40-year storage period used by the Staff in the DEIS was in error, the State could have, and should have, submitted a contention on that issue following its receipt of the DEIS. The State failed to file such a contention in a timely manner, but instead chose to rely upon its own expectation that the Staff might revise the analysis when it issued the FEIS -- whereas it should have filed comments on the

¹⁰ The Staff noted in the DEIS that it had not included two so-called small throughput scenarios in its analysis, in light of a proposed license condition that would bound those scenarios. See DEIS, § 8.1, at 8-2.

issue as well as a new DEIS-based contention, to assure that this issue is addressed in a manner to its satisfaction. The State did not do so.¹¹

As set forth above, the State had ample information available to it to formulate such a contention when the ER was originally filed, when the DEIS was issued, or, at the latest, when PFS submitted its responses to the Staff's third request for additional information in November, 2000. See PFS Third RAI Response (Nov. 15) at 2; PFS Third RAI Response (Nov. 22) at 2. Accordingly, the State has not demonstrated good cause for late filing of this portion of Contention Utah SS.

3. Basis 3, regarding the time for starting operation, is late without good cause.

The State indicates that a third new assumption used in the FEIS "is the date on which commercial operations will start at the Applicant's proposed project." Late Filed Request at 8. The State argues that the agency did not consider the potential for delay, and that the date on which commercial operations would start used in the FEIS is "plainly in error." *Id.* at 8-9. This assertion is without merit. Had the State examined PFS's responses to the Staff's third request for additional information, it would have discovered the date proposed by PFS for the start of operations, in the context of the cost-benefit analysis. These documents explicitly state that the cost-benefit analysis considers that operations of the proposed PFSF would begin in 2003. PFS Third RAI Response (Nov. 15) at 1 and Enclosure at 3. This same assumption is reflected in the related portion of the FEIS. Accordingly, the State could have filed this portion of Contention Utah SS at least a year earlier, based on its receipt and review of the Applicant's submission; and the State has not demonstrated good cause for late filing of Basis 3.

In summary, the unavailability of the FEIS until now does not establish good cause for the late filing of this cost-benefit contention, particularly since information was publicly available to the State with respect to these matters prior to the issuance of the FEIS. See, e.g., *Catawba*,

¹¹ Similarly, if the State believed the DEIS was deficient without a "breakeven capacity" analysis, it should have raised that matter as a contention upon issuance of the DEIS.

CLI-83-19, 17 NRC at 1045; *Seabrook*, ALAB-737, 18 NRC at 172 n.4; *Private Fuel Storage*, LBP-98-29, 48 NRC at 292. The State's failure to raise these matters earlier supports a conclusion that it lacks good cause for its late filing. Further, as set forth below, the State has not shown that the other factors set forth in 10 C.F.R. § 2.714(a)(1) support the late-filing of these contentions.

C. The State Has Not Shown That the Other Late-Filing Factors Weigh in Its Favor.

Regarding factors two and four, the Staff agrees that the State's interest may not be represented by existing parties with respect to the issues raised in these late-filed contentions, and that, at this stage of the proceeding, no other means are available to protect the State's interest with respect to these issues. Further, the Staff does not here assert that factor three (assistance in developing a sound record) weighs against the admission of this contention.

With respect to factor five, the State claims that the admission of this contention may not broaden the issues in the proceeding. Late-Filed Request at 12. However, there is no cost-benefit contention currently pending before the Board, and only four other environmental contentions (Contentions Utah DD, Utah O, SUWA B, and OGD O) remain in issue. Accordingly, the addition of proposed Contention Utah SS would indisputably broaden the issues remaining before the Board for resolution. Moreover, admission of this contention would certainly result in delay.¹²

In sum, the Staff submits that the State has failed to establish good cause for the late filing of Contention Utah SS, inasmuch as the State could have framed this contention long ago.

¹² The State characterizes the changes to the cost-benefit analysis it seeks as straightforward (*id.*), however, this is not readily apparent. Inclusion of this contention now, near the end of the hearing process, will require time for discovery and other litigation tasks. The Staff anticipates that it would take several weeks to prepare testimony on this issue after a ruling on the contention's admission and the completion of discovery. In addition, four weeks would be required between the submission of pre-filed testimony and the hearing, to allow for pre-hearing tasks such as motions *in limine* and preparation of cross-examination plans. Thus, litigation of this contention could not be accomplished within the current hearing schedule for this proceeding, which provides for hearings during April and May, 2002. Based on the foregoing, the Staff would anticipate that a hearing could likely be held on proposed Contention Utah SS no earlier than about July. This would likely cause a delay in the proceeding of at least 2-3 months. Thus, the admission of this contention will cause a delay in the overall schedule for this proceeding.

Further, the State's lack of good cause for filing this contention late 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 late-filed Contention Utah SS should be rejected.

CONCLUSION

Based upon the foregoing, the Staff submits that Contention Utah SS does not meet the standards for the admission of late-filed contentions set forth in 10 C.F.R. § 2.714(a). Accordingly, Late-Filed Contention Utah SS should be rejected.

Respectfully submitted,

/RA/
Robert M. Weisman
Counsel for NRC Staff

Dated at Rockville, Maryland
this 26th day of February 2002

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S RESPONSE TO 'STATE OF UTAH'S REQUEST FOR ADMISSION OF LATE-FILED CONTENTION UTAH SS,'" 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 26th day of February, 2002:

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