

October 22, 2001 (5:12PM)

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

OFFICE OF SECRETARY  
RULEMAKINGS AND  
ADJUDICATIONS STAFF

BEFORE THE COMMISSIONERS

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In the Matter of:	)	Docket No. 72-22-ISFSI
	)	
PRIVATE FUEL STORAGE, LLC	)	ASLBP No. 97-732-02-ISFSI
(Independent Spent Fuel	)	
Storage Installation)	)	October 10, 2001

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STATE OF UTAH'S PETITION FOR IMMEDIATE RELIEF  
SUSPENDING LICENSING PROCEEDINGS

**Introduction**

This petition seeks immediate action ordering the suspension of the pending licensing proceeding in the above-captioned matter. This action is necessitated by the imminent threat to the public health and safety revealed by acts of terrorism committed on this nation on September 11, 2001, resulting in the war on terrorism now being waged. The identities and location of those with whom we are at war and the extent of their capabilities are still being discovered. The vulnerability of nuclear facilities to this new type of terrorist threat is unknown, prompting new legislation to be introduced in Congress which would require new licensing procedures that take into account the events of September 11<sup>th</sup>. Since the World Trade Center attack, President Bush has appointed Tom Ridge to head the newly created Office of Homeland Security, charged with coordinating terrorism protection for "facilities that produce, use, store, or dispose of nuclear material," a task just begun.<sup>1</sup>

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<sup>1</sup>Office of the Press Secretary Press Release "President Establishes Office of Homeland Security," October 8, 2001.

One fact is certain at this time: terrorism can be inflicted in ways not previously acknowledged nor guarded against, with resulting loss of life on a scale not imagined. Former notions of terrorism and sabotage are an unacceptable basis for licensing the PFS facility, which proposes to store in one exposed location an unprecedented quantity of spent nuclear fuel equal to all the spent fuel now existing at U.S. commercial reactor sites. Utah Contention RR is being filed contemporaneously with this Petition to challenge the PFS application for its failure to assess impacts from a terrorist attack of the type revealed on September 11<sup>th</sup>.<sup>2</sup> Neither a determination on the admission of Contention RR nor any other proceeding on the PFS application should go forward until new legislation and policy reviews now underway have brought NRC licensing rules into conformity with present realities. Therefore, the licensing proceeding of the massive PFS facility should be immediately suspended to prevent licensing decisions which will not protect the public health and safety.

### **Jurisdiction**

The Commission has jurisdiction over this Petition and the relief requested by virtue of its inherent supervisory authority to oversee all aspects of the regulatory and licensing process and its “overriding responsibility for assuring public health and safety in the operation of nuclear power facilities.” Consolidated Edison Co. of New York, Inc. (Indian Point, Units 1, 2, and 3), CLI- 75-8, 2 NRC 173, 175 (1975). Further, the Commission is

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<sup>2</sup>The State of Utah’s Request for Admission of Late-Filed Contention Utah RR (Suicide Mission Terrorism and Sabotage) (“Utah Contention RR”) (October 10, 2001).

ultimately responsible for the policy of the agency, and for that reason has “inherent authority to review and act upon any adjudicatory matter before a Commission tribunal...” In the Matter of Baltimore Gas & Electric Company (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), CLI-98-15, 48 NRC 45, 52 (1998). The Commission “regularly issues case-specific guidance to the Board on both procedural and substantive issues.” *Id.* at 51. In this case, exercise of the Commission’s inherent supervisory authority is particularly appropriate because the pending license application is for a first-of-its-kind, away from reactor storage of 40,000 metric tons of spent nuclear fuel (“SNF”) in a single, exposed location, and the transportation of SNF to that location through major cities in nearly every state in the United States. It is critical that the Commission suspend licensing decisions on what is in reality a premier target for terrorism until such time as pending legislation and developing information can be applied to adequately protect the public health and safety.<sup>3</sup>

### **Statement of Facts**

The proposed PFS facility would store 40,000 metric tons of SNF contained in 4000 dry storage casks located on concrete slabs exposed to view. The largest dry storage cask

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<sup>3</sup> If the PFS facility had already received a license to operate, the Commission would specifically be authorized to summarily suspend the license where Congress has declared that a state of war or national emergency exists. 42 U.S.C. § 2138. Although Congress clearly contemplated that action by the Commission may be needed in a time of war, suspending the license of an operating PFS-type facility would have little benefit since the massive concentration of spent fuel in exposed storage casks would exist, with or without a license. Far greater protection for the public health and safety can be achieved by suspending the licensing proceeding until the proposed facility can be assessed using fully developed information on terrorism and reconciled with the nation’s overall plan for terrorist defense.

facility existing in the United States has only 49 casks.<sup>4</sup> Also unprecedented is the proposed mass movement of 2000 metric tons of SNF per year, with some shipments spanning a distance of over 2700 miles to reach the PFS facility proposed to be located 45 miles from Salt Lake City.<sup>5</sup>

Filed contemporaneously herewith is State of Utah's Request for Admission of Late-Filed Contention Utah RR (Suicide Mission Terrorism and Sabotage), a copy of which is contemporaneously served on the Commission. In summary, Utah Contention RR seeks a review of the PFS application in light of the new and imminent threat of terrorism revealed by the September 11, 2001 attack on the World Trade Center and the Pentagon.

Also relevant are the following events occurring since the September 11<sup>th</sup> attack:

1. The Department of Energy ("DOE") suspended indefinitely all cross-country shipments of spent nuclear fuel and other high level nuclear waste.<sup>6</sup>
2. The NRC directed the staff to review the NRC security regulations and procedures and acknowledged that attacks by large commercial aircraft have not been contemplated nor have spent fuel storage and transportation casks been analyzed as to their

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<sup>4</sup> *Information Digest 2000*, NUREG-SR1350, U.S. Nuclear Regulatory Commission, at Figure 43.

<sup>5</sup> NUREG-1714, *Draft Environmental Impact Statement for the Construction and Operation of an Independent Spent Fuel Storage Installation on the Reservation of the Skull Valley Band of Goshute Indians and the Related Transportation Facility in Tooele County, Utah*, June 2000.

<sup>6</sup> Attack Brings Halt to Cross-Country Shipments of Nuclear Fuel, The Associated Press, September 21, 2001.

ability to withstand a crash of such aircraft.<sup>7</sup> Chairman Meserve has indicated that in reviewing the security regulations “there will have to be a much broader review involving the entire government.”<sup>8</sup>

3. In light of the September 11<sup>th</sup> attack, the DOE is evaluating the proposed Yucca Mountain repository for an aircraft crash scenario, an analysis not previously undertaken. The project includes an above ground building where spent nuclear fuel is repackaged for underground placement.<sup>9</sup>

4. On October 3, 2001, the House Energy and Commerce Committee adopted an amendment to the Atomic Energy Act which would require the Commission, after consultation with the Director of Homeland Security, Federal Bureau of Investigation, Central Intelligence Agency and other agency heads, to issue a rule revising the design basis threat and associated regulations. The final rule would specifically take into account the events of September 11, 2001 and other expanded notions of terrorism and would specifically address the protection of spent fuel in storage casks. The amendment would also require armed escorts on all spent fuel shipments, capable of repelling “a large number of attackers working as several coordinated teams, using sophisticated techniques and

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<sup>7</sup> NRC Press Release No. 01-112, “NRC Reacts to Terrorist Attacks,” September 21, 2001.

<sup>8</sup>Security of Nuclear Power Plants Under Review, The Washington Post, September 26, 2001, page A08.

<sup>9</sup>Attack Raise Safety Concern About Proposed Nevada Nuclear Dump, The Associated Press, September 27, 2001.

equipment.”<sup>10</sup> *Markey, 077, A Toxic Energy Act Hearing before the House Energy and Commerce Committee*, 107<sup>th</sup> Congress (2001), attached hereto as “Attachment 1.”

5. On October 4, 2001, Senator Richard Shelby, ranking Republican on the Senate Intelligence Committee, stated, “We have to believe there will be another attempt by a terrorist group to hit us again,” and that law enforcement agencies are trying to think “out of the box” in anticipation that terrorists will do something unexpected.<sup>11</sup>

6. In Contrast with the foregoing events and apparently not heeding the implications of September 11<sup>th</sup>, the NRC staff argued on September 12, 2001:

Under the long-established rule-of-reason line of NEPA decisions, federal agencies need only address reasonably foreseeable environmental impacts arising from a proposed action, [ ] and [petitioner] does not establish that terrorist acts (involving the proposed MOX Facility or related materials) fall within the realm of “reasonably foreseeable” events.

“NRC Staff’s Response to Contentions Submitted by Donald Moniak,” et. al (September 12, 2001), at 22, Docket No. 070-03909, Duke Cogema Stone & Webster Mixed Oxide Fuel Fabrication Facility (Construction Authorization Request) (“DCS license proceeding”) (emphasis supplied, citation omitted).

### **Basis For Relief**

The responsibility for safeguarding the health and safety of the public belongs to the

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<sup>10</sup>House Panel Oks Bill On Security For Nuclear Plants, Waste, Las Vegas Review-Journal, October 4, 2001.

<sup>11</sup>FBI, CIA Warn of More Attacks, The Washington Post, October 5, 2001, page A01.

Commission. Power Reactor Development Co. v. International Union of Electrical, Radio and Machine Workers, AFL-CIO, 367 U.S. 396, 404 (1961). The Commission's duty in this regard is specific. It is authorized to:

prescribe such regulations or orders as it may deem necessary . . . (3) to govern any activity authorized pursuant to this chapter, including standards and restrictions governing the design, location, and operation of facilities used in the conduct of such activity, in order to protect health and to minimize danger to life or property;

42 U.S.C. § 2201(i)(3). This subsection "clearly contemplates that the Commission shall by regulation set forth what the public safety requires as a prerequisite to the issuance of any license or permit under the Act." Power Reactor, 367 U.S. at 404.

What is proposed in this licensing proceeding is the creation of the largest concentration of SNF in the nation, accompanied by thousands of SNF shipments from reactors throughout the country. Both the massive quantity of SNF in a single location as well as the continual movement of SNF through major population centers present obvious terrorist opportunities, particularly in light of the events of September 11th.

The current NRC regulations and licensing procedures are being reviewed because they do not contemplate the type of terrorist threat we now face, and are simply inadequate to protect the public. However, unless the Commission suspends the licensing proceeding, those inadequate regulations and procedures will govern the adjudication of Utah Contention RR and will otherwise serve as a basis to assess the design and operational requirements of the PFS facility. Unless the Commission exercises its inherent authority to halt the application of existing regulations and policies in the licensing proceeding, the NRC

staff will continue to argue, as it did on September 12<sup>th</sup> in the DCS license proceeding, that terrorist acts are not reasonably foreseeable events that need to be addressed. Assessing the safety plans for the majority of all high-level waste in the United States can be safely done only after the lessons learned in the wake of the recent events have been fully revealed and incorporated into the licensing process.

Nor should the licensing proceeding go forward believing it can be modified or corrected at a later date. If the proceeding moves ahead at this time, the evidence, to the extent it is now available, will be judged against regulations which are no longer valid standards. The record created for later review will be void of critical facts now developing. If a license is issued to PFS, the opportunity for modifications will diminish as the activities permitted under the license are pursued. If transportation and storage of spent fuel begins under unsafe design and operation standards, the public will immediately be placed at risk, quite possibly in ways that cannot be remedied. The mass movement of nuclear waste to a single location cannot be undone.

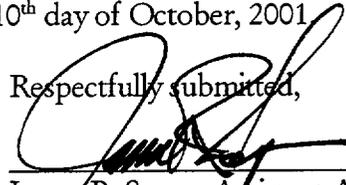
## **Conclusion**

There is no doubt that the terrorist attack suffered on September 11<sup>th</sup> was not contemplated, not only as to the manner of the attack, but in the lack of appreciation for the intensity, commitment, resources and sophistication of those responsible. Answers are being sought to questions of where our vulnerabilities exist and what is required in the future to protect the public from terrorism. Those answers will be reflected in new legislation and regulations already being proposed and studied. Until such revised standards for terrorism

protection are in place, landmark decisions for potential terrorist targets such as the mass transportation and storage of high level nuclear waste cannot be safely made. The Commission should accordingly suspend the licensing proceeding for the PFS facility until such time as it can be safely resumed under laws and regulations reflecting existing realities for terrorism protection.

DATED this 10<sup>th</sup> day of October, 2001

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a copy of STATE OF UTAH'S PETITION FOR IMMEDIATE RELIEF SUSPENDING LICENSING PROCEEDINGS was served on the persons listed below by electronic mail (unless otherwise noted) with conforming copies by United States mail first class, this 10<sup>th</sup> day of October, 2001:

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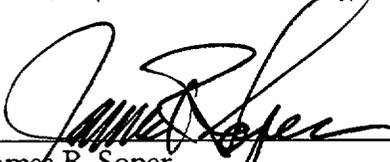
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**ATTACHMENT 1**

To

STATE OF UTAH'S PETITION FOR IMMEDIATE RELIEF  
SUSPENDING LICENSING PROCEEDINGS (October 10, 2001)  
Docket 72-22

**AMENDMENT TO THE AMENDMENT IN THE  
NATURE OF A SUBSTITUTE  
OFFERED BY MR. MARKEY**

At the end of the bill, insert the following new section:

**1 SEC. 4. DESIGN BASIS THREAT.**

2 (a) AMENDMENT.—Chapter 14 of the Atomic Energy  
3 Act of 1954 (42 U.S.C. 2201–2210b) is amended by add-  
4 ing at the end the following new section:

5 “SEC. 170C. DESIGN BASIS THREAT.—

6 “a. The Nuclear Regulatory Commission, not later  
7 than 60 days after the date of the enactment of this sec-  
8 tion, after consultation with the Secretary of Defense, the  
9 Director of Central Intelligence, the Director of the Fed-  
10 eral Bureau of Investigation, the National Security Advi-  
11 sor, the Director of Homeland Security (or any successor  
12 official), and any other appropriate Federal, State, or non-  
13 governmental entities, shall commence a rulemaking to  
14 consider changes to the design basis threat for facilities  
15 licensed by the Commission under this Act. Within 1 year  
16 after the date of the enactment of this section, the Com-  
17 mission shall issue a final rule revising the design basis  
18 threat and associated regulations.

1       “b. Regulations issued under this section shall take  
2 into account—

3           “(1) the events of September 11, 2001;

4           “(2) the potential for attack on facilities by  
5 multiple coordinated teams totaling in the aggregate  
6 at least 20 individuals;

7           “(3) the potential for assistance in an attack  
8 from several persons employed at the facility;

9           “(4) the potential for suicide attacks;

10          “(5) water-based and air-based threats;

11          “(6) the potential use of explosive devices of  
12 considerable size and other modern weaponry;

13          “(7) the potential for attacks by persons with  
14 a sophisticated knowledge of facility operations;

15          “(8) the threat of fires, especially fires of long  
16 duration; and

17          “(9) protection of spent fuel storage pools and  
18 dry cask storage, including after reactor closure.

19       “c. Regulations issued under this section shall estab-  
20 lish requirements for licensees relating to construction, op-  
21 eration, security procedures, and emergency response, and  
22 shall require conforming amendments to existing licenses.

23       “d. Regulations issued under this section shall re-  
24 quire armed escorts for all spent fuel shipments, capable  
25 of repelling attacks by a large number of attackers work-

1 ing as several coordinated teams and using sophisticated  
2 techniques and equipment.

3 “e. (1) Regulations issued under this section shall in-  
4 clude the establishment of an Operational Safeguards Re-  
5 sponse Evaluation program, whose Director shall report  
6 directly to the Nuclear Regulatory Commission, which  
7 shall ensure that the operational safeguards response of  
8 each facility described in paragraph (2) is tested at least  
9 once every 2 years to determine whether the design basis  
10 threat factors identified in regulations issued under this  
11 section have been adequately addressed.

12 “(2) Facilities subject to testing under paragraph (1)  
13 include commercial nuclear powerplants, research reac-  
14 tors, spent fuel storage facilities and associated support  
15 facilities and equipment, and any other licensed facility  
16 the Nuclear Regulatory Commission considers appro-  
17 priate.

18 “f. Regulations issued under this section shall be re-  
19 viewed and revised as appropriate at least once every 5  
20 years.”.

21 (b) TABLE OF SECTIONS AMENDMENT.—The table of  
22 sections for chapter 14 of the Atomic Energy Act of 1954  
23 is amended by adding at the end the following new item:

“Sec. 170C. Design basis threat.”.