

June 8, 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) )

**APPLICANT'S BRIEF IN RESPONSE TO THE ATOMIC SAFETY  
AND LICENSING BOARD'S JUNE 2, 1999 MEMORANDUM AND ORDER**

**I. INTRODUCTION**

Applicant Private Fuel Storage L.L.C. ("Applicant" or "PFS") hereby files this brief in response to the Atomic Safety and Licensing Board's ("Board") June 2, 1999 "Memorandum and Order (Providing Opportunity to Address Import of License Application Amendment)" ("Order"), which provided the parties with the opportunity to address the significance of PFS's Amendment 3 to its June 1997 application ("Amendment") with respect to PFS's April 21, 1999 motion for summary disposition ("Motion") of the State of Utah's Contention C.

As explained fully below, the filing of the Amendment has no impact on the merits of the Motion. Accordingly, the Board should summarily dismiss Utah Contention C for the reasons set forth in the Motion.

**II. BACKGROUND**

On December 10, 1998, the NRC Staff sent PFS a Request for Additional Information ("RAI") that, among other things, asked PFS to revise accident dose

calculations in PFS' Safety Analysis Report using the new NRC Staff guidance. On February 10, 1999, PFS responded to the December 10, 1998 RAI.<sup>1</sup> PFS's response to RAI 7-1 included the revised analysis it had performed in accordance with the new guidance. PFS forwarded a copy of its RAI responses to Utah via overnight mail on February 10, 1999.<sup>2</sup>

On April 21, 1999, Applicant filed its Motion seeking summary disposition of Utah Contention C. As the Motion fully explains, the revised dose analysis set forth in PFS's February 10, 1999 RAI response rendered moot the issues raised in Utah Contention C.<sup>3</sup> On May 7, 1999, Applicant stated that it would be amending the application to reflect its RAI responses.<sup>4</sup> In its May 11, 1999 opposition to Applicant's Motion, Utah argued, among other things, that Contention C was not moot because PFS had not yet amended its application and that the RAI response was "mere correspondence".<sup>5</sup> The NRC Staff's response to Applicant's Motion concurred with PFS that summary disposition of Utah Contention C was proper, noting that PFS's RAI responses resolved the issues raised by the contention.<sup>6</sup> On May 19, 1999, Applicant

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<sup>1</sup> Letter from John D. Parkyn to NRC ("Response to Request for Additional Information") (February 10, 1999).

<sup>2</sup> A copy of the calculations and other backup to PFS's responses, including the backup calculations for PFS's response to RAI 7-1, were sent to Utah for next business day delivery on February 12, 1999.

<sup>3</sup> See Motion at pp. 2-4 and 16-18.

<sup>4</sup> Applicant's Response to State of Utah's Proprietary and Non-Proprietary Motions to Compel Applicant to Respond to State's First Set of Discovery Requests (May 7, 1999) at p. 6, n.12.

<sup>5</sup> State of Utah's Opposition To Applicant's Motion For Summary Disposition Of Contention C (May 11, 1999) at pp. 7-11.

<sup>6</sup> NRC Staff's Response to Applicant's Motion for Summary Disposition of Utah Contention C (Dose Limits) (May 11, 1999). The Staff noted that, even if the Amendment had not been filed, at most a license condition could have imposed to require that the application be amended.

submitted the Amendment. Among other things, the Amendment revised chapter eight of PFS's Safety Analysis Report to incorporate the revised dose analysis contained in Applicant's RAI response.

### III. ARGUMENT

As PFS demonstrated in its Motion, the revised dose analysis contained in its February 10, 1999 RAI response rendered moot each of the issues identified in Utah Contention C. PFS's subsequent Amendment has no impact on the arguments set forth in the Motion. The Amendment does no more than formally incorporate into the application the revised dose calculations contained in Applicant's RAI response.

Utah claims that PFS's RAI responses are "mere correspondence".<sup>7</sup> Nothing could be further from the truth. The Commission's regulations, 10 C.F.R. § 2.102(a), explicitly authorize the Staff to require an applicant to provide additional information for its review of an application. In fact, the NRC may deny an application if the applicant fails to respond to an RAI. See 10 C.F.R. § 2.108(a). Indeed, an applicant is under a legal obligation, subject to sanctions, to ensure that any information it provides to the Commission is "complete and accurate in all respects".<sup>8</sup> Moreover, the Commission has recognized that RAI responses may form the basis for contentions.<sup>9</sup> Given Applicant's obligation to answer RAIs and the potential impact those answers could have on this

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<sup>7</sup> Utah's Opposition at 8 and 9.

<sup>8</sup> 10 C.F.R. § 72.11(a). Violation of this obligation "can result in the full range of enforcement sanctions." Enforcement Policy (NUREG-1600, "General Statement of Policy and Procedure for NRC Enforcement Actions") 63 Fed. Reg. 26630, 26646 (May 13, 1998).

<sup>9</sup> Baltimore Gas & Electric Co. (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), CLI-98-25, 48 NRC 325 (1998).

proceeding, the importance of Applicant's RAI responses cannot be dismissed as "mere correspondence."<sup>10</sup>

In addition, Applicant's February 10 RAI response and the supporting affidavit accompanying the Motion constitute legally sufficient grounds for granting summary disposition. Under the Commission's regulations and case law, summary disposition can be based on pleadings, affidavits, discovery responses, and other documentary information.<sup>11</sup> There is no requirement in regulations or case law that a summary disposition motion be based on a license application or amendment thereto. Here, there is no reason here to doubt the reliability of the information provided by PFS in either the RAI responses or the affidavit. Certainly, Utah has suggested none. Thus, as the NRC Staff's comments concerning the effect of the Amendment recognize, even without the Amendment, summary disposition of Utah Contention C would be proper solely on the basis of the relevant RAI response, because that response "constitutes an implicit revision to the licensing basis."<sup>12</sup>

The Amendment can not have come as a surprise to Utah. PFS previously stated that it intended to file a license amendment formally incorporating into its application the

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<sup>10</sup> Cf. 10 C.F.R. §54.3(a) ("current licensing basis" defined to include commitments made in docketed licensing correspondence as well as design basis information in the final safety analysis report.)

<sup>11</sup> See 10 C.F.R. §2.749(d); Washington Public Power Supply System (WPPSS Nuclear Project No. 1), ALAB-771, 19 NRC 1183, 1189 (1984).

<sup>12</sup> NRC Staff Comments Concerning the Effect of the May 19, 1999 License Application Revision on Applicant's Motion for Summary Disposition of Utah Contention C (Dose Limits) (June 4, 1999) at pp. 5-6. Moreover, the fact that PFS did not file an amendment to its application at an earlier date is not prejudicial to Utah. Even in the case of operating facilities, changes to a safety analysis report must be updated only every six months. 10 C.F.R. 72.70.

analyses and commitments that it made in its RAI responses.<sup>13</sup> PFS had filed several RAI responses prior to the February 10 filing in question here.<sup>14</sup> In no case was the RAI response in the form of a license amendment.<sup>15</sup> In only one instance was the RAI response immediately followed by a license amendment. But Utah was certainly aware that there would be a license amendment to incorporate the February 10 responses. Utah has acknowledged that PFS routinely has updated its license application to incorporate changes to its licensing basis.<sup>16</sup> While Utah claims that “the NRC generally required such commitments to be accompanied by change sheets showing the amendment to the application”, Utah Opposition at 10, it provides neither citation nor basis for such an alleged “requirement”. The Amendment does no more or no less than the relevant RAI response, because both the Amendment and the response contain identical dose calculations.<sup>17</sup> For this reason, the Amendment has no impact on the merits of the Motion, and summary disposition of Utah Contention C is proper.

Utah claims that it is somehow “unfair and prejudicial to the State” for the RAI response to be the basis for the summary disposition motion. Utah Opposition at 9. Utah argues that PFS’ reliance on the RAI response is inconsistent with “long-established

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<sup>13</sup> Applicant’s May 7 Response at p. 6, n.12.

<sup>14</sup> See letters from John D. Parkyn to NRC, dated May 15, 1998, May 19, 1998, June 15, 1998, June 18, 1998, September 15, 1998, and February 11, 1999.

<sup>15</sup> Utah, Opposition at 10, refers to a February 11, 1999 PFS RAI response which “attached change pages to the Topical Report which is attached as an Appendix to its license application.” In fact, the Topical Report to which Utah refers was not (and is not) an Appendix to the PFS license application.

<sup>16</sup> Utah’s Opposition at 10.

<sup>17</sup> Indeed, Utah confirms that with the Amendment, the PFS’ safety analysis report conforms to the RAI response. See Utah Response Regarding Significance of License Amendment Application (June 8, 1999) at 3.

Commission precedent” that changes to the application “are the triggering events which require amendments to contentions.” While the relevance of this argument to the summary disposition motion is difficult to fathom, it clearly misstates the Commission’s long-established precedent on the triggering events for amending or adding contentions.

According to the Commission, “[u]nder our practice, a petitioner has an ‘ironclad obligation’ to examine the application, and other available documents, with sufficient care to uncover any information which could serve as the foundation for a contention.”<sup>18</sup>

The Commission has found that this obligation applies to “publicly available documentary material pertaining to the facility in question. . . .”<sup>19</sup> Moreover, the Commission specifically has recognized that RAI responses may form the basis for contentions:

If a petitioner concludes that a staff RAI or an applicant RAI response raises a legitimate question about the adequacy of the application, the petitioner is free to posit that issue as a new or amended contention, subject to complying with the late-filing standards of section 2.714(a).<sup>20</sup>

Consistent with these principles, the submission of RAI responses, whether or not formally incorporated into a license application, triggers an obligation to file timely contentions relating to issues raised therein. Accordingly, Utah’s obligation to file or

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<sup>18</sup> Duke Energy Corp. (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 48 NRC \_\_\_, 1999 NRC Lexis 52, \*20 (1999) (emphasis added).

<sup>19</sup> Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), CLI-83-19, 17 NRC 1041, 1045 (1983).

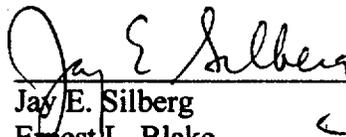
<sup>20</sup> Baltimore Gas & Electric Co., CLI-98-25, 48 NRC 325, quoting Baltimore Gas & Electric Co. (Calvert Cliffs Nuclear Power Plant, Units 1 and 2) LBP-98-26, 48 NRC 232, 243 (1998). The Commission also recently has recognized that issues forming the basis for contentions may “emerge” from RAIs. Duke Energy Corp., CLI-99-11, 1999 NRC Lexis at \*21.

amend contentions based on the dose calculations contained in Applicant's RAI responses began on February 11, 1999 (the date Utah received those responses), and not on the date Applicant filed its Amendment. Utah's suggestion that it can ignore information that it has had for many months would make a mockery of the Commission's licensing process.

#### IV. CONCLUSION

For the foregoing reasons, Applicant requests that the Board dismiss Utah Contention C as requested in Applicant's Motion.

Respectfully submitted,



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Jay E. Silberg  
Ernest L. Blake  
Paul A. Gaukler  
SHAW PITTMAN  
2300 N Street, N.W.  
Washington, DC 20037  
202-663-8000

Dated: June 8, 1999

Counsel for Private Fuel Storage L.L.C.

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NUCLEAR REGULATORY COMMISSION**

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(Private Fuel Storage Facility) )

**CERTIFICATE OF SERVICE**

I hereby certify that copies of the Applicant's Brief in Response to the Atomic Safety and Licensing Board's June 2, 1999 Memorandum and Order was served on the persons listed below (unless otherwise noted) by e-mail with conforming copies by U.S. mail, first class, postage prepaid, this 8<sup>th</sup> day of June 1999.

G. Paul Bollwerk III, Esq., Chairman  
Administrative Judge  
Atomic Safety and Licensing Board Panel  
U.S. Nuclear Regulatory Commission  
Washington, D.C. 20555-0001  
e-mail: [GPB@nrc.gov](mailto:GPB@nrc.gov)

Dr. Jerry R. Kline  
Administrative Judge  
Atomic Safety and Licensing Board Panel  
U.S. Nuclear Regulatory Commission  
Washington, D.C. 20555-0001  
e-mail: [JRK2@nrc.gov](mailto:JRK2@nrc.gov); [kjerry@erols.com](mailto:kjerry@erols.com)

Dr. Peter S. Lam  
Administrative Judge  
Atomic Safety and Licensing Board Panel  
U.S. Nuclear Regulatory Commission  
Washington, D.C. 20555-0001  
e-mail: [PSL@nrc.gov](mailto:PSL@nrc.gov)

\* Susan F. Shankman  
Deputy Director, Licensing & Inspection  
Directorate, Spent Fuel Project Office  
Office of Nuclear Material Safety &  
Safeguards  
U.S. Nuclear Regulatory Commission  
Washington, D.C. 20555

Office of the Secretary  
U.S. Nuclear Regulatory Commission  
Washington, D.C. 20555-0001  
Attention: Rulemakings and Adjudications  
Staff  
e-mail: hearingdocket@nrc.gov  
(Original and two copies)

Catherine L. Marco, Esq.  
Sherwin E. Turk, Esq.  
Office of the General Counsel  
Mail Stop O-15 B18  
U.S. Nuclear Regulatory Commission  
Washington, D.C. 20555  
e-mail: pfscase@nrc.gov

John Paul Kennedy, Sr., Esq.  
Confederated Tribes of the Goshute  
Reservation and David Pete  
1385 Yale Avenue  
Salt Lake City, Utah 84105  
e-mail: john@kennedys.org

Diane Curran, Esq.  
Harmon, Curran, Spielberg &  
Eisenberg, L.L.P.  
1726 M Street, N.W., Suite 600  
e-mail: dcurran@harmoncurran.com

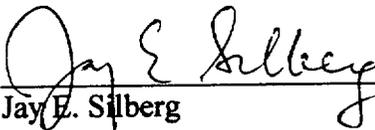
\* Adjudicatory File  
Atomic Safety and Licensing Board Panel  
U.S. Nuclear Regulatory Commission  
Washington, D.C. 20555-0001

Denise Chancellor, Esq.  
Assistant Attorney General  
Utah Attorney General's Office  
160 East 300 South, 5<sup>th</sup> Floor  
P.O. Box 140873  
Salt Lake City, Utah 84114-0873  
e-mail: dchancel@state.UT.US

Joro Walker, Esq.  
Land and Water Fund of the Rockies  
2056 East 3300 South, Suite 1  
Salt Lake City, UT 84109  
e-mail: joro61@inconnect.com

Danny Quintana, Esq.  
Skull Valley Band of Goshute Indians  
Danny Quintana & Associates, P.C.  
50 West Broadway, Fourth Floor  
Salt Lake City, Utah 84101  
e-mail: quintana@xmission.com

\* By U.S. mail only

  
Jay E. Silberg

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