

September 25, 2000

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
	)	
(Independent Spent	)	
Fuel Storage Installation)	)	

NRC STAFF'S (1) RESPONSE TO "STATE OF UTAH'S  
MOTION TO STRIKE PART OF THE STAFF'S RESPONSE TO STATE  
OF UTAH'S MOTION TO AMEND LATE-FILED CONTENTION UTAH LL," AND  
(2) MOTION TO STRIKE PORTIONS OF THE STATE'S REPLY/MOTION TO AMEND

INTRODUCTION

Pursuant to 10 C.F.R. § 2.730(c), and the Atomic Safety and Licensing Board's "Order (Schedule for Response to Motion to Strike)," dated September 19, 2000, the NRC Staff ("Staff") hereby (a) responds to the "State of Utah's Motion to Strike Part of the Staff's Response to State of Utah's Motion to Amend Late-Filed Contention Utah LL" ("Motion to Strike"), dated September 18, 2000, and (b) moves to strike portions of the Reply/Motion to Amend filed by the State of Utah ("State") on September 7, 2000.<sup>1</sup> For the reasons set forth below, the Staff submits that the State's Motion to Strike should be denied, and portions of its Reply/Motion to Amend should be stricken as an improper supplementation of Late-Filed Contentions LL-OO.

BACKGROUND

On or about June 16, 2000, the NRC Staff and three cooperating federal agencies issued a Draft Environmental Impact Statement ("DEIS"), concerning the application of Private Fuel Storage, L.L.C. ("Applicant" or "PFS"), for an NRC license to construct and

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<sup>1</sup> "State of Utah's Reply to Applicant's and Staff's Responses to Late-Filed Contentions Utah LL Through OO and Motion to Amend Contention LL," dated September 7, 2000 ("Reply/Motion to Amend").

operate an independent spent fuel storage installation ("ISFSI") and a related transportation facility.<sup>2</sup> On August 2, 2000, the State filed the "State of Utah's Request for Admission of Late-Filed Contentions Utah LL Through OO (Relating to the DEIS's analysis of spent fuel transportation risks)" ("Late-Filed Request"). The Applicant and Staff filed responses to the State's late-filed Contentions LL-OO on August 30, 2000, in which they each argued, *inter alia*, that a principal reference cited by the State in support of Contention LL (*viz.*, Table J.12 of the DEIS for Yucca Mountain prepared by the U.S. Department of Energy ("DOE")), did not, in fact, support the contention, and that the contention should therefore be rejected.<sup>3</sup>

On August 31, 2000, the State requested leave to reply to the Applicant's and Staff's responses to Contentions Utah LL-OO, based in part on its assertion that "complex and novel issues of timing and admissibility are involved here."<sup>4</sup> The State's unopposed request was granted by the Licensing Board on September 1, 2000.<sup>5</sup>

On September 7, 2000, the State filed its reply to the Applicant's and Staff's responses to Contentions Utah LL-OO -- along with a motion to amend Contention Utah LL to include an additional document and the State's discussion thereof.

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<sup>2</sup> NUREG-1714, "Draft Environmental Impact Statement for the Construction and Operation of an Independent spent Fuel Storage Installation on the Reservation of the Skull Valley Band of Goshute Indians and the Related Transportation Facility in Tooele County, Utah" (June 2000) ("DEIS").

<sup>3</sup> See "NRC Staff's Response to State of Utah's Request for Admission of Late-Filed Contentions Utah LL Through OO," dated August 30, 2000, at 16-18; "Applicant's Response to State of Utah's Request for Admission of Late-Filed Contentions Utah LL Through OO," dated August 30, 2000, at 14.

<sup>4</sup> "State of Utah's Motion for Leave to Reply to Applicant's and Staff's Responses to Late-Filed Contentions LL Through OO," dated August 31, 2000, at 2.

<sup>5</sup> "Order (Granting Motion for Leave to Reply and Permitting Additional Filings on Impact of CLI-00-13)," dated September 1, 2000, at 1.

In moving to amend Contention Utah LL, the State, *inter alia*, admitted that it "agrees" with the Applicant's and Staff's observation that Table J-12 "by itself" does not support its contention (Reply/Motion to Amend at 4), but stated that it had "also relied" upon a 1993 DOE document, which was never cited in Contention Utah LL; the State further claimed that the 1993 DOE document had been omitted from its contention due to an "excusable" "clerical error" (*Id.* at 5). Accordingly, the State requested leave to amend Contention LL to include a discussion of the information contained in this previously undisclosed document (*Id.* at 4-5). In addition, however, in the course of its reply to the Applicant and Staff on other contentions, the State proceeded to introduce new information and arguments concerning the "meaning" of Contentions Utah MM-OO, without seeking leave to amend those contentions.

Pursuant to the Licensing Board's Order of September 11, 2000,<sup>6</sup> responses to the State's motion to amend Contention LL were filed by the Applicant and Staff on September 14, 2000.<sup>7</sup> In the Staff's Response to the State's Reply/Motion to Amend, the Staff observed that the State had improperly included therein "numerous new assertions, bases and reformulations" of contentions other than Contention Utah LL, which the Staff stated should be rejected as untimely revisions of those contentions (Staff's Response at 8); and the Staff provided several examples of such improperly introduced new material relating to Contentions MM and OO (*Id.* at 8-10).

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<sup>6</sup> "Order (Schedule for Responses to Motion to Amend Late-Filed Contention Utah LL)," dated September 11, 2000.

<sup>7</sup> See "NRC Staff's Response to State of Utah's Motion to Amend Contention Utah LL" ("Staff Response"), dated September 14, 2000; and "Applicant's Response to State of Utah's Motion to Amend Contention Utah LL" ("Applicant's Response"), dated September 14, 2000.

On September 18, the State filed its instant motion to strike a portion of the Staff's Response of September 14. Therein, the State asserts that the Staff had improperly included in its Response a discussion of the State's "Reply" concerning Contentions MM and OO, which the State described as an improper "surreply" (Motion to Strike, at 1); according to the State, the Staff was barred from addressing those matters without seeking leave to do so. In the alternative, the State requested leave to respond to the Staff's views, and it proceeded to respond to the Staff's assertion that it had improperly introduced new matter in its Reply/Motion to Amend.

#### DISCUSSION

The Staff has previously stated its view, in its Response of September 14, that the State's "Reply/Motion to Amend" improperly contained new material that exceeded the scope of late-filed Contentions Utah LL-OO. Five examples of these new matters were described by the Staff, concerning Contentions Utah MM and OO (Staff's Response at 8-9). By presenting these matters for the first time in its "Reply" rather than in its contentions, the State submitted new bases and reformulations of its contentions. Thus, rather than filing a "reply" to the Staff's and Applicant's views concerning the admissibility of the contentions as filed, the State filed an impermissible amendment to Contentions Utah MM-OO.

The Staff has again reviewed the State's Reply/Motion to Amend, and is satisfied that the State did indeed present new information and raise new issues that cannot reasonably be found within the scope of the contentions as filed. Whether the Staff is correct in its assessment of the State's Reply/Motion to Amend -- or whether the State is correct in disputing this assessment (Motion to Strike at 2-5) -- can be resolved by the Licensing Board upon an examination and comparison of the contentions and supporting basis statements with the State's Reply/Motion to Amend.

While the State sought leave to amend Contention Utah LL to include consideration of a new document, it did not seek leave to amend its other contentions to include new basis statements and other material, also set forth in its Reply/Motion to Amend of September 7, 2000; and it did not explain why such material was omitted from its contentions as filed on August 2, 2000. Neither the Staff nor the Applicant has responded to those new matters;<sup>8</sup> and fairness requires that all matters which were improperly raised in the State's Reply/Motion to Amend, outside the scope of the contentions and without leave to amend, should be stricken.<sup>9</sup>

Accordingly, the Staff requests that the Licensing Board (a) strike such matters from the State's Reply/Motion to Amend, and (b) deny the State's motion to strike that portion of the Staff's Response which had challenged the State's improper attempt to introduce such new matters into its contentions.

#### CONCLUSION

The State's inclusion of new assertions, bases and reformulations of Late-Filed Contentions LL-OO, in its September 7 "reply" to the Staff's and Applicant's responses to

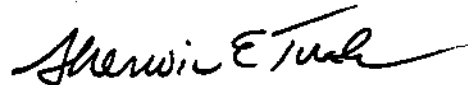
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<sup>8</sup> The Staff's Response of September 14 did not address the admissibility of the State's contentions based on new matters in the State's Reply/Motion to Amend, but only addressed the fact that such matters were not within the scope of the contentions as filed (see Staff's Response at 8-10). There is no merit in the State's assertion that the Staff's Response contained "arguments regarding the admissibility of Contentions Utah MM and OO, in surreply to" the State (see Motion to Strike at 1). Further, no response to these new matters was filed by the Applicant. See Applicant's Response of September 14, 2000.

<sup>9</sup> This is not the first instance in which the Staff has found the State to have introduced new issues into a contention in an untimely or improper manner. See, e.g., (1) "NRC Staff's Response to State of Utah's Request to Withdraw Contention Utah GG (TranStor Cask/Pad Stability)," dated September 21, 2000, at 2 and n.2 (superfluous statements concerning the issues in Contentions Utah L and EE); (2) "NRC Staff's Motion in Limine to Exclude Portions of Prefiled Testimony of Gary A. Wise," dated May 31, 2000, at 3-5 (inclusion of evidence outside the scope of Contention R, concerning Occupational Safety and Health Administration regulations); and (3) Letter from Sherwin E. Turk to the Licensing Board, dated May 26, 2000, at 2 (issues improperly introduced concerning Contention Utah H).

contentions, has resulted in considerable confusion and disarray. For the reasons set forth above, the Staff submits that the State's motion to strike portions of the Staff's Response that address that pleading should be denied and, instead, newly presented matters in the State's "Reply/Motion to Amend," which exceed the scope of the State's contentions, should be stricken. In the alternative, the Staff submits that the timeliness and propriety of the State's having included new matter in its Reply/Motion to Amend should be considered by the Licensing Board and ruled upon in the course of its consideration of the State's request to admit Late-Filed Contentions Utah LL-OO.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Sherwin E. Turk". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Sherwin E. Turk  
Robert M. Weisman  
Counsel for NRC Staff

Dated at Rockville, Maryland  
this 25th day of September 2000

UNITED STATES OF AMERICA  
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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S (1) RESPONSE TO 'STATE OF UTAH'S MOTION TO STRIKE PART OF THE STAFF'S RESPONSE TO STATE OF UTAH'S MOTION TO AMEND LATE-FILED CONTENTION UTAH LL,' AND (2) MOTION TO STRIKE PORTIONS OF THE STATE'S REPLY/MOTION TO AMEND" in the above captioned proceeding have been served on the following through deposit in the NRC's internal mail system, with copies by electronic mail, as indicated by an asterisk, or by deposit in the U.S. Postal Service, as indicated by double asterisk, with copies by electronic mail this 25th day of September, 2000:

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