

December 18, 2003

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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
"OGD PETITION FOR REVIEW OF INTERLOCUTORY
BOARD ORDERS AS DIRECTED IN CLI-03-16"

INTRODUCTION

Pursuant to 10 C.F.R. § 2.786(b)(3) and the Commission's Order of November 13, 2003 (CLI-03-16),¹ the NRC Staff ("Staff") hereby files its response to the "OGD Petition for Review of Interlocutory Board Orders as Directed in CLI-03-16" ("Petition"), filed by Ohngo Gaudadeh Devia ("OGD") on December 4, 2003. In its Petition, OGD challenges the Licensing Board's ruling on contentions of April 22, 1998 (LBP-98-7),² insofar as the Board rejected four of OGD's contentions in whole or in part. For the reasons set forth below, the Staff submits that OGD fails to demonstrate that Commission review of the Licensing Board's decision is warranted under 10 C.F.R. § 2.786(b)(4). Accordingly, OGD's Petition should be denied.

BACKGROUND

This proceeding involves the application of Private Fuel Storage, L.L.C. ("PFS" or "Applicant") for a license to construct and operate an Independent Spent Fuel Storage Installation ("ISFSI") on the Reservation of the Skull Valley Band of Goshute Indians ("Skull Valley Band"),

¹ *Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation)*, CLI-03-16, 58 NRC ____ (Nov. 13, 2003).

² *Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation)*, LBP-98-7, 47 NRC 142 (1998).

geographically located in Skull Valley, Utah. On September 12, 1997, OGD (a group of Native Americans and other persons, a majority of whom are members of the Skull Valley Band who oppose the PFS application) filed a petition to intervene in the proceeding;³ and on November 24, 1997, OGD filed 16 contentions which it sought to litigate in the proceeding.⁴ Responses to those contentions were filed by PFS and the Staff on December 24, 1997.⁵

On April 22, 1998, the Licensing Board issued a Memorandum and Order, LBP-98-7, in which it ruled on the standing of petitioners for leave to intervene and the admissibility of their contentions. In particular, as pertinent here, the Board found that OGD possessed standing to intervene in this proceeding, LBP-98-7, 47 NRC at 169, and that portions of OGD Contention O ("Environmental Justice") (in which OGD challenged the adequacy of the Applicant's consideration of environmental justice issues in its Environmental Report ("ER")) stated an admissible contention. *Id.* at 233. The Board further ruled, however, that OGD's other contentions, as well as other portions of OGD Contention O, failed to satisfy the Commission's standards governing the admissibility of contentions and should therefore be rejected. *Id.* at 226-34.

Litigation then proceeded on all admitted contentions, including OGD Contention O. On May 25, 2001, PFS filed a motion seeking summary disposition of OGD Contention O, on the grounds that there did not exist a genuine dispute of material fact with respect to the matters raised

³ See "Ohngo Gaudadeh Devia's Request for Hearing and Petition to Intervene," dated September 12, 1997, at 2-3.

⁴ See "Ohngo Gaudadeh Devia's Contentions Regarding the Materials License Application of Private Fuel Storage in an Independent Spent Fuel Storage Installation," filed November 24, 1997 ("OGD Contentions"), and "Errata" thereto, filed November 25, 1997. OGD filed its contentions pursuant to a 30-day extension of time afforded by the Licensing Board to all petitioners for leave to intervene. See "Memorandum and Order (Ruling on Motions to Suspend Proceeding and for Extension of Time to File Contentions)," dated October 17, 1997, at 8-9, 11.

⁵ See "Applicant's Answer to Petitioners' Contentions" (PFS Response), dated December 24, 1997; and "NRC Staff's Response to Contentions Filed by (1) the State of Utah, (2) the Skull Valley Band of Goshute Indians, (3) Ohngo Gaudadeh Devia, (4) Castle Rock Land and Livestock L.C., *et al.*, and (5) the Confederated Tribes of the Goshute Reservation and David Pete" ("Staff Response"), dated December 24, 1997.

in the contention.⁶ Responses to that motion were filed by OGD and the Staff on June 28, 2001. On February 22, 2002, following a reconstitution of the Licensing Board,⁷ the Board issued a Memorandum and Order in LBP-02-08, in which it granted in part, and denied in part, the motion for summary disposition, and set a number of issues for hearing concerning the financial practices and leadership of the Skull Valley Band.⁸ On March 7, 2002, the Commission undertook interlocutory review of the Board's decision and stayed all proceedings related thereto;⁹ and on October 1, 2002, the Commission reversed the Board's decision and directed it to grant the Applicant's motion for summary disposition.¹⁰

Following issuance of CLI-02-20, litigation of other admitted contentions in this proceeding proceeded. Hearings on certain contentions were held in April-July 2002; the Licensing Board then issued partial initial decisions concerning certain contentions; and a final set of hearings is expected to be held in 2004 on the issue of aircraft crash consequences. On November 13, 2003, in order to expedite the conclusion of the proceeding, the Commission issued CLI-03-16, directing the parties "to file petitions for review of any interlocutory Board orders (other than those relating to matters still awaiting final Board decision) they wish to challenge." CLI-03-16, slip op. at 3.

In response to the Commission's Order in CLI-03-16, on December 4, 2003, OGD filed the instant Petition, in which it seeks review of the Licensing Board's rejection in LBP-98-7 of all or

⁶ See "Applicant's Motion For Summary Disposition of OGD Contention O -- Environmental Justice," dated May 25, 2001.

⁷ See "Notice of Reconstitution," 66 Fed. Reg. 67335 (Dec. 28, 2001).

⁸ See *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-02-08, 55 NRC 171 (2002).

⁹ See *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-02-8, 55 NRC 222 (2002).

¹⁰ See *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-02-20, 56 NRC 147, 160 (2002). To the Staff's knowledge, the Licensing Board has not yet performed the ministerial task of granting the Applicant's motion for summary disposition as the Commission directed in CLI-02-20.

portions of four contentions: (a) OGD Contention B (emergency planning); (b) OGD Contention E (leaking or contaminated casks); (c) OGD Contention J (permits, licenses and approvals); and (d) OGD Contention O (environmental justice) (Bases 2, 3 and 4). The Staff submits that the Licensing Board correctly rejected these contentions in LBP-98-7, and OGD has not shown that Commission review of that decision is warranted under 10 C.F.R. § 2.786. Accordingly, OGD's Petition should be denied.

DISCUSSION

I. Applicable Legal Standards.

A. Legal Standards Governing Petitions for Review.

Pursuant to 10 C.F.R. § 2.786(b)(4), Commission review of a Licensing Board decision may be undertaken in accordance with the following principles:

(4) The petition for review may be granted in the discretion of the Commission, giving due weight to the existence of a substantial question with respect to the following considerations:

- (i) A finding of material fact is clearly erroneous or in conflict with a finding as to the same fact in a different proceeding;
- (ii) A necessary legal conclusion is without governing precedent or is a departure from or contrary to established law;
- (iii) A substantial and important question of law, policy or discretion has been raised;
- (iv) The conduct of the proceeding involved a prejudicial procedural error; or
- (v) Any other consideration which the Commission may deem to be in the public interest.

10 C.F.R. § 2.786(b)(4). *Accord, Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2, Catawba Nuclear Station, Units 1 and 2), CLI-03-17, 58 NRC ____ (Dec. 9, 2003); *Pacific Gas & Electric Co.* (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), CLI-03-12, 58 NRC ____ (Oct. 15, 2003); *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-01-09, 53 NRC 232, 234 (2001).

B. Legal Standards Governing the Admissibility of Contentions.

It is well established that contentions may only be admitted in an NRC licensing proceeding if they fall within the scope of issues set forth in the *Federal Register* notice of hearing and comply with the requirements of 10 C.F.R. § 2.714(b) and applicable Commission case law. *See, e.g., Philadelphia Electric Co. (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-216, 8 AEC 13, 20 (1974); Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 and 2), ALAB-107, 6 AEC 188, 194 (1973), aff'd sub nom. BPI v. Atomic Energy Commission, 502 F.2d 424, 429 (D.C. Cir. 1974).*

Pursuant to 10 C.F.R. § 2.714(b)(1), a petitioner for leave to intervene is required to file a list of the contentions it seeks to have litigated in the proceeding, at least one of which must satisfy the requirements of § 2.714(b)(2). Section 2.714(b)(2), as amended,¹¹ requires that each contention "must consist of a specific statement of the issue of law or fact to be raised or controverted," and that the following information must be provided in support of the contention:

(i) A brief explanation of the bases of the contention.

(ii) A concise statement of the alleged facts or expert opinion which support the contention and on which the petitioner intends to rely in proving the contention at the hearing, together with references to those specific sources and documents of which the petitioner is aware and on which the petitioner intends to rely to establish those facts or expert opinion.

(iii) Sufficient information . . . to show that a genuine dispute exists with the applicant on a material issue of law or fact. This showing must include references to the specific portions of the application (including the applicant's environmental report and safety report) that the petitioner disputes and the supporting reasons for each dispute, or, if the petitioner believes that the application fails to contain information on a relevant matter as required by law, the identification of each failure and the supporting reasons for the petitioner's belief.

¹¹ These provisions were adopted by the Commission upon amending the regulation in 1989. *See Statement of Consideration, "Rules of Practice for Domestic Licensing Proceedings - Procedural Changes in the Hearing Process," 54 Fed. Reg. 33,168 (Aug. 11, 1989), as corrected, 54 Fed. Reg. 39,728 (Sept. 28, 1989).*

On issues arising under the National Environmental Policy Act, the petitioner shall file contentions based on the applicant's environmental report.

See generally Dominion Nuclear Connecticut, Inc. (Millstone Nuclear Power Station, Unit 2), CLI-03-14, 58 NRC ____ (Oct. 23, 2003) (slip op. at 7); *Arizona Public Service Co.* (Palo Verde Nuclear Generating Station, Units 1, 2 and 3), CLI-91-12, 34 NRC 149, 155 (1991); *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), LBP-91-35, 34 NRC 163, 167-68 (1991).¹²

The Commission has recognized that the amended rules "raise the threshold for the admission of contentions,"¹³ and has stated that the amended rules are "strict by design."¹⁴ Under the revised rules, a petitioner must provide a "clear statement as to the basis for the contentions and the submission of more supporting information and references to specific documents and sources that establish the validity of the contention." *Palo Verde, supra*, 34 NRC at 155-56. The Commission has summarized the revised rule as follows:

These sections demand that all Petitioners provide an explanation of the bases for the contention, a statement of fact or expert opinion upon which they intend to rely, and sufficient information to show a dispute with the applicant on a material issue of law or fact. If any one of these requirements is not met, a contention must be rejected.

Id. at 155. Further, pursuant to 10 C.F.R. § 2.714(d)(2), a contention must be rejected if:

(i) The contention and supporting material fail to satisfy the requirements of [§ 2.714(b)(2)]; or

¹² These requirements are intended, *inter alia*, to ensure that a petitioner reviews the application and supporting documentation prior to filing contentions; that the contention is supported by at least some facts or expert opinion known to the petitioner at the time of filing; and that there exists a genuine dispute between the petitioner and the applicant before a contention is admitted for litigation -- so as to avoid the practice of filing contentions which lack any factual support and seeking to flesh them out later through discovery. *See, e.g., Shoreham, supra*, 34 NRC at 167-68.

¹³ Statement of Consideration, *supra*, 54 Fed. Reg. at 33,168.

¹⁴ *Millstone, supra*, CLI-03-14, slip op. at 7, *citing Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 & 3), CLI-01-24, 54 NRC 349, 358 (2001).

(ii) The contention, if proven, would be of no consequence in the proceeding because it would not entitle petitioner to relief.

See generally Palo Verde, supra, 34 NRC at 155; *Shoreham, supra*, 34 NRC at 167.

In this regard, it is well established that the purpose for the basis requirements of 10 C.F.R. § 2.714(b)(2) is (1) to assure that the contention raises a matter appropriate for adjudication in a particular proceeding; (2) to establish a sufficient foundation for the contention to warrant further inquiry into the assertion; and (3) to put other parties sufficiently on notice of the issues so that they will know generally what they will have to defend against or oppose. *Peach Bottom, supra*, 8 AEC at 20-21; *Palo Verde, supra*, LBP-91-19, 33 NRC at 400. Further, the *Peach Bottom* decision requires that a contention be rejected if:

- (1) it constitutes an attack on applicable statutory requirements;
- (2) it challenges the basic structure of the Commission's regulatory process or is an attack on the regulations;
- (3) it is nothing more than a generalization regarding the petitioner's view of what applicable policies ought to be;
- (4) it seeks to raise an issue which is not proper for adjudication in the proceeding or does not apply to the facility in question; or
- (5) it seeks to raise an issue which is not concrete or litigable.

Peach Bottom, supra, 8 AEC at 20-21.

II. OGD's Petition Fails to Demonstrate that Commission Review Is Warranted in Accordance With the Requirements of 10 C.F.R. § 2.786.

A. The Licensing Board Properly Rejected OGD Contention B.

OGD Contention B asserted as follows:

OGD Contention B. Emergency Plan fails to address the safety of those living outside of the facility.

The license application, specifically the emergency plan submitted with the license application fails to address the safety provisions made for those individuals living outside of the facility within a five mile radius of the facility. The emergency plan addresses only those measures that pertain to employees and have not addressed the

provisions that would apply to those people living around the facility. The emergency plan does not address a warning system such as would be implemented to put the residents on notice of an accident.

OGD Contentions at 6. In January 1998, OGD filed three subparts of this contention, asserting (a) that PFS had not provided "an adequate backup means for offsite communication for notification of emergencies or requests for assistance"; (b) that PFS had not shown a "means for compliance" with the Emergency Planning and Community Right-to-Know Act of 1986; and (c) that PFS had failed to meet all of the requirements of 10 C.F.R. § 72.32(8).¹⁵ Further, in support of its contention, OGD asserted that PFS had not shown "a commitment" to "promptly notify offsite response organizations and request offsite assistance, including medical assistance for the treatment of contaminated injured onsite workers"; and that the application failed "to deal with the unavailability of some personnel, parts of the facility, and some equipment should an accident occur." OGD Contentions at 6.

In LBP-98-7, the Licensing Board rejected this contention as inadmissible, on the grounds that "the contention and its supporting bases fail to establish with specificity any genuine dispute; impermissibly challenge the Commission's regulations or generic rulemaking-associated determinations; lack adequate factual or expert opinion support; and/or fail properly to challenge the PFS application." LBP-98-7, 47 NRC at 227.¹⁶

The Licensing Board's ruling was entirely correct. First, OGD's assertion that offsite protective measures must be put in place for persons living within a 5-mile radius of the facility

¹⁵ See "OGD's Response to Memorandum and Order Dated 1/6/98 Granting Leave to File Reply Pleading and Requesting Information," dated January 16, 1998 ("Modification"), at 2-3.

¹⁶ OGD filed a motion seeking reconsideration of the Licensing Board's decision, in which it (a) challenged the Board's ruling concerning the Emergency Planning and Community Right-to-Know Act of 1986, and (b) raised a new issue concerning emergency planning at the (offsite) intermodal transfer point. The Licensing Board denied that motion in *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-98-10, 47 NRC 288, 292 (1998); OGD's Petition does not cite that decision and does not appear to seek review thereof.

constituted a general statement of its views concerning acceptable emergency planning, but is not based upon any Commission requirement. Rather, the emergency planning and preparedness requirements applicable to ISFSIs, set forth in 10 C.F.R. § 72.32, impose obligations only for on-site emergency planning and preparedness.¹⁷ The Commission has explained that its ISFSI emergency planning regulations do not include an offsite component since such measures are not required, considering the limited radiological consequences of an accident at an ISFSI; and it specifically rejected the suggestion that a 1-5 mile Emergency Planning Zone is required.¹⁸ As the Commission observed:

The analysis of potential onsite and offsite consequences of accidental releases associated with the operation of an ISFSI is contained in NUREG-1140. NUREG-1140 concluded that the postulated worst-case accident involving an ISFSI has insignificant consequences to the public health and safety. Therefore, the final requirements to be imposed on most ISFSI licensees reflect this fact, and do not mandate formal offsite components to their onsite emergency plans.¹⁹

Accordingly, this portion of OGD's contention constituted a challenge to the Commission's regulations and was properly rejected.

¹⁷ With respect to measures for offsite protection, 10 C.F.R. § 73.22 imposes requirements that ISFSI licensees be committed (and briefly describe the means) to notify offsite response organizations and request offsite assistance, coordinate with offsite response organizations that are expected to assist in an on-site response, effectively use offsite assistance on-site, and make arrangements for providing information to the public. See 10 C.F.R. §§ 72.32(a)(8), (15) and (16). Specific planning for offsite protective actions is not required, and offsite response organizations are not required to participate in on-site exercises. See 10 C.F.R. §§ 72.32(a)(12) and (15).

¹⁸ See Statement of Consideration, "Emergency Planning Licensing Requirements for Independent Spent Fuel Storage Facilities (ISFSI) and Monitored Retrievable Storage Facilities (MRS)," 60 Fed. Reg. 32,430, 32,435, 32,437 (June 22, 1995).

¹⁹ Statement of Consideration, 60 Fed. Reg. at 32,431, *citing* NUREG-1140, "A Regulatory Analysis on Emergency Preparedness for Fuel Cycle and Other Radioactive Material Licensees" (Final Report, January 1988). The Commission distinguished stand-alone ISFSIs that do not plan to handle, process and/or repackage spent fuel (such as the instant facility) from MRS and ISFSI facilities that do conduct such activities; for such other facilities, the Commission adopted enhanced emergency planning provisions, to include a limited offsite component, comparable to the requirements imposed for low power reactor licensing. See 10 C.F.R. § 72.32(b).

OGD's remaining assertions failed to point to any specific language or sections of the Applicant's emergency plan which it contended are inadequate; and, indeed, nothing appeared in the contention or basis therefor which would indicate that OGD had a specific dispute with that plan. While OGD asserted that the emergency plan lacks necessary information, it failed to explain why it believed the information presented by the Applicant was incomplete or otherwise deficient. Accordingly, the contention lacked the specificity required of contentions under 10 C.F.R. § 2.714(b), and was properly rejected.

In its Petition, OGD asserts that "[t]he Board erred by failing to recognize the [asserted] shortcomings of the PFS application," and that "[t]he Board improperly placed the burden of producing information about the lack of proper emergency/safety provision on OGD. The factual evidence of the PFS application shortcomings is the lack of information in the application itself." Petition at 2. It further asserts that "PFS should provide this emergency/safety information to the public," and that OGD should have been given an opportunity to conduct discovery on this contention. *Id.* at 2, 3.

Significantly, OGD fails to point to any specific provisions in the application which it believed were deficient, which it could have cited to establish an admissible contention under 10 C.F.R. § 2.714(b). OGD's generalized statements fail to establish an admissible contention -- and its assertions concerning the burden imposed upon it by the Licensing Board disregard the clearly established rule that contentions should not be admitted unless they are supported by specific bases which satisfy the requirements of 10 C.F.R. § 2.714(b). Moreover, OGD's Petition runs afoul of the Commission's express instruction that "[a] petitioner is not permitted to file a vague, unparticularized contention, followed by an endeavor to flesh it out through discovery." *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2, Catawba Nuclear Station, Units 1 & 2), CLI-02-28, 56 NRC 373, 387 (2002) (internal quotations and footnote omitted).

Finally, OGD has failed to provide any support for its assertion that its contention [or the Board's ruling]²⁰ "involve[s] a legal conclusion without governing precedent, and raise[s] substantial and important questions of law and public policy" (Petition at 3) -- and it has failed to identify any other consideration set forth in 10 C.F.R. § 2.786(b) which merits Commission review of the Board's ruling on this contention. Accordingly, OGD has failed to establish that Commission review of this ruling is warranted under 10 C.F.R. § 2.786(b)(4).

B. The Licensing Board Properly Rejected OGD Contention E.

In OGD Contention E, OGD asserted as follows:

OGD Contention E. License Application fails to provide information and a plan to deal with casks that may leak or become contaminated during the 20 to 40 year storage period. The License Application poses undue risk to the public health and safety because it fails to provide information and a plan to deal with casks that may leak or become contaminated during the 20 to 40 year storage period. Sending such casks back to the generating reactor may not be an option for several reasons, such as: PFS does not have the facilities to repackage contaminated canisters, the casks may be too contaminated to transport, or the nuclear power plant from which the fuel originated may have been decommissioned, and there are no assurances that the storage will be only "interim". The license application provides no assurance that there will be an alternative location to which canisters and/or casks can be shipped if they become defective while in storage at PFS.

OGD Contentions, at 17; Modification at 4. OGD listed three subparts of this contention, as follows:

(1) "the license application provides very little procedure for dealing with defective canisters and/or casks that may leak or become contaminated"; (2) "[n]o alternative location is designated in the license application should a canister become defective while in storage especially if the reactor that

²⁰ OGD asserts that the "concerns fairly raised in OGD Contention B raise material questions of fact, involve a legal conclusion without governing precedent, and raise substantial and important questions of law and public policy." Petition at 3. In making this assertion, OGD appears to misunderstand the standard for review set forth in 10 C.F.R. § 2.786, which pertains to allegations of error in a Licensing Board ruling, rather than the adequacy of an intervenor's contention. In the text above, the Staff treats OGD's assertions as if they had been directed correctly to allegations of error in the Board's ruling in LBP-98-7.

originally shipped the canister is decommissioned"; and (3) "[t]he license application does not adequately address the uncertainties about the suitability of Yucca Mountain as a repository site, and if ever, spent fuel stored at PFS should be shipped to Yucca Mountain." Modification at 4-5.

The Licensing Board rejected this contention as inadmissible, on the grounds that "the contention and its supporting bases fail to establish with specificity any genuine dispute; impermissibly challenge the Commission's regulations or generic rulemaking-associated determinations, including 10 C.F.R. §§ 51.23; lack materiality; lack adequate factual or expert opinion support; and/or fail properly to challenge the PFS application." LBP-98-7, 47 NRC at 229.

The Licensing Board's determination to reject this contention was entirely correct. While OGD expressed concern that casks may leak or become contaminated, it failed to provide any support for its underlying premise that casks may leak or become contaminated while in storage at the PFS facility, or that the Applicant's proposed measures to deal with such contamination are inadequate.²¹ Indeed, OGD failed to reference the accident analyses contained in the Applicant's Safety Analysis Report ("SAR") or its Emergency Plan measures for detecting and mitigating such events. Accordingly, this contention was properly rejected. *Peach Bottom, supra*, 8 AEC at 20-21; 10 C.F.R. § 2.714(b)(iii).

In its Petition, OGD asserts that it had "correctly pointed out that the PFS license application . . . fails to provide information and a plan to deal with casks that may leak or become contaminated during the proposed 20-40 year storage period," and that it had set forth a number of reasons why it may not be possible to send such casks back to the originating reactor, to an alternative location, or to the proposed Yucca Mountain repository. Petition at 4-5. OGD then reiterates its allegations concerning Contention B, *supra*, asserting that "[t]he Board erred by failing to recognize the [asserted] shortcomings in the PFS license application," and that "[t]he Board improperly placed the burden of producing information about the above-referenced deficiencies on OGD where it is

²¹ See, e.g., Environmental Report §§ 3.1 - 3.3; Safety Analysis Report § 8.2.7.

clearly the applicant's obligation to file a complete and adequate application. The factual evidence of the PFS application shortcomings is the lack of information in the application itself." *Id.* at 5. Again, it asserts that "PFS should provide this emergency/safety information to the public," and that OGD should have been given an opportunity to conduct discovery on this contention. *Id.* at 5, 6.

While OGD contests the Board's ruling, as in the case of Contention B, *supra*, its Petition fails to point to any specific assertions in its contention or supporting bases which were sufficient to state an admissible contention under 10 C.F.R. § 2.714(b); it fails to address the Commission's ruling that discovery may not be used to "flesh out . . . a vague, unparticularized contention," *McGuire, supra*, CLI-02-28, 56 NRC at 387; and it fails to provide any support for its assertion that this contention [or the Board's ruling] "involve[s] a legal conclusion without governing precedent, and raise[s] substantial and important questions of law and public policy." *Id.* at 3. Further, OGD has failed to identify any other consideration set forth in 10 C.F.R. § 2.786(b) which merits Commission review of the Board's ruling. Accordingly, OGD has failed to establish that Commission review of this ruling is warranted under 10 C.F.R. § 2.786(b)(4).

C. The Licensing Board Properly Rejected OGD Contention J.

OGD Contention J asserted as follows:

OGD Contention J. The license application fails to address the status of compliance with all permits, licenses and approvals required for the facility.

The license application violates NRC regulations because the ER fails to address the status of compliance with all permits, licenses and approvals required for the facility.

OGD Contentions at 23. In support of this contention, OGD asserted that the Applicant's ER "fails to address federal water discharge requirements and the certifications and permits required for water and storm discharges, erosion and sediment control for prevention of pollution of water; air quality requirements and the construction of a stationary source permit"; that "there is ever present the possibility that an accident will occur"; that groundwater could become contaminated due to

routine operations or the occurrence of an accident; and that the Federal government's "Special Trust Relationship" with Indian tribes rendered it "vitaly important that the NRC make certain that the land as well as the water is protected from harm." *Id.* at 23, 24. Subsequently, OGD listed three subparts of this contention (Modification at 6):

1. The license application fails to address the certifications and permits required for water and storm discharges, erosion and sediment control for prevention of pollution of water; air quality requirements and the construction of a stationary source permit.
2. The license application fails to provide adequate protection of the land and water of the Goshute Reservation and Goshute people from harm.
3. Contention A ["Lack of sufficient provisions for prevention of and recovery from accidents"] and applicable subcontentions are hereby incorporated in this contention, regarding relevant accident discussion.

The Licensing Board rejected this contention as inadmissible, on the grounds that "the contention and its supporting basis fail to establish with specificity any genuine dispute; lack adequate factual or expert opinion support; and/or fail properly to challenge the PFS application." LBP-98-7, 47 NRC at 231. The Board further observed that at oral argument, "OGD revised this contention to withdraw any portion of the contention that deals with OGD A. *See Tr.* at 510"; and "to the extent this contention is footed in a purported 'trust responsibility' owed to individual members of a Native American tribe by a federal regulatory agency exercising its undifferentiated statutory responsibility to protect the public health and safety and the environment, it lacks a litigable basis." *Id.*²²

OGD seeks Commission review of the Board's ruling, asserting that the Board erred "by failing to evaluate the PFS application's treatment of water and air regulatory compliance in light of the federal government's special Indian trust responsibility." Petition at 7. OGD asserts that "the

²² OGD filed a motion seeking reconsideration of the Licensing Board's rejection of OGD Contention J, which the Board denied. *See Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation)*, LBP-98-10, 47 NRC 288, 292 (1998). OGD's Petition does not cite that decision and does not appear to seek review thereof.

federal government owes a trust responsibility to the Skull Valley Band of Goshute Indians," that the Board should have afforded OGD "an opportunity for discovery or a hearing," and that "OGD "has been denied the opportunity to litigate tribal members' concerns about the inadequate protections of Tribal land, water, and air contained in the PFS application." *Id.* at 7, 8.

OGD's Petition fails to show any error in the Licensing Board's ruling. Nowhere in this contention did OGD challenge the Applicant's discussion of the permits and approvals needed for its facility;²³ nowhere did it point to any provision in the license application, Safety Analysis Report or Environmental Report which it believe failed to afford adequate protection of the air, land, or water; and it failed to cite any provision in the application which it believed did not provide adequate consideration of the potential consequences and means to remediate an accident at the PFS site. Further, OGD does not challenge the Board's observation that OGD had withdrawn this contention's reference to OGD Contention A; nor does it provide any basis to challenge the Board's ruling that its argument concerning the Federal government's trust responsibility to an Indian tribe failed to establish a litigable issue.²⁴

As in the case of Contentions B and E, *supra*, OGD's Petition fails to point to any specific assertions in its contention or supporting bases which were sufficient to state an admissible contention under 10 C.F.R. § 2.714(b); it fails to address the Commission's ruling that discovery may not be used to "flesh out . . . a vague, unparticularized contention," *McGuire, supra*, CLI-02-28, 56 NRC at 387; and it fails to provide any support for its assertion that this contention [or the Board's ruling] "involve[s] a legal conclusion without governing precedent, and raise[s] substantial

²³ See Environmental Report, Ch. 9.

²⁴ The Staff did not oppose the admission of this contention, except insofar as OGD (a) sought to incorporate by reference OGD Contention A, and (b) relied upon the Federal government's "trust responsibility" for Indian tribes, in that such a trust responsibility did not establish "a litigable issue pertaining to whether the instant ISFSI application satisfies pertinent statutory and regulatory requirements," and thus did not "present a concrete and litigable issue appropriate for adjudication in this proceeding." Staff Response at 90-91, *citing Peach Bottom, supra*, 8 AEC at 20-21.

and important questions of law and public policy.” *Id.* at 8. Further, OGD has failed to identify any other consideration set forth in 10 C.F.R. § 2.786(b) which merits Commission review of the Board’s ruling. Accordingly, OGD has failed to establish that Commission review of this ruling is warranted under 10 C.F.R. § 2.786(b)(4).

D. The Licensing Board Properly Rejected Contention O, Bases 2, 3 and 4.

As filed by OGD, Contention O (“Environmental Justice”) asserted as follows:

OGD Contention O. Environmental Justice Issues are not addressed.

The license application poses undue risk to public health and safety because it fails to address environmental justice issues. In Executive Order 12898, 3 C.F.R. 859 (1995) issued February 11, 1994, President Clinton directed that each Federal agency “shall make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies and activities on minority populations and low-income populations in the United States.” It is not just and fair that this community be made to suffer more environmental degradation at the hands of the NRC. Presently, the area is surrounded by a ring of environmentally harmful companies and facilities. Within a radius of thirty-five (35) miles the members of OGD and the Goshute reservation are inundated with hazardous waste from: Dugway Proving Ground, Utah Test and Training Range South, Deseret Chemical Depot, Tooele Army Depot, Envirocare Mixed Waste storage facility, Aptus Hazardous Waste Incinerator, Grassy Mountain Hazardous Waste Landfill and Utah Test and Training Range North.

OGD Contentions at 27-28. OGD submitted an extensive basis statement in support of this contention (*Id.* at 28-36), which it subsequently distilled into seven proposed subissues:

1. The license application does not address the fact that the proposed plant will have negative economic and sociological impacts on the Native community of Goshute Indians and OGD members who live very close to the proposed site.
2. The license application does not address indirect and direct costs of the project to the Skull Valley Band of Goshutes.
3. The license application does not address the benefit-cost analysis of leaving waste on-site at present facilities.
4. The described need for the ISFSI site is inadequate in the license application.

5. The disproportionate adverse health or environmental effects on a minority population is not discussed in the licensing application.
6. The licensing application fails to look at the affect [sic] that the siting of this facility will have on subjecting the persons and populations in the area to discrimination because of their race, color or national origin.
7. The license application fails to address the effect that the facility will have on the property that is owned by members of OGD or by others living in and around the area of the proposed ISFSI site.

Modification at 8-9.

The Licensing Board admitted certain portions of this contention, insofar as it raised "disparate impact matters" in Bases 1, 5 and 6. LBP-98-7, 47 NRC at 233. The Board excluded consideration of "psychological stress" -- a matter raised in Basis 2 (Contentions at 30) -- as failing to raise a cognizable environmental impact issue under the National Environmental Policy Act ("NEPA"). *Id.*, 47 NRC at 233, citing *Metropolitan Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 772-79 (1983) ("PANE"). Further, the Board rejected Bases 2, 3 and 4, finding they "do not support admission of this contention because the facility cost-benefit issues they seek to raise are not relevant to this contention." *Id.*²⁵

OGD challenges the Licensing Board's rejection of Bases 2, 3 and 4 of this contention, asserting that "the Board provided no explanation" for its finding that cost-benefit issues are not relevant to a contention asserting "environmental justice" concerns. Petition at 9. Further, OGD asserts that Basis 2 had properly challenged the adequacy of the application's consideration of "environmental, sociological and psychological costs" on persons living within a few miles of the facility, and the negative impacts of the proposed facility on Tribal culture and traditional practices

²⁵ The Licensing Board subsequently modified the scope of OGD Contention O, deleting reference to certain facilities listed therein. *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-98-10, 47 NRC 288, 298-99, 301 (1998). The Commission further limited the permissible scope of OGD Contention O, removing consideration of OGD's challenges to the Applicant's motivation and social equity in siting, as being beyond the scope of NEPA. *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-98-13, 48 NRC 26, 36 (1998).

(*Id.* at 9-10); that Basis 3 had correctly challenged the adequacy of the application's consideration of the cost of leaving waste onsite until a permanent waste repository is approved and constructed (*Id.* at 10); and that Basis 4 had established a "genuine issue of fact regarding the unavailability of storage space for existing waste to be shipped to and stored at the proposed PFS facility" (*Id.*).

OGD's assertions fail to establish any basis for review of the Board's ruling on this contention. First, it is indisputable that the Board admitted the issue of environmental justice for litigation in this proceeding, thus allowing litigation on the fundamental issue of whether issuance of a license for the PFS facility would cause disparate adverse impacts to be suffered by the Skull Valley Band or other minority or disadvantaged populations. The Board excluded, as a basis for this contention, the separate and distinct issue as to whether the Applicant had adequately considered costs and benefits under NEPA. OGD altogether fails to address the Board's determination that allegations concerning the adequacy of a NEPA cost-benefit analysis do not support a contention concerning disparate adverse impacts to be suffered by disadvantaged and minority populations. Indeed, OGD Contention O failed to show that issues pertaining to the Applicant's consideration of the need, benefits and cost of the facility affect the issue of whether environmental justice has been adequately considered. Similarly, OGD fails to make any such showing in its Petition seeking Commission review.

Finally, OGD's Petition altogether fails to address the correctness of the Board's ruling that the issue of psychological stress fails to present a cognizable issue under NEPA, as established by the Supreme Court in *PANE*. This principle is well established in Commission jurisprudence. *See, e.g., Georgia Power Co. (Vogtle Electric Generating Plant, Units 1 and 2), ALAB-872, 26 NRC 127, 132 n.15 (1987)*. OGD has made no showing that review of the Board's ruling on this issue is warranted.

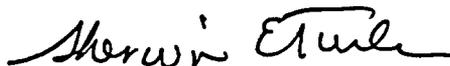
For the reasons set forth above, the Staff submits that OGD has failed to show any error in the Board's rejection of Bases 2, 3 and 4 as part of this contention. Further, while OGD asserts

that "the Board provided no explanation" for finding that cost-benefit issues are not relevant to a contention raising environmental justice concerns (Petition at 9), the burden, instead, was on OGD to show the existence of such a link. Having failed to do so, OGD has not shown any basis for the Commission to undertake review of this matter under 10 C.F.R. § 2.786(b)(4).

CONCLUSION

For the reasons set forth above, the Staff respectfully submits that OGD's Petition fails to demonstrate that Commission review of LBP-98-7 is warranted under 10 C.F.R. § 2.786. The Petition should therefore be denied.

Respectfully submitted,



Sherwin E. Turk
Catherine L. Marco
Counsel for NRC Staff

Dated at Rockville, Maryland
this 18th day of December, 2003

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE 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 "NRC STAFF'S RESPONSE TO "OGD PETITION FOR REVIEW OF INTERLOCUTORY BOARD ORDERS AS DIRECTED IN CLI-03-16" 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 18th day of December, 2003:

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