

September 27, 2013

Mr. Robert M. Palmberg
Chairman of the Board
Private Fuel Storage, LLC
3200 East Avenue South
La Crosse, WI 54601

Dear Mr. Palmberg:

By letter dated March 8, 2013, and April 8, 2013, Private Fuel Storage (PFS) requested a fee exemption under *Title 10 of the Code of Federal Regulations* (10 CFR), Part 171, Section 11(b) based on public interest considerations. PFS requested the Nuclear Regulatory Commission (NRC) provide a complete exemption from all annual fees retroactive to January 1, 2013. PFS maintains that granting an exemption serves the public interest by preserving diverse interim storage options for high-level radioactive waste (until a permanent disposal is implemented by the U.S. Government). As an alternative, PFS requests that the NRC reduce the amount of the annual fees (10 CFR Part 171) to the amount available to licensees who qualify for small entity status, retroactive to January 1, 2013. Additionally, PFS believes it is due a refund for hourly fees assessed in fiscal year (FY) 2013 under 10 CFR Part 170. PFS also requests that any exemption granted by the NRC be applied to all subsequent fiscal years.

NRC regulations at 10 C.F.R. Part 171.11(b) provide in pertinent part:

The Commission may, upon application by an interested person or on its own initiative, grant an exemption from the requirements of this part that it determines is authorized by law or otherwise in the public interest.

In an October 9, 2012, letter responding to PFS's prior request for an exemption, the NRC stated that the Department of the Interior's (DOI) denial of the required lease and right of path necessary to construct the PFS facility has no bearing on the safety and security of nuclear materials. Accordingly, the NRC determined that these facts were not sufficient to justify granting PFS a public interest exemption from required NRC fees (ADAMS Accession No. ML12279A064). Upon consideration and review of PFS' new request, the NRC believes its October 9, 2012, decision was too limited. As discussed below, the determination of what constitutes grounds for a "public interest" exemption from fees is not limited solely to factors affecting public health and safety. It can also encompass the basic concepts of fairness and equity that underlie the NRC's fee structure. Accordingly, the NRC concludes that PFS *should* be granted a full exemption of annual fees for FY 2013.

The statute that authorizes the NRC to collect fees, the Omnibus Budget Reconciliation Act of 1990, requires the NRC to equitably recover the costs of providing regulatory services.

Furthermore, longstanding NRC fee policy dictates that fees assessed to licensees should—to the maximum extent practicable—reflect the actual costs that the NRC incurs when providing regulatory services. Implicit in this policy is the expectation that annual fees should be based on basic notions of fairness and equity.¹

PFS argues that it is entitled to a fee exemption because it has been unable to derive any use from its license through no fault of its own. Specifically, PFS is unable to obtain the necessary permits from the DOI required to utilize the NRC license. PFS has made a concerted effort to obtain those permits, including successful Federal court litigation. PFS brought suit against DOI in the United States District Court for the District of Utah. In 2010, the Court concluded that DOI's decision to deny PFS the required permits was arbitrary and capricious, and an abuse of discretion. The Court vacated the DOI determinations and remanded the disputed matters back to DOI for reconsideration. As of today, PFS has not received the required permits from DOI. See *Skull Valley Band of Goshute Indians v. Davis*, 728 F.Supp.2d 1287 (D. Utah 2010).

PFS' situation represents a unique set of facts. The NRC agrees that PFS is unable to use or to derive any benefit from its NRC license through no fault of its own. Basic concepts of fairness and equity suggest that under these circumstances, it is in the public interest to grant a fee exemption to PFS for FY 2013. Accordingly, the NRC has determined that PFS will be granted a full exemption for all Part 171 annual fees owed in FY 2013.

The NRC calculates PFS' full exemption for FY 2013 annual fees to be \$231,000.00. PFS has already paid \$48,505.23 in annual fees for FY 2013; therefore, this amount will be refunded to PFS. The PFS remaining annual fee balance of \$182,494.77 plus interest, penalty, and administrative charges, totaling \$1,723.39 for FY 2013, will be waived for PFS by the NRC.

PFS also argues that it is in the public interest to preserve PFS as a viable interim storage option for long-term disposal of spent nuclear waste. The NRC has determined that PFS is entitled to a fee exemption on other grounds. Therefore, it is not necessary, and the NRC does not now, make a determination on PFS's claim that maintaining its facility as a viable interim storage option for long-term disposal of spent nuclear waste is in the public interest. Alternatively, PFS argues that it should be treated as a small entity for purposes of calculating 10 CFR Part 171 annual fees. The NRC has reviewed PFS' request and concludes that granting a full exemption of FY 2013 fees annual fees is in the public interest. Because the NRC is granting PFS a full exemption, it is not necessary, and the NRC does not now, make a determination on PFS' small entity status

PFS also asserts that it should not be charged any 10 CFR Part 170 hourly fees for any period after December 20, 2012, and believes it is due a pro-rata refund of some fees already paid. The staff has calculated PFS' hourly fees to be \$1,821.93 which includes interest, penalty, and administrative charges totaling \$109.43 for FY 2013. PFS has not paid these hourly fees for FY 2013. The staff has determined these hourly fees were properly assessed to PFS for specific services provided by the NRC; thus, these fees will not be waived by the NRC.

¹ See, e.g., 42 U.S.C. § 2214(c)(3)(noting that the Commission should establish “a schedule of charges fairly and equitably” and that fees should “have a reasonable relationship to the cost of providing regulatory services”).

Finally, PFS has requested that current or future invoices for licensing fees issued by the NRC after January 1, 2013, be cancelled and the new invoice(s) reflect the exemption status granted by the NRC. The NRC is granting PFS a full exemption for annual fees for FY 2013. The NRC is not granting PFS a prospective exemption for subsequent fiscal years. Although, PFS cannot use its license right now, it still derives some benefits from generic NRC activities such as research and rulemaking activities, because those activities could prove beneficial to PFS, if it becomes able to use its NRC license in the future. Just as notions of fairness and equity justify granting the full exemption for the current fiscal year; those same notions require PFS to continue to justify a fee waiver in future fiscal years.

Along those lines, 10 CFR Part 171 Section 11(b) provides in pertinent part:

“Requests for exemption must be filed with the NRC within 90 days from the effective date of the final rule establishing the annual fees for which the exemption is sought in order to be considered.”

Therefore, in subsequent years, the NRC requests that PFS submit a new request for a fee exemption for each fiscal year for which PFS desires an exemption. Such requests must include sufficient documentation to substantiate PFS' fee-exemption request. Namely, PFS must continue to show that it is actively seeking all requisite permits, and that its inability to use its NRC license is caused by no fault or delay of its own making.

Please contact Ms. Arlette Howard, of my staff, at (301) 415-1481, for any fee-related questions, or Mr. William Blaney, of my staff, at (301) 415-5092, concerning invoice questions.

Sincerely,

/RA/

J. E. Dyer
Chief Financial Officer

