

December 18, 2003

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of)	
)	
PRIVATE FUEL STORAGE, L.L.C.)	Docket No. 72-22-ISFSI
)	
(Independent Spent)	
Fuel Storage Installation))	

NRC STAFF'S RESPONSE TO "STATE OF UTAH'S
PETITION FOR REVIEW OF NON-HEARING ISSUES
IN THE PRIVATE FUEL STORAGE, LLC LICENSING PROCEEDING"

INTRODUCTION

Pursuant to 10 C.F.R. § 2.786(b)(3) and the Commission's Orders of November 13 and December 16, 2003,¹ the NRC staff ("Staff") hereby files its response to the "State of Utah's Petition for Review of Non-Hearing Issues in the Private Fuel Storage, LLC Licensing Proceeding" ("Petition"), filed on December 4, 2003. In its Petition, the State of Utah ("State") challenges certain of the Licensing Board's rulings rejecting or dismissing all or part of 24 of the State's contentions, which the State groups into three categories: (1) "safety, security, and associated contentions," Petition at 1-7; (2) NEPA contentions, *Id.* at 7-18; and (3) transportation contentions, *Id.* at 18-20. For the reasons set forth below, the Staff submits that the State fails to demonstrate that Commission review of the Licensing Board's decisions is warranted under 10 C.F.R. § 2.786(b)(4). Accordingly, the Petition should be denied.

BACKGROUND

This proceeding involves the application of Private Fuel Storage, L.L.C. ("PFS" or "Applicant") for a license to construct and operate an Independent Spent Fuel Storage Installation ("ISFSI") on the Reservation of the Skull Valley Band of Goshute Indians, geographically located

¹ *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-03-16, 58 NRC ____ (Nov. 13, 2003) (directing the filing of petitions for review of interlocutory decisions); *Private Fuel Storage, L.L.C.* ([ISFSI]), "Order" dated December 16, 2003 (affording the Staff a 5-page enlargement of the page limit for the instant response).

in Skull Valley, Utah. On November 24, 1997, the State filed 30 contentions which it sought to litigate in the proceeding,² and subsequently filed 35 late-filed contentions or amended contentions, raising numerous other safety, security, and environmental issues.

On April 22, 1998, the Licensing Board issued its decision in LBP-98-7, in which it ruled on the standing of petitioners for leave to intervene and the admissibility of their initial contentions.³ As pertinent here, the Board found that the State possessed standing to intervene in this proceeding, and that certain of its proposed contentions were admissible. LBP-98-7, 47 NRC at 169, 183-211. The Board further ruled, however, that many other contentions failed to satisfy the Commission's standards governing the admissibility of contentions and should therefore be rejected. *Id.* As litigation in this proceeding progressed, the Licensing Board issued numerous other decisions ruling, *inter alia*, on the admissibility of numerous late-filed and amended contentions, as well as various motions for summary disposition of admitted contentions.

On November 13, 2003, in order to expedite "the final stages" of this licensing proceeding, the Commission issued CLI-03-16, directing the parties "to file petitions for review of any interlocutory Board orders (other than those relating to matters still awaiting final Board decision) they wish to challenge." CLI-03-16, slip op. at 3. In response to the Commission's Order, on December 4, 2003, the State filed the instant Petition, in which it seeks review of the Licensing Board's rejection or summary disposition, in various decisions, of all or portions of 24 contentions.

As set forth below, the Staff submits that the Board correctly resolved the contentions raised in the State's Petition, and the State has not shown that Commission review of the Licensing Board's decisions is warranted under any of the criteria set forth in 10 C.F.R. § 2.786(b)(4). For these reasons, as more fully set forth below, the State's Petition should be denied.

² See "State of Utah's Contentions on the Construction and Operating License Application by Private Fuel Storage, LLC For an Independent Spent Fuel Storage Facility," filed November 24, 1997 ("Initial Contentions").

³ See *Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation)*, LBP-98-7, 47 NRC 142 (1998).

DISCUSSION

I. Applicable Legal Standards.

A. Standards Governing Petitions for Review.

Pursuant to 10 C.F.R. § 2.786(b)(4), Commission review of a licensing board decision may be undertaken in accordance with the following principles:

(4) The petition for review may be granted in the discretion of the Commission, giving due weight to the existence of a substantial question with respect to the following considerations:

(i) A finding of material fact is clearly erroneous or in conflict with a finding as to the same fact in a different proceeding;

(ii) A necessary legal conclusion is without governing precedent or is a departure from or contrary to established law;

(iii) A substantial and important question of law, policy or discretion has been raised;

(iv) The conduct of the proceeding involved a prejudicial procedural error; or

(v) Any other consideration which the Commission may deem to be in the public interest.

10 C.F.R. § 2.786(b)(4). See *Pacific Gas & Electric Co.* (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), CLI-03-12, 58 NRC ____ (Oct. 15, 2003), slip op. at 3; *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-01-09, 53 NRC 232, 234 (2001).

B. Standards Governing the Admissibility of Contentions

The legal standards governing the admissibility of contentions are set forth at length in the "NRC Staff's Response to 'OGD Petition for Review of Interlocutory Board Orders as Directed in CLI-03-16,'" at 5-7. In brief, pursuant to 10 C.F.R. § 2.714(b)(2), as amended in 1989, to be admissible a contention "must consist of a specific statement of the issue of law or fact to be raised or controverted," and must be supported by the following:

(i) A brief explanation of the bases of the contention.

(ii) A concise statement of the alleged facts or expert opinion which support the contention and on which the petitioner intends to rely in proving the contention at the hearing, together with references to those specific sources and documents of which the

petitioner is aware and on which the petitioner intends to rely to establish those facts or expert opinion.

(iii) Sufficient information . . . to show that a genuine dispute exists with the applicant on a material issue of law or fact. This showing must include references to the specific portions of the application (including the applicant's environmental report and safety report) that the petitioner disputes and the supporting reasons for each dispute, or, if the petitioner believes that the application fails to contain information on a relevant matter as required by law, the identification of each failure and the supporting reasons for the petitioner's belief. On issues arising under the National Environmental Policy Act, the petitioner shall file contentions based on the applicant's environmental report.

See generally Dominion Nuclear Connecticut, Inc. (Millstone Nuclear Power Station, Unit 2), CLI-03-14, 58 NRC ____ (Oct. 23, 2003), slip op. at 7. These requirements are "strict by design." *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-01-24, 54 NRC 349, 358 (2001). Contentions which fail to meet these requirements must be rejected. *Arizona Public Service Co.* (Palo Verde Nuclear Generating Station, Units 1, 2 and 3), CLI-91-12, 34 NRC 149, 155 (1991).

II. The State's Petition Fails to Demonstrate that Commission Review Is Warranted in Accordance With the Requirements of 10 C.F.R. § 2.786.

A. The Licensing Board Properly Ruled on the Safety, Security and Associated Contentions Cited by the State.

1. Contentions Utah Security-A, Security-G, Utah U (Basis 4), and Security-J.

The State asserts that the Licensing Board erred in rejecting certain issues in Contentions Security-A (Security Plan Staffing), Security-G (Procedures), and Utah U Basis 4 (Terrorism and Sabotage), concerning the lack of nearby housing for security guards, the adequacy of contingency procedures to respond to terrorism and sabotage, and the risk of sabotage. Petition at 2.⁴ Further, the State challenges the rejection of a proposed amendment to Contentions Security-A and -C,

⁴ See *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-98-13, 47 NRC 360, 368, 372 (1998) (rejecting Security-A and Security-G); and LBP-98-7, 47 NRC at 199 (rejecting Utah U Basis 4), *reconsideration denied*, LBP-98-10, 47 NRC 288, 290 (1998).

based on the Tooele County Attorney's opinion that "I do not believe Tooele County is obligated to provide law enforcement protection to [PFS] and their proposed storage site." *Id.* at 3.⁵ Finally, the State contests the Board's grant of summary disposition of Contention Security-J (Law Enforcement), decided under the doctrine of repose, based on a U.S. District Court decision declaring unconstitutional a Utah state law which would have prevented the Tooele County Sheriff's Office from performing law enforcement services at the PFS site. *Id.*⁶

In support of these assertions, the State argues that the Board's rulings on nearby housing, contingency plans and the Tooele County Attorney's opinion "add up to a lack of timely response and a lack of adequate security staffing for PFS to cope with or timely respond to onsite safeguards contingencies at the ISFSI." *Id.* Further, the State argues that the Board's summary disposition of Contention Security-J based on the U.S. District Court's decision "is on unsteady footing," because that decision is on appeal before the Tenth Circuit Court of Appeals, and because "PFS could comply with NRC regulations . . . by having its own designated response force in place." *Id.* at 4.⁷ The State urges the Commission to "accept review and require PFS to maintain its own designated response force." *Id.*

The State's arguments are without merit. First, the Board's decisions rejecting Utah Contentions Security-A, Security-G, and Utah U Basis 4 were entirely correct,⁸ and the State fails

⁵ See *Private Fuel Storage, L.L.C. ([ISFSI])*, LBP-99-7, 49 NRC 124, 128-29 (1999).

⁶ See *Private Fuel Storage, L.L.C. ([ISFSI])*, LBP-02-20, 56 NRC 169, 183 (2002) granting summary disposition of Security-J based on the decision in *Skull Valley Band of Goshute Indians v. Leavitt*, 215 F. Supp. 2d 1232 (D. Utah 2002) (finding the State statute is preempted by the Atomic Energy Act of 1954, as amended), *appeal pending*, Case No. 02-4149 (10th Cir.).

⁷ The Licensing Board recognized that the District Court's preemption ruling could be reversed on appeal and that Contention Security-J would then have to be litigated before the NRC -- "but that is a risk that PFS must bear relative to facility licensing." LBP-02-20, 56 NRC at 184.

⁸ See "NRC Staff's Response to Contentions Filed by (1) the State of Utah, [et al.]" ("Staff Response"), dated December 24, 1997, at 53-63 (Utah Contention U Basis 4 and Utah Contention V, incorporated therein); and "NRC Staff's Response to State of Utah's Security Plan Contentions, dated January 20, 1998, at 18-20 (Security-G).

to point to any specific error in the Board's rulings. Similarly, the State fails to identify any specific error in the Board's ruling on Contention Security-G, or its determination that the State's assertion that contingency procedures must be set out in a security plan constituted an impermissible challenge to the Commission's regulations and/or lacked materiality. LBP-98-13, 47 NRC at 372.

Further, the State fails to point out that while the Licensing Board rejected its Contention Security-A concerning the availability of housing for PFS security staff and the impact this might have on a timely response, the Board admitted Contention Security-C concerning the Applicant's ability to provide a timely response to a security event at the site. LBP-98-13, 47 NRC at 369-70. Thus, the issue of a timely response and the potential need for PFS to have an on-site response force was not excluded from litigation.⁹

Finally, the State fails to point out that the Board's ruling rejecting the State's amended contentions Security-A and -C concerning the Tooele County Attorney's opinion, was not based on a determination that his opinion lacked merit, but, rather, was based on a determination that the State failed to meet the five-factor balancing test for late-filed contentions set forth in 10 C.F.R. § 2.714(a)(1). *See Private Fuel Storage, L.L.C. ([ISFSI])*, LBP-99-7, 49 NRC 124, 128-29 (1999). The State nowhere challenges or provides any basis to disturb the Board's ruling in this regard.

For all the above reasons, the State's challenges to the Board's rulings on Contentions Utah O Basis 4, Security-A, Security-G, and Security-J fail to establish that Commission review of the Board's decisions is warranted under 10 C.F.R. § 2.786(b)(4).

2. Contentions Utah B (B-1), Security-F, Security-H, and Security-I

The State further challenges the Licensing Board's rulings rejecting Contentions Security-F, Security-H, and Security-I, and its decision granting summary disposition of Contention

⁹ Significantly, the State withdrew the issue of timely response (which was admitted under Contention Security-C) from litigation in this proceeding, and the Board then dismissed that contention. *See Private Fuel Storage, L.L.C. ([ISFSI])*, LBP-00-5, 51 NRC 64, 67-69 (2000). The State fails to address the effect of its withdrawal of this issue on the claim in its Petition that the Board's rulings "add up to a lack of timely response." *See* Petition at 3.

Utah B (B-1).¹⁰ The State argues -- without citing any legal authority -- that PFS must provide a physical security plan for the proposed Intermodal Transfer Facility ("ITF") to be located over 25 miles from the PFS Facility, and must provide a central communications center to monitor the progress of fuel shipments to its facility under 10 C.F.R. § 73.37(b)(4). Petition at 5. The State asserts that the Board erred in finding that the ITF -- where shipments would be transferred from rail cars to heavy haul trucks for transport down Skull Valley Road to the PFS Facility -- is part of the transportation process and thus is governed by U.S. Department of Transportation regulations and 10 C.F.R. Part 71, and it argues that the Board should have held the ITF to be an ISFSI subject to NRC regulations in 10 C.F.R. Part 72. *Id.* Further, the State asserts that "the rulings below present substantial questions of law, policy, safety, and public interest." *Id.* at 6.

While the State disagrees with the Board's decisions, it fails to provide any reason to believe that the Board's rulings were incorrect or in conflict with governing precedent, as required to establish grounds for review under 10 C.F.R. § 2.786(b)(4)(ii). Rather, the State asserts that the ITF will constitute a "de facto" ISFSI which should be required to comply with the numerous and varied requirements 10 C.F.R. Part 72; and it argues that the importance of the issue warrants Commission review -- apparently relying on the standards for review set forth in § 2.786(b)(4)(iii) ("substantial and important question of law, policy or discretion") and (v) ("[a]ny other consideration which the Commission may deem to be in the public interest"). Petition at 6. These arguments should be rejected.

Notwithstanding the State's characterization of the proposed Intermodal Transfer Facility as a "de facto" ISFSI, which it argues "should" be regulated under 10 C.F.R. Part 72, it is clear that the ITF is a facility in which spent nuclear fuel is to be transferred from one mode of transportation

¹⁰ Utah Contention B (License Needed for Intermodal Facility) was admitted in part, and then resolved by summary disposition in *Private Fuel Storage, L.L.C.* ([ISFSI]), LBP-99-34, 50 NRC 168, 174-77 (1999). Contentions Security-F (Intermodal Transfer at Rowley Junction), Security-H (Transportation of Spent Fuel to and From the ISFSI), and Security-I (Establishment of a Central Communications Center) were rejected in LBP-98-13, 47 NRC at 371-73.

to another by a private or common carrier, subject to the regulatory responsibilities established by DOT and NRC transportation regulations. The Licensing Board applied clear and long-standing legal precedent in ruling against the State, based on a thorough analysis of the regulatory scheme governing the transportation of spent nuclear fuel under applicable DOT and NRC regulations. *See, e.g.*, LBP-99-34, 50 NRC at 175-77.¹¹ As the Board held, the State's effort to apply the regulatory requirements of Part 72 to such transportation constitutes an impermissible challenge to the basic structure of the Commission's regulatory process and/or an attack on the regulations. LBP-99-34, 50 NRC at 176-77; LBP-98-13, 47 NRC at 372, 373.¹² The State has provided no reason to believe that Commission review of the Board's decisions applying this well established regulatory scheme in ruling on these contentions is warranted under 10 C.F.R. § 2.786(b)(4).

3. Contentions Utah J and Utah U Basis 2.

The State challenges the Licensing Board's ruling rejecting Contention Utah J ("Inspection and Maintenance of Safety Components, Including Canisters and Cladding")¹³ -- in which the State

¹¹ As the Board observed, its ruling is consistent with the Commission's decision regarding the intermodal shipment of spent nuclear fuel in *State of New Jersey* (Department of Law and Public Safety), CLI-93-25, 38 NRC 289, 294 (1993) ("holding that transportation activities for the shipment of spent nuclear fuel are governed by Part 71 and do not require a specific license under Part 72"). LBP-99-34, 50 NRC at 177. In its Petition, the State argues that the decisions in *State of New Jersey* and *Shipments of Fuel from Long Island Power Authority's Shoreham Nuclear Station to Philadelphia Electric Co.'s Limerick Generating Station*, DD-93-22, 38 NRC 365 (1993) "are not relevant to the highly irradiated shipments to PFS." Petition at 6 n.8. The State fails to provide any authority in support of its attempt to restrict Part 71 in this manner.

¹² As stated in *Philadelphia Electric Co.* (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-216, 8 AEC 13, 20-21 (1974), a contention must be rejected where:

- (1) it constitutes an attack on applicable statutory requirements;
- (2) it challenges the basic structure of the Commission's regulatory process or is an attack on the regulations;
- (3) it is nothing more than a generalization regarding the petitioner's view of what applicable policies ought to be;
- (4) it seeks to raise an issue which is not proper for adjudication in the proceeding or does not apply to the facility in question; or
- (5) it seeks to raise an issue which is not concrete or litigable.

¹³ LBP-98-7, 47 NRC at 190, *reconsideration denied*, LBP-98-10, 47 NRC at 293.

asserted that NRC regulations require PFS to construct "a hot cell or other facility for opening casks and inspecting the condition of spent fuel," Initial Contentions at 63. Similarly, it contests the Board's rejection of Contention Utah U Basis 2 ("Impacts of Onsite Storage Not Considered")¹⁴ -- in which the State argued that PFS failed to consider the potential for adverse environmental impacts which might occur at the site during storage due to the lack of a hot cell. *Id.* at 142.

The Licensing Board rejected Contention Utah J on the grounds that "the contention and its supporting bases impermissibly challenge agency regulations or rulemaking-associated generic determinations, including those concerning canister inspection and repair; and/or lack adequate factual information or expert opinion support." LBP-98-7, 47 NRC at 190, *reconsideration denied*, LBP-98-10, 47 NRC at 293. The Licensing Board's rejection of this contention was entirely correct. Contrary to the contention's assertion, see Initial Contentions at 63-65, NRC regulations do not require an ISFSI to provide a hot cell for handling spent fuel casks. Indeed, the State appears to recognize the contention's mistake, as it now asserts, instead, that "there is no rule specifically on point." Petition at 7. Accordingly, the State fails to show any error in the Board's ruling that the contention constituted an impermissible challenge to Commission regulations.

Further, apart from providing conclusory statements supported by the Declaration of Dr. Marvin Resnikoff, the State did not provide any fact or expert opinion which explained its view that Commission regulations should be supplemented by a requirement that a hot cell be provided for this facility.¹⁵ In addition, the contention failed to address the Applicant's statement that "retrieval of the spent fuel from the canister can be achieved if necessary" (SAR at 4.7-2) or the Applicant's discussion of its spent fuel handling operations systems or the shielding afforded by the canister transfer building (SAR § 4.7). Accordingly, the Licensing Board correctly determined that

¹⁴ LBP-98-7, 47 NRC at 199.

¹⁵ The State relied solely upon a one-page "Declaration" by Dr. Marvin Resnikoff, who stated that he had read the State's numerous contentions and that "the technical facts presented in those contentions are true and correct to the best of my knowledge, and the conclusions drawn from those facts are based on my best professional judgment." Initial Contentions, Exhibit 2.

the contention failed to satisfy the requirements of 10 C.F.R. § 2.714(b)(2)(ii), in that the State had failed to point to any specific deficiency in the application or the SAR.

The Licensing Board rejected Contention Utah U Basis 2 ("Impacts of Onsite Storage Not Considered"), which concerned the impacts due to lack of a hot cell, on the grounds that the State's assertions "fail to establish with specificity any genuine dispute; impermissibly challenge the Commission's regulations or rulemaking-associated generic determinations, including those involving canister inspection and repair and transportation sabotage; lack adequate factual or expert opinion support; and/or fail properly to challenge the PFS application." LBP-98-7, 47 NRC at 199. The Licensing Board's rejection of this issue was correct. In this basis statement, the State asserted only that the Applicant's Environmental Report ("ER") failed to consider "the safety risks," "costs," and "health risks to workers" posed by the lack of a hot cell at the facility. The State failed, however, to provide any specification of these asserted costs and risks, failed to provide supporting facts or expert opinion in support of the contention (other than its reference to the one-page Declaration of Dr. Resnikoff), and failed to point to any specific discussion in the ER which the State believed was deficient. Accordingly, Contention U Basis 2 failed to comply with the basis and specificity requirements in 10 C.F.R. § 2.714(b), and was properly rejected by the Licensing Board.

In its Petition, the State fails to point to any legal error in the Licensing Board's rulings on these contentions under 10 C.F.R. § 2.714(b), nor has it provided any other reason to believe that Commission review of these rulings is warranted under any of the standards set forth in 10 C.F.R. § 2.786(b)(4). Accordingly, its petition seeking review of these rulings should be rejected.

B. The Licensing Board Properly Rejected
The NEPA Contentions Cited by the State.

1. Contention Utah X (Need for the Facility).

The State seeks review of the Licensing Board's rejection of Contention Utah X. See LBP-98-7, 47 NRC at 202. In this contention, the State asserted that the Applicant's statement of the need for the proposed action - - inability to meet spent fuel storage requirements at reactor

sites -- is without support. Initial Contentions at 165. The State contended that the actual "need" is to provide economic advantage to a select group, which does not establish a need for the facility; and it asserted that the Applicant's ER must discuss the national need for the ISFSI and should detail and justify the quantity, capacity, cost, and legal impediments to storage at each reactor. *Id.* at 165-66. The Licensing Board ruled that this contention was inadmissible, in that "the contention and its supporting bases fail to establish with specificity any genuine dispute; impermissibly challenge the Commission's regulations or rulemaking-associated generic determinations; and/or lack adequate factual and expert opinion support." LBP-98-7, 47 NRC at 202.

In its Petition, the State treats Contentions Utah X ("Need for the Facility") and Utah Z ("No Action Alternative") together, and fails to distinguish between the assertions made in each contention. See Petition at 8-9. While it is unclear which assertions pertain to which contention, it appears that the State challenges the Board's ruling on Contention Utah X on the grounds that the ER fails to inform the NRC and the public about potential "adverse environmental effects" and the availability, if any, of "less harmful alternatives" as required under NEPA; and the State urges the Commission to evaluate whether the record contains an "even handed discussion" of the actual need for the proposed facility, and to determine whether the NRC has satisfied NEPA. *Id.* at 9.¹⁶

The State has failed to establish the existence of a "substantial question" with respect to any of the considerations in 10 C.F.R. § 2.786(b)(4) governing Commission acceptance of review. See *PFS*, CLI-01-09, 53 NRC at 234. The State nowhere addresses the regulatory standards governing the admissibility of contentions set forth in 10 C.F.R. § 2.714, and it fails to discuss how

¹⁶ In its Petition, the State further asserts that the Applicant's ER lacked an even-handed discussion and a consideration of alternatives and environmental impacts. However, Contention Utah X pertained to the accuracy of the Applicant's statement of need for the proposed facility. Insofar as the Petition's arguments are directed to this contention, they constitute new arguments and should be disregarded. *Yankee Atomic Electric Co. (Yankee Nuclear Power Station)*, CLI-96-7, 43 NRC 235, 260 & n.19 (1996). Similarly, the State's references to cases that address no action and alternative analyses under NEPA are not relevant to the issue of the need for the proposed action set forth in Contention Utah X. See Petition at 9 n.11.

the Licensing Board's application of those standards to Contention Utah X was erroneous. The State has failed to demonstrate any reason to believe that the Licensing Board erred in rejecting the State's contention for failure to satisfy the standards of 10 C.F.R. § 2.714. To the contrary, the Board's decision was correct, in that the State did not present any specific basis to support its contention alleging that the Applicant's ER discussion regarding the need for the facility was inadequate. Accordingly, the State has failed to show any reason that warrants Commission review of the Licensing Board's rejection of Contention Utah X under 10 C.F.R. § 2.786(b)(4).

2. Contention Utah Z (No Action Alternative).

The State seeks review of the Licensing Board's dismissal of Contention Utah Z upon granting the Applicant's motion for summary disposition of the contention.¹⁷ In its contention, the State asserted that the Applicant's no action alternative discussion focuses "solely on the perceived disadvantages of the no build alternative," and the State asserted that the ER failed to discuss or consider specific advantages to the no action alternative. Initial Contentions at 169.

The Licensing Board admitted Contention Utah Z for litigation, LBP-98-7, 47 NRC at 203, but subsequently granted summary disposition of the contention following the Staff's issuance of its Draft Environmental Impact Statement ("DEIS"), which contained an analysis of both the advantages and disadvantages of the no action alternative, including the specific matters identified in the State's contention. See LBP-01-23, 54 NRC at 171-72. In granting the Applicant's motion for summary disposition, the Licensing Board determined that the contention, as framed, was an "omission" challenge to the ER, meaning the contention alleged a failure in the ER to include a discussion of the disadvantages of the no action alternative. *Id.* at 171. Consequently, the

¹⁷ See *Private Fuel Storage, L.L.C.*, (Independent Spent Fuel Storage Installation), LBP-01-23, 54 NRC 163 (2001).

Licensing Board found that issuance of the DEIS containing the allegedly omitted material warranted dismissal of the contention as moot. *Id.* at 171-72.¹⁸

The Board's determination to grant summary disposition of this contention is consistent with well-established precedent. The Commission has stated that "[w]here a contention alleges the omission of particular information or an issue from an application, and the information is later supplied by the applicant or considered by the Staff in a draft EIS, the contention is moot."¹⁹ In order to litigate these matters, following the issuance of the DEIS it was incumbent upon the State to file a new or amended contention that met the factors in 10 C.F.R. § 2.714(b). *McGuire*, CLI-02-28, 56 NRC at 383 ("If we did not require an amended or new contention in "omission" situations, an original contention alleging simply a failure to address a subject could readily be transformed -- without basis or support -- into a broad series of disparate new claims."). Therefore, the State has failed to demonstrate the existence of a "substantial question" with respect to any of the considerations set forth in 10 C.F.R. § 2.786(b)(4).²⁰

¹⁸ In its Petition, the State asserts that the Licensing Board found Utah Contention Z was moot based on a single sentence in the DEIS (Petition at 8). This assertion is without merit. The Licensing Board found that the Staff's DEIS contained an analysis that discusses both the advantages and disadvantages of the no action alternative, including the matters identified in the State's contention; indeed, the Board's review of the pleadings on summary disposition identified numerous places in the DEIS that address this matter. *See* LBP-01-23, 54 NRC at 168. *See also* "NRC Staff's Response to 'Applicant's Motion For Summary Disposition of Utah Contention Z - No Action Alternative,'" dated March 6, 2001 at 8-13 (detailing the DEIS discussion of the no action alternative and the DEIS consideration of the matters raised by the State in Utah Contention Z).

¹⁹ *See Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-28, 56 NRC 373, 382-83 (2002).

²⁰ The State asserts that the Licensing Board "undermined" Utah Z in a discovery order that clarified that economic impacts fell outside of the contention's scope. Petition at 8. In that Memorandum and Order, the Licensing Board reviewed the language of the contention and its supporting bases, and granted the Staff's request for a protective order with respect to discovery requests pertaining to the economic costs of fuel storage, based on its determination that the contention raises only "environmental (as opposed to economic) impacts" concerning the no action alternative. *See* Memorandum and Order (Ruling on Contention Z Discovery Production Requests), dated November 9, 2000 at 4, 7. Significantly, the Petition does not point to any error in the Board's reading of the contention, and it fails to demonstrate the existence of a "substantial question" that would merit Commission review of the Board's ruling.

3. Contention Utah Y (Connected Action).

The State seeks review of the Licensing Board's rejection of Contention Utah Y. See LBP-98-7, 47 NRC at 202. In this contention, the State asserted that the Applicant did not adequately discuss the link between its proposal and the national high level waste program, which the State alleged to be a connected action; further, the contention asserted that the Applicant's proposal will commit the government to a course of action regarding high level waste disposal and will discourage other alternatives, and claimed that the Applicant needs to consider that the ISFSI will become a "de facto permanent repository." Initial Contentions at 167.

The Licensing Board rejected this contention as inadmissible, finding that "the contention and its supporting bases fail to establish with specificity any genuine dispute; impermissibly challenge the Commission's regulations or rulemaking-associated generic determinations, including 10 C.F.R. §§ 51.23, 51.61; and/or lack adequate factual or expert opinion support." LBP-98-7, 47 NRC at 202. This determination was entirely correct.

In its Petition, the State repeats certain of the arguments made in its contention and asserts that contrary to the Licensing Board's ruling, the contention "does not challenge any NRC regulation and raises a genuine dispute." Petition at 10. These assertions fail to establish that Commission review of this ruling is warranted under 10 C.F.R. § 2.786(b)(4). First, as the Board found, the contention failed to provide any specific information, as required in 10 C.F.R. § 2.714(b), which would suggest that the licensing of this ISFSI is connected to or might foreclose future decisions which might be made by Congress and the Executive Branch to construct a permanent waste repository.²¹ The State nowhere addresses the standards for the admissibility of contentions and fails to provide any reason to believe that the Board erred in applying those standards to

²¹ Such a connection is not readily apparent. See generally, *Kerr-McGee Corp. (West Chicago Rare Earths Facility)*, CLI-82-2, 15 NRC 232, 263-65 (1982) and *Duke Power Co., (Amendment to Materials License SNM-1773 -- Transportation of Spent Fuel From Oconee Nuclear Station for Storage at McGuire Nuclear Station)*, ALAB-651, 14 NRC 307, 313-15 (1981).

Contention Utah Y. Second, the State fails to address the Board's determination that its assertions constitute an impermissible challenge to NRC regulations. Contrary to the State's assertion, NRC regulations do not require an applicant or the Staff to consider the potential that a facility could become a "de facto permanent repository." See 10 C.F.R. § 51.23(b) (no discussion of environmental impact of storage at an ISFSI beyond the term of the ISFSI is required for ISFSI licensing), and § 51.61 (no impacts for storage of spent fuel at an ISFSI beyond its license terms need to be discussed in the ER). The Licensing Board correctly held that the State's assertion that such matters required consideration impermissibly challenged the Commission's regulations. See 10 C.F.R. § 2.758. The State's Petition on this contention fails to show the existence of a "substantial question" with respect to any of the considerations set forth in 10 C.F.R. § 2.786(b)(4), and fails to establish that Commission review is warranted. See PFS, CLI-01-09, 53 NRC at 234.

4. Contention Utah CC (One-Sided Costs-Benefit Analysis)

The State seeks review of the Licensing Board's rejection of Contention Utah CC in LBP-98-7. This contention alleged that, "[c]ontrary to the requirements of 10 C.F.R. § 51.45(c), the Applicant fails to provide an adequate balancing of the costs and benefits of the proposed project, or to quantify factors that are amenable to quantification." Initial Contentions at 178. The Licensing Board held this contention and its supporting bases "fail to establish with specificity any genuine dispute; lack adequate factual or expert opinion support; and/or fail properly to challenge the PFS application." LBP-98-7, 47 NRC at 204.²² In its Petition, the State asserts that the Licensing Board "shifted the burden" of discussing environmental costs to the State. Petition at 12-13. This assertion is without merit.

²² The State, in a footnote, asserts that the Licensing Board's ruling relied on boilerplate language and did not provide an exposition of its ruling. Petition at 13, n.15. This is incorrect. Although tersely stated, the bases for the Board's decision "may reasonably be discerned." *Private Fuel Storage*, LBP-98-10, 47 NRC 288, 290-1 (1998), quoting *Motor Vehicle Manufacturers Association of the United States v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 43 (1983). See also *GTE Service Corporation v. FCC*, 205 F.3d 416 (D.C. Cir. 2000), quoting *Bowman Transportation, Inc. v. Arkansas-Best Freight Systems, Inc.*, 419 U.S. 281, 286 (1974).

In this contention, the State challenged the adequacy of the Applicant's consideration of "indirect" costs (which PFS found to be "minimal due to the remote location and small size of the actual storage area");²³ it alleged that the costs of other (unspecified) environmental impacts related to nine other State contentions needed to be considered; and it contended that PFS had made "no attempt to quantify the costs" of the facility's impacts. Initial Contentions at 178-79. Nowhere, however, did the State explain or provide any concrete factual reason to believe that any specific costs had been overlooked by the Applicant. *See Id.*²⁴ The Licensing Board correctly found that the State had not provided specific facts or expert opinion, or pointed out specific deficiencies in the application or the ER, as required under 10 C.F.R. § 2.714(b)(2)(ii)-(iii). Inasmuch as the State had failed to provide the necessary factual and technical support for the contention, it failed to satisfy its own burden of going forward under 10 C.F.R. § 2.714(b)(2).²⁵ The Licensing Board's rejection of Utah Contention CC was therefore not erroneous. *Accord, Dominion Nuclear Connecticut* (Millstone Nuclear Power Station, Unit 2), CLI-03-14, 58 NRC ____ (Oct. 23, 2003), slip op. at 7-8. The State's Petition fails to demonstrate that the Board's ruling raises a "substantial question" with regard to any of the considerations set forth in 10 C.F.R. § 2.786(b)(4).

5. Contention Utah SS (Final EIS Revised Cost Benefit Analysis).

The State seeks review of the Licensing Board's oral ruling of May 17, 2002, in which the Board rejected late-filed Contention Utah SS ("Revised Cost-Benefit Analysis"). *See* Tr. 9,210-17.

²³ This contention did not challenge the adequacy of PFS's analysis of the direct economic costs of constructing and operating the facility. *See* Initial Contentions at 178.

²⁴ "Bald assertions" and "mere speculation" are not sufficient to support a contention. *See Sacramento Municipal Utility District* (Rancho Seco Nuclear Generating Station) LBP-93-23, 38 NRC 200, 246 (1993); *Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), LBP-96-2, 43 NRC 61, 75 (1996).

²⁵ *See, e.g., Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), LBP-91-35, 34 NRC 163, 167-68 (1991) (amended § 2.1714(b)(2) does not shift the burden of persuasion from the applicant on the issue of whether a license should be granted, but specifies what a petitioner must do to satisfy its burden of coming forward with information in support of a proposed contention).

This contention challenged certain aspects of the cost-benefit analysis contained in the Staff's Final Environmental Impact Statement, published in December 2001.²⁶ In particular, it alleged that the Staff's cost-benefit analysis based on a 20-year license period and a 40-year storage term is erroneous because it assumes a longer operation period than the 20-year license that PFS seeks, thus skewing the results of the cost-benefit analysis. Contention Utah SS at 3.

Following oral argument (held on May 10, 2002), the Licensing Board issued an oral ruling in which it rejected the contention, ruling that, even if the contention were admitted, no relief could be granted, *inter alia*, because the issues raised by the State involved the purported need for economic analysis that was unrelated to adverse environmental impacts, and pertained to the use of land owned by a private party (the Skull Valley Band) who had consented to such use; the record provided adequate information to the public with respect to the 20-year/ 40-year issue; the legality of the project was already under consideration in connection with other contentions and in Federal court; and the Applicant's financial qualifications were addressed via the safety evaluation process, so that the risk that orphaned casks might be left at the site did not mandate consideration of the Applicant's financial qualifications under NEPA. Tr. 9,213-15.²⁷

In its Petition, the State asserts that the Board's ruling was in error because the dismissal of Contention Utah SS allows "misleading analysis to inform decision makers and the public"; and it argues that "permission by the band for PFS to use its land somehow substitutes for a NEPA analysis is contrary to law." Petition at 13. This assertion fails to demonstrate the existence of a "substantial question" warranting Commission review under the criteria of 10 C.F.R. § 2.786(b)(4). A contention must have a basis in fact or law, and it must entitle a petitioner to relief. See

²⁶ See "State of Utah's Request for Admission of Late-Filed Contention Utah SS," dated February 11, 2002.

²⁷ The Staff filed a written opposition to Contention Utah SS based solely on the grounds that it was untimely and failed to meet the criteria for a late-filed contention. See "NRC Staff's Response to 'State of Utah's Request for Admission of Late-Filed Contention Utah SS,'" dated February 26, 2002, at 4-12. The Board deferred ruling on the timeliness issue in its oral ruling, Tr. at 9,212, but has not issued its intended written decision on this issue. See Tr. 9,211, 9,216-17.

10 C.F.R. §§ 2.714(b)(2)(iii) and (d)(2)(ii). As the Board correctly held, the State's arguments regarding the financial qualifications of the Applicant were already addressed in other aspects of the licensing proceeding. See Tr. at 9,215. Further, the Board properly determined that no relief could be granted because a cost-benefit analysis is not "central" to a determination of the adequacy of the FEIS or any portion thereof; and it concluded that the analysis provided is adequate to allow the public to "draw its own conclusions about the 20-year receipt, 40-year storage argument." Tr. at 9,214. NEPA "does not demand that every federal decision be verified by reduction to mathematical absolutes for insertion into a precise formula." *Louisiana Energy Services, L.P.*, (Claiborne Enrichment Center), CLI-98-3, 47 NRC 77, 88 (1998) quoting *Sierra Club v. Lynn*, 502 F.2d 43, 61 (5th Cir. 1974). Therefore, the Licensing Board correctly determined that this contention should be rejected, and the State has failed to show that Commission review of this decision is warranted under 10 C.F.R. § 2.786(b)(4).

6. Contention Utah HH (Low Rail Corridor).

The State seeks review of the Licensing Board's rejection of Contention Utah HH, which asserted that the Applicant failed to adequately consider fire hazards and firefighting concerns associated with its proposed rail spur.²⁸ This contention was filed in response to a 1998 amendment to the PFS license application, in which the Applicant (a) identified rail transportation as the preferred transportation alternative and (b) changed the location of the rail corridor in Skull Valley. Low Rail Contentions, at 2-3.

The Licensing Board rejected Contention Utah HH, as failing to satisfy the standards for late-filed contentions.²⁹ In doing so, the Board determined that the State lacked good cause for filing the contention late because the State failed to show that the information upon which it relied

²⁸ See "State of Utah's Contentions Relating to the Low Rail Transportation License Amendment," dated September 29, 1998 (hereafter "Low Rail Contentions").

²⁹ See *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-98-29, 48 NRC 286, 292-94 (1998).

as the basis for the contention was not available earlier. LBP-98-29, 48 NRC at 293. The Board found that the State had long been aware of the Applicant's rail option, and the State did not suggest anything unique about the new location of the rail spur that would involve fire hazards and firefighting concerns that could not have raised with respect to the former location. *Id.* at 293 n.2.

In its Petition, the State argues that the Licensing Board's decision is based on "contrived reasoning" and elevates form over substance; and that the standard used by the Board in rejecting the contention does not conform to existing NRC case law. Petition at 15-16. Further, the State suggests that it could not have filed the contention earlier because its concerns involved fires on open rangeland in Skull Valley, which was not a concern for the previous rail spur alignment located next to a paved highway. *Id.* at 15.

The State fails to demonstrate the existence of a "substantial question" with respect to the considerations in 10 C.F.R. 2.786(b)(4), and it impermissibly raises a new argument on appeal. First, the Licensing Board correctly applied well-established Commission case law in rejecting the contention. In fact, the Commission recently affirmed the principle that "NRC contention admissibility and timeliness requirements demand a level of discipline and preparedness on the part of petitioners." *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2, Catawba Nuclear Station, Units 1 and 2), CLI-03-17, 58 NRC ____ (Dec. 9, 2003), slip op. at 13.³⁰ Thus, parties have "an obligation to examine the application and publicly available information, and to set forth their claims at the earliest possible moment." *Id.*³¹ The State has failed to meet this requirement, in that

³⁰ To the extent the State asserts that the Board should have overlooked the State's lateness, this argument constitutes an impermissible attack on the Commission's regulations and should not be entertained. *See* 10 C.F.R. § 2.758. The rules specify that impermissibly late contentions "will not be entertained" absent a balancing test. *See* 10 C.F.R. § 2.714(a)(1).

³¹ *See, e.g., McGuire*, CLI-02-28, 56 NRC at 386 (late-filed contentions must be based on "new information not previously available"); *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-01-1, 53 NRC 1, 7 (2001) (the regulations specify that impermissibly late contentions "will not be entertained"); *Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 340 (1999) (new claims based on Staff requests for information, filed after the deadline for contentions, would not be permitted absent a showing of good cause for
(continued...)

it has not shown that it could not have filed this contention two years earlier with respect to the Applicant's initial discussion of the rail spur alternative.

Second, the State raises a new argument in asserting that its contention was not filed sooner due to the differences between the rail spur described in the original application ("next to a paved highway") and the rail spur described in the amended application ("in open rangeland"). In this regard, the State previously claimed that it did not file this contention sooner because it thought the Applicant would not pursue rail transportation and, therefore, "submitting contentions on that option would not constitute a wise use of the State's resources."³² Accordingly, the State's argument that it failed to file this contention sooner because its concern only arose upon the change in rail spur location must be rejected as being improperly raised for the first time on appeal.

In sum, the Licensing Board correctly rejected the State's argument as failing to demonstrate good cause for filing late. *PFS*, LBP-98-29, 48 NRC at 292-93.³³ The State has not shown any grounds to challenge that ruling, and has failed to demonstrate any basis warranting Commission review of this decision under 10 C.F.R. § 2.786(b).

7. Contention Utah II (Cost and Effects
Associated with the Low Rail Corridor).

The State seeks review of the Licensing Board's rejection of Contention Utah II. LBP-98-29, 48 NRC 286, 295-96 (1998). In this contention, the State set forth seven bases that addressed the Applicant's Low Corridor license amendment's purported failure to evaluate, quantify, and analyze the costs and cumulative impacts associated with constructing and operating

³¹(...continued)
lateness); *Duke Power Co.* (Catawba Nuclear Station, Units 1 and 2), CLI-83-19, 17 NRC 1041, 1048 (1983) (unavailability of document does not establish good cause for late filing if information was available "early enough to provide the basis for the timely filing of that contention.").

³² "State of Utah's Reply to Applicant's and Staff's Responses to Low Rail Contentions," dated October 26, 1998 at 2-3.

³³ The Licensing Board also considered that had the contention not failed for lateness, all but one portion of the contention would have been rejected as failing to meet the admissibility requirements in 10 C.F.R. § 2.714(b). See LBP-98-29, 48 NRC at 294 n.6.

the rail line on the regional environment. Low Rail Contentions at 7-12. The Licensing Board found one of the bases inadmissible on the grounds that the State did not establish good cause for lateness. LBP-98-29, 48 NRC at 295. With respect to this basis statement, the Board applied the reasoning set forth in connection with Contention Utah HH, described above. The Board found that good cause existed for late filing the remainder of the contention (Bases 2-7), *Id.* at 295-96, but that these matters were otherwise inadmissible. *Id.*

In its Petition, the State focuses solely on the Licensing Board's consideration of the good cause standard for late-filed contentions, altogether ignoring the greater part of the Licensing Board's treatment of Contention Utah II. The Staff submits that the Licensing Board's ruling on timeliness was correct, for the reasons described in the discussion of Contention Utah HH, *supra*, and in the Board's decision. Moreover, no error has been shown to exist with respect to the Board's ruling on Bases 2-7 of Contention Utah II, and the State has therefore failed to establish that a "substantial question" exists with respect to any of the factors governing Commission acceptance of review under 10 C.F.R. § 2.786(b)(4).

8. Contention Utah KK (Military Training Impacts).

The State seeks review of the Licensing Board's rejection of Contention Utah KK, which the Licensing Board dismissed as failing to satisfy the standards for late-filed contentions.³⁴ The State filed its contention in July 2000, following its receipt of the DEIS. Contention Utah KK challenges the lack of consideration in the DEIS of the impacts to military training, readiness and national security, and subsequent impacts to the Utah economy.³⁵ The Board determined that the State lacked good cause for filing this contention late, in that it could have raised the issue in the State's

³⁴ See *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-00-27, 52 NRC 216 (2000).

³⁵ See "State of Utah's Request for Admission of Late-Filed Utah Contention KK (Potential Impacts to Military Training and Testing and State Economy)," dated July 27, 2000 (hereafter Late-Filed Utah Contention KK), at 1.

initial contentions in 1997, or, at the latest, following the State's receipt of a letter concerning this matter in 1999. LBP-00-27, 52 NRC at 223-24.

In its Petition, the State asserts that the Board elevated form over substance. The State asserts that it raised its concern to the Staff as part of the environmental scoping process and that by relying on the NEPA scoping process to address its concerns (and then by filing a contention when it did not), the State is promoting efficiency in NRC proceedings. The State alleges that this avoids unnecessary litigation and "swamping" the Board with contentions which require "predictive rulings as to the future scope" of the DEIS.³⁶ Petition at 18.

The State's arguments concerning its failure to file this contention in a timely manner should be rejected. First, the Commission's rules clearly specify that on issues arising under NEPA, the petitioner shall file contentions based on the Applicant's environmental report and may amend those contentions or file new contentions if data or conclusions in the DEIS differ significantly from the ER. 10 C.F.R. § 2.714(b)(2)(iii). The State's argument challenges the process described in this regulation and thus cannot be entertained. See 10 C.F.R. § 2.758(a). Second, Commission case law instructs that "an untimely filing is not made more acceptable by the fact that the party refrained from burdening the adjudicatory process during the months of delay." *Commonwealth Edison Co.* (Braidwood Nuclear Power Station, Units 1 and 2), CLI-86-8, 23 NRC 241, 245 (1986) (parties to Commission proceedings must live with the choices they make). Third, the State is incorrect that admissibility determinations regarding timely environmental contentions require "predictive rulings as to the future scope" of the DEIS. Rather, such contentions are based on

³⁶ The State asserts that it relied on the Staff's "pronouncement" in a November 1999 Supplemental Scoping Report that the scope of the EIS would include the ISFSI's cumulative impacts on other area facilities and activities, and direct and indirect economic effects. Petition at 17. Late-Filed Utah Contention KK at 3-4. Regardless of the "reasonableness" of the State's belief that the DEIS would address (and presumably, resolve) its concerns, it was incumbent upon the State to timely file its contention at the time it obtained, or could have obtained, information regarding those matters, without waiting for publication of the DEIS. See 10 C.F.R. § 2.714(b)(2)(iii).

information contained in an applicant's ER and are judged on whether they show a material dispute with the *applicant* on a material issue of law or fact. See 10 C.F.R. § 2.714(b)(2)(iii).³⁷ The Petition fails to show that the Board erred in finding that the State lacked good cause for the lateness of this contention, and fails to establish that Commission review of this ruling is warranted under 10 C.F.R. § 2.786(b).³⁸

C. The Licensing Board's Rulings on the Transportation Contentions Cited by the State Were Not Erroneous and Do Not Warrant Review.

The State contends that the Licensing Board erred in rejecting certain transportation-related issues raised in a proposed amendment to Contention Utah V, and Late-Filed Contentions Utah LL through OO (Petition at 18, 19) -- which the Board ruled were impermissibly late without a showing of good cause, as required in 10 C.F.R. § 2.714(a)(1). See *Private Fuel Storage, L.L.C.* ([SFSI]), LBP-00-14, 51 NRC 301, 309-10 (2000) (Amended Contention Utah V); *Private Fuel Storage, L.L.C.* ([SFSI]), LBP-00-28, 52 NRC 226, 238-39, *reconsideration denied*, LBP-00-31, 52 NRC 340 (2000), *petition for interlocutory review denied*, CLI-01-01, 53 NRC 1 (2001) (Contentions Utah LL through OO).

³⁷ The State claimed that the Licensing Board should have found "good cause" due to the "national significance" of the issue. Late-Filed Utah Contention KK at 8-9. The Licensing Board properly treated this assertion, finding that the State's argument is "not a compelling contributor to good cause." *PFS*, LBP-00-27, 52 NRC at 223, *citing South Carolina Elec. and Gas Co.* (Virgil C. Summer Nuclear Station, Unit 1), ALAB-642, 13 NRC 881, 887 n.5 (1981). The State's attempt to distinguish *Summer* (Petition at 17) is without merit; rather, the Appeal Board's pronouncement that "whether there is 'good cause' for a late filing depends *wholly* upon the substantiality of the reasons assigned for not having filed at an earlier date," *Summer, supra* (emphasis in original), directly applies to the State's arguments here concerning the alleged significance of this issue.

³⁸ The State asserts that it described "with specificity and documentation the military significance of the UTTR and the economic significance of Hill AFB, yet the Board weighed these factors against the State." Petition at 17. The State fails to note, however, that the basis for the Board's ruling on factor three in 10 C.F.R. § 2.714(a) was that the State had not summarized its witnesses' proposed testimony or identified the matters the State wished to address. LBP-00-27, 52 NRC at 224. The State fails to address this deficiency. Similarly, while the State argues that it filed the contention one year prior to scheduled environmental hearings, Petition at 17, it fails to address the Board's ruling that factor five weighed against the State because the issue would broaden the issues and "would almost certainly delay the proceeding."

While the State contends that the Board's rejection of these contentions constitutes "prejudicial procedural error," Petition at 19, that assertion is entirely without merit. The Licensing Board explained the rationale for its decisions at length, indicating that Amended Contention Utah V "could reasonably have been raised as early as 1997 when contention Utah V initially was filed," and -- contrary to the State's assertion -- was not dependent upon the prior publication of the August 1999 addendum to NUREG-1437. LBP-00-14, 51 NRC at 309. Further, with respect to Contentions Utah LL through OO, the Board explained that its 30-day deadline for filing contentions related to the publication of Staff documents was established in June 1998, and was well known to the parties; moreover, the Board had extended this deadline for filing contentions related to the DEIS by eight days, such that contentions based on the DEIS were due on July 27, 2000. LBP-00-28, 52 NRC at 235, 236. The State's filing of Contentions Utah LL through OO on August 2, 2000, was thus six days late, in contravention of the Board's scheduling order. *Id.* at 236. While the Licensing Board recognized that its decision rejecting Contentions Utah LL through OO "may seem harsh," it determined that this outcome was consistent with Commission guidance, that presiding officers are to set schedules, parties are to adhere to those schedules, and compliance with those schedules is to be enforced. *Id.* at 237, *citing* "Statement of Policy on Conduct of Adjudicatory Proceedings," CLI-98-12, 48 NRC 18, 21 (1998).³⁹

Notwithstanding the State's arguments to the contrary, the Licensing Board's rejection of these contentions did not constitute an abuse of discretion (Petition at 19), nor did it constitute an abuse of the State's due process rights. The Licensing Board did no more than apply the Commission's late-filing regulations and its own long-standing Order scheduling the deadline for filing contentions; this does not constitute an "abuse of discretion." Rather, it was incumbent upon

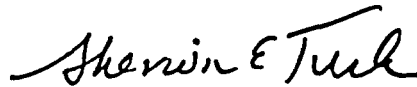
³⁹ The Staff notes that it opposed the admission of Contentions Utah LL through OO, but did not base its opposition on the State's failure to meet the Board's established filing deadline. See "NRC Staff's Response to State of Utah's Request for Admission of Late-Filed Contentions Utah LL Through OO," dated August 30, 2000, at 6, 36.

the State to meet the filing schedule imposed by the Board, or to seek relief therefrom by filing a timely motion for an extension of time. The State did neither.⁴⁰ Inasmuch as the Licensing Board's rejection of these contentions was consistent with established law and well-known filing requirements in this proceeding, and resulted from the State's own failure to file these contentions in a timely manner, the State has failed to show any reason for the Commission to undertake review of these rulings under 10 C.F.R. § 2.786(b)(4).⁴¹

CONCLUSION

For the reasons set forth above, the Staff submits that the State's Petition fails to demonstrate that Commission review of any of the Licensing Board's interlocutory rulings on these contentions is warranted under 10 C.F.R. § 2.786. The Petition should therefore be denied.

Respectfully submitted,



Sherwin E. Turk
Catherine L. Marco
Laura C. Zaccari
Counsel for NRC Staff

Dated at Rockville, Maryland
this 18th day of December, 2003

⁴⁰ As the Licensing Board and the Commission have both observed, the State previously stated that it did not "recall" the Board's schedule due to the press of other litigation tasks, LBP-00-28, 52 NRC at 236, and that it was not aware the 30-day time period was a "hard and fast" deadline, CLI-01-1, 53 NRC at 4.

⁴¹ The State also voices dissatisfaction over the Board's ruling that Contention Utah V was moot, but does not appear to seek review of that decision. See Petition at 19, citing *Private Fuel Storage, L.L.C. ([ISFSI])*, LBP-01-22, 54 NRC 155 (2001) (granting summary disposition of Contention Utah V). Contention Utah V, as admitted, challenged the Environmental Report's reliance on the generic transportation impacts set forth in 10 C.F.R. Part 51, Table S-4. Subsequent to the admission of this issue, the Staff issued its Draft Environmental Impact Statement for the PFS Facility ("DEIS"), NUREG-1714 (June 2000), in which the Staff provided a PFS-specific transportation analysis rather than relying on the generic values in Table S-4. See DEIS, § 5.7.2 and Appendix D thereto. The State does not assert that the Board erred in finding that the DEIS rendered this issue moot; rather, it observes that publication of the DEIS served as the impetus for its filing of Contentions Utah LL through OO. See Petition at 18.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of)	
)	
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 "NRC STAFF'S RESPONSE TO 'STATE OF UTAH'S PETITION FOR REVIEW OF NON-HEARING ISSUES IN THE PRIVATE FUEL STORAGE, LLC LICENSING PROCEEDING'" 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 18th day of December, 2003:

G. Paul Bollwerk, III, Chairman*
Chief Administrative Judge
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, DC 20555
(E-mail copy to GPB@NRC.GOV)

Michael C. Farrar, Chairman*
Administrative Judge
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, DC 20555
(E-mail copy to MCF@NRC.GOV)

Dr. Jerry R. Kline*
Administrative Judge
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, DC 20555
(E-mail copy to JRK2@NRC.GOV)

Dr. Peter S. Lam*
Administrative Judge
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, DC 20555
(E-mail copy to PSL@NRC.GOV)

Atomic Safety and Licensing Board
Panel
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Office of the Secretary*
ATTN: Rulemakings and Adjudications
Staff
U.S. Nuclear Regulatory Commission
Washington, DC 20555
(E-mail copies to SECY@NRC.GOV
and HEARINGDOCKET@NRC.GOV)

Office of the Commission Appellate
Adjudication
Mail Stop: 16-C-1 OWFN
U.S. Nuclear Regulatory Commission
Washington, DC 20555

James M. Cutchin, V*
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, DC 20555
(E-mail to JMC3@NRC.GOV)

Jay E. Silberg, Esq.**
Paul A. Gaukler, Esq.
Sean Barnett, Esq.
Shaw Pittman
2300 N Street, N.W.
Washington, DC 20037-8007
(E-mail copy to jay_silberg,
paul_gaukler, and sean_barnett
@shawpittman.com)

Tim Vollmann, Esq.**
3301-R Coors Road N.W.
Suite 302
Albuquerque, NM 87120
(E-mail copy to tvollmann@hotmail.com)

Denise Chancellor, Esq.**
Fred G. Nelson, Esq.
Laura Lockhart, Esq.
Utah Attorney General's Office
160 East 300 South, 5th Floor
P.O. Box 140873
Salt Lake City, UT 84114-0873
(E-mail copies to dchancellor, fnelson,
jsoper, and llockhart@utah.gov, and
attygen@xmission.com)

Connie Nakahara, Esq.**
Utah Dep't of Environmental Quality
168 North 1950 West
P. O. Box 144810
Salt Lake City, UT 84114-4810
(E-mail copy to
cnakahara@utah.gov)

Diane Curran, Esq.**
Harmon, Curran, Spielberg & Eisenberg
1726 M Street, N.W., Suite 600
Washington, D.C. 20036
(E-mail copy to
dcurran@harmoncurran.com)

John Paul Kennedy, Sr., Esq.**
David W. Tufts, Esq.
Durham, Jones & Pinegar
111 East Broadway, Suite 900
Salt Lake City, UT 84105
(E-mail copy to dtufts@djplaw.com)

Joro Walker, Esq.**
Western Resource Advocates
1473 South 1100 East, Suite F
Salt Lake City, UT 84105
(E-mail copy to
jwalker@westernresources.org)

Western Resource Advocates**
2260 Baseline Road, Suite 200
Boulder, CO 80302

Paul C. EchoHawk, Esq.
EchoHawk PLLC
P.O. Box 6119
Pocatello, Idaho 83205-6119
E-mail copy to:
pechohawk@hollandhart.com



Sherwin E. Turk
Counsel for NRC Staff