

December 7, 2004 (11:15am)

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

OFFICE OF SECRETARY  
RULEMAKINGS AND  
ADJUDICATIONS STAFF

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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In the Matter of:	)	Docket No. 72-22-ISFSI
PRIVATE FUEL STORAGE, LLC	)	ASLBP No. 97-732-02-ISFSI
(Independent Spent Fuel	)	
Storage Installation)	)	November 16, 2004

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STATE OF UTAH'S SUPPLEMENT TO CONTENTION UTAH UU  
PURSUANT TO BOARD ORDER DATED NOVEMBER 16, 2004

In order to serve efficiency and effectiveness the Board requested the State to supplement Contention Utah UU as to the following two issues: (1) whether and to what extent 10 CFR § 2.734 (motions to reopen) is applicable Utah's Request for Admission of Late Filed Contention Utah UU; and (2) should the contention be admitted, Utah's position on whether the merits of the contention should be addressed in the first instance by the Board (and if so how) or by the Staff (as part of its NEPA review). Board Order (Nov. 16, 2004) at 2-3. The State is cognizant of the NRC's desire to achieve finality in the PFS proceeding. However, given the gravity of the issues presented in Utah UU and the effect they will have on the State of Utah, to protect its interests the State has brought these issues to the Board in the hope that they will be treated fairly. The bottom line answer to the Board's questions is that even if the Board were to apply the reopening standards to Contention Utah UU, the State meets those standards. Also, the Board should rule on the admissibility of the contention, as it would any other contention but it is premature to discuss how the merits of the contention should be addressed.

## A. Reopening the Record

Under section 2.734(a), the criteria to reopen a closed record are:

- (1) The motion must be timely, except that an exceptionally grave issue may be considered in the discretion of the presiding officer even if untimely presented.
- (2) The motion must address a significant safety or environmental issue.
- (3) The motion must demonstrate that a materially different result would be or would have been likely had the newly proffered evidence been considered initially.

Further, the motion must be accompanied by an affidavit setting forth the factual or technical bases to show the criteria in paragraph (a) have been met and the affidavit must meet 10 CFR § 2.743(c) admissibility standards. 10 CFR § 2.734(b). In addition, if reopening relates to a contention not previously in controversy among the parties, the proponent of the contention must also satisfy § 2.714(a)(1) late filed factors. 10 CFR § 2.734(d).

Even though the State does not believe that due process would be satisfied if it had to meet the reopening standards to bring forward a genuine and germane unresolved issue of fact that has a significant effect on the national nuclear waste program, it will first address that issue because PFS and the Staff will undoubtedly claim the reopening standards apply.

There is no question that the State's motion is timely. Unlike the reopening case in Shoreham<sup>1</sup> where the intervenors filed an arguably identical contention one year later, or in

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<sup>1</sup>Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-89-1, 29 NRC 89 (1989).

Seabrook<sup>2</sup> where the intervenors waited until 10 months after published information was available on a safety issue, the State filed its contention within 30 days of the genesis of the issues raised in Contention Utah UU (*i.e.*, 30 days from when the State's first learned that DOE will not accept fuel in welded canisters and that DOE has no obligation to collect fuel from the PFS site). Notably, however, the 30-day filing "deadline," judicially created by the Bollwerk Licensing Board, is specific to filing contentions relating to the DEIS and FEIS by a date certain. Order June 28, 1998; *see also* LBP-00-28, 52 NRC 226, 235 (2000). There is no judicially created deadline for reopening the record. In the course of this proceeding, because the previous Board dismissed many of Utah's contentions based on failure to meet timeliness under the good cause factor, the State has been assiduous in filing contentions within 30 days of the triggering event. But to couple the rigorous contention-filing deadline with the onerous reopening standards puts a burden on the State that is tantamount to denial of an effective opportunity to be heard. Nonetheless, given the stringent application of the late-filed requirements to the State in this proceeding, as discussed in more detail below, the contention and supporting documentation meet the reopening standard.

The contention speaks for itself in that it addresses significant environmental and safety issues. The remaining criterion in 2.734(a) then is whether a materially different result would likely ensue had this information been before the Staff in its NEPA and financial assurance reviews. As demonstrated in the contention and supporting documentation, the cost and benefit evaluations of the federal action demanded of an agency by NEPA are

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<sup>2</sup>Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), CLI-90-06, 31 NRC 483 (1990).

wholly without discussion in the final EIS conducted by NRC and the other cooperating agencies. The State would not be so bold as to claim that no matter what evidence was presented to the Staff, the NRC would whole heartedly endorse the PFS proposal. Therefore, given the gravity of the issues presented in Utah UU, a materially different result is likely to emerge from an impartial NEPA analysis. Without addressing proprietary information, suffice it to say that because each and every cask to be shipped from the PFS site will not, as anticipated, be paid for by DOE, there is a genuine unresolved issue of fact as to the lack of financial assurance in the operation of a 4,000 cask storage facility. The information presented in Utah UU is new; it is not a differing analysis by experts of information already in the record; and is therefore consistent with section 2.734(a)(3). See Pacific Gas & Electric Co. (Diablo Canyon Nuclear Power Plant, Unites 1 & 2), ALAB-644, 13 NRC 903, 994-95 (1981).

Even though the State had anticipated that it was only required to meet the late filed standard, Contention Utah UU meets the admissibility standard for reopening.<sup>3</sup> As the Board informed the State in this proceeding,

[T]hose who want to participate in its proceedings, and thereby to force an applicant for a license to bear the heavy burden of such a proceeding, must themselves carry a heavy initial burden. It is not sufficient to show up on the Commission's doorstep, as it were, with generalized complaints about a proposed facility or action. Instead, complaints must be stated with great specificity, a basis for them must be put forward, and indeed at a very early stage one who wishes to participate in the proceeding must go so far as to describe in general terms the nature of the evidence that will be put forward.

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<sup>3</sup>To be admissible, evidence must be relevant, material and reliable and not unduly repetitious. 10 CFR § 2.743(c).

LBP-01-39, 54 NRC 497, 507 (2001). In filing Utah UU the State submits that it met the rigorous test quoted above. And by meeting that test, it also meets the admissibility standard by presenting relevant, material, and reliable information.

One crucial component of the State's contention is whether it is based on reliable information. In evaluating whether to file the contention, the State assessed this question. The information was obtained from a knowledgeable DOE official responsible for the Yucca Mountain shipping campaign and transmitted to the Governor of Utah. Other information was obtained from a member of the NRC Spent Fuel Project Office. It is difficult to imagine that any federal official would stretch the facts or provide unreliable information when personally addressing a state governor. On this basis, therefore, the information contained in Utah UU is reliable. Furthermore, it is difficult to imagine anything more relevant and material to the PFS proceeding than whether licensing the PFS facility will create a dysfunctional national waste program and necessitate multiple and otherwise unnecessary fuel shipments back and forth across the country. The State described with specificity the basis for its contention sufficient to show that there is a genuine issue of material dispute. At this stage that is all the State can evaluate because no responses to the contention have yet been filed.

Finally, this Board has jurisdiction to entertain disposition of Contention Utah UU. As long as some part of a licensing case remains before the Licensing Board, and no appeal to the Commission is presently pending, the Board retains jurisdiction to reopen the record on any properly presented issue for the proceeding, including matters on which it had already ruled and that had been affirmed by the Commission. Dominion Nuclear

Connecticut, Inc. (Millstone Nuclear Power Station, Unit 3), LBP-02-5, 55 NRC 131, 137-38 (2002).

**B. Consideration of the Merits**

The State finds itself in the position of suggesting to the Board how the merits of its contention should be addressed before either the Staff or PFS has responded to its contention. Importantly, under the procedures established pursuant to the Board's efficiency Order, the State is without benefit of knowing how the Staff will react to the issues raised in its contention, whether it will summarily dismiss them, or whether it will on its own volition undertake a further NEPA and financial assurance review of the PFS's licensing action. Throughout this proceeding, the Staff has assessed the State's contentions, timely replied to each contention, and, with rare exception, its usual position is that the State's contentions lacked either procedural or substantive merit. Of course, the State would not object to the Staff taking an objective and hard look at the issues raised in Contention Utah UU. However, the experience in this proceeding is that unless there is a pending issue before the Board, the Staff tends to be dismissive of any issues raised by the State. Therefore, from the State's perspective, it does not desire Staff review in lieu of consideration of the contention by the Board.

Furthermore, unless the Staff voluntarily steps forward to conduct an independent review, the State does not believe the Board has jurisdiction to direct to the Staff the matters under consideration in Contention Utah UU. As the Commission noted in Duke Energy Corp. (Catawba Nuclear Station, Units 1 and 2), CLI-04-06, 59 NRC \_\_\_\_, "licensing boards have wide powers over adjudication, as for example, . . . which issues are litigable." CLI-04-

06, slip op. at 11. “The licensing boards’ sole, but very important, job is to consider safety, environmental, or legal issues raised by license applicants.” *Id.* To this extent, it is obvious that the Board has jurisdiction to consider Utah’s contention. The Commission made plain, however, the Board has no authority over the Staff:

NRC staff reviews . . . fall under the direction of Staff management and the Commission itself, not licensing boards. . . We long have held that licensing boards do not . . . direct NRC staff regulatory reviews . . . . Licensing boards simply have no jurisdiction over non-adjudicatory activities of the Staff. . . . unless the Commission itself grants that jurisdiction to [sic] Board.

*Id.* Accordingly, the Board is without jurisdiction to direct the Staff in the first instance to consider the matters raised by Contention Utah UU as a supplement to the Staff’s NEPA review functions.

The Board’s lack of jurisdiction to direct Staff actions, however, does not mean that the Board can act on the merits of the contention, should it be admitted, without the Staff having evaluated the totality of the issues raised in Contention Utah UU<sup>4</sup> and presented its position to the Board and the parties. Sections 51.70(b) and 51.90 specifically charge the NRC Staff – not the Applicant or the Board – with the responsibility for evaluating all information used in the draft and final EIS. The Bollwerk Board in SUWA B rejected the proposition that the Board is “not constrained by the staff’s admitted inability to express an

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<sup>4</sup>See LBP-01-38, 54 NRC at 494-95 (Board rejected the argument that Staff’s conclusion about the sum of the whole [agreeing with PFS’s overall assessment] can be reached without an assessment of its individual parts [Staff failure to assess specifics of design and alignment details of the Western Skull Valley Alternative]. See also LBP-01-34, 54 NRC 293, 303 (2001) (“although the Staff’s supporting witness indicated satisfaction with the PFS evaluation of this alignment, he also acknowledged that the Staff has not fully evaluated this proposed western alternative.”).

opinion about the validity of the specific PFS undisputed material factual statements regarding the Western Skull Valley Alternative . . .” LBP-01-38, 54 NRC 490, 494 (2001). Accordingly, it is premature for the State to propose (or predict) how and whether the Staff will address the totality of the issues in Utah UU.

There is an avenue available to expedite adjudication of this contention, should it be admitted. The subpoena power of the Board could be used to obtain information under oath from the Department of Energy. *See* 10 CFR §§ 2.718, 2.720. This could substantially affect the way in which the merits of the contention would be addressed.

Finally, it would not be equitable to require cross motions for summary disposition. *See* Board Order (Nov. 16, 2004) at 3. The regulations place the burden on the movant to meet the criteria for late filing a contention and reopening the record. In this instance the State has met those burdens. *If cross motions for summary disposition were required, there would be an additional burden placed on the State that is not contemplated by the regulations.*<sup>5</sup>

The State appreciates the Board’s effort to consider efficiency and effectiveness, but without the benefit of the Staff’s or PFS’s responses to the contention, it is premature for

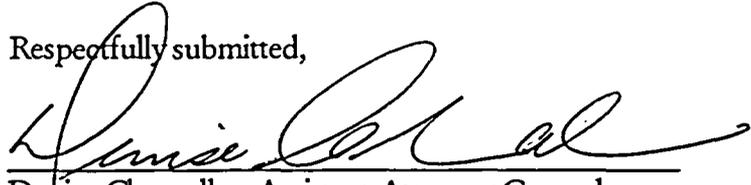
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<sup>5</sup>While an intervenor has the option to file a motion for summary disposition, under the regulations it is not mandated to do so. 10 CFR § 2.749(a) (“Any party” to the proceeding may move for summary disposition).

the State to adequately address the second portion of the Board's November 16, 2004  
Order.

DATED this 29<sup>th</sup> day of November, 2004.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Denise Chancellor", written over a horizontal line.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of STATE OF UTAH'S SUPPLEMENT TO  
CONTENTION UTAH UU PURSUANT TO BOARD ORDER DATED NOVEMBER  
16, 2004 was served on the persons listed below by electronic mail (unless otherwise noted)  
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