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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING BOARD

LBP-00-15

DOCKETED 06/01/00

SERVED 06/01/00

Before Administrative Judges:

G. Paul Bollwerk, III, Chairman
Dr. Jerry R. Kline
Dr. Peter S. Lam

In the Matter of

PRIVATE FUEL STORAGE, L.L.C.

(Independent Spent Fuel Storage Installation)

Docket No. 72-22-ISFSI

ASLBP No. 97-732-02-ISFSI

June 1, 2000

MEMORANDUM AND ORDER
(Denying Request for Admission of
Late-Filed Amended Contention Utah L)

Previously, in LBP-99-21, 49 NRC 431 (1999), we denied as premature a motion by intervenor State of Utah (State) to amend its contention Utah L, Geotechnical, to permit it to contest a request by applicant Private Fuel Storage, L.L.C., (PFS) to the NRC staff for an exemption from the requirements of 10 C.F.R. § 72.102(f)(1) to permit PFS to use a probabilistic rather than a deterministic standard for its seismic hazard analysis relative to the proposed PFS Skull Valley, Utah 10 C.F.R. Part 72 independent spent fuel storage installation (ISFSI). Now before us is another State request to admit a late-filed issue relating to contention Utah L, this time a modification to address a proposal to grant the still-pending PFS exemption request set forth in the staff's December 1999 safety evaluation report (SER) regarding the PFS application. As before, both PFS and the staff oppose the State's request, albeit on somewhat different grounds.

For the reasons set forth below, we deny the State's motion for the late-filed modification of contention Utah L.

I. BACKGROUND

In LBP–99-21, we provided the following synopsis of the PFS exemption request at issue in the pending State motion:

Under the current provisions of 10 C.F.R. Part 72 relating to ISFSI seismic analysis, a facility like that proposed by PFS must meet the same standards applicable to a nuclear power plant under 10 C.F.R. Part 100, Appendix A. See 10 C.F.R. § 72.102(f)(1). The Part 100 standard for calculating a safe shutdown or design earthquake uses a deterministic approach. In an April 2, 1999 request directed to the staff, invoking 10 C.F.R. § 72.7, PFS asked for an exemption from this Part 72 standard to permit the use of a probabilistic seismic hazard analysis along with a consideration of the risk involved to establish the design-basis earthquake at the PFS facility. According to PFS, such a change would have some significance because its own probabilistic analysis indicates that the relative risk at the PFS ISFSI warrants a design earthquake with lower peak ground accelerations than that calculated using the Part 100, Appendix A deterministic methodology.

49 NRC at 434 (citation and footnote omitted). In that decision, we denied the State's request that we either require PFS to frame its exemption request as a rule waiver petition under 10 C.F.R. § 2.758(b) so as to permit Board consideration of that request in this proceeding or that we permit an amendment to contention Utah L to allow the State to contest the PFS exemption request here. As to the latter State request, we declared:

the exemption material provided by PFS to the staff and the State seems to be sufficiently well-defined to provide the information needed to formulate a contention. Considerably less certain, however, is the question of its ripeness. By its nature, an exemption request is atypical. The rules promulgated by the Commission reflect a considered judgment about the requirements necessary to protect the public health and safety and the environment. In contrast to a license application that generally seeks to demonstrate the requester's compliance with agency requirements, an exemption request attempts to show why those regulatory requirements should not be applied to the requester. The latter thus is more problematic in terms of its likely

impact on the administrative process. Indeed, the uncertain nature of an exemption request (i.e., that the request may not be granted) counsels that consideration of an exemption-related contention should await staff action on the exemption. Accordingly, the timeliness of a contention based on an applicant's exemption request is more properly judged from the time of staff action on the exemption rather than when the exemption request is filed.

Id. at 437-38 (footnote omitted).

Relative to the present State request, we note that while the Part 100, Appendix A, standard applicable under section 72.102(f) remains deterministic, in 1997 the agency amended section 100.23 to permit the optional use of a probabilistic seismic hazards analysis for new 10 C.F.R. Part 52 power reactor early site permit and combined construction permit/operating license applicants. See 10 C.F.R. § 100.23(a), (c)-(d); see also 61 Fed. Reg. 65,167 (1996). Thereafter, in a 1998 rulemaking plan, see SECY-98-126, Rulemaking Plan: Geological and Seismological Characteristics for Siting and Design of Cask [ISFSIs] (June 4, 1998), the staff proposed and the Commission approved the institution of a rulemaking proceeding to conform the seismic evaluation standard of section 72.102 to the new section 100.23 probabilistic methodology rather than the Part 100, Appendix A deterministic analysis. Moreover, as part of the rulemaking plan, the staff proposed requiring that ISFSI systems, structures, and components (SSCs) be designed to withstand either a Frequency Category 1 design basis ground motion, with a 1000-year recurrence interval, or a Frequency Category 2 design basis ground motion with a 10,000-year recurrence interval. In its original exemption request, PFS submitted its design basis ground motion based on a 1000-year interval, but in August 1999 amended its request to substitute a 2000-year interval. Thereafter, in its December 15, 1999 SER, which was received by the State on December 27, 1999, the staff noted relative to the pending PFS exemption request that it proposed to grant the

exemption request using a 2000-year return period interval as requested by PFS. See [SER] of the Site-Related Aspects of the [PFS] Facility [ISFSI] at 2-45 (Dec. 15, 1999).

As it was set forth in the November 1997 PFS supplemental intervention petition, basis two to contention Utah L provides:

2. **Ground motion.** The site may also be subject to ground motions greater than those anticipated by the Applicant due to spatial variations in ground motion amplitude and duration because of near surface traces of potentially capable faults (the Stansbury and Cedar Mountain faults). Sommerville, P.G., Smith, N.F., Graves, R.W., and Abrahamson, N.A., Modification of empirical strong ground motion attenuation relations to include the amplitude and duration effects of rupture directivity, in 68 Seismological Research Letters (No. 1) 199 (1997). Failure to adequately assess ground motion places undue risk on the public and the environment and fails to comply with 10 C.F.R. § 72.102(c).

[State] Contentions on the Construction and Operating License Application by [PFS] for an [ISFSI] (November 23, 1997) at 82-83. In the pending motion filed following issuance of the staff SER, the State declares that with the December 1999 SER, the staff has now granted the PFS exemption request to allow the use of a probabilistic seismic hazard analysis with a 2000-year interval. As such, the State declares that it wishes to modify its contention to require either the use of a probabilistic methodology with a return period of 10,000 years, as provided in the 1998 staff rulemaking plan, or compliance with the deterministic analysis requirement of the current section 72.102(f). See [State] Request for Admission of Late-Filed Modification to Basis 2 of Utah Contention L (Jan. 26, 2000) at 7.

Relative to the former point, the State sets forth its analysis of why the staff has acted improperly in failing to follow the June 1998 rulemaking plan, including the staff's failure to address the radiological consequences of a failed SSC design in accordance with 10 C.F.R. § 72.104(a); the seismic adequacy of the Canister Transfer Building equipment given the

possibility of a canister drop during the transfer from the HI-STAR transportation cask to the HI-STORM storage cask; and inadequacies in the PFS design basis accident evaluation and leakage rate methodology, including leak hole diameter calculations based on sabotage accidents. Also challenged by the State are the four reasons set forth in the staff's December 1999 SER in support of the use of a 2000-year return period, which the State asserts are inadequate to support employing that value. Additionally, the State addresses the five late-filing factors of 10 C.F.R. § 2.714(a)(1), declaring that a balancing of those elements establishes that its late-filed contention modification request should be permitted. See id. at 7-23.

In its response to the State's late-filed issue request, PFS declares that the Board should deny the request as seeking to raise an issue outside the scope of this proceeding, namely, a challenge to the staff's grant of an exemption to an agency rule. Additionally, PFS asserts that, as it relies upon the June 1998 rulemaking plan, the State's request is an impermissible challenge to the agency regulations, specifically 10 C.F.R. § 72.2 that permits the staff to issue an exemption to the Part 72 requirements. Further, PFS declares that the State's attempt to invoke the rulemaking plan's provisions ignores the fundamental principal that an exemption does not conform to existing regulations and is not judged against them. Finally, PFS declares that the purported deficiencies in the staff's determination to permit a 2000-year return period either lack a proper factual basis or are immaterial. See [PFS] Response to [State] Request for Admission of Late-Filed Modification to Basis 2 of Utah Contention L (Feb. 14, 2000) at 4-13.

Although agreeing with PFS that the State's request should be denied, the staff takes at least a partially different route to arrive at that result. Initially, the staff argues that the State's request is not ripe since, as its December 1999 SER makes clear, the staff has not yet granted, or decided to grant, the PFS exemption. Also, according to the staff, the State's assertion that

staff's action on the exemption is improper for failing to follow the June 1998 rulemaking plan does not state a legally cognizable basis for its issue amendment. Besides failing as an impermissible challenge to the adequacy of a staff activity review, the staff declares that the rulemaking plan has no status as a binding regulatory requirement. As to the issues regarding Canister Transfer Building equipment and the PFS accident leak rate assumptions, the staff declares they should be rejected as unrelated to the PFS seismic exemption request or, in the latter instance, as untimely filed. See NRC Staff's Response to "[State] Request for Admission of Late-Filed Modification to Basis 2 of Utah Contention L" (Feb. 14, 2000) at 5-10.

In its reply to the PFS and staff filings, the State declares that notwithstanding the staff's ripeness argument, which PFS did not adopt, the Board should admit its modified issue statement to provide the State with a forum to challenge the 2000-year return period earthquake using a probabilistic approach. Additionally, the State maintains that there is an adequate basis for admission in that PFS cannot meet the existing seismic design standards of Part 72; the admission of the modified basis two is necessary to evaluate properly the State's existing contention and to determine whether the new standard and methodology will protect the public health and safety; and the applicability of the June 1998 rulemaking plan must be considered, including consideration of the contradictory positions of PFS and the staff regarding its applicability. See [State] Reply to [PFS] and NRC Staff's Responses to Late-Filed Bases for Utah Contention L (Feb. 22, 2000) at 3-16.

II. ANALYSIS

In the context of our prior ruling on the admissibility of a State request to amend contention Utah L, we noted that the question of when a new or amended contention must be filed in order to meet the section 2.714(a)(1) late-filing criteria, specifically the critical "good

cause” criterion, “calls for a judgment about when the matter is sufficiently factually concrete and procedurally ripe to permit the filing of a contention.” LBP-99-21, 49 NRC at 437. In that instance, we found relative to the PFS exemption request that a contention regarding the validity of the exemption would become ripe when, and if, the staff granted the exemption. See id. at 438.

The State now asserts that the staff has, in effect, taken that action in connection with the December 1999 SER, a claim PFS apparently chooses not to challenge at this juncture. As the staff points out, however, the language of the December 1999 SER makes it clear that this has not yet occurred. In pertinent part the staff SER states:

[T]he staff concludes that additional analyses are needed to assess ground vibrations of the Facility and to approve the applicant’s request for an exemption to 10 CFR 72.102(f)(1). The staff agrees that the use of the [probabilistic seismic hazard analysis] methodology is acceptable, however, the SAR analyses need to be revised to consider a 2,000-year return period, rather than a 1,000-year return period.

SER at 2-45. Additionally, the SER lists the facility seismic design and the PFS exemption request as an “open item.” Id. at 2-52. Thus, although the staff seems inclined to grant the exemption, it has not yet done so. As a consequence, the ripeness concern upon which we based our earlier ruling continues unabated.

The State, particularly in its reply pleading, provides an extended discussion of its views on its need and right in this proceeding to adjudicate the validity of the PFS exemption request, assuming that request is granted. As we observed previously relative to contention Utah L, based on our reading of the applicable precedent, if and when that contingency comes to fruition, “to countenance an adjudicatory challenge to the PFS exemption petition, the Board would have to invoke its certified question or referred ruling authority under 10 C.F.R. §§ 2.718(i), 2.730(f) to determine whether the Commission wants the Board to consider the

contention.” LBP-99-21, 49 NRC at 438. As before, this is a bridge we, and the parties, will have to cross only if the staff rules favorably on the PFS exemption request.

III. CONCLUSION

We deny the State’s request to admit a late-filed modification to basis two of contention Utah L. As we did in LBP-99-21, we find that the proposed modification is not ripe for

admission in the absence of a favorable staff ruling on the pending 10 C.F.R. § 72.2 request of applicant PFS for an exemption from the seismic design criteria of 10 C.F.R. Part 100, App. A.

For the foregoing reasons, it is this first day of June 2000, ORDERED, that the State's January 26, 2000 motion to admit a late-filed modification of basis two of contention Utah L is denied.

THE ATOMIC SAFETY
AND LICENSING BOARD*

/RA/

G. Paul Bollwerk, III
ADMINISTRATIVE JUDGE

/RA/

Dr. Jerry R. Kline
ADMINISTRATIVE JUDGE

/RA/

Dr. Peter S. Lam
ADMINISTRATIVE JUDGE

Rockville, Maryland

June 1, 2000

* Copies of this memorandum and order were sent this date by Internet e-mail transmission to counsel for (1) applicant PFS; (2) intervenors Skull Valley Band of Goshute Indians, Ohngo Gaudadeh Devia, Confederated Tribes of the Goshute Reservation, Southern Utah Wilderness Alliance, and the State; and (3) the staff.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LB MEMORANDUM AND ORDER (DENYING REQUEST FOR ADMISSION OF LATE-FILED AMENDED CONTENTION UTAH L) (LBP-00-15) have been served upon the following persons by deposit in the U.S. mail, first class, or through NRC internal distribution.

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Docket No. 72-22-ISFSI
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(DENYING REQUEST FOR
ADMISSION OF LATE-FILED
AMENDED CONTENTION UTAH L)
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Original signed by Adria T. Byrdsong

Office of the Secretary of the Commission

Dated at Rockville, Maryland,
this 1st day of June 2000