

November 27, 2001

Dianne R. Nielson, Ph.D.
Executive Director
State of Utah Department
of Environmental Quality
168 North 1950 West
P.O. Box 144810
Salt Lake City, Utah 84114-4810

Jay Silberg, Esq.
Shaw Pittman, LLP
2300 N. Street, NW
Washington, D.C. 20037-1128

Dear Dr. Nielson and Mr. Silberg:

This letter responds to your recent letters on the effect of a proposed recent modification to a rulemaking plan concerning seismological requirements for independent spent fuel storage installations.

On September 26, 2001, the NRC staff sent the Commission a proposed modified rulemaking plan outlining changes in its strategy for developing a regulation using a probabilistic seismic hazard analysis at an ISFSI (SECY 01-0178, Modified Rulemaking Plan: Geological and Seismological Characteristics for Siting and Design of Dry Cask Independent Spent Fuel Storage Installations, 10 C.F.R. Part 72, a copy of which is enclosed). The modified plan anticipates a rule requiring all structures to withstand a design basis earthquake, and abandons a previous proposal to use two different design basis earthquakes, depending on a structure's importance to safety.

Dr. Nielson argues that this modification is an "inappropriate[], and possibly illegal[]" attempt by the staff to use the rulemaking process to support its adjudicatory position on seismic design. She is concerned that the modification will undermine the adjudication. Mr. Silberg wrote to express his opinion that the Commission is free to resolve safety questions through adjudication or rulemaking.

The Commission has the authority to determine whether a particular issue should be decided through rulemaking, through adjudication, or through both means. We see no reason for the Commission to disrupt either the ongoing adjudication of seismic issues or the rulemaking. With regard to the rulemaking, the Commission has recently approved the staff's plan to revise the rulemaking plan, subject to comments provided in the enclosed staff requirements memorandum. At the same time, the Atomic Safety and Licensing Board, and the Commission itself, as appropriate on appeal, will continue to address the seismic issues material to licensing the proposed Private Fuel Storage facility. See *Private Fuel Storage*,

L.L.C. (Independent Spent Fuel Storage Installation), CLI-01-12, 53 NRC 459 (2001). This is not affected by the new rulemaking plan, which, of course, has no legally binding effect. See *id.*, at 471.

It would be inappropriate to comment further on issues still in litigation before the Board and the Commission.

Sincerely,

/RA/

Richard A. Meserve

cc: Service List in *Private Fuel Storage, L.L.C.* (Docket No. 72-22-ISFSI)

Enclosures:

1. SECY-01-0178
2. SRM on SECY-01-0178