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RULEMAKINGS AND
ADJUDICATIONS STAFF

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSIONERS

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| In the Matter of: | ) | Docket No. 72-22-ISFSI |
| PRIVATE FUEL STORAGE, LLC (Independent Spent Fuel Storage Installation) | ) | ASLBP No. 97-732-02-ISFSI |
| | ) | 2 October 2002 |

**UTAH'S MOTION TO ALLOW THREE-PAGE SUPPLEMENT ON THE MEANING OF 42 U.S.C. § 10155(h)**

Relative to Utah's pending Suggestion of Lack of Jurisdiction, Utah moves the Commission for an order allowing Utah to file a three-page supplement regarding the meaning of 42 U.S.C. § 10155(h), the subsection at the center of the Commission's current task relative to the Suggestion. A copy of that three-page supplement is attached.

Utah's lawyers recently refined and significantly advanced their understanding of the language of subsection (h), in a way we believe will be of substantial assistance to the Commission in determining Congress's intent in enacting that subsection.

Template = SECY-041

SECY-02

Regarding the timing of this motion, it comes within five days of when one of Utah's lawyers first had the flash leading to the attached document.

DATED this 2nd day of October 2002.

Respectfully submitted,

Monte N. Stewart
Special Assistant Attorney General
Helen A. Frohlich
Assistant Attorney General
5110 State Office Building
Salt Lake City, Utah 84114
Tel. 801/538-3276

Attorneys for the State of Utah

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# UTAH'S THREE-PAGE SUPPLEMENT ON THE MEANING OF 42 U.S.C. § 10155(h).

The original subsection (h) provides:

> Notwithstanding any other provision of law, nothing in this Act [now codified as "this chapter"] shall be construed to encourage, authorize, or require the private or Federal use, purchase, lease or other acquisition of any storage facility located away from the site of any civilian nuclear power reactor and not owned by the Federal Government on the date of the enactment of this Act [now codified as "on January 7, 1983"].

For the Commission's analysis, the key language is this: "Notwithstanding any other provision of law, nothing in this Act shall be construed to . . . authorize . . . the private . . . use . . . of any storage facility located away from the site of any civilian nuclear power reactor . . . ."

The only sensible reading of this language – the only reading that does not ignore language in subsection (h) – is that Congress excluded a PFS-type facility from the Nation's nuclear waste management system. First, "this Act" was, and was understood by the Congress that enacted it to be, not just Congress's first excursion into the management of high-level nuclear waste but a comprehensive treatment of that subject.[1] (When enacted in 1954, the AEA said nothing regarding nuclear waste management, and even now, nearly fifty years later, any references in the AEA to

[1] See pages 14-15 of Utah's 11 February 2002 Petition to Institute Rulemaking, adopted into Utah's Suggestion of Lack of Jurisdiction.

nuclear waste management are *de minimis* in number and substance.) Thus, in the field of the management of nuclear waste, particularly SNF from civilian nuclear power reactors, what "this Act" expressly does not "authorize" is not Congressionally authorized.

This conclusion is reinforced by the other key language: "Notwithstanding any other provision of law." That language has no meaning unless it means that no other previously enacted provision of law can counter the Congressional decision not to authorize a PFS-type facility. Indeed, this "notwithstanding" language is nonsensical if the only purpose of subsection (h) is to say that the NWPA itself does not authorize a PFS-type facility, with no intent to affect law outside the NWPA. The "notwithstanding" language's purpose must be to affect law outside the NWPA; that is what such clauses do. Or, stated slightly differently, the "notwithstanding" language is exactly contrary to an intent not to affect law outside the NWPA.

That realization – that the intent of the "notwithstanding" language must be to affect law outside the NWPA[2] – brings us back to this question: Affect how? The only plausible answer is, to prevent any previously enacted law from countering the Congressional decision not to authorize a facility not sanctioned by the NWPA. That must be the answer because withholding that Congressional authorization is the point of the language following the "notwithstanding" clause.

Here is another helpful way to understand the meaning and import of the "notwithstanding" clause: Assume for the moment that the clause is absent from subsection (h). In that case, one could plausibly argue either of two different interpretations of the subsection, the *action* interpretation and the *no-decision* interpretation. The *action* interpretation is that, because of Congress's view of the

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[2] In this context, it bears emphasis that the "notwithstanding" clause refers not to "any other provision of this Act" but to "any other provision of law." Congress certainly knew how to use the phrase "this Act" if that phrase suited its purposes; Congress used that phrase later in subsection (h) itself. But in the "notwithstanding" clause, Congress used not "this Act" but "law" generally, thereby evidencing the Congressional intent to affect law outside the NWPA.

comprehensive nature of the NWPA relative to away-from-reactor SNF, what Congress does not authorize in "this Act" is not Congressionally authorized, period. The *no-decision* interpretation is that Congress simply wanted to make clear that it was not deciding, in enacting the NWPA, whether federal law precluded "the private or Federal use" of away-from-reactor SNF facilities not expressly sanctioned in the NWPA.

But then, upon restoring the "notwithstanding" clause so subsection (h) reads like Congress wrote it, the *no-decision* interpretation ceases to be viable and the *action* interpretation emerges as clearly correct. That is because, if Congress simply wanted to make clear that it was not deciding the fate of away-from-reactor SNF facilities not expressly addressed in the NWPA, Congress would have no reason to begin by saying "notwithstanding any other provision of law." Indeed, the use of that phrase would be contrary to an intent to simply limit the scope and effect of the NWPA; in drafting the NWPA, one limits the scope and effect of that Act by what one says in the Act about the Act – not by limiting the scope and effect of some non-NWPA law. Yet the "notwithstanding" clause is wonderfully consistent with the *action* interpretation. That is because, if Congress wanted its express refusal to authorize non-NWPA sanctioned facilities to preclude such facilities across the board, the exactly logical words for Congress to use would be "notwithstanding any other provision of law."

Respectfully submitted,

Monte N. Stewart
Special Assistant Attorney General
Helen A. Frohlich
Assistant Attorney General
5110 State Office Building
Salt Lake City, Utah 84114
Tel. 801/538-3276

Attorneys for the State of Utah

CERTIFICATE OF SERVICE

I hereby certify that a copy of UTAH'S MOTION TO ALLOW THREE-PAGE SUPPLEMENT ON THE MEANING OF 42 U.S.C. § 10155(h) was served on the persons listed below by electronic mail (unless otherwise noted) with conforming copies by United States mail first class, this 2nd day of October, 2002:

Emile L. Julian, Assistant for
Rulemakings and Adjudications
Rulemaking & Adjudication Staff
Secretary of the Commission
U. S. Nuclear Regulatory Commission
Washington D.C. 20555
e-mail: hearingdocket@nrc.gov
(*original and two copies*)

Richard A. Meserve, Chairman
U.S. Nuclear Regulatory Commission
Mail Stop O-16 G15
One White Flint North
11555 Rockville Pike
Rockville, MD 20852-2738
e-mail: chairman@nrc.gov

Edward McGaffigan, Jr., Commissioner
U.S. Nuclear Regulatory Commission
Mail Stop O-16 G15
One White Flint North
11555 Rockville Pike
Rockville, MD 20852-2738
e-mail: cmrmcgaffigan@nrc.gov

Greta J. Dicus, Commissioner
U.S. Nuclear Regulatory Commission
Mail Stop O-16 G15
One White Flint North
11555 Rockville Pike
Rockville, MD 20852-2738
e-mail: cmrdicus@nrc.gov

Nils J. Diaz, Commissioner
U.S. Nuclear Regulatory Commission
Mail Stop O-16 G15
One White Flint North
11555 Rockville Pike
Rockville, MD 20852-2738
e-mail: cmrdiaz@nrc.gov

Jeffrey S. Merrifield, Commissioner
U.S. Nuclear Regulatory Commission
Mail Stop O-16 C1
One White Flint North
11555 Rockville Pike
Rockville, MD 20852-2738
e-mail: cmrmerrifield@nrc.gov

Michael C. Farrar, Chairman
Administrative Judge
Atomic Safety and Licensing Board
U. S. Nuclear Regulatory Commission
Washington, DC 20555-0001
E-Mail: mcf@nrc.gov

Dr. Jerry R. Kline
Administrative Judge
Atomic Safety and Licensing Board
U. S. Nuclear Regulatory Commission
Washington, DC 20555
E-Mail: jrk2@nrc.gov
E-Mail: kjerry@erols.com

Dr. Peter S. Lam
Administrative Judge
Atomic Safety and Licensing Board
U. S. Nuclear Regulatory Commission
Washington, DC 20555
E-Mail: psl@nrc.gov

Sherwin E. Turk, Esq.
Catherine L. Marco, Esq.
Office of the General Counsel
Mail Stop - 0-15 B18
U.S. Nuclear Regulatory Commission
Washington, DC 20555
E-Mail: set@nrc.gov
E-Mail: clm@nrc.gov
E-Mail: pfscase@nrc.gov

Jay E. Silberg, Esq.
Ernest L. Blake, Jr., Esq.
Paul A. Gaukler, Esq.
Shaw Pittman
2300 N Street, N. W.
Washington, DC 20037-8007
E-Mail: Jay_Silberg@shawpittman.com
E-Mail: ernest_blake@shawpittman.com
E-Mail: paul_gaukler@shawpittman.com

John Paul Kennedy, Sr., Esq.
David W. Tufts
Durham Jones & Pinegar
111 East Broadway, Suite 900
Salt Lake City, Utah 84111
E-Mail: dtufts@djplaw.com

Joro Walker, Esq.
Land and Water Fund of the Rockies
1473 South 1100 East, Suite F
Salt Lake City, Utah 84105
E-Mail: utah@lawfund.org
(*electronic copy only*)

Larry EchoHawk
Paul C. EchoHawk
Mark A. EchoHawk
EchoHawk Law Offices
151 North 4th Avenue, Suite A
P.O. Box 6119
Pocatello, Idaho 83205-6119
E-mail: paul@echohawk.com

Tim Vollmann
3301-R Coors Road N.W. # 302
Albuquerque, NM 87120
E-mail: tvollmann@hotmail.com

James M. Cutchin
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
E-Mail: jmc3@nrc.gov
(*electronic copy only*)

Office of the Commission Appellate
Adjudication
Mail Stop: 16-G-15 OWFN
U. S. Nuclear Regulatory Commission
Washington, DC 20555
(*United States mail only*)

Helen A. Frohlich
Assistant Attorney General
State of Utah