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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

November 22, 2002 (11:27AM)

Before the Atomic Safety and Licensing Board

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

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 ANSWER OPPOSING
STATE OF UTAH'S MOTION FOR PRODUCTION OF COMMISSION ORDER
RELATING TO SAFEGUARDS UNDER A PROTECTIVE ORDER
AND FOR OPPORTUNITY TO FILE CONTENTIONS**

On November 7, 2002, the State of Utah filed a "Motion for Production of Order Relating to Safeguards Under a Protective Order and for Opportunity to File Contentions" ("State Motion"). In it, the State invokes the provisions of 10 C.F.R. §§ 2.744(a) and (e) to request that the Board¹ order the Executive Director of Operations ("EDO") to provide the State with a copy of Attachment 2 to the Order issued on October 23, 2002 by the Deputy Director, Office of Nuclear Materials Safety and Safeguards ("Order")² to "all 10 CFR Part 72 licensees who currently store or have near term plans to store spent fuel in an ISFSI under the specific license provisions of 10 CFR Part 72." See 67 Fed. Reg. 65152-54 (2002)." State Motion at 1. In addition, the State is seeking leave to file additional contentions "within 45 days from actual receipt of Attachment 2." Id. at 2. The State Motion should be denied.

¹ The State Motion was filed with the Licensing Board chaired by Judge Farrar. However, the contention it references – proposed Contention Utah RR – was filed with (and rejected by) the Board headed by Judge Bollwerk and is currently under review by the Commission. See Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Facility), CLI-02-03, 55 NRC 155, 156 (2002). As a result, the Commission – rather than the Board – now has jurisdiction over proposed Contention Utah RR. Should proposed Contention RR be remanded to the Board, it would presumably return to Judge Bollwerk's Board. This Answer is being filed with both Boards.

² A copy of the Order is enclosed as Attachment A hereto. An identical order was also issued to the holders of general licenses to store spent fuel at ISFSIs. See 67 Fed. Reg. 65,150 (2002).

As an initial matter, the State Motion does not indicate that the State has made a request to the EDO pursuant to 10 C.F.R. §2.744(a) for the document it seeks, or that the EDO has declined in accordance to 10 C.F.R. § 2.744(b) to provide the document.³ In the absence of such a request and denial thereof, it would be inappropriate for the Board to entertain the State's request, which (if the request for production is denied by the EDO) must take the form of a motion to the Board under 10 C.F.R. § 2.744(c) to compel production of the requested document.⁴

In addition to failing to comply with the procedures specified in 10 C.F.R. § 2.744, the State Motion is at best premature, since the document the State seeks could not possibly be the basis for any new contentions in this proceeding.⁵ The Order, by its own terms, does not apply to PFS. As the Order states, its new requirements are imposed as modifications of "all specific licenses identified in Attachment 1 to this Order." 67 Fed. Reg. at 65,153. PFS is neither the holder of a specific license nor identified in Attachment 1 of the Order. Therefore, the Order is not applicable to PFS.

³ 10 C.F.R. § 2.744(a) provides: "A request for the production of an NRC record or document not available pursuant to Sec. 2.790 by a party to an initial licensing proceeding may be served on the Executive Director for Operations, without leave of the Commission or the presiding officer. The request shall set forth the records or documents requested, either by individual item or by category, and shall describe each item or category with reasonable particularity and shall state why that record or document is relevant to the proceeding." 10 C.F.R. § 2.744(b) states: "If the Executive Director for Operations objects to producing a requested record or document on the ground that (1) it is not relevant or (2) it is exempted from disclosure under Sec. 2.790 and the disclosure is not necessary to a proper decision in the proceeding or the document or the information therein is reasonably obtainable from another source, he shall so advise the requesting party."

⁴ 10 C.F.R. § 2.744(c) states in relevant part: "If the Executive Director for Operations objects to producing a record or document, the requesting party may apply to the presiding officer, in writing, to compel production of that record or document." At that point, the application will be handled as a motion under 10 C.F.R. § 2.730 and the requesting party, the Staff and the applicant may submit their positions to the Board as to whether the document should be produced. *Id.* If the Board determines that the requested document should be produced, the procedures outlined in 10 C.F.R. §§ 2.744(d) and (e) will be followed to protect the confidentiality of safeguards information.

⁵ In any case, it is well established that discovery is not available to frame a new contention. *See, e.g., Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 & 2), ALAB-107, 6 AEC 188, 192, recon. denied, ALAB-110, 6 AEC 247, aff'd, CLI-73-12, 6 AEC 241 (1973).*

Indeed, the Order may never apply to PFS. The Commission advises that the measures identified in Attachment 2 to the Order are “interim requirements” that are subject to modification if there is “a significant change in the threat environment” or if “the Commission determines that other changes are needed.” 67 Fed. Reg. at 65,153 (emphasis added). The State has provided no basis for assuming that these “interim requirements” will be applied to PFS when PFS becomes licensed and storage of spent fuel at the Private Fuel Storage Facility (“PFSF”) becomes a “near term” event. Therefore, asserting contentions on “whether PFS could comply with the requirements in Attachment 2” as the State wishes to do (State Motion at 2), even putting aside the fact that Attachment 2 does not set forth any “requirements” for PFS, would be a futile exercise that would not lead to admissible contentions. For, as this Board and the Commission have recognized, contentions based on speculation are inadmissible for lack of an adequate basis. Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Facility), LBP-98-7, 47 NRC 142, 180 (1998); Yankee Atomic Electric Co. (Yankee Nuclear Power Station), CLI-96-7, 43 NRC 235, 274 (1986) (contention alleging lack of consideration of potential drop of spent fuel cask into spent fuel pit not admissible because applicant had not yet sought a license amendment to be allowed to remove fuel from spent fuel pit); Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), LBP-90-6, 31 NRC 85, 100 (1990) (contention challenging allocation of land resources to disposal of radioactive waste not admissible since the Environmental Assessment evaluating such potential impacts had yet to be produced); Yankee Atomic Electric Co. (Yankee Nuclear Power Station), LBP-99-14, 49 NRC 238, 243 (1999) (contention challenging implementation of license termination plan not admissible since plan was yet to be implemented). See generally, Duke Energy Corp. (Oconee Nuclear Station, Units 1, 2 and 3), CLI-99-11, 49 NRC 328, 334 (1999).⁶

⁶ If and when an order modifying the security requirements applicable to the PFSF is issued, the order may then afford the State a mechanism for requesting a hearing or otherwise challenging PFS’s compliance with such an order. See 67 Fed. Reg. at 65,153.

Moreover, the Order expressly notes that the interim requirements set forth in Attachment 2 “supplement existing regulatory requirements,” 67 Fed. Reg. at 65,153 (emphasis added), *i.e.*, go beyond the existing requirements of the regulations. Therefore, any contention based on the interim requirements of the Order would be subject to dismissal on the same grounds as Utah Contention RR, which was rejected by the Board because it “constitute[d] an impermissible challenge to existing agency regulatory requirements.” Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Facility), LBP-01-37, 54 NRC 476, 484 (2001).⁷ Since the Order does not apply to PFS, any allegation that PFS failed to meet the interim requirements of the Order would similarly constitute an impermissible challenge to the regulatory requirements to which the PFSF facility is subject.⁸

The State also asserts that it “would like the opportunity to review Attachment 2 to determine whether it needs to take action on Contention RR.” State Motion at 2. However, proposed Contention Utah RR was rejected by the Board because it “constitutes an impermissible challenge to existing agency regulatory requirements” that bar the consideration of the terrorism claims asserted by the State. LBP-01-37, 54 NRC at 484. Moreover, the Board referred its ruling to the Commission, 54 NRC at 487, and the Commission accepted the referral. Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Facility), CLI-02-03, 55 NRC 155 (2002). The State has no right “to take action” with respect to this rejected contention before the Board, which has no jurisdiction over that contention while the Commission review is pending.⁹

⁷ The Board recognized that the “existing agency regulations [had been] adopted prior to September 11” and that the Commission was considering “whether and to what degree the agency’s regulatory regime . . . should be changed to reflect what transpired on that fateful day,” and for that reason referred its ruling to the Commission. LBP-01-37, 54 NRC at 487.

⁸ While the Commission is evaluating whether and to what degree its regulatory regime for plant security should be changed in light of September 11, it has not done so to date. Thus, the licensing requirements for the PFSF in the area of plant security remain unchanged.

⁹ As noted by the Board in LBP-01-37, Contention Utah RR is but the latest in a series of attempts by the State and other intervenors to have a contention relating to terrorism or sabotage admitted into this proceeding. LBP-01-37, 54 NRC at 479.

Moreover, given the basis for the Board's rejection of the proposed contention, there is no action that the State can take that would render Contention Utah RR litigable.

In reality, the State Motion is still another attempt to revive Utah Contentions RR and Security-J, even though the first one of these was rejected outright by the Board and the second one was dismissed via summary disposition only a few weeks ago. LBP-01-37, *supra*; LBP-02-20, 55 NRC ___, slip op. (October 15, 2002). In this instance, not only is the State seeking a second bite at the apple, but it is seeking to take a bite of an apple that is not now, and may never be, ripe.

For the foregoing reasons, the State's motion should be denied.

Respectfully submitted,



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Dated. November 15, 2002

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NUCLEAR REGULATORY COMMISSION

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CERTIFICATE OF SERVICE

I hereby certify that copies of the Applicant's Answer Opposing State of Utah's Motion for Production of Order Relating to Safeguards Under a Protective Order and for Opportunity to File Contentions" 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 15th day of November, 2002.

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