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February 14, 2000

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

In the Matter of	)	
	)	
PRIVATE FUEL STORAGE L.L.C.	)	Docket No. 72-22-ISFSI
	)	
(Private Fuel Storage Facility)	)	ASLBP No. 97-732-02-ISFSI

APPLICANT'S RESPONSE TO STATE OF UTAH'S REQUEST FOR ADMISSION OF LATE-FILED MODIFICATION TO BASIS 2 OF UTAH CONTENTION L

Applicant Private Fuel Storage L.L.C. ("Applicant" or "PFS") hereby responds to the "State of Utah's Request for Admission of Late-Filed Modification to Basis 2 of Utah Contention L," filed January 26, 2000 ("State Request"). The State Request should be denied because it raises impermissible challenges to both an action committed to the Staff's discretion and to NRC regulations currently in effect; it fails to assert an admissible contention; and it provides no valid legal or factual basis for the claims it seeks to advance.

I. BACKGROUND

Utah Contention L ("Utah L"), admitted in April 1998, challenges the adequacy of PFS's geo-technical investigations at the Private Fuel Storage Facility ("PFSF"). Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation) LBP-98-7, 47 NRC 142, 251-52 (1998). As admitted, Basis 2 of Utah L alleges that "the [PFSF] site may [] be subject to ground motions greater that those anticipated by the Applicant," thus

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"fail[ing] to comply with 10 C.F.R. § 72.102(c)."[1] State of Utah's Contentions on the Construction and Operating License Application by Private Fuel Storage, LLC for an Independent Spent Fuel Storage Facility, p. 82-83 (1997).

On April 2, 1999, PFS submitted an exemption request, pursuant to 10 C.F.R. C.F.R. § 72.7, which sought NRC Staff approval for using a probabilistic seismic hazard evaluation methodology based on a 1,000-year return period earthquake, instead of the deterministic methodology otherwise required by 10 C.F.R. Part 72.[2] On April 30, 1999, the State filed a motion which sought to either require PFS to file for a rule waiver under 10 C.F.R. § 2.758(b) – so that the request for a change in seismic hazard evaluation methodology could be litigated in this proceeding – or amend Utah L. The Board denied the State's motion to require a rule waiver and also denied the State's motion to amend Utah L, holding that "the question of admitting or amending contentions relative to the PFS exemption request must await favorable staff action on that request." Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-99-21, 49 NRC 431, 439 (1999). In so doing, the Board noted that "there is a considerable question whether the State has really framed what could be a 'contention' relative to the PFS request." Id. at 437.

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1 Under this regulatory provision, an applicant for an ISFSI license must perform its seismic analyses using a deterministic approach for characterizing the earthquake motion. This is the same analytical approach that was required in the licensing of nuclear power plants prior to the amendment of 10 C.F.R. Part 100 to allow the use of a probabilistic analysis.

2 Letter from John Parkyn, PFS, to Mark Delligatti, NRC, dated April 2, 1999. The License Application was amended on May 19, 1999 to change the design basis earthquake to the 1,000-year return period earthquake. See SAR at 2.6-38 [Rev. 3].

On August 24, 1999, PFS modified its exemption request to reflect a probabilistic analysis based on a 2,000-year return period earthquake, as a result of comments received from the Staff.[3] Shortly thereafter, it revised its License Application to use 2,000-year return period earthquake as the design basis earthquake.[4] SAR at 2.6-68 [Rev. 6].

On December 15, 1999, the NRC Staff issued its Safety Evaluation Report ("SER") for the PFSF, in which it concluded that use of a probabilistic seismic hazard methodology and a 2,000-year return period earthquake would be acceptable.[5] On January 26, 2000, the State filed its request to modify Basis 2 of Utah L. If the State Request is granted, Basis 2 of Contention L will allege that "the Applicant has not complied with either 10 CFR § 72.102(c) or Frequency Category 2 events (10,000 year return) in the NRC Rulemaking Plan in its assessment of ground motion, thereby placing undue risk on the public and the environment." State Request at 7.

The State acknowledges that its requested modification to require consideration of a 10,000-year return period earthquake is based on a rulemaking plan which contemplated a proposed change in NRC regulations. State Request at 7-8. In SECY-98-126, "Rulemaking Plan: Geological and Seismological Characteristics for Siting and Design of Dry Cask Independent Spent Fuel Storage Installations, 10 CFR Part 72" ("Rulemaking Plan"), the Staff proposed a draft rulemaking plan to modify Part 72 to

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3 Letter from John Parkyn, PFS, to Mark Delligatti, NRC, dated August 24, 1999.

4 Letter from John Parkyn, PFS, to NRC, dated September 8, 1999.

5 The Staff, however, has not yet formally granted Applicant's exemption request and the SER does not officially address information and analysis contained in SAR revisions subsequent to the May 19, 1999 Revision 3.

allow ISFSI applicants to use a probabilistic methodology in their seismic analysis.[6] The Rulemaking Plan would use a graded approach for seismic design, requiring structures to meet a Frequency-Category-1 design basis ground motion (1,000 year return period), unless the failure of the structure would result in releases in excess of the radiological standards of 10 C.F.R. § 72.104(a), in which case a Frequency-Category-2 design basis ground motion (10,000 year return period) would apply. The Rulemaking Plan has not been implemented – no final rule has been adopted, and not even a proposed rule has been published. The Staff did not use the approach in the Rulemaking Plan in determining that the approach sought by Applicant was acceptable.[7]

II. DISCUSSION

The explanation offered by the State for propounding a change in Basis 2 of Utah Contention L is that the Staff's acceptance of the approach proposed by Applicant "does not comport with the conceptual change proposed by NRC to amend Part 72 in NRC's Rulemaking Plan. Furthermore, the rationale for the Staff's grant of the exemption request is arbitrary, capricious and not in accordance with law." State Request at 7.

The State Request is founded entirely on a challenge to the Staff's granting of the exemption sought by Applicant. Accordingly, the Board should deny the State Request because it seeks to raise an issue that falls outside of the scope of this proceeding. This licensing proceeding is not the proper forum to challenge the Staff's grant of an exception

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[6] The Commission, by negative consent, assented to the proposed Staff action. See Staff Requirements Memorandum – SECY-98-126, dated June 24, 1998.

[7] The Staff based its acceptance, in part, on the seismic requirements exemption previously granted to the Department of Energy for the TMI-2 Independent Spent Fuel Storage Installation at the Idaho National Engineering and Environmental Laboratory. SER at 2-45.

to a Commission rule. Furthermore, even if the exemption request were within this proceeding's scope, the State Request would still need to be denied as an impermissible challenge to the Commission's regulations. Finally, the State's attacks on the factual bases for the granting of the exemption are insufficient to support the new contention because they are immaterial, rest on mistaken factual assumptions, and are not directed at PFS's application. In short, as the Board adverted to earlier, the State has failed to frame what could be a contention relative to the PFS exemption request. [8]

A. The Staff's Grant Of An Exemption Request Is Outside The Scope of The PFS Licensing Proceeding

The contention propounded in the State Request is not directed at Applicant's compliance with the seismic analysis requirements imposed by the Staff in the SER. Rather, the State challenges the Staff's grant of the exemption itself as "arbitrary, capricious and not in accordance with law." State Request at 7. The Board has already ruled, however, that in the absence of a contrary Commission directive, "exemption requests falling outside the ambit of section 2.758 are not subject to challenge in an adjudicatory proceeding." LBP-99-21, 47 NRC at 438. It is the Staff, not the Board, "that has the delegated authority to consider the request wholly outside this adjudication." Id. at n.6. Therefore, the State cannot ask the Board to overturn what the Staff decided pursuant to its delegated authority, just as it could not have litigated the exemption

[8] In the interest of avoiding unnecessary delays, PFS does not challenge whether the State Request is premature or procedurally ripe. Additionally, based on the Board's Order on the State's previous attempt to amend Utah L, LBP-99-21, 49 NRC 431, PFS does not challenge whether the State Request satisfies the admissibility standards for a late-filed contention.

request in this forum.[9] Accordingly, the State Request should be denied because it inappropriately seeks to require the Board to overturn the Staff's grant of an exemption from the regulations, as opposed to determining the adequacy of the PFS application pending before it.

B. The State Request Impermissibly Challenges the Commission's Regulations

Even if this proceeding were the proper forum for attacking the Staff's grant of Applicant's exemption request, the State Request would still need to be rejected because in reality it amounts to a collateral attack on NRC regulations currently in effect.

PFS submitted its request for exemption pursuant to 10 C.F.R. § 72.7, which states:

> The Commission may, upon application by any interested person or upon its own initiative, grant such exemptions from the requirements of the regulations in this part as it determines are authorized by law and will not endanger life or property or the common defense and security and are otherwise in the public interest.

This specific exemption is analogous to the waiver/exemption provisions for other types of NRC licenses.[10]

The State claims that the NRC Staff was bound to abide by the Rulemaking Plan when ruling on Applicant's exemption request. State Request at 7-8. This is incorrect, as

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[9] There is no unfairness to this result. The State knew the Staff was considering the PFS exemption request, which was pending for over eight months, and could have made the Staff aware of its views on the request while it was under review. This suggestion was in fact made by the Board to the State in May, seven months before the SER was issued. See LBP 99-21, supra, at n.5. To Applicant's knowledge, the State did not take the issue up with the Staff.

[10] See, e.g., 10 C.F.R. §§ 30.11 (Part 30 byproduct material), 40.14 (Part 40 source material), 50.12 (Part 50 production and utilization facilities), and 70.14 (Part 70 special nuclear material).

a rulemaking plan is not a regulation, but merely a method by which the NRC Staff can eventually initiate a rulemaking action that may (or may not) result in the issuance of a new rule. In this case, the Rulemaking Plan has not even resulted in a *proposed* rule, so the State's reliance on its authority is misplaced. More importantly, in seeking to preclude the Staff from exercising its authority under 10 C.F.R. § 72.7 and having it comply instead with a non-binding rulemaking plan, the State is launching an impermissible collateral attack on the NRC regulations that define the scope of the Staff's authority to grant exemptions. See, e.g., Porter County Chapter of the Izaak Walton League v. Atomic Energy Commission, 533 F.2d 1011, 1016 (7th Cir.), cert. denied, 429 U.S. 945 (1976) (when reviewing a license application, Staff draft positions are not binding) and, Louisiana Energy Services (Clairborne Enrichment Center), LBP-91-41, 34 NRC 332, 346-47 (1991) (bases that seek to require standards more stringent than regulatory requirements constitute an impermissible challenge to the Commission's regulations). Thus, in effect the State is attacking the validity of § 72.7, which it clearly is not permitted to do. On this basis, also, the State Request should be denied.

C. The State Request Ignores the Regulatory Bases for Evaluating Exemption Requests Under 10 C.F.R.§ 72.7

Even if the Rulemaking Plan warranted somehow being treated as a regulation, the NRC Staff would not be required to follow it when evaluating a request for an exemption. The purpose of § 72.7, and other similar waiver/exemption provisions in NRC regulations, is to allow the Staff the flexibility to deviate from the norms of regulations and apply a more appropriate, but still prudent, standard under the specific conditions presented. The only factors that the Staff must consider as it decides whether

to grant an exemption request are whether the exemption is authorized by law, whether the exemption would endanger life or property or the common defense and security, and whether the exemption is otherwise in the public interest. See 10 C.F.R. § 72.7. There is no regulatory requirement that the Staff consider whether the exemption request is consistent with existing, let alone potentially proposed, regulations. In short, the State Request ignores the fundamental concept that an exemption, by definition, does not conform to existing regulations and is not to be judged against them. Once again, the State Request fails to present a valid argument for admission of the modification to Utah L.

D. The State's Attacks On The Grant of the Exemption Fail To Challenge PFS's License Application, Lack Proper Factual Basis, And Are Immaterial

The State offers three arguments for challenging the Staff's grant of the exemption request. First, the State claims that the Staff's acceptance of "a 2,000 year return period does not address the radiological consequences of a failed design." State Request at 9. Second, the State claims that "PFS has not demonstrated that either (a) the design of the PFS facility will provide adequate protection against an exceedance of the dose limits in section 72.104(a), or (b) the equipment is designed to withstand a 2,000 year recurrence earthquake." Id. Third, the State attacks the four reasons underlying the Staff's acceptance of PFS's exemption request. None of these arguments provides a valid basis for the admission of the State's amended bases.

1. Alleged Failure to Consider Radiological Consequences

The State's first argument, which concerns the Staff's failure to consider the radiological consequences of a "failed design," does not challenge any aspect of the PFS

license application. The State points to no deficiency in PFS's license application, but instead faults the Staff for not considering radiological consequences when granting the exemption request. See State Request at 9 ("The Staff's approach is in error for several reasons. First, the Staff's justification for accepting a 2,000 year return period does not address radiological consequences. . . .") (Emphasis added). Because the focus of the State Request is the Staff's grant of the exemption, and not PFS's license application, this argument does not justify admission of the modified contention. As this Board has previously held, "a contention that fails to controvert the license application at issue . . . is subject to dismissal." LBP-98-7, 47 NRC at 181.

In addition, the Staff's asserted failure to consider radiological consequences would in any case be immaterial to whether the Applicant should receive a license. The premise of the State's argument is that, under the Rulemaking Plan, the seismic design basis for a structure should be tied to the radiological consequences of the structure's failure. State Request at 9. However, as explained above, the positions in a rulemaking plan are not binding on anyone and have no relevance to the Staff's determination whether to grant Applicant's exemption request. The immateriality of whether the Staff complied with the positions in the Rulemaking Plan is another reason why this argument does not support admission of the modification to Utah L. See LBP-98-7, 47 NRC at 179-80.

2. Alleged Seismic Design Deficiencies

The State's second argument challenges the seismic adequacy of the PFS's facility design and equipment. While this argument, unlike the other two, is at least

focused on the PFS license application, its challenge to the application is based on four immaterial, irrelevant and factually incorrect examples.

In its first example, the State attacks PFS's alleged reliance on a single-failure-proof crane to prevent a drop exceeding the maximum horizontal lift height of the HI-TRAC transfer cask during a 2,000 year return earthquake. The factual premise for the attack, however, is simply wrong. As PFS recently reconfirmed, the crane will be seismically qualified for the design basis earthquake, which is based on the 2,000-year return period. SAR § 4.7.2.5 [Rev. 9]. The design specifications clearly mandate that:

> The Seller shall qualify the canister transfer building cranes and associated equipment to the specified seismic environment utilizing the dynamic analysis method of seismic qualification in accordance with ASME NOG-1 and the requirements of this specification. It is not a design requirement that the crane be operable during an earthquake or that it be operable after an earthquake, although the later is desirable. The following is mandatory:
>
> a) The crane bridge (gantry) and trolley are provided with suitable restraints so that they do not leave their rails during an earthquake.
>
> b) No part of the crane shall become detached and fall during an earthquake.
>
> c) The crane shall not lower in an uncontrolled manner during or as a result of an earthquake.

Id. Thus, the State's hypothetical example of an equipment failure has no merit because it is based on an incorrect assumption as to the seismic qualification of the equipment.

The State's second example under this argument asserts that "PFS's accident evaluation does not bound the design basis accident because the accidents considered by PFS are not design basis accident DE IV under ANSI/ANS-57.9-1999." State Request at 11. Whether true or not, however, this example is irrelevant because PFS is not required

to analyze design basis accidents against ANSI/ANS-57.9-1999. This is so, first because the cited ANSI/ANS standard is not a regulation. Also, under the guidance of NUREG-1567, Standard Review Plan for Spent Fuel Storage Facilities, PFS needs only to consider the standards of ANSI/ANS-57.9-1984. NUREG-1567 at 12-4, 18-5. In fact, PFS has analyzed the design basis accidents under the 1984 ANSI/ANS standard in Section 8.2 of the Safety Analysis Report ("SAR"), where it shows that the design complies with the standard. See SAR at 8.2-1 – 8.2-49. The State has pointed to no shortcomings in Applicant's analysis, nor has it provided support for its bald assertion that a different analysis under ANSI/ANS-57.9-1999 is required.[11]

In its third example, the State once again questions the basis for PFS's leakage rate calculations. The State claims that the leakage rate used by PFS is not conservative because it is derived from NUREG-1617 and NUREG/CR-6487. As PFS has, however, previously explained,[12] PFS bases its leakage rate not on the methodology of NUREG-1617 or of NUREG/CR-6487, but on the Topical Safety Analysis Report for the HI-STAR canister, which is identical to the canister used in the HI-STORM storage system. The calculation of the leakage rate is in accordance with the guidance of the NRC's Interim Staff Guidance-5. See HI-STAR TSAR, Section 7.3.3.1 (Holtec Report No. HI-941184, NRC Docket No. 72-1008). Thus, this example, since it is based on a false

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[11] To the extent that the State is arguing that the accident leak dosage calculation does not bound a DE-IV accident, the State fails to provide any factual basis in support of a claim that PFS has failed to evaluate a credible accident that could result in an exceedance of the NRC dose limits. For that reason, the State's argument must be rejected. See Georgia Institute of Technology (Georgia Tech Research Reactor), LBP-95-6, 41 NRC 281, 305, vacated and remanded on other grounds, CLI-95-10, 42 NRC 1, aff'd in part, CLI-95-12, 42 NRC 111 (1995).

[12] See Response to Request for Additional Information, at RAI 7-1, letter to John Parkyn, PFS, to Mark Delligatti, NRC, dated February 10, 1999. See also, SAR § 8.2.7.

assumption, lacks the proper factual basis to support the State's requested modification. LBP-98-7, 47 NRC at 180; see also, Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station), LBP-93-23, 38 NRC 200, 246 (1993).

For its last example to support its challenge of PFS's facility design and equipment, the State and Dr. Resnikoff repeat their familiar refrain that a sabotage event involving an anti-tank device could produce a larger hole than considered by PFS. This example is not only unrelated to PFS's use of a 2,000-year return period earthquake, but also, despite the State's persistent attempts, remains outside the scope of this proceeding. See Pacific Gas & Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-653, 16 NRC 55 (1981) (holding that applicant need not evaluate security threat from anti-tank weapons).

3. Challenge to Staff's Reasoning

For its third and final argument, the State attacks the validity of the reasons provided by the Staff in its acceptance of the exemption request.[13] As in the State's first example, these attacks are immaterial. As the Commission has previously stated, "[a]s a general matter, the Commission's licensing boards and presiding officers have no authority to direct the Staff in its performance of its safety review." Curators of the University of Missouri, CLI-95-1, 41 NRC 71, 121 (1995). "Consequently, the adequacy of Staff's safety review is, in the final analysis, not determinative of whether the

[13] See State Request at 12 ("In addition to non-compliance with the Rulemaking Plan, and the radiological requirements and consequences, which pose seriously problems for the Staff's approach, each of the four justifications presented by the Staff for determining 'that a 2,000-year return value with the PHSA methodology can be acceptable" (SER at 2-44) is flawed.") (Emphasis added).

application should be approved." Id. "Moreover, even assuming arguendo that the Staff did conduct an insufficient review, a denial of a meritorious application on that ground would be grossly unfair – punishing the Applicant for an error by the Staff." Id. The Commission's position is predicated on its previous pronouncement that:

> Apart from NEPA issues, which are specifically dealt with in the rule, a contention will not be admitted if the allegation is that the NRC staff has not performed an adequate analysis. . . . [T]he sole focus of the hearing is on whether the application satisfies NRC regulatory requirements, rather than the adequacy of the NRC staff performance. . . . [W]e reject . . . suggestions that intervenors not be required to set forth pertinent facts until the staff has published its FES and SER.[14]

54 Fed. Reg, 33,168, 33,171 (1989) (Statement of Considerations for "Rules of Practice for Domestic Licensing Proceedings – Procedural Changes in the Hearing Process"). Since the Commission has instructed that the adequacy of the Staff's review is not a sufficient basis for the denial of a license application, the State's third argument is not material and, like all the other factual arguments, does not support the admission of the modified contention.

As set forth above, the State has failed to set forth any admissible challenge premised on the License Application itself, and therefore the State's amended bases must be dismissed.

III. CONCLUSION

For the foregoing reasons, the State has failed to assert an admissible contention,

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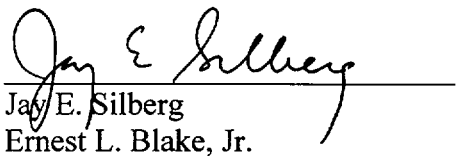
[14] See also Duke Power Company (Catawba Nuclear Station, Units 1 and 2), CLI-83-19, 17 NRC 1041, 1048-49 (1983) (safety-related contentions must be filed on the basis of the applicant's SAR, not the Staff's subsequently issued SER).

hence its request to admit its late-filed modification of Basis 2 of Contention Utah L should be denied.

Respectfully submitted,



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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 Modification to Basis 2 of Utah Contention L," dated February 14, 2000 were served on the persons listed below (unless otherwise noted) by e-mail with conforming copies by U.S. Mail, first class, postage prepaid, this 14th day of February, 2000.

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