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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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
PETITION FOR REVIEW OF LBP-00-35
AND OTHER RULINGS CONCERNING
CONTENTION UTAH R (EMERGENCY PLANNING)

Sherwin E. Turk
Counsel for NRC Staff

January 26, 2001

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INTRODUCTION

Pursuant to 10 C.F.R. § 2.786(b)(3), the NRC Staff ("Staff") hereby responds to the "State of Utah's Petition for Review of LBP-00-35, 'First Partial Initial Decision (Contention Utah R, Emergency Plan)', and Other Matters Related to Utah Contention R" ("Petition"), filed on January 16, 2001. For the reasons set forth below, the Staff submits that the State of Utah's Petition should be denied, in that it fails to demonstrate the existence of a substantial question with respect to any error of fact, law or policy by the Licensing Board, as required under 10 C.F.R. § 2.786(b)(4), and therefore fails to show that Commission review is warranted.

BACKGROUND

On November 23, 1997, the State of Utah ("State") filed Contention Utah R, in which it challenged various aspects of the emergency plan for the independent spent fuel storage installation ("ISFSI") proposed by Private Fuel Storage, L.L.C. ("PFS" or "Applicant").¹ In support of this contention, the State's basis statements challenged, *inter alia*, emergency planning at the (formerly) proposed Rowley Junction Intermodal Transfer Point or Facility ("ITP" or "ITF"), where

¹ See "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 116-22 ("R. Emergency Plan").

spent fuel casks would be transferred from trains to trucks (Utah Contentions at 116-17); PFS' description of the equipment it would use to mitigate the consequences of a cask tipover accident (*Id.* at 120-21); and PFS' fire fighting capability and the adequacy of its water supply (*Id.* at 121).

On April 22, 1998, the Licensing Board issued its decision in LBP-98-07, ruling on the admissibility of contentions.² With respect to Contention Utah R, the Licensing Board admitted subparts of the contention involving the ITP and the Applicant's fire fighting capability, but rejected other portions of the contention (including cask tipover). As admitted, Contention Utah R asserted:

Utah R -- Emergency Plan

CONTENTION: The Applicant has not provided reasonable assurance that the public health and safety will be adequately protected in the event of an emergency at the storage site or the transfer facility in that:

1. PFS has not adequately described the ITP, the activities conducted there, or the area near the ITP in sufficient detail to evaluate the adequacy and appropriateness of the emergency plan.
2. PFS does not address response action, emergency information dissemination, or emergency response training programs for accidents at the ITP.
3. PFS has not adequately described the means and equipment for mitigation of accidents because it does not have adequate support capability to fight fires onsite.³

On September 20, 1999, the Licensing Board issued LBP-99-39, in which it dismissed issues concerning emergency planning for the Rowley Junction ITP⁴ -- in accordance with its decision granting summary disposition of Contention Utah B (alleging that a Part 72 license was

² *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-98-07, 47 NRC 142, 196 (1998).

³ LBP-98-07, 47 NRC at 254. With respect to its admission of ITP-related portions of the contention, the Board noted that "further litigation on its merits may be subject to any merits disposition of Utah B ['License Needed for Intermodal Transfer Facility']." *Id.* at 196 n.18.

⁴ *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-99-39, 50 NRC 232, 236 (1999)

required for activities to be conducted at the ITP), on the grounds that the rail-to-truck transfer activities to be conducted at the ITP constitute a transportation function governed by 10 C.F.R. Part 71 and U.S. Department of Transportation regulations, rather than the specific license requirements in 10 C.F.R. Part 72.⁵

As a result of these rulings, only the fire-fighting issue raised in Contention Utah R proceeded to hearing.⁶ Evidentiary hearings on Contention Utah R were held in Salt Lake City on June 19, 2000, at which expert witnesses were presented by PFS, the State and the Staff. See Tr. 1380-1668. Proposed findings of fact and conclusions of law concerning this contention were then submitted by the parties; and on December 29, 2000, the Licensing Board issued its Partial Initial Decision (LBP-00-35), in which it found that the PFS Emergency Plan provides reasonable assurance that, in the event of a fire at its facility, the public health and safety will be protected.⁷

ARGUMENT

I. Legal Standards Governing the State's Petition for Discretionary Commission Review of the Licensing Board's PID and Other Rulings.

Pursuant to 10 C.F.R. § 2.786(b)(4), Commission review of a Licensing Board decision may be undertaken in accordance with the following principles:

(4) The petition for review may be granted in the discretion of the Commission, giving due weight to the existence of a substantial question with respect to the following considerations:

⁵ See LBP-99-39, 50 NRC at 236; *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-99-34, 50 NRC 168, 174-77 (1999). In disposing of Contention Utah B, the Licensing Board noted that its ruling could impact the litigation of ITP-related portions of other contentions, including Contention Utah R. *Id.* at 178.

⁶ On August 30, 1999, the Licensing Board denied PFS' motion for summary disposition of the fire-fighting issue in Contention Utah R, finding a genuine dispute of material fact. *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-99-36, 50 NRC 202, 207-08 and n.4 (1999).

⁷ *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-00-35, 53 NRC ____ (Dec. 29, 2000) ("First Partial Initial Decision (Contention Utah R, Emergency Plan)"), slip op. at 64.

- (i) A finding of material fact is clearly erroneous or in conflict with a finding as to the same fact in a different proceeding;
- (ii) A necessary legal conclusion is without governing precedent or is a departure from or contrary to established law;
- (iii) A substantial and important question of law, policy or discretion has been raised;
- (iv) The conduct of the proceeding involved a prejudicial procedural error; or
- (v) Any other consideration which the Commission may deem to be in the public interest.

Id.; emphasis added. A Commission determination to grant a petition for review is discretionary, and will generally be undertaken only when a “substantial question” exists with respect to one of the considerations set forth in § 2.786(b)(4).⁸

II. The State Has Failed to Demonstrate the Existence of A Substantial Question of Legal, Factual or Policy Error, or Any Matter That Warrants Commission Review.

In its Petition, the State raises the following claims concerning the Licensing Board's rulings on Contention Utah R: (1) It asserts that the Board's decision in LBP-00-35 not to impose license conditions to enforce the Applicant's commitments to follow NFPA 600 and to maintain a certain number of fire fighters on-site “is erroneous, contrary to governing precedent and raises an important policy question” (Petition at 4); (2) it asserts that the Board's decision in LBP-98-07 to reject part of the contention challenging PFS' description as to “how it would procure a crane within 48 hours for a tip over cask accident” was not “an appropriate exercise of policy judgment” (*Id.* at 9); and (3) it requests that it be allowed to defer its appeal from the Board's decision in LBP-99-39, dismissing emergency planning issues related to the Rowley Junction ITP, until it appeals from the Board's ruling on Contention Utah B (*Id.* at 10). These assertions fail to show the existence of a substantial question that warrants Commission review.

⁸ See, e.g., *Northeast Nuclear Energy Co.* (Millstone Nuclear Power Station, Unit No. 3), CLI-01-03, 53 NRC ___ (Jan. 17, 2001), slip op. at 4 and n.6; *Aharon Ben-Haim, Ph.D.*, CLI-99-14, 49 NRC 361, 364 (1999); *Kenneth G. Pierce* (Shorewood, IL), CLI-95-6, 41 NRC 381, 382 (1995); *Piping Specialists, Inc.* (Kansas City, MO), CLI-92-16, 36 NRC 351, 352-53 (1992).

A. The Alleged Need for Fire Brigade License Conditions.

In LBP-00-35, the Licensing Board carefully reviewed the evidence of record, and concluded as follows (*Id.*, slip op. at 64-65):

[T]he PFS emergency plan meets the applicable regulatory criteria in that it adequately describes the types of radioactive materials accidents that may involve a fire emergency and the means and equipment to be used to mitigate such accidents as well as establishes that PFS has adequate support capability (including water supply and firefighting personnel) for use in fighting fires onsite. Therefore, relative to the issues raised in Contention Utah R, in accordance with 10 C.F.R. §§ 72.24(k), 72.40(a)(11), we find that PFS has provided an adequate description of its plans for coping with emergencies involving fires in compliance with 10 C.F.R. § 72.32(a)

With respect to PFS' onsite fire brigade, the Licensing Board correctly found that eleven individuals will be trained to be fire brigade members, of which a minimum of five members are to be on call at any one time to form a fire brigade. LBP-00-35, slip op. at 59.⁹ With respect to NFPA 600,¹⁰ the Licensing Board correctly found that the Applicant had committed to comply with this NFPA standard with respect to organizing, operating, equipping, and training its fire brigade employees. See LBP-00-35, slip op. at 56, 57-58, 60-61.¹¹

⁹ The State incorrectly claims that PFS had committed to "a minimum of 11 employees trained as fire fighters, five of whom will be on site during normal business hours" (Petition at 6, emphasis added). In fact, the evidence showed that the fire brigade will consist of a minimum of 5 persons -- and at least 11 persons will be trained to serve on the fire brigade during normal hours of operation (*i.e.*, the "day shift"), as well as when transfer operations are conducted during extended hours. Dungan/Lewis Post Tr. 1456, at 26; Tr. 1499, 1508-09, 1525, 1528-29; PFS Exh. G, EP at 4-3; State Exh. 1, Fig. 4-1.

¹⁰ NFPA 600 ("Standard on Industrial Fire Brigades") is a standard promulgated by the National Fire Protection Association ("NFPA"). See Staff Exh. B (NFPA 600, 2000 Ed.). The NFPA is a consensus standards development organization which produces widely-accepted standards on fire safety. The NRC is represented on the NFPA committee that establishes standards for nuclear facilities. Dungan/Lewis Post Tr. 1456, at 2.

¹¹ PFS committed to meet NFPA 600 in all respects, including training. The requirements of NFPA 600, to which fire brigade members will be trained and equipped, represent industry best practice. Dungan/Lewis Post Tr. 1456, at 26, 27; Tr. 1520, 1529.

Significantly, the State does not challenge these findings. Rather, it asserts only that PFS' commitments to staff the fire brigade with a minimum of five persons and to follow NFPA 600 should be imposed as license conditions (Petition at 4-7). The State's arguments are without merit.

With respect to the Applicant's fire brigade staffing commitment, the State asserts that the Applicant recently introduced "a new financing scheme" which could lead to a "revenue shortfall" and cost-cutting measures by PFS, such as "a reduction in personnel" at the site (*Id.* at 6). This assertion fails to warrant Commission review. First, this assertion constitutes a wholly new claim, relating to a recent financial assurance submittal by PFS, which the State never brought to the attention of the Licensing Board in connection with Contention Utah R, in a motion to reopen or otherwise¹² -- although the State could have raised this matter prior to issuance of LBP-00-35.¹³ Having failed to raise this matter for the Licensing Board's consideration, the State may not raise it for the first time on appeal. *See, e.g., Philadelphia Electric Co.* (Limerick Generating Station, Units 1 and 2), ALAB-828, 23 NRC 13, 20 (1986); *Id.*, ALAB-836, 23 NRC 479, 496 n.28 (1986); *Duke Power Co.* (Catawba Nuclear Station, Units 1 and 2), ALAB-813, 22 NRC 59, 82-83 (1985).¹⁴ Second, the State has provided no factual basis, other than its own surmise and speculation, to support its claim that PFS' "new financing scheme" could lead to cost-cutting measures such as a reduction in the number of fire brigade personnel. Accordingly, there is no basis for the State's

¹² In addition, nowhere in Contention Utah R did the State ever present a claim that the adequacy of the Applicant's emergency planning might be affected by financial concerns. Accordingly, apart from its other defects, this assertion exceeds the scope of Contention Utah R.

¹³ While the State asserts that the Licensing Board "fail[ed] to recognize this potential problem" (Petition at 6), the State fails to mention that it never brought to the Board's attention any issue concerning the impact of financial matters on PFS' emergency planning commitments. Nor is there any merit in the State's claim that the Board's passing reference to the Staff's Safety Evaluation Report concerning financial matters shows "reliance on an outdated [financial] scheme" or that the Board's decision "is clearly erroneous" (*Id.*, citing LBP-00-35, slip op. at 26).

¹⁴ The Staff notes that the State's request that the Commission rule on the proprietary nature of certain matters set forth in its Petition (Petition at 7 n.3) should have been raised before the Licensing Board or Staff in the first instance, rather than in a petition for Commission review.

ipse dixit claim that “[t]his raises a “substantial and important question of law relating to the safety of on-site workers and the public” (Petition at 7).

With respect to the alleged need to incorporate PFS’ commitment to follow NFPA 600 in a license condition, the State claims that PFS “has grafted fire-fighting duties onto other full-time duties the fire fighting member must perform,”¹⁵ that “PFS is trying to do too much with too few people,” and that “PFS can barely adhere to its commitment to meet NFPA 600 with the personnel it plans to employ” (Petition at 7). According to the State, “[t]his raises a substantial and important question of law relating to the safety of on-site workers and the public” (*Id.*).

These claims are unsupported by the evidence. First, the record supports the Board’s determination that the PFS fire brigade is adequately staffed. See LBP-00-35, slip op. at 56, 59-61. Second, as the State observes (Petition at 5), the PFS Emergency Plan already incorporates the Applicant’s commitment that 11 persons will receive fire brigade training, and that “[t]he fire brigade will be organized, operated, trained and equipped in accordance with NFPA 600.” PFS Exh. G, EP at 4-3, Rev. 9.¹⁶ Accordingly, these commitments are already binding to the extent necessary or appropriate, since changes to the emergency plan may only be made in accordance with regulatory procedures. See 10 C.F.R. § 72.44(f) (changes that decrease the effectiveness of an approved emergency plan may not be implemented without prior Commission approval).¹⁷ The State has

¹⁵ The State is correct that PFS will draw its fire brigade personnel from the facility’s operations staff -- as is consistent with industry practice and Staff approval. See, e.g., Dungan/Lewis Post Tr. 1456, at 26-27; Lain/Sullivan Post Tr. 1543, at 14-15; PFS Exh. G, EP at 4-3; State Exh. 1, Fig. 4-1; Tr. 1507, 1511, 1565-66.

¹⁶ In addition, as the Licensing Board found, false statements made by PFS’s witnesses under oath before the Board or as part of its application were subject to penalties, and agency enforcement actions are sufficient to ensure compliance without the need for license conditions. See LBP-00-35, slip op. at 63-64.

¹⁷ Thus, there is no basis whatsoever for the State’s view that whether PFS adheres to its commitments depends “solely on the Applicant’s good-will,” or that “there will be no procedure for verification inspection by NRC” of PFS’ fulfillment of its commitments (Petition at 8).

shown no reason to believe that § 72.44 fails to provide an adequate means for enforcing commitments incorporated in an Emergency Plan, so as to require specific license conditions.

Finally, while the State relies on CLI-00-13, in which the Commission directed the imposition of license conditions concerning PFS' financial assurance commitments,¹⁸ that decision is inapposite here. As the State observes, the Commission found that PFS's financial assurance commitments should be incorporated into the license "in order to eliminate any ambiguity as to what PFS's commitments are and to eliminate any question about whether these promises are fully enforceable" (Petition at 5-6, *citing* CLI-00-13, 52 NRC at 33). In contrast, no "ambiguity" or question of enforceability exists with respect to PFS' emergency planning commitments -- which are already set forth explicitly in its Emergency Plan, consistent with Commission precedent.¹⁹

In sum, the State has failed to show the existence of a substantial question with respect to any finding or conclusion in LBP-00-35 that requires Commission review.

B. The Emergency Plan's Lack of Details Concerning How PFS Will Obtain a Crane to Mitigate An Emergency Involving Cask Tipover.

Basis 4(a) of Contention Utah R asserted that PFS had not adequately described the means and equipment provided for mitigation of accidents, as provided in 10 C.F.R. § 72.32(a)(5). In particular, while the State acknowledged that the Emergency Plan stated that in the event of a cask tipover, PFS "will procure a capable crane" to return the cask to its upright position "within the necessary timeframe," it asserted that PFS had not identified "with specificity the location from which a capable crane can be procured and the time in which it will take to acquire such a crane . . . [including] during adverse weather conditions" (Utah Contentions at 120-21; emphasis added).

¹⁸ *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-00-13, 52 NRC 23 (2000).

¹⁹ Inasmuch as the PFS Emergency Plan already incorporates these commitments, no further license conditions are needed, consistent with the Commission's decision in *Louisiana Energy Services, L.P.* (Claiborne Enrichment Center), CLI-96-8, 44 NRC 107, 109-10 (1996) (finding that an applicant was bound by a description of its fire brigade's role as set forth in a pleading, and directing it to revise its emergency plan to incorporate that description).

In rejecting this and other portions of Contention Utah R, the Board ruled as follows:

[T]hese portions of the contention and their supporting bases fail to establish with specificity any genuine dispute; impermissibly challenge the Commission's regulations or generic rulemaking-associated determinations, including Commission determinations relating to the need for offsite emergency response plans for ISFSIs; lack materiality; lack adequate factual or expert opinion support; and/or fail properly to challenge the PFS application.

LBP-98-7, 47 NRC at 196. In its Petition, the State challenges this determination, asserting that a storage cask that has tipped over must be uprighted within "33 hours (assuming a complete blockage of all air ducts)," that a loaded cask weighs 175 tons, that the PFS site is located about 75 miles by road from Salt Lake City, and that "it is not evident how PFS will timely acquire a crane or cranes to upright casks stored at the ISFSI, which could number up to 4,000 casks" (Petition at 9; emphasis added). The State asserts that Commission review is appropriate because this issue "raises important policy questions relating to safety and public interest"; and that "the Board's conclusion that the Emergency Plan provides reasonable assurance that health and safety will be protected is factually erroneous in the absence of this additional assurance" (*Id.*).

The State's arguments in this regard are without merit. Altogether missing from its Petition -- and from its contention -- is any factual support for its concern that PFS might not be able to obtain a crane (or cranes) in a timely manner to upright casks involved in a tipover event; thus, this part of the contention failed to satisfy the basis requirements in 10 C.F.R. § 2.714(b)(2). Further, the State seeks to impose a requirement that is not found in the Commission's regulations (and its basis statement was therefore inadmissible), inasmuch as 10 C.F.R. § 72.32(a)(5) requires only that an ISFSI's emergency plan must contain "a brief description of the means of mitigating the consequences of each type of accident" -- which the PFS Emergency Plan does. The State points to no regulatory requirement that implementing details (such as the names of firms that will provide cranes in an emergency) must be set forth in an emergency plan, itself -- rather than in the plan's implementing procedures, which is where details concerning resources and how the plan will be

implemented normally appear. *See, e.g., Louisiana Power and Light Co.* (Waterford Steam Electric Station, Unit 3), ALAB-732, 17 NRC 1076, 1106-07 (1983). Accordingly, the State has not shown that the Board erred in rejecting this basis for the contention.

C. Issues Concerning the Intermodal Transfer Facility.

Finally, the State requests that it be allowed to defer its appeal from the Licensing Board's dismissal of emergency planning issues related to the Intermodal Transfer Facility until it appeals from the dismissal of its Contention Utah B concerning the ITF (Petition at 10).²⁰ Nowhere, however, did the State specify any error committed by the Licensing Board, as is explicitly required by 10 C.F.R. § 2.786(b)(2)(ii). Further, the State failed to show that the Board's treatment of this issue raises a "substantial question" with respect to any of the criteria specified in 10 C.F.R. § 2.786(b)(4).²¹ Accordingly, the State's request to defer its appeal on this matter must be denied.

CONCLUSION

For the reasons set forth above, the Staff respectfully submits that the State's petition for review should be denied.

Respectfully submitted,

/RA/

Sherwin E. Turk
Counsel for NRC Staff

Dated at Rockville, Maryland
this 26th day of January, 2001

²⁰ Nor is there any merit in the State's claim that to brief fully the emergency plan issues relating to the ITF, would require it to address Utah B, "thus making the appeal interlocutory" (Petition at 10). Emergency planning issues are clearly separable from other ITP-related issues.

²¹ This failure is significant, particularly in light of the Commission's direction -- in response to the State's request for clarification -- that any claims that "could have affected the outcome" of a Partial Initial Decision must be raised in a petition for review of that decision. *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-00-24, 52 NRC _ (Dec. 20, 2000), slip op. at 3.

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S RESPONSE TO STATE OF UTAH'S PETITION FOR REVIEW OF LBP-00-35 AND OTHER RULINGS CONCERNING CONTENTION UTAH R (EMERGENCY PLANNING)" in the above captioned proceeding have been served on the following through deposit in the NRC's internal mail system, with copies by electronic mail, as indicated by an asterisk, or by deposit in the U.S. Postal Service, as indicated by double asterisk, with copies by electronic mail this 26th day of January, 2001:

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