UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

RAS 4221

DOCKETED 04/03/02

COMMISSIONERS

SERVED 04/03/02

Richard A. Meserve, Chairman
Greta Joy Dicus
Nils J. Diaz
Edward McGaffigan, Jr.
Jeffrey S. Merrifield

In the Matter of	)	
PRIVATE FUEL STORAGE L.L.C.	)	Docket No. 72-22-ISFSI
(Independent Spent Fuel Storage Installation)	)	

CLI-02-11

MEMORANDUM AND ORDER

This order concerns two documents filed by the State of Utah on February 11, 2002, relating to the pending license application submitted by Private Fuel Storage, L.L.C. (PFS). Utah's "Suggestion of Lack of Jurisdiction" argues that the Nuclear Waste Policy Act of 1982, as amended (NWPA),[1] deprives the Commission of "jurisdiction" over PFS's application for a license to construct and operate an independent spent fuel storage installation (ISFSI) on the reservation of the Skull Valley Band of Goshute Indians. In its "Petition to Institute Rulemaking and to Stay Licensing Proceeding," Utah asks the Commission to amend its regulations in accordance with this theory, and to suspend related proceedings while the rulemaking is pending.

For the reasons set forth below, we deny the request for stay, set a schedule for interested parties to submit briefs on the substantive issue whether the NRC has authority under

[1] 42 U.S.C. §10101 *et. seq*.

federal law to issue a license for the proposed privately-owned, away-from-reactor spent fuel storage facility, and defer a decision on the rulemaking petition until we have had the opportunity to decide this threshold legal question.

I. BACKGROUND

In 1980, the NRC promulgated its regulations allowing for licensing of ISFSIs, 10 C.F.R. Part 72, under its general authority under the Atomic Energy Act (AEA) to regulate the use and possession of special nuclear material.[2] This was two years before Congress enacted the NWPA.

In both its Petition for Rulemaking and "Suggestion of Lack of Jurisdiction," Utah argues that the NWPA contemplates a comprehensive and exclusive solution to the problem of spent nuclear fuel and does not authorize private, away-from-reactor storage facilities such as the proposed PFS facility. Utah rests its argument on the following provision:

> Notwithstanding any other provision of law, nothing in this act shall be construed to encourage, authorize, or require the private or Federal use, purchase, lease, or other acquisition of any storage facility located away from the site of any civilian nuclear power reactor and not owned by the Federal Government on the date of the enactment of this Act.[3]

Thus, says Utah, the NWPA cannot be said to "authorize" a private, away-from-reactor ISFSI like the proposed the PFS facility. Utah claims that because the NWPA established a comprehensive system for dealing with spent nuclear fuel, it is the only possible source for NRC's jurisdiction over spent fuel storage and overrides the Commission's general authority under the AEA to regulate the handling of spent fuel.

PFS opposes Utah's petitions, and argues that nothing in the NWPA expressly repeals the NRC's general, AEA-based licensing authority over spent fuel. PFS emphasizes that the

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[2] *See* 45 Fed. Reg. 74,693 (Nov. 12, 1980).

[3] NWPA § 135(h).

NWPA provision on which Utah relies does not explicitly prohibit a private, away-from-reactor facility. The NRC Staff opposes Utah's petitions on procedural grounds.

II. Discussion

A. Request for Stay of Proceedings Pending Review

We find that Utah's request does not meet the four-part test for a stay of Board proceedings. In determining whether to grant a stay of a licensing proceeding, the Commission looks at four factors: 1) whether the petitioner has made a strong showing that it is likely to prevail upon the merits; 2) whether the petitioner faces irreparable injury if a stay is not granted; 3) whether the issuance of a stay would harm other interested parties; and 4) where the public interest lies.[4] The proponent of the stay has the burden of demonstrating that these factors are met.[5]

First, Utah does not make a strong showing of probable success on the merits. The NWPA on its face does not prohibit private, away-from-reactor spent fuel storage. The NWPA section on which Utah relies, if intended to prohibit such storage, certainly does not do so directly. It says only that "*nothing in this act* ... encourage[s], authorize[s], or require[s]" the use of such facilities. It does not, in terms, prohibit storage of spent nuclear fuel at any privately-owned, away-from-reactor facility–which is Utah's position. We are willing to consider Utah's complex legislative history and statutory structure arguments, but we are not prepared to say that Utah's arguments are likely to prevail.

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[4] *See Sequoyah Fuels Corp.,* (Gore, Oklahoma Site), CLI-94-9, 40 NRC 1, 6 (1994); *Allied-General Nuclear Services* (Barnwell Nuclear Fuel Plant Separations Facility), ALAB-296, 2 NRC 671, 677-78 (1975); *Cf. Private Fuel Storage, L.L.C,* (Independent Spent Fuel Storage Installation), CLI-02-08, 55 NRC __, slip op. at 3 n. 7 (2002). This is the same test set forth in our regulations for determining whether to grant a stay of the effectiveness of a presiding officer's decision. 10 C.F.R. § 2.788(e).

[5] *See Hydro Resources Inc.,* CLI-98-08, 47 NRC 314, 323 (1998); *Alabama Power Co.* (Joseph M. Farley Nuclear Power Plant, Units 1 and 2), CLI-81-27, 14 NRC 795, 797 (1981).

Second, we find no evidence that Utah faces "irreparable injury" if an immediate stay is not granted. Utah claims that it will suffer a loss of "costs, expenses, and attorneys' fees" resulting from its participation in the PFS licensing proceeding.[6] It is well-established in Commission case law, however, that we do not consider the incurrence of litigation expenses to constitute irreparable injury in the context of a stay decision.[7] Therefore, the State has failed to demonstrate that it would be irreparably harmed if a stay is not granted.

We also find that the third and fourth factors of the stay test are not met. Utah argues that PFS is not harmed, and will in fact benefit by saving litigation costs, if the Commission stays proceedings that will ultimately prove futile once we determine that we have no authority to issue this license. Although this reasoning is imaginative, PFS does not agree and opposes the stay. The proceedings, which have gone on for over four years, are at last nearing completion and further hearings are imminent. If the other parties are forced to reschedule expert and attorney time for some future date, it will cause them great inconvenience. The imminence of the hearings is also a factor in our determination that the public interest will be served if the parties are allowed to wrap up the matters they have been litigating for so long.

For the foregoing reasons, we deny Utah's request for a stay of these proceedings.

B. Commission Consideration of NWPA Issue on the Merits

Both the NRC staff and PFS argue that the Commission should not consider the NWPA issue at this time because the Suggestion of Lack of Jurisdiction is untimely. They maintain that

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[6]Rulemaking Petition at 37-38.

[7]*See Sequoyah Fuels Corporation and General Atomics*, CLI-94-9, 40 NRC at 6. *See also Metropolitan Edison Co.* (Three Mile Island Nuclear Station, Unit 1), CLI-84-17, 20 NRC 801, 804 (1984).

the "suggestion" constitutes an untimely interlocutory appeal of a 1998 Atomic Safety and Licensing Board decision ruling on Contention Utah A.[8]

Utah first made its NWPA argument in 1997 in its Contention Utah A in the proceedings before the Licensing Board.[9] On April 22, 1998, the Board rejected the contention as an impermissible challenge to the Commission's regulations.[10] Utah's newly-filed "suggestion" could be viewed as merely a misnamed interlocutory appeal of the 1998 Board ruling, particularly because NRC's rules of practice have no provision for a pleading or motion called a "Suggestion of Lack of Jurisdiction." A petition for interlocutory Commission review, if desired, should have come 15 days after the Board entered the ruling.[11] Otherwise, interlocutory rulings must wait for resolution until a final decision is entered.

Despite the reasonableness of the staff and applicant's timeliness argument, we find countervailing concerns that make immediate merits consideration appropriate. The issue presented here raises a fundamental issue going to the very heart of this proceeding. If in fact NRC has no authority to issue PFS a license, completion of the licensing process would be a waste of resources for all parties as well as the Commission. In addition, Utah has filed a petition for rulemaking, arguing that NRC's regulations must be amended in accordance with the

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[8] *See* "NRC Staff's Response to the State of Utah's (1) Request to Stay Proceeding, and (2) Suggestion of Lack of Jurisdiction," (Feb. 26, 2002), at 7-8; "Applicant's Response to Utah's Suggestion of Lack of Jurisdiction" (Feb. 21, 2002), at 4-7.

[9] *See* "State of Utah's Contentions on the Construction and Operating License Application by Private Fuel Storage L.L.C. for an Independent Spent Fuel Storage Facility," (Nov. 23, 1997). ("Congress has not authorized the NRC to issue a license to a private entity for a 4,000 cask, away-from-reactor, centralized, spent nuclear fuel storage facility.")

[10] *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-98-7, 47 NRC 142, 183 (1998).

[11] *See* 10 C.F.R. §2.786(b).

state's legal theory. The underlying legal question, whether the law requires a rule change, must be resolved before NRC can accept or deny that petition.

We have decided that the legal issue is better resolved in an adjudicatory format–*i.e.,* through legal briefs--than in a rulemaking format. We therefore take review in the exercise of our inherent supervisory authority over adjudications and rulemakings.[12]

The parties to this adjudication are intimately concerned and eminently well-informed about the legal question raised in Utah's petition. These litigation parties, as opposed to the general public, are likely to be the source of the most pertinent arguments and information. Public comment is likely to be less useful here, in a situation calling for pure legal analysis, than in the usual situation where the rulemaking proceeding raises scientific, policy or safety issues. We do consider, however, that persons outside this litigation should have an opportunity to weigh in on the NWPA issue and therefore invite any interested persons to submit *amicus curiae* briefs.

We conclude that the rulemaking process should be put on hold until the Commission rules on the threshold issue of whether the NWPA deprives it of authority to license a private, away-from-reactor spent fuel storage facility. If the legal issue is ultimately resolved in Utah's favor, then a formal revision clarifying Part 72 could be issued at that time.

III. Briefs

We already have before us extensive arguments by Utah (in its Suggestion and Rulemaking Petition) and PFS (in its Response to Utah's Suggestion of Lack of Jurisdiction and attachments). We will consider the legal arguments set forth in those documents.

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[12]*See, e.g.*, *North Atlantic Energy Service Corporation* (Seabrook Station, Unit 1), CLI - 98-18, 48 NRC 129 (1998); *Baltimore Gas & Electric Co.* (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), CLI-98-15, 48 NRC 45, 52-53 (1998); *Cf. Kansas Gas and Elec. Co.*, (Wolf Creek Generating Station, Unit 1), CLI-99-05, 49 NRC 199 (1999).

If these parties wish to supplement the arguments made therein, they may submit further briefs to the Commission by May 15. In addition, interested persons are invited to submit *amicus curiae* briefs by May 15. Briefs should be no longer than 30 pages and should be submitted electronically (or by other means to ensure that receipt by the Secretary of Commission by the due date), with paper copies to follow. Briefs in excess of 10 pages must contain a table of contents, with page references, and a table of cases (alphabetically arranged), statutes, regulations, and other authorities cited, with references to the pages of the brief where they are cited. Page limitations are exclusive of pages containing a table of contents, table of cases, and any addendum containing statutes, rules, regulations, and like material.

IV. Conclusion

For the foregoing reasons, the request for a stay of proceedings is denied, the petition for rulemaking is deferred, Commission review of the NWPA issue is granted, and the adjudicatory parties and any interested amicus curiae are authorized to file briefs as set out above.

IT IS SO ORDERED.

For the Commission[13]

/RA/

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ANNETTE VIETTI-COOK
Secretary of the Commission

Dated at Rockville, MD
This 3rd day of April, 2002

[13] Commissioner Diaz was not present for the affirmation of this Order. If he had been present, he would have approved it.

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing COMMISSION MEMORANDUM AND ORDER (CLI-02-11) have been served upon the following persons by deposit in the U.S. mail, first class, or through NRC internal distribution with copies by electronic mail or facsimile as indicated.

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Docket No. 72-22-ISFSI
COMMISSION MEMORANDUM
AND ORDER (CLI-02-11)

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COMMISSION MEMORANDUM
AND ORDER (CLI-02-11)

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[Original signed by Adria T. Byrdsong]

Office of the Secretary of the Commission

Dated at Rockville, Maryland,
this 3rd day of April 2002