

May 23, 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 RESPONSE TO "STATE OF UTAH'S  
PETITION FOR REVIEW OF BOARD'S PROPOSED REDACTIONS TO  
EVIDENTIARY RECORD AND DECISIONAL MATERIAL RELATING TO  
PRIVATE FUEL STORAGE'S CLAIMED PROPRIETARY INFORMATION"

INTRODUCTION

Pursuant to 10 C.F.R. § 2.786(b)(3), the NRC Staff ("Staff") hereby responds to the "State of Utah's Petition for Review of Board's Proposed Redactions to Evidentiary Record and Decisional Material Relating to Private Fuel Storage's Claimed Proprietary Information" ("Petition"), dated May 12, 2005. Therein, the State of Utah ("State") requests that the Commission review the Atomic Safety and Licensing Board's "Memorandum and Order (Proposed Redactions and Paragraph Numbering Correction)" of April 25, 2005 ("Order"), in which the Licensing Board issued its proposed redactions to six previous decisions<sup>1</sup> and various evidentiary materials in this proceeding,

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<sup>1</sup> In its Order of April 25, 2005, the Licensing Board proposed redactions to its prior decisions in (1) *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), "Partial Initial Decision (Contention Utah E/Confederated Tribes F, Financial Assurance), dated May 27, 2003; (2) *PFS*, "Memorandum and Order (Rulings on Summary Disposition Motion and Other Filings Relating to Remand from CLI-00-13)," dated May 27, 2003; (3) *PFS*, "Partial Initial Decision (Contention Utah S)," dated May 27, 2003; (4) *PFS*, "Memorandum and Order (Granting in Part and Denying in Part Motion for Reconsideration and/or Clarification of Financial Qualifications Decisions)," dated January 5, 2004; (5) *PFS*, "Memorandum and Order (Disclosure/Redaction of Evidentiary and Decisional Materials Relating to Contentions Utah E/Confederated Tribes F and Utah S; Adopting Transcript Corrections Relating to Contentions Utah E/Confederated Tribes F and Utah S)," dated March 31, 2004; and (6) *PFS*, "Memorandum and Order (Forwarding Cross-Examination Plans)," dated March 31, 2004.

concerning the financial qualifications and decommissioning funding assurance provided by Applicant Private Fuel Storage, L.L.C. (“PFS” or “Applicant”).

For the reasons set forth below, the Staff respectfully submits that the State has not shown that review of the Licensing Board’s decision is warranted under 10 C.F.R. § 2.786(b)(4). Nonetheless, the Staff does not oppose the State’s assertion that certain proposed redactions should be set aside because the redacted material has elsewhere been disclosed to the public, and recommends that this limited issue be remanded to the Licensing Board for consideration; in all other respects, the Staff opposes the State’s Petition and recommends that it be denied.

#### DISCUSSION

Both the Licensing Board and the Commission have afforded substantial consideration of the Applicant’s request for redaction of proprietary financial information from the evidentiary record and adjudicatory decisions of this proceeding, as well as the State’s request for public disclosure of such information. This effort has consumed considerable attention and resources during the past two years. On January 5, 2005, following a full year of litigation of this issue, the Commission issued CLI-05-01,<sup>2</sup> in which it ruled upon the permissible scope of any proposed redactions and established a procedure for further actions in this regard by the parties and the Licensing Board.

Specifically, in CLI-05-01, the Commission directed PFS to conform its proposed redactions to the rulings set forth therein, and to forward its proposed redactions to the Board; further, the Commission instructed the Licensing Board to review PFS’s proposed redactions and to adopt them in its decisions except to the extent the Board deemed it necessary to modify the proposed redactions to be consistent with the Commission’s rulings in CLI-05-01; thereafter, the parties would be afforded an opportunity to file petitions for Commission review of the Board’s final redactions. CLI-05-01, slip op. at 36-37.

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<sup>2</sup> See *Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation)*, CLI-05-01, slip op. (Jan. 5, 2005).

In accordance with the Commission's instructions, on March 7, 2005, the Applicant filed its proposed redactions of the Licensing Board's decisions;<sup>3</sup> and on April 25, 2005, the Licensing Board issued its Order, adopting the Applicant's proposed redactions with certain limited modifications. The State then filed the instant petition for review.

In its Petition, the State asserts that certain redactions should be set aside on the grounds that (a) the redacted material has been disclosed to the public in other Licensing Board or Commission decisions, Petition at 3, 4-5, Appendix, *passim*; (b) the Licensing Board redacted certain assertions by the State, while disclosing responses by PFS or the Staff to those assertions, *Id.* at 3-4, 6; (c) certain redactions lack sufficient basis, *Id.* at 6-7; and (d) certain other redactions have a misleading effect, *Id.* at 7-8. The State has failed to demonstrate, however, that Commission review of the Licensing Board's decision is warranted.

Pursuant to 10 C.F.R. § 2.786(b)(4), Commission consideration of a petition for review is undertaken in accordance with the following principles:

(4) The petition for review may be granted in the discretion of the Commission, giving due weight to the existence of a substantial question with respect to the following 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); emphasis added. See generally, *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-04-04, 59 NRC 31, 35-36 (2004).

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<sup>3</sup> See "Applicant's Redaction of the Financial Assurance Evidentiary Record and Licensing Board Decisions," dated March 7, 2005.

Significantly, nowhere in its Petition does the State address the standards set forth in 10 C.F.R. § 2.786(b)(4). Further, while the State asserts that certain (unspecified) redactions by the Licensing Board constitute reversible error, Petition at 3, it fails to make clear which of the redactions cited in its Petition it believes are so significant as to warrant reversal of the Board's decision. In the Staff's view, none of the redactions cited by the State – even assuming the State is correct in claiming that they constitute error – represent an error with respect to a substantive matter so significant as to warrant Commission review of the Board's decision, particularly in light of the substantial amount of information which the Commission and Licensing Board have now ruled should be disclosed. Accordingly, the State has not sustained its burden of showing that the Commission should exercise its discretion to undertake review of the Board's decision.

Nonetheless, the Staff agrees with the State's assertion that matters which have already been disclosed in Commission or Licensing Board decisions should not be redacted now. However, given the Licensing Board's familiarity with its redactions, the Staff suggests that the State's assertions concerning matters that were disclosed elsewhere should be remanded to the Board for further consideration prior to issuance of its final decision in this matter.

#### CONCLUSION

For the reasons stated above, the Staff respectfully submits that the State has not shown that Commission review of the Licensing Board's decision is warranted. Nonetheless, to the extent that the State asserts that certain redacted information has been disclosed, the Staff suggests that those assertions should be remanded to the Licensing Board for further consideration.

Respectfully submitted,

*/RA/*

Sherwin E. Turk  
Counsel for NRC Staff

Dated at Rockville, Maryland  
this 23<sup>rd</sup> day of May, 2005

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S RESPONSE TO 'STATE OF UTAH'S PETITION FOR REVIEW OF BOARD'S PROPOSED REDACTIONS TO EVIDENTIARY RECORD AND DECISIONAL MATERIAL RELATING TO PRIVATE FUEL STORAGE'S CLAIMED PROPRIETARY INFORMATION,'" 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 23<sup>rd</sup> day of May, 2005:

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