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February 27, 2002

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Commission

In the Matter of	)
	)
PRIVATE FUEL STORAGE L.L.C.	)Docket No. 72-22
	)
(Private Fuel Storage Facility)	)ASLBP No. 97-732-02-ISFSI

APPLICANT'S BRIEF ON THE ADMISSIBILITY OF THE THREAT OF TERRORISM AS A CONTENTION IN THE LICENSING PROCEEDING FOR THE PRIVATE FUEL STORAGE FACILITY

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In accordance with the Commission's Order, CLI-02-03, 55 NRC __ (February 6, 2002), Applicant Private Fuel Storage, L.L.C. ("Applicant" or "PFS") hereby files its brief on the admissibility of the threat of terrorism as a safety contention and an environmental contention in the Private Fuel Storage Facility ("PFSF") licensing proceeding. Intervenor State of Utah ("State" or "Utah") filed Contention Utah RR, claiming that the threat of terrorism must be addressed both as a safety issue and as an environmental issue.[1] As set forth below, the Atomic Safety and Licensing Board ("Licensing Board" or "Board") correctly held the contention to be inadmissible as it "constitutes an impermissible challenge to existing agency regulatory requirements" that bar the consideration of the terrorism claims asserted by the State. Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Facility), LBP-01-37, 54 NRC __, slip op. at 10 (December 13, 2001). Thus, the Board's ruling should be affirmed.

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

I. BACKGROUND

In June 1997, PFS filed its license application for an independent spent fuel storage installation ("ISFSI"). Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-98-7, 47 NRC 142, 157 (1998). In November 1997, the State filed contentions on the application, some of which were admitted for hearing. See id. at 251-57.

On September 11, 2001, terrorists linked to the al Qaeda network and terrorist Osama bin Laden hijacked four American jet airliners in flight and deliberately crashed two of them into the World Trade Center and one of them into the Pentagon. The fourth airliner crashed in southwestern Pennsylvania after passengers attempted to retake control of the plane. Michael Grunwald, "Terrorists Hijack 4 Airliners, Destroy World Trade Center, Hit Pentagon," Wash. Post., September 12, 2001 at A1. President Bush called the attack "an act of war."[2] In response to the attack the Commission quickly announced that it "continues to monitor the situation, and is prepared to make any adjustments to security measures as may be deemed appropriate." NRC News Release No. 01-112, Sept. 21, 2001. The Commission directed the NRC Staff to review the Commission's security regulations and procedures. Id. Just yesterday, the Commission issued orders to U.S. nuclear facilities to implement interim compensatory security measures. NRC News Release No. 02-025, Feb. 26, 2002. Some of these requirements will formalize measures that licensees had taken in response to NRC advisories issued since September 11 and some have emerged from the Commission's on-going top-to-bottom security review. Id.

On October 10, 2001, the State filed Contention Utah RR, which asserted that the PFS Safety Analysis Report ("SAR") and Environmental Report ("ER") and the NRC

[2] Address to a Joint Session of Congress and the American People, http://www.whitehouse.gov/news/releases/2001/09/print/20010920-8.html, (September 20, 2001).

Staff's September 2000 Safety Evaluation Report ("SER")[3] and Draft Environmental Impact Statement ("DEIS")[4] for the PFSF are deficient for failing to assess the impacts from "suicide mission terrorism and sabotage" that could occur at the proposed PFSF and related activities. State Req. at 1-2.

The contention asserted that:

> The Applicant, in its Safety Analysis Report, and the Staff, in its Safety Evaluation Report, have failed to identify and adequately evaluate design basis external man-induced events such as suicide mission terrorism and sabotage, "based on the current state of knowledge about such events" as required by 10 CFR § 72.94 (emphasis added). In addition, the scope of the Applicant's Environmental Report and the Staff's Draft Environmental Impact Statement is too limited to comply with the National Environmental Policy Act and 10 CFR §§ 72.34, 51.45, 51.61 and 51.71 because they do not adequately identify and evaluate any adverse environmental effects which cannot be avoided from attacks by suicide mission terrorism or sabotage.

Id. at 3-4. Based on the events of September 11, the State asserted that "[n]ow a suicide mission to crash a hijacked commercial airliner loaded with jet fuel into a nuclear facility is a reasonably foreseeable event." Id. at 3. In addition, the State claimed—with no factual support—that other terrorist attacks against the PFSF, "such as truck bombs, present day weapons (e.g., tow anti-tank and armor piercing weapons), [and] multi-member, inter-coordinated attacks" were now reasonably foreseeable. Id. at 14. The State also

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[3] Safety Evaluation Report Concerning the Private Fuel Storage Facility, Docket No. 72-22, September 29, 2000. The Staff also issued a supplemental safety evaluation report for the PFSF after the State filed its contention and after the Board rendered its decision.

[4] 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, U.S. Nuclear Regulatory Commission, Office of Nuclear Material Safety and Safeguards, NUREG-1714 (June 2000). The Final Environmental Impact Statement for the PFSF had not been published at the time the State filed its contention nor at the time the Board rendered its decision. CLI-02-03, slip op. at 2 n.3.

claimed that transportation of spent fuel to the PFSF and the PFS intermodal transfer facility may be terrorist targets. Id. at 11-13.

In response, PFS set forth a host of reasons why Contention Utah RR should be dismissed.[5] It should be dismissed as an impermissible challenge to the Commission's regulations for the security of ISFSIs and the NRC's requirements concerning the preparation of environmental reports and environmental impact statements. 10 C.F.R. § 2.758(a). It should be dismissed for impermissibly challenging the NRC Staff's evaluation of the license application rather than the application itself. Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-01-12, 53 NRC 459, 472-73 (2001). It should be dismissed for impermissibly raising transportation issues that are outside the scope of this proceeding. Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-99-34, 50 NRC 168, 176-77 (1999). It should be dismissed for lack of factual basis. 10 C.F.R. § 2.714(b)(2)(ii). Finally, it should be dismissed for seeking to litigate a matter that is currently under review by the Commission and may become the subject of a general rulemaking. Duke Energy Corp. (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 345 (1999).

The NRC Staff also argued that Utah RR should be dismissed.[6] As explained by the Staff, the contention constitutes an impermissible challenge to the Commission's regulations; it impermissibly raises transportation issues that are outside the proper scope of this proceeding; it lacks sufficient basis as to NEPA requirements; it lacks any factual basis as to terrorist attacks other than crashes of hijacked airliners; and the issues raised

[5] See Applicant's Response to State of Utah's Request for Admission of Late-Filed Contention Utah RR (Oct. 24, 2001).

[6] NRC Staff's Response to State of Utah's Request for Admission of Late-Filed Contention Utah RR (Suicide Mission Terrorism and Sabotage) (Oct. 26, 2001) ("Staff Resp.").

in the contention should rather be considered by rulemaking or other generic basis by the Commission. Staff Resp. at 10-20.

The Licensing Board held the contention to be inadmissible as it "constitutes an impermissible challenge to existing agency regulatory requirements" that bar the consideration of the terrorist threat asserted by the State. LBP-01-37, slip op. at 10. First, the specific physical protection requirements for ISFSIs are spelled out in 10 C.F.R. § 73.51. Id. at 11. Section 73.51 was the product of a May 1998 final rule whose statement of considerations specifically stated that "malevolent use of an airborne vehicle" "is not included within the protection goal for this final rule." Id. at 11-12 (quoting 63 Fed. Reg. 26,955, 26,956 (1998)). Thus, it "ma[de] admission of contention Utah RR as a safety issue problematic." Id. at 12.

The Board found that this result was appropriate considering the overall Commission approach regarding sabotage/terrorism events involving power reactors. Id. The Board quoted 10 C.F.R. § 50.13, which states that a reactor license applicant "is not required to provide for design features or other measures for the specific purpose of protection against the effects of (a) attacks and destructive acts, including sabotage, directed against the facility by an enemy of the United States, whether a foreign government or other person . . ." Id. at 13. Further, the Board quoted the rationale behind section 50.13, a decision on a power reactor licensing case in which the Commission stated that the protection against hostile enemy acts was the responsibility of the nation's defense establishment and the various agencies having internal security functions. Id. (quoting Florida Power & Light Co. (Turkey Point Nuclear Generating Units 3 and 4), 4 AEC 9, 13 (1967), aff'd sub nom, Siegel v. AEC, 400 F.2d 778 (D.C. Cir. 1968)). Designing reactors to protect against the full range of modern weapons is not practicable and "the defense and internal security capabilities of this country constitute, of necessity, the basic

'safeguards' as respects possible hostile acts by an enemy of the United States." Id. (quoting Turkey Point, 4 AEC at 9). The Board then found that the attacks of September 11 constituted acts by an enemy of the United States, "as would any similar acts directed against American nuclear facilities." Id. at 13. As such, the Commission policy of excluding such acts[7] from licensing determinations barred the admission of Utah RR as a safety contention. Id. at 13-14.

With respect to the State's contention that the National Environmental Policy Act ("NEPA") required the analysis of the effects of terrorism, the Board held, in accordance with Appeal Board precedent, that the contention was inadmissible. Id. at 14. "[T]he rationale for 10 CFR § 50.13 [is] as applicable to the Commission's NEPA responsibilities as it is to its health and safety responsibilities." Id. at 13 (quoting Long Island Lighting Co. (Shoreham Nuclear Power Station), ALAB-156, 6 AEC 831, 851 (1973)). The Board also noted that because uncertainty in current risk assessment techniques would not allow meaningful assessment of the risk of terrorism, the risk need not be considered in environmental impact statements. Id. (citing Limerick Ecology Action v. NRC, 869 F.2d 719, 743-44 (3d Cir. 1989)).

Finally, although the Board's rulings above were dispositive of Contention Utah RR, the Board also found that the State's claims regarding the potential for terrorist attacks other than with a hijacked airliner (e.g., with a truck bomb) lacked factual basis, the State's allegations regarding potential attacks on spent fuel transportation fell outside the scope of the proceeding, and the State's claim that the requirement to address design ba-

[7] Acts that fell within the already defined threat protection goals for the facility, however, would be exceptions to the exclusion of enemy acts. Id. at 13 (citing Commonwealth Edison Co. (Braidwood Nuclear Power Station, Units 1 and 2), LBP-85-27, 22 NRC 126, 137-38 (1985)).

sis external man-induced events under 10 C.F.R. § 72.94 included terrorist attacks and sabotage was misplaced. Id. at 13-14 n.3.

Nevertheless, while finding Utah RR inadmissible, the Board recognized that the Commission is considering whether, and to what degree, the agency's regulatory regime should be changed to reflect the events of September 11. Therefore, the Board referred its decision to the Commission for early review. Id. at 15.

II. DISCUSSION

As PFS argued and as the Board held below, Contention Utah RR is an impermissible challenge to NRC regulations concerning the safeguards and security of ISFSIs and NEPA requirements, and Contention RR lacks the requisite factual basis. Therefore, the Board's ruling should be affirmed.

A. The PFS Safety Analysis Report Need Not Identify and Evaluate Potential Intentional Attacks Against the Facility

Contention Utah RR is an impermissible challenge to the Commission's regulations governing ISFSI safeguards and security, 10 C.F.R. Part 73. First, it impermissibly seeks to require PFS to protect against enemy attacks, which is beyond the specific requirements for ISFSI security set forth in section 73.51. See also Physical Protection for Spent Nuclear Fuel and High-Level Radioactive Waste, Final Rule, 63 Fed. Reg. at 26,956 (ISFSI security level less than that for reactors); 10 C.F.R. § 50.13 (reactor security need not protect against enemy attacks). Second, it impermissibly seeks to require the SAR to identify and evaluate terrorism and sabotage threats, where the regulations required an ISFSI's safeguards and physical protection against terrorism and sabotage to be described in the facility physical protection plan, 10 C.F.R. § 72.180, not the SAR.

1. An ISFSI Licensee Need Not Protect Against Enemy Attacks

The State claims that the PFS SAR (and the Staff's SER) are inadequate for failing to evaluate suicide mission terrorism and sabotage in light of the current state of

knowledge. State Req. at 3. The State cites a suicide mission to crash an airliner into a nuclear facility as a "reasonably foreseeable event." Id.; see id. at 9-11. It also claims—with no factual support—that "truck bombs, present day weapons (e.g., tow anti-tank and armor piercing weapons), [and] multi-member, inter-coordinated attacks . . . should be identified and adequately evaluated." Id. at 14.

The State's attack on the Commission's ISFSI security requirements is plainly impermissible. 10 C.F.R. § 2.758(a).[8] The specific requirements for ISFSI security are set forth in 10 C.F.R. § 73.51. 10 C.F.R. § 73.51(a)(1)(i); see 10 C.F.R. § 72.180. Specific security performance objectives are set forth in section 73.51(b)(2). These consist of: storage of spent fuel within a protected area; restricted access to the protected area; detection and assessment of unauthorized penetration of the protected area; timely communication with a response force when necessary; and management of the security organization so as to maintain its effectiveness. 10 C.F.R. §§ 73.51(b)(2)(i) to (v). Overall, the ISFSI physical protection system must "be designed to protect against loss of control of the facility that could be sufficient to cause a radiation exposure exceeding the dose as described in [10 C.F.R.] § 72.106 . . . ." 10 C.F.R. § 73.51(b)(3). Methods by which licensees are to meet the performance requirements of section 73.51(b)(2) are set forth in section 73.51(d). The Commission may authorize other methods of meeting the performance requirements on a specific basis. 10 C.F.R. § 73.51(d).

Section 73.51, however, does not require an ISFSI physical protection plan to protect against enemy attacks, such as a suicide mission to crash a hijacked commercial airliner. First, ISFSI security requirements are less than those for reactors:

[8] The State did not request a waiver of the Commission's rules. To obtain a waiver it would had to have shown that "special circumstances with respect to the subject matter of the particular proceeding are such that the application of the rule or regulation (or provision thereof) would not serve the purposes for which the rule or regulation was adopted." 10 C.F.R. § 2.758(b).

> The Commission believes that the appropriate level of physical protection for spent fuel and high-level radioactive waste lies somewhere between industrial-grade security and the level that is required at operating power reactors. The Commission also notes that the nature of spent fuel and of its storage mechanisms offers unique advantages in protecting the material.

63 Fed. Reg. at 26,956; see also id. at 26,955-56. Therefore, ISFSI security systems are not required to protect against the same design basis threat as nuclear reactors. See id. at 26,957 (removing reference to section 73.1 design basis threat, discussing use of force); compare 10 C.F.R. § 73.1(a). As discussed below, even nuclear reactor licensees do not need to protect against enemy attacks. 10 C.F.R. § 50.13.

Second, as the Board noted, in promulgating section 73.51, the Commission specifically rejected suggestions that ISFSI physical protection systems be required to protect against malevolent use of a land or airborne vehicle:

> With regard to protection against the malevolent use of a land-based vehicle, NRC has determined, based on the opinions of expert study and a peer review of findings, that there is no compelling justification for requiring a vehicle barrier as perimeter protection for spent fuel and high-level radioactive waste stored under a Part 60 or Part 72 license. Inclusion of an airborne vehicle was assessed for possible inclusion into the protection goal for this rule. However, protection against this type of threat has not yet been determined at sites with greater potential consequences than spent fuel storage installations [i.e., nuclear reactors]. Therefore, this type of requirement is not included within the protection goal for this final rule.

63 Fed. Reg. at 26,956 (emphasis added).

Third, as the Board also noted, even nuclear reactors are not required to be protected against enemy attacks:

> [A license applicant] is not required to provide for design features or other measures for the specific purpose of protection against the effects of (a) attacks and destructive acts, including sabotage, directed against the facility by an enemy of the United States, whether a foreign government or other person . . . .

10 C.F.R. § 50.13.[9] While one NRC licensing board recently found that this rule applies only to reactors, Duke Cogema Stone & Webster (Savannah River Mixed Oxide Fuel Fabrication Facility), LBP-01-35, 54 NRC __, __ (slip op. at 52) (Dec. 6, 2001), when the question of protection against hostile attacks was first referred to the Commission, it stated to the contrary that the rule applied to facilities generally:

> The position of the Commission with respect to acts of war and destructive acts by enemy agents is set forth in the referenced notice of proposed rule making [for section 50.13]. We there confirmed the Commission's past practice of not requiring applicants for facility licenses to provide for special design features or other measures for protection against the effects of attacks and destructive acts, including sabotage, directed against the facility by an enemy of the United States.

Florida Power & Light Co. (Turkey Point Nuclear Generating Units No. 3 and No. 4), Commission Memorandum and Order, 3 AEC 173 (1967) (emphasis added).

The Commission enunciated sound policy reasons for this rule, which apply to all nuclear facilities and which the Licensing Board recognized:

> It would appear manifest, as an initial proposition, that the protection of the United States against hostile enemy acts is a responsibility of the nation's defense establishment and of the various agencies of our Government having internal security functions.

Turkey Point, 4 AEC at 13; see also Siegel, 400 F.2d at 784. Nuclear facility safety features are not specifically intended to protect them against enemy attacks and destructive acts. Turkey Point, 4 AEC at 13. However, as noted above, "the nature of spent fuel and of its storage mechanisms [e.g., dry fuel in metal rods and assemblies inside thick con-

[9] "Attacks and destructive acts" are those above and beyond the threats against which the reactor's physical protection system must defend under the Commission's specific security requirements in 10 C.F.R. Part 73. Braidwood, LBP-85-27, 22 NRC at 137-38.

crete and steel storage casks] offers unique advantages in protecting the material." 63 Fed. Reg. at 26,956.[10]

> One factor underlying [the Commission's] practice in this connection has been a recognition that [facility] design features to protect against the full range of the modern arsenal of weapons are simply not practicable and that the defense and internal security capabilities of this country constitute, of necessity, the basic "safeguards" as respects possible hostile acts by an enemy of the United States.
>
> The circumstances which compel [the Commission's] recognition are not, of course, unique as regards a nuclear facility; they apply also to other structures which play vital roles within our complex industrial economy. The risk of enemy attack or sabotage against such structures, like the risk of all other hostile acts which might be directed against this country, is a risk that is shared by the nation as a whole. This principle, we believe, is rooted in our political history and we find no Congressional indication that nuclear facilities are to be treated differently in the subject regard.

Turkey Point, 4 AEC at 13.

Finally, the Commission has also stated that inquiring into the vulnerability of nuclear facilities to enemy attacks in the context of public hearings would be unwise as a matter of public policy:

> Moreover, examination into [issues of vulnerability to enemy attacks], apart from their extremely speculative nature, would involve information singularly sensitive from the standpoint of both our national defense and our diplomatic relations. These matters are clearly not amenable to board consideration and determination in the licensing process . . . .

Id. at 14 (emphasis added).

Thus, security of the PFSF against hostile attacks, like those perpetrated on September 11, is the primary responsibility of the nation's defense and internal security es-

[10] The Siegel court similarly noted that reactor safety systems intended to protect against the effects of accidents would also provide protection against enemy attacks. 400 F.2d at 782 n.4.

tablishments, not the NRC.[11] Indeed, since September 11, security around the United States, including at the nation's airports, seaports, and borders, has been increased significantly. Further, the United States and other nations are continuing efforts to destroy the al Qaeda terrorist network throughout the world. Finally, examining the potential vulnerability of the PFSF to enemy attacks in the context of a public hearing would be unwise because of the sensitive information the examination would necessarily involve. Therefore, Contention RR challenges the NRC's security regulations and the Licensing Board's ruling dismissing it should be affirmed.

The fact that the attacks of September 11 were committed by individual terrorists rather than by a foreign government does not differentiate them from enemy attacks. NRC case law holds that they are the same from the perspective of nuclear facility security requirements. In Consolidated Edison Co. of New York, Inc. (Indian Point Station, Unit No. 2), ALAB-202, 7 AEC 825, 829-30 (1974), the Appeal Board held that an attack by "an armed band of trained saboteurs" would constitute an enemy attack under 10 C.F.R. § 50.13 regardless of the actual nature or allegiance of the attackers. Therefore, "an applicant should be entitled to rely on settled and traditional governmental assistance in handling [the] attack." Id. at 830. The Licensing Board here correctly concluded that the attacks of September 11 constituted acts by an enemy of the United States, "as would any similar acts directed against American nuclear facilities." LBP-01-37, slip op. at 13.

2. The PFS Physical Protection Plan—Not the SAR—Provides for Security Measures

The State also claimed that under 10 C.F.R. § 72.94, the PFS SAR must identify and evaluate suicide mission terrorism and sabotage as a "design basis external man-

[11] The same philosophy has been applied abroad. See, e.g., Inside NRC (October 22, 2001) at 1 (French government protection for La Hague reprocessing facility against airborne attack threat).

induced event." State Req. at 3. As the Board recognized, the State's claim is patently wrong. Section 72.94 is one of the "siting evaluation factors" in Part 72, Subpart E. The purpose of that section is to evaluate "site characteristics" that may affect the safety of the ISFSI. 10 C.F.R. § 72.90(a). Section 72.94 concerns potential accidents associated with "past and present man-made facilities and activities." 10 C.F.R. § 72.94(a). The purpose of this section is to evaluate the potential for accidents associated with normal human activity in the vicinity of the ISFSI site, not deliberate attacks against the facility. As stated in the context of ISFSI emergency planning requirements, "[t]he Commission's established practice with respect to dangers of [sabotage, terrorism, and military attacks] is that the protection of the United States against hostile enemy acts is a responsibility of the nation's defense establishment and the various agencies having internal security functions." 53 Fed. Reg. 31,651, 31,653 (1988).[12]

As discussed above, the specific security requirements for ISFSIs are set forth in 10 C.F.R. Part 73 and they define what PFS must do. Moreover, section 73.21 requires that safeguards information be protected from public disclosure. Evaluation of security threats in the SAR would violate that provision, in that the evaluation would necessarily include detailed information concerning the physical protection at the PFSF. See 10 C.F.R. § 73.21(b)(1).

B. NEPA Does Not Require the Assessment of Terrorist Attacks or Sabotage

Contention Utah RR asserted that the PFS ER and the Staff DEIS are inadequate under NEPA "because they do not adequately identify and evaluate any adverse environmental effects which cannot be avoided from attacks by suicide mission terrorism or

[12] Licensing Requirements for the Independent Storage of Spent Nuclear Fuel and High-Level Radioactive Waste, Final Rule.

sabotage." State Req. at 3; see also id. at 7, 12, 15-16, 19.[13] The State's claims provide no basis for the admission of Contention RR.

1. Under NRC Case Law and Commission Policy Terrorism and Sabotage are Outside the Scope of NEPA

Under NRC case law and Commission policy , it is clear that terrorism and sabotage effects lie outside the scope of NEPA. As set forth by the Appeal Board in holding that wartime sabotage need not be considered under NEPA:

> [t]aking into account the 'rule of reason' which we believe must govern the interpretation of NEPA, we find the rationale for 10 CFR § 50.13 to be as applicable to the Commission's NEPA responsibilities as it is to its health and safety responsibilities. We so construe the regulation.

Shoreham, ALAB-156, 6 AEC at 851 (footnote omitted). In support of its holding, the Appeal Board quoted the principles articulated by the Siegel court in upholding section 50.13:

> (1) the impracticality, particularly in the case of civilian industry, of anticipating accurately the nature of enemy attack and of designing defenses against it, (2) the settled tradition of looking to the military to deal with this problem and the consequent sharing of its burdens by all citizens, and (3) the unavailability, through security classification and otherwise, of relevant information and the undesirability of ventilating what is available in public proceedings.

Id. (quoting Siegel, 400 F.2d at 782). In accordance with the Appeal Board's ruling, the Licensing Board here correctly held that consideration of terrorism is not required under NEPA. LBP-01-37, slip op. at 13.

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[13] The State's declarant, Dr. Marvin Resnikoff, also attacked the DEIS for the way in which it presents information concerning spent fuel transportation risk. Declaration of Dr. Marvin Resnikoff in Support of Utah Contention RR (Oct. 10, 2001) ¶ 25 ("Resnikoff Dec."). The State, however, did not cite that claim in its request for admission of Contention RR. Furthermore, since the DEIS was published in June 2000, any contention concerning the way in which it presents information is grossly and unjustifiably late. Thus that claim should not be admitted. 10 C.F.R. § 2.714(a)(1).

Second, as also noted by the Licensing Board, NEPA does not require the assessment of "remote and speculative impacts." Limerick Ecology Action, 869 F.2d at 739. In Limerick Ecology Action, the Third Circuit held that NEPA does not require the NRC to consider sabotage risk in an environmental impact statement, because assessment of such risk is attended by a great deal of uncertainty and cannot be meaningfully considered in the decision-making process. Id. at 743; see also id. at 744 n.32 (NRC consideration of some speculative risks does not require consideration of sabotage). Thus, the NRC assessment in that case, which did not assess sabotage risk, satisfied NEPA's requirement to take a "hard look" at environmental impacts. Id. at 743.

The Commission has long recognized the speculative nature of the potential threat of hostile attacks:

> Assessment of whether, at some time during the life of a facility, another nation actually would use force against that particular facility, the nature of such force and whether that enemy nation would be capable of employing the postulated force against our defense and internal security capabilities are matters which are speculative in the extreme.

Turkey Point, 4 AEC at 13-14 (emphasis added).

Most recently, in a 1999 rulemaking considering changes to the analysis of transportation in the Generic Environmental Impact Statement for License Renewal of Nuclear Plants (NUREG-1437) (1996), the Commission reiterated:

> NRC has not quantified the likelihood of the occurrence of sabotage in this analysis because the likelihood of an individual attack cannot be determined with any degree of certainty.

64 Fed. Reg. 48,496, 48,505 (1999).[14]

[14] Final Rule, "Changes to Requirements for Environmental Review for Renewal of Nuclear Power Plant Operating Licenses."

Finally, as noted above, the Commission has also stated that inquiring into the vulnerability of nuclear facilities to enemy attacks in the context of public hearings would be unwise as a matter of public policy, in that the inquiry would necessarily involve "singularly sensitive" defense and diplomatic information. Turkey Point, 4 AEC at 14. Thus, such matters "are clearly not amenable to board consideration and determination in the licensing process." Id.

Consistent with the above, the PFSF Licensing Board previously rejected, as challenges to the Commission's regulations or generic rulemaking-associated determinations, all past attempts by Utah to introduce sabotage as a basis for the admission of NEPA contentions. See Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-98-10, 47 NRC 288, 296 (1998). Here, the Board similarly and correctly rejected terrorism as a NEPA contention. LBP-01-37, slip op. at 14 (quoting Shoreham, ALAB-156, 6 AEC at 851). The Board's ruling should be affirmed.

2. Under Federal Case Law Terrorism and Hostile Attacks Are Outside the Scope of NEPA

In addition to the NRC case law, federal case law concludes that terrorism and hostile attacks against a facility are outside the scope of the issues that must be discussed under NEPA. Fundamentally, the potential effects of an attack by an enemy are issues of foreign policy, national defense, intelligence gathering, and law enforcement, not environmental policy. It is not possible to accurately assess the likelihood and potential severity of enemy attack without delving deeply into those realms. Moreover, the potential effects of the attack are dictated largely by the potential actions of the attacker—a third party—not the proposed action being licensed. Assessing the likelihood and the effects of an enemy attack is essentially unrelated to the effects of the proposed federal action upon the environment. Therefore, the issue of enemy attacks lacks the requisite nexus with environmental policy and hence lies outside the scope of NEPA. In addition, as-

sessing the likelihood that a given facility would be attacked and the consequences of the attack are speculative endeavors which NEPA does not require. Finally, merely assuming that an attack of some postulated nature would occur and then attempting to assess its consequences would overstate the risk from terrorism, thereby producing an analysis of no value to decisionmakers and potentially distorting the decisionmaking process.

a. Assessment of the Effects of Terrorism and War Lies Outside the Scope of Environmental Policy

In Romer v. Carlucci, the Eighth Circuit rejected a challenge to an Air Force environmental impact statement ("EIS") for the deployment of the MX nuclear intercontinental ballistic missile, where the challenge had asserted that the EIS should discuss alternative weapon systems, alternative missile basing modes, and the potential wartime use of the missiles. 847 F.2d 445, 447 (8th Cir. 1988) (en banc). In rejecting these claims as outside the scope of NEPA, the court stated:

> It is really expecting too much of the National Environmental Policy Act (NEPA) and the EIS process to ask them to grapple with issues of that scope and magnitude, issues that would inevitably involve large amounts of classified information, and as to which environmental effects as the term is normally used would be unlikely to be of decisional significance. . . . Defendants cannot be reasonably expected to reinvent the world or re-examine strategic doctrine from the ground up every time they compile an EIS on a weapons-related decision. It is only "appropriate" alternatives to a proposed course of action that an EIS must describe.

Id. at 456-57. Regarding alternative missile basing modes, the court added:

> The strategic considerations in the placement of nuclear missiles are obviously of enormous importance and would involve the review of intricate and sensitive defense policy information. Moreover, consideration of the merits of one basing mode over another would likely plunge the defendant, and hence the courts, into a thoroughgoing and fundamental re-examination of strategic doctrine with regard to missile basing decisions. Finally, given the information available to Congress [from alternative governmental sources], we believe that it is [unlikely] that EIS information concerning alternative basing modes would be of "decisional significance" . . . .

Id. at 457.

Here, as the Commission in Turkey Point and the Appeal Board in Shoreham (quoting the D.C. Circuit in Siegel) recognized regarding hostile attacks generally, assessing the likelihood and the consequences of a terrorist attack against a nuclear facility (or, for that matter, any facility requiring the preparation of an EIS) would similarly involve large amounts of classified information regarding terrorist intentions and capabilities and U.S. military, intelligence, and law enforcement capabilities to thwart potential attacks. In performing the assessment, the NRC, stepping into the role of the various national security agencies, would have to examine—and allow the litigation of—military, intelligence, and law enforcement plans to defend against and defeat terrorism as well as highly sensitive potential foreign policy decisions (e.g., regarding Middle Eastern policy) that could have a significant bearing on whether particular terrorist plots against the United States would be initiated in the first place. The defense of the United States against terrorism is the responsibility of the national security apparatus and it provides information directly to Congress (and on a selective basis to the public) regarding its activities and potential threats to the nation, which Congress uses to make policy decisions. Analysis of the threat of terrorism simply lies outside the realm of environmental policy that federal agencies are required to execute under NEPA. Thus, terrorism, like the questions related to nuclear deterrence, national security, and war in Romer, should not be assessed in an EIS and the Commission holding set forth in Turkey Point and followed in Shoreham remains sound.

b. Hostile or Criminal Third Party Acts Lack the Requisite Nexus with the Proposed Action and Environmental Policy to Require Their Analysis Under NEPA

In Glass Packaging Institute v. Regan, the District of Columbia Circuit rejected a challenge to a Bureau of Alcohol, Tobacco, and Firearms environmental assessment re-

garding a decision to allow the packaging of liquor in plastic bottles. 737 F.2d 1083, 1091-94 (D.C. Cir.), cert. denied, 469 U.S. 1035 (1984), overruled in part on other grounds, Hazardous Waste Treatment Council v. EPA, 861 F.2d 277, 283 n.2 (D.C. Cir. 1988). The challenge had asserted that the assessment was flawed for failing to consider the potential injury or death that could result from criminal tampering with the bottles. Glass Packaging Institute, 737 F.2d at 1091-94.

The court rejected the claim on the grounds that the potential for tampering with the bottles—a third party criminal act—implicated "[n]o cognizable environmental effect." Id. at 1091 (emphasis in original). Including the potential effects of criminal tampering would impermissibly dilute the policies served by NEPA. Id. "The Supreme Court has cautioned that

> NEPA does not require the agency to assess every impact or effect of its proposed action, but only the impact or effect on the environment. If we were to seize the word "environmental" out of its context and give it the broadest possible definition, the words 'adverse environmental effects' might embrace virtually any consequence of a governmental action that someone thought "adverse."

Id. (quoting Metropolitan Edison Co. v. People Against Nuclear Energy, 460 U.S. 766, 772 (1983)). The plaintiffs' definition of adverse environmental impact to include injury from the ingestion of criminally adulterated food "extend[ed] the scope of 'environment' well beyond any reasonable interpretation of the 'natural and physical environment' encompassed under NEPA." Id.

The court squarely rejected the plaintiffs' claim that the potential for harm from tampering must be considered as caused by "reasonably foreseeable criminal acts of third parties." Id.

> [M]ere foreseeability does not trigger a duty to consider an alleged environmental effect. The limits to which NEPA's causal chain may be

> stretched before breaking must be defined by the policies and legislative intent behind NEPA.[15] NEPA is meant to supplement federal agencies' other nonenvironmental objectives, not to transplant specific regulatory burdens from those expert agencies otherwise authorized to redress specific nonenvironmental problems and pointlessly to reimpose those objectives on other unqualified agencies. Several provisions of the Federal Food, Drug, and Cosmetic Act prohibit "adulteration" of food .... The Federal Anti-Tampering Act makes it a federal crime to inject poison in foods. That Act specifically empowers the FDA to investigate violations of the Act involving products subject to FDA regulation .... In light of this specific congressionally conferred FDA mandate to control tampering with food, ... it would be absurd to hold that susceptibility to tampering is an environmental health risk which the Bureau and every other agency must consider in making an environmental assessment.

Id. at 1092 (emphasis added).

> We seriously doubt whether Congress fashioned NEPA as an administrative incarnation of the policeman's squad car, roving the streets in search of sporadic criminal activity which may occasionally occur in the aftermath of an agency action, there to arrest the criminal in the name of "environmental protection."

Id. The court added that "[a] decision that no significant environmental effect will occur is buttressed by the conformity of the proposed federal action to federal regulations governing other aspects of that action's interrelationship with the physical environment."[16] In the end, "[a]lthough tampering may pose a consumer health risk, it is definitely not an environmental consequence under any reasonable interpretation of the National Environmental Policy Act." Id. at 1094.

Here, the Appeal Board's holding in Shoreham excluding hostile attacks from assessment under NEPA is directly supported by Glass Packaging Institute. Criminal acts,

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[15] Metropolitan Edison Co. v. People Against Nuclear Energy, [460 U.S. at 774] n.7 ["In the context of ... NEPA, courts must look to the underlying policies or legislative intent in order to draw a manageable line between those causal changes that may make an actor responsible for an effect and those that do not."].

[16] Id. (citing Preservation Coalition, Inc. v. Pierce, 667 F.2d 851, 861 (9th Cir. 1982); Maryland-National Capital Park & Planning Comm'n v. U.S. Postal Serv., 487 F.2d 1029, 1036-37 (D.C. Cir. 1973)); see also Public Citizen v. National Highway Transportation Safety Administration, 848 F.2d 256, 268 (D.C. Cir. 1988).

terrorist acts, and acts of war do not implicate environmental effects cognizable under NEPA, even where postulated acts are considered to be foreseeable. 737 F.2d at 1091-92. As the Commission stated and as the Appeal Board recognized, "the protection of the United States against hostile enemy acts is a responsibility of the nation's defense establishment and of the various agencies of our Government having internal security functions." Turkey Point, 4 AEC at 13; see Shoreham, ALAB-156, 6 AEC at 851 (quoting Siegel, 400 F.2d at 782). Glass Packaging Institute is very clear: "NEPA is . . . not [meant] to transplant specific regulatory burdens from those expert agencies otherwise authorized to redress specific nonenvironmental problems and pointlessly to reimpose those objectives on other unqualified agencies." 737 F.2d at 1092. Here, requiring the NRC to assess the likelihood and the consequences of a terrorist attack under the rubric of environmental protection, while the substantive responsibility for protection against terrorism lies with the various national security agencies, would be doing just that. To paraphrase the court, NEPA is not an administrative incarnation of the armed forces, the CIA, and the FBI, roving the world in search of sporadic terrorist activity which might occasionally occur in the aftermath of NRC action, there to defeat the terrorist in the name of "environmental protection." Although terrorism is a national security issue, it is not an environmental consequence under a reasonable interpretation of NEPA.

c. The Effects of Terrorism and War are Speculative Matters that Need Not be Assessed in an EIS

In No GWEN Alliance of Lane County v. Aldridge, the Ninth Circuit rejected a challenge to an Air Force environmental assessment for a strategic nuclear forces command and control radio tower that had asserted that the assessment was flawed for failing to discuss the environmental impact of nuclear war. 855 F.2d 1380, 1385-86 (9th Cir. 1988). There, the challengers had asserted that the towers would make nuclear war more likely and more prolonged and that any geographic area in which one of the towers in the

system was located would become a priority target in the event of an attack. Id. at 1381-82.

The court rejected the challenge primarily because the assessment of the likelihood and consequences of nuclear war as related to the radio tower system was speculative. The court recognized that EISs need not discuss remote and speculative consequences. Id. at 1385. This limit, flowing from the "rule of reason" under which NEPA must be implemented, controls the definition of the "reasonably foreseeable" impacts that EISs must consider under Council on Environmental Quality ("CEQ") regulations. Id. at 1386 & n.1 (citing 40 C.F.R. § 1502.22). The court found the claim that the tower would be a primary target in the event of a nuclear war (and that hence the consequences of a nuclear attack were a foreseeable effect of the project) to be speculative. Id. at 1386.[17] In the end, "the nexus between the construction of [the radio tower] and nuclear war is too attenuated to require discussion of the environmental impacts of nuclear war in an environmental assessment or environmental impact statement." Id.

Similarly, as discussed in Section II.B.1, supra, the Third Circuit in Limerick Ecology Action held that the NRC did not need to consider the effects of sabotage in EISs for nuclear power plants because there was no meaningful method to accurately assess or predict the probability that the sabotage would occur in the first place, i.e., the risk from sabotage was speculative.[18] 869 F.2d at 743-44. Further, in City of New York v. DOT, the Second Circuit upheld the Department of Transportation's decision not to consider the potential effect of sabotage and terrorism against highway shipments of nuclear

[17] The court also rejected the claim that the challengers' speculation regarding the likelihood and consequences of nuclear war and the Air Force's speculation that the radio tower system would deter nuclear war should both be discussed on the grounds that the consequences of nuclear war would be "catastrophic" and that the EIS need not discuss them because doing so would "serve no useful purpose." Id. (citing Warm Springs Dam Task Force v. Gribble, 621 F.2d 1017, 1026 (9th Cir. 1980)).

[18] Risk is defined as the product of the probability of the event and its consequences. 869 F.2d at 738.

material in light of evidence that the risk of sabotage and terrorism added nothing to the risk of high-consequence accidents or, at worst, the risk of sabotage and terrorism was "unascertainable." 715 F.2d 732, 750 (2d Cir. 1982).

Here, the Commission has long recognized that assessment of whether a facility would actually be attacked by an enemy and whether the attack would be successful against our defense and internal security capabilities are matters which are "speculative in the extreme." Turkey Point, 4 AEC at 13-14 (emphasis added); see also 64 Fed. Reg. at 48,505. The No GWEN court similarly found that whether the radio tower in that case would be a target in a nuclear war was speculative and that thus the consequences of an attack need not be discussed in the EIS. 855 F.2d at 1386. Indeed, the rejected claim in No GWEN was similar to the State's claim that the PFSF would be a target of terrorism. See State Req. at 9-11. Other courts have concurred that where agencies determine that assessing the likelihood of an attack is a speculative matter they do not need to discuss the consequences of sabotage or terrorism in their environmental assessments. Limerick Ecology Action, 869 F.2d at 743-44 (NRC); see City of New York v. DOT, 715 F.2d at 750 (DOT). Therefore, the Shoreham Appeal Board was correct in holding that NEPA does not require a discussion of the consequences of an enemy attack against a nuclear facility. See ALAB-156, 6 AEC at 851. Thus, the Commission case law remains sound and the Licensing Board ruling should be affirmed.

d. Merely Assuming an Attack Would Occur Would Yield an Assessment of No Value to Decisionmakers and Would Potentially Distort the Decisionmaking Process

It has been proposed that the difficulty of assessing the likelihood and the nature of a terrorist attack could be avoided by simply assuming that one or more different types of attacks could occur and then proceeding to assessing their consequences. See, e.g., Dominion Nuclear Connecticut, Inc. (Millstone Nuclear Power Station, Unit No. 3; Fa-

cility Operating License NPF-49), LBP-02-05, 55 NRC __ (slip op. at 16) (Jan. 24, 2002). Such an approach would be impermissibly flawed, however, as it would speculatively paint a misleading picture of the threat posed by terrorism and hence would yield an assessment that would be of no value to environmental decisionmaking concerning the facility.

Assuming arguendo that terrorism should be analyzed under NEPA at all, the Supreme Court has held that NEPA does not require "worst case" analysis of potential environmental effects, in that such analysis in an EIS "distort[s] the decisionmaking process by overemphasizing highly speculative harms." Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 356 (1989). In repealing its regulations formerly requiring a worst case analysis, the CEQ stated that the worst case requirement forced agencies to speculate on the "worst" possible consequences of an action. Proposed amendment to 40 CFR 1502.22, 50 Fed. Reg. 32,234, 32,236 (1985). This produced speculative conclusions, in that one could always make a "worst" case worse by adding variables to hypothetical scenarios. Id. Those conclusions were useless to decisionmakers because ultimately they were not based on credible scientific evidence or analysis and thus they overstated the potential for harm posed by proposed actions. Id. In this vein, as discussed above, the courts have held that agencies do not need to consider the effects of sabotage or terrorism in EISs where there is no meaningful method to accurately assess or predict the probability that the sabotage or terrorism would occur in the first place. Limerick Ecology Action, 869 F.2d at 743-44 (NRC);[19] see City of New York v. DOT, 715 F.2d at 750 (DOT); see also No GWEN, 855 F.2d at 1386. In accordance with Methow Valley and the CEQ, discussions of the consequences of sabotage or terrorism in those EISs

[19] The NRC never adopted the CEQ worst case analysis regulations. See id. at 743.

would have been useless, as they would have overemphasized the risks posed by the potential attacks and thereby distorted the decisionmaking process.

Here, if it were merely assumed that terrorist attacks against the PFSF of certain types could occur—without considering the likelihood that they would occur—and the EIS proceeded directly to analyze the consequences of the attacks, the conclusion of the EIS regarding the risk posed by terrorism would be based entirely on speculation regarding the likelihood and the nature of the attacks. Such a conclusion would falsely overstate the risk posed by terrorism and impermissibly distort the decisionmaking process.

The State of Utah has claimed that because the deliberate crash of a hijacked airliner has, in fact, occurred, it must be analyzed in the PFSF EIS. See State Req. at 3. Nevertheless, simply assuming that that kind of attack would be repeated at the PFSF, without considering airport and airline security measures implemented since September 11 and all of the government's other responses to terrorism, let alone assessing whether terrorists would actually seek to attack the PFSF, would create the distorted impression that such an attack, with its attendant consequences, would occur.[20] Such a misleading approach is not helpful to environmental decisionmaking and is impermissible under NEPA. See Methow Valley, 490 U.S. at 356.

Similarly, if the nature of the attacks, i.e., the number of attackers, the weaponry used, and the circumstances under which the attacks occurred, were merely assumed without real basis in evidence or analysis, any conclusion regarding the potential effects of the attacks would also be speculative and likely misleading. For example, a postulated

[20] Indeed, the court in Glass Packaging Institute rejected as speculative the plaintiff's claim regarding potential harm to human health from criminal tampering of plastic bottles where the claim was supported only by analogy to the 1982 Tylenol poisonings which had occurred shortly before the claim was filed. See 737 F.2d at 1093-94; see also Metropolitan Edison, 460 U.S. at 779 (scope of NEPA should not be expanded "in the wake of" any kind of accident.).

attack by a single individual armed with only a firearm would likely have no effect on the PFSF or the surrounding area, while a postulated attack by a large force armed with powerful military weapons or even weapons of mass destruction could have severe consequences wholly independent of the design of the facility or the security measures employed there. Choosing an attack or attacks somewhere on the spectrum between those two examples, without supporting evidence or analysis, as the basis for an environmental impact assessment would be speculative and misleading. Thus, the conclusion of the assessment would not be meaningful and useful to environmental decisionmakers and it could impermissibly distort the decisionmaking process. Therefore, the Commission should reject any suggestion that the effects of terrorism should be analyzed in the PFSF EIS by simply assuming away all of the prohibitive difficulties the Commission has recognized that an accurate assessment of the risks of hostile attacks would encounter.

3. Conclusion Regarding NEPA Requirements

In the end, the Commission has held that we look to the nation's defense and internal security establishments to protect us from the threat of hostile attacks. The Commission and the courts have recognized that evaluating the effectiveness of our national defense and security, or assessing the likelihood that an outside attacker could penetrate our defenses and the consequences of its doing so, is not a nuclear safety or environmental policy function, it is a national security function. Thus, an EIS prepared under NEPA and litigated before an NRC licensing board is not the proper place to conduct such an evaluation. Furthermore, the courts have clearly held that NEPA does not require agencies to consider highly speculative events or perform speculative analyses in EISs. This makes the assessment of the consequences of terrorism in an EIS problematic in two respects. First, as the Commission and the courts have recognized, predicting hostile attacks is an inherently speculative endeavor. Second, because the assessment that would be required to accurately determine the likelihood of a successful attack and its conse-

quences, given an attempt in the first place, would be so sensitive, difficult, and complex (and alien to the NRC), any analysis conducted within the framework of an EIS and its subsequent litigation would most likely yield a speculative conclusion that would either be of little use to environmental decisionmakers or would potentially distort the environmental decisionmaking process. Therefore, for the foregoing reasons, the Shoreham Appeal Board holding that hostile attacks need not be analyzed under NEPA and the PFS Licensing Board's holding following that decision are correct and should be upheld.

C. Challenges to the NRC Staff's Safety Evaluation of the PFS Application Are Not Permissible

In addition to challenging PFS's license application, the State also impermissibly challenged the Staff's evaluation of it, asserting deficiencies in the Staff's SER for failure to evaluate "suicide mission terrorism and sabotage." State Req. at 3; see also id. at 8-10 (challenging level of protection provided by NRC safeguards systems). "[C]ontentions must challenge the adequacy of the application, not the adequacy of the Staff's review." CLI-01-12, 53 NRC at 472. "[T]he [applicant] rather than the Staff bears the burden of proof in this proceeding. Consequently, the adequacy of the Staff's safety review is, in the final analysis, not determinative of whether the application should be approved." Id. at 473 (quoting Curators of the University of Missouri, CLI-95-1, 41 NRC 71, 121 (1995)); see also Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), CLI-83-19, 17 NRC 1041, 1048-49 (1983) (SAR, not SER, is "central document" for formulation of safety contentions). Thus, the State's challenges of the Staff's safety review formed no basis for the admission of Contention RR.

D. Transportation Issues Are Outside the Scope of This Proceeding

In addition to raising the issue of terrorist attacks against the PFSF itself, the State impermissibly sought to raise the issue of terrorist attacks against spent fuel transportation to and from the PFSF and against the PFS intermodal transfer point. State Req. at 3-

4; see id. at 11-15. As the Board recognized, the safety of spent fuel transportation, including the safety of intermodal transfer operations, is outside the scope of this proceeding. LBP-99-34, 50 NRC at 176-77. Therefore, these issues were rightly excluded from this litigation.

E. Contention Utah RR Lacked the Requisite Factual Basis

In addition to impermissibly challenging the NRC's regulations and seeking to litigate issues outside the scope of this proceeding, the State made claims in Contention RR that lacked factual basis necessary for the admission of a contention. 10 C.F.R. § 2.714(b)(2)(ii). First, the State claimed that a suicide aircraft crash into a nuclear facility is now "a reasonably foreseeable event." State Req. at 3; see Resnikoff Dec. ¶ 7. Nevertheless, the attacks on September 11 did not take place at nuclear facilities and the State provided no reason to believe that it is any more likely that the PFSF would be attacked than any other facility, nuclear or non-nuclear. Furthermore, the State failed to consider the effect of the nearby presence of Hill Air Force Base and its F-16s on the likelihood that an attack with a hijacked airliner could be made against the PFSF.

Second, the State claimed that the PFSF would present an "opportune terrorist target." State Req. at 9-11. But the State failed to consider the implication of the fact, which it concedes, that the PFSF is located in Skull Valley, "45 miles from a large metropolitan area." Id. at 10 (emphasis added).

Third, the State claimed that the engines of a crashing jetliner would penetrate the storage casks and the transportation casks to be used at the PFSF. State Req. at 11-13; Resnikoff Dec. ¶¶ 9-13. The State's calculations, however, assumed without basis that the crashing airliner would impact the 19-foot high casks precisely perpendicular to the side of the cask. See Resknikoff Dec. ¶ 10, Exh. C (assuming horizontal impact). An aircraft impacting at an angle would have a lower velocity perpendicular to the cask and

thus, according to the equation used by the State, it would not penetrate as far into concrete or steel. See id. Since even by the State's calculation assuming a perpendicular impact the airliner would have to be traveling very fast to penetrate the cask, an impact at a significant angle would result in no penetration at all. Dr. Resnikoff also alleged with no supporting calculation at all that a crashing airliner would penetrate a spent fuel transportation cask. See Resnikoff Dec. ¶ 26.

Fourth, the State claimed that the casks used at the PFSF would not withstand a jet fuel fire that could result from a crash. State Req. at 12-13; Resnikoff Dec. ¶¶ 14-20. The State, however, bases its assertion on the erroneous claim that the HI-STORM 100 storage cask can only withstand a severe fire for 15 minutes. Resnikoff Dec. ¶ 15. In fact, while PFS only analyzed the effects of a 15 minute fire in the SAR, the cask can withstand a hot fire for much longer—for many hours. See Holtec HI-STORM 100 FSAR at 11.2-12 to 13 (fire duration of 12.8 hours would have almost no effect on contents of fuel canister).

Fifth, the State claimed that an impact of a jet airliner at the PFSF would cause a significant release of radioactive material based on an assumption that the effects the aircraft impact would be the same as the impact into a storage cask of an inert 2,000 lb. bomb. State Req. at 13; Resnikoff Dec. ¶¶ 21-23. Dr. Resnikoff's declaration, on which the State relies, is wholly unsupported by analysis and ignores the significant facts that 1) the 2,000 lb. bomb has a much smaller cross-section than the airliner's engine, compare Resnikoff Dec. Exh. C with Exh. H, and 2) the airliner's engine is deformable on impact while the bomb is a solid object.[21]

[21] The fact that the bomb is a solid object with a narrow cross section would increase its ability to penetrate concrete or steel vis-a-vis a jet engine which is a deformable object with a wider cross section. See U.S. Department of Energy, Accident Analysis for Aircraft Crash into Hazardous Facilities, DOE STD-3014-96 at 67-69 (Oct. 1996).

Finally, as the Licensing Board noted, LBP-01-37, slip op. at 15 n.3, the State also claimed—with absolutely no factual support—that "truck bombs, present day weapons (e.g., tow anti-tank and armor piercing weapons), [and] multi-member, inter-coordinated attacks" are also reasonably foreseeable events at the PFSF. State Req. at 14. Thus, this claim provided no basis for admitting the contention. Therefore, in addition to being legally barred, Contention RR lacked adequate factual basis and was correctly dismissed below.

F. Contentions May Not Seek to Litigate Matters that May Be the Subject of a General Rulemaking

In addition to the foregoing reasons, Contention RR was rightly dismissed because it seeks to litigate a matter that is now the subject of a comprehensive regulatory review by the NRC. Oconee, CLI-99-11, 49 NRC at 345. "It has long been agency policy that Licensing Boards 'should not accept in individual license proceedings contentions which are (or are about to become) the subject of general rulemaking by the Commission.'" Id. (quoting Potomac Electric Power Co. (Douglas Point Nuclear Generating Station, Units 1 and 2), ALAB-218, 8 AEC 79, 85 (1974)); see Union of Concerned Scientists v. AEC, 499 F.2d 1069, 1081-82 (D.C. Cir. 1974).

The Commission has clearly stated that in the aftermath of September 11, it is reassessing its facility security requirements:

> In the aftermath of the terrorist attacks and the continuing uncertainty about future terrorist intentions, the agency is conducting a comprehensive review of its safeguards and physical security program at the direction of Chairman Richard A. Meserve, with the support of the Commission.

NRC News Release No. 01-124, October 18, 2001. Indeed, the NRC has just issued orders implementing new security requirements for U.S. nuclear facilities, some of which are the product of its ongoing review. NRC News Release No. 02-025, February 26, 2002. Moreover, the potential terrorist threat and any new NRC responses to it are rele-

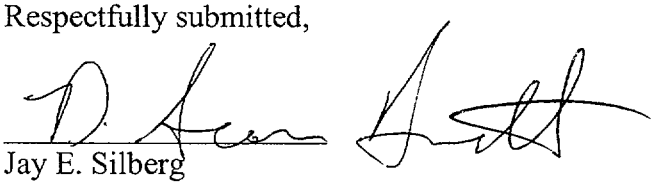
vant to all NRC-licensed facilities nationwide, not just ISFSIs or the PFSF. Therefore, this is a generic issue that is currently being addressed by the NRC and thus, in addition to the reasons it stated, the Board was correct not to have admitted it for litigation that would be, at best, a duplication of effort. See Douglas Point, ALAB-218, 8 AEC at 85.

The fact that the State has filed a contention on this issue does not prevent the Commission from addressing it through rulemaking. It is well established, under both judicial and NRC precedent, that the Commission may lawfully choose to resolve such generic issues either through rulemaking or adjudication. The Commission's discretion is not affected by an intervenor's attempt to raise those issues in an on-going licensing hearing. See, e.g., Baltimore Gas & Electric Co. v. Natural Resources Def. Council, 462 U.S. 87, 100-01 (1983); Union of Concerned Scientists, 499 F.2d at 1080-82.

III. CONCLUSION

For the foregoing reasons, the Applicant requests that the Commission affirm the Board's decision denying Utah's request to admit Contention Utah RR.

Respectfully submitted,



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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before The Commission

In the Matter of	)	
	)	
PRIVATE FUEL STORAGE L.L.C.	)	Docket No. 72-22
	)	
(Private Fuel Storage Facility)	)	ASLBP No. 97-732-02-ISFSI

CERTIFICATE OF SERVICE

I hereby certify that copies of the Applicant's Brief on the Admissibility of the threat of Terrorism as a Contention in the Licensing Proceeding for the Private Fuel Storage Facility 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 27th day of February, 2002.

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