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USNRCUNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

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BEFORE THE ATOMIC SAFETY AND LICENSING BOARDOFFICE OF SECRETARY  
RULEMAKINGS AND  
ADJUDICATIONS STAFF

In the Matter of )

Docket No. 72-22-ISFSI

PRIVATE FUEL STORAGE, LLC )

ASLBP No. 97-732-02-ISFSI

(Independent Spent Fuel Storage  
Installation) )

January 7, 1998

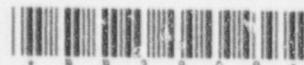
STATE OF UTAH'S RESPONSE TO  
APPLICANT'S AND NRC STAFF'S PLEADINGS ON  
THE LICENSING BOARD'S AUTHORITY TO ISSUE A FINAL  
INITIAL DECISION PRIOR TO ISSUANCE OF THE NRC  
STAFF'S DRAFT OR FINAL EIS AND SER

## INTRODUCTION

The State of Utah responds to the question raised by the Board in its October 17, 1997 Memorandum and Order about the Board's authority to issue a final initial decision on the safety, environmental, or other issues that may be admitted in the absence of the NRC Staff's draft or final Safety Evaluation Reports (SERs) and Environmental Impact Statements (EISs). The Staff and the Applicant addressed this question in pleadings filed with the Board on December 30, 1997.<sup>1</sup> As discussed below, the State asserts that the Board lacks authority to issue a final initial decision in the absence of the introduction of the Staff's final SER and final EIS into the record.

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<sup>1</sup> NRC Staff's Response to the Licensing Board's Question Concerning its Authority to Issue a Final Initial Decision Prior to Issuance of NRC Staff's Safety and Environmental Reports ("NRC Staff's Response") and Applicant's Memorandum on the Board's Authority to Issue Partial Initial Decisions Prior to the Issuance of the SER or EIS ("Applicant's Memorandum").



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In addressing the Board's question, it is useful to keep in mind that the application submitted by PFS is different in kind and scope from other ISFSI license applications: it is for a centralized away-from-reactor facility that will receive fuel shipments from all over the United States and store up to 4,000 casks of spent nuclear fuel at a facility sited on Indian trust lands. The Applicant intends to use casks from two different manufacturers for casks that have yet to receive certificates of compliance from NRC. In fact, this is the reason for the NRC staff's delay in completing its Safety Evaluation Report. NRC Staff's Status Report and Response to Request for Hearing and Petitions to Intervene, dated October 1, 1997, at 5. Moreover, the Applicant is a newly formed limited liability company with no track record in the areas of safety, health or the environment.

## DISCUSSION

### 1. Safety Evaluation Report

The NRC Staff, citing 10 CFR 2.743(g) and relevant case law, states that the SER must be introduced into evidence and that no final initial decision may issue on safety and other issues <sup>as</sup> for litigation in this proceeding. NRC Staff Response at 2-3. The Applicant's view is that the Board may issue partial initial decision on health and safety issues raised by petitioners absent the Staff's final issuance of a draft or final SER. Applicant's Memorandum at 2-3. The State disagrees with the Applicant's analysis.

It is undisputed that the NRC staff must make safety findings before a license for the proposed ISFSI issues. Indeed, the initial hearing notice states that "[p]rior to the issuance of the requested license, the NRC will have made the findings required by the Atomic Energy Act of 1954 ... and the NRC's rules and regulations." 62 Fed. Reg. 41,900 (July 31, 1997). Consistent with its standard practice, the NRC staff has announced its intention to issue those findings regarding the proposed ISFSI in the form of a Safety Evaluation Report. NRC Staff's Status Report and Response to Request for Hearing and Petitions to Intervene, dated October 1, 1997, at 5. As required by 10 CFR § 2.743(g), any SER that is prepared by the staff in this case must be introduced as evidence into the record.

Moreover, if the Board were to reach a final initial decision without the benefit of the Staff's conclusions regarding the safety of the proposed project, the licensing of the proposed ISFSI would be reduced to a dispute between the Applicant and the Intervenor, with the Board acting as umpire. Such an approach would render the agency's own technical review and oversight an irrelevance, and would constitute an abdication of the agency's ultimate responsibility as regulator of the Applicant. Furthermore, the Applicant is applying for a one-of-a kind away from reactor centralized ISFSI that is sure to raise novel health and safety issues. See e.g., State's Contention B on the intermodal transfer point. Accordingly, it is the State's position that the Licensing Board lacks authority to issue a final decision in the absence of the

introduction of the Staff's SER into the record.

The Applicant's reliance on The Curators of the University of Missouri (TRUMP-S Project), CLI-95-1, 41 NRC 71 (1995) and Florida Power & Light Company (St. Lucie Nuclear Power Plant, Unit 1), ALAB-921, 30 NRC 177 (1989) in its attempt to substantiate that "the Board is authorized to issue partial initial decisions on health and safety issues raised by petitioners absent the Staff's issuance of a draft or final SER" is misplaced. See Applicant's Memorandum at 2-3. In University of Missouri, the Commission held that the NRC staff was not obligated to make "specific findings of fact or to explain its approval" of proposed license amendments and that it was not required by the regulation to prepare a SER. 41 NRC at 122-23. That case did not question whether the staff was required to make safety findings before a license could be approved, but rather the degree to which it was required to explain or justify those findings on the record. Moreover, although the staff may not necessarily be required to issue its findings in the form of an SER, in this case it has decided to follow that procedure and, therefore, 10 CFR § 2.743(g) applies. Similarly, in St. Lucie, the Commission merely held that the staff was not required to independently verify the Applicant's calculations regarding a particular issue, and that the adequacy of the application, not the staff's review, is the proper focus of a licensing hearing. 30 NRC at 185-7. Neither of these holdings undermines the fundamental and longstanding principle that the staff must issue its safety findings before the Board may decide safety

issued. See, e.g., Duke Power Co. (William B. McGuire Nuclear Station, Units 1 and 2), LBP-77-20, 5 NRC 680 (1977), holding that summary disposition of safety issues is premature before issuance of the SER.<sup>2</sup>

## 2. Environmental Impact Statement and NEPA

The Applicant suggests that the Board may consider environmental issues prior to the issuance of the EIS "so long as it does not consider the ultimate NEPA cost-benefit balance of the proposed action." Applicant's Memorandum at 9. By contrast, the NRC Staff points out that the regulatory requirements of 10 CFR §§ 51.100, 102(c) and 104 and 10 CFR § 2.743(g) preclude the Licensing Board from issuing a final initial decision on any environmental or other issue that is admitted for litigation until the Staff has issued its final EIS and SER and offered them into evidence. See NRC Staff's Response.

The State agrees with the Staff's position. The regulations on their face require that prior to any decision by the Commission, the EIS be distributed to EPA, other commenting agencies, and made available to the public and that the Commission take no action that would have an adverse environmental impact or limit the choice of reasonable alternatives. 10 CFR §§ 51.100, 51.101. As the Board derives its authority from the Commission it would be subject to the same constraints. See 10 CFR § 2.704,

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<sup>2</sup> The Applicant suggests, at page 5, that the Staff may issue a "partial" SER which would allow the disposition of contested issues. The State submits that given the interrelationship of the issues raised by this application, this is unlikely to be a practical or efficient approach.

2.717. Not only is distribution of the EIS and limitations on federal action a regulatory requirement but it is only required by federal law as enacted by Congress in NEPA. See 42 USC § 4332(C).

The Staff suggests that the Board could direct other parties to present their witnesses and take positions in the hearing prior to issuance of the final EIS. However, this would be an inexpedient way to proceed, may require re-litigation of issues after the issuance of the EIS and, moreover, could be prejudicial to the Intervenor if the Board considered the evidence in such a piecemeal fashion.

The Applicant inappropriately relies on Philadelphia Electric Company (Limerick Generating Station, Units 1 and 2), ALAB-785, 20 NRC 848 (1984). Limerick involved the Board's decision to conduct early hearings in an operating license proceeding prior to the issuance of a draft or final EIS, because certain specific impacts may have become moot if they were not subject to an early hearing. In that case a construction permit was issued in 1974, judicial review was complete in 1975, construction commenced in December 1982 but was later suspended, and the Board was faced with evaluating whether construction of an intake and reservoir for the supplemental cooling water system would have environmental effects prior to continuation of construction activities. The Board's review and the Commission's review on appeal were conducted under the former 10 CFR § 51.52(a). The Commission stated that the Board did not act "in literal accordance with agency

regulations," that "in the usual case, environmental hearings await the preparation and circulation of the staff's FES," and that the regulations now in effect (i.e. the current 10 CFR § 51.52(a)) make it clear that "the FES is to precede the hearing on environmental issues." Limerick at 863-864 and n. 43. The Commission acknowledged that the Board did not resolve the ultimate cost/benefit balance under NEPA, which would await the issuance of the staff's environmental statement. Id. at 864.

Nor do the other cases cited by the Applicant support its position that some NEPA issues may be litigated and decided before issuance of the EIS. Duke Power Co (Catawba Nuclear Station, Units 1 and 2), CLI-83-9, 17 NRC 1041, 1049, merely held that as a time-saving mechanism, intervenors could be required to initially base their contentions on the license application, before the EIS issues. Contrary to the Applicant's suggestion, the Commission explicitly recognized that once the case is ready for litigation, the proceeding must focus on the adequacy of the EIS. Id.

Another case cited by the Applicant, Allies General Nuclear Services, et al (Barnwell Nuclear Fuel Plant Separations Facility), ALAB-296, 2 NRC 671, 681 (1975) concerned a proceeding in which an EIS for the proposed facility was already prepared prior to the hearing but was being partially revised. The Appeal Board refused to hold, as a general matter, that the hearing should be postponed pending the revisions, noting that a decision on whether some of the issues should be held up pending the revisions was premature. Id. at 681. Nothing in that decision can be read to suggest the acceptability

of proceeding with a NEPA hearing in the absence of an EIS.

Neither Limerick nor other NEPA cases support the Applicant's proposition that allows a Licensing Board "to consider environmental issues prior to the issuance of the EIS by the Staff so long as it does not consider the ultimate NEPA cost-benefit balance of the proposed action." Applicant's Memorandum at 9. See e.g., Public Service Company of Oklahoma (Black Fox Station, Units 1 and 2), CLI-80-31, 12 NRC 264, 274-275 (1980) (NEPA is an essential element of the agency's decision making process. An agency discharges its obligation to consider every significant aspect of the environmental impact of the proposed action by filing an EIS); Kansas Gas and Electric Company (Wolf Creek Nuclear Generating Station, Unit No. 1), CLI-77-1, 5 NRC 1, 5 (1977) (The broad and general prohibition of construction so as not to affect the environment of a site is easily read to bar such construction activities as road and railway construction leading to the site, at least where substantial clearing or grading is involved.).

Another reason for the Board not to proceed with the issuance of any initial decisions until introduction into evidence of the NRC Staff's final EIS is the requirement for NRC to consult with other federal agencies. For example, under its NEPA analysis, the NRC may give considerable weight to action taken by another competent and responsible government authority in enforcing an environmental statute. Public Service Company of Oklahoma (Black Fox Station, Units 1 & 2), LBP-

78-28, 8 NRC 281, 282 (1978). Other federal agencies may be required to comment on the draft and final EIS in this proceeding and allowing any construction activities by PFS will be premature for purposes of their review. Bureau of Land Management public land may be affected, for example, by Applicant's road widening activities or right-of-way or land acquisitions for the rail spur or intermodal facility. Another federal agency, the Secretary of the Interior, acting through the Bureau of Indian Affairs (BIA), has a clear statutory duty to evaluate leases on Indian lands giving consideration to a variety of factors including:

... the relationship between the use of the leased lands and the use of neighboring lands; ... the availability of police and fire protection and other services; the availability of judicial forums for all criminal and civil causes arising on the leased lands; and the effects on the environment of the uses to which the leased lands will be subject.

25 USC § 415(a) (emphasis added). The BIA has stated that it will rely on the NRC's environmental documents prepared under NEPA to evaluate the environmental impacts of leasing Indian trust lands to the Applicant for storage of spent nuclear fuel rods. September 18, 1997 letter from Jeanette Hanna, Acting Phoenix Area Director, Bureau of Indian Affairs, attached hereto as Exhibit 1.

## Conclusion

For the reasons stated above, the Board should not proceed with the issuance of any initial decisions until introduction into evidence of the NRC Staff's final EIS and SER.

DATED this 7th day of January, 1998.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Denise Chancellor", written over a horizontal line.

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CERTIFICATE OF SERVICE

I hereby certify that copies of STATE OF UTAH'S RESPONSE TO JAN 12 P5:38  
APPLICANT'S AND NRC STAFF'S PLEADINGS ON THE LICENSING  
BOARD'S AUTHORITY TO ISSUE A FINAL INITIAL DECISION PRIOR TO  
ISSUANCE OF THE NRC STAFF'S DRAFT OR FINAL E'S AND SER  
were served on the persons listed below by Electronic Mail (unless otherwise noted)  
with conforming copies by First class mail this 7th day of January, 1998:

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Office of the Commission Appellate  
Adjudication  
Mail Stop: 16-G-15 OWFN  
U. S. Nuclear Regulatory Commission  
Washington, DC 20555  
(United States mail first class only)

Dated this 7<sup>th</sup> day of January, 1998.

  
Denise Chancellor  
Assistant Attorney General  
State of Utah

## EXHIBIT 1

Department Of Interior Letter Dated  
September 18, 1997



# United States Department of the Interior

BUREAU OF INDIAN AFFAIRS

PHOENIX AREA OFFICE

P.O. BOX 10

PHOENIX, ARIZONA 85001



IN REPLY  
REFER TO  
Branch of Real Estate Services  
(602) 379-6781

SEP 18 1997

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Phillip C. Pugsley  
Assistant Attorney General  
160 East 300 South  
P.O. Box 140874  
Salt Lake City, Utah 84114-0874

Re: Notice of Appeal, Statement of Reasons, and  
Request for Immediate Relief Skull Valley  
Goshute Tribe Lease to Private Fuel Storage,  
Inc.

Dear Mr. Pugsley:

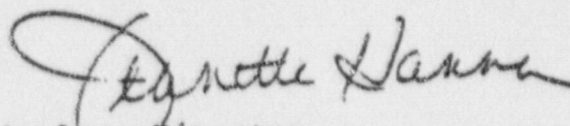
We received your Notice of Appeal and Statement of Reasons dated June 30, 1997. You are appealing the decision of the Superintendent of the Uintah and Ouray Agency, Bureau of Indian Affairs (Superintendent), to conditionally approve the lease between the Skull Valley Band of Goshute Indians, a federally recognized Indian Tribe (Tribe), and Private Fuel Storage, L.L.C., a Delaware limited liability company comprised of several Midwestern utility companies (Lessee Company). The purpose of the lease is to develop, construct, and operate a private, interim, spent nuclear fuel storage facility on a portion of the Skull Valley Indian Reservation. We have also reviewed the Answer submitted by the Lessee Company, as well as the State's response.

We believe your appeal of the Superintendent's decision to conditionally approve the lease is premature. The Superintendent's approval is conditioned upon the successful completion of an environmental impact statement, including the implementation of any necessary mitigation. We disagree with your assertion that the Bureau of Indian Affairs (BIA) may not rely upon environmental documents prepared for the Nuclear Regulatory Commission licensing process. Obviously, the BIA will independently evaluate the environmental impacts disclosed by the environmental impact statement. In addition, the State of Utah will have ample opportunity to intervene and provide its views during both the environmental review and NRC licensing process. See 10 C.F.R. §§2.714 and 2.715(c).

We therefore affirm the Superintendent's decision to conditionally approve the lease. If you choose to appeal this decision, a notice of appeal must be mailed to the Interior Board of Indian Appeals at 4015 Wilson Boulevard, Arlington, Virginia 22203, within 30 days of receipt of this letter. Any notice of appeal should clearly identify the decision being appealed and certify that copies of such notice have been sent to the Assistant Secretary-Indian Affairs, this office, and all other interested parties. Upon receipt of a notice of appeal, the Board will advise the appellant of further appeal procedures. If no interested party appeals this decision, it will become final for the Department of the Interior upon expiration of the appeal period.

If you should have any questions regarding this notice, please contact our office at 602-379-6781.

Sincerely

A handwritten signature in cursive script, appearing to read "Danette Hanna".

Acting Area Director