RAS 4507

May 30, 2002

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED
USNRC

BEFORE THE COMMISSION

June 7, 2002 (12:30PM)

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

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 RESPONSE OPPOSING UTAH'S MOTION FOR REPLY BRIEFS AND/OR ORAL ARGUMENT REGARDING UTAH'S SUGGESTION OF LACK OF JURISDICTION

Applicant Private Fuel Storage, L.L.C. ("PFS") opposes the State of Utah's May 22, 2002 Motion for an Order Allowing Reply Briefs and/or Oral Argument Regarding Utah's Suggestion of Lack of Jurisdiction ("State's Motion") before the Commission regarding the Nuclear Regulatory Commission's ("Commission" or "NRC") authority to license PFS's proposed privately-owned, away-from-reactor spent fuel storage facility ("PFSF"). Utah's request is unjustified in light of the extensive briefing of this issue over the almost five years since Utah first raised this issue. In addition, Utah's request for oral argument should be denied as untimely.

I. BACKGROUND

As the Commission has recognized, Utah has already presented extensive arguments on the issue of NRC's jurisdiction to license the PFSF.[1] In fact, Utah has had seven opportunities to argue this issue to the NRC. Utah first raised this issue before the Atomic Safety and Licensing Board as its proposed Contention Utah A. State of Utah's Contentions on the Construction and Operating License Application by PFS for an ISFSI (Nov. 23, 1997) at 3-9. After PFS and

[1] Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-02-11, 67 Fed. Reg. 18,253, 18,254 (Apr. 15, 2002).

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the Staff responded that the NRC had authority under the Atomic Energy Act to license the PFSF, Utah's reply again argued NRC's lack of jurisdiction. State of Utah's Reply to the NRC Staff's and Applicant's Response to State of Utah's Contentions A through DD (Jan. 16, 1998) at 9-15. The Atomic Safety and Licensing Board then heard oral argument on Utah Contention A, including the NRC's jurisdiction to license the PFSF. Tr. at pp. 45-64 (Jan. 27, 1998). Utah argued NRC's lack of jurisdiction for a fourth time in response to another intervenor's petition for a waiver of the Commission's rules. State of Utah's Response to Castle Rock Land & Livestock, L.C., et al's Non-Application or Waiver of Commission Regulations, Rules and General Determinations (Feb.18, 1998) at 2-5. Before the Commission, Utah has now submitted three additional filings on the jurisdictional issue -- its Suggestion and Petition, both on February 11, 2002, and its Supplemental Brief on May 15, 2002.

There have also been extensive filings, including oral argument, on this issue in the pending Utah Federal District Court suit[2] in which PFS and the Skull Valley Band of Goshute Indians have challenged Utah's legislative scheme to block the PFSF.[3] In a recent filing in the Court Suit, Utah summarized its pleadings on the jurisdictional issue as follows:

> In this Court. (1) in Utah's 18 July 2001 Answer, with the denials of PFS's many allegations that the Skull Valley scheme is authorized by and/or consistent with governing federal law; (2) in Utah's Answer, with affirmative allegations that federal law prohibits the Skull Valley scheme; (3) in Utah's Answer, with the counterclaim seeking a declaration in Utah's favor on the "lawfulness" issue; (4) in Utah's 20 September 2001 Motion for Judgment on the Pleadings, with its request for a ruling on the "lawfulness" issue; (5) in Utah's 9 January 2002 Reply regarding that motion, with a renewal of that request; (6) in Utah's 14 January 2002 Suggestion of Lack of Jurisdiction, with its request for the same; and (7) in Utah's 4 March 2002 Reply re Utah's Suggestion of Lack of Jurisdiction, with its request for the same.

[2] Skull Valley Band of Goshute Indians v. Leavitt, Case No. 2:01CV00270 (D. Utah) ("Court Suit").

[3] See Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-02-07, 55 NRC 167 (2002) (Admitting Contention Security-J).

> Before the NRC. (1) in Utah's 23 November 1997 Contention A, with its contention that governing federal law prohibited the proposed Skull Valley facility; (2) in Utah's 11 February 2002 Suggestion of Lack of Jurisdiction, with its identical contention; and (3) in Utah's 11 February 2002 Petition for Rulemaking, with its request that the NRC amend its Part 72 ISFSI regulation to make clear that the regulation does not allow a privately owned, away-from-reactor, SNF storage facility.
>
> With the Administration. In Utah's numerous and repeated oral and written communications with the Department of Energy, the Department of Justice, the Department of Interior, and the White House, with the request that the "lawfulness" issue be sent to Justice's Office of Legal Counsel for an opinion.

Utah's Response to Plaintiff's Joint Motion for Summary Judgment (Mar. 7, 2002) at 11 n. 7.

II. ARGUMENT

Utah's request is unjustified in view of the extensive briefing of this issue over the almost five years since it was first raised. In addition, Utah's request for oral argument should be denied as untimely.

A. Utah Provides No Justification for Additional Briefing or Argument Beyond That Already Allowed by the Commission

In CLI-02-11, the Commission stated that it would rule on the jurisdictional issue raised by Utah in its Suggestion and Petition, and provided an opportunity for supplemental briefs on the issue by May 15, 2002. Utah, along with PFS, the NRC Staff, the Skull Valley Band of the Goshute Indians, and intervenor Ohngo Gaudadeh Devia, took advantage of this opportunity and filed simultaneous briefs on the issue on May 15, 2002. In its May 22, 2002 Motion, Utah asserts for the first time that such simultaneous filings are "unfair" to Utah. Consistent with the Commission rules of procedure, the briefing schedule established by CLI-02-11 was intended to encourage the parties to make their strongest arguments clearly and concisely.[4] Specifically, CLI-02-11 noted that Utah and PFS had already made extensive filings, but stated that "[i]f these

[4] See generally Hydro Resources, Inc., CLI-01-04, 53 NRC 31, 46 (2001); Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant), CLI-01-11, 53 NRC 370, 393 (2001).

parties wish to supplement the arguments made therein, they may submit further briefs." 67 Fed. Reg. at 18,255. Utah's protests to the contrary notwithstanding, it is unclear why Utah would be surprised that any supplemental brief filed in response to CLI-02-11 might contain new arguments. Nor does Utah suggest what additional arguments it might now wish to make.[5] Having failed to identify circumstances which warrant additional briefing after the date established in CLI-02-11,[6] Utah's request should be denied.

B. Utah's Request for Oral Argument is Late Without Justification

Utah's motion for oral argument should be denied as unjustifiably late. Utah's request was filed on May 22, 2002, subsequent to the May 15, 2002 deadline specified in CLI-02-11 for supplemental briefs. Utah should have requested oral argument either with its original (February 11, 2002) request for Commission action, or its supplemental brief of May 15, 2002. See 10 C.F.R. § 2.763; see also Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-92-12, 36 NRC 62, 69 n. 4. Utah provides no explanation as to why its request is late.

Granting oral argument before the Commission is discretionary. As such, "a party seeking oral argument must explain 'how [oral argument] would assist us in reaching a decision.'" CLI-92-12, 36 NRC at 68 (citation omitted); see also Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Unit 2), CLI-93-2, 37 NRC 55, 59 n. 4 (1993). Having failed to explain why the written record is inadequate for the Commission to use to base its decision, Utah's request should be denied.

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[5] Utah's sole justification for the need for additional briefs is its assertion "that a substantial number of the new arguments and materials advanced by PFS and Staff are misleading" without further explanation. State's Motion at 2. Such unsubstantiated allegations "without more" are not an appropriate basis for agency action. See CLI-92-12, 36 NRC at 68.

[6] Generally, unless additional briefing has been requested by the Commission, good reasons must be set forth to explain why the substance of the submission could not have been furnished in a more timely fashion. Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-115, 6 AEC 257 (1973).

III. CONCLUSION

For all the reasons discussed above, the Commission should deny Utah's motion for additional briefing and/or oral argument.

Respectfully submitted,

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Dated: May 30, 2002

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CERTIFICATE OF SERVICE

I hereby certify that copies of the Applicant's Response Opposing Utah's Motion for Reply Briefs and/or Oral Argument Regarding Utah's Suggestion of Lack of Jurisdiction was served on the persons listed below (unless otherwise noted) by e-mail with conforming copies by U.S. mail, first class, postage prepaid, this 30th day of May 2002.

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Document #: 1245255 v.2