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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
	)	
(Private Fuel Storage Facility)	)	ASLBP No. 97-732-02-ISFSI

APPLICANT'S REPLY BRIEF ON THE STATE OF UTAH'S REQUEST FOR MODIFICATION TO BASIS 2 OF UTAH CONTENTION L

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Applicant Private Fuel Storage L.L.C. ("Applicant" or "PFS") hereby replies to the briefs filed by the Staff[1] and the State of Utah ("State")[2] in response to the Commission's Order, CLI-01-06, 53 NRC __ (February 14, 2001) ("February 14 Order").[3] The briefs address the "State of Utah's Request for Admission of Late-Filed Modification to Basis 2 of Utah Contention L," filed November 9, 2000 ("State Request"), portions of which were certified to the Commission by the Atomic Safety and Licensing Board ("Licensing Board" or "Board") in its Memorandum and Order of January 31, 2001.[4] The Commission in its February 14 Order requested briefing on two issues: (1) whether the exemption request approved by the Staff authorizing PFS to use a probabilistic seismic hazard evaluation methodology based on a 2,000-year return period earthquake should be

[1] "NRC Staff's Brief Concerning the Licensing Board's Referred Rulings and Certified Question in LBP-01-03 (State of Utah's Request to Amend Contention Utah L to Challenge the Applicant's Seismic Exemption Request" (March 2, 2001) ("Staff Brief").

[2] "State of Utah's Brief on the Commission's Review of Applicant's Seismic Exemption Request and Admission of Amendment to Contention Utah L (Geotechnical)" (March 2, 2001) ("State Brief").

[3] Applicants also filed a brief in response to the February 14 Order. See "Applicant's Brief Opposing Admission and Adjudication of the State Of Utah's Request for Modification to Basis 2 of Utah Contention L" (March 2, 2001) ("PFS Brief").

[4] Memorandum and Order (Ruling on Admissibility of Late-Filed Modification of Contention L, Geotechnical, Basis 2; Referring Rulings and Certifying Question Regarding Admissibility), LBP-01-03, 53 NRC __ (January 31, 2001) ("January 31 Order").

subject to adjudicatory challenge in the licensing proceeding for the Private Fuel Storage Facility ("PFSF"); and (2) whether the contention proposed by the State challenging the exemption would be admissible for adjudication in accordance with NRC regulations.

Both the State and the Staff address at some length in their briefs what kind of a hearing should be provided on the exemption request. This brief will show that the "hearing" requirement set by Section 189(a) of the Atomic Energy Act does not necessitate a formal adjudicatory hearing, as the State contends. Thus, even assuming that the State had raised an admissible contention, the State's request to have an evidentiary hearing on it in the PFS licensing proceeding should be denied and a rulemaking should be instituted or an informal hearing should be held on the contention.

As in the PFS Brief, we first briefly discuss the admissibility of the issues raised by the State and then turn to the type of hearing that should be held assuming that any of the issues raised by the State would be found admissible as a contention.

I. THE STATE HAS FAILED TO RAISE AN ADMISSIBLE CONTENTION

The discussion in the State Brief of the contentions ruled admissible by the Board largely parallels its arguments below and needs no detailed response. Several points are worth making, however. First, the State centers its argument on the admissibility of its contention not on the merits of the exemption, but on the Staff's decision making process, and in particular on its failure to conform to the Rulemaking Plan presented in SECY-98-126. State Brief at 17-18. As discussed in the PFS Brief and in the Staff Brief,[5] the Board was in error when it ruled that an admissible contention could be drawn on the basis of the Staff's failure to follow the Rulemaking Plan. The Rulemaking Plan is only a planning tool by the Staff, which is subject to modification in the course of developing a proposed rule, and which can be set aside in individual cases if circumstances warrant.[6]

[5] See PFS Brief at 11-13; Staff Brief at 12-13.

[6] See, e.g., Yankee Atomic Electric Co. (Yankee Nuclear Power station, CLI-96-7, 43 NRC 235 (1996).

Second, by virtue of its focus on the Staff's decision making process, the State does not provide (indeed, it has never provided) an explanation of why the exemption request as filed by PFS or approved by the Staff was inadequate on the technical merits.[7] Thus, whereas the Staff conducted extensive geotechnical analyses independent from those conducted by PFS, the State Request does not address the examination by Stamakatos (1999), or any other site-specific analysis by the Staff. Further, the 2,000-year return period is not attacked because it is an improper return period based on site-specific characteristics or consequences, but because in selecting it the Staff did not follow the 1,000-year or 10,000-year return period options suggested in the proposal for rulemaking in SECY-98-126. As noted in PFS's brief (at 12-13, n. 19), the nonsensical nature of the State's "either/or" argument is underscored by the fact that if the Staff had approved the 1,000-year return period as requested and supported by PFS the State would have no basis to contend the Staff erred in granting the exemption. Ironically, the State, in effect, is complaining that the Staff approved a more conservative return period.

Third, the State Brief argues, as a reason for allowing the earthquake definition issue to be litigated in this proceeding, that the claims raised in Utah L are "directly relevant to the exemption request" and that "the standard and methodology to be used will have a direct effect on the outcome of Utah L." State Brief at 9-10. That is definitely not the case, as the Licensing Board found in LBP-99-21, 49 NRC 431 (1999):

> There is a geotechnical issue in this proceeding – contention Utah L. A review of that contention leads us to conclude, in agreement with PFS and the Staff, that the requested exemption has no direct bearing on that issue statement. The seismic matters that are under scrutiny in contention Utah L . . . are not matters that are directly impacted by whether the design-

[7] The State avers that the issues raised by the exemption request are "technically complex" and indicates that "the adjudication would benefit from hearing from the State's experts, such as seismologist Dr. Arabasz." State Brief at 14. However, Dr. Arabasz would presumably be available to provide his views in a forum other than a licensing proceeding. In any case, the State cannot bootstrap itself into having a hearing by promising that the grounds for its contention will be explained at the hearing itself.

> basis earthquake for the PFS facility ultimately is calculated using the Part 100 deterministic standard or the probabilistic methodology championed by PFS in its exemption request.

Id. at 436. Also incorrect in the same vein is the State's claim (State Brief at 7) that it is litigating, as part of Utah L, the failure of PFS to perform a deterministic seismic hazards analysis ("DSHA"). Such a claim is not within the scope of Utah L.[8]

Fourth, the State finds fault with the Board's determination that some aspects of the proposed contention were not admissible. State Brief at 19-21. However, the Board's ruling on these issues is not before the Commission at this time, for the Commission granted review of the "Board's holdings that Utah's exemption related issues would be admissible." February 14 Order at 1. There is nothing novel or contradictory with case law, policy, or Commission regulations in the Board's decision not to admit these contentions.[9] Thus, they should be treated no differently than other contentions that have been rejected by the Board, and which are potentially subject to appeal to the Commission at the end of the licensing proceeding [10]

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[8] LBP-99-21, 49 NRC at 436; see also Applicant's Motion for Summary Disposition of Utah Contention L (December 30, 2000) at 6-8; Applicant's Motion to Strike Portions of State of Utah's Response to Applicant's Motion for Summary Disposition of Utah Contention L (February 9, 2000) at 6.

[9] The Commission normally takes interlocutory review only in extraordinary situations. See, e.g., Sacramento Metropolitan Utility District (Rancho Seco Nuclear Generating Station), CLI-94-02, 39 NRC 91 (1994).

[10] The State's arguments for the admissibility of the excluded issues also have no merit. Item 3, which raised questions on the radioactive dose calculations in the PFS accident analysis, was dismissed by the Board as untimely since the claims made there could have been raised earlier and are independent of the earthquake definition. January 31 Order at 12. The State's argument against this determination is that there is no longer the degree of conservatism in the design of the PFS that would have existed had the facility been designed to deterministic earthquake standards. State Brief at 19-20. However, the matters raised by the State in Item 3 have nothing to do with how the design-basis earthquake is calculated, hence the State's argument is invalid. Likewise, the Board dismissed Item 2(b), in which the State asserted that PFS failed to show that certain Category 1 structures had been designed to withstand a 2,000 year return period earthquake, since PFS has now shown that those structures are designed against such an earthquake. January 31 Order at 15-16. In response, the State claims that "only now when the Board found the State's challenge to the exemption was ripe were there any applicable design basis standards under the exemption request that the State could challenge." State Brief at 18. However, the reason this item was dismissed was not for unripeness but because it had been mooted by PFS's steps to document its designs' ability to withstand a 2,000 year return earthquake. PFS's explanation completely refutes the item.

For these reasons and those presented in the PFS Brief, the State has failed to raise an admissible contention against the exemption sought by PFS and is therefore not entitled to a hearing on the issues it raises.

II. THE COMMISSION SHOULD NOT ORDER AN ADJUDICATORY HEARING ON APPLICANT'S SEISMIC EXEMPTION REQUEST

Should the Commission conclude that the State has raised an admissible contention, the issue is then the type of hearing to be held.[11] As discussed below, Section 189(a) of the Atomic Energy Act, 42 U.S.C. § 2239(a), does not require a formal adjudicatory hearing here. Further, since all the issues relating to the exemption are generic in nature and there are no substantial issues of fact relating to the PFSF that need to be decided, the issues raised by the State can best be handled by rulemaking or through informal adjudication.

A. A Section 189(a) Hearing Does Not Have To Be A Formal Adjudication

Under the Atomic Energy Act, the NRC need not grant a formal hearing unless required by statute, regulations, or due process.[12] In particular, Section 189(a) does not require full adjudicatory hearings, but leaves it to the sound discretion of the Commission to determine the appropriate form of a hearing.[13] Contrary to the State's suggestion, Section 189(a) does not require a full-blown adjudication. As the D.C. Circuit held in Philadelphia Newspapers, Inc. v. NRC, 727 F.2d 1195, 1202 (D.C. Cir. 1984), "Section 189(a)

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[11] The State raises a "strawman" by claiming that the recent Commission's decision in Commonwealth Edison Co., (Zion Nuclear Power Station Units 1 and 2), CLI-00-5, 51 NRC 90 (2000), could not possibly be read to mean that no hearing is ever needed regarding an exemption request. That is not what Zion held; the case stands for the proposition that if the exemption does not concern the licensing of a facility, no hearing is required in connection with the exemption request. 51 NRC at 96.

[12] "In order to prevail on a claim that the NRC is bound to conduct its proceedings in a particular manner, a petitioner 'must point to a statute specifically mandating that procedure, for 'absent constitutional constraints or extremely compelling circumstances' courts are never free to impose on the NRC (or any other agency) a procedural requirement not provided for by Congress.'" Kelley v. Selin, 42 F.3d 1501, 1522 (6th Cir. 1995), quoting Union of Concerned Scientists v. NRC, 920 F.2d 50, 53 (D.C. Cir. 1990).

[13] See, e.g., United States Department of Energy (Clinch River Breeder Reactor Plant), CLI-81-35, 14 NRC 1100 (1981).

provides for hearings in a number of circumstances but does not on its face require *on-the-record* hearings."[14] Likewise, in West Chicago v. NRC, 701 F.2d 632 (1984), the Seventh Circuit upheld the NRC's decision to provide a hearing with only written submissions as satisfying Section 189(a)'s hearing requirements.[15]

The Commission itself is increasingly opting for the use of informal, rather than full-blown adjudicatory hearings. It has, for example, adopted a streamlined approach to the hearing process in a variety of areas, such as license transfer applications, noting that in those situations, "the formal adjudicatory hearing process would needlessly add formality and resource burdens to the development of a record for reaching a decision . . . without any commensurate benefit to the public health and safety or the common defense and security."[16] Further, the Commission has just recently decided to develop a proposed rule that would make informal hearings the norm for most licensing hearings, including those for ISFSIs under Part 72.[17] In light of the Commission's decisions to promote informal hearings where appropriate, and the absence of complex disputed issues of material facts (discussed below), the Commission should follow an informal approach for any hearing determined to be necessary here.[18]

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[14] See also, Kelley v. Selin, supra, (use of generic rulemaking, despite request for an adjudicatory hearing concerning the dry storage of spent fuel at a specific site, was proper exercise of agency discretion).

[15] Affirming Kerr-McGee Corp. (West Chicago Rare Earths Facility), CLI-82-2, 15 NRC 2323 (1982) (holding informal, written hearings appropriate for materials license issues).

[16] Streamlined Hearing Process for NRC Approval of License Transfers, 63 Fed.Reg. 66,721, 66,727 (Dec. 3, 1998) (Final Rule).

[17] SECY-00-0017 "Proposed Rule Revising 10 CFR Part 2 – Rules of Practice (January 21, 2000); "Staff Requirements – SECY-00-0017 – Proposed Rule Revising 10 CFR Part 2 – Rules of Practice" (February 16, 2001). Under approach proposed, Part 72 proceedings would be handled under a revised Subpart L patterned after the informal hearing procedures of existing Subpart M. See also, SECY-99-006. (Re-Examination of the NRC Hearing Process).

[18] Section 554(a) of the Administrative Procedures Act, 5 U.S.C. § 554(a), cited by the State, does not dictate a different result, for it is well established that Section 554(a) requirements apply only if and to the extent that another statute requires formal adjudication. Philadelphia Newspapers, supra, 727 F.2d at 1202. As discussed, Section 189(a) does not call for formal adjudication.

Even under existing practice, the Commission has adopted an informal hearing approach in cases where, as in the current case:

- There are no disputed case specific facts.[19]
- The proceeding can be handled as a rule making.[20]
- Licensing a reactor is not involved.[21]
- The subject of the licensing is nuclear materials.[22]
- The subject of the hearing is an exemption from NRC regulations.[23]

All five circumstances are present in this case. The State Request involves an exemption from Commission regulations, and not directly the License Application. The requested exemption as discussed involves the subject to a proposed rulemaking and would better be dealt with in that venue. Moreover, the State has not raised any factual issue that could be considered an adjudicatory fact,[24] and the present License Application is more in the nature of a materials license than it is a license to operate a nuclear reactor. Thus, the Commission should, if it deems a hearing necessary, proceed with an informal hearing.[25]

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[19] Kerr-McGee, supra, at 255.

[20] The Commission has almost invariably used informal hearings in rule-making proceedings, despite their being subject to the Section 189(a) hearing requirement use of the same statutory language. Siegel v. AEC, 400 F.2d 778 (D.C. Cir. 1968).

[21] For example, the Commission in Kerr McGee, noted that the 1957 amendments to the AEA were primarily concerned with reactors. Kerr McGee at 252. Moreover, even in reactor licensing cases, the D.C. Circuit Court of Appeals has upheld changes in the NRC's rules replacing formal hearings with informal hearings. See Nuclear Information Resource Serv. v. NRC, 969 F.2d 1169 (D.C. Cir. 1992).

[22] See, e.g., Kerr-McGee, supra.

[23] See Clinch River, supra, at 1104, n.2 (applying an informal hearing procedure to an exemption challenge, where the circumstances warranted a hearing).

[24] The State does not attack any site-specific concerns regarding the exemption, but the process of granting the exemption itself. To the extent the State has raised any issues, they go to scientific and technical issues, which may be "technically complex", but contrary to the State's inaccurate assertion, do not require an adjudication to be adequately addressed. See Matthews v. Eldridge, 424 U.S. 319, 344-45 (1976).

[25] The State argues that the grant of the exemption to PFS constitutes a substantive policy change that warrants a hearing. State Brief at 7 - 10. However, no substantive policy change is involved in moving away from a DSHA to a PSHA in the case of the PFS exemption, because the Commission has been moving to make a PSHA the standard for all its licenses; it has done so in the case of licenses under Part 50, see 10 CFR § 100.23, and is getting ready to do the same for Part 72 licenses, witness the Rulemaking Plan described in SECY-98-126. Moreover, for such a change in policy, rulemaking and not formal adjudication is the norm followed by the Commission.

B. There Are No Factual Issues That Require An Evidentiary Hearing Before The Licensing Board

The State Brief attempts to establish the need for an adjudicatory hearing on the exemption request by alleging that a record needs to be developed on several factual matters. The reasons alleged by the State are, however, spurious.

a. The State alleges as a basis for holding a hearing the failure by PFS and the Staff "to show the consequences of a denial of PFS's exemption request. "State Brief at 12. However, the consequences of PFS's failure to get an exemption are irrelevant and self-evident. As noted in the State Brief itself, "[u]nder Part 72, PFS is required to conduct a deterministic seismic hazard analysis and the design earthquake must be equivalent to the safe shutdown earthquake for a nuclear power plant." Id. at 7. Thus, if the exemptions request were denied, PFS would have to comply with the requirements of 10 CFR § 72.102(f)(1). No evidentiary hearing is required to elucidate this issue, which is one of law, not fact.

b. The State argues that there needs to be a hearing on whether PFS can meet the "current" (deterministic) standard. State Brief at 9. However, since PFS has applied for an exemption from the deterministic standard, whether it meets such a standard is immaterial to the issue raised by the exemption request.

c. The State also argues that there is no record to show whether PFS can meet a design basis with a 10,000 year return period, "or at least a return period greater than 2,000 years." Id. at 10. Again, neither of these options is encompassed in PFS's exemption request, so there is no purpose for a hearing on them.

d. The State alleges that PFS should, in an adjudicatory hearing, "be required to defend its need for an exemption" and "document[ ] or demonstrate[ ] why it cannot meet acceptable facility design values and comply with the current regulations . . ." Id. at 11, 13. However, there is no regulatory basis for the showing sought by the State.[26]

e. The State alleges that PFS has not documented or demonstrated an acceptable or logical basis for the exemption standards PFS may use in its seismic hazards analysis. State Brief at 13. However, as noted above, PFS provided analyses supporting the exemption request, both at the time the request was filed and subsequently in response to questions by the Staff. To date, the State has failed to confront those analyses directly. Indeed, with respect to Items 4, 5 and 6, it bears re-emphasizing the point made in the PFS Brief (and also in the Staff Brief)[27] that

[26] See 10 CFR § 72.7. Compare 10 CFR § 50.12, the regulation for seeking exemptions of requirements applicable to power reactors, which requires an exemption request to be supported by a showing of "special circumstances."

[27] See Staff Brief at 18.

the State has chosen to challenge the Staff's approval of the exemption request made by PFS, rather than the request itself. In so doing, the State has failed to create a factual issue that could be subject to adjudication in a licensing hearing.

It is therefore plain that the justifications asserted by the State for an adjudicatory hearing on this matter are shallow and unpersuasive. Indeed, there is no basis for referring back to the Board for determination issues, such as these, that are generic and therefore more suitable for resolution by other means.

C. A Rulemaking Proceeding Is The Proper Vehicle For Generic Issues Such As The Proper Earthquake Definition

As discussed in the PFS Brief, the Staff's approval of the PFS exemption request is a generic determination of the acceptability of a PSHA using a 2,000-year return period for dry storage ISFSIs, and is the subject of a rulemaking plan. It is well established that a contention that is the subject, or about to become the subject, of a pending rulemaking should not be adjudicated in individual licensing proceedings. Further, a rulemaking that covered both the probabilistic seismic hazard analysis, including the appropriate return period would allow the Commission to decide important policy issues that are better resolved generically than by case-by-case adjudication. However, such a rulemaking would need to occur expeditiously given the current schedule.[28]

D. If Rulemaking Can Not Be Completed Consistent With The PFS Licensing Schedule, An Informal Hearing Could Be A Workable Alternative

If the Commission were to conclude that the State had set forth an admissible contention but the Commission did not believe a rulemaking could be completed by April 2002, the Commission should consider an informal hearing to resolve the State's challenge.[29] There is precedent for such a procedure. In Clinch River, the Commission al-

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[28] The recently revised schedule for the PFSF provides for the issuance of the final initial decision in April 2002, about a year from now. Memorandum and Order (General Schedule Revision), February 22, 2001.

[29] See, e.g., Kelley v. Selin, 42 F.3d at 1513 ("The applicable statute, 42 U.S.C. § 2239(a)(1)(A), provides for a 'hearing,' but does not provide for any particular format for this hearing"); Cf, 10 C.F.R. § 2.758(d) (waiver of regulation under § 2.758 may be determined by the Commission "on the basis of the petition, af-

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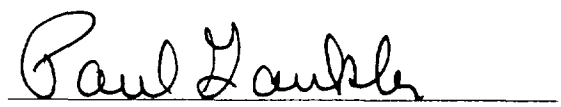
lowed the submission of written comments and oral presentations by the parties on a request for an exemption from 10 CFR 50.10 to allow site preparation activities prior to the issuance of a construction permit or limited work authorization. Given that the State attack is focused on a methodology that the Commission has already elsewhere adopted by regulation, this challenge parallels Clinch River, where "major and novel policy and legal issues that are best resolved by the Commission itself . . ." were present. Likewise, informal hearings have been held or are being provided in a number of proceedings under Section 189(a).[30] In the absence of a rulemaking, an informal hearing would represent the best approach for addressing the State's issues.

III. CONCLUSION

For the foregoing reasons, the Commission should deny the State's Request.

Respectfully submitted,



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fidavit, and any response" or "the Commission may direct such further proceedings as it deems appropriate to aid its determination")

[30] See, e.g., 10 C.F.R. 2, Subparts L and M.

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CERTIFICATE OF SERVICE

I hereby certify that copies of the "Applicant's Reply Brief on the State of Utah's Request for Modification to Basis 2 of Utah Contention L" were served on the persons listed below (unless otherwise noted) by e-mail with conforming copies by U.S. mail, first class, postage prepaid, this 12th day of March 2001.

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