

March 24, 2005 (4:14pm)

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

BEFORE THE COMMISSIONERS

In the Matter of:)	Docket No. 72-22-ISFSI
)	
PRIVATE FUEL STORAGE, LLC)	ASLBP No. 97-732-02-ISFSI
(Independent Spent Fuel)	
Storage Installation))	March 16, 2005

STATE OF UTAH'S PETITION FOR REVIEW OF THE BOARD'S
INTERLOCUTORY RULING ON CONTENTION UTAH UU

In accordance with the Commission's Order of March 11, 2005, the State of Utah petitions for review of Memorandum and Order (Ruling on State of Utah's Recently-Filed Contention UU) (Feb. 24, '05), LBP-05-05. The Commission may grant discretionary review upon consideration that, *inter alia*, "[a] substantial and important question of law, policy or discretion has been raised" or "[a]ny other consideration the Commission may deem to be in the public interest. 10 C.F.R. § 2.786(b)(4)(iii) and (v). Here, such questions and considerations have been raised: under the Standard Contract, is the U.S. Department of Energy ("DOE") obligated to accept fuel in sealed canisters and is DOE obligated to collect fuel from the PFS site. This in turn presents the Commission with a choice: (a) whether the Commission will squarely address the intersection between NRC's authority and responsibility under the Atomic Energy Act with that of DOE's authority and responsibility under the Nuclear Waste Policy Act; or (b) whether, by taking no action on this issue, the Commission will impede or usurp DOE's ability to carry out its statutory role in setting the SNF waste acceptance form for transportation and permanent disposal.

Background

On October 14, 2004, the State first learned that DOE has no obligations to collect fuel in sealed canisters or collect fuel from the PFS site. Gary Lanthrum, Director, Office of National Transportation, U.S. Department of Energy (DOE) advised then Utah Governor, Olene S. Walker, and Dr. Dianne Nielson, Executive Director of the Department of Environmental Quality, 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. Contention Utah UU,¹ Exh. 1.

The exclusive cask for storage of fuel at the PFS site is the HI-STORM 100 (Rev. 0) cask system. Fuel rods that will be stored at the PFS site, are loaded into a HI-STORM canister at the reactor site and welded shut. PFS's licensing basis, as the Commission noted, is to "completely seal spent fuel inside a canister that is never opened from the time it leaves the power plant until it is deposited into a permanent repository . . ." CLI-04-22, slip op. at 6-7. The PFS site has no handling capabilities for fuel repackaging, such as a hot cell, and according to the Commission, none is required under NRC regulations. *Id.* at 8.

In response to the announcement by the Director of DOE's Office of National Transportation, Utah filed Contention Utah UU, which charges:

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

¹State of Utah's Request for Admission of Late-Filed Contention Utah UU (Ramifications of DOE's Refusal to Accept Fuel in Welded Canister from the PFS Site) or in the Alterative Petition for Rulemaking (Nov. 12, 2004) hereafter "Contention Utah UU".

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.

Contention Utah UU at 2.² After reviewing the record, including supplemental filings, the Board, on the one hand, failed to admit Utah's contention,³ and on the other hand, found the matter sufficiently material that it recommended the Commission address the issues raised in the contention.⁴ If the issue is sufficiently grave that the Commission should address it, then the bases of the contention is sufficiently reliable that the Board should have admitted the contention. The contention also contains an alternative – a petition for rulemaking. If the Commission does not accept review, the State then requests the Commission treat Contention Utah UU, in whole or in part, as a petition for rulemaking.

The contention challenges two distinct aspects of the licensing basis for the PFS ISFSI – NEPA and financial assurance. It is important to note what is not challenged in Contention Utah UU. First, the contention does not challenge DOE's obligation to dispose of SNF in a permanent repository. Utah Reply⁵ at 2. The contention is specific to the waste acceptance form of the fuel DOE is obligated, under the Standard Contract, to collect from utilities (specifically those storing fuel at PFS) and whether DOE will pick up that fuel from the PFS site. Contention Utah UU, Nielson Dec. ¶ 4. Second, the contention does not challenge the

²See LBP-05-05, slip op. at 4-7, for details of the procedural history of this contention.

³The Board's sole ground for not admitting the contention was that, in its view, the statement by the DOE Director of the Office of National Transportation constituted an insufficient basis for the contention. *Id.* at 2, 20.

⁴*Id.* at 23-25.

⁵State of Utah's Reply to Responses Filed by the Applicant and the Staff to Utah's Request for Admission of Late-filed Contention Utah UU (Dec. 17, '04).

waste confidence rule or other regulations. Contention Utah UU at 9-10. The State's complaint is specific to the lack of NEPA analysis that fuel stored at the PFS site in welded canisters will be shipped across the country three times, instead of once, and the lack of assurance that PFS will have sufficient operating revenue or commitments from its customers to pay for and accept the fuel for repackaging. *Id.* at 3-9.

On an issue too important to ignore, the Commission should accept review of this substantial and important question of law and policy and a matter that is in the public and national interests.

I. By Ordering Utah to File Any Petition for Review of an Interlocutory Order Prior to Final Board Action, the Commission has Acted Arbitrarily and has Denied Utah Procedural Fairness.

In holding Contention Utah UU inadmissible, the Board advised "this ruling is interlocutory and thus not appealable upon issuance. Any appeal is to be taken after we render our final ruling in the proceeding." LBP-05-05, slip op at 25. In the Final Partial Initial Decision Regarding F-16 Aircraft Accident Consequences (Feb. 24, '05) ("Cask Breach PID"), the Board advised that appeal of outstanding interlocutory rulings must be filed at the time a petition for review is filed on the cask breach. PID at G-6. On March 7, 2005, the State filed a Motion for Reconsideration of the Cask Breach PID with the Board; at the same time it requested either the Commission or the Board grant an enlargement of time to file petitions for review of the cask breach and confirm that a petition of the Contention Utah UU ruling would be filed at the same time. Late Friday, the State received an order from the Commission⁶ granting the State's request to postpone the time to file a petition on cask breach but denied the State's request to file its interlocutory appeal of Contention Utah UU concurrently with cask

⁶The Order was issued and transmitted to the State by e-mail at 4:22 pm EDT, Friday, March 11, 2005.

breach. Instead, it ordered any petition on Contention Utah UU to be filed by Wednesday, March 16. The Order reiterated that comments on the Commission's immediate effectiveness review are due on the established deadline of March 14.

Earlier in this proceeding, the Commission stated:

Absent special circumstances, review of preliminary rulings unrelated to the partial initial decision must wait until either the Board considers the issue in a relevant partial initial decision or the Board completes its proceedings, depending on the nature of the preliminary ruling.

CLI-00-24, slip op at 4 (*footnote omitted*). Then in a November 2003 Order, the Commission took "the unusual step, in the interest of efficiency, of calling for appeals of Board decisions that would otherwise be considered interlocutory orders appealable only at the conclusion of the underlying ASLBP proceeding." CLI-03-16, slip op. at 1. All interlocutory appeals were due 21 days from the date of the Order. *Id.* at 3. The Commission noted, "the parties have already had considerable time to review the Board's various interlocutory rulings." *Id.* at 2.

NRC case law establishes that parties may not appeal interlocutory Board rulings until the end of the case. *See Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), CLI-02-7, 55 NRC 205, 213 (2002) (*citing cases*). The Board has yet to rule on Utah's Motion for Reconsideration of the Cask Breach PID, and until it does, the ruling on Contention Utah UU remains interlocutory.⁷ Therefore, there was no reason for the State to contemplate that its petition for review of Contention Utah UU would be due by March 16. To this end, Utah proceeded to draft and timely file papers on the substantive issues, motion for reconsideration of the Board's ruling on cask breach (filed March 7) and comments on the

⁷*See e.g., Philadelphia Electric Co.* (Limerick Generating Station, Units 1 and 2) LBP 83-25,17 NRC 681, 688 (1985)(under NRC regulations only one Board at a time, acting as the presiding officer, will have jurisdiction over a particular matter. Once the Appeal Board obtains jurisdiction over a matter, the title of 'presiding officer' passes from the Licensing Board to the Appeal Board.)

Commission's immediate effectiveness review (filed March 14).⁸ Accordingly, the State essentially had three working days from the date of the Commission's order to draft and file this petition for review, as well as meet the March 14 deadline.

The March 11, 2005 Order did not document any exigent or special circumstances to justify changes to established procedural rules. The Commission has previously relied on its interest in efficiency for changing established procedures. *Sæ e.g.*, CLI-03-01, slip op at 1.⁹ In the instant case, however, expedited review is at the expense of procedural fairness to the State.

II. The Bases for the State's Contention Demonstrate the Need for the NRC to Impose Conditions on PFS's License.

A. The Bases Presented in Contention UU are Reliable and Material.

The Board is under the misunderstanding that the contract between DOE and each nuclear fuel owner has not reached finality.¹⁰ The Board refers to "the current form of the Standard Contract being executed between originating nuclear utilities and DOE for acceptance of spent nuclear fuel by DOE at Yucca Mountain (a form contract that does not indicate what different contract would eventuate, if the PFS facility were to be built and to be utilized by nuclear utilities)." LPB-05-05 slip op at 21 (*emphasis added*). The Standard Contract between DOE and the nuclear industry is codified at 10 C.F.R. Part 961. The summary of the final rule for the Standard Contract states: "Section 302 of [the Nuclear Waste Policy] Act requires DOE

⁸These two filings required review of a large volume of material, and complex legal research and analysis, in a very short period of time.

⁹Here, no such exigency exists; the Farrar Licensing Board has ordered the responses to Utah's Reconsideration Motion are not due to be filed until March 21. Accordingly, there is no justifiable reason to hastily call for expedited review.

¹⁰Logically, the State could not have contemplated this result and therefore had no opportunity to present evidence to the Board to dispel this misunderstanding. *Cf. Private Fuel Storage* (Independent Spent Fuel Storage Installation), CLI-04-22, 60 NRC 125, 140 (2004).

and the owners or generators of spent nuclear fuel . . . to execute, by June 30, 1983, a contract under which DOE will accept and dispose of such material.” 48 Fed. Reg. 16590 (April 18, 1983) (*emphasis added*). The Standard Contract is not merely hypothetical; it is a fully executed contract that the industry was required to enter into with DOE by June 30, 1983. Moreover, the Board’s reliance on a future contract that may materialize if PFS is built and used by nuclear utilities, is contrary to the Nuclear Waste Policy Act and amounts to nothing more than speculation.¹¹ Relying on future changes to the law (as must be done to change the Standard Contract) to find PFS’s evidence carried the day, is a conclusion that is contrary to law and fact.

The Board relies on the following statement to find the basis for Utah’s contention unreliable: “The DOE official upon whose statement the State would rely does not appear to be in the specific area of which he spoke.” LPB-05-05, slip op at 22 (*emphasis omitted*); *see also id.* at 2. The Board found the documents PFS submitted “portray the matter differently” and the evidence Utah submitted is “insufficient to launch a new adjudicatory inquiry at this juncture.” *Id.* at 2 (*emphasis omitted*). Rather than portray “the matter differently,” the documents submitted to the Board by PFS portray a “different matter.” As the State said in its Reply (at 2-3): “all the PFS-submitted correspondence shows is that DOE has been non-committal in responding to requests by utilities, the NRC, and congressional representatives that it will accept fuel in multiple purpose canisters (MPCs) under the Standard Contract.”¹² Nor does the Board

¹¹The Standard Contract contains an assignment clause. It states: “The rights and duties of the Purchaser [the entity who entered into the contract with DOE] may be assignable with transfer of title of the SNF/and or HLW involved [and certain notice requirement to DOE].” 10 C.F.R. § 961.11, Article XIV. A change in the ownership of SNF may occasion the Purchaser assigning the Standard Contract but it is a *non sequitur* to conclude that building the PFS facility and utilities storing fuel there are related to the form of the contract under the Nuclear Waste Policy Act.

¹²Recently, Christopher Kouts, Director of the Office of Systems Analysis and Strategy Development (responsible for waste acceptance), Office of Civilian Radioactive Waste

explain why PFS's exhibits are probative of the issues raised in Contention Utah UU. As also discussed in the State's Reply, PFS documentation do not refute the State's contention. For example, PFS Exhibit 7 states that the Standard Contract "signed by the Department and each utility is the key instrument guiding the specific terms and conditions for spent nuclear fuel acceptance." *See*, State Reply at 3-5.

Moreover, the Board failed to explain why it found that Gary Lantrum is not directly responsible for whether DOE will accept bare fuel. *See* LPB-05-05, slip op at 2. Importantly, in developing and managing a SNF transportation system to the repository, the Office of National Transportation is responsible for the acquisition of casks. *See e.g.*, Annual Report to Congress, Dec. 2004, DOE/RW-0569, Office of Civilian Radioactive Waste Management, at 30-31. Clearly, Mr. Lantrum is authorized to determine which cask designs are acceptable prior to acquisition, delivery, and receipt of SNF from utilities for transport to a repository.

The underpinnings of the Board finding that the State's evidence is unreliable, is legally and factually erroneous. Accordingly, the Commission should accept review of this necessary legal and factual conclusion that does not support the Board's decision. The questions of law, policy and public interest that are implicated by this ruling are significant issues that warrant Commission review.

B. The NRC Has No Reasonable Assurance That Fuel Will Be Removed from the PFS site.

Management (OCRWM), DOE, informed the congressionally appointed Nuclear Waste Technical Review Board (NWTRB), that bare fuel is "the only acceptable waste form currently under the [standard] contract." NWTRB Mtg. (02/08/05) Tr. at 64. Moreover, due to pending litigation Mr. Kouts refused to confirm that DOE would accept fuel in "sealed" canisters, noting that DOE would look at that issue in the future. *Id.* (*emphasis added*). When making these statements to the NWTRB, Mr. Kouts appeared jointly with Gary Lantrum, Director of OCRWM's Office of National Transportation, and Richard Craun, Director of OCRWM's Office of Project Management and Engineering. *Id.*

Yesterday, in addition to comments on the Commission's Immediate Effectiveness Review, PFS submitted a declaration of John D. Parkyn, in which Mr. Parkyn declared: "Utilities owning shutdown nuclear plants need to be able to ship spent nuclear fuel to an off-site facility in order to fully decommission the sites." Parkyn Dec. (Mar. 11 '05) ¶ 5. If the asserted need for the PFS storage site is to allow nuclear plants to "fully decommission" then there is no reasonable assurance that the fuel owner will have the capability to take back fuel that is unacceptable for direct transport to and disposal in a permanent repository. A contractual provision between PFS and its customers may reap PFS money damages, but not specific performance to force the owner to take the fuel.¹³

In addition to the infeasibility of returning fuel to decommissioned reactors – a condition that will be exacerbated as more reactors decommission in the next 20 or more years – the Commission's review of PFS's financial plan for operations did not encompass the costs of shipping each and every cask back to the originating reactor site. Contention Utah UU at 8. Accordingly, without reasonable restrictions on PFS's license, neither the Board nor the Commission can satisfy itself that PFS will have the necessary funds available to cover operating costs. 10 C.F.R. § 72.22(e). By taking review of this issue, the Commission may ameliorate the foreseeable potential that casks will be abandoned at the PFS site, that PFS will be fiscally incapable of returning the casks, and that shut down reactors will be incapable of repackage fuel.

C. Restrictions on Fuel Receipt and Assurance That Fuel Owners Will Be Capable of Repackaging Fuel must Be Conditions Precedent to Fuel Receipt and Storage at the PFS Facility.

¹³Northern States Power Co. v. Department of Energy, 128 F.3d 754 (D.C. Cir. 1997)(court refused to grant writ of mandamus ordering DOE to meet its contractual deadline to remove nuclear waste from reactors).

The operation of a centralized ISFSI that is far ahead of DOE's waste acceptance criteria and DOE's shipping campaign to a permanent repository¹⁴ poses unique problems in developing a comprehensive and coordinated national waste management system. However, placing reasonable restrictions on PFS's license may obviate creating a dysfunctional system.

The Nuclear Waste Policy Act contemplates an active role by the Commission in ensuring that nuclear reactors have entered into contracts with the DOE for the disposal of spent fuel generated from operation under an NRC issued license. The Act requires:

The Commission, as it deems necessary or appropriate, may require as a precondition to the issuance or renewal of a license under section 2133 or 2134 of this title that the applicant for such license shall have entered into an agreement with the Secretary for the disposal of high-level radioactive waste and spent nuclear fuel that may result from the use of such license.

10 U.S.C. § 10222(b)(1)(B). Obviously, the congressional policy is that NRC licensing should attempt to integrate the generation – and hence also the storage – of SNF with DOE's disposal program. The Commission has the direct authority under Part 72 to precondition an ISFSI license and it should do so. 10 C.F.R. § 72.44.

There are important practical, policy, and safety reasons that cry out for the Commission to take action to ameliorate the potential for disrupting the integration of the national nuclear waste program. First, as a pre-condition to the receipt of spent nuclear fuel at the PFS facility, each fuel owner (*i.e.*, PFS customer) must first receive written confirmation by DOE that the fuel container is acceptable for direct shipment to and disposal in a permanent repository. Second, a similar written commitment from DOE showing that DOE will collect fuel away-from-reactor at the PFS facility. Third, a condition that PFS has written assurance from each fuel owner that it will accept fuel back for repackaging and that each owner will have

¹⁴See Contention Utah UU at 6-7.

the capability to do so. Finally, to cover financial contingencies, 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.

III. NRC NEPA Analysis Is Inadequate to Satisfy Multiple and Unnecessary Fuel Handling and Fuel Shipment Across the Country.

Should the Commission reject Utah's request to pre-condition PFS's license, then NRC's final Environmental Impact Statement ("FEIS"), NUREG-1714, for the licensing the PFS facility is in violation of NEPA. In determining whether Utah met the reopening standard, the Board analyzed whether Contention Utah UU would bring about a materially difference result to NRC's FEIS. The Board accurately summarized the State's argument thus:

[T]he State's challenge is not to the necessity for a second cross-country shipment if Yucca Mountain is not built. It is, rather, to the addition -- if Yucca Mountain is built but rejects the PFS-stored fuel as is -- of (1) not only an unnecessary second such shipment but a third one as well, and of (2) a major operational step, before that third shipment, of unsealing the welded canister to "re-package" the spent fuel.

....

But assuming that any transportation-related environmental impacts could be justified as part of a coherent scheme of waste fuel disposal -- from originating reactor, cross-country to temporary storage, then to nearby permanent repository, all in the same canister -- those impacts may make far less sense if they are known to be part of what the State calls a dysfunctional system -- from originating reactor, cross-country to temporary storage, back cross-country to reactor (or elsewhere) to be "recontainerized," and back again cross-country to permanent repository not far from the initial temporary storage site. If NEPA requires anything, it is that alternatives be evaluated, and that latter one would seem to have little to commend it.

slip op at 16- 17 (*emphasis in original*).

There is universal recognition that extra and unnecessary handling and transportation of spent nuclear fuel is undesirable and creates added safety risks. The cumulative impacts of these added risks have not been analyzed or described in NRC's FEIS for the PFS facility. This

issue presents a substantial question of law that the Commission should review.

IV. In Addition to Assurances Specific to the PFS Proposal, the Commission May and Should Also Address the Issues Raised Herein Generically Through Rulemaking.

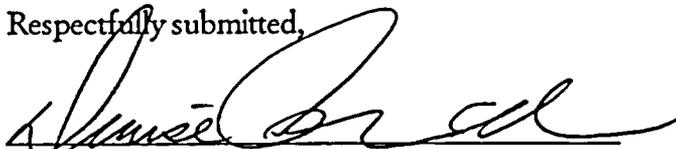
The Commission may address an issue through adjudication or rulemaking, or a combination of both.¹⁵ Many of the issues raised in Contention Utah UU are common to the integration of DOE's responsibilities under the Standard Contract with NRC's licensing of facilities for off-site storage and generic cask licensing (including welded canisters). The State realizes that all the issues it has raised may not be resolved through adjudication and, therefore, requests the Commission to institute rulemaking to ensure that independent actions by the NRC and the DOE are fully consistent with a comprehensive, integrated, and coherent national waste system. See Contention Utah UU at 10 (alternative request for a petition for rulemaking).

CONCLUSION

For the foregoing reasons, the State requests the Commission to accept review of Contention Utah UU.

DATED this 16th day of March, 2005.

Respectfully submitted,



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¹⁵Fire Protection for Operating Nuclear Power Plants, CLI-81-11, 13 NRC 778, 800-01 (1980); Consumers Power Co. (Midland Plant, Units 1 and 2), LBP-82-118, 16 NRC 2034, 2038 (1982); NAACP v. Federal Power Comm., 425 U.S. 662, 668 (1976).

CERTIFICATE OF SERVICE

I hereby certify that a copy of STATE OF UTAH'S PETITION FOR REVIEW OF THE BOARD'S INTERLOCUTORY RULING ON CONTENTION UTAH UU was served on the persons listed below by electronic mail (unless otherwise noted) with conforming copies by United States mail first class, this 16th day of March, 2005:

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