

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY 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
)
)

October 1, 1997

**STATE OF UTAH'S MOTION TO SUSPEND LICENSING PROCEEDINGS
PENDING ESTABLISHMENT OF A LOCAL PUBLIC DOCUMENT ROOM
AND APPLICANT'S SUBMISSION OF A SUBSTANTIALLY COMPLETE
APPLICATION, AND REQUEST FOR RE-NOTICE OF CONSTRUCTION
PERMIT/OPERATING LICENSE APPLICATION**

The State of Utah moves the Licensing Board to suspend licensing proceedings and re-notice the opportunity for public hearing on the Private Fuel Storage, LLC (PFS) 10 CFR Part 72 application to construct and operate an Independent Spent Fuel Storage Installation (ISFSI) on the Skull Valley Reservation in Utah.

The State requests the Licensing Board to suspend this proceeding until after (1) the Nuclear Regulatory Commission (NRC) Staff has established a Local Public Document Room (LPDR) in the vicinity of Private Fuel Storage, LLC's (PFS's) proposed ISFSI, and (2) PFS has submitted a substantially complete application. Upon completion of (1) and (2), the State requests the Licensing Board to order re-notice of the opportunity for a hearing in the Federal Register.¹

¹ The Board has the authority to order re-notice of the opportunity for hearing and request to intervene. See Rochester Gas & Electric Corp., (R.E.Ginna Nuclear

As discussed below, suspension of further proceedings pending establishment of an LPDR and substantial completion of the application is necessary to provide meaningful participation by the State and the public in the proceeding. Moreover, the requested suspension would cause no harm to the Applicant, as the license application is far from ready for litigation. In fact, the Staff has informed the State that it does not expect to issue its own key NEPA and safety review documents for a matter of years. Under these circumstances, there is no justification for moving ahead with the proceeding at this point. Instead, the interest of fairness and judicial economy would be served by suspending the proceeding pending the establishment of an LPDR, providing adequate hearing notice to the public, and awaiting the substantial completion of PFS's application before proceeding.

I. STATEMENT OF FACTS

On April 28, 1997, after becoming aware that PFS was going forward with its ISFSI application, Dr. Dianne R. Nielson, Executive Director of the Utah Department of Environmental Quality, requested that before docketing the application, the NRC establish a local public document room that contains documents, including referenced documents, relied on in the application. Letter from Dianne R. Nielson to Charles Haughney attached hereto as Exh. 1. Dr. Nielson expressed her concern to the NRC that the public in Utah be granted access to all relevant documents during the period

Plant, Unit 1), LBP-83-73, 18 NRC 1231 (1983) (Board ordered re-notice of opportunity to intervene after extensive delays due to postponement of construction).

when the public may request a hearing and petition for leave to intervene in the licensing proceeding.

On July 7, 1997, the NRC published a notice of intent to establish an LPDR in Utah "once the application from Private Fuel Storage, Limited Liability Corporation (PFS) has been docketed." The notice invited public comments, to be submitted by July 25, 1997, on possible LPDR locations. See "Private Fuel Storage, LLC Independent Spent Fuel Storage Installation; Intent To Establish Local Public Document Room," 62 Fed. Reg. 36,320 (July 7, 1997).

On June 25, 1997 PFS filed an application with the NRC to construct and operate an ISFSI on the Skull Valley Reservation in Utah. The application consisted of: (1) a license application; (2) an emergency plan; (3) an environmental report; (4) a safety analysis report; and (5) confidential physical security plan. PFS also delivered a copy of the submitted material, with the exception of the security plan, to the State on June 25.

The application submitted by PFS is either incomplete or in violation of NRC procedural requirements in numerous significant respects. For instance, the Applicant failed to submit its emergency plan to offsite responders for their comments before submitting it to the NRC, as required by 10 CFR § 72.32(a)(14). The application also failed to provide such fundamental information as the nature and membership of PFS's limited liability company, which is required by 10 CFR § 72.22(a)-(d). Although 10

CFR § 72.22(e) requires ISFSI applicants to demonstrate their financial qualifications to build and operate their facilities, the application provides no information about PFS's assets or the corporate structure of the LLC. See LA 1.4. Construction and decommissioning cost estimates were given in gross terms without any supporting detail by which they could be evaluated. See LA 1.6 and 1.7. Moreover, the application fails to address how it will deal with contaminated or leaking casks. The application contemplates transfer of spent fuel casks from rail to truck at Rowley Junction, 24 miles from the proposed ISFSI site, but it provides no evidence that PFS has the right to use any property at Rowley Junction; provides no discussion of emergency planning or decommissioning funding for Rowley Junction; and provides no plan for transfer of the casks from Rowley Junction to the facility.

On June 27, 1997 the State of Utah filed a 10 CFR 2.206 petition, incorporated by reference into this motion and attached as Exhibit 2, requesting the NRC staff to reject PFS's application for failure to submit the emergency plan to offsite authorities as required by 10 CFR § 72.32(a)(14). On July 21, 1997, the State of Utah filed a second 10 CFR 2.206 petition, incorporated by reference and attached as Exhibit 3, requesting the NRC staff not to accept the PFS license submittal because of its gross deficiencies and incompleteness.

Without even acknowledging the existence of Utah's two 2.206 petitions, on July 22, 1997 NRC announced its acceptance of PFS's Part 72 application and on July

31, 1997 published a "Notice of Consideration of Issuance of a Materials License for the Storage of Spent Fuel and Notice of Opportunity for a Hearing." 62 Fed. Reg. 41,099. This announcement came three days before the close of comments on where to set up an LPDR. To date no LPDR has been established in Utah.

Finally, responding to the State's two 2.206 petitions in a letter dated August 6, 1997, NRC's Charles J. Haughney stated that the two petitions were rejected because they did not seek "enforcement action." Mr. Haughney stated that the concerns raised in the State's petitions presented licensing issues and would be considered during the NRC staff's review of the application for compliance with 10 CFR Part 72. Letter from Charles Haughney to Dianne R. Nielson, attached as Exhibit 4.

On September 11, 1997, the State of Utah filed a Request for a Hearing and Petition for Leave to Intervene. By happenstance at a public meeting on September 11, 1997, the State learned that some time in July PFS submitted a multi-volume calculation package to the NRC. PFS had made no reference to the calculation package when it delivered a copy of the application to the State on June 25. In response to a recent request by the State, PFS's attorney agreed to send the State a copy of the non-proprietary information contained in the calculation package.

To date, no LPDR has been established in Utah. The public most affected by this licensing action does not have access to the application submittal nor does the public know about or have access to the calculation package.

II. DISCUSSION

As discussed below, the commencement of this proceeding without establishing an LPDR deprives the State and the public of an opportunity for meaningful participation. Furthermore, it would be unfair to the petitioners and waste the Board's and the parties' resources to require the development of contentions based on the current substantially inadequate application. Finally, the Applicant would not be prejudiced by a suspension of this proceeding because it is still far from presenting the full information that is necessary to obtaining a license under 10 CFR Part 72.

A. This Proceeding Should be Suspended Until an LPDR Has Been Established.

Although the regulations governing ISFSI facilities do not specifically require the establishment of LPDRs before commencing hearings, Commission precedents, pronouncements made in this proceeding, and the nature of this case support the issuance of a suspension of this proceeding until an LPDR has been established as publicly promised by the Commission in July.

First, suspension of the proceeding pending establishment of an LPDR is supported by Commission precedents. This licensing proceeding is being conducted according to the formal procedures and pleading requirements of 10 CFR Part 2, Subpart G, which were developed for the licensing of nuclear power plants. In nuclear power plant licensing proceedings, it is the policy and practice of the Commission to announce in the notice of opportunity for a hearing the availability of licensing

documents in "an appropriate office near the site of the proposed facility." 10 CFR Part 2, Appendix A, Section I. The reasoning behind Appendix A's LPDR requirement for nuclear power plant licensing proceedings applies equally to intervenors in other formal NRC proceedings.

Prospective intervenors in ISFSI licensing proceedings are subject to the same substantial threshold pleading requirements as prospective intervenors in nuclear power plant licensing cases. These burdens include demonstrating injury-in-fact that is "concrete" and "fairly traceable" to the proposed project, in order to establish standing. 10 CFR § 2.714(a); Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992). Prospective intervenors must also plead "contentions" that are "specific" and provide "[s]ufficient information" to show that "a genuine dispute exists with the applicant on a material issue of law or fact." 10 CFR § 2.714(b). In order to be able to address these substantial pleading requirements in an informed manner, it is essential that petitioners have reasonable access to the license application and other critical licensing documents. In fact, the Licensing Board has recognized, where licensing documents are not locally available at the time a petition to intervene must be filed, the pleading requirements for standing and identifying litigable issues must be lower than under Subpart G standards, as "a necessary concomitant of a meaningful right to a fair hearing." Combustion Engineering, Inc. (Hematite Fuel Fabrication Facility), LBP-89-23, 30 NRC 140, 144 (1989).

Second, the Commission made a commitment to establish an LPDR in this case "once the application from Private Fuel Storage . . . has been docketed." Notice of Intent to Establish Local Public Document Room, 56 Fed. Reg. at 36,320. This notice implicitly requires the establishment of an LPDR at the earliest possible date, before the formal proceeding commences. Contrary to the intent of the notice, no LPDR has been established in the more than two months that have passed since the license application was docketed. The Board should ensure that the intent of the notice is fulfilled by suspending this proceeding until the LPDR is established and stocked with all relevant documents.

Third, the nature of this case warrants suspension of this proceeding pending the establishment of a LPDR. PFS's application is for a major high-level nuclear waste storage facility of unprecedented size,² which would receive shipments from plants located all over the United States. The application involves extensive transportation and intermodal transportation of these large volumes of waste, all of which pose substantial risks to the public and the environment. Yet, the Applicant claims that the proposed facility is a passive system and poses no significant risk. *See e.g.*, SAR p. 1.2-1. In order to establish injury-in-fact and adequately plead contentions in such a

² The application is for storage of up 40,000 metric tons of uranium (MTU). By contrast, the total amount of spent nuclear fuel stored at all commercial nuclear power reactors in the United States is about 30,000 MTU. NRC Information Digest, 1997 Ed., NUREG-1350, Vol. 9, Table 15, p. 78, *citing* Spent Fuel Discharges from U.S. Reactors (SR/CNEAF/96-01), Feb. 1996.

complex, unprecedented, and sharply contested proceeding, petitioners are entitled to a reasonable opportunity to examine PFS and NRC documents related to the application.

Furthermore, voluminous reports relied on in the application and major periodic updates to the application are not readily available to the public in Utah and would be expensive to purchase from the Public Document Room in Washington, D.C. (PDR). These documents include not only the application itself but also such related documents as the Safety Analysis Report (SAR) for the TranStor Shipping Cask System and the SAR for the TranStor Storage Cask System. Moreover, the people affected by the proposed ISFSI facility include many people of modest means who are not in a position to pay hundreds of dollars to the PDR for the copying and mailing of the PFS license application and other related documents. Thus, the statement in the original hearing notice that the application is available in the PDR does not provide members of the public with reasonable access to the licensing documents. In order to provide the citizens of Utah with a meaningful opportunity to review and respond to the license application, it is essential that a library be established in a public, accessible location in the area of the proposed ISFSI.

The State requests the Licensing Board to suspend this proceeding until such time as the Staff has fulfilled the Commission's commitment to establish an LPDR. Once an LPDR has been established and stocked with all of the relevant licensing

documents, the State of Utah requests the Board to order the issuance of a new notice of hearing, which notifies the public of the availability of documents in the LPDR, and the address and public hours of the LPDR. Thereafter, the Licensing Board should allow a reasonable opportunity for the filing of new petitions to intervene, and postpone the deadline for filing contentions until at least 45 days after the deadline for filing petitions to intervene.

B. The Proceeding Should be Suspended Until All Existing Documents Are Made Publicly Available.

The proceeding should also be suspended until all documents that have been submitted to the Staff by PFS are publicly accessible, including those documents presently unavailable. As discussed above, for example, the State learned on September 11 that PFS had submitted a calculation package to the NRC Staff. The State obtained the calculation package from PFS's counsel on September 22. The data package addresses storage pad parameters and cask stability calculations; geotechnical calculations; meteorological data and tornado probability calculations; and radiation protection calculations. Access to this substantive multi-volume package is essential to meaningful review of the application. The State is concerned that there may be other important licensing documents, submitted to the Staff by PFS, that are similarly unavailable to the State and to the public.

Moreover, the Applicant relies on documents that are proprietary or not generally available. For example, in almost all of the eleven chapters of the Safety

Analysis Report, except chapters 2, 9 and 11, the Applicant relies on the Safety Analysis Reports (SARs) for the Holtec International HI-STAR 100 Cask System (Docket No. 72-1014) and Sierra Nuclear Corporation TranStor Storage Cask System (Docket No. 72-1023) to support its ISFSI application. See SAR 1.7, 3.7, 4.8, 5.7, 6.6, 7.7, 8.4, and 10.3. The SAR for the Holtec casks is proprietary. According to the PDR at some unknown future date a nonproprietary version of the Holtec SAR will be available in the PDR.

C. The State and the Public Cannot Meaningfully Review the Application Because of the Omission of Important Requirements and Superficial Discussion of Other Requirements.

Because construction permits and operating license proceedings are combined for ISFSIs, the Commission "requires considerable detail in the license application, particularly in the [Safety Analysis Report] SAR." 45 Fed. Reg. 74,695 (November 12, 1980). The Commission also specifically directed that the Environmental Report include "an evaluation of the environmental impact of the ISFSI on the region in which it is located, including transportation that is involved." *Id.* As the Commission recognized, the transportation involving spent fuel shipments to an ISFSI, especially a large installation, is an important consideration in an evaluation of site suitability. *Id.* at 74,698.

Contrary to the Commission's requirement for "considerable detail," PFS's application is woefully incomplete in considerable respects. As discussed above and in

the State's July 21 2.206 petition, the application contains egregious omissions, including: failure to identify members of PFS's LLC or describe the corporate structure or assets of the LLC; no contingency measures for leaking and contaminated casks; no documentation of the right to use and control land at the site and at the rail transfer point (Rowley Junction); no plan as to how the casks will be transported from the railhead to the facility; and no discussion of emergency planning and decommissioning planning or funding for the Rowley Junction site.

Other Part 72 requirements are so superficially discussed as to render the application unreviewable. The Safety Analysis Report does not address financial qualifications, decommissioning or constructions costs. There are merely passing references to these items in the License Application. PFS does not provide any factual information to substantiate its claim that it is financially qualified to engage in the proposed activity. Nor does it provide any information to show the source of its decommissioning estimate, with the result that petitioners have no basis for evaluating it. Corporate and financial information, for example, contain gross general statements. The application does not describe the corporate structure of the Applicant, other than general statements that it is a limited liability company. Also, it is unclear which utilities and how many are current members of PFS and what each utility's commitment is to the enterprise. See LA pp. 1-3 to 1-10. The application only includes gross construction costs, which cannot meaningfully be evaluated; does not

discuss equity contributions or subscription agreements from PFS members; fails to show reasonable assurance of obtaining funds; and provides no basis for its general assertions regarding decommissioning cost estimates or funds. See Exh. 2, pp. 3-5. Thus it provides no means for evaluating the Applicant's compliance with financial qualifications or decommissioning funding requirements. A quality assurance program is not provided. Instead for this application the Applicant relies on some other quality assurance program relating to cask packaging that NRC approved for PFS on November 3, 1996 for use under 10 CFR 71, Subpart H (Docket 71-0829). The Part 71 quality assurance program is totally inadequate to meet the requirement of 10 CFR 72, Subpart G.

The Applicant has made no effort to coordinate the development of its emergency response plan with any governmental entity that may be expected to respond to an emergency, except Tooele County. This has led to a violation of 10 CFR 72.32(a)(14) (failure to allow emergency responders 60 days to review the emergency plan prior to submittal of the application) and a totally inadequate emergency response plan. Additionally, the Applicant has made no effort to coordinate emergency planning with the federal agencies who control much of the land surrounding the Indian reservation (e.g., surrounding military installations). See State's 2.206 petition, Exhibit 2, for additional discussion on Emergency Response.

By having to review an application that is so incomplete and difficult to assess, the State and other prospective intervenors are severely prejudiced in developing their contentions. Moreover, the paucity of information in the application will inevitably require petitioners to supplement their contentions. This will place an unfair burden on petitioners who must make a showing, consistent with 10 CFR § 2.714(a)(1) (e.g., good cause, assistance in developing a sound record, etc.), before the Board will address late-filed petitions. Under such circumstance the burden will inappropriately and unnecessarily be shifted to the petitioners as a result of the Applicant's initial failure to comply with the Commission's requirement to submit a considerably detailed application. This can and should be remedied by a suspension of the proceeding until PFS files a substantially complete application.

By prematurely accepting and reviewing this inadequately developed application, the NRC staff has stifled public participation and has placed a substantial burden on the State and others in their review of the application. The expenditure of additional resources in order to understand and respond to the application will continue if the NRC staff allows the Applicant to submit major portions of the application piecemeal to the NRC.

In the interests of justice, the licensing proceeding should be suspended until the Applicant submits an application suitable for review *in toto* by the public, the State and other petitioners.

D. The Applicant Will Not Be Harmed and the Public Will Benefit By Suspending Proceedings and Re-Noticing the Application.

As discussed above, it is obvious that PFS is not ready to go forward with its application. PFS must eventually supply the omissions from the application and supplement those requirements that have only been superficially addressed. The requested suspension would not delay PFS's ability to obtain a license application in any respect, but would rather hold the proceeding in abeyance until such time as PFS submits an application that is complete enough to be ready for litigation. Thus, suspension of the proceeding would cause no additional harm to PFS beyond that which PFS has already caused to itself by submitting an incomplete application.

Moreover, this proceeding is incapable of going forward any time soon, given the Staff's schedule for issuing its own NEPA and safety review documents. As counsel for the NRC Staff recently informed the State, the Staff does not expect to issue a Draft Environmental Impact Statement (EIS) until approximately two years from now, with a Final EIS to follow six months to a year afterwards. The Staff does not expect to issue the Safety Evaluation Report until approximately three years from now. Given the Staff's extremely long review schedule, it is unlikely that this proceeding can go beyond the initial stages of contention-filing and preliminary discovery for some years. Accordingly, PFS would not be harmed by a stay of the proceeding.

In fact, suspending the proceedings would save PFS resources associated with premature litigation costs. Given the current state of the application, PFS would need to respond to intervenors who would undoubtedly file additional contentions each time PFS supplemented its application. Thus, any delay in this proceeding caused by the requested suspension would have no negative effect on PFS.

Assuming *arguendo* that there is any harm to PFS, it is completely outweighed by the benefits to all parties of conducting a fair and effective hearing that allows for meaningful and timely public participation.

III. ACTION REQUESTED

The State of Utah requests the Board to suspend further proceedings and order re-notification of the application after the NRC has established an LPDR in Utah that contains all relevant licensing documents. In addition, the State requests the Licensing Board to suspend further proceedings until the Applicant has submitted sufficient additional information to make its application substantially complete and suitable for meaningful review by the public.

IV. EXPECTED RESPONSE FROM OTHER PARTIES

In compliance with the Board's September 23 order, the State had contacted counsel for the other parties to the proceeding regarding this motion. Petitioners Castle Rock Land and Livestock, L.C. et al; Ohngo Gaudadeh Devia; and

Confederated Tribes of the Goshute Reservation and David Pete, support the motion.

The NRC Staff and the Applicant oppose the motion. The Skull Valley Band of Goshute Indians probably oppose the motion.

DATED this 1st day of October, 1997

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that copies of "STATE OF UTAH'S MOTION TO SUSPEND LICENSING PROCEEDINGS PENDING ESTABLISHMENT OF A LOCAL PUBLIC DOCUMENT ROOM AND APPLICANT'S SUBMISSION OF A SUBSTANTIALLY COMPLETE APPLICATION, AND REQUEST FOR RE-NOTICE OF CONSTRUCTION PERMIT/OPERATING LICENSE APPLICATION," dated October 1, 1997, were served on the persons listed below by Federal Express (unless otherwise noted) with conforming copies by hand delivery to those indicated by asterisk:

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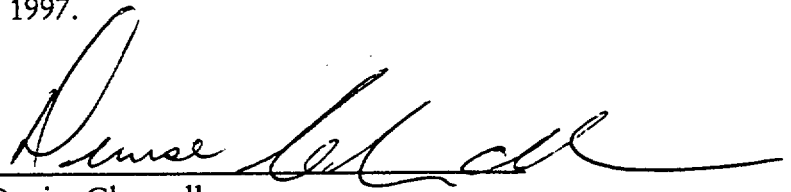
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Dated this 1st day of October, 1997.



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