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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-ISFSI
	)	
(Independent Spent	)	
Fuel Storage Installation	)	

NRC STAFF'S REPLY BRIEF PURSUANT TO CLI-02-11 AND ORDER OF THE SECRETARY DATED JUNE 7, 2002

Jared K. Heck
Counsel for NRC Staff

June 17, 2002

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INTRODUCTION

On April 3, 2002, the Commission issued a Memorandum and Order permitting interested parties to submit briefs on the issue of whether the Commission has the authority under federal law to issue a license for a privately-owned, away-from-reactor spent fuel storage facility, in response to the "Suggestion of Lack of Jurisdiction" (Suggestion) filed by the State of Utah (State) on February 11, 2002.[1] The NRC Staff (Staff) filed its Brief in Response to CLI-02-11 on May 15, 2002, as did the State, Private Fuel Storage, L.L.C. (PFS or Applicant), the Skull Valley Band of Goshute Indians, and Ohngo Gaudadeh Devia (OGD).[2] The State subsequently filed a request that the parties be allowed to file reply briefs,[3] which the Secretary granted in an Order dated June 7,

[1] *See Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-02-11, 55 NRC 260, 261-62, 265 (2002).

[2] *See* (1) "NRC Staff's Brief in Response to CLI-02-11" (Staff Brief), (2) "Utah's Supplemental Brief Regarding Utah's Suggestion of Lack of Jurisdiction" (Utah Brief), (3) "Applicant's Brief in Opposition to Utah's Suggestion of Lack of Jurisdiction" (Applicant's Brief), (4) "Brief of the Skull Valley Band on NRC Jurisdiction (CLI-02-11)," and (5) "Ohngo Gaudadeh Devia ('OGD')'s Brief in Support of Utah's Suggestion of Lack of Jurisdiction" (OGD Brief), each dated May 15, 2002.

[3] *See* "Utah's Motion for an Order Allowing Reply Briefs and/or Oral Argument Regarding Utah's Suggestion of Lack of Jurisdiction" (May 22, 2002).

22002. Pursuant to that Order, the Staff hereby submits this reply to OGD's and Utah's Briefs of May 15, 2002.

DISCUSSION

Utah presents three arguments in its Brief, none of which present new issues beyond those already raised in Utah's Suggestion and Rulemaking Petition of February 11, 2002, and two of which are unresponsive to the central issue raised by CLI-02-11, namely, whether the Commission has the authority under federal law to license privately owned, away-from-reactor spent fuel storage. OGD presents only one independent argument in its brief, choosing to rely primarily on the arguments set forth in Utah's Suggestion and Rulemaking Petition. The Staff relies primarily on its May 15, 2002 Brief in Response to CLI-02-11 to reply to the arguments presented by Utah and OGD, as discussed below.

A. Reply to Utah's Brief

In its Brief, Utah begins by arguing that "[t]his is not a 'repeal by implication' case. . . 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 [spent nuclear fuel] storage."[4] Utah Brief at 4. In the Staff's view, Utah is asserting a position already set forth in its Suggestion and Rulemaking Petition, that Congress's intent in passing the Nuclear Waste Policy Act of 1982, as amended (NWPA), is clear on the statute's face and there is, therefore, no need to ask whether the NWPA implicitly repeals the Commission's licensing authority under the Atomic Energy Act of 1954, as amended (AEA). As the Staff argued in its Brief in Response to CLI-02-11, nothing in the text or legislative history of the NWPA reveals an intent on the part of Congress to explicitly or implicitly limit the Commission's authority under the AEA to license privately owned, away-from-reactor spent fuel

[4]To the extent Utah is arguing that the NWPA does not impliedly repeal any licensing authority of the Commission under the AEA, the Staff agrees with the state.

storage facilities. *See* Staff Brief at 3-16. The Staff's position is set forth fully in its Brief in Response to CLI-02-11, and no further reply to Utah's first argument is provided herein.

Utah next argues that licensing the Private Fuel Storage (PFS) facility "will create anomalies in and do violence to the NRC's own regulations." Utah Brief at 4. Specifically, Utah argues that the use of a 40-year period over which to measure the costs and benefits of the proposed PFS facility under the National Environmental Policy Act of 1969 (NEPA) is contrary, *inter alia*, to 10 C.F.R. §§ 51.97(a) and 72.42,[5] and that the NEPA cost/benefit analysis, when limited to a twenty-year period, undermines the Skull Valley project. Utah Brief at 4-5. This argument is wholly unresponsive to the question posed by CLI-02-11, and is more in the nature of a new contention regarding the appropriate environmental standards to be applied in the present licensing proceeding.[6] Because the argument is irrelevant to the central issue raised by CLI-02-11, no further reply to that argument is provided.

Finally, Utah advances numerous political and policy arguments against the creation of PFS's proposed privately owned, away-from-reactor spent fuel storage facility. Utah argues that such a facility should only be the result of a "conscious, deliberate, affirmative Congressional decision," and not "passive inaction by a Congress supposedly not overtly conscious of the issue." Utah Brief at 6. According to Utah, only members of Congress, as elected officials, have the legitimate authority to decide whether the proposed PFS facility should be allowed, and the Commission should, therefore, refuse to make a licensing decision in this proceeding. *Id* at 6, 9.

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[5] Section 72.42 ("Duration of license; renewal") provides, in pertinent part, that an ISFSI may be licensed for a period not to exceed 20 years. Section 51.97(a) provides that, unless the Commission determines otherwise, a final environmental impact statement for an ISFSI will consider the environmental impacts of spent fuel storage at the facility only for the term of the license or amendment applied for.

[6] In fact, the Staff notes that the environmental argument presented by the State relates to Contention Utah SS (*see* Utah Brief at 4) -- which the Licensing Board declined to admit in an oral ruling issued subsequent to the filing of the State's Reply. *See* Tr. 9210-17 (May 17, 2002).

As the Staff noted in its Brief in response to CLI-02-11, Congress deliberately gave the Commission the authority to regulate spent fuel disposal under the AEA, Congress was aware of this authority when it enacted the NWPA, and Congress did nothing in the NWPA to alter the Commission's authority with respect to privately owned, away-from-reactor spent fuel storage facilities. *See* Staff Brief at 3-6, 11-16. With respect to the remainder of Utah's final argument, the Staff submits that Utah goes beyond the scope of CLI-02-11 by raising political questions regarding the proper role of both Congress and the Commission in formulating a solution to the issue of spent fuel storage, without specifically addressing any portion of the existing federal statutory scheme from which the Commission derives its licensing authority. That argument is irrelevant to the central legal issue presented by CLI-02-11, and, in any event, fails to address the authority of the Commission to license an away-from-reactor ISFSI under existing federal law. Accordingly, no further response to that argument is required.

B. Reply to OGD's Brief

In its "Brief in Support of Utah's Suggestion of Lack of Jurisdiction," OGD adopts the position advanced by the State of Utah in support of the Suggestion and Petition. *See* OGD Brief at 1. OGD specifically articulates only one argument:

> In examining whether Congress intended to allow for the type of privately owned, away-from-reactor storage facility proposed by PFS, the Commission should reflect upon the relative enormity of the proposed facility and contemplate whether the inaction of Congress in expressly addressing the NRC's regulations allowing for licensing of ISFSI's when it passed the NWPA should be interpreted as affirmative approval of a scheme Congress never consciously considered.

Id. at 2-3; footnote omitted. As set forth more fully in the Staff's Brief in Response to CLI-02-11, the legislative history of the NWPA shows that Congress was aware of the Commission's regulations in 10 C.F.R. Part 72 and knew of the option for privately owned, away-from-reactor spent fuel storage under pre-NWPA law, yet chose not to address these matters in the statutory

text. *See* Staff Brief at 11-16. While this Congressional choice should not be read as an affirmative approval of the instant licensing proceeding, neither can it be read as an implicit limitation of the Commission's AEA authority to license the proposed PFS facility under 10 C.F.R. Part 72. *See id.* at 8-11. Because the Staff's Brief in Response to CLI-02-11 fully addresses OGD's argument, no further reply to that argument is provided herein.

CONCLUSION

The arguments advanced by the State of Utah and OGD regarding the Commission's authority under federal law to license privately owned, away-from-reactor spent fuel storage facilities have either been addressed in the Staff's Brief in Response to CLI-02-11, or are irrelevant. For the reasons set forth above and in the Staff's Brief in Response to CLI-02-11, the Staff submits that the Commission has the legal authority to license a privately owned, away-from-reactor spent fuel storage installation, and the State of Utah's Suggestion of Lack of Jurisdiction should be dismissed.

Respectfully submitted,

/RA/

Jared K. Heck
Counsel for NRC Staff

Dated at Rockville, Maryland
this 17th day of June 2002.

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S REPLY BRIEF PURSUANT TO CLI-02-11 AND ORDER OF THE SECRETARY DATED JUNE 7, 2002" in the above captioned proceeding have been served on the following through deposit in the NRC's internal mail system, with copies by electronic mail, as indicated by an asterisk, or by deposit in the U.S. Postal Service, as indicated by double asterisk, with copies by electronic mail this 17TH day of June, 2002:

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