

December 10, 2004

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of )  
 )  
PRIVATE FUEL STORAGE, L.L.C. ) Docket No. 72-22-ISFSI  
 )  
(Independent Spent )  
Fuel Storage Installation) )

NRC STAFF'S RESPONSE TO "STATE OF UTAH'S REQUEST  
FOR ADMISSION OF LATE-FILED CONTENTION UTAH UU  
(RAMIFICATIONS OF DOE'S REFUSAL TO ACCEPT  
FUEL IN WELDED CANISTERS FROM THE PFS SITE)  
OR IN THE ALTERNATIVE PETITION FOR RULEMAKING"

INTRODUCTION

Pursuant to 10 C.F.R. § 2.714(c) and the Atomic Safety and Licensing Board's Orders of November 16 and December 7, 2004,<sup>1</sup> the NRC Staff ("Staff") hereby responds to (1) the "State of Utah's Request for Admission of Late-Filed Contention Utah UU (Ramifications of DOE's Refusal to Accept Fuel in Welded Canisters from the PFS Site)" ("Request"), filed November 12, 2004, and (2) the "State of Utah's Supplement to Contention Utah UU Pursuant to Board Order Dated November 16, 2004" ("Supplement"), filed November 29, 2004.

As more fully set forth below, Late-filed Contention Utah UU raises issues which the State of Utah ("State") previously raised, or could have raised, and fails to provide any significant new information that was not previously available. For this reason and the reasons set forth below, the Staff respectfully submits that Contention UU is impermissibly late and the State has failed to demonstrate that good cause and a balancing of the factors specified in 10 C.F.R. § 2.714(a)(1)

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<sup>1</sup> See (1) "Order (Addressing Applicant's Request for Extension and Related Matters)," dated November 16, 2004; and (2) "Order Regarding 'Contention Utah UU,'" dated December 7, 2004. In addition, the Licensing Board enlarged the page limit for the Applicant's and Staff's responses to the State's filings, by Order dated December 3, 2004; and on December 10, 2004, the Licensing Board granted Staff Counsel's telephone request, without opposition by PFS or the State, for leave to file a 22-page response.

support its admission. Further, Contention Utah UU lacks any substantial factual basis and fails to satisfy the Commission's standards for admissible contentions; in addition, the State fails to show that a materially different result would be or would have been reached if the contention was admitted, as required by 10 C.F.R. § 2.734. Accordingly, the State has failed to demonstrate that the contention should be admitted or that the record should be reopened to consider it.

#### BACKGROUND

On June 25, 1997, Private Fuel Storage, L.L.C. ("PFS" or "Applicant"), filed an application 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 within Skull Valley, Utah. The application was accompanied, *inter alia*, by a safety analysis report ("SAR") and an environmental report ("ER"). On July 31, 1997, the Commission published in the *Federal Register* a Notice of Consideration and Notice of Opportunity for Hearing ("Notice") concerning the license application, advising interested persons, *inter alia*, that contentions must be filed no later than 15 days before the first pre-hearing conference scheduled in the proceeding. See 62 Fed. Reg. 41,099 (1997).

Petitions for leave to intervene and numerous contentions were then filed by various petitioners, including the State of Utah ("State").<sup>2</sup> As discussed in detail below, the State's initial contentions raised many concerns that are similar to those raised in late-filed Contention Utah UU. On April 22, 1998, the Licensing Board ruled on the petitions to intervene and admissibility of contentions.<sup>3</sup> The Licensing Board found, *inter alia*, that the State and other petitioners had demonstrated their standing to intervene and had submitted at least one admissible contention, and

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<sup>2</sup> 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" ("Initial Contentions"), dated November 23, 1997; and the State's Security Plan contentions, filed January 3, 1998.

<sup>3</sup> See *Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation)*, LBP-98-7, 47 NRC 142, *as modified*, LBP-98-10, 47 NRC 288 (1998).

admitted them as parties to this proceeding. *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-98-7, 47 NRC 142 (1998).

On or about June 16, 2000, the NRC Staff and the cooperating federal agencies (the U.S. Bureau of Indian Affairs, U.S. Bureau of Land Management, and U.S. Surface Transportation Board) issued their Draft Environmental Impact Statement (“DEIS”),<sup>4</sup> in accordance with the National Environmental Policy Act of 1969 (“NEPA”), 42 U.S.C. § 4321 *et seq.* The DEIS evaluated the environmental impacts of the Applicant’s proposal, including the impacts resulting from transportation of SNF to and from the PFS facility,<sup>5</sup> the compatibility of PFS’s multi-purpose canister with potential U.S. Department of Energy (“DOE”) design requirements for a high-level waste disposal repository, and the Applicant’s expectation that it would be able to ship SNF to the proposed Yucca Mountain repository.<sup>6</sup>

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<sup>4</sup> 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”).

<sup>5</sup> See, e.g., DEIS, § 2.1.2.1 (Transportation of Spent Fuel to the Proposed PFSF); § 5.7.1 (Non-Radiological Impacts); § 5.7.2 (Radiological Impacts); Appendix C (Rail Routes to the Proposed PFSF Site); and Appendix D (Transportation Risks Analysis).

<sup>6</sup> Thus, the DEIS indicated, in pertinent part, that (1) DOE is legally obligated to accept and take title to SNF from U.S. utilities for disposal in a permanent repository by January 31, 1998, DEIS at 1-6; (2) Congress had directed DOE to study only the Yucca Mountain site for the proposed repository site, *Id.* at 5-32, 5-39; (3) DOE’s Draft EIS for the Yucca Mountain repository indicated it could become operational as early as 2010, *Id.* at 1-7, *citing* DOE/EIS-0250D, “Draft Environmental Impact Statement for a Geologic Repository for the Disposal of Spent Nuclear Fuel and High-Level Radioactive Waste at Yucca Mountain, Nye County, Nevada” (DOE Office of Civilian Radioactive Waste Management (“OCRWM”), July 1999) (DEIS at 12-3); (4) ownership and responsibility for the SNF would remain with the originating utilities until the SNF is transferred to DOE, *Id.* at 1-5; (5) PFS planned to use the HI-STORM cask system with a dual-purpose canister, *Id.* at 1-5, 2-23; (6) PFS expected its dual-purpose canister system would be compatible with DOE’s plans for placement in a permanent repository, *Id.* at 2-23; (7) fuel would be shipped from the PFS site to the repository when it becomes available, using NRC-certified shipping casks, *Id.* at 2-15, 2-23, 8-3; and (8) consistent with the NRC’s Waste Confidence Decision, a repository is expected to be available by the end of 2025, but “in any case, the proposed lease would require removal of the SNF” within 90 days after the lease expires, *Id.* at xxxii, and 2-28.

Following issuance of the DEIS, the State filed four contentions challenging certain aspects of the DEIS transportation impacts analysis.<sup>7</sup> The State did not file any contentions challenging the DEIS discussion of matters pertaining to a DOE repository or the acceptance of SNF from the PFS facility at the repository.

In December 2001, the Staff and cooperating federal agencies issued their Final Environmental Impact Statement (“FEIS”) for the proposed PFS facility.<sup>8</sup> The FEIS presented the agencies’ final evaluation of the environmental impacts of their proposed licensing actions, as well as their responses to the numerous comments which had been received from members of the public and other organizations (including extensive comments from the State of Utah) concerning the DEIS. In particular, the FEIS explicitly addressed numerous comments filed by the State,<sup>9</sup> which raised issues similar or related to the issues raised in Contention Utah UU.<sup>10</sup>

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<sup>7</sup> On August 2, 2000, the State filed a “Request for Admission of Late-Filed Contentions Utah LL Through OO (Relating to the DEIS’s Analysis of Spent Fuel Transportation Risks),” challenging various aspects of the DEIS transportation risk analysis. That request was denied on November 1, 2000, for failing to meet the late-filing standards set forth in 10 C.F.R. § 2.714(a). *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-00-28, 52 NRC 226, 233-39 (2000), *aff’d*, CLI-04-4, 59 NRC 31, 45-47 (2004).

<sup>8</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 in Tooele County, Utah” (December 2001) (“FEIS”).

<sup>9</sup> The State of Utah, Office of the Governor, is identified in the FEIS as Commenter 0198; the Utah Attorney General’s Office is identified as Commenter 0261; the Utah Department of Environmental Quality is identified as Commenter 0238; other Utah Departments are identified as Commenters 0051, 0066, and 0099. FEIS at H-8, H-9.

<sup>10</sup> For example, the FEIS addressed comments by the State which asserted (1) that the Yucca Mountain or other repository might not be built or available to take SNF from the PFS site, FEIS Comments, at G-27, G-78, G-420; (2) that the priority ranking queue for shipment of SNF from the PFS Facility to the DOE repository is subject to the provisions in the “Standard Contract” between DOE and reactor licensees, which had not been adequately considered in the DEIS, *Id.* at G-420, *citing* 10 C.F.R. § 961.11; (3) that the PFS cask design might not be compatible with DOE requirements for disposal at the Yucca Mountain repository, *Id.* at G-37, G-76; (4) that a hot cell was needed at the PFS site to assure that SNF can be transported to the repository in casks that  
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On February 11, 2002, the State filed a single contention, late-filed Contention Utah SS, which challenged certain aspects of the FEIS revised cost-benefit analysis.<sup>11</sup> The State did not file any other contentions challenging either the FEIS or the FEIS response to comments concerning the DOE repository or the potential acceptance of SNF from the PFS facility at the repository.<sup>12</sup>

On November 12, 2004 – some three years following issuance of the FEIS – the State filed its request for admission of late-filed Contention Utah UU, alleging that DOE will not accept SNF in welded canisters from the PFS site, based on certain reported oral remarks by Gary Lanthrum, a DOE waste transportation official. On November 29, 2004, the State filed a Supplement to its Request, addressing two questions raised in the Board’s Order of November 16, 2004: (1) whether and to what extent the standards for reopening apply to its Request, and (2) if admitted, whether the merits of the contention should be addressed in the first instance by the Staff or the Board.

On December 6, 2004, the Applicant filed its response to the State’s Request and Supplement, in which it, *inter alia*, provided a detailed explanation of DOE’s obligations under the

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<sup>10</sup>(...continued)

are compatible with DOE requirements, *Id.* at G-48, G-76; (5) that PFS had not provided sufficient data about the design of the storage casks to assure compatibility with DOE’s repository requirements, *Id.* at G-74; (6) that the proposed DOE repository must be considered a “connected action,” *Id.* at G-166; (7) that SNF might have to be shipped back to the originating reactors or to alternative storage sites, *Id.* at G-316, G-330, G-333, G-335, G-360; (8) that shipment back to the originating reactors might not be possible, *Id.* at G-78, G-360; and (9) that SNF might not be shipped off the PFS site, *Id.* at G-73, G-74.

<sup>11</sup> See “State of Utah’s Request for Admission of Late-Filed Contention Utah SS,” dated February 11, 2002.

<sup>12</sup> The State also filed before the Commission a “Suggestion of Lack of Jurisdiction” and a “Petition to Institute Rulemaking and to Stay Licensing Proceeding,” based on its interpretation of the Nuclear Waste Policy Act of 1982 (“NWPA”), as amended. The Commission denied both of these requests. See *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-02-29, 56 NRC 390 (2002); *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-02-11, 55 NRC 260 (2002). The Commission’s decision in CLI-02-29 contains a thorough discussion of DOE’s authority and responsibilities under the NWPA, and the NRC’s legal authority to license an away-from-reactor ISFSI.

Standard Contract to accept all commercial SNF; the contract provisions which would apply to the shipment of SNF in welded canisters to the DOE repository; and the lack of any substantial factual or legal basis for the State's contention. PFS opposed the admission of the contention under 10 C.F.R. § 2.714 or the reopening of the record under 10 C.F.R. § 2.734, and provided its view as to the manner in which the contention should be addressed, if admitted.<sup>13</sup>

On December 7, 2004, the Licensing Board issued its second Order,<sup>14</sup> in which it directed the State and Staff to address the Applicant's factual presentation challenging the basis for Contention Utah UU; directed the Staff to indicate whether "any DOE documents were previously introduced into our proceeding, or otherwise available to the Applicant or the Staff, to indicate that PFS-stored fuel would or would not be acceptable at Yucca Mountain," *Id.* at 1 n.1; and directed the State to address the Applicant's arguments that the FEIS is adequate. *Id.* at 2.

## DISCUSSION

### I. Contention Utah UU Fails to Satisfy the Standards Governing the Admission of Contentions.

#### A. Legal Standards

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 NRC case law. Pursuant to 10 C.F.R. § 2.714(b)(2), the following information must be provided in support of a contention:

- (i) A brief explanation of the bases of the contention.
- (ii) A concise statement of the alleged facts or expert opinion which support the contention . . . 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.

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<sup>13</sup> "Applicant's Response to State of Utah's Request for Admission of Late-Filed Contention Utah UU," dated December 6, 2004 ("Applicant's Response").

<sup>14</sup> "Order Regarding 'Contention Utah UU,'" dated December 7, 2004).

(iii) Sufficient information . . . to show that a genuine dispute exists with the applicant on a material issue of law or fact. . . .

*See, e.g., Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 333-34 (1999); *Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-96-7, 43 NRC 235, 248 (1996). The failure of a contention to comply with any one of these requirements is grounds for dismissing the contention. *See* 10 C.F.R. § 2.714(d)(2)(i); *Arizona Public Service Co.* (Palo Verde Nuclear Generating Station, Units 1, 2 and 3), CLI-91-12, 34 NRC 149, 155-56 (1991); *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-98-7, 47 NRC 142, 178-181 (1998).<sup>15</sup>

With respect to factual information or expert opinion alleged to provide the basis for a contention, the Licensing Board is not to accept uncritically the assertion that a document or other factual information or an expert opinion supplies the basis for a contention. Rather, the Board should review the information provided to ensure that it indeed supplies a basis for the contention. *See Vermont Yankee Nuclear Power Corp.* (Vermont Yankee Nuclear Power Station), ALAB-919, 30 NRC 29, 48 (1989); *vacated in part on other grounds and remanded*, CLI-90-4, 31 NRC 333 (1990); *see also Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), LBP-96-2, 43 NRC 61, 90 (1996) (a document submitted as the basis for a contention is subject to scrutiny both for what it does and does not show). Contentions that are not supported by some alleged fact or facts should not be admitted, nor should the full adjudicatory hearing process be triggered by contentions that lack a factual and legal foundation. *Oconee*, CLI-99-11, 49 NRC at 334-35, *citing Final Rule*, "Rules of Practice for Domestic Licensing Proceedings -- Procedural Changes in the Hearing Process," 54 Fed. Reg. 33,168, 33,172 (1989). Finally, a contention must show that a genuine dispute exists with the Applicant on a material issue of law or fact. 10 C.F.R. § 2.714(b)(2)(iii);

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<sup>15</sup> Further, pursuant to 10 C.F.R. § 2.714(d)(2), a contention must be rejected if the contention and supporting material fail to satisfy the requirements of § 2.714(b)(2), or the contention, if proven, would be of no consequence because it would not entitle petitioner to relief.

*Oconee*, CLI-99-11, 49 NRC at 333-34. “The intervenor must “be able to identify some facts at the time it proposes a contention to indicate that a dispute exists between it and the applicant on a material issue.” *Id.* at 335, *citing* 54 Fed. Reg. at 33,171.<sup>16</sup>

B. Application of These Standards to Contention Utah UU.

In late-filed Contention Utah UU, the State asserts as follows:

**Contention Utah UU – Ramifications of DOE’s Refusal to Accept Fuel in Welded Canisters from the PFS Site**

PFS’s license application and NRC’s final environmental impact statement fail to describe or analyze the effect of DOE’s refusal to collect fuel in welded canisters from the PFS site and the concomitant potential to create a dysfunctional national waste management system, and added risks and costs from multiple and unnecessary fuel shipments back and forth across the country. In addition, absent a condition that fuel will only be accepted at PFS’s Skull Valley site if it can be shipped directly from PFS to a permanent repository, PFS must provide reasonable assurance that each and every fuel owner will accept the fuel back for repackaging, and PFS or the fuel owner will place, up-front in an escrow account, sufficient funds to cover the cost of fuel shipment back to the reactor or other facility for repackaging.

State Request at 2. In support of this contention, the State cites recent oral statements purportedly made by Mr. Gary Lanthrum, Director of the Office of National Transportation in OCRWM (DOE), to a Salt Lake Tribune reporter and in a conversation with Utah officials, in which Mr. Lanthrum allegedly stated that “DOE was only obligated to accept bare fuel or fuel packaged in bolted canisters.” *Id.* at 1. The State attaches the Declaration of Dr. Dianne R. Nielsen, Executive Director of the Utah Department of Environmental Quality, who states that she heard Mr. Lanthrum make the following statements:

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<sup>16</sup> The purpose for the “basis” requirements in 10 C.F.R. § 2.714(b)(2) is (a) to assure that the contention raises a matter appropriate for adjudication in a particular proceeding; (b) to establish a sufficient foundation for the contention to warrant further inquiry into the assertion; and (c) to put other parties sufficiently on notice of the issues so that they will know generally what they will have to defend against or oppose. Contentions that lack a factual and legal foundation should not be admitted. *Oconee*, CLI-99-11, 49 NRC at 333-34; *Yankee*, CLI-96-7, 43 NRC at 248.

4. . . . Mr. Lanthrum stated that under the DOE standard contract with the nuclear industry, DOE was only required to accept bare fuel. As such, said Mr. Lanthrum, DOE would not accept spent nuclear fuel in welded canisters and DOE has no obligation to pick up fuel from the Private Fuel Storage (PFS) Facility. . . .

5. Also as part of the conversation with Mr. Lanthrum, he confirmed his comments of October 13, 2004, to Salt Lake Tribune reporter, Patty Henetz, that DOE had no obligation to accept spent nuclear fuel in welded canisters, the welded canister does not meet DOE standard contract requirements, and DOE had no obligation to pick up fuel from the PFS facility.<sup>17</sup>

Nielsen Declaration at 1-2. The State describes Mr. Lanthrum's oral remarks as a DOE "announcement," Request at 1, 3; on the basis of those comments, it claims that "Now, . . . no fuel can be shipped directly from PFS to DOE," and "it is now known that fuel will not be shipped directly from PFS to Yucca Mountain," *Id.* at 8, 10. The State then evaluates the impact of this alleged new development on various aspects of the PFS application and the FEIS for the facility. *Id.* at 2-9.

Significantly, these alleged oral remarks constitute the sole new factual basis for late-filed Contention Utah UU; in all other respects, the State refers to matters which have been known or addressed years ago.<sup>18</sup> Indeed, most if not all of the concerns raised by the State were the subject of Contention Utah D (discussed *infra*) and numerous other contentions which the State filed

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<sup>17</sup> "Declaration of Dianne R. Nielsen, Ph.D. in Support of Late Filed Contention Utah UU," at 1-2 (Exh. 1 to State Request); emphasis added.

<sup>18</sup> In this regard, the State's Request raises concerns regarding the Applicant's proposed use of a multi-purpose canister; the potential lack of MPC compatibility with DOE requirements; the environmental impacts of transporting SNF to and from the PFS Facility; the lack of a hot cell at the PFS Facility; potential difficulties in opening the welded canister; the "assumption" that SNF would be shipped from PFS to a DOE repository; the adequacy of the FEIS cost-benefit analysis; NRC's "preempting" of DOE's statutory authority to set standards for Yucca Mountain shipments, or disrupting DOE's waste management system under the NWPA; PFS's financial assurance; and the need for originating reactors to provide financial assurance for shipment of fuel back to the reactor. See Request at 2-9. As discussed below, all of these matters are addressed long ago in this extended licensing proceeding.

previously in this proceeding,<sup>19</sup> and/or were the subject of comments submitted by the State concerning the adequacy of the DEIS, all of which were addressed in the FEIS without subsequent challenge by the State.<sup>20</sup> Nowhere, however, does the State point to any document or other evidence which would indicate that Mr. Lanthrum's reported remarks are correct,<sup>21</sup> or that DOE has in fact now decided not to accept SNF in welded canisters at the Yucca Mountain repository.

Moreover, Mr. Lanthrum's alleged comments do not appear to present any new information, but rather appear to state his understanding or interpretation of DOE's obligations under DOE's Standard Contract with the nuclear industry – a document which is published in 10 C.F.R. Part 961. Mr. Lanthrum's remarks, even if correctly reported by the State,<sup>22</sup> can hardly be said to constitute

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<sup>19</sup> A review of the State's Initial Contentions, filed on November 24, 1997, reveals that the following concerns raised in Contention Utah UU have been raised previously: (1) the impacts of SNF transportation to and from the proposed PFS Facility, see Contentions Utah A, B, C, J, V, and Y (Initial Contentions at 6, 10-15, 19-20, 71, 144-61, and 167-68); (2) the availability of the proposed Yucca Mountain repository to receive spent fuel from the PFS site, see Contentions Utah A, D, S, and Y (Initial Contentions at 6, 22-26, 125, and 167-68); (3) the need to treat DOE's high-level waste program and the proposed Yucca Mountain repository as connected actions under NEPA, and the potential that NRC action on the PFS proposal could compromise DOE's repository planning, see Contention Utah Y (Initial Contentions at 167-68); (4) the potential that spent fuel may remain at the PFS site indefinitely, see Contentions Utah A, S and Y (Initial Contentions at 6, 124-25, and 168); (5) PFS will need to transport the spent fuel back to the originating reactor licensees, see Contentions Utah B and V (Initial Contentions at 14, 144 and 150); (6) the need for reactor licensees to provide assurance that they will accept fuel that is returned to them by PFS, see Contention Utah E (Initial Contentions at 32-33 and 37-38); (7) the adequacy of PFS's financial assurance if it can not ship SNF to the Yucca Mountain repository, see, e.g., Contentions Utah E and S (Initial Contentions at 32-33, 37-38, and 125); and (8) the adequacy of the EIS cost benefit analysis, see Contentions Utah S, U and CC (Initial Contentions at 123-30, 142 and 178-79).

<sup>20</sup> See nn. 6 and 10, *supra*.

<sup>21</sup> The State provided portions of a transcript of an October 14, 2004 meeting of the U.S. Nuclear Waste Transportation Technical Review Board, at which Mr. Lanthrum was reported to have made his comments, but the transcript pages filed by the State do not include any statements by Mr. Lanthrum. See State Request, Exh. 9.

<sup>22</sup> Dr. Nielsen's Declaration indicates that Mr. Earl Easton of the NRC's Spent Fuel Project Office was present during Mr. Lanthrum's conversation with her and Utah Governor Olene S. Walker. Nielsen Declaration, ¶ 3. Upon inquiry, Mr. Easton has confirmed to Staff Counsel that he was present during that conversation and, based on his recollection, the comments attributed  
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an authoritative legal interpretation of the terms of a written contract that has been adopted and published in DOE regulations, nor do those remarks provide the type of concrete evidence that is required to support the admission of a contention under 10 C.F.R. § 2.714. Indeed, the State, itself, calls Mr. Lanthrum's reported remarks into question, noting that even today, "DOE has not formally developed its plans for waste acceptance at the permanent repository." State Request at 12; emphasis added. Thus, Mr. Lanthrum's reported oral comments have not been shown to be have the legal significance alleged by the State.<sup>23</sup>

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<sup>22</sup>(...continued)

to Mr. Lanthrum in Paragraph 4 of the Nielsen Declaration appear to be correct. He further indicated, however, that Dr. Nielsen's description of Mr. Easton's statements in Paragraph 4 of the Declaration do not correctly reflect his comments; that he does not recall hearing the statements attributed to Mr. Lanthrum in Paragraph 5 of the Declaration; and that he was not present during Mr. Lanthrum's interview with the Salt Lake Tribune reporter and cannot comment on the accuracy of that report. See Easton Affidavit attached hereto.

<sup>23</sup> The Staff notes that NRC and DOE management officials hold public, quarterly meetings in which DOE's high-level waste repository planning is discussed. The most recent quarterly meeting was held on November 22, 2004, which Mr. Easton, Mr. Lanthrum and other NRC and DOE officials attended. See Exhibit 1, attached hereto. Mr. Lanthrum provided a discussion on DOE's acquisition plans for spent fuel transportation casks that could be used for shipments to Yucca Mountain. In this regard, Mr. Lanthrum stated that eight existing cask designs already certified by the NRC could accommodate up to sixty percent of the spent fuel available for shipment in 2010. See *id.* at 5-6. Of the eight NRC-certified cask designs referenced by Mr. Lanthrum, two are small capacity truck-based casks (e.g., 1-4 PWR fuel assemblies), and six are large capacity rail casks (e.g., for 24-32 PWR assemblies); of these six rail casks, five are dual-purpose designs (including the HI-STAR 100 cask) that use welded canisters. The Staff asked Mr. Lanthrum about the use of transportation casks with welded inner containers, such as those that may be used by the Private Fuel Storage; he replied that their use was a waste acceptance issue and a matter of contractual arrangements with individual utilities. He also stated that there were no regulatory or operational impediments that would prohibit the use of such casks for shipments to Yucca Mountain. These facts are consistent with the Staff's understanding that Mr. Lanthrum's comments in Utah were based on an interpretation of the DOE Standard Contract, and do not constitute a decision by DOE not to accept SNF in welded MPCs. To the best of our knowledge, DOE's current planning appears to contemplate the acceptance of SNF in welded canisters, as indicated in DOE's "Civilian Radioactive Waste Management System Requirements Document" (Rev. 06, Sept. 2004) (Attachment 1 to Applicant's Response), at 9, ¶ F. See Easton Affidavit attached hereto.

Further, the Commission – which is certainly aware of DOE’s obligation to accept SNF owned by U.S. nuclear utilities<sup>24</sup> – has promulgated and continues to implement a comprehensive set of regulations governing the storage of SNF in an ISFSI under 10 C.F.R. Part 72. In a 1990 rulemaking to amend those regulations, the Commission observed, “specific design criteria for spent fuel disposal may not be available until a repository design is approved”; further, “[c]ask designers should remain aware that spent fuel ultimately will be received by DOE and that cask designs should adopt DOE criteria as they become available.”<sup>25</sup> As indicated above, the State’s Request, itself, indicates that nothing has changed, notwithstanding Mr. Lanthrum’s reported comments: DOE still “has not formally developed its plans for waste acceptance at the permanent repository.” State Request at 12.

The Applicant’s Response provides a detailed description of a September 2004 DOE Requirements Document and the February 2004 Final EIS for the proposed Yucca Mountain repository, which indicate that the repository is expected to accommodate both bare and canistered SNF, including SNF in multi-purpose canisters. Applicant’s Response at 7-9. Further, the Applicant describes DOE’s obligation under the NWPA and DOE’s Standard Contract to accept all SNF from U.S. nuclear utilities, even if it is contained in canisters (subject to possible schedule adjustments); and it provides copies of correspondence from DOE and NRC officials supporting its view that DOE will accept SNF contained in NRC-certified multi-purpose canisters. *Id.* at 9-14. The Applicant concludes that Mr. Lanthrum’s reported remarks fail to provide a sufficient factual

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<sup>24</sup> See, e.g., *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-02-29, 56 NRC 390, 410 (2002) (referring to DOE’s contractual obligation to take SNF from nuclear utilities, and the utilities’ lawsuits over DOE’s breach of contract); Statement of Consideration, “Interim Storage for Greater Than Class C Waste,” 66 Fed. Reg. 51,823, 51,828 (Oct. 11, 2001) (commenting on DOE’s obligation to accept SNF under the Standard Contract).

<sup>25</sup> Statement of Consideration, “Storage of Spent Fuel in NRC-Approved Storage Casks at Power Reactor Sites,” 55 Fed. Reg. 29,181, 29,187 (1990).

or legal basis to support the admission of Contention Utah UU in light of this documentation. *Id.* at 7, 9, 14.

The Staff agrees with the Applicant's conclusion that Mr. Lanthrum's reported remarks do not provide a sufficient basis to warrant the admission of this contention.<sup>26</sup> Contrary to the requirements of 10 C.F.R. § 2.714(b), the State's reliance on these reported remarks, does not provide any substantial basis to show that a genuine dispute exists with the Applicant on a material issue of law or fact.<sup>27</sup>

II. The State Has Failed to Satisfy the Standards for Reopening the Record.

A. Legal Standards Applicable to Reopening the Record

The standards for reopening are set forth in 10 C.F.R. § 2.734. For a motion to reopen to be granted:

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<sup>26</sup> The Staff shares the Applicant's understanding that DOE is obliged to accept all SNF owned by U.S. nuclear utilities. This view is supported by a letter from Lake H. Barrett (former Acting Director of OCRWM, DOE), to E. William Brach (Director of the NRC Spent Fuel Project Office ("SFPO")), dated April 9, 2001, concerning the proposed use of welded NAC-UMS multi-purpose canister storage casks at the Maine Yankee site. Therein, Mr. Barrett stated, "OCRWM's long-standing policy has been that it will accept any NRC-certified transportation systems when we begin shipping to a repository." See Exhibit 2, attached hereto (emphasis added).

<sup>27</sup> In its Order of December 7, 2004, the Licensing Board directed the Staff to address, in the instant Response, "whether any DOE documents were previously introduced into our proceeding, or otherwise available to the Applicant or the Staff, to indicate that PFS-stored fuel would or would not be acceptable at Yucca Mountain." *Id.* at 1 n.1. In response, the Staff notes that it is unable to say what documents were available to the Applicant, as that information is unknown to the Staff. Staff Counsel has conducted a limited review of the record, and determined that several DOE documents, cited herein, were referred to by the parties with respect to Intervenor's contentions and should have been available to all parties. Further, the FEIS for the PFS Facility addressed DOE's Draft EIS for the Yucca Mountain repository, as well as DOE's annual acceptance priority ranking – which DOE is required to provide under 10 C.F.R. § 961.11 (Standard Contract, Art. IV.B.5). Finally, Staff Counsel canvassed various Staff members and managers who were involved in preparation of the December 2001 FEIS; those person were unable to recall at this time which DOE documents were available to the Staff other than the documents cited in the FEIS. Notwithstanding the difficulty inherent in trying to recall or locate documents which may have been contained in the agency's files several years ago, the Staff is satisfied that the FEIS accurately reflects the facts known to the Staff at that time, as to whether "PFS-stored fuel would or would not be acceptable at Yucca Mountain."

(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.

See *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-04-09, 59 NRC 120, 123 (2004).<sup>28</sup>

B. The State Has Not Satisfied the Standards for Reopening.

The State argues that its Request is timely, in that it was filed within 30 days after the State learned of Mr. Lanthrum's remarks. Supplement at 2-3. However, the reports of Mr. Lanthrum's remarks indicate that they were based on an interpretation or understanding of the DOE Standard Contract. Nielsen Declaration at ¶ 4. The Standard Contract, however, was published in 10 C.F.R. Part 961 in 1983, and the State could have formulated a contention based on an interpretation of the Standard Contract long ago. Thus, despite the timing of Mr. Lanthrum's reported remarks, the contention is untimely.

Moreover, in 1997 the State filed a contention substantially similar to Contention Utah UU, in which it alleged that DOE may not accept SNF from the Applicant at the Yucca Mountain repository due to the potential incompatibility of PFS's SNF canister design with DOE requirements. Thus, in Contention Utah D, the State asserted:

**D. Facilitation of Decommissioning**

The proposed ISFSI is not adequately designed to facilitate decommissioning, because PFS has not provided sufficient information about the design of its storage casks to assure

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<sup>28</sup> In response to the Licensing Board's Order of November 16, 2004, at 2-3, the Staff notes that these reopening standards apply to contentions which were the subject of evidentiary hearings, as well as to contentions which were never filed previously or were resolved without evidentiary hearings. See, e.g., *PFS*, CLI-04-09, 59 NRC at 126 and n.33 (contention resolved on summary disposition); *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), CLI-90-06, 31 NRC 483, 487-89 (1990) (new contention); *Id.*, ALAB-936, 32 NRC 75, 79, 82 (1990) (same).

compatibility with DOE repository specifications. Moreover, in the reasonably likely event that PFS's casks do not conform to DOE specification, PFS fails to provide any measures for repackaging of spent fuel for ultimate disposal in a high level radioactive waste repository. Moreover, PFS provides no measures for verification of whether the condition of spent fuel meets disposal criteria that DOE may impose.

Initial Contentions at 22; emphasis added. The basis statements provided by the State in support of that contention resemble many of the assertions offered by the State in support of late-filed Contention Utah UU. Thus, the State alleged “potential incompatibility between the design of PFS storage canisters and the DOE’s acceptance criteria for the packaging of spent fuel in a high level nuclear waste repository. These criteria are currently under development.” *Id.* at 23. The State further stated, *inter alia*, that “DOE has not yet issued its design criteria,” but “currently available information shows a significant potential for disparities between the waste acceptance criteria and the specifications for PFS’s storage canisters,” *Id.* at 24;<sup>29</sup> “DOE may also require that irradiated fuel be transferred to the proposed Yucca Mountain repository in DOE casks, which may not be compatible with the Holtec . . . canister,” *Id.*; “[i]n order for PFS to transfer fuel to casks that are compatible with DOE requirements, a hot cell is needed,” *Id.* at 25; it is unrealistic to expect that transfer operations will take place at the originating reactor or at the Yucca Mountain repository, because the repository’s opening may be delayed, “[a] queue has been established for the first ten years of repository operation,” and a fuel pool may not be available when SNF from the PFS Facility arrives, *Id.*<sup>30</sup> and it is unreasonable to expect the Yucca Mountain facility will be able to transfer fuel from “the many cask designs that are now and will be in use when it is opened. It is

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<sup>29</sup> In support of this assertion, the State cited a document published by the DOE Office of Civilian Radioactive Waste Management (“OCRWM”), entitled “Multi-Purpose Canister (MPC) Implementation Program, Conceptual Design Phase Report, Volume I - MPC Conceptual Design Summary Report” (Final Draft, Sept. 30, 1993), attached as Exh. 4 to the State’s Initial Contentions.

<sup>30</sup> In support of this assertion, the State cited a statement contained in a DOE document, DOE/RW-0457, “Department of Energy Annual Capacity Report (OCRWM, March 1995), attached as Exh. 5 to the State’s Initial Contentions.

far more reasonable for the DOE to require all potential users of the repository to properly package their waste before shipping it to the facility,” *Id.* at 26.

In response to Contention Utah D, the Applicant stated (as it now states in response to late-filed Contention Utah UU) that it had selected its canister-based design to be compatible with DOE design criteria, to the extent that these were available, and that this concept was consistent with published statements by DOE.<sup>31</sup> The Applicant further cited NRC determinations that “specific criteria for designing spent fuel casks for compatibility may not be available until the design for a high-level waste repository is complete,” and that cask designs should take into account the transportation and ultimate disposal of SNF by DOE “to the extent practicable.”<sup>32</sup> The Applicant noted that DOE is required to accept spent fuel as long as the SNF meets the acceptance criteria specified in the Standard Contract in 10 C.F.R. Part 961 and related regulations;<sup>33</sup> and that DOE’s 1993 MPC Conceptual Design Report indicated that “if the MPC design turns out to be incompatible with the desired thermal loading strategy, then the SNF . . . can be repackaged at the repository.”<sup>34</sup>

The Licensing Board rejected Contention Utah D, stating as follows:

As this contention and its supporting basis allege incompatibility with DOE repository specifications, it is inadmissible because it seeks to challenge the Commission's regulatory program, regulations, or

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<sup>31</sup> See “Applicant’s Answer to Petitioners’ Contentions,” dated December 24, 1997 (“Applicant’s Answer”), at 61-62, *citing* DOE/RW-0445, “Multi-Purpose Canister System Evaluation (OCRWM, Sept. 1994), and the OCRWM 1993 MPC Conceptual Design Report which the State had cited.

<sup>32</sup> Applicant’s Answer at 62, *citing* Statement of Consideration, “Storage of Spent Fuel in NRC-Approved Storage Casks at Power Reactor Sites,” 55 Fed. Reg. 29,181, 29,187 (1990). The Staff’s response in opposition to Contention Utah D similarly cited this Statement of Consideration, noting the Commission’s statements that “specific design criteria for spent fuel disposal may not be available until a repository design is approved,” and that “[c]ask designers should remain aware that spent fuel ultimately will be received by DOE and that cask designs should adopt DOE criteria as they become available. ”NRC Staff’s Response to Contentions Filed by (1) the State of Utah, [*et al.*],” dated December 24, 1997, at 25.

<sup>33</sup> Applicant’s Answer at 63-64, 65-66;

<sup>34</sup> Applicant’s Answer at 66, *citing* DOE’s MPC Conceptual Design Summary Report at I.6-4.

rulemaking-associated generic determinations under which DOE cask criteria, admittedly incomplete at present, need only be addressed as they become available, and has not demonstrated any specific inadequacy in the application's discussion of any existing DOE specifications that creates a genuine dispute. See section II.B.1.a.i., ii., vi. above. As this contention and its supporting basis assert the need for a facility "hot cell" for spent fuel canister inspection to ensure compatibility with future DOE spent fuel acceptance limits, avoid storage removal operational safety problems, or provide a fuel repackaging capability for fuel transfer to casks compatible with later DOE requirements or for transfer of degraded fuel prior to shipment to a HLW repository, the contention also is inadmissible as impermissibly challenging the agency's regulations or rulemaking-associated generic determinations and lacking the necessary factual information or expert opinion support. See section II.B.1.a.i., ii., v

LBP-98-7, 47 NRC at 186-87; emphasis added.<sup>35</sup>

The State's request for admission of Contention Utah UU, in effect, seeks to set aside the Licensing Board's rulings rejecting Contention Utah D and various other contentions (cited herein), which raised issues similar to those raised in this new, late-filed contention. Significantly, the State's request for admission of Contention Utah UU re-submits many of the bases it had submitted for Contention Utah D (and other previously rejected Utah contentions), to which the State adds only a single new fact – Mr. Lanthrum's reported comments interpreting the DOE Standard Contract. This additional basis statement fails to "demonstrate that a materially different result would be or would have been likely had the newly proffered evidence been considered initially." 10 C.F.R. § 2.734(a)(3). Accordingly, the State has failed to show that the record should now be reopened - seven years after the State filed Contention Utah D – to consider this matter.

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<sup>35</sup> No appeal was filed from this determination. See "State of Utah's Petition for Review of Non-Hearing Issues in the Private Fuel Storage, LLC Licensing Proceeding," filed December 4, 2003; *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-03-16, 58 NRC 360, 362 (2003). The State did seek review of the Board's rejection of two other contentions cited herein -- Contentions Utah J (Inspection and Maintenance of Components [Hot Cell]) and Utah Y (Connected Actions). The Board's ruling on those contentions was affirmed by the Commission. See *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-04-04, 59 NRC 31, 39, 41-42 (2004).

Further, the Staff submits that the FEIS for the PFS Facility has adequately addressed this matter. Contrary to the State's suggestion (Request at 1, 3), the FEIS did not "assume" that SNF would be shipped from the PFS site to the repository. Rather, the FEIS indicated that DOE had not yet finalized its plans for a permanent repository; that PFS "expected" its canister-based system would be compatible with DOE's repository plans; and that the SNF would be shipped to a repository "when a DOE permanent repository becomes available." FEIS at 2-26. However, the FEIS indicated that, under the PFS service agreements, "if the PFS license is terminated before a permanent geological repository becomes available, the companies storing SNF at PFSF would continue to retain responsibility for the fuel and would be required to remove it from the proposed PFSF site." *Id.* Further, the FEIS explicitly stated that "the service agreement requirement to remove the SNF from the proposed PFSF is not dependent upon the availability of a permanent geological repository." *Id.* at 1-6.<sup>36</sup>

In sum, the FEIS did not assume that SNF would be shipped from the PFS site to the Yucca Mountain repository. The State's reliance on Mr. Lanthrum's reported comments does not provide any substantial new basis to indicate that the FEIS assessment of this issue was incorrect or that

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<sup>36</sup> In assessing the impacts of SNF transportation to and from the PFS Facility, the FEIS transportation impact analysis thus considered representative routes for SNF shipments to and from the PFS Facility. FEIS at 5-50, 5-53 - 5-54, 5-55. In doing so, the FEIS maximized the environmental impacts of such transportation, using the greatest possible route length and population density for SNF shipments to the site (assuming that all such shipments originate at the Maine Yankee nuclear power plant and proceed through a densely populated northeast rail corridor). *Id.* at 5-43, 5-46, 5-50, 5-54 - 5-55. While the FEIS indicated that the SNF "would eventually be shipped to a permanent repository," *Id.* at 5-1, it did not assume that the repository would be located at Yucca Mountain, or that a repository would in fact be the destination for the SNF stored at PFS; rather it considered the impacts of SNF shipment from the PFS site to the western Utah border "for analytical purposes" only, and did "not dictate any particular result for future actions taken with respect to other nuclear waste management facilities (including a repository or other storage facility)." *Id.* at 5-54; *cf. id.* at 5-35, 5-46.

a genuine dispute of material fact exists with respect to this issue. Accordingly, his reported statements fail to provide a sufficient basis to reopen the record.<sup>37</sup>

III. Contention Utah UU Fails to Satisfy the Standards Governing Late-Filed Contentions.

A. Legal Standards for Late-Filed Contentions.

The criteria to be considered when determining the admissibility of a late-filed contention are set forth in 10 C.F.R. § 2.714(a)(1)(i)-(v), as follows:

- (i) Good cause, if any, for failure to file on time.
- (ii) The availability of other means whereby the petitioner's interest will be protected.
- (iii) The extent to which the petitioner's participation may reasonably be expected to assist in developing a sound record.
- (iv) The extent to which the petitioner's interest will be represented by existing parties.
- (v) The extent to which the petitioner's participation will broaden the issues or delay the proceeding.

In considering these factors, the Licensing Board has held that:

To justify a presiding officer's consideration of the "merits" of a late-filed contention, i.e., whether the contention fulfills the admissibility standards . . . a party first must demonstrate that a balancing of the five factors . . . supports accepting the petition. And in that regard, it is well established that (1) the first and foremost factor is whether good cause exists that will excuse the late-filing of the contention; and (2) lacking good cause, a balancing of the other four factors -- in which factors three (assistance in developing a sound record) and five (broadening the issues/delaying the proceeding) are given more weight than factors two (availability of other means to protect the petitioner's interests) and four (extent of representation of those interests by other parties) -- must provide a compelling showing in favor of admission.

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<sup>37</sup> The Licensing Board has inquired whether, if the contention were to be admitted, it is more appropriate for it to be addressed by the Staff or by the Licensing Board in the first instance. Order of November 16, 2004, at 2. In this regard, the Staff submits that if the contention is admitted, it should be resolved by summary disposition, and there is no need for the FEIS to be supplemented by the Staff and cooperating Federal agencies.

*Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-01-20, 53 NRC 565, 570 (2001), citing *Commonwealth Edison Co.* (Braidwood Nuclear Power Station, Units 1 and 2), CLI-86-8, 23 NRC 241, 244-45 (1986).<sup>38</sup>

B. The State Fails to Satisfy the Late-Filing Criteria.

As noted above with respect to the timeliness of a motion to reopen, the State argues that Mr. Lanthrum's remarks were made only recently. The State asserts that "[p]rior to this time, the State had no knowledge of DOE's non-acceptance of fuel from the PFS site." Request at 11. As further noted above, however, the Standard Contract which underlies his remarks was published some 20 years ago. The State could have filed this contention based on its own interpretation of that Contract, or it could have sought an authoritative DOE interpretation of the Standard Contract, long ago, when it filed Contention Utah D.<sup>39</sup> The State's reliance on the recency of Mr. Lanthrum's remarks fails to provide good cause for its late filing. See *Catawba*, CLI-83-19, 17 NRC at 1045; *Seabrook*, ALAB-737, 18 NRC at 172 n.4; *PFS*, LBP-98-29, 48 NRC at 292.

In addition, the State has not made a compelling showing that consideration of the other four factors set forth in 10 C.F.R. § 2.714(a)(1) support the late-filing of this contention, as is

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<sup>38</sup> With respect to the third factor (the potential contribution to the development of a sound record), petitioners are to provide a "real clue about what they would say to support the contention beyond the minimal information they provide for admitting the contention." *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation) LBP-98-7, 47 NRC 142, 208-09 (1998).

<sup>39</sup> In this regard, it has been held that where a contention is based upon the publication of a licensing-related document, the institutional unavailability of the document does not establish good cause for filing a contention late under 10 C.F.R. § 2.714(a)(1)(i) if information was publicly available early enough to provide the basis for the timely filing of that contention. *Duke Power Co.* (Catawba Nuclear Station, Units 1 and 2), CLI-83-19, 17 NRC 1041, 1045 (1983). Thus, where a contention is purportedly based on the existence of a document recently made publically available, an important consideration in assessing good cause for lateness is the extent to which the contention could have been submitted prior to the document's availability. *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), ALAB-737, 18 NRC 168, 172 n.4 (1983); *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-98-29, 48 NRC 286, 292 (1998).

required by Commission practice. See *Mississippi Power & Light Co.* (Grand Gulf Nuclear Station, Units 1 and 2), ALAB-704, 16 NRC 1725, 1730 (1982).

Regarding factors two and four, the State's interest is not represented by existing parties with respect to the issues raised in late-filed Contention Utah UU, and other means are not available whereby the State's interest will be protected regarding such issues. While factors two and four weigh in the State's favor, they are less important than the other factors, and are entitled to less weight. *Comanche Peak*, CLI-92-12, 36 NRC at 74.

With respect to factor three, the State's participation cannot be expected to assist in developing a sound record for two reasons: First, Dr. Nielsen has not been shown to have any knowledge about DOE's interpretation of the Standard Contract or DOE's waste acceptance as-yet unannounced waste acceptance criteria for Yucca Mountain. Further, the State has not proffered Mr. Lanthrum as a witness, nor has it identified any other DOE official who may support its claim that DOE has announced a new policy regarding its acceptance of SNF in multi-purpose canisters from PFS. Indeed, the State indicates a total lack of knowledge as to DOE's intentions, stating that DOE thus far "has not formally developed its plans for waste acceptance at the permanent repository." State Request at 12. Thus, the State has not shown that it may contribute to the development of a sound record in connection with these assertions, and this third factor of the late-filing criteria therefore weighs against the admission of Contention Utah UU.

With respect to the fifth factor of 10 C.F.R. § 2.714(a)(1), it is readily apparent that the admission of this contention will greatly broaden the issues and result in substantial delay in this (now) seven-year long proceeding. All NEPA issues have been litigated and resolved by the Licensing Board and the Commission. Similarly, all safety issues other than the aircraft crash consequence issue have been resolved, and a Licensing Board decision on that one remaining issue is expected to be issued next month. The admission of this broad contention at this stage

in the hearing process will require discovery and further evidentiary hearings, leading to much delay in the proceeding. Thus, this factor weighs against the admission of this contention.

In sum, the State has failed to establish good cause for the late filing of Contention Utah UU, and its lack of good cause is not overcome by a "compelling" showing that the other factors specified in 10 C.F.R. § 2.714(a)(1) favor its admission. *State of New Jersey* (Department of Law and Public Safety's Requests Dated October 8, 1993), CLI-93-25, 38 NRC 289, 296 (1993).

#### CONCLUSION

For the reasons set forth above, the Staff respectfully submits that Contention Utah UU fails to satisfy the late-filing criteria set forth in 10 C.F.R. § 2.714(a)(1), the basis requirements set forth in 10 C.F.R. § 2.714, or the reopening criteria in 10 C.F.R. § 2.734. Accordingly, the Staff opposes the admission of Contention Utah UU and recommends that it be rejected.<sup>40</sup>

Respectfully submitted,

*/RA/*

Sherwin E. Turk  
Counsel for NRC Staff

Dated at Rockville, Maryland  
this 10<sup>th</sup> day of December 2004

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<sup>40</sup> The State requests that its motion to admit Contention Utah UU be treated, in the alternative, as a petition for rulemaking, if the Board finds that it "challenges any NRC regulation." Request at 10. The State provides no indication as to what "rule" it would ask the Commission to promulgate in any such rulemaking proceeding. While it is premature to determine whether any such rulemaking proceeding would be warranted in advance of the Board's ruling, a request to institute a rulemaking proceeding should be filed, in the first instance, before the Commission.

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of )  
)  
PRIVATE FUEL STORAGE L.L.C. ) Docket No. 72-22-ISFSI  
)  
(Independent Spent )  
Fuel Storage Installation) )

CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S RESPONSE TO 'STATE OF UTAH'S REQUEST FOR ADMISSION OF LATE-FILED CONTENTION UTAH UU (RAMIFICATIONS OF DOE'S REFUSAL TO ACCEPT FUEL IN WELDED CANISTERS FROM THE PFS SITE) OR IN THE ALTERNATIVE PETITION FOR RULEMAKING" 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, by deposit in the U.S. Postal Service, as indicated by double asterisk with copies by electronic mail, this 10th day of December, 2004:

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