

February 21, 2002

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

DOCKETED
USNRC

Before the Atomic Safety and Licensing Board

March 1, 2002 (2:40PM)

In the Matter of)

PRIVATE FUEL STORAGE L.L.C.)

(Private Fuel Storage Facility))

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

Docket No. 72-22

ASLBP No. 97-732-02-ISFSI

**APPLICANT'S RESPONSE TO STATE OF UTAH'S
REQUEST FOR ADMISSION OF LATE-FILED
CONTENTION UTAH SS - REVISED COST-BENEFIT ANALYSIS**

Applicant Private Fuel Storage L.L.C. ("PFS") hereby responds to the "State of Utah's Request for Admission of Late-Filed Contention Utah SS," submitted February 11, 2002 ("State's Request"). Contention Utah SS ("Utah SS") alleges that the Final Environmental Impact Statement¹ fails to properly analyze the costs and benefits of the Private Fuel Storage Facility ("PFSF"). The State's late-filed request must be denied as a matter of law because Utah SS (1) is inexcusably late; (2) is not needed to develop a sound record, (3) would unnecessarily broaden the scope and delay these proceedings; and (4) does not entitle the State to any relief.

I. BACKGROUND

In June 2000, the Nuclear Regulatory Commission ("NRC") issued a Draft Environmental Impact Statement ("DEIS"), which included a discussion of cost-benefit analyses of the proposed PFSF. In sixteen pages of detailed comments on the DEIS submitted

¹ NUREG-1714, "Final 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 Toole County, Utah" (Dec. 2001) ("FEIS").

to NRC on September 27, 2000, the State “raised the issue of the proper period of time on which to base the cost-benefit analysis.” State’s Request at 4. In particular, the State excoriated the “Staff’s presentation in Chapter 8 of the DEIS,” State’s DEIS Comments² at 3, because

[The] entire modeling effort explicitly assumes a “40 Year License” in every one of its mathematical scenarios as relied upon by the Staff. The 40 year assumption is integral to the mathematics of the [PFS] models. Moreover, [PFS] did not – at least in the materials provided to the State – do any analysis based on a 20 year scenario or even a single sensitivity run based on a 20 year scenario.

State’s DEIS Comments at 4 (footnotes omitted). The State concluded that this “central incorrect assumption” and analysis “must be revised.” *Id.* The State also complained that the year 2002 date for PFS operation was “premature” and asserted that “PFS could not begin commercial operations until mid-2004 at the earliest.” *Id.* at 8.

On October 24, 2000, the NRC Staff issued a Request for Additional Information³ to PFS requesting, *inter alia*, that PFS perform new analyses to revise and update the costs and benefits of the proposed PFSF and revise the date that the PSFS would become operational. RAI, Questions 5, 6. PFS responded to the RAI in correspondence dated November 7, 15, and 22, 2000.⁴ The PFS responses stated that new cost-benefit analyses

² Comments Submitted by the State of Utah September 27, 2000, on the The NRC Staff’s DEIS Cost Benefit Analysis in Light of Staff’s Reliance on ERI’s Mathematical Modeling of the Market for the Proposed PFS Facility (Sep. 27, 2000) (“State’s DEIS Comments”).

³ NRC letter, Delligatti to Parkyn, Request for Additional Information for the Environmental Impact Statement (Oct. 24, 2000) (“RAI”).

⁴ PFS letter, Donnell to NRC, Responses to Third Round EIS Request for Additional Information (Nov. 7, 2000) (“November 7 RAI Response”); PFS letter, Donnell to NRC, Proprietary Responses to Third Round EIS Request for Additional Information (Nov. 15, 2000) (“November 15 RAI Response”); PFS letter, Donnell to NRC, Responses to Third Round EIS Request for Additional Information (Nov. 15, 2000); PFS letter, Donnell to NRC, Proprietary Responses to Third Round EIS Request for Additional Information (Nov. 22, 2000) (“November 22 RAI Response”); PFS letter, Donnell to NRC, Responses to Third Round EIS Request for Additional Information (Nov. 22, 2000).

would be based on the assumption that no fuel is received at the PFSF subsequent to 20 years of facility operation (November 7 RAI Response at 1-2) and a new operational date of 2003. November 15 RAI Response at 1-2. PFS also provided the proprietary electronic files containing the revised cost-benefit analyses. November 22 RAI Response at 1-2. The State's counsel was a recipient of the RAI and each response.

On February 11, 2002, the State requested admission of a new contention stating:

The Final Environmental Impact Statement, NUREG1714, fails to properly analyze the costs and benefits of the Applicant's proposed ISFSI project based on three new assumptions presented for the first time in Chapter 8 of the FEIS and therefore does not comply with National Environmental Policy Act ("NEPA") or 10 CFR § 51.91.

State's Request at 2. The basis for the contention is purportedly "new" assumptions regarding the "20-year license period," "breakeven analysis," and "start of operations." Id. at 2, 6, 7. The State asserts that: (1) the FEIS cost-benefit analyses "quite improperly assumes that SNF may nonetheless be stored at the facility for 40 years;" (2) the "breakeven analysis" is "flawed" because "it assumes a 40 year storage period;" and (3) that cost-benefit analysis uses an incorrect PFS start date and must be "redone using at a minimum the July 2004 operations start date" demanded by the State. Id. at 3, 6, 9.

II. ARGUMENT

The Board should not admit Utah SS because the proposed contention fails to satisfy the Commission's substantive standards for the admission of late-filed contentions. This failure is particularly gross here, where the purportedly "new" assumption of a 40-year facility operational life has been PFS' consistent position since project inception in 1997.⁵ Thus, Utah SS (1) is inexcusably late; (2) offers no expectation of im-

⁵ See, e.g., Private Fuel Storage Facility License Application, Docket No. 72-22 (1997) at 3-1 ("PFSF is designed to store spent fuel for up to 40 years" and before "the end of the initial license term an application

Footnote continued on next page

proving an already sound record, (3) will serve only to broaden and delay this proceeding; and (4) raises issues that, even if resolved in the State's favor, do not entitle the State to any relief. PFS demonstrates that, for all these reasons, the Board should deny the State's request. The bases for each of these conclusions are discussed below.

A. Legal Standards for a Late-Filed Contention

Utah SS is late-filed and the State has failed to establish good cause for the late filing. As the Board has explained many times in this proceeding, if a contention is not filed on time, the Commission's rules prescribe a balancing test considering five factors:

- (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; and
- (v) The extent to which the petitioner's participation will broaden the issues or delay the proceeding.

10 CFR §§ 2.714(a)(1)(i)-(v). In applying these rules, the Board has observed:

In evaluating the admissibility of a late-filed contention, the first and foremost factor in this appraisal is whether good cause exists that will excuse the late-filing of the contention. And relative to our evaluation of that factor here, as we have noted previously . . . the good cause element has two components that impact on our assessment of the timeliness of a contention's filing: (1) when was sufficient information reasonably available to support the submission of the late-filed contention; and (2) once

for license renewal will be submitted"); NRC Safety Evaluation Report Concerning the Private Fuel Storage Facility Docket No. 72-22 (2000) ("all spent fuel would be transferred offsite and the [PFSF] would be ready for decommissioning . . . by the end of a second [license] term."); Environmental Report, Private Fuel Storage Facility, Skull Valley Indian Reservation, Tooele County, Utah, Revision 14 (2001) ("ER") at 1.2-7 ("PFSF is designed to store spent fuel for up to 40 years . . . [p]rior to the end of the initial license term an application for license renewal will be submitted."). In addition, several FEIS analyses assume this realistic 40-year PFSF operational period. See, e.g., FEIS at 4-1, 4-44, Table 4.6, 5-36, Table 5-36.

the information was available, how long did it take for the contention admission request to be prepared and filed. Moreover, relative to the four other factors, in the absence of good cause there must be a compelling showing on the four remaining elements, of which factors two and four -- availability of other means to protect the petitioner's interest and extent of representation of petitioner's interests by other parties -- are to be given less weight than factors three and five -- assistance in developing a strong record and broadening the issues/delaying the proceeding.

Private Fuel Storage L.L.C. (Independent Spent Fuel Storage Installation) ("PFSF"), LBP-01-039, 54 NRC ____ (slip op. at 14-15) (Dec. 26, 2001) (citations and emphasis omitted). Additionally, even if these factors support admission, the contention itself must be admissible under the standards established in 10 C.F.R. §§ 2.714(b)(2), (d)(2) and the Commission's case law. See PFSF, LBP-01-37, 54 NRC ____ (slip op. at 10) (Dec. 13, 2001).

The "crucial" inquiry regarding the issue of good cause is the "determination of the point from which timeliness should be calculated." PFSF, LBP-99-43, 50 NRC 306, 312 (1997). The Commission has stated that "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." Id. at 313 (1999) citing Duke Energy Corp. (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 338 (1999). The Board has explicitly stated in this proceeding that where

[A] new contention purportedly is based on information contained in a document recently made public[ly] 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.

PFSF, LBP-99-43, 50 NRC at 313; see also PFSF, LBP-98-29, 48 NRC 286, 292 (1998).

In other words, good cause reduces to whether the contention was submitted within a reasonable time after "the State had information sufficient to frame the contention with 'rea-

sonable specificity and basis.”” PFSF, LBP-99-43, 50 NRC at 313; LBP-98-29, 48 NRC at 437.

PFS demonstrates below that information sufficient to frame the contention was available to the State well over a year before the instant request and the balance of factors do not favor the State. In any event, the substance of the proposed contention fails to meet the Commission’s standards for admission. The Board, therefore, should not admit the contention.

B. The State Has Failed to Establish Good Cause for Late-Filing Utah SS

1. The State Elected to Ignore Available Information For Over a Year

Utah SS is clearly late. The State asserts that the information providing the basis for the contention was “presented for the first time in Chapter 8 of the FEIS.” State’s Request at 2 (emphasis added). Contrary to this assertion, the State’s own documents establish not only awareness, but detailed knowledge and analysis of the underlying bases, since at least September 2000. The State simply chose to ignore applicable Commission rules, despite repeated and consistent rulings of this Board regarding timely contentions.

The State was aware of the purported analysis deficiencies long before the FEIS was published. The State’s Request itself admits that “Utah raised the issue of the proper period of time on which to base the cost-benefit analysis in its comments on the DEIS.” State’s Request at 4. The State’s DEIS comments were submitted on September 27, 2000, well over a year before the instant contention.

Further, the State had more than mere “awareness” of potential issues: the State had analyzed the DEIS to a degree sufficient to prepare formal written comments urging “that the DEIS be rewritten.” Id. at 6 (citing FEIS, App. G-424, 25). A comparison of

the DEIS comments and the statements in the State's Request are not reasonably distinguishable. Compare State's DEIS Comments at 3, 4, 8, with State's Request at 3, 6, 9. The issues of the appropriate period to assume for analyses purposes (i.e., 20 years or 40 years) and the appropriate PFS operational start date are the bases for both documents.

It is indisputable, therefore, that contrary to the instant assertions, the State was fully informed and aware of the issues raised in Utah SS well over a year before submitting the proposed contention. Indeed, based on its DEIS comments the State was particularly knowledgeable of these specific issues. Further, the RAI and three PFS responses, each available on the PFS docket and provided to State's counsel, explicitly identified the PFS analyses methodologies and assumptions the State now asserts first appeared in the FEIS. The State's assertion of timeliness is clearly baseless.

2. Good Cause Does Not Exist

The State's basis for its assertion of good cause is also demonstrably wrong. The State's entire basis for good cause is that "the FEIS presented a revised cost-benefit analysis based on three new assumptions, assumptions that were not part of the analysis previously prepared by the Applicant or included in its environmental report." State's Request at 9-10 (emphasis added). Contrary to this assertion, the ER clearly states that the financial benefit estimates are based on "a 40 year operating period" for the facility. ER at 7.2-4. As described above, the State admits that it was aware that the DEIS benefits analyses were based on "a 40-year accumulation of net benefits" in September 2000. State's Request at 4. Finally, PFS prepared extensive cost-benefit analyses in response to the RAI, of which the State's counsel was supplied complete copies. All of these sources of information pre-date the FEIS by over a year.

Moreover, the State is well aware of the Board's position on good cause for late-filed contentions. The Board has consistently rejected the State's attempts to submit late-filed contentions following publication of documents where the relevant information has been previously available elsewhere.⁶ Further, the delay in this case, well over a year, is an egregious example of the State's failure to be diligent. The State's baseless assertions of timeliness simply do not provide any reason for the Board to reverse its clear and consistent position requiring authentic good cause for late-filed contentions.

C. The Balance of the Other Late-Filing Factors Do Not Favor Admission

The second and fourth factors specified in 10 C.F.R. § 2.714(a)(1) do not compel admission of Utah SS. The State has protected its own interests with respect to these issues to the extent it determined appropriate. Since at least April 2000, the State has been, or should have been, aware of the assumptions that PFS and the NRC Staff would use in the cost-benefit analyses. By at least September 2000, the State was armed with full knowledge of the issues, but did not file a contention, and instead limiting itself to comments on assumptions used in the DEIS analyses. Indeed, the State's dormancy begs the question of whether the contention would have been submitted at all if any other FEIS challenges could have been crafted. In any event, the State's interest, such as it is, has received the protection the State deemed commensurate with its relevance to the proceeding. The second factor, therefore, favors PFS.

⁶ See, e.g., LBP-00-14, 51 NRC 301 (2000) (Denying request for admission of late-filed amended contention Utah L); LBP-00-16, 51 NRC 329 (2000) (Denying request for admission of late-filed contention Utah JJ); LBP-00-08, 51 NRC 146 (2000) (Denying request for admission of late-filed bases for contention Utah S); LBP-99-43, 50 NRC 306 (1999) (Denying request for admission of late-filed amended contention Utah C).

Regarding the third factor, a sound record on these issues already exists and is replete with information regarding the cost-benefit analyses, break-even analyses, and dates for PFSF operation and closure. The broad issue of PFS financial qualifications to operate the PFSF has been exhaustively examined. A previous attempt to challenge the purportedly "One-sided Costs-Benefit Analysis" was considered and rejected by the Board. See PFSF, LBP-98-7, 47 NRC 142, 204 (1998). As noted above, the ER, DEIS, RAI, and three separate RAI responses discussed the same issues and the assumptions and methodologies employed by PFS and NRC Staff. The State has been an active participant in this entire proceeding and has certainly not been reticent to voice its positions or challenge PFS or NRC Staff methods or results as it saw fit (e.g., DEIS comments). Based on this extensive record, litigation of Utah SS will add little, if any, substantive information to the record.

As to the final factor, the State is attempting to inject issues that have no substantive impact on the overall conclusion of the NRC Staff's cost benefit analysis. (See infra, section D). The State has not identified any requirement for the FEIS cost-benefit analyses to show any particular result. Thus, admission of Utah SS would only serve to expend scarce resources debating financial projection trivia. There is simply no need to broaden and delay this proceeding to resolve the issues raised by the State's assertions. See Texas Utilities Generating Company (Comanche Peak Steam Electric Station, Units 1 and 2), LBP-83-75A, 18 NRC 1260, 1263 (1983) (rejecting an otherwise admissible contention under the late-filing factors because "any attempt to litigate" the [contention] would be "fruitless"). It would clearly be fruitless to expend precious resources on litigation that ultimately would have no impact on the proceeding.

D. The Contention Does Not Entitle the State to Any Relief

Even assuming, *arguendo*, that the State's assertions are correct, neither the National Environmental Policy Act ("NEPA") or Commission regulations mandate any relief. A contention is inadmissible if, even if proven, it would be of no consequence in the proceeding because it would not entitle the proponent to relief. 10 C.F.R. § 2.714(d)(2). Pursuant to NEPA, courts apply a "rule of reason" to analyses and do "not 'fly speck' an EIS and hold it insufficient based on inconsequential or technical deficiencies." Dubois v. United States Dep't of Agriculture, 102 F.3d 1273, 1287 (1st Cir. 1996) (citation omitted). Further, an "assumption cannot be evaluated in isolation;" rather, "it must be assessed in relation to the limited purpose for which the Commission made the assumption." Baltimore Gas & Electric v. NRDC, 462 U.S. 87, 102 (1983).

Here, the assumptions challenged by the State are only three of many assumptions supporting the calculation of potential financial benefits from PFSF operation. See generally, FEIS Chapter 8. Further, the NRC Staff recognized the hazards of demanding precision in such economic projections stating:

The scenarios evaluated by the staff indicate the potential for a net positive benefit past the break-even throughput volume of SNF. . . . The net economic benefits of the proposed PFSF are sensitive to several factors that are inherently uncertain. An analysis of the sensitivity of the potential net economic benefits to critical cost assumptions indicates the possibility of considerable variation in outcome.

FEIS § 8.1.3 (emphasis added). It is precisely in this type of situation where "a reviewing court must remember that the Commission is making predictions" and "be at its most deferential." Baltimore Gas & Electric, 462 U.S. at 103.

The NRC Staff's conclusion regarding the FEIS cost-benefit analyses is not based on any single numerical result. To the contrary, the conclusion is based on the overall

trend of positive net benefits.⁷ Therefore, a slight reduction in magnitude of the benefits would have no impact on the NRC Staff's overall conclusion of a "potential for net positive benefit." Indeed, the State's own expert found that, even applying all the purportedly "correct" assumptions, each FEIS analyses still shows a positive "Net Benefit" from PFSF operation. Attachment to Declaration of Michael F. Sheehan, Ph.D. In Support of State of Utah's Request For Admission of Late-Filed Contention Utah SS. Thus, no change to the NRC Staff's FEIS conclusion would be required or necessary even if the State's assertions are substantiated. There is simply nothing to be gained by admitting this proposed contention.

Moreover, admission of Utah SS will force a delay in the proceeding. Hearings on the admitted contentions are scheduled to begin in less than two months. As a practical matter, Utah SS discovery alone would require a longer time to complete, resulting in moving back the hearings or a subsequent hearing. In either case, the proceeding will be delayed, at PFS' expense.⁸ The Board should not ignore the inequity that would result, without any corresponding relief, from admitting this late-filed contention.

In summary, the proposed contention is grossly late without good cause. The State has also failed to show that the balance of the Commission's criteria favor admission. Further, admission of Utah SS should be denied in any event because the conten-

⁷ This is particularly important with regard to the State's fixation with the PFS "start date." As the FEIS states, a delay in the start date would "potentially" reduce the projects net benefits. FEIS at G-424. The net economic benefits, however, are "very sensitive" to the discount rate, PFSF size, and when the permanent repository opens. FEIS at 8-6. The State has made no showing that a change from a few month project delay exceeds the inherent uncertainty in the analyses already acknowledged in the FEIS.

⁸ The State would, almost assuredly, then file an additional contention seeking to again litigate the "misleading" nature of the project start date regardless of the result.

tion would be of no practical consequence in the proceeding because it would not entitle the State to any relief.

III. CONCLUSION

For all the foregoing reasons, the Board should not admit late-filed Utah SS.

Respectfully submitted,

A handwritten signature in cursive script, reading "Paul Gaukler", written in black ink.

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Dated: February 21, 2002

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UNITED STATES OF AMERICA

NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

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CERTIFICATE OF SERVICE

I hereby certify that copies of the Applicant's Response to State of Utah's Request for Admission of Late-filed Contention Utah SS – Revised Cost-Benefit Analysis was served on the persons listed below (unless otherwise noted) by e-mail with conforming copies by U.S. mail, first class, postage prepaid, this 21st day of February, 2002.

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