

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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

INTRODUCTION

Pursuant to 10 C.F.R. § 2.730(c), the NRC Staff ("Staff") hereby files its response to the "State of Utah's Petition for Immediate Relief Suspending Licensing Proceedings" ("Petition"), dated October 10, 2001. For the reasons set forth below, the Staff submits that the State of Utah ("State") has not provided any reason to believe that an immediate suspension of this license proceeding is required in order to protect public health and safety. Accordingly, the Staff respectfully submits that the State's Petition should be denied.

BACKGROUND

The events of September 11, 2001, which are relied upon by the State, are well known and need not be recited at length herein. These events, which are considered to pose a threat to the national security and foreign policy of the United States,¹ are the basis for the State's request, in the instant Petition, for an immediate suspension of all licensing proceedings related to the license application of Private Fuel Storage, L.L.C. ("PFS") to construct and operate an independent spent

¹ See e.g., S.J. Res. 23, enacted as P.L. 107-40, 115 Stat. 224 (Sept. 20, 2001) (authorizing the use of United States armed forces against those responsible for the recent attacks launched against the United States).

fuel storage installation (“ISFSI”) on the Reservation of the Skull Valley Band of Goshute Indians, within the boundaries of the State of Utah.

DISCUSSION

In its Petition, the State asserts that the events of September 11 pose an “imminent threat to the public health and safety” (Petition at 1); and that “[t]he vulnerability of nuclear facilities to this new type of terrorist threat is unknown” (*Id.*). The State then recites various initiatives being undertaken by the President, the Congress, the Department of Energy, and the Commission, to take these events into account (Petition at 1-2, 5-7).

With respect to the PFS Facility (“PFSF”), the State asserts that “[f]ormer notions of terrorism and sabotage are an unacceptable basis for licensing,” due to the large quantity of spent nuclear fuel (“SNF”) that would be stored at the PFSF and the need to transport that quantity of SNF to the PFSF (Petition at 2). The State further indicates that it has filed a new contention in the PFS adjudicatory proceeding (Contention Utah RR), concerning the potential impacts of an attack utilizing this new form of terrorism (*Id.*).² The State then asserts as follows:

Neither a determination on the admission of Contention [Utah] 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.

Id.; emphasis added.

The Staff submits that the State has failed to demonstrate that an immediate suspension of this licensing proceeding, or of proceedings concerning the admission of its proposed Contention

² See “State of Utah’s Request for Admission of Late-Filed Contention Utah RR (Suicide Mission Terrorism and Sabotage),” filed on October 10, 2001.

Utah RR, is required to protect public health and safety³ or to avert irreparable injury or substantial prejudice.⁴ Accordingly, the Staff respectfully submits that the State's Petition should be denied.

The Commission is fully aware of the events of September 11, and is taking action to assess the need to take those events into consideration as they may affect the licensing and regulation of nuclear facilities and materials. As the State, itself, indicates (*Id.* at 5), the Commission has directed the Staff to review the NRC's security regulations and procedures in light of those events,⁵ and the Staff is currently engaged in these and other efforts to address the events of September 11, consistent with the Commission's responsibility to assure protection of public health and safety.⁶

While the events of September 11 are without question significant, the State has provided no reason to believe that any imminent danger to public health and safety would result from a continuation of adjudicatory proceedings relating to the PFS license application. To the contrary,

³ See, e.g., *Vermont Yankee Nuclear Power Corp.* (Vermont Yankee Nuclear Power Station), CLI-00-20, 52 NRC 151, 173-74 (2000) (suspension of license transfer proceeding was not warranted in the absence of "immediate threats to public health and safety requiring such a drastic course of action").

⁴ See, e.g., *Georgia Power Co.* (Vogtle Electric Generating Plant, Units 1 and 2), CLI-95-09, 41 NRC 404, 405 (1995) (the Commission may stay a parallel proceeding to avert "substantial prejudice," such as where discovery would compromise an OI investigation).

⁵ See NRC Press Release No. 01-112 (September 21, 2001) ("NRC Reacts to Terrorist Attacks").

⁶ The State refers to a pleading filed by the Staff in the MOX fuel facility proceeding, one day after the events of September 11, in which the Staff (a) recited the well-established principle that under the National Environmental Policy Act federal agencies are required to consider the "reasonably foreseeable environmental impacts" of their actions, and (b) provided the Staff's view that the petitioner in that proceeding had not shown that terrorist acts involving the MOX facility or related materials "fall within the realm of 'reasonably foreseeable' events" (Motion at 7). In doing so, the State appears to criticize the Staff's filing in that proceeding. The issue of whether terrorism is a reasonably foreseeable event that requires consideration in the EIS for the PFS facility has been raised in Contention Utah RR, and may be addressed by the parties in their responses to that contention in this proceeding. The State's reference to any pleadings filed in another, wholly unrelated proceeding are beyond the scope of the instant proceeding and are inappropriate here.

PFS has not been licensed to receive SNF, and a continuation of this licensing proceeding would not cause such materials to be shipped to the PFS site. Indeed, PFS cannot be licensed to receive and possess such materials until the Licensing Board has issued an initial decision authorizing a license for the facility -- and even then, pursuant to 10 C.F.R. § 2.764(c), no license may be issued to PFS until the Commission, itself, expressly authorizes such action.⁷ Further, under the current schedule in the adjudicatory proceeding, even if a license is issued to PFS, SNF is not anticipated to arrive at the PFS site until at least mid-2004 (*i.e.*, almost three years).⁸ Accordingly, there is no reason to believe that a continuation of adjudicatory proceedings will result in any harm to the State or any detriment to the public health and safety.

Further, as the State appears to recognize (Petition at 5), the Commission has initiated various generic efforts related to the events of September 11, with potential applicability to a range of nuclear facilities. It is entirely appropriate that the Commission continue with these efforts. At the same time, however, it is also appropriate that the Commission should continue to perform its statutory responsibilities for the licensing and regulation of nuclear facilities and materials in a

⁷ See 10 C.F.R. § 2.764(c) (requiring Commission action before any initial decision authorizing the issuance of a license for an away-from-reactor ISFSI may become effective, and prohibiting the Staff from issuing any such license until it is expressly authorized to do so by the Commission).

⁸ The Licensing Board has established a schedule in the proceeding pursuant to which additional hearings will be held in April 2002, and an initial decision may be issued in September 2002. See "Order (General Schedule Revisions)," dated September 20, 2001. Briefs may be filed before the Commission, such that a Commission decision on licensing could be issued several months thereafter (*i.e.*, in early 2003). Construction of the PFSF could begin after receipt of Commission authorization, and may continue for approximately 15-18 months (*i.e.*, until mid-2004, at least), before operations may begin. See License Application, Rev. 13, § 1.8, at 1-9 (schedule projection based on license issuance in Spring 2002). In sum, if a license is issued for the PFSF, construction would not begin until early 2003, and operations would not commence until mid-2004.

timely and deliberate manner,⁹ and that the agency's review and adjudication of pending license applications need not and should not be disrupted -- particularly where, as here, those activities can have no adverse impact on public health and safety.¹⁰

In addition, in the event that the Commission's review of the September 11 events leads it to conclude that it should modify its license requirements, it may do so at any time by rule, regulation or order; and it may make such requirements applicable both to applicants and licensees of nuclear facilities -- including the PFSF, if necessary or appropriate. See, e.g., Atomic Energy Act of 1954, as amended, sec. 161b, 42 U.S.C. §2201(b); 10 C.F.R. §§ 2.202, 72.44(b)(2), 72.60, 72.62.¹¹ Thus, continuation of this proceeding will not detract from the Commission's protection of public health and safety.

Moreover, the State fails to observe that numerous issues pending before the Licensing Board and/or Commission at this time are altogether unrelated to the terrorism issue raised in Contention Utah RR, and that a suspension of all proceedings concerning those matters is

⁹ See, e.g., *Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 339 (1999), citing *Duke Power Co.* (Catawba Nuclear Station), CLI-83-19, 17 NRC 1041, 1048 (1983) (finding "a substantial public interest in efficient and expeditious administrative proceedings").

¹⁰ Cf. 10 C.F.R. §2.788(e) (requiring a showing of irreparable harm or likelihood of success on the merits to support an application to stay a decision or action of a presiding officer).

¹¹ The State asserts that if the Commission licenses the PFSF and later seeks to suspend that license, any such suspension "would have little benefit since the massive concentration of spent fuel in exposed storage casks would exist, with or without a license" (Petition at 4 n.3). Further, the State asserts that "[f]ar greater protection for the public health and safety can be achieved by suspending the licensing proceeding until the proposed facility can be assessed" taking into consideration "fully developed information on terrorism" and "the nation's overall plan for terrorist defense" (*Id.*). This argument is misplaced. First, while the State asserts that the PFSF will have a "massive concentration of spent fuel in exposed storage casks," it fails to observe that the PFSF is expected to receive approximately 200 casks per year, such that design modifications could be implemented more readily than the State suggests. Further, issuance of a license would not foreclose the Commission from taking effective action later, such as requiring revisions to the facility's safeguards contingency plan or, if necessary, design modifications.

unnecessary.¹² For example, the Licensing Board is currently considering the Applicant's motions for summary disposition of five environmental contentions, concerning such matters as environmental justice (Contention OGD O), rail line alternatives (Contention SUWA B), hydrology (Contention Utah O), flooding (Contention Utah W), and impacts on biological species (Contention Utah DD). In addition, various safety contentions remain pending before the Licensing Board, including geotechnical issues (Contention Utah L), and accidental aircraft crash hazards (Contention Utah K/Confederated Tribes B).¹³ Similarly, the Commission currently has under consideration an issue concerning the appropriate regulatory standard to be utilized in determining whether aircraft crash hazards should be deemed to be a "credible accident" for an ISFSI.¹⁴ *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-01-15, 53 NRC 563 (2001). The issue raised in the State's Petition does not support the suspension of proceedings

¹² Contentions that are scheduled for hearing are identified in the Licensing Board's "Order (General Schedule Revisions)," dated September 20, 2001 (Attachment, nn. 2-3). In addition to the issues identified in the discussion above, other contentions, concerning financial assurance (Contention Utah E), decommissioning funding (Contention Utah S), and local law enforcement authority (Contention Security-J), remain before the Board.

¹³ Contention Utah K/Confederated Tribes B states as follows:

The Applicant has inadequately considered credible accidents caused by external events and facilities affecting the ISFSI and the intermodal transfer site, including the cumulative effects of the nearby hazardous waste and military testing facilities in the vicinity and the effects on wildfires.

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

¹⁴ The State had requested an opportunity to file a brief before the Commission concerning the referred ruling. See (1) "State of Utah's Request for an Opportunity to Brief the Licensing Board's Certified Question to the Commission in LBP-01-19", dated June 7, 2001; (2) "Applicant's Response to State Request to Brief the Certified Question in Licensing Board Order LBP-01-19," dated June 8, 2001; and (3) "NRC Staff's Response to 'State of Utah's Request for an Opportunity to Brief the Licensing Board's Certified Question to the Commission in LBP-01-19,'" dated June 18, 2001.

on such unrelated contentions.¹⁵ Moreover, as stated above, the State has provided no reason to believe that the mere continuation of proceedings related to these other issues would have any adverse impact on public health and safety or cause any irreparable injury or substantial prejudice.¹⁶

Finally, the State has shown no reason to believe that proceedings related to consideration of the admission of its proposed Contention Utah RR should be suspended immediately. The State has formulated and filed Contention Utah RR, and the admissibility of that contention, as framed, can now be evaluated by the Licensing Board. The Licensing Board's ruling concerning the admissibility of this contention may ultimately be reviewed by the Commission in accordance with 10 C.F.R. § 2.786, or sooner if the Commission determines that such action is appropriate.¹⁷ Similarly, in the event that any new information or revised regulatory requirements result from the Commission's ongoing regulatory efforts concerning the events of September 11, the State will have an opportunity to raise those matters in this proceeding. There is thus no basis for the State's

¹⁵ See, e.g., *Northeast Nuclear Energy Co.* (Millstone Nuclear Power Station, Unit 3), CLI-01-3, 53 NRC 22, 29 (2001) (stay of appellate proceedings was unwarranted to await developments concerning an unrelated issue).

¹⁶ It is unclear whether the State seeks to suspend the Staff's review of the PFS application. In this regard, the Staff notes that in June 2000, the Staff and three cooperating Federal Agencies issued 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" ("DEIS"); the Staff and cooperating Federal agencies are currently preparing the Final EIS, and expect to publish that document in December 2001. In addition, in September 2000, the Staff published its "Safety Evaluation Report Concerning the Private Fuel Storage Facility" ("SER"); the Staff is currently developing SER Supplements concerning geotechnical and accidental aircraft crash issues, and expects to publish the SER Supplements later this year. The State has shown no reason to believe that a continuation of the Staff's review efforts related to the PFS facility would have an adverse impact on public health and safety, or that the State would be unable to assess and contest the results of the Staff's review in this proceeding.

¹⁷ See, e.g., 10 C.F.R. §§ 2.718(i), 2.730(f); *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-01-06, 53 NRC 111 (2001); *Id.*, CLI-00-13, 52 NRC 23, 28-29 (2000); *Statement of Policy on Conduct of Adjudicatory Proceedings*, CLI-98-12, 48 NRC 18, 23 (1998).

assertion that “unless the Commission suspends the licensing proceeding, 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” (Petition at 8-9).¹⁸ Accordingly, no reason has been shown to support the State’s view that proceedings concerning Contention Utah RR should immediately be suspended at this time.

CONCLUSION

For the reasons set forth above, the Staff respectfully submits that the State of Utah has shown no reason to believe that an immediate suspension of proceedings concerning the PFS license application or Contention Utah RR is warranted at this time. Accordingly, the Staff opposes the State’s Petition and recommends that it be denied.

Respectfully submitted,

/RA/

Sherwin E. Turk
Counsel for NRC Staff

Dated at Rockville, Maryland
this 25th day of October 2001

¹⁸ See generally, *Consolidated Edison Co. of New York* (Indian Point, Units 1 and 2), CLI-01-08, 53 NRC 225, 229 (2001) (suspension of proceeding to await the outcome of other proceedings was unwarranted); *Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 338-39 (1999) (suspension of proceeding to await completion of Staff review was unwarranted).

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S RESPONSE TO THE STATE OF UTAH'S PETITION FOR IMMEDIATE RELIEF SUSPENDING LICENSING PROCEEDINGS," 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 25th day of October, 2001:

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