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

INTRODUCTION

In accordance with the Commission's Order of February 14, 2001,¹ the NRC Staff ("Staff") hereby responds to the "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)," dated March 2, 2001 ("Utah Brief"). For the reasons set forth below, the Staff submits (a) that the State of Utah ("State") has failed to show that a formal hearing is required to consider its November 9, 2000 request to modify Contention Utah L to challenge to the seismic exemption request filed by Private Fuel Storage, L.L.C. ("PFS" or "Applicant"),² or (b) that the specific issues discussed in its Brief, ruled upon by the Licensing board in LBP-01-03,³ constitute admissible contention bases.

¹ *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-01-06, 53 NRC __ (Feb. 14, 2001) (slip opinion).

² "State of Utah's Request for Admission of Late-Filed Modification to Basis 2 of Contention Utah L," dated November 9, 2000 ("Modification Request").

³ *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-01-03, 53 NRC __ (Jan. 31, 2001) ("Memorandum and Order (Rulings on Admissibility of Late-Filed Modification of Contention Utah L, Geotechnical, Basis 2; Referred Rulings and Certifying Question Regarding Admissibility)") (slip opinion).

DISCUSSION

In the Staff's Brief of March 2, 2001,⁴ the Staff stated its views that (a) the Licensing Board in LBP-01-03 had erred in ruling that many of the issues raised by the State in its Modification Request were admissible, and (b) that a formal hearing to consider the exemption request is not required.⁵ The State took a different position, arguing that two of the issues excluded by the Board were admissible, and that an adjudicatory hearing is required on its Modification Request. In addition, the State, for the first time, presented a number of new issues which it seeks to raise in a hearing on the exemption request. For the reasons set forth below, the State's arguments and new issues should be rejected.

A. The Scope of Existing Contention Utah L.

In its Brief to the Commission, the State claims -- without any citation to the language of its contention or its bases -- that Contention Utah L challenges the adequacy of the Applicant's deterministic seismic hazard analysis ("DSHA"). Thus, the State asserts that it has challenged PFS's "failure to conduct a true [DSHA]" (Utah Brief at 6); that Contention Utah L challenges PFS's failure to meet "the requirement for a valid [DSHA]" (*Id.* at 8); that the Applicant's original 1997 DSHA and a 1999 update thereof constitute a "hybrid DSHA" (*Id.* at 12); and that "the standard and methodology to be used will have a direct effect on the outcome of Utah L" (*Id.* at 8).

These assertions lack any basis in fact, and fail to warrant a hearing on the State's Modification Request. Nowhere does Contention Utah L challenge the Applicant's failure to

⁴ "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)," dated March 2, 2001 ("Staff Brief").

⁵ The Applicant stated its view that none of the issues raised by the State were admissible, and that a hearing should not be required because the issues raised by the State are to be addressed in a generic rulemaking proceeding. See "Applicant's Brief Opposing Admission and Adjudication of the State of Utah's Request for Modification to Basis 2 of Utah Contention L," dated March 2, 2001 ("PFS Brief"), at 11-20. In contrast, the Staff did not oppose the admissibility of item (7) listed in LBP-01-03, slip op. at 11. See Staff Brief at 9.

conduct a “true” or “valid” DSHA or the adequacy of its “hybrid” DSHA (as distinct from the PSHA, which is the subject of the State’s current Modification Request), nor is it apparent that “the standard and methodology” of the Applicant’s seismic analysis “will have a direct effect on the outcome of Utah L.” Rather, as the Staff observed in its Brief to the Commission, Basis 2 to Contention Utah L raised only a limited ground motion issue related to the adequacy of PFS’s site characterization work prior to the State’s filing of this contention in November 1997;⁶ this issue is unrelated to the Applicant’s seismic exemption request (Staff Brief at 14-15).⁷ Further, Contention Utah L does not present a design issue or claim that “the way in which the Applicant conducts its seismic hazard analysis will determine whether the Applicant’s design basis provides adequate safety for potential earthquake ground motions” (Utah Brief at 8). In sum, existing Contention Utah L is not affected by PFS’s submission of its PSHA-based exemption request,⁸ and there is

⁶ See *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-98-7, 47 NRC 142, 191, 253 (1998).

⁷ The sole issue raised by the State in Basis 2 to Contention Utah L asserted that the PFS site may “be subject to ground motions greater than those anticipated by the Applicant due to spatial variations in ground motion amplitude and duration because of near surface traces of potentially capable faults (the Stansbury and Cedar Mountain faults).” 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, at 82-83.

⁸ The Licensing Board previously reached the same conclusion, stating as follows:

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, which include the adequacy of PFS's efforts to identify, characterize, and/or quantify surface faulting, ground motion, subsurface soils, and soil stability and foundation loading, are not matters that are directly impacted by whether the design 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. Similarly, PFS's request to use a probabilistic methodology in lieu of the deterministic approach of Part 100 does not raise any questions about regulatory

(continued...)

no merit in the State's claim that PFS's use of a PSHA will "have a direct effect on the outcome of Utah L," so as to require a hearing on the exemption request under Section 189a of the Atomic Energy Act (*Id.*). Accordingly, although a decision on the exemption request may be material to a decision whether to grant a license to PFS,⁹ it need not be considered in a hearing in the absence of an admitted or timely filed admissible contention that raises this issue. See Staff Brief at 14-15.¹⁰

B. The New Issues Raised by the State in Its Brief Should Be Rejected.

In its Brief to the Commission, the State raises various new issues which it contends require a hearing in connection with PFS's seismic exemption request. The State asserts:

[N]either PFS nor the Staff have developed a record to show the consequences of a denial of PFS's exemption request. Nowhere is there any discussion of any physical or fiscal impediments to PFS meeting the current standard. Nor is there a 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.

* * * *

⁸(...continued)

interpretation or application relative to the facts at issue in this proceeding as expressed in contention Utah L.

Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-99-21, 49 NRC 431, 436 (1999).

⁹ See Utah Brief at 8, citing *Union of Concerned Scientists v. NRC*, 735 F.2d 1437 (D.C. Cir. 1984), cert denied sub nom. *Arkansas Power & Light Co. v. Union of Concerned Scientists*, 469 U.S. 1132 (1985).

¹⁰ Similarly, there is no merit in the State's claim that the exemption request requires a hearing under Section 189a of the Act because it involves "a substantive policy change" or "a change in a substantive rule dealing with licensee activities." (Utah Brief at 8-9, citing *Citizens Awareness Network, Inc. v. NRC*, 59 F.3d 284, 292 (1st Cir. 1995) and *Union of Concerned Scientists v. NRC*, 711 F.2d 370, 380 (D.C. Cir. 1983)). The issue discussed in *CAN*, cited by the State, involved a change in the Commission's substantive interpretation of its regulations, which the court determined could only be made in accordance with the "notice and hearing" requirements of the Act; similarly, the *UCS* decision involved the need for notice and comment procedures for an interim rule that affected all reactor licensees. Those decisions are inapplicable to a determination whether a hearing on an applicant's exemption request is required in an individual license proceeding.

... PFS should ... be required to defend its need for an exemption. PFS has not documented or demonstrated why it cannot meet acceptable facility design values and comply with the current regulations or why it should be entitled to avoid those regulations.

* * * *

PFS in its seismic exemption request to the Staff has not documented or demonstrated why it cannot meet acceptable facility design values and comply with the current regulations. There is no record of whether there are any physical limitations to designing a facility that is capable of meeting the updated peak ground accelerations or whether such a design is more costly than PFS is willing to bear. It is, therefore, necessary to have a hearing to flush out the justification for such an extraordinary method of complying with existing regulatory standards.

(Utah Brief at 10-13; emphasis added).¹¹

The State's attempt to raise these new issues, which it never raised in its November 9, 2000 or previous challenges to the exemption request, should be rejected as untimely and lacking in basis. First, the issues raised by the State were carefully listed by the Licensing Board in LBP-01-03. The Board observed that the State had raised three categories of issues concerning the exemption request: (1) whether the Staff's approval of the exemption request complies with the 1998 Rulemaking Plan, and takes into account the radiological consequences of a failed design or PFS's failure to show that the facility and its equipment will satisfy the dose limits in 10 C.F.R.

¹¹ In addition, the State asserts that it "should now be permitted to form an admissible exemption challenge" (Utah Brief at 18; emphasis added). The State raises the following issues:

First, PFS is currently re-analyzing the development of its design basis ground motion. Second, part of PFS's rationale for the exemption is based on the Holtec cask sliding and tipover analysis, which uses 2,000 year PSHA ground motions. Third, many other analyses, such as the stability analyses for the Canister Transfer Building and storage pads, foundation loading, and soil stability, use 2,000 year PSHA ground motions as inputs into the calculations.

(*Id.*) No showing has been made by the State as to why issues concerning the cask sliding and tipover analyses, or other existing analyses, could not have been submitted previously. Further, the Applicant's current re-analysis has not been presented yet, and it is presently unknown whether it may affect the exemption request or the Staff's review thereof. See Staff Brief at 4 n.13.

§ 72.104(a) and can withstand a 2,000-year return earthquake; (2) whether the Staff's reasons for allowing PFS to use a PSHA with a 2,000-year return period are adequate; and (3) whether a 2,000-year return period is adequately conservative (*see* LBP-01-03, slip op. at 7). The Licensing Board then parsed these matters into seven discrete issues (*Id.* at 9-11). Nowhere did the Licensing Board mention the new issues which the State now seeks to introduce -- nor do those issues appear in the State's various modification requests. These issues should therefore be rejected as an improper attempt to expand the State's request to modify Contention Utah L.

Second, it is beyond dispute that the State was required to file its proposed challenge to the Applicant's seismic exemption request by November 9, 2000.¹² The State has failed to show "good cause" or to otherwise justify its attempt to frame new factual issues now, many months after the November 9 deadline for filing contentions has passed. These issues should therefore be rejected as untimely, in accordance with 10 C.F.R. § 2.714(a)(1).

Third, there is no legal or regulatory basis to support the State's assertion that a hearing is required in order to consider such issues as "the consequences of a denial of PFS's exemption request," the reasons why PFS requires an exemption, whether there are "physical or fiscal impediments" to its compliance with the deterministic requirements in 10 C.F.R. Part 72, whether "such a design is more costly than PFS is willing to bear," or whether PFS "can meet a design basis with a 10,000 year return period" or some "return period greater than 2,000 years." *See* 10 C.F.R. § 72.7.¹³ Accordingly, the State's attempt to raise these issues fails to state a cognizable basis under 10 C.F.R. § 2.714(b)(2) and should be rejected.

¹² *See* "Order (Schedule for Filing New or Modified Contentions)," dated November 1, 2000; "State of Utah's Request for Clarification or in the Alternative Request for an Extension of Time to File New or Modified Contentions Based on the Final [SER]," dated October 31, 2000.

¹³ As indicated in the Staff's Brief (at 3 n.5), the showing required under 10 C.F.R. § 72.7 for an exemption from the regulations in Part 72 differs considerably from the showing required under 10 C.F.R. § 50.12 for an exemption from the regulations in Part 50. Significantly, in contrast to the showing required under § 50.12, no showing of "special circumstances" is required here.

C. The Admissibility of the Issues Raised in the State's Modification Request.

1. Admitted Issues.

In its Brief to the Commission, the Staff presented its view that the Licensing Board erred in ruling admissible a claim that the Staff's approval of the exemption request "failed to comply with the Rulemaking Plan in SECY-98-126" (Staff Brief at 10).¹⁴ As the Staff pointed out, the Board's ruling on this issue "effectively establishes the Rulemaking Plan as a baseline regulatory standard that must be addressed in any exemption request" (*Id.*). Significantly, the State's Brief to the Commission directly supports the Staff's view. There, the State asserts that the Staff's approval of the exemption request "is violative of the Commission's Rulemaking Plan" (Utah Brief at 15); that the Staff's Safety Evaluation Report¹⁵ improperly "ignored" the Rulemaking Plan" (*Id.* at 16);¹⁶ and that the Staff failed to explain "why its exemption decision does not conform to SECY-98-126" (*Id.* at 17). These statements demonstrate that the State's Modification Request indeed equates SECY-98-126 to a regulatory requirement -- and that the Board's decision to admit this issue (*see* LBP-01-03, slip op. at 15) was therefore improper.

2. Rejected Issues.

The Licensing Board's ruling in LBP-01-03 ruled that three issues raised by the State -- items 2(b), 3 and 6(b) -- were inadmissible and/or failed to satisfy the late-filed criteria in 10 C.F.R. § 2.714(a)(1). The State argues that two of these (items 2(b) and 3) were incorrectly excluded.

¹⁴ See SECY-98-126, "Rulemaking Plan: Geological and Seismological Characteristics for Siting and Design of Dry Cask Independent Spent Fuel Storage Installations, 10 CFR Part 72" (June 4, 1998).

¹⁵ "Safety Evaluation Report Concerning the Private Fuel Storage Facility" ("SER") attached to letter from Mark S. Delligatti to John D. Parkyn, dated September 29, 2000.

¹⁶ The State cites a statement in the SER which the State believes to be incorrect, *i.e.*, that the "the mean annual probability of exceedance for the PFS Facility may be less than 10^{-4} per year" (Utah Brief at 16, *citing* SER at 2-42). The Staff has under consideration the possible need to correct this SER statement to read, ". . . may be greater than 10^{-4} per year."

With respect to item 2(b), which questioned whether PFS's facility and equipment "are designed to withstand a 2000-year return earthquake," the Licensing Board found that this issue had been rendered moot following the admission of the contention. In particular, the Board observed that PFS had revised its Safety Analysis Report ("SAR") to clarify that the Canister Transfer Building, overhead bridge crane, and semi-gantry crane are designed to withstand the PSHA ground motion with a 2,000-year return period. LBP-01-03, slip op. at 16.

The State argues that the Licensing Board erred in rejecting this issue:

For not admitting this portion of the State's challenge, the Board relies on the fact that since the State began challenging PFS's exemption request, PFS has since amended its application; Notwithstanding PFS's license amendments, 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. Furthermore, to require the State to parse the exemption request into what is and is not ripe for Board review is unreasonable.

(Utah Brief at 18). These arguments miss the point. The Licensing Board did not rule that this challenge was untimely or unripe; rather, it found that PFS had revised its application in a manner that rendered this concern moot. The State has not shown why this determination was erroneous. Moreover, there is no merit in the State's claim that it could not challenge "any applicable design basis standards" before the exemption became ripe; rather, those matters were stated in the SAR long before the Staff acted on the exemption request, and could have been challenged then.

With respect to item (3), which challenged PFS's accident evaluation, including concerns regarding the design basis accident, leakage rate and breach hole assumptions, and beyond-design basis events involving sabotage with anti-tank devices, the Licensing Board found that these issues were untimely raised and were inadmissible under the 10 C.F.R. § 2.714(a)(1) late filing criteria (LBP-01-03, slip op. at 12, 22). As noted by the Board, these issues "could have been

raised much earlier, regardless of the PSHA return period under consideration or, indeed, whether a deterministic or probabilistic analysis is used" (*Id.* at 12).

In challenging this ruling, the State argues that "it was not untimely in raising PFS's accident analysis, because there is no longer the degree of conservatism in the design of the PFS facility that there would be if PFS had to design the facility to deterministic standards or probabilistic standards with a 10,000 year return period" (Utah Brief at 17). This assertion is without merit. The adequacy of PFS's accident analysis is unrelated to the adequacy of its seismic hazard analysis. Regardless of whether PFS utilized a DSHA or a PSHA, and regardless of the return period, the accident analysis stands on its own. Accordingly, the State could have raised these issues sooner, without waiting for the Staff to approve the seismic exemption request.¹⁷

D. The Choice of Formal or Informal Adjudicatory Procedures.

In its Brief to the Commission, the Staff stated its view that the Commission may determine, in its discretion, the type of any hearing to be afforded on the Applicant's exemption request, and that if a hearing is conducted it should be informal in nature, given the circumstances present here. See Staff Brief at 16-18, *citing United States Department of Energy* (Clinch River Breeder Reactor Plant), CLI-81-35, 14 NRC 1100, 1103-05 (1981). The State takes a different position, seeking a formal adjudication with expert witnesses and cross-examination (Utah Brief at 10, 13).

In support of its request for formal hearings, the State asserts that "important questions will not be tested unless there is an adversarial process to present all legal, technical and policy sides of the issue," and it cites the anticipated benefit that might result if its seismic expert, Dr. Arabasz, is permitted to present testimony (*Id.* at 13). The State, however, provides no reason to believe that Dr. Arabasz could not describe his views adequately in a written filing -- which presumably would contain the same information concerning any alleged deficiencies in the exemption request

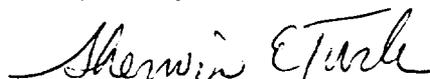
¹⁷ The Licensing Board also rejected item 6(b) of the State's concerns. LBP-01-03, slip op. at 10. The State's Brief does not appear to challenge this determination. See Utah Brief at 17-20.

(or the Staff's approval thereof) as he would present in pre-filed written testimony in a formal proceeding. Further, the State provides no reason to believe that cross-examination of witnesses is required -- particularly since the exemption request and the Staff's reasons for approving it are a matter of record and can be adequately challenged in written filings in an informal proceeding -- just as the acceptability of a PSHA with a 2,000-year return period could be adequately challenged in a generic rulemaking proceeding using written notice and comment procedures. Accordingly, no reason has been shown to require a formal hearing to consider PFS's exemption request.¹⁸

CONCLUSION

For the reasons set forth above, the State's arguments concerning the admissibility of the specific issues discussed in its Brief and the need for a formal hearing on the exemption request should be rejected.

Respectfully submitted,



Sherwin E. Turk
Counsel for NRC Staff

Dated at Rockville, Maryland
this 12th day of March 2001

¹⁸ In arguing for the remand of its additional issues pertaining to need and costs, the State argues that "[s]uch a remand will not delay the licensing proceeding because hearings on Utah L are not scheduled until November and December, 2001" (Utah Brief at 10-11). The Staff disagrees. Discovery on safety issues has closed, and the final date for filing motions for summary disposition is approaching. See "Memorandum and Order (General Schedule Revision)," dated February 22, 2001. Accordingly, a remand of exemption-related issues to the Licensing Board could delay the conclusion of this proceeding.

UNITED STATES OF AMERICA
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BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)
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PRIVATE FUEL STORAGE L.L.C.) Docket No. 72-22-ISFSI
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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S RESPONSE TO '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)'" 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 12th day of March, 2001:

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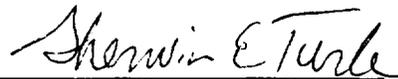
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