

21116

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

LBP-00-01  
DOCKETED  
USNRC

'00 JAN -6 P1:56

On  
FILED  
ADJUTANT  
**SERVED JAN - 6 2000**

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

January 6, 2000

MEMORANDUM AND ORDER

(Denying Request to Admit Late-Filed  
Second Amended Contention Utah Q)

In its April 22, 1998 ruling on the standing and contentions of the various intervening parties to this proceeding regarding the application of Private Fuel Storage, L.L.C., (PFS) for permission to construct and operate a 10 C.F.R. Part 72 independent spent fuel storage installation (ISFSI) in Skull Valley, Utah, the Licensing Board rejected contention Utah Q, Adequacy of ISFSI Design to Prevent Accidents, as lacking adequate basis. See LBP-98-7, 47 NRC 142, 195, 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). Intervenor State of Utah (State) now seeks to have an

PDR ADD CLK

DS02

amended version of that contention admitted on a late-filed basis, a request opposed both by PFS and the NRC staff.

For the reasons set forth below, we deny the State's request to admit this issue, finding that once again the State improperly seeks to raise a challenge in this adjudicatory proceeding that is properly the subject for rulemaking.

#### I. BACKGROUND

As set forth in the State's November 1997 intervention petition supplement, contention Utah Q provided that:

The Applicant has failed to adequately identify and assess potential accidents, and therefore, the Applicant is unable to determine the adequacy of the ISFSI design to prevent accidents and mitigate the consequences of accidents as required by 10 C.F.R. 72.24(d)(2).

[State] Contentions on the Construction and Operating License Application by [PFS] for an [ISFSI] Facility (Nov. 23, 1997) at 114. As the basis for that contention, among other things, the State asserted that PFS had failed to address adequately the affects of a cask drop accident and of spent fuel element cladding embrittlement as they might cause nuclear material releases. As described in its August 20, 1999, request for admission of a second amended, late-filed contention Utah Q, see [State] Request for Admission of Late-Filed Second Amended Utah Contention Q

(Aug. 20, 1999) at 13-14 [hereinafter State Request], following the Board's April 1998 dismissal of its initial contention Utah Q, the State continued to pursue the issue of the adequacy of cask stability accident analyses in the context of the rulemaking regarding the agency's 10 C.F.R. § 72.214 certification of the Holtec International (HI) HI-STAR 100 cask storage system. The HI-STAR 100 is another storage system manufactured by HI, the fabricator of the HI-STORM 100 system that is one of the two storage systems PFS intends to utilize for its Skull Valley facility. According to the State, because of its concerns expressed in contention Utah Q and correspondence between State consultant Dr. Marvin Resnikoff and the staff that apparently began in February 1998, on May 21, 1999, the staff issued an interim staff guidance (ISG) document, ISG-12, Buckling of Irradiated Fuel Under Drop Conditions. See State Request at 5, 14.

Previously, PFS had relied on an October 1987 Lawrence Livermore National Laboratory (LLNL) report, UCID-21246, to support its analysis of cask drop and tipover accidents. See [PFS], Safety Analysis Report [for PFS] Facility at 8.2-32, 8.4-3 (rev. 0 June 1997) [hereinafter PFS SAR]; see also [PFS] Answer to Petitioners' Contentions (Dec. 24, 1997) at 208. In ISG-12, the staff described as "simplistic" the methodology used in that LLNL report to

analyze irradiated fuel rod buckling resulting from cask bottom end drops and outlined several alternative analytical approaches to assess cask drop accident fuel integrity. State Request exh. 3, at 1 of 2 (ISG-12). Thereafter, HI modified its topical safety analysis report (TSAR) relative to the HI-STORM 100 system to provide a revised cask drop analysis, which was incorporated into the PFS application in an August 27, 1999 amendment. See PFS SAR at 8.2-31 to -32 (rev. 5 Aug. 1999).

According to the State, its second revised contention Utah Q reflects these unfolding events relative to the cask drop analysis supporting the PFS application.<sup>1</sup> As amended, that contention now provides:

The Applicant has failed to adequately identify and assess potential accidents involving impacts to fuel cladding. In particular, the Applicant has failed to take into consideration (a) compounded embrittlement and thinning of the zircalloy cladding, and (b) the dynamic effects of a cask drop accident. Therefore, the Applicant is unable to determine the adequacy of the ISFSI design to prevent accidents and mitigate the consequences of accidents as required by 10 C.F.R. 72.24(d)(2).

---

<sup>1</sup> As the State notes, see State Request at 1 n.2, it initially sought admission of a revised contention Utah Q in a July 22, 1999 filing in which it asserted that PFS had to perform a revised cask stability analysis that conformed with the staff's ISG-12 guidance. PFS responded by pointing out that HI had performed such an analysis in June 1999. According to the State, because it appeared PFS was going to adopt that analysis, the State withdrew its first amended contention Utah Q on August 18, 1999.

State Request at 6. As the basis for the revised portions of this contention, noting that PFS now appears to rely on the post-ISG-12 revised HI TSAR for the HI-STORM 100 system, the State claims there are two significant deficiencies in the HI cask drop analysis for that storage system: (1) failure to account for the effects of the irradiation and consequent embrittlement of the zirconium alloy used in the fuel cladding; and (2) use of an overly simplistic static analytical model to account for the physical structure of the fuel pellets and their relationship to the cladding. See id. at 6-9. Further, addressing the five elements that make up the balancing test for late-filed issues set forth in 10 C.F.R. § 2.714(a)(1), the State concludes that its prompt filing after learning PFS intended to amend its license application to rely on the revised HI cask stability analysis provides the requisite good cause and that the other factors -- development of a sound record, availability of other means to protect the petitioner's interests, representation of those interests by other parties, and broadening the issues or delaying the proceeding -- also support admitting its late-filed amended contention Utah Q. See State Request at 12-16; see also [State] Reply to [PFS] and Staff Oppositions to Late-Filed Second Amended Utah Contention Q (Sept. 13, 1999) at 7-11 [hereinafter State Reply].

PFS and the staff oppose the admission of the State's late-filed amended contention Utah Q, both for failure to meet the late filing standards and as improperly plead. Relative to the section 2.714(a)(1) five-factor balancing test, PFS maintains that the State lacks good cause for filing late because it should have submitted its concerns as much as seventeen months earlier when its consultant, Dr. Resnikoff, began to raise questions about the LLNL report in the context of the HI-STAR 100 rulemaking. It also declares that the other four factors do not provide sufficient weight in favor of admission to overcome this significant deficiency. See [PFS] Response to [State] Request for Admission of Late-Filed Second Amended Utah Contention Q (Sept. 3, 1999) at 3-7 [hereinafter PFS Response]. The staff, on the other hand, finds good cause for the State filing as it concerns embrittlement and thinning of zircalloy cladding, but concludes that in all other respects there is no good cause for late filing nor support for admission from a balancing of the other four factors. See NRC Staff's Response to [State] Request for Admission of Late-Filed Second Amended Utah Contention Q (Sept. 3, 1999) at 6-11 [hereinafter Staff Response].

According to PFS and the staff, the State's amended contention Utah Q also is inadmissible because it seeks to raise matters that pertain to the agency's approval of the

HI-STORM 100 cask system as suitable for use at ISFSI facilities, which the agency has determined are to be dealt with in the context of a cask certification rulemaking rather than any adjudication regarding the ISFSI where the cask will be located. Additionally both assert that the State has failed to establish there are any genuine disputed factual or legal issues relative to its cladding irradiation effect or fuel pellet dynamic loading concerns. See PFS Response at 7-10; Staff Response at 3-5.

## II. ANALYSIS

Generally, in dealing with a late-filed contention, a presiding officer first analyzes the question of the issue's admissibility under the late-filing factors in 10 C.F.R. § 2.714(a)(1). Then, to the degree the balancing process mandated by that provision supports admission of the contention, the presiding officer goes on to determine whether the issue statement merits admission under the specificity and basis standards set forth in section 2.714(b)(2). In this instance, however, we conclude that no useful purpose would served by an extensive exposition on the former point given that the latter is so clearly dispositive of the contention at issue.

As we noted in our initial ruling on the admissibility of contentions in this proceeding, a contention that seeks

to litigate a matter that is the subject of an agency rulemaking is not admissible. See LBP-98-7, 47 NRC at 179. As the State itself recognizes, see State Request at 14-15, the agency has decided to utilize the rulemaking process for requests for approval of cask storage systems for spent nuclear reactor fuel, see 55 Fed. Reg. 29,181, 29,182 (1990) (casks will be approved by rulemaking and any safety issues that are connected with casks are properly addressed in rulemaking rather than in a hearing). It is, of course, a well-recognized proposition that the choice to use rulemaking rather than adjudication is a matter within the agency's discretion. See NLRB v. Bell Aerospace Co., 416 U.S. 267, 294 (1974). Nonetheless, in requesting that amended contention Utah Q be admitted, the State seeks to have the Board disregard that election. This we cannot do.

Although couched in terms of a challenge to the PFS license application for the Skull Valley facility, the discussion in the State's pleadings makes it apparent that the State's real bone of contention is with the TSAR analyses of fuel pellet dynamics and cladding embrittlement/thinning that accompanied the recently-approved HI request for certification of its HI-STAR 100 cask storage system, see 64 Fed. Reg. 48,259 (1999), and is a part of its certification request for the HI-STORM 100 cask storage system that is to be utilized at



the PFS facility. Indeed, regarding these issues, the State has failed to present any cognizable matter that is specific to the use of the HI-STORM 100 cask storage system at the PFS facility. Rather, the State seeks to bootstrap its concerns about the sufficiency of the HI cask system into this adjudicatory proceeding by citing the fact that PFS "relies" upon the generic TSARs proffered by HI in the cask system certification rulemakings as support for the sufficiency of its application. See State Request at 6-7; State Reply at 3 n.2. Permitting such an assertion to form the acceptable basis for a contention, however, would nullify the agency's previous choice to use rulemaking as its method for arriving at a determination about the acceptability of cask storage systems, including the HI system at issue here.

Undoubtedly, the State may feel frustrated to have the staff apparently acknowledge some of its concerns in issuing ISG-12, but find that its efforts do not translate into consideration of those matters in the context of this adjudicatory proceeding. This, nonetheless, is the case. As it has framed its concerns about the cask stability analysis for the HI-STORM 100 cask system in its amended contention Utah Q, the proper forum for the State to pursue those matters continues to be the ongoing certification rulemaking regarding that cask storage system. See 64 Fed.

Reg. 51,271 (1999) (proposed certification rule regarding HI-STORM 100 cask system). As such, we find its contention inadmissible.<sup>2</sup>

### III. CONCLUSION

In proffering its late-filed second amended contention Utah Q, the State seeks to have the Board delve into matters that are part and parcel of the certification rulemaking proceeding for the HI-STORM 100 system that is to be utilized at the PFS Skull Valley ISFSI. Because this contention attempts to have the Board litigate matters that are the subject of an ongoing Commission rulemaking proceeding, we conclude it does not present issues that are admissible in this adjudicatory proceeding.

---


For the foregoing reasons, it is this sixth day of January 2000, ORDERED, that the State's August 20, 1999 request for admission of late-filed second amended

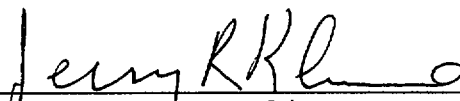
---

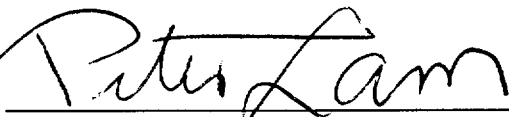
<sup>2</sup> In addition to the fuel pellet dynamic loading and embrittlement/thinning issues specified in the text of amended contention Utah Q, in the basis statement the State seeks to reintroduce several matters, such as intermodal transfer site/transport accidents, that the Board previously rejected in its April 1998 initial ruling on contentions. See State Request at 10-11. Nothing provided by the State in connection with second amended contention Utah Q gives us cause to revisit our ruling relative to those matters.

contention Utah Q, Adequacy of ISFSI Design to Prevent  
Accidents, is denied.

THE ATOMIC SAFETY  
AND LICENSING BOARD<sup>3</sup>

  
G. Paul Bollwerk, III  
ADMINISTRATIVE JUDGE

  
Dr. Jerry R. Kline  
ADMINISTRATIVE JUDGE

  
Dr. Peter S. Lam  
ADMINISTRATIVE JUDGE

This memorandum and order is issued pursuant to the  
authority of the Atomic Safety and Licensing Board  
designated for this proceeding.

Rockville, Maryland

January 6, 2000

---

<sup>3</sup> 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-00-01) 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 - 0-15 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-00-01)

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  
2300 N Street, NW  
Washington, DC 20037

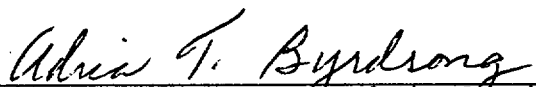
John Paul Kennedy, Esq.  
Confederated Tribes of the Goshute  
Reservation and David Pete  
1385 Yale Avenue  
Salt Lake City, UT 84105

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  
6 day of January 2000

  
Office of the Secretary of the Commission