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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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BEFORE THE COMMISSION

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

In the Matter of:)	Docket No. 72-22-ISFSI
PRIVATE FUEL STORAGE, LLC)	ASLBP No. 97-732-02-ISFSI
(Independent Spent Fuel)	
Storage Installation))	March 12, 2001

STATE OF UTAH'S REPLY BRIEF ON THE COMMISSION'S
REVIEW OF APPLICANT'S SEISMIC EXEMPTION
REQUEST AND ADMISSION OF AMENDMENT
TO CONTENTION UTAH L (GEOTECHNICAL)

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AMENDMENT TO CONTENTION UTAH L (GEOTECHNICAL)**

In accordance with the Commission's February 14, 2001, Order, CLI-01-06, the State of Utah hereby submits its brief in reply to briefs addressing LBP-01-03¹ filed by NRC Staff and the Applicant, Private Fuel Storage, LLC ("PFS"). In its Brief dated March 2, 2001, the State urged the Commission or the Board to hold an formal hearing on PFS's exemption request and that the Commission find admissible the State's challenge to PFS's exemption request. Neither the NRC Staff nor the Applicant, in their briefs of the same date, were supportive of this position. The Staff, however, did opine that if a hearing on the exemption were to be held, it should be an informal hearing.

The exemption request has arisen because PFS cannot (or is unwilling to) meet existing regulations by which seismicity at proposed ISFSI sites West of the Rocky Mountain Front must be evaluated. PFS's failure to meet the existing standard affects the licensability of the ISFSI. The State believes that both PFS and the Staff are inappropriately attempting

¹ Memorandum and Order (Rulings on Admissibility of Late-Filed Modification of Contention Utah L, Geotechnical, Basis 2; Referring Rulings and Certifying Question Regarding Admissibility) dated January 31, 2001.

to shift the burden of proof in the licensing proceeding from the Applicant to the State. Furthermore, PFS's request does not relate to a non-safety requirement, such as the placement of a sign, but has serious safety ramifications. PFS is requesting an exemption from a foundational regulation that is used for other safety analyses. Consequently, a loosening of the seismic hazard analysis standard has significant safety implications for the analysis of the PFS site and the facility.

In addition, there is a three year old Rulemaking Plan² to amend the regulation from which PFS has requested an exemption. Instead of following the Rulemaking Plan, the Staff has cobbled together ad hoc and arbitrary and capricious reasons for divining a standard for PFS to use in lieu of the existing standard. Both PFS and the Staff take contradictory positions with respect to the Rulemaking Plan: first, they argue the plan is irrelevant and the Staff may ignore it in determining the standard to apply under the exemption request; they then argue that the plan is relevant, rulemaking is imminent, and the State cannot litigate this issue in an adjudicative licensing proceeding. *See* PFS Brief at 9, 10, 11, 14, 18, 19; Staff Brief at 7, 10, and n. 27. All of this, if the Commission were to adopt this view, leaves the State with no recourse to challenge the agency action in selecting standards that lack adequate conservatism for a seismically active and complex site on which the largest ISFSI ever contemplated by the nuclear industry will be constructed.

The Commission should eschew the attempt by the Staff and PFS to relegate this site specific exemption request to a generic rulemaking issue. Agency actions on exemptions are

² "Rulemaking Plan: Geological and Seismological Characteristics for Siting and Design of Dry Cask Independent Spent Fuel Storage Installations, 10 C.F.R. Part 72," SECY-98-126 ("Rulemaking Plan") (June 1998).

no substitute for, and do not comport with, rulemaking under the Administrative Procedures Act (“APA”). PFS’s and the Staff’s positions have no merit. The State urges the Commission to allow the State to present its case in a formal hearing on the effect of granting an exemption to PFS from a regulation PFS cannot meet.

I. The Staff’s Grant of the Exemption Does Not Comply with 10 C.F.R. § 72.7.

To grant an exemption, such as the one requested by PFS, the Commission must determine that the exemption request is “authorized by law and will not endanger life or property or the common defense and security and [is] otherwise in the public interest.” 10 C.F.R. 72.7. Here neither the Staff nor PFS has met its burden to show that there is a rational basis for granting PFS’s request.

Both PFS and the Staff claim that the State has raised only generic issues in which the State challenges the Staff’s rationale for granting the request. Further, PFS, citing Shearon Harris, asserts that the State has raised no issues of material fact and thus has not raised a litigable issue.³ PFS Brief at 8. Instead, PFS argues that the Staff’s reasons for granting the request “clearly relate to the process by which the Staff decided to evaluate the PFS exemption request” and the State can only challenge the application of those site specific parameters the Staff derived from its evaluation. PFS Brief at 12 (*emphasis in original*). This is ridiculous. The Staff in the final Safety Evaluation Report (“FSER”) “determined

³ Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant), CLI-86-24, 24 NRC 769 (1986), *aff’d sub nom. Edelman v. NRC*, 825 F.2d 46 (4th Cir. 1987). In Shearon Harris, the Staff proposed to grant an exemption by finding that the requirements of 10 C.F.R. § 50.12 have been met; the Commission required the petitioner to present material issues of fact as to whether the exemption was authorized by law, will not affect public health and safety and that the existing regulation is not necessary to achieve the underlying purpose of the rule. 24 NRC at 774.

that a 2,000 year return value with the PSHA methodology can be acceptable for the following [five] reasons....” FSER at 2-41. Those reasons enumerated by the Staff are the basis of the agency action for granting the request. Such agency action must comport with 10 C.F.R. § 72.7.

By law, the Commission may only issue a license to PFS if the Commission finds, *inter alia*, that an applicant’s “proposed site complies with the criteria in subpart E.” 10 C.F.R. § 72.40. The Commission may grant specific exemptions from Part 72 regulations in conformance with section 72.7. If the Commission grants an exemption from existing Subpart E regulations, the Commission’s final agency action must be based on a supportable record to defend against judicial review of the grant of the exemption request and satisfaction of 10 C.F.R. § 72.40. The Board rightly found that the Applicant’s exemption request did not provide an appropriate justification for use of the 2,000-year return period and that the Staff proffered its own justification for the request. LBP-01-03, slip op. at 17-19. Here the current record to support the Commission’s final agency action is the Staff’s FSER -- a record that will not withstand scrutiny.

The State believes that the Commission should look to the exemption factors in Part 50 in determining whether there is record support for the Staff’s actions. Undoubtedly, the Staff and PFS will argue that unlike Part 50, Part 72 does not require a showing of special circumstances to grant an exemption. *Cf.* 10 C.F.R. § 50.12(a) with § 72.7. Section 72.7 has a “public interest” requirement that is absent in § 50.12(a) but the State would argue that some of the factors enumerated in 10 C.F.R. § 50.12(a) explain the abbreviated reference to the public interest as well as the other factors required by section 72.7. One requirement in

section 50.12(a) is that the exemption must not defeat the underlying purpose of the rule. This is a legitimate public interest and health and safety concern that Part 72 should have to satisfy. In the final Part 72 rule, the Commission stated: “The principle of selecting sound sites has been retained in the final rule.” Final Rule, Licensing Requirements for the Storage of Spent Fuel in an Independent Spent Fuel Storage Installation, 45 Fed. Reg. 74,693, 74,697 (1980) (*codified at* 10 C.F.R. Part 72).⁴ For sites in the western United States, “developing a site specific design earthquake by the very thorough investigation required by Appendix A of 10 C.F.R. Part 100 is considered necessary and appropriate for the protection of an ISFSI which could contain a large inventory of spent fuel.” *Id.*

The exemption request defeats the purpose of the rule. Neither PFS nor the Staff defend against the rationale the Staff used to grant the request. PFS asserts that section 72.7 gives the Staff the flexibility to dispense with existing regulations and apply a more appropriate standard. PFS Brief at 9. To so interpret section 72.7 eliminates all public participation in the process and leaves the agency unaccountable for arbitrary and capricious action. Such is the case here. PFS also asserts that the State’s technical challenges to the underlying rationale for the grant of the request are distinctions without a difference. PFS Brief at 15. This is incorrect. The standard by which PFS will evaluate the peak ground accelerations at the Skull Valley site is a building block for other analyses. The peak ground

⁴ The Commission gave as an example of an unsound site that should be avoided one that lies “within the range of strong nearfield ground motion from earthquakes on larger capable faults....” *Id.* A capable fault dips under the PFS site and other capable faults are only a few miles from the PFS site. Utah Brief at 12 and n. 12. *See also* State of Utah’s Response to Applicant’s Motion for Summary Disposition of Utah Contention L (January 30, 2001) (“State’s Response to Summary Disposition, Utah L”) at 4-5.

acceleration is an input into such calculation as the site specific cask stability, Canister Transfer Building, and foundation and soils analyses.⁵ The lack of conservatism in the exemption standard does not reflect the considered judgment of conservatism in the existing rule and thereby defeats the purpose of the seismic regulations.

PFS erroneously argues that Utah is attempting to insert its building and highway bridge standards into the NRC proceeding. PFS Brief at 15. PFS misses the point. The public interest component of section 72.7 is not met when ordinary buildings and highway bridges in this State are built to a safer standard than the PFS nuclear facility.

The agency action on the exemption request abandons any evaluation of the public interest and, as well, is not faithful to the underlying purpose of the rule.

II. The Rulemaking Plan is Relevant to the Exemption Request.

Both PFS and the Staff bemoan the State's assertion that the Staff has given no explanation for not complying with the Commission's Rulemaking Plan, SECY-98-126. *See* *eg.*, PFS Brief at 9-10; Staff Brief at 10. The State acknowledges that regulatory guides, proposed rulemaking plans and the like are not binding regulations. But such documents do have the Commission's imprimatur of legitimacy in advising an applicant how to comply with the Commission's regulations. For example, licensees are required to show equivalent

⁵ The State disputes the Staff's statement that these issues are not relevant to Contention Utah L. Staff Brief at 14-15. There has been an ongoing dispute among the parties as to the scope of Utah L. A perusal of State's Response to Summary Disposition, Utah L (January 30, 2001) will show, for example, that PFS has not satisfied the concerns raised by the State in Basis 2 (State's Response at 10-12), PFS has not accounted for conflicts in the data (State's Response at 12-14) and that, in addition to relying on non-conservative assumptions, PFS's investigation has not satisfied the concern raised in Basis 3 (Response at 14-24). The summary disposition decision is pending before the Board.

or better measures than a relevant regulatory guide if an applicant chooses not to comply with the guidance document. Consolidated Edison Co of N.Y (Indian Point, Unit No. 2) and Power Authority of State of N.Y (Indian Point, Unit No. 3), LBP-82-105, 16 NRC 1629, 1631 (1982).

The Staff suggests that the Board's decision, in effect, establishes the Rulemaking Plan as the baseline regulatory standard. Staff Brief at 10. The Staff reads too much into the Board's decision. The Board merely found the Staff cannot ignore the Rulemaking Plan. LBP-01-03, slip op. at 15. There are a number of reasons the Rulemaking Plan should be the starting point for the Staff's evaluation of PFS's request. First, PFS's ostensible impetus for its request was to take advantage of the proposed PSHA methodology described in the Rulemaking Plan. Utah Brief at 14. Second, the Commission has already signaled its agreement with the use of a 10,000 year return period PSHA. Third, while the Staff should not have to rationalize all action not considered, when it is given direction from the Commission on an issue, there is a reasonable expectation the Staff will comply or explain why it is deviating from that course.

The Rulemaking Plan is a legitimate touchstone to show whether the standard the Staff has developed will withstand review, are arbitrary and capricious and, thus, form a basis for a litigable contention.

III. Action on this Exemption Request Is Not a Generic Rulemaking Issue but Is a Decision in a Licensing Proceeding for Which the State Is Entitled to a Formal Hearing.

A rule is a statement of general applicability and future effect of agency requirements authorized by law. 5 U.S.C § 551(4) and (5). It is prospective not retrospective and must

comply with the rulemaking procedures of the APA, 5 U.S.C. § 551, et. seq. In an attempt to cloak its exemption request as a general rulemaking issue, PFS says:

[I]n reality, the Staff's approval of the PFS seismic exemption request is a generic determination of the acceptability of a probabilistic seismic hazard analysis using a 2,000 year return period for dry storage ISFSIs. The Staff's analysis would be equally applicable to other proposed dry storage sites, just as this methodology has been adopted under other parts of NRC regulations.

PFS Brief at 18. By this statement PFS is asking the Commission to completely dispense with prospective rulemaking procedures. This is clearly a direct contravention of the Administrative Procedures Act. *See e.g., Columbia Falls Aluminum Co. v. E.P.A.*, 139 F.3d 914, 919 (D.C. Cir. 1998) (once rule is final, agency can amend it only through new rulemaking); *Alaska Professional Hunters Ass'n, Inc. v. F.A.A.*, 177 F.3d 1030, 1033-1034 (D.C. Cir. 1999) (when an agency has given its regulation a definitive interpretation, and later significantly revises that interpretation, the agency has in effect amended its rule, something it may not accomplish without notice and comment, 5 U.S.C. § 551(5)).

In the context of the PFS adjudicatory proceeding, the Staff cannot retroactively revise the generic standards by which all ISFSI applicants must demonstrate they can meet. PFS's attempt to transform the State's challenge to the exemption request into a retroactive rulemaking issue should be soundly rejected. Of course, generic matters should be resolved through rulemaking. But PFS's exemption request is not a generic matter. This particular Applicant cannot demonstrate that it can meet the existing regulations required to obtain a Part 72 license. That is why PFS needs an exemption from the regulations.

To be entitled to an ISFSI license, PFS's burden is to demonstrate that it can meet all relevant part 72 regulations, and that, for adjudicated contentions, there are no disputed

relevant material facts and PFS is entitled to judgment as a matter of law. 10 C.F.R. §§ 2.732, 2.749. Here, PFS unabashedly argues that the burden in this proceeding is on the State to show that application of the ad hoc standard the Staff specifically devised for the PFS site will exceed dose limits at the PFS facility. PFS's reading of section 72.7 ignores whether the exemption is authorized by law, is in the public interest, and whether the agency action is arbitrary and capricious. In addition, this approach also frustrates the Atomic Energy Act section 189a requirements for a hearing on granting a licence or modification of regulations dealing with licensee activities. *See* 42 U.S.C. § 2239(a) and Utah Brief at 6-11.

PFS argues that because the Licensing Board cannot direct the Staff's actions it would be anomalous for the Board to review the State's challenge to the Staff's rationale for granting the request. PFS Brief at n. 20. What is anomalous is that, according to the Staff and PFS, there is no forum in which the State may present, in a formal hearing, its challenge to this exemption which has potentially significant consequences on the licensability and safety of the PFS facility. The Staff holds out an alternative, that if there must be a hearing, it should be an informal one based on paper submittals to the Commission. Staff Brief at 16. The Staff compares such a hearing to the generic rulemaking proceeding that has already been planned under SECY-98-126 and believes this should satisfy the State. As explained above, the Staff's decision to grant the exemption is not a generic rulemaking issue. It has serious ramifications on other aspects of PFS's safety evaluation. Furthermore, the issues involved are complex and extremely technical. The State believes it cannot fairly portray all relevant site specific and policy issues to the Commission using only written procedures. Moreover, such a procedure would deprive the adjudicator of the benefit of hearing

testimony from experts in the field of seismic hazard analysis and who are familiar with the PFS site. See Utah Brief at 13-14.

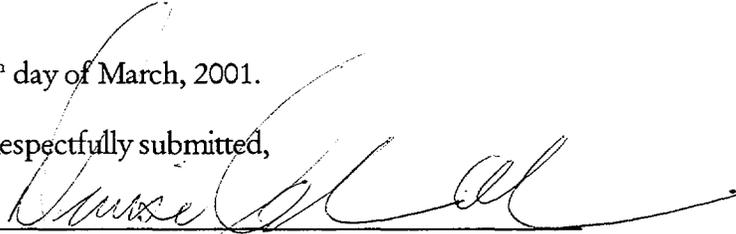
If the Commission so chose, and with appropriate guidance to the Board, the State believes the Commission could remand this issue to the Board for hearing with the other issues in contention Utah L. The Commission has the authority to so remand because the Board "conducts hearings for the Commission and such other regulatory functions as the Commission authorizes." 10 C.F.R. § 1.15. Moreover, under 10 C.F.R. § 2.721(a), a licensing board established by the Commission may perform such other adjudicatory functions as the Commission deems appropriate. Alternatively, the State requests a formal hearing before the Commission where it may present witnesses and cross examine other parties' witnesses.

CONCLUSION

For the foregoing reasons, the State requests the Commission find the State has presented litigable issues and is entitled to a formal hearing in its challenge to PFS's exemption request.

DATED this 12th day of March, 2001.

Respectfully submitted,



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I hereby certify that a copy of STATE OF UTAH'S REPLY BRIEF ON THE COMMISSION'S REVIEW OF APPLICANT'S SEISMIC EXEMPTION REQUEST AND ADMISSION OF AMENDMENT TO CONTENTION UTAH L (GEOTECHNICAL) was served on the persons listed below by electronic mail (unless otherwise noted) with conforming copies by United States mail first class, this 12th day of March, 2001:

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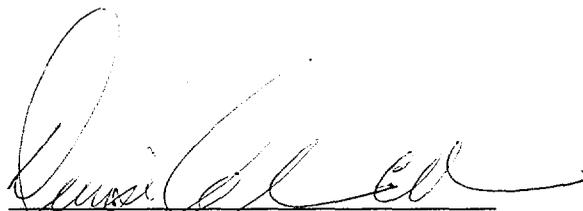
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