

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of:

PRIVATE FUEL STORAGE, LLC
(Independent Spent Fuel
Storage Installation)

)
) Docket No. 72-22-ISFSI
)
) ASLBP No. 97-732-02-ISFSI
)
) June 8, 1999

STATE OF UTAH'S RESPONSE REGARDING SIGNIFICANCE
OF LICENSE AMENDMENT APPLICATION WITH RESPECT
TO MOTION FOR SUMMARY DISPOSITION OF UTAH CONTENTION C

In its June 2 Memorandum and Order, the Board provided the parties with an opportunity to address "the import, if any, of the May 1999 PFS application amendment upon the arguments previously made in support of, or in opposition to, the pending PFS dispositive motion regarding Utah C." Memorandum and Order (Providing Opportunity to Address Import of License Application Amendment), slip op. at 2. The State of Utah hereby responds. As discussed below, the Amendment fundamentally alters the disputed elements of the license application. Nevertheless, because the Amendment postdates the filing of the summary disposition motion, the motion should be denied as premature; or in the alternative, it should be held in abeyance until the State has had a reasonable opportunity to review the Amendment and file any necessary amendments to Contention C.

FACTUAL BACKGROUND

A detailed description of the factual background regarding events leading up to the filing of the Amendment is provided in the State of Utah's Opposition to Applicant's Motion for Summary Disposition of Contention C at 1-6 (May 11, 1999) ("State's Opposition"). In summary, Contention C challenges the adequacy of the dose calculations presented in Chapter 8 of the Applicant's Safety Analysis Report ("SAR"), on the grounds that:

1. License Application makes selective and inappropriate use of data from NUREG-1536 for the fission product release fraction.
2. License Application makes selective and inappropriate use of data from SAND80-2124 for the respirable particulate fraction.
3. The dose analysis in the License Application only considers dose due solely to inhalation of the passing cloud. Direct radiation and ingestion of food and water are not considered in the analysis.

Private Fuel Storage, LLC (Independent Spent Fuel Storage Installation), LBP-98-7, 47 NRC 142, 251 (1998).

On December 18, 1998, the NRC Staff sent PFS a Request for Additional Information ("RAI"), which requested PFS to revise its calculations regarding accident impacts. The Staff recommended that PFS use an alternative means of performing dose calculations that does not rely on NUREG-1536 or SAND 80-2124, but instead is based on NUREG-1617, a draft Standard Review Plan for Transportation Packages for Spent Nuclear Fuel (March 1998).

In PFS's February 10, 1999, response to the RAI, it submitted new dose

calculations based on NUREG-1617 rather than NUREG-1538 or SAND 80-2124. The RAI response also included calculations of ingestion doses. The RAI response, however, was not accompanied by any changes to the SAR. The calculations in the SAR remained the same as originally filed.

On April 21, 1999, PFS filed a motion seeking summary disposition of Contention C, on the ground that its RAI Response has mooted the concerns raised in the contention. PFS has also refused to answer any of the State's discovery requests with respect to Contention C, on the same grounds. The State opposed the motion, on the ground, *inter alia*, that PFS's RAI responses had not altered its license application, and therefore the State continues to have a dispute with the Applicant regarding the adequacy of the application.

On May 19, 1999, the Applicant submitted License Application Amendment # 3 to the NRC Staff. Letter from John D. Parkyn to Director, Office of Nuclear Material Safety and Safeguards. The State of Utah received the Amendment on May 24, 1999. The Amendment contained change pages to the application, including revisions to the dose calculations presented in Chapter 8 of the SAR. The SAR now conforms to the dose calculations provided by PFS in its February 1999 RAI Response.

DISCUSSION

The filing of the Amendment does not alter any of the arguments made in the State's Opposition. The Amendment only serves to confirm the State's position that the Applicant's Summary Disposition Motion was premature, and therefore should be denied. The Applicant's Motion was based only on statements made in response to the Staff's RAI. No changes had been made to the license application at the time the Motion was filed. As the Commission has stressed, under its "longstanding practice," contentions "must rest on the *license application*, not on NRC Staff reviews." *Baltimore Gas and Electric Co.* (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), CLI-98-25, 48 NRC 325, 349 (1998) (emphasis in original). RAI correspondence constitutes merely an "ongoing staff dialogue" with the licensee. *Duke Energy Corporation* (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, slip op. at 10 (April 15, 1999). Just as an RAI does not reflect "any ultimate staff determinations," *id.*, so an Applicant's answers do not represent ultimate determinations by the licensee, *i.e.*, amendments to the license application.

Now, with the filing of the Amendment, the Applicant has fundamentally changed the dose calculations in the license application, such that PFS no longer relies on the assumptions disputed in Contention C. However, because the Amendment was filed *after* the Summary Disposition Motion, it cannot be relied on as grounds for granting the Motion. As the Commission held in *Duke Power Co.* (Catawba Nuclear

Station, Units 1 and 2), CLI-83-19, 17 NRC 1041 (1983):

[T]he FSAR is the central document for the formulation of safety contentions. Should the subsequent issuance of the SER *lead to a change in the FSAR* and thereby modify or moot a contention based on that document, *that contention can be amended or promptly disposed of* by summary disposition or a stipulation.

Id. at 1048-49 (emphasis added).¹ Here, in contrast to the Commission's directive in *Catawba*, the Summary Disposition Motion was not preceded by any change to the SAR, and the State has had no reasonable opportunity to amend Contention C. Accordingly, the Motion must be dismissed as premature.

The State and its experts are currently in the process of reviewing the Amendment, and determining whether the information provided therein warrants the amendment or withdrawal of Contention C. The technical evaluation required for this determination is complex and time-consuming, but the State expects to complete

¹In *Catawba*, the Commission also held that intervenors must "diligently uncover and apply all publicly available information to the prompt formulation of contentions," such that the "institutional unavailability of a licensing-related document does not establish good cause for filing a contention late if information was available early enough to provide the basis for the timely filing of that contention." 17 NRC at 1048. Thus, an intervenor is responsible for promptly raising any new information that calls the adequacy of the application into question. However, this holding cannot be extrapolated into a requirement that an intervenor must modify a duly admitted contention that is based on an SAR, just because there is some correspondence indicating that the applicant may change the SAR in the future. Nowhere in *Catawba* does the Commission retract or modify its holding that "the FSAR is the central document for the formulation of safety contentions." 17 NRC at 1048-49. See also *Kerr-McGee Chemical Corporation* (West Chicago Rare Earths Facility), LBP-89-16, 29 NRC 508, 514 (1989) (holding that it "makes no sense" to require an intervenor to file contentions based on a draft Environmental Impact Statement, because the contentions "would have to be revisited once the final issued.")

this process within 30 days of receiving the Amendment, or by June 24, 1999. The State has also filed discovery requests to the Applicant, seeking information on the basis for the changes in the dose calculations that were contemplated in the RAI Response.² PFS has refused to provide the requested information. Applicant's Objections and Non-Proprietary Responses to States's First Requests for Discovery at 34-37 (April 21, 1999).

It would be extremely unfair and prejudicial to the State to dismiss Contention C based on *post hoc* revisions to the license amendment application, to which the State has had no reasonable opportunity to respond. It would also be unfair and prejudicial to dismiss the contention while the State's legitimate discovery requests are pending. The Motion should be denied, and the State should be given a reasonable opportunity to review the license amendment application and either amend or withdraw Contention C.

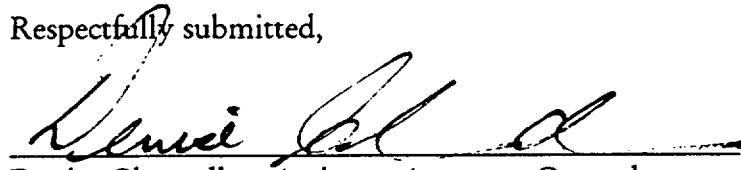
²The State also intends to file similar discovery with the NRC Staff.

CONCLUSION

For the foregoing reasons, the Applicant's Summary Disposition Motion should be denied as premature. In the alternative, it should be held in abeyance pending a reasonable opportunity for the State to amend Contention C.

DATED this 8th day of June, 1999.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a copy of STATE OF UTAH'S RESPONSE REGARDING SIGNIFICANCE OF LICENSE AMENDMENT APPLICATION WITH RESPECT TO MOTION FOR SUMMARY DISPOSITION OF UTAH CONTENTION C was served on the persons listed below by electronic mail (unless otherwise noted) with conforming copies by United States mail first class, this 8th day of June, 1999:

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