



apparent to any passing motorist on Interstate 80. See State's Materials Facts ¶¶ 1, 7, and 8. Approximately 200 casks per year will come into the ITF and on average four casks per week will be present at the ITF. Applicant's Response to EIS RAI Question 1-2 dated February 18, 1999, attached as Exhibit 2. The Applicant will have only two trucks to move the casks from the ITF to the reservation and it is unlikely that more than one cask per day will be able to be moved. Id. Thus, a cask or casks will be stored at the ITF throughout the 20 year license term.

The ITF is the rail terminus for all cask shipments that will be transferred to heavy haul truck. The land, equipment and buildings at the ITF will be leased or owned by the Applicant and be under the Applicant's control. Applicant's Response to Safety RAI No. 2, dated February 10, 1999 at pp. 5-6 (attached to Applicant's Motion, Vincent Declaration as Exhibit 2).

At the ITF, the operation of lifting a cask from a rail car onto a heavy haul truck will be performed by a 150 ton gantry crane. The crane is a fixed structure and it, along with other transfer equipment, will be housed in a metal building. Applicant's RAI Response dated May 18, 1998 to Question LA 9-1, attached as Exhibit 3. The Applicant asserts that the entire ITF site will be enclosed with an eight foot high chain link fence. Id. The Applicant also asserts that it will employ certain security measures at the ITF such as lighting, motion detectors and dispatch of security personnel to investigate unauthorized entry into the site. Id. See also ER (Rev. 1) at 3.2-5.

In admitting Utah Contention B,<sup>1</sup> Bases 1 and 4, the Board noted,

[T]here is a genuine legal/factual issue that merits further inquiry as to whether the PFS scheme for operation of the Rowley Junction ITP will cause the materials delivered there to remain within the possession and control of the entity or entities that comply with the terms of the general license issued under section 71.12 or will be handled in such a way as to require specific licensing under Part 72.

PFS, 47 NRC at 185. The Applicant in its Motion has failed to show how all activities at the ITF will be regulated under Part 71. Furthermore, NRC is without authority to regulate equipment important to safety used to lift and manoeuver the casks unless it resorts to Part 72 to fill the regulatory void.

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<sup>1</sup> CONTENTION B was admitted as follows:

PFS's application should be rejected because it does not seek approval for receipt, transfer, and possession of spent nuclear fuel at the Intermodal Transfer Point ("ITP"), in violation of 10 C.F.R. § 72.6(c)(1), in that the Rowley Junction operation is not merely part of the transportation operation but a de facto interim spent fuel storage facility at which PFS will receive, handle, and possess spent nuclear fuel. Because the ITP is an interim spent fuel storage facility, it is important to provide the public with the regulatory protections that are afforded by compliance with 10 C.F.R. Part 72, including a security plan, an emergency plan, and radiation dose analyses.

Private Fuel Storage, LLC (Independent Spent Fuel Storage Installation), LBP 98-7, 44 NRC 14, 184-85 ("PFS").

## ARGUMENT

### I. THE APPLICANT HAS FAILED TO SHOW THAT IT IS ENTITLED TO SUMMARY DISPOSITION OF CONTENTION B AS A MATTER OF LAW.

Pursuant to NRC regulations at 10 C.F.R. § 2.740, a party is entitled to summary disposition if “there is no genuine issue as to any material fact” and the party “is entitled to a decision as a matter of law.” The burden of proving entitlement to summary disposition is on the movant. *Advanced Medical Systems, Inc.* (One Factory Row, Geneva, Ohio 44041), CLI-93-22, 38 NRC 98, 102 (1993). Because the burden of proof is on the proponent, “the evidence submitted must be construed in favor of the party in opposition thereto, who receives the benefit of any favorable inferences that can be drawn.” *Sequoyah Fuels Corp. and General Atomics Corp.* (Gore, Oklahoma Site Decontamination and Decommissioning Funding), LBP-94-17, 39 NRC 359, 361, *aff’d* 40 NRC 55, CLI-94-11 (1994). Furthermore, if there is any possibility that a litigable issue of fact exists or any doubt as to whether the parties should be permitted or required to proceed further, the motion must be denied. General Electric Co. (GE Morris Operation Spent Fuel Storage Facility), LPB-82-14, 15 NRC 530, 532 (1982).

The Applicant claims that it has two options for shipments of fuel to the proposed ISFSI. One would be entirely by rail via the Low rail corridor, and the other would be via intermodal transfer at Rowley Junction. ER (Rev. 1) at 3.2-5 and 6. For purposes of a motion for summary disposition, any favorable inference from the

evidence must be constructed in favor of the party opposing the motion. Gore, 39, NRC at 361. Therefore, for purposes of this summary disposition motion, the Board must construe the evidence in favor of the State by assuming that the entire 4,000 casks shipments requested under PFS license applicant will be transported via the intermodal transfer facility.

The Applicant has gone to great lengths to describe and label its activities as strictly transportation-related until the time the casks arrived at the Skull Valley reservation but its efforts create such regulatory voids and lack of enforceable conditions that many aspects of the ITF will be unregulated. The State is not challenging the NRC's regulatory scheme. Rather, the State maintains that all of the Applicant's operations at the ITF cannot be squeezed into Part 71 and U.S. Department of Transportation (DOT) regulations. Instead, the NRC Staff must rely on Part 72 to regulate the ITF.

**A. The Applicant's Proposition that All Activities at the ITF are Covered by Transportation Regulations Would Create Regulatory Voids.**

The Applicant maintains that no part of its operation at the ITF should be regulated under Part 72. Instead the Applicant offers three reasons why the ITF motion is covered by other regulations. First, operation of the ITF falls within the confines of 10 CFR Part 71, citing to sections 71.12, 72.20a, and DOT regulations. Second, that shipments of spent fuel will remain within the possession and control of general license issued under 10 CFR § 71.12. Third, materials will not be handled in

such a way as to require licensing under Part 72.

The Applicant's Motion fails because first Part 71 does not cover all activities at the ITF. Second, the gantry crane will be unregulated under the Applicant's scheme. Third, the Applicant has completely failed to demonstrate the relevant of the Shoreham-to-Limerick transfer to this case. Fourth, the Applicant's promises about security and other issues at the ITF will be completely unenforceable by the NRC or DOT.

1. Part 71 is Not Applicable to Stationary Fixtures or Facilities

As applicable to the ITF, Part 71 regulations apply to "[r]equirements for packaging, preparation for shipment and transportation of licensed material." 10 CFR § 71.0(a)(1). The DOT regulates transportation and storage incident to transportation of hazardous materials, including radioactive materials. 49 CFR Part 172. The NRC and DOT have entered into a memorandum of understanding to delineate the roles of each agency with respect to the transportation of radioactive materials. 44 Fed. Reg. 38,690 (July 2, 1979). The two agencies will conduct an inspection and enforcement program within each agency jurisdiction. *Id.* at 38,691. Thus, to the extent that either NRC or DOT has jurisdiction, activities at the ITF will be subject to regulation. However, there are many activities that will occur at the ITF that will fall through the cracks of both agencies unless Part 72 is invoked by NRC.

The Applicant is so concerned about fitting its scheme for moving the casks

into the transportation mode that many important safety considerations will be missing at the ITF. The massive movement of spent fuel rods into the ITF is unlike any of the packages that NRC regulates under Part 71 or the hazardous material shipments that DOT regulates under its transportation regulations. At least 200 cask shipments per year will terminate at the ITF. Under the Applicant's scheme, the casks will not be inspected once they arrive at Rowley Junction. From a safety perspective, this makes no sense for the Applicant not to conduct some important safety checks prior to unloading the casks from the rail car. See Resnikoff Declaration at ¶ 10. If there is a radioactive leak the cask could more easily be returned to the originating reactor from the railhead than have to re-transport the cask back along Skull Valley Road to the ITF.

The Applicant is required to have certain worker safety procedures, training requirements, quality assurance programs in place at the ISFSI under Part 72. None of the foregoing will be applied by the Applicant to activities at the ITP. This leads to the absurdity that a worker (e.g., a crane operator) will be required to wear a dosimeter at the ISFSI, follow certain safety procedures, maintain a level of training qualifications but the same worker will not have those enforceable safeguards or requirements if the worker operates the gantry crane at the ITF.

2. The Gantry Crane at the ITF Will be Unregulated

Nowhere in the Applicant's Motion is there a discussion of which agency or

under what requirements the gantry crane at the ITF will be regulated. The Applicant will use a fixed piece of equipment, a 150 ton gantry crane, to lift the casks from a rail car to the heavy haul truck. The crane is a structure system and component important to safety but it will be completely unregulated under the Applicant's proposed scheme. See State's Material Facts ¶¶ 15 to 18. A regulatory void will occur because part 71 only regulated "any structural part of the package that could be used to lift or tie down the package during transport..." 10 CFR § 17.87(h); Utah Material Facts ¶ 19. DOT regulations, including those cited by the Applicant in footnote 12 of its Motion, do not regulate such devices.<sup>2</sup> Thus there is no enforceable requirement as to type of crane to be used, the safety standards it must meet or the procedures that must be followed in operating the crane. Certainly the gantry crane and its operation will not be covered by the Applicant's quality assurance and training programs because those programs are only applicable to the ISFSI. Under Part 71 NRC cannot place any enforceable limits or controls on the movement of 4,000 casks from rail car to heavy haul truck at the

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<sup>2</sup> The Applicant's claim that the following DOT regulations govern "intermodal transfer between transportation modes" is misleading. Applicant's motion at p. 8. 49 CFR § 177.834, contains certain general prohibition relating to hazardous material, such as securing packages, no smoking while loading or unloading, prohibition on the use of certain tools. Section 177.834(h) requires a motor carrier to ensure that the cargo tank is attended by a qualified person at all during loading and unloading. A person "attends" if "he is awake, has an unobstructed view of the cargo tank, and is within 7.62 meters (25 feet) of the cargo tank. Id. at (h)(1). A person is "qualified" is "he is made aware of the hazardous material, has been instructed in emergency procedures and is authorized to move the cargo tank." Id. at (h)(2). 49 CFR § 177.842 merely deals with placarding radioactive materials.

ITF.

3. The Shoreham-to-Limerick Transfer is Not Applicable to this Case

The Applicant claims that the NRC "has directly addressed the licensing required for spent fuel shipments involving intermodal transfer," citing State of New Jersey (Department of Law and Public Safety's Requests Dated October 8, 1993), CLI-93-25, 38 NRC 289, 294 (1993); and Shipments of Fuel from Long Island Power Authority's Shoreham Nuclear Power Station to Philadelphia Electric Co.'s Limerick Generating Station, DD-93-22, 38 NRC 365, 371 (1993). Applicant's Motion at 8.

These cases generally describe the 1993-94 transport of slightly irradiated fuel from the Shoreham nuclear plant on Long Island to the Limerick plant in Pennsylvania. The fuel was barged from the Shoreham plant to southeastern Pennsylvania, and then shipped by rail to Limerick. The cases cited by the Applicant do not, however, address the nature or circumstances of the intermodal transfers; nor has the Applicant provided any information that would demonstrate the relevance of the decisions to the case at hand. In fact, the concern of New Jersey Attorney General in bringing these actions was the potential for barge accidents, not the intermodal transfers.

Moreover, what little information is available in contemporaneous licensing documents stored in the NRC's Public Document Room shows important distinctions between the Shoreham case and this case, and raises significant and relevant questions that remain unanswered. For instance, the casks used for the Shoreham-to-Limerick

transport were much smaller than the Holtec casks proposed for use by PFS. The cask used for the Shoreham-to-Limerick transfer weighed approximately 85 tons including the basket, 17 fuel assemblies, and the redundant cask lifting yoke. See DD-93-22 at 371 note 5; letter from G.A. Hunger, Philadelphia Electric Co., to NRC (March 8, 1993), Attachment 1: Limerick Generating Station, Units 1 and 2, Operating License Change Request at 5. In contrast, the PFS casks will contain between 24 PWR and 68 BWR spent fuel assemblies, and the maximum weight of a loaded shipping cask bound for the PFS facility is 142 tons. SAR at 3-1; ER at 4.7-3. Thus, any issues that may have been raised by that case regarding the handling of casks during the transfer, the operation of the transfer cranes, or the qualifications of the crane and its handlers, would not have been as significant. Moreover, because the casks contained only slightly irradiated fuel, they were much less radioactive than the casks bound for the PFS facility, and would not have raised the same concerns with respect to protection of the public. In addition, because of their relatively low radioactivity level, the casks probably would not have exceeded the radioactivity threshold for triggering the application of 49 C.F.R. § 173.441(b) and 10 C.F.R. § 71.47(b), which forbid unloading of casks during shipment for highly radioactive casks. Moreover, there were only a few shipments in 1993 and 1994, and the barges and trains presumably were in transit the entire time; thus, the issues raised by the stationary nature of the ITF would not have arisen. Thus, the Applicant has completely failed to demonstrate the

relevant of the Shoreham-to-Limerick transfer to this case.

4. Other Activities at the ITF will be Unregulated or Any Promises by the Applicant will be Unenforceable.

Under Part 71 there is no requirement for any of the extra measures the Applicant say it will take at the ITF. Consequently, there is no requirement, and thus no enforceability, that the gantry crane meets NRC safety standards for systems structure and components important to safety under Part 72; that the crane operator will be properly trained; that the equipment will be properly maintained; that the site will be fenced and lighted; that security measures will be in place; etc., etc. Only by regulating these activities under Part 72 will NRC have the regulatory authority to enforce these requirements.

**B. The Public Must be Afforded the Regulatory Protections Under Part 72 Because the ITP is Not Merely a Transportation Point but is a Facility at Which Spent Nuclear Fuel will be Stored.**

The State is not suggesting that NRC impose a new regulatory scheme on PFS, nor is it challenging NRC's existing regulatory scheme. The State maintains that NRC is wrong in not applying Part 72, such as the citing criteria, accident analysis, and other safeguards required under Part 72, to the ITF.

By insisting that the ITF is not regulated under Part 72 important public health and safety evaluations have been omitted from a facility that will receive up to 4,000 cask over a 20 year period (or 200 casks per year). It is essential to the health and safety of the public that the Applicant conduct an analysis of the credible accidents that could

occur at the ITF; that the Applicant develop an emergency plan for the ITF; and that the Applicant put in place a safeguards plan at the ITF.

The ITF is located between two military bombing ranges and is in the flight path of commercial aircraft traveling to and from Salt Lake City International Airport. State's Material Facts ¶¶ 1 and 2. Given the dangerous activities that occur in the vicinity it is important to public health and safety for the Applicant to conduct an credible accident analysis.

The ITF is located next to Interstate 80. Extremely hazardous rocket motors travel directly passed the ITF. Attached A to the Hawley Declaration shows the fireball from the an explosion from a one of these rocket motors. The rocket motors have a net explosive of 17,000 lbs or 40,000 lbs. Id. Four thousand casks arriving at Rowley Junction over a 20 year period introduces a new target against which the potential of a rocket motor explosion has not been analyzed. Protection of public health and safety require such an analysis.

The State's Contention N, Flooding at Rowley Junction, is a legitimate concern because of the potential of the Great Salt Lake to flood. Again, this analysis will be missing if NRC does not look to Part 72 to regulate the ITF.

The Applicant's Emergency Plan does not cover the ITF. The Applicant intends to rely on public resources (*i.e.* State and local government) as the first responders under the transportation regulation to provide emergency response to

incidents at the ITF. Applicant's Motion at 14. Given the fact that casks will always be present at the ITF and the unloading and moving of 200 casks per year that will take place at the ITF, it is unreasonable to expect that public health and safety will be protected by the Applicant's call to State and local fire departments for assistance.

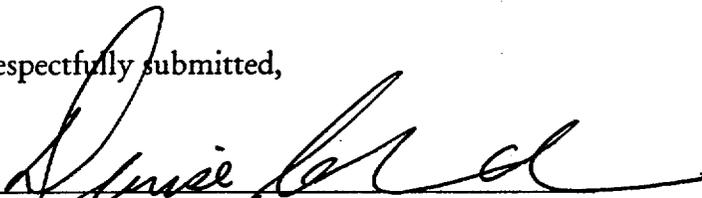
Finally, the Applicant's safeguards plan only covers the ISFSI site. While the Applicant promises to fence the ITF site with an eight foot high chain link fence and employ certain security measures at the ITF such as lighting , motion detectors and dispatch of security personnel to investigate unauthorized entry into the site, there is absolutely no enforceable requirement to do so. See Exhibit 3 and ER (Rev. 1) at 3.2-5. Moreover, there is no owner controlled area requirement similar to that required under Part 72. Therefore, there is no enforceable requirement for any security measures for a fixed site like there are under Part 72. Given high visibility of the ITF from Interstate 80 and the potential for sabotage, this situation warrants the application of Part 72.

## CONCLUSION

The Applicant has tried in vain to fit the movement and storage of 4,000 casks at the ITF into the transportation regulations. Public health and safety demand that NRC regulate this facility under Part 72. Accordingly, the Applicant should not be entitled to summary disposition as a matter of law.

DATED this 16th day of July, 1999.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a copy of STATE OF UTAH'S OPPOSITION TO APPLICANT'S MOTION FOR SUMMARY DISPOSITION OF UTAH CONTENTION B was served on the persons listed below by electronic mail (unless otherwise noted) with conforming copies by United States mail first class, this 16th day of July, 1999:

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UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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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 16, 1999

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**STATEMENT OF MATERIAL FACTS IN DISPUTE  
REGARDING UTAH CONTENTION B**

The State of Utah submits, in support of its opposition to the Applicant's Motion for Summary Disposition on Utah Contention B, this statement of material facts in dispute.

1. The Intermodal Transfer Facility ("ITF") is located between two military bombing ranges: Utah Test and Training Range ("UTTR") North and UTTR South. See Map, *UTTR Military Airspace, Western Utah and Eastern Nevada*, attached to Exhibit 5 (Cole Declaration) of the Applicant's Motion for Partial Summary Disposition of Utah Contention K, dated June 7, 1999. Cf Applicant's Statement of Material Facts on which no Genuine Dispute Exists ("Applicant's Material Facts") at ¶ 1.
2. The ITF is also located in the flight path of commercial aircraft traveling to and from Salt Lake City International Airport. State of Utah's Contention on the Construction and Operating License Application by Private Fuel Storage, LLC for an Independent Spent Fuel Storage Facility, dated November 23, 1997, ("State's Contentions") at 77.
3. There is a potential for a credible accident to occur at the ITF involving military and commercial aircraft crashes, which the applicant has not evaluated or analyzed. Resnikoff Declaration at ¶ 5.
4. The SAR has little information about the ITF. Section 4.5.4.1 has one

paragraph devoted to the "Intermodal Transfer Point." The paragraph has no discussion of the potential for air crashes at the ITF. Resnikoff Declaration at ¶ 6.

5. The ITF is not designed to withstand an air crash and, thus, spent fuel would not remain sealed in the case of an aircraft accident. Id. at ¶ 7.

6. The ITF is also located immediately adjacent to Interstate 80 and near the Great Salt Lake. License Application at Fig. 1-1.

7. The ITF has the potential for flooding, which the Applicant has not evaluated or analyzed. Utah Contention N. See State's Contentions at 98-99.

8. The ITP will have spent fuel casks onsite in a single fixed location, 365 days per year and 24 hours per day. Applicant's Responses to EIS RAI Question 1-2, dated February 18, 1999. There is no secret about the proposed location of the ITP or its purpose. The information already is generally available to the public, and will be widely known. The ITP site is adjacent to and clearly visible from I-80 and the frontage road north of I-80. Casks sitting on the site will be clearly visible to the passing public. ER at Fig. 3.2-1 (sheet 2).

9. Hazardous materials, including military rockets motors from Alliant Technologies (formerly known as Hercules) and rockets for use by Apache helicopters at the Lakeside bombing range north of the ITF are transported along interstate 80 passed the ITF. Hawley Declaration (attached at Exhibit 4) ¶ 7; Resnikoff Declaration at ¶ 8.

10. The rocket motors that are transported from the Alliant Technologies facility in Magna along interstate 80 to the North UTTR contain 17,000 lbs explosive weight (2nd stage Trident C4 rocket motors) and 40,000 lbs net explosive weight (first stage Trident I rocket motors). Exhibit A to Hawley Declaration.

11. There is a potential for a credible accident to occur at the ITF involving explosion of a rocket motor being transported along Interstate 80, which the Applicant has not analyzed or evaluated. Resnikoff Declaration at ¶ 8.

12. The ITF is not designed to withstand a rocket motor explosion, or a direct strike by an rocket from an Apache helicopter, and thus, spent fuel would not remain sealed in the case of rocket motor explosion. Id.

13. The Applicant is wrong in stating that no activities will occur at the ITF that

are outside the normal scope of transportation activities regulated under Part 71. See Applicant's Motion at 3.

14. Part 71 applies to requirements for packaging, preparation for shipment, and transportation of licensed material. 10 CFR § 71.0.

15. The Applicant will own and operate a 150 ton gantry crane at the ITF. SAR at 4.5-3 (Rev. 2).

16. The gantry crane at the ITP is a "structure system and component" important to safety. SAR § 3.4.1.4 (Rev. 0) ("Lifting devices ... are classified as Important to Safety, Classification B to preclude the accidental drop of a canister."); see also *id.* § 3.4.4.

17. The gantry crane, which is not a structural part of the cask shipment, will be used to lift the cask from the railcar to the heavy haul truck. Applicant's Motion for Summary Disposition of Contention Utah B, Donnell Declaration (Exhibit 2) at ¶ 6 and Exhibit 2 to the Donnell Declaration .

18. The gantry crane equipment is a fixed facility and will not be regulated under Part 71 because Part 71 only regulates the lifting attachment that is a structural part of a package. See 10 CFR § 71.87(h) ("any structural part of the package that could be used to lift or tie down the package during transport is rendered inoperable for that purpose unless it satisfies 71.45.")

19. If the cask were dropped at a height greater than 10 inches without the cushioning of impact limiters (which do not fully protect the sides of a cask), the fuel cladding could buckle and degrade; the canister could not then be transferred to a HI-STORM cask. This is contrary to the requirements of 10 CFR 72.122(h)(1). Resnikoff Declaration ¶ 9; cf Applicant's Material Facts ¶ 2.

20. It makes no sense to transport all the casks by road along Skull Valley Road to the proposed ISFSI before performing a simple inspection to determine the integrity of the shipment and whether the casks should be returned to the originating reactor. The sole operation performed at the ITF should not be the transfer of transportation casks from rail car to heavy-haul tractor/trailer but it must also include checking the cask valves to determine whether helium and no radionuclides are present. Resnikoff Declaration at ¶ 10.

21. All transfer operations may not be performed within the transportation

cask's design basis because the Applicant has not been shown that the cask could not be dropped from the gantry crane, thereby exceeding the NRC's Certificate of Compliance for the cask ("CoC"). If an aircraft accident were to occur during transfer operations, or while the casks were sitting at the rail siding, the CoC may be exceeded. To prevent such an occurrence, the facility should be licensed under Part 72. Resnikoff Declaration at ¶¶ 7-9; cf Applicant's Material Facts at ¶ 5.

22. There is a material fact absent in the Applicant's license submittal because the Applicant has not stated whether workers at the ITF will be treated as radiation workers under PFS's radiation safety program, including badging and other medical safeguards, or whether under the transportation regulations workers at the ITF will be treated the same as members of the public.

23. The transfer operation at the ITF increases the hazard to transportation workers. This appears to be the rationale why, for shipments of casks where the direct radiation on the external surface exceeds 200 mrem/hour, NRC and DOT regulations bar loading and unloading operations between the beginning and end of the transportation (10 CFR 71.47 (b)(1)(iii); 49 C.F.R. 173.441(b)(1)(iii)). Resnikoff Declaration, ¶ 11.