RAS 4578

June 17, 2002

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION



**Before the Commission**

| | | |
|---|---|---|
| In the Matter of | ) | |
| | ) | |
| PRIVATE FUEL STORAGE, L.L.C. | ) | Docket No. 72-22 |
| | ) | ASLBP No. 97-732-02-ISFSI |
| (Private Fuel Storage Facility) | ) | |

**APPLICANT'S REPLY BRIEF REGARDING THE STATE OF UTAH'S SUGGESTION OF LACK OF JURISDICTION**

By Order dated June 7, 2002, the Secretary of the Nuclear Regulatory Commission ("NRC") authorized all parties to file reply briefs concerning the State of Utah's ("State's") Suggestion of Lack of Jurisdiction. Pursuant to that Order, Applicant Private Fuel Storage, L.L.C. ("PFS") hereby submits this reply to the State's "Supplemental Brief Regarding Utah's Suggestion of Lack of Jurisdiction," dated May 15, 2002 ("Supplemental Brief"). As set forth below, the Supplemental Brief adds nothing to the analysis of the NRC's jurisdiction to license privately-owned, away-from-reactor independent spent fuel storage installations ("ISFSIs") such as the proposed Private Fuel Storage Facility. Rather, the State seeks to confuse the issues with convoluted and unsupported arguments, cryptic allusions, and hyperbole. None of the Supplemental Brief's three arguments have merit.

## I. REPEAL BY IMPLICATION

The Supplemental Brief (at 2-4) criticizes as "bogus" the characterization of the State's position as calling for a repeal by implication of the NRC's Atomic Energy Act authority to license privately-owned, away-from-reactor ISFSIs. Although the State does not challenge the

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"cardinal rule...that repeals by implication are not favored," Morton v. Mancari, 417 U.S. 535, 549 (1974), the State claims – without analysis or citation – that "[t]his is not a 'repeal by implication' case." Supplemental Brief at 4.

The State never explains why this is not a repeal by implication case. The State cannot deny that the NRC, relying on its authority under the Atomic Energy Act, issued regulations prior to enactment of the Nuclear Waste Policy Act ("NWPA") that authorized the licensing of privately-owned, away-from-reactor ISFSIs. See, e.g. 45 Fed. Reg. 74,693 (1980). And while the State (Supplemental Brief at 3) is correct in stating that the pre-NWPA Part 72 applied to federal ISFSIs as well as private ones, see, e.g. 45 Fed. Reg. at 74,700 (§ 72.3(p) definition of "person"), it provides no explanation as to why the NWPA's silence on NRC's authority to license those facilities can somehow be transmogrified into an affirmative legislative statement on what "Congress...will not allow." Supplemental Brief at 2. While the State talks about "Congress's limitation of privately owned SNF storage facilities to reactor sites," id., and "Congress's prohibition of privately-owned away-from-reactor storage facilities," id. at 3, it never points to any NWPA provision that explicitly creates such a limitation. Therefore, if the State's underlying argument has any merit – which it does not – it can only be that the NWPA somehow repeals by implication the NRC's preexisting authority. As PFS' prior briefs have shown, that argument is baseless.

## II. ANOMALIES IN NRC REGULATIONS

The State's second argument (Supplemental Brief at 4-5) is that NRC's continued licensing of privately-owned, away-from-reactor ISFSIs does violence to NRC regulations, specifically the different license terms for a Monitored Retrievable Storage facility (40-year maximum) and any other ISFSI (20-year maximum). 10 CFR § 72.42(a). It is by no means

obvious why the license term for a Department of Energy facility tied to the operation of the DOE waste disposal system has any relationship to the license term of private or federal storage facilities independent of the DOE waste disposal system. In any case, in response to comments suggesting that all ISFSIs should have 40 year license terms, the NRC pointed out that "[t]he Commission has in place a license renewal process for ISFSI storage which provides an opportunity for extension of the 20-year license term." 53 Fed. Reg. 31,651, 31,657 (1988).

The State's reference to its late-filed contention Utah SS (Supplemental Brief at 4) is another red herring. The parties have extensively briefed[1] and orally argued[2] that issue and the Board has denied its admission.[3] Whether or not "twenty years is an impossibly short time for a storage project of the magnitude contemplated for Skull Valley," Supplement Brief at 5, or whether PFS and the NRC Staff "have done violence to the twenty year/forty year distribution so carefully stated in NRC's own regulation," id., is simply irrelevant to the jurisdictional issue.

Finally, the State's comment that there is "simply no possible way for honest adherence to [the NRC's waste confidence] regulation in connection with the PFS project," Supplement Brief at 5, indicates either a failure to read or a failure to understand that regulation. The waste confidence rule, 10 CFR § 51.23(a), is the Commission's generic determination that spent fuel can be stored safely and without significant environmental impacts for at least 30 years beyond the licensed life of operation—including renewal periods—at either at-reactor or away-from-reactor ISFSIs. It has nothing to do with the appropriateness of the twenty year initial license

[1] State of Utah's Request for Admission of Late-Filed Contention Utah SS (February 11, 2002); Applicant's Response to State of Utah's Request for Admission of Late-Filed Contention Utah SS—Revised Cost-Benefit Analysis (February 21, 2002); NRC Staff's Response to "State of Utah's Request for Admission of Late-Filed Contention Utah SS" (February 26, 2002).

[2] Transcript, pp. 1-124 (May 10, 2002)

term for a non-MRS ISFSI. Nor does the State coherently link this argument to its jurisdiction claims.

## III. NEED FOR A "CONSCIOUS DELIBERATE, AFFIRMATIVE CONGRESSIONAL DECISION"

The State's third argument (Supplemental Brief at 6-9) is the pseudo-syllogism that the PFS project is a "Big Decision" (whatever that means), that only Congress can make this Big Decision, that Congress "never even took up the Big Decision of a PFS-type project," id. at 7, and that therefore, the NRC has no jurisdiction to license the PFS project. Wholly apart from its circularity and its lack of any cited legal authority, the argument totally ignores the NRC's well-established scope of authority. In the D.C. Circuit's oft-cited holding, the Atomic Energy Act created "a regulatory scheme which is virtually unique in the degree to which broad responsibility is reposed in the administering agency, free of close prescription in its charter as to how it shall proceed in achieving the statutory objectives." Siegel v. AEC, 400 F.2d 778, 783 (D.C. Cir. 1968) (citations omitted). That responsibility clearly includes the authority to regulate spent fuel storage. Illinois v. General Elec. Co., 683 F.2d 206, 215 (7th Cir. 1982); Jersey Cent. Power & Light Co. v. Township of Lacey, 772 F.2d 1103, 1112 (3d Cir. 1985). Big Decision or not, the NRC has clear legal authority to license the PFS project without an further Congressional authorization or direction.

Notwithstanding the State's belief that the resolution of its jurisdictional argument requires "a mind [] set attuned to the democratic political process and steeled against the engineering process," Supplemental Brief at 9, the issue before the Commission is the language of the NWPA—which as PFS has demonstrated, did not repeal the NRC's previously-exercised

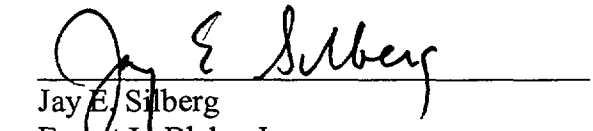
[3] Transcript, pp. 9210-9217 (May 17, 2002).

authority to license privately-owned, away-from-reactor ISFSIs[4]— and its accompanying legislation history which explicitly recognized the existence of just the sort of facilities that the State claims Congress prohibited.[5]

## IV. CONCLUSION

For the reasons set forth above and in PFS' prior pleadings, the Commission should reject the State's Suggestion of Lack of Jurisdiction and its related Rulemaking Petition.

Respectfully submitted,



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Dated: June 17, 2002

[4] See Applicant's Response to Utah's Suggestion of Lack of Jurisdiction (February 21, 2002), enclosure 1 at 23-32.

[5] See id. at 28-30; Applicant's Brief in Opposition to Utah's Suggestion of Lack of Jurisdiction (May 15, 2002) at 7-9.

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## CERTIFICATE OF SERVICE

I hereby certify that copies of the "Applicant's Reply Brief Regarding the State of Utah's Suggestion of Lack of Jurisdiction" were served on the persons listed below (unless otherwise noted) by e-mail with conforming copies by U.S. mail, first class, postage prepaid, this 17th day of June 2002.

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