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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING BOARD

LBP-01-22

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Before Administrative Judges:

G. Paul Bollwerk, III, Chairman
Dr. Jerry R. Kline
Dr. Peter S. Lam

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

August 1, 2001

MEMORANDUM AND ORDER
(Granting Summary Disposition Motion
Regarding Contention Utah V)

Pending before the Licensing Board in this proceeding concerning the June 1997 application of Private Fuel Storage, L.L.C., (PFS) for authorization to construct and operate a 10 C.F.R. Part 72 independent spent fuel storage installation (ISFSI) in Skull Valley, Utah, is a PFS motion for summary disposition regarding intervenor State of Utah's (State) contention Utah V, Inadequate Consideration of Transportation-Related Radiological Environmental Impacts. As admitted, contention Utah V challenges the sufficiency of the PFS environmental report relative to its analysis of the environmental effects of transporting spent nuclear fuel to and from the proposed ISFSI. PFS asks that summary disposition be granted in its favor on contention Utah V because that issue is now moot, a request that is supported by the NRC staff and opposed by the State.

For the reasons set forth below, we grant the PFS dispositive motion on this issue.

I. BACKGROUND

In our April 1998 ruling on standing and litigable issues, the Licensing Board admitted a portion of contention Utah V, concerning the transportation-related environmental impacts of the proposed ISFSI. See LBP-98-7, 47 NRC 142, 199-201, reconsideration granted in part and denied in part, LBP-98-10, 47 NRC 288, aff'd on other grounds, CLI-98-13, 48 NRC 26 (1998). In admitting the contention, the Licensing Board allowed only that portion of the State's proffered bases for the contention asserting that the weight for a loaded shipping cask to be utilized for transportation of spent nuclear fuel to the facility is outside the parameters of 10 C.F.R. § 51.52 (Summary Table S-4) and that a detailed description of transportation impacts must therefore be provided. Id. at 200. As admitted by the Board, the contention reads:

The Environmental Report ("ER") fails to give adequate consideration to the transportation-related environmental impacts of the proposed ISFSI in that PFS does not satisfy the threshold condition for weight specified in 10 C.F.R. § 51.52(a) for use of Summary Table S-4, so that the PFS must provide 'a full description and detailed analysis of the environmental effects of transportation of fuel and wastes to and from the reactor' in accordance with 10 C.F.R. § 51.52(b).

Id. at 256. PFS subsequently sought reconsideration or clarification relative to contention Utah V, arguing that the Board's decision to admit the contention relative to the "weight" component of Table S-4, 10 C.F.R. § 51.52(c), should be circumscribed to include only

consideration of regional impacts; however, that reconsideration request was denied.¹ See LBP-98-10, 47 NRC at 295-96.

In June 2000, the staff issued its draft environmental impact statement (DEIS) for the PFS facility. See 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, NUREG-1714 (June 2000) [hereinafter DEIS]. In addressing the transportation-related environmental impacts of the proposed ISFSI in the DEIS, rather than relying on Table S-4, the staff utilized PFS-specific computer analyses, specifically the RADTRAN 4 computer model. See DEIS at 5-36 to -39; see also id. app. C (Rail Routes to the Proposed PFS Site); id. app. D (Transportation Risks Analysis). Thereafter, the State requested the admission of five late-filed contentions challenging various aspects of the DEIS transportation impacts analysis, but the Board denied the requests as failing to meet the late-filing criteria of section 2.714(a)(1). See LBP-00-28, 52 NRC 226 (2000) (late-filed contentions Utah LL through Utah OO), petition for interlocutory review denied, CLI-01-01, 53 NRC 1 (2001); LBP-01-13, 53 NRC 319 (2001) (late-filed contention Utah PP).

¹ Thereafter, in October 1999, the State submitted what it labeled a late-filed, amended contention Utah V. Based on a discussion of spent fuel shipment convergence impacts in the Las Vegas, Nevada area relative to the proposed Yucca Mountain high-level waste repository in the August 1999 addendum to NUREG-1437, the generic environmental impact statement for nuclear power plant license renewal, the amended contention sought to challenge the adequacy of the PFS ER and Table S-4 relative to those items consideration of the impacts of the convergence of shipments of spent fuel in the Salt Lake City, Utah area and at the PFS facility. See [State] Request for Admission of Late-Filed Amended Utah Contention V (Oct. 4, 1999). After considering the submissions by the parties, in a June 2000 ruling the Board denied the State's request for admission as failing to meet the late-filing criteria of 10 C.F.R. § 2.714(a)(1) and as an untimely request for reconsideration of its April 1998 contention admission decision. See LBP-00-14, 51 NRC 301, 308-11 (2000).

On April 16, 2001, PFS filed the motion for summary disposition of contention Utah V that presently is before us for resolution, along with a supporting statement of material facts not in dispute. See [PFS] Motion for Summary Disposition of Utah Contention V -- Inadequate Consideration of Transportation-Related Radiological Environmental Impacts (Apr. 16, 2001) [hereinafter PFS Dispositive Motion]; see also id. Statement of Material Facts On Which No Genuine Dispute Exists [hereinafter PFS Undisputed Facts]. On May 15, 2001, the State and the staff filed responses to the PFS dispositive motion. See [State] Response to [PFS] Motion for Summary Disposition of Utah Contention V (May 15, 2001) [hereinafter State Response]; NRC Staff Response to [PFS] Motion for Summary Disposition of Utah Contention V -- Inadequate Consideration of Transportation-Related Radiological Environmental Impacts (May 15, 2001) [hereinafter Staff Response]. In opposing the PFS motion, the State included a statement of disputed and relevant material facts and the affidavit of Radioactive Waste Management Associates Senior Associate Dr. Marvin Resnikoff, with supporting materials. See State Response, [State] Statement of Disputed and Relevant Material Facts [hereinafter State Disputed Facts]; id. exh. 1 (Declaration of Dr. Marvin Resnikoff Regarding Material Facts in Dispute with Respect to Contention Utah V) [hereinafter Resnikoff Declaration]. The staff included the declaration of Office of Nuclear Material Safety and Safeguards Spent Fuel Project Nuclear Engineer Robert J. Lewis in support of its position that the PFS motion should be granted. See Staff Response, unnumbered exhibit (Affidavit of Robert J. Lewis Concerning Utah Contention V) [hereinafter Lewis Declaration]. Finally, the staff's pleading engendered a May 25, 2001 State reply opposing the staff's support for the PFS contention Utah V summary disposition request. See [State] Reply to Staff's Response to [PFS] Motion for Summary Disposition of [Contention Utah V] (May 25, 2001) [hereinafter State Reply].

II. ANALYSIS

A. Summary Disposition Standards

The standard governing a presiding officer's consideration of a motion for summary disposition is well established and has been repeatedly used in this proceeding in ruling on previous PFS motions:

Under 10 C.F.R. § 2.749(a),(d) summary disposition may be entered with respect to any matter (or all of the matters) in a proceeding if the motion, along with any appropriate supporting material, shows that there is "no genuine issue as to any material fact and that the moving party is entitled to a decision as a matter of law." The movant bears the initial burden of making the requisite showing that there is no genuine issue as to any material fact, which it attempts to do by means of a required statement of material facts not at issue and any supporting materials (including affidavits, discovery responses, and documents) that accompany its dispositive motion. An opposing party must counter each adequately supported material fact with its own statement of material facts in dispute and supporting materials, or the movant's facts will be deemed admitted. See Advanced Medical Systems, Inc. (One Factory Row, Geneva, Ohio 44041), CLI-93-22, 38 NRC 98, 102-03 (1993).

LBP-01-19, 53 NRC 416, 421-22 (2001) (quoting cited cases from this proceeding).

With these general principles as the backdrop, we now turn to the PFS summary disposition motion regarding contention Utah V.

B. Application to Contention Utah V

1. PFS Position

PFS provides nine undisputed material facts in support of its argument that the State's concerns with respect to the ER analysis of transportation-related impacts, as articulated in contention Utah V as admitted by the Board, have been rendered moot by the subsequent staff DEIS. Initially, PFS recognizes that its June 1997 ER analysis of the transportation-related environmental impacts was based on 10 C.F.R. § 51.52(a), Table S-4, rather than a detailed,

facility-specific analysis. See PFS Undisputed Facts at 1. According to PFS, however, the June 2000 issuance of the DEIS displaced the ER Table S-4-based analysis by providing an “independent, detailed analysis -- not based on Table S-4 -- of potential environmental impacts from transportation of spent nuclear fuel to and from the [PFS facility].” PFS Dispositive Motion at 5. Thus, instead of relying upon Table S-4, the DEIS analysis used the RADTRAN 4 computer code to model and estimate the potential radiological impacts from incident-free transport and potential transportation accidents using the PFS-specific parameters for cask loading.

Although noting agency caselaw that contentions challenging an ER are considered as also contesting a subsequently-prepared DEIS, PFS nonetheless concludes that the upshot of the above-described developments regarding the PFS facility DEIS is that contention Utah V now raises no disputed issues of material fact. See PFS Dispositive Motion at 5-6 (citing Louisiana Energy Services (Claiborne Enrichment Center), CLI-98-3, 47 NRC at 77, 84 (1998); Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), CLI-83-19, 17 NRC 1041, 1049 (1983)). This result follows, according to PFS, because (1) the State did not revise contention Utah V following issuance of the DEIS, notwithstanding the fact the DEIS did not rely upon Table S-4 that was the focus of contention Utah V as admitted; and (2) the Board rejected late-filed contentions Utah LL through Utah OO by which the State sought to challenge the non-Table S-4 dependent DEIS transportation analysis. The concerns expressed in contention Utah V thus having been addressed so as to render that contention moot, PFS maintains that summary disposition in its favor is appropriate. See PFS Dispositive Motion at 7-10.

2. Staff Position

The staff agrees with PFS that there no longer exists any genuine dispute of material facts with respect to contention Utah V. According to the staff, the DEIS discussion of

transportation-related radiological environmental impacts eliminates any genuine dispute of material fact concerning the assertions contained in contention Utah V. In this regard, the staff also points out that section 5.7.2 of the DEIS, which provides an analysis of the transportation-related radiological environmental impacts of the proposed PFS facility, does not rely on Table S-4 but uses PFS facility-specific considerations and RADTRAN 4 computer analyses to assess the incident-free and accident-related radiological impacts of cross-country and regional transportation of spent fuel to and from the PFS facility. Arguing, like PFS, that the State may not change the scope of its contention to raise a challenge to the DEIS, in the staff's view the scope of contention Utah V is limited to whether a case-specific analysis that does not rely upon Table S-4 should be used to determine the transportation-related radiological environmental impacts of the PFS proposal. According to the staff, the subsequent DEIS, by providing a facility-specific transportation impacts analysis, differs so significantly from the ER that the State had to amend its contention or file a new contention to challenge the adequacy of the DEIS analysis, which it failed to do in a timely manner. In light of these circumstances, the staff concludes that PFS has met its burden of showing that there are no material facts in dispute regarding contention Utah V and so should have summary disposition entered in its favor. See Staff Response at 4-6.

3. State Position

Seeking to establish the existence of a material factual dispute with regard to PFS material facts six and seven, the State notes that the DEIS includes an analysis of the environmental effects of transporting spent nuclear fuel to and from the proposed PFS facility based on RADTRAN 4 computer modeling, but disputes that there is a sufficiently detailed analysis of the environmental effects of transporting fuel and wastes to and from the reactor as required by 10 C.F.R. § 51.52(b), with a listing of what it considers to be specific deficiencies in

the DEIS analysis. See State Disputed Material Facts at 1-2 (citing Resnikoff Declaration at 3-5). According to the State, contention Utah V is a broad challenge to the adequacy of any analysis of the impacts from the transportation of spent nuclear fuel to and from the proposed PFS facility, and not simply a challenge to an analysis that relies upon Table S-4. As a result, it clearly has established a material factual dispute relative to the adequacy of the DEIS transportation impacts analysis such that summary disposition relative to contention Utah V is not appropriate. See State Response at 3-9; see also State Reply at 3-4.

4. Board Ruling

As admitted, contention Utah V concerns alleged inadequacies in the use of Table S-4 relative to the analysis of transportation-related radiological impacts. Whatever the situation prior to the submission of the staff's DEIS transportation analysis, there is no question now that the revised transportation analysis provided in the DEIS is not based on Table S-4, a significant change from the ER transportation analysis. Despite the State's reliance on what it considers flaws and inadequacies in the DEIS analysis relative to the requirements in 10 C.F.R. § 51.52(b) -- particularly the ability of certain reactor sites to handle the HI-STAR 100 shipping cask or its railcar -- those arguments do not support a denial of summary disposition for contention Utah V. As was the case previously with contention Utah C, see LBP-99-23, 49 NRC 485, 492-93 (1999), the State's displeasure with a revised analysis does not mean there is controversy, factual or otherwise, regarding an existing contention relating to the same general subject. In this instance, the State's arguments regarding the alleged current deficiencies in the DEIS transportation analysis should have been channeled into a new contention (or perhaps an amended version of contention Utah V), an action the State already tried to take, albeit unsuccessfully. Thus, absent some additional significant change in the final

environmental impact statement, see 10 C.F.R. § 2.714(b)(2)(iii), the time for introducing such matters into this proceeding appears to have long since passed.²

III. CONCLUSION

In connection with contention Utah V, Inadequate Consideration of Transportation-Related Radiological Environmental Impacts, in light of the revised transportation impacts analysis put forth by the staff in its June 2000 DEIS, we conclude that PFS has met its burden of establishing there are no material factual issues remaining in dispute regarding contention Utah V so as to entitle it to a judgment in its favor as a matter of law in that contention Utah V is now moot.

For the foregoing reasons, it is this first day of August 2001, ORDERED, that the April 16, 2001 motion for summary disposition of PFS regarding contention Utah V is granted and, for the reasons set forth in section II.B.4 of this memorandum and order, a decision

² As the discussion above makes clear, the ultimate issue of the validity or adequacy of the DEIS transportation analysis is not now before us. We thus do not express a view on the “correctness” of the staff’s revised DEIS analysis. Instead, we consider the staff’s computer-modeled analysis of the transportation-related radiological environmental impacts facially sufficient to support the PFS “mootness” argument regarding contention Utah V.

regarding contention Utah V is rendered in favor of PFS on the ground that the issue is now moot.

THE ATOMIC SAFETY
AND LICENSING BOARD³

/RA/

G. Paul Bollwerk, III
ADMINISTRATIVE JUDGE

/RA/

Dr. Jerry R. Kline
ADMINISTRATIVE JUDGE

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Dr. Peter S. Lam
ADMINISTRATIVE JUDGE

Rockville, Maryland

August 1, 2001

³ 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

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PRIVATE FUEL STORAGE L.L.C.)	Docket No. 72-22-ISFSI
)	
(Independent Spent Fuel Storage)	
Installation))	

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LB MEMORANDUM AND ORDER (GRANTING SUMMARY DISPOSITION MOTION REGARDING CONTENTION UTAH V) (LBP-01-22) have been served upon the following persons by deposit in the U.S. mail, first class, or through NRC internal distribution.

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Docket No. 72-22-ISFSI
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(SUMMARY DISPOSITION MOTION
REGARDING CONTENTION UTAH V) (LBP-01-22)

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Dated at Rockville, Maryland,
this 1st day of August 2001