

June 11, 1999

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
)	
(Private Fuel Storage Facility))	ASLBP No. 97-732-02-ISFSI

**APPLICANT'S MOTION FOR
SUMMARY DISPOSITION OF CONTENTION UTAH B**

Applicant Private Fuel Storage L.L.C. ("Applicant" or "PFS") files this motion for summary disposition of Contention Utah B – "License Needed for Intermodal Transfer Facility," ("Utah B") pursuant to 10 C.F.R. § 2.749. Summary disposition is warranted on the grounds that there exists no genuine issue as to any material fact relevant to this contention and therefore, under the applicable NRC regulations, PFS is entitled to a decision as a matter of law. This motion is supported by a Statement of Material Facts as to which PFS asserts there is no genuine dispute and the Declarations of John Vincent, Chairman of PFS's Technology Committee, and John Donnell, PFS Project Director.

I. STATEMENT OF THE ISSUES

On April 22, 1998, the Atomic Safety and Licensing Board ("Licensing Board" or "Board") admitted Contention Utah B. Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-98-7, 47 NRC 142, 184-85. Contention Utah B states:

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

Id. at 251. In admitting Utah B, the Board rejected the State's proposed bases two and three, which sought to distinguish prior intermodal transfers and which argued that temporary storage would occur at the Intermodal Transfer Point ("ITP"), making it a spent fuel storage facility.¹ Id. at 184. The Board rejected both paragraphs as:

impermissibl[e] challenge[s] [to] the Commission's regulations or rule-making-associated generic determinations, including the provisions of 10 C.F.R. Part 71 governing transportation of spent fuel from reactor sites to the PFS facility.

Id. Thus, issues such as storage incident to transportation, queuing of rail cars, and the number and maintenance of heavy-haul truck/trailers are no longer part of this contention.

In admitting contention Utah B, the Board identified two specific issues that must be addressed to resolve the contention:

- 1) Will the PFS scheme for operation of the Rowley Junction ITP cause the materials delivered there to remain within the possession and control of an entity

¹ These paragraphs stated (id. at 184):

2. The anticipated volume and quantity of fuel shipments that will pass through Rowley junction is a large magnitude that is unlike the intermodal transfer operations that previously occurred with respect to shipments of spent nuclear fuel from commercial nuclear power plant sites.
3. The volume of fuel shipments will not be capable of passing directly through Rowley Junction and some types of temporary storage of casks will be necessary at the site of the ITP, thus making Rowley Junction a spent nuclear fuel storage facility. Further PFS fails to discuss the number of heavy haul trucks that will be available to haul casks, the mechanical reliability of these units, and their performance under all weather conditions which is necessary to analyze the amount of queuing and storage that will occur at Rowley Junction.

or entities that comply with the terms of the general license issued under section 71.12?

- 2) Will materials delivered to the ITP be handled in such a way as to require specific licensing under Part 72?

Id. at 185. The answer to the first question is “yes.” Materials at the ITP will remain in the possession of an entity that will be subject to compliance under Part 71. The answer to the second question is “no.” No activities will occur at the ITP that are outside of the normal scope of transportation activities regulated under Part 71 and, as such, no activities at the ITP will require specific licensing under Part 72. Thus, the Board must dismiss Contention Utah B as a matter of law because ITP operations will be regulated under Part 71 and are therefore beyond the scope of this Part 72 licensing proceeding.²

II. PFS IS ENTITLED TO SUMMARY DISPOSITION OF UTAH B

The material facts regarding the function and operations of the ITP are not in dispute and, as the Board has already recognized, Utah B is essentially a legal contention appropriate for summary disposition.³ The ITP will be located 1.8 miles west of Rowley Junction. Donnell Dec. at ¶ 3. It will consist of rail sidings and heavy-haul tractor/trailer yard, a single-failure-proof 150-ton gantry crane, and a weather enclosure. Id. at ¶ 4. The ITP will serve one function only, to transfer spent fuel transportation casks from one mode of transportation to another for the purpose of facilitating shipment of the spent fuel to the Private Fuel Storage Facility (“PFSF”), 25 miles south of the ITP. Id. at ¶¶ 3, 6.

² PFS has set forth the relevant law governing summary disposition at some length in its first motion for summary disposition, and the legal basis provided in that motion is incorporated by reference herein. See Applicant’s Mot. Summ. Disp. Utah C at 4-16 (April 21, 1999).

³ See Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-98-10, 47 NRC 288, 291 (1998).

While at the ITP, spent fuel will at all times remain sealed inside a transportation cask and the cask will at all times remain in the shipment mode: loaded on its transportation cradle, with impact limiters installed, in a horizontal configuration. Id. at ¶ 5. The sole operation performed at the ITP will be to transfer the cask from a rail car to a heavy-haul tractor/trailer. Id. at ¶ 6.⁴ All transfer operations will be performed within the cask's design basis as defined by the cask's NRC Certificate of Compliance. Id. at ¶ 7.

PFS's plan for operating the ITP is described in the Affidavit of John Vincent, and is further addressed in PFS's response to the NRC Staff's Request for Additional Information ("RAI") regarding operation of the ITP.⁵ As set forth in Section A below, the PFS plan falls wholly within the bounds of the NRC's (and the Department of Transportation's) regulatory scheme for transporting spent fuel. As set forth in Section B, materials at the ITP will remain in the possession of an entity subject to Part 71, and as set forth in Section C, no activities that require regulation under Part 72 will be conducted at the ITP.

A. PFS's Plan for Operating the ITP Falls Within the General Regulatory Scheme for Transporting Spent Fuel under 10 C.F.R. Part 71

Under 10 C.F.R. Part 71, the transportation of spent fuel is regulated by both NRC and DOT.⁶ NRC and DOT have allocated responsibility for regulating radioactive material transportation, including spent nuclear fuel, through a Memorandum of Understand-

⁴ PFS will not use the ITP as a repackaging facility, staging facility, or buffer storage facility. Id.

⁵ See PFS RAI Response, ITP-1 at 1-6 (Feb. 10, 1999). A copy of the ITP RAI response is attached as Exhibit 2 to the Affidavit of John Vincent.

⁶ See 10 C.F.R. §§ 71.0, 71.5 and 71.12 (compliance with 10 C.F.R. Parts 70 and 73 and DOT transportation regulations required). Spent nuclear fuel is included within Class 7, Radioactive Materials, in the DOT hazardous materials transportation regulations. See 49 C.F.R. Part 173 Subpart I.

ing (“MOU”). 44 Fed. Reg. 38,690 (1979). Under the MOU, NRC is responsible for regulating transportation licensing, packaging and physical protection; DOT regulates preparation of a shipment for transportation and transportation operations.

The NRC licenses the transportation of spent fuel under two related regulatory provisions, 10 C.F.R. § 71.12 and 10 C.F.R. § 70.20a. The shipment of spent nuclear fuel is licensed under the general license in 10 C.F.R. § 71.12, which provides that:

A general license is hereby issued to any licensee of the Commission to transport, or to deliver to a carrier for transport, licensed material in a package for which a license, certificate of compliance, or other approval has been issued by the NRC.

(Emphasis added.) In turn, the possession of spent nuclear fuel during shipment by carriers, to whom the general licensee delivers the spent fuel for transport, is licensed under 10 C.F.R. § 70.20a, which issues a general license “to any person to possess . . . irradiated reactor fuel . . . in the regular course of carriage for another or storage incident thereto.”

Here, the shipper of the spent fuel from the originating reactor site will be the reactor licensee, who will ship the spent fuel under the general license authority of 10 C.F.R. § 71.12. Vincent Dec. at ¶ 3. The reactor licensee will contract with one or more carriers – as authorized under the general license provisions of 10 C.F.R. § 71.12 – to transport the spent fuel to the PFSF. *Id.* at ¶ 4. Each carrier to which custody and control of the spent fuel is given will “possess” the spent fuel under the general license provisions of 10 C.F.R. 70.20a. Under PFS’s current plans, the carrier operating the ITP and

in possession of the spent fuel at the ITP will be PFS (or alternately PFS will arrange for another entity to be the carrier conducting ITP operations).⁷

The general license for transportation in 10 C.F.R. § 71.12 requires that the spent fuel be transported in transportation casks certified by the NRC under 10 C.F.R. Part 71.⁸ The PFS plan for operating the ITP will meet these NRC requirements. Spent fuel at the ITP will at all times remain sealed inside an NRC-certified transportation cask and all transfer operations will be performed within the transportation cask's design basis as defined by the cask's NRC Certificate of Compliance ("CoC"). Donnell Dec. at ¶¶ 5, 7.

The NRC also specifies various physical protection requirements to protect the spent fuel during transit, such as continuous escorts, surveillance of the spent fuel and a continuously staffed communications center to monitor the progress of the shipment.⁹ See 10 C.F.R. § 73.37. Those requirements will be met at the ITP. Under PFS's plan, PFS would, as part of the transportation services agreements with its utility customers, provide armed escorts, a staffed communications center, and other required physical protection for spent fuel shipment from the originating reactors to the PFSF. Vincent Dec. at ¶¶ 10-11. Such protection would be provided for the entire transportation route, includ-

⁷ As discussed in greater detail in the next section, PFS currently plans to operate the ITP as a common/contract carrier under transportation services agreements with its utility customers, the originating reactor licensees. See Vincent Dec. at ¶ 6. Alternately, PFS would arrange for a third party to provide such services. *Id.* PFS would not operate the ITP or transport spent fuel as a private carrier because it will never take title to or own the spent fuel. *Id.* at ¶ 12. Any reference hereinafter to PFS serving as the carrier at the ITP should be taken to include the alternative that PFS may arrange for a third party to perform such services at the ITP.

⁸ See, e.g., 10 C.F.R. Part 71, Subparts E and F (package approval standards and tests).

⁹ Under 10 C.F.R. § 71.12, the shipper is responsible for ensuring the provision of physical protection of shipments of irradiated reactor fuel in accordance with 10 C.F.R. § 73.37. Under 10 C.F.R. § 70.20a, the carrier is responsible for ensuring implementation of the physical protection requirements during shipment.

ing at the ITP. Id. These requirements are similar to what have traditionally and readily been met by shippers and carriers of commercial spent nuclear fuel. Vincent Dec. at ¶ 11.

The DOT regulates the preparation of the loaded transportation cask and transportation vehicle for shipment.¹⁰ Under DOT regulations, these operations are the responsibility of the “shipper,” who must certify prior to the shipment leaving its origination point that the shipment complies with the package selection and preparation regulations. See 49 C.F.R §§ 172.204, 173.22. As discussed above, under PFS’s plan, the “shipper” is the originating reactor licensee and thus it will be responsible for complying with these requirements.¹¹ Because shipment preparation is completed before the shipper turns the shipment over to the carrier, each carrier, including PFS at the ITP, is required only to verify that the transportation cask is accompanied by shipping papers and that the shipment is still marked, labeled and placarded in compliance with the DOT’s regulations. See 49 C.F.R. §§ 172.3, 174.14 and 177.817. PFS will verify that transportation casks arriving at the ITP are accompanied by shipping papers and continue to be marked, labeled, and placarded in compliance with DOT’s regulations. Donnell Dec. at ¶ 7.

DOT also regulates the intermodal transfer of spent fuel transportation casks. The Hazardous Materials Transportation Act (“HMTA”) defines “transportation” to mean “the

¹⁰ Preparation of the loaded cask and vehicle for shipment includes completing the shipping papers and properly marking, labeling and placarding the shipment to notice the shipments contents. See 49 C.F.R. Part 172, Subparts C - F.

¹¹ The shipper is the “licensee [who] deliver[s] to a carrier for transport” under the 10 C.F.R. § 71.12 general license. As the shipper, the originating reactor licensee is also responsible for ensuring that the spent fuel is properly loaded into the canister, pursuant to its Part 50 license, and that the canister is properly loaded into the transportation cask.

movement of property and loading, unloading, or storage incidental to the movement.”

49 U.S.C. § 5102(12). Pursuant to the HMTA, DOT has promulgated a comprehensive set of regulations governing the loading and unloading of shipments to and from different transportation modes, including intermodal transfer between transportation modes.¹² PFS will perform intermodal transfer operations at the ITP in compliance with the applicable DOT transportation operation regulations. See Vincent Dec. at ¶ 10.

In short, PFS’s plan for operating the ITP fits squarely within the scope of activities normally regulated under 10 C.F.R. Part 71. Moreover, both NRC and DOT precedent demonstrate that intermodal transfer of spent fuel transportation casks – as will be performed at the ITP – is regulated under 10 C.F.R. Part 71, not 10 C.F.R. Part 72.

The NRC has directly addressed the licensing required for spent fuel shipments involving intermodal transfer. In the case of the spent fuel shipments from the Shoreham power plant to the Limerick power plant, shipments included intermodal transfer from vessel (a barge) to rail (a rail car).¹³ Just as in this contention, the petitioner in that case challenged the legality of performing the spent fuel shipments, including intermodal transfer, under the general license provisions of 10 C.F.R. Part 71, and asserted that a specific license was required. The NRC Director’s Decision rejected the claim, conclud-

¹² Some specific examples of such regulations include 49 C.F.R. §§ 174.14 (time for transfer), 174.61 (highway or vessel to rail), 176.89 (highway to vessel), 177.834 (loading and unloading from highway), and 177.842 (loading radioactive material packages).

¹³ State of New Jersey (Department of Law and Public Safety’s Requests Dated October 8, 1993), CLI-93-25, 38 NRC 289, 294 (1993); Shipments of Fuel from Long Island Power Authority’s Shoreham Nuclear Power Station to Philadelphia Electric Co.’s Limerick Generating Station, DD-93-22, 38 NRC 365, 371 (1993).

ing that “[u]nder the existing regulatory scheme, a licensee’s transport of nuclear fuel [including intermodal transfer] is by general license.” DD-93-22, supra, 38 NRC at 375.

The Commission addressed the same facts, including intermodal transfer, and reached the same conclusion that a specific license is not required. CLI-93-25, supra, 38 NRC at 294.

The Commission held that “the rule establishing the general license [under 10 C.F.R. § 71.12], in effect, replaces individual licensing proceedings.” Id. (emphasis in original).

The Commission’s determination in Shoreham, that the intermodal transfer of spent fuel is regulated under the 10 C.F.R. Part 71 general license, is further confirmed in the Commission’s guidance in NUREG-0561 for physical protection during spent fuel transportation under Part 71.¹⁴ NUREG-0561 identifies specific physical protection requirements for intermodal transfer,¹⁵ further demonstrating the Commission’s intent that intermodal transfer is regulated under its Part 71 transportation regulations.

Further, both DOT and Federal Court precedent establish that intermodal transfer operations are regulated as part of transportation. DOT has specifically held in Inconsistency Ruling No. IR-19¹⁶ that the intermodal transfer of hazardous materials – in-

¹⁴ NUREG-0561, Physical Protection of Shipments of Irradiated Reactor Fuel (Rev. 1, 1980). The Commission explicitly endorsed and adopted this NUREG when it promulgated 10 C.F.R. § 73.37. 45 Fed. Reg. 37,399 (1980).

¹⁵ For example, NUREG-0561 makes repeated reference to “the particular mode(s) of transportation utilized for the shipment.” See NUREG-0561 at 2, 9 and 33 (emphasis added). In order to have more than one transportation mode within a particular shipment, there must be intermodal transfer between the different modes as part of the shipment. Moreover, NUREG-0561 affirms that intermodal transfer from railcar (or vessel) to truck is included in transportation by identifying specific “requirements affecting the road portions of a spent fuel shipment by rail or sea.” NUREG-0561 at 36; see also id. at 50.

¹⁶ 52 Fed. Reg. 24,404 (1987) (“IR-19”). In an “Inconsistency Ruling,” the DOT determines whether the provisions of State statutes and regulations are already regulated by the DOT’s hazardous materials regulations (“HMR”), and are therefore preempted under the HMTA. See 52 Fed. Reg. at 24,405.

cluding radioactive materials – is regulated by DOT under its hazardous materials regulations.¹⁷ DOT’s determination in IR-19 regarding intermodal transfer was affirmed by the U.S. Court of Appeals for the Ninth Circuit.¹⁸

Thus, no doubt can exist that the intermodal transfer of spent fuel transportation casks from railcars to heavy-haul trailers that will occur at the ITP is within the scope of, and is regulated by, NRC and DOT regulations concerning spent fuel transportation.

B. Materials at the ITP will Remain Within the Possession and Control of an Entity or Entities Subject to the General License Issued Under Section 71.12

The answer to the first issue identified by the Board in admitting Utah B – “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” – is plainly yes. Under the PFS plan for operating the ITP, described above, the shipment of spent nuclear fuel will be under the auspices of the originating reactor licensee’s (the shipper’s) general

¹⁷ In IR-19, the DOT determined that Nevada Administrative Code provisions governing certain railroad-related loading, unloading, transfer and storage operations for hazardous materials were already addressed in DOT regulations and were therefore preempted under the HMTA. *Id.* at 24,411. The hazardous materials in the Nevada regulations specifically included radioactive materials. *Id.* at 24,405. The Nevada Administrative Code Provision subject to preemption in IR-19 attempted to require a State permit in order to, *inter alia*, “transfer hazardous material from railroad property to another means of transportation.”¹⁷ *Id.* at 24,405. The DOT ruled in IR-19 that Nevada’s “coverage of intermodal transfers” is included within the HMTA coverage of “movement of property by any mode.” *Id.* at 24,407 (emphasis added). The DOT cited several examples of provisions in its transportation regulations that regulate “the railroad transportation-related loading, unloading, or transfer of hazardous materials.” *Id.* (emphasis added). DOT concluded that the Nevada intermodal transfer regulation was preempted under the HMTA because it was an “activit[y] extensively covered by the HMTA and the HMR.” *Id.* at 24,407, 24,411.

¹⁸ *Southern Pac. Transp. Co. v. Pub. Serv. Comm’n of Nev.*, 909 F.2d 352, 358-59 (9th Cir. 1990). In its decision affirming IR-19, the Ninth Circuit determined that DOT’s transportation regulations provide “extensive regulation of loading, unloading, transfer and storage incidental to transportation of hazardous materials.” *Id.* at 358.

license for transporting spent nuclear fuel under 10 C.F.R. § 71.12. Under that general license, the originating reactor licensee is authorized to “deliver to a carrier for transport” spent fuel packaged in an NRC-certified transportation cask. 10 C.F.R. § 71.12(a). The originating reactor licensee may contract with carriers to complete the shipment. Under the PFS plan for operating the ITP, described above, PFS (or a third party, see n.7) will be the carrier operating the ITP under contract to the originating reactor licensee. As such, PFS will be authorized under the general license in 10 C.F.R. § 70.20a to “possess” the spent fuel transportation casks at the ITP as part of the “regular course of carriage for another.”

Thus, spent fuel transportation casks at the ITP will be in the possession and control of an entity subject to the terms and conditions of the general license of 10 C.F.R. § 71.12, namely a carrier authorized to possess the spent fuel being shipped under 10 C.F.R. § 70.20a. There is no physical or legal impediment to PFS being such a carrier at the ITP. The NRC itself sets no limitation on entities being carriers. It simply defines “carrier” to be “a person engaged in the transportation of passengers or property by land or water as a common, contract, or private carrier, or by civil aircraft.” 10 C.F.R. § 71.4.

Similarly, there is no physical or legal impediment to PFS qualifying and performing as a carrier under other applicable regulatory regimes. Should PFS choose the heavy-haul alternative for shipping spent fuel to the PFSF (which includes intermodal transfer), it would file an appropriate application to qualify as a motor common or con-

tract carrier with the Federal Highway Administration ("FHWA").¹⁹ Vincent Dec. at ¶ 7. To qualify as a carrier with FHWA, PFS would need to implement certain safety programs, such as a driver safety training program and a means to oversee driver qualification requirements and would also need to submit proof of surety bonds for bodily injury, property damage, and cargo liability. Id. Should PFS chose the ITP alternative, it would undertake steps to meet these and other requirements necessary to qualify as a motor carrier with FHWA. Id. PFS would also take the necessary steps to qualify as a carrier of hazardous materials under applicable DOT regulations, which entail registration with DOT and payment of a nominal (\$300) registration fee (49 C.F.R. § 107.601(a)) and compliance with DOT hazardous materials transportation requirements. Id. at ¶ 8.

Once registered, PFS will have to comply with the requirements applicable to carriers of spent fuel. PFS will comply with all such requirements to carry sealed spent fuel transportation casks. Donnell Dec. at ¶¶ 5, 7. The primary requirement imposed by NRC regulations on carriers of spent fuel transportation casks is to provide physical protection in accordance with 10 C.F.R. § 73.37. See 10 C.F.R. § 70.20a. As stated above, PFS intends to provide physical protection at the ITP, including the provision of escorts and continuous surveillance of transportation casks at the ITP, as part of the transportation service agreements with its utility customers. PFS will also comply with the other NRC requirements applicable to carriers of spent fuel.²⁰

¹⁹ 49 C.F.R. § 365.105. There is generally no distinction between common and contract carriers under FHWA regulations except common carriers must file proof of cargo insurance while contract carriers are not required to do so. 49 C.F.R. 365.109(a)(5)(iii).

²⁰ Most requirements of the transportation general license are on the shipper. See 10 C.F.R. § 71.12(b)-(c) (quality assurance; documentation; notice; conformance with CoC; meet NRC and DOT regulations).

In identifying the two issues, set forth in Section I above, to be addressed under Utah B, the Board referred to the State's assertion that "PFS will be receiving and handling spent fuel at the ITP using PFS owned and operated equipment" as well as to the Prehearing Transcript at pages 144-162 for matters to be considered in resolving these issues. LBP-98-7, 47 NRC at 185. Among the items discussed in the prehearing transcript was whether it made any difference if PFS employees operated the ITP, unloading, handling and transferring casks, or if PFS owned the ITP building and crane. As made clear above, PFS can receive and handle spent fuel at the ITP and undertake the operations at the ITP as a carrier without taking possession for the purpose of interim storage.²¹ Therefore, it makes no difference that PFS employees will be operating the ITP, unloading, handling and transferring spent fuel transportation casks, for PFS will be doing so as a carrier. For the same reason, it is of no consequence that PFS will own the building and crane, since activities at the ITP are subject to Part 71 by virtue of the nature of the activities conducted there, not by virtue of the ownership of the physical structures.

C. Materials Delivered to the ITP Will Not be Handled in Such a Way as to Require Specific Licensing Under Part 72

The answer to the second issue identified by the Board in admitting Utah B – whether the material delivered to the ITP “will be handled in such a way as to require

The carrier is required to provide physical protection for the sealed transportation cask and to handle the cask in conformance with its CoC. See 10 C.F.R. §§ 70.20a, 71.12(c)(2). The only cask handling operation performed at the ITP is to transfer the cask from a rail car to a heavy-haul trailer. The entire transfer operation will be performed in conformance with the transportation cask's CoC. Donnell Dec. at ¶¶ 6-7.

²¹ The License Application specifically provides that receipt and inspection for acceptance of a shipment by PFS for the purposes of storage at the PFSF will be performed at the PFSF on the Skull Valley Indian Reservation. Donnell Dec. ¶ 9. It is at the PFSF, not the ITP, that the spent fuel is transferred from the transportation casks into storage casks and placed on the concrete pads for storage.

specific licensing under Part 72” – is plainly no. A spent fuel transportation cask at the ITP will be handled at all times in conformance with its CoC and the NRC and DOT regulatory scheme for transportation of spent nuclear fuel. See supra, n.20. Physical protection, radiation protection and emergency preparedness are all required under the transportation regulations and will be provided as such at the ITP.²² See Donnell Dec. at ¶¶ 7-8. The PFS plan for operation of the ITP contemplates nothing different than that which is normally regulated under the transportation regulations in Part 71.

The State in its opposition may try to distinguish the ITP operations from previous intermodal transfers by arguing that the frequency of intermodal transfers at the ITP will be greater than previous instances and will result in incidental storage of transportation casks at the ITP. The Board has already rejected these arguments and should do so again. The simple fact is that intermodal transfers of spent fuel transportation casks are, and always have been, regulated under the general license provisions of Part 71. The frequency of intermodal transfers does not change the applicable regulations; nor does the fact that some incidental storage of transportation casks may occur during the intermodal transfer operations. Such arguments are, as already recognized by the Board, a direct challenge to the NRC’s transportation regulations as they exist.

Specific licensing of intermodal transfer at the ITP under Part 72 would violate the Federal regulatory scheme for radioactive materials transportation. Congress defined hazardous materials transportation to include “loading [and] unloading” of transportation

²² See 10 C.F.R. § 73.37 (physical protection); 10 C.F.R. § 71.47, 49 C.F.R. § 173.441 (radiation protection); 49 C.F.R. § 171.15, 49 C.F.R. Part 172, Sub. G; 44 C.F.R. Part 351 (emergency preparedness).

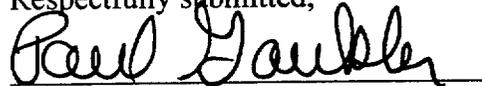
packages within a shipment. See § II.A. Pursuant to the HMTA and the NRC-DOT MOU on regulation of radioactive materials transportation, DOT has promulgated regulations covering the intermodal transfer of transportation casks. Id. Specific licensing of ITP operations by the NRC under Part 72 would be inconsistent with Congress' intent in the HMTA and the long-standing MOU between the NRC and the DOT.

Specific licensing of intermodal transfer at the ITP under Part 72 would also be contrary to NRC, DOT and Federal Court case precedent. The Commission determined in the Shoreham case that spent fuel shipments including intermodal transfer are regulated under the Part 71 general license provisions, and do not require specific licensing. Id. The DOT determined in IR-19, and was affirmed by the U.S. Court of Appeals for the Ninth Circuit, that intermodal transfer of radioactive materials is regulated under its hazardous materials transportation regulations. Id. The Board should follow this long-standing precedent and dismiss Utah Contention B in its entirety.

III. CONCLUSION

For these reasons, the Board should grant PFS summary disposition on Utah Contention B and dismiss the Contention.

Respectfully submitted,



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Dated: June 11, 1999

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**STATEMENT OF MATERIAL FACTS
ON WHICH NO GENUINE DISPUTE EXISTS**

The Applicant submits, in support of its motion for summary disposition of Contention Utah B, this statement of material facts as to which the Applicant contends that there is no genuine issue to be heard.

1. The ITP consists of rail sidings and heavy-haul tractor/trailer yard, a single-failure-proof 150-ton gantry crane, and a weather enclosure. Donnell Dec. at ¶ 4.
2. Spent fuel at the ITP will at all times remain sealed inside transportation casks. Id. at ¶ 5.
3. The transportation casks at the ITP will at all times remain in shipment mode: loaded on transportation cradles, with impact limiters installed, in a horizontal configuration. Id.
4. The sole operation performed at the ITP will be to transfer transportation casks from rail car to heavy-haul tractor/trailer. Id. at ¶ 6.
5. All transfer operations will be performed within the transportation cask's design basis as defined by the cask's NRC Certificate of Compliance. Id. at ¶ 7.
6. The shipper will be the originating reactor licensee. Vincent Dec. at ¶ 3.
7. The carrier in possession of the spent nuclear fuel at the ITP will be PFS, or PFS will arrange for a carrier. Id. at ¶¶ 4, 6.

8. If PFS choose the ITP/heavy-haul alternative for shipping spent nuclear fuel to the PFSF, PFS will file an application with the FHWA and undertake other necessary steps to qualify as a motor carrier with the FHWA for operating the ITP, or arrange for a third party to operate the ITP as a motor carrier. Id. at ¶¶ 7, 8.
9. Should PFS operate the ITP, it would also take the necessary steps to file an appropriate application and qualify as carrier of hazardous materials with the DOT. Id. at ¶ 8.
10. The origination point of the shipment will be the originating reactor site where the cask is loaded. Id. at ¶¶ 3, 4.
11. The destination of the shipment from the reactor site will be the Private Fuel Storage Facility site on the Skull Valley Indian Reservation. Id. at ¶¶ 4, 5; Donnell at ¶ 9.

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CERTIFICATE OF SERVICE

I hereby certify that copies of the "Applicant's Motion for Summary Disposition of Contention Utah B," "Statement of Material Facts on Which No Genuine Dispute Exists," "Declaration of John Vincent" and "Declaration of John Donnell" were served on the persons listed below (unless otherwise noted) by e-mail, and exhibits by facsimile, with conforming copies by U.S. mail, first class, postage prepaid, this 11th day of June, 1999.

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U.S. Nuclear Regulatory Commission
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Office of the Secretary
U.S. Nuclear Regulatory Commission
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Attention: Rulemakings and Adjudications
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* Adjudicatory File
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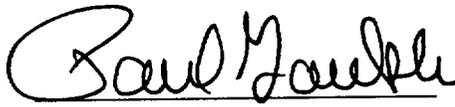
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