RAS 2460

November 29, 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)	)	

APPLICANT'S RESPONSE TO STATE OF UTAH'S REQUEST FOR ADMISSION OF LATE-FILED MODIFICATION TO BASIS 2 OF UTAH CONTENTION L

Applicant Private Fuel Storage L.L.C. ("Applicant" or "PFS") hereby responds to the "State of Utah's Request for Admission of Late-Filed Modification to Basis 2 of Utah Contention L," filed November 9, 2000 ("State Request"). The State Request should be denied because it challenges the grant of an exemption request by the NRC Staff over which the Licensing Board lacks jurisdiction. The State Request also impermissibly challenges NRC regulations; fails to assert an admissible contention; and provides inadequate bases for the claims it seeks to advance. For these reasons, there is also no basis for certifying or referring the issue to the Commission, because the issue raised does not meet the threshold for a certified question or a referred ruling.

I. BACKGROUND

Utah Contention L ("Utah L"), admitted in April 1998, challenges the adequacy of PFS's geo-technical investigations at the Private Fuel Storage Facility ("PFSF"). Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation) LBP-98-7, 47 NRC 142, 251-52 (1998). Utah L, as admitted, raises issues as to the adequacy of PFS's efforts to identify, characterize and quantify surface faulting (Basis 1), the alleged failure by PFS to account for spatial variations in ground motion amplitude and duration because of near surface traces of potentially capable faults (Basis 2), the characterization of subsurface

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soils (Basis 3), and soil stability (Basis 4). Nowhere in Contention L is there an issue with respect to the design basis earthquake and, as the Board has recognized, the claims raised in Utah L are not affected by whether the design-basis earthquake is calculated using one type of earthquake or another. Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-99-21, 49 NRC 431, 436 (1999).

On April 2, 1999, PFS submitted an exemption request, pursuant to 10 C.F.R. § 72.7, which sought NRC Staff approval for using a probabilistic seismic hazard evaluation methodology based on a 1,000-year return period earthquake, instead of the deterministic methodology otherwise required by 10 C.F.R. Part 72.[1] On April 30, 1999, the State filed a motion which sought to either require PFS to file for a rule waiver under 10 C.F.R. § 2.758(b) – so that the request for a change in seismic hazard evaluation methodology could be litigated in this proceeding – or amend Utah L. The Board denied the State's motion, holding inter alia that "the question of admitting or amending contentions relative to the PFS exemption request must await favorable Staff action on that request." LBP-99-21, 49 NRC at 439. In so doing, the Board noted that "there is a considerable question whether the State has really framed what could be considered a 'contention' relative to the PFS request." Id. at 437.

On August 24, 1999, PFS modified its exemption request to reflect a probabilistic analysis based on a 2,000-year return period earthquake, as a result of comments received

[1] Letter from John Parkyn, PFS, to Mark Delligatti, NRC, dated April 2, 1999. The License Application was amended on May 19, 1999 to change the design basis earthquake to the 1,000-year return period earthquake. See SAR at 2.6-38 [Rev. 3]. 10 C.F.R. § 72.102(c) provides for an ISFSI applicant to perform its seismic analyses using a deterministic approach for characterizing the earthquake motion. This is the same analytical approach that was required in the licensing of nuclear power plants prior to the amendment of 10 C.F.R. Part 100 to allow the use of a probabilistic analysis. See 61 Fed. Reg. 65, 176 (1996).

from the Staff.[2] Shortly thereafter, it revised its License Application to use 2,000-year return period earthquake as the design basis earthquake.[3] SAR at 2.6-68 [Rev. 6].

On December 15, 1999, the NRC Staff issued a Safety Evaluation Report for the PFSF, in which it indicated that use of a probabilistic seismic hazard analysis and a 2,000-year return period earthquake would be an acceptable methodology. On January 26, 2000, the State filed a request to modify Basis 2 of Utah L[4] so that it would allege that Applicant had not complied with either 10 CFR § 72.102(c)[5] or the seismic analysis requirements in the NRC Rulemaking Plan in its assessment of ground motion, thereby placing undue risk on the public and the environment. Both the Applicant and the NRC Staff opposed the State's motion. On June 1, 2000, the Board denied the State's motion to accept the late-filed amended Contention L, ruling that such a motion was not ripe for determination in the absence of a favorable Staff ruling on the Applicant's exemption request. LBP-00-15, 51 NRC 313, 318 (2000). Such a favorable ruling has now been issued and is presented in the Staff's updated SER, issued on September 29, 2000.[6]

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[2] Letter from John Parkyn, PFS, to Mark Delligatti, NRC, dated August 24, 1999.

[3] Letter from John Parkyn, PFS, to NRC, dated September 8, 1999.

[4] Basis 2 of Utah Contention L alleges in relevant part that "the [PFSF] site may [] be subject to ground motions greater that those anticipated by the Applicant . . . ." State of Utah's Contentions on the Construction and Operating License Application by Private Fuel Storage, LLC for an Independent Spent Fuel Storage Facility, p. 82 (November 23, 1997).

[5] The rulemaking plan at issue was presented in SECY-98-126, "Rulemaking Plan: Geological and Seismological Characteristics for Siting and Design of Dry Cask Independent Spent Fuel Storage Installations, 10 CFR Part 72" ("Rulemaking Plan"), wherein the Staff proposed a draft rulemaking plan to modify Part 72 to allow ISFSI applicants to use a probabilistic methodology in their seismic analysis. The Commission, by negative consent, assented to the proposed Staff action. See Staff Requirements Memorandum – SECY-98-126, dated June 24, 1998.

[6] The relevant language in the SER reads as follows:

> . . . [T]he staff has determined that a 2,000-year return value with the [probabilistic seismic hazard analysis] methodology can be acceptable for the following reasons:
>
> - The radiological hazard posed by a dry cask storage facility is inherently lower and the Facility is less vulnerable to earthquake-induced accidents than operating commercial nuclear power plants (Hossain et al., 1997). In its Statement of Consideration accompanying the rulemaking for 10 CFR Part 72, the

The State Request was filed on November 9, 2000, after the Board granted the State's motion to be allowed to file new or modified contentions based on the SER by that date. (Order, dated November 1, 2000). In its request, the State seeks to modify Basis 2 of Contention L to directly challenge the exemption granted by the Staff. It seeks to require the use of a probabilistic seismic hazards analysis ("PSHA") with a return period of 10,000 years for the design basis for earthquake ground motions, or the use of a deterministic seismic hazards analysis ("DSHA").[7]

As further discussed below, the State's challenge is not cognizable in the instant licensing proceeding. In addition, the State is launching an impermissible challenge to

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NRC recognized the reduced radiological hazard associated with dry cask storage facilities and stated that the seismic design basis ground motions for these facilities need not be as high as for commercial nuclear power plants (45 FR 74697, 11/12/80; SECY-98-071; SECY-98-126).

- Seismic design for commercial nuclear power plants is based on a determination of the Safe Shutdown Earthquake ground motion. This ground motion is determined with respect to a reference probability level of 10^{-5} (median annual probability of exceedance) as estimated in a probabilistic seismic hazard analysis (Reference Reg Guide 1.165). The reference probability, which is defined in terms of the median probability of exceedance, corresponds to a mean annual probability of exceedance of 10^{-4} (Murphy et al., 1997). That is, the same design ground motion (which has a median reference probability of 10^{-5}) has a mean annual probability of exceedance of 10^{-4}.
- On the basis of the foregoing, the mean annual probability of exceedance for the PFS Facility may be less than 10^{-4} per year.
- The DOE standard, DOE-TD-1020-94 (U.S. Department of Energy, 1996), defines four performance categories for structures, systems, and components important to safety. The DOE standard requires that performance Category-3 facilities be designed for the ground motion that has a mean recurrence interval of 2000 yrs (equal to a mean annual probability of exceedance of 5×10^{-4}). Category-3 facilities in the DOE standard have a potential accident consequence similar to a dry spent fuel storage facility.
- The NRC has accepted a design seismic value that envelopes the 2000-yr return period probabilistic ground motion value for the TMI-2 ISFSI license (Nuclear Regulatory Commission, 1998b; Chen and Chowdhury, 1998). The TMI-2 ISFSI was designed to store spent nuclear fuel in dry storage casks similar to the PFS Facility.

In summary, the staff agrees that the use of the PSHA methodology is acceptable. A 2,000-year return period is acceptable for the seismic design of the PFS Facility. As discussed in the subsequent chapters of this SER, the design analyses use a spectrum that envelops the 2,000-year return period uniform hazard spectra. (SER at 2-41 to 2-42).

[7] As an alternative to these two approaches, the State seeks to require use of a PSHA with an unspecified return period "significantly greater than 2,000 years to avoid placing an undue risk on public safety and the environment." State Request at 6.

the Commission's regulations on how exemptions from Part 72 requirements are sought and approved. Moreover, the basis for the challenge – failure to adhere to a pending Rulemaking Plan – is legally insufficient to overturn the Staff's action. Finally, the State's attacks on the factual bases for the granting of the exemption are insufficient to support the new contention because they are immaterial and rest on speculative matters. The State has thus failed to frame an admissible contention relative to the exemption.

II. DISCUSSION

A. The Staff's Grant Of An Exemption Request Is Outside The Scope of The PFS Licensing Proceeding

The contention propounded in the State Request is not directed at Applicant's compliance with the seismic analysis requirements imposed by the Staff in the SER. Rather, the State challenges the Staff's grant of the exemption itself as "arbitrary, capricious, does not ensure an adequate level of conservatism, and is not in accordance with law." State Request at 7. The Board has repeatedly ruled, however, that in the absence of a contrary Commission directive, "exemption requests falling outside the ambit of section 2.758 are not subject to challenge in an adjudicatory proceeding." LBP-99-21, 49 NRC at 438; LBP-00-08, 51 NRC 146, 156 (2000). It is the Staff, not the Board, "that has the delegated authority to consider the request wholly outside this adjudication." LPB-99-21, 49 NRC at 438, n.6. Therefore, the State cannot ask the Board to overturn what the Staff decided pursuant to its delegated authority, just as it could not have litigated the exemption request in this forum. Accordingly, the State Request should be denied as outside the scope of this Board's jurisdiction.

B. The State's Proposed Contention does not Meet the Standards for Certification of an Issue to the Commission

The State asks that if the Board "finds that it may not have authority to address the issue, . . . the Board . . . certify or refer this matter to the Commission." State Request

at 6. However, there is no need for the Board to certify this matter to the Commission because the State has not framed an admissible contention.[8]

The Commission's Statement of Policy on Conduct of Adjudicatory Proceedings, CLI-98-12, 48 NRC 18 (1998) contains the following guidance with respect to interlocutory reviews by the Commission, either via certification or through interlocutory appeals: "Although the regulation [10 CFR § 2.714a] reflects the Commission's general policy to minimize interlocutory review, . . . the Commission encourages the licensing boards to refer rulings or certify questions on proposed contentions involving novel issues to the Commission in accordance with 10 CFR § 2.730(f) early in the proceeding." 48 NRC at 23. The Commission has clarified this general guidance in a recent ruling in this proceeding in a situation involving, as here, the potential admission of a new contention by the State. In Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-00-2, 51 NRC 77 (2000) the Commissioners had to decide whether to grant discretionary review of a Board order denying the State's request for the admission of a late-filed contention on the adequacy of the Applicant's design-basis accident dose calculations. In upholding the Board's ruling that the propounded contention should not be admitted, the Commission wrote:

> None of our prior decisions has found the admission or denial of a contention, where the intervenor has other contentions pending in the proceeding, to be anything more than a routine interlocutory ruling not subject to immediate appellate review; such rulings must "abide the end of the case."

[8] 10 CFR § 2.718(i) grants the presiding officer the power to "[c]ertify questions to Commission for its determination, either in his discretion or on direction of the Commission." The presiding officer also has the power to refer a ruling to the Commission when, in the presiding officer's judgment, " prompt decision is necessary to prevent detriment to the public interest or unusual delay or expense." 10 CFR § 2.730(f).

51 NRC at 80. On the other hand, the Commission has granted interlocutory review in circumstances involving novel issues of law that have generic implications.[9]

These two recent decisions by the Commission make it abundantly clear that, where the issue is novel, is one of law, and may have generic implications for other proceedings, it is appropriate to have interlocutory review by the Commission. On the other hand, where the issue is case-specific and is one of a number of contentions propounded by an intervenor, the policy against interlocutory appeals should apply to allow the issue to be resolved by the licensing board without Commission involvement.

Here, the issue is whether the State should be allowed to litigate in an adjudicatory hearing the validity of the Staff's decision to grant PFS an exemption. The State claims that it has a right to a hearing under Section 189a of the Atomic Energy Act ("AEA"), arguing that the Commission "has never granted a contested exemption under 10 C.F.R. § 50.12 without an adjudicatory hearing."[10] Regardless of how the authority relied upon by the State is to be interpreted,[11] the Commission in subsequent cases has clearly not granted a hearing whenever an exemption is contested. In Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant), CLI-86-24, 24 NRC 769 (1986),

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[9] In Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-00-13, 52 NRC 23 (2000), the Commission reaffirmed its general policy of minimizing interlocutory reviews, but decided to review the issue whether a license condition may be used to support a finding of financial assurances in a Part 72 proceeding because it was "a legal question" of first impression whose early review by the Commission "not only will clarify what, if anything, requires further litigation in the current case, but also may have generic implications for other proceedings, as the question of when a license applicant has met its financial qualification requirements comes up frequently in a variety of contexts." Id. at 29.

[10] "State of Utah's Reply to Applicant's and NRC Staff's Response to Late-Filed Bases for Utah Contention L" at 12 (Feb. 22, 2000), incorporated by reference into the State Request. See State Request at 6.

[11] The State's assertion is based entirely on the dissenting views of Commissioner Bradford in U.S. Dept. of Energy Project Management Corporation Tennessee Valley Authority (Clinch River Breeder Reactor Plant), CLI-81-35, 14 NRC 1100, 1107 (1981), in which the majority reached a different conclusion upon review of the existing precedent.

affirmed, Edelman v. NRC, 825 F.2d 46 (1987), the Commission declined to hold a hearing on a contested exemption:

> Even if § 189a of the Atomic Energy Act required an adjudicatory hearing on this exemption request, as Petitioners assert, threshold procedural requirements for institution of a hearing would still have to be met. Since adjudicatory hearings are intended only for the resolution of disputed issues of material fact, one such procedural requirement is that a person seeking a hearing must tender sufficient information to establish that there are material issues of fact warranting a hearing. Petitioners have failed to meet this threshold requirement, and therefore the Commission need not address whether § 189a gives interested persons hearing rights on the exemption request at issue here, either within the operating license proceeding or as a separate matter.

Id. at 774 (citations and footnote omitted, emphasis added.)[12] Further, just recently in Commonwealth Edison Co. (Zion Nuclear Power Station, Units 1 and 2), CLI-00-5, 51 NRC 90 (2000), the Commission held that § 189a of the AEA does not grant a right to a hearing on an exemption request. As stated by the Commission:

> . . . Congress intentionally limited the opportunity for a hearing to certain designated agency actions – that do *not* include exemptions. . . . As Senator Hickenlooper pointed out, the statute "clearly specifies the type of circumstance in which hearings are to be held." Unless the exemption in question here can be properly characterized as one of these "circumstances", Petitioners have no right to a hearing.

Id. at 96, citations omitted. The Commission went on to hold in Zion that the granting of an exemption to an existing licensee did not constitute an amendment to the license, and therefore no hearing under Section 189a was required. Id. at 96.

Thus, under existing Commission precedent, in order for the State to be entitled to a hearing on the grant of PFS's exemption request, (1) the exemption must be within one of the enumerated activities of Section 189(a), and (2) the State must raise a "material

[12] Accord Florida Power & Light Co. (St. Lucie, Units 1 and 2), CLI 89-21, 30 NRC 325 (1989) (denying a petitioner's request for hearing on a contested exemption for lack of standing.)

issues of fact regarding whether the standards of [10 CFR § 72.7] are met." Shearon Harris at 774-775. As made clear by the Commission in Shearon Harris, the "material issue of fact" standard is nothing more than a showing that a party has raised "any litigable contentions" regarding the grant of the exemption, as determined under standard Commission pleading requirements. Id. at 772 n.3.

As shown in the next Section, the State has not raised a litigable contention with respect to the exemption. PFS therefore urges the Board to decide on the admissibility of the State's Late-Filed Modification to Basis 2 of Utah Contention L, reject the proposed expansion of the contention, and allow the Board's ruling to "abide the end of the case." Should the Board so conclude, there would be no novel or unusual issue to certify to the Commission, since the situation would be analogous to one in which the Board rejects a proffered contention. If, on the other hand, the Board determines that the State has raised a litigable contention, the Board should certify the matter to the Commission, framing the issues as concretely as possible with an eye towards expediting resolution by the Commission. LBP-99-21, 49 NRC at 438.[13]

C. There is No Basis for Certification to the Commission Because the State Has not Raised an Admissible Contention

Certification to the Commission should be denied because the State Request fails to raise what would be an admissible contention, in that it raises an impermissible challenge to NRC regulations, and also because the State's factual attacks on the grant of the exemption fail to raise an issue of material fact that would warrant a hearing.

[13] For example, the Board should exclude from the issues certified to the Commission the various allegations in Dr. Marvin Resnikoff's Declaration of January 26, 2000, since they are irrelevant to the selection of a design basis earthquake, and were filed late without good cause shown as required by 10 C.F.R. § 2.714(a)(1).

1. The State Request Impermissibly Challenges NRC Regulations

The State Request must be rejected because in reality it amounts to a collateral attack on NRC regulations currently in effect. PFS submitted its request for exemption under 10 C.F.R. § 72.7, which states:

> 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 or the common defense and security and are otherwise in the public interest. [14]

In seeking to preclude the Staff from exercising its authority under 10 C.F.R. §72.7, the State is launching an impermissible collateral attack on the NRC regulations that define the scope of the Staff's authority to grant exemptions.[15] Thus, the State is attacking the validity of § 72.7, which it clearly is not permitted to do.

In addition, the basis asserted by the State for assailing the Staff's grant of the exemption request is that the Staff did not adhere to the NRC Rulemaking Plan to justify use of a PSHA with a 2,000-year return period. State Request at 7. In its current version, the draft Rulemaking Plan would use a graded approach for seismic design, requiring structures to meet a Frequency-Category-1 design basis ground motion (1,000-year return period), unless the failure of the structure would result in releases in excess of the radiological standards of 10 C.F.R. § 72.104(a), in which case a Frequency-Category-2 design basis ground motion (10,000-year return period) would apply.

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[14] This specific exemption is essentially the same as the waiver/exemption provisions for other types of NRC licenses. See, e.g., 10 C.F.R. §§ 30.11 (Part 30 byproduct material), 40.14 (Part 40 source material), 50.12 (Part 50 production and utilization facilities), and 70.14 (Part 70 special nuclear material).

[15] Zion, supra, 51 NRC at 97 (exemption provision of Part 50 is an integral part of the regulations applicable to a license); Louisiana Energy Services (Claiborne Enrichment Center), LBP-91-41, 34 NRC 332, 346-47 (1991) (bases that seek to require standards more stringent than regulatory requirements constitute an impermissible challenge to the Commission's regulations).

The Rulemaking Plan has not been implemented. No final rule has been adopted, and not even a proposed rule has been published.[16] The Staff did not use the approach in the Rulemaking Plan in evaluating the exemption sought by Applicant and it is not known whether the eventual final rule will follow the approach of the Rulemaking Plan, or that used by the Staff here, or some other approach. Accordingly, there can be no legal requirement – and the State cites to none – that the Staff apply the terms of a rule that is still at the planning stages to the evaluation of an applicant's request for an exemption.

Even if the Rulemaking Plan were to be treated as a regulation, the NRC Staff would not be required to follow it when evaluating a request for an exemption. The purpose of § 72.7, and other similar waiver/exemption provisions, is to 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. The factors that the Staff must consider as it decides whether to grant an exemption are whether the exemption is authorized by law, whether it would endanger life or property or the common defense and security, and whether it is otherwise in the public interest. See 10 C.F.R. § 72.7. There is no regulatory requirement that the Staff consider whether the exemption request is consistent with existing, let alone potentially proposed, regulations. To the contrary, an exemption by definition presumes that it is appropriate to depart from existing regulations.

[16] Implementation of a rulemaking plan is not completed until a proposed rule is developed, is reviewed by the various NRC offices and other cognizant entities, and is published for public comment. See NRC Regulations Handbook, NUREG/BR-0053, Revision 4, September 1997 at Section 1.7. See also, Porter County Chapter of the Izaak Walton League v. Atomic Energy Commission, 533 F.2d 1011,1016 (7th Cir.), cert. denied, 429 U.S. 945 (1976) (when reviewing a license application, Staff draft positions are not binding).

In short, the State Request ignores the fundamental concept that an exemption, by definition, is an action that authorizes an alternative to compliance with an existing regulation's requirements, and thus may not be judged against them.

2. The State's Factual Attacks On The Grant of the Exemption Fail to Raise an Issue of Material Fact that Would Warrant a Hearing

The State Request attacks the bases for the Staff's[17] grant of the exemption on two grounds.[18] The State claims that the Staff's reasons for allowing PFS to use a PSHA with a 2,000-year return period are "*ad hoc*" and either "flawed" or "not compelling," and that the use of a 2,000-year return period PSHA does not ensure "an adequate level of conservatism for seismic design of the PFS Facility." State Request at 8, 12. These attacks are, however, immaterial. As the Commission has previously stated:

> Apart from NEPA issues, which are specifically dealt with in the rule, a contention will not be admitted if the allegation is that the NRC staff has not performed an adequate analysis. . . . [T]he sole focus of the hearing is on whether the application satisfies NRC regulatory requirements, rather than the adequacy of the NRC staff performance. . . .[19]

Since the Commission has instructed that the adequacy of the Staff's review is not a sufficient basis for the denial of a license application, the State's arguments concerning the adequacy of the Staff's review are not material and do not support the admission of

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[17] Nowhere in the State Request are any factual allegations that the Applicant has failed to comply with the criteria set by the NRC Staff for the seismic design of the PFSF. Instead, the State focuses entirely on the Staff's action in the SER approving the exemption request.

[18] The State Request (at 5-6) incorporates by reference several factual arguments made in its January 26, 2000 Request for admission of a late-filed modification to Basis 2 against Applicant's exemption request. Applicant addressed these arguments in its February 14, 2000 "Response to State of Utah's Request for Admission of Late-Filed Modification to Basis 2 of Utah Contention L" at 8-12. In the interest of brevity, the discussion in Applicant's February 14, 2000 filing is incorporated by reference here.

[19] 54 Fed. Reg. 33,168, 33,171 (1989) (Statement of Considerations for "Rules of Practice for Domestic Licensing Proceedings – Procedural Changes in the Hearing Process"). See also Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), CLI-83-19, 17 NRC 1041, 1048-49 (1983) (safety-related contentions must be filed on the basis of the applicant's SAR, not the Staff's subsequently issued SER).

the modified contention. Rather, as stated above, what is important is whether the State has raised a material issue of fact going to the validity of the exemption. As set forth below, other than stating its dislike for a 2,000-year return period earthquake, the State has raised no material issues of fact with respect to the adequacy of the PFSF design to protect the public health and safety in the event of such an earthquake.

a) Use of a PSHA with a 2,000-year Return Period Earthquake

The State attacks the use by the NRC Staff of a mean probability of 10^{-4} per year for the design basis earthquake to be exceeded at the PFS site. It contends, based on criteria used for the siting of commercial nuclear power plants, that the correct parameter to use is a median annual probability of 10^{-5} which, for western sites such as Skull Valley, could translate into a mean annual probability significantly greater than 10^{-4} per year. State Request at 11-12. However, the State's argument is irrelevant because the State has failed to provide any credible evidence that the design basis earthquake selected by PSF and endorsed by the NRC Staff will result in doses outside the PFS site in excess of the applicable regulatory limits, to the detriment of public health and safety.[20]

The State also challenges the reference in the SER to the DOE's Performance-3 facilities, which as the Staff notes in the SER (and the State does not dispute) are required

[20] The State argues, based on the proposed Rulemaking Plan, that the applicable dose limit is set forth in 10 CFR § 72.104(a), which in fact is only applicable to normal operating conditions, not accident conditions. Assuming, for the sake of the argument, that such is the applicable dose limit, the statements filed by the State do not provide evidence that the dose limit would be exceeded. The State Request incorporates by reference a January 26, 2000 Declaration by its proposed witness Dr. Marvin Resnikoff which seeks to raise issues about cask transfer accidents, doses due to undetected helium leakage, sabotage-caused leak holes, and impacts from jet engines or hanging bombs. Without debating at this time the dubious merits of Dr. Resnikoff's assertions, it is evident that most, if not all, the events he postulates are irrelevant to the determination of what earthquake should be selected for the Skull Valley site. There is no relationship, for example, between the occurrence of a 2,000 year return earthquake and the impact of a jet engine on the casks stored at the site, or the occurrence of such an earthquake and a sabotage event involving an anti-tank device (which at any rate would be outside the scope of this proceeding, see Pacific Gas & Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-653, 16 NRC 55 (1981)).

to be designed for a 2,000-year return period earthquake and have potential accident consequences similar to those from an accident at an ISFSI facility. The State seeks to negate the use of the DOE practice as a reference point because, in its Rulemaking Plan, the NRC did not adopt the various DOE facility performance categories, including the category corresponding to a 2,000-year return period. State Request at 12-13. However, as discussed above, the Rulemaking Plan is not controlling on the Staff's consideration of the PFS exemption request and thus whether the Rulemaking Plan adopts the DOE categorical standards is immaterial.

Finally, the State seeks to get around the fact that the NRC has already accepted, in connection with the TMI-2 ISFSI, a design seismic value that envelopes the 2,000-year earthquake return period (as does the PFSF seismic design). The State argues that "there were extenuating circumstances that led the DOE to press for the exemption," and that "DOE was a party to a settlement agreement with the state of Idaho that required construction of the ISFSI by the end of 1998." State Request at 13. All of this is mere speculation, and irrelevant to boot. The issue is not why DOE asked for the exemption but whether the NRC granted it -- which it did, thereby providing an important precedent. The State has failed to show why that precedent should not be followed here.

b) Alleged Lack of Conservatism in the use of a PSHA with a 2,000-Year Return Period

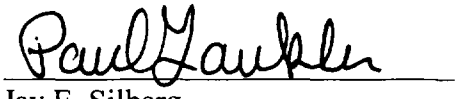
The State advances a further, irrelevant argument in an attempt to raise an issue as to whether the use of a 2,000-year return period earthquake ensures an adequate level of conservatism for the seismic design of the PFS facility. It posits that "it will be unconvincing to the citizens of Utah that the design ground motion level for a nuclear waste storage facility is adequately conservative when design levels for new building construction and new highway bridges in Utah are more stringent." State Request at 14.

This argument of counsel has no probative weight.[21] In addition, the State's argument fails to recognize that the design of nuclear facilities complies with the requirements of 10 CFR Part 72 and the guidance in the NRC Standard Review Plan, which provide adequate levels of conservatism.[22] In any event, the State's argument raises no material issues with respect to the adequacy of the design provided by PFS to protect the public health and safety against the radiological consequences of a seismic event.

III. CONCLUSION

For the foregoing reasons, the State has failed to assert an admissible contention, hence its request to admit its late-filed modification of Basis 2 of Contention Utah L should be denied.

Respectfully submitted,



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Dated: November 29, 2000

[21] None of the witness statements offered by the State addressed what meaningful comparisons, if any, can be drawn between the design of commercial structures and ISFSIs. Nor is there any support, other than counsel's argument, for the State's contention (State Request at 12) that "design levels for new building construction and new highway bridges in Utah are more stringent" then those at the PFSF.

[22] The NRC's approach to protecting health and safety includes the philosophy of defense-in-depth, which requires the application of conservative codes and standards to establish substantial safety margins in the design of nuclear facilities. See, e.g., Indiana Michigan Power Company (Donald C.Cook Nuclear Power Plant, Units 1 and 2), DD-99-3, 49 NRC 161, 168 n.3 (1999); Northeast Utilities (Millstone nuclear Power Station, Units 1, 2 and 3; Haddam Neck Plant), DD-97-21, 46 NRC 108, 113 n.2 (1997).

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(Private Fuel Storage Facility)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of the "Applicant's Response to State of Utah's Request for Admission of Late-Filed Modification to Basis 2 of Utah Contention L," dated November 29, 2000 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 29th day of November, 2000.

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Washington, D.C. 20555-0001
Attention: Rulemakings and Adjudications Staff
e-mail: hearingdocket@nrc.gov
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