

July 7, 1999

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)

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Docket No. 72-22-ISFSI

NRC STAFF'S RESPONSE TO STATE OF UTAH'S REQUEST
FOR ADMISSION OF LATE-FILED AMENDED UTAH CONTENTION C

INTRODUCTION

Pursuant to the Atomic Safety and Licensing Board's "Order (Schedules for Late-Filed Contention Responses)" (Order), dated June 25, 1999 and 10 C.F.R. § 2.714(c), the staff of the Nuclear Regulatory Commission (Staff) hereby files its response to the "State of Utah's Request For Admission of Late-Filed Amended Utah Contention C," (Late-Filed Contention C) filed June 23, 1999. For the reasons set forth below, the State's Late-Filed Contention should be rejected.

BACKGROUND

Original Utah Contention C ("Failure to Demonstrate Compliance with NRC Dose Limits") was admitted by the Board in its initial ruling on contentions. *See Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-98-7, 47 NRC 142, 185-186 (1998). On December 10, 1998, the Staff issued its second round of Requests for Additional Information (RAIs) to Private Fuel Storage, L.L.C. (PFS or the Applicant). Specifically, two of the requests indicated that the Applicant's dose analysis, contained in its Safety Analysis Report (SAR),

required justification and/or revision with respect to matters raised in Contention C. *See* Letter from Mark S. Delligatti (NRC) to John D. Parkyn (PFS), dated December 10, 1998. On February 10, 1999, the Applicant responded to the Staff's RAIs, in which it submitted a revised dose analysis. *See* Letter from John D. Parkyn (PFS) to Director, Office of Nuclear Material Safety and Safeguards (NRC), dated February 10, 1999. In its response to the RAI, the Applicant stated that the revised calculation was based on Interim Staff Guidance-5 (ISG-5) to show compliance with the accident dose limits set forth in 10 C.F.R. § 72.106(b). *Id.* On May 19, 1999, the Applicant submitted its revision to the PFS license application in which it, among other things, incorporated the revised dose analysis in the SAR.

Meanwhile, following its submittal of the RAI response, the Applicant, on April 21, 1999, filed "Applicant's Motion for Summary Disposition of Utah Contention C" (Motion).¹ On June 17, 1999, the Board granted the Applicant's Motion on the basis that the Applicant's revised dose analysis rendered the contention moot.² *See* "Memorandum and Order (Granting Motion for

¹ The Staff and the State of Utah filed responses to this motion. *See* "NRC Staff's Response to Applicant's Motion for Summary Disposition of Utah Contention C (Dose Limits)," dated May 11, 1999; "State of Utah's Opposition to Applicant's Motion for Summary Disposition of Contention C," dated May 11, 1999. The State also filed "State of Utah's Reply to NRC Staff's Response to Applicant's Motion for Summary Disposition of Utah Contention C (Dose Limits)," dated May 20, 1999.

² On June 2, 1999, the Board issued a "Memorandum and Order (Providing Opportunity to Address Import of License Application Amendment" to give the parties an opportunity to comment on the effect of the license application revision that the Applicant had submitted. The Staff, State of Utah, and Applicant submitted their views to the Board. *See* "NRC Staff Comments Concerning the Effect of the May 19, 1999 License Application Revision on Applicant's Motion for Summary Disposition of Utah Contention C (Dose Limits)" (Staff Comments), dated June 4, 1999; "State of Utah's Response Regarding Significance of License Amendment Application with Respect to Motion for Summary Disposition of Utah Contention C," dated June 8, 1999; and "Applicant's Brief in Response to the Atomic Safety and Licensing

Summary Disposition Regarding Contention Utah C)," LBP-99-23, slip op. at 1, dated June 17, 1999. Thereafter, on June 23, 1999, the State of Utah filed Late-Filed Contention C, which challenges the adequacy of the Applicant's revised design basis accident dose calculations. Late-Filed Contention C at 1. In its June 25, 1999 Order, the Board provided that the parties shall have until July 7, 1999, to respond to the State's late-filed contention.

DISCUSSION

A. Legal Standards for Late-Filed Contentions.

The criteria to be considered when determining the admissibility of a late-filed contention are set forth in 10 C.F.R. § 2.714(a)(1)(i)-(v). *Sacramento Municipal Utility Dist.* (Rancho Seco Nuclear Generating Station), CLI-93-12, 37 NRC 355, 363 (1993). The five factors are:

- (i) Good cause, if any, for failure to file on time.
- (ii) The availability of other means whereby the petitioner's interest will be protected.
- (iii) The extent to which the petitioner's participation may reasonably be expected to assist in developing a sound record.
- (iv) The extent to which the petitioner's interest will be represented by existing parties.
- (v) The extent to which the petitioner's participation will broaden the issues or delay the proceeding.

10 C.F.R. § 2.714(a)(1). The burden of proof is on the petitioner, and the petitioner is obliged to affirmatively address the five lateness factors in its petition, and to demonstrate that a balancing

Board's June 2, 1999 Memorandum and Order," dated June 8, 1999.

of the five factors warrants overlooking the petition's lateness. *Boston Edison Co.* (Pilgrim Nuclear Power Station), ALAB-816, 22 NRC 461, 466 n.22 (1985).

Although the regulations call for a balancing of these factors, it has long been held that where a petitioner fails to show good cause for filing its contention late, the other four factors must weigh heavily in its favor in order for its petition to be granted. *See, e.g., State of New Jersey* (Department of Law and Public Safety's Requests Dated October 8, 1993), CLI-93-25, 38 NRC 289, 295 (1993). In evaluating the five lateness factors, two factors -- the availability of other means to protect the petitioner's interest and the ability of other parties to represent the petitioner's interest -- are less important than the other factors, and are therefore entitled to less weight. *Texas Utilities Elec. Co.* (Comanche Peak Steam Elec. Station, Units 1 and 2), CLI-92-12, 36 NRC 62, 74 (1992). With respect to the third factor (the potential contribution to the development of a sound record), the petitioner is obliged to "set out with as much particularity as possible the precise issues it plans to cover, identify its potential witnesses, and summarize their proposed testimony." *Commonwealth Edison Co.* (Braidwood Nuclear Power Station, Units 1 and 2), CLI-86-8, 23 NRC 241, 246 (1986), *quoting Mississippi Power and Light Co.* (Grand Gulf Nuclear Station, Units 1 and 2), ALAB-704, 16 NRC 1725, 1730 (1982). In addition to the showing that a balancing of the five factors favors intervention, a petitioner must also meet the requirements for setting forth a valid contention. 10 C.F.R. § 2.714(d)(2).

B. The State Has Failed to Establish
Good Cause For the Late Filing of Contention C

The State contends that it has good cause for the late filing of its contention because it received the Applicant's revised license application on May 24, 1999 and submitted its late-filed

contention within 30 days of receipt of the revised license application. Late-Filed Contention C at 14. The State further asserts that following receipt of the revision to the license application, the State's attorneys and experts were engaged in other obligations connected with the proceeding, such as discovery matters and summary disposition responses. *Id.* For these reasons, the State asserts that it is reasonable for it to submit this contention within thirty days of its receipt of the revision to the application. *Id.*

Notwithstanding these assertions, the Staff submits that the State has not demonstrated good cause for filing its contention late. The State has provided no information as to when the State first received specific information of the Applicant's revised dose analysis upon which this contention is based. Indeed, the State's receipt of the Applicant's revised dose analysis contained in its February 10, 1999 response to the Staff's RAIs is the appropriate starting point from which the contention's timeliness should be judged. The State's submittal of its late-filed contention trails the Applicant's response to the RAI by well over 4 months -- an unacceptably late period of time.³ As such, the State does not have good cause for filing its contention late.

The State, in its Late-Filed Contention C, states that despite the availability of the Applicant's February 10, 1999, RAI response containing the revised dose analysis, Commission case law as well as past conduct in the instant proceeding sanction the State's decision to wait until such time as the license application was revised prior to formulating its contention. This assertion is without merit. Neither the Commission's case law, nor past events in this proceeding, support

³ The Board has held that a forty-five day period, even with respect to a newcomer to the proceeding (which the State is not), approaches the "outer boundary" of good cause. *See Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-99-3, 49 NRC 40, 47 (1999).

the State's inaction in the face of the specific, reliable information contained in the Applicant's February 1999 RAI response.⁴

This Board has stated that "in instances . . . in which 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." *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-98-29, 48 NRC 286, 292 (1998) (emphasis added). Likewise, the Commission's *Catawba* decision stands for the principle that the institutional unavailability of a licensing-related document does not establish good cause for filing a contention late if information was available to provide the basis for the timely filing of the contention. *Duke Power Co.* (Catawba Nuclear Station, Units 1 and 2), CLI-83-19, 17 NRC 1041, 1045, 1048 (1983) (intervenors must diligently "uncover and apply all publicly available information" to the prompt formation of contentions) (emphasis added).

The State asserts that the Commission's holding in *Catawba* cannot mean that an intervenor must modify an 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." Late-Filed Contention at 16 (emphasis added). However, where, as here, the information is technically sufficient to allow an intervenor to amend an existing contention with new bases, and is almost

⁴ The Staff's RAI requested the Applicant to "[r]evis[e] the calculation of the impacts of the accident using release fractions and methodology contained in (ISG-5)." The Staff set forth specific inappropriate calculations in the SAR. The Applicant, in response, stated that the calculations "have been revised," and set forth detailed information and dose tables concerning the revised analysis.

certain to be the subject of a future license application revision since it revises an analysis described in the SAR,⁵ an intervenor runs the risk of losing the ability to litigate that matter by not raising it in a timely manner upon its receipt of the information. Indeed, the State has acknowledged that at least as of early April 1999, when it submitted discovery on this subject, it recognized that the Applicant might amend its license application to incorporate the new dose calculations. See Late-Filed Contention at 18.

The State makes much of the fact that the SAR is the "central document for the formulation of safety contentions." *Id.* at 16. The Commission in *Catawba*, however, recognized that although the future issuance of the Staff's SER may result in a change in the SAR, that does not prohibit the filing of safety-related contentions prior to the issuance of the SER. *Catawba*, CLI-83-19, 17 NRC at 1049. Likewise, the Commission has indicated that issues resulting from RAI responses may also form the bases for litigable contentions. See *Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, slip op. at 13 (April 15, 1999) ("if genuinely new and material safety or environmental issues later emerge from RAIs or other NRC staff documents, our contention rule does not prevent their litigation.") The Commission's decision in *Catawba* is controlling: it firmly establishes that intervenors are expected "to raise issues as early as possible." *Catawba*, CLI-83-19, 17 NRC at 1050.

The State asserts that based on the Applicant's past practice in submitting application revisions, the State had no reason to believe that the Applicant "intended to amend the application

⁵ Had the Applicant merely indicated that it was considering a revision to the accident analysis, or if the information itself was in incomplete form, the State might have raised the argument that an admissible contention could not yet be formulated. This is not the case here.

when it filed the RAI response." Late-Filed Contention at 17. This argument is unpersuasive. As discussed above, the RAI response indicated that an analysis described in the SAR had been revised. It was therefore obvious that the SAR would have to be revised accordingly. Further, based on the numerous and detailed Board rulings to date in the instant proceeding on the issue of late-filed contentions, the State's assertion that, as a result of some development in the case it was free to wait for an indefinite period of time prior to submitting a contention based on specific information that was already before it, is clearly without merit. As noted in *Catawba*, the admission of a late-filed contention must be balanced against the public interest considerations in the efficient and timely conduct of administrative proceedings. *Catawba*, CLI-83-19, 17 NRC at 1046, 1047. In sum, it is the availability of pertinent new information, rather than the evolving state of the license application, that triggers an intervenor's obligation to submit a contention.

Finally, the State asserts that licensing proceedings must be conducted with procedural fairness and regularity, including clarity regarding the matters that trigger obligations. Late-Filed Contention at 18. The Staff agrees with this principle. However, the Staff submits that the standards for good cause for late-filed contentions are clear and that the process is fair and reasonable. Further, administrative fairness and efficiency is best served when intervenors raise matters when they are first able to do so. Otherwise, Commission proceedings could be unnecessarily delayed if intervenors are permitted to wait for information contained in a RAI response to be administratively inserted into a license application before they come forward with new contentions. For these reasons, the State has not established good cause for the late filing of Contention C.

C. The Other Late-Filing Factors Do Not Favor of the Contention's Admission.

With respect to the four other factors specified in 10 C.F.R. § 2.714(a)(1), the Staff submits that those factors weigh against the admission of Late-Filed Contention C. Regarding factors two and four, other means do not appear to be available to protect the State's interest with respect to the issues raised in Late-Filed Contention C; and the State's interest may not be represented by existing parties with respect to these issues. Factors two and four, however, carry less weight than the three other factors specified in the regulation. *See Commonwealth Edison Co. (Braidwood Nuclear Power Station, Units 1 and 2), CLI-86-8, 23 NRC 241, 245 (1986); Private Fuel Storage, LBP-98-7, 47 NRC at 208.*

With respect to factor three, whether the State's participation may be expected to assist in developing a sound record, the State has identified Dr. Marvin Resnikoff, who supported the contention originally. Late-Filed Contention at 19. While such identification may have sufficed for the original Contention C, which was timely filed, late-filed standards require more. Specifically, the State has not provided a summary of Dr. Resnikoff's expected testimony. Without a summary of what Dr. Resnikoff would testify to in support of this contention, this factor must be viewed as weighing against the contention's admission. *See Braidwood, CLI-86-8, 23 NRC at 246; Private Fuel Storage, LBP-98-7, 47 NRC at 208-09.*⁶

With respect to the fifth factor, the admission of this contention will broaden the issues and will commensurately delay the proceeding. First, inasmuch as original Contention C has been

⁶ The Staff recognizes, however, that if the contention is assumed to reflect Dr. Resnikoff's views and his expected testimony, this factor would weigh in favor of the contention's admission.

eliminated from the proceeding on summary disposition, there remain no other contentions related to the accident dose analysis that the State would seek to litigate. Thus, admission of this contention would broaden the issues in the proceeding. *See Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation)*, LBP-99-6, 49 NRC 114, 119 (1999).

The admission of this new contention will also inevitably delay the proceeding to some extent, to accommodate discovery and other litigation tasks associated with the admission of a new contention at this time. The State suggests that Contention C could be placed in Group II, in order to allow sufficient time to complete discovery and any additional summary disposition motions. However, five contentions are already scheduled for Group II litigation, on which discovery has already been conducted. While a limited discovery window of two months has been provided for Group II issues, the admission of a new contention would likely require an expansion of this period, which could further delay the schedule. Accordingly, since admission of this contention now will broaden the issues to be heard, and will likely cause delay in the completion of hearings, this factor weighs against the admission of Late-Filed Contention C.

In sum, the Staff submits that the State has failed to establish good cause for the late filing of Contention C, given the submittal of the Applicant's response to the RAIs in February. Further, the Staff submits that the State's lack of good cause for filing this contention late has not been overcome by a "compelling" showing that the factors specified in 10 C.F.R. § 2.714(a)(1) favor of its admission. *State of New Jersey*, CLI-93-25, 38 NRC at 296. For these reasons, revised Contention C should be rejected.

D. The Admissibility of Revised Contention C.

The Staff submits that, apart from the factors governing late-filed contentions discussed above, the State has set forth an admissible contention in accordance with the Commission's regulations in 10 C.F.R. § 2.714. The Staff, however, objects to the admission of certain statements in the contention and/or bases for the contention.

First, the Staff objects to the first subpart of this contention which states, "The Applicant relies on cask designs that have not been approved by the NRC." Late-Filed Contention at 3. As noted by the State, the same argument was raised with regard to the original Contention C and was rejected by the Board. *Id.* at n.3. As stated by the Board, the basis constitutes an impermissible challenge to the "Commission's regulatory scheme, provisions, or rulemaking-associated generic determination, which establish a separate cask design approval process under rulemaking procedures and cask design approval prior to licensing of the PFS facility." *PFS*, LBP-98-7, 47 NRC at 186. *See also* 10 C.F.R. § 2.758; *Kelly v. Selin*, 42 F.3d 1501, 1512 (6th Cir.), *cert. denied*, 515 U.S. 1159 (1995).

Second, the Staff objects to the State's assertion that "the need for offsite emergency planning must be considered." Late-Filed Contention at 7. Such an assertion constitutes an improper request for waiver of the Commission's emergency planning regulations for ISFSIs and its determination that offsite emergency planning is not required for ISFSIs; accordingly, this assertion must be rejected, in the absence of a proper petition for waiver under 10 C.F.R. § 2.758. *See, e.g., PFS*, LBP-98-7, 47 NRC at 179, 196.

Third, the Staff objects to a portion of the second basis, which asserts that "accidents involving sabotage" or "impact with a jet engine or a hanging bomb at 600 mph" require inclusion

in the design basis for the facility. Late-Filed Contention at 10-11. Significantly, the revised contention fails to show that these are credible events which require inclusion in the design basis for the facility. Further, the issue of credible accidents is already the subject of other contentions (e.g., Utah Contention K). Moreover, these issues are not prompted by the Applicant's revised dose analysis (indeed, most, if not all of these issues have been raised previously), and the State has not shown that it could not have raised these issues earlier; therefore, the State's raising of these issues now is untimely without good cause, and the State has not shown that the factors specified in 10 C.F.R. § 2.714(a) favor their admission.

Accordingly, in the event that the Licensing Board determines to admit revised Contention C, these issues should be excluded from the contention.

CONCLUSION

For the reasons set forth above, the State's Late-Filed Contention C should be rejected as failing to satisfy the Commission's requirements for the admission of late-filed contentions.

Respectfully submitted,

Catherine L. Marco

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Counsel for NRC Staff

Dated at Rockville, Maryland
this 7th day of July 1999

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S RESPONSE TO STATE OF UTAH'S REQUEST FOR ADMISSION OF LATE-FILED AMENDED UTAH CONTENTION C" in the above captioned proceeding have been served on the following through deposit in the Nuclear Regulatory Commission's internal mail system, or by deposit in the United States mail, first class, as indicated by an asterisk, with copies by electronic mail as indicated, this 7th day of July, 1999:

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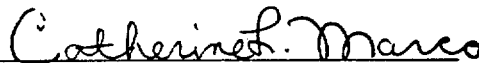
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