

October 22, 2001

UNITED STATES OF AMERICA

NUCLEAR REGULATORY COMMISSION

DOCKETED
USNRC

Before the Commission

November 5, 2001 (8:16AM)

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

In the Matter of)
)
PRIVATE FUEL STORAGE L.L.C.)
)
(Private Fuel Storage Facility))

Docket No. 72-22

ASLBP No. 97-732-02-ISFSI

**APPLICANT'S RESPONSE IN OPPOSITION TO
STATE OF UTAH'S PETITION FOR IMMEDIATE RELIEF
SUSPENDING LICENSING PROCEEDINGS**

Applicant Private Fuel Storage L.L.C. ("Applicant" or "PFS") hereby responds to the State of Utah's ("State") "Petition for Immediate Relief Suspending Licensing Proceedings" ("Petition") filed on October 10, 2001, which seeks to suspend the ongoing proceeding to license the Private Fuel Storage Facility ("PFSF") until some indefinite point in the future when "pending legislation and developing information can be applied adequately to protect the public health and safety." Petition at 3. As more fully discussed below, the Petition lacks merit because it: (1) seeks relief not provided for by the Commission regulations; (2) is not supported by good cause; and (3) constitutes an impermissible attempt to preclude the Atomic Safety and Licensing Board ("ASLB" or "Board") in this proceeding from ruling on the State's parallel effort to admit into the proceeding a late-filed "suicide mission terrorism and sabotage contention."¹ The State's Petition should accordingly be denied.

¹ State of Utah's Request for Admission of Late-Filed Contention Utah RR (Suicide Mission Terrorism and Sabotage) dated October 10, 2001 ("Proposed Utah RR").

I. BACKGROUND

The State's Petition arises from the acts of war perpetrated against the United States by foreign terrorists on September 11, 2001. Citing the unprecedented nature of the attacks, the State seeks the immediate suspension of the ongoing NRC proceeding to license the PFSF, now in its fourth year. The basis asserted for the Petition is that "[f]ormer notions of terrorism and sabotage are an unacceptable basis for licensing the PFS facility," hence suspension of the licensing proceeding is necessary "to prevent licensing decisions which will not protect the public health and safety." Petition at 2.

II. THERE IS NO BASIS FOR THE STATE'S REQUEST THAT THE ONGOING LICENSING PROCEEDING FOR THE PFSF BE SUSPENDED

A. The Relief Sought by the State is Without Basis

There is no Commission regulation, decision or other authority that supports its request that the licensing proceeding for the PFSF be suspended at this time. The State erroneously cites Consolidated Edison Co. of New York, Inc. (Indian Point, Units 1, 2 and 3), CLI-75-8, 2 NRC 173, 175 (1975) and Baltimore Gas & Electric Co. (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), CLI-98-15, 48 NRC 45, 52 (1998) for the proposition that the Commission has authority to oversee adjudicatory matters pending before a Commission tribunal. However, those cases deal with the Commission's power to expedite licensing proceedings or to review Staff decisions. They do not even remotely support the proposition that it is appropriate to halt in mid-stream an ongoing licensing proceeding.

In several recent cases, on the other hand, parties have petitioned the Commission to suspend a licensing proceeding. Such petitions have been uniformly denied. *See, e.g.,* Consolidated Edison Co. of New York (Indian Point, Units 1 and 2), CLI-01-08, 53 NRC 225, 228 (2001); Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), CLI-00-20, 52 NRC 151, 173-74 (2000).

It is no accident that, in fifty years of licensing of nuclear facilities, the Commission has not found it necessary to suspend an ongoing licensing proceeding. Suspension of the license to operate an existing nuclear facility may be appropriate under certain circumstances (e.g., war, national emergency, or an unexpected operational event), and the Atomic Energy Act ("the Act") so provides.² On the other hand, a facility that has yet to begin operating, to say nothing of having a license authorizing construction, cannot possibly pose a threat to the public; suspending the licensing process for such a facility without a showing that doing so is imminently required to protect public health and safety is not only unwarranted, but potentially inconsistent with the right of the prospective licensee to have its application reviewed and either granted or denied in accordance with the law and applicable regulations. See 10 CFR §§72.1, 72.40.

Nor does the State identify any grounds why suspension of the ongoing PFSF licensing proceeding would be warranted. The State argues in a footnote that suspending the license of the PFSF after it goes into operation would have little benefit, and "[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" Petition at n. 3. But there can be no threat to the public health and safety from a facility that is not yet built. In any event, there are many points in the process leading to full facility operation at which the Commission may exercise its oversight authority. Those include, among others, (1) the Commission's authorization of the issuance of Part 72 license pursuant to 10 CFR §2.764(c); (2) the Commission's review of the proposed initial decision by the ASLB and any objections thereto that may be raised by the parties, including the State;

² See Section 108 of the Atomic Energy Act of 1954 as amended, 42 U.S.C. §2138 (suspension of licenses for war or national emergency). After the Three Mile Island Unit 2 ("TMI") accident in 1979, several plants of similar design to TMI were ordered to remain shut down until certain actions had been successfully accomplished. See, e.g., 44 Fed. Reg. 27,779 (1979); Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station), CLI-79-7, 9 NRC 680 (1979).

(3) its issuance of new regulations that may affect facilities such as the PFSF, whether under construction or in operation; and (4) its review via the 10 CFR §2.206 petition process of any request by interested members of the public that the facility's operations be suspended. Thus, there is ample opportunity for the Commission to take action with respect to the PFSF without disturbing the licensing process.

B. The Relief Sought by the State is Unnecessary

The State notes that, in this country's search for methods to cope with the expanded threat of international terrorism "[a]nswers 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." Petition at 8. The State thus acknowledges that the answers to the issues raised by the September 11 attacks are being sought by Congress and the Commission and may at some future date be reflected in new legislation and/or Commission regulations. If such legislation is enacted or such regulations promulgated, PFS will be required to comply with those that are applicable. The State's proposed remedy, however, assumes that legislative or regulatory events which have not yet occurred will in fact take place.³ Such speculation is not the basis for a suspension order.

In any case, the State has available to it adequate means of raising its concerns outside the PFSF licensing arena. It can lobby Congress for the enactment of legislation. It can file comments during any future rulemaking proceeding on such new rules as the Commission may propose dealing with the threat of terrorism. See 10 CFR § 2.805 and Siegel v. Atomic Energy Commission, 400 F.2d 778, 785 (D.C. Cir. 1968). The State

³ The "Markey Amendment" included as Attachment 1 to the Petition has yet to be considered by either chamber of Congress and there is no indication of whether, when or in what form it will be adopted and signed into law. The only anti-terrorism bill passed by the U.S. House of Representatives thus far, the "Uniting and Strengthening America Act" (H.R. 2975), does not contain any provisions requiring changes to the NRC licensing requirements to meet the risk of terrorist activities.

can also file a petition for rulemaking. See 10 CFR § 2.802. And it can file a petition with the Commission pursuant to 10 CFR §2.206. Therefore, there is no need for the State to seek remedy in the context of the PFSF licensing proceeding.

III. NO GOOD CAUSE EXISTS FOR GRANTING THE RELIEF SOUGHT BY THE STATE

A. There is no Risk of Irreparable Damage that Warrants Granting the Relief Sought in the Petition

Even if suspension of the licensing proceeding for the PFSF were an appropriate form of relief for the State to request, there would be no good cause for granting such a relief at this time. According to the most recent schedule issued by the ASLB, the initial decision that could provide the basis for the Commission to authorize the issuance of a license allowing the start of construction of the PFSF will be issued at the earliest in September 2002.⁴ Construction of the facility would take more than a year.⁵ Thus, assuming favorable action by the ASLB and authorization by the Commission, the first spent fuel shipment to the PFSF will occur at least two or more years from now.⁶ Thus, there is no imminent risk to the health and safety of the public that would justify suspending the licensing process. See Vermont Yankee, supra, 52 NRC at 173-74.

The State does not clearly articulate why the relief it seeks needs to be granted now. The closest it comes to an explanation is the assertion that “[a]ssessing 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 recent events have been fully revealed and incorporated into the licensing process.” Petition at 8. This is no more than restating the relief sought. In any event, two years or more should be ample time for the NRC or Congress

⁴ See Order (General Schedule Revision), dated September 20, 2001, Attachment A.

⁵ See PFS License Application §1.8, Rev. 13 (2001); see also PFS Environmental Report §3.2.1, Rev. 13 (2001).

⁶ Id.

to determine whether any new initiatives to address terrorism are needed and the nature of any resulting requirements.

Conversely, to grant the relief sought by the State – that is, to suspend the ongoing licensing proceeding for the PFSF – would certainly have adverse consequences for the Applicant, because of the additional costs and delays that such a suspension would entail. The State has shown no good cause for inflicting such consequences on the Applicant, nor provided any basis for weighing the alleged benefits from the suspension (which, as discussed above, are non-existent) against the very real costs that would arise from such a suspension.

B. The Relief Sought by the State is Impermissibly Vague

The State is asking the Commission to “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.” Petition at 9. Such a request is impermissibly vague, since it defines no specific actions by the Commission, its Staff or Applicants that would suffice to lift the suspension. Were this relief to be granted, licensing of the PFSF could be suspended indefinitely, since what constitutes “safely resum[ing]” licensing, and what laws and regulations would “reflect existing realities for terrorism protection” are subjective matters, open to interpretation and disputes. Such a relief is impermissibly vague and may not be granted. See 10 CFR §2.730(b).

IV. THE PETITION IS AN ACKNOWLEDGED ATTEMPT TO PRECLUDE THE LICENSING BOARD FROM DISCHARGING ITS FUNCTIONS

The State argues that, unless the Commission suspends the licensing proceeding, current “inadequate” NRC regulations and licensing 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 7. In so arguing, the State expressly acknowledges that the true aim of the Petition is to prevent the ASLB from ruling on the State’s request for admission of its late-filed contention Utah RR, lest the proposed contention be weighed against existing law and regulations and rejected by the Board.⁷

The Petition is thus an impermissible attempt to interfere with the licensing process set forth in 10 CFR Part 72. Unquestionably, the State could not directly challenge the adequacy of existing NRC regulations in a licensing proceeding. See 10 CFR §2.758(a); Private Fuel Storage L.L.C. (Independent Fuel Storage Installation), LBP-98-29, 48 NRC 286, 296 (1998).⁸ What it cannot do directly it may not seek to do indirectly by having the proceeding suspended before the law and regulations can be applied.⁹ The Petition, therefore, must be rejected.

⁷ It is long settled that a proposed contention in an NRC licensing proceeding that seeks to litigate the risk of an external attack against a nuclear facility by a foreign enemy must be rejected, since such an attack is not one of the risks that the Act requires that nuclear facilities be protected against. Siegel v. Atomic Energy Commission, *supra*, 400 F.2d at 783-84. NRC regulations are to the same effect. See 10 CFR §50.13 and Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant, Units 1 and 2), LBP-82-119A, 16 NRC 2069, 2098 (1982) (contention alleging that terrorists might commandeer a large airplane and dive it into the containment of a nuclear power plant rejected as barred by 10 CFR §50.13).

⁸ A party to a licensing proceeding may petition that the application of a Commission regulation be waived for a particular proceeding because special circumstances with respect to the subject matter of that particular proceeding are such that application of the regulation would not serve the purpose for which the regulation was adopted. 10 CFR §2.758(b). That is not the situation here, however. The State is broadly arguing that the current NRC regulations in the area of plant security are inadequate in light of the September 11 events. Such a claim runs squarely against the prohibitions in 10 CFR §2.758(a).

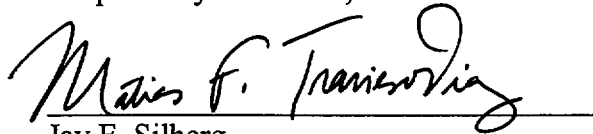
⁹ The vehicle provided by law for addressing any inadequacy in NRC regulations is the modification of such regulations via rulemaking. Offering interested parties, such as the State, the opportunity to com-

Footnote continued on next page

V. CONCLUSION

For the foregoing reasons, the Commission should deny the State's Petition.

Respectfully submitted,



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Dated: October 22, 2001

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ment on proposed new regulations fully complies with the public hearing requirements of Section 189(a) of the Act, 42 U.S.C. §2239(a). Siegel, supra, 400 F.2d at 785.

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Before the Commission

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CERTIFICATE OF SERVICE

I hereby certify that copies of the "Applicant's Response In Opposition To State Of Utah's Petition For Immediate Relief Suspending Licensing Proceedings" were served on the persons listed below (unless otherwise noted) by e-mail with conforming copies by U.S. mail, first class, postage prepaid, this 22nd day of October 2001.

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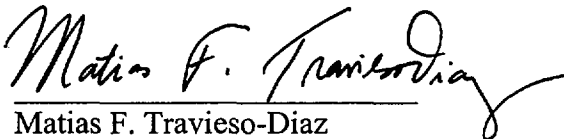
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