

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSIONBEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

NRC STAFF'S MOTION IN LIMINE TO EXCLUDE
CERTAIN EXHIBITS FILED BY THE STATE OF UTAHINTRODUCTION

Pursuant to 10 C.F.R. §§ 2.730 and 2.743 (c), and the Atomic Safety and Licensing Board's "Memorandum and Order (Granting Joint Motion to Approve Stipulation on Contention Utah S and Outlining Administrative Matters)," dated May 1, 2000, NRC Staff ("Staff") hereby requests that the Licensing Board issue an Order, *in limine*, excluding from the evidentiary record of this proceeding ten exhibits (Utah Exhibits 7, 9, 10, 11, 12, 13, 30, 31, 32, and 53) that have been proposed for admission by the State of Utah ("State"). Further, the Staff opposes the admission of three other exhibits in their current form (Utah Exhibits 1, 14, and 35), but would not oppose the admission of those exhibits upon the State's insertion of correct pages in lieu of certain superseded pages that appear therein. The reasons in support of this Motion are set forth in the discussion below.

A. Exhibits to Be ExcludedUtah Exhibit 7

Utah Exhibit 7 consists of certain rules promulgated by the Occupational Safety and Health Administration, published at 29 C.F.R. § 1910.156 ("Fire brigades"). Inasmuch as this proposed exhibit consists of Federal regulations, there is no reason why it should be

included in the record as evidentiary material. Further, the subject of PFS' compliance with OSHA standards is beyond the proper scope of Contention Utah R, and is beyond the scope of the Commission's jurisdiction; accordingly, this proposed exhibit should also be excluded as irrelevant.

Utah Exhibit 9

Utah Exhibit 9, similar to Utah Exhibit 7, consists of rules promulgated by the Occupational Safety and Health Administration, published at 29 C.F.R. § 1910.134 ("Respiratory protection"). Inasmuch as this proposed exhibit consists of Federal regulations, there is no reason why it should be included in the record as evidentiary material. Further, the subject of PFS' compliance with OSHA standards is beyond the proper scope of Contention Utah R, and is beyond the scope of the Commission's jurisdiction; accordingly, this proposed exhibit should also be excluded as irrelevant.

Utah Exhibit 10

Utah Exhibit 10 consists of NFPA 1500 ("Standard on Fire Department Occupational Safety and Health Program"), Chapter 1 and Appendix A. This NFPA document is beyond the scope of any issues admitted as part of Contention Utah R, in that the State never identified this standard in its contention. *See, e.g., Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), ALAB-899, 28 NRC 93, 97 (1988) (the scope of a contention is limited to its terms and its stated basis). Moreover, this document, on its face, is irrelevant to the licensing of the PFS facility, in that the document explicitly states that "[t]his standard does not apply to industrial fire brigades or industrial fire departments meeting the requirements of NFPA 600, *Standard on Industrial Fire Brigades*." *Id.*, at § 1-1.3. Accordingly, the Staff opposes its admission into evidence in this proceeding.

Utah Exhibit 11

Utah Exhibit 11 consists of a copy of Chapter 4 (“Thermal Evaluation”) of the Staff’s Safety Evaluation Report (“SER”) for the HI-STORM 100 Cask System. Chapter 4 of the HI-STORM SER has also been proposed for admission by the Staff, without opposition by PFS or the State, as part of Staff Exhibit B. There is no reason why the same document should be admitted twice; indeed, the State’s proposal to do so would violate the rule in 10 C.F.R. § 2.743(c) prohibiting the admission of evidence that is unduly repetitious. Further, the version of this document proffered by the State does not exactly correspond with the actual document, at least with respect to format (*compare, e.g.,* Staff Exh. B at 1 *with* Utah Exh. 11, at 1; and Staff Exh. B at 3 *with* Utah Exh. 11 at 3 (line numbering)).

Utah Exhibit 12

Utah Exhibit 12 consists of Chapter 4 (“Thermal Evaluation”) of NUREG-1536, “Standard Review Plan for Dry Cask Storage Systems” (Final Report, January 1997). The admission of this document is not necessary to a proper decision in the proceeding. As an NRC regulatory guidance document, the Licensing Board may take official notice of this chapter of NUREG-1536 in accordance with 10 C.F.R. § 2.743(i), and the document may be cited by the parties without its having been admitted as an exhibit in the proceeding. *See, e.g., Sacramento Municipal Utility District* (Rancho Seco Nuclear Generating Station), CLI-93-03, 37 NRC 135, 147 n.30 (1993) (“The Commission can take official notice of ‘a matter beyond reasonable controversy’ and one that is ‘capable of immediate and accurate determination by resort to easily accessible sources of indisputable accuracy’ (citations omitted)). Indeed, regulatory guides have been admitted in other NRC proceedings. *See, e.g., Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), LBP-87-10, 25 NRC 177, 192 n.11 (1987) (“The Board takes official notice of pertinent Commission’s

NUREGs and Regulatory Guides”); *Duke Power Co.* (Catawba Nuclear Station, Units 1 and 2), LBP-84-37, 20 NRC 933, 939 n.2, and 971 (1984) (Licensing Board took official notice of NUREG-0654 (“Criteria for Preparation and Evaluation of Radiological Emergency Response Plans and Preparedness in Support of Nuclear Power Plants” (Rev. 1, Nov. 1980)), and FEMA-43 (“Standard Guide for Evaluation of Alert and Notification Systems for Nuclear Power Plants” (Sept. 1983))); *Kansas Gas & Electric Co.* (Wolf Creek Generating Station, Unit No. 1), LBP-84-26, 20 NRC 53, 60 (1984) (Licensing Board took official notice of NUREG-0654/FEMA-REP-1).¹ The Staff believes this course of action is appropriate here, to avoid freighting the record with unnecessary evidentiary exhibits -- as long as any potential use of the document is identified by the State on the record of the proceeding.²

¹ Nonetheless, the Staff recognizes that regulatory guides have been admitted as evidence in some proceedings. *See, e.g., Louisiana Energy Services, L.P.* (Claiborne Enrichment Center), LBP-96-7, 43 NRC 142 (1996) (Regulatory Guide 3.67); *Philadelphia Electric Co.* (Limerick Generating Station, Units 1 and 2), ALAB-819, 22 NRC 681 (1985) (Regulatory Guide 1.91); *Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-653 (1981) (Regulatory Guide 5.20); *Boston Edison Co.* (Pilgrim Nuclear Power Station, Unit 2), LBP-81-3, 13 NRC 103 (1981) (WASH-1238 and NUREG-75/038); *Tennessee Valley Authority* (Hartsville Nuclear Plant, Units 1A, 2A, 1B, and 2B), ALAB-463, 7 NRC 341 (1978) (Regulatory Guide 1.109).

² The extent to which an exhibit may be relied upon in a party’s proposed findings of fact and conclusions of law may be limited by a ruling on the purpose for its admission into evidence, which averts unfair surprise to other parties. *Cf. Federal Rules of Evidence*, Rule 105 (“Limited Admissibility”); *Duke Power Co.* William B. McGuire Nuclear Station, Units 1 and 2), ALAB-669, 15 NRC 453, 476 (1982); *Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-781, 20 NRC 819, 831 n.43 (1984). This principle applies to documents of which official notice is taken, pursuant to 10 C.F.R. § 2.743(i)(1). This regulation states as follows:

Each fact officially noticed . . . shall be specified in the record with sufficient particularity to advise the parties of the matters which have been noticed or brought to the attention of the parties before final decision and each party adversely affected by the decision shall be given opportunity to controvert the fact.

Utah Exhibit 13

Utah Exhibit 13 consists of an early version of Interim Staff Guidance 11 ("ISG-11"), entitled "Storage of High Burnup Spent Fuel." This document was recently superseded by Revision 1 to ISG-11, on May 16, 2000; a copy of ISG-1, Revision 1, is attached hereto. While this document constitutes an interim guidance document, the Staff submits that the Licensing Board may take official notice of it and that it need not be admitted as an exhibit in the proceeding, for the reasons set forth with respect to State Exhibit 12; in any event, however, if ISG-11 is admitted as an exhibit in the record, the current version (Rev. 1) should be inserted in place of proposed State Exhibit 13.

Utah Exhibit 30

Utah Exhibit 30 consists of several pages reprinted from the Licensing Board's decision in LBP-98-7, 47 NRC 142, 251-52 (1998), in which the Board admitted certain contentions for litigation in this proceeding. The Licensing Board's decision, however, is readily available for citation by the Board and parties as a legal document. No reason exists why this material should also be admitted as an evidentiary exhibit in the record. Accordingly, the Staff opposes the admission of this proposed exhibit.

Utah Exhibits 31 and 32

Utah Exhibits 31 and 32 appears to consist of an electronic ("WestLaw") version of NRC regulations published in 10 C.F.R. § 72.22 (Utah Exhibit 31) and 10 C.F.R. § 72.40 (Utah Exhibit 32). These regulations do not constitute "evidence" and are inappropriate for inclusion in the evidentiary record. Moreover, no reason appears why the Commission's regulations should be admitted as evidentiary exhibits in the proceeding, inasmuch as they

are available for citation by the Licensing Board and parties as legal materials. Accordingly, the Staff opposes the introduction of these exhibits.³

Utah Exhibit 53

Utah Exhibit 53 appears to consist of a letter from an NRC attorney (C. William Reamer) to Christopher J. Wentz, Coordinator of the Radioactive Waste Consultation Task Force, New Mexico Energy, Minerals, and Natural Resources Department, dated June 29, 1995. In this letter, the Office of the General Counsel ("OGC") provided its views concerning the applicability of the Price Anderson Act to spent fuel shipments to the Mescalero storage facility. However, the letter explicitly states that it contains (OGC's) "informal views" concerning the specific questions raised therein," and does not constitute anything of the nature of "formal, written interpretations of the regulations which are recognized as binding on the Commission"; thus, it is clear that this letter does not constitute a binding interpretation of the statute. Further, the letter provides a legal interpretation of the Price Anderson Act rather than any form of evidentiary (factual) material. Accordingly, the document lacks any factual or legal significance in this proceeding, and should be excluded as irrelevant pursuant to 10 C.F.R. § 2.743(c).

³ In contrast, the Staff does not oppose the admission of Utah Exhibit 51, which consists of sections 19-3-301 - 19-3-318 of the Utah Radiation Control Act (pertaining to the placement of high level nuclear waste in the State). To be sure, this proposed exhibit consists of statutory material, and is readily available for citation by the Board and parties; however, at least one Licensing Board has stated that "official notice of state law is not a good concept in a federal proceeding." *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), LBP-89-32, 30 NRC 375, 525 (1989); *cf.* *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), LBP-88-13, 27 NRC 509, 565-66 (1988) (declining to take official notice of three Town Resolutions, cited in a party's proposed findings, since that would preclude other parties from confronting the issues -- notwithstanding the Board's recognition that it was "authorized to take official notice of facts such as certified acts of government bodies").

B. Exhibits to Be Corrected

Utah Exhibit 1

Utah Exhibit 1 consists of a copy of Chapter 4 of the PFS Emergency Plan ("EP"). The last page of this exhibit sets out an organizational chart for the "Functional PFSF Organization." This page, however, has been superseded by the Applicant's submittal of EP Revision 7, on May 8, 2000, which deletes certain specific information concerning the security organization. The Staff would not oppose the introduction of this exhibit, subject to the State's insertion of the correct page in lieu of this superseded page.

Utah Exhibit 14

Utah Exhibit 14 consists of section 4.1.5.2 ("Thermal Design") of the PFS Safety Analysis Report ("SAR"), along with the first page of the accompanying reference section. While most of this proposed exhibit reflects the latest version of the PFS SAR document, certain pages have been superseded by later versions of the SAR (pages 4.2-14, 4.2-16, and 4.2-16b). The Staff would not oppose the proffer of this section of the SAR as an exhibit, subject to the State's insertion of the correct pages in lieu of these superseded pages.

Utah Exhibit 35

Utah Exhibit 35 consists of portions of the Applicant's Environmental Report ("ER"), *i.e.*, section 3.2 ("Facility Construction") and Appendix 7A ("Basis for the Use of a 3.8% Discount Rate"). While most of this proposed exhibit reflects the latest version of the PFS ER, certain pages have been superseded by later versions of the ER (pages 3.2-6 and 3.2-7). The Staff would not oppose the proffer of this exhibit, subject to the State's insertion of the correct pages in lieu of these superseded pages.

CONCLUSION

For the reasons set forth above, the Staff submits that the instant Motion in Limine should be granted, and the proposed exhibits excluded or modified in the manner set forth herein.

Respectfully submitted,

Sherwin E. Turk **/RA/**
Counsel for NRC Staff

Dated at Rockville, Maryland
this 31st day of May 2000

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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PRIVATE FUEL STORAGE L.L.C.)	Docket No. 72-22-ISFSI
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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF MOTION IN LIMINE TO EXCLUDE PORTIONS OF PREFILED TESTIMONY OF GARY A. WISE," "NRC STAFF'S MOTION IN LIMINE TO EXCLUDE PORTIONS OF PREFILED TESTIMONY OF MICHAEL F. SHEEHAN, Ph.D. REGARDING UTAH CONTENTION S," and "NRC STAFF'S MOTION IN LIMINE TO EXCLUDE CERTAIN EXHIBITS FILED BY THE STATE OF UTAH" 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 asterick, or by deposit in the U.S. Postal Service, as indicated by double asterisk, with copies by electronic mail this 31st day of May, 2000:

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