

20961

DOCKETED
USNRC

LBP-99-43

'99 NOV -4 P12:04

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

G. Paul Bollwerk, III, Chairman
Dr. Jerry R. Kline
Dr. Peter S. Lam

OFFICE OF THE CHIEF
REGULATOR FOR NUCLEAR
ADJUDICATION AND ADOPTION

RECEIVED NOV - 4 1999

In the Matter of

PRIVATE FUEL STORAGE, L.L.C.

(Independent Spent Fuel
Storage Installation)

Docket No. 72-22-ISFSI

ASLBP No. 97-732-02-ISFSI

November 4, 1999

MEMORANDUM AND ORDER
(Denying Request for
Admission of Late-Filed
Amended Contention Utah C)

In response to the Licensing Board's decision in LBP-99-23, 49 NRC 485 (1999), granting summary disposition in favor of applicant Private Fuel Storage, L.L.C., (PFS) regarding contention Utah C, Failure to Demonstrate Compliance with the NRC Dose Limits, intervenor State of Utah (State) has requested that we admit a late-filed amended contention Utah C. In its submission, the State challenges the revised dose analysis that has been incorporated into the pending PFS application for a 10 C.F.R. Part 72 license to construct and operate an independent spent fuel storage installation (ISFSI) on the Skull Valley, Utah reservation of the Skull Valley Band of Goshute Indians. In this regard, the State claims the PFS

PDR ADCK1

DS02

application, even as revised, insufficiently evaluates the dose consequences of a loss-of-confinement accident and so fails to satisfy the Commission's health and safety regulations. In response to the State's request, although not in agreement on whether the amended contention has the requisite basis and specificity needed for admission, PFS and the NRC staff both assert the contention should be rejected because the governing five-factor balancing test for late-filed issues does not support its admission.

For the reasons described below, we deny the request for admission of late-filed amended contention Utah C.

I. BACKGROUND

PFS submitted its pending proposal to construct and operate an ISFSI facility on the Skull Valley reservation in a June 1997 license application and accompanying safety analysis report (SAR). In the SAR, PFS relied upon data from the staff-issued NUREG-1536, Standard Review Plan for Dry Cask Storage Systems (Jan. 1997), and a Sandia National Laboratory report, SAND80-2124, Transportation Accident Scenarios for Commercial Spent Fuel (Feb. 1981), to analyze the radiation dose consequences of the plan and demonstrate compliance with 10 C.F.R. § 72.106(b). See LBP-99-23, 49 NRC at 488. In pertinent part, that section of Part 72 directs that:

[a]ny individual located on or beyond the nearest boundary of the [ISFSI] controlled area may not receive from any design basis accident the more limiting of a total effective dose equivalent of 0.05 Sv [(sievert)] (5 rem), or the sum of the deep-dose equivalent and the committed dose equivalent to any individual organ or tissue (other than lens of the eye) of 0.5 Sv (50 rem).

10 C.F.R. § 72.106(b). In considering the original contention Utah C, in which the State argued that the PFS dose analysis calculation methods outlined in the SAR failed to comply with this safety regulation, the Board in its April 1998 initial ruling on contention admissibility found that issue statement presented a litigable contention. See LBP-98-7, 47 NRC 142, 185-86, reconsideration granted in part and denied in part on other grounds, LBP-98-10, 47 NRC 288, aff'd on other grounds, CLI-98-13, 48 NRC 26 (1998).

On December 10, 1998, the staff submitted requests for additional information (RAI) to PFS, including RAI 7-1 that inquired about the dose analysis calculations included in the 1997 SAR. In its RAI responses submitted on February 10, 1999, PFS included a revised dose analysis calculation that, in accordance with Interim Staff Guidance-5 (Oct. 1998) (ISG-5), did not utilize NUREG-1536 or SAND80-2124. See LBP-99-23, 49 NRC at 489. Thereafter, PFS filed an April 21, 1999 motion asking for summary disposition in its favor on contention Utah C based upon

its RAI 7-1 revised dose analysis for the ISFSI facility. Several weeks later, as part of its May 7, 1999 response to a State motion to compel discovery regarding contention Utah C, PFS expressed its intention formally to incorporate this revised calculation into its application. See [PFS] Response to [State] Proprietary and Non-Proprietary Motions to Compel [PFS] to Respond to State's First Set of Discovery Requests (May 7, 1999) at 6 n.12. PFS then did so on May 19, 1999, as part of its third amendment to its license application, which incorporated the revised dose analysis into chapter eight of the SAR.

In LBP-99-23, 49 NRC at 494, the Board granted summary disposition in favor of PFS on contention Utah C, ruling that contention Utah C was rendered moot by the PFS amendment incorporating the revised dose analysis. In this June 17, 1999 decision, the Board found that the PFS revisions addressed the deficiencies that composed the three admitted portions of contention Utah C. The Board explained:

As to the first two portions of the contention concerning the fission product release fraction and the respirable particulate fraction, PFS has responded to the State's concerns about its use of data from NUREG-1536 and SAND80-2124 to arrive at those fractions by eliminating those figures as a basis for its dose analysis. . . . And regarding the third segment of the contention -- failure to consider dose pathways other than passing cloud

inhalation, including direct radiation and food and water ingestion pathways -- the new dose analysis does consider other pathways

Id. at 491-92.

Within a week, the State filed the pending motion requesting admission of a late-filed amended contention Utah C. This version of contention Utah C, like its predecessor, challenges the adequacy of the PFS dose analysis calculations. The State asserts that the requirements of 10 C.F.R. §§ 72.24(m), 72.106(b), 72.126(b), still are not satisfied because the new analysis does not demonstrate that offsite doses can be contained within acceptable limits. Late-filed amended contention Utah C, as submitted by the State, reads:

The Applicant has failed to demonstrate a reasonable assurance that the dose limits specified in 10 CFR § 72.106(b) can and will be complied with, in the following respects:

1. The Applicant relies on cask designs that have not been approved by the NRC.
2. The Applicant has not demonstrated that the accident evaluated is a design basis or bounding event.
3. The Applicant makes unreasonable assumptions about the duration of the radiation dose.
4. The Applicant makes unreasonable assumptions about the length of time that a

person outside the controlled area will be exposed.

5. The Applicant does not adequately evaluate the ingestion pathway dose.

[State] Request for Admission of Late-Filed Amended Utah Contention C (June 23, 1999) at 3 (footnote omitted) [hereinafter State Request].

In supporting the admission of this amended contention, the State argues that (1) a balancing of the five factors set forth in 10 C.F.R. § 2.714(a)(1)(i)-(v) that govern the admission of a late-filed contention establishes the contention should be admitted, see State Request at 14-20; and (2) the information it has provided in support of the contention is sufficient to establish the requisite basis and specificity to gain its admission under the requirements of 10 C.F.R. § 2.714(b)(2), (d)(2), (e), see State Request at 7-14. PFS, on the other hand, argues that the State's request should be denied because it has failed to satisfy the section 2.714(a)(1) late-filed contention test, in particular the requirement to show good cause for its late filing, and its contention lacks an adequate basis under section 2.714(b)(2). See [PFS] Response to [State] Request for Admission of Late-Filed Amended Utah Contention C (July 7, 1999) at 3-20 [hereinafter PFS Response]. The staff, while agreeing with PFS that the contention should be dismissed because of the State's failure to prevail under a

balancing of the five late-filing factors, nonetheless declares that all or portions of paragraphs two, three, four, and five of the amended contention have a basis sufficient to warrant admission under the standards in section 2.714. See NRC Staff's Response to [State] Request for Admission of Late-Filed Amended Utah Contention C (July 7, 1999) at 4-12 [hereinafter Staff Response].

II. ANALYSIS

As we have previously explained in this proceeding, see, e.g., LBP-98-7, 47 NRC at 182-83, the admission of a late-filed contention, such as amended contention Utah C, is governed by the five-factor test set forth in 10 C.F.R. § 2.714(a)(1). In seeking admission, the burden of proof is on the petitioner, who must affirmatively address all five factors and demonstrate that on balance they warrant overlooking the lateness of the filing. See, e.g., Baltimore Gas & Electric Co. (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), CLI-98-25, 48 NRC 325, 347 & n.9 (1998) (citing cases), petitions for review pending, National Whistleblower Center v. NRC, Nos. 99-1002 & 99-1043 (D.C. Cir. Jan. 4, 1999 & Feb. 8, 1999). Even if a late-filed contention meets the requirements of section 2.714(a)(1), however, it also must satisfy the admissibility standards set forth in

section 2.714(b)(2)(i)-(iii), (d)(2), (e), in order to receive merits consideration. See LBP-98-29, 48 NRC 286, 291 (1998).

The first, and most important, section 2.714(a)(1) element is whether the party seeking admission of the issue has demonstrated good cause for its late filing. And crucial to that inquiry in this instance is a determination of the point from which timeliness should be calculated. Although all of the parties involved concede the State received the applicable PFS RAI responses in February 1999,¹ they disagree as to whether this is the date from which any timeliness determination should be calculated. The State declares the RAI responses were merely provisional and argues timeliness must be computed from the date PFS formally incorporated the new, revised dose analysis into its license application, which was less than thirty days from the date of the State's late-filed contention request. See State Request at 15-17. PFS and the staff, on the other hand, argue that the proper point for beginning the timeliness calculation is the date the State received the PFS RAI-7 response, some four months before the State's late-filed contention was submitted. See PFS Response at 3;

¹ The State has not contested the PFS assertion that its RAI 7-1 response and the supporting calculations and backup information were provided to the State in mid-February 1999. See PFS Response at 2 & n.1.

Staff Response at 5. This, these parties claim, puts the State's present request for the admission of late-filed amended contention Utah C far beyond even the forty-five days the Board previously described as "approaching the outer boundary of 'good cause.'" LBP-99-3, 49 NRC 40, 47, aff'd, CLI-99-10, 49 NRC 318 (1999).

Relative to this timing question, the Commission has stated "a petitioner has an 'ironclad obligation' to examine the application, and other publicly available documents, with sufficient care to uncover any information that could serve as the foundation for a contention." Duke Energy Corp. (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 338 (1999). Further, participants in agency proceedings have been counseled to evaluate all available information at the earliest possible time to identify the potential basis for contentions and preserve their admissibility. See Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), CLI-83-19, 17 NRC 1041, 1050 (1983) (intervenors expected "to raise issues as early as possible"). And along this same line, the Board previously has indicated that where "a new contention purportedly is based on information contained in a document recently made publically available, an important consideration in judging the contention's timeliness is the extent to which the new contention could have been put forward with any degree of

specificity in advance of the document's release."

LBP-98-29, 48 NRC 286, 292 (1998).

As these decisions suggest, in making a judgment about timeliness, the emphasis is on the substance and sufficiency of the information available to the contention's sponsor. And from the Board's perspective, as we explained earlier in this proceeding, making a determination on such a timeliness issue "calls for a judgment about when the matter is sufficiently facially concrete and procedurally ripe to permit the filing of a contention." LBP-99-21, 49 NRC 431, 437 (1999).

In analyzing the question of factual concreteness in this instance, we must ascertain when the State had information sufficient to frame the contention with "reasonable specificity and basis." Id. at 437. Although the State sees the filing of the May 1999 license application amendment as the defining moment in this instance, PFS and the staff argue the State had the information necessary to formulate amended contention Utah C upon receipt of the PFS RAI 7-1 response in February 1999. These parties maintain that on its face the RAI 7-1 response makes it clear the revised dose analysis both addressed the substantive concerns previously raised by the staff and the State and would replace the earlier dose analysis calculations that had been questioned. For instance, in its

response to RAI 7-1, PFS stated, "[t]he calculation of the impacts . . . has been revised in accordance with [ISG-5] to show compliance with the accident dose limits in 10 [C.F.R. §] 72.106(b)." [PFS] Motion for Summary Disposition of Utah Contention C -- Failure to Demonstrate Compliance with NRC Dose Limits (Apr. 21, 1999), Affidavit of William Hennessy, exh. 2, at 1 of 4.

We agree that the revised technical information contained within the February 1999 PFS response to RAI 7-1 in fact provided an adequate basis, i.e., the requisite factual concreteness, for the formulation of an updated contention. The RAI response contained information with a degree of specificity sufficient to provide the State with the basis for formulating amended contention Utah C. Nor, as the State asserts, does the fact the information was contained in an RAI response rather than a license application amendment somehow toll its obligation to come forth with a contention based on that information. Even though this RAI response differs procedurally from an application amendment, Commission case law recognizes that such material can provide an acceptable basis for a contention. See Oconee, CLI-99-11, 49 NRC at 338.

That this is the case is not surprising. As we have noted previously, within the context of a license application process, in reaching a determination about

whether a particular applicant submission, such as the instant RAI response, has sufficient procedural ripeness to cause it to trigger late-filed contention timing concerns, consideration should be given to whether the included information was "put before the agency in a context that is (a) reasonably likely to have a material impact on the administrative process (e.g., will influence Staff consideration of the pending license application); and (b) is subject to consideration in the related adjudicatory proceeding." LBP-99-21, 49 NRC at 437. We have little trouble in concluding that the State reasonably should have known that upon submission, the information contained in the RAI response was likely materially to impact the staff's consideration of the PFS application.² Within the context of its submission, the response to RAI-7 directly addressed staff and State concerns over the methodology used by PFS in

² By way of contrast within this proceeding, the PFS RAI response at issue differs markedly from other information sources previously considered by the Board both in terms of its specificity and likely administrative process impact. See LBP-99-21, 49 NRC at 437-38 (applicant request for exemption is atypical and its "likely impact on the administrative process" uncertain as compared to license application in which an applicant seeks to demonstrate compliance with agency requirements); LBP-98-29, 48 NRC 286, 293 n.4 (notwithstanding early July 1998 letter to docket announcing intent to amend application with proposal to build Low Junction rail spur, see LBP-99-3, 49 NRC at 47, finding regarding untimeliness of late-filed contentions not based on lack of good cause for filing contentions within 30 days of August 1998 application amendment detailing rail spur proposal).

its initial dose analysis and evidenced an intention that the new calculation should constitute the basis upon which the staff should make a judgment about the sufficiency of its application. Therefore, the RAI response containing the analysis that now constitutes a central basis for amended contention Utah C was "procedurally ripe" such that the time at which the State received that response was an appropriate point from which "good cause" considerations began to accrue.

Having failed to demonstrate that the information made available to it in February 1999 as a result of the PFS RAI response was inadequate to provide a basis for formulating its amended contention Utah C, we conclude the State did not have good cause for waiting until June 1999 to file that contention.

In the absence of good cause, the State must make a compelling showing that remaining four section 2.714(a)(1) factors outweigh factor one so as to favor admission. See Commonwealth Edison Co. (Braidwood Nuclear Power Station, Units 1 and 2), CLI-86-8, 23 NRC 241, 244 (1986). Additionally, when analyzing the remaining four factors, the Board is to afford factors two and four -- availability of other means to protect the petitioner's interest and extent of representation of petitioner's interests by existing parties -- less weight than factors three and five --

assistance in developing a sound record and broadening the issues/delaying the proceeding. See id. at 245.

We find factors two and four weigh in favor of the State, given it is unlikely that another means is available to the State to raise this dose analysis matter or that the State's interests will be represented by another party to the proceeding. However, factors two and four must still be evaluated along with factors three and five to see whether their overall balance is sufficient to outweigh the lack of good cause. With regard to factor three, the State fails to make a compelling showing that admission of the contention will assist in developing a sound record. Petitioners are required to provide the Board with a "real clue about what they would say to support the contention beyond the minimal information they provide for admitting the contention." LBP-98-7, 47 NRC at 208. Here, the State simply indicates the name and profession of their expert witness and asserts that his testimony will develop a sound record without providing a real explanation as to what will compose such a record, the type of proffer we previously have found lacks the specificity demanded by the Commission if this factor is to be accorded any significant weight in favor of admitting the contention. See, e.g., LBP-98-29, 48 NRC at 294 & n.5.

Similarly, the State fails to make a convincing argument that admission will not broaden or delay the

proceeding as required under factor five. The Board has already granted summary disposition on the original contention Utah C because the RAI 7-1 revised analysis, which has now been formally incorporated into the SAR, effectively mooted the State's challenge to this part of the PFS plan. See LBP-99-23, 49 NRC at 494. Admitting the amended contention thus would reintroduce a subject matter previously eliminated from this proceeding. Additionally, paragraph one of amended contention Utah C is identical to paragraph one the Board rejected in admitting the original contention Utah C as "impermissibly challeng[ing] the Commission's regulatory scheme, provisions, or rulemaking-associated generic determinations." LBP-98-7, 47 NRC at 186. Thus, at this juncture, the admission of amended contention Utah C undoubtedly would increase, at least to some degree, both the breadth and duration of this proceeding.

In sum, notwithstanding the fact section 2.714(a)(1) factors two and four support the admission of amended contention Utah C, a balancing of all four criteria does not establish the requisite compelling showing needed to

overcome the lack of good cause under factor one.³ As a consequence, amended contention Utah C cannot be admitted.

III. CONCLUSION

In seeking admission of its late-filed amended contention Utah C contesting PFS's compliance with agency dose limits in connection with operation of its proposed Skull Valley ISFSI, in accordance with the section 2.714(a)(1) five-factor balancing test governing the admission of late-filed contentions, the State has failed to establish under factor one that good cause existed for filing the contention in June 1999 when the dose analysis it challenges was made available to the State in February 1999 as part of a PFS response to a December 1998 staff RAI. In the absence of good cause, and the State having failed to show that a balancing of the remaining four factors strongly

³ While our ruling on the late-filing criteria means we need not reach the question of the contention's admissibility under the section 2.714 criteria, based on our review of the parties' filings, we would have admitted paragraphs two, three, four, and five of the contention, excluding the asserted bases for paragraph two relating to (1) the need for offsite emergency planning, which constitutes an inadequately supported request for a rule waiver, see 10 C.F.R. § 2.758; and (2) accidents caused by sabotage, which seeks to challenge Commission regulations or rulemaking-associated generic determinations. Consistent with our ruling in LBP-98-7, 47 NRC at 186, we also would have denied admission of paragraph one for the reasons given in rejecting the same issue relative to the State's original contention Utah C.

favors admission of amended contention Utah C, we deny the State's request for admission of that contention.

For the foregoing reasons, it is this fourth day of November 1999, ORDERED, that the State's June 23, 1999

request for admission of late-filed amended contention
Utah C is denied.

THE ATOMIC SAFETY
AND LICENSING BOARD⁴

B. Paul Bollwerk, III
G. Paul Bollwerk, III
ADMINISTRATIVE JUDGE

Jerry R. Kline
Dr. Jerry R. Kline
ADMINISTRATIVE JUDGE

Peter Lam
Dr. Peter S. Lam
ADMINISTRATIVE JUDGE

Rockville, Maryland

November 4, 1999

⁴ Copies of this memorandum and order were sent this date by Internet e-mail transmission to counsel for (1) applicant PFS; (2) intervenors Skull Valley Band of Goshute Indians, Ohngo Gaudadeh Devia, Confederated Tribes of the Goshute Reservation, Southern Utah Wilderness Alliance, and the State; and (3) the staff.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of

PRIVATE FUEL STORAGE, LLC

(Independent Spent Fuel Storage
Installation)

Docket No.(s) 72-22-ISFSI

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LB MEMO & ORDER (LBP-99-43) have been served upon the following persons by U.S. mail, first class, except as otherwise noted and in accordance with the requirements of 10 CFR Sec. 2.712.

Office of Commission Appellate
Adjudication
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Administrative Judge
G. Paul Bollwerk, III, Chairman
Atomic Safety and Licensing Board Panel
Mail Stop - T-3 F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Administrative Judge
Jerry R. Kline
Atomic Safety and Licensing Board Panel
Mail Stop - T-3 F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Administrative Judge
Peter S. Lam
Atomic Safety and Licensing Board Panel
Mail Stop - T-3 F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Sherwin E. Turk, Esq.
Catherine L. Marco, Esq.
Office of the General Counsel
Mail Stop - O-15 D21
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Diane Curran, Esq.
Harmon, Curran, Spielberg
& Eisenberg, L.L.P.
1726 M Street, NW, Suite 600
Washington, DC 20036

Martin S. Kaufman, Esq.
Atlantic Legal Foundation
205 E. 42nd St.
New York, NY 10017

Joro Walker, Esq.
Land and Water Fund of the Rockies
2056 East 3300 South, Suite 1
Salt Lake City, UT 84109

Docket No.(s)72-22-ISFSI
LB MEMO & ORDER (LBP-99-43)

Denise Chancellor, Esq.
Assistant Attorney General
Utah Attorney General's Office
160 East 300 South, 5th Floor
P.O. Box 140873
Salt Lake City, UT 84114

Jay E. Silberg, Esq.
Shaw, Pittman, Potts & Trowbridge
2300 N Street, NW
Washington, DC 20037

John Paul Kennedy, Esq.
Confederated Tribes of the Goshute
Reservation and David Pete
1385 Yale Avenue
Salt Lake City, UT 84105

Richard E. Condit, Esq.
Land and Water Fund of the Rockies
2260 Baseline Road, Suite 200
Boulder, CO 80302

Danny Quintana, Esq.
Skull Valley Band of Goshute Indians
Danny Quintana & Assocs., P.C.
68 South Main Street, Suite 600
Salt Lake City, UT 84101

Richard Wilson
Department of Physics
Harvard University
Cambridge, MA 02138

Dated at Rockville, Md. this
4 day of November 1999

Adria T. Byrdsong
Office of the Secretary of the Commission