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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED
USNRC

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

'00 FEB -7 P3:14

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|---------------------------|---|---------------------------|---|
| In the Matter of: |) | | OFFICE OF THE PUBLIC AFFAIRS ADJUDICATION STAFF |
| |) | Docket No. 72-22-ISFSI | |
| PRIVATE FUEL STORAGE, LLC |) | ASLBP No. 97-732-02-ISFSI | |
| (Independent Spent Fuel |) | | |
| Storage Installation) |) | January 28, 2000 | |

STATE OF UTAH'S RESPONSE TO NRC STAFF'S MOTION TO STRIKE PORTIONS OF "STATE OF UTAH'S REPLY TO THE STAFF'S RESPONSE TO THE APPLICANT'S MOTION FOR PARTIAL SUMMARY DISPOSITION OF UTAH CONTENTION E/CONFEDERATED TRIBES CONTENTION F"

On January 19, 2000, the NRC Staff ("Staff") filed a "Motion to Strike Portions of the State's Reply to the Staff's Response to the Applicant's Motion for Partial Summary Disposition of Utah Contention E/Confederated Tribes Contention F" ("Staff's Motion to Strike"). The State now files this Response to the Staff's Motion to Strike. The Staff's request to strike from the record, based on its replacement of an "incorrect" version of the Staff's Safety Evaluation Report ("SER"), should be denied as an inappropriate attempt to rewrite the record that existed at the time the State filed its Reply to the Staff's Response to the Applicant's Motion for Partial Summary Disposition of Utah Contention E/Confederated Tribes Contention F ("State's Reply"). The relief requested is also an inappropriate way to remedy the Staff's own errors, both in issuing an "incorrect" version of the SER in the first place, and in failing to give timely notice to the State of the error in the SER or of its reissuance.

D503

BACKGROUND

Applicant's Motion for Partial Summary Disposition of Utah Contention E/Confederated Tribes Contention F" ("Applicant's Motion") was filed on December 3, 1999. The Staff filed a Response to the Applicant's Motion on December 22, 1999 ("Staff's Response"), and the State filed the State's Response to Applicant's Motion on December 27, 1999 ("State's Response"). The State filed its Reply on January 10, 2000.

The Staff filed NRC Staff's Statement of Its Position Concerning Group I - II Contentions on December 15, 1999 ("Staff's Position") in which the Staff referred to two proposed license conditions in the SER. *See* Staff's Position at 2-3, 4. Also on December 15, 1999, the Staff issued the SER ("Original SER"). The State did not receive its copy of the SER until December 27, 1999. *See* State's Reply at 2.

On the following day, December 28, 1999, the NRC Staff became aware that the Original SER contained an incorrect version of Chapter 17. *See* Staff's Motion to Strike at 2; Delligatti's Affidavit ¶¶ 4-5. Importantly, Chapter 17 of the SER addresses the Staff's evaluation of the Applicant's financial qualifications, the subject matter disputed in the Applicant's Motion, the State's Response, the Staff's Response, and the State's Reply. *See* SER Chapter 17; *see also generally* Applicant's Motion, State's Response, Staff's Response, and State's Reply.

The Staff revised and reprinted the SER on January 4, 2000 ("Replacement SER"). *See* Staff's Motion to Strike; Delligatti Affidavit ¶ 5. Although the Staff indicates it issued the Replacement SER on January 7, 2000 (*see* Staff's Motion to Strike

at 2; Delligatti's Affidavit ¶¶ 4-5, and Exhibit 2 to the Staff's Motion to Strike), the Replacement SER that was mailed to the State was sent on January 11, 2000, apparently by U.S. third class mail. *See* Declaration of Jean Braxton, attached hereto as Exhibit 1. The State did not receive this copy of the Replacement SER until January 24, 2000. *Id.*, *see also*, Delligatti transmittal memo, attached hereto as Exhibit 2. However, in response to the State's inquiries, the Staff did send a second copy of the Replacement SER that the State received on January 18, 2000. *See* transmittal letter from Catherine Marco, attached hereto as Exhibit 3.

As these chronologies indicate, the State's Reply, from which the Staff now seeks to strike portions, was filed eight days before the State received the "correct" version of the SER. Yet thirteen days prior to the deadline for the State's Reply, the Staff knew, but did not inform the State of the error in the SER.

ARGUMENT

I. THE STAFF HAS CITED NO AUTHORITY IN SUPPORT OF ITS REQUEST

The Staff has cited no authority, other than the general authority for filing motions, in support of its motion, and the State has been unable to find any such authority. Other NRC rules, not applicable to this proceeding, do provide authority to strike. *See* Rockwell International Corporation (Rocketdyne Division), LBP-90-10, 31 NRC 293, 298 (1990) (10 CFR § Sec 2.1233(e)) provides authority and standard for striking written material in informal adjudications procedures in materials and operator licensing proceedings).

In the absence of NRC rules, it is reasonable for the Board to look to Federal Rules of Civil Procedure by analogy. Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), LBP-83-17, 17 NRC 490 (1983). Many courts have held that the federal rules do not give them authority to strike briefs, memoranda, or affidavits, but only give them authority to strike pleadings. International Longshoremen's Association v. Virginia International Terminals, 904 F.Supp. 500, 504 (E.D. Va. 1995); Wimberly v. Clark Controller Company, 364 F. 2d 225, 227 (6th Cir. 1966); *but see* Rawson v. Sears Roebuck and Co., 585 F. Supp. 1393, 1397 (D. Colo. 1984). Instead, the fact that the material is irrelevant goes to the weight of the argument or evidence, and is not a justification for striking the material. Wimberly, at 227.

Should the Board choose to adopt the federal standard by analogy, the Staff's Motion to Strike should be denied.¹

Even when motions to strike are allowed, they are not favored, and are frequently denied where no prejudice could result from the challenged allegations. Dipietro v. Jefferson Bank, 1993 WL 101356, 101357 (E.D. Pa. 1993). The movant bears the burden of demonstrating it will be unduly prejudiced. Rawson v. Sears Roebuck and Co., 585 F. Supp. 1393, 1397 (D. Colo. 1984). While the Staff may be embarrassed by its mistake, it has failed to demonstrate that it will be unduly prejudiced by references to the error.

¹ The State acknowledges, however, that the agency has on occasion, stricken briefs and memoranda without citing to authority. Louisiana Power and Light Company (Waterford Steam Electric Station, Unit 3), ALAB-801, 21 NRC 479 (1985) (inadequate brief of Staff stricken).

II. LANGUAGE IN THE STATE'S REPLY REFERENCING THE ORIGINAL SER SHOULD NOT BE STRICKEN

The NRC Staff does not and cannot argue that the State's Reply contained any material that was not relevant to the record as it was available to the State at the time the State filed its Reply. The Staff's mistake was not merely a ministerial or "collation" error. The Staff's mistake produced two substantive and different sets of license conditions. Confronted with these two sets of different license conditions, the State would have been remiss if it did not address them in its Reply. Moreover, at the time, it was totally appropriate and relevant to compare and contrast the differences in the two sets of conditions.

The Staff's heavy handed attempt to excise out of the State's Reply pages of argument, disputed material facts and supporting declaration completely destroys the cohesiveness of the State's presentation to the Board. Furthermore, significant portions of the proposed excised material are relevant to the credibility of the Staff's witness, Mr. McKeigney, who supported the Staff's Response. It is a significant fact that Mr. McKeigney claimed responsibility for preparing Chapter 17 of the SER as well as supporting the Staff's Response. *See State's Reply at 13-14.*

In its Motion, the Staff is arguing that, because it later changed the record by re-issuing the SER, prior filings in this proceeding that refer to the Original SER should be stricken from the record such that the record will be consistent with the Replacement SER. This attempt to re-write history should be resisted. It is equivalent to asking the

Board to strike portions of a brief that cite a case that is later overturned. The correct remedy in that case, and in this, is for the Staff simply to notify the Board of the change. The Board can then take the new information into account as it makes its decision.

III. THE RELIEF REQUESTED BY THE STAFF IS INAPPROPRIATE AND OVERREACHING

Even if the Board is persuaded that references to the Original SER must be removed from the State's Reply, the form of the Staff's requested relief is inappropriate. It should be left to the State to determine how it should respond in light of any new guidance from the Board; leave to amend within a reasonable period should be granted to the State.

The importance of allowing the State to craft its own document is clear from the recklessness with which the Staff struck language from the State's Reply. In several instances, the Staff struck language that is equally relevant to the Original and Replacement versions of the SER, or that is relevant to other documents. For example, the Staff suggests the Board strike the following language from page 8 of the State's Reply:

There is not even a requirement that PFS members must commit \$6 million in equity for construction funding, as proposed in the SER or by PFS in its license application.

See Staff's Motion to Strike, Exhibit 4 at 8 (citations omitted). The Staff apparently removed this because the Replacement SER no longer referred to the \$6 million equity commitment, and therefore no longer conflicted with the license conditions. This is a absurd reinterpretation of the State's argument. The stricken provision is in a section of

the State's Reply complaining that the Staff's license conditions are vague, unenforceable, and no substitute for a pre-license financial assurance adjudication. The point of the stricken provision was to demonstrate that the Staff was so extreme in its adoption of vague, unenforceable standards that it failed even to include a somewhat concrete provision that, however inadequate, had been proposed by the Applicant itself.

A second example is found on page 14 of the State's Reply, where the Staff has stricken every word. *See* Staff's Motion to Strike, Exhibit 4 at 14. The State does not agree that any of this is appropriately stricken based on the Staff's reissuance of the SER. The State still believes it is important to seek discovery against the Staff regarding the differing license conditions and their genesis, and it has not changed its position about the confusion indicating that Mr. McKeighney has failed to conduct an extensive, careful, and thorough review.

A third example of the Staff's recklessness may be seen in the "State of Utah's Supplement to Its Statement of Disputed and Relevant Material Facts for Utah Contention E," paragraph 3, where the Staff struck the statement "[t]he State further disputes that the Staff's conditions are 'substantially the same as Applicant's commitments'." The State's position about this matter is relevant to both the old and the new license conditions.

In sum, not only is the Staff requesting drastic relief that is unsupported by sufficient justification, but many portions of the State's Reply that the Staff has suggested be stricken are overreaching and still relevant to the summary disposition decision.

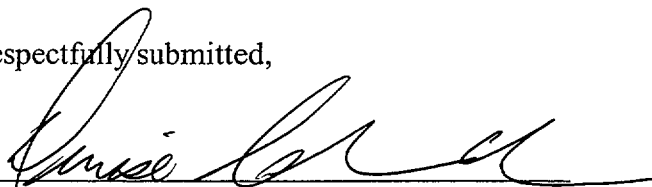
RELIEF REQUESTED

The State requests that the Board deny Staff's Motion to Strike. Alternatively, in the event the Board concludes that it is not appropriate for State's Reply to refer to the original version of the SER, the State seeks leave to amend its Reply to the Staff within a reasonable period of time.

The State also requests that the Board admonish the Staff for failing to make any reasonable effort to timely notify the State about the mistaken release of the "incorrect" portion of the SER. The Staff knew or should have known that the portion of the SER being changed, Chapter 17, was directly relevant to the State's Reply due on January 10. Moreover, the State requests that the Board admonish the Staff for indiscriminately suggesting that portions of the State's Reply be stricken regardless of the applicability of those portions to the "correct" version of the SER.

DATED this 28th day of January, 2000.

Respectfully submitted,



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Laura Lockhart, Assistant Attorney General
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CERTIFICATE OF SERVICE

DOCKETED
USNRC

I hereby certify that a copy of STATE OF UTAH'S RESPONSE TO NRC
STAFF'S MOTION TO STRIKE PORTIONS OF "STATE OF UTAH'S REPLY TO
THE STAFF'S RESPONSE TO THE APPLICANT'S MOTION FOR PARTIAL
SUMMARY DISPOSITION OF UTAH CONTENTION E/CONFEDERATED TRIBES
CONTENTION F" was served on the persons listed below by electronic mail (unless
otherwise noted) with conforming copies by United States mail first class, this 28th day
of January, 2000:

'00 FEB -7 P3:14

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ADJUDICATIVE
STAFF

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Denise Chancellor
Assistant Attorney General
State of Utah

EXHIBIT 1

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

| | | |
|---------------------------|---|---------------------------|
| In the Matter of: |) | Docket No. 72-22-ISFSI |
| |) | |
| PRIVATE FUEL STORAGE, LLC |) | ASLBP No. 97-732-02-ISFSI |
| (Independent Spent Fuel |) | |
| Storage Installation) |) | January 28, 2000 |

AFFIDAVIT OF JEAN BRAXTON

STATE OF UTAH)
) ss.
COUNTY OF SALT LAKE)

JEAN BRAXTON deposes on oath and says:

1. I have a Legal Assistant Certificate.
2. I am a legal assistant for the Utah Attorney General's Office, Environmental Division, and have worked for the Attorney General's Office since October of 1991.
3. On January 24, 2000, our division of the Utah Attorney General's Office received the revised Safety Evaluation Report ("SER") sent with transmittal memo dated January 7, 2000 from Mark S. Delligatti, Senior Project Manager, Nuclear Regulatory Commission.
4. I noticed that the envelope containing the SER and memo was postmarked January 11, 2000 with approximately \$1.58 in postage. The total package weighed one pound 11.55 ounces.

5. On January 28, 2000, I contacted a United States Postal Service clerk who informed me that a third class package weighing 1 lb. 11.55 oz. sent between Salt Lake City and Washington, D.C. would cost \$1.58.

6. I attest to the truth and accuracy of this information to the best of my ability.

FURTHER AFFIANT SAYETH NOT.

DATED this 28th day of January, 2000.


JEAN BRAXTON

The foregoing Affidavit was voluntarily signed and sworn to before me this 28th day of January, 2000, by the signer, whose identity is personally known to me or was proven to me on satisfactory evidence.


NOTARY PUBLIC

Residing at: Salt Lake County Utah

My commission expires: May 16, 2002

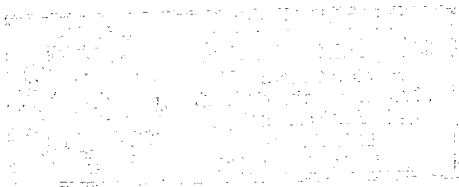
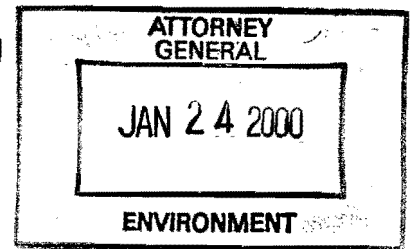


EXHIBIT 2



UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D.C. 20555-0001



January 7, 2000

NOTE TO: PFS Service List

FROM: Mark S. Delligatti, Senior Project Manager
U.S. Nuclear Regulatory Commission

SUBJECT: PLEASE RETURN OR DISCARD EARLIER VERSION
OF PFS SER

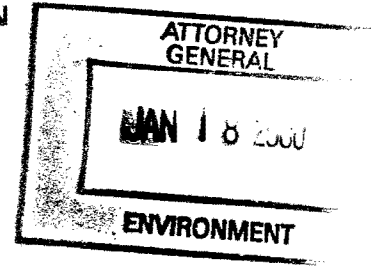
Due to a collation error, an incorrect version of Chapter 17 was included in the document originally distributed. Please replace that document with the attached one and either return the original version to me or discard it. If you have any questions, I can be reached at 301 415-8518.

EXHIBIT 3



UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D.C. 20555-0001

January 14, 2000



Denise Chancellor, Esq.
Utah Attorney General's Office
160 East 300 South, 5th Floor
P.O. Box 140873
Salt Lake City, UT 84114-0873

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

Dear Ms. Chancellor:

In your letter of January 13, 2000 and in our conversation of January 12, 2000 you stated that you did not receive e-mail that we transmitted this past week, specifically the staff's January 10, 2000 response to discovery. You mentioned in our conversation, however, that you finally did receive the staff's January 10, 2000 response to discovery in the regular mail.

Mr. Turk and I would be happy to alert you by telephone when the staff transmits a filing via e-mail. Please let me know when the e-mail is again working properly.

You stated that you did not receive Mr. Delligatti's request that you return or discard the incorrect version of Chapter 17 of the Staff's SER. Therefore, I am sending you a copy of Mr. Delligatti's request and the accompanying correct version of the SER by overnight mail today. Please note that the staff sent this document by regular mail and not by e-mail.

Sincerely

Catherine L. Marco

Catherine L. Marco
Counsel for NRC staff

cc: Service List