

December 18, 2003

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

DOCKETED  
USNRC

December 22, 2003 (3:45PM)

Before the Commission

OFFICE OF SECRETARY  
RULEMAKINGS AND  
ADJUDICATIONS STAFF

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

**APPLICANT'S RESPONSE TO OGD PETITION  
FOR REVIEW OF INTERLOCUTORY BOARD ORDERS**

Pursuant to 10 C.F.R. § 2.786(b)(3), Applicant Private Fuel Storage, L.L.C. ("Applicant" or "PFS") opposes the "OGD Petition for Review of Interlocutory Board Orders as Directed in CLI-03-16," filed December 4, 2003 ("Petition"). OGD petitions for review of the Atomic Safety and Licensing Board's ("Board") rejection of four contentions it filed at the beginning of the PFS Facility licensing proceeding. Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-98-7, 47 NRC 142, 226-34, aff'd in part on other grounds, CLI-98-13, 48 NRC 69 (1998). PFS respectfully submits that OGD's petition for review be denied. OGD fails to show that the Board's decision contained clear errors of fact or necessary legal conclusions contrary to established law and it fails to raise substantial and important questions of law or policy.

**I. STANDARDS OF LAW**

**A. Standard for Granting a Petition for Review**

A petition for review of the decisions of a licensing board is granted only at the discretion of the Commission, "giving due weight to the existence of a substantial question with respect to the following relevant 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 considerations which the Commission may deem to be in the public interest.”

10 C.F.R. § 2.786(b)(4) (emphasis added); Duke Energy Corp. (McGuire Nuclear Station, Units 1 and 2, Catawba Nuclear Station, Units 1 and 2), CLI-03-17, 58 NRC \_\_\_, slip op. at 4 (Dec. 9, 2003).<sup>1</sup> Since OGD raises no substantial questions of fact, law or policy, there is no reason why the Commission should exercise its discretionary power to review the Board’s decision.

#### **B. Standard for Admitting Contentions**

Because the contentions for which OGD petitions for review were rejected by the Board at the filing stage, the Board’s decision must be judged against the standards for admitting contentions. Contentions must meet the standards set forth in 10 C.F.R. § 2.714(b)(2), which provide that “[e]ach contention must consist of”

- “a specific statement of the issue of law or fact to be raised or controverted”, accompanied by
- (i) a “brief explanation of the bases of the contention”;
- (ii) a “concise statement of the alleged facts or expert opinion” supporting the contention together with references to “specific sources and documents . . . on which the petitioner intends to rely to establish those facts or expert opinion”; and
- (iii) “[s]ufficient information . . . to show that a genuine dispute exists with the applicant on a material issue of law or fact,” which showing must include “references to the specific portions of the application . . . that the petitioner disputes and the supporting reasons for each dispute . . . .”

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<sup>1</sup> OGD does not claim that the Licensing Board made a procedural error, so 10 C.F.R. § 2.786(b)(4)(iv) is not relevant here.

10 C.F.R. § 2.714(b)(2). The failure of a contention to comply with any one of these requirements is grounds for dismissing the contention. 10 C.F.R. § 2.714(d)(2)(i). The Board discussed the standards for admitting contentions in detail when it rejected the contentions in question here. Private Fuel Storage, LBP-98-7, 47 NRC at 178-83.

## II. DISCUSSION

### A. The Commission Should Deny OGD's Petition for Review Regarding OGD Contention B—Emergency Plan

OGD Contention B concerned emergency planning for the PFS facility. See Ohngo Gaudadeh Devia's Contentions Regarding the Materials License Application of Private Fuel Storage in an Independent Spent Fuel Storage Installation (Nov. 24, 1997) ("OGD Cont.") at 6. OGD alleged that the PFS emergency plan failed to address the safety of individuals living outside of the facility and failed to include an off-site warning system. Id. It also claimed that the emergency plan was deficient in several other respects: (1) it did not provide for backup means for off-site communication required by 10 C.F.R. § 72.32; (2) it did not indicate how PFS plans to comply with the Emergency Planning and Community Right to Know Act 1986 ("EPCRTKA") with respect to hazardous materials at the facility; (3) it fails to "show a 'commitment to' and a 'means to' promptly notify offsite response organizations and request offsite assistance" when appropriate; and (4) it fails to deal with the unavailability of personnel, parts of the facility, and equipment in the event of an accident. Id.

Citing the responses by PFS<sup>2</sup> and the NRC Staff,<sup>3</sup> the Board rejected the contention and its supporting bases because they "fail to establish with specificity any genuine dispute; impermissibly challenge the Commission's regulations or generic rulemaking-associated de-

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<sup>2</sup> Applicant's Answer to Petitioners' Contentions (Dec. 24, 1997) ("PFS Ans.")

<sup>3</sup> 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 (Dec. 24, 1997).

terminations; lack adequate factual or expert opinion support; and/or fail to properly challenge the PFS application.” LBP-98-7, 47 NRC at 227.

In its petition, OGD does not assert that the Board’s decision contained any specific errors. Rather, OGD claims broadly that the Board “fail[ed] to recognize the [asserted] shortcomings of the PFS license application” and improperly placed the burden of “producing information about the lack of proper emergency/safety provision” on OGD. Petition at 2. It claims without support that “these matters of emergency response and safety provisions have a direct and serious health and welfare impact on OGD members.” Id. at 2-3. Finally, OGD claims only in conclusory fashion that its petition warrants discretionary Commission review of the Board’s decision. See id. at 3.

In its response to OGD’s contentions, PFS clearly demonstrated why OGD Contention B should be rejected. PFS Ans., at 486-493. First, an ISFSI like the PFS Facility, that will not “process and/or repackage spent fuel,”<sup>4</sup> is not required to have an offsite component to its emergency plan. PFS Ans. at 488 (citing sources). Second, contrary to OGD’s claim, PFS did in fact properly provide for backup communications with offsite response organizations. Id. at 491. Third, PFS complied with EPCRTKA in that it stated that “it will not have extremely hazardous substances present in an amount equal to or greater than the threshold planning quantities” specified in EPCRTKA implementing regulations. Id. at 490. Fourth, the emergency plan did in fact properly provide for the notification of off-site response organizations. Id. at 490-91. Finally, OGD’s claim regarding the failure to provide for the unavailability of personnel or equipment was inadmissible as entirely non-specific and it failed to recognize that PFS had in fact provided for such potential unavailability. Id. at 491-93. OGD’s Petition makes no effort to address these deficiencies in its contentions. Therefore,

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<sup>4</sup> The PFS Facility will neither process nor repackage spent fuel. License Application at 1-1; compare 10 C.F.R. § 72.32(a) with 10 C.F.R. § 72.32(b).

the Board's rejection of the contention was fully justified and appropriate and OGD's petition provides no reason for the Commission to exercise discretionary review.

OGD's petition claims generally that the Board erred by "plac[ing] the burden of producing information" on OGD. Petition at 2, 5. On the contrary, the burden of providing factual information sufficient to show a genuine dispute on a material issue is placed on petitioners by NRC regulations. 10 C.F.R. §§ 2.714(b)(2)(ii) and (iii). In promulgating its contention rule, the Commission stated that

the rule will require that before a contention is admitted the intervenor have some factual basis for its position and that there exists a genuine dispute between it and the applicant. . . . [T]his will preclude a contention from being admitted where an intervenor has no facts to support its position and where an intervenor contemplates using discovery or cross-examination as a fishing expedition which might produce relevant supporting facts. . . . [T]he new rule may require persons seeking intervention to do more work at an earlier stage of the proceeding than under the [former] regulations.

Rules of Practice for Domestic Licensing Proceedings—Procedural Changes in the Hearing Process, Final Rule, 54 Fed. Reg. 33,168, 33,170-171 (1989) (citations omitted). Thus, the Board made no error in rejecting OGD's contentions for lack of basis.

**B. The Commission Should Deny OGD's Petition for Review Regarding OGD Contention E—Leaking/Contaminated Casks**

OGD Contention E asserted that PFS had not provided a plan to deal with spent fuel casks that may leak or become contaminated during their storage period. OGD Cont. at 17-18. It claimed that PFS may not have the means to send contaminated casks back to the reactors from whence they came. Id. at 17. It also claimed that PFS provided no assurance that a location to send the casks would be available if the originating reactors had been decommissioned. Id. at 17-18. Finally, it challenged the ultimate availability of the Yucca Mountain site as a repository to which casks could be sent after storage at the PFS Facility. Id. at 18.

Citing the responses by PFS and the NRC Staff, the Board rejected the contention and its supporting bases because they "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 to properly challenge the PFS application." LBP-98-7, 47 NRC at 229.

In its petition, OGD again does not assert that the Board's decision contained any specific errors. Rather, it reiterates the claims it made in the contention and asserts that the Board "fail[ed] to recognize the [asserted] deficiencies in the PFS license application" and "improperly placed the burden of producing information" on OGD. Petition at 5. OGD again asserts without support that "these issues . . . have a direct and serious health and welfare impact on OGD members" and claims only in conclusory fashion that its petition warrants discretionary Commission review of the Board's decision. *Id.* at 5-6.

In its response to OGD's contentions, PFS demonstrated why OGD Contention E should be rejected. PFS Ans. at 521-29. First, OGD's claims about leaking casks or canisters, whether and how they might have to be removed from the PFS Facility, and where they might have to be sent, were completely lacking in factual or expert opinion basis. *Id.* at 522-23, 526-27. Second, OGD's allegations about leaking canisters were contrary to the NRC's generic determination in the course of promulgating ISFSI emergency planning rules that it "was not able to identify any design basis accident that would result in the failure of a [spent fuel] confinement boundary." *Id.* at 523-24.<sup>5</sup> Third, OGD ignored the fact that PFS had established a three-tiered method for accident recovery and retrieval capability following a hypothetical (and non-credible) loss of confinement barrier accident. *Id.* at 524-25. Fourth, OGD impermissibly collaterally attacked the Commission's rules by advocating that accident recovery procedures (rather than a plan) be included in a license application. *Id.* at 525-26. Fifth, OGD failed to show a material factual dispute with respect to leaking canisters from

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<sup>5</sup> Quoting 60 Fed. Reg. 32,430, 32,438 (1995) (Part 72, Statements of Consideration).

potentially decommissioning reactors, in that PFS will have additional means to deal with such canisters. Id. at 527-28. Finally, OGD's assertion that a DOE spent fuel repository may not be available was irrelevant to dealing with potential leaking casks or canisters and moreover it impermissibly challenged the Commission's Waste Confidence Rule. Id. at 528-29. OGD's Petition makes no effort to address these deficiencies in its contentions.

Therefore, the Board's rejection of the contention was warranted and OGD's petition provides no reason for the Commission to exercise discretionary review.

**C. The Commission Should Deny OGD's Petition for Review Regarding OGD Contention J—Status of Compliance with Permits**

OGD Contention J asserted that the PFS Environmental Report failed to address federal water discharge requirements and permits required for water and storm discharges, erosion and sediment control, air quality requirements, and the permit for the construction of a stationary source. OGD Cont. at 23. It also asserted that, because of the special trust relationship between the federal government and the Indian tribes, the NRC has a special obligation to the members of OGD. Id. at 23-24.<sup>6</sup>

The Board dismissed the contention and its supporting bases because they "fail to establish with specificity any genuine dispute; lack adequate factual and expert opinion support; and/or fail to properly challenge the PFS application." LBP-98-7, 47 NRC at 231. With respect to the asserted "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," the Board found that the contention lacked a litigable basis. Id.

OGD asserts that the Board erred in "failing to evaluate the PFS application's treatment of water and air regulatory compliance in light of the federal government's special In-

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<sup>6</sup> OGD withdrew the portion of OGD Contention J that was related to Contention OGD A—Prevention of and Recovery from Accidents. LBP-98-7, 47 NRC at 231.

dian trust responsibility.” Petition at 7. OGD claims that the NRC is obligated “to ensure that Indian lands, air, and water resources are adequately protected from improper contamination and pollution” and that by denying OGD “an opportunity to explore the land and environmental resource protection concerns raised in OGD Contention J without an opportunity for discovery or a hearing, the NRC fails to fulfill its trust obligations to the Skull Valley Band membership.” *Id.* OGD claims that the Board erred in failing to evaluate the contention and the application “in accordance with the heightened scrutiny required by the federal government’s trust responsibility.” *Id.* at 8.

OGD’s claim does not warrant review. At the outset, OGD does not even assert that the Board erred in finding that the contention did not establish a genuine dispute with specificity, lacked factual basis, and failed to challenge the PFS application. Nor does OGD address the defects in its arguments pointed out in PFS’s response. Regarding OGD’s trust responsibility/heightened scrutiny claim, first, as PFS explained, the Atomic Energy Act, under which the NRC protects the public health and safety, does not allow the NRC to apply different standards (“heightened scrutiny”) to the members of OGD, or any other special group. PFS Ans. at 567-68. Under the Atomic Energy Act the Commission is charged to protect the health and safety of all of the public. Nor does OGD cite any authority which creates any “special obligation” on the part of the NRC toward OGD’s members regarding matters arising under the Atomic Energy Act. *Id.*<sup>7</sup>

Second, only an Indian tribe—the Skull Valley Band here—can assert the benefit of a trust responsibility. *Id.* at 568-70 (citing cases). A group of individuals—OGD, some of whom are not even members of the Skull Valley Band—cannot. *Id.* Furthermore, to the extent that OGD now attempts to assert the benefit of a trust responsibility on behalf of the

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<sup>7</sup> PFS’s Answer addressed several of the cases cited by OGD in its Petition. OGD’s new cases, Cobell v. Norton, 240 F.3d 1081 (D.C. Cir. 2001), and United States v. White Mountain Apache Tribe, 537 U.S. 465 (2003), do not impose any additional obligation on the NRC toward OGD.

Band, as opposed to its members, its claim is further barred because it did not attempt to do so before the Board below. Yankee Atomic Electric Co. (Yankee Nuclear Power Station), CLI-96-7, 43 NRC 235, 260 (1996). OGD's claim that the Board was obliged to provide OGD with the opportunity to explore its "land and environmental resource protection concerns" through discovery and a hearing (Petition at 7) is also in error. It is well established NRC law that a petitioner cannot file a contention merely with the hope of substantiating its allegations through the discovery and hearing process. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-942, 32 NRC 395, 426-27 (1990). For the foregoing reasons, the Board's decision was correct and the Commission should not its exercise review authority with respect to Contention J.

**D. The Commission Should Deny OGD's Petition for Review Regarding OGD Contention O—Environmental Justice**

OGD Contention O concerned environmental justice issues and included six supporting bases. See OGD Cont. at 27-36. OGD seeks review of the Board's dismissal of the contention with respect to bases 2, 3, and 4, concerning facility cost-benefit issues. Petition at 9.<sup>8</sup> Basis 2 asserted that, while PFS had discussed the benefits to the Skull Valley Band from the project, it had failed to discuss the "environmental, sociological and psychological costs" that nearby residents may incur, including "added traffic, more people, cultural impacts on traditional lifestyles, stigmatization resulting from adverse impacts (real or perceived) . . . changes in traffic patterns, and . . . fear." OGD Cont. at 30. Basis 3 asserted that PFS had not performed a cost-benefit analysis that considered the alternative of leaving the spent fuel at reac-

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<sup>8</sup> Bases 1, 5, and 6 were admitted by the Board. LBP-98-7, 47 NRC at 233. Bases 5 and 6 were later dismissed on summary disposition, but Basis 1 was set for hearing. Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-02-08, 55 NRC 171 (2002). The Commission reversed the Board's decision regarding Basis 1 and directed the Board to grant summary disposition. Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-02-20, 56 NRC 147 (2002). As of this date, the Board has not yet granted summary disposition as directed by the Commission.

tor sites “until a safe solution is developed.” Id. at 30-31. Basis 4 challenged the PFS Environmental Report regarding the need for the PFS Facility. Id. at 31-32.

The Board dismissed Contention O with respect to Bases 2, 3, and 4 “because the facility cost-benefit issues they seek to raise are not relevant to this contention.” LBP-98-7, 47 NRC at 233. The Board further held that “[i]t also is not admissible to permit consideration of ‘psychological stress’ as an environmental impact under NEPA, which is not a cognizable basis for the contention.” Id.

As with Contentions B and E, OGD’s petition fails to assert that the Board’s decision regarding Contention O contained any specific errors. Petition at 10. Rather, OGD merely repeats the claims it made in the contention and claims only in conclusory fashion that its petition warrants discretionary Commission review of the Board’s decision. Id.

The Board was correct in dismissing the contention. OGD’s claims in Bases 2, 3, and 4 are irrelevant to environmental justice. See 10 C.F.R. § 2.714(b)(2)(ii) (contention bases must “support the contention”). The Commission has defined the NRC’s obligation with respect to the environmental justice “disparate impact” analysis as the assessment of adverse effects “on low-income and minority communities that become apparent only by considering factors peculiar to those communities.” Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-98-13, 48 NRC 26, 36 (1998). The environmental cost-benefit balance of a proposed facility is a separate issue from the assessment of adverse impacts on low-income and minority communities. To the extent that Basis 2 raises issues regarding the assessment of such impacts (traffic, people, cultural impacts), the asserted impacts are the same as those asserted in Contention O Basis 1. See OGD Cont. at 28-29. The assessment of those impacts in the PFS environmental impact statement (“EIS”) was litigated to the point of summary disposition and the Commission directed the Board to grant PFS summary disposi-

tion with respect to Basis 1. CLI-02-20, 56 NRC at 154, 160.<sup>9</sup> To the extent that Basis 2 concerns psychological effects such as stress, fear, and stigmatization, the Board correctly held that they are not cognizable under NEPA. LBP-98-7, 47 NRC at 233 (citing Metropolitan Edison Co. v. People Against Nuclear Energy, 460 U.S. 766, 772-79 (1983)).

Contention O Bases 3 and 4 are irrelevant because they simply do not concern adverse effects on a low-income or minority community. Basis 3 concerns the cost-benefit balance between the PFS Facility and the alternative of storing spent fuel at reactor sites. OGD Cont. at 30-31. Basis 4 concerns the need for the PFS Facility in light of claims regarding the availability of spent fuel storage capacity at reactors. Id. at 31. In sum, Bases 2, 3, and 4 do not concern the assessment of impacts on the Skull Valley Band that become apparent only by considering factors peculiar to that community. Therefore the Board's decision rejecting the bases was correct.

In addition to the foregoing, the Board's rejection of Bases 2, 3, and 4 should be affirmed for a reason not relied upon by the Board<sup>10</sup>—that OGD ignored information regarding its claims that was in the Environmental Report and is contained—and expanded upon—in the PFS EIS. (Since the PFS EIS has been published since the Board rendered its rulings on the admissibility of contentions, it is now appropriate to evaluate OGD's claims against the EIS rather than the PFS Environmental Report. See Duke Energy Corp. (McGuire Nuclear Station, Units 1 and 2, Catawba Nuclear Station, Units 1 and 2), CLI-02-28, 56 NRC 373, 382-83 (2002).) With respect to Basis 2, as noted above, the Commission has already found

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<sup>9</sup> The Commission noted with respect to Basis 1 that "the EIS found the overall environmental impacts on reservation residents small or 'small to moderate,' a finding not now in dispute before the Board." CLI-02-20, 56 NRC at 154. "The EIS considered all the adverse impacts that the Board found significant—noise, visual impact, and cultural insult—and concluded that none of those would have a disproportionately high impact on the Skull Valley Band, or other low income or minority populations residing near the reservation." Id. n.37.

<sup>10</sup> A prevailing party—PFS—is free on appeal to urge any ground in defending a result, including grounds rejected by a licensing board. Niagara Mohawk Power Corp. (Nine Mile Point Nuclear Station, Unit 2), ALAB-264, 1 NRC 347, 357 (1975).

that the PFS EIS addressed the impacts asserted by OGD.<sup>11</sup> Basis 3, the cost-benefit balance of the PFS Facility vis-a-vis at reactor storage, i.e., the no-action alternative, was addressed in detail in the EIS. EIS § 9.4.1.5; see § 2.2.5 (no-action alternative). Basis 4, the need for the PFS Facility, was also discussed in detail in the EIS. EIS § 1.3. (Furthermore, Bases 3 and 4, beyond brief and conclusory statements of unknown validity, were completely lacking in factual or expert opinion support. See PFS Ans. at 602-05.) Therefore, because OGD's claims in Bases 2, 3, and 4 are addressed in the pertinent environmental documentation for the PFS Facility (and Bases 3 and 4 had no support), the Board's decision was correct and the Commission should decline to grant review.<sup>12</sup>

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<sup>11</sup> See also 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, NUREG-1714 (Dec. 2001), e.g., §§ 4.5 (socioeconomics and community resources), 4.6 (cultural resources), 4.8.1 (noise), 5.5, 5.6 5.8.1 (transportation impacts), 6.2 (environmental justice).

<sup>12</sup> The fact that the contention was written against the PFS Environmental Report and that report has been superseded by the EIS does not undermine this conclusion. If OGD had wished to challenge the EIS directly, it should have amended its contention to do so. McGuire, CLI-02-28, 56 NRC at 383.

### III. CONCLUSION

As discussed above, OGD has failed to raise any substantial question of law, fact, or policy with respect to the Board's decision and thus the Commission should deny OGD's petition.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "D. Sean Barnett", written over a horizontal line.

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Dated: December 18, 2003

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(Private Fuel Storage Facility)	)	ASLBP No. 97-732-02-ISFSI

CERTIFICATE OF SERVICE

I hereby certify that copies of the Applicant's Response to OGD Petition for Review of Interlocutory Board Orders were served on the persons listed below (unless otherwise noted) by e-mail with conforming copies by U.S. Mail, first class, postage prepaid, this 18<sup>th</sup> day of December, 2003.

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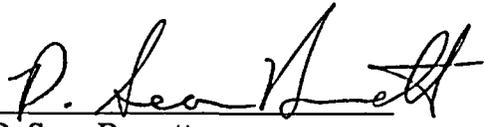
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