

March 28, 2005

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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

NRC STAFF'S RESPONSE TO "STATE OF UTAH'S
PETITION FOR REVIEW OF THE BOARD'S
INTERLOCUTORY RULING ON CONTENTION UTAH UU"

INTRODUCTION

Pursuant to 10 C.F.R. § 2.786(b)(3) and the Commission's Order of March 11, 2005, the NRC staff ("Staff") hereby files its response to the "State of Utah's Petition for Review of the Board's Interlocutory Ruling on Contention Utah UU" ("Petition"), filed on March 16, 2005. In its Petition, the State of Utah ("State") challenges the Licensing Board's decision in LBP-05-05, rejecting late-filed Contention Utah UU ("Ramifications of DOE's Refusal to Accept Fuel in Welded Canisters From the PFS Site").¹ For the reasons set forth below, the Staff respectfully submits that the State fails to demonstrate that Commission review of the Licensing Board's decision is warranted under 10 C.F.R. § 2.786(b)(4). Accordingly, the Petition should be denied.

BACKGROUND

This proceeding concerns the application by Private Fuel Storage, L.L.C. ("PFS" or "Applicant") for a license to possess and store 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. On July 31, 1997, the Commission published in the *Federal Register* a Notice of Consideration and Notice of Opportunity for Hearing ("Notice")

¹ *Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation)*, LBP-05-05, 61 NRC ____ (Feb. 24, 2005), as corrected by "Errata to LBP-05-05 (Contention Utah UU)," issued March 15, 2005.

concerning the application. See 62 Fed. Reg. 41,099 (1997).² Petitions for leave to intervene and numerous contentions were then filed by various petitioners, including the State.³ On April 22, 1998, the Licensing Board ruled on the petitions to intervene and the petitioners' initial contentions, in which it admitted the State (and certain other petitioners) as parties to the proceeding.⁴

In June 2000, the NRC Staff and three 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") for the proposed PFS Facility,⁵ 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, 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.⁶

² "Private Fuel Storage, Limited Liability Company; Notice of Consideration of Issuance of a Materials License for the Storage of Spent Fuel and Notice of Opportunity for a Hearing," 62 Fed. Reg. 41,099 (July 31, 1997).

³ 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.

⁴ *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).

⁵ NUREG-1714, "Draft Environmental Impact Statement for the Construction and Operation of an [ISFSI] on the Reservation of the Skull Valley Band of Goshute Indians and the Related Transportation Facility in Tooele County, Utah" (June 2000) ("DEIS").

⁶ 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

(continued...)

In December 2001, the Staff and cooperating federal agencies issued their Final Environmental Impact Statement (“FEIS”), in which they presented their final evaluation of the environmental impacts of their proposed licensing actions, along with their responses to numerous comments on the DEIS, including comments submitted by the State.⁷ In particular, as pertinent here, the FEIS explicitly addressed numerous comments by the State that raised issues similar or related to the issues raised in Contention Utah UU.⁸ While the State filed five contentions concerning the adequacy of either the DEIS or FEIS,⁹ it never challenged the DEIS or FEIS discussion of the proposed DOE repository or PFS’s ability to ship SNF to the proposed repository.

⁶(...continued)

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.

⁷ NUREG-1714, “Final Environmental Impact Statement for the Construction and Operation of an [ISFSI] on the Reservation of the Skull Valley Band of Goshute Indians and the Related Transportation Facility in Tooele County, Utah” (December 2001) (“FEIS”). In the FEIS, 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. See FEIS at H-8, H-9.

⁸ For example, the FEIS addressed comments by the State which asserted that (1) the Yucca Mountain or other repository might not be available to take SNF from the PFS site, FEIS Comments, at G-27, G-78, G-420; (2) 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) 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) a hot cell was needed at the PFS site to assure that SNF can be transported to the repository in casks that are compatible with DOE requirements, *Id.* at G-48, G-76; (5) 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) the proposed DOE repository must be considered a “connected action,” *Id.* at G-166; (7) 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) shipment back to the originating reactors might not be possible, *Id.* at G-78, G-360; and (9) SNF might not be shipped off the PFS site, *Id.* at G-73, G-74.

⁹ 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 those 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.

On November 12, 2004 (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 solely on certain reported oral remarks by Gary Lanthrum, a DOE waste transportation official.¹⁰ On December 6, 2004, the Applicant filed its response to the State’s Request, in which it, *inter alia*, described DOE’s obligations under the Standard Contract to accept all commercial SNF, and presented the written statements of other DOE officials showing the lack of any substantial basis for the State’s contention.¹¹ The Staff filed its response on December 10, 2004, and the State filed its reply on December 17, 2004.¹²

On February 24, 2005, the Licensing Board issued its decision in LBP-05-05, in which it ruled that Contention Utah UU is inadmissible. As the Licensing Board observed, the contention was based entirely upon the reported oral remarks by Mr. Lanthrum, in which he opined that DOE was not obliged to accept SNF in welded canisters from PFS at the proposed repository under the DOE “Standard Contract” (published in 10 C.F.R. Part 961); in contrast, the Board took note of the numerous, previous written statements by DOE officials which indicated that DOE would accept spent fuel in any NRC-approved canisters at its planned repository. The Board concluded:

The underpinning provided is essentially the State’s interpretation of an “unofficial” oral opinion by a DOE Office Director who is not directly responsible for the subject about which he spoke. That opinion, when measured against the key “official” DOE documents

¹⁰ “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. On November 29, 2004, the State filed the “State of Utah’s Supplement to Contention Utah UU Pursuant to Board Order Dated November 16, 2004” (“Supplement”), addressing certain questions raised in the Board’s Order of November 16, 2004.

¹¹ See “Applicant’s Response to State of Utah’s Request for Admission of Late-Filed Contention Utah UU,” dated December 6, 2004 (“PFS Response”).

¹² See (1) “NRC Staff’s Response to ‘State of Utah’s Request for Admission of Late-Filed Contention Utah UU . . .,’” dated December 10, 2004 (“Staff Response”), as corrected by letter of December 21, 2004; and (2) “State 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,” dated December 17, 2004 (“State Reply”).

brought to our attention that portray the matter differently, is insufficient to launch a new adjudicatory inquiry at this juncture.

LBP-05-05, slip op. at 2 (emphasis in original); *cf. id* at 20-22. As more fully set forth below, the Licensing Board's decision is entirely correct, and the State has not shown that Commission review of the Board's decision is warranted under 10 C.F.R. § 2.786(b)(4).¹³

DISCUSSION

I. Applicable Legal Standards.

A. Standards Governing Petitions for Review.

Pursuant to 10 C.F.R. § 2.786(b)(4), Commission review of a licensing board decision may be undertaken in accordance with the following principles:

(4) The petition for review may be granted in the discretion of the Commission, giving due weight to the existence of a substantial question with respect to the following considerations:

(i) A finding of material fact is clearly erroneous or in conflict with a finding as to the same fact in a different proceeding;

(ii) A necessary legal conclusion is without governing precedent or is a departure from or contrary to established law;

(iii) A substantial and important question of law, policy or discretion has been raised;

(iv) The conduct of the proceeding involved a prejudicial procedural error; or

¹³ In addition to seeking review of the Licensing Board's ruling, the State contests the Commission's Order of March 11, 2005, which directed the State to file the instant Petition by March 16, 2005. The State asserts that "the Commission has acted arbitrarily and has denied Utah procedural fairness." Petition at 4 (capitalization omitted). There is no basis for this assertion. In accordance with NRC regulations, petitions for review were due to be filed within 15 days following service of the Board's final partial initial decision. 10 C.F.R. § 2.786(b)(1). The Licensing Board issued its Final PID on February 24, 2005; the State then filed a motion for reconsideration of the Final PID, but its filing of that motion did not automatically extend the time in which a petition for review must be filed – as the State has implicitly recognized, by filing its March 7, 2005 motion to enlarge the time in which to file a petition for review of that decision. Moreover, the Commission previously ordered that petitions for review of interlocutory decisions be filed without awaiting the issuance of the Board's Final PID. *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-03-16, 58 NRC 360 (2003). Further, while the State filed a request for enlargement of the time in which to file a petition for review of the Board's Final PID – which it claimed would also defer the time for filing a petition for review of LBP-05-05 – that request was opposed by the Applicant and Staff. Thus, the State had no reasonable basis to expect that it could delay the filing of its petition for review of LBP-05-05, in the absence of a Commission Order which specifically authorized it to do so. The State's claims in this regard should therefore be rejected.

(v) Any other consideration which the Commission may deem to be in the public interest.¹⁴

B. Standards Governing the Admissibility of Contentions

It is well established that contentions may only be admitted in an NRC licensing proceeding if they comply with the requirements of 10 C.F.R. § 2.714(b) and applicable Commission case law.¹⁵ In accordance with 10 C.F.R. § 2.714(b)(2), as amended, each contention "must consist of a specific statement of the issue of law or fact to be raised or controverted." Further, the following information must be provided in support of the 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 and on which the petitioner intends to rely in proving the contention at the hearing, together with references to those specific sources and documents of which the petitioner is aware and on which the petitioner intends to rely to establish those facts or expert opinion.

(iii) Sufficient information . . . to show that a genuine dispute exists with the applicant on a material issue of law or fact. This showing must include references to the specific portions of the application (including the applicant's environmental report and safety report) that the petitioner disputes and the supporting reasons for each dispute, or, if the petitioner believes that the application fails to contain information on a relevant matter as required by law, the identification of each failure and the supporting reasons for the petitioner's belief. On issues arising under the National Environmental Policy Act, the petitioner shall file contentions based on the applicant's environmental report.¹⁶

¹⁴ See *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2, Catawba Nuclear Station, Units 1 and 2), CLI-03-17, 58 NRC 419 (2003); *Pacific Gas & Electric Co.* (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), CLI-03-12, 58 NRC 185 (2003); *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-01-09, 53 NRC 232, 234 (2001).

¹⁵ See, e.g., *Philadelphia Electric Co.* (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-216, 8 AEC 13, 20 (1974); *Northern States Power Co.* (Prairie Island Nuclear Generating Plant, Units 1 and 2), ALAB-107, 6 AEC 188, 194 (1973), *aff'd sub nom. BPI v. Atomic Energy Commission*, 502 F.2d 424, 429 (D.C. Cir. 1974).

¹⁶ These provisions were adopted by the Commission upon amending the regulation in 1989. See Statement of Consideration, "Rules of Practice for Domestic Licensing Proceedings - Procedural Changes in the Hearing Process," 54 Fed. Reg. 33,168 (Aug. 11, 1989), *as corrected*, 54 Fed. Reg. 39,728 (Sept. 28, 1989). The Commission has recognized that the amended rules "raise the threshold for the admission of contentions," *Id.* at 33,168, and has stated that the amended rules are "strict by design." *Millstone, supra*, CLI-03-14, 58 NRC at 213, *citing Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 & 3), CLI-01-24, 54 NRC 349, 358 (2001).

See generally *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Unit 2), CLI-03-14, 58 NRC 207, 212-13 (2003); *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); *Arizona Public Service Co.* (Palo Verde Nuclear Generating Station, Units 1, 2 and 3), CLI-91-12, 34 NRC 149, 155 (1991). A petitioner must provide a "clear statement as to the basis for the contentions and the submission of more supporting information and references to specific documents and sources that establish the validity of the contention." *Palo Verde, supra*, 34 NRC at 155-56. The failure of a contention to comply with any one of these regulatory requirements is grounds for dismissing the contention. See 10 C.F.R. § 2.714(d)(2)(i); *Palo Verde*, CLI-91-12, 34 NRC at 155-56.¹⁷

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 must 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). 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); *Yankee*, CLI-96-7, 43 NRC at 248. Finally, a contention must show that

¹⁷ 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. *Peach Bottom, supra*, 8 AEC at 20-21; *Palo Verde, supra*, LBP-91-19, 33 NRC at 400. Contentions which fail to meet these requirements must be rejected. *Arizona Public Service Co.* (Palo Verde Nuclear Generating Station, Units 1, 2 and 3), CLI-91-12, 34 NRC 149, 155 (1991).

a genuine dispute exists with the Applicant on a material issue of law or fact. 10 C.F.R. § 2.714(b)(2)(iii); *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.

An application of these principles to the State’s Petition demonstrates that the Licensing Board did not err in rejecting late-filed Contention Utah UU, and the State has failed to show that Commission review of the Board’s decision is warranted under 10 C.F.R. § 2.786(b)(4).

- II. The State’s Petition Fails to Demonstrate that Commission Review Is Warranted in Accordance With the Requirements of 10 C.F.R. § 2.786.
 - A. The Licensing Board Correctly Determined That Contention Utah UU Lacked Adequate Factual Basis to be Admitted at This Juncture of the Proceeding.

In late-filed Contention Utah UU, the State asserted 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.

Request at 2. In support of this contention, the State cited 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 1.¹⁸ The State described Mr. Lanthrum’s oral remarks as a DOE “announcement,” Request at 1, 3. Further, on the basis of those comments, the State claimed 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 evaluated the impact of this alleged new development on various aspects of the PFS application and the FEIS for the facility. *Id.* at 2-9.¹⁹

Significantly, these alleged oral remarks by Mr. Lanthrum constituted the sole new factual basis for late-filed Contention Utah UU. However, the Applicant’s and Staff’s responses to this contention showed that numerous documents issued by DOE officials over the past few years do not support Mr. Lanthrum’s interpretation of the DOE Standard Contract. Thus, the Applicant’s Response described 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 described 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 PFS provided copies of correspondence from DOE and NRC officials supporting its view that DOE will accept SNF

¹⁸ The State also attached the Declaration of Dr. Dianne R. Nielsen, Executive Director of the Utah Department of Environmental Quality, who stated that she heard Mr. Lanthrum state, in part, that “under the DOE standard contract with the nuclear industry, DOE was only required to accept bare fuel. As such, . . . DOE would not accept spent nuclear fuel in welded canisters and DOE has no obligation to pick up fuel from the [PFS] Facility”; and she cited his comments to a Salt Lake Tribune reporter, “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.” 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.

¹⁹ In this regard, the State’s Request raised 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. All of these matters were addressed long ago in this proceeding, in various contentions and/or the DEIS and FEIS.

contained in NRC-certified multi-purpose canisters. *Id.* at 9-14. Other documentation having a similar effect was cited by the Staff in its Response,²⁰ and the Staff indicated that to its knowledge, Mr. Lanthrum's reported remarks did not establish that DOE had changed its long-standing announced policy.²¹

In this regard, Mr. Lanthrum's oral remarks may state his understanding or interpretation of DOE's obligations under DOE's Standard Contract with the nuclear industry, but those remarks can hardly be said to constitute 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. Mr. Lanthrum's reported comments were not shown to have the legal significance alleged by the State; and the State failed to point to any other evidence which would indicate that DOE has now decided not to accept SNF in welded canisters at the proposed Yucca Mountain repository.

²⁰ The Staff noted that NRC and DOE management officials hold public, quarterly meetings in which DOE's high-level waste repository planning is discussed; the Staff attached the minutes of the most recent meeting, held on November 22, 2004, in which DOE's Mr. Lanthrum discussed DOE's acquisition plans for spent fuel transportation casks that could be used for shipments to Yucca Mountain – and stated that eight existing NRC-certified cask designs – most of which are dual purpose designs (including the HI-STAR 100 transportation cask which PFS proposes to use) – could accommodate up to sixty percent of the spent fuel available for shipment in 2010. See Staff's Response at 11 n.23, and Exh. 1 at 5-6. The Staff further reported its discussion with Mr. Lanthrum about the use of transportation casks with welded inner containers, in which he indicated that their use was a waste acceptance issue and a matter of contractual arrangements with individual utilities, but there were no regulatory or operational impediments that would prohibit the use of such casks for shipments to Yucca Mountain. The Staff noted that this was consistent with "the Staff's understanding that Mr. Lanthrum's comments were based on an interpretation of the DOE Standard Contract, and did not constitute a decision by DOE not to accept SNF in welded MPCs." Further, the Staff indicated that "[t]o 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 Staff's Response at 11 n.23, and Easton Affidavit attached thereto.

²¹ In its Response, the Staff noted that it "shares the Applicant's understanding that DOE is obliged to accept all SNF owned by U.S. nuclear utilities." Staff's Response at 13 n.26. In support of this view, the Staff provided 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 – in which 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." *Id.*; Exh. 2 to Staff's Response (emphasis added).

Further, the Commission – which is certainly aware of DOE’s obligation to accept SNF owned by U.S. nuclear utilities²² – 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.”²³ The State’s Request, itself, indicated that nothing has changed, notwithstanding Mr. Lanthrum’s reported comments: Thus, the State recognized that DOE still “has not formally developed its plans for waste acceptance at the permanent repository.” State Request at 12.

In its Petition, the State asserts that Commission should undertake review of the Licensing Board’s decision for a variety of reasons; nowhere, however, does it address the standards in 10 C.F.R. § 2.714 governing the admissibility of contentions – upon which the Board’s decision was based (see LBP-05-05, slip op. at 2, 20-22); similarly, while the State quarrels with (a) the Board’s assessment of Mr. Lanthrum’s authority,²⁴ and (b) the significance of the DOE documentation submitted by PFS and the Staff (Petition at 7-8), nowhere does the State show that the Board erred

²² 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).

²³ Statement of Consideration, “Storage of Spent Fuel in NRC-Approved Storage Casks at Power Reactor Sites,” 55 Fed. Reg. 29,181, 29,187 (1990).

²⁴ The State challenges the Board’s determination that Mr. Lanthrum’s official responsibility “does not appear to be in the specific area of which he spoke.” Petition at 7-8, citing LBP-05-05, slip op. at 2 and 22. While the State claims that the Board provided no explanation for these statements, no further explanation was required: It is beyond dispute that Mr. Lanthrum’s responsibility involves SNF transportation rather than interpreting the DOE Standard Contract – and his informal remarks conflicted with written statements concerning DOE’s obligations under the Standard Contract, made by other DOE officials (including a former Director and former Acting Director of OCRWM) having overall responsibility for the acceptance of SNF at the proposed repository under the Standard Contract. See LBP-05-05, slip op. at 21-22; Applicant’s Response at 12-13; Staff’s Response at 12-13 and n. 26.

in finding that the factual underpinning provided by the State in support of this contention (*i.e.*, Mr. Lanthrum's reported oral remarks) was inadequate. In sum, the State failed to provide the necessary factual support for the contention, and thereby failed to satisfy its burden of going forward under 10 C.F.R. § 2.714(b)(2).²⁵ *Accord, Dominion Nuclear Connecticut* (Millstone Nuclear Power Station, Unit 2), CLI-03-14, 58 NRC at 212-13. The State has not shown any reason to believe that the Licensing Board erred in rejecting the State's contention, in the face of substantial documented statements by DOE officials which undercut the validity of Mr. Lanthrum's reported remarks. As the Board observed, the State did not challenge those other statements, nor did it provide further support for its reliance on Mr. Lanthrum's remarks even when specifically offered an opportunity to do so. See LBP-05-05, slip op. at 21; Order of December 7, 2004, at 1-2. The Licensing Board correctly concluded that "at this juncture" of the proceeding, the State failed to demonstrate that the contention should be admitted. LBP-05-05, slip op. at 2.²⁶ The State has failed to establish the existence of a "substantial question" as to an error of fact or law in this respect, as required to warrant Commission review under 10 C.F.R. § 2.786(b)(4)(i) or (ii).

B. The Licensing Board's Decision Does Not Present A Substantial and Important Question of Law, Policy or Discretion, or Other Consideration Which Would Warrant Commission Review.

In its Petition, the State asserts that Commission review of LBP-05-05 is warranted, in that the Board's decision raises a "substantial and important question of law, policy or discretion," and/or a "consideration the Commission may deem to be in the public interest," as to whether the Department of Energy is obliged to accept SNF in canisters from the PFS Facility. Petition at 1. In this regard, the State asserts that (a) the Commission lacks reasonable assurance that SNF will

²⁵ See, *e.g.*, *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), LBP-91-35, 34 NRC 163, 167-68 (1991) (amended § 2.714(b)(2) does not shift the burden of persuasion from the applicant on the issue of whether a license should be granted, but specifies what a petitioner must do to satisfy its burden of coming forward with information in support of a proposed contention).

²⁶ *Cf.* LBP-05-05, slip op. at 9-10, *citing Vermont Yankee Nuclear Power Corp.* (Vermont Yankee Nuclear power Station), ALAB-138, 6 AEC 520, 523-24 (1973) ("[t]o justify the granting of a motion to reopen [to admit a contention,] the moving papers must be strong enough, in the light of any opposing filings, to avoid summary disposition") (emphasis omitted).

be removed from the PFS site, *Id.* at 8-9; (b) that “restrictions” or license conditions should be imposed on PFS and each owner of the SNF prior to shipment to the PFS Facility, to assure that DOE will accept the fuel canister at the proposed repository, that DOE will take the SNF from the PFS Facility, that the owners will take their SNF back and will have the capability to re-package it, and that an escrow account is established to cover the cost of shipping SNF back to the owner or other facility for repackaging; and (c) that the FEIS is in violation of NEPA, in that “the cumulative risks” asserted by the State in the “extra and unnecessary handling and transportation” of SNF and the creation of a “dysfunctional” cross-country SNF transportation system, *Id.* at 11.²⁷

These claims fail to establish a substantial and important question of law, policy or discretion, or any other matter that warrants Commission review of the Board’s decision. First, virtually all of these claims were raised in numerous other contentions filed by the State,²⁸ each of

²⁷ Contrary to the State’s assertions in its request to admit Contention Utah UU (Request at 1, 3), the FEIS for the PFS Facility did not “assume” that SNF would be shipped from the PFS site to the proposed Yucca Mountain repository. Rather, the FEIS indicated that DOE had not 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 also 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. In addition, in assessing the impacts of SNF transportation to and from the PFS Facility, the FEIS considered representative routes for SNF shipments to and from the PFS Facility. FEIS at 5-50, 5-53 - 5-54, 5-55. 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. See also n.8, *supra* (concerning the FEIS response to comments).

²⁸ The State raised the following concerns in its Initial Contentions of November 1997, which it also raised in late-filed Contention Utah UU: (1) the potential that PFS’s storage cask design may be incompatible with DOE repository specifications (Contention Utah D); (2) the impacts of SNF transportation to and from the proposed PFS Facility (Contentions Utah A, B, C, J, V, and Y); (3) the availability of the proposed Yucca Mountain repository to receive spent fuel from the PFS site (Contentions Utah A, D, S, and Y); (4) the need here to treat DOE’s high-level waste program and the proposed Yucca Mountain repository as “connected (continued...) ”

which has been ruled upon by the Licensing Board and/or the Commission in favor of the Applicant.²⁹ Apart from pointing to the oral remarks of Mr. Lanthrum, the State has provided no reason to disturb the Board's and Commission's previous rulings on the State's prior contentions – and the State's present reliance solely on Mr. Lanthrum's reported remarks fails to establish a "substantial and important" question, in that his remarks were otherwise unsupported and were shown to be contrary to numerous written statements by DOE. Moreover, the State's assertions that a dysfunctional transportation system will be created by the licensing the PFS Facility constitute mere speculation and unsupported, bald assertions,³⁰ and fail to establish the existence of a "substantial" question that warrants Commission review of the Board's decision.

Second, to the extent that the State argues that license conditions should be imposed on PFS and each owner of SNF, to require written commitments from DOE that it will accept SNF in welded canisters from the PFS Facility, those assertions constitute new issues which were not raised in the State's request to admit late-filed Contention Utah UU. Accordingly, they may not be raised now for the first time in a petition for review of the Board's decision. See, e.g., *Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-96-7, 43 NRC 235, 260 and n.19 (1996).

Finally, to the extent that the State assert that Commission review is required to "ameliorate the foreseeable potential that casks will be abandoned at the PFS site," Petition at 9, the State

²⁸(...continued)

actions" under NEPA, and the potential that NRC action on the PFS proposal could compromise DOE's repository planning (Contention Utah Y); (5) the potential that spent fuel may remain at the PFS site indefinitely (Contentions Utah A, S and Y); (6) PFS will need to transport the spent fuel back to the originating reactor licensees (Contentions Utah B and V); (7) the need for reactor licensees to provide assurance that they will accept fuel that is returned to them by PFS (Contention Utah E); (8) the adequacy of PFS's financial assurance if it can not ship SNF to the Yucca Mountain repository (Contentions Utah E and S); and (9) the adequacy of the EIS cost benefit analysis (Contentions Utah S, U and CC).

²⁹ See, e.g., *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-04-4, 59 NRC 31 (2004) (Contentions Utah J, U, Y and CC). Upon issuance of CLI-04-4, finality had attached to the Board's resolution of all the State's contentions, other than Contentions Utah K and UU.

³⁰ It has been held that "bald assertions" and "mere speculation" are not sufficient to support a contention. See *Sacramento Municipal Utility District* (Rancho Seco Nuclear Generating Station) LBP-93-23, 38 NRC 200, 246 (1993); *Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), LBP-96-2, 43 NRC 61, 75 (1996).

presents an impermissible challenge to NRC regulations. See 10 C.F.R. § 51.23(b) (no discussion of environmental impact of storage at an ISFSI beyond the term of the ISFSI is required for ISFSI licensing), and § 51.61 (no impacts for storage of spent fuel at an ISFSI beyond its license terms need to be discussed in the Environmental Report). See 10 C.F.R. § 2.758.

In sum, the State's Petition fails to show the existence of a "substantial question" with respect to any of the consideration set forth in 10 C.F.R. § 2.786(b)(4), and fails to establish that Commission review is warranted. See *PFS*, CLI-01-09, 53 NRC at 234.³¹

CONCLUSION

For the reasons set forth above, the Staff respectfully submits that the Licensing Board correctly rejected Contention Utah UU for failing to satisfy the requirements governing the admissibility of contentions set forth in 10 C.F.R. § 2.714(b)(2). The State's Petition fails to demonstrate that Commission review of the Board's decision is warranted under 10 C.F.R. § 2.786, and the Petition should therefore be denied.³²

Respectfully submitted,

/RA/

Sherwin E. Turk

³¹ In its decision, the Licensing Board considered the timeliness of the State's filing of Contention Utah UU and the materiality of the information presented therein, in accordance with 10 C.F.R. §§ 2.714(a)(1) and 2.734 – but it declined to base its decision on those considerations. See LBP-05-05, slip op. at 19-20 and 22. Nonetheless, the Licensing Board properly could have rejected the contention as impermissibly late without good cause, and for failing to show that the FEIS had treated this issue inadequately and that a "materially different result . . . would have been likely" if the information contained in this contention had been considered initially. See Applicant's Response at 14-17 (materiality); Staff's Response at 14-19 (materiality) and 20-22 (timeliness).

³² In addition to seeking review of the Board's decision, the State claims that "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)"; and the State urges the Commission to initiate a "rulemaking" proceeding to address those issues. Petition at 3, 12. The State does not specify the issues it seeks to have addressed in rulemaking – but, in any event, this request should be addressed, if at all, outside the scope of this proceeding. The State previously asked the Licensing Board to treat its request to admit Contention Utah UU, in the alternative, as a petition for rulemaking, if the Licensing Board found that it "challenges any NRC regulation." Request at 10. The Board did not find that the motion challenged any NRC regulation, and it did not address this part of the State's Request. See LBP-05-05, slip op. at 24.

Counsel for NRC Staff

Dated at Rockville, Maryland
this 28th day of March 2005

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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

CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S RESPONSE TO 'STATE OF UTAH'S PETITION FOR REVIEW OF THE BOARD'S INTERLOCUTORY RULING ON CONTENTION UTAH UU,'" 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 28th day of March, 2005:

Michael C. Farrar, Chairman*
Administrative Judge
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, DC 20555
(E-mail copy to MCF@NRC.GOV)

Office of the Secretary*
ATTN: Rulemakings and Adjudications
Staff
U.S. Nuclear Regulatory Commission
Washington, DC 20555
(E-mail copies to SECY@NRC.GOV
and HEARINGDOCKET@NRC.GOV)

Dr. Paul B. Abramson*
Administrative Judge
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, DC 20555
(E-mail copy to PBA@NRC.GOV)

Office of the Commission Appellate
Adjudication
Mail Stop: 16-C-1 OWFN
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Dr. Peter S. Lam*
Administrative Judge
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, DC 20555
(E-mail copy to PSL@NRC.GOV)

James M. Cutchin, V*
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, DC 20555
(E-mail to JMC3@NRC.GOV)

Atomic Safety and Licensing Board
Panel
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Jay E. Silberg, Esq.**
Paul A. Gaukler, Esq.
Sean Barnett, Esq.
Shaw Pittman
2300 N Street, N.W
Washington, DC 20037-8007
(E-mail copy to jay_silberg,
paul_gaukler, and sean_barnett
@shawpittman.com)

Tim Vollmann, Esq.**
3301-R Coors Road N.W.
Suite 302
Albuquerque, NM 87120
(E-mail copy to tvollmann@hotmail.com)

Denise Chancellor, Esq.**
James Soper, Esq.
Laura Lockhart, Esq.
Utah Attorney General's Office
160 East 300 South, 5th Floor
P.O. Box 140873
Salt Lake City, UT 84114-0873
(E-mail copies to dchancellor, jsoper, and
llockhart@utah.gov, and
attygen@xmission.com)

Connie Nakahara, Esq.**
Utah Dep't of Environmental Quality
168 North 1950 West
P. O. Box 144810
Salt Lake City, UT 84114-4810
(E-mail copy to
cnakahara@utah.gov)

Diane Curran, Esq.**
Harmon, Curran, Spielberg & Eisenberg
1726 M Street, N.W., Suite 600
Washington, D.C. 20036
(E-mail copy to
dcurran@harmoncurran.com)

John Paul Kennedy, Sr., Esq.**
David W. Tufts, Esq.
Durham, Jones & Pinegar
111 East Broadway, Suite 900
Salt Lake City, UT 84105
(E-mail copy to dtufts@djplaw.com)

Joro Walker, Esq.**
Western Resource Advocates
1473 South 1100 East, Suite F
Salt Lake City, UT 84105
(E-mail copy to
jwalker@westernresources.org)

Western Resource Advocates**
2260 Baseline Road, Suite 200
Boulder, CO 80302

Paul C. EchoHawk, Esq.
EchoHawk PLLC
P.O. Box 6119
Pocatello, Idaho 83205-6119
E-mail copy to:
pechohawk@hollandhart.com

/RA/

Sherwin E. Turk
Counsel for NRC Staff