

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

LBP-99-21

ATOMIC SAFETY AND LICENSING BOARD

'99 MAY 26 P2:16

Before Administrative Judges:

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

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**SERVED MAY 26 1999**

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

May 26, 1999

MEMORANDUM AND ORDER  
(Denying Motion to Require  
Rule Waiver Request or to  
Amend Contention Utah L)

The genesis of the motion now pending with the Licensing Board is an April 2, 1999 request from applicant Private Fuel Storage, L.L.C., (PFS) to the NRC staff for an exemption from some of the seismic criteria of 10 C.F.R. Part 72 relative to the proposed PFS Skull Valley, Utah independent spent fuel storage installation (ISFSI). Specifically, PFS asks that it be given an exemption from the requirements of section 72.102 such that it can substitute a probabilistic approach to calculating the PFS design basis earthquake for the deterministic methodology mandated under the existing rule. In its April 30, 1999 motion, which both PFS and the staff oppose, intervenor State of Utah asks that we either require PFS to frame its

exemption application as a rule waiver petition under 10 C.F.R. § 2.758(b), which would be subject to Board consideration as part of this proceeding, or that we permit an amendment of contention Utah L, which deals with the PFS facility's seismic design, so as to allow the State to contest the PFS exemption request in this proceeding.

For the reasons set forth below, we deny the State's motion.

#### I. BACKGROUND

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.<sup>1</sup> 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

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<sup>1</sup> Appendix A to 10 C.F.R. Part 100 defines a safe shutdown or design earthquake as "that earthquake which is based upon an evaluation of the maximum earthquake potential considering the regional and local geology and seismology and specific characteristics of local subsurface material. It is that earthquake which produces the maximum vibratory ground motion for which certain [subsequently defined safety] structures, systems, and components are designed to remain functional." 10 C.F.R. Part 100, App. A, § III(c).

consideration of the risk involved to establish the design 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. See [State] Motion Requiring Applicant to Apply for Rule Waiver under 10 C.F.R. § 2.758(b) or in the Alternative Amendment to Utah Contention L (Apr. 30, 1999) Exh. A, at 1-2 [hereinafter State Motion].

The State apparently received this PFS exemption request on April 7, 1999, and filed the motion now pending before us three weeks later. Citing the Commission's decision in Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit No. 1), CLI-80-16, 11 NRC 674 (1980), the State declares that the Board should require PFS to make its exemption request under the provisions of 10 C.F.R. § 2.758, which govern consideration of agency rules and regulations in an adjudicatory proceeding such as this one. Alternatively, the State asserts it should be given leave to amend contention Utah L concerning the geotechnical aspects of the PFS application to permit it to contest what the State asserts will be a diminution of the standard for determining the PFS facility's seismic design if the staff

acts favorably on the PFS exemption request. See State Motion at 3-9.

In their May 12, 1999 responses to the State's motion, PFS and the staff oppose both prongs of its request. Each asserts that while section 2.758 is an alternative method for seeking a waiver or exemption from a Commission regulation, it is not applicable in this instance. Both also declare that, pending staff action on the exemption request, permitting an amendment of Utah L is premature and, in any event, would require Commission endorsement. See Applicant's Response to State's Motion Requiring Applicant to Apply for Full Waiver under 10 C.F.R. § 2.758(b) or in the Alternative Amendment to Utah Contention L (May 12, 1999) at 2-6 [hereinafter PFS Response]; NRC Staff's Response to "[State] Motion Requiring Applicant to Apply for Rule Waiver under 10 C.F.R. § 2.758(b) or in the Alternative Amendment to Utah Contention L" (May 12, 1999) at 2-10 [hereinafter Staff Response].

## II. ANALYSIS

### A. Applicability of 10 C.F.R. § 2.758(b)

The regulation the State seeks to invoke relative to the pending PFS exemption request is paragraph (b) of section 2.758 of 10 C.F.R., which provides in pertinent part:

A party to an adjudicatory proceeding involving initial or renewal licensing subject to this subpart may petition that the application of a specified Commission rule or regulation or any provision thereof . . . be waived or an exception made for the particular proceeding. The sole ground for petition for waiver or exception shall be that special circumstances with respect to the subject matter of the particular proceeding are such that the application of the rule or regulation (or provision thereof) would not serve the purposes for which the rule or regulation was adopted.

Assuming a party is able to make a prima facie showing regarding the existence of the requisite "special circumstances," the provision further provides that the presiding officer shall certify the matter directly to the Commission for a determination whether the application of the rule or provision should be waived or an exception made. See 10 C.F.R. § 2.758(d).

Commission case law teaches that section 2.758(b) and the waiver/exemption provisions found in the various substantive provisions of the Commission rules,<sup>2</sup> offer alternative methods for seeking waivers or exemptions of Commission rules. See Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant), CLI-86-24, 24 NRC 769, 774 n.5 (1986); see also Cleveland Electric Illuminating Co. (Perry

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<sup>2</sup> 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), 70.14 (Part 70 special nuclear material); 72.7 (Part 72 ISFSIs).

Nuclear Power Plant, Units 1 and 2), LBP-85-33, 22 NRC 442, 445-46 (1985), aff'd, ALAB-841, 24 NRC 64 (1986). Moreover, prior adjudicatory rulings suggest that section 2.758 need not be invoked unless (1) the exemption request is directly related to a pending contention, see Shearon Harris, CLI-86-24, 24 NRC at 774 n.5; or (2) the interpretation or application of a regulation to specific facts is questioned, Perry, LBP-85-33, 22 NRC at 445.

In this instance we are unable to find that section 2.758 is a preferable method for proceeding with the PFS exemption request. There is a geotechnical issue in this proceeding -- contention Utah L. A review of that contention leads us to conclude, in agreement with PFS and the staff, that the requested exemption has no direct bearing on that issue statement. The seismic matters that are under scrutiny in contention Utah L, which include the adequacy of PFS's efforts to identify, characterize, and/or quantify surface faulting, ground motion, subsurface soils, and soil stability and foundation loading, are not matters that are directly impacted by whether the design earthquake for the PFS facility ultimately is calculated using the Part 100 deterministic standard or the probabilistic methodology championed by PFS in its exemption request. Similarly, PFS's request to use a probabilistic methodology in lieu of the deterministic approach of Part 100 does not

raise any questions about regulatory interpretation or application relative to the facts at issue in this proceeding as expressed in contention Utah L.<sup>3</sup>

Accordingly, we see no basis for granting the State's request to compel PFS to utilize section 2.758 as its exemption avenue.

B. Amending Contention Utah L

Similarly, the State's alternative request for relief -- the amendment of contention Utah L -- also provides no basis for Board action at this time. Putting aside the fact there is a considerable question whether the State has really framed what could be considered a "contention" relative to the PFS request, in these circumstances the State's request for adjudicatory consideration of its concerns is premature.

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<sup>3</sup> Nor do we find that the Three Mile Island case relied upon by the State mandates a different result. In that instance, the Commission found section 2.758 was not the appropriate vehicle for considering whether an exemption was needed relative to a regulatory provision establishing a design basis for post-accident combustion gas control systems. Although the Commission acknowledged that hydrogen gas generation during the then-recent Three Mile Island Unit 2 accident was well in excess of the design basis amount, the Commission concluded a section 2.758 waiver was not the appropriate response to address the issue because that condition did not create any special circumstances relative to the particular case before the Board. Rather, the Commission held the issue was a generic matter relating to all light water power reactors that should be addressed in a rulemaking proceeding that it intended to initiate. See CLI-80-16, 11 NRC at 675. How the Commission's holding in that case provides any support for the State's position here is not apparent.

The question of when a new or amended contention must be filed in order to meet the late-filing standards of 10 C.F.R. § 2.714(a) -- and specifically the critical criteria concerning "good cause" for late filing -- is one we have already explored in this proceeding in other contexts. See, e.g., LBP-99-7, 49 NRC 124, 128 (1999); see also LBP-99-3, 49 NRC 40, 47-48 (1999) (late-intervention petition), aff'd, CLI-99-10, 49 NRC \_\_ (Apr. 15, 1999). In large part, this calls for a judgment about when the matter is sufficiently factually concrete and procedurally ripe to permit the filing of a contention.

When dealing with information supplied to the agency by a license applicant, such as now is at issue in connection with the instant PFS exemption request, the concept of factual concreteness requires an inquiry into the question of when the moving party had access to information sufficient to permit it to frame an issue statement with reasonable specificity and basis. And for applicant-supplied information, the concept of procedural ripeness involves consideration of whether, within the context of the agency administrative process that is the subject of an adjudication (e.g., license application review process), the applicant information to which the moving party had access to frame the contention is being put before the agency in a context that is (a) reasonably likely to

have a material impact on the administrative process (e.g., will influence staff consideration of the pending license application); and (b) is subject to consideration in the related adjudicatory proceeding.

In this instance, 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.<sup>4</sup> 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 many

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<sup>4</sup> As the staff notes, see Staff Response at 3, in contrast to the exemption provision for 10 C.F.R. Part 50 governing power reactors, the exemption provision applicable to ISFSIs does not require a showing of "special circumstances" in order to obtain a rule waiver. Compare 10 C.F.R. § 50.12(a)(2) with id. § 72.7. For the reasons we outline above, however, a request to waive the agency's duly adopted rules is never a matter that can be treated as wholly routine.

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.

In addition, the matter of ripeness is further influenced by the question of how that request is to be considered in the adjudicatory process. The Commission has made it clear 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. See United States Department of Energy (Clinch River Breeder Reactor Plant), CLI-81-35, 14 NRC 1100, 1103-04 & n.2 (1981). Consequently, to countenance an adjudicatory challenge to the PFS exemption petition,<sup>5</sup> 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. Obviously, in invoking such authority, we should present the Commission with questions that are as concrete as possible. And, in

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<sup>5</sup> As far as we are aware, there is nothing that precludes the State presently from making the staff aware of its views on the substance of the April 1999 PFS exemption request as part of the staff's review of the request.

the case of the PFS exemption request, any concerns about Board consideration of the merits of the exemption will be most determinant if, and when, the staff acts favorably on the request.<sup>6</sup>

Accordingly, as the State itself has suggested may be true, see State Motion at 2-3, its request to amend contention Utah L is premature.<sup>7</sup> We thus deny it as well,

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<sup>6</sup> As the staff also notes, see Staff Response at 4-5 & n.4, there have been instances in the past when the Commission has sanctioned Licensing Board consideration of exemption requests, most notably Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-84-8, 19 NRC 1154 (1984). There, the Commission directed that an applicant's planned but yet to-be-filed exemption request should be created as an application modification that was subject to Board consideration in the ongoing adjudication regarding the application. See id. at 1155.

Here, however, we cannot find that Shoreham supports the State's position. The PFS exemption application has already been filed with the staff. Under the caselaw cited in the text above and the agency's management directives, see United States Nuclear Regulatory Commission, Management Directives, Directive 9.17 (Sept. 1991) (authority delegation to Executive Director for Operations (EDO)); id. Directive 9.26 (NRC Manual Chapter 0124, § 0124-0311 (Oct. 1989) (authority delegation from EDO to Director, Office of Nuclear Materials Safety and Safeguards)), it is the staff that has the delegated authority to consider the request wholly outside this adjudication.

<sup>7</sup> Our determination to forego action at this time on the State's concerns regarding the PFS exemption request is buttressed by the fact, as the staff notes, see Staff Response at 8-10 & n.7, that there already is an outstanding Commission-approved staff rulemaking plan to modify the seismic design criteria for ISFSIs to encompass a probabilistic (i.e., risk-informed) approach. See LBP-98-7, 47 NRC 142, 179 (contention that seeks to litigate matter clearly about to become subject of rulemaking is inadmissible), aff'd on other grounds, CLI-98-13, 48 NRC 26  
(continued...)

albeit without prejudice to a subsequent filing if the staff acts favorably on the PFS request.

### III. CONCLUSION

The State has asked that a 10 C.F.R. § 72.2 request by PFS for an exemption to the seismic design criteria of 10 C.F.R. Part 100, App. A, be resubmitted as an exemption request under 10 C.F.R. § 2.758(b) so that the exemption can be litigated in this adjudicatory proceeding. We deny that request, finding section 2.758(b) inapplicable because the PFS request has no direct bearing on the only pending geotechnical issue, contention Utah L. Additionally, we deny the State's alternative request to consider its motion as a request to amend its contention Utah L to frame a challenge to the substance of the PFS exemption request. We find that the question of admitting or amending contentions relative to the PFS exemption request must await favorable staff action on that request.

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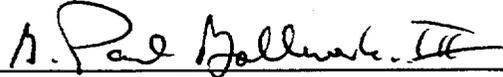
For the foregoing reasons, it is this twenty-sixth day of May 1999, ORDERED, that the State's April 30, 1999 motion to require applicant PFS to apply for a 10 C.F.R. § 2.758(b)

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<sup>7</sup>(...continued)  
(1998). That rulemaking activity is expected to result in the issuance of a proposed rule in fiscal year 2000.

rule waiver or, in the alternative, to amend contention  
Utah L is denied.

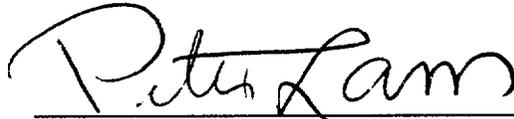
THE ATOMIC SAFETY  
AND LICENSING BOARD<sup>8</sup>



G. Paul Bollwerk, III  
ADMINISTRATIVE JUDGE



Dr. Jerry R. Kline  
ADMINISTRATIVE JUDGE



Dr. Peter S. Lam  
ADMINISTRATIVE JUDGE

Rockville, Maryland

May 26, 1999

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<sup>8</sup> 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

In the Matter of

PRIVATE FUEL STORAGE, LLC

(Independent Spent Fuel Storage  
Installation)

Docket No.(s) 72-22-ISFSI

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LB MEMO & ORDER (LBP-99-21) have been served upon the following persons by U.S. mail, first class, except as otherwise noted and in accordance with the requirements of 10 CFR Sec. 2.712.

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Docket No.(s)72-22-ISFSI  
LB MEMO & ORDER (LBP-99-21)

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Dated at Rockville, Md. this  
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