UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED 12/28/01

SERVED 12/28/01

COMMISSIONERS

Richard A. Meserve, Chairman
Nils J. Diaz
Greta Joy Dicus
Edward McGaffigan, Jr.
Jeffrey S. Merrifield

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

CLI-01-26

MEMORANDUM AND ORDER

On October 10, 2001, the State of Utah petitioned the Commission for immediate relief suspending licensing proceedings in light of the terrorist attacks of September 11, 2001. Utah claims that the proposed Independent Spent Fuel Storage Installation (ISFSI) would be an attractive target for terrorists, and that our licensing proceedings should be halted immediately while the NRC reviews its regulations in response to the heightened terrorist threat. Both the applicant, Private Fuel Storage, L.L.C. (PFS), and the NRC staff oppose the petition.

The State of Utah, simultaneously with this petition, asked the Board to admit a late-filed contention concerning the risk of terrorists attacking the facility. On December 13, 2001, the Board denied the request to admit the contention and referred its ruling for Commission review.[1] The Commission is not acting on that ruling in this order.

[1] *Private Fuel Storage, L.L.C.*, (Independent Spent Fuel Storage Installation), LBP-01-37, 54 NRC __ (2001).

We find that the relief requested in Utah's petition--immediately staying these proceedings--is not necessary or appropriate at this time. Because the facility cannot possibly be in a position to receive spent fuel shipments for more than two years, there is no immediate threat that this facility can be a target for terrorists. In the meantime, the Commission has undertaken a top-to-bottom review of its regulations concerning physical protection of all licensed facilities and materials to determine if any revisions should be made in light of the September 11, 2001, events. As the following discussion shows, the threat of terrorist attacks against the proposed ISFSI can and will be properly addressed without halting the licensing adjudication.

I. Background

A. Physical Protection Requirements for an ISFSI

The Commission sets forth its regulations on physical protection of an ISFSI in 10 C.F.R. Parts 72 and 73. The design for physical protection must include design features to protect the ISFSI against acts of radiological sabotage.[2] The performance objective of the physical protection system for an ISFSI is to provide high assurance that licensed activities do not constitute an unreasonable risk to public health and safety.[3] Specific requirements to meet the performance objective are substantial and include a barrier at the perimeter of the protected area and an additional barrier offering "substantial penetration resistence," as well as continual surveillance of the perimeter of the protected area.[4]

B. NRC's Response to the Events of September 11, 2001

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[2]10 C.F.R. § 72.182.

[3]10 C.F.R. § 73.51(b)(1).

[4]10 C.F.R. § 73.51(d).

In response to the September 11, 2001 terrorist attacks, the Commission has taken a number of actions to ensure the security of NRC-licensed facilities and materials, including activation and staffing the NRC Operations Center on a 24-hour-a-day basis. Immediately following the attacks, the NRC advised nuclear power plant licensees and fuel facilities to go to the highest level of security, and all promptly did so. In addition, the Commission has had continuous and close coordination with the Federal Bureau of Investigation, other intelligence and law enforcement agencies, the Office of Homeland Security, NRC licensees, and military, state and local authorities. The Commission has issued security advisories to licensees to update them on the available threat information and to recommend additional security measures. The Commission continues to monitor the situation, and is prepared to make any adjustments to security measures for NRC-licensed activities as may be deemed appropriate.

The Commission believes that its response to these unsettling events has been expeditious and that the current safeguards and physical security programs provide for a very high level of security at NRC-licensed facilities. However, in the aftermath of the terrorist attacks and the continuing uncertainty about future terrorist intentions, we have commenced a thorough review of our safeguards and physical security programs, from top to bottom, including those applicable to independent spent fuel storage installations. The review will involve a comprehensive examination of the programs' basic underlying assumptions.

Historically, the NRC has drawn a distinction between requiring its licensees to defend their facilities against sabotage and requiring them to protect against attacks and destructive acts by enemies of the United States. Even NRC-licensed facilities that are required to meet the most stringent security requirements (because the potential consequences of sabotage are greatest) are not required to protect against enemies of the United States. For example, reactor licensees are required to protect against a prescriptive list of possible threats, referred

to collectively as the "design basis threat."[5] However, our regulations stipulate that power reactors are not required to be designed or to provide other measures to counteract destructive acts by "enemies of the United States."[6] The basis for this distinction is that the national defense establishment and various agencies having internal security functions have the responsibility to address this contingency, and that requiring reactor design features to protect against the full range of the modern arsenal of weapons is simply not practical.[7]

The top-to-bottom review of our physical protection regulations will consider these distinctions, which have been underlying principles of the Commission's regulations in this area, and apply them as appropriate. The consideration of any adjustments to licensee, federal, state, and local response capabilities is being conducted in consultation with the appropriate authorities.

II. Discussion

As described above, the Commission is in the process of reviewing its regulations to determine if revisions should be made in response to the events of September 11. Utah has asked that the instant licensing proceeding be stopped until applicable laws and regulations can be brought into "conformity with present realities."[8] It asserts that we have authority to do this under our general obligation to ensure that all licensing decisions protect public health and safety. We find, however, that holding the PFS proceeding in abeyance is not warranted. In

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[5]10 C.F.R. § 73.55, requiring protection against the design basis threat described in 73.1(a)(1).

[6]10 C.F.R. § 50.13.

[7]*See* "Licensing of Production and Utilization Facilities; Procedures for Review of Certain Nuclear Reactors Exempted from Licensing Requirements," 32 Fed. Reg. 13,445 (Sept. 26, 1967). *See also Siegel v. AEC*, 400 F.2d 778, 780-84 (D.C.Cir. 1968).

[8]State of Utah's Petition for Immediate Relief Suspending Licensing Proceedings, (October 10, 2001), at 2.

two other cases decided today, we similarly decide against postponing licensing proceedings to await ongoing review of the agency's terrorism-related policies.[9]

In all three cases, we consider whether moving forward with the adjudication will jeopardize the public health and safety, prove an obstacle to fair and efficient decisionmaking, or prevent appropriate implementation of any pertinent rule or policy changes that might emerge from our important ongoing evaluation of terrorism-related policies. None of these considerations, in our view, justifies postponing Licensing Board proceedings in the three cases we consider today, including this one.

A. The PFS Facility Poses No Immediate Threat to Public Safety

There is no immediate threat that the PFS facility will become a target for terrorists because no spent nuclear fuel will be located on the site of the proposed facility for at least two years. Many issues remain to be litigated in the ongoing proceedings. According to the most recent schedule issued by the Board, the earliest it could issue its initial decision is September, 2002. Even if that decision is favorable to the applicant, the Commission itself must authorize issuance of the license.[10] The Commission could hold up the license at that time if a revision to the regulations is imminent. In addition, according to PFS, construction of the facility after a license is issued would take more than one year. Therefore, even if the licensing, construction, and shipping processes all go forward without further delay, the first storage casks would not arrive on the site for more than two years.[11]

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[9]*See Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2, and Catawba Nuclear Station, Units 1 and 2), CLI-01-27, 54 NRC __ (2001); *Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Facility), CLI-01-28, 54 NRC __ (2001).

[10]10 C.F.R. § 2.764(c).

[11]According to the NRC staff's estimates, "mid-2004" would be the earliest that the facility could actually receive spent fuel. *See* "NRC Staff's Response to the State of Utah's Petition for Immediate Relief Suspending Licensing Proceedings," (October 25, 2001) at 4, n.8.

A site that currently contains no radiological materials and will not for at least two years cannot present an immediate threat to public safety. Therefore, this consideration does not warrant a halt to the current proceeding.

B. Adjudication of Other Issues Must Proceed in a Fair and Efficient Manner.

We also find that it is both in the interest of the public and in the interest of fairness to the parties that all the issues raised by this adjudication be resolved efficiently.

1. **Commission's Obligation to Achieve Expeditious Decision-Making.**

The Commission has a responsibility to go forward with other regulatory and enforcement activities even while terrorism-related standards are being reviewed. In our 1998 Statement of Policy on the Conduct of Adjudicatory Proceedings, we reaffirmed our commitment to efficient and expeditious processing of adjudications.[12] Our hearing policies seek to "instill discipline in the hearing process and ensure a prompt yet fair resolution of contested issues in adjudicatory proceedings."[13] This is in keeping with the Administrative Procedure Act's directive that agencies should complete hearings and reach a final decision "within a reasonable time."[14] While the agency's top-to-bottom review is pending, there are numerous safety and environmental issues that must be resolved in this adjudication, many with no conceivable connection to terrorism. Under these circumstances, we see no basis for freezing the ongoing licensing proceeding.

2. Commission Narrowly Tailors Delay Orders

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[12]*Statement of Policy on Conduct of Adjudicatory Proceedings*, CLI-98-12, 48 NRC 18 (1998).

[13]*Id.* at 19.

[14]*See* 5 U.S.C. § 558(c).

The Commission's longstanding practice has been to limit orders delaying proceedings to the duration and scope necessary to promote the Commission's dual goals of public safety and timely adjudication.

The Commission's response to the serious accident at Three Mile Island, Unit 2, on March 28, 1979, illustrates this approach. Immediately after the accident, the Commission chose not to halt ongoing licensing proceedings,[15] but instead temporarily stopped issuing licenses for any new facilities pending its assessment of the accident.[16] Later, the Commission issued a Statement of Policy announcing that pending consideration of changes in safety requirements and procedures, the Commission itself would decide whether to grant final approval for new construction permits, limited work authorizations, or operating licenses for reactors.[17] All other adjudicatory proceedings, including enforcement and license amendment proceedings, were allowed to continue.[18] The agency also rejected a petition claiming that the TMI-2 incident required that all similar operating reactors be immediately shut down.[19]

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[15]*See, e.g., Pacific Gas & Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-728, 17 NRC 777 (1983).

[16]This temporary pause in licensing was initiated by an unpublished order dated June 5, 1979. A discussion of the Commission's actions following the TMI-2 accident is included in *Diablo Canyon*, 17 NRC at 784-85.

[17]*See* "Interim Statement of Policy and Procedure," 44 Fed. Reg. 58,559 (Oct. 10, 1979).

[18]*Id.*

[19]*See, e.g., Petition to Suspend All Operating Licenses for Pressurized Water Reactors,* DD-81-8, 13 NRC 767 (1981). This petitioner wanted licenses for all pressurized water reactors suspended or revoked, contending the licenses were invalid because TMI-2 events proved that analyses used to predict the reactors' emergency core cooling systems' performance did not meet the requirements of 10 C.F.R. § 50.46.

More recently, in a decision in the *Hydro Resources, Inc.* proceeding, we overturned a Board order holding portions of the proceeding in abeyance indefinitely.[20] There, petitioners challenged an already-issued license on environmental and environmental justice grounds. The license authorized the licensee, Hydro Resources, Inc. (HRI), to conduct *in situ* leach mining at four sites in New Mexico, but provided that HRI would begin operations at one site and could not move on to the next site until it had conducted an acceptable groundwater restoration demonstration at the first. The Board ordered all proceedings concerning mining effects at sites other than the first to be held in abeyance until such time as HRI decided it wanted to mine the other sites. The Commission reversed the Board's order, rejecting the argument that environmental effects of mining the remaining sites would not be "ripe" for adjudication unless and until HRI decided to mine them. The Commission found that the Board's decision both violated principles of expeditious case management and imposed an unacceptable burden on the petitioners by forcing them to wait indefinitely to be heard.

In a similar vein, the Commission has declined to stay proceedings in license transfer cases where parallel proceedings in another forum might moot the transaction.[21] Because the sale of a power plant requires the approval of a variety of authorities, including the state utilities regulators, the Federal Energy Regulatory Commission, the Securities and Exchange Commission, and the Internal Revenue Service, the whole transaction could fall through if a

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[20] *Hydro Resources, Inc.* (P.O. Box 15910, Rio Rancho NM 87174), CLI-01-04, 53 NRC 31, 34-35 (2001).

[21] *See, e.g., Niagara Mohawk Power Corporation,* (Nine Mile Point Nuclear Station, Units 1 and 2), CLI-99-30, 50 NRC 333 (1999)(stay granted while co-owners decided whether to exercise right of first refusal but denied while New York Public Utility Commission proceedings pending); *see also Consolidated Edison Company of New York* (Indian Point, Units 1 and 2), CLI-01-8, 53 NRC 225 (2001)(denied request to suspend proceedings on transfer of Units 1 and 2 until after completion of Commission proceeding related to transfer of Indian Point Unit 3); *Vermont Yankee Nuclear Power Corp.* (Vermont Yankee Nuclear Power Station), CLI-00-20, 52 NRC 151, 173-74 (2000)(refusing to suspend license transfer proceedings until Commission examines effects of industry consolidation).

single authority withholds its approval. If each agency took turns reviewing a single transfer, however, the whole process would be prolonged by years. By necessity, therefore, the Commission has found that the mere possibility that our proceedings will be mooted by another agency's decision is not sufficient reason to postpone reviewing the application before us.

The Commission will postpone adjudicatory matters in the unusual cases where moving forward would clearly amount to a waste of resources. For example, in a San Onofre licensing proceeding, the Appeal Board delayed reviewing the Licensing Board's initial decision because California authorities had already issued a ruling blocking construction of the facility.[22] The Appeal Board found that unless the California authorities either reversed their decision or were reversed by a state court, NRC review would simply be futile.

Although the Commission ultimately might change some regulations regarding protections from attacks or sabotage, we do not find that the instant proceeding presents a situation similar to that in San Onofre where delay would be appropriate. As noted in Section II.A above, there are many issues unrelated to terrorism that remain to be decided in this litigation.

Moreover, the Commission, disfavors holding proceedings in abeyance where the relief is not narrowly tailored to the goal of promoting adjudicatory efficiency. Utah, however, has asked that the entire proceeding be suspended. We think it clear that postponing all further proceedings on the PFS ISFSI application would not advance our goal of efficient decisionmaking.

C. Proceedings Will Not Thwart Regulatory Review

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[22] *See Southern California Edison Co.* (San Onofre Nuclear Generating Station, Units 2 and 3), ALAB-171, 7 AEC 37, 39 (1974).

Uncertainty as to the possible outcome of our regulatory review is another factor that leads us to believe that suspending this proceeding is not an appropriate course of action. Utah has asked that the proceedings be stayed until Congress and the Commission have acted to revise the law and applicable regulations as necessary with respect to the increased threat of domestic terrorism. But we find that holding up these proceedings is not necessary to ensure that the public will realize the full benefit of our ongoing regulatory review at the PFS facility.

If a review of the terrorism threat causes the NRC to revise its requirements concerning facility protection at an ISFSI, PFS may well be subject to new regulations.[23] Depending on the nature and timing of any new regulations, Utah may have an opportunity to file late contentions or to reopen the record.[24] Even if PFS has already received its license, the NRC can order that the facility be backfit where it is necessary to protect public health and safety.[25]

III. Conclusion

Because moving forward with this proceeding would neither present a threat to public safety nor interfere with our ongoing regulatory review, and halting it would interfere with our goal of adjudicatory efficiency, we decline to suspend the proceeding. Utah's petition is therefore *denied*.

IT IS SO ORDERED.

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[23]We note that PFS bears the risk that a potential change in the governing law and regulations will force it to revise its security plan or the physical design of the facility and possibly to relitigate some issues. PFS's willingness to bear this risk of regulatory uncertainty plays a part in our decision not to delay the proceedings at this time.

[24]*See* 10 C.F.R. § 2.714(a), 10 C.F.R. § 2.734.

[25]10 C.F.R. § 72.62.

For the Commission[26]

/RA/

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ANNETTE L. VIETTI-COOK
Secretary of the Commission

Dated at Rockville, MD
this 28th day of December, 2001

[26]Commissioner Diaz was not present for the affirmation of this Order. If he had been present, he would have approved it.