

November 18, 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 MOTION
TO REOPEN THE RECORD AND TO AMEND CONTENTION UTAH UU"

INTRODUCTION

On November 3, 2005, the State of Utah ("State") filed the "State of Utah's Motion to Reopen the Record and to Amend Contention Utah UU" ("Motion"), based upon recent statements by officials within the U.S. Department of Energy ("DOE") evidencing DOE's current intention to accept spent nuclear fuel ("SNF") in multipurpose canisters at the proposed Yucca Mountain repository. In accordance with 10 C.F.R. §§ 2.730 and 2.734, the NRC staff ("Staff") hereby files its response to the State's Motion. For the reasons set forth below, the Staff submits that the State has failed to satisfy its burden of showing that "a materially different result . . . would have been likely had the newly proffered evidence been considered initially" or that a genuine dispute of material fact exists, as is required to sustain its motion to reopen and to admit this amendment to late-filed Contention Utah UU. Accordingly, the State's Motion should be denied.

BACKGROUND

This completed adjudicatory 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. The proceeding commenced more than eight years ago, upon publication in July 1997 of a "Notice of

Consideration” and “Notice of Opportunity for Hearing” concerning the PFS application.¹ Petitions for leave to intervene and numerous contentions were filed by various petitioners, including the State;² and the State and other petitioners were admitted as parties to the proceeding, along with many of their contentions.³

Over the course of the past eight years, the parties engaged in extensive litigation, including many months of evidentiary hearings (in 2000, 2002, and 2004). This adjudicatory process culminated in the Licensing Board’s issuance of its Final Partial Initial Decision on aircraft crash issues,⁴ and the Commission’s denial of the State’s petition for review of that decision and its authorization for the Staff to issue a license to PFS, on September 9, 2005.⁵ The State filed a petition seeking review of that decision in the U. S. Court of Appeals for the District of Columbia Circuit on November 8, 2005, five days after filing the instant Motion.⁶

Prior History Concerning Late-Filed Contention Utah UU

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)

¹ “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).

² See “State of Utah’s Contentions on the Construction and Operating License Application by [PFS] for an Independent Spent Fuel Storage Facility” (“Initial Contentions”), dated November 23, 1997.

³ *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).

⁴ See *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-05-29, 62 NRC ____ (“Order Issuing Redacted Version of Final Partial Initial Decision”) (Oct. 28, 2005); *Id.*, “Final Partial Initial Decision” (Feb. 24, 2005), *reconsideration denied*, LBP-05-12, 61 NRC 319 (May 24, 2005).

⁵ *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-05-19, 62 NRC ____ (Sept. 9, 2005). In accordance with the Commission’s authorization, the Staff is currently completing preparations for license issuance.

⁶ Petition for Review, *State of Utah v. Nuclear Regulatory Commission*, Case No. 05-1420 (Nov. 8, 2005).

issued a Draft Environmental Impact Statement (“DEIS”) for the proposed PFS Facility,⁷ 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 PFS proposal, including the impacts resulting from transportation of SNF to and from the PFS facility, the compatibility of PFS’s multipurpose canister (“MPC”) with potential DOE design requirements for a high-level waste repository, and PFS’s expectation that it would be able to ship SNF to the proposed Yucca Mountain repository.⁸

In December 2001, the Staff and cooperating federal agencies issued a 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 extensive comments by the State.⁹ In this regard,

⁷ 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”).

⁸ 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 [EIS] 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 expected its HI-STORM dual-purpose canister system would be compatible with DOE’s plans for placement in a permanent repository, *Id.* at 2-23; (6) 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 (7) 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.

⁹ 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 Utah Governor’s Office is identified 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; and other Utah Departments are identified as Commenters 0051, 0066, and 0099. See FEIS at H-8, H-9.

the FEIS explicitly addressed comments by the State that raised issues related to the question of whether PFS would be able to ship SNF to the proposed repository.¹⁰

On November 12, 2004 (three years following issuance of the FEIS), the State submitted a request for admission of late-filed Contention Utah UU, asserting that the FEIS is deficient because DOE allegedly will not accept SNF in welded canisters from the PFS site. In support of this assertion, the State pointed to certain reported oral remarks by Gary Lanthrum, a DOE waste transportation official, who opined that DOE is 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).¹¹ On December 6, 2004, the Applicant filed its response to the State's request to admit Contention Utah UU, in which it, *inter alia*, (a) described DOE's obligations under the Standard Contract to accept all commercial SNF, and (b) presented written statements by other DOE officials regarding DOE's intentions to accept SNF in

¹⁰ 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 and PFS application must be considered to be "connected actions," *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.

¹¹ "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 questions raised in the Board's Order of November 16, 2004.

NRC-approved containers; similar documentation showing DOE's previously-stated intentions was proffered by the Staff in its response in opposition to the contention.¹²

On February 24, 2005, the Licensing Board issued its decision in LBP-05-05, ruling that Contention Utah UU is inadmissible. In particular, the Board observed as follows:

[W]e must reject the contention (and the motion to reopen the record) because its factual underpinning is inadequate. 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 brought to our attention that portray the matter differently, is insufficient to launch a new adjudicatory inquiry at this juncture.

LBP-05-05, 61 NRC at 111 (emphasis in original); *cf. id* at 117-25.

The State filed a petition seeking Commission review of the Licensing Board's decision in LBP-05-05. On June 20, 2005, the Commission issued its decision in CLI-05-12, denying the State's petition for review.¹³ The Commission found that the Licensing Board had reasonably rejected the State's late-filed contention, upon viewing the countering evidence proffered by PFS in opposition thereto. CLI-05-12, 61 NRC at 350-54. The Commission concluded, *inter alia*, that the State's "thinly supported new contention does not justify reopening the adjudicatory record and restarting our hearing process this late in a protracted, 8-year-old proceeding," and that the State had not shown that the new information proffered in support of its contention would "likely" trigger a different result if it had been considered. *Id.* at 346, 355.

On November 3, 2005, two months after the Commission issued its final decision and authorized the issuance of a license to PFS, the State filed the instant Motion. Therein, the State alleged that on October 25, 2005, DOE officials announced a new plan, pursuant to which

¹² See "Applicant's Response to State of Utah's Request for Admission of Late-Filed Contention Utah UU," dated December 6, 2004; (2) "NRC Staff's Response to 'State of Utah's Request for Admission of Late-Filed Contention Utah UU . . .,'" dated December 10, 2004, as corrected by letter of December 21, 2004. See also "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.

¹³ *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-05-12, 61 NRC 345 (June 20, 2005).

it now intends to develop a standardized multipurpose canister for transportation, storage and disposal of SNF at the proposed repository. The State asserts that if the Commission considers this new information, a different result would ensue with respect to its request to admit late-filed Contention Utah UU. Motion at 9. Further, the State asserts that PFS “cannot be licensed absent (1) a formal DOE pronouncement that the PFS canister . . . is the standardized canister selected to be accepted at the Yucca Mountain Repository, and (2) confirmation that DOE is obligated to collect fuel from the PFS off-site ISFSI.” Motion at 6.¹⁴

For the reasons set forth below, the Staff submits that the State’s Motion fails to demonstrate (a) that a materially different result would be likely if the information submitted in support of the State’s Motion is considered, or (b) that a genuine dispute of material fact exists that warrants admission of Contention Utah UU, if amended as proposed by the State.¹⁵

¹⁴ On November 14, 2005, the Applicant filed its response to the State’s Motion. See “Applicant’s Response to State of Utah’s Motion to Reopen the Record and to Amend Contention Utah UU,” dated November 14, 2005 (“PFS Response”).

¹⁵ The State asserts that the Commission has jurisdiction to consider its Motion, notwithstanding the fact that the Commission’s decision in CLI-05-19, in which it authorized the Staff to issue a license to PFS, constitutes the agency’s final adjudicatory decision. See Motion at 3. Further, the State asserts that because a license has not yet been issued, “the State would be left remediless if the Commission found its jurisdiction has expired.” *Id.* The Applicant argues, in contrast, that there is no longer any proceeding to reopen. See Applicant’s Response, at 5-9. In this regard, the Staff has not identified any case involving the precise procedural posture presented by the instant Motion; nonetheless, based on its review of applicable caselaw, the Staff believes the Commission does have jurisdiction to consider the Motion. See *Florida Power and Light Co.* (St. Lucie Nuclear Power Plant, Unit 2), CLI-80-41, 12 NRC 650, 651, 652 (1980) (upon the identification of “important” and “serious” generic issues by the Staff after the time for Commission review had expired, the Commission held that it could reconsider its prior determination not to review an otherwise final decision, finding that it retains jurisdiction to reconsider a final decision for 60 days after issuance thereof, under the Hobbs Act, 28 U.S.C. § 2347). This is not to say that the Commission should reopen the proceeding to consider the information presented in the State’s instant Motion to reopen. The Commission’s issuance of its decision in CLI-05-19, authorizing the Staff to issue a license to PFS, brought this adjudicatory proceeding to a conclusion. A party’s ability to present new information for consideration in an adjudicatory proceeding must end upon issuance of a final agency decision, in the absence of the most compelling circumstances. *Cf.* 10 C.F.R. § 2.734(a)(1) (an exceptionally grave issue presented in a motion to reopen may be considered in the discretion of the presiding officer, even if untimely presented). Were this not the case, parties could routinely prevent any adjudicatory proceeding from ever reaching a conclusion, simply by filing one new assertion after another, after the close of the proceeding. See Statement of Consideration, “Criteria for Reopening Records in Formal Licensing Proceedings,” 51 Fed. Reg. 19,535, 19,539 (1986). Such a result would be inconsistent with the Commission’s interest in assuring the “prompt,” “fair” and “efficient” conduct and resolution of its adjudicatory proceedings. See *Statement of Policy on Conduct of Adjudicatory Proceedings*, 48 NRC 18, 19, 24 (1998). Thus, notwithstanding the State’s jurisdictional argument, its

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DISCUSSION

I. Applicable Legal Standards.

A. Standards Governing Motions to Reopen.

Pursuant to 10 C.F.R. § 2.734(a), “[a] motion to reopen a closed record to consider additional evidence will not be granted unless the following criteria are satisfied”:

(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.¹⁶

It is well established that the proponent of a motion to reopen bears a heavy burden. See, e.g., *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), CLI-88-3, 28 NRC 1, 3 (1988); *Louisiana Power & Light Co.* (Waterford Steam Electric Station, Unit 3), CLI-86-1, 23 NRC 1, 5 (1986). It is not sufficient that a motion to reopen merely rest upon new information; rather, “the information must be significant and plausible enough to require reasonable minds to inquire further,” and must be “likely” to trigger a “different result.” *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-05-12, 61 NRC 345, 350 (2005).¹⁷

B. Standards Governing the Admissibility of Contentions

¹⁵(...continued)

motion to reopen should be rejected as having been improperly filed without substantial basis after the close of this proceeding.

¹⁶ Under the Commission’s rules of practice, a motion to reopen “must be accompanied by one or more affidavits which set forth the factual and/or technical bases for the movant’s claim that the criteria of [§ 2.734(a)] have been satisfied.” Such affidavit(s) “must be given by competent individuals with knowledge of the facts alleged, or by experts in the disciplines appropriate to the issues raised. Evidence contained in affidavits must meet the admissibility standards set forth in § 2.743(c). . . .” 10 C.F.R. § 2.734(b).

¹⁷ Where a motion to reopen seeks to introduce an issue that has not been in controversy, the motion must satisfy the standards governing the admissibility of non-timely contentions. 10 C.F.R. § 2.734(d).

A contention may only be admitted if it complies with the requirements of 10 C.F.R. § 2.714(b) and applicable Commission case law. See generally, *Philadelphia Electric Co.* (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-216, 8 AEC 13, 20-21 (1974). In particular, each contention "must consist of a specific statement of the issue of law or fact to be raised or controverted," and must provide the following information:

- (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.¹⁸

10 C.F.R. § 2.714(b)(2).¹⁹ 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

¹⁸ 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). These amended rules "raise the threshold for the admission of contentions," *Id.* at 33,168, and are "strict by design." *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Unit 2), CLI-03-14, 58 NRC 207, 213 (2003), citing *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 & 3), CLI-01-24, 54 NRC 349, 358 (2001).

¹⁹ 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).

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.

With respect to factual information or expert opinion alleged to provide the basis for a contention, the assertion that a document or other factual information or an expert opinion supplies the basis for a contention should not be accepted uncritically. Rather, the cited information must be reviewed 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).²⁰ 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); *Oconee*, CLI-99-11, 49 NRC at 333-35.

II. The State's Motion Fails to Demonstrate that The Proceeding Should Be Reopened to Consider the New Information Submitted by the State.

A. The Motion Fails to Show That A Materially Different Result Would Have Been Likely If the New Information Was Considered Initially.

In late-filed Contention Utah UU, filed on November 12, 2004, the State asserted that the FEIS was deficient because DOE will refuse to accept SNF in welded multipurpose canisters from the PFS site. This assertion was based on oral remarks by Gary Lanthrum, a DOE transportation official, suggesting that the Standard Contract did not require DOE to accept SNF from the PFS site and that DOE is only required to accept bare fuel or fuel in bolted (*i.e.*, non-welded) containers:

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

²⁰ 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.

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; emphasis added. In support of this claim, the State described Mr. Lanthrum's oral remarks as a DOE "announcement" (Request at 1, 3), and claimed that "Now, . . . no fuel can be shipped directly from PFS to DOE" (*Id.* at 8, 10), resulting in various impacts which the State alleged had not been evaluated in the FEIS for the PFS Facility (*Id.* at 2-9).²¹

The Licensing Board rejected the State's request for admission of late-filed Contention Utah UU, finding that the State's "evidence" was insufficient to overcome the "countering" evidence proffered by the Applicant, including other DOE documents concerning its acceptance of SNF at the proposed repository.²² LBP-05-05, 61 NRC at 111, 124-25. The

²¹ 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.

²² The Applicant's response to the contention 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 of December 6, 2004, at 7-9. Further, the Applicant described DOE's legal obligation to accept all SNF from U.S. nuclear utilities, even if it is contained in welded 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 contained in NRC-certified multi-purpose canisters. *Id.* at 9-14.

Other documentation was cited by the Staff in its response to the contention, including (a) the minutes of a November 2004 meeting in which Mr. Lanthrum stated that eight existing NRC-certified cask designs – of which are dual purpose designs (including the HI-STAR 100 transportation cask which
(continued...)

Commission denied the State's petition for review of the Licensing Board's ruling, finding the Board's decision to be reasonable. CLI-05-12, 61 NRC at 350-55. The State's present attempt to reopen the record and to amend Contention Utah UU, to consider DOE's recently announced "new path forward" fails to provide any reason to believe that the Licensing Board and the Commission likely would have reached a materially different conclusion if the new information had been considered initially.²³

DOE's latest announcement establishes that DOE currently "envision[s] spent fuel being delivered to Yucca Mountain primarily in standard canisters . . . which are then placed in a

²²(...continued)

PFS proposes to use) – could accommodate up to sixty percent of the spent fuel available for shipment to Yucca Mountain in 2010 (Staff's Response of December 10, 2004, Exh. 1 at 5-6); (b) a letter from Lake H. Barrett (former Acting Director of OCRWM, DOE) to the NRC, dated April 9, 2001, concerning the use of welded multi-purpose canisters 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); and (c) an Affidavit by Earl Easton, stating that to the best of the Staff's 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). . . at 9, ¶ F."

²³ The State raised concerns substantially similar to those raised in Contention Utah UU, in many of its Initial Contentions including, significantly, Contention Utah D. These concerns included: (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 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 (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). All of these contentions were duly ruled upon by the Licensing Board and the Commission. *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 these contentions. These contentions, including Contention Utah D – were discussed at length in the Staff's response to Contention Utah UU. There, the Staff presented its view that the State's attempt to raise these same issues again, in late-filed Contention Utah UU, constituted an improper motion for reconsideration of the Board's (and Commission's) decisions rejecting those previous contentions. *See* Staff's Response of December 10, 2004, at 14-17. The Staff hereby incorporates that discussion herein.

waste package for emplacement, without handling individual fuel canisters.”²⁴ Under this approach, “most spent nuclear fuel would be sent to Yucca Mountain in a standardized container that would not require repetitive handling of bare fuel prior to disposal.”²⁵ DOE further instructed its contractor “to submit a preliminary draft of the Conceptual Design package (or CD-1) to DOE,” which would become “the project’s baseline design” if approved by DOE’s Acquisition Advisory Board. Motion, Exh. 6. At the same time, DOE instructed its contractor “to use proven technology and commercial approaches where possible,” and to also “provide recommendations on optimum methods and timing of handling waste in existing non-disposable dual purpose canisters.”²⁶

Thus, rather than show that a different result would have been reached if the new information had been considered initially, DOE’s announcement of its “new path forward,” reflecting its current, evolving deliberation on its proposed operation of a permanent repository, does not undermine the conclusions reached by the Board and the Commission. To the contrary, DOE’s recent announcement is consistent with the Licensing Board’s determination in LBP-05-05, finding the State had failed to provide sufficient evidence to show that DOE had established a policy of accepting only “bare” fuel or fuel in non-welded canisters.²⁷ Moreover, DOE’s announcement did not establish a design for the canisters – and it left open the possibility that existing multipurpose canister designs might be compatible with the design that

²⁴ DOE News, “New Yucca Mountain Repository Design to be Simpler, Safer and More Cost-Effective” (Motion, Exh. 2), at 1; emphasis added.

²⁵ “Yucca Mountain - Program Redirection Fact Sheet” (Updated Oct. 25, 2005) (Motion, Exh. 6); emphasis added.

²⁶ Letter from W. John Arthur, III (Deputy Director, OCRWM) to Ted C. Feigenbaum (President and General Manager, Bechtel SAIC), dated October 25, 2005 (PFS Response, Attach. 2).

²⁷ Indeed, DOE’s latest announcement – which the State describes as “a sea change in DOE’s design plans for Yucca Mountain,” Request at 1; emphasis added – severely undercuts the State’s previous argument in Contention Utah UU that DOE will only accept bare fuel or fuel in bolted and therefore will not accept SNF from the PFS Facility. If DOE’s latest pronouncements had been known when the State proffered Contention Utah UU, this information would have provided additional bases for the contention to be rejected at that time.

is ultimately selected by DOE.²⁸ Further, the State has provided no information showing that the FEIS is deficient in any manner.²⁹ In sum, the State has failed to show that a materially different result would be or would have been reached if the new information was considered.

B. The Motion Fails to Demonstrate The Existence of A Genuine Dispute of Material Fact, as Required to Warrant Admission of the Contention.

As set forth above, the documentation provided by the State does not show that DOE's "new path forward" is necessarily inconsistent with the PFS proposal. None of the new information presented by the State shows that DOE has now finalized its selection of any package design, let alone selected a design which is incompatible with the MPC to be used by PFS, or that DOE will refuse to accept SNF at the proposed repository in MPCs shipped from the PFS Facility.³⁰ Further, even if DOE eventually selects a "Conceptual Design package (or

²⁸ In 1990, the Commission observed that "specific design criteria for spent fuel disposal may not be available until a repository design is approved," and "[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." Statement of Consideration, "Storage of Spent Fuel in NRC-Approved Storage Casks at Power Reactor Sites," 55 Fed. Reg. 29,181, 29,187 (1990). DOE's latest announcement does not alter this situation; as the State observed in its initial request to admit Contention Utah UU, DOE still "has not formally developed its plans for waste acceptance at the permanent repository." Request at 12.

²⁹ In assessing transportation impacts, the FEIS considered representative routes for SNF shipments to and from the PFS Facility and maximized the environmental impacts of such transportation, using the greatest possible route length / 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). FEIS at 5-43, 5-46, 5-50, 5-53, 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; rather it considered the impacts of SNF shipment from the PFS site to the western Utah border "for analytical purposes," 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. 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.*; *cf. id.* at 1-6 (the requirement to remove SNF from the PFS facility "is not dependent upon the availability of a permanent geological repository.")

³⁰ In addition to the DOE announcements discussed in the text above, the State filed the November 3, 2005, Declaration of Dr. Dianne R. Nielson, Director of the Utah Department of Environmental Quality, who provided her personal assessment of the recent DOE announcements

(continued...)

CD-1)” which is incompatible with the PFS MPC, no showing has been made that alternate canister designs would not also be approved by DOE, consistent with its instruction to “provide recommendations on optimum methods and timing of handling waste in existing non-disposable dual purpose canisters.” The State’s claim that DOE’s new plan establishes that DOE will not accept SNF from the PFS Facility constitutes mere speculation and unsupported, bald assertions, and fails to establish sufficient grounds for the contention’s admission.³¹ The State has failed to show the existence of a genuine dispute of material fact based on the new information, and thus failed to satisfy its burden of going forward under 10 C.F.R. § 2.714(b)(2). *Accord, Millstone, supra*, CLI-03-14, 58 NRC at 212-13.³² Accordingly, the State has failed to demonstrate that its contention (even if amended) should be admitted “at this juncture” of the proceeding.³³

³⁰(...continued)

(Motion, Exh. 1). Dr. Nielson states, *inter alia*, that “there is no reason why DOE should be held captive to PFS’s storage plans because the Secretary of Energy has said ‘the Private Fuel Storage Facility initiative is not part of the Department’s overall strategy for the management of spent nuclear fuel and high-level radioactive waste.’” Nielson Declaration, at 3 ¶ 13, *citing* Letter from DOE Secretary Samuel W. Bodman to Hon. Orrin G. Hatch, dated October 26, 2005 (attached as Exh. A). Dr. Nielson, however, has not been shown to have any special expertise or personal knowledge of these matters, contrary to the requirements of 10 C.F.R. § 2.734(b); moreover, Secretary Bodman’s letter – which is not cited in the Motion – does not indicate that DOE will refuse to accept SNF from the PFS Facility.

³¹ 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). Nor does speculation about future events present a significant safety issue which would warrant the reopening of a proceeding. *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 & 2), CLI-90-10, 32 NRC 218, 223 (1990).

³² 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) specifies what a petitioner must do to satisfy its burden of coming forward with information in support of a proposed contention).

³³ LBP-05-05, 61 NRC at 111. As the Licensing Board further observed:

[T]o justify the granting of a motion to reopen, the moving papers must be strong enough, in the light of any opposing filings, to avoid summary disposition. Thus, . . . no reopening of the evidentiary hearing will be required if the [documents] submitted in response to the motion demonstrate that there is no genuine unresolved issue of fact, *i.e.*, if the undisputed facts establish that the apparently significant . . . issue does not exist, has been resolved, or for some other reason will have no

(continued...)

C. The State's Request for the Imposition of A
New License Conditions Should Be Rejected.

In addition to seeking to amend and admit Late-Filed Contention Utah UU for litigation, the State urges the Commission to impose a new condition on the PFS license, to prohibit PFS from accepting any spent fuel at its facility before DOE agrees to accept such fuel, as then packaged. Motion at 10. This request seeks to impose a condition which is outside the scope of any admitted contention in the proceeding and should be rejected.³⁴ Further, given the lack of any showing that DOE will refuse to accept such fuel from PFS, or that the FEIS failed to adequately address this issue, the State's request for imposition of a new license condition should be rejected.

CONCLUSION

For the reasons set forth above, the Staff respectfully submits that the State's request to reopen this completed adjudicatory proceeding and to amend and admit late-filed Contention Utah UU should be denied.³⁵

Respectfully submitted,

³³(...continued)
effect upon the outcome of the licensing proceeding.

Id. at 116, citing *Vermont Yankee Nuclear Power Corp.* (Vermont Yankee Nuclear power Station), ALAB-138, 6 AEC 520, 523-24 (1973).

³⁴ The State requested other license conditions in its initial request to admit Contention Utah UU. There, the State urged that conditions be imposed on PFS and the owners of the SNF prior to shipment to the PFS Facility, to assure that DOE will accept the SNF canisters from PFS at the proposed repository, that the owners will take their SNF back for repackaging, and that an escrow account is established to cover the cost of shipping SNF back to the owner or other facility for repackaging. See Request, at 2, 8-9. These suggested conditions, as well as a new suggestion that conditions 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, were proposed in the State's petition for review of LBP-05-05, dated March 16, 2005, at 9-11.

³⁵ The State's Motion incorporates by reference, without discussion, all of its previous filings concerning the admission of Contention Utah UU. Motion at 7 and n.6. The State's action fails to provide proper notice as to which of its previous statements of fact and arguments it now seeks to rely upon. Accordingly, in an abundance of caution, to the extent not set forth above the Staff hereby incorporates by reference its previous arguments concerning the admissibility of Contention Utah UU, set forth in the Staff's filings of December 10, 2004 and March 28, 2005.

/RA/

Sherwin E. Turk
Counsel for NRC Staff

Dated at Rockville, Maryland
this 18th day of November 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 MOTION TO REOPEN THE RECORD AND TO AMEND 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, or by deposit in the U.S. Postal Service, as indicated by double asterisk, with copies by electronic mail this 18th day of November, 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.
Pillsbury Winthrop Shaw Pittman LLP
2300 N Street, N.W.
Washington, DC 20037-8007
(E-mail copy to jay.silberg, and
paul.gaukler@pillsburylaw.com)

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

Leon Bear, Chairman
Skull Valley Band of Goshute Indians
3359 South Main
Box 808
Salt Lake City, Utah 84115

Denise Chancellor, Esq.**
Fred G. Nelson, 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, llockhart,
jsoper, and jbraxton@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)

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

Paul C. EchoHawk, Esq.
EchoHawk Law Offices
151 North 4th Avenue, Suite A
P.O. Box 6119
Pocatello, Idaho 83205-6119
(E-Mail copies to: paul, larry and
mark@echohawk.com)

Paul H. Tsosie, Esq.
Calvin M. Hatch, Esq.
Tsosie & Hatch
2825 East Cottonwood Pkwy, Suite 500
Salt Lake City, UT 84121
(E-mail copy to:
Paul@tsosieandhatch.com)

/RA/

Sherwin E. Turk
Counsel for NRC Staff