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UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

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Before the Commission

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In the Matter of )

PRIVATE FUEL STORAGE L.L.C. )

(Private Fuel Storage Facility) )

Docket No. 72-22

ASLBP No. 97-732-02-ISFSI

OFFICE OF SECRETARY  
RULEMAKINGS AND  
ADJUDICATIONS STAFF

APPLICANT'S RESPONSE TO STATE OF UTAH'S BRIEF ON COMMISSION  
REVIEW OF CONTENTIONS UTAH U BASIS 2 AND UTAH CC AND UTAH SS

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

**APPLICANT'S RESPONSE TO STATE OF UTAH'S BRIEF ON COMMISSION  
REVIEW OF CONTENTIONS UTAH U BASIS 2 AND UTAH CC AND UTAH SS**

Pursuant to the Commission's Memorandum and Order of February 5, 2004,<sup>1</sup> Applicant Private Fuel Storage, L.L.C. ("PFS") files this brief in opposition to the "State of Utah's Brief on the Commission's Review of Contentions Utah U Basis 2, and Utah CC and Utah SS," filed February 26, 2004 ("Br."). The State has completely failed to show that the decisions of the Atomic Safety and Licensing Board ("Board") contain any errors of law or fact warranting their reversal. In addition, at this late date in the proceeding the State improperly attempts to inject into the record many new issues and arguments that were never before the Board, in a misguided effort to show Board error. The Board's decisions should be affirmed.

**I. LEGAL STANDARDS APPLICABLE ON APPEAL**

**A. Standard of Review**

Licensing board rulings are affirmed where the petitioner's brief on appeal points to no error of law or abuse of discretion that might serve as grounds for reversal. Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-00-21, 52 NRC 261, 265 (2000). Licensing boards are the Commission's primary fact finding tribunals. Northern Indiana Public Service Co. (Bailly Generating Station, Nuclear-1), ALAB-303, 2 NRC 858, 867 (1975). As such, in reviewing a board's decision on the admission of a contention, the

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<sup>1</sup> Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-04-04, 59 NRC \_\_ (2004).

Commission should decline to “second guess” the board on whether a petitioner has presented a “sufficient basis” for a contention. Georgia Institute of Technology (Georgia Tech Research Reactor), CLI-95-12, 42 NRC 111, 121, 123 (1995) (affirming decision that petitioner provided sufficient facts to establish a material issue of disputed fact); see also 10 C.F.R. § 2.786(b)(4)(i) (granting review only where there exists a substantial question as to whether a finding of material fact is “clearly erroneous”).<sup>2</sup> Here, the State’s arguments primarily challenge the Board’s determinations that the State has provided insufficient basis to raise material issues of disputed fact. Thus, the Commission should give those determinations their due deference.

**B. Scope of Appeal**

The scope of an appeal to the Commission is limited to matters previously presented to the Board. An intervenor “cannot revive [its] case on appeal on the basis of a new argument that the Board had no fair opportunity to consider.” Commonwealth Edison Co., (Zion Nuclear Power Station, Units 1 and 2), CLI-99-4, 49 NRC 185, 194 (1999). Nor can an intervenor supplement the record on appeal in an attempt to bolster its claim that a board erred on an issue that was before it.

The Licensing Board’s ruling on [an] intervention petition [is] necessarily based on the record before it. Consequently, we would scarcely be justified in overturning the ruling on the strength of new assertions of fact which could have been, but were not, either included in the petition or otherwise presented to the Board below.

Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-582, 11 NRC 239, 242 (1980) (footnote omitted); accord Hydro Resources, Inc., (2929 Coors Road) CLI-00-8, 51 NRC 227, 243 (2000) (“Intervenors . . . are precluded from supplement-

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<sup>2</sup> Cf. Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 and 3), ALAB-680, 16 NRC 127, 133 (1982) (Appeal Board “very hesitant” to substitute its judgment for that of licensing board with respect to factual questions raised in motion for stay).

ing the record as of right."); see also 10 C.F.R. §§ 2.714(a)(1) (procedures for filing late contentions) and 2.734 (procedures for re-opening the record). Here, the State's brief is replete with claims and references to documents that were never placed before the Board. The State should not be allowed at this late date, in its appeal to the Commission, to supplement the record in an effort to show that the Board's rejection of the State's contentions was in error.

### C. Standards for Admitting Contentions

Because the State's contentions were rejected at the filing stage, the Board's decision must be reviewed against the standards for admitting contentions. "Each 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 . . . ."

10 C.F.R. § 2.714(b)(2). To be admitted, a contention must comply with each of these requirements. 10 C.F.R. § 2.714(d)(2)(i); see also Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-98-7, 47 NRC 142, 178-83 (1998) (discussing in detail the standards for the admission of contentions). The Commission has recently elaborated on the intent of its contention rules:

Our contention rule is "strict by design." It thus insists upon "some reasonably specific factual or legal basis" for a petitioner's allegations. Contention requirements seek to ensure that NRC hearings "serve the purpose for which they are intended: to adjudicate genuine, substantive safety and environmental issues placed in contention by qualified intervenors."

Dominion Nuclear Connecticut, Inc. (Millstone Nuclear Power Station, Unit 2), CLI-03-14, 58 NRC 207, 213 (2003) (footnote omitted).

## II. UTAH U BASIS 2 – ENVIRONMENTAL EFFECTS OF NO HOT CELL

### A. Contention

Basis 2 of Contention Utah U asserted that the PFS Environmental Report (“ER”) failed to consider the safety risks and costs raised by PFS’s asserted failure to “provide adequate means” (1) “for inspecting and repairing the contents of spent fuel canisters” or (2) “for detecting and removing contamination on the canisters.”<sup>3</sup> As the basis for these two claims, the State incorporated by reference its basis for Utah J, *id.*, in which the State had claimed that a hot cell at the PFS facility was needed to safely perform these tasks as well as others.

### B. Board Decision and Commission Order Granting Review

The Board rejected Utah U Basis 2 because it “fail[ed] to establish with specificity any genuine dispute; impermissibly challenge[d] the Commission’s regulations or rulemaking-associated generic determinations, including those involving canister inspections and repair . . . ; lack[ed] adequate factual or expert opinion support; and/or fail[ed] to properly challenge the PFS application.” LBP-98-7, 47 NRC at 199. It also rejected Utah J (the basis for Utah U) for similar reasons. *Id.* at 190. The State sought reconsideration of the dismissal of Utah J (though not of the dismissal of Utah U Basis 2), but the Board declined, repeating that “the contention and its supporting bases impermissibly challenge agency regulations or associated rulemaking-associated generic determinations.” Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-98-10, 47 NRC 288, 293 (1998).

The Commission declined to grant review of the Board’s rejection of Utah J. Spent fuel cladding need not be inspected because, once in a canister, it is no longer important to

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<sup>3</sup> State of Utah’s Contentions on the Construction and Operating License Application by Private Fuel Storage, LLC for an Independent Spent Fuel Storage Facility (Nov. 23, 1997) (“State Cont.”) at 142.



safety. Moreover, the Commission found no basis for questioning the Board's determination that the contention also lacked factual or expert opinion support. CLI-04-04, slip op. at 7. The Commission granted review on Utah U Basis 2 because it did not find the Board's rationale for rejecting the contention entirely clear. While the Board stated that the contention "impermissibly attacked agency regulations or rulemaking-associated generic determinations[,]" the Commission observed that "whether or not NRC safety regulations impose certain requirements does not resolve the question whether there are any potential environmental consequences that should be discussed under NEPA." *Id.* The Commission also asked whether the PFS Final Environmental Impact Statement ("FEIS")<sup>4</sup> mooted the contention. *Id.*

### C. Discussion

The State has provided no reason to reverse the Board's rejection of Utah U Basis 2. Its brief consists essentially of a wholly inappropriate attempt – directed at the FEIS and not the Board's decision – to inject into the record a host of new issues and documents that are nowhere found in Utah U Basis 2 (or Utah J). Its appeal of Utah U Basis 2 should be rejected on that basis alone. Moreover, the Board properly rejected the contention for collaterally attacking NRC regulations, lacking factual support, and failing to properly controvert PFS's application.<sup>5</sup> Finally, the FEIS has rendered moot the cognizable part of the contention.

#### 1. The State Impermissibly Attempts to Supplement the Record on Appeal

The State's brief should be rejected as an improper attempt to supplement the record with material that was not contained or cited in either Utah U or Utah J. It is clearly impermissible on appeal to attempt to raise new issues or support existing issues with information not in the record. *Zion*, CLI-99-4, 49 NRC at 194; *Allens Creek*, ALAB-582, 11 NRC at

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<sup>4</sup> NUREG-1714, Final Environmental Impact Statement for the Construction and Operation of an Independent Spent Fuel Storage Installation on the Reservation of the Skull Valley Band of Goshute Indians and the Related Transportation Facility on Tooele County, Utah (Dec. 2001).

<sup>5</sup> The NRC Staff also opposed the admission of Contentions Utah U, Basis 2, and Utah J before the Licensing Board. NRC Staff's Response to Contentions ("Staff Ans.") (Dec. 24, 1997) at 32, 53-54.

242. While environmental contentions originally based upon an applicant's ER are to be read against the FEIS after it is published, an intervenor is not free to amend its contentions on appeal to raise new issues against the FEIS. See Duke Energy Corp. (McGuire Nuclear Station, Units 1 and 2), CLI-02-28, 56 NRC 373, 382 (2002) (new claims require new or amended contention). The following issues and documents were improperly raised or cited in the State's brief for the first time on appeal:

- Environmental impacts resulting from PFS's plan for addressing breached canisters through the use of spent fuel transportation casks (Br. at 6)
- The FEIS's alleged failure to address the effects of returning damaged canisters to reactors or allowing them to remain on site (Id.)
- Lack of experience in transporting fuel in a HI-STAR transportation cask (Id. at 7.)
- Alleged problems of Certificate of Compliance holders in packaging and transporting radioactive material (Id. at 7 n.8 (citing 69 Fed. Reg. 385, 386 (Jan. 5, 2004)))
- Alleged problems with design, procurement, and QA activities at Holtec and U.S. Tool & Die (Id. at 7 n.9)
- New PFS cask design and alleged problem fitting lid on the cask (Id. at 8 & n.10)
- Alleged problems with welding and fabricating Holtec casks (Id. at 8 & n.11)
- Citation of HI-STAR transportation cask technical specifications and alleged difficulty of flushing contamination from the cask (Id. at 9)

Because the State's brief represents little more than a wholesale attempt to re-write the contention on appeal, the portion concerning Utah U Basis 2 should be stricken. See Hydro Resources, CLI-00-8, 51 NRC at 243 (granting motion to strike). Even if not stricken, the new arguments and documents never placed before the Board should clearly be disregarded by the Commission.

## **2. The Board Properly Rejected Utah U Basis 2**

The few parts of the State's brief that are not new provide no reason to overturn the Board's rejection of Utah U Basis 2. The first prong of Utah U Basis 2 alleges risks and costs associated with "inspecting and repairing the contents of spent fuel canisters." State

Cont. at 142; see also Br. at 10. As noted, however, by the Commission in CLI-04-04, slip op. at 6-7, NRC rules do not require PFS to inspect the contents of the canisters, and PFS has no plans to do so.<sup>6</sup> Since the activity will not occur, it can cause no impact to the environment. Thus, this claim is not cognizable, and its rejection was correct because it is, at bottom, a collateral attack on agency regulations which the Board and the Commission previously rejected in rejecting Utah J.

The second part of Utah U Basis 2 claimed that PFS's ER "fail[ed] to consider the safety risks and costs" associated with "detecting and removing contamination on the canisters," including risks to workers, during both operations and decommissioning. State Cont. at 142. The Board properly rejected this part of Utah U Basis 2 for failing to controvert the license application and for lack of adequate factual basis and improper challenges to generic Commission rulemaking-associated determinations.

**a) Failure to Controvert the License Application**

As PFS argued in 1997, the second prong of Utah U Basis 2 was flawed because it ignored evaluations in the ER (and in the PFS Safety Analysis Report ("SAR")) that conservatively addressed the potential impact of radioactive releases from contaminated canisters on the environment and on workers. PFS Ans. at 287-88 (citing ER § 5.1; SAR at 7.1-7 to -8, 8.1-16 to -18). Neither Utah U Basis 2, nor the basis of Utah J incorporated by reference, challenged the adequacy of (or even acknowledged) these evaluations. See State Cont. at 63-71, 142. Hence, the Board properly rejected the second prong of Utah U Basis 2 for failing to controvert PFS's application.

Further, the FEIS's adoption and expansion of PFS's evaluations served to moot any claim concerning canister contamination. The FEIS evaluated a conservative, postulated off-normal release of canister contamination and shows that it would not pose a significant risk

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<sup>6</sup> Applicant's Answer to Petitioners' Contentions (Dec. 24, 1997) ("PFS Ans.") at 286.

to people or the environment. See FEIS at 4-51. The evaluation assumes that a conservative level of removable contamination covers the entire surface of the canister and that all of that contamination is released to the atmosphere in a single event. Id. This assumption is highly conservative because preventive measures at nuclear power plants loading the canisters will prevent significant contamination and, if excessive contamination were present nonetheless, PFS would detect it and send the canister back to the originating power plant. Id. The FEIS shows that an individual 500 m from the canister (i.e., at the boundary of the owner-controlled area) would receive, under conservative meteorological conditions, a total effective dose equivalent (“TEDE”) of only 0.0044 mrem. Id. On-site personnel assumed to be 150 m from the canister would receive a TEDE of 0.03 mrem. Id. The FEIS found those doses to be insignificant because they are “generally undetectable and well below regulatory dose limits in 10 CFR 72.104 (by approximately three to four orders of magnitude).” Id.

The FEIS also addressed the radiation dose that workers would receive under normal conditions and concluded that those workers likely to receive the highest doses would receive less than the NRC occupational limit of 5 rem/year. Id. at 4-48. Further, that estimate would likely be reduced by PFS’s ALARA program. Id. Finally, the FEIS estimates that effectively no dose to workers during decommissioning would result from contamination, because contamination is not expected in the first place and even if it were to occur, it would be detected, removed, and disposed of as low-level waste. Id. at 4-70; see id. §§ 2.1.6.1 & 2.1.6.2. Thus, the FEIS has thoroughly and conservatively estimated the environmental impacts of potential contamination of canisters at the PFSF.

The State’s brief neither address the Board’s dismissal of Utah Basis 2 for failure to controvert the license application<sup>7</sup> nor the ER and FEIS evaluations of the impacts of postu-

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<sup>7</sup> The State may in its reply attack the sufficiency of the Board’s statement of the bases for its decision, as it did in its initial petition to the Commission on non-hearing issues. State of Utah’s Petition for Review of Non-Hearing Issues (Dec. 4, 2003) at 13 n. 15. But as noted in PFS’s response, any such argument lacks merit because (1) the Board’s rationale for rejecting the contention may be reasonably discerned in the context of the re-

lated canister contamination. See Br. at 6-10. Thus, the Board's dismissal of the second part of Utah U Basis 2 on this ground is unchallenged and should be affirmed.

**b) Lack of Adequate Factual Support**

The second prong of Utah U Basis 2 concerning the alleged potential for canister contamination was also properly rejected for lacking adequate factual support. The State's sole predicate for Utah U Basis 2 was the basis of Utah J, which Utah U Basis 2 incorporated by reference. State Cont. at 142. And as found by the Board (and the Commission), Utah J had no factual support or improperly challenged Commission generic determinations.

PFS showed in its initial response to Utah J that the State's claims on canister contamination and damage did not give rise to an admissible contention. The State's argument about contaminated canisters arriving at the PFS facility, Br. at 7-8, improperly ignored material in the PFS application and had no factual support. As PFS noted in response to Utah J, the contention ignored measures that would prevent contamination of canisters prior to shipping. PFS Ans. at 139-41; see also FEIS at 4-51. The contention's claim that canisters could become contaminated en route to PFS had no factual basis and ignored PFS's procedures for inspecting for contamination. PFS Ans. at 141.

The State's allegation about the environmental effects of damaged canisters shipped back to reactors or remaining at the PFS site, Br. at 6, is impermissibly new and, as shown by PFS below, its factual premise of a damaged canister is baseless. As PFS noted, helium-filled spent fuel canisters, double-seal welded shut (like PFS's) need not be inspected for leaks or corrosion,<sup>8</sup> and the Commission has generically determined that canister breach events at ISFSIs are not credible. Recon. Resp. at 11-14; see also FEIS at 4-51, 4-53 (no

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cord before it, including the arguments of the parties, and (2) the arguments as set forth in PFS's and the Staff's Answers demonstrate that the contention was properly rejected. See Applicant's Response to State of Utah's Petition for Review of Non-Hearing Issues, (Dec. 18, 2003) at 14 n. 14.

<sup>8</sup> See PFS Ans. at 123-25 (responding to Contention Utah 1); Applicant's Response to NRC Staff, State of Utah and OGD Motions for Reconsideration & Clarification (May 13, 1998) ("Recon. Resp.") at 9-10.

credible accident scenario would result in release of radioactive material). Utah J's claim that canisters could somehow arrive or become damaged at the PFS facility was wholly speculative and without factual support, PFS Ans. at 139; see LBP-98-7, 47 NRC at 181, and it constituted a factually baseless attack on reactor quality assurance (QA) programs as well as an impermissible attack on the NRC's QA regulations for reactors, PFS Ans. at 136-39.

The State's unsupported claim that a canister could become "warped or damaged" if dropped, such that it would no longer fit into a cask, Br. at 8, was unspecific and lacked factual or expert opinion basis. PFS Ans. at 139. Moreover, the PFS SAR shows that such a canister drop accident at the PFSF is not credible, and hence highly unlikely, and that canister stresses from other potential handling accidents would be bounded by canister drop accidents analyzed in the HI-STORM 100 FSAR. PFS SAR § 8.1.4 ("Operator Error"); see FEIS at 4-50 (accident would not result in additional dose to workers or the public).

The State's claim that canister contamination would exceed 10 C.F.R. Part 71 limits thereby prohibiting return of the canister to its originating reactor, Br. at 8-9, was flawed for the same reasons as the State's prior arguments concerning potential canister contamination. In addition, Utah J provided no explanation as to how contamination could reach that level. See State Cont. at 71.<sup>9</sup> In response, PFS showed that contaminated canisters could in fact be shipped in appropriate Part 71 certified shipping casks. PFS Ans. at 143-44.

Thus, the Board appropriately found that Utah J, which was the only asserted factual basis for Utah U Basis 2, lacked proper factual or expert opinion support and impermissibly challenged generic rulemaking-associated determinations. LBP-98-7, 47 NRC at 190. The Commission declined review on Utah J, "see[ing] no basis for questioning the Board's determination that the contention presented an impermissible challenge to [the Commission's]

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<sup>9</sup> It is assumed that the claim in Utah J that, "It would be highly improper to send a cask with smearable contamination above regulatory limits back on the rails and highway," State Cont. at 71 (emphasis added), actually refers to a canister, as discussed on the previous page of the contention. If, in fact, it refers to a cask, then the argument in the State's brief should be rejected as not raised before the Board.

regulations, rulemaking-associated determinations, and lacked factual or expert opinion support.” CLI-04-04, slip op. at 7. Moreover, as noted above, even assuming the State provided a proper basis for its claims of potential canister contamination in Utah J, Utah U Basis 2 would still be inadmissible because of the State’s failure to controvert the ER and FEIS evaluation of postulated release of radioactive contamination into the environment.

### **3. The FEIS Moots Utah U’s Only Cognizable Claim**

As discussed in subsection 2(a) above, the FEIS has rendered moot Utah U Basis 2’s claim concerning canister contamination and, as noted in subsection 2(b) above, it has also rendered moot several of the claims in Utah J advanced as the basis for Utah U Basis 2.

For the above reasons, the Board’s rejection of Utah U Basis 2 should be affirmed.

## **III. UTAH CC AND UTAH SS – NEPA COST-BENEFIT ANALYSIS**

### **A. Contentions**

Contention Utah CC challenged the original PFS ER. See LBP-98-7, 47 NRC at 204. The contention made unspecific allegations – lacking factual or expert opinion support – to the adequacy of the ER’s cost-benefit discussion, asserting in particular that the qualitative discussion of environmental and socio-economic costs in ER Section 7.3-1 was inadequate and that quantification of many of those costs was required. State Cont. at 178-79.

Contention Utah SS was filed against the FEIS in 2002.<sup>10</sup> While described as a challenge to the NEPA “cost-benefit analysis” in the FEIS, Utah SS Pet. at 1-2, in fact it focused entirely on the economic cost-benefit and economic “breakeven”<sup>11</sup> analyses of the project presented in FEIS § 8.1. Utah SS alleged that the FEIS’s two economic analyses were flawed because of: a) an assumption of a 40-year spent fuel storage period when the license term

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<sup>10</sup> State of Utah’s Request for Admission of Late-Filed Contention Utah SS (Feb. 11, 2002) (“Utah SS Pet.”).

<sup>11</sup> The breakeven analysis calculates the total amount of spent fuel (in metric tons uranium) that would have to be stored at the facility over the life of the project (i.e., the “throughput”) for the project to achieve a net cost savings, i.e., a positive economic cost-benefit balance, vis-a-vis at-reactor spent fuel storage. See FEIS at 8-10 to 8-11.

was only 20 years, id. at 2-3 (cost benefit analysis), 6 (breakeven analysis), and b) an allegedly incorrect date for the start of operations, id. at 7. The State claimed the assumptions were “presented for the first time in Chapter 8 of the FEIS.” Id. at 2; see id. at 3 (storage period), 7 (start of operations).

**B. Board Decision and Commission Order Granting Review**

The Board dismissed Utah CC for failing to establish a genuine dispute with specificity, inadequate factual support, and failure to properly challenge the PFS application. LBP-98-7, 47 NRC at 204; recons. denied, LBP-98-10, 47 NRC at 294.

The Board rejected Utah SS in an oral ruling. Tr. 9210-17 (May 17, 2002).<sup>12</sup> It held that the contention was invalid because, even if proven, it would not entitle the State to relief. Tr. at 9213 (Farrar, J.). The Board pointed out that the environmental impacts of the project would not be large and thus an economic analysis of the benefits of the project “may or may not be necessary.” Id. at 9213-14. Moreover, the challenged economic “breakeven” analysis was not critical, given the fact that the PFS facility is at least in part intended to serve as insurance against the delayed operation of a permanent repository for spent nuclear fuel. Id. at 9214. The Board found that the economic analysis of the PFS project in “the entire record of the case” was accurate enough for the public to “draw its own conclusions” regarding the environmental cost-benefit balance of PFS’s plan to receive spent fuel at the facility for 20 years and store it for 40. Id. Finally, the Board noted that the State’s allegation that adverse impacts would result if PFS ever went bankrupt was being addressed in the financial qualifications portion of the PFS proceeding. Id. at 9215; see also FEIS at 8-1 n.2.

The Commission granted review on Utah CC and Utah SS because “NEPA cost/benefit questions have proved troublesome in the past . . . , because the record would benefit from a written decision on these issues, and because the context of the question here

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<sup>12</sup> No written decision was issued for the contention. See CLI-04-4, slip op. at 14 & n.26.



is unusual.” CLI-04-04, slip op. at 11-12 (citing Louisiana Energy Services, L.P. (Claiborne Enrichment Center), CLI-98-3, 47 NRC 77 (1998)).

## C. Discussion

### 1. Utah CC

The Board’s dismissal of Utah CC was entirely appropriate. The contention ignored the fact that the qualitative discussion in ER Section 7.3-1 was based on a detailed evaluation of the socioeconomic and environmental impacts in ER Chapters 4 and 5 showing such impacts to be minimal.<sup>13</sup> The contention failed to specify the environmental impacts of the project that the ER’s cost-benefit analysis allegedly failed to consider, failed to provide any facts showing that the ER’s cost-benefit analysis was flawed, and ignored the ER’s consideration of the few environmental impacts or alternatives that the contention did specify. Id. at 35-43. Finally, Utah CC was fundamentally flawed because NEPA’s rule of reason does not require monetary quantification of impacts and benefits. Rather NEPA calls for the furnishing of such information as may be necessary under the circumstances for evaluating the project. Id. at 40 (citing cases). Thus, the Board’s decision should be affirmed.

In any event, Utah CC is now moot, as it has been overtaken by the analyses presented in the FEIS. McGuire, CLI-02-28, 56 NRC at 382; see generally FEIS § 4-6 (impacts); id. § 9.4.3 (Recommendation of Preferred Alternative). The few individual impacts and alternatives mentioned in Utah CC have been addressed by the FEIS. See id. §§ 4-6 (impacts generally), 6.7, 9.4.1.5 (no-action alternative), 4-5 passim (mitigation measures). The State never sought to amend Utah CC to challenge either the Draft Environmental Impact Statement (“DEIS”) or the FEIS. (As noted above, Utah SS focused on the FEIS’s economic cost-benefit analysis, not its environmental cost-benefit analysis.) Moreover, aside from summa-

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<sup>13</sup> Applicant’s Supplemental Answer to the State of Utah’s Contentions Z to DD (Jan. 6, 1998) (“PFS Supp. Ans.”) at 33-35.

rizing its claims in the brief's introduction,<sup>14</sup> the State does not mention Contention Utah CC and makes no attempt to show Board error. See Br. at 2-3, 10-20. That alone is enough to affirm the Board's dismissal of Utah CC.<sup>15</sup>

2. Utah SS

a) The Board's Decision Was Correct

The Board correctly rejected Utah SS because, even if proven, the contention would not entitle the State to relief. The State's challenge to the FEIS's economic benefit analysis did not show that its environmental cost-benefit assessment was wrong. The Commission has explained that FEIS's are required to weigh environmental costs against total societal benefits, but economics are only tangential to that assessment.

"Although the statute itself does not mandate a cost-benefit analysis, NEPA is generally regarded as calling for some sort of weighing of the environmental costs against the economic, technical, or other public benefits of a proposal." Claiborne, CLI-98-3, 47 NRC at 88; 10 C.F.R. § 51.71(d).

NEPA's "theme. . . is sounded by the adjective 'environmental': NEPA does not require the agency to assess every impact or effect of the proposed action, but only the impact or effect on the environment." An agency's "primary duty" under NEPA is to take a "hard look" at environmental impacts." "Determination of economic benefits and costs that are tangential to environmental consequences are within [a] wide area of agency discretion."

Claiborne, CLI-98-3, 47 NRC at 88-89 (citing cases; citations omitted). While "misleading information" on economic benefits could skew an agency's assessment of a project the "key consideration" is "whether the economic assumptions of the FEIS '[are] so distorted as to

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<sup>14</sup> The introduction repeats Utah CC's false claim that the ER's only discussion of the environmental costs of the project consisted of one sentence, Br. at 2-3 & n.1, when, in fact, two chapters of the ER discussed environmental costs in detail. See PFS Supp. Ans. at 33-35.

<sup>15</sup> An issue not addressed in an appellate brief is considered to be abandoned, even though it may have been raised before the Licensing Board. International Uranium (USA) Corp. (White Mesa Uranium Mill), CLI-01-21, 54 NRC 247, 253 (2001).

impair fair consideration of the project's adverse environmental effects," Id. at 89. To put it another way, "[u]nless the proposed nuclear [facility] has environmental disadvantages in comparison to possible alternatives, differences in financial cost are of little concern . . . ." Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-458, 7 NRC 155, 162 (1978).

Here, most importantly, the FEIS concluded that most of the adverse environmental impacts of the project are "small" and "small to moderate" for a few others. E.g., FEIS Table 9.1; id. at 9-11. Thus, to show a positive environmental cost-benefit balance, which is the pertinent issue,<sup>16</sup> relatively few benefits from the project would be required. The FEIS concluded (at 9-16) that the proposed action was the preferred alternative because "the overall benefits of the proposed PFSF outweigh the disadvantages and costs, based upon consideration of"

- The need for an alternative to at-reactor SNF storage that provides for a consolidated, and for some reactor licensees, economical storage capacity for SNF from U.S. power generating reactors;
- The minimal radiological risks from transporting, transferring, and storing the proposed quantities of SNF canisters and casks;
- The economic benefits that would accrue to the Skull Valley Band during the life of the project; and
- The absence of significant conflicts with existing resource management plans or land use plans within Skull Valley

Thus, the relative cost of storing fuel at the PFSF was only one part of one of the bases for the agency's recommendation of the action. As the Board and the FEIS noted, in addition to providing an economical storage option, the PFSF would also provide an "insurance policy" against the late opening of a permanent spent fuel repository. See Tr. at 9214

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<sup>16</sup> Note, however, that "NEPA . . . does not mandate any particular results". Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 350 (1989). "If the adverse environmental effects of the proposed action are adequately identified and evaluated, the agency is not constrained by NEPA from deciding that other values outweigh the environmental costs." Id.

(Farrar, J.); FEIS at 1-8, 1-12. Indeed, Utah SS did not attempt to show, using its assumptions regarding the spent fuel storage period, start date, and maximum throughput for the facility, that the economic benefits of the PFSF would be so low that the FEIS's environmental cost-benefit balance would be upset. See Utah SS Pet. at 2-9. Thus, Utah SS failed to show a genuine dispute on a material factual or legal issue, 10 C.F.R. § 2.714(b)(2)(iii), and, because "NRC adjudicatory hearings are not EIS editing sessions," CLI-04-04, slip op. at 11, the contention, even if proven, would entitle the State to no relief.

In addition to Utah SS on its face failing to show a genuine dispute on a material issue, the contention's claims regarding the net economic benefits of the project are completely undermined by its flawed legal assertion regarding the spent fuel storage period. The State claims that the FEIS must calculate economic benefits based on a 20-year storage period corresponding to the first PFS license term. Br. at 11 (citing 10 C.F.R. § 51.97(a)<sup>17</sup>). Section 51.97(a), however, imposes no such limit, for it does not concern NEPA cost-benefit assessment but only environmental impacts that would result after planned closure of a facility. The regulation was a product of the Commission's Waste Confidence rulemaking proceeding, where it was concluded that there is reasonable assurance of the availability of a geologic repository for spent fuel in the near future and that spent fuel storage for 30 years beyond the expiration of reactor operating licenses-either at or away from the reactors-is feasible, safe, and would not result in a significant impact on the environment.<sup>18</sup> Thus, in Part 72 ISFSI licensing actions an EIS need not consider environmental impacts beyond the expected lifetime of the ISFSI:

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<sup>17</sup> "Unless otherwise determined by the Commission, and in accordance with the generic determination in § 51.23(a) and the provisions of § 51.23(b), [an FEIS for an ISFSI] . . . will address environmental impacts of spent fuel storage only for the term of the license . . . applied for."

<sup>18</sup> Requirements for Licensee Actions Regarding the Disposition of Spent Fuel Upon Expiration of Reactor Operating Licenses, Final Rule, 49 Fed. Reg. 34,688 (1984) ("Statement of Considerations"); see id. at 34,695-96 (§ 51.97(a)). The Commission updated the projected date of repository availability to the first quarter of the 21<sup>st</sup> century in the current § 51.23(a).

the NRC will continue to require consideration of reasonably foreseeable safety and environmental impacts of spent fuel storage only for the period of the license applied for. The amendment to 10 CFR Part 51 confirms that the environmental impacts of spent fuel storage in . . . [ISFSIs] for the period following expiration of the . . . installation storage license or amendment applied for need not be addressed in any . . . impact statement, . . . prepared in connection with the . . . initial license for an [ISFSI] or amendment thereto.

49 Fed. Reg. at 34,689 (emphasis added). Therefore, section 51.97(a)'s statement that an FEIS "will address environmental impacts . . . only for the term of the license" must be interpreted to mean that the FEIS "need address environmental impacts only for the term of the license." Compare 10 C.F.R. § 51.23(b) (no discussion of impacts following the term of the license applied for "is required" (emphasis added)). Hence, it does not limit the FEIS to considering a 20-year storage term in its environmental cost-benefit assessment.

The FEIS's assumed 40-year storage period and 2003 start date are permissible because "[an agency] is entitled to rely on reasonable assumptions in its environmental analyses." Inland Empire Pub. Lands Council v. U.S. Forest Serv., 88 F.3d 754, 761 (9<sup>th</sup> Cir. 1996). Here, the FEIS relied on those reasonable assumptions based on information provided by PFS.<sup>19</sup> The assumption of a 40-year storage period does not guarantee or preordain PFS license renewal; rather, it is a reasonable estimate of what PFS plans to do. E.g., FEIS at 1-6, 1-15, 2-26, 4-1. Furthermore, even if PFS does not renew its license, it may store (but not receive) fuel for some time beyond the 20-year license term to allow for decommissioning.<sup>20</sup> Thus, the FEIS's assumed storage period is reasonable;<sup>21</sup> the State has provided no reason, beyond its erroneous legal argument, that it is not.

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<sup>19</sup> See NRC Staff's Response to "State of Utah's Request for Admission of Late-Filed Contention Utah SS" (Feb. 26, 2002) ("Staff SS Resp.") at 7-10; see also Br. at 11 & n.12.

<sup>20</sup> Under 10 C.F.R. § 72.54(c), the license expires at the end of its term, but it is not terminated—and thus spent fuel can be stored and decommissioning conducted—until the Commission explicitly terminates it. See also Timeliness in Decommissioning of Materials Facilities, Final Rule, 59 Fed. Reg. 36,026, 36,030 (1994) (estimating 62 months to complete decommissioning for facilities required to submit decommissioning plans).

<sup>21</sup> While the 2003 start date proved not to be correct, Utah SS did not demonstrate that changing it would have a material effect on the economic cost-benefit analysis, let alone the overall environmental cost-benefit assess-

Finally, the Commission should keep in mind that economic assessments conducted as part of NEPA environmental cost-benefit balancing necessarily entail uncertainties. For example, projections of supply, demand, and price, “reflect not ineluctable truth, but rather a plausible scenario.” Hydro Resources, CLI-01-4, 53 NRC at 48 (citing Claiborne, CLI-98-3, 47 NRC at 93-94). The FEIS recognizes these uncertainties (including the amount of spent fuel to be stored at the facility). See FEIS §§ 8.1.2, 8.1.3.<sup>22</sup> In the end, particularly given the financial assurance license conditions imposed on PFS,<sup>23</sup> there is no reason to expect that PFS will construct and operate the PFS facility unless doing so is likely to be economically beneficial to it and/or its customers. See Hydro Resources, CLI-01-4, 53 NRC at 49. Thus, the State’s economic claims in Utah SS simply do not give rise to a genuine dispute over whether or not the environmental cost-benefit balance of the PFSF will be positive. Thus, their claims would entitle them to no relief and the Board’s rejection of Utah SS should be affirmed.

**b) The Board’s Decision Should Also Be Affirmed Because the Contention Was Unjustifiably Late**

In addition to being affirmed on substantive grounds, the rejection of Utah SS should also be affirmed because the contention was unjustifiably late.<sup>24</sup> In responding to Utah SS, PFS and the NRC Staff showed that the information needed to frame the contention was available well over a year before it was submitted. Thus, Utah SS was filed grossly out of

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ment. See Utah SS Pet. at 7-9 (asserting without showing actual impact that it would be “significant”). Moreover, agencies are not required to continuously supplement EISs to capture changing facts that do not “reveal a ‘seriously different picture’” of the environmental impacts or cost-benefit balance of a proposal. Hydro Resources, Inc., CLI-01-4, 53 NRC 31, 52 (2001).

<sup>22</sup> It also recognizes the uncertainty associated with the date of availability for the geologic repository that the State raises for the first time in its brief. FEIS § 8.1.2.2; see Br. at 12 & n.13.

<sup>23</sup> See Memorandum and Order (Rulings on Summary Disposition Motion and Other Filings Relating to Remand from CLI-00-13), slip op. at 3-4 (May 27, 2003) (not yet published).

<sup>24</sup> Although the Board appears not to have decided whether Utah SS was unjustifiably late, Tr. at 9211-13, a prevailing party (here PFS) is free to urge any ground in defending a result (the dismissal of Utah SS), including grounds rejected by the Licensing Board. Niagara Mohawk Power Corp. (Nine Mile Point Nuclear Station, Unit 2), ALAB-264, 1 NRC 347, 357 (1975).

time without good cause. In September 2000, the State filed comments on the DEIS challenging the 40-year storage period and the date for starting operations assumed in the economic cost-benefit analysis. PFS SS Resp. at 2-3, 6. After the State filed its DEIS comments, the NRC Staff requested that PFS prepare new economic cost-benefit analyses using a 20-year license period, a 40-year storage period, and a start date of 2003—the same assumptions subsequently used in the FEIS. *Id.* at 2-3. PFS provided its responses to the Staff's request to the State in November 2000. *Id.* at 2 & n.4. Thus, the State had the information it challenged in Utah SS over a year before it filed the contention.<sup>25</sup> Intervenors are required to file contentions within a reasonable time of the availability of the information necessary to support a contention, not the later publication of a Staff document containing the same information. See Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-92-12, 36 NRC 62, 70 (1992); PFS SS Resp. at 5-6 (citing cases). The State failed to show good cause (or indeed any cause) for its lateness. See Utah SS Pet. at 9-10.

Where intervenors lack good cause for the lateness of a contention, they must make a “compelling showing” that admission of the contention is warranted under the other four factors of 10 C.F.R. § 2.714(a)(1). Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-00-2, 51 NRC 77, 79 (2000). The State made no such showing. PFS SS Resp. at 8-9. Thus, the Commission should also affirm the rejection of Utah SS because it was unjustifiably late.

**D. Issues Raised for the First Time on Appeal Should Be Disregarded**

Finally, like large portions of its brief on Utah U, Basis 2, Section III.C of the State's brief attempts to raise for the first time on appeal issues that were not raised in Contentions Utah CC or Utah SS. For the reasons set forth in Section II.C.1 above, such issues must be

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<sup>25</sup> Indeed, the PFS ER, available in 1997, projected a 40-year operating lifetime for the facility that the State failed to challenge. See ER at 7.2-2, 7.3-1 (Rev. 0).

rejected. See Zion, CLI-99-4, 49 NRC at 194. The following issues allegedly affecting the environmental cost-benefit balance were never presented to the Board in Contentions Utah CC or Utah SS:

- The “schism” among members of the Skull Valley Band of Goshutes allegedly caused by the project (Br. at 15 & n.19)
- Public resources allegedly required to respond to a transportation emergency or a “hint of a terrorist threat” (id. at 16)
- An allegation that more spent fuel can be stored in reactor spent fuel pools than previously believed (id. at 16 & n.20)
- A request for recirculation of a new version of the FEIS (id. at 17; see also id. at 14 & n. 18)
- Asserted policy support in the Nuclear Waste Policy Act for the overall costs of the PFS project outweighing its overall benefits (id. at 17-18).

For the foregoing reasons, the Board’s rejection of Utah SS should be affirmed.

#### IV. CONCLUSION

For the reasons stated above, the Commission should affirm the Board’s rejection of Contentions Utah U, Basis 2, Utah CC, and Utah SS.

Respectfully submitted,



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Dated: March 18, 2004



**UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION**

Before the Commission

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

**CERTIFICATE OF SERVICE**

I hereby certify that copies of the "Applicant's Response to State of Utah's Brief on Commission Review of Contentions Utah U Basis 2 and Utah CC and Utah SS" 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 March 2004.

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