

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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BEFORE THE COMMISSION

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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))	July 23, 2001

**STATE OF UTAH'S OPPOSITION TO THE NUCLEAR ENERGY
INSTITUTE'S MOTION FOR LEAVE TO FILE AN AMICUS BRIEF
ON THE REGULATORY STANDARD FOR AIRCRAFT
CRASH HAZARDS AT SPENT FUEL FACILITIES**

Concurrent with its Amicus Brief, on July 13, 2001, the Nuclear Energy Institute ("NEI") filed a Motion for Leave to File an Amicus Brief on the Regulatory Standard for Aircraft Crash Hazards at Spent Fuel Facilities. The State opposes NEI's motion on four grounds. First, NEI has not adequately supported the reasons why its brief is desirable such that the Commission should exercise its discretionary authority and accept NEI's brief. See 10 CFR § 2.715(d). Second, NEI's claim that the aircraft crash standard for the PFS site "affects the interest of the nuclear energy industry generally" is incorrect. NEI Motion at 1.¹ The question before the Commission does not call for a decision on the generic standard for all spent fuel facilities. Rather it is site-specific to the PFS facility, located under military operating airspace and next to a military bombing and training range. Third, NEI advocates a less protective standard based purely on economic grounds and ignores adequate public

¹ The State has yet to receive a hard copy of NEI's Motion or Brief and citations to these documents are to the electronic copy served on the State July 13, 2001, the final version of which was re-submitted electronically on July 16, 2001.

protection. NEI Motion at 2, NEI Amicus Brief at 4-5. Fourth, NEI's claim that a 10^{-7} standard for the PFS site would "derail" the development of storage facilities is devoid of support. See NEI Amicus Brief at 5. Similarly, NEI's claim that the State's position "could directly affect development of the proposed Yucca Mountain facility" is also completely devoid of any legal or factual support. NEI Motion at 2; NEI Brief at 2. For these reasons the State requests the Commission to exercise its discretionary authority and reject NEI's amicus curiae brief.

ARGUMENT

A. NEI Has Failed to Satisfy 10 CFR § 2.715(d).

The Commission has discretionary authority to accept amicus briefs from a non-party. 10 CFR § 2.715(d). For such a brief to be accepted, the amicus must present reasons why a brief is desirable. NEI has failed to meet this burden.

NEI, a proponent of the nuclear industry, in its brief merely restates PFS's position. NEI contributes no substantive legal arguments beyond those already presented by PFS. The NEI Amicus Brief discusses the applicability of Part 60 to all storage facilities and is otherwise devoid of matters relevant to the question presently before the Commission. See e.g., NEI Amicus Brief at 5-7, 8-9. Merely restating the Applicant's arguments fails to contribute to the Commission's decision on this important safety issue and fails to satisfy 10 CFR § 2.715(d).

B. NEI Is Inappropriately Advocating a Generic Standard for All Spent Fuel Facilities.

The Board referred its summary disposition ruling concerning the appropriate “standard that governs the ISFSI aircraft crash hazards [at the PFS facility] to the Commission for its further consideration.” LBP-01-19 at 54. In deciding to certify the question to the Commission, the Board recognized that the “benchmark probability [in the PFS proceeding] is an important factor relative to this contention because if, as the State asserts, the figure were found to be 1E-07, based on its current submissions PFS cannot meet this standard relative to the cumulative hazard from aircraft accidents and jettisoned ordnance.” *Id.* at 21. Thus, the question before the Commission relates specifically to the PFS facility and is not a generic question of what the aircraft standard should be for ALL spent fuel facilities. The NEI Amicus Brief inappropriately advances a generic standard. NEI continuously states that Part 60 is an appropriate standard for all spent fuel facilities, not only the PFS facility. *See*, NEI Amicus Brief at 2, 5, 8-9. Moreover, NEI’s Amicus Brief only incidentally notes the effect that a Part 60 standard would have on the PFS facility. *See*, NEI Amicus Brief at 2, 8-9. Inasmuch as it is not the customary role of an appellate body to consider generic questions in an individual licensing proceeding,² and NEI advances an absolute generic standard for all storage facilities, the State urges the Commission to deny NEI’s Motion for Leave to File an Amicus Brief.

² The appellate role “in the adjudication of contested issues in an individual licensing case does not extend to the consideration of generic policy questions.” Duke Power Company (William B. McGuire Nuclear Station, Units 1 & 2), ALAB-128, 6 AEC 399, 400 (1973), *aff’d*. Carolina Environmental Study Group v. United States, 510 F.2d 796 (D.C.Cir. 1975).

C. **NEI Advocates a Less Protective Standard Based Purely on Economic Grounds at the Peril of Public Safety.**

It is within the discretion of the Commission to allow amicus participation where the Commission believes participation will “assist [in] resolution of the issues.” Nuclear Fuel Services, Inc. and New York State Energy Research and Development Authority (Western New York Nuclear Service Center), ALAB-679, 16 NRC 121, n.11 (1982). When an amicus participates by submitting a brief, “the customary content of an amicus brief” is “legal argument.” Kerr-McGee Chemical Corporation (Kress Creek Decontamination), ALAB-885, 27 NRC 59, 71 (1988) (*emphasis added*). NEI’s Amicus Brief, full of policy statements, offers few new legal arguments beyond pure conjecture, and will not assist the Commission in resolving the question before it.

The question before the Commission is one of safety to assure the public adequate protection from aircraft crashes at the proposed PFS site. However, a significant portion of the NEI Amicus Brief is devoted to a generic discussion of economic development of spent nuclear fuel facilities or the continued viability of nuclear power plants. NEI Amicus Brief at 4-5. NEI’s discussion is irrelevant to the instant question before the Commission. For example, NEI inappropriately infers that a less protective aircraft crash standard is warranted because a 10^{-7} standard would “impede the development of spent fuel storage facilities” and “derail the development of spent fuel facilities” or that a less protective standard would remedy the problems caused by the decreased availability of at-reactor spent pool storage capacity and the alleged higher costs of onsite dry storage. *See* NEI Amicus Brief at 2, 4-5. Notwithstanding that the State vigorously disputes the accuracy of many of NEI’s

statements, even assuming *arguendo* that the statements are true, NEI's statements have no bearing on ensuring the protection of the public if a less protective aircraft crash standard is authorized. Clearly, the Commission cannot fulfil its public protection role by accepting NEI's non-safety related arguments for the appropriate standard at the PFS site.

C. NUREG-0800 Provides a Rational Basis to Impose a 10^{-7} per Year Probability Standard on the PFS Part 72 Away-From-Reactor ISFSI.

Although the Commission has not withdrawn NUREG-0800, NEI claims the State's reliance on that guidance document is at "odds with the Commission's Safety Policy Statement" (NEI Amicus Brief at 4) and application of the 10^{-7} NUREG-0800 standard would be "arbitrary and capricious (*i.e.*, it would have no rational basis)" (*id.* at 8). The State vehemently disagrees.

In the absence of promulgated Part 72 standard, the Commission has a rational basis to use the 10^{-7} standard in NUREG 800 § 3.5.1.6, which it developed specifically to evaluate site-specific aircraft crash hazards. Like the Applicant and the Staff, NEI strives to establish some nexus to the Part 72, away-from-reactor PFS ISFSI from the Commission's indirect statements that pertain specifically to reactors or geologic repository operations. Such linkage should be rejected because it is imprudent to justify a less protective aircraft crash standard based on the Commission's indirect statements in the preamble to a rulemaking procedure unrelated to ISFSIs. Acceptance of this type of indirect justification would only serve to circumvent the public notice and comment requirements of the Administrative Procedures Act. *See* State Brief at 15-16. Should the Commission find the arguments for a less protective standard compelling, the State urges the Commission to initiate Part 72

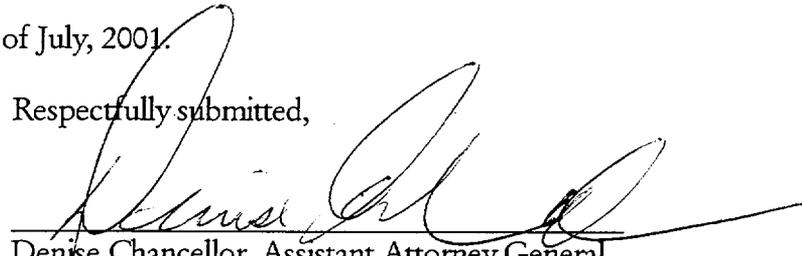
rulemaking to formally establish the less protective standard allowing all interested parties, including the State, the Applicant, and NEI, to participate in that process.³

CONCLUSION

For the foregoing reasons, the State urges the Commission to reject NEI's Amicus Brief on both procedural and substantive grounds.

DATED this 23rd day of July, 2001.

Respectfully submitted,



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³ Resolution of generic issues "are more properly and effectively done through rulemaking proceedings in which all interested persons may participate." Offshore Power Systems (Floating Nuclear Power Plants), CLI079-9, 10 NRC 257, 262 (1979).

CERTIFICATE OF SERVICE

I hereby certify that a copy of STATE OF UTAH'S OPPOSITION TO THE NUCLEAR ENERGY INSTITUTE'S MOTION FOR LEAVE TO FILE AN AMICUS BRIEF ON THE REGULATORY STANDARD FOR AIRCRAFT CRASH HAZARDS AT SPENT FUEL FACILITIES was served on the persons listed below by electronic mail (unless otherwise noted) with conforming copies by United States mail first class, this 23rd day of July, 2001:

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