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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of:	)	Docket No. 72-22-ISFSI
PRIVATE FUEL STORAGE, LLC (Independent Spent Fuel Storage Installation)	)	ASLBP No. 97-732-02-ISFSI
	)	February 26, 2004

STATE OF UTAH'S BRIEF ON THE COMMISSION'S REVIEW OF CONTENTIONS UTAH U BASIS 2, AND UTAH CC AND UTAH SS

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In accordance with Memorandum and Order, CLI-04-04 (February 5, 2004), the State of Utah submits its brief on two NEPA issues: the adequacy with which NRC's final Environmental Impact Statement ("FEIS"), NUREG-1714, addresses (1) the environmental impacts from PFS's lack of an adequate onsite means to inspect and repair spent nuclear fuel canisters (Utah U Basis 2), and (2) the cost-benefit analysis and its basis for a meaningful comparison of alternatives (Utah CC and Utah SS).

The questions before the Commission are twofold: (1) whether the environmental effects of PFS's failure to have an adequate means of inspecting and repairing the contents of spent fuel canisters or detecting and removing contamination on the canisters, as raised in Contention Utah U Basis 2 (which challenged PFS's Environmental Report or "ER"), have been adequately addressed in the FEIS; and (2) whether, as claimed in Utah CC and Utah SS, the cost-benefit analysis in the FEIS is biased, is inadequate to provide a meaningful basis for comparison of alternatives, and is violative of NEPA and NRC regulations.

The relief the State seeks is for the Commission to find in its favor, admit contentions Utah U Basis 2, Utah CC, and Utah SS, and permit discovery and hearing on those

issues. In the alternative, the State requests the NRC conduct a more thorough, rigorous, and disciplined cost-benefit and environmental analyses such that those analyses provide a "hard look" at the environmental factors affecting its decision, especially in weighing alternatives, and publish the analyses, subject to public comment, in an FEIS supplement.

I. BACKGROUND

Contentions Utah U Basis 2 and Utah CC, filed at the initial contention filing stage, challenged PFS's ER and were deemed inadmissible. Utah SS, timely filed in response to the final EIS, likewise was deemed inadmissible.

Utah U basis 2 incorporates contention Utah J (Inadequate Inspection and Maintenance of Safety Components, Including Canisters and Cladding). Together these contentions assert that PFS does not comply with Part 72 regulatory requirements that spent fuel systems be designed (1) to permit inspection, maintenance and testing (§ 72.122(f)), (2) to allow ready retrievability of spent fuel (§ 72.122(l)), or (3) with the capability to test and monitor components important to safety (§ 72.128(a)(1)). In sum, Utah U basis 2 maintains that PFS's ER fails to consider the risks and costs raised by PFS's failure to comply with the foregoing regulations.

Contention Utah CC challenges the ER as making no attempt to objectively address the costs of the project; as not addressing the numerous adverse environmental impacts against the alleged benefits of the facility; as failing to compare the environmental costs of PFS's proposal with the significantly lower environmental costs of the no-action alternative; and as making no attempt to quantify the costs associated with the impacts of the facility. A

mere one-sentence mention of non-construction and operating costs[1] in the 1997 ER, Ch. 7 (Economic and Social Effects of Facility Construction and Operation) provides no means of comparing meaningful alternatives to the proposed ISFSI. Likewise, the distorted final EIS impairs a fair consideration of the ISFSI's adverse overall environmental effects because it provides misleading information on the economic benefits of the project. As challenged in Utah SS, the FEIS uses a 20 year period for fuel receipt but improperly uses a 40 year period for accumulation of net benefits; the break-even analysis is flawed because it too uses a 40 year storage period; and the FEIS, published in December 2001, uses 2003 as the unrealistic start of operations date, when at that time the earliest credible start date would have been July 2004, thereby presenting yet another bias favoring the benefits of the project.

II. LEGAL STANDARD

The two principal goals of an FEIS are to force agencies to take a "hard look" at the environmental consequences of a proposed project, and, by making relevant analyses openly available, to permit the public a role in the agency's decision-making process.[2] As stated in Public Service Co. of Oklahoma (Black Fox Station, Units 1 and 2) CLI-80-31, 12 NRC 264, 275 (1980):

> The impact statement does not simply 'accompany' an agency recommendation for action in the sense of having some independent significance in isolation from the deliberative process. Rather, the impact statement is an

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[1]Other than financial costs incurred by PFS in constructing and operating the ISFSI, the only discussion of costs in the ER is the following: "The indirect costs, which are derived from the socioeconomic and environmental impacts of the facility, are minimal due to the remote location and small size of the actual storage area." ER at 7.3-1.

[2]Louisiana Energy Services, L.P. (Claiborne Enrichment Center), CLI-98-3, 47 NRC 77, 87-88 (1998); *see also* Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 349-50 (1989); Hughes River Watershed Conservancy v. Glickman, 81 F.3d 437, 443 (4th Cir.1996).

integral part of the Commission's decision. It forms as much a vital part of the NRC's decisional record as anything else, such that for reactor licensing, for example, the agency's decision would be fundamentally flawed without it.

The second goal of the EIS (the disclosure function), as recognized by the Commission in Claiborne, "gives the public the assurance that the agency has indeed considered environmental concerns . . . and perhaps more significantly, provides a springboard for public comment." 47 NRC at 87 (*citing* Robertson, 490 U.S. at 349). Further, the amount of detail required in an EIS is "that which is sufficient to enable those who did not have a part in its compilation to understand and consider meaningfully the factors involved,"[3] and it should provide "sufficient discussion of the relevant issues and opposing viewpoints to enable the decisionmaker to take a 'hard look' at environmental factors and to make a reasoned decision."[4] The FEIS is intended to "foster both informed decision-making and informed public participation," and thus ensure that the agency does not act upon "incomplete information, only to regret its decision after it is too late to correct."[5]

NRC regulations direct the Staff to consider and weigh the environmental, technical,

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[3]Limerick Ecology Action, Inc., v. NRC, 869 F.2d 719, 737 (3d Cir. 1989); Environmental Defense Fund, Inc. v. Corps of Engineers, 492 F.2d 1123, 1136 (5th Cir. 1974).

[4]Tongass Conservation Society v. Cheney, 924 F.2d 1137, 1140 (D.C.Cir.1991) (*quoting* Natural Resources Defense Council, Inc. v. Hodel, 865 F.2d 288, 294 (D.C. Cir. 1988)).

[5]Claiborne, 47 NRC at 87, *citing* Marsh v. Oregon Natural Resources Council, 490 U.S. 360, 371 (1989).

and other costs and benefits[6] of a proposed action and alternatives. 10 C.F.R. § 51.71(d). Furthermore, as the Supreme Court held in Robertson, 490 U.S. at 351-52, NEPA includes an implicit duty to discuss mitigation measures of any adverse environmental effects which cannot be avoided in sufficient detail to ensure that environmental consequences have been fairly evaluated. *See also* 40 C.F.R. § 1508.20.

As the Commission said in Claiborne, misleading information on the economic benefits of a project could skew an agency's overall assessment of a project's costs and benefits, and potentially result in approval of a project that otherwise would not have been approved because of its adverse environmental effects. 47 NRC at 89 (*internal quotations omitted*). In assessing how economic benefits are portrayed, a key consideration is whether the economic assumptions of the FEIS were so distorted as to impair fair consideration of the project's adverse environmental effects. Id.

Finally, recirculation of the FEIS may be in order where the FEIS omits discussion of issues mandated by NEPA or has been so changed by adjudicatory decisions as not to have fairly been exposed to public comment during its initial circulation. Public Service Co. of Oklahoma (Black Fox Station, Units 1 and 2), ALAB-573, 10 NRC 775, 786 (1979). Under 10 C.F.R. § 51.92(b) NRC may prepare a supplement to the FEIS when, in its opinion, it furthers the purposes of NEPA, while 10 C.F.R. § 51.97(a) instructs that the FEIS for an ISFSI "will address environmental impacts of spent fuel storage only for the term of the license . . . applied for."

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[6]A cost benefit analysis should also include consideration and balancing of qualitative as well as quantitative impacts. Kerr-McGee Chemical Corp. (West Chicago Rare Earths Facility), LBP-84-42, 20 NRC 1296, 1329 (1984), *citing* 49 Fed. Reg. 9363 (1984); Claiborne, 47 NRC at 88. *See also* 40 C.F.R. § 1502.23 and 10 C.F.R. § 51.45(c).

III. ARGUMENT

A. The FEIS Does Not Address the Environmental Effects Raised by PFS's Failure to Have an Adequate Means of Inspecting and Repairing the Contents of Spent Nuclear Fuel Canisters or Detecting and Removing Contamination on the Canisters.

At one time PFS intended to have two breached canister overpacks on site as the means of dealing with leaking or breached canisters. Utah-E Findings (July 31, 2000) at 19-21. At the time of PFS's pre-filed testimony on financial assurance (Utah E), it had reduced the number of onsite breached canister overpacks from two to one. By the time PFS's CEO testified at the Utah E hearing, this whole contingency measure was thrown out. Id. Instead, Mr. Parkyn testified that PFS will pull a transportation cask from its operations to either transport the defective canister offsite or to store it onsite.[7] Tr. (Parkyn) 1984, 1986-87. Reliance on this practice is inadequate to prevent adverse environmental impacts because PFS-owned transportation casks may not be immediately available for use at the PFS ISFSI. They could be undergoing fuel loading at reactor sites or otherwise engaged in PFS's normal transport operations.

PFS's protocol for dealing with leaking, degraded, or contaminated spent nuclear fuel canisters then is to ship them back to the originating reactor. In the FEIS, the Staff finds this protocol acceptable. FEIS at 2-22. However, the FEIS does not address the environmental effects from shipping damaged canisters from the Skull Valley site back to reactor sites, or allowing the canisters to remain onsite. In fact, there is sparse discussion in the FEIS of cask or canister contamination. *See* FEIS at 2-19 and 2-22. The FEIS

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[7]PFS has provided no additional funding to replenish the transportation cask used in its normal operations; it argues that such funds will come from a small contingency fund for cost overruns and unanticipated expenses. Utah E Findings 19-21.

acknowledges that the canister and HI-STAR 100 transportation cask may become contaminated with radionuclides during fuel loading in the reactor pool. FEIS at 2-19. The FEIS then concludes that contamination will be removed at the reactor site and that "any unacceptable release to the environment during transportation . . is precluded" because of the design of the HI-STAR cask.[8] FEIS at 2-19. If the exterior of the transportation cask is contaminated when it arrives at the ISFSI, PFS will decontaminate it (there is no discussion of whether this is feasible at the PFS facility or how it will be done) and if PFS finds that the canister meets acceptable contamination levels, it will transfer it into a HI-STORM storage cask. FEIS at 2-21.

In addition to the lack of reasonable assurance that a transportation cask will timely be available at the PFS site, there are several other shortcomings in the FEIS. First, only since mid-1999 has HI-STAR been certified as a transportation cask.[9] Docket No. 71-9261. Consequently, contrary to the implicit assumptions in the FEIS, there is little, if any, experience in transporting fuel in a HI-STAR cask or in transferring fuel canisters between HI-STAR and HI-STORM casks. Second, the NRC assumes that the canisters will arrive at PFS almost contamination-free. This is a fallacy because PFS has no control over the

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[8]Notably, for several years the Commission has observed problems with the performance of certain Certificate of Compliance (CoC) holders and their agents in packaging and transporting radioactive material and, as a consequence, it has amended Part 71 and its Enforcement Policy to add additional enforcement sanctions, such as notices of violation, against CoC holders. *See e.g.*, 69 Fed. Reg. 385-86 (January 5, 2004).

[9]In fact, NRC inspections have uncovered several problems with design, procurement and QA activities at Holtec and its fabricator, U.S. Tool and Die relating to the HI-STAR system. *See e.g.*, Holtec International Inspection Plan (August 30, 2001) at 1 and 9-10 [accession no. ML040060101]; US Tool and Die Inspection Plan [February 4-8, 2002 inspection] at 1 and 5-6 [ML040060132].

loading procedures used at a myriad of reactor sites from which it would be receiving fuel. Furthermore, there are many complex steps in loading and preparing casks for shipment to the ISFSI that, based on past experience, are not error-free. *See e.g.*, Utah Contentions (November 23, 1997) at 68-69. In addition, given PFS's new cask design and the difficulty in fitting the lid on the HI-STORM cask during transfer operations,[10] the reported problems with welding and fabricating Holtec casks,[11] and the unavoidable human accidents that may occur in transferring the canister into the storage cask, there is the potential for the canister to become warped or otherwise damaged. In such cases the canister may no longer fit within a storage or transportation cask and PFS has no means of inspecting, repairing a damaged canister, or transferring its contents into another canister. This is not a remote or speculative possibility because even one "problem" warped or damaged canister out of the potential 4,000 casks to be stored at PFS could create significant harm to humans or the environment.

Third, NRC erroneously assumes that PFS will be able to discover contamination on the canister and be capable of decontaminating the HI-STAR cask. Without a hot cell PFS may only inspect and take smear samples on the shielded part of the canister, *i.e.*, the canister cover. At PFS, the other parts of the canister will remain uninspected. If contamination on

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[10]*See* Late filed contention Utah TT (January 9, 2004).

[11]*See, e.g.*, NRC meeting notice dated Dec. 16, 2002 to discuss, among other items, weldability problems with HI-STORM Multi-purpose Canister lids [accession no. ML023510139]; and July 7, 2003 memorandum from R. Landsman to C. Miller, NRC Decommissioning Branch, expressing concern about Holtec casks used at Dresden in that the "72.48 process was placing more emphasis on cost and schedule than on safety," and gives the appearance of "reduction in rigor in applying the 72.48 process to the [Holtec] FSAR design" [accession no. ML033030306]. *See also* fn. 9.

the canister exceeds Part 71 regulatory limits, then it may not be accepted for return in the transportation system. The result is again a "problem" canister without a mitigation plan. As to external contamination on a transportation cask, at one time HI-STAR technical specifications (TSs) directed that when the cask surface exceeds certain radiation levels, the accessible surface be flushed or pressure washed, and if this does not reduce surface contamination to acceptable levels, other actions need to be performed up to and including removal of the canister from the HI-STAR 100 overpack after removing the spent fuel from the canister. *See e.g.*, 64 Fed. Reg. 48,259, 48,269 (September 3, 1999). The Commission no longer requires this specific action; now HI-STAR TS § 2.2.2 more generally states that contamination be removed within 7 days. However, the former TS is instructive as to the actions required to remove contamination. The EIS does not address the environmental effects of flushing contamination from a cask if indeed it can be done at the PFS site. Conditions relating to fuel unloading certainly cannot be met at PFS's off-site ISFSI and now PFS has not only a "problem" canister but also a "problem" cask too, the environmental effects of which, or the mitigation measures in response to this situation, have not been discussed in the FEIS.

In making a finding of no significant impact (FONSI) for Part 72 rulemaking amendments applicable to both MRSs and ISFSIs, the NRC relied, in part, on NUREG-1092. 53 Fed. Reg. 31,651, 31,657-58 (1998). One of the findings in NUREG-1092 is: "Knowledge of material degradation mechanisms under dry storage conditions and the ability to institute repairs in a reasonable manner without endangering the health of the public shows dry storage options do not significantly impact the environment." NUREG-

1092 at III-2. Obviously, this FONSI finding is inapplicable at the PFS site because PFS has no means to "institute repairs." Nor does the FEIS address the significant environmental effects that may ensue or the remedial measures to be taken because of PFS's inability to inspect and repair the contents of spent nuclear fuel canisters or detect and remove contamination on the canisters. Thus, NRC's compliance with NEPA is deficient.

B. The Cost-Benefit Analysis in the FEIS is Biased, Contains Misleading and Inaccurate Information, and is Insufficient to Allow the Commission to Objectively Evaluate the Proposed Facility.

The EIS is an integral part of the Commission's deliberative process and, while procedural in nature, it forms a vital part of NRC's decisional record, without which the agency's decision would be fundamentally flawed. *See* Black Fox Station, 12 NRC at 275. The NRC's record in this case, however, skews the analysis in favor of the PFS project without an objective or balanced analysis, as required by NEPA, of the overall costs and adverse environmental impacts of the project. It is a record that is insufficient for the Commission to compare the overall environmental costs and benefits of PFS's proposal with those for the no-action alternative or for it to rely on the FEIS cost-benefit analysis.

In FEIS Chapter 8 (Benefits and Costs of the Proposed Action), the Staff supplements economic cost and benefit data provided by PFS (id at 8-1) to arrive at the conclusion:

> From an economic perspective, the net benefit of the proposed PFS [facility] is directly proportional to the quantity of SNF shipped to the facility. The scenarios evaluated by the staff indicate the potential for a net positive benefit past the break-even throughput volume of SNF. As the SNF throughput decreases, the economic benefit decreases.... [C]ases in which the proposed PFS [facility] has a capacity of 10,000 MTU and a throughput of at least 15,500 MTU have a greater likelihood of positive net benefits.

FEIS at 8-11.

The scenarios evaluated by the Staff in the FEIS are based on fuel receipt over a 20 year license term. FEIS at 8-1 and G-422. Notably, however, the storage benefits are allowed to accumulate over a 40 year period. FEIS Tables 8.2 and 8.3; 3rd Round EIS RAI Response (November 22, 2000) at 2 and Enclosure 1.[12] There is no legitimate basis for the Staff's choice of 20 year fuel receipt and 40 year fuel storage. Use of these variant time periods is violative of NEPA and NRC regulations. It biases the Staff's breakeven analysis, and the premature start of operations further biases the benefits in favor of the PFS project.

NRC explicitly recognizes that "a final environmental impact statement on the issuance of an initial license for the storage of spent fuel at an independent spent fuel storage installation (ISFSI) or any amendment thereto, will address **environmental impacts of spent fuel storage only for the term of the license** . . . applied for." 10 C.F.R. § 51.97 (*emphasis added*). The license term for an MRS is for 40 years. 10 C.F.R. § 72.42. Unlike an MRS, the license term for an ISFSI is 20 years. Id. The FEIS for the initial licensing of the PFS ISFSI is, therefore, limited to the license term of 20 years. In response to Utah's comments on the Staff's cost-benefit analysis in the DEIS, the Staff changed the fuel receipt period used in the DEIS from 40 years to 20 years but, as it had done in the DEIS, it continued in the FEIS to use the improper fuel storage period of 40 years. The Staff thereby allowed benefits from the proposed project to accumulate twice as long as under a 20 year license. This obviously skews the analysis in the FEIS heavily in favor of the proposed

[12]In RAI Response Enclosure 1, PFS provides revised cost-benefit analyses based on fuel receipt for an initial 20 year license term; all cost-benefit scenarios presented in Enclosure 1, however, are based on 40 years of operations. In previous cost-benefit analyses, PFS assumed it could accept fuel over a 40 year term. Enclosure 1 at 1. The DEIS, relying on PFS's cost-benefit data, uses a 40 year period for both fuel receipt and fuel storage. DEIS Ch. 8; FEIS at G-422.

project and makes the analysis meaningless to the Commission as an objective reflection of the costs and benefits of PFS's proposal.

Another change from the DEIS is to move the start of PFS operations date from 2002 to mid-2003. At the time the FEIS was issued, it was obvious that, at best, the date of first fuel receipt was about 15 months later. Contention Utah SS, Exhibit 1 at ¶ 13. Another factor affecting the cost-benefit analysis for the PFS ISFSI is the Staff's choice in some of its FEIS scenarios of using 2010 (not 2015)[13] as the permanent repository opening date.

Aware that NRC adjudicatory proceedings and Commission appeals are not editing sessions, CLI-04-04, slip op. at 9, the State's appeal is that the Commission should not rely on misleading information contained in the FEIS for the economic benefits of a project. The Commission should not accept the inaccuracies in the FEIS as representing a slight reduction in the potential net positive benefits of the proposal. The inaccuracies in the FEIS totally and unrealistically skew those benefits in favor of the PFS proposal such that the Commission's reliance on this FEIS could skew the agency's overall assessment of the project's costs and benefits, favoring a project that should not otherwise be licensed. Claiborne, 47 NRC at 89. It is apparent that all of the cost-benefit scenarios presented in FEIS Tables 8.2 and 8.3 are infeasible even when using assumptions such as the legally required 20 year period for both fuel receipt and fuel storage, a start of PFS operations by summer 2004,[14] the availability of permanent repository by 2015, and the same assumptions

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[13]PFS's cost-benefit analysis is based on repository availability by 2015. FEIS at 8-2.

[14]Of course, this start of operations date is no longer feasible because PFS will not be licensed by that date. Even if PFS commenced construction immediately after obtaining a license and there were no construction delays, it would not become operational until at least 22 months later. The Commission should take into account these changed circumstances

that PFS's consultants used for rate of PFS fuel handling[15] and repository receipt rates. In presenting Contention Utah SS for admission, and using the foregoing assumptions, the State showed that it is impossible in a single 20 year license term to remove the 27,000 MTU throughput specified in Table 8.2 scenarios I and II, much less the 38,000 MTU throughput in scenarios III and IV.

The Staff's use of invalid throughputs at PFS further biases the FEIS in favor of the proposed project. There were insufficient data available to the State to permit a numerical recalculation of the net benefits of a true 20-year license term. In support of Utah SS, however, the State's expert was able to show that some or all of the figures presented in FEIS Chapter 8 would be substantially negative. For example, where the FEIS (at 8-10) says there will be net positive benefits from the project at a throughput of 15,500 MTU (10,000 MTU capacity) if a permanent repository opens in 2015, there is a 42% shortfall in the breakeven figure if receipt and storage are limited to 20 years (plus an additional 2 years of outbound shipments during decommissioning). Contention Utah SS, Exhibit 1 at 8.

The shortfall in the FEIS break-even capacity is significantly greater when using a reasonable start of operations date,[16] an annual shipment rate of 1,500 MTU or 1,000 MTU,

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since the publication of the FEIS in weighing the overall costs and benefits of the PFS ISFSI.

[15]In PFS's cost-benefit analysis, its consultant used 2,000 MTU as the annual rate for inbound/outbound shipments. However, this fuel handling capacity is premised on PFS having sufficient locomotive capacity for shipping SNF to or from its facility. Whether PFS will acquire sufficient locomotive capacity to handle 2,000 MTU annually depends on the number of customers it attracts to its facility. Tr. (Parkyn) at 2134-35. Moreover, the FEIS projects average annual shipment rates at 1,500 MTU. FEIS at 2-19. Thus, the fuel handling rate could be as low as 1,000 MTU per year for most (or all) of the initial license term.

[16]This date is now, at the earliest, in the latter part of 2006.

and re-evaluating the assumption that PFS will have a priority to allow it to consume 43% of the repository's receipt rate.[17] The Staff's starting premise in the FEIS of break-even throughput volume of SNF is invalid and legally deficient. Its conclusions of likely potential net benefits flowing from that premise (FEIS at 8-11) are likewise invalid, not based on objective data, and are legally deficient to comply with NEPA.

In sum, the assumptions upon which FEIS Chapter 8 is bottomed are inaccurate and misleading, and the legally deficient document constitutes NRC's final NEPA record. Rather than comply with NEPA to the fullest extent possible, the information and assumptions the Staff has presented in Chapter 8 are not even-handed or consistent but are arbitrarily biased in favor of the PFS proposal. As such, the FEIS offers an insufficient and arbitrary basis for the Commission to independently and objectively evaluate the economic costs and benefits of constructing and operating the proposed PFS facility. Accordingly, the Commission should allow the State to litigate this issue or, in the alternative, conduct a more thorough, rigorous, and disciplined cost-benefit analysis based on legally supportable and even-handed assumptions. Because of the significant deficiencies in Chapter 8, any supplemental analyses should be recirculated and be subject to public comment.[18] The fact

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[17]In fact, PFS has admitted that it has no control over the rate and timing that fuel from PFS would be shipped to a repository. Tr. (Parkyn) at 2080-82.

[18]In Long Island Lighting Co (Jamesport Nuclear Power Station, Units 1 and 2, LBP-77-21, 5 NRC 684 (1977), for example, the Board decided that rather than directing the Staff to prepare and circulate a supplement to its EIS, it would call its own witness for examination of critical EPA comments on deficiencies of the EIS that affect the cost benefit analysis. 5 NRC at 689-90. However, in Kerr-McGee Chemical Corp. (West Chicago Rare Earths Facility), LBP-85-3, 21 NRC 244, 255-56 (1985), the Board found it necessary for the Staff to first supplement an EIS that omits broad areas of environmental impact prior to going forward with hearing in order to apprise the public of the nature and consequences of the proposed action. The PFS NEPA adjudicatory proceeding has ended and the significant

that a significantly negative economic impact analysis will not change the Commission's mind does not satisfy NEPA. Commonwealth of Massachusetts v. Watt, 716 F.2d 946, 951 (1st Cir. 1983) ("in some instances, the statement may change a mind that previously thought itself unchangeable; in other instances the statement will simply allow the public to judge more fully the merits of the decision that was made").

C. The FEIS, Which Does Not Objectively or Accurately Compare the Overall Environmental Costs and Benefits of PFS's Proposal, Should Be Supplemented and Subject to Recirculation and Public Comment.

The economic cost-benefit analysis is not the end of the Commission's consideration. There are other costs and benefits that should inform the Commission's final licensing decision. However, for the Commission to rely on the FEIS, that document must adhere to the Commission's caution in Claiborne that "[i]f important factors cannot be quantified, they may be discussed qualitatively." 47 NRC at 88. This the FEIS has failed to do as the following examples demonstrate.

Chapter 8 of the FEIS features socioeconomic benefits of the proposed action but it does not discuss socioeconomic costs. FEIS at § 8.2. One such cost is the schism the PFS project has caused amongst tribal members. The FEIS only acknowledges benefits. For example, it says the Band would benefit financially as the lessee of its land to PFS but it fails to discuss socioeconomic costs associated with that transaction.[19] In this case the FEIS does

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negative change in the outcome of the cost benefit analysis is such that it should be formally supplemented.

[19]Recently, allegations have come to light against Leon Bear and his administration of criminal misconduct, financial corruption, and withholding funds to those members who do not support the PFS project. *See* OGD's Motion to Reopen the Record on OGD Contention O (January 29, 2004).

not fairly evaluate the overall benefits to the Band as a whole and instead focuses on the socioeconomic benefits to a limited subgroup. *See e.g.*, CLI-02-20, 56 NRC 147 (2002).

Also, while the FEIS mentions exposure to the public along the transportation route of "a very small, incremental amount of radiation," it fails to give even passing reference to the significant public resources PFS would need to call upon in the case of a transportation emergency or hint of a terrorist threat to its SNF shipments. NRC and PFS would expect these resources to be supplied by state and local responders. *See* NRC's "realism doctrine" codified at 10 C.F.R. § 50.47(c)(1)(iii); *see also* Long Island Lighting Co. (Shoreham Nuclear Power Station Unit 1), CLI-87-5, 25 NRC 884, 888 (1987); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-89-32, 30 NRC 375, 525 (1989).

In addition, FEIS § 8.3, Other Societal Benefits and Costs, contains a statement that the existence of PFS would provide alternative SNF storage such that reactors would not have to prematurely shut down for lack of storage capacity. This statement, however, needs to be modified based on published reports that NRC now considers more spent fuel can be stored in at-reactor storage pools than previous NRC studies had contemplated, and an industry spokesperson has gone so far as to say that dry cask storage may no longer be necessary.[20]

As can be seen from these examples, and from the misleading cost-benefit analysis discussed in Part B, *supra*, the FEIS has a strong and unsupportable bias towards the PFS

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[20] *See* Associated Press (John Heilprin) article reported in the Miami Herald, February 12, 2004 and Las Vegas Review-Journal, February 18, 2004, quoting NRC's Farouk Eltawila that "previous NRC studies are overly conservative" and do not "take advantage of all the work that we have done the past 25 years," and also quoting John Vincent, Nuclear Energy Institute, that "[n]ot only does [dry cask storage] cost too much, it's not necessary."

project such that its discussion of overall costs and benefits associated with the PFS project should be redone. As it now stands, the FEIS does not provide an objective record from which the Commission can base its licensing decision. An objective cost-benefit analysis is also essential to address the differing needs of the other agencies cooperating in the preparation of this EIS (*i.e.*, BLM, BIA and STB). FEIS at 1-15.[21] Accordingly, recirculation of the FEIS, as supplemented to correct the deficiencies in Chapter 8, is needed to give the public the opportunity to comment and also to inform the other cooperating agencies of the objective overall costs and benefits of the project. *See e.g.*, Brooks v. Volpe, 350 F. Supp. 269 (W.D. Wash. 1972) (FEIS inadequate when it suffers from a serious lack of detail and relies on conclusions and assumption without reference to supporting objective data).

There are also policy reasons in support of overall costs outweighing overall benefits of the PFS project. In Claiborne, for example, the Commission turned to congressional and NRC policy statements and objectives to buttress the benefits of the enrichment facility at issue in that case. 47 NRC at 95-96. Here no comparable policy claims can be made. The Nuclear Waste Policy Act (NWPA) represents Congress' comprehensive statement on the storage and disposal of spent nuclear fuel. *See e.g.*, 128 Cong. Rec. 27,779, 32,556, 32,560-63 (1982). NWPA, Subpart B addresses interim storage of spent nuclear fuel; it evidences a strong congressional preference for at-reactor SNF storage and development of technology for onsite storage. 42 U.S.C. §§ 10153-10155. Importantly, the NWPA sought to minimize the transportation of spent fuel. Id. § 10155(a)(3). Congressional floor debates also reflected members' concern with cross country transportation of SNF. *See e.g.*, 128 Cong.

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[21]For example, BLM will consider the social and economic impacts to local communities as a result of granting PFS a right-of-way over public lands. FEIS at 1-17.

Reg. 28,033-34. There is, therefore, a strong congressional signal as to its preference for onsite storage and for minimizing spent fuel transportation. This policy, too, may also be reflected in NRC's latest pronouncement on the additional storage available in at-reactor spent fuel pools. The State respectfully suggests that these national policies bear on the potential costs of the PFS proposal and the favorable evaluation of the no action alternative.

CONCLUSION

NEPA directs all Federal agencies to comply with its requirements "to the fullest extent possible." 42 U.S.C. § 4332. The FEIS evinces such a strong and unsupportable bias in favor of the PFS project that the decisional record in this proceeding violates NEPA and NRC regulations. The State requests the Commission rule in its favor and either allow it to litigate these issues or have the agency conduct a more thorough, rigorous, and disciplined NEPA analysis and publish those results in a supplement to the FEIS that is subject to recirculation and public comment.

DATED this 26th day of February, 2004.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of STATE OF UTAH'S BRIEF ON THE COMMISSION'S REVIEW OF CONTENTIONS UTAH U BASIS 2, AND UTAH CC AND UTAH SS was served on the persons listed below by electronic mail (unless otherwise noted) with conforming copies by United States mail first class, this 26th day of February, 2004:

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