RAS 4512

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of:	)	Docket No. 72-22-ISFSI
PRIVATE FUEL STORAGE, LLC (Independent Spent Fuel Storage Installation)	)	ASLBP No. 97-732-02-ISFSI
	)	May 31, 2002

UTAH'S OPPOSITION TO PFS'S MOTION FOR SUMMARY DISPOSITION OF UTAH CONTENTION SECURITY J – LAW ENFORCEMENT

I. INTRODUCTION

Utah opposes PFS's motion for summary disposition of Utah Contention Security J – Law Enforcement (30 April 2002). That motion is baseless, as a matter of law. First, because governing federal law prohibits rather than authorizes PFS's proposed Skull Valley facility, the challenged Utah statutes ("the municipal contract provisions") can in no way be deemed pre-empted by federal law or in conflict with Interstate Commerce Clause doctrine. This conclusion is so self-evident that, if this Board deems itself unauthorized to resolve this threshold issue of federal law prohibiting the facility ("the threshold issue"), this Board must deem itself unable to address and adjudicate PFS's motion's first basis – the supposed unconstitutionality of the municipal contract provisions.

Template = SECY-041

SECY-02

Second, even assuming that governing federal law does not preclude the proposed Skull Valley facility, the municipal contract provisions pass constitutional muster. The law is settled that a state "non-participation" decision relative to nuclear facility safety is not preempted by the Atomic Energy Act ("AEA"). (The "municipal contract provisions" in Utah's statutes, the provisions attacked by PFS in the context of Utah's Contention J, embody Utah's "non-participation" decision.) Moreover, the AEA does not pre-empt state control of law enforcement, a core state government function. Neither do the municipal contract provisions conflict with Interstate Commerce Clause doctrine, for the simple reasons, (i) that the municipal contract provisions do not discriminate between interstate and intrastate commerce, and (ii) that PFS has failed to show that those provisions impose any actual burden. The cases advanced by PFS's motion to sustain a contrary conclusion actually support Utah's position.

Third, the so-called "realism doctrine" has no applicability in this case. That doctrine was fabricated in the context of possible state agency action in *reaction* to a serious radiological hazard already occurring at a nuclear power plant. The key idea (hope) is that, faced with a serious radiological hazard and all that means for those people state and local agents are sworn to protect, those agents will respond with their best efforts – state and local laws to the contrary notwithstanding. In contrast, the primary objective of adequate security arrangements (whether provided by means of an arrangement with local law enforcement or with a privately constituted "designated response force") is *preventative*. The primary objective of adequate security arrangements is, in the first

place, to prevent an intrusion and, in the second place, to prevent an intrusion from escalating into a health hazard. (It is no triumph of security to capture the criminal terrorists *after* they have triggered the serious health hazard.) In the light of this understanding, it does not wash to say that local law enforcement, prohibited by state law from doing so, will respond to news of an intrusion – the intent and capacity for harm of which is most likely unknowable at the time of the news, with the intent possibly being as benign as a civil disobedience protest and the capacity for harm possibly being nothing more than what is inherent in a "No Nukes" placard. In other words, the "logic" of the "realism doctrine" does not apply in this case.

This last point leads to a consideration of how PFS's strategy is compromising security for the proposed Skull Valley facility. PFS has always had two options to provide adequate security: an agreement with local law enforcement[1] or a privately constituted "designated response force." The NRC Staff itself has pointed out the second alternative[2], but PFS says: "Although government licensees, such as the U.S. Dept. of Energy, may be able to designate alternative response forces with police powers, this option is not credible

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[1] As shown below, the municipal contract provisions do not flatly prohibit an agreement between PFS and local law enforcement but do require compliance with certain conditions before such an agreement can be valid.

[2] See LBP-01-20, 53 NRC at 571 n. 4; NRC Staff's Response to State of Utah's Request for Admission of Late-filed Contention Utah Security J, at 9-10 (27 April 2001).

for a private party like PFS."[3] Motion, at p. 13 n. 16. Read "not credible" as meaning "more cost and bother than we want to deal with." But now PFS has come up with an even less bothersome way to posture on "adequate security." Call it a "no-pay contract." By misapplying the "realism doctrine," PFS hopes to get the benefits (in the licensing context) of a contract with local law enforcement but one PFS does not have to pay for; PFS will get the Board and the Commission to say that local law enforcement will act (contrary to the dictates of state law) just as if there were a valid, honored contract in place. Such an approach does not make for good security.

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In later sections, we demonstrate in detail the baselessness of PFS's motion. But first we do what PFS's motion should have done but failed to do: make clear exactly what Utah statutory provisions it is asking this Board to declare unconstitutional and exactly what those provisions do and do not do. As to what those provisions do and do not do, PFS's motion says much that is at best confusing and at worst misleading.

II.
THE FEW UTAH STATUTORY PROVISIONS ACTUALLY SUBJECT TO PFS'S CONSTITUTIONAL ATTACK DO NOT DO WHAT PFS ASSERTS THOSE PROVISIONS DO.

PFS's motion meanders between a general attack on the entire Utah statutory scheme relative to high-level nuclear waste dumps, on one hand, and a more specific

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[3] Which is probably one reason among many why Congress provided that big, away-from-reactor, spent nuclear fuel ("SNF") storage facilities would be created and operated by, and only by, the U.S. Dept. of Energy ("DOE").

attack on four sections within that scheme lumped by PFS under the name "the municipal contract provisions." Those four provisions are codified as Utah Code § 17-27-102(2); § 17-34-1(3); § 19-3-301(6); and § 19-3-301(9). For ease of reference, we attach of copy of those sections as Appendix 1.

The general statutory scheme of which those provisions are a part is built on a logical progression – which must be understood for a correct understanding of the scope and operation of the municipal contract provisions. As a first step, the Utah Legislature took the well-founded position that federal law prohibits a privately owned, away-from-reactor, SNF storage facility, U.C.A. § 19-3-302 (2), and, on that basis, prohibited such a facility in Utah, U.C.A. § 19-3-301(1), and prohibited various activities designed to accomplish such an unlawful enterprise.

But the Legislature also recognized that the NRC's "authority . . . to grant a license [for a privately owned, away-from-reactor, SNF storage facility might be] upheld by a final judgment of a court of competent jurisdiction." U.C.A. § 19-3-301(2)(a)(ii). In that case, the rules of the game in Utah change; Utah does not prohibit such an SNF storage facility but rather exercises its authority to reasonably protect vital local economic, environmental, and land-use interests. The Legislature expressly noted its authority to so regulate. When Utah's Legislature adopted the general statutory scheme, it was aware that while only the federal government could regulate the "radiation hazards" associated with nuclear facilities, the states could address other concerns like economic and land-use issues. *Pacific Gas and Electric Company v. State Energy Resources Conservation &*

Development Comm'n, 461 U.S. 190, 211-212 (1983). This awareness is reflected in this statement of the legislative intent:

> (3) The state of Utah has environmental and economic interests which do not involve nuclear safety regulation, and which must be considered and complied with in siting a high-level nuclear waste or greater than class C radioactive waste transfer, storage, decay in storage, treatment, or disposal facility and in transporting these wastes in the state.
> (4) An additional primary purpose of this part is to ensure protection of the state from nonradiological hazards associated with any waste transportation, transfer, storage, decay in storage, treatment, or disposal.

U.C.A. § 19-3-302(3) and (4).

The resulting "fall-back" regulatory scheme[4] requires the promoter of a private nuclear waste dump, affected local government entities, and various state agencies to comply with certain requirements. For example, a county hosting such a nuclear facility has to first amend its general plan to "include specific provisions related to" such a facility, in conformity with various specific guidelines. U.C.A. § 17-27-301(3).

That background description brings us to the municipal contract provisions. As long as the NRC's licensing authority has not been "upheld by a final judgment of a court of competent jurisdiction," U.C.A. § 19-3-301(2)(a)(ii), and therefore the flat prohibition remains in effect, local government cannot contract to provide municipal services to the prohibited facility. But, in the event that flat prohibition and its basis go by the wayside through due process, then local government can contract to provide such services upon

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[4] That is, the scheme triggered by a final holding that Congress did not prohibit (or did not prohibit clearly enough) a PFS-type facility.

compliance with the fall-back regulatory scheme. E.g., U.C.A. § 17-27-102(2) (upon compliance "with the mandatory provisions of this part," a county's "agreement or contract to provide goods, services, or municipal-type services to any storage facility . . . may be executed [and] implemented.").

Moreover, the prohibition on municipal-type services is limited just to the "area under consideration for a storage facility." U.C.A. § 17-34-1(3). As is commonly known, and as the Legislature made clear during its deliberations on this provision, "area" means just that, the area devoted to the storage facility. In this case, that means the 820 acres devoted to the dump site and **does not mean** any other portion of the Skull Valley Band's reservation of some 18,000 acres. Thus, the Cooperative Law Enforcement Agreement ("CLEA") attached as Exhibit 1 to PFS's motion is in full force and effect for all but the 820 acres – where nobody lives. That has consistently been Utah's position, including in its Contention J.[5] We clarify this point because PFS's motion repeatedly suggests that the Utah statutes invalidate the whole CLEA.

All this leads to an important question, one much muddled by PFS's motion: What Utah statutes are really before this Board for a determination of constitutionality? The plain and simple answer is: The municipal contract provisions, those being the statutes that raise a question about PFS's ability to provide adequate security. Certainly PFS

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[5] "There can be no doubt that the CLEA is invalid **as it relates to the PFS facility**." State of Utah's Request for Admission of Late-Filed Contention Utah Security J (Law Enforcement), at 7 (13 April 2001) (emphasis added).

cannot be asking this Board, in the context of Contention J, to examine and pass "constitutional" judgment on the statute requiring an amendment to a county's general zoning plan or the statute requiring testing for drugs or alcohol or the statute providing for adjudication of water rights. Indeed, at times PFS's motion slips into clarity on this point and makes clear that PFS's attack is on, and only on, the municipal services provisions. In this Opposition, we will proceed on that basis.

III.
BECAUSE GOVERNING FEDERAL LAW PROHIBITS THE PROPOSED SKULL VALLEY FACILITY, PFS'S CONSTITUTIONAL CHALLENGES TO THE UTAH STATUTES COLLAPSE. INDEED, THOSE CHALLENGES CANNOT EVEN BE SENSIBLY CONSIDERED UNTIL THERE IS A FINAL, DEFINITIVE RESOLUTION OF THAT UNAVOIDABLE THRESHOLD ISSUE.

1. The AEA preemption argument's premise is that governing federal law authorizes the proposed Skull Valley facility; the entire argument must fail on a holding that governing federal law prohibits that facility.

The summary disposition motion's own cited cases demonstrate that the AEA preemption argument must fail on a holding that governing federal law prohibits the proposed Skull Valley facility. Thus, *California Coastal Commission v. Granite Rock Co.*, 480 U.S. 572, 581 (1987), holds that, in cases where "Congress has not entirely displaced state regulation over the matter in question," state law is preempted only "to the extent it actually conflicts with federal law, that is, when it is impossible to comply with both state and federal law, . . . or where the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress." To state the obvious, state law prohibiting or hindering a privately owned, away-from-reactor, SNF storage

facility does not actually conflict with – but rather is wonderfully consistent with – federal law doing the exact same thing. Likewise with federal law prohibiting such a facility, a state law doing the same cannot stand as an "obstacle to" but must be viewed rather as a facilitator of "the full purposes and objectives of Congress."

Nor does PFS's "field" preemption argument fare any better than its argument based on *California Coastal Commission v. Granite Rock.* For one thing, when Congress prohibits a facility, it thereby excludes that facility from the "field" subject to the comprehensive regulatory scheme. And certainly it is Congress that defines the scope of the "field" of its regulatory endeavor. For another thing, PFS has not and cannot present any case asserting the ludicrous – that "field" preemption operates to invalidate a state law prohibiting or hindering just what federal law prohibits. Finally, as the summary disposition motion should have in candor admitted, *Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Commission,* 461 U.S. 190 (1983), makes clear that "Congress has not entirely displaced state regulation over" the economic impacts of things nuclear, and the provision of law enforcement services is very much an issue of the allocation of economic resources. The motion's twists and turns to the contrary notwithstanding avail PFS nothing.

In short, a holding that Congress prohibited a PFS-type facility destroys the AEA preemption argument.

2. The Commerce Clause argument's premise is that governing federal law authorizes the proposed Skull Valley facility; the entire argument must fail on a holding that governing federal law prohibits that facility.

The summary disposition motion's own cited cases demonstrate that the Commerce Clause argument must fail on a holding that governing federal law prohibits the proposed Skull Valley facility. Those cited cases and the language of the Commerce Clause itself demonstrate that Congress has the power to regulate interstate commerce. That power includes the power to exclude from interstate commerce, indeed, to prohibit the existence of something that, but for the prohibition, would qualify as a component of interstate commerce. The cited cases further demonstrate that the challenged state statute, to be invalid, must interfere with interstate commerce. Now, to state the obvious: a state statute prohibiting or hindering a facility excluded by Congress from interstate commerce does not interfere with interstate commerce. PFS provides no cases refuting that obvious truth.

In short, a holding that Congress prohibited a PFS-type facility destroys the Commerce Clause argument.

3. The Contract Clause argument's premise is that governing federal law authorizes the proposed Skull Valley facility; the entire argument must fail on a holding that governing federal law prohibits that facility.

PFS buries its Contract Clause argument in a footnote, Motion at p. 11 n. 13. That effort to hide the argument does nothing to diminish its baselessness.

The Contract Clause provides that "no state shall . . . pass any . . . law impairing the obligation of contracts." Yet the courts have consistently held that this language does

not protect illegal or void contracts, including contracts contrary to public policy. *E.g., Zane v. Hamilton County,* 189 U.S. 370, 383 (1903); *People by Mosk v. Lynam*, 61 Cal. Rptr. 800, 806 (Cal. 1967) ("No contract contrary to public policy, however, is protected by that [the Contract] clause.")

Any PFS contract with local law enforcement will have this obvious purpose: bringing to pass the creation and operation of the proposed Skull Valley nuclear waste dump. Yet if Congress has prohibited such a facility, contracts designed to create such a facility in violation of Congressional intent are contrary to public policy and can certainly be made unenforceable, void, or otherwise unlawful by the State Legislature.

In short, a holding that Congress prohibited a PFS-type facility destroys the Contract Clause argument.[6]

4. Congress prohibited a PFS-type facility.

Utah incorporates by reference here its Petition to Institute Rulemaking and to Stay Licensing Proceeding filed with the Commission on 11 February 2002.

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[6] Analysis leads to the same conclusion when premised on *Energy Reserves Group, Inc. v. Kansas Power and Light Co.*, 459 U.S. 400 (1983), with its allowance of state legislation impairing contractual obligations where the State's legislation has an important protective function. First, the Court noted: "Although the language of the Contract Clause is facially absolute, its prohibition must be accommodated to the inherent police power of the State 'to safeguard the vital interests of its people.'" *Id.* at 410. Then the Court explained that a state regulation, although constituting a substantial impairment, does not impair the Contract Clause where the State has "a significant and legitimate public purpose behind the regulation, . . . such as the remedying of a broad and general social or economic problem." *Id.* at 411-12. A blitzkrieg to ramrod into this State a nuclear waste dump prohibited by Congress constitutes, we submit, a broad and general social and economic problem.

5. In light of the unavoidable requirement to adjudicate the threshold issue in order to adjudicate the first basis of the PFS motion, the timing of PFS's motion is all wrong where that threshold issue is pending already before the federal district court in Salt Lake City and before the Commission and where this Board has already said it is powerless to adjudicate that threshold issue.

PFS's motion asks this Board to declare state statutes unconstitutional. That is no light matter, even for an Article III court plainly empowered to wrestle with such issues. For one thing, state statutes are presumed to be constitutional. *E.g., Fitts v. Kolb,* 779 F. Supp. 1502, 1513 (D.S.C. 1991) ("State statutes are presumed to be constitutional. . . . This presumption of constitutionality will prevail unless there is a 'clear showing that [the statute] transgresses constitutional limitations.'") For another thing, the Board has already said that it cannot adjudicate the threshold issue[7] – which this Board must adjudicate and resolve in favor of PFS before this Board can make any declaration of unconstitutionality. For yet another thing, the threshold issue is now pending before the federal district court in Salt Lake City and before the Commission. That issue will get resolved, finally and definitively and soon enough, by a Court of Appeals.

Consequently, it is simply wrong headed for PFS to be pushing this Board at this time to adjudicate the constitutionality of the municipal contract provisions. PFS's effort puts this Board, unnecessarily, in an untenable position, either to construct a legal

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[7] Utah raised the threshold issue as its very first contention, Utah Contention A. The Board stated in its refusal to admit the contention that Contention A constituted an "impermissible challenge to the agency's existing regulatory provisions" and that inquiry into the issue raised by it (the threshold issue) was thus beyond the Board's authority. LBP-98-7, Docket No. 72-22-ISFSI.

conclusion without the necessary foundation (a pro-PFS adjudication of the threshold issue) or to build the foundation (that is, resolve the threshold issue) before the Commission and/or the district court (and, ultimately, the Court of Appeals) resolves the identical issue.

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In sum, PFS is presenting the first basis of its motion – the supposed unconstitutionality of the municipal contract provisions – in the wrong place at the wrong time. Moreover, that basis cannot survive the correct resolution of the unavoidable threshold issue, Congressional intent to prohibit a PFS-type facility.

IV.
EVEN ASSUMING A PRO-PFS RESOLUTION OF THE THRESHOLD ISSUE, THE MUNICIPAL CONTRACT PROVISIONS ARE CONSTITUTIONALLY VALID BECAUSE THOSE STATUTES ARE A LAWFUL EXERCISE OF UTAH'S LEGISLATIVE AUTHORITY OVER THE ALLOCATION OF LAW ENFORCEMENT RESOURCES.

1. The AEA does not pre-empt Utah's statutory provisions embodying the State's "non-participation" decision.

Settled law, both at the NRC and in the courts, holds that the AEA does **not** pre-empt a state's decision that state and local agencies will not participate in or cooperate with security arrangements for a nuclear facility. The Licensing Board's decision in *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 2), 21 NRC 644, 900-909 (1985) (Margulies, Kline, and Shon), examines in a thorough, scholarly fashion the very same pre-emption arguments PFS is raising here and rejects those preemption arguments

entirely. We will not repeat or even summarize that Board's analysis here, trusting that this Board is familiar with it, but simply incorporate that analysis by reference.

Moreover, that Board's thorough analysis is in accord with federal court decisions. In *Citizens for an Orderly Energy Policy, Inc. v. County of Suffolk*, 604 F.Supp. 1084, 1093-96 (E.D.N.Y. 1985), the court addressed the very same argument PFS advances here:

> Reduced to its simplest form, plaintiffs' theory runs as follows. The defendants' conduct regarding radiation emergency response planning amounts to local regulation of the health and safety aspects of nuclear power production. All local regulation of the health and safety aspects of nuclear power production is federally preempted. The defendants' conduct regarding radiation emergency response planning is, therefore, preempted. Accordingly, plaintiffs seek a judgment declaring the County's resolutions to be void and illegal.

Id. at 1093. Yet, as the court noted,

> The only act of defendants which may arguably be said to regulate nuclear safety is the passage of resolutions . . . effectively establish[ing] the County's policy to oppose nuclear power facilities within its borders and to refuse to cooperate in radiological emergency response planning. Plaintiffs' argument is somewhat unique in that the County's refusal to act in a given area is what is objected to as preempted. Although the passage of the resolutions may be said to be a positive act, in essence the resolutions merely manifest the County's intention not to engage in emergency planning.

Id. at 1094.

"In order to determine whether defendants' refusal to participate is in fact a preempted regulation of nuclear safety, the court looks to judicial precedent and the legislative history of the AEA for guidance." *Id.* That look (careful and detailed) led the court to hold: no pre-emption. *Id.* at 1096.

A traditional and core area of State authority is law enforcement, including the allocation of law enforcement resources. Because in Utah a county is a subdivision of the State, county law enforcement constitutes a component of the State's total law enforcement resources. With the municipal contract provisions, the State announced a decision regarding the allocation of its law enforcement resources; the State determined that its law enforcement resources would not be used in connection with a nuclear waste facility unless and until due process led to a holding that such a facility was lawful and, if such a holding materialized, that its law enforcement resources would then be used in connection with such a facility only upon that facility's compliance with various state regulatory requirements. Importantly, the municipal contract provisions do **not** in any way prohibit or hinder the promoter of such a facility from engaging private security forces.

In the clear light of these truths, PFS's AEA pre-emption argument founders. That argument founders because, as shown above, on-point and settled NRC and judicial precedent defeat the argument. PFS's argument also founders because it is nothing more nor less than an assertion that the AEA empowers PFS to force Utah to use its law enforcement resources where Utah does not want to use them. To state that assertion is to refute it. Whatever pre-emptive effect the AEA may have, the AEA certainly does not operate, under the guise of "pre-emption," to dictate how and when and where and on whose behalf the State will use its law enforcement resources. And, of course, PFS presents no authority suggesting otherwise.

2. The municipal contract provisions do not violate the Commerce Clause.

The Commerce Clause "limits the power of the States to discriminate against interstate commerce." *New Energy Co. of Indiana v. Limbach,* 486 U.S. 269, 273 (1988). For purposes of the Commerce Clause, discrimination is defined as "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Oregon State Waste Systems, Inc. v. Department of Envtl of State of Oregon,* 511 U.S. 93, 99 (1994). In other words, the Commerce Clause prohibits only those state "regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors." *New Energy Co. v. Limbach, supra,* at 273. As the Sixth Circuit summarized in a case previously relied on by PFS in the federal district court action:

> Thus, there are two complementary components to a claim that a statute [discriminates against] interstate commerce: the claimant must show both how local economic actors are favored by the legislation, and how out-of-state actors are burdened by the legislation.

Eastern Kentucky Resources v. The Fiscal Court of Magaffin County, Ky., 127 F.3d 532, 543 (6th Cir. 1997).

In its argument, PFS fails to show "how local economic actors are favored by the legislation." This is because the challenged statutes were not designed to "benefit in-state economic interests" at the expense of PFS and are therefore not discriminatory for purposes of the Commerce Clause. PFS has therefore failed to make even a prima facie case that the challenged statutes violate the Commerce Clause and its claim must be rejected.

PFS argues first that the municipal contract provisions are invalid because the purpose of those statutes is discriminatory. But PFS confuses hostility with discrimination and certainly with that particular discrimination required to sustain a Commerce Clause claim. As noted above, under Commerce Clause analysis, the purpose of a statute is not discriminatory unless it was "designed to benefit in-state economic interests by burdening out-of-state competitors." That is not the case here. There are no local competitors of PFS that will benefit from the provisions of the statutes. If there were such competitors, they would be subject to the very same provisions of the statutes as is PFS and in the very same way. The challenged statutes make no distinctions between in-state and out-of-state companies involved with nuclear waste. The requirement is that any person, whether in-state or out, who wishes to construct or operate a nuclear waste storage facility in Utah must first get a license. U.C.A. § 19-3-304.

PFS's other argument is that the municipal contract provisions violate the Commerce Clause because those statutes supposedly will have a severely discriminatory effect on interstate commerce. Again, PFS apparently misunderstands the test for Commerce Clause violations as enunciated by the Supreme Court. For discrimination to be prohibited by the Commerce Clause, it must be of a kind that benefits "local economic actors" and burdens "out-of-state actors." The municipal contract provisions do not do that, and they are therefore not in violation of the Commerce Clause.

An even more fundamental flaw in PFS's Commerce Clause argument is PFS's utter failure to show that the municipal contract provisions burden commerce (whether

interstate or otherwise). A fair look at the specifics of the statutes being challenged in the context of Utah's Contention J – the municipal contract provisions – reveals PFS's failure. The fact is that the municipal contract provisions regulate the allocation of State law enforcement resources, directing where they will not be used (at an in-state waste facility) and when (until that facility complies with the state regulatory scheme). The further fact is that PFS has available a course for satisfying NRC security regulations for the proposed facility, a course not involving local law enforcement resources. That course is the provision of a private "designated response force." And now the dispositive fact: PFS has utterly failed to bring forth any evidence that the private initiative will cost PFS more than will a contract with local law enforcement.[8] PFS has made no acceptable showing that, in meeting NRC security regulations, PFS's lack of access to local law enforcement will cost PFS one dime more than it would otherwise have to pay. In other words, PFS has failed to produce any evidence that the municipal contract provisions operate or will operate to impose any real burden on PFS's enterprise. And that failure to prove any actual burden, as all must agree, defeats PFS's Interstate Commerce Clause arguments; Commerce Clause doctrine – besides requiring the right kind of "discrimination" – definitely requires a burden on interstate commerce.

In its effort to evade these clear principles of Commerce Clause jurisprudence, PFS relies on cases that actually reinforce the principles sustaining Utah's position. Thus, PFS

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[8] As noted earlier, PFS has asserted that the private "designated response force" is not a "credible" alternative, but lawyer assertions are not evidence.

relies on Judge Posner's decision in *Illinois v. General Electric Co.*, 683 F.2d 206 (7th Cir. 1982), yet that very case acknowledges the continuing validity of the "discrimination" principle on which Utah relies. The principle is that "undiscriminating hostility is at least nondiscriminatory" and that hostility "to the thing itself, not to merely the interstate shipments of the thing" – that is, hostility to a "bads" – constitutes "undiscriminating hostility," 683 F.2d at 214, which is not unconstitutional exactly because it is "nondiscriminatory" under the governing Commerce Clause test: the challenged state action is impermissible only if "designed to benefit in-state economic interests by burdening out-of-state competitors," or, as Judge Posner put it, the challenged state action arises "out of affection for its [the state's] local" and competing interests. *Id.*

Likewise, PFS's reliance on *Hunt v. Washington State Apple Advertising Comm'n,* 432 U.S. 333 (1977), fails. There the challenged North Carolina action – prohibiting the display of state grades on apple containers at the expense of Washington State apple growers – did arise "out of affection for its [North Carolina's] local" apple growers, 432 U.S. at 353, thus implicating the "discrimination" principle. And the challenged North Carolina action in fact imposed an actual, substantial, and proven financial burden on the Washington growers, 432 U.S. 347-48, thus implicating the "actual burden" principle. "As the District Court correctly found, the challenged statute has the practical effect of not only **burdening** interstate sales of Washington apples, but also **discriminating** against them."

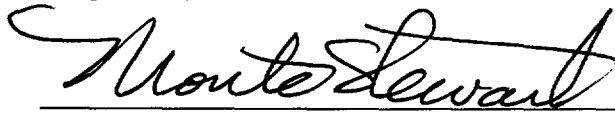
432 U.S. at 350 (emphasis added). In contrast, PFS continues to fails its burden of showing both the requisite improper discrimination and the requisite actual burden.[9]

IV.
THE "REALISM DOCTRINE" CANNOT SENSIBLY, LOGICALLY, OR SAFELY BE APPLIED TO THE ABSENCE OF A CONTRACT BETWEEN PFS AND LOCAL LAW ENFORCEMENT.

The Introduction section of this Opposition, Section I above, demonstrates the fatal flaws in PFS's effort to apply the "realism doctrine" – developed in the context of state agency reaction to an already occurring radiological hazard -- to the different circumstances of preventative law enforcement. We need not belabor that analysis here, other than to note that Appendix 2 contains a plausible dramatization of how, if the Board and the Commission buy into PFS's scheme, things might play out in a real life telephone call between the PFS facility and the Tooele County Sheriff's office.

DATED: 31 May 2002.

Respectfully submitted,



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[9] The lower court cases on which PFS relies likewise fail PFS's purposes. *SDDS, Inc. v. South Dakota*, 47 F.3d 263 (8th Cir. 1995), struck down a South Dakota initiative that imposed an extra burden on a dump primarily for out-of-state refuse while not imposing that burden and actual on dumps primarily for in-state refuse. To the extent *Chambers Med. Tech. v. Jarrett*, 841 F. Supp. 1402 (D.S.C. 1994), struck down, rather than upheld, South Carolina regulations, it did so because of improper discrimination between in-state and out-of-state interests that actually burdened the former.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of UTAH'S OPPOSITION TO PFS'S MOTION FOR SUMMARY DISPOSITION OF UTAH CONTENTION SECURITY J – LAW ENFORCEMENT was served on the persons listed below by electronic mail (unless otherwise noted) with conforming copies by United States mail first class, on 31 May 2002.

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of:	)	Docket No. 72-22-ISFSI
PRIVATE FUEL STORAGE, LLC (Independent Spent Fuel Storage Installation)	)	ASLBP No. 97-732-02-ISFSI
	)	May 31, 2002

STATE OF UTAH'S STATEMENT OF DISPUTED AND RELEVANT MATERIAL FACTS

In support of its Opposition to PFS's Motion for Summary Disposition of Utah Contention Security J - Law Enforcement, the State submits this Statement of Disputed and Relevant Material Facts.

1. The State disputes PFS Material Fact 2 to the extent that it obligates Tooele County to provide law enforcement protection to the Private Fuel Storage Site. See Appendix 3.

2. The State disputes PFS Material Fact 4. Senate Bill (S.B.) 81, "Provisions Relating to High-Level Nuclear Waste" does not, as PFS claims, void the CLEA in its entirety. The prohibition on municipal-type services in S.B. 81 is limited to the "area under consideration for a storage facility."

3. Utah Code Annotated (U.C.A.) §17-34-1(3) codifies S.B. 81, providing that "[a] county may not (a) provide, contract to provide, or agree in any manner to provide municipal-type services, as these services are defined in Section 19-3-303, to any area under consideration for a storage facility or transfer facility for the placement of high-level nuclear waste, or greater than class C radioactive waste." "Area" refers to the 820-acre area devoted to the proposed storage facility, not to any other portion of the Skull Valley Band's reservation of approximately 18,000 acres.

4. PFS has always had two options to provide adequate security, through a "documented liaison with a designated response force or local law enforcement agency (LLEA)." 10 C.F.R. §73.51(6).

5. The "municipal contract provisions" of the Utah Code provide as follows:

§17-27-102(2) requires that "[a] county shall comply with the mandatory provisions of this part before any agreement or contract to provide goods, services, or municipal-type services to any storage facility or transfer facility for high-level nuclear waste, or greater than class C radioactive waste, may be executed or implemented."

6. U.C.A. §17-34-1(3) provides that "[a] county may not: (a) provide, contract to provide, or agree in any manner to provide municipal-type services, as these services are defined in Section 19-3-303, to any area under consideration for a storage facility or transfer facility for the placement of high-level nuclear waste, or greater than class C radioactive waste; or (b) seek to fund services for these facilities by (i) levying a tax; or (ii) charging a service charge or fee to persons benefitting from the municipal-type services."

7. U.C.A. §19-3-301(6) states that "(a) State agencies may not, for the purpose of providing any goods, services, or municipal-type services to a storage facility or transfer facility, or to any organization engaged in the transportation of waste, enter into any other agreements prior to: (i) the satisfaction of the conditions in Subsection (4); and (ii) the executive director of the department having certified that the requirements of Sections 19-3-304 through 19-3-308 have been met for the purposes of a license application proceeding for a storage facility or transfer facility. (b) Political subdivisions of the state may not enter into any contracts or any other agreements for the purpose of providing any goods, services, or municipal-type services to a storage facility or transfer facility, or to any organization engaged in the transportation of waste. (c) this Subsection (6) does not prohibit a state agency from exercising the regulatory authority granted to it by law."

8. U.C.A. §19-3-301(9) states that "(a)(i) Any contract or agreement to provide any goods, services, or municipal-type services to any organization engaging in, or attempting to engage in the placement of high-level nuclear waste or greater than class C radioactive waste at a storage facility or transfer facility within the state are declared to be against the greater public interest, health, and welfare of the state, by promoting an activity which has the great potential to cause extreme public harm. (ii) These contracts or agreements under Subsection (9)(a)(i), whether formal or informal, are declared to be void from inception, agreement, or execution as against public policy. (b)(i) Any contract or other agreement to provide goods, services, or municipal-type services to storage or transfer facilities may not be executed within the state. (ii) Any contract or other agreement, existing or executed on or after March 15, 2001, is considered void from the time of agreement or execution."

9. Article XI, Section 1 of the Utah Constitution provides that "[t]he counties of the State of Utah are recognized as legal subdivisions of the state." Accordingly, county law enforcement constitutes a component of the state's total law enforcement resources.

APPENDIX 1

17-27-102 Purpose.

(2) A county shall comply with the mandatory provisions of this part before any agreement or contract to provide goods, services, or municipal-type services to any storage facility or transfer facility for high-level nuclear waste, or greater than class C radioactive waste, may be executed or implemented.

17-34-1 Counties may provide municipal services - Limitation - Provision of services in first class counties.

(3) A county may not:

(a) provide, contract to provide, or agree in any manner to provide municipal-type services, as these services are defined in Section 19-3-303 , to any area under consideration for a storage facility or transfer facility for the placement of high-level nuclear waste, or greater than class C radioactive waste; or

(b) seek to fund services for these facilities by:

(i) levying a tax; or

(ii) charging a service charge or fee to persons benefitting from the municipal-type services.

19-3-301 Restrictions on nuclear waste placement in state.

(6) (a) State agencies may not, for the purpose of providing any goods, services, or municipal-type services to a storage facility or transfer facility, or to any organization engaged in the transportation of waste, enter into any contracts or any other agreements prior to:

(i) the satisfaction of the conditions in Subsection (4); and

(ii) the executive director of the department having certified that the requirements of Sections 19-3-304 through 19-3-308 have been met for the purposes of a license application proceeding for a storage facility or transfer facility.

(b) Political subdivisions of the state may not enter into any contracts or any other agreements for the purpose of providing any goods, services, or municipal-type services to a storage facility or transfer facility, or to any organization engaged in the transportation of waste.

(c) This Subsection (6) does not prohibit a state agency from exercising the regulatory authority granted to it by law.

19-3-301 Restrictions on nuclear waste placement in state.

(9) (a) (i) Any contract or agreement to provide any goods, services, or municipal-type services to any organization engaging in, or attempting to engage in the placement of high-level nuclear waste or greater than class C radioactive waste at a storage facility or transfer facility within the state are declared to be against the greater public interest, health, and welfare of the state, by promoting an activity which has the great potential to cause extreme public harm.

(ii) These contracts or agreements under Subsection (9)(a)(i), whether formal or informal, are declared to be void from inception, agreement, or execution as against public policy.

(b) (i) Any contract or other agreement to provide goods, services, or municipal-type services to storage or transfer facilities may not be executed within the state.

(ii) Any contract or other agreement, existing or executed on or after March 15, 2001, is considered void from the time of agreement or execution.

APPENDIX 2

PFS employee: "Is that you, Mike?"
Deputy sheriff: "Yeah, Jake. How's life in Skull Valley?"
PE: "Hey, I've got an intrusion."
DS: "So, I can't help you. You know that. You'll have to take care of it. It's probably just an anti-nuke nut going to chain himself to the fence."
PE: "I don't know. The monitors show an intrusion and one of the guys caught a glimpse of him."
DS: "So you don't even know if he's packin' a pistol or a squirt gun."
PE: "This is Utah. He's probably at least packin' a pistol."
DS: "No stereotypes, bud. Some university presidents and church types around here don't pack any heat."
PE: "I need a response."
DS: "So respond. You have no indication this is serious. What if it's just a fraternity initiation? It's that time of year. Besides, you guys guaranteed that nothing can happen to those casks."
PE: "Nah, come on. Send somebody out."
DS: "Can't. Everybody's busy."
PE: "Don't give me that. There are only so many stools at the donut shop."
DS: "Funny, funny. Really, I don't have anybody available, especially for something as vague as you're talking about and with me up against the 'no-get-involved' policy. You being an import and not a local boy and all, you're forgetting the Big Game starts in two hours – Tooele High against Grantsville High. The whole county will be here, and every officer is assigned. So what do you say to that?"
PE: "Go, Beetdiggers?"
DS: "No, that's Jordan High. It's Buffaloes against the Cowboys. Any more news on the intrusion in the last two minutes?"
PE: "Nope. The guys are out looking."
DS: "Well, good luck."
PE: "Ciao."

Appendix 3

UTAH'S OPPOSITION TO PFS'S MOTION FOR SUMMARY DISPOSITION OF UTAH CONTENTION SECURITY J - LAW ENFORCEMENT

May 31, 2002

Office of
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December 2, 1998

Dianne R. Nielson
Executive Director
State Department of Environmental Health
168 North 1950 West
P.O. Box 144810
Salt Lake City, Utah 84114-4810

Dear Ms. Nielson:

Thank you for your letter dated October 14, 1998, regarding Tooele County's Cooperative Law Enforcement Agreement (CLEA) with the Bureau of Indian Affairs and the Skull Valley Band of Goshute Indians. Teryl Hunsaker, Commission Chair, referred it to me for response.

I do not believe Tooele County is obligated to provide law enforcement protection to Private Fuel Storage and their proposed storage site. Tooele County patrols areas as requested by Skull Valley Tribal government. If they desire to include the Private Fuel Storage site we will have to revisit the CLEA and negotiate to provide this service. At the time the CLEA was signed there was no discussion or contemplation that Private Fuel Storage would be part of the agreement. Moreover, the county has not yet entered into any agreement that has any bearing on locating the PFS storage facility on the reservation.

Sincerely,

Douglas J. Ahlstrom

DOUGLAS J. AHLSTROM
Tooele County Attorney

cc: Tooele County Sheriff