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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before The Commission

In The Matter Of	)	
	)	
PRIVATE FUEL STORAGE L.L.C.	)	DOCKET NO. 72-22
	)	
(PRIVATE FUEL STORAGE FACILITY)	)	

APPLICANT'S RESPONSE TO STATE OF UTAH'S MOTION TO REOPEN THE RECORD AND TO AMEND UTAH CONTENTION UTAH UU

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Applicant Private Fuel Storage L.L.C. ("PFS") hereby responds to the "State of Utah's Motion to Reopen the Record and to Amend Contention Utah UU," filed November 3, 2005 ("Motion").[1] The State's Motion requests that the Commission reopen the PFS hearing record to consider issues allegedly arising from recent statements by the Department of Energy ("DOE") that it intends to develop a standardized canister design for use at Yucca Mountain. The State's Motion must, however, be denied for three wholly separate and distinct reasons.

First, the PFS licensing proceeding is over. On September 9, 2005, the Commission issued a final order resolving the last outstanding issue in the proceeding, and the State has already filed a petition for review in the U.S. Court of Appeals for the District of Columbia Circuit challenging the Commission's action.[2] Thus, the PFS licensing proceeding has ended, and there is no ongoing adjudicatory proceeding before the Commission in which the record could be reopened. Second, even assuming the proceeding were still ongoing, the claim raised by the State's Motion – the alleged incompatibility of the PFS spent fuel canisters with the yet-to-be-

[1] The Commission's Rules of Practice which were applicable to this proceeding do not prescribe any page limitation for motions to reopen the record or responses thereto. See 10 C.F.R. §§ 2.730 and 2.734. The Licensing Board established a 15 page limit for new or amended contentions and responses thereto which PFS is treating as being applicable here. See Board Memorandum and Order (Granting Page Limit Extension and Providing Additional Pages for Late-Filed Contentions) (Feb. 9, 2000) at 3.

[2] Petition for Review, State of Utah v. Nuclear Regulatory Commission, Case No. 05-1420 (Nov. 8, 2005) ("State Pet.").

developed standardized canister for Yucca Mountain – is identical to the claim raised in the State's original Contention Utah D, filed in November 1997 and rejected by the Atomic Safety and Licensing Board ("Licensing Board" or "Board"). The State's Motion provides no new information that would demonstrate any material difference in the result. Third, independent of the first two grounds for dismissal, the State fails to provide sufficient basis either to reopen the record or to admit a new or amended contention.

I. BACKGROUND

On September 9, 2005, the Commission issued its final decision for the licensing of the Private Fuel Storage Facility ("PFSF"), denying the State's petition for review of a series of Licensing Board orders concerning the hazards from a potential aircraft crash into the PFSF.[3] The Commission's decision resolved the last outstanding issue in the PFS licensing proceeding and Commission specifically noted that the "decision . . . concludes this protracted adjudication." CLI-05-19, slip op. at 27. Simultaneously, the Commission "authorized [the Staff] to issue PFS a license to construct and operate" the PFS facility. Id.

On November 8, 2005 the State filed a Petition for Review with the U.S. Court of Appeals for the District of Columbia Circuit "to review the final decision and actions" of the Commission concerning the PFS license. State Pet. at 1. The State's Petition specifically noted the Commission's statement that CLI-05-19 "concludes this protracted adjudication" and acknowledged that CLI-05-19 "represented final agency decision and action and made the other decisions from the PFS licensing process ripe for judicial review." Id. at 2. Oddly, the State's Petition to the D.C. Circuit nowhere refers to the State's Motion, filed with the Commission just five days earlier to reopen the PFS record.

The State filed its Motion seeking to reopen the PFS hearing record and to amend Contention Utah UU on November 3, 2005. Although the Motion addresses only Utah UU, in fact the issues raised in the Motion hark back to Contention Utah D filed by the State as part of its

[3] Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), , CLI-05-19, slip. op., 62 N.R.C. __ (2005).

initial set of contentions on November 23, 1997.[4] Utah D alleged, inter alia, that the PFS facility "was not adequately designed to facilitate decommissioning, because PFS has not provided sufficient information about the design of its storage casks to assure compatibility with DOE repository specifications." Id. at 22. The contention claimed that DOE would "require all potential users of the repository to properly package their waste" in accordance with DOE specifications "before shipping it" to the repository, id. at 26, and argued that the PFS facility design was inadequate because it lacked the capability to repackage spent fuel. PFS opposed admission of Utah D because its license application addressed DOE requirements to the extent practicable, and no more was required by Commission regulation.[5] The Licensing Board agreed and denied the admission of Utah D.[6] The State never sought Commission review of the Board's dismissal.[7]

On November 12, 2004, after the record had been closed,[8] the State filed Contention Utah UU alleging that spent fuel stored in sealed, welded canisters, such as those proposed for use at the PFSF, would not be accepted by DOE.[9] This assertion was premised on a purported DOE "announcement" "that DOE was only obligated to accept bare fuel or fuel packaged in bolted canisters." Utah UU at 1. Accordingly, the State claimed that fuel stored at the PFSF could not be shipped directly to the DOE geologic repository (presumably, Yucca Mountain) for disposal and that, instead, it would have to be shipped back to its utility owners, repackaged in a form acceptable to DOE, and then shipped to DOE. See id. at 4, 12. The State argued that, as a result, (1) the final environmental impact statement ("FEIS") for the PFSF was inadequate because it al-

[4] State of Utah's Contentions on the Construction and Operating License Application by Private Fuel Storage, LLC for an Independent Spent Fuel Storage Facility (Nov. 23, 1997) ("State Contentions").

[5] Applicant's Answers to Petitioners' Contentions (Dec. 24, 1997) ("PFS Answer"). The NRC Staff also opposed the admission of Utah D. See NRC Staff's Response to Contentions Filed by (1) the State of Utah [et al] (Dec. 24, 1997) at 23-26.

[6] Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-98-7, 47 N.R.C. 142, 186-187 (1998).

[7] See State of Utah's Petition for Review of Non-Hearing Issues in the Private Fuel Storage, LLC Licensing Proceeding (Dec. 4, 2003).

[8] The record in the PFS licensing proceeding was closed on September 15, 2004. Tr. at 19700.

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

legedly did not account for shipping fuel back to the utilities, repackaging, and shipment to DOE, and (2) PFS's financial qualifications were inadequate because its plans allegedly did not account for shipping fuel back to the utilities. Id. at 1,2, 12.

PFS and the NRC Staff both opposed the admission of Utah UU.[10] PFS set forth extensive information demonstrating that there was simply no factual basis to support Utah UU's claim that DOE will not accept canistered fuel. See PFS Utah UU Resp. at 6-14. PFS further demonstrated that, even assuming the spent fuel would have to be shipped from the PFSF back to the utilities for repackaging, that would not materially affect either the FEIS analysis or PFS's financial qualifications because both accounted for the possibility that the spent fuel might have to be shipped back to the utilities prior to shipment to DOE. Id. at 14-19. The NRC Staff concurred with PFS's arguments and further argued that Utah UU was inadmissible because it was unjustifiably late.

On February 24, 2005, the Board dismissed Utah UU, finding that its "factual underpinning is inadequate."[11] On March 16, 2005, the State petitioned the Commission for review of the Board's ruling dismissing Utah UU.[12] On March 28, 2005, PFS and the Staff responded to the State's petition, opposing Commission review of the Board's ruling.[13] On June 20, 2005, the Commission denied the State's petition for review, finding Utah UU to be "much too thinly supported to conclude that taking it to hearing would 'likely' cause a different result within the meaning of [the Commission's] reopening rule," 10 C.F.R. § 2.734.[14]

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[10] Applicant's Response to State of Utah's Request for Admission of Late-Filed Contention Utah UU (Dec. 6, 2004) ("PFS Utah UU Resp."); NRC Staff Response to "State of Utah's Request for Admission of Late-Filed Contention UU (Ramifications of DOE's Refusal to Accept Fuel in Welded Canisters from the PFS Site) or in the Alternative Petition for Rulemaking" (Dec. 10, 2004) ("Staff Utah UU Resp.").

[11] Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-05-05, 61 N.R.C. 108, 111 (2005).

[12] State of Utah's Petition for Review of the Board's Interlocutory Ruling on Contention Utah UU (Mar. 16, 2005) ("State Utah UU Pet.").

[13] Applicant's Response to State of Utah's Petition for Review of Late-Filed Contention Utah UU (Mar. 28, 2005) ("PFS Resp. to Utah UU Pet."); NRC Staff's Response to "State of Utah's Petition for Review of the Board's Interlocutory Ruling on Contention Utah UU" (Mar. 28, 2005) ("Staff Resp. to Utah UU Pet.").

[14] Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-05-12, slip op. at 13, 61 N.R.C. __ (2005).

II. THE COMMISSION SHOULD REJECT THE STATE'S MOTION BECAUSE THE PFS LICENSING PROCEEDING HAS ENDED

The State's Motion is fatally flawed because there is no adjudicatory proceeding pending before the Commission to be reopened. Indeed, save for a single footnote explaining why it cites to the former Part 2 regulation (Motion at 3 n.1), the State's Motion mentions neither the existence nor the effect of CLI-05-19, which terminated the PFS licensing proceeding. Ignoring the Commission's decision, the State argues that, no license having yet been issued, the Commission retains jurisdiction to reopen the hearing record. Id. at 3. It further claims that the Commission must have jurisdiction, otherwise it "would be left remediless" because a 10 C.F.R. § 2.206 petition does not apply. Id. And, apparently in anticipation of its petition for review filed with the D.C. Circuit, the State offers that the Hobbs Act may not deprive the Commission of jurisdiction "over certain limited issues." Id. The State's arguments have no merit and must be rejected.

The Commission should not permit the PFS hearing record to be reopened. The Commission has issued its final decision concluding the adjudicatory proceeding and authorizing the NRC Staff to issue the license. CLI-05-19, slip op. at 27. The Commission clearly stated that its decision "[c]oncluded this protracted litigation" and that "[t]here are no remaining adjudicatory issues to resolve." Id. Thus, in accordance with 10 C.F.R. § 2.770 ("Final Decision"), CLI-05-19 was the Commission's "Final Decision," and that decision both closed the PFS adjudicatory proceeding and the notice of opportunity for a hearing published in the Federal Register on the PFS license. "A motion to reopen goes to the need for further hearings in a formal matter which is pending before the Commission."[15] As there are no PFS licensing matters pending before the Commission, the State's Motion is wholly improper and must be rejected.

The State acknowledges that CLI-05-19 constitutes final agency action. The State's Petition to the D.C. Circuit explicitly states that CLI-05-19 "concluded [the Commission's] adjudication of all issues" and that "this decision represented final agency decision and action, and made the other decisions from the PFS licensing process ripe for judicial review." State Pet. at 2 (em-

[15] Final Rule, Criteria for Reopening Records in Formal Licensing Proceedings, 51 Fed. Reg. 19,535, 19,538 (May 30, 1986).

phasis added). The State is correct, for CLI-05-19 is a final agency decision ripe for appeal under the Hobbs Act. It "disposes of all issues as to all parties in the licensing proceeding...[and] consummates the agency's decision making process . . . ."[16] As the State has since filed a judicial appeal of CLI-05-19, the case is now before the D.C. Circuit Court of Appeals and not the Commission.[17]

The State cites the Commission's decision in Comanche Peak for the proposition that, until a license is issued, the possibility of a reopened hearing is not entirely foreclosed. Motion at 3. The Comanche Peak decision does not support the State's argument. Although the NRC Staff has not yet issued the PFS license, the situation here is not analogous to that in Comanche Peak. In Comanche Peak, there was no final Commission decision or petition for judicial review with respect to adjudicatory licensing issues. There, a settlement was reached among the parties during the course of the adjudicatory proceeding and the proceeding was dismissed.[18] Thus, Comanche Peak is not authority for the situation here where the formal licensing adjudication has reached a final decision and judicial appeal has been taken.[19]

Further, unlike the situation here, each Commission statement in Comanche Peak on the continued possibility for reopening the Comanche Peak Unit 2 hearing[20] was made prior to the

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[16] Massachusetts v. NRC, 924 F.2d 311, 322 (D.C. Cir. 1991). See also 28 U.S.C. § 2342; 42 U.S.C. § 2239(a)-(b).

[17] See Pacific Gas & Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-85-14, 22 N.R.C. 177, 179 (1985) ("the Commission should not, without judicial approval, reconsider a decision after the filing of a petition for judicial review").

[18] Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-92-1, 35 N.R.C. 1, 3 (1992); Id., CLI-93-1, 37 N.R.C. 1, 2 (1993).

[19] The State's reliance on Limerick and Three Mile Island also fails to support its arguments. While those cases establish that jurisdiction over motions to reopen records properly resides with the adjudicatory body within the Commission reviewing petitions to review an underlying decision, they fail to answer the question of whether a motion to reopen a record can be entertained once all adjudicatory issues have been resolved and the proceeding terminated. See Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-823, 22 N.R.C. 773, 775 (1985); Metropolitan Edison Co. (Three Mile Island Nuclear Station Unit 1), ALAB-699, 16 N.R.C. 1324, 1327 (1982)

[20] Comanche Peak, CLI-92-1, 35 N.R.C. 1, 6 n.5 (1992) (issued Jan. 17, 1992); id., CLI-92-12, 36 N.R.C. 62, 67 (1992) (issued Aug. 12, 1992); Id., CLI-93-1, 37 N.R.C. 1, 3 (1993) (issued Jan. 29, 1993); Id., CLI-93-4, 37 N.R.C. 156, 160 (1993) (issued Mar. 9, 1993). See also id., CLI-93-10, 37 N.R.C. 192, 204-05 (1993) (issued Mar. 30, 1993).

Commission's authorization for the Staff to issue the Comanche Peak Unit 2 license.[21] The NRC Staff issued the Comanche Peak Unit 2 license on the same day the Commission authorized its issuance.[22] In PFS, the Commission simultaneously concluded the adjudicatory proceedings and authorized the NRC Staff to issue the license,[23] but the Staff has not yet issued the license.

Furthermore, it is clear from the Commission's Comanche Peak decisions that the touchstone for determining if a hearing record can be reopened is whether agency action had yet "closed out the opportunity for a hearing" provided in the Federal Register for the given license.[24] The answer to this determinative question does not turn on whether the NRC Staff has issued the license.[25]

The determinative question for evaluating the appropriateness of the State's Motion is, then, whether CLI-05-19 "closed out the opportunity for a hearing" and disposed of all issues "pending before the Commission." The answer is yes, as evidenced by the Commission's express words, its authorization to the Staff to issue the license, and the State's Petition for Review to the DC Circuit. The Commission should recognize that the PFS licensing proceeding is over, and that any continuing regulatory functions by the Staff do not create an opportunity to reopen a completed hearing.

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[21] The Commission rejected petitioners' final stay motion, motion for reconsideration, and motion to hold in abeyance, see Comanche Peak., CLI-93-11, 37 N.R.C. 251 (1993), and authorized the NRC Staff to issue the Comanche Peak Unit 2 full power operating license on April 6, 1993. See Memorandum For James M. Taylor, NRC Executive Director for Operations, and William C. Parler, NRC General Counsel, from Samuel J. Chilk, Secretary of the Commission (Apr. 6, 1993), available at www.adamswebsearch.nrc.gov, Accession No. ML003760365.

[22] See Letter from Jack W. Roe, Director, Division of Reactor Projects III/IV/V, NRC Office of Nuclear Reactor Regulation, to William J. Cahill, Jr. Group Vice President, Nuclear, TU Electric (Apr. 6, 1993), available at www.adamswebsearch.nrc.gov, Accession No. ML022270634.

[23] Private Fuel Storage, , CLI-05-19, slip op. at 27.

[24] See, e.g., Comanche Peak, CLI-92-12, 36 N.R.C. at 67 (rejecting a motion for late intervention and a motion to reopen the record because "[t]he NRC has issued the operating license for Unit 1. That action has closed out the Notice for Opportunity for a Hearing" provided for both the operating license and the construction permit amendment) (emphasis added); id., CLI-93-1, 37 N.R.C. at 3 ("Issuance of the full-power license for Unit 1 closed out the opportunity for a hearing on the Unit 1 operating license under the 1979 Federal Register notice; however, until the full-power license for Unit 2 has actually been issued, the possibility of a reopened hearing is not entirely foreclosed.") (emphasis added).

[25] For example, the Staff may issue a license while appeals to the Commission are pending and before the Commission issues a final decision consummating the agency's decision making process. See, e.g., 10 C.F.R. § 2.764; Private Fuel Storage, CLI-05-19, slip op. at 27 n.93.

A similar situation was addressed in Indian Point where a petitioner sought to prevent the issuance of an authorized but not yet issued reactor operating license because its seismic concerns had not been considered in the operating license hearing.[26] The Appeal Board denied the petitioner's stay motion because, among other things, the operating license hearing was over, and the petitioner had failed to intervene in that proceeding. ALAB-319, 3 N.R.C. at 193. Any remaining seismic findings required to precede the issuance of the license fell to the Staff to resolve. Id. Indeed, the Appeal Board noted that once all contested issues and issues raised sua sponte were resolved, the responsibility over any remaining items resided with the Staff outside the context of a hearing. Id. at 190.

Hence, after the Commission's final decision with respect to all issues, including authorization for the Staff to issue the license, a 10 C.F.R. § 2.206 petition directed to the Staff is the appropriate mechanism for the State to seek redress of its concerns. Contrary to the State's assertion,[27] the fact that the Staff has not yet issued the PFS license in no way forecloses the applicability of § 2.206. Section 2.206 provides that "[a]ny person may file a request to institute a proceeding pursuant to § 2.202 to modify, suspend, or revoke a license, or for any other action as may be proper."[28] Notably, its text does not differentiate between issued and authorized licenses. Moreover, the Staff in fact entertains § 2.206 petitions prior to issuance of a license.[29]

Finally, the State contends that a petition for review under the Hobbs Act does not deprive the Commission of jurisdiction "over certain limited issues."[30] But in Marble Hill, the party petitioning for judicial review, while also requesting Commission reconsideration, had

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[26] Consolidated Edison Co. of New York, Inc. (Indian Point, Units 1, 2 & 3) ALAB-319, 3 N.R.C. 188, 193 (1976).

[27] Motion at 3 n.2.

[28] 10 C.F.R. § 2.206 (2005) (emphasis added).

[29] See, e.g., Public Service Electric & Gas Co. (Salem Nuclear Generating Station, Unit 2) DD-80-17, 11 N.R.C. 596, 610 (1980) (issued Apr. 16, 1980) ("[o]ur evaluation of these matters will be presented in a supplement to the [SER] prior to a decision concerning issuance of an operating license."). The Staff issued the Salem Unit 2 full power operating license on May 20, 1981. See Letter from Darrel G. Eisenhut, Director, NRC Division of Licensing, Office of Nuclear Reactor Regulation, to Mr. R. L. Mitti, General Manager, Public Service Electric and Gas Company (May 20, 1981), available at www.adamswebsearch.nrc.gov, Accession No. ML011730121.

[30] Motion at 3 (citing Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-493, 8 N.R.C. 253, 258-59) (1978). The State never explains what it means by "certain limited issues."

"expressly asked the court of appeals to stay its hand until [the NRC's] proceedings are completed," to which the Commission agreed and the appeals court acceded.[31] One may search in vain for any mention in the State's Petition for Review of its attempt to seek re-litigation of Contention UU before the Commission. More importantly, the petition for review in Marble Hill had challenged the issuance of a limited work authorization ("LWA").[32] Thus, unlike the situation here, the licensing proceeding in Marble Hill (for the issuance of the construction permit) was still ongoing. Id. While the issuance of the LWA was subject to review under Section 189 of the Atomic Energy Act, it did not constitute the agency's final decision under 10 C.F. R. § 2.770 rendering other decisions made in the licensing process ripe for review.[33] Here, as the State concedes, CLI-05-19 concluded the adjudicatory proceeding and constitutes the "final agency decision," making "the other decisions from the PFS licensing process ripe for judicial review." State Pet. at 2-6. Accordingly, unlike Marble Hill, the PFS licensing proceeding has ended. Marble Hill is wholly inapposite here.

Consequently, for the reasons set forth above, the Commission should reject the State's Motion because there no longer exists a PFS licensing proceeding to be reopened.

III. THE COMMISSION SHOULD ALSO REJECT THE STATE'S MOTION BECAUSE IT (1) FAILS TO PROVIDES SUFFICIENT FACTUAL BASIS TO REOPEN THE HEARING RECORD OR TO ADMIT UTAH UU AS AMENDED AND (2) FAILS TO DEMONSTRATE THAT A MATERIALLY DIFFERENT OUTCOME WOULD RESULT IF THE RECORD WERE REOPENED

A. Legal Standard for Reopening a Licensing Proceeding Record

Under 10 C.F.R. § 2.734, a motion to reopen a closed record to consider additional evidence will not be granted unless the following criteria are satisfied:

(a) (1) The motion must be timely . . .

(2) The motion must address a significant safety or environmental issue.

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[31] Marble Hill, ALAB-493, 8 N.R.C. at 259.

[32] Id. at 256; see also, Marble Hill, ALAB-459, 7 N.R.C. 179 (1978).

[33] See, e.g., Massachusetts v. NRC, supra note 16, 924 F.2d at 322 (an immediate effectiveness order by the Commission authorizing license issuance pending Commission review was not a "final decision" under 10 C.F. R. § 2.770 and did not make ripe for review other decisions rendered during the licensing process).

(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.

10 C.F.R. § 2.734.[34] The Commission has held that the "burden of satisfying the reopening requirements is a heavy one."[35] The focus is on the outcome of the proceeding; the record should not be reopened merely because new information has been proffered, even if it is relevant.[36] Rather, "it must be established that 'a different result would have been reached initially had [the material submitted in support of the motion] been considered.'"[37]

The State does not come close to meeting this heavy burden for reopening the record.

B. The State Provides Insufficient Basis to Reopen the Record or to Admit Utah UU

At the outset, the State provides an insufficient factual basis either to reopen the record or to admit Utah UU as amended since the facts referred to by the State do not support the claims made in amended Contention UU. As amended by the State, Utah UU now asserts that "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 or other non-standardized canisters from the PFS site. . ." Motion at 6-7 & n. 5 (emphasis added). However, the State provides nothing to support its claim that DOE has refused to collect spent fuel from the PFS site, or from any other site, that would store spent fuel in NRC-licensed spent fuel storage casks.

The recent DOE announcement relied upon by the State indicates that DOE is developing a proposal to use a standardized canister design at the Yucca Mountain repository. State Exhs. 2 and 6. A "Conceptual Design Package" is being developed for the proposed program change which will be submitted to the Secretary of Energy's Acquisition Advisory Board for review. "If

[34] A motion to reopen the record to file or amend a contention must also meet the contention admissibility standards. See 10 C.F.R. § 2.734.(d) and PFS Utah UU Resp. at 2-3.

[35] Louisiana Power & Light Co. (Waterford Steam Electric Station), CLI-86-1, 23 N.R.C. 1, 5 (1986) (citations and quotations omitted).

[36] See Kansas Gas & Electric Co. (Wolf Creek Generating Station, Unit No. 1), ALAB-462, 7 N.R.C. 320, 338 (1978).

[37] Pacific Gas & Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-756, 18 N.R.C. 1340, 1344 (1983) (bracketed wording in original), quoting Northern Indiana Public Service Co. (Bailly Generating Station, Nuclear-1), ALAB-227, 8 A.E.C. 416, 418 (1974).

the board approves the package it will become the project's baseline design." Id. (emphasis added). Recent testimony by David Zabransky, Contracting Officer for the Standard Contract, emphasizes that DOE's announcement represents a "proposal" that must be reviewed and approved before it becomes part of the Yucca Mountain program. See Attachment 1.

Moreover, the DOE announcement states only that the program change, if approved and implemented, would result in "most spent nuclear fuel" – not all spent fuel – being shipped to the "repository in a standardized canister that would not require repetitive handling prior to disposal." State Exhs. 2 and 6 (emphasis added). In this respect, DOE's directive to its Yucca Mountain contractor to develop the "conceptual design" for the program change also directs the contractor to "provide recommendations on optimum methods and timing of handling of waste in existing non-disposable dual purpose canisters," clearly expressing DOE's intent to accept and handle such canisters. See Attachment 2. Nowhere does DOE ever suggest that DOE will not accept spent fuel stored in currently approved NRC-licensed storage casks. Nor does the DOE announcement state that NRC-licensed storage casks, such as those proposed for the PFSF, would not be compatible with the yet-to-be-designed DOE standardized canister that DOE is proposing to consider. Many facilities currently store spent fuel in NRC-licensed casks. A significant number of these sites are decommissioned plants (such as Maine Yankee, Trojan, Rancho Seco, Connecticut Yankee, and Yankee Rowe) that would, like PFS, have no capability to repackage spent fuel.

In short, the State provides no factual basis to admit amended UU or to reopen the record.

C. The State Fails to Show a Materially Different Result from Reopening of the Record

In arguing that DOE's recent announcement of its intent to develop a standardized canister for use at Yucca Mountain would bring about "a materially different result," the State seeks to show how this announcement differs from the purported DOE announcement of last year that the State relied upon in submitting Utah UU. Motion at 5-7. In doing so, however, the State wholly ignores the fact that its current claim that DOE would refuse to accept spent fuel other

than in DOE standardized canisters is substantially identical to the claims raised in 1997 in Contention Utah D and rejected by the Licensing Board. The State makes no showing that the purported new information would lead to a materially different result than the Board's 1998 dismissal of Utah D, a ruling which the State never appealed.

In 1997, DOE was also contemplating a canisterized system for the disposal of spent fuel at Yucca Mountain.[38] Contention D alleged that the PFS had not "provided sufficient information about the design of its storage casks to assure compatibility with DOE repository specifications" for the multi-purpose canisters ("MPCs") that would be developed by DOE for the storage and transportation of the spent fuel and ultimately used for disposal of the spent fuel at Yucca Mountain. State Contentions at 22, 24. The State specifically claimed, for example, that the Holtec canister to be used at the PFSF "may be incompatible with" the DOE MPC and that "DOE may also require irradiated fuel to be transferred to the proposed Yucca Mountain repository in DOE casks which may not be compatible with the Holtec . . . canister." Id. at 24. In this same vein, the State asserted that the Yucca Mountain facility would not be capable of transferring fuel from "the many cask designs" that would be in use when the repository opened and that DOE would instead "require all potential users of the repository to properly package their waste before shipping it to the facility." Id. at 26.

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

> As this contention and its supporting basis allege incompatibility with DOE repository specifications, it is inadmissible because it seeks to challenge the Commission's regulatory program, regulations, or rulemaking-associated generic determinations under which DOE cask criteria, admittedly incomplete at present, need only be addressed as they become available, and has not demonstrated any specific inadequacy in the application's discussion of any existing DOE specifications that creates a genuine dispute. *See* section II.B.1.a.i., ii., vi. above. As this contention and its supporting basis assert the need for a facility "hot cell" for spent fuel canister inspection to ensure compatibility with future DOE spent

[38] See, e.g., DOE, Office of Civilian Radioactive Waste Management, "Multi-Purpose Cansiter (MPC) Implementation Program, Conceptual Design Phase Report, Volume I – MPC Conceptual Design Summary Report" (Final Draft: September 30, 1993) cited by the State in Utah D (State Contentions at 24) and attached as Exhibit 4 to the State's November 1997 Contentions.

> fuel acceptance limits, avoid storage removal operational safety problems, or provide a fuel repackaging capability for fuel transfer to casks compatible with later DOE requirements or for transfer of degraded fuel prior to shipment to a HLW repository, the contention also is inadmissible as impermissibly challenging the agency's regulations or rulemaking-associated generic determinations and lacking the necessary factual information or expert opinion support. *See* section II.B.1.a.i., ii., v

LBP-98-7, 47 N.R.C. at 186-87 (emphasis added).[39] The Commission's regulations for certifying dry storage cask designs provide that cask designs should take into account transportation and disposal of spent nuclear fuel by DOE "[t]o the extent practicable," 10 C.F. R. § 72.236(m), but as the Commission has noted, the "specific criteria for designing spent fuel casks for compatibility may not be available until the design for a high-level waste repository is complete."[40]

The State makes no showing that DOE's recently announced intent to develop a standardized canister design, analogous to that being considered by DOE in 1997, would lead to a materially different result than that reached by the Board in dismissing Utah D. Both the NRC's regulations and the extent to which DOE's specifications are available for spent fuel canisters remain unchanged from 1997. Thus, the same result reached by the Board in Utah D would be mandated today.

Moreover, even assuming arguendo as claimed by the State that spent fuel stored at the PFSF would need to be shipped back to the originating utility or elsewhere for repackaging prior to shipment to DOE, the State has failed to show any material effect on the outcome of this licensing proceeding. As it previously claimed in conjunction with Utah UU, the State argues that the Commission lacks assurance that PFS will have sufficient revenues or commitments from its customers to pay for and accept fuel back for repackaging. Motion at 9. The State's argument is baseless. As PFS has stated previously in response to Utah UU, PFS's Model Service Agreement ("MSA") – which defines the respective obligations of PFS and its customers – expressly makes each "customer/owner responsible for removing its SNF from the site at the end of the

[39] As noted above, no appeal was filed by the State from this ruling. See page 3 and note 7, supra.

[40] "Storage of Spent Fuel in NRC-Approved Storage Casks at Power Reactor Sites," 55 Fed. Reg. 29,181, 29,187 (1990).

agreement at its own expense."[41] Thus, if spent fuel could not be shipped to DOE at the end of the PFS license, the obligation for removing the fuel from the PFS site would rest squarely with PFS's customers. Furthermore, both the Commission and the Board have previously found that the remedy mechanisms of the MSA provide sufficient protection to PFS to assure that its customers will fulfill their obligations under the MSA.[42]

Equally baseless is the State's claim that the FEIS would be "deficient" should the fuel need to be shipped back to the originating utility prior to shipment to a DOE repository. Motion at 7. As previously set forth by both PFS and the Staff, the FEIS already considers the State's alleged need for multiple shipments as follows:

> Service agreements (i.e. contracts) between PFS and companies storing SNF at the proposed PFSF will require that these companies remove all SNF from the proposed PFSF by the time the PFS license is terminated and PFS had completed its licensing or regulatory obligations under the NRC license. The service agreement requirement to remove the SNF from the proposed PFSF is not dependent upon the availability of a permanent geological repository. Therefore, if the PFS license is terminated prior to the availability of a permanent geological repository, the reactor licensees storing SNF at PFSF would continue to retain responsibility for the fuel and must remove it from the proposed PFSF site before termination of the PFS license.

PFS FEIS at 1-6 (emphasis added). Thus, the FEIS fully considers the environmental impacts in the event that the spent fuel could not be shipped directly from PFS to a permanent repository for whatever reason. Moreover, the environment impacts of additional shipments of the spent fuel are easily ascertained from those set forth in the PFS FEIS, and they would remain "small."[43]

IV. THE STATE'S OTHER CLAIMS ARE EQUALLY MERITLESS

As before, the State asks the Commission to condition the issuance of the license in the event it does not grant the State's Motion. Motion at 9-10. Such conditions would be wholly inappropriate given the lack of any factual basis for their imposition. Furthermore, as noted above,

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[41] Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-05-20, slip op. at 67, 62 N.R.C. ___ (2005); see also PFS Utah UU Resp. at 17-19; PFS Resp. to Utah UU Pet. at 10.

[42] CLI-04-10, 61 N.R.C. 131, 141-42 (2005); LBP-05-20, slip op. at 61, 71-72.

[43] See PFS Resp. to Utah UU Pet. at 12-14.

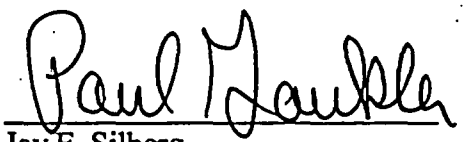
PFS is not unique. Other ISFSIs at decommissioned reactor sites are in the same position as PFS if for some unknown reason DOE would not accept spent fuel stored in NRC-licensed canisters. Contrary to the State's concerns, however, DOE has repeatedly assured Congressional, Federal, State and utility officials that DOE would take all appropriate actions necessary to accept spent nuclear fuel stored in NRC-licensed canisters.[44] Indeed, the Commission has expressly relied upon those assurances in certifying dry cask storage designs. Id. at 12. Nothing presented by the State suggests that DOE is about to renege on its repeated assurances. Accordingly, the conditions sought by the State are wholly unwarranted.

The State also suggests that the Commission should reopen the record or impose license conditions because otherwise "sunk economic costs" could somehow affect difficult licensing issues that might arise in the future with respect to the PFSF. Motion at 8. This claim is meritless for the reasons already set forth above. Nothing presented by the State suggests that DOE will not accept spent fuel from directly from the PFS site, and if for some unknown reason the spent fuel cannot be shipped directly to a DOE repository, the obligation for removing the fuel from the PFS site would rest squarely with PFS's customers.

V. CONCLUSION

For the foregoing reasons, the Commission should deny the State's Motion.

Respectfully submitted,



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November 14, 2005

[44] See PFS Utah UU Resp at 12-14 and Attachments 3-8.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Commission

In the Matter of	)	
	)	
PRIVATE FUEL STORAGE L.L.C.	)	Docket No. 72-22
	)	
(Private Fuel Storage Facility)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of the Applicant's Response to State of Utah's Motion to Re-open the Record and to Amend Utah Contention Utah UU were served on the persons listed below (unless otherwise noted) by e-mail with conforming copies by U.S. Mail, first class, postage prepaid, this 14th day of November, 2005.

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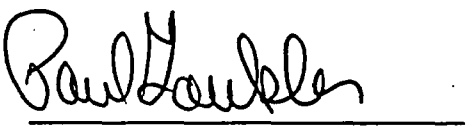

Paul A. Gaukler

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Partial Transcript of October 27, 2005 Testimony of David Zabronsky:

Southern Nuclear Operating Company, Alabama Power Company, and Georgia Power Company,

Plaintiffs

vs.

The United States

Defendant

No: 98-614C

Court of Federal Claims
Judge Merow

Q And this was a statement to Congress in support of appropriations and other legislative proposals being submitted to the Congress by the administration, correct?

A I don't know what this one particularly was for, but I don't think it was a budget cycle one, but it was statement for Congress.

MR. BLANTON: No further questions, Your Honor.

JUDGE MEROW: I have one question, which may provoke the same response, but we'll see.

There was an article in the Washington Post yesterday, a very short article, that said that DOE had modified its policy on acceptance of spent fuel at Yucca to change to accepting only clean casks, sealed casks canisters I believe it said.

THE WITNESS: Yes, sir.

JUDGE MEROW: And my question would be, is that consistent with the standard contract? And if not, would it have to be modified?

THE WITNESS: Well, again, I'm -- that's a process that's ongoing. DOE has decided to look into changing its program to that, and the intent would be to use canisters to ship the fuel and dispose of it. I'm not sure, I don't know whether it's inconsistent

or not at this point in time.

JUDGE MEROW: You haven't been asked to --

THE WITNESS: We haven't been asked to -- the proposal is a proposal at this point, and the process that starts now is an evaluation of whether we're going to implement that proposal.

MR. BLANTON: That provokes one follow-up Your Honor.

BY MR. BLANTON:

Q The press report I saw, Mr. Zebransky, said that the canister loading would take place at DOE -- excuse me, at utility sites at DOE expense. Is that consistent with the proposal as you understand it?

A I don't think the proposal is that delineated at this point in time, not that I've seen.

MR. BLANTON: Nothing further, thank you.

JUDGE MEROW: Further redirect?

MS. SULLIVAN: I have one or two questions.

JUDGE MEROW: Sure.

Department of Energy
Office of Civilian Radioactive Waste Management
Office of Repository Development
1551 Hillshire Drive
Las Vegas, NV 89134-6321

QA: N/A

OCT 25 2005

Ted C. Feigenbaum
President and General Manager
Bechtel SAIC Company, LLC
1180 Town Center Drive, M/S 423
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DIRECTION TO PREPARE A REVISED CRITICAL DECISION-1 (CD-1) FOR ACCEPTING AND HANDLING PRIMARILY CANISTERIZED FUEL AT THE YUCCA MOUNTAIN (YM) REPOSITORY; CONTRACT NUMBER DE-AC28-01RW12101.

The purpose of this letter is to direct Bechtel SAIC Company, LLC (BSC), to develop a revised CD-1 package in accordance with DOE Order 413.3 for accepting and handling primarily canisterized fuel at the YM repository. The objective of this modification is to simplify the design, licensing, construction, and operation of the repository surface facilities. The program is revising the current program approach to include the use of Transport, Aging, and Disposal (TAD) canisters for the acceptance of spent nuclear fuel from the utilities. The use of TAD canisters will permit smaller, less complex surface facilities to operate in a clean, simplified, and safe manner, while minimizing radiological contamination issues. The U.S. Department of Energy (DOE) will develop a commercial approach that will rely upon the private sector to design and license the TAD canister based transportation systems that meet DOE performance specifications.

BSC is directed to stop work associated with activities that support primarily bare fuel handling at the repository, other than that required for limited bare fuel and off-normal operations, and develop a CD-1 package that addresses the following:

1. Canisterized operations with a focus on simple, safe, and clean operations.
2. Canisters arriving at the repository will be disposable after being placed in a waste package.
3. Develop minimum bare fuel handling capability that would also be used for off-normal operations with remediation capabilities.
4. Utilize aspects of the current design to the extent practicable.
5. Maintain phased construction approach.
6. Include capability for both truck and rail deliveries.
7. Is consistent with Civilian Radioactive Waste Management Requirements Document acceptance rates of spent nuclear fuel.
8. Examine the feasibility of utilizing commercially available shielded canister transfer facility with addition of a waste package closure cell.

9. Minimize impact on initial conditions for post closure safety case.
10. Location of surface facilities are not constrained to the north portal area but in the EIS analyzed space.
11. Evaluate and recommend other system optimizations to ensure best cost and schedule value.

The revised CD-1 should use proven technology and commercial approaches where possible. The revised CD-1 should also include an analysis of the impacts to the License Application, Environmental Impact Statement, Total System Performance Assessment, Preclosure Safety Analysis and CD-1 documentation, and it should identify risks associated with each. In addition, BSC should provide recommendations on optimum methods and timing of handling waste in existing non-disposable dual purpose canisters.

BSC will be responsible for the development of the CD-1 documentation deliverables; specifically, the Conceptual Design Report, Risk Assessment, the Safety Hazards Analysis, and updated preliminary design phase budget and schedule and total project cost and schedule range. The DOE will maintain responsibility for the Project Execution Plan, the Acquisition Strategy, and the assessment of programmatic risks.

BSC is directed to complete a preliminary report due to DOE in writing within 30 days from the date of this letter with an overall goal of completing the revised CD-1 within 90 days. The preliminary report should address the planning assumptions, feasibility, and risks associated with the conceptual design alternatives, deliverables, and schedules to develop the CD-1 documentation. BSC is directed to provide weekly updates to DOE management through the completion of this effort in accordance with DOE Order 413.3 requirements.

If it is determined by the contractor that this direction results in changes to the terms of the contract, you are directed to notify the Contracting Officer immediately so that appropriate action can be taken.

Should you have any questions in this regard, please contact me at (702) 794-1300.

W. John Arthur, III
Deputy Director

OPM&E:VFI-0030

cc:
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