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January 2, 2004

Roy P. Zimmerman  
Director, Office of Nuclear Security and Incident Response  
U.S. Nuclear Regulatory Commission  
11545 Rockville Pike, 4<sup>th</sup> Floor, Room D 21  
Rockville, MD 20852

Dear Mr. Zimmerman:

re: Safeguards Determination – Utah Expert Reports filed September 18, 2003  
in the Private Fuel Storage Licensing Proceeding, Docket No. ISFSI 72-22

The purpose of this letter is to request NRC to reconsider its safeguards determination relating to four of six Utah expert reports filed September 18, 2003 in the Private Fuel Storage, LLC (PFS) licensing proceeding. In an abundance of caution, the State filed the six expert reports with the Licensing Board under safeguard procedures, but the State made no assertion that the reports contained safeguards information (SGI).

On November 17, 2003 the State received a letter from Sherwin E. Turk, Esq., Counsel for NRC Staff, advising that four of the six reports contained SGI and should be handled as such. On November 19, 2003, I sent a letter to Mr. Turk requesting clarification as to which entity at NRC made the safeguards determination. I also requested that Mr. Turk provide the State with a "portion-marked" copy of the four Utah expert reports deemed by NRC to be SGI. To date, I have not had a written response from Mr. Turk, although in a telephone conversation Mr. Turk advised me that the SGI determination was made by the Office of Nuclear Security and Incident Response, primarily by Mr. Bernard Stapleton.

I am now requesting from you a portion-marked copy of the following four reports, determined by NRC to contain SGI:

1. C. M. Hoffmann, M. Sozen, and S. Kilic, *Structural Evaluation of Impacts From F-16 Aircraft and Military Ordnance on Holtec HI-STORM 100 Overpack and Multi-purpose Canister* (September 2003);

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2. G. Thompson, Institute for Resource and Security Studies, *Radiation Dose from Potential Accidental Release of Radioactive Material at the Proposed PFS Facility* (September 2003);
3. M.C. Thorne, et al, Mike Thorne & Associates, Ltd., *Criticality Safety Assessment under Accident Scenarios at the Proposed Private Fuel Storage Facility for Spent Nuclear Fuel in Utah* (September 2003); and
4. M. C. Thorne, Mike Thorne & Associates, Ltd., *Probability of Munitions Impacts and Aircraft Crashes at a Proposed Private Fuel Storage Facility for Spent Nuclear Fuel in Utah* (September 2003).

The State does not believe that it needs to file a FOIA request for this information but if one is needed, then please consider this such a request.

The State has good cause for requesting a copy of the Utah reports that have been portion-marked. First, the markings will allow the State to better understand the basis for NRC's SGI determination. As it now stands, there is absolutely no transparency in how NRC made its determination. Second, if the State had a portion-marked copy of the Utah reports, it could alleviate some of the burdensome NRC procedures which restrict means and methods the State must use to communicate with its experts (all of whom are out-of-State or overseas). For example, Mr. Stapleton of your office advised the Licensing Board in the PFS proceeding as follows:

[E]ven though we may mark a particular document or report as Safeguards information, we're also required to what they call portion mark the document.

So, it is conceivable that a document that is 100 pages may be marked Safeguards information but when you get down to the nitty gritty, it may be that 88 pages are releasable and only 12 pages would actually be Safeguards information.

Tr. 13952-53 (June 25, 2003). If only very limited information of a multi-page expert report triggers SGI, then the non-SGI information could be freely discussed by telephone or e-mail.

Notwithstanding that the State does not have a portion-marked copy of the Utah expert reports that the NRC considers to be SGI, the State requests your office to reconsider the SGI determination, especially with respect to the Thompson radiation dose report and the Thorne criticality report. PFS did not conduct radiation dose or criticality analyses and neither the Thompson nor the Thorne reports rely on SGI information provided by PFS.

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The Thompson Report is a straight radiation dose analysis, similar in scope to other radiation expert reports and testimony the State has previously presented in open forum before the Licensing Board. *See e.g.*, Resnikoff Testimony Utah LL/QQ (April 1, 2002) (notably, this testimony was presented after 9/11). The Thompson Report explicitly states that it does not rely on any SGI. In particular, as a preface to his report, Dr. Thompson states:

No classified information, safeguards information or commercially confidential information was used in the preparation of this report. Documents cited here are in the public domain.

The report contains information solely from the public domain, the accumulation of which should not trigger SGI. NRC's existing publically issued SGI guidance, NUREG-0794, *Protection of Unclassified Safeguards Information* (October 1981) describes the types of information that are considered SGI. The type of information includes physical security and safeguards contingency plans; drawings, sketches, etc of site safeguard features and equipment vital for physical protection; details of alarm systems, guard orders and procedures, and response procedures. *Id.* at 1-2. The type of information contained in Dr. Thompson's report is nothing like the type of information described in NUREG-0794. There is no apparent basis for your SGI determination of the Thompson report, and the State requests that you release the entire document as non-SGI.

The Thorne Criticality Report describes a series of criticality assessments in which MCNP4C was used to model accident-damaged storage casks flooded with water or kerosene. The report, however, does not show how to cause such damage. Moreover, the report details analysis of past criticality accidents relying, in part, on information from the McLaughlin et. al Los Alamos Report LA-13638, *A Review of Criticality Accidents: 2000 Revision* (May 2000), a report that, to the State's knowledge, is not considered SGI. Thus, State requests that the Thorne criticality report be released as non-SGI in its entirety.

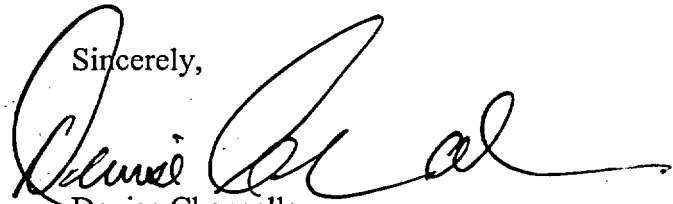
If NRC is making its SGI determination based on the quality and likelihood of success on the merits of the Utah reports, then there will be no objective standard against which NRC may evaluate similar reports. Furthermore, if NRC is determining that expert analyses introduced by an Intervenor in a licensing proceeding is SGI whenever there is an health and safety risk, then almost all admissible safety contentions will become SGI and the public will be locked out of NRC licensing proceedings.

The State is submitting this appeal for reconsideration of SGI determination under safeguard procedures because this letter has generally referred to information contained in documents NRC deems to be SGI. However, the State maintains that nothing herein is SGI.

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The State appreciates your reconsideration of NRC's SGI determination and awaits a favorable determination by you. If your office did not make the SGI determination, please send this letter to the appropriate office at NRC.

Sincerely,

A handwritten signature in cursive script, appearing to read "Denise Chancellor", written in black ink.

Denise Chancellor  
Assistant Attorney General

cc: Administrative Law Judge Michael F. Farrar  
Administrative Law Judge Peter S. Lam  
Administrative Law Judge Jerry R Kline  
Emile Julian, Assistant for NRC Rulemakings and Adjudications  
Sherwin Turk, Esq, NRC Office of General Counsel  
Jay E. Silberg, Esq., Shaw Pittman, Counsel for PFS

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