

March 14, 2005

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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

NRC STAFF'S COMMENTS ON WHETHER THE
ATOMIC SAFETY AND LICENSING BOARD'S FINAL
PARTIAL INITIAL DECISION OF FEBRUARY 24, 2005
SHOULD BECOME IMMEDIATELY EFFECTIVE

INTRODUCTION

On February 28, 2005, the Commission issued an Order directing the parties "to file comments with the Commission on whether it should direct issuance of an immediately effective license under section 2.764(c)." *Id.* at 1. In accordance with the Commission's Order, the NRC Staff ("Staff") herewith provides its views as to whether a license should now be issued in this proceeding.

BACKGROUND

This proceeding concerns the application by Private Fuel Storage, L.L.C. ("PFS" or "Applicant") PFS for a license to construct and operate an independent spent fuel storage installation ("ISFSI") on the Reservation of the Skull Valley Band of Goshute Indians ("Skull Valley Band"), located in Skull Valley, Utah. The proceeding commenced upon publication in the Federal Register of a notice of opportunity for hearing in July 1997.¹ Various individuals and entities filed petitions to intervene in the proceeding, including the Skull Valley Band and the State of Utah

¹ See "Private Fuel Storage, [L.L.C.]; Notice of Consideration of Issuance of a Materials License for the Storage of Spent Fuel and Notice of Opportunity for a Hearing," 62 Fed. Reg. 41099 (July 31, 1997).

("State"). The Licensing Board granted six petitions to intervene, finding that those petitioners had filed at least one admissible contention.

During the course of the proceeding, approximately 160 contentions or modifications thereof were filed by petitioners and intervenors, including some 68 contentions or modifications thereof filed by the State of Utah. In the past seven years, each of those contentions or modifications thereof were duly considered and ruled upon by the Licensing Board, in a series of rulings in favor of PFS. In addition, the Commission, itself, has reviewed and affirmed the Board's rulings on virtually all of those contentions.² Indeed, following the Commission's rulings in 2004 on the Intervenor's petitions for review of the Board's previous interlocutory decisions, only two decisions were issued by the Board which have not yet been reviewed by the Commission – the Licensing Board's issuance on February 24, 2005, of (a) LBP-05-05, rejecting Contention Utah UU (DOE acceptance of canistered spent fuel from PFS),³ and (b) the Board's Final PID, resolving Contention Utah K/Confederated Tribes F (credible accidents– aircraft crash consequences) in favor of PFS.⁴

² See, e.g., (1) *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-04-04, 59 NRC 31 (2004); (2) *PFS*, CLI-04-22, 59 NRC 125 (2004); (3) *PFS*, CLI-04-10, unpublished (March 24, 2004); (4) *PFS*, CLI-03-08, 58 NRC 11 (2003); (5) *PFS*, CLI-02-29, 56 NRC 390 (2002); (6) *PFS*, CLI-02-25, 56 NRC 340 (2002); (7) *PFS*, CLI-02-20, 56 NRC 147 (2002); and (8) *PFS*, CLI-00-13, 52 NRC 23 (2000). The Commission has deferred action on only one matter, involving the Applicant's and Staff's petitions for review of the Board's decision on aircraft crash probability issues. See *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-03-05, 57 NRC 279 (2003).

³ *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-05-05, 61 NRC ____ (Feb. 24, 2005) ("Memorandum and Order (Ruling on State of Utah's Recently-Filed Contention UU").

⁴ See *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), "Final Partial Initial Decision (Regarding F-16 Aircraft Accident Consequences)," dated February 24, 2005.

DISCUSSION

As set forth above, the Commission has already considered and resolved almost all of the numerous environmental and safety issues that were raised in this lengthy proceeding. In each instance, the Commission found that the contention properly should be, or was, decided in favor of issuance of a license to PFS. Thus, with respect to those issues, there is no reason why a license should not be issued at this time authorizing the construction and operation of this proposed away-from-reactor ISFSI. Similarly, all non-contested matters pertaining to the environmental impacts and safety of the proposed facility were considered by the Staff and resolved in favor of license issuance.⁵ Only two matters remain for consideration by the Commission, *i.e.*, the Board's two decisions of February 24, 2005. A review of those two decisions leads the Staff to conclude that those decisions were correct, and no reason appears why an immediately effective license should not be issued to PFS at this time.

The Commission's regulations establish that an initial decision authorizing issuance of a license for construction and operation of an away-from-reactor ISFSI may "shall become effective only upon order of the Commission." 10 C.F.R. § 2.764(c). Further, the Director of the Office of Nuclear Material Safety and Safeguards ("NMSS") may not issue such a license "until expressly authorized to do so by the Commission." *Id.* The regulations do not specify the criteria which will be considered by the Commission in determining whether to allow such a decision to become immediately effective; however, pertinent guidance may be found in the criteria set forth in 10 C.F.R. § 2.764(e), applicable to consideration as whether an initial decision authorizing issuance of an operating reactor license under 10 C.F.R. Part 50 should become immediately effective.

⁵ See (1) "Final Environmental Impact Statement for the Construction and Operation of an [ISFSI] on the Reservation of the Skull Valley Band of Goshute Indians and the Related Transportation Facility in Tooele County, Utah," NUREG-1714 ("FEIS"), dated December 2001 (Staff Exh. E); and (2) "Consolidated Safety Evaluation Report Concerning the Private Fuel Storage Facility" ("SER"), dated March 2002 (Staff Exh. C).

In this regard, the regulations clearly establish that an initial decision authorizing the construction of a nuclear power reactor shall not become immediately effective until the Commission has considered whether the decision should be stayed. See 10 C.F.R. § 2.764(a) and (e)(2). With respect to decisions authorizing reactor operation at levels above five percent rated power,⁶ the regulations establish that the Commission will determine whether the effectiveness of the decision should be stayed, giving due consideration to the public interest; the Commission will stay any such decision “if it determines it is in the public interest to do so, based on a consideration of the gravity of the substantive issue, the likelihood that it has been resolved incorrectly below, the degree to which correct resolution of the issue would be prejudiced by operation pending review, and other relevant public interest factors.” 10 C.F.R. § 2.764(f)(2)(i).⁷

An application of these criteria to the issues considered in LBP-05-05 and the Board’s Final PID supports the issuance of a license at this time.

⁶ In contrast, decisions authorizing reactor operations at power levels up to five percent of rated power, or construction and operation of an ISFSI at a reactor site, are immediately effective unless a party shows “good cause” to the contrary. 10 C.F.R. § 2.764(a).

⁷ These criteria may be compared to the criteria governing considerations of a requests for a stay, set forth in (former) 10 C.F.R. § 2.788. As set forth therein, in determining whether to grant a stay request, the Commission shall consider:

- (1) Whether the moving party has made a strong showing that it is likely to prevail on the merits;
- (2) Whether the party will be irreparably injured unless a stay is granted;
- (3) Whether the granting of a stay would harm other parties; and
- (4) Where the public interest lies.

Accord, 10 C.F.R. § 2.7342.

1. The Issues Considered in LBP-05-05 (Contention Utah UU).

In LBP-05-05, the Licensing Board rejected late-filed Contention Utah UU, which had asserted that the U.S. Department of Energy (“DOE”) will not accept spent nuclear fuel (“SNF”) in welded canisters from PFS.⁸ The Board rejected this contention on the grounds that it lacked adequate factual basis. LBP-05-05, slip op. at 2. The Licensing Board’s decision provides a clear statement of the reasons supporting its decision to reject the contention. In the Staff’s view, the Board’s decision is entirely correct, for the reasons stated in the Staff’s response to the contention.⁹ Accordingly, the Staff believes that the Licensing Board’s issuance of LBP-05-05 does not warrant delaying the issuance of an immediately effective license.

2. The Aircraft Crash Consequence Issues Considered in the Board’s Final PID.

In its Final PID, the Licensing Board considered and resolved the remaining issues raised in Contention Utah K/ Confederated Tribes B, pertaining to the risk of an accidental F-16 aircraft crash or ordnance impact at the proposed PFS site. The Staff performed an exhaustive review and analysis of the issues raised in this contention, with technical assistance from experts at Sandia National Laboratories and the Oak Ridge National Laboratory, and presented its analyses and conclusions in testimony before the Licensing Board. The Staff is satisfied that the Board’s decision resolving this contention, amply supported by the record, was entirely correct for reasons set forth at length in the Staff’s proposed findings of fact and conclusions of law concerning this matter.¹⁰

⁸ Contention Utah UU was filed on November 12, 2004, some seven years after the commencement of this proceeding, based on informal remarks reportedly made by Gary Lanthrum, a DOE transportation official.

⁹ See “NRC Staff’s Response to ‘State of Utah’s Request for Admission of Late-Filed Contention Utah UU (Ramifications of DOE’s Refusal to Accept Fuel in Welded Canisters From the PFS Site) or in the Alternative Petition For Rulemaking,’” dated December 10, 2004. As set forth therein, the Staff believes that contention was impermissibly late and lacked adequate basis.

¹⁰ See (1) “NRC Staff’s Proposed Findings of Fact and Conclusions of Law Concerning Contention Utah K/Confederated Tribes B (Credible Accidents) (F-16 Aircraft and Ordnance Impact (continued...)

Further, the Licensing Board's decision reflects the existence of substantial conservatisms in the Applicant's and Staff's analyses, which provide additional confidence in the outcome reached by the Board majority. Based on its review of the record and the Board's decision concerning this matter, the Staff is not aware of any reason why the Board's decision resolving this contention and authorizing the issuance of a license should not become immediately effective.¹¹

3. The Public Interest and Other Considerations.

Further, the Staff submits that issuance of an immediately effective license to PFS will not result in any harm to the public interest, nor will it prejudice the rights of any party. Upon issuance of a license, PFS will need to secure the approval of two other Federal agencies prior to being allowed to commence construction: the Bureau of Indian Affairs ("BIA") must grant final approval of the lease between PFS and the Skull Valley Band; and the Bureau of Land Management ("BLM") must amend the resource management plan for Skull Valley, to grant PFS's request for a right-of-way in which to construct a 32-mile rail line through Skull Valley over BLM-managed land. See FEIS at 1-16 – 1-18. In addition, the Commission has approved the imposition of conditions on the

¹⁰(...continued)

Consequences," dated October 28, 2004; and (2) "NRC Staff's Reply Findings of Fact and Conclusions of Law Concerning Contention Utah K/Confederated Tribes B (Credible Accidents) (F-16 Aircraft and Ordnance Impact Consequences," dated November 19, 2004.

¹¹ On March 7, 2005, the State filed, before the Licensing Board, the "State of Utah's Motion for Reconsideration of Final [PID] Regarding Aircraft Crash Consequences" ("Motion"). The Staff has reviewed the State's Motion and has concluded that it fails to demonstrate the existence of any error in the Board's decision that would warrant reconsideration thereof. The Staff's views concerning this matter will be set forth in its response to the motion, to be filed on March 21, 2005; the Staff notes that in the event that the Commission authorizes the issuance of a license, the Staff will ensure that the license incorporates the Applicant's proposed cask modifications cited by the State in its Motion, at 8-9.

license, requiring PFS to secure customer agreements to use its facility before it may commence construction, thus providing the financial assurance required in 10 C.F.R. Part 72.¹²

The need for these actions to be taken prior to the commencement of construction provide substantial assurance that construction of the proposed facility will not commence until 2006, and the proposed facility would not commence operations until approximately 18 months thereafter.¹³ Thus, neither construction nor operation is likely to commence prior to completion of the Commission's review of LBP-05-05 and the Licensing Board's Final PID. Accordingly, issuance of a license at this time will not result in any harm to the public and will not prejudice the rights of any party, pending Commission review of the Board's decisions.¹⁴

Moreover, the Staff submits that the public interest favors the issuance of a license at this time. The Commission has previously observed that this proceeding "has dragged on for a number of years," and "the time has now come to make every effort to bring the proceeding to closure soon and to decide whether to issue a license or not." *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-03-16, 58 NRC 360 (2003), *quoting PFS*, CLI-03-5, 57 NRC 279, 285 (2003).¹⁵ Issuance of a license would permit PFS to take the necessary steps of securing the

¹² See, e.g., *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-00-13, 52 NRC 23 (2000).

¹³ See "Declaration of John D. Parkyn" ("Parkyn Declaration") at ¶¶ 14-15, attached to "Applicant's Comments Supporting Issuance of an Immediately Effective License," dated March 14, 2005.

¹⁴ In addition, it should be noted that construction of the proposed facility is projected to take a substantial period of time – and even after construction is completed, it will be many years before the facility reaches the full 4,000-cask capacity which was considered by the Licensing Board in its probability calculations. See, e.g., *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-03-4, 57 NRC 69, 120, 214-15 (2003).

¹⁵ In CLI-03-16, the Commission directed the filing of appeals from any interlocutory decisions by the Licensing Board, noting that it had previously expressed "its strong interest in expediting this case," and that by directing the early filing of appeals from the Board's interlocutory orders, the Commission "can do its part to speed this proceeding to its resolution." *Id.*, 58 NRC at 361.

requisite BIA and BLM approvals, and will permit it to commence the solicitation of commitments from potential customers. See Parkyn Declaration, ¶¶ 6-7. Accordingly, the Staff believes that issuance of a license at this time would be in the public interest, consistent with the Commission's observations in CLI-03-16.

CONCLUSION

For the reasons stated above, the Staff respectfully submits that the Licensing Board's decision should be allowed to become immediately effective, and the Commission should authorize the issuance of a license at this time.

Respectfully submitted,

/RA/

Sherwin E. Turk
Counsel for NRC Staff

Dated at Rockville, Maryland
this 14th day of March, 2005

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S COMMENTS ON WHETHER THE ATOMIC SAFETY AND LICENSING BOARD'S FINAL PARTIAL INITIAL DECISION OF FEBRUARY 24, 2005 SHOULD BECOME IMMEDIATELY EFFECTIVE" 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 14th day of March, 2005:

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