

May 12, 1999

**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

**APPLICANTS' RESPONSE TO STATE'S  
MOTION REQUIRING APPLICANT TO APPLY FOR  
FULL WAIVER UNDER 10 C.F.R. § 2.758(b) OR IN THE  
ALTERNATIVE AMENDMENT TO UTAH CONTENTION L**

The State of Utah's April 30, 1999 "Motion Requiring Applicant to Appeal For Rule Waiver Under 10 C.F.R. § 2.758(b) or in the Alternative Amendment Utah Contention L" ("State's Motion") asks the Atomic Safety and Licensing Board ("Board") for alternative relief in light of an exemption request filed by Applicant Private Fuel Storage L.L.C. ("PFS"). The exemption request, submitted pursuant to 10 C.F.R. § 72.7, seeks the NRC Staff's approval to use probabilistic seismic hazard evaluation methodology in place of the deterministic methodology otherwise required by 10 C.F.R. Part 72.<sup>1</sup> The State's Motion asks that the Board either require PFS "to apply for a waiver of the seismic siting rules under 10 C.F.R. § 2.758(b)," or, if the Board rules that § 2.758(b) is not applicable, to grant leave to the State to amend Contention Utah L. PFS respectfully submits that the Board should deny both of the State's

requested forms of relief. As to the first, the State misunderstands the relationship between the exemption regulation, 10 CFR 72.7, and the waiver regulation 10 C.F.R. § 2.758. As to the second, no amendment of Contention L is required. It is already broad enough to allow the State to challenge whether PFS "adequately address[ed] site and subsurface investigation necessary to determine geologic conditions, potential seismicity, soil stability and foundation loading", regardless of the methodology used to evaluate the seismicity of the site..

I. Section 2.758 Waiver/Exception

Section 72.7 of the Commission's regulations provides that:

The Commission may, upon application by any interested person or upon its own initiative, grant such exemptions from the requirements of the regulations in this part as it determines are authorized by law and will not endanger life or property of the common defense and security and are otherwise in the public interest.

Similar provisions appear in other parts of the Commission's regulations. See e.g., 10 C.F.R. §§ 30.11 (byproduct material), 40.14 (source material), 50.12 (production and utilization facilities), 70.14 (special nuclear materials), 76.23 (gaseous diffusion plants).

Section 2.758, added to the Commission's Rules of Practice long after the exemption provisions, see 37 Fed. Reg. 15136 (1972), prohibits an attack on a Commission rule in an adjudicatory proceeding such as this one, other than by the mechanism set forth in §2.758 (b) –

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<sup>1</sup> Letter from John Parkyn, PFS, to Mark Delligatti, NRC, dated April 2, 1999, transmitting "Request for Exemption to 72.102(f)(1) Seismic Design Requirement for the Private Fuel Storage Facility."

(d). That mechanism requires that a party to an adjudicatory proceeding petition for the waiver or exception of the rule in that proceeding.

The sole ground for petition for waiver or exception shall be that special circumstances with respect to the subject matter of the particular proceeding are such that the application of the rule or regulation (or provision thereof) would not serve the purpose for which the rule or regulation was adopted.

The Commission neither amended nor modified the existing exemption regulations when it created § 2.758.

The State is simply incorrect to suggest that PFS may not use the existing exemption provisions of § 72.7. There is no requirement, either in the regulations or the case law, that the Applicant request a waiver or exception under 10 C.F.R. § 2.758, rather than an exemption under 10 C.F.R. § 72.7.

The State's sole citation of authority is simply incorrect. The State cites Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit No. 1), CLI-80-16, 11 N.R.C. 674 (1980) for the proposition the PFS is required to seek a § 2.758 waiver. That case holds nothing of the kind. The decision does not even mention exemptions. Thus the decision cannot provide authority for prohibiting an applicant from seeking to apply an exemption provision. Nor did the case involve the situation where the applicant sought an exemption. Rather it was a ruling on a § 2.758 petition filed by an intervenor. See Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit No. 1), LBP-80-1, 11 N.R.C. 37 (1980). Indeed, the Commission in that case denied the requested waiver of the rule. As in the present case, the Commission observed that "suspension [of the rule in question] would only affect the context in which the issue would be evaluated, and not whether the issue would be litigated at all." CLI-80-16, 11 NRC at 676.

The Commission has concluded that Sections "2.758 and [the analogous exemption provision in Part 50] offer alternative methods for seeking waivers or exemptions from the Commission's regulations." Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant), CLI-86-24, 24 NRC 769, 774 n.5 (1986) (emphasis added).<sup>2</sup> Thus, "it is clear that a petition for a waiver or exception under § 2.758 represents an optional procedure." Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), LBP-85-33, 22 NRC 442, 445 (1985), affirmed, ALAB-841, 24 NRC 64, 99 (1986) (emphasis added). While it is an "optional procedure," Section 2.758 "generally should be utilized where the interpretation or the application of a regulation to specific facts is questioned." Perry, LBP-85-33, supra, 22 NRC at 445, citing Washington Public Power Supply System (WPPSS Nuclear Projects Nos. 3 and 5), CLI-77-11, 5 NRC 719, 723 (1977).<sup>3</sup> These circumstances, however, are not present here. In this instance, PFS is not asking the Commission for an "interpretation" of the deterministic approach "or the application of [the deterministic approach] to specific facts" in this case. Rather PFS is requesting to use a probabilistic, risk-informed approach in place of the deterministic approach. Moreover, where 10 C.F.R. § 2.758 states that it is applicable only when "the rule or regulation . . . would not serve the purposes for which [it] was adopted," in this instance the PFS is rather requesting the exemption to conform with the Commission's stated policy to implement risk-informed regulation and to be consistent with the Commission's position granting the same exemption for a similar facility. See 64 Fed. Reg. 13,828 (1999) (discussing exemption allowing

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<sup>2</sup> Cases interpreting 10 C.F.R. § 50.12, the specific exemption provision of Part 50, provide an analog for the analysis of 10 C.F.R. § 72.7, the sister provision in Part 72.

<sup>3</sup> Note that even in these circumstances, the Applicant is not required to use Section 2.758. See WPPSS, CLI-77-11, supra, 5 NRC at 723 ("should," not "must").

DOE ISFSI to implement probabilistic, risk-informed approach to seismic analyses); 64 Fed. Reg. 14,946 (1999) (Commission issuance of license for DOE ISFSI based on exemption). Because Section 2.758 is an optional procedure that PFS is not required to pursue, the Board must deny the State's motion to force the Applicant to request a waiver under Section 2.758.

In addition, the State's attempt to restrict Applicant's use of 10 C.F.R. § 72.7 is itself a challenge to the Commission's regulations that must be rejected by the Board. 10 C.F.R. § 2.758. The Applicant's exemption request squarely fits within the scope of 10 C.F.R. § 72.7. Section 72.7 specifically provides that an "interested person" may request the Commission to "grant such exemptions from the requirements of its regulations as it determines are authorized by law and will not endanger life or property or the common defense and security and are otherwise in the public interest." 10 C.F.R. § 72.7 (emphasis added). As an applicant for an ISFSI license, PFS certainly qualifies as an "interested person" under Section 72.7. Moreover, nothing in the text of Section 72.7 restricts when it can be used to only times other than when a license proceeding is pending. PFS, as an "interested person," has requested the Commission to "grant [an] exemption[] from the requirements of its regulations" to allow PFS to change from a "deterministic approach to a probabilistic, risk-informed approach" to calculate a design earthquake. See PFS Request for Exemption at 1. The State, however, requests that the Board restrict PFS from requesting an exemption under 10 C.F.R. § 72.7 by "requir[ing] the Applicant to apply for a waiver . . . under 10 CFR § 2.758(b)." State's Motion at 2. The State's attempt to restrict the PFS from using this Commission regulation must be rejected by the Board as a collateral attack on the Commission's regulations.

## II. Amendment to Contention Utah L

Nor should the Board grant the State's alternative relief, i.e. granting the State leave to amend Contention Utah L.<sup>4</sup> The contention is already a broadly worded challenge to PFS' site characterization. The contention asserts that:

The Applicant has not demonstrated the suitability of the proposed ISFSI site because the License Application and SAR do not adequately address site and subsurface investigations necessary to determine geologic conditions, potential seismicity, ground motion, soil stability and foundation loading.

LBP-98-7, 47 NRC 142, 253 (1998). The Commission has determined that a contention should not be amended to include an exemption request where the petitioner "would have . . . the same complaints even if [the exemption were not granted]." Shearon Harris, CLI-86-24, supra, 24 NRC at 777. In this case, the State has raised complaints regarding the "site and subsurface investigations necessary to determine geologic conditions, potential seismicity, ground motion, soil stability and foundation loading" of the PFSF. The contention wording does not cite, and is not limited by or to, a deterministic analysis of seismic hazards. The granting of Applicant's exemption request to use a probabilistic analysis of seismic hazards would not change the State's ability to challenge the "site and subsurface investigations necessary to determine geologic conditions, potential seismicity, ground motion, soil stability and foundation loading" of the PFSF. Therefore, the Board should not revise the current wording of Utah L because the State "would have . . . the same complaints" to raise in the hearing "even [if the exemption is not granted]." Id.

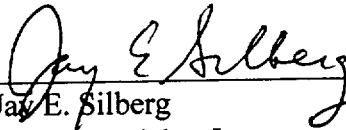
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<sup>4</sup> In addition, nowhere in the State's Motion does the State set forth a contention.

III. Conclusion

For the reasons set forth above, PFS respectfully requests that the Board deny the State's motion.

Respectfully submitted,



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**UNITED STATES OF AMERICA**  
**NUCLEAR REGULATORY COMMISSION**

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PRIVATE FUEL STORAGE L.L.C.

(Private Fuel Storage Facility)

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Docket No. 72-22

**CERTIFICATE OF SERVICE**

I hereby certify that copies of the foregoing Applicants' Response To State's Motion Requiring Applicant To Apply for Full Waiver Under 10 C.F.R. § 2.758(b) or in the Alternative Amendment to Utah Contention L were served on the persons listed below (unless otherwise noted) by e-mail with conforming copies by U.S. mail, first class, postage prepaid, this 12th day of May 1999.

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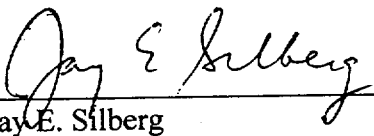
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