

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 BRIEF IN RESPONSE TO "STATE OF
UTAH'S BRIEF ON THE COMMISSION'S REVIEW OF
CONTENTIONS UTAH U BASIS 2, UTAH CC AND UTAH SS"

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INTRODUCTION

Pursuant to 10 C.F.R. § 2.786(d) and CLI-04-04,¹ the NRC staff ("Staff") hereby files its response to the "State of Utah's Brief on the Commission's Review of Contentions Utah U Basis 2, Utah CC and Utah SS" ("Utah Br."), filed by the State of Utah ("State") on February 26, 2004. For the reasons set forth below, the Staff submits that the Licensing Board correctly ruled upon the admissibility of Contentions Utah U, Basis 2, Utah CC and Utah SS, and the Board's rulings rejecting these contentions should therefore be affirmed.

BACKGROUND

This proceeding involves the application of Private Fuel Storage, L.L.C. ("PFS" or "Applicant") for a license to possess and store spent nuclear fuel ("SNF") in an Independent Spent Fuel Storage Installation ("ISFSI") to be constructed and operated on the Reservation of the Skull Valley Band of Goshute Indians, located in Skull Valley, Utah. PFS filed its application on June 25, 1997, together with a Safety Analysis Report ("SAR"), an Environmental Report ("ER"), an emergency plan, and a physical security plan.

¹ *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-04-04, 59 NRC ____, slip op. (Feb. 5, 2004).

On November 24, 1997, the State filed 30 contentions which it sought to litigate in this proceeding.² These included two contentions that are the subject of the instant appeal: Contentions Utah U (“Impacts of Onsite Storage Not Considered”), and Utah CC (“One-Sided Cost-Benefit Analysis”), each of which challenged certain aspects of the Applicant’s consideration of environmental issues in its Environmental Report. See Initial Contentions at 142-43, 178-79.

On April 22, 1998, the Licensing Board issued its decision in LBP-98-7, in which it ruled on the standing of petitioners for leave to intervene and the admissibility of their initial contentions.³ As pertinent here, the Board found that the State possessed standing to intervene and it admitted many of the State’s proposed contentions. LBP-98-7, 47 NRC at 169, 183-211. The Board further ruled, however, that certain other contentions, including Contention Utah U, Basis 2, and Contention Utah CC (which are addressed in the instant appeal), failed to satisfy the Commission’s standards governing the admissibility of contentions and should be rejected. *Id.* at 199, 204. On May 18, 1998, the Licensing Board issued LBP-98-10, ruling upon the State’s motion for reconsideration of portions of LBP-98-7, in which it, *inter alia*, denied the State’s motion for reconsideration of its ruling on Contention Utah CC.⁴

In June 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

² See “State of Utah’s Contentions on the Construction and Operating License Application by Private Fuel Storage, LLC For an Independent Spent Fuel Storage Facility,” filed November 24, 1997 (“Initial Contentions”).

³ See *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-98-7, 47 NRC 142 (1998).

⁴ See *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-98-10, 47 NRC 288, 294 (1998). The State did not seek reconsideration of the Board’s ruling on Contention Utah U.

responsibilities under the National Environmental Policy Act of 1969 (“NEPA”).⁵ In December 2001, the Staff and cooperating federal agencies issued their Final Environmental Impact Statement (“FEIS”) for the PFS Facility (“PFSF”), taking into consideration numerous comments that were submitted on the DEIS, including comments by the State of Utah.⁶ On February 21, 2002, the State submitted late-filed Contention Utah SS (“Revised Cost-Benefit Analysis”), in which it challenged the adequacy of the economic cost-benefit analysis set forth in the FEIS.⁷ Oral argument on Contention Utah SS was held on May 10, 2002; and on May 17, 2002, the Licensing Board issued an oral ruling rejecting this contention. See Tr. 9210-17.

On November 13, 2003, the Commission directed the parties “to file petitions for review of any interlocutory Board orders . . . they wish to challenge.”⁸ In accordance with the Commission’s Order, on December 4, 2003, the State filed a petition seeking Commission review of the Licensing Board’s rejection or summary disposition of all or portions of 24 contentions.⁹ On February 5, 2004, the Commission issued CLI-04-04, in which it denied the State’s Petition in part, and requested

⁵ 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 . . .,” 65 Fed. Reg. 39,206 (June 23, 2000).

⁶ NUREG-1714, “Final Environmental Impact Statement for the Construction and Operation of an [ISFSI] on the Reservation of the Skull Valley Band of Goshute Indians and the Related Transportation Facility in Tooele County, Utah” (“FEIS”), dated December 2001; see also, “Notice of Availability of Final Environmental Impact Statement . . .,” 67 Fed. Reg. 2702 (Jan. 18, 2002).

⁷ See “State of Utah’s Request for Admission of Late-Filed Contention Utah SS,” filed February 11, 2002 (“Contention Utah SS”). See also (1) “Applicant’s Response to State of Utah’s Request for Admission of Late-Filed Contention Utah SS -- Revised Cost-Benefit Analysis,” dated February 21, 2002 (“PFS Response-Utah SS”); and (2) “NRC Staff’s Response to ‘State of Utah’s Request for Admission of Late-Filed Contention Utah SS,’” dated February 26, 2002 (“Staff Response-Utah SS”).

⁸ *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-03-16, 58 NRC 360, 362 (2003).

⁹ See “State of Utah’s Petition for Review of Non-Hearing Issues in the Private Fuel Storage, LLC Licensing Proceeding” (“Petition”), filed on December 4, 2003.

briefs from the parties concerning the Board's resolution of Contentions Utah U, Basis 2, Utah CC and Utah SS. CLI-04-04, slip op. at 7-8, 10-12, and 22.¹⁰

As set forth below, the Staff submits that the Licensing Board correctly rejected Contentions Utah U Basis 2, Utah CC and Utah SS, and the State has not shown any error in the Board's rulings that would warrant a reversal of those decisions. Moreover, Contention Utah SS was filed impermissibly late, and could have been rejected for that reason alone. Accordingly, as more fully set forth below, the Licensing Board's decisions rejecting these contentions should be affirmed.

ARGUMENT

I. The Licensing Board's Determination to Reject Contention Utah U, Basis 2, Was Consistent With the Commission's Standards Governing the Admissibility of Contentions and Should Be Affirmed.

In Contention Utah U, the State asserted that PFS had failed to consider the potential for adverse environmental impacts which might occur at the site during the storage of spent fuel, due to the lack of a hot cell, stating as follows:

U. Impacts of Onsite Storage not Considered

Contrary to the requirements of NEPA and 10 C.F.R. 51.45(c), the Applicant fails to give adequate consideration to reasonably foreseeable potential adverse environmental impacts during storage of spent fuel on the ISFSI site.

Initial Contentions at 142. The State offered four basis statements in support of this contention, *Id.* at 142-43; of these, Basis 2 asserted, in its entirety, as follows:

2. The ER fails to consider the safety risks and costs raised by PFS's failure to provide adequate means for inspecting and repairing the contents of spent fuel canisters, or for detecting and removing contamination on the canisters. These include risks to workers posed by handling or inspecting casks with contaminated or defective contents, during receipt of casks, storage of casks, or in preparing them for shipment to a repository. They also include health risks and increased costs during the decommissioning

¹⁰ In addition, the Commission denied the petition for review which was filed by Intervenor Ohngo Gaudadeh Devia ("OGD"). CLI-04-04, slip op. at 17-22.

process. See Contention J (Inadequate Inspection and Maintenance of Safety Components, Including Canisters and Cladding), whose basis is adopted and incorporated by reference.

Id. at 142.¹¹

The Licensing Board rejected Contention U, Basis 2, on the grounds that the State's claims "fail to establish with specificity any genuine dispute; impermissibly challenge the Commission's regulations or rulemaking-associated generic determinations, including those involving canister inspection and repair and transportation sabotage; lack adequate factual or expert opinion support; and/or fail properly to challenge the PFS application." LBP-98-7, 47 NRC at 199.

In CLI-04-04, the Commission undertook review of the Licensing Board's rejection of Contention U, Basis 2, focusing on the Board's determination that "this basis impermissibly attacked agency regulations or rulemaking-associated determinations." CLI-04-04, slip op. at 7. The Commission observed that "whether or not NRC safety regulations impose certain requirements does not resolve the question whether there are potential environmental consequences that should be discussed under NEPA." *Id.* Finding that the Board's rationale for rejecting this basis statement was not entirely clear, the Commission requested briefs concerning the Board's ruling on this contention; further, noting that "[v]arious portions [of] the FEIS discussed inspections and procedures to ensure that no contaminated canisters are stored at the PFS facility," it requested the parties' views as to whether the discussion in the FEIS mooted the

¹¹ Utah Contention J ("Inspection and Maintenance of Safety Components, Including Canisters and Cladding") asserted that the PFSF design was inadequate due to its failure to include "a hot cell or other facility for opening casks and inspecting the condition of spent fuel." Initial Contentions at 63. According to the State, "PFS's failure to provide a spent fuel pool where canisters and cladding can be inspected and repaired violates NRC regulations," and "a hot cell is needed to protect workers and the public against undue risks caused by the handling and storage of spent fuel." *Id.* The Board rejected this contention on the grounds that "it and its supporting bases impermissibly challenge agency regulations or rulemaking-associated generic determinations, including those concerning canister inspection and repair; and/or lack adequate factual information or expert opinion support." LBP-98-7, 47 NRC at 190; *reconsideration denied*, LBP-98-10, 47 NRC at 293. Significantly, the Commission has denied the State's petition for review of this determination. See CLI-04-04, slip op. at 6-7.

contention. *Id.* at 7-8, *citing Duke Energy Corp.* (McGuire Nuclear Station, Units 1 & 2; Catawba Nuclear Station, Units 1 & 2), CLI-02-28, 56 NRC 373, 382-84 (2002).

The Licensing Board's determination to reject this basis statement was entirely correct. In this regard, it is well established that contentions may only be admitted in an NRC licensing proceeding if they 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). Pursuant to 10 C.F.R. § 2.714(b)(2), as amended in 1989,¹² each contention "must consist of a specific statement of the issue of law or fact to be raised or controverted," and must be supported by the following information:

- (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. 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 207, 212-13, 216 (2003); *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*

¹² 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).

Co. (Shoreham Nuclear Power Station, Unit 1), LBP-91-35, 34 NRC 163, 167-68 (1991).¹³ The Commission has held that a contention must be rejected if any one of the requirements set forth in revised § 2.714(b) is not met. See, e.g., *Palo Verde, supra*, 34 NRC at 155.¹⁴ Further, Commission case law establishes that a contention must 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.

An application of these principles to the Board's ruling on Contention Utah U, Basis 2, demonstrates that the Licensing Board correctly rejected this issue. In this one-paragraph basis statement, the State asserted that the Applicant's Environmental Report ("ER") failed to consider "the safety risks," "costs," and "health risks to workers" posed by the lack of a hot cell at the facility. However, the State totally failed to provide any specification of these asserted costs and risks, and failed to provide any facts or expert opinion in support of the contention, contrary to the

¹³ 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.

¹⁴ The Commission has stated that the amended rules are "strict by design," *Millstone, supra*, 58 NRC at 213, *citing Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 & 3), CLI-01-24, 54 NRC 349, 358 (2001). Further, the Commission has recognized that the amended rules "raise the threshold for the admission of contentions." Statement of Consideration, *supra*, 54 Fed. Reg. at 33,168.

requirements of 10 C.F.R. § 2.714(b)(2)(ii).¹⁵ Moreover, the State failed to point to any specific discussion in the ER which the State believed was deficient, regarding the Applicant's statements that contaminated casks would not be present at the PFSF or, if present, that they could be decontaminated and/or returned to the originating reactor or otherwise transferred offsite without significant adverse impact. See, e.g., ER § 3.3 ("Facility Operation"), § 3.4 ("Waste Confinement and Effluent Control"), § 4.2.9 ("Radiological Effects").¹⁶ The State's failure to reference any specific discussion of these matters in the Applicant's ER or SAR thus failed to satisfy the requirements of 10 C.F.R. § 2.714(b)(2)(iii).

In sum, Contention Utah U, Basis 2, failed to comply with the Commission's regulatory requirement that an Intervenor must provide specific references to the Applicant's ER or SAR with which it disagrees, and must identify a specific factual basis for its contention. The Licensing Board correctly determined that Basis 2 failed to satisfy the basis and specificity requirements of 10 C.F.R. § 2.714(b)(2), in that the State "lack[ed] adequate factual or expert opinion support," and "fail[ed] properly to challenge the PFS application." LBP-98-7, 47 NRC at 199. For this reason alone, the Licensing Board's determination to reject Contention Utah U, Basis 2, was correct and should be affirmed. *Palo Verde, supra*, 34 NRC at 155.

Further, the Licensing Board correctly determined that Contention Utah U, Basis 2, "impermissibly challenge[d] the Commission's regulations or rulemaking-associated generic determinations, including those involving canister inspection and repair and transportation

¹⁵ The State relied solely upon its reference to a one-page conclusory declaration by Dr. Marvin Resnikoff, who stated that he had read the State's numerous contentions and that "the technical facts presented in those contentions are true and correct to the best of my knowledge, and the conclusions drawn from those facts are based on my best professional judgment." Initial Contentions, Exhibit 2.

¹⁶ Similarly, the State failed to address statements contained in the Applicant's SAR that "retrieval of the spent fuel from the canister can be achieved if necessary" (SAR at 4.7-2), or the SAR discussion of the Applicant's spent fuel handling operation systems or the shielding afforded by the canister transfer building (SAR § 4.7).

sabotage.” LBP-98-7, 47 NRC at 199 (referred to in CLI-04-04, slip op. at 7). In this regard, the State had asserted in Contention Utah J (which was “incorporated by reference” in Contention Utah U Basis 2) that NRC regulations require the construction of a hot cell at the PFS Facility; then, in Contention Utah U, Basis 2, the State asserted that the environmental impacts of operating such a “required” hot cell must be considered in the ER. These two contentions were explicitly linked by the State, and the State’s claims in Utah U, Basis 2, that PFS was required to discuss the environmental impacts of hot cell operations would be litigable only if the State was correct in asserting that PFS was required by Commission regulations to construct such a hot cell at its Facility. In contrast, if hot cell is not required under NRC safety regulations, PFS would not incorporate such a hot cell in its facility -- and there would be no need to consider the environmental impacts of a hypothetical design feature like a hot cell that would not be present at the facility. See *Peach Bottom, supra*, 8 AEC at 20-21 (a contention must be rejected if “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 if it “seeks to raise an issue which is not concrete or litigable.”). Accordingly, the Licensing Board correctly determined that this Basis statement must be rejected, as it involved an impermissible challenge to NRC regulations or rulemaking-associated generic determinations.

In CLI-04-04, the Commission observed that “whether or not NRC safety regulations impose certain requirements does not resolve the question whether there are potential environmental consequences that should be discussed under NEPA.” CLI-04-04, slip op. at 7. The Staff respectfully submits that the Licensing Board’s ruling does not run afoul of the principle stated by the Commission, in that the Board did not suggest that NRC safety regulations limit the potential environmental consequences that must be evaluated under NEPA. Rather, read in context, this aspect of the Board’s decision should be understood to mean that the State was incorrect in asserting that Commission regulations require a hot cell to be installed at the PFS Facility -- and as a result, a hot cell will not be installed at the PFS Facility and the environmental consequences

of such an absent design feature need not be evaluated when considering the potential environmental impacts of the facility's operation. See *Peach Bottom, supra*, 8 AEC at 20-21; see also FEIS at G-142 - 143 (hot cell impacts need not be considered for PFSF operation).¹⁷ This determination was entirely correct, and should be affirmed.

In CLI-04-04, the Commission also requested the parties' views as to whether the Staff's FEIS mooted the State's concerns. *Id.*, slip op. at 7-8. In this regard, the FEIS discusses the low likelihood that any contaminated casks would be received at the PFS Facility, and it addresses the Applicant's proposed means for handling, decontaminating and shipping any such contaminated casks offsite, as well as the Applicant's plans for decontaminating and decommissioning the Facility. See, e.g., FEIS at 2-19, 2-22, 2-28, 2-33 – 2-34, 4-12 – 4-14, and 4-70.¹⁸ It is difficult to conclude, however, that the FEIS entirely mooted the State's concerns, due to the vagueness and lack of specificity in Basis 2 of Contention Utah U. Thus, Basis 2 did not provide sufficient specificity to allow one to determine which "safety risks and costs" the State believed should be addressed; why one should expect that contaminated shipping casks will be received at the Facility; or why the Applicant's proposed means for handling, decontaminating, or transferring any such casks offsite are inadequate. Accordingly, the Staff is unable reasonably to conclude that the FEIS mooted the concerns expressed in this contention.

Significantly, the State has failed to address either the correctness of the Licensing Board's rejection of Contention Utah U, Basis 2 or the Commission's inquiry as to whether the FEIS mooted

¹⁷ In contrast, the Staff notes that the ER did consider an alternative design in which a hot cell would be utilized. See ER § 8.2.2, in which PFS discussed an alternative design involving the transfer of spent fuel assemblies from a single-purpose shipping canister to a storage canister, requiring a hot cell to protect workers from increased levels of radiation. The State did not challenge the adequacy of that discussion in Contention U, Basis 2; nor did the State challenge the Staff's discussion of such an alternative technology in the FEIS (see FEIS at 2-37 - 2-39).

¹⁸ The State has never asserted, prior to filing its brief on appeal in February 2004, that the Staff's discussion of these matters in the FEIS was inadequate; and it failed to re-file this contention following publication of the FEIS. See discussion *infra* at 11-12.

the State's concerns. Rather, in its brief on appeal, the State asserts that the "NRC's compliance with NEPA is deficient," Utah Br. at 10, using the briefing opportunity provided by the Commission to mount an entirely new attack on the PFS application and the Staff's FEIS (see Utah Br. at 6-10).

These assertions should be rejected. In essence, the State presents what appears to be a new, late-filed contention challenging the Applicant's proposed means for inspecting, repairing and decontaminating fuel canisters, and the Staff's discussion of these matters in the FEIS -- relying extensively on new allegations or information that were never included in Contention Utah U and which are raised for the first time on appeal. Indeed, the State's assertions are based primarily upon information that arose long after Contention Utah U was filed¹⁹ and more than two years after the FEIS was published.²⁰ The State fails to explain why it failed to raise these assertions in timely manner, following publication of the DEIS in June 2000, publication of the FEIS in December 2001, or at any other time.²¹ Accordingly, the State's untimely insertion of these issues in its brief on appeal should be rejected for failing to satisfy the requirements set forth in 10 C.F.R. § 2.714(a)(1).

¹⁹ For example, the State cites testimony presented by PFS in the hearings on the State's financial assurance contention in June 2000, Utah Br. at 6; statements contained in the FEIS published in December 2001, *id.* at 6-7; the lack of actual experience using the HI-STAR shipping cask since it was certified in 1999, *id.* at 7; and an early version of the HI-STAR shipping cask technical specifications, published in September 1999, *id.* at 9. All of these events occurred after Contention Utah U was filed in November 1997, and none of them are embraced by the contention.

²⁰ The State raises numerous matters which arose after the FEIS was published in December 2001. For example, the State cites notices of violation issued to holders of cask Certificates of Compliance in January 2004, *id.* at 7 n.8; problems detected in NRC inspections related to Holtec's HI-STAR shipping casks in February 2004, *id.* at 7 n.9; a proposed cask lid design feature cited in Contention Utah TT in January 2004, *id.* at 8 n.10; and welding problems detected by the NRC Staff involving the HI-STORM 100 multipurpose canister lids in December 2002 and July 2003, *id.* at 8 n. 11. All of these events occurred long after Contention Utah U was filed in November 1997, and none of them are embraced by the contention.

²¹ The State cites a finding of no significant impact ("FONSI") associated with a Part 72 rulemaking action in 1988. See Utah Br. at 9-10, *citing* Statement of Consideration, "Licensing Requirements for the Independent Storage of Spent Nuclear Fuel and High-Level Radioactive Waste," 53 Fed. Reg. 31,651, 31,657-58 (Sept. 19, 1988). This FONSI, however -- issued nine years before the State filed Contention Utah U -- was not cited by the State in its contention.

Moreover, the State does not assert that the matters raised in its brief were erroneously overlooked by the Licensing Board in its April 1998 rejection of this contention, nor does it point to any specific error which it believes was committed by the Board in rejecting this contention. The State's appeal from this ruling should therefore be deemed to be abandoned.²² Finally, the State fails to explain why it should be permitted to raise these new matters for the first time on appeal, in contravention of well-established legal principles.²³ In sum, the Licensing Board's decision disposing of Contention Utah U, Basis 2, was entirely correct, and the State has failed to show any error in that decision. The State's newly asserted claims that the Staff's FEIS is inadequate should be rejected as improperly and untimely raised for the first time on appeal. For these reasons, the Commission should affirm the Licensing Board's decision to reject Contention Utah U, Basis 2.

II. The Licensing Board's Determination to Reject Contention Utah CC, Was Consistent With the Commission's Standards Governing the Admissibility of Contentions and Should Be Affirmed.

In Contention Utah CC, filed on November 24, 1997, the State challenged the adequacy of the Applicant's Environmental Report, asserting: "Contrary to the requirements of 10 C.F.R. § 51.45(c), the Applicant fails to provide an adequate balancing of the costs and benefits of the proposed project, or to quantify factors that are amenable to quantification." Initial Contentions at 178. As clarified and restated by the parties and Board, this contention asserted as follows:

CC. One-Sided Cost-Benefit Analysis

Contrary to the requirements of 10 C.F.R. § 51.45(c), the Applicant fails to provide an adequate balancing of the costs and benefits of the proposed project, or to quantify factors that are amenable to quantification in that:

1. Applicant's Environmental Report makes no attempt to objectively discuss the costs of the project.

²² See, e.g., *Carolina Power & Light Co.* (Shearon Harris Nuclear Power Plant), ALAB-856, 24 NRC 802, 809 (1986).

²³ See, e.g., *Philadelphia Electric Co.* (Limerick Generating Station, Units 1 and 2), ALAB-836, 23 NRC 479, 496 n.28 (1986).

2. Applicant fails to weigh the numerous adverse environmental impacts discussed, for example, in Contentions H through P, against the alleged benefits of the facility.
3. Applicant fails to compare the environmental costs of the proposal with the significantly lower environmental costs of the no-action alternative.
4. Applicant fails to weigh the benefits to be achieved by alternatives that could reduce or mitigate accidents, environmental contamination, and decommissioning costs, such as inclusion of a hot cell in the facility design.
5. Applicant makes no attempt to quantify the costs associated with the impacts of the facility, many of which are amenable to quantification in that:
 - a. costs related to accidents and contamination may be quantified in terms of health effects and dollar costs;
 - b. decommissioning impacts can be quantified;
 - c. visual impacts can be quantified in terms of lost tourist dollars; and
 - d. emergency response costs can be quantified based on the cost of those services.

LBP-98-7, 47 NRC at 204. The Licensing Board rejected Contention Utah CC, on the grounds that the contention and its bases “fail to establish with specificity any genuine dispute; lack adequate factual or expert opinion support; and/or fail properly to challenge the PFS application.” *Id.*

The Licensing Board’s ruling was entirely correct. In this contention, the State challenged the adequacy of the Applicant’s consideration of “indirect” costs (which PFS found to be “minimal due to the remote location and small size of the actual storage area”); it alleged that the costs of other (unspecified) environmental impacts related to nine other State contentions needed to be considered; and it contended that PFS had made “no attempt to quantify the costs” of the facility’s impacts. Initial Contentions at 178-79. Nowhere, however, did the State explain or provide any concrete factual reason to believe that any specific costs had been overlooked by the Applicant, nor (with one exception, concerning “indirect costs”) did the State even point to any specific discussion in the Applicant’s ER which it believed was deficient. *See id.* Accordingly, the Licensing Board correctly found that the State had not provided specific facts or expert opinion, and had not pointed out specific deficiencies in the application or the ER, as required under 10 C.F.R.

§ 2.714(b)(2)(ii)-(iii).²⁴ In light of the State's failure to provide such information, the Licensing Board properly determined that the contention must be rejected. *See generally, Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Unit 2), CLI-03-14, 58 NRC 207, 215 (2003).

In its brief on appeal, as in its Petition, the State fails to distinguish between Contentions Utah CC and Utah SS.²⁵ Rather, in the introduction to its brief, the State claims that the issue before the Commission is "whether, as claimed in Utah CC and Utah SS, the cost-benefit analysis in the FEIS is biased, is inadequate to provide a meaningful basis for comparison of alternatives, and is violative of NEPA and NRC regulations." Utah Br. at 1 (emphasis added). It further asserts that the FEIS is "biased, contains misleading and inaccurate information, and is insufficient to allow the Commission to objectively evaluate the proposed facility," Utah Br. at 10 (capitalization omitted, emphasis added). However, the State fails to note that Contention Utah CC was filed and rejected several years before the Staff published its FEIS, and thus it did not challenge the FEIS cost-

²⁴ Inasmuch as the State had failed to provide the necessary factual and technical support for the contention, it failed to satisfy its burden of going forward under 10 C.F.R. § 2.714(b)(2). *See, e.g., Shoreham, supra*, 34 NRC at 167-68 (10 C.F.R. § 2.714(b)(2) does not relieve an applicant of its burden to sustain its application, but specifies what a petitioner must do to satisfy its own burden of coming forward with information in support of a proposed contention). The State argued in its Petition that the Licensing Board "shifted the burden" of discussing environmental costs to the State. Petition at 12-13; *see also* Staff Response at 15-16. The State did not advance this assertion in its brief on appeal.

²⁵ In CLI-04-04, the Commission undertook review of the Board's ruling on Contention Utah CC in tandem with its ruling Contention Utah SS. *See* CLI-04-04, slip op. at 10-12. In doing so, the Commission appears to suggest that these two contentions are somehow related -- perhaps because the State had commingled these contentions in its Petition and failed to address the Board's separate reasons for rejecting them. *See* Petition at 11-14. No such connection exists, however, either between the two contentions or between the Board's rationale for rejecting them. Contention Utah CC (filed in November 1997), challenged various aspects of a cost-benefit analysis presented in the Applicant's ER; it was rejected for failing to satisfy the Commission's requirement that contentions must provide specificity and references to the particular portions of the ER which the Intervenor believed to be deficient. *See* LBP-98-7, 47 NRC at 204. In contrast, Contention Utah SS (filed in February 2002), raised a new issue concerning the storage period considered by the Staff in an economic cost-benefit analysis presented in the FEIS -- some four years after the State filed Contention Utah CC. The "storage period" issue raised in Contention Utah SS was never mentioned in Contention Utah CC; and Utah SS was rejected for reasons wholly different from the Board's rejection of Contention Utah CC four years earlier. *See* discussion *infra* at 15-20. Accordingly, the correctness of each of the Board's rulings on these contentions must be addressed on its own, separate merits.

benefit analysis -- and it fails to note that this contention was never re-filed or amended to challenge the adequacy of the FEIS. Moreover, the State altogether fails to specify any error in the Board's stated rationale for rejecting Contention Utah CC. See Utah Br. at 10-18. Accordingly, the State's appeal from the Board's ruling on this contention should be denied.

III. The Licensing Board's Oral Ruling Rejecting Contention Utah SS Is Consistent with the Requirements of NEPA and Should Be Affirmed.

In Contention Utah SS ("Revised Cost-Benefit Analysis"),²⁶ the State challenged the adequacy of an economic cost-benefit analysis presented in the Staff's FEIS of December 2001.

This contention stated as follows:

CONTENTION UTAH SS - Revised Cost-Benefit Analysis:

The Final Environmental Impact Statement, NUREG 1714, fails to properly analyze the costs and benefits of the Applicant's proposed ISFSI project based on three new assumptions presented for the first time in Chapter 8 of the FEIS and therefore does not comply with [NEPA] or 10 CFR § 51.91[.]

In support of this contention, the State identified three assumptions in the FEIS which it claimed were deficient: (1) the assumption of a 20-year license term for the PFSF and a 40-year storage period, *Id.* at 2-6; (2) inclusion of an analysis using the break-even capacity and throughput for the project, based on a 40-year storage period, *Id.* at 6-7; and (3) the assumption that commercial operations at the PFSF would commence in 2003, *Id.* at 7-9.

The Licensing Board rejected this contention in an oral ruling issued on May 17, 2002. See Tr. 9,210-17. The Board ruled that, even if the contention were admitted, no relief could be granted,²⁷ *inter alia*, because the issues raised by the State involved the purported need for an economic analysis that was unrelated to environmental impacts; the record provided adequate

²⁶ See "State of Utah's Request for Admission of Late-Filed Contention Utah SS," dated February 11, 2002 ("Contention Utah SS"), at 2.

²⁷ A contention must be rejected if it is found to be of no consequence in the proceeding, because it would not entitle the petitioner to relief. 10 C.F.R. § 2.714(d)(2)(ii); *Palo Verde, supra*, 34 NRC at 155.

information to the public with respect to the 20-year/ 40-year issue; and the Applicant's financial qualifications were addressed in the safety evaluation process, so that the risk that orphaned casks might be left at the site did not require yet further consideration of its financial qualifications under NEPA. See Tr. 9,213-15. While the Board's statement of its rationale might have been stated more clearly in a written decision, its ruling was correct and should be affirmed.

The sole issue raised in this contention is the adequacy of the discussion in Section 8.1 of the FEIS ("Economic Benefits and Costs of Constructing and Operating the Proposed Facility") -- in which the Staff provided an analysis of the economic costs and benefits of the PFSF, as compared to a "no action" alternative in which SNF continued to be stored at reactor sites. See FEIS at 8-4.²⁸ This analysis included various assumptions, including an assumption that spent nuclear fuel ("SNF") will be received at the PFSF during an initial 20-year license period; that SNF will be stored at the PFSF for a total of 40 years, and that the PFSF would open in mid-2003. FEIS at 8-1. The Staff projected the comparative costs and benefits of storage assuming a variety of "throughput" scenarios, discount rates, and permanent waste repository opening dates (2010 or 2015). *Id.* at 8-7; Table 8.2.²⁹ The Staff also performed sensitivity analyses, and found that the "net economic benefit" of the PFSF was "highly sensitive" to a 10 percent change in costs, *id.*

²⁸ The environmental costs and benefits of the proposed facility are discussed elsewhere in the FEIS. See, e.g., FEIS § 8.2 ("Environmental Benefits and Costs"); § 8.3 ("Other Societal Benefits and Costs"); § 1.3 ("Need for the Proposed Action"); Chapter 4 ("Environmental Consequences of Constructing and Operating the Proposed PFSF"); Chapter 5 ("Transportation Impacts of the Proposed Action"); and Chapter 6 ("Summary of Impacts"). Similarly, the FEIS contains a thorough assessment of available alternatives, see, e.g., FEIS Chapters 2, 7, 9. The State did not challenge any of that discussion in Contention Utah SS.

²⁹ The Staff explained that it had also performed an analysis of a 40-year license term, and found that "the 20-year term analysis provides more conservative results because the costs per year of operation are higher." *Id.* In contrast, using a 40-year assumption for the storage period was conservative in that it reflected a longer period of storage costs, based on the potential that SNF would remain at the facility up to 40 years. See FEIS at 1-6, 1-15, 2-26. With respect to environmental impacts, "assessments were made considering either a 20-year or a 40-year (assuming license renewal) period of operation for the proposed PFSF. Where the 40-year period was assumed, this reflects a conservative analysis." FEIS at 4-1.

at 8-10 and Table 8-3; and it found that the net economic benefit of the PFSF would vary widely by modifying the assumptions used in the analysis. See FEIS Table 8-2.³⁰ The Staff concluded:

From an economic perspective, the net benefit of the proposed PFSF is directly proportional to the quantity of SNF shipped to the facility. The scenarios evaluated by the staff indicate the potential for a net positive benefit past the break-even throughput volume of SNF. As the SNF throughput decreases, the economic benefit decreases. The net economic benefits of the proposed PFSF are sensitive to several factors that are inherently uncertain. An analysis of the sensitivity of the potential net economic benefits to critical cost assumptions indicates the possibility of considerable variation in outcome. Notwithstanding the sensitivity of the benefits to these factors, cases in which the proposed PFSF has a capacity of 10,000 MTU and a throughput of at least 15,500 MTU have a greater likelihood of positive net benefits.³¹

FEIS at 8-11, emphasis added. Further, the Staff observed that “individual reactor licensees may have different cost-benefit results” than that shown “from an overall industry-wide perspective.” *Id.*

While the State asserted in Contention Utah SS that the Staff erred in its assumption of a 40-year storage period, a 2003 PFSF operation start date, and use of break-even scenarios in the FEIS, these concerns -- even if correct³² -- would not warrant reversal of the Board’s decision.³³

³⁰ These variables include such factors as the length of time the PFSF actually operates; when the PFSF commences and ceases operation; the discount rate in effect; the number of casks that are shipped to the PFSF, when such shipments are made and the length of time they are stored; when a permanent waste repository becomes available; the availability and cost of storage at individual reactor sites; and the difficulty of predicting whether or when individual customers may decide to ship SNF to the PFSF based on considerations other than a simple comparison of financial costs for storage at the reactor site versus storage at the PFSF. See FEIS at 8-6 - 8-11.

³¹ The Staff also recognized that use of a small “throughput” assumption could result in a negative net economic benefit -- but this was irrelevant because a license condition developed in the safety evaluation process which would preclude operation of the PFSF with such a small throughput amount. See FEIS at 8-10 - 8-11.

³² The FEIS includes the Staff’s response to the comments submitted by the State on this issue; it notes that the Staff had modified the FEIS discussion, in part, in light of those comments, and it explains the rationale for the assumptions used in the FEIS. See FEIS at G-418 - G-425.

³³ Under 10 C.F.R. §§ 51.23(b) and 51.61, no discussion of the environmental impact of storage of SNF at an ISFSI beyond the initial term of the ISFSI “is required” in an EIS or an ER. The regulations do not, however, prohibit consideration of storage at an ISFSI beyond the term of
(continued...)

Even if the Commission were to accept the State's analysis and find a negative net financial benefit, on an industry-wide basis, for SNF storage at the PFSF, that analysis -- like the cost-benefit analysis presented in the FEIS -- would be subject to great uncertainty due to the variability and inherent unpredictability of a number of key factors. Like the analysis in the FEIS, such an analysis would provide one picture of what the financial costs and benefits might be, given certain scenarios and assumptions -- but an almost infinite set of plausible cost-benefit results might also be postulated, based upon widely varying combinations of assumptions which may or may not prove to be warranted. In sum, even if the State's contention was admitted and found to be correct, the resulting analysis would not contribute meaningfully to a decision as to the net financial benefit of the PFSF or a decision whether to license the facility.³⁴

³³(...continued)

the license. Further, 10 C.F.R. § 51.97(a) specifies that “[u]nless otherwise determined by the Commission,” an FEIS for an ISFSI “will address environmental impacts of spent fuel storage only for the term of the license” -- thus leaving open the possibility that a longer period of storage may be considered if appropriate. Moreover, 10 C.F.R. § 72.42 allows licensees to seek a renewal of their licenses; and if a license renewal application is timely filed, “the existing license shall not expire until a final decision concerning the application for renewal has been made by the Commission.” 10 C.F.R. § 72.42(c); *cf.*, *Texas Utilities Electric Co.* (Comanche Peak Steam Electric Station, Unit 2), CLI-93-10, 37 NRC 192, 202 (1993). Accordingly, the FEIS's consideration of storage beyond the initial 20-year term was both reasonable and appropriate in light of PFS's announced intention to seek a license renewal; indeed, the State's argument that storage beyond a 20-year period should be ignored might well be deemed to be unreasonable.

³⁴ As the Board observed, the Applicant's financial qualifications were addressed in the safety evaluation process, so that the risk that orphaned casks might be left at the site did not mandate consideration of its financial qualifications under NEPA. See Tr. 9,213-15. Thus, the industry-wide financial cost-benefit analysis presented in the FEIS should not affect a Commission decision whether to issue a license for the PFS Facility, because even if the net financial benefit is negative, the PFSF will not be allowed to operate unless it first obtains sufficient customer service agreements to provide financial assurance that the facility will be safely operated and decommissioned. See *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-00-13, 52 NRC 23 (2000). Whether or not PFS is able to obtain sufficient customer agreements to enable it to commence operations will depend upon each potential customer's individual balancing of the economic and non-economic costs and benefits that SNF storage at the PFSF would afford. Such decisions are within the discretion of each such private entity, and are not subject to Commission review or approval. See, e.g. *Hydro Resources, Inc.* (P.O. Box 15910, Rio Rancho, NM 87174), CLI-01-4, 53 NRC 31, 48-49 (2001).

Moreover, the FEIS clearly identified the assumptions which underlie the financial cost-benefit analysis presented therein and the variables which might affect the results of the analysis; and it explicitly stated that the results were “highly sensitive” to small changes in these inputs. The FEIS considered a broad spectrum of scenarios and assumptions, and presented a balanced evaluation of the financial costs and benefits of the facility.³⁵ In light of these considerations, the Licensing Board correctly concluded that, for NEPA purposes, the admission of Contention Utah SS would not entitle the State to relief, in that the record contained sufficient information about the PFSF’s financial costs and benefits, the assumptions used in the Staff’s analysis, and the susceptibility of the analysis to changes based on varying those assumptions. See Tr. at 9,214. Accordingly, the FEIS satisfies NEPA’s requirement that the agency take a “hard look” at the environmental consequences of its actions, and does not contain “[m]isleading information on the economic benefits of a project . . . [that] could skew an agency’s overall assessment of a project’s costs and benefits, and potentially ‘result in approval of a project that otherwise would not have been approved because of its adverse environmental effects.’” See CLI-04-04, *citing Louisiana Energy Services, L.P.* (Claiborne Enrichment Center), CLI-98-3, 47 NRC 77, 88-89 (1998).³⁶

³⁵ NEPA establishes a rule of reason for evaluating the costs and benefits of a federal action. The FEIS is intended to ensure that “agencies to take a “hard look” at the environmental consequences of a proposed project in order to make an informed and reasoned decision, and, “by making relevant analyses openly available, to permit the public a role in the agency’s decision-making process.” *Louisiana Energy Services, L.P.* (Claiborne Enrichment Center), CLI-98-3, 47 NRC 77, 87-88 (1998); *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 348-49 (1989). An EIS, however, need not contain a formal or mathematical cost-benefit analysis, in which a decision is verified “by reduction to mathematical absolutes for insertion into a precise formula.” *Id.*, *citing Sierra Club v. Lynn*, 502 F.2d 43, 61 (5th Cir.1974), *cert. denied*, 422 U.S. 1049 (1975). *Cf.* 10 C.F.R. § 51.71(d) (a DEIS should, “to the fullest extent practicable, quantify the various factors considered”; important factors which cannot be quantified may be discussed qualitatively).

³⁶ In CLI-04-04, the Commission indicated its view that the Board “had found the contention timely.” *Id.*, slip op. at 11. This is incorrect. The Licensing Board deferred ruling on whether the contention had been timely filed under 10 C.F.R. § 2.714(a)(1). See Tr. 9,212-13, 9,211, 9,216-17. The Staff notes that it had opposed Contention Utah SS solely on the grounds that it was untimely. See Staff Response-Utah SS, at 4-12, as corrected on March 7, 2002; see also PFS Response-Utah SS, 3-9, 10-11 (arguing that the contention was “grossly late without good cause” and, even if correct, it would not entitle the State to relief).

Finally, if the Commission determines that the Licensing Board erred in rejecting Contention Utah SS, it could admit the contention and issue a decision modifying the FEIS to include the State's analysis in addition to the current FEIS cost-benefit analysis -- thus providing information as to a possible financial cost-benefit result that might arise in the event that the assumptions and scenarios presented by the State come to fruition.³⁷ Accordingly, in the event that any error occurred in the Board's decision, it may be remedied by the Commission.³⁸

CONCLUSION

For the reasons set forth above, the Staff submits that the Licensing Board's decisions rejecting Contentions Utah U Basis 2, Utah CC and Utah SS were correct and should be affirmed.

Respectfully submitted,

/RA/

Sherwin E. Turk
Counsel for NRC Staff

Dated at Rockville, Maryland
this 18th day of March 2004

³⁷ See Contention Utah SS at 4, and Declaration of Michael F. Sheehan, attached thereto. Contrary to the State's assertion (Utah Br. at 14, 15), an FEIS may be modified by an adjudicatory decision, and an FEIS Supplement is not required unless the additional information is significant. See, e.g. *Hydro Resources, supra*, 53 NRC at 53. Here, given the extreme variability and near-infinite number of combinations of inputs and assumptions that could affect the reliability of the financial cost-benefit analysis, the State's demonstration that some potential scenarios may result in a negative or less positive net benefit in the cost-benefit analysis can not reasonably be considered to be "significant."

³⁸ The State's brief on appeal raises numerous new challenges to the FEIS -- including such matters as "socioeconomic costs," a "schism" among tribal members, allegations made in 2004 concerning Chairman Bear's conduct, financial resources needed to respond to an emergency or terrorist threats, newspaper reports in 2004 suggesting that increased space may be available for at-reactor storage, and an alleged Congressional preference for at-reactor storage, Utah Br. at 15-18 -- which go far beyond the scope of the economic cost-benefit issue raised in Contention Utah SS. These new issues should be rejected as having been improperly raised for the first time on appeal and as being outside the scope of the issues raised by Contention Utah SS.

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 BRIEF IN RESPONSE TO 'STATE OF UTAH'S BRIEF ON THE COMMISSION'S REVIEW OF CONTENTIONS UTAH U BASIS 2, UTAH CC AND 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 18th day of March, 2004:

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