

May 12, 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  
 )  
(Independent Spent Fuel )  
Storage Installation) )

NRC STAFF'S RESPONSE TO  
"STATE OF UTAH'S MOTION REQUIRING APPLICANT  
TO APPLY FOR RULE WAIVER UNDER 10 CFR § 2.758(b)  
OR IN THE ALTERNATIVE AMENDMENT TO UTAH CONTENTION L"

INTRODUCTION

Pursuant to 10 C.F.R. § 2.730, the NRC Staff ("Staff") herewith responds to the "State of Utah's Motion Requiring Applicant to Apply for Rule Waiver Under 10 CFR § 2.758(b) or in the Alternative Amendment to Utah Contention L" ("Motion"), filed on April 30, 1999 by the State of Utah. For the reasons set forth below, the Staff opposes the State's Motion and recommends that it be denied.

BACKGROUND

In its Motion, the State of Utah states that on April 2, 1999 (received by the State five days later, on April 7, 1999), Private Fuel Storage L.L.C. ("Applicant" or "PFS"), submitted to the NRC Staff ("Staff") a request for exemption, pursuant to 10 C.F.R. § 72.7, from the Commission's requirements governing the seismic design for an independent spent fuel storage installation ("ISFSI") as set forth in 10 C.F.R. § 72.102(f)(1). According to the State, the Applicant's exemption request

“would substantially lower the standards of conservatism against which seismic issues in Utah Contention L would be judged” in this proceeding (Motion at 1). The State further asserts that the Applicant should be required to seek a waiver of the Commission’s rules in this proceeding pursuant to 10 C.F.R. § 2.758(b), or, in the alternative, that the State should be allowed to amend its seismic contention (Utah Contention L) to contest the Applicant’s “proposed diminution of the standard for determining the seismic design” for the PFS facility (*Id.* at 2).

### DISCUSSION

#### A. Request for Exemption

In an NRC adjudicatory proceeding, a party may request that a particular Commission rule or regulation be waived or that an exception be made, on “the sole ground . . . that special circumstances with respect to the subject matter of the particular proceeding are such that the application of the rule or regulation (or provision thereof) would not serve the purposes for which the rule or regulation was adopted.” 10 C.F.R. § 2.758(b); emphasis added. Any such request is required to be supported by an affidavit that sets forth “with particularity the special circumstances alleged to justify the waiver or exception requested. *Id.* Where a presiding officer determines that a *prima facie* showing has been made in support of the request for waiver or exception, the presiding officer is required to certify the question to the Commission prior to ruling thereon. 10 C.F.R. § 2.758(d).<sup>1</sup> Where the Licensing Board determines that a *prima facie* showing has not been made,

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<sup>1</sup> In its Motion, the State asserts that “under established Commission precedent, PFS is required to seek a waiver under 10 CFR 2.758(b).” Motion at 2, citing *Metropolitan Edison Co.* (Three Mile Island Nuclear Station, Unit No. 1), CLI-80-16, 11 NRC 674 (1980). That decision does not support the State’s assertion. Further, in *TMI*, the Commission found that a § 2.758 waiver of the regulations was inappropriate in the absence of “special circumstances” unique to that proceeding; and it determined instead that the issue should be addressed in a generic rulemaking proceeding to

(continued...)

the petition for waiver under § 2.758 must be rejected. *See, e.g., Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), LBP-87-12, 25 NRC 324 (1987) (request for reduction of plume exposure emergency preparedness pathway, pursuant to § 2.758).

In contrast, an applicant may request an exemption from a particular rule or regulation on grounds other than the assertion that the rule or regulation would not serve the purpose for which it was adopted, under the Commission's exemption procedures. *See, e.g., Cleveland Electric Illuminating Co.* (Perry Nuclear Power Plant, Units 1 and 2), LBP-85-33, 22 NRC 442, 446 (1985). Exemptions from the requirements in 10 C.F.R. Part 72 may be granted where the Commission determines that the exemptions "are authorized by law and will not endanger life or property or the common defense and security and are otherwise in the public interest." 10 C.F.R. § 72.7. A showing of "special circumstances" is not required in connection with an application for exemption from the requirements in Part 72 under 10 C.F.R. § 72.7.<sup>2</sup>

The Commission's authority to grant exemptions from its regulations has been delegated to the Staff. In particular, as applicable here, this authority has been delegated to the Director of the Office of Nuclear Materials Safety and Safeguards (NMSS). *See* NRC Management Directive 9.17 (Executive Director for Operations), §§ 9.17-02, 9.17-03; NRC Management Directive 9.26 (NRC Manual Ch. 0124 (NMSS)), § 0124-0311. The authority to grant exemptions from the Commission's regulations has not been delegated to the Atomic Safety and Licensing Board Panel (ASLBP). *See*

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<sup>1</sup>(...continued)  
amend or suspend the existing regulation. *Id.* at 675.

<sup>2</sup> In contrast, exemptions from the requirements of 10 C.F.R. Part 50 require a showing, *inter alia*, that "special circumstances" are present, as defined in 10 C.F.R. § 50.12. A showing of "special circumstances" is also specifically required under § 2.758.

NRC Management Directive 9.5 (NRC Manual Ch. 0106 (ASLBP)), § 0106-031. *Accord, Gulf States Utilities Co.* (River Bend Station, Unit 1), LBP-95-10, 41 NRC 460, 473 (1995) (the Licensing Board "is not authorized to grant exemptions to NRC regulations or to acquiesce in arguments that would result in circumvention of those regulations"); *Southern California Edison Co.* (San Onofre Nuclear Generating Station, Units 2 and 3), LBP-77-35, 5 NRC 1290, 1291 (1977).

Notwithstanding the Licensing Board's lack of delegated authority to grant a request for exemption from the Commission's regulations, the Commission has the inherent authority to direct the Licensing Board to consider the merits of an exemption request in a related adjudicatory proceeding. *See, e.g., Carolina Power and Light Co.* (Shearon Harris Nuclear Power Plant, Units 1, 2, 3 and 4), CLI-74-9, 7 AEC 197, 198 (1974); *U.S. Department of Energy* (Clinch River Breeder Reactor Plant), CLI-81-35, 14 NRC 1100, 1104 n.2 (1981) (summarizing past Commission practice on the handling of exemption requests, and indicating that a decision to hold hearings on such a request is discretionary); *Perry, supra*, 22 NRC at 446.<sup>3</sup> In addition, where an applicant submits a request for exemption that relates to the subject of an adjudicatory proceeding, the application may be deemed to be modified by the exemption request, and the modified application may be considered by the Licensing Board. *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1),

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<sup>3</sup> The Management Directives establish that the Licensing Board's function is to "conduct such hearings as the Commission may authorize or direct, make such intermediate or final decisions as the Commission may authorize in proceedings to grant, suspend, revoke, or amend licenses or authorizations, and perform such other regulatory functions as the Commission deems appropriate." NRC Management Directive 9.5 (NRC Manual Ch. 0106 (ASLBP)), § 0106-022.

CLI-84-8, 19 NRC 1154, 1155 (1984); *Perry*, 22 NRC at 445-46 (noting that the exemption request in Shoreham was directly related to a contention in the proceeding).<sup>4</sup>

In sum, an applicant is not required to file a request for waiver or exception under 10 C.F.R. § 2.758 -- and any such request could only be granted based upon a showing of "special circumstances" as defined in the regulations. In the present circumstances, there is no basis for concluding that the Applicant should (or could) be required to submit a request for waiver under 10 C.F.R. § 2.758. Further, the Licensing Board has not been delegated the authority to consider a request for exemption under 10 C.F.R. § 72.7. In the event, however, that the State submits an admissible late-filed contention concerning the Applicant's reliance upon a probabilistic analysis to support its seismic design (see discussion *infra*), the Commission could assign consideration of that issue to the Licensing Board notwithstanding the fact that the Applicant has requested an exemption from Part 72 requirements to allow such an approach to be utilized.

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<sup>4</sup> To be sure, exemptions have been considered by the Licensing Boards in various NRC proceedings, subject to Commission review. See, e.g., *Philadelphia Electric Co.* (Limerick Generating Station, Units 1 and 2), CLI-85-16, 22 NRC 459 (1985) (vacating, as moot, Licensing Board and Appeal Board decisions concerning an exemption from certain requirements in 10 C.F.R. § 50.47); *Id.*, CLI-85-11, 21 NRC 1585 (1985); *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), CLI-85-1, 21 NRC 275 (1985) (allowing a Licensing Board decision that had granted an exemption from General Design Criterion 17 to become effective); *Id.*, CLI-84-8, 19 NRC 1154, 1155 (1984) (directing that an application be modified to include the exemption request and that the application be submitted to the Licensing Board). The Commission has indicated, however, that it may decide exemption requests itself, that the Atomic Energy Act does not require formal hearings on exemption requests, and that a decision to hold hearings on an exemption request is discretionary, based on the facts in the proceeding. *U.S. Department of Energy* (Clinch River Breeder Reactor Plant), CLI-81-35, 14 NRC 1100, 1103-04 (1981) (declining to assign a pending exemption request to a Licensing Board, despite the existence of factual issues).

B. Request to Amend Contention L.

In its Motion, the State requests, "in the alternative, or to the extent that the Board finds that 10 C.F.R. § 2.758(b) is not applicable in these circumstances," that it be granted leave to amend Contention L "for the purpose of contesting the proposed diminution of the standard for determining the seismic design [for] the PFS facility as currently required by 10 CFR § 72.102(f)(1)" (Motion at 2).

While the State requests leave to amend Contention L to include a challenge to the Applicant's reliance upon a probabilistic seismic analysis, it is clear that Contention L does not include any related issues. Rather, Contention L raises site characterization concerns, as to whether the Applicant has performed adequate seismic and soil investigations to afford proper understanding of the seismic hazard posed by the site. The contention thus asserts: "The Applicant has not demonstrated the suitability of the proposed ISFSI site because the License Application and SAR do not adequately address site and subsurface investigations necessary to determine geologic conditions, potential seismicity, ground motion, soil stability and foundation loading."<sup>5</sup> Nowhere in Contention L does the State challenge the Applicant's analytical methodology, be it deterministic or probabilistic, other than challenging the sufficiency of the Applicant's understanding and characterization of the site; indeed, even where the contention addresses inadequacies in the Applicant's deterministic analysis, it raises issues as to the sufficiency of site characterization data in the Applicant's analysis

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<sup>5</sup> *Private Fuel Storage, LLC* (Independent Spent Fuel Storage Installation), LBP-98-7, 47 NRC 142, 191 (1998). See also, "State of Utah's Contentions on the Construction and Operating License Application by Private Fuel Storage, LLC for an Independent Spent Fuel Storage Facility," dated November 23, 1997 ("Utah Contentions"), at 80-95.

(see Utah Contentions at 90-92).<sup>6</sup> Accordingly, Contention L may be litigated at this time wholly apart from any consideration of whether the Applicant should utilize a deterministic or probabilistic seismic analysis in the licensing basis for the facility.

Further, the State has not clearly identified its proposed contention. The State indicates that it wishes to challenge “the proposed diminution of the standard for determining the seismic design [for] the PFS facility as currently required by 10 CFR § 72.102(f)(1)” (Motion at 2). However, nowhere in its Motion does the State propose any language for the contention; and reference to the facts offered in support of the motion does not entirely clarify the scope of the contention. Rather than present a focused challenge to the Applicant’s probabilistic analysis, the State’s Motion includes a plethora of issues pertaining to both the deterministic and probabilistic analyses, including assertions that the “hybrid deterministic-probabilistic methodology” used in the Applicant’s seismic hazard analysis is inadequate (*Id.* at 4-5); that, even if a probabilistic approach is authorized, a ground motion level higher than the 84th percentile should be utilized (*Id.* at 5); that PFS has not calculated the peak ground acceleration at the site (*Id.*); that PFS has not performed the deterministic analysis required by 10 C.F.R. Part 72 (*Id.* at 4-6); that PFS seeks to use a less conservative approach, based on a probabilistic analysis as to whether a seismic event would result in an offsite dose in excess of 100 mrem (*Id.* at 6); that there is an unacceptably high 4% probability of exceeding the 1,000 year ground motion at the site, over a 40-year period (*Id.* at 6-7); that the use of a radiation standard to support the seismic design is inappropriate at this site, given the large number of casks, the need to upright any casks within 48 hours to avoid heat-induced fuel degradation, and the potential inability

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<sup>6</sup> There is thus no basis for the State’s assertion that “the Applicant’s exemption request directly affects Contention L” (Motion at 3).



to upright all casks in a timely manner (*Id.* at 7); and that the seismic design requires public confidence (*Id.* at 7-8); that the 1,000 year return period is too short (*Id.* at 8).

Finally, one other consideration precludes the Staff from supporting the State's request that it be allowed to modify its contention to challenge the Applicant's exemption request: As the State observes, the Staff has under consideration "potential rulemaking changes to Part 72" (*Id.* at 6). Indeed, the Staff has announced that it is planning to publish a proposed rule which "would amend the Commission's regulations on geological and seismological characteristics of spent fuel storage systems," whereby Part 72 would be revised "to use a risk-informed, performance-based regulatory approach." Semiannual Regulatory Agenda, 64 Fed. Reg. 22380 (April 26, 1999). The proposed revision "would use a methodology which is consistent with the approaches taken in part 60, the new proposed part 63, and the recent revision to part 100." *Id.*

With respect to its anticipated rulemaking proceeding, on June 4, 1998, the Staff transmitted to the Commission SECY-98-126, entitled "Rulemaking Plan: Geological and Seismological Characteristics for Siting and Design of Dry Cask Independent Spent Fuel Storage Installations, 10 CFR Part 72." As set forth in SECY-98-126, the Staff intends to amend 10 C.F.R. §§ 72.102 and 72.212(b), to make the provisions governing seismic evaluations for an ISFSI consistent with recent revisions to 10 C.F.R. Parts 50 and 100:

The issues that require rulemaking are twofold. First, in 1997, the Commission amended Parts 50 and 100 of its regulations to update the criteria used in decisions regarding NPP [nuclear power plant] siting, including geologic, seismic, and earthquake engineering considerations for future NPPs. Part 100 as amended in 1997 placed a new 10 CFR 100.23 section in the regulations to allow the option of using a probabilistic seismic-hazard methodology as part of the geologic and seismic siting criteria. A conforming change to 10 CFR 72.102 is proposed which will allow new dry cask ISFSI licensees to

take advantage of the 1997 Part 100 amendments, specifically [section] 100.23.

The second issue involves section 72.102(f)(1) which requires ISFSI sites west of the Rocky Mountain Front and in other areas of known seismic activity to use the SSE as determined by Appendix A of Part 100 as the design basis earthquake for the design of structures. The value determined by this process is equivalent to the SSE [safe shutdown earthquake] for a NPP. To date, one exemption to 10 CFR 72.102(f)(1) has been requested and reviewed. This type of exemption request is expected to continue in the future from other ISFSI applicants in the western United States. Thus, a change is proposed that will reduce the need for dry cask ISFSI licensees to request exemptions from Section 72.102(f)(1). The change would allow the use of a risk-informed graded approach to seismic design of ISFSI structures, systems and components (SSCs), while still maintaining reasonable assurance that public health and safety will be adequately protected. The risk-informed graded approach would be comparable to the 10 CFR Part 60 graded approach to design ground motion for SSCs in pre-closure facilities. . . .

The Staff's proposed rulemaking plan was approved by the Commission in a Staff Requirements Memorandum (SRM) dated June 24, 1998. While the proposed rule has not yet been published,<sup>7</sup> the Commission has approved the rulemaking plan and has clearly indicated that the seismic design criteria for an ISFSI under the proposed rule would be similar to the risk-informed (*i.e.*, probabilistic) approach that now applies to other types of facilities under § 100.23 rather than the deterministic approach mandated by 10 C.F.R. Part 100, Appendix A. See SECY-98-126, at 2; SRM at 1-2.

In view of the Commission's announcement of its intention to conduct a rulemaking proceeding that would permit ISFSI applicants such as PFS to utilize a probabilistic seismic design approach, it would be improper to admit in this proceeding a contention issue that challenges the adequacy of that approach. In this regard, it is well established that Licensing Boards should not

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<sup>7</sup> The Staff currently expects to issue the proposed rule during FY 2000.

accept in an individual licensing proceeding any contentions (or sub-issues) which are or are about to become the subject of generic rulemaking. *Duke Power Co.* (Catawba Nuclear Station, Units 1 and 2), ALAB-813, 22 NRC 59, 86 (1985); *Sacramento Municipal Utility District* (Rancho Seco Nuclear Generating Station), ALAB-655, 14 NRC 799, 816 (1981).<sup>8</sup>

CONCLUSION

For the reasons set forth above, the Staff opposes the State's request that the Applicant be required to file a petition for waiver under 10 C.F.R. § 2.758, or, in the alternative, that Contention L now be amended to challenge the adequacy of the Applicant's probabilistic seismic analysis.

Respectfully submitted,



Sherwin E. Turk  
Counsel for NRC Staff

Dated at Rockville, Maryland  
this 12th day of May, 1999

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<sup>8</sup> Of course, the fact that rulemaking is under consideration does not lessen the Applicant's duty to satisfy existing (deterministic) seismic regulations under 10 C.F.R. Part 72, and the State may challenge the Applicant's seismic design as failing to satisfy existing regulations. Similarly, the fact that PFS has applied for an exemption from the Commission's regulations does not lessen its obligation to comply with existing regulations unless and until its exemption request is granted.

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S RESPONSE TO 'STATE OF UTAH'S MOTION REQUIRING APPLICANT TO APPLY FOR RULE WAIVER UNDER 10 CFR § 2.758(b) OR IN THE ALTERNATIVE AMENDMENT TO UTAH CONTENTION L'" 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 United States mail, first class, as indicated by an asterisk, with copies by electronic mail as indicated, this 12th day of May, 1999:

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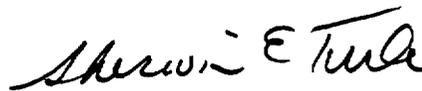
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