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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

In the Matter of)	
)	
PRIVATE FUEL STORAGE L.L.C.)	Docket No. 72-22 - ISFSI
)	
(Private Fuel Storage Facility))	ASLBP No. 97-732-02-ISFSI

**APPLICANT'S RESPONSE TO STATE OF UTAH'S REQUEST FOR
ADMISSION OF LATE-FILED UTAH CONTENTION JJ**

Applicant Private Fuel Storage L.L.C. ("Applicant" or "PFS") hereby responds to the "State of Utah's Request for Admission of Late-Filed Utah Contention JJ," filed April 19, 2000 ("State's Request"). The State's Request should be denied because Contention JJ is lacking in good cause for its late filing, is immaterial to the grant or denial of the PFS license application, and impermissibly challenges the Commission's regulations.

I. BACKGROUND

On April 2, 1999, PFS submitted an exemption request, pursuant to 10 C.F.R. § 72.7, for a probabilistic seismic hazard evaluation methodology based on a 1,000-year return period earthquake, instead of the deterministic methodology otherwise required by 10 C.F.R. Part 72.¹ On August 24, 1999, PFS modified its exemption request to reflect a 2,000-year return period earthquake, as a result of comments received from the Staff.²

¹ Letter from John Parkyn, PFS, to Mark Delligatti, NRC, dated April 2, 1999.

² Letter from John Parkyn, PFS, to Mark Delligatti, NRC, dated August 24, 1999.

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Shortly thereafter, it revised its License Application to use a 2,000-year return period earthquake as the design basis earthquake.³ On December 15, 1999, the NRC Staff issued its Safety Evaluation Report for the PFSF, which concluded that a probabilistic seismic hazard methodology and a 2,000-year return period earthquake would be acceptable.⁴

On January 26, 2000, the State filed its "Request for Admission of Late-Filed Modification to Basis 2 of Utah Contention L," opposed by both PFS and the NRC Staff, which is currently pending before the Board. In its request to modify Basis 2 of Utah L, the State alleges that the NRC Staff must either require the deterministic analysis set forth in 10 C.F.R. Part 72, or require a probabilistic seismic hazards analysis with a 10,000-year return period, as proposed in a 1998 Staff rulemaking plan.⁵

On February 11, 2000, the NRC Staff asked PFS to evaluate the likelihood of a co-seismic rupture and determine if such a rupture would have any effect on PFS's seismic hazard analysis. On February 23, 2000, PFS responded to the Staff's request with Commitment Resolution Letter #26, which explained that, although a co-seismic rupture could result in larger ground motions, the lower probability of such an event actually decreased the likelihood that the design peak ground acceleration would be exceeded.⁶ On March 17, 2000, PFS submitted License Amendment #10, which added SAR Appendix 2G, Additional Seismic Evaluations. Appendix 2G incorporated the co-

³ Letter from John Donnell, PFS, to NRC, dated August 27, 1999.

⁴ The Staff, however, has not yet granted Applicant's exemption request.

⁵ Rulemaking Plan: Geological and Seismological Characteristics for Siting and Design of Dry Cask Independent Spent Fuel Storage Installations, 10 CFR Part 72," SECY-98-126, dated June 4, 1998.

⁶ Letter from John Donnell, PFS, to NRC, dated February 23, 2000.

seismic rupture information that had been included in Commitment Resolution Letter #26.

On April 19, 2000, the State filed its request to admit late-filed Utah Contention JJ, which seeks to challenge PFS's co-seismic rupture analysis. Specifically, Contention JJ states that:

The Applicant's failure to comply with 10 CFR § 72.102 places undue risk on the public health, safety, and the environment because the Applicant's effort to assess the seismic hazard implications of possible co-seismic rupture of the Stansbury Fault with the East and/ or West Fault is erroneous and incomplete.

State's Request at 5. The State sets forth three bases to support its contention.⁷ First, the State claims that PFS made an error in calculating the ground motion for the design basis 2,000-year return period ground motion by omitting from the calculation an assessment of the effect of simultaneous ruptures on earthquake magnitude. Id. at 6. In its explanation of Basis 1, the State admits that the effect of this error is "arguably not too significant" in that, upon its correction by the State, the co-seismic rupture analysis still results in a slight decrease in the 2,000-year return period design ground motion for the facility. Id. at 9-10. Second, the State claims that PFS "omitted computation of the effects of such a co-seismic rupture based on the requirements of the current regulations (*i.e.* a deterministic hazard analysis)." Id. at 6. Third, the State alleges that PFS failed to calculate the effects "as required by the Commission's Rulemaking Plan (*i.e.* a 10,000-year return period)." Id.

⁷ The State also includes a single sentence that questions, without explanation, support or any other bases, the appropriateness of PFS's use of the adjustment factors developed by Yucca Mountain ground motion experts. State's Request at 7. Interestingly, the State seems to find the methodology acceptable enough to use throughout the remainder of the supporting basis of its contention. Id. at 7-10.

On April 24, 2000, PFS filed an “Errata to Correct Appendix 2G of the PFSF License Application”.⁸ The Errata corrects the omission in Appendix 2G as originally filed of the effect of simultaneous ruptures on the earthquake magnitude. Just as the State concludes in its request, PFS’s Errata finds that the correction of the computational error would result in a slight decrease in the 2,000-year return period ground motions.

II. DISCUSSION

In Contention JJ, the State attempts to leverage an admittedly insignificant computational error – subsequently corrected – into another challenge of PFS’s exemption request. The Board should reject this attempt because the State lacks good cause for its late filing, presents immaterial issues, and improperly challenges the Commission’s regulations.

A. The State’s Request to File Contention JJ Is Unjustifiably Late

The State has failed to provide a valid explanation for its lack of timeliness in filing late-filed Contention JJ, as each of the three bases supporting Contention JJ is based on information available more than 45 days prior to the filing of the State’s Request.

1. The State Lacks Good Cause

The State has failed to explained why its first basis, concerning the computational error contained in Commitment Resolution Letter #26 and in the uncorrected Appendix 2G, is timely. All the information in the original Appendix 2G was set forth in Commitment Resolution Letter #26, which the State admits receiving 50 days prior to the filing of the State’s request. The State has identified no information on which it relies

⁸ Letter from John Donnell, PFS, to NRC, dated April 24, 2000.

that was not available in Commitment Resolution Letter #26. In fact, the co-seismic rupture analysis portion of License Amendment is taken essentially verbatim from Commitment Resolution Letter #26. As this Board has previously stated, a contention filed 45 days from the availability of the underlying information “approach[es] the outer boundary of ‘good cause’”. Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-99-3, 49 NRC 40, 47 (1999).

The State defends its tardiness by reiterating its claim that it is only required to file a contention after the license application has been amended. Once again, the State ignores clear Commission precedent to the contrary. As this Licensing Board has previously explained when denying a late-filed contention,

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”).”

Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-99-43, 50 NRC 306, 307 (1999). This obligation does not depend on whether the information becomes available from a response to a Staff Request for Additional Information or from a Commitment Resolution Letter prepared to answer questions raised in discussions with the Staff.

Here, the State claims that because the contention involves “very detailed and specific information,” it would be “unrealistic” to expect it to perform a full analysis on information in a commitment resolution letter. State’s Request at 11. This logic is

misguided. As the Commission has stated, an intervenor cannot ignore the basic principle that a person who invokes the right to participate in an NRC proceeding also voluntarily accepts the obligations attendant upon such participation. Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), CLI-83-19, 17 NRC at 1043-44. Thus, the State has failed to provide a valid explanation for the lack of timeliness of its first basis.

Bases 2 and 3 should also be dismissed for lack of timeliness. Neither basis relies on the co-seismic rupture calculations contained in Commitment Resolution Letter #26, added as Appendix 2G by License Amendment #10. In fact, the foundation of these bases is the absence of a deterministic analysis of a co-seismic rupture and the absence of a co-seismic rupture analysis with a 10,000-year return period earthquake.

Bases 2 and 3 are factually correct in that PFS has never analyzed a co-seismic rupture either as part of a deterministic hazard analysis or for a 10,000-year return period earthquake. These particular analyses have not been included in any submission by PFS to the NRC. Specifically, these analyses were not included in the original PFS License Application, any of the previous 9 amendments to the License Application, PFS's request for an exemption to 10 C.F.R. § 72.7, or PFS's modification of its exemption request.

Given the omission of these analyses from every PFS submittal, the State has not offered any valid reason for its failure to file a contention based on the absence of these calculations prior to this request. As stated above, the State is obligated to file its contentions in a timely manner. The State offers no explanation why it could not have raised the failure to consider a co-seismic rupture in a deterministic analysis based upon PFS's original License Application as submitted in June 1997. Nor does the State explain why Basis 3, based on a 10,000-year return period earthquake proposed in a 1998

Staff rulemaking plan, could not have been raised after the filing of PFS's exemption request in April 1999. Instead, the State attempts to justify its late filing by claiming credit for raising the issue of a co-seismic rupture in a discovery response in August 1999. State's Request at 10. However, even after explicitly pointing out the absence of a co-seismic rupture analysis and knowing that PFS had not filed a co-seismic rupture analysis for either a deterministic analysis or for a 10,000-year return period, the State waited over seven months before filing a contention.

2. The Other Factors Do Not Justify Admission of the Late-Filed Contention

Of the remaining four factors, the third and fifth factors are to be accorded more weight than the second and fourth factors, which concern the protection of the petitioner's asserted interest by other means or parties. Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-98-7, 47 NRC 142, 207-209 (1998).

Neither the third nor the fifth factor supports the State here. Regardless of Dr. Pechmann's seismologic credentials, his involvement in this contention would do little to assist in the development of a sound record. As Basis 1 is admittedly insignificant and in any event is in agreement with corrected Appendix 2G, Contention JJ essentially concerns whether PFS is required to perform either of the omitted analyses (*i.e.*, deterministic or 10,000-year return period). This is a legal question, which is essentially being addressed by the Board in its review of the State's attempt to modify Basis 2 of Contention Utah L. Dr. Pechmann's technical knowledge will not help resolve this legal issue. Also, contrary to the State's assertion, admission of the contention will certainly broaden and inevitably delay this proceeding by expanding its scope to include a contention that is not currently part of the licensing proceeding.

In sum, even though the State's position may not be protected by other means or represented by another party, the four factors weighed together militate against granting the State's late-filed motion, and therefore clearly do not make the compelling showing required to overcome the State's lack of good cause.

B. The State's Late-Filed Contention Is Inadmissible

The State's Request should be denied because Contention JJ fails to satisfy the standards of admissibility for contentions. First, as acknowledged by the State, Basis 1 is admittedly immaterial, and moreover has been rendered moot by PFS's correction of its co-seismic rupture analysis. Second, Basis 2 is immaterial because the Applicant has requested an exemption from the requirements of 10 C.F.R. Part 72, and thus will not rely on a deterministic seismic analysis. Finally, Basis 3 must be rejected as a collateral attack on NRC regulations.

Basis 1 alleges that, due to a computational error, PFS's analysis of the effect of a co-seismic rupture does not consider the effect on earthquake magnitude. Specifically, the State claims that a co-seismic rupture "results in an earthquake of M 7.047 (rounded to 7.0)," which results in a peak ground acceleration of $\sim 0.61g$ "instead of the incorrect value of $0.537g$ used by the Applicant" in its co-seismic rupture analysis. State's Request at 8, 9. By the State's own admission, "[t]he implications of [PFS's] error are arguably not too significant if the NRC allows the design ground motions to be based on probabilistic 2000-year return period ground motions." *Id.* at 10. In addition, the State admits that, even after correcting the calculation, a co-seismic rupture will not result in a ground motion exceeding PFS's design ground motion. *Id.* at 9. This basis fails to raise an issue that is material to the grant or denial of the License Application, and therefore does not support admission of Contention JJ.

In addition to immateriality, this basis should also be dismissed as moot because PFS has corrected the computational error. See PFS's Errata at 4–8. Specifically, the corrected analysis is based on an earthquake of M 7.05 (compared to the State's rounding of the earthquake to M 7.0), and a peak ground acceleration of 0.61g. Id. at 5, 7. Accordingly, the error identified by the State has been corrected and is no longer relevant.

Basis 2 of Contention JJ must be rejected as immaterial to the grant or denial of PFS's License Application. Basis 2 is grounded on the assumption that PFS must perform a deterministic analysis of a co-seismic rupture.⁹ However, PFS has requested an exemption from the NRC requirements to perform a deterministic seismic analysis, and instead relies on a probabilistic seismic hazards analysis to support its license application. Contrary to the State's unsupported assertion, there is no requirement for a deterministic analysis as "a valid baseline for comparison to probabilistic design ground motions." State's Request at 10. Because PFS has chosen to rely on a probabilistic seismic analysis and, because, if its exemption request is granted, PFS will not be required to perform a deterministic analysis, Basis 2 does not support admission of Contention JJ.

Basis 3 must be rejected as a collateral attack on the Commission's regulations. There is no regulatory requirement that PFS analyze a co-seismic rupture with a 10,000-year return period. The State's claim that the 10,000-year return period must be evaluated is based on the logic that the NRC Staff is required to follow a NRC

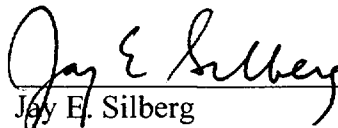
⁹ "[PFS] has omitted computation of the effects of such a co-seismic rupture based on the requirements of the current regulations (*i.e.* a deterministic hazard analysis)" State's Request at 6.

rulemaking plan when granting an exemption request. This logic is mistaken. As PFS has already explained,¹⁰ a Staff rulemaking plan is neither binding on the Staff nor is it determinative of the type of analysis that an applicant must perform. Thus, because Basis 3 “advocate[s] stricter requirements than agency rules impose,” LBP-98-7, 47 NRC at 179, it must be dismissed.

III. CONCLUSION

For the foregoing reasons, the State has failed to assert an admissible contention; hence its request to admit late-filed Contention JJ should be denied.

Respectfully submitted,



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¹⁰ See Applicant’s Response to State of Utah’s Request for Admission of Late-Filed Modification to Basis 2 of Utah Contention L, dated February 14, 2000, at 6-8.

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Before the Atomic Safety and Licensing Board

OFFICE OF THE
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ADJUTANT GENERAL

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

CERTIFICATE OF SERVICE

I hereby certify that copies of Applicant's Response to State of Utah's Request for Admission of Late-Filed Utah Contention JJ 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 3rd day of May 2000.

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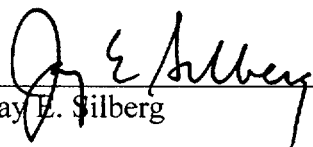
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