

September 7, 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 POSITION ON DISMISSAL OF
ITP-RELATED CONTENTIONS**

Applicant Private Fuel Storage L.L.C. ("Applicant" or "PFS") hereby provides the Atomic Safety and Licensing Board ("Board") with its position regarding dismissal of contentions related to the Intermodal Transfer Point ("ITP") in light of the Board's ruling on contention Utah B. Portions of several contentions in this proceeding are related to the ITP and were admitted subject to the disposition of contention Utah B. In its Memorandum and Order (Granting Motion for Summary Disposition Regarding Contention Utah B), the Board afforded the parties an opportunity to address the continuing validity of the ITP-related portions of these contentions and to provide their views on whether, in light of the Board's ruling on Utah B, these contentions should be dismissed as they relate to the ITP. Private Fuel Storage L.L.C. (Independent Spent Fuel Storage Installation), LBP-99-34, 50 NRC __, __ (slip op. at 19-20) (Aug. 30, 1999).

I. BACKGROUND

In its Memorandum and Order dismissing Utah B, the Board ruled that activities at the ITP are transportation activities governed by 10 C.F.R. Part 71 and the

complementary regulations of the Department of Transportation (“DOT”), and are not Independent Spent Fuel Storage Installation (“ISFSI”) activities governed by Part 72. The Board held that “[t]he established regulatory scheme for the transportation of spent nuclear fuel is found in 10 C.F.R. Part 71 and the complementary DOT regulations and is applicable to the ITP.” Id. (slip op. at 17) (footnote omitted). As a corollary, the Board also held that the ITP “cannot, and need not, be regulated under 10 C.F.R. Part 72.” Id. (slip op. at 21).

The Board pointed out that “the State’s concerns challenging this [Part 71] regulatory scheme, to the degree [the State] desires that scheme to mirror the various requirements of Part 72, must be pursued as an effort to change those rules,” and are not appropriate for adjudication in this Part 72 licensing proceeding. Id. (slip op. at 17-18) (citing 10 C.F.R. § 2.758) (footnote omitted). The Board reiterated the familiar doctrine that “[a]gency adjudications are not the proper forum for challenging applicable federal regulations.” Id. (slip op. at 17). Similarly, any remaining ITP-related contentions that seek to have the Board apply the various requirements of Part 72 to ITP activities are not appropriate for adjudication in this proceeding and, therefore, must be dismissed.

II. ARGUMENT

The remaining ITP-related portions of the State’s contentions should be dismissed because they are premised on the mistaken assertion that ITP activities must meet the requirements of 10 C.F.R. Part 72. In light of the Board’s ruling in LBP-99-34 that ITP activities cannot be regulated under Part 72, these remaining ITP-related contentions must be dismissed from this Part 72 licensing proceeding as a matter of law.

A. Utah K – Inadequate Consideration of Credible Accidents

The ITP-related portions of contention Utah K are based on the erroneous presumption that the ITP must be regulated under 10 C.F.R. Part 72. Consistent with LBP-99-34, the ITP-related portions must also be dismissed. Contention Utah K asserts in part that “the Applicant has inadequately considered credible accidents caused by external events and facilities affecting the . . . intermodal transfer site.” Private Fuel Storage L.L.C. (Independent Spent Fuel Storage Installation), LBP-98-7, 47 NRC 142, 253 (1998). Specifically, the Board admitted ITP-related bases:

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 (footnote omitted).¹ The State’s regulatory basis for contention Utah K is that “[t]he Applicant is required to identify, examine, and evaluate the frequency and severity of external natural and man-induced events that could affect the safe operation of the proposed facility design . . . as required by 10 CFR §§ 72.90 and 72.94.” State of Utah’s Contentions on the Construction and Operating License Application by Private Fuel Storage, LLC for an Independent Spent Fuel Storage Facility (Nov. 23, 1997) at 72, 79 (“State’s Contentions”). The State in Utah K seeks to have the Board apply the ISFSI siting evaluation and design basis event requirements of Part 72 to the ITP. In light of the Board’s ruling in LBP-99-34 that “[t]he established regulatory scheme for the transportation of spent nuclear fuel is found in 10 C.F.R. Part 71 and the complementary

¹ These ITP-related bases were admitted subject to any merits disposition of Utah B. See id. at 190 n.12.

DOT regulations and is applicable to the ITP[,]” the Board should now likewise dismiss the ITP-related portions of Utah K as impermissibly challenging the basic structure of the agency’s regulations, including 10 C.F.R. Part 71. See Private Fuel Storage, LBP-99-34, supra, 50 NRC at ___ (slip op. at 17) (footnote omitted) (emphasis added). Since only portions of contention Utah K is ITP-related, the Board should revise Utah K to dismiss those portions of contention Utah K that are related to the ITP.²

B. Utah N – Inadequate Flood Evaluation at ITP

Utah N in its entirety is based on the erroneous presumption that the ITP must be regulated under 10 C.F.R. Part 72, and therefore must be dismissed. Contention Utah N asserts that “Contrary to the requirements of 10 C.F.R. § 72.92, the Applicant has completely failed to collect and evaluate records of flooding in the area of the intermodal transfer site” Private Fuel Storage, LBP-98-7, supra, 47 NRC at 192. The State’s attempt in Utah N to have the Board apply the design basis event requirements of Part 72 to the ITP is contrary to the Board’s ruling in LBP-99-34. See 10 C.F.R. § 72.92. Because Part 72 has been ruled not to apply to the ITP, this contention is not appropriate for adjudication and must be dismissed. Utah N relates only to the ITP and therefore should be dismissed in its entirety.

C. Utah O – Failure to Assess Effects of ITP on Hydrology

The ITP-related portion of Utah O is based on the incorrect presumption that the ITP must be regulated under 10 C.F.R. Part 72, and therefore, as previously done with the transportation aspects in the proposed contention, the ITP-related portion must also be

² The Board’s summary disposition decision on Utah K has clearly defined the ITP-related portions of Utah K that should be dismissed. See Private Fuel Storage L.L.C. (Independent Spent Fuel Storage Installation), LBP-99-35, 50 NRC __, __ (slip op. at 3) (Aug. 30, 1999).

dismissed. In filing contention Utah O, the State claimed that the Applicant failed to adequately assess the impacts on groundwater from “the facility . . . , the intermodal transfer point, and transportation of spent fuel,” in derogation of the requirements of Part 72. See State’s Contentions at 100. In its ruling on contentions, the Board rejected the basis of Utah O regarding transportation “as an impermissible challenge to the Commission’s regulations or rulemaking-associated generic determinations, including 10 C.F.R. Part 71.” Private Fuel Storage, LBP-98-7, supra, 47 NRC at 192. At that time, however, the Board declined to dismiss the ITP-related basis of Utah O pending the merits disposition of Utah B. Id. at 193 n.16. Based the Board’s ruling in LBP-99-34 that the ITP is a transportation activity governed by 10 C.F.R. Part 71, the Board should now likewise dismiss the basis of Utah O regarding the ITP “as an impermissible challenge to the Commission’s regulations or rulemaking-associated generic determinations, including 10 C.F.R. Part 71.” The same generic determinations that applied to the transportation aspects of Utah O also apply to the contention’s ITP aspects. Since only a portion of contention Utah O is ITP-related, the Board should revise Utah O to delete the words “and the ITP” from the wording of the contention. See id. at 254.

D. Utah R – Inadequate Emergency Plan at ITP

The ITP-related portions of Utah R are based on the erroneous presumption that the ITP must be regulated under 10 C.F.R. Part 72, and therefore the ITP-related portions must be dismissed. The State’s regulatory basis for contention Utah R is that “[t]he Applicant has not complied with the Commission’s emergency planning regulations in 10 CFR § [72.32].” State’s Contentions at 116; see also State of Utah’s Reply to the NRC Staff’s and Applicant’s Response to State of Utah’s Contentions A through DD (Jan. 16,

1998) at 67 (verifying State's citation is to 10 C.F.R. § 72.32). Contrary to the Board's ruling in LBP-99-34, the State in Utah R seeks to have the Board apply the emergency planning requirements of Part 72 to the ITP. Because Part 72 has been ruled not to apply to the ITP, this contention is not appropriate for adjudication in this proceeding and must be dismissed.³ Only the first two bases of Utah R, as admitted, are ITP-related.⁴ As both presume that the ITP must comply with the ISFSI emergency planning requirements in 10 C.F.R. § 72.32, both Bases 1 and 2 of Utah R must be dismissed in their entirety.

E. Utah S – Inadequate Decommissioning Plan for the ITP

The ITP-related portion of Utah S is based on the incorrect presumption that the ITP must be regulated under 10 C.F.R. Part 72, and therefore the ITP-related portion must be dismissed. Contention Utah S asserts that “[t]he decommissioning plan does not contain sufficient information . . . as required by 10 C.F.R. § 72.30(a), nor does the decommissioning funding plan contain sufficient information . . . as required by 10 C.F.R. § 72.22(e).” Private Fuel Storage, LBP-98-7, supra, 47 NRC at 255. With regard to the ITP, Basis 11 of the contention asserts that the Applicant has failed to meet these Part 72 decommissioning planning requirements for the ITP.⁵ See State's Contentions at 130. Contrary to the Board's ruling in LBP-99-34, Basis 11 of Utah S seeks to have the Board apply the decommissioning planning requirements of Part 72 to the ITP. Because

³ Similarly, in ruling on contentions admissibility, the Board rejected the transportation aspects of Utah R as “impermissibly challeng[ing] the Commission's regulations.” Private Fuel Storage, LBP-98-7, supra, 47 NRC at 196. Having ruled that the ITP is part of transportation, the Board should now likewise dismiss the ITP-related portions of Utah R.

⁴ Basis 1 asserts that an emergency plan meeting 10 C.F.R. § 72.32 must be provided for the ITP. Basis 2 asserts that emergency response actions meeting 10 C.F.R. § 72.32 must be provided for the ITP. Id. at 254.

⁵ The Board admitted Basis 11 regarding the ITP subject to any merits disposition of Utah B. See Private Fuel Storage, LBP-98-7, supra, 47 NRC at 197 n.19.

Part 72 has been ruled not to apply to the ITP, this contention is not appropriate for adjudication in this proceeding and thus Basis 11 of contention Utah S must be dismissed in its entirety.

F. Utah T – Inadequate Assessment of Permits and Entitlements for the ITP

The ITP-related portion of Utah T is based on the incorrect presumption that this proceeding includes the entitlement to build or operate an ITP. The identification of permits and entitlements that 10 C.F.R. § 51.45(d) requires to be included in the applicant's Environmental Report only applies to those "which must be obtained in connection with the proposed action." The proposed action here is the authorization for the ISFSI, not for the ITP. Basis 1 of Utah T asserts that "[t]he Applicant has shown no proof of entitlement to build a transfer facility at Rowley Junction or right to use the terminal there." Private Fuel Storage, LBP-98-7, supra, 47 NRC at 255. The Board admitted Basis 1 regarding the ITP subject to any merits disposition of Utah B. Id. at 198 n.20. In its merits ruling disposing of Utah B, the Board ruled that the ITP is part of transportation and governed by Part 71, and that NRC licenses transportation activities by general license under 10 C.F.R. § 71.12. Private Fuel Storage, LBP-99-34, supra, 50 NRC at __ (slip op. at 3, 20-21). The Board determined that no Part 72 specific license is required for the ITP, and thus the issue of entitlement to construct the ITP is moot. Basis 1 of Utah T relates only to the ITP and therefore should be dismissed in its entirety.

G. Utah U – Impacts of Onsite Storage Not Considered

Although LBP-99-34 identifies contention Utah U as one of the contentions potentially affected by the Board's ruling on Utah B, Applicant does not understand that contention to refer to the ITP. Contention Utah U concerns the "storage of spent fuel on

the ISFSI site.” Private Fuel Storage, LBP-98-7, supra, 47 NRC at 199. Basis 1 of Utah U, the only basis of Utah U that was admitted, asserts that “[t]he 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.” State’s Contentions at 142. Although footnote 22 in the Board order admitting Utah U noted that “[f]urther litigation on the merits of this contention relative to basis one regarding the ITP may be subject to any merits disposition of Utah B,” Private Fuel Storage, LBP-98-7, supra, 47 NRC at 199 n.22, there does not appear to be any connection between the ITP and basis one of Utah U.⁶

Neither the text of contention Utah U nor its statement of basis one mentions the ITP. See generally State’s Contentions at 142-43. Nor was the ITP mentioned with respect to basis one during the Prehearing Conference or in the State’s Motion for Reconsideration. See generally Prehearing Conf. Trans. at 526; State of Utah’s Motion for Clarification and Reconsideration of LBP-98-7 (May 6, 1998) at 4-5. Basis one of Utah U addresses overheating of concrete storage casks “during storage of spent fuel on the ISFSI site.” State’s Contentions at 142 (footnote omitted) (emphasis added). Basis one does not address either spent fuel in metal transportation casks or storage of fuel at

⁶ It is possible that this footnote regarding “basis one” is a typographical error. In the slip opinion for the Board’s Order on contentions admissibility, this same footnote refers to “basis two” (rather than “basis one” as in the case reporter version), a basis which was rejected by the Board. See Private Fuel Storage L.L.C. (Independent Spent Fuel Storage Installation), LBP-98-7, 47 NRC __, __ (slip op. at 82). The Board’s rejection of basis two rendered the footnote moot and hence the Applicant did not seek reconsideration of this issue. The case reporter version, which appeared several months later, changed the wording of footnote 22 without explanation from “basis two” to “basis one.” This unexplained change is substantive because the footnote in the case reporter version is linked to a basis for Utah U which was admitted, rather than one that was rejected. In any event, there is no apparent connection between basis one and the ITP.

the ITP. Because there is no connection between basis one of Utah U and the ITP, there is nothing relating to the ITP that could be litigated.

H. Utah W – Impacts of Flooding at the ITP Not Considered in ER

Utah W is based on the incorrect presumption that the ITP must be regulated under 10 C.F.R. Part 72, and therefore, as was done with the transportation basis in the proposed contention Utah W, the ITP-related portion of Utah W must now also be dismissed. In filing contention Utah W, the State initially challenged the Applicant's assessment of environmental effects associated with transportation accidents (proposed Basis 2) and flooding events at the ITP (proposed Basis 3). State's Contentions at 162-63. In response to the State's assertions regarding analysis of environmental effects within the scope of transportation, the Applicant stated that the environmental effects of transportation are evaluated, by regulation, using the Commission's data in Table S-4 of 10 C.F.R. § 51.52, and that the Applicant had, in fact, performed the required Table S-4 evaluation for transportation activities. See Applicant's Answer to Petitioners' Contentions (Dec. 24, 1997) at 315-16. Pursuant to the Commission's regulations, applicants are not required to perform fact-specific accident scenario evaluations for transportation. In its decision on contentions admissibility, the Board rejected the State's basis regarding assessment of environmental effects of transportation activities for "fail[ing] to properly challenge the PFS application," given that the Applicant had, in fact, performed the required Table S-4-based environmental assessment of transportation activities in the License Application. Private Fuel Storage, LBP-98-7, supra, 47 NRC at 202. At that time, the Board declined to dismiss the State's assertion that the Applicant should perform a fact-specific assessment of environmental effects for a flooding event at

the ITP, pending the merits disposition of Utah B. Id. at 202 n.24. Based the Board's ruling on Utah B in LBP-99-34 that the ITP is a transportation activity governed by 10 C.F.R. Part 71, the Board should likewise dismiss the admitted basis of Utah W regarding the ITP for also "fail[ing] to properly challenge the PFS application." See id. at 202. The Applicant's environmental effects analysis using Table S-4 addresses all transportation activities, including the ITP. See 10 C.F.R. § 51.52; Applicant's Response to State's Contentions at 315-16. The State's assertion that the Applicant should perform a fact-specific assessment of environmental effects for the ITP, a transportation activity, is directly contrary to the Commission's regulations in 10 C.F.R. § 51.52, which permits the use of Table S-4. Just like the Board ruled in Utah B, the State's challenge to the regulation of transportation activities in Utah W must therefore "be pursued [if at all] as an effort to change those rules." Private Fuel Storage, LBP-99-34, supra, 50 NRC at ___ (slip op. at 17-18) (footnote omitted). This adjudicatory proceeding is not the proper forum for the State to challenge the applicable federal regulation. See id. at 17. Because the ITP has been ruled to be a transportation activity governed by Part 71, this contention is not appropriate for adjudication in this proceeding and must be dismissed. Utah W relates only to the ITP and therefore should be dismissed in its entirety.

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CERTIFICATE OF SERVICE

I hereby certify that copies of Applicant's Position on Dismissal of ITP-Related Contentions 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 7th day of September 1999.

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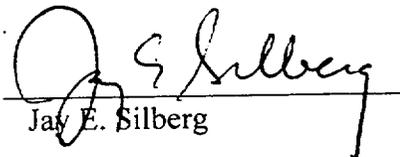
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