

May 6, 1998

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
)
(Independent Spent)
Fuel Storage Installation))

NRC STAFF'S MOTION FOR
PARTIAL RECONSIDERATION OF LBP-98-7

INTRODUCTION

Pursuant to 10 C.F.R. § 2.730 and the Licensing Board's "Memorandum and Order (Rulings on Standing, Contentions, Rule Waiver Petition, and Procedural/Administrative Matters)," LBP-98-7, 47 NRC ___ (Apr. 22, 1998) ("Order"), the NRC Staff ("Staff") hereby requests that the Licensing Board reconsider limited portions of its Order, insofar as it admitted Utah Contention B and portions of certain other contentions which assert that a license is required for the Rowley Junction intermodal transfer point (ITP) and/or that the Commission's regulations in 10 C.F.R. Part 72 establish requirements that apply to the ITP.¹ For the reasons set forth below, the Staff submits that the Licensing Board's determination to admit Utah Contention B and related contention subparts, identified herein, constitutes a significant legal

¹ These consist of the following contentions, as combined with other parties' contentions and reworded in the Appendix to the LBP-98-7: (1) Utah Contention K - Credible Accidents (LBP-98-7, slip op. at 67-68); (2) Utah Contention N - Flooding (*Id.* at 70); (3) Utah Contention O - Hydrology (*Id.* at 71); (4) Utah Contention R - Emergency Plan (*Id.* at 75-77); (5) Utah Contention S - Decommissioning (*Id.* at 77-78); (6) Utah Contention T - Permits (*Id.* at 79-81); and (7) Utah Contention W - Other Impacts (*Id.* at 86).

error in that it fails to recognize that the ITP is an integral part of the transportation of spent fuel, governed by the requirements set forth in 10 C.F.R. Parts 71 and 73, and Department of Transportation (DOT) regulations, and is not subject to the regulations in 10 C.F.R. Part 72. For these reasons, as more fully set forth below, the Staff requests that the Licensing Board reconsider its admission of Utah Contention B and the ITP-related portions of the other contentions identified herein, and exclude those matters from litigation in this proceeding.²

DISCUSSION

In Contention B, the State of Utah asserted, in essence, that the Rowley Junction ITP -- a rail siding off the Union Pacific main rail line, with a 150-ton gantry crane (with weather enclosure), and a tractor/trailer yard -- is an integral part of the instant ISFSI application, and should be treated as part of the ISFSI site (Utah Contentions at 10). The Licensing Board admitted two portions of this contention, and reworded the admitted portions to read as follows:

Utah B -- License Needed for Intermodal Transfer Facility

CONTENTION: PFS's application should be rejected because it does not seek approval for receipt, transfer, and possession of spent nuclear fuel at the Rowley Junction Intermodal Transfer Point ("ITP"), in violation of 10 C.F.R. § 72.6(c)(1), in that the Rowley Junction operation is not merely part of the transportation operation but a de facto interim spent fuel storage facility at which PFS will receive, handle, and possess spent nuclear fuel. Because the ITP is an interim spent fuel storage facility, it is important to provide the public with the regulatory protections that are afforded

² A motion for reconsideration is appropriate to point out errors or deficiencies in the prior decision, and may elaborate upon or refine arguments previously advanced; it may not rely upon an entirely new thesis or include new arguments, unless they relate to a Board concern that could not reasonably have been anticipated. *Tennessee Valley Authority* (Hartsville Nuclear Plant, Units 1A, 2A, 1B and 2B), ALAB-418, 6 NRC 1, 2 (1977); *Texas Utilities Electric Co.* (Comanche Peak Steam Electric Station, Units 1 and 2), LBP-84-10, 19 NRC 509, 517-18 (1984).

by compliance with 10 C.F.R. Part 72, including a security plan, an emergency plan, and radiation dose analyses.³

In admitting these portions of Utah Contention B, the Licensing Board stated that the Commission's Part 71 regulations authorize transportation of spent fuel under a general license for a Commission licensee or "carrier" (defined as a common, contract, or private carrier) "that complies with the general controls and procedures requirements, quality assurance measures, and other provisions of Subparts A, G, and H of Part 72. 10 C.F.R. §§ 71.0(d), 71.4, 71.12." LBP-98-7, slip op. at 58; emphasis added. Further, the Licensing Board determined (*Id.*):

In this instance, there is a genuine legal/factual issue that merits further inquiry as to whether the PFS scheme for operation of the Rowley Junction ITP will cause the materials delivered there to remain within the possession and control of an entity or entities that comply with the terms of the general license issued under section 71.12 or will be handled in such a way as to require specific licensing under Part 72. See State Contentions at 11 (PFS will be receiving and handling spent fuel at ITP using PFS owned and operated equipment); Tr. at 144-62.

³ The Licensing Board admitted the following portions of Utah Contention B:

CONTENTION: PFS's application should be rejected because it does not seek approval for receipt, transfer, and possession of spent nuclear fuel at the Rowley Junction Intermodal Transfer Point ("ITP"), in violation of 10 C.F.R. § 72.6(c)(1), in that:

1. The Rowley Junction operation is not merely part of the transportation operation but a de facto interim spent fuel storage facility at which PFS will receive, handle, and possess spent nuclear fuel for extended periods of time.

* * *

4. Because the ITP is stationary, it is important to provide the public with the regulatory protections that are afforded by compliance with 10 C.F.R. Part 72, including a security plan, an emergency plan, and radiation dose analyses.

These determinations are erroneous and require reconsideration. First, the Licensing Board incorrectly stated that provisions in 10 C.F.R. §§ 71.0(d), 71.4, and 71.12 require adherence to Subparts A, G and H of Part 72. Rather, these provisions require Commission licensees to comply with the cited subparts in Part 71, pertaining to operating controls and procedures (Subpart G), quality assurance (Subpart H), and other general provisions (Subpart A), when transporting or delivering spent fuel to a carrier for transport. See 10 C.F.R. § 71.0(d); see generally, *Commonwealth Edison Co.* (Shipment of Irradiated Nuclear Fuel from West Valley, N.Y.), DD-83-14, 18 NRC 726, 732 (1983). Additionally, carriers (both contract and common) are exempted from the Commission's regulations for transporting source, byproduct, special nuclear material, and spent fuel,⁴ except with respect to certain provisions concerning physical protection in transit. Further, although PFS will be required to comply with Part 72 for storage activities at its ISFSI, Part 72 regulations do not extend to PFS' activities as a contract carrier, including activities conducted in transportation or at any points in the

⁴ The NRC has historically exempted common and contract carriers from the need to obtain an NRC possession license when transporting byproduct, source, or special nuclear material (all of which are contained in spent fuel) in the regular course of carriage for another "or storage incident thereto," with the exception that they must satisfy certain physical protection requirements, under 10 C.F.R. § 70.20a(c). See also, 10 C.F.R. §§ 30.13, 40.12, and 70.12. In doing so, the Commission has relied on the general licensing provisions of 10 C.F.R. § 71.12 to assure that shippers (e.g., reactor licensees) use an NRC certified shipping cask under an NRC approved quality assurance program, and DOT carrier regulations to ensure safety during actual transport and storage incident thereto. The licensing exemption for common and contract carriers, freight forwarders and warehousemen applies regardless of the quantities shipped or the quantities in temporary storage incident to transit at any one time. In fact, the concept of temporary storage incident to transport is a commonly accepted and essential element in the efficient operation of the U.S. transportation system, and is recognized in DOT regulations (e.g., 49 C.F.R. §§ 173.447, 173.457(a)(2), 174.700(b), and 177.842), and is thereby applicable to the transportation of spent fuel and storage incident thereto, under 10 C.F.R. § 71.5.

transportation route (including rail yards, sidings, or intermodal transfer points).⁵ Rather, as stated in the Staff's response to Contention B, safety requirements for transportation and points therein are established by 10 C.F.R. Parts 71 and 73, and by extensive DOT safety regulations.⁶

Second, the Licensing Board incorrectly concluded that Contention B should be admitted on the belief that "[i]n this instance, there is a genuine legal/factual issue that merits further inquiry as to whether the PFS scheme for operation of the Rowley Junction ITP will cause the materials delivered there to remain within the possession and control of an entity or entities that comply with the terms of the general license issued under section 71.12 or will be handled in such a way as to require specific licensing under Part 72. See State Contentions at 11 (PFS will be receiving and handling spent fuel at ITP using PFS owned and operated equipment); Tr. at 144-62." In fact, it is irrelevant whether PFS, itself, will own and operate the equipment at Rowley Junction, since it could do so as a contract carrier under DOT regulations.⁷ In that event, operation of the spent fuel cask transfer equipment at the ITP would constitute part of the

⁵ As a carrier, PFS would not be conducting any processing or other activities other than the activities required to transport a shipment to its final destination (for example, it would not repackage the spent fuel or provide a shipper certification under 49 C.F.R. § 172.204).

⁶ See "NRC Staff's Response to Contentions Filed by (1) the State of Utah, (2) the Skull Valley Band of Goshute Indians, (3) Ohngo Gaudadeh Devia, (4) Castle Rock Land and Livestock, L.C., *et al.*, and (5) the Confederated Tribes of the Goshute Reservation and David Pete" ("Staff Response"), dated December 24, 1997, at 15-17.

⁷ PFS has indicated that "transportation of the spent fuel shipping casks from the originating reactor to the PFSF will occur in accordance with 10 CFR 71 and the originating reactor's license, and is not a part of this License Application" (Lic. App. at 1-3); further, PFS has indicated that it will not take receipt of the spent fuel under its Part 72 license until the casks arrive at the ISFSI site (*Id.* at 3-2; SAR at 1.4-2). Therefore, if PFS transports spent fuel from the ITP to the ISFSI site, it would appear to be acting as a carrier on behalf of another (*i.e.*, the shipper). PFS, of course, is in the best position to confirm that it will act as a contract carrier for the shipper during such transportation.

transportation process whereby the fuel is shipped via contract and common carrier from the originating reactor to PFS' ISFSI site. The fact that PFS may own and operate the ITP equipment does not deprive it of its right to act separately as a contract carrier -- including the use of any necessary transfer equipment during the transportation process; nor would PFS' ownership or operation of that equipment, or short-term storage at the ITP incident to transportation, mandate that a regulatory regime (*i.e.*, Part 72) be applied that is fundamentally different than the regulatory regime that applies when a railroad or other common or contract carrier owns and operates the same equipment.

As the Staff stated in its response to Contention B, the ITP constitutes a transfer point in the transportation of spent fuel from shippers to the ISFSI, and should be treated as part of the transportation process. *See* Staff Response at 15-16 and 19.⁸ Simply put, Utah Contention B raises issues which are governed by Part 71 of the Commission's regulations, and fails to present an issue as to whether PFS qualifies for a Part 72 license -- which is the subject of this proceeding. Accordingly, Contention B should be rejected. *See, e.g., Duke Power Co.* (Catawba Nuclear Station, Units 1 and 2), LBP-82-51, 16 NRC 167, 172 (1982) (excluding a portion of a contention "which relates to the transport of irradiated fuel because the safety aspects of this activity are controlled by 10 CFR Parts 71 and 73, and by DOT regulations and is outside the scope of this hearing.").

⁸ As the Staff stated previously, spent fuel is expected to be transported to the ISFSI from a number of reactor sites, and may well be routed through intermodal transfer points, rail yards and interchange points during the normal course of shipment; further, the use of intermodal transfer points, rail storage and interchange yards by common carriers has long been an accepted practice in the shipment of hazardous materials, including spent fuel and other radioactive material -- and such areas are recognized in DOT regulations to be an integral part of the transportation process. *See* Staff Response at 15-16.

The Licensing Board's determination to admit this contention appears to be based, in part, on a footnote that appears in the Staff's response to the contention. In this regard, the Licensing Board observed that "[a]lthough PFS suggests the issue of license authority over the Rowley Junction ITP is outside the scope of this proceeding, . . . this seemingly runs contrary to the staff's apparent belief that it may, in the context of acting on the PFS license, exert regulatory authority relative to PFS activities at Rowley Junction, see Staff Contentions Response at 19 n.29." LBP-98-7, slip op. at 58 n.10.⁹ The Licensing Board's apparent interpretation of the Staff's footnote 29 is incorrect. In fact, the Staff's response to this contention indicated clearly that the NRC does not have licensing authority under Part 72 over transportation activities at Rowley Junction. The Staff stated, "as a transfer point along the shipping route to be utilized for the transportation of licensed material, the Rowley Junction ITP is subject to regulation under DOT's transportation requirements (including regulations governing in-transit storage), rather than as a facility subject to NRC licensing requirements in 10 C.F.R. Part 72."

⁹ Footnote 29 stated as follows:

The Staff . . . intends to review the Applicant's discussion of the equipment and transfer operations to be located at the Rowley Junction ITP, and may seek further information regarding those matters from the Applicant. The Staff will consider, in the course of its review, whether the planned transfer operations at that location present grounds to consider whether additional measures, beyond those specified in Commission and/or DOT regulations, should apply to operations conducted at that location. In the event the Staff concludes that additional requirements may need to be imposed on those operations, it will provide timely notice of that determination to the Licensing Board and parties to this proceeding via a Board Notification.

Staff Response at 19 n.29; emphasis added.

Staff Response at 18. The footnote referred to by the Licensing Board did not alter the Staff's conclusion that Part 72 does not apply at the ITP. Rather, it indicated that the Staff would consider "whether additional measures, beyond those specified in Commission and/or DOT regulations should apply to operations conducted at that location."¹⁰ As the Staff stated, if such a determination is made, it would be conveyed to the Board and parties. However, footnote 29 did not suggest or make any change to the Staff's fundamental conclusions that the existing requirements in Parts 71 and 73 and DOT regulations govern activities at the ITP, and that the State's attempt to apply Part 72 to the ITP constitutes a challenge to the basic structure of the Commission's regulations (*see* Staff Response at 15-19; Tr. 155).

Finally, the fact that Part 72 does not apply to transportation activities at the transfer points such as the ITP does not mean that no protection of public health and safety exists at such locations, or that application of Part 72 is required to achieve the protection sought by the contention. Utah Contention B states that "[b]ecause the ITP is an interim spent fuel storage facility, it is important to provide the public with the regulatory protections that are afforded by compliance with 10 C.F.R. Part 72, including a security plan, an emergency plan, and radiation dose analyses" (*Id.*, emphasis added). However, the State (and Licensing Board) overlooked the fact that these protections are afforded by the Commission's and DOT's transportation regulations, so that failure to apply Part 72 does not result in a regulatory gap. Specifically, with respect to security plans, physical protection requirements for spent fuel in transit or

¹⁰ The Staff's footnote 29 is in keeping with the Commission's statement, in 10 C.F.R. § 71.65, that "[t]he Commission may, by rule, regulation, or order, impose requirements on any licensee, in addition to those established in this part, as it deems necessary or appropriate to protect public health or to minimize danger to life or property."

storage incident thereto are contained in 10 C.F.R. Part 73 (*see, e.g.*, 10 C.F.R. 70.20a(e) and 73.37). With respect to emergency plans, planning for emergencies in the transportation of hazardous materials (including storage incident thereto) is required by DOT regulations, including requirements for emergency response information, communications and notices (such as marking and labeling of shipping casks, vehicle placarding, shipping papers, etc., *see, e.g.*, 49 C.F.R. Part 172), and requirements for actions to be taken in the event of breakage, spillage, or suspected radioactive contamination involving Class 7 (radioactive) materials shipments (*see, e.g.*, 49 C.F.R. §§ 174.750, 171.15, 171.16, and 107.117). With respect to radiation protection, an exemption from Part 20 is provided to general licensees by 10 C.F.R. § 70.20a(c) -- and radiation dose limits on individual shipping casks, segregation limits for multiple casks, and radiation protection programs for carriers are established in DOT regulations (*see, e.g.*, 49 C.F.R. §§ 172.801 *et seq.*, 173.441, 173.447 - 173.476, 174.700, and 174.705).¹¹

The requirements established in DOT regulations and in 10 C.F.R. Parts 71 and 73 have been determined by the Commission and DOT to be adequate for protecting public health and safety during transportation (including storage incident thereto) and/or a transportation accident.¹²

¹¹ *See generally, In re State of Wisconsin* (Denial of Petition for Rulemaking) DPRM-86-5, 24 NRC 647, 650-51 and 655-56 (1986) (discussing DOT's highway routing rule, its rail inspection program, and the Federal Railroad Administration's rail safety regulations in 49 C.F.R. Part 174 -- which require, *inter alia*, a separation of spent fuel from other placarded cars in the train, a time limit on forwarding spent fuel after receipt in any yard or transfer station -- and emergency response training for transportation accidents).

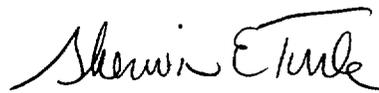
¹² *See, e.g., Duke Power Co.* (Amendment to Materials License SNM-1773 -- Transportation of Spent Fuel from Oconee Nuclear Station for Storage at McGuire Nuclear Station), ALAB-651, 14 NRC 307, 318 (1981) ("spent fuel assemblies must be transported in specially designed and manufactured casks which offer a high degree of protection against the release of radioactivity in an accident, . . . must comply with the stringent safety and other
(continued...)

There is no reason to believe that an accident at Rowley Junction would be more severe or more difficult to respond to than a transportation accident already considered under DOT and NRC regulations, such that the existing regulatory regime should be disregarded. See Staff Response at 16-17, and 46-48 (Utah Contention R, Emergency Plan for ITP).

CONCLUSION

For the reasons set forth above, the Staff submits that the Licensing Board erred in admitting Utah Contention B and the related subparts of other contentions identified herein, and that the admission of these issues for litigation should be reconsidered.

Respectfully submitted,



Sherwin E. Turk
Counsel for NRC Staff

Dated at Rockville, Maryland
this 6th day of May 1998

¹²(...continued)

requirements . . . prescribed by the Commission (10 CFR Parts 71 and 73) . . . [and] must also comply with [DOT] requirements covering the packaging and movement of radioactive materials (49 CFR Parts 171-79)." It has been observed that, together, Commission and DOT regulations "are designed to ensure safety in transporting radioactive materials through adequate containment of the radioactive material, adequate control of the radiation emitted by the material, and prevention of nuclear criticality. . . . Primary reliance for safety in transport of radioactive material is placed on the packaging. The NRC regulations establishing the requirements for packaging, preparation for shipment, and transportation of licensed material are set forth in 10 C.F.R. Part 71." *Shipments of Fuel From Long Island Power Authority's Shoreham Nuclear Power Station to Philadelphia Electric Company's Limerick Generating Station*, DD-93-22, 38 NRC 365, 373 (1993). The Commission has concluded that its regulations for certifying shipping packages for radioactive material (10 C.F.R. Part 71) are adequate to protect the public against unreasonable risk in the transport of these materials. *Id.* at 369.

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S MOTION FOR PARTIAL RECONSIDERATION OF LBP-98-7," in the above captioned proceeding have been served on the following through deposit in the Nuclear Regulatory Commission's internal mail system, or by deposit in the United States mail, first class, as indicated by an asterisk, with copies by electronic mail as indicated, this 6th day of May, 1998:

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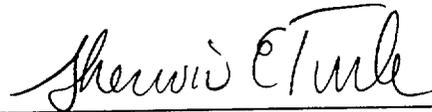
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