

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of:)	Docket No. 72-22-ISFSI
)	
PRIVATE FUEL STORAGE, LLC)	ASLBP No. 97-732-02-ISFSI
(Independent Spent Fuel)	
Storage Installation))	July 26, 1999

**STATE OF UTAH'S RESPONSE TO
NRC STAFF'S RESPONSE TO APPLICANT'S MOTION FOR
SUMMARY DISPOSITION OF CONTENTION UTAH B**

The Applicant filed a Motion for Summary Disposition of Contention Utah B ("Applicant's Motion") on June 11, 1999 to which both the Staff and the State filed responses on July 16, 1999. The State now submits a brief reply to the Staff's Response.

The Staff takes the position that no factual issues remain to be resolved concerning Utah Contention B. Staff Response at 11-12. To support this proposition, the Staff relies, in part, on the Applicant's February 10, 1999 response to the Staff's December 10, 1998 Requests for Additional Information ("RAIs"). The Staff relies on the Applicant's RAI response as to how PFS plans to operate the intermodal transfer facility ("ITF"), and also as to the emergency response and physical protection to be provided at the ITF. The Staff also maintains that the Applicant's operation at the ITF will fall within the established regulatory regime governing transportation of

spent fuel, and, thus all legal issues concerning Utah Contention B are resolved. Staff Reply at 13. Moreover, in the Staff's Statement of its Position concerning Contention Utah B, ("Staff's Position") filed on June 15, 1999, the Staff asserts that if "unforeseen circumstances arose" with respect to multiple casks present at the ITF, NRC could condition "utility route approvals to requirement permission from PFS to begin shipment... and require that armed guards be posted when multiple casks are present at the [ITF] . . ." Staff Position, Attachment, at 3.

The State strongly disputes the Staff's position. Nowhere in the Staff's Reply or in the Staff's Position, does NRC Staff discuss the regulation of the gantry crane. As the State pointed out in its July 16, 1999, Response to the Applicant's Motion, the gantry crane, used to maneuver the casks from railcar to truck bed, will not be regulated under Part 71. Furthermore, to the extent that the Staff is relying on promises made by the Applicant in its February 10, 1999 RAI response, with respect to security measures and emergency response procedures to ensure that all necessary regulatory protections are in place at the ITF, those promises are unenforceable by the NRC.

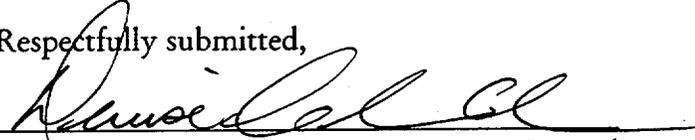
The Atomic Safety and licensing Appeal Board In the Matter of Wrangler Laboratories, et. al (General License Authority of 10 CFR § 40.22), ALAB-051, 33 NRC 505 (1991), addressed the scope of "requirements" (*i.e.* "a legally binding requirement such as a statute, regulation, license condition, technical specification, or

order") that may be imposed on a licensee under the Commission's enforcement policy. 33 NRC at 519. The Board could not find that specific license or guidance requirements had been imposed on the licensee by prior order or some other legally binding requirement. *Id.* Furthermore, the Staff cannot impose requirements on a licensee by orders that have a retroactive application. Oncology Services Corp (Order Suspending Byproduct Material License No. 37-28540-01), ASLBP No. 93-684-02-EA, 39 NRC 11, 21 (1994). Thus, NRC cannot rely on the Applicant's RAI responses or impose an order if "unforeseen circumstances arose" to ensure that PFS's operation of the ITF is fully covered by enforceable regulations. Furthermore, the regulatory scheme the Staff plans to use does not cover an important piece of safety equipment, the gantry crane.

The State has raised a number of factual and legal disputes with the Applicant's and Staff's position to show that PFS will not operate the ITF in accordance with an established transportation regulatory regime. Accordingly, the Applicant's Motion for Summary Disposition of Utah Contention B should be rejected in toto by the Board.

DATED this 26th day of July, 1999.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a copy of STATE OF UTAH'S RESPONSE TO NRC STAFF'S RESPONSE TO APPLICANT'S MOTION FOR SUMMARY DISPOSITION OF CONTENTION UTAH B was served on the persons listed below by electronic mail (unless otherwise noted) with conforming copies by United States mail first class, this 26th day of July, 1999:

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