

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))

CERTIFICATE OF SERVICE

I hereby certify that copies of the "NRC STAFF'S POSITION REGARDING THE IMPACT OF LBP-99-34 ON OTHER CONTENTIONS" 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 Nuclear Regulatory Commission's internal mail system, as indicated by an asterisk, with copies by electronic mail, or by deposit in the United States mail, first class, as indicated by double asterisk, with copies by electronic mail as indicated, this 7th day of September, 1999.

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September 7, 1999

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NRC STAFF'S POSITION REGARDING THE
IMPACT OF LBP-99-34 ON OTHER CONTENTIONS

INTRODUCTION

Pursuant to the Atomic Safety and Licensing Board's "Memorandum and Order (Granting Motion for Summary Disposition Regarding Contention Utah B)," LBP-99-34, 50 NRC ___ (Aug. 30, 1999), the staff of the Nuclear Regulatory Commission (Staff) hereby submits its views on the impact of LBP-99-34 on portions of other admitted contentions that pertain to the Rowley Junction Intermodal Transfer Point (ITP). See LBP-99-34, slip op. at 21. For the reasons set forth below, the Staff submits that the Licensing Board's grant of summary disposition regarding Utah Contention B merits the dismissal of all other ITP-related contentions.

BACKGROUND

Contention Utah B ("License Needed for Intermodal Transfer Facility") asserted that the ITP is a "de facto interim spent fuel storage facility" and, as such, must be licensed under 10 C.F.R. Part 72. See *Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation)*, LBP-98-7, 47 NRC 142, 184, 251 (1998). On August 30, 1999, the Board granted

summary disposition of this contention in favor of Private Fuel Storage, L.L.C. (PFS or Applicant). LBP-99-34, *supra*. In ruling on the motion for summary disposition, the Licensing Board concluded that PFS is entitled to summary disposition on the issue of whether the ITP activities are governed by the general licensing provisions of 10 C.F.R. Part 71 and related Department of Transportation (DOT) regulations, so as not to require specific licensing under 10 C.F.R. Part 72. *Id.*, slip op. at 15-16. The Licensing Board further held that since 10 C.F.R. Part 71 and related DOT regulations are applicable to the ITP, assertions that the requirements of 10 C.F.R. Part 72 should apply to the ITP constitute an impermissible challenge to the Commission's established regulatory scheme and cannot be entertained in this proceeding. *Id.* at 17-18.

The Staff's views with respect to the effect of the Board's Order on other admitted contentions pertaining to the ITP are set forth below. For the reasons set forth below, the Staff submits that all of the ITP-related contentions (or portions of contentions) should now be dismissed from this proceeding.

DISCUSSION

1. Utah K/Confederated Tribes B (Inadequate Consideration of Credible Accidents).

The Licensing Board admitted a portion of Utah K/Confederated Tribes B pertaining to the ITP and noted that further litigation on its merits may be subject to disposition of Utah B. LBP-98-7, 47 NRC at 190 & n.12. The relevant portion of the Board's ruling admits the following issue for litigation:

Further, this contention is admitted . . . regarding the State's assertions concerning the impact on the Rowley Junction ITP of accidents involving (1) materials or activities at or emanating from

the facilities specified above, or (2) hazardous materials that pass through Rowley Junction from the Laidlaw APTUS hazardous waste incinerator, the Envirocare low-level radioactive and mixed waste landfill, or Laidlaw's Clive Hazardous Waste Facility and Grassy Mountain hazardous waste landfill.

Id. at 190. At the same time, the Board rejected a portion of this contention regarding lack of consideration of accidents involving trucks or railcars transporting spent fuel casks as they travel to the ITP facility from reactor sites and thereafter along the Skull Valley Road as being an impermissible challenge to "the basic structure of the agency's regulatory processes, requirements, or rulemaking-associated determinations, including 10 C.F.R. Part 71, which places such matters within the ambit of DOT regulation and control." *Id.* at 190-91. Inasmuch as the Licensing Board has now held that the ITP activities are governed by the provisions of 10 C.F.R. Part 71 and DOT regulations, potential safety impacts of accidents on the ITP should likewise be excluded from consideration in the proceeding.

2. Utah N (Flooding)

The Licensing Board admitted Utah N, which presents a safety concern regarding the ITP, noting that further litigation on its merits may be subject to disposition of Utah B. LBP-98-7, 47 NRC at 192 & n.15. This contention states as follows:

Contrary to the requirements of 10 C.F.R. § 72.92, the Applicant has completely failed to collect and evaluate records relating to flooding in the area of the intermodal transfer site, which is located less than three miles from the great Salt Lake shoreline.

Id. at 192, 254. Inasmuch as this contention presents an assertion that the safety of operations at the ITP should be addressed under 10 C.F.R. Part 72 and seeks to impose requirements beyond what is required under Part 72, this contention presents an impermissible challenge to the

Commission's regulatory scheme, similar to Contention Utah B. See LBP-99-34, slip op. at 17-18. Accordingly, this contention should now be dismissed.

3. Utah O (Hydrology)

The Licensing Board admitted a portion of Utah O pertaining to "construction related groundwater impacts and other impacts relative to the Rowley Junction ITP," noting that further litigation on its merits may be subject to disposition of Utah B. LBP-98-7, 47 NRC at 193 and n.16. At the same time, the Licensing Board rejected a portion of this contention that raised issues pertaining to the groundwater impacts of spent fuel shipments on transportation routes as being an impermissible challenge to the Commission's regulations or rulemaking determinations, including 10 C.F.R. Part 71. *Id.* at 192. Now that the Board has held that the ITP activities are also governed by the provisions of 10 C.F.R. Part 71 and DOT regulations, issues pertaining to groundwater impacts of the ITP should likewise be excluded from consideration in the proceeding.

4. Utah R (Emergency Plan)

The Licensing Board admitted a portion of Utah R pertaining to the ITP, which asserted that "PFS does not address transportation accidents or accidents at the intermodal transfer point." LBP-98-7, 47 NRC at 195. The Board noted, however, that further litigation on its merits may be subject to disposition of Utah B. *Id.* at 196 n.18.

The Commission's regulations at 10 C.F.R. § 72.32 establish the emergency planning and preparedness requirements that apply to ISFSIs. This section imposes no requirements for offsite emergency preparedness, nor does it establish emergency planning requirements for transfer points in transportation. The only offsite emergency planning requirements imposed by Part 72 are that ISFSI licensees be committed to notify offsite response organizations and request offsite

assistance, coordinate with offsite response organizations that are expected to assist in an on-site response, effectively use offsite assistance on-site, and make arrangements for providing information to the public. *See* 10 C.F.R. §§ 72.32(a)(8), (15), and (16). Specific planning for offsite protective actions is not required, and offsite response organizations are not required to participate in on-site exercises. *See* 10 C.F.R. §§ 72.32(a)(12) and (15).

As the Licensing Board has recognized, the established regulatory scheme for the transportation of spent fuel is found in 10 C.F.R. Part 71 and related DOT regulations, and it is this regulatory scheme that applies to the ITP. LBP-99-34, slip op. at 17. Assertions that the requirements of 10 C.F.R. Part 72 should apply to the ITP constitute an impermissible challenge to the Commission's established regulatory scheme, seek to impose requirements beyond those set forth in 10 C.F.R. Part 72, and may not be entertained in this proceeding. *Id.* at 17-18. Therefore, this issue should be excluded from consideration in this Part 72 proceeding.

5. Utah S (Decommissioning)

The Licensing Board admitted a portion of Utah S pertaining to the ITP, noting that further litigation on its merits may be subject to disposition of Utah B. LBP-98-7, 47 NRC at 196-97 and n.19. This issue (Basis 11) stated as follows:

The Applicant has failed to provide decommissioning procedures and costs at an intermodal transfer facility (Rowley Junction). In fact the application has failed to provide any significant details concerning the planned structures and operations at the transfer facility.¹

¹ "State of Utah's Contentions on the Construction and Operating License Application by Private Fuel Storage, LLC for an Independent Spent Fuel Storage Facility" ("Utah Contentions"), dated November 23, 1997, at 130.

The State, in support of its contention, relies on the requirements of 10 C.F.R. §§ 72.30(a) and 72.30(b). These regulations pertain to the need for a proposed decommissioning plan to assure that decommissioning of the ISFSI at the end of its useful life will provide adequate protection of public health and safety and to the need for a decommissioning funding plan to show that adequate funds will be available to decommission the ISFSI. See 10 C.F.R. § 72.30. In LBP-99-34, the Licensing Board specifically held that ITP activities are governed by the provisions of 10 C.F.R. Part 71 and DOT regulations. Regulations in 10 C.F.R. Part 72 that pertain to decommissioning of the ISFSI are not applicable to the ITP. Inasmuch as this portion of the contention presents an assertion that operation of the ITP should be addressed under 10 C.F.R. Part 72, and seeks to impose requirements beyond what is required under Part 72, it presents an impermissible challenge to the Commission's regulatory scheme, similar to Contention Utah B. Accordingly, this portion of the contention should be dismissed.

6. Utah T (Inadequate Assessment of Required Permits and Other Entitlements)

The Licensing Board admitted a portion of Utah T pertaining to the ITP and noted that further litigation on its merits may be subject to disposition of Utah B. LBP-98-7, 47 NRC at 197-98 and 198 n.20. The relevant portion of the Board's ruling addressed the following issue:

The Applicant has shown no proof of entitlement to build a transfer facility at Rowley Junction or right to use the terminal there; nor has it identified the number of casks expected on each shipment, or explained the effects of rail congestion or whether Rowley Junction has the capacity of handling the expected number of casks; nor has it shown that Union Pacific is willing and capable to handle shipments to Rowley Junction.

Id. at 197. The Licensing Board rejected a portion of this contention that relied upon rail shipment volume as its basis, for the same reason it rejected this issue in Utah B -- *i.e.*, because

it constitutes an impermissible challenge to "the Commission's regulations or rulemaking-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.* at 184; *cf. id.* at 198 n.20. Inasmuch as the Licensing Board has now held that the ITP activities are governed by the provisions of 10 C.F.R. Part 71 and DOT regulations, issues pertaining to the proof of entitlement to build at the ITP and the willingness and capability of Union Pacific to handle shipments, should likewise be excluded from litigation in this proceeding.

7. Utah U (Impacts of Onsite Storage Not Considered)

The Licensing Board admitted a portion of Utah U (Basis 1), noting that further litigation on its merits may be subject to disposition of Utah B. LBP-98-7, 47 NRC at 199 and n.22. This issue, which was not reprinted in the Board's Order, stated as follows:

The ER fails to consider the impacts of overheating of casks due to the facility's inadequate thermal design. *See* Contention H (Inadequate Thermal Design), whose basis is adopted and incorporated herein by reference.

Utah Contentions at 142. This matter, by its terms, pertains to the facility's thermal design and "onsite" storage, and does not address the ITP. Moreover, nowhere in this contention, nor in Contention H which is referenced herein, is any mention made of the ITP. Therefore, there does not appear to be any ITP-related matter to litigate with respect to Contention U.² In any event,

² To be sure, during oral argument concerning the admission of this contention, the State raised an issue concerning the environmental impacts of potential sabotage at the ITP. *See* Tr. at 525-28. Counsel for the State remarked, "there's an issue here as to whether the intermodal transfer station at Rowley Junction constitutes part of the storage facility that should be subject to protection." Tr. 525. The State's assertion of this matter in oral argument exceeded the scope of the contention's written terms.

however, even if this contention had raised an issue concerning potential sabotage at the ITP, that issue constitutes an impermissible challenge to the Commission's regulatory scheme whereby sabotage during transportation is regulated under 10 C.F.R. Part 71 and the related physical protection requirements of 10 C.F.R. § 73.37 -- and this issue was specifically excluded by the Licensing Board in its ruling on the contention. See LBP-98-7, 47 NRC at 199.³

8. Utah W (Other Impacts Not Considered)

The Board admitted a portion of Utah W pertaining to the ITP, noting that further litigation on its merits may be subject to disposition of Utah B. LBP-98-7, 47 NRC at 201, 202 n.24. The relevant portion of the Board's ruling admits the following issue for litigation:

The Environmental Report does not adequately consider the adverse impacts of the proposed ISFSI and thus does not comply with NEPA or 10 C.F.R. § 51.45(b) in that the Applicant has not adequately considered the impact of flooding on the intermodal transfer point.

Id. at 256; emphasis added. In support of this contention, the State relied solely on Contention Utah N (Flooding), stating that its "basis is incorporated herein." Utah Contentions at 163. Inasmuch as these contentions present an assertion that the safety of operations at the ITP should be addressed under 10 C.F.R. Part 72, and thereby seek to impose requirements beyond what is required under Part 72, this portion of Contention Utah W presents an impermissible challenge to the Commission's regulatory scheme and it should therefore be dismissed.

³ The Staff notes that potential environmental impacts involving transportation were raised in Contention Utah V. See LBP-98-7, 47 NRC at 199-201 and 256.

CONCLUSION

For the reasons set forth above, the Staff submits that the remaining ITP-related contentions (or portions of contentions) should be dismissed.

Respectfully submitted,

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Dated at Rockville, Maryland
this 7th day of September 1999