RAS 6577

June 23, 2003

UNITED STATES OF AMERICA

NUCLEAR REGULATORY COMMISSION

Before the Commission

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

APPLICANT'S RESPONSE IN OPPOSITION TO STATE OF UTAH'S PETITION FOR REVIEW OF LBP-03-08

Pursuant to 10 C.F.R. § 2.786(b)(3), Applicant Private Fuel Storage, L.L.C. ("Applicant" or "PFS") responds in opposition to the "State of Utah's Petition for Review of LBP-03-08,"[1] filed June 11, 2003 ("Petition"). The Petition fails to show that the Decision by the Atomic Safety and Licensing Board (the "Board") contained clearly erroneous material findings of fact, unprecedented legal conclusions, legal rulings contrary to established law, prejudicial procedural errors, or "substantial and important question of law, policy or discretion." 10 C.F.R. § 2.786(b)(4). Thus, the Petition should be denied.

I. BACKGROUND

Litigation of the geotechnical issues was a factually complex and protracted process that is well summarized in the Decision. *See* Decision, slip op. at 10-25. The Board had the benefit of five weeks of hearing, the testimony of some two dozen expert witnesses, thousands of pages of prefiled direct and rebuttal testimony, proposed findings of

[1] *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), Partial Initial Decision (Regarding Geotechnical Issues), LBP-03-08, 57 NRC __, (May 22, 2003) (hereinafter the "Decision").

Template = SECY-021

SECY-02

fact and conclusions of law, and many thousands of pages of exhibits. Accordingly, the Board's detailed 372 page Decision should be accorded substantial deference and should not be subject to review unless potentially serious errors are brought to the Commission's attention. As discussed below, the issues on which the State of Utah (the "State") is seeking review were appropriately decided and do not, by any stretch of the imagination, amount to potential errors whose significance would warrant Commission review. *Carolina Power & Light Co.* (Shearon Harris Nuclear Power Plant), CLI-01-11, 53 NRC 370, 382, 387-88 (2001); *Hydro Resources, Inc.* (P.O. Box 15910, Rio Rancho, NM 87174), CLI-01-4, 53 NRC 31, 45-46 (2001); *Louisiana Energy Services, L.P.* (Claiborne Enrichment Center), CLI-98-3, 47 NRC 77, 92-93 (1998); *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), ALAB-788, 20 NRC 1102, 1151 (1984).

II. DISCUSSION

A. Standard for Granting a Petition for Review

A petition for review of the decisions of a licensing board is granted only at the discretion of the Commission, "giving due weight to the existence of a substantial question with respect to the following relevant considerations:

(i) A finding of material fact is clearly erroneous or in conflict with a finding as to the same fact in a different proceeding;

(ii) A necessary legal conclusion is without governing precedent or is a departure from or contrary to established law;

(iii) A substantial and important question of law, policy or discretion has been raised;

(iv) The conduct of the proceeding involved a prejudicial procedural error; or

(v) Any other consideration which the Commission may deem to be in the public interest."

10 C.F.R. § 2.786(b)(4). The Petition does not attempt to show that the issues it raises satisfy any of the grounds for review in § 2.786(b)(4); indeed, except for broad non-specific pronouncements (*see* Petition at 5, 14-15) it does not even identify which of the

grounds might apply to a particular issue. As discussed below, the State raises no substantial questions of fact, law or policy; hence, there is no reason why the Commission should exercise its discretionary power to review the Board's Decision.

B. The Board's Decision to Allow Post-Licensing Completion of the Soil-Cement Testing Program is Consistent with Commission Practice and Precedent

The first issue raised in the Petition challenges the Board's decision to allow post-licensing completion of the testing program for soil cement. PFS intends to use soil cement (a mixture of local soil and Portland cement) to improve the properties of the soils beneath and around the concrete pads on which the storage casks rest and the soils around the foundation of the Canister Transfer Building. Decision at 10 and C.3.[2] The performance requirements of the soil cement are set forth in PFS's Safety Analysis Report ("SAR") for the facility. *Id.* at C.49. The SAR also describes the laboratory testing program that will establish the proper formulation for the soil cement. Specified industry codes and standards will govern how the tests are to be performed and the test results evaluated. *Id.* at 44-45, C.33 - C.41.[3]

All parties, including the State's soil-cement expert, agreed that PFS has developed a suitable program for testing the properties of soil cement, and that the program to which PFS has committed to in the SAR is reasonable and will lead to the proper formulation and installation of the soil cement at the PFSF. *Id.* at 44-45 and C.47 - C.49.

Notwithstanding all parties' agreement that the PFS program for the testing and construction of soil cement will accomplish its goals, the State raises four objections to

---

[2] Where multiple citations to the slip opinion are given, the first is to the applicable page in the narrative portion of the Decision, and the second (*e.g.*, C.3) is to the numbered findings of fact on the issue.

[3] The SAR also states that following completion of the testing phase, procedures will be developed for the placement and treatment of soil cement, in accordance with specific industry standards. *Id.* at C.43 - C.44.

the manner in which PFS intends to proceed with the testing of soil cement: (1) the testing program's completion is likely to take place after the Commission has issued a license for the facility; (2) the Board imposed no licensing conditions relating to soil-cement testing; (3) the post-licensing completion of the test program would allow the NRC Staff "extra legal post license discretion," and (4) PFS should not be allowed, as a matter of policy, to "evade licensing requirements until after license issuance." Petition at 5. None of these objections is meritorious.[4]

1. The Timing of the Completion of the Soil-Cement Testing Program Has No Licensing Significance

The State argues that allowing completion of soil-cement testing to take place after a license has been issued for the PFSF "will truncate the State's hearing rights as there will be no adjudicatory forum in which the State may challenge the adequacy of PFS's post-license testing program to meet [10 C.F.R.] section 72.102(d)." Petition at 3-4. This assertion is plainly incorrect on three grounds: *First*, the State has already had an appropriate adjudicatory forum, the proceeding before the Board, in which to challenge the adequacy of the soil-cement testing program, and has taken full advantage of the opportunity to do so.[5] *Second*, it is undisputed that the program set forth in the SAR identifies the

[4] Although the Petition is silent on this point, it appears that the State is seeking to bring itself within the second potential ground for Commission review cited in 10 C.F.R. § 2.786(b)(4) – that "[a] necessary legal conclusion is . . . a departure from or contrary to established law." The State, however, points to no regulation or legal precedent that establishes that it has the right to a pre-licensing hearing on whether PFS has met its licensing commitments.

[5] The State cites *Union of Concerned Scientists v. NRC*, 735 F.2d 1437 (D.C. Cir. 1984), *cert. denied sub nom. Arkansas Power & Light Co. v. Union of Concerned Scientists*, 469 U.S. 1132 (1985) for the proposition that post-license evaluation of the soil-cement testing program "will truncate the State's hearing rights." Petition at 3-4. However, in *UCS* the Commission regulations expressly indicated that assessment of the results of emergency planning exercises were to be examined in deciding whether to issue an operating license to a reactor. That being the case, held the Court, the NRC could not implement a rule that excluded such results from examination at the licensing hearings. 735 F.2d at 1443; *see also, Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-00-13, 52 NRC 23, 33 n.3 (2000). The *UCS* situation is clearly not present here, for there is no regulation that offers the State a right to a pre-licensing

necessary properties of the soil-cement formulation and defines the testing necessary to establish the proper formulation. Since the SAR commitments are part of the licensing basis of the PFSF, any significant changes to them would require an amendment that the State could challenge. *Third*, if the State concludes after the licensing of the facility that there are deficiencies in the soil-cement testing program, it can file a petition under 10 C.F.R. § 2.206 and request that the NRC Staff take enforcement action to provide appropriate redress. Thus, no rights of the State are affected by allowing completion of the soil-cement testing program to occur after the PFSF license is issued.

2. The Decision Not to Impose a Licensing Condition Was Appropriate

The State criticizes the Board for "failing to compile PFS's promises into licensing conditions." Petition at 5. However, the imposition of licensing conditions is not required by NRC regulations. Indeed, it is Commission policy that license conditions

> are to be reserved for those matters as to which the imposition of rigid conditions or limitations upon reactor operation is deemed necessary to obviate the possibility of an abnormal situation or event giving rise to an immediate threat to the public health and safety.

Portland General Electric Co. (Trojan Nuclear Plant), ALAB-531, 9 NRC 263, 273 (1979) (footnote omitted).[6]

Moreover, it is not necessary to "compile PFS's promises into licensing conditions." PFS's commitments as to the soil-cement testing methodology, the applicable test and construction standards, and the soil-cement design requirements are all stated or in-

---

hearing on the implementation of the soil-cement testing program. In addition, unlike the situation in *UCS*, assessing the adequacy of the post-licensing program will be "evaluated in terms of pre-established criteria," *see* Decision at C.43-C.44, and therefore falls within the "inspections, tests or elections" provisions of the Administrative Procedure Act, 5 U.S.C. § 554(a)(3).

[6] *Accord, Final Policy Statement on Technical Specifications Improvements for Nuclear Power Reactors*, 58 Fed. Reg. 39,132, 39,136 (July 22, 1993). *See UCS*, 735 F.2d at 1451.

corporated by reference in Section 2.6.4.11 of the SAR.[7] Commitments in licensing documents like the SAR are controlled by NRC regulations. 58 Fed. Reg. at 39,134, 39,136. In particular, changes to the PFSF SAR are controlled by 10 C.F.R. § 72.48, which requires in appropriate instances the filing of a license amendment application. *See also* 58 Fed. Reg. at 39,138 (requirements in licensee-controlled documents remain entirely enforceable by the NRC). Therefore, compliance with SAR commitments is mandated without the need for a license condition.

3. No "Post-Licensing Discretion" is Vested on the NRC Staff

The State insists that having the NRC Staff verify compliance of the soil-cement program with SAR commitments "will likely involve more than ministerial action" and will permit the Staff "extra legal post license discretion." Petition at 5. There is, however, nothing in the record or the Board's Decision that would support a prediction that the Staff will need to exercise discretion regarding soil-cement testing. On the contrary, the PFS and Staff witnesses testified and the Board found that the design and testing requirements are adequately established in the PFS SAR and can be verified by the Staff without exercise of "post license discretion" and without need for pre-licensing confirmation. *See* Decision at 46-47 and C.60; *see also Metropolitan Edison Co.* (Three Mile Island Nuclear Station), ALAB-729, 17 NRC 814, 885-87 (1983) (where operational requirements for connecting pressurizer heaters to the emergency power supplies had been established, there was no need to conduct qualification testing prior to licensing).[8]

[7] The State incorrectly asserts that "PFS's promises as to how it will achieve soil-cement properties, and implement the program, are scattered throughout the licensing process." Petition at 4 (footnote omitted). In fact, the extensive discussion in the SAR of the proposed use of soil cement at the PFSF, and the codes and standards referenced therein, are sufficient to define a program that the State's own soil-cement expert found to be reasonable and expected to lead to a proper soil-cement installation. *See* Decision at C-49.

[8] The State attempts to distinguish the *TMI* decision by arguing that the emergency diesel generators at issue at *TMI* were "standard equipment" whereas the intended use of soil cement at the PFSF is a first of a kind

4. There Was No "Evasion" of Licensing Requirements

The State argues that PFS could have completed its soil-cement testing program in advance of the licensing hearings, but chose not to do so in order to "evade" licensing requirements until after license issuance. Petition at 5. The argument fails *ab initio* because, for the reasons discussed above, PFS had no obligation to complete soil-cement testing prior to licensing. In addition, the State itself explains the reasons why the program could not be finished in advance of the licensing hearings:

> The [PFS soil-cement testing] program has been "on hold" since at least March 2002 for two reasons: one, because it had lower priority than licensing litigation and SAR updates and, two, because PFS needed expert assistance in evaluating why preliminary test results had failed.

Petition at 5 n.9 (citation omitted). These reasons are uncontradicted and constitute no "evasion" of licensing requirements. The State's claim of "evasion" is unsupported.

C. The Board's Upholding of the Exemption from the Deterministic Standard for Predicting Seismic Ground Motions Was Well Justified and is Consistent with the Public Interest

The Petition seeks Commission review of the Board's affirmance of the Staff's grant of an exemption from the deterministic standard for predicting seismic ground motions. The exemption allowed PFS to design the facility using a probabilistic methodology and a 2,000-year return period design basis earthquake ("DBE"). PFS and the Staff provided independent justifications for the exemption, both of which the Board found "provided adequate justification" to support the granting of the exemption. Decision at 371; *see also id.* at 99.

---

application. Petition at 4-5. This is an incorrect reading of the *TMI* decision. *TMI*'s approval of postponing qualification tests until after licensing was in no way predicated on prior experience with the diesel generators; to the contrary, the ability to connect the pressurizer heaters to the emergency diesel generators in the event of a loss of offsite power was unproved and was an issue in the case. *TMI*, 17 NRC at 855-60.

PFS demonstrated that the exemption was acceptable based on two key elements: (1) a risk-informed approach to seismic design that assigns a lower probability of failure to facilities and structures whose failure would have more severe consequences, *see* Decision at 88-89 and F.33-35; and (2) a "two-handed approach" under which the adequacy of a postulated design basis earthquake to provide the desired level of seismic safety is judged by considering two factors: (a) the mean annual probability of exceedence of the design basis earthquake and (b) the level of conservatism incorporated in the design criteria and procedures used for the design of the facility (also know as "risk reduction factors"). *Id.* at 89-90 and F.36-40. The Board noted that all parties agreed that using a risk-informed approach was appropriate, *see id.* at F. 35, and that the significant safety margins embedded in the PFSF design under the second factor of the "two handed approach" provides reasonable assurance that a 2,000-year mean return period is adequate. *Id.* at 99.

The Petition does not allege that there are any errors in the PFS analysis, or that the risk-informed approach to seismic design is faulty, or that use of a two-handed approach for selecting the design basis earthquake is improper. Indeed, the State's own expert "emphatically" agreed with PFS's approach. *See* Decision at F.35, F.44. All the State argues is that by "designing only to a 2,000-year DBE . . . , the absolute margins of safety are greatly diminished." Petition at 11-12. Assuming for argument's sake that this assertion is correct, it does not amount to a claim that the granting of the seismic exemption was based on a clear factual or legal error that would warrant Commission review pursuant to 10 C.F.R. §§ 2.786(b)(4)(i) or (ii).[9] Thus, no Commission review is warranted.

[9] The State recites a number of Board findings that it alleges cut against safety margins. Petition at 12. Again, the State proffers no reasons why those findings are erroneous, and instead makes the broad assertion that "[s]hould the Commission accept any of the positions relied on by the Board, the Staff, or PFS in

Since the State raises no cognizable objections to the independent rationale offered by PFS in support of the seismic exemption, there is no need to review in detail the reasons the Staff adduced for its approval of the exemption request. The Staff offered four separate bases for its approval: (1) previous Commission actions evidence Commission approval of the use of a probabilistic safety hazards analysis ("PSHA") of the type conducted by PFS; (2) the Department of Energy's use in standard DOE-STD-1020-94 of seismic design ground motions based on a 2,000-year return period earthquake for independent spent fuel storage installations, such as the PFSF; (3) the Commission's 1998 approval of a 2,000-year return period earthquake as the design basis ground motion for the TMI-2 ISFSI at INEEL; and (4) the Staff's conclusion that PFS provided "an overly conservative seismic hazard assessment, which added an additional margin of safety to the Applicant's design." Decision at 95-96 and F.88, F.90-98, F.102-09.

The State only takes exception to the last of the four grounds asserted by the Staff as justifying the granting of the seismic exception. *See* Petition at 7-11. By not seeking review of the Board's adoption of the other independent bases for the Staff's approval, the Staff's ultimate conclusion stands: regardless of the State's attacks on one of the bases, the Staff has adequately supported its approval of the exemption request.

With respect to the one contested ground for Staff approval, *i.e.*, the conservative nature of PFS's PSHA, the State makes a fact-based argument that consists in part of a comparison of the credentials of the witnesses for the State and the Staff, *see id.* at 7-8, and in part of the assertion that certain methodological disputes between the State and the

---

support of PFS's exemption allowing it to use a 2,000-year DBE, it will be setting a trail blazing path – but one that is not based on any actual test data or valid scientific bases, and one that severely reduces safety margins by relying on concepts contrary to earthquake engineering practices." Petition at 12. Such bald, generalized allegations of error do not constitute grounds for review. *See Houston Lighting & Power Co.* (South Texas Project, Units 1 and 2), ALAB-799, 21 NRC 360, 378 (1985).

Staff witnesses should have been resolved in the State's favor. *See id.* at 8-11. However, resolution of matters such as witness credentials and disputed factual assertions are the province of the licensing boards, and will only be subject to reversal if the record appears to compel a different result, which in this case it does not. *Niagara Mohawk Power Corp.* (Nine Mile Point Nuclear Station, Unit 2), ALAB-264, 1 NRC 347, 357 (1975). No "clearly erroneous" factual finding can be discerned from the State's arguments, thus no review by the Commission is warranted. *See* 10 C.F.R. § 2.786(b)(4)(i).

The State makes one final argument against the granting of the seismic exemption: that there is no discussion of the public interest requirement of 10 C.F.R. § 72.7 in the Decision, the testimony by the Staff at the hearing, or the Staff's Safety Evaluation Report. Petition at 12-13. This argument must be rejected for three reasons. *First*, the State failed to raise the public interest issue in a timely manner. It did not do so in the initial submittal of the contention, *see* State of Utah's Request for Admission of Late-Filed Modification to Basis 2 of Contention Utah L, November 9, 2000. It did not do so in the final text of Contention L/QQ. *See* Decision at 23-25. It did not do so in direct or rebuttal testimony at the hearing. It was only in its proposed findings of fact that the State raised the public interest issue for the first time. It is entirely too late now to raise a "public interest" claim before the Commission, and the State's attempt must be rejected.[10] *See, e.g., Sequoyah Fuels Corp. and General Atomics* (Gore, Oklahoma Site), CLI-97-13, 46 NRC 195, 221 (1997); *Philadelphia Electric Co.* (Limerick Generating Station, Units 1 and 2), ALAB-845, 24 NRC 220, 235 (1986).

[10] It is unclear whether the State is trying to justify Commission review of the grant of the exemption on public interest considerations pursuant to 10 C.F.R. § 2.784(b)(4)(v). However, the State has not identified any significant "public interest" consideration that would merit Commission review.

Second, the Board was aware of the "public interest" requirement in 10 C.F.R. § 72.7 and referred to it in its Decision. *See* Decision at 88 and F.11. Indeed, the Board determined as a Conclusion of Law that the Staff's grant of the seismic exemption was "otherwise in the public interest." Decision at 371. Thus, it is incorrect to argue, as the State does, that in upholding the grant of the exemption request the Board ignored the public interest.[11] In addition, there was testimony by the Staff at the hearing explaining why the grant of the exemption was in the public interest. *See* Tr. 8253 (Stamatakos). Thus, the Board's findings were supported by the record.

Third, there is no disagreement on the record that the probabilistic approach is superior to the deterministic method for quantifying earthquake hazards, and the State makes no claim to the contrary in its Petition.[12] Undoubtedly, it is in the public interest that analyses of structures important to public health and safety be conducted using the most accurate and up-to-date methodology available.

For these reasons, the "public interest" argument belatedly raised by the State presents no issue for Commission review.

D. The Board Used an Appropriate Exposure Duration to Compute Radiation Doses at the Facility Boundary

The State seeks Commission review of the radiation dose consequences portion of the Decision insofar as it accepts PFS's use of a 2,000 hours/year occupancy at the site

---

[11] Since the State introduced no "public interest" contention and presented no evidence on the issue, it is not surprising that the "public interest factor" was not covered in detail in the Decision.

[12] *See, e.g.*, Tr. 9116-19 (Arabasz); Tr. 8253 (Stamatakos). Indeed, the Commission has adopted a probabilistic approach for the evaluation of earthquake hazards at nuclear power plants, *see* 10 C.F.R. § 100.23, and has proposed to amend 10 C.F.R. Part 72 to provide a probabilistic risk approach for seismic hazards. 67 Fed. Reg. 47,745 (July 22, 2002). In the statement of considerations accompanying the proposed rule the Commission identified several reasons why it is desirable to change the Part 72 regulations to use a probabilistic method. 67 Fed. Reg. at 47,746. The Commission noted, *inter alia*, that use of a probabilistic approach for Part 72 facilities is "based on developments in the field over this past two decades" and parallels the changes made to 10 CFR Part 100. *Id. See also* Decision at F.1-F.4.

boundary (corresponding to the annualized number of hours of operation of the PFSF), as opposed to 8,760 hours/year (representing continuous, around-the-clock presence at the boundary). Petition at 14-15; *see* Decision at 101-102 and G.17. The State contends that 10 C.F.R. § 72.106(b) requires that accident dose calculations be conducted assuming that a hypothetical individual will be present at the boundary for 8,760 hours/year. Petition at 14. The State further argues that, to the extent that actual site boundary occupancy conditions are considered, the Board should not have accepted PFS testimony regarding land use at the PFSF site. *Id.* Finally, the State argues that the 8,760 hours/year occupancy in the analyses that supported the generic Certificate of Compliance ("CoC") granted to cask designer Holtec, Inc. ("Holtec") for the HI-STORM 100 cask that will be used at the PFSF should be controlling as to the exposure duration at the site boundary. *Id.* at 14-15. None of these claims is valid. In fact, the State's own witness in this area testified that it would be incorrect to use an 8,760 hour/year occupancy assumption in calculating accident doses. Tr. 12436-37 (Resnikoff).

1. 10 C.F.R. § 72.106(b) Does Not Require 8,760 hour/year Occupancy

The State asserts that the Board ignored the difference in the wording in section 72.104(a) operational conditions ("a real individual") and section 72.106(b) accident conditions ("any individual"). Petition at 14. However, the language of 10 C.F.R. §72.106(b) does not require that an individual be assumed to be present at the site boundary 8,760 hours/year.[13] 10 C.F.R. § 72.106(b) reached its current form by an amendment issued in 1998 to conform its dose calculation methodology to that used in 10 C.F.R. Part 20. *See, Minor Revision of Design Basis Accident Dose Limits for Independent Spent*

[13] The State cites no decision or other authority that reaches a contrary construction of 10 C.F.R. § 72.106(b), hence this issue does not meet the requirements of 10 C.F.R. § 2.786(b)(4)(ii).

Fuel Storage and Monitored Retrievable Storage Installations, Final Rule, 63 Fed. Reg. 54,559, 54,560 (Oct. 13, 1998). In amending § 72.106(b), the Commission expressed its intent as follows: "This final rule makes § 72.106 consistent with part 20 dose calculational methodology." 63 Fed. Reg. at 54,560. Under 10 C.F.R. Part 20, the total effective dose should be calculated or measured for the individual likely to receive the highest dose from the licensed operation; that is, a real individual rather than a hypothetical individual. 10 C.F.R. § 20.1302; *Hydro Resources, Inc.* (2929 Coors Rd., Suite 101, Albuquerque, NM 87120), LBP-99-15, 49 NRC 261 and LBP-99-19, 49 NRC 421 (1999). Since the intent in amending 10 C.F.R. § 72.106(b) was to make it consistent with the Part 20 dose computation methodology, the real individual standard in Part 20 would also apply to § 72.106(b), for both regulations refer to "any individual." Thus, § 72.106(b) calls for the application of a real individual standard in dose level calculations.

2. The Board Appropriately Considered Land Use in Determining Occupancy

The State asserts that the Board incorrectly accepted a 2,000 hour/year occupancy standard because it relied on the testimony by PFS witnesses who (according to the State) are all employees of Holtec and who "have no familiarity with the PFS site or land use in Skull Valley and by ignoring contrary testimony on the potential future residential land use in Skull Valley." Petition at 14. These statements are factually inaccurate. The testimony concerning current land use around the PFSF site came both from a Holtec employee *and* from the PFSF Project Manager, who is intimately familiar with the PFSF site and land uses in Skull Valley and around the site. *See* Tr. 12559-66, 12576-84 (Donnell). The State does not contest the accuracy of the testimony on the current condition of the land around the site (very sparsely settled, with the nearest residence located over two miles from the site boundary; *see* SAR § 2.1.3; Tr. 12066-67 (Redmond); Tr. 12579

(Donnell)). With respect to potential future changes in land use, there was no testimony by *any* witness that the current land use was likely to change in the future, and the State's claim to the contrary (*see* Petition at 14) is simply wrong.[14] Indeed, the Board's finding that "few individuals will desire such land [at the PFSF site boundary] in the future," Decision at 102, is fully supported by the testimony on the record about the nature of the land around the site – open land, used only for livestock grazing. *See* Tr. 12,559-66 (Donnell). There is no factual error by the Board warranting Commission review. 10 C.F.R. § 2.786(b)(4)(i).

3. The Use of 8,760 Hour/Year Occupancy in the Holtec HI-STORM 100 CoC is Immaterial to this Proceeding

Finally, the State attacks the Board's finding that a 2,000 hours/year occupancy time is appropriate for accident dose analyses in this proceeding by arguing that it is "contrary to Holtec's certificate of compliance for the HI-STORM 100 cask which is supported by an analysis using 8,760 hours per year for the exposure duration . . . ." Petition at 14-15. Holtec's analyses in support of a CoC for the HI-STORM 100 cask, reflected in the FSAR for the HI-STORM 100, is irrelevant to this proceeding. The HI-STORM 100 CoC generic analyses were not being relied on for determining radiation dose levels at the PFSF site because a site-specific accident analysis was performed for the PFSF. Tr. 12151 (Singh). In addition, the 8,760 hour/year occupancy was used in the HI-STORM 100 CoC for calculating doses because of the generic nature of the HI-STORM 100 CoC

[14] The State refers to "contrary testimony on the potential future residential land use in Skull Valley. *Cf* PID ¶ G.18 *with* Tr. (Redmond) 12,081-82; (Donnell) 12,578-82." Petition at 14. However, Dr. Redmond testified that he was unaware of any land use plans for the PFSF area for the next 20 years. Tr. 12081-82 (Redmond). Mr. Donnell did not express an opinion about future land use changes around the site, and specifically warned that he could not go beyond saying that "there is obvious growth from Salt Lake City moving outward." Tr. 12582 (Donnell). Salt Lake City is over 50 miles away from the PFSF site. *See* SAR Fig. 1.1.1.

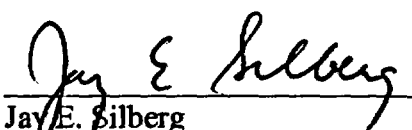
which by necessity must be valid for sites, unlike the PFSF, where there is full-time occupancy at the site boundary. Tr. 12091-92 (Redmond).

In addition to being factually and legally incorrect, the State's assertion that Section 72.106(b) requires that accident dose levels be calculated based on an 8,760 hours/year occupancy is moot. A hypothetical beyond-design-basis accident would result in radiation dose levels that would not exceed the normal operating dose levels, *see* Decision at G.11. No postulated accident would exceed the radiation dose limit of 5 rem set in 10 C.F.R. § 72.106(b), even if a hypothetical person were continuously stationed, forever, at the site boundary. *See* Decision at G.40. The Board appropriately determined that the accident dose limit of Section 72.106(b) will not be exceeded by a seismically-induced accident at the PFSF no matter how doses are calculated, and there is no basis for the Commission to review any aspect of that determination.

III. CONCLUSION

For the reasons stated above, the Commission should deny the State's Petition to review the Board's partial initial decision on geotechnical issues.

Respectfully submitted,



Jay E. Silberg
Paul A. Gaukler
Matias F. Travieso-Diaz
Blake J. Nelson
SHAW PITTMAN LLP
2300 N Street, N.W.
Washington, DC 20037
(202) 663-8000
Counsel for Private Fuel Storage L.L.C.

Dated: June 23, 2003

UNITED STATES OF AMERICA

NUCLEAR REGULATORY COMMISSION

Before the Commission

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

CERTIFICATE OF SERVICE

I hereby certify that copies of the "Applicant's Response In Opposition to State of Utah's Petition for Review of LBP-03-08" were served on the persons listed below (unless otherwise noted) by e-mail with conforming copies by U.S. mail, first class, post-age prepaid, this 23rd day of June 2003.

Nils J. Diaz, Chairman
U.S. Nuclear Regulatory Commission
One White Flint North
Mail Stop 16 C1, Room 18-E1
11555 Rockville Pike
Rockville, MD 20852-2738
e-mail: Chairman@nrc.gov

Jeffrey S. Merrifield, Commissioner
U.S. Nuclear Regulatory Commission
Mail Stop: O-16 C1, Room 18-F1
One White Flint North
11555 Rockville Pike
Rockville, MD 20852-2738
e-mail: cmrmerrifield@nrc.gov

Edward McGaffigan, Jr. Commissioner
U.S. Nuclear Regulatory Commission
Mail Stop: 16 C1, Room 18-G1
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: 16 C1, Room 17-D1
One White Flint North
11555 Rockville Pike
Rockville, MD 20852-2738
e-mail: cmrdicus@nrc.gov

Emil 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)

Adjudicatory File
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001

Michael C. Farrar, Esq., Chairman Administrative Judge
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
e-mail: MCF@nrc.gov

Dr. Jerry R. Kline
Administrative Judge
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
e-mail: JRK2@nrc.gov; kjerry@erols.com

Dr. Peter S. Lam
Administrative Judge
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
e-mail: PSL@nrc.gov

*Office of the Commission Appellate Adjudication
Mail Stop: 16-G-15 OWFN
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
(United States mail only)

Sherwin E. Turk, Esq.
Office of the General Counsel
Mail Stop O-15 B18
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555
e-mail: set@nrc.gov
e-mail: pfscase@nrc.gov

Denise Chancellor, Esq.
Assistant Attorney General
Utah Attorney General's Office
160 East 300 South, 5th Floor
P.O. Box 140873
Salt Lake City, Utah 84114-0873
e-mail: dchancellor@utah.gov

Diane Curran, Esq.
Harmon Curran Spielberg & Eisenberg L.L.P.
1726 M Street, N.W., Suite 600
Washington, D.C. 20036
e-mail: dcurran@harmoncurran.com

John Paul Kennedy, Sr., Esq.
David W. Tufts, Esq.
Confederated Tribes of the Goshute Reservation and David Pete
Durham Jones & Pinegar
111 East Broadway, Suite 900
Salt Lake City, Utah 84105
e-mail: dtufts@djplaw.com

Joro Walker, Esq.
Land and Water Fund of the Rockies
1473 South 1100 East
Suite F
Salt Lake City, UT 84105
e-mail: utah@lawfund.org

Paul EchoHawk, Esq.
Larry EchoHawk, Esq.
Mark EchoHawk, Esq.
EchoHawk PLLC
P.O. Box 6119
Pocatello, ID 83205-6119
e-mail: paul@echohawk.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
(e-mail copy only)

Tim Vollmann, Esq.
Skull Valley Band of Goshute Indians
3301-R Coors Road, N.W.
Suite 302
Albuquerque, NM 87120
e-mail: tvollmann@hotmail.com

Jay E. Silberg