

UNITED STATES OF AMERICA
 NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)	
)	
PRIVATE FUEL STORAGE, L.L.C.)	Docket No. 72-22-ISFSI
)	
(Independent Spent)	
Fuel Storage Installation))	

NRC STAFF'S RESPONSE TO APPLICANT'S
 MOTION FOR RECONSIDERATION OF PARTIAL INITIAL
DECISION REGARDING CREDIBLE ACCIDENTS (LBP-03-04)

INTRODUCTION

Pursuant to 10 C.F.R. § 2.730(c), the NRC Staff ("Staff") hereby files its response to "Applicant's Motion for Reconsideration of Partial Initial Decision Regarding Credible Accidents" ("Motion"), filed by Private Fuel Storage, L.L.C. ("PFS" or "Applicant") on March 31, 2003, in which PFS sought reconsideration of the Atomic Safety and Licensing Board's decision on aircraft crash hazards.¹ For the reasons set forth herein, the Staff opposes the Applicant's Motion -- although the Staff agrees with certain statements contained therein, as discussed below. In addition, the Staff herein sets forth its response to the questions posed by the Licensing Board in its "Memorandum and Order (Reconsideration Motion)," issued on April 4, 2003 ("Order").

BACKGROUND

On March 10, 2003, the Licensing Board issued its Partial Initial Decision in LBP-03-04, in which it resolved the remaining portions of Utah Contention K/Confederated Tribes B ("Contention Utah K"). Therein, the Licensing Board found that the annual probability of an F-16 crash into the

¹ See *Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation)*, LBP-03-04, 57 NRC __ (March 10, 2003) ("Partial Initial Decision Regarding 'Credible Accidents'") (hereinafter referred to as "Partial Initial Decision" or "PID").

proposed PFS Facility is 4.29×10^{-6} , which it determined exceeds the Commission's threshold probability standard governing aircraft crash impacts at an ISFSI. See LBP-03-04, slip op. at 2.² On March 31, 2003, the Applicant and the Staff filed separate petitions seeking Commission review of the Licensing Board's decision, under 10 C.F.R. § 2.786.³ In addition, PFS simultaneously informed the Licensing Board that it wished to proceed with litigation on the consequences of an aircraft crash at the PFS Facility, to which the Staff and the State of Utah responded.⁴

Also on March 31, 2003, the Applicant filed the instant Motion before the Licensing Board, in which it requested reconsideration of certain aspects of the Board's PID. PFS stated as follows:

[B]ased on the record before the Board, the Board could and should have ruled that the facility be licensed subject to a condition that the size of the facility is limited such that the aircraft crash hazard would remain below the Commission's safety criterion.

Motion at 1. PFS further stated that if a license condition is adopted, limiting the PFS Facility to storage of 336 casks pending the conclusion of other aircraft crash litigation, "the effective area of the Facility would be reduced such that the cumulative aircraft crash and jettisoned ordnance impact probability and the cumulative probability for all impacts would remain below $1 \text{ E-}6$ per year."

Id. at 2.⁵ Accordingly, PFS urged the Board to rule that "the PFSF should be licensed subject to

² While the Licensing Board did not state a value for the cumulative aircraft crash hazard, the individual hazards enumerated in the PID and in a prior decision would result in a cumulative hazard of approximately 4.72×10^{-6} . See LBP-03-04, slip op. at 60, 64-65, 66, 67, 68, 73, 75; *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-01-19, 53 NRC 416, 449-52 (2001); see also, Motion at 5 (cumulative hazard of 4.714×10^{-6}).

³ See "Applicant's Petition for Review of LBP-03-04," dated March 31, 2003; and "NRC Staff's Petition For Commission Review of the Licensing Board's Partial Initial Decision in LBP-03-04 Concerning Credible Accidents," dated March 31, 2003.

⁴ See "Joint Report on 'Consequences' Proceedings," dated March 31, 2003, at 2.

⁵ The effective area of a facility is referred to as "A" in the NUREG-0800 formula used in calculating probability of an aircraft crash, where P (probability) = C (crash rate) x N (number of flights) x A (effective area of the facility) / w (width of airway). See LBP-03-04, slip op. at 15, 60, 115; NUREG-0800, "Standard Review Plan for the Review of Safety Analysis Reports for Nuclear Power Plants" (Rev. 2, July 1981) (PFS Ex. RRR), § 3.5.1.6 ("Aircraft Hazards").

a license condition that would appropriately limit the number of casks that could be stored at the facility pending the outcome of the appeal of the Partial Initial Decision and the ‘consequences’ proceeding.” *Id.*

On April 4, 2003, the Licensing Board issued its Order, requesting that the parties address the following questions in their responses to the Applicant’s Motion:

1. Procedural. The Applicant’s Motion (p. 1) asserts that this Board “could and should have ruled” in our Partial Initial Decision that the license condition now presented be adopted. Does the record reflect a previous request or suggestion for such a ruling? If not, does the Applicant’s current request meet the criteria for reconsideration?
2. Evidentiary. In both the aircraft and the seismic portions of the hearing, as we recall them, the evidence presented as to the layout and the size of the proposed facility was essentially uncontested (see particularly LBP-03-04, pp. 47, fn. 73; 57-58; and 194-95), as was the appropriateness of the NUREG-0800 factors and the straightforwardness of the formulaic calculation thereunder (*id.* at 47 and 49, fn. 76). Could we therefore proceed to decide the calculational matters raised by the Applicant’s Motion simply on the reconsideration pleadings, without providing an opportunity for the submission of factual affidavits (in a fashion akin to summary disposition practice) or an evidentiary mini-hearing?
3. Collateral. Quite apart from the NUREG-0800 formulaic probability calculation, to what extent, if any, does the downsized facility contemplated by the now-proposed license condition implicate or call into question any other safety, environmental, or financial issues or findings? (See Applicant Motion, pp. 10-12.)

Order at 2.

DISCUSSION

In the following discussion, the Staff responds to the Applicant’s Motion and to the specific questions raised in the Board’s Order. Inasmuch as the Board’s Order raises important questions which may well govern the disposition of this matter, the Staff’s response is structured so as to address those questions, *seriatim*.

A. Procedural Matters.

Under Commission case law, a motion for reconsideration may be filed to request correction of an error by the Licensing Board, by refining an argument or by pointing out a factual

misapprehension or a controlling decision of law that was overlooked; new arguments, however, are improper. *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-00-21, 52 NRC 261, 264 (2000), citing *Louisiana Energy Services, L.P.* (Claiborne Enrichment Center), CLI-97-2, 45 NRC 3, 4 (1997). A motion for reconsideration may not rely on entirely new theses or arguments, except to the extent that it attempts to address a presiding officer's ruling that could not reasonably have been anticipated. *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-98-17, 48 NRC 69, 73 (1998). Similarly, it has been held that motions to reconsider may seek reevaluation in light of an elaboration upon or a refinement of arguments previously advanced, but are not an occasion to advance an entirely new thesis. *Central Electric Power Cooperative, Inc.* (Virgil C. Summer Nuclear Station, Unit No. 1), CLI-81-26, 14 NRC 787, 790 (1981); *PFS*, 48 NRC at 73-74.

In its Motion, PFS asserts that the Licensing Board "could and should" have ruled that the proposed PFS Facility should be licensed subject to a license condition restricting its size to 336 casks, pending the completion of other aircraft crash probability and consequences litigation. Such a license condition, however, has not previously been proposed by PFS, nor does the Staff recall that the Licensing Board and parties had been put on notice that such a restriction would be sought or proposed, prior to the issuance of the Board's PID. Rather, the license condition proposed by PFS in its Motion appears to constitute a new matter or "new thesis" that may not properly be considered to be a misapprehension of critical fact or controlling legal precedent.⁶

In sum, in response to the Board's first question, the Staff believes that (a) the record does not reflect a previous request or suggestion for a ruling that would limit the size of the proposed Facility; and (b) as a result, the Applicant's current request does not meet the criteria for reconsideration. At the same time, however, the Staff agrees with the Applicant that the Licensing

⁶ Cf. *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Unit No. 3), LBP-02-05, 55 NRC 131, 138-39 (2002).

Board “could” have imposed a restriction on the size of the Facility, based upon the undisputed evidence of the effective area of the Facility -- if such a size restriction had been proposed by PFS prior to the close of the record.

The fact that the Applicant had not raised this matter previously does not necessarily preclude the relief sought by its Motion. Rather, the Motion could be treated as a request to supplement the record and to consider a new matter (*i.e.*, PFS’s proposed license condition) which, under appropriate circumstances, could be resolved as a matter of law.⁷ However, the Staff believes the Motion (and any responses thereto) should be supported by affidavits to address the collateral matters raised in the Board’s Order (*see* discussion *infra* at 7); alternatively, if the Board determines that cross-examination of witnesses is warranted, PFS should be required to file a motion to reopen.⁸

⁷ See, *e.g.*, *Southern California Edison Co.* (San Onofre Nuclear Generating Station, Units 2 and 3), LBP-83-47, 18 NRC 228, 232-34 (1983), *vacated on other grounds sub nom. Guard v. NRC*, 753 F.2d 1144 (D.C. Cir. 1985) (motion to supplement granted on a narrow factual issue, based on the positions of the Applicant, Staff and Federal Emergency Management Agency, absent “a particularized showing of need as a predicate for further hearings”); *see also, Northern States Power Co.* (Prairie Island Nuclear Generating Plant, Units 1 and 2), ALAB-284, 2 NRC 197, 205-06 (1975) (record may be supplemented by affidavit without requiring a reopening where the factual issue to be decided is narrow and relatively simple, but reopening is appropriate where cross-examination or Board questioning is required).

⁸ The evidentiary record is now closed. See Tr. 13720. Pursuant to 10 C.F.R. § 2.734, a motion to reopen a closed record to consider additional evidence must be accompanied by affidavits supporting the movant’s claim that the following criteria are satisfied:

- (1) The motion must be timely
- (2) The motion must address a significant safety or environmental issue.
- (3) The motion must demonstrate that a materially different result would be or would have been likely had the newly proffered evidence been considered initially.

10 C.F.R. § 2.734(a). Here, the Applicant’s Motion does not request reopening, nor is it supported by affidavit; accordingly, it should not be treated as a motion to reopen.

B. Evidentiary Matters.

In its Order, the Licensing Board correctly observed that “[i]n both the aircraft and the seismic portions of the hearing, . . . the evidence presented as to the layout and the size of the proposed facility was essentially uncontested . . . , as was the appropriateness of the NUREG-0800 factors and the straightforwardness of the formulaic calculation thereunder” Order at 2. Indeed, both the size of the proposed Facility and the use of the NUREG-0800 formula were known to the parties throughout the previous litigation before the Board on this contention, and no challenge to the Applicant’s calculation of the Facility’s size or to the use of the NUREG-0800 formula was ever raised by any party. Further, the Board explicitly found that the Applicant’s calculation of the effective area of the facility (“A”) was not contested by the State of Utah or the Staff. See LBP-03-04, slip op. at 57-58 and 195. Moreover, the methodology used to calculate size of the Facility, the calculated value thereof, and the use of the NUREG-0800 formula were all critical elements in the previous litigation of aircraft crash issues before the Board. See Motion at 6-7, and record evidence cited therein.

Inasmuch as no challenge was raised with respect to these matters previously, they are not properly subject to challenge at this time. Rather, the Board’s ruling in LBP-03-04 constitutes the law of the case as to the effective area of the proposed PFS Facility; and further litigation of this matter is barred at this time under the doctrine of repose. See, e.g., *Louisiana Energy Services, L.P.* (Claiborne Enrichment Center), LBP-97-3, 45 NRC 99, 109 (1997), *rev’d in part and aff’d in part*, CLI-98-3, 47 NRC 77 (1998); *Georgia Power Co.* (Vogtle Electric Generating Plant, Units 1 and 2), LBP-94-16, 39 NRC 257, 259 (1994); *Ohio Edison Co.* (Perry Nuclear Power Plant, Unit 1, Facility Operating License No. NPF-58), LBP-92-32, 36 NRC 269, 283-85 (1992).

In sum, in response to the Board’s second question, the Staff believes that the Licensing Board could properly decide the calculational matters raised by the Applicant’s Motion based solely on the existing evidentiary record, as set forth in the Applicant’s Motion -- subject to providing an

opportunity for other parties to point to other evidence in the existing record which might call the Applicant's submission into question. No further factual affidavits or evidentiary presentations should be permitted on these matters, nor should any "evidentiary mini-hearing" be conducted.

C. Collateral Matters.

The Licensing Board's Order of April 4, 2003, requests the parties' views on whether "the downsized facility contemplated by the now-proposed license condition implicate[s] or call[s] into question any other safety, environmental, or financial issues or findings? (See Applicant Motion, pp. 10-12.)." Order at 2. While the Staff believes that this issue more appropriately should be addressed by affidavits in connection with a motion to supplement or motion to reopen, the Staff herein provides its views in response to the Licensing Board's question.

In this regard, the Staff has reviewed its Safety Evaluation Report ("SER"),⁹ Final Environmental Impact Statement ("FEIS"),¹⁰ and the financial assurance license conditions established by the Commission in this proceeding.¹¹ Based on this review, the Staff has concluded that the Applicant's proposed restriction of the size of its Facility does not implicate or call into question any other safety, environmental, or financial issues or findings with respect to the proposed licensing of the PFS Facility. However, the Staff believes that the Applicant's proposed license condition should be clarified, as set forth below.

First, with respect to safety matters, the Staff has found no adverse safety effect that may be occasioned by restricting the size of the Facility to 336 casks, as proposed by PFS. To the

⁹ "Consolidated Safety Evaluation Report Concerning the Private Fuel Storage Facility," dated March 2002 (Staff Exh. C).

¹⁰ NUREG-1714, "Final Environmental Impact Statement for the Construction and Operation of an Independent Spent Fuel Storage Installation on the Reservation of the Skull Valley Band of Goshute Indians and Related Transportation Facility in Tooele County, Utah," dated December 2001 (Staff Exh. E).

¹¹ *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-00-13, 52 NRC 23, 36 (2000).

contrary, the size restriction proposed by PFS would ameliorate the safety concern addressed in LBP-03-04, in that the size of the facility is a factor that specifically affects the outcome of the NUREG-0800 calculation; and, further, a reduction in the size of the facility would not adversely affect any other safety finding. In this regard, based on the specific inclusion of the value for “A” in the NUREG-0800 formula, the Staff agrees with PFS’s assertion that “the hazard to the PFSF from military aircraft crashes and impacts of jettisoned ordnance is directly proportional to the effective area of the facility,” and that its proposed license condition would reduce the effective size of the facility in the manner stated. See Motion at 6. Further, the design and function of the Facility would remain unchanged, except that the number of pads to be built and the number of casks to be stored would be reduced pending the completion of other aircraft crash litigation in this proceeding. PFS has proposed no change in the operation of its Facility, except that the volume of operations would be reduced to reflect the decrease in number of casks to be stored onsite. Motion at 10. However, to assure that the effective area of the Facility is consistent with the value stated in PFS’s Motion, the Staff believes that the license condition proposed by PFS should be modified to reflect the statement in its Motion that the 336 casks would be stored on a total of 42 pads, arranged in an array of seven columns and six rows, with 35 ft. between each column of pads and 5 ft. between each row of pads. See Motion at 7. In addition, the proposed license condition should be modified to specify that the restriction to 336 casks shall expire upon the conclusion of all aircraft crash litigation in this proceeding in a manner that allows the storage of a larger number of casks at the Facility as reflected in PFS’s license application.

Second, with respect to financial assurance matters, the Staff notes that PFS has committed to adhere to the existing financial assurance license conditions. PFS states as follows:

PFS’s financial assurance is provided by license conditions that require PFS to obtain committed funding adequate to construct a facility of a capacity specified to the NRC²¹ before beginning construction and to obtain long-term service agreements covering the term of the license with prices sufficient to cover the operating,

maintenance, and decommissioning costs of the PFSF prior to beginning operation. Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-00-13, 52 NRC 23, 27, 32 (2000); see also id. at 36. PFS will meet those conditions regardless of the number of casks it stores on site.

²¹ The actual capacity is proprietary information, but in any event PFS's decision to store fewer casks on site would not affect the level of funding commitment PFS would have to obtain before beginning construction.

Motion at 10-11. Under the license conditions established by the Commission, regardless of the number of casks that are ultimately stored at the PFS Facility, PFS is required (a) to defer construction until it has received committed funding (debt, revenue, equity) to store the minimum number of casks it previously specified to the Commission, and (b) to defer operation until it has obtained long-term service agreements covering the term of the license with prices sufficient to cover the operating, maintenance, and decommissioning costs of the PFSF. Accordingly, the financial assurance license conditions establish the requisite financial assurance for construction and operation of the PFS Facility, even if PFS stores no more than 336 casks at its Facility.¹²

Third, with respect to environmental matters, the Staff considers that the potential impacts of the PFS Facility in its reduced size would be bounded by the impacts of the full-sized facility as described in the FEIS. To be sure, certain of the financial benefits described in the FEIS would likely be smaller if a smaller facility is constructed (*e.g.*, the number of jobs and financial benefit to be produced by construction and operation of the facility, the dollar amount of payments to Tooele County, State tax benefits), as would the benefits to reactor licensees who ship spent fuel to the PFS Facility (*i.e.*, avoiding premature reactor shutdown, permitting early reactor site

¹² The license conditions established by the Commission require funding "in the amount to be determined at hearing." *See Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-00-13, 52 NRC 23, 36 (2000). The amount of funding to be required is under consideration by the Licensing Board at this time.

decommissioning, and providing reduced costs for spent fuel storage).¹³ On balance, however, the FEIS provides sufficient information as to the costs and benefits of the PFS Facility for the agency to consider in reaching a licensing decision -- just as the cost-benefit balance set forth in an EIS for a full power license has been found to be adequate to support issuance of a low power license.¹⁴ Accordingly, the Staff has concluded that supplementation of the FEIS is not required.¹⁵

In sum, in response to the Licensing Board's third question, the Staff has concluded that the Applicant's proposed restriction of the size of its Facility does not implicate or call into question any other safety, environmental, or financial issues or findings with respect to the proposed licensing of the PFS Facility, although the proposed condition should be clarified as set forth above.

CONCLUSION

For the reasons set forth above, the Staff opposes the Applicant's motion for reconsideration of the Licensing Board's Partial Initial Decision in LBP-03-04.

Respectfully submitted,

/RA/

Sherwin E. Turk
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Counsel for NRC Staff

Dated at Rockville, Maryland
this 21st day of April, 2003

¹³ As stated in the FEIS, "the net economic benefits of the proposed PFSF are very sensitive to the . . . the size of the proposed PFSF . . ." FEIS at 8-6; see Table 8.2, *id.* at 8-7.

¹⁴ See, e.g., *Cuomo v. NRC*, 772 F.2d 972, 975 (D.C. Cir. 1985); *Philadelphia Electric Co.* (Limerick Generating Station, Units 1 and 2), CLI-89-10, 30 NRC 1, 5, n.3 (1989); *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), CLI-84-9, 19 NRC 1323, 1326 (1984).

¹⁵ In contrast, under 10 C.F.R. § 51.92, the NRC Staff would prepare a supplement to a final environmental impact statement noticed in the Federal Register, if:

- (1) There are substantial changes in the proposed action that are relevant to environmental concerns; or
- (2) There are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.

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PRIVATE FUEL STORAGE L.L.C.) Docket No. 72-22-ISFSI
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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S RESPONSE TO APPLICANT'S MOTION FOR RECONSIDERATION OF PARTIAL INITIAL DECISION REGARDING CREDIBLE ACCIDENTS (LBP-03-04)," 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 21st day of April, 2003:

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