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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of:	)	Docket No. 72-22-ISFSI
PRIVATE FUEL STORAGE, LLC (Independent Spent Fuel Storage Installation)	)	ASLBP No. 97-732-02-ISFSI
	)	February 22, 2000

STATE OF UTAH'S REPLY TO APPLICANT'S AND NRC STAFF'S RESPONSES TO LATE-FILED BASES FOR UTAH CONTENTION L

Pursuant to the Board's February 2, 2000 Order (General Schedule Revision and Other Matters), the State files this Reply to the Applicant's and the NRC Staff's February 14, 2000 Responses to State of Utah's Request for Admission of Late-Filed Modification to Basis 2 of Utah Contention L ("Modified Basis").

INTRODUCTION

The State has made a good faith effort to comply with NRC's stringent procedural requirements in this proceeding, often to be thwarted by not anticipating events and being found to be too late to file new contentions or amending existing ones.[1] This time, however, the Staff argues that the State is too early to modify a basis to Contention L. A brief review of the pleadings relating to Contention L shows that, procedurally, the State has been placed in an impossible position.

[1] *See, e.g.*, State's September 28, 1998 Contentions Relating to the Low Rail Transportation License Amendment; State's December 17, 1998 Motion to Amend Security Contentions.

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The State timely filed Contention L on November 23, 1997. The NRC, on June 4, 1998, issued a Rulemaking Plan to amend how an applicant must evaluate seismicity under 10 CFR § 72.102. The Applicant, on April 2, 1999, filed for an exemption from 10 CFR § 72.102, to which the State, on April 30, 1999, filed a motion requiring the Applicant to request a rule waiver from the Board, or in the alternative the State requested an amendment to a basis of Contention L. On May 12, 1999 both the Applicant and the Staff filed Responses to the State's Motion.[2] On May 26, 1999, the Board found the State's request to amend Contention L too early. On December 15, 1999, the Staff issued its Safety Evaluation Report ("SER") in which, to any objective observer, the Staff had taken action on the Applicant's seismic exemption request. The State, on January 26, 2000, filed a modification to Basis 2 of Contention L.

PFS argues that whether or not the issue is ripe, the State impermissibly challenges the Staff's action and has failed to establish an admissible contention. Applicant's Response at 1. The Staff argues the exemption issue is not yet ripe, that part of the State's bases to modify Contention L is too late, and that the State has failed to state a legally cognizable basis. Staff Response at 6 and 8. For the reasons stated below, the Board should admit the modified basis to Contention L to allow the State a forum in which it may challenge the use of a 2,000 year return period earthquake using a probabilistic approach as the standard and methodology by which the Applicant may

[2] Hereafter, Applicant's or Staff's Response to State's Rule Waiver Motion.

evaluate the design of the PFS facility.

DISCUSSION

I. The State's Modified Basis to Contention L Is Admissible.

There are a number of reasons why Modified Basis 2 should be admitted. First, the Applicant cannot meet the existing seismic design standards in Part 72. Second, the admission of the Modified Basis is necessary to evaluate Basis 2 in the State's existing contention. Admission is also necessary to determine whether the new standard and methodology will provide adequate protection of public health, safety and the environment. Third, the Modified Basis requires consideration of the applicability of Rulemaking Plan to amend 10 CFR § 72.102. Fourth, the Modified Basis spotlights the contradictory positions taken by the Staff and PFS in favoring the applicability of the Rulemaking Plan when the State first brought up the rule waiver issue, and then ignoring the Rulemaking Plan when determining what standard the proposed ISFSI should meet. Finally, the State argues that there must be a forum in which the State may obtain a hearing on what standard and methodology are applicable to the proposed PFS facility.

A. The Applicant Cannot Meet the Seismic Design Requirements of the Existing NRC Regulations

In its Response the Staff states: "the peak horizontal acceleration and peak vertical acceleration values from a seismic event would exceed the proposed facility's design value." Staff Response at 2. This statement by the Staff makes it clear that by exceeding ground motion values, the Applicant cannot meet the seismic design

requirements of the existing NRC regulation, 10 CFR § 72.102(f)(1) and 10 CFR Part 100, App. A. The State's Basis 2 to Contention L raises the same issue: the Applicant's assessment of ground motion places undue risk on the public and the environment. *See* Modified Basis at 7.

Therefore, in order to meet the proposed ISFSI's design values, the Applicant must receive an exemption from the standard and methodology by which a Part 72 applicant should conduct its seismic hazard analysis as required by 10 CFR § 72.102.

B. The Admission of the State's Modified Basis Is Necessary to Evaluate Basis 2 of the State's Existing Contention and Determine Whether Public Health and Safety and the Environment Will Be Adequately Protected.

The State found it necessary to modify Basis 2 of Contention L because the methodology and standard used to undertake a seismic hazardous analysis relate directly to whether the Applicant will exceed ground motion values to which a particular structure, system or component is designed. The State will be placed in the procedurally impossible position in this proceeding before the Board of arguing from the existing regulations that the Applicant has not conducted a true deterministic hazardous analysis and that the design basis earthquake exceeds ground motion values, only to be confronted by the Staff's and the Applicant's claims that the seismic exemption request standard and methodology allows the proposed ISFSI to meet the design values. Accordingly, the State must be permitted to raise the issue of the standard by which the Applicant's ground motion and design values will be judged in some forum that may grant the State relief.

The State recognizes that under 10 CFR § 72.7 it may be appropriate for it to lodge its dispute of the Staff's grant of an exemption with the Commission. However, given the procedural complexities and the vacillation in the Staff's position on whether it has yet made a decision on the exemption request, the State believes that it is appropriate to bring the issue to the Licensing Board in order to ensure that all necessary administrative measures are exhausted.

In ruling on the State's initial attempt to get this issue before the Board, the Board reminded the parties that "an exemption request is atypical" ... and "a request to waive the agency's duly adopted rules is never a matter that can be treated as wholly routine." Board Order dated May 26, 1999 (Denying Motion to Require Rule Waiver Request or to Amend Contention Utah L) at 9 and n. 4. LBP-99-21, 49 NRC 431. The Applicant's and the Staff's Responses, however, appear to treat the exemption request as a routine matter wholly delegated to the Staff's unbridled discretion.

The Applicant argues that the State's Modified Bases is "a collateral attack on NRC regulations currently in effect." Applicant's Response at 6. Specifically, the Applicant charges the State is seeking to preclude the Staff from exercising its authority under 10 CFR § 72.7. Id. at 7. Ironically, the Applicant cites Louisiana Energy Services (Claiborne Enrichment Center), LBP-91-41, 34 NRC 332, 346-47 (1991) for the proposition that requiring standards more stringent than regulatory requirements constitutes an impermissible challenge to NRC's regulations. Id. This is ironic because the State is not arguing for more stringent standards; the State merely wants the Applicant

to comply with existing standards as articulated in 10 CFR § 72.102.[3]

The Applicant puts forth a "fundamental concept" that "an exemption, by definition, does not conform to existing regulations and is not to be judged against them." Applicant's Response at 8. The Applicant overlooks another fundamental concept: exemptions by their nature are atypical and are not a matter to be treated as wholly routine. Furthermore, the Applicant's standards to judge when and how the Staff may excuse an entity from complying with existing regulations are wholly one-sided and eviscerate the protections built into existing regulations. For example, the Applicant argues that (1) exemptions "allow the Staff the flexibility to deviate from the norms of regulations and apply a more appropriate, but still prudent, standard under the specific conditions presented"; (2) the "only" factors the Staff must consider are whether the exemption request is authorized by law, would endanger life or property or the common defense and security and is otherwise in the public interest; and (3) there is "no regulatory requirement that the Staff consider whether the exemption request is consistent with existing ... [or] proposed regulations." Applicant's Response at 7-8.

The Applicant's concept that its seismic exemption "deviates from the norms of regulations" ignores the principal that "rules promulgated by the Commission reflect a considered judgment about the requirements necessary to protect the public health and

[3] As discussed in more detail below, the State also argues that if any exemption is to be granted, it should comply with the Commission's duly approved Rulemaking Plan to amend 10 CFR § 72.102.

safety and the environment." LBP-99-21 at 9. Moreover, to state that the Staff need not consider consistency with existing regulations ignores the considered judgment by the Commission in enacting the regulations in the first place. The concepts proposed by the Applicant must be rejected as a collateral attack on the Commission's existing regulations.

The Staff argues that the State's discussion in its Modified Basis goes off on a tangent in discussing dose analysis and other safety issues at the PFS facility. Staff Response at 7. This issue is wholly relevant to the Applicant's exemption request because without the exemption, PFS cannot meet the proposed facility's design values. The State did not raise the dose analysis and safety concerns in the context of its seismic contention when it first submitted its contention because the Applicant was required to comply with 10 CFR § 72.102, a duly promulgated regulation that reflects the Commission's considered judgment about the requirements necessary to protect the public health, safety and the environment. Now that the existing regulations have been dispensed with, it is timely and appropriate to raise dose and safety concerns that will be implicated if PFS is allowed to obtain a license using a more relaxed standard and methodology than the Commission considers necessary to protect public health, safety and the environment. Accordingly, the State's discussion of the flaws in the Staff's acceptance of a probabilistic seismic hazard analysis ("PSHA") with a 2,000 year return period based on site specific radiological and safety concerns, is directly on point to whether a new standard and methodology are appropriate for the PFS site.

C. The Standard by Which Any Exemption to PFS Is Granted Cannot Ignore the Rulemaking Plan to Amend the Existing Regulations.

The SER states: "the staff has determined that a 2,000-year return value with the PSHA methodology can be acceptable for the following [four] reasons." SER at 2-44. None of the four reasons cited by the Staff includes the Rulemaking Plan to amend 10 CFR § 72.102. Furthermore, the Staff's ad hoc rationale is not faithful to the conceptual framework used in the Rulemaking Plan and does violence to the safety concepts underlying the Plan. There must be a defensible reason, and not just caprice, for the Staff to allow PFS to use a PSHA with a 2,000 year return period. The same arguments would hold true if the issue involved a regulatory guide, and the Staff were arbitrarily picking and choosing how to apply it.

Notably, the Staff's rationale is violative of the Rulemaking Plan. *See, e.g.*, Modified Basis at 7-9. Furthermore, neither the Staff nor PFS adequately rebuts the State's discussion of why the Staff's rationale is technically and logically flawed. The Staff's criticism of the State's Modified Basis, aside from the dose and safety issues discussed above, is that the State is challenging the adequacy of the Staff's evaluation of the exemption request. Staff's Response at 6-7.

It is patently unfair for the Staff to find on the one hand that PFS cannot meet the requirements of the regulation that form part of the basis of the State's Contention L, and on the other hand argue that the State cannot challenge the Staff's evaluation of how the Applicant will meet the ad hoc standards set out in the SER. To the extent that the Board

is prepared to obtain a directive from the Commission whether the Commission will allow the Board to consider the standard and methodology by which PFS has to meet ground motions and a seismic hazard analysis, the State places the matter before the Board.[4]

Like the Staff, the Applicant chooses not to address the substance of the State's challenge to the Staff's reasoning. Instead, the Applicant, quoting Curators of the University of Missouri, CLI-95-1, 41 NRC 71, 121 (1995) points out that even if the Staff conducted an insufficient review, "a denial of a meritorious application on that ground would be grossly unfair -- punishing the Applicant for an error by the Staff." Applicant's Response at 13. Similarly unfair, is to punish an intervenor on the ground that it cannot form as basis for a contention that the Staff has conducted an insufficient review of a non-meritorious exemption request.

D. It Is Disingenuous of the Staff and PFS to Argue Now That the Rulemaking Plan Is Irrelevant When Both Argued That the Plan Formed the Basis for Allowing PFS to Initially Proceed with its Seismic Exemption Request.

When the State filed its motion to require the Applicant to apply to the Board for a rule waiver, the Staff and the Applicant argued that the exemption was appropriate under

[4] The Board stated in its May 26, 1999 ruling that "to countenance any adjudicatory challenge to the PFS exemption petition, the Board would have to invoke its certified question or referred ruling authority under 10 C.F.R. §§ 2.718(i), 2.730(f) to determine whether the Commission wants the Board to consider the contention." LBP-99-21 at 10. The State urges the Board to take whatever action is necessary to grant the State a full and fair hearing on the issue.

the Rulemaking Plan whereby Part 72 would be revised to implement a risk-informed, performance-based regulation. Staff's Response to State's Rule Waiver Motion at 8; Applicant's Response to State's Rule Waiver Motion at 4.[5] The Staff noted that the Plan was approved by the Commission and while the rule has not yet been published, the seismic design criteria for an ISFSI under the proposed rule would be similar to the probabilistic approach applicable to nuclear power plants. Staff Response to State's Rule Waiver Motion at 8-9. The Staff further argued that Licensing Boards "should not accept in an individual licensing proceeding any contentions (or sub-issues) which are or about to become the subject of generic rulemaking." Id. at 9-10.

The Staff has now turned tail and argues not that the issue raised by the State is about to become a generic rulemaking. Instead, the Staff argues "there is no reason why an exemption request must be ... approved by the Staff based upon a proposed rule or regulatory approach. Staff Response at 7 (*emphasis in original*). Clearly, such an contradictory attitude points out why is it essential that the State be granted a forum in which this issue may be heard.

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[5] The Applicant also hinged its exemption request on the Commission's grant of an exemption to the U.S. Department of Energy ("DOE") for the Three Mile Island ISFSI at INEEL. As the State pointed out in its Modified Basis the premise underlying the Staff's reliance on the DOE exemption is wrong because the Staff incorrectly assumed that like the INEEL ISFSI, PFS's 2,000 year PSHA response spectra envelops the 50th percentile deterministic seismic hazard analysis ("DSHA") response spectra. PFS has deviated from the regulatory requirements for conducting a true DSHA. *See* Modified Basis at 16-18

E. The State Is Entitled to a Hearing Either in this Proceeding or Before the Commission.

The State is entitled to a hearing under Section 189(a) of the Atomic Energy Act ("AEA") because Modified Basis 2 raises an issue that is a material factor affecting the Board's licensing decision; it also involves a substantive policy and regulatory change by the NRC. Section 189(a) provides, in relevant part:

> In any proceeding under this Act for the granting .. of any license .. and in any proceeding for the issuance or modification of rules and regulations dealing with the activities of licensees.. the Commission shall grant a hearing upon the request of any person whose interest may be affected by the proceeding....

42 USC § 2239(a)(1).

At issue in the Applicant's exemption request is the standard and methodology that the Applicant may employ to conduct a seismic hazard analysis instead of the existing deterministic analysis required by 10 CFR § 72.102. The issues raised in this proceeding by the State in Basis 2 are directly relevant to the exemption request because the way in which the Applicant conducts its seismic hazardous analysis will determine whether the Applicant will exceed ground motion values. Consequently, the standard and methodology used will affect the outcome of the Applicant's analysis and will have an effect on the Licensing Board's decision on Contention L. The State, therefore, is entitled to a hearing that bears on this material factor of the Board's licensing decision. Union of Concerned Scientists v. NRC, 735 F.2d 1437, 11433 (D.C. Cir 1984) ("once a licensing proceeding is begun, hearing must encompass all material factors bearing on the licensing

decision raised by the requester"), *cert. denied* Arkansas Power & Light Company v. Union of Concerned Scientists, 469 U.S. 1132 (1985)..

In addition, because the Applicant cannot meet the existing seismic design standards in 10 CFR § 72.102 and because the Staff will not follow the Commission's Rulemaking Plan to amend 10 CFR § 72.102, the standards and methodology that the Staff may allow the Applicant to employ involve a substantive policy change. Accordingly, the State is entitled to a hearing under section 189(a) of the AEA. Citizens Awareness Network v. NRC, 59 F.3d 284 (1st Cir. 1995) (the Commission cannot effect substantiative interpretative policy changes without complying with the notice and hearing provisions of section 189(a)). *See also* Union of Concerned Scientists v. NRC, 711 F.2d 370, 380 (D.C. Cir. 1983).

The State recognizes that the Licensing Board is not authorized to grant exemptions, and thus, may not be empowered to hear the issue raised in Modified Basis 2. *See* Gulf States, 41 NRC 460, 473 (1995). However, the Commission has never granted a contested exemption under 10 CFR § 50.12 without an adjudicatory hearing. United States Department of Energy Project Management Corporation Tennessee Valley Authority (Clinch River Breeder Reactor Plant), CLI-81-35, 14 NRC 1100, 1107 (1981) (Views of Commissioner Bradford). While the Applicant is applying for an exemption under Part 72, the regulation from which the Applicant seeks an exemption (10 CFR §

72.102(b)) incorporates the standards applicable to Part 50 licensees.[6] Therefore, it is appropriate that the factual and legal matters at issue in the exemption request be subject to an adjudicatory hearing, either before the Licensing Board or before the Commission.

The issues involved in the seismic exemption request are highly technical and may be better suited to be heard before the Licensing Board than before the Commission. For example, the State contested the basis on which the Staff attempted to justify the use of a probabilistic methodology and a 2,000 year return period. One of the Staff's justifications involved a comparison of the PFS site to the grant of an exemption to DOE's TMI-2 ISFSI. SER at 2-44, 2-45. An appreciation of the similarities (or dissimilarities) of the methodologies employed at the sites requires some understanding of how seismic hazard analyses are performed. The State has always argued that PFS has conducted a hybrid DSHA. Therefore, the NRC Staff's comparison of the 50th percentile deterministic ground motion value relies on an invalid baseline for the PFS site. *See* Modified Basis at 16-17.

Unlike the Commission's conclusion in Clinch River that formal hearings will likely produce little additional benefit to the process (14 NRC at 1105), that is not the case here. A formal adjudicatory proceeding is already underway that will hear issues on Contention L. Therefore, expediency, economy and fairness suggest that the Board

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[6] Section 72.102(b) references Part 100, Appendix A, Seismic and Geologic Siting Criteria for Nuclear Power Power Plants. Nuclear power plants are regulated under Part 50.

should hear this issue and the Board may wish to reconsider whether it should take up with matter under 10 CFR § 2.758 or apply to the Commission to allow the Board to consider matter. *See* n. 3 *supra*. However, whether before the Licensing Board or before the Commission, the State should be granted an adjudicatory hearing with full rights of discovery, presentations by expert witnesses and ability to cross examine the other parties' experts. Section 189(a) of the AEA affords the State such a hearing on Contention L. The Staff and the Applicant should not be permitted to escape defending their positions by hiding behind the grant of an exemption from duly enacted regulations.

In sum, whether or not the Staff has granted an exemption to the Applicant, the State is entitled to a hearing under section 189(a) of the Atomic Energy Act on the standard and methodology to be used by the Applicant for its seismic analysis. In order to exhaust all administrative remedies, the State places this issue before the Licensing Board.

II. The State Meets the Late-Filed Factors for Modification of Basis 2.

The Staff does not oppose the State on late-filed factors, except with respect to dose and safety issues. As discussed in the above section, now that it is clear that the Staff will condone PFS's non-compliance with existing regulations, it is timely and appropriate to raise dose and safety concerns that will affect public health, safety and the environment because the exemption will allow PFS to obtain a license using the less conservative standards and methodology for its seismic hazard analysis.

The Staff, however, says that the State's Modified Basis is premature.

Surprisingly, the Staff says that it has not yet granted an exemption to the seismic regulations or concluded its review of the exemption request. Staff Response at 5. Had the State not attempted to amend Basis 2 now, the State anticipates the Staff would have taken its usual position of arguing that the State does not meet the good cause factor because, in this case, the State should have ascertained from the SER that the Staff intended the Applicant to use a PSHA methodology and a 2,000 year return period. *See, e.g.* NRC Staff's October 14, 1998 Response to State of Utah's Contentions Relating to the Low Rail Transportation License Amendment at 4-6, 8 (arguing that the State was aware "that a rail spur in Skull Valley had been proposed in the original application and . . . its concerns regarding the fire hazards associated with construction and operation of a rail spur could have been raised . . . by November 24, 1997."). The State would also have been vulnerable to the Applicant raising similar failure to meet good cause arguments.

Unlike the Staff, PFS does not challenge whether the Modified Basis is premature or procedurally ripe. Applicant's Response at 5 n. 8. The Applicant notes that although it has not yet obtained the Staff's formal grant of an exemption, the SER "concluded that use of a probabilistic seismic hazard methodology and a 2,000-year return period earthquake would be acceptable." Applicant's Response at 3.

The State followed the Board's guidance in LBP-99-21, which noted that "when a new or amended contention must be filed ... calls for a judgment about when the matter is sufficiently factually concrete and procedurally ripe to permit the filing of a contention." LBP 99-21 at 8. The State believed it had access to information in the SER sufficient to

permit it to frame a modified basis with reasonable specificity. Thus, given the Staff's action in the SER, the State did not want to jeopardize being found late by waiting until the Staff, with an absolute certainty, had approved the seismic exemption request. Significantly, the Staff has approved the use of the PSHA methodology and justified the use of a 2,000 year return period, and that is the State's impetus for now modifying Basis 2.

It is obvious that the State has experts who may assist in developing a sound record. Of note, neither PFS nor the Staff refuted the State's showing that the Staff put forward a specious ad hoc rationale for its apparent grant of the exemption request. Thus, it is imperative that the NRC Board or the Commission hear all sides of the issue, and allowing the State to participate will achieve that end. Accordingly, modification of Basis 2 will not broaden or delay the proceed.

Finally, the State submits that if the Board does not allow the State to address, in this proceeding, the standards and methodology the Staff will permit the Applicant to meet, it will create procedural chaos during the adjudicatory hearing on Contention L. For example, the State will be arguing from the existing regulations that the Applicant does not meet the ground motion requirements. However, the Applicant will not have conducted its seismic hazard analysis under the existing regulations. Therefore, the arguments in the hearing will be confusing as to which standards apply. Accordingly, admission of the modification of Basis 2 will not broaden or delay the proceeding.

CONCLUSION

For the reasons stated above, the Board should admit the State's Modification to Basis 2 of Utah Contention L.

DATED this 22nd day of February 2000.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of STATE OF UTAH'S REPLY TO APPLICANT'S AND NRC STAFF'S RESPONSES TO LATE-FILED BASES FOR UTAH CONTENTION L was served on the persons listed below by electronic mail (unless otherwise noted) with conforming copies by United States mail first class, this 22nd day of February, 2000:

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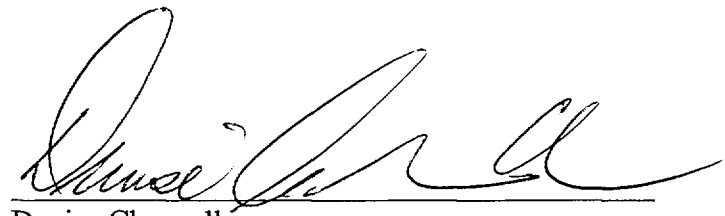

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