RAS 4490

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSIONERS

In the Matter of:	)	Docket No. 72-22-ISFSI
PRIVATE FUEL STORAGE, LLC (Independent Spent Fuel Storage Installation)	)	ASLBP No. 97-732-02-ISFSI
	)	15 May 2002

UTAH'S SUPPLEMENTAL BRIEF REGARDING UTAH'S SUGGESTION OF LACK OF JURISDICTION

With this its Supplemental Brief, Utah addresses three important points not addressed in its filings initiating the Commission's consideration of the issue now before it. That issue, of course, is a pure question of law, indeed, a pure question of Congressional intent: Did Congress intend to authorize or prohibit a privately owned, away-from-reactor, spent nuclear fuel storage facility? (Our shorthand name for that issue will be the "Congressional intent issue.") The three points are:

1. Talk of "repeal by implication" is bogus. Congress's limitation of privately owned SNF storage facilities to reactor sites is no more a repeal of this Commission's licensing authority than is Congress's various limitations on a federally owned, away-from-reactor storage facility, limitations such as number, location, capacity, and timing.

2. NRC rejection of Congress's prohibition on privately owned, away-from-reactor storage facilities will create anomalies in and do violence to the NRC's own regulations.

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3. Creation of a privately owned, away-from-reactor storage facility to take the Nation's entire present inventory of commercially generated SNF should be the result of, and only of, a conscious, deliberate, affirmative Congressional decision and should **not** be – what Private Fuel Storage urges really happened – the result of passive inaction by a Congress supposedly not overtly conscious of the issue.

I.
Talk of "repeal by implication" is bogus. Congress's limitation of privately owned SNF storage facilities to reactor sites is no more a repeal of this Commission's licensing authority than is Congress's various limitations on a federally owned, away-from-reactor storage facility, limitations such as number, location, capacity, and timing.

The Applicant, Private Fuel Storage LLC ("PFS"), has raised the specter that Utah's position on the Congressional intent issue somehow "repeals by implication" the Commission's licensing authority. That specter is without substance.

It is clear what Congress has done with the Nuclear Waste Policy Act of 1982, as amended, 42 U.S.C. 10101, *et seq.* ("the NWPA"). Congress – in the messy, political, give-and-take of the democratic process – said here is what we will allow in the way of interim SNF storage and here is what we will not allow; and said further that an NRC license would be required for what was allowed (thereby reaffirming the NRC's licensing authority).

Yet from that plain picture, PFS tries to argue that Utah is really asserting – when noting the clear Congressional intent to prohibit privately owned, away-from-reactor storage facilities – that NRC licensing authority must be deemed "repealed by implication." Yet that PFS argument is exactly equal to arguing that Congress's many limitations on federally owned storage facilities constitutes a disfavored "repeal by implication" of NRC licensing authority.

PFS cannot escape that equation – and that fatal flaw – in its argument, for this simple reason. The basis of PFS's argument is that prior to passage of the NWPA in 1982, the NRC, by its Part 72 regulation, had provided for exercise of NRC authority to license privately owned storage facilities (including away-from-reactor); that Congress, knowing that "fact," did not expressly in the NWPA "repeal" that authority in connection with Congress's prohibition of privately owned, away-from-reactor storage facilities; and that a disfavored "repeal by implication" should not be allowed to diminish the scope of NRC's pre-existing licensing authority. Yet the NRC, by its pre-NWPA Part 72 regulation, had equally provided for exercise of NRC authority to license **federally** owned storage facilities (**without** regard to the many limitations on such facilities later specified by Congress in the NWPA[1]). Moreover, Congress, allegedly knowing of the "fact" of the Part 72 regulation relative to federally owned storage facilities, did not in the NWPA (where Congress placed many limitations on such federally owned facilities) expressly "repeal" that broad pre-existing NRC licensing authority. By the force and logic of PFS's argument, the NRC can now ignore those many Congressional limitations on federally owned facilities and can do so on the basis of the "repeals by implication are disfavored" doctrine.

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[1] In Subtitle B of the NWPA, those limitations include a capacity limit of 1,900 MTU in aggregate; restriction to already owned federal facilities; prior NRC determination of unavoidable crisis of at-reactor storage; total SNF removal within three years of an NWPA repository or MRS becoming operative; full respect for local government rights and involvement; and payment of impact assistance to local government. In Subtitle C, those limitations include detailed feasibility studies (first by the DOE and then by the MRS Review Commission); no more than one MRS; capacity limit of 10,000 MTU prior to repository opening and of 15,000 MTU thereafter; no construction before repository construction; full respect for local government rights and involvement; and payment of impact assistance to local government.

The point should be clear. This is not a "repeal by implication" case. This is not a case where the "repeals by implication are disfavored" doctrine has any place. This case is not some attack on the NRC's proper role in SNF storage. This is simply a case of deciding what Congress – the voice of We the People – intended it would allow and not allow in regards to interim SNF storage.

II.
NRC rejection of Congress's prohibition on privately owned, away-from-reactor storage facilities will create anomalies in and do violence to the NRC's own regulations.

In Utah's prior filings, we demonstrated how NRC rejection of Utah's position and NRC acceptance of PFS's position will do violence to Congress's comprehensive, integrated legislative scheme. That violence is the unavoidable consequence of the Big Anomaly. You will recall that the Big Anomaly resulting from the PFS position is the radically disparate Congressional treatment between a federally owned away-from-reactor facility and a privately owned away-from-reactor facility – with absolutely no reason for such radically disparate treatment, indeed, with every conceivable reason pointing to a reversal in the treatment of federal and private actors from what Congress supposedly chose.

It is becoming clear that NRC acceptance of PFS's position will also create anomalies in and do violence to the NRC's own regulations. This grim reality is demonstrated by analysis of Utah Contention SS, now before the Licensing Board but no doubt in due course to be before the Commission. NRC's regulation at 10 C.F.R. § 72.42 provides that an ISFSI license must not exceed twenty years but that an MRS may be licensed for forty years. That distinction makes sense given what Congress and the industry understood about ISFSIs and MRSs back in the 1980's. But that clear distinction became a major problem when PFS decided to do a private –

albeit outlaw – MRS, indeed, an MRS about three times larger than what Congress authorized the federal government to create. That distinction became a problem because PFS had to proceed under the ISFSI ruse and twenty years is an impossibly short time for a storage project of the magnitude contemplated for Skull Valley. Even the twenty years plus a reasonable "decommissioning" time of two to five years is an impossibly short time. This all became evident in the context of the NEPA mandated cost/benefit analysis of the Skull Valley proposal. PFS and Staff simply assumed a forty year period – even though the major federal action triggering the NEPA process is issuance of (ostensibly) a twenty-year license. In this fashion, PFS and Staff have done violence to the twenty year/forty year distinction so carefully stated in NRC's own regulation.

But the violence does not end there. The NRC's waste confidence regulation expressly provides that the Commission "will address environmental impacts of spent fuel storage only for the term of the license . . . applied for." 10 C.F.R. § 51.97(a). See also 10 C.F.R. §§ 51.23(b) and 51.61. That regulation makes sense for a genuine ISFSI and a genuine MRS, but there is simply no possible way for honest adherence to that regulation in connection with the PFS project – for the very reason suggested in the preceding paragraph. The NEPA cost/benefit analysis, when limited to a twenty-year period, kills the Skull Valley project; no unbiased, responsible federal decision maker would chose that project over the "no action alternative."

In sum, PFS's position will create anomalies in and do violence to the NRC's own regulations.

III.

Creation of a privately owned, away-from-reactor, storage facility to take the Nation's entire present inventory of commercially generated SNF should be the result of, and only of, a conscious, deliberate, affirmative Congressional decision and should not be – as Private Fuel Storage urges – the result of passive inaction by a Congress supposedly not overtly conscious of the issue.

A profound difference distinguishes Utah's position from PFS's position. The basis of Utah's position is that Congress – through conscious, deliberate, affirmative decision-making – resolved against privately owned, away-from-reactor storage facilities. By stark contrast, the basis of PFS's position – at the very best – is that PFS's scheme is licenseable because of passive, not-overtly-conscious, Congressional **inaction.** In other words, PFS is saying that PFS should be allowed to pursue its scheme exactly because Congress never consciously considered such a scheme – thereby leaving for full stretching and application the 1954 general grant of licensing authority (even though Congress did not even consider the storage problem in 1954 and did not grapple with that problem until 1982).[2]

This distinction between Utah's position and PFS's position is profound because it goes to the heart of our democratic system of government. Simply, but helpfully, stated: The people's elected representatives make the big decisions; agencies fill in the interstices, the remaining small gaps. Because Members of Congress are directly accountable to the people, only they have the legitimacy to make the big decisions. It cannot be disputed that a PFS-type project is a Big Decision. No proof is necessary beyond Congress's clear agonizing over a 2,800 MTU versus a 1,900 MTU aggregate limit under Subtitle B; or Congress's clear agonizing over a 10,000/15,000

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[2] Not one shred of evidence exists that Congress, with the NWPA in 1982 and subsequently, ever had on its radar screen the possibility of what PFS is now promoting. An assertion to the contrary, so as to intimate that Congress has given its blessing to PFS's scheme, will not pass the laugh-out-loud test. We do not understand PFS to be making such an assertion.

MTU limit under Subtitle C; or the fact that the proposed Skull Valley facility is more than half the size of the proposed Yucca Mountain project (40,000 MTU versus 77,000 MTU) and more than 60 times larger than any now-existing facility of the same type. Yet PFS is basing its entire position on the supposed "reality" that Congress never even took up the Big Decision of a PFS-type project.[3]

Fundamental notions of our democratic form of government sustain Utah's position and defeat PFS's position.[4]

Moreover, essential features of our democratic form of government give both guidance and caution to the Commission as it seeks to resolve the Congressional intent issue. One essential caution is this: The very kinds of issues that most or all of the Commissioners by training, experience, and temperament are most adept at and comfortable with resolving are exactly the kinds of issues that must **not** be considered in correctly resolving the Congressional intent issue. Those enticing but deceiving and misleading issues include: Does the rational management of the Nation's SNF point to creation of a large, centralized, interim storage facility – regardless of whether federally or privately owned? Would the industry be maximizing efficiencies with such a facility? To what conclusion does systems analysis, rigorously conducted, lead? In short, do I,

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[3] The actual reality, of course, is that a PFS-type project was Congress's worst nightmare, with Congress taking real steps to assure that nightmare would occur in no Member's district. We so demonstrated at pages 8 through 33 of Utah's Petition to Institute Rulemaking, which we incorporated by reference into Utah's Suggestion of Lack of Jurisdiction.

[4] PFS's position even gives rise to a serious and specific constitutional issue: excessive delegation. See *Industrial Union Dept., AFL-CIO v. American Petroleum Institute*, 448 U.S. 607 (1980).

the rational, highly trained technocrat, think it would be wise and best in an ultimate sense to have a PFS-type facility in existence and soon?

All those kinds of considerations are wrong in the context of the Congressional intent issue. They are wrong because there is only one legitimate question to answer in reaching a correct, morally defensible conclusion to the Congressional intent issue. The one legitimate question is: What did Congress intend, as revealed by the words and structure of its legislative handiwork and its own words regarding that handiwork and its purposes? And there is only one legitimate mind set in working through that question: The Members of Congress did not approach their work as rational, highly trained technocrats; rather, the Members approached their work as products of and key actors in the often messy, often inefficient political endeavor that we call the democratic process. "To engineers the democratic political process is emotional, irrational, and offers only superficial adherence to systems approaches. . . . The democratic political process is virtually the antithesis of the engineering process." James Glover and Mark Peterson, *Engaging Engineers in Science and Technology Policy Development,* Proceedings of the 1996 IEEE International Engineering Management Conference 175 (IEE 1996) (hereafter "Glover and Peterson').

A second caution emerging from our democratic traditions is this: It is difficult for an entity to be an impartial arbiter of its own power. That caution has particular meaning here because the Congressional intent issue is all about the scope of the NRC's power; indeed, the Congressional intent issue is all about the NRC's power to make a very Big Decision. To voice this caution is not to single out the NRC by an means or to suggest that the NRC is any different from any other agency. The suggestion is well known that "bureaucracies will seek to maximize

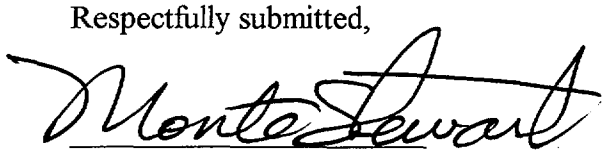
the number of allies they can claim among their constituents and elsewhere and . . . will attempt to increase their autonomy, authority, and control as much as possible." Douglas Yates, *Bureaucratic Democracy: The Search for Democracy and Efficiency in American Government* 102 (Harvard 1982). The firm view of the Framers, of course, was that human nature runs toward, not away from, more power.

These cautions suggest that, to increase its chances of correctly resolving the Congressional intent issue, the Commission should make a conscious effort to eschew improper considerations and focus only on the valid considerations. That means, for example, that the Commission must put aside any view that rational management of the SNF problem mandates a centralized, interim storage facility; that the Nation would have one by now, if only the politicians had some backbone; and that this PFS facility is our only hope to get any time soon such a needed facility. That means, as further example, that the Commission consciously must recognize that "[t]he democratic political process is virtually the antithesis of the engineering process," Glover and Peterson at p. 175, and then further recognize that correct resolution of the Congressional intent issue requires a mind set attuned to the democratic political process and steeled against the engineering process. That means, as further example, that the Commission consciously must chose to leave the Big Decision where it belongs – with the elected officials – and thereby resist the temptation to take more power to itself.

IV.
Conclusion

For the reasons explained above and in its earlier filings, Utah respectfully submits that the Commission lacks jurisdiction over PFS's application. The Commission should forthwith enter a decision so holding and, on that basis, dismiss this licensing proceeding.

Respectfully submitted,



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I hereby certify that a copy of UTAH'S SUPPLEMENTAL BRIEF REGARDING UTAH'S SUGGESTION OF LACK OF JURISDICTION was served on the persons listed below by electronic mail (unless otherwise noted) with conforming copies by United States mail first class, this 15th day of May, 2002:

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