

October 10, 1997

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

NRC STAFF'S RESPONSE TO STATE OF UTAH'S
MOTION TO SUSPEND LICENSING PROCEEDINGS
AND TO REQUIRE RENOTICE OF THE APPLICATION

INTRODUCTION

On October 1, 1997, the State of Utah filed a motion seeking (1) the suspension of this proceeding, pending the establishment of a Local Public Document Room ("LPDR") in the vicinity of the site of the independent spent fuel storage installation ("ISFSI") proposed to be constructed and operated by Private Fuel Storage, L.L.C. ("PFS" or "the Applicant"), and the submission of a "substantially complete" application by the Applicant, and (2) issuance of an Order requiring that the opportunity for hearing in this proceeding be renoticed in the *Federal Register*.¹

¹ "State of Utah's Motion to Suspend Licensing Proceedings Pending Establishment of a Local Public Document Room and Applicant's Submission of a Substantially Complete Application, and Request for Re-Notice of Construction Permit/Operating License Application," dated October 1, 1997 ("Motion").

In accordance with 10 C.F.R. § 2.730 and the Licensing Board's scheduling Order of October 7, 1997,² the NRC Staff ("Staff") hereby responds to the State's Motion. For the reasons set forth below, the Staff submits that the Motion should be denied.

BACKGROUND

On June 20, 1997, PFS applied for a license, pursuant to 10 C.F.R. Part 72, to receive, transfer and possess power reactor spent fuel and other radioactive material associated with spent fuel storage in an independent spent fuel storage installation, to be constructed and operated on the Skull Valley Indian Reservation in Tooele County, Utah. On July 31, 1997, the Commission published a "Notice of Consideration of Issuance of a Materials License for the Storage of Spent Fuel and Notice of Opportunity for a Hearing," concerning the PFS application. 62 Fed. Reg. 41,099 (July 31, 1997). The Notice provided that by September 15, 1997, "any person whose interest may be affected by this proceeding and who wishes to participate as a party in the proceeding must file a written request for a hearing and a petition for leave to intervene with respect to the subject materials license in accordance with the provisions of 10 C.F.R. 2.714." *Id.* In response to the Notice, five requests for hearing and/or petitions for leave to intervene were filed by various persons, including the State of Utah.

As required by the Licensing Board's Order of September 23, 1997, on October 1, 1997, the Staff filed a status report concerning its anticipated review schedule.³ The Staff indicated

² "Memorandum and Order (Schedule for Responses to Motions to Suspend Proceeding and for Extension of Time to File Contentions)," dated October 7, 1997.

³ "NRC Staff's Status Report and Response to Requests for Hearing and Petitions to Intervene Filed by (1) the State of Utah, (2) Skull Valley Band of Goshute Indians, (3) Ohngo Gaudadeh Devia, and (4) Castle Rock Land and Livestock, L.C., *et al.*," dated October 1, 1997.

that it currently expects to complete a draft environmental impact statement (EIS) within approximately two years, with a Final EIS to be issued approximately six to twelve months later. Further, the Staff indicated that it currently expects to issue a safety evaluation report (SER) in approximately two to three years. The Staff noted that its review schedule depends upon the prior occurrence of certain other events, including completion of the certification process for the casks to be used by PFS, and the receipt of timely and complete responses from PFS to any requests for information which may be transmitted by the Staff during its review. *Id.*

DISCUSSION

A. The State's Request to Suspend the Proceeding.

The State of Utah requests that the proceeding be suspended pending the establishment of an LPDR and the submission of a "substantially complete" application by PFS. The State has not provided sufficient cause to warrant this relief.

Although the State argues that the application lacks certain information (Motion at 3-4 and 11-14), it is beyond dispute that the application (including, *inter alia*, the safety analysis report, environmental report, and emergency plan),⁴ does contain a considerable amount of information and that it has been docketed for review by the Staff. The question as to whether the application was acceptable for docketing was a determination properly to be made by the Staff, alone. See 10 C.F.R. §§ 2.101(a)(3), 72.16(e); *New England Power Co.* (NEP, Units 1 and 2), LBP-78-9, 7 NRC 271, 280 (1978). Further, even if the State is correct in its assertion that portions of the application are incomplete or lacking in detail, that would not require that

⁴ See Letter from John D. Parkyn (PFS) to Director, Division of Industrial and Medical Nuclear Safety, NMSS, dated June 20, 1997.

the proceeding be suspended. *NEP, supra*, 7 NRC at 282-83.⁵ This is true notwithstanding the possibility, as alleged by the State (Motion at 14), that subsequent supplementation by PFS could trigger the filing of revised or supplemental contentions.⁶

Further, the State's concern over its current lack of access to proprietary documents, such as safety analysis reports pertaining to spent fuel casks (*Id.* at 10-11), may well be cured by the release of those documents under a confidentiality agreement prior to the deadline for filing contentions, or might be cited in support of a request to file certain contentions later -- but, in any event, would not constitute good cause for the total suspension of the proceeding at this time. Nor does the State's assertion that the emergency plan has not been submitted for comment to all appropriate organizations⁷ warrant the suspension of this proceeding, since any

⁵ As the Board in *NEP* further observed, "no statutes or regulations are violated by the NRC's announced long-standing practice of docketing incomplete applications which the applicant is required to flesh out by means of detailed requests for further information and data." *NEP, supra*, 7 NRC at 281. See also, *Curators of the University of Missouri* (TRUMP-S Project), CLI-95-8, 41 NRC 386, 395 (1995) (rejecting the view that an application must be rejected when flaws are found, and may not be modified or improved as the NRC review goes forward, as "incompatible with the dynamic licensing process followed in Commission licensing proceedings"); *Curators of the University of Missouri* (TRUMP-S Project), CLI-95-1, 41 NRC 71, 96 (1995).

⁶ See generally, *Duke Power Co.* (Catawba Nuclear Station, Units 1 and 2), CLI-83-19, 17 NRC 1041, 1045-48 (1983) (discussing criteria for acceptance of late-filed contentions).

⁷ The State asserts that the emergency plan were not submitted for comment to offsite response organizations expected to respond in an emergency "except Tooele County," allegedly in violation of 10 C.F.R. § 72.32 (Motion at 13). It appears that the emergency plan was submitted for comment to at least one offsite response organization, the Tooele County Department of Emergency Management, which then submitted comments on behalf of itself and the Tooele County Sheriff's department. See Letter from Kari Sagers to John D. Parkyn, dated June 3, 1997 (appended to emergency plan). The State has not provided any reason to believe that comments by other officials were required pursuant to 10 C.F.R. § 72.32.

such failure could be remedied by forwarding the plan to such persons or by other means, without prejudice to the petitioners or PFS.

Similarly, although the establishment of a Local Public Document Room (LPDR) could serve to facilitate the petitioners' formulation of contentions in this proceeding (Motion at 6-10), PFS has apparently already transmitted the application and accompanying documents to the State of Utah,⁸ and no reason appears why other persons could not have obtained copies of those documents from the State or PFS, or from the NRC (via the Public Document Room in Washington, D.C., or a Freedom of Information Act request) upon learning that the NRC had received and/or docketed the application. Further, as the State recognizes (*Id.* at 6), there is no legal requirement that an LPDR be established prior to the commencement of hearings in proceedings on ISFSI applications.⁹

Finally, the Staff wishes to inform the Licensing Board and petitioners that an LPDR site in Salt Lake City has now been identified, and it is expected that the LPDR will be established

⁸ See, e.g., "Applicant's Answer to the State of Utah's Motion for an Extension of Time to File Contentions," dated October 6, 1997, at 3).

⁹ While the State argues that a July 7, 1997 *Federal Register* notice concerning the establishment of an LPDR reflected an "implicit" intent to establish the LPDR "at the earliest possible date, before the proceeding commences" (Motion at 8), no such intent, explicit or implicit, appears in that Notice. Rather, the Notice indicates only that an LPDR will be established "once the application . . . has been docketed." See "Private Fuel Storage, LLC Independent Spent Fuel Storage Installation; Intent to Establish Local Public Document Room," 62 Fed. Reg. 36320 (July 7, 1997).

and functioning shortly.¹⁰ Thus, no reason has been shown which would support the suspension of the proceeding at this time.

B. The State's Request to Renotify the Opportunity for Hearing.

The State of Utah requests that the opportunity for hearing in this matter be renoticed in the *Federal Register* (Motion at 15-16). The State, however, fails to demonstrate sufficient cause to warrant the grant of this relief.¹¹ The initial *Federal Register* notice, published on July 31, 1997, provides ample notice to all interested persons of the nature of the proceeding and the requirements for filing petitions to intervene. The fact that PFS may provide further information in supplementing its application is to be expected (*see* discussion *supra*, at 3-4), and does not vitiate the initial notice.

Similarly, the fact that an EIS or SER may not issue until two to three years after the commencement of the proceeding does not constitute an "extremely long" review time (Motion

¹⁰ The Staff has learned that the University of Utah's Marriott Library, located in Salt Lake City, has agreed to host the LPDR. Microfiched documents will be transmitted to the Marriott Library shortly, and a notice announcing the establishment of the LPDR will be published in the *Federal Register* in the near future. Persons desiring to contact or visit the LPDR may contact Mr. Lee Warthen at the Marriott Library documents department.

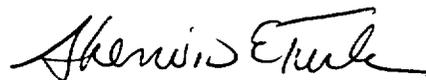
¹¹ The State asserts that the Licensing Board "has the authority to order re-notice of the opportunity for hearing," citing *Rochester Gas & Electric Corp.* (R.E. Ginna Nuclear Plant, Unit 1), LBP-83-73, 18 NRC 1231 (1983), where a notice published nine years prior to issuance of the Staff's SER was found to be "stale." (Motion at 1 n.1). However, while renoticing was ordered in the *Ginna* proceeding, neither in that case nor in any other reported NRC decision was the Licensing Board's authority to require renoticing directly addressed. In this regard, the Staff notes that while 10 C.F.R. § 2.718 authorizes the presiding officer to exercise all powers necessary "to conduct a fair and impartial hearing according to law, to take appropriate action to avoid delay, and to maintain order," including the power to "(e) [r]egulate the course of the hearing," 10 C.F.R. § 2.105(a)(7) specifies that a notice of opportunity for hearing is to be issued by the Commission. Thus, the Licensing Board's authority to require renoticing (as distinct from finding that a prior notice is stale) is not altogether clear.

at 15) and, indeed, does not differ substantially from the Staff's review schedule in other proceedings. Nor does a period of two to three years constitute so long a period of time as to render the prior notice of opportunity for hearing "manifestly stale," under the reasoning of the Appeal Board's decision in *Houston Lighting and Power Co.* (Allens Creek Nuclear Generating Station, Unit 1), ALAB-539, 9 NRC 422, 425 (1979) (a delay of "perhaps 5 to 10 years" would render a prior notice of hearing "manifestly stale" so as to "vitiate" that prior notice). Accordingly, no reason has been shown which would require republishing the notice of opportunity for hearing in the *Federal Register*.

CONCLUSION

For the reasons set forth above, the Staff submits that the State of Utah has not shown that a suspension of this proceeding is required at this time or that the notice of opportunity for hearing should be republished in the *Federal Register*. Accordingly, the Staff opposes the State's Motion and recommends that it be denied.

Respectfully submitted,



Sherwin E. Turk
Counsel for NRC Staff

Dated at Rockville, Maryland
this 10th day of October 1997

October 10, 1997

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NRC STAFF'S RESPONSE TO STATE OF UTAH'S
MOTION FOR EXTENSION OF TIME TO FILE CONTENTIONS

On October 1, 1997, the State of Utah filed a "Motion for Extension of Time to File Contentions" ("Motion"), in which it requested that the time for filing contentions be extended for a period of 45 days beyond the current deadline of October 24, 1997, which was established in the Licensing Board's "Memorandum and Order (Initial Prehearing Order)," dated September 23, 1997. The NRC Staff ("Staff") herewith responds to the State's Motion, in accordance with the Licensing Board's scheduling Order of October 7, 1997.¹

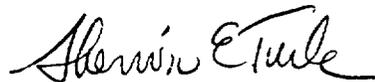
In its Motion, the State provided various reasons in support of its request for an extension. The State further indicated, *inter alia*, that the Staff "does not object to a 30-day extension, with Staff responses due by December 22, 1997" (Motion at 2). While the State has accurately stated the Staff's position, the Staff wishes to elucidate its views herein.

¹ "Memorandum and Order (Schedule for Responses to Motions to Suspend Proceeding and for Extension of Time to File Contentions)," dated October 7, 1997.

The Staff believes that the schedule established by the Licensing Board is reasonable. Nonetheless, the State has identified certain factors, particularly its need for additional time for its experts to assist it in framing contentions (Motion at 6 and n.3), which may warrant a brief extension of the filing deadline. In view of the State's interest in and potential for meaningful participation in this proceeding, the Staff does not oppose its request for a brief extension of time. However, if an extension of time is granted, the Staff believes that a 30-day extension, until November 24, 1997, should provide sufficient time for the filing of contentions.

Further, inasmuch as any extension of time is likely to result in the filing of even more contentions than might otherwise be expected, the Staff believes that other parties (including the Staff) should be afforded a four-week period of time in which to file responses thereto. For instance, if, as the Staff suggests, contentions are required to be filed by November 24, 1997, other parties should be afforded a period of four weeks, until December 22, 1997, in which to respond thereto. Such an extension of the response deadline would provide slightly more time (11 days) than was afforded by the Licensing Board's Order, but would still allow responses to be filed promptly, prior to the departure of various Staff members and Counsel for the holidays.²

Respectfully submitted,



Sherwin E. Turk
Counsel for NRC Staff

Dated at Rockville, Maryland
this 10th day of October 1997

² On the other hand, if the date for filing contentions is extended until December 15, 1997, as requested by the State, the Staff requests that responses be required to be filed by January 20, 1998, due to the intervening holiday season.

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CERTIFICATE OF SERVICE

I hereby certify that copies of (1) "NRC STAFF'S RESPONSE TO STATE OF UTAH'S MOTION TO SUSPEND LICENSING PROCEEDINGS AND TO REQUIRE RENOTICE OF THE APPLICATION" and (2) "NRC STAFF'S RESPONSE TO STATE OF UTAH'S MOTION FOR EXTENSION OF TIME TO FILE CONTENTIONS" in the above captioned proceeding have been served on the following through deposit in the Nuclear Regulatory Commission's internal mail system (with E-mail copies as indicated); by facsimile transmission with a conforming copy by deposit in the United States mail, first class, as indicated by an asterisk; or by United States mail, first class, as indicated by a double asterisk, this 10th day of October, 1997:

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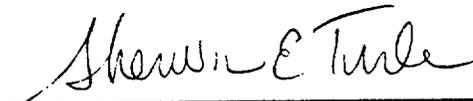
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