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January 28, 2000

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

In the Matter of)	
)	
PRIVATE FUEL STORAGE L.L.C.)	Docket No. 72-22
)	
(Private Fuel Storage Facility))	ASLBP No. 97-732-02-ISFSI

**APPLICANT'S SUPPORT OF NRC STAFF MOTION TO STRIKE PORTIONS
OF STATE OF UTAH'S REPLY TO STAFF RESPONSE TO APPLICANT'S
MOTION FOR SUMMARY DISPOSITION OF CONTENTION UTAH E**

On January 19, 2000, the NRC Staff ("Staff") filed "NRC Staff's Motion to Strike Portions of 'State of Utah's Reply to the Staff's Response to the Applicant's Motion for Partial Summary Disposition of Utah Contention E/Confederated Tribes Contention F,'" (January 19, 2000) [hereinafter "Staff Mot." and "State Rep."] on the grounds that the State's reply, which was filed on January 10, 2000, cited a mistakenly released draft of the Staff Safety Evaluation Report ("SER") that had been superseded by a later, final version.¹ Staff Mot. at 1. Pursuant to the Atomic Safety and Licensing Board ("Board") orders of January 20 and January 21, 2000, Private Fuel Storage L.L.C. ("Applicant" or "PFS") files this reply in support of the Staff's motion.

¹ On December 3, 1999, the Applicant filed Applicant's Motion for Partial Summary Disposition of Utah Contention E and Confederated Tribes Contention F (December 3, 1999). The NRC Staff filed its response to the Applicant's motion on December 22, 1999. The State filed its response to the Applicant's motion on December 27, 1999.

I. BACKGROUND

On December 3, 1999, PFS filed its motion for partial summary disposition of Contention Utah E/Confederated Tribes F. On December 15, 1999, the Staff issued the SER that included a mistakenly released draft version of Chapter 17, which pertains to PFS's financial qualifications, the subject matter of Contention Utah E. Staff Mot. at 3. On December 22, the Staff filed its response supporting PFS's motion. On December 27 the State received a copy of the SER with the erroneously released draft of Chapter 17, id., and the State filed its response to PFS opposing PFS's motion. On January 7, 2000 the Staff sent a letter to, *inter alia*, the State of Utah, noting the error with respect to SER Chapter 17 and including a correct, final version of the entire SER. Id.; Delligatti Aff. at ¶ 5. On January 10, 2000, the State filed its reply to the Staff's response and cited draft SER Chapter 17 extensively in its reply and in its "Supplement to its Statement of Disputed and Relevant Material Facts for Utah Contention E," in an attempt to undermine the Staff's position. See State Rep. at 8, 14-15, 19; "State of Utah's Supplement to Its Statement of Disputed and Relevant Material Facts for Utah Contention E" [hereinafter Sup. St. Disp. Mat. Facts]. On January 18, 2000, the Staff contacted the State and asked the State to amend its pleading in light of its references to the superseded draft of SER Chapter 17, but the State refused the Staff's request. Staff Mot. at 4 n.8. On January 19, 2000, the Staff filed its motion to strike.

II. DISCUSSION

The Staff's motion to strike should be granted in that the State's reply relies on a document—the mistakenly released draft of SER Chapter 17—that has been superseded

and hence has no legal status in this proceeding.² Moreover, when directly notified of the mistake and provided with a correct, final version of the SER—the Staff’s true position on the contention, the State refused to even acknowledge to the Board and the parties that its reply to the Staff had relied on the superseded draft. The State should not be allowed to attack the Staff’s true position, or assert disputes of fact, on the basis of a known erroneous representation of the Staff’s position.

The State’s reply relies on the superseded draft of SER Chapter 17 in three principal respects. First, the State uses it to attack the Staff’s proposed license conditions for PFS arising from PFS’s commitments not to proceed with facility construction without committed funds sufficient to cover construction costs and not to proceed with facility operation without customer Service Agreements sufficient to cover operation and maintenance costs (including amortization of any debt used to finance facility construction). The State alleges the existence of contradictions between the SER and the Staff’s response to PFS’s motion for summary disposition. See State Rep. at 8; Sup. St. Disp. Mat. Facts at ¶¶ 1-3. In fact, the alleged contradictions do not exist and hence the State’s assertions are baseless.

Second, the State uses the superseded draft Chapter 17 to attack the qualifications and testimony of the Staff’s financial analyst, Alex F. McKeigney. The State asserts that

² It has long been held that internal Staff draft documents have no legal status in Commission licensing proceedings. Consolidated Edison Company of New York, Inc. (Indian Point Station, Unit 2), ALAB-209, 7 AEC 971, 973 (1974) (an internal Staff working draft “has no legal significance for any [Commission] regulatory purpose.”); Duke Power Company (Catawba Nuclear Station, Units 1 and 2), ALAB-355, 4 NRC 397, 416 (1976) (affirming Licensing Board refusal to allow intervenors to use Staff working paper at the hearing, quoting Indian Point).

Mr. McKeigney is responsible for the “confusion” in the NRC’s proposed license conditions for PFS and claims that “Mr. McKeigney has not conducted an extensive, careful, and thorough review” by alleging contradictions between PFS’s commitments and the SER. See State Rep. at 14-15. In fact, there is no “confusion” in the NRC’s proposed license conditions and there are no contradictions between PFS’s commitments and the SER. Thus, the State’s allegations provide no support for its attack on Mr. McKeigney’s qualifications and testimony.


Third, the State uses the superseded draft Chapter 17 to support its assertion that it needs information from the Staff to “shed some light on” the allegedly conflicting Staff proposed license conditions. State Rep. at 15. The State asserts material differences between the SER conditions and the conditions in Mr. McKeigney’s affidavit. Id. In fact, there are no material differences and hence the State’s assertion provides no basis for its claim that it needs more information from the Staff.

The State should not be allowed to rely on a superseded document it knows was mistakenly released in the first place to attack the Staff’s position or to attempt to obfuscate the issues before the Board. The State’s refusal to even acknowledge—after being duly notified of the fact—that the draft of SER Chapter 17 was mistakenly released and had been superseded is not the basis on which this proceeding should be litigated.

III. CONCLUSION

For the foregoing reasons, the NRC Staff's motion to strike should be granted.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Paul Gaukler", is written over a horizontal line.

Jay E. Silberg
Ernest L. Blake, Jr.
Paul A. Gaukler
SHAW PITTMAN,
2300 N Street, N.W.
Washington, DC 20037
(202) 663-8000
Counsel for Private Fuel Storage L.L.C.

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CERTIFICATE OF SERVICE

I hereby certify that copies of the Applicant's Support of the NRC Staff's Motion to Strike Portions of State of Utah's Reply to Staff Response to Applicant's Motion for Summary Disposition of Contention Utah E was served on the persons listed below (unless otherwise noted) by e-mail with conforming copies by U.S. mail, first class, postage prepaid, this 28th day of January 2000.

G. Paul Bollwerk III, Esq., Chairman Ad-
ministrative Judge
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
e-mail: GPB@nrc.gov

Dr. Jerry R. Kline
Administrative Judge
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
e-mail: JRK2@nrc.gov; kjerry@erols.com

Dr. Peter S. Lam
Administrative Judge
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
e-mail: PSL@nrc.gov

* Susan F. Shankman
Deputy Director, Licensing & Inspection
Directorate, Spent Fuel Project Office
Office of Nuclear Material Safety &
Safeguards
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Office of the Secretary
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
Attention: Rulemakings and Adjudications
Staff
e-mail: hearingdocket@nrc.gov
(Original and two copies)

Catherine L. Marco, Esq.
Sherwin E. Turk, Esq.
Office of the General Counsel
Mail Stop O-15 B18
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555
e-mail: pfscase@nrc.gov

John Paul Kennedy, Sr., Esq.
Confederated Tribes of the Goshute
Reservation and David Pete
1385 Yale Avenue
Salt Lake City, Utah 84105
e-mail: john@kennedys.org

D. Curran, Esq.
Harmon, Curran, Spielberg &
Eisenberg, L.L.P.
1726 M Street, N.W., Suite 600
Washington, D.C. 20036
e-mail: DCurran.HCSE@zzapp.org

* Adjudicatory File
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001

Denise Chancellor, Esq.
Assistant Attorney General
Utah Attorney General's Office
160 East 300 South, 5th Floor
P.O. Box 140873
Salt Lake City, Utah 84114-0873
e-mail: dchancel@state.UT.US

Joro Walker, Esq.
Land and Water Fund of the Rockies
2056 East 3300 South, Suite 1
Salt Lake City, UT 84109
e-mail: joro61@inconnect.com

Danny Quintana, Esq.
Skull Valley Band of Goshute Indians
Danny Quintana & Associates, P.C.
68 South Main Street, Suite 600
Salt Lake City, Utah 84101
e-mail: quintana@xmission.com

* By U.S. mail only


Paul A. Gaukler