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UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

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Before the Commission

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

**APPLICANT'S RESPONSE TO  
STATE OF UTAH'S MOTION FOR CLARIFICATION**

Pursuant to 10 C.F.R. § 2.730, Applicant Private Fuel Storage, L.L.C. ("Applicant" or "PFS") respectfully submits this response to the "State of Utah's Motion for Clarification" filed November 28, 2000 ("Motion"). In its Motion, the State "requests clarification from the Commission on the scope and timing of appeals which may be filed pursuant to 10 CFR § 2.786" from decisions of the Atomic Safety and Licensing Board ("Licensing Board" or "Board"). State Motion at 1. In this response, (1) PFS opposes the Motion to the extent that it would affect the appealability of previous Board decisions, in particular the Licensing Board's decisions on the nine security contentions filed by the State; (2) PFS does not oppose the Motion insofar as it is limited to Contention Utah R; and (3) PFS believes that the State's Motion is otherwise improperly seeking an advisory opinion and should be rejected as premature.

## I. BACKGROUND.

The State correctly notes in its Motion that it “first filed contentions in [this] proceeding on November 23, 1997;” that “[s]ome contentions were admitted for hearing [and] others were not;” that “[d]uring the course of the proceeding, the State . . . filed additional contentions,” of which “some were admitted [and] others were not;” and that “part or all of some contentions have been dismissed under summary disposition procedures while other contentions have gone forward to hearing.” State Motion at 1. Additionally, not noted by the State but relevant here, the last part of Contention Security-C, the last remaining contention of the State’s nine Security Contentions challenging the PFS’s Physical Security Plan (“PSP”) for the Private Fuel Storage Facility (“PFSF”), was dismissed by the Licensing Board on February 29, 2000; the Board dismissed the contention under 10 C.F.R. § 2.707 based on the State’s stated intent to abandon and not litigate the remaining issues left in the contention. Private Fuel Storage, L.L.C (Independent Spent Fuel Storage Installation), LBP –00-05, 51 NRC 64 (2000).<sup>1</sup> In its Memorandum and Order dismissing the remaining part of Security-C, the Board specifically noted that,

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<sup>1</sup> With respect to the nine security contentions, the Board had held a special prehearing conference in Rockville, Maryland in June 1998, after ruling on the admission of the other contentions, because of the safeguards nature of the materials contained in the parties’ filings concerning the contentions. The Board dismissed outright six of the nine contentions and, after reconsideration, admitted parts of three of the contentions, Security-A, Security-B and Security-C. See 51 NRC at 66; see also Private Fuel Storage (Independent Spent Fuel Storage Facility), LBP-98-17, 48 NRC 69 (1998). On summary disposition, the Board dismissed the remaining parts of Security-A and Security-B and another part of Security-C, leaving only a portion of Security-C left for litigation, for which a separate hearing was scheduled for March 14-15, 2000. See 51 NRC at 66-67; see also Private Fuel Storage (Independent Spent Fuel Storage Facility), LBP-99-31, 50 NRC 147 (1999). On February 14, 2000, the State Utah filed “Notification of its Decision not to go Forward with Utah Security-C,” indicating its intent not to proceed on the remaining part of Security-C. The State’s pleading was discussed by the Board and the parties at a February 22, 2000 telephone prehearing conference previously scheduled to discuss administrative matters relating to the planned March 2000 hearing, at which both the Staff and the Applicant argued that, given the State’s intent not to proceed, the appropriate course of action for the Board was to dismiss the remaining part of Security-C under 10 C.F.R. § 2.707.

“with [its] ruling, all party issues regarding the adequacy of the proposed PFS facility PSP have been resolved.” Id. at 69 (emphasis added).<sup>2</sup>

In its Motion, the State professes to read “10 CFR § 2.786(b)(1) to mean that all contentions that were dismissed at the filing stage and all contentions that were dismissed at the summary disposition stage must wait until after the Licensing Board issues its final initial decision before those issues may be appealed to the Commission.” State Motion at 2. The State claims, however, that section 2.786(b)(1) is unclear on the “scope of an appeal from a contention that was heard by the Board and on which the Board has issued a partial initial decision.” Id. at 2.

As an example, the State refers to its contention challenging PFS’s Emergency Plan, Contention Utah R, where portions of the contention were dismissed at the filing stage, portions at the summary disposition stage, and the remaining portions of the contention have gone to hearing. Id. at 2. With respect to contentions like Contention Utah R, the State suggests that it would be most expedient to appeal all issues relating to the Contention at one time (i.e., bases not admitted or dismissed pre-hearing as well as the

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<sup>2</sup> In the conference call on this matter, the Chairman of the Board specifically noted that:

[I]f this issue had gone to hearing, we would have issued an initial decision which in that case probably would have basically wrapped up this segment of the case, and there is case authority that indicates that appeal rights then do come from that initial decision. . . . [G]iven the way this is proceeding, I have no idea where that leaves us in term of appeal rights, but I will leave that up to you all to decide, you know, where or when, or what appeals you wish to file after we issue whatever order we issue related to the pleading that has been filed indicating the State is not going forward on Security-C.

Telephone Pre-hearing Conference (Feb. 22, 2000), Tr. 1299-1300. As set forth below, under Commission precedent (1) the State’s nine contentions challenging the PFSF PSP comprise a “major segment” of the proceeding for finality purposes, and (2) the State’s abandonment under 10 C.F.R. 2.707 of the remaining PSP issues triggered its appeal rights and related deadlines under 10 C.F.R. § 2.786.

bases that went to hearing) rather than appeal only the issues that went to hearing. Id. at 2. The State closes its request by specifically requesting (1) “guidance on whether filing an appeal on all issues relating to a specific contention for which the Board issues a partial initial decision, . . . is acceptable to the Commission” and (2) “guidance on whether all other contentions must await the Board’s final initial decision before being appealed to the Commission.” Id. at 2-3 (emphasis added).

## II. DISCUSSION

Longstanding Commission precedent addresses the issue of when a licensing board decision is appealable. As stated by the Appeal Board in Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-894, 27 NRC 632 (1988):

Although [the regulation] speaks in terms of appeals from “initial decisions,” we long ago decided that that phraseology was not to be taken too literally. As explained in our 1975 decision in [Toledo Edison Co. (Davis-Besse Nuclear Power Station)], ALAB-300, 2NRC 752, 758]:

The test of “finality” for appeal purposes before this agency (as in the courts) is essentially a practical one. As a general matter, a licensing board’s action is final for appellate purposes when it either disposes of at least a major segment of the case or terminates a party’s right to participate; rulings which do neither are interlocutory.

27 NRC at 636 (footnotes omitted) (emphasis added).<sup>3</sup> In this respect a major segment of the case may be a group of contentions concerning a particular issue or set of issues. See

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<sup>3</sup> In Seabrook, the licensing board had dismissed two contentions abandoned by the intervenor after the licensing board in that case had limited the scope of the contentions contrary to the intervenor’s position (exactly analogous to what occurred here with respect to the State’s Security Contentions). The Appeal Board held that, because the licensing board’s order “should be deemed to have disposed of a ‘major segment’ of [the remaining case],” the licensing board’s dismissal of the contentions, based on the intervenor’s abandonment of their further litigation, met the “Davis-Besse test of finality” and triggered the applicable

e.g., Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-943, 33 NRC 11, 13 (1991) (“emergency planning issues” comprise “‘major segment’ of the case”); Long Island Lighting Company (Shoreham Nuclear Power Station, Unit 1), LBP 83-20, 17 NRC 580, 583 (1983) (“all contentions concerning the issues of physical security of the plant” comprise “a major segment of the Shoreham operating license proceeding”); Cleveland Electric Illuminating Company (Perry Nuclear Power Plant, Units 1 and 2), LBP-83-77, 18 NRC 1365, 1395 (1983) (“quality assurance issue is . . . ‘a major segment of [the] case’”). See also Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-941, 32 NRC 333, 344 (1990) (dismissed contentions appealable when initial decision on related contentions constituting a major segment of the case is issued).

Thus, Commission precedent is available for the State to ascertain when it needs to file an appeal and the scope of any such appeal. With respect to the State’s request for clarification insofar as it relates solely to Utah Contention R, PFS agrees that, under the above precedent, the Licensing Board’s decision on Utah R will trigger the State’s right to appeal any of the Board’s previous rulings dismissing portions of Utah R. Utah R is the only admitted contention concerning emergency planning, which the above precedent recognizes as a major segment of the licensing of a nuclear facility. Further, with the initial decision concerning Utah R being appealable, it follows that other portions of Utah R previously dismissed and other dismissed contentions related to emergency planning will be up for approval. See Seabrook ALAB-941, supra.

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appeal deadlines in the regulation. However, because the deadline was missed by only five days, the Appeal Board allowed the filing of an untimely notice of appeal.

Insofar, however, as the State's request for clarification extends to other contentions, PFS opposes the request. First, the Commission should deny the State's Motion to the extent it would affect those matters on which the State's right to appeal has expired. In particular, PFS believes that the time for the State to appeal the Board's decisions on its Security Contentions challenging the PFSF PSP has expired. As set forth in notes 2 and 3 supra, the remaining portion of the State's Security Contentions was dismissed after the State clearly stated its intent not to proceed with its litigation. Under the above precedent, security issues have previously been recognized as a "major segment" of NRC licensing cases. Further, the security contentions in this proceeding were handled entirely independently and separately from the other contentions. Thus, under the Seabrook precedent set forth in note 3, supra, the State's abandonment of the remaining part of Security-C met NRC finality requirements and triggered the deadlines of 10 C.F.R. § 2.786. The State's Motion should not be allowed to resuscitate what appeal rights that it has missed by its inaction.

Second, insofar as the State's Motion seeks clarification on the appealability of the other dismissed contentions, the Motion is premature. As the Appeal Board has stated:

[W]hether [the] resolution [of an issue] can be regarded as disposing of a "major segment of the case," and thus, as satisfying the Davis-Besse test of "finality" for appeal purposes [is an inquiry that] is best left for such later date when and if it would no longer be simply conjectural.

Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2) ALAB-906, 28 NRC 615, 619 (1988). Thus, what contention or group of contentions, including

those contentions previously dismissed, would constitute a major segment of the case would best await the Licensing Board's resolution of various contentions.<sup>4</sup> In this respect, as stated above, PFS believes that one major segment of this licensing proceeding – the adequacy of the physical security plan for PFSF – has already been fully resolved for which the time for appeal has long expired.

### III. CONCLUSION

For the reasons stated above, the Commission should deny the State's Motion, other than its request for clarification on the appealability of those portions of Utah Contention R, previously dismissed by the Licensing Board, upon the Board's issuance of its partial initial decision concerning Utah R.

Respectfully submitted,



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

Dated: December 8, 2000

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<sup>4</sup> PFS would generally agree with the State, however, that, to the extent a Licensing Board decision of the remaining part of a contention were appealable, the other parts of the contention that had been previously dismissed by the Board would be appealable at the same time.

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CERTIFICATE OF SERVICE

I hereby certify that copies of the "Applicant's Response to State of Utah's Motion For Clarification" 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 8<sup>th</sup> day of December 2000.

Richard A. Meserve, Chairman  
OCM/RAM  
U.S. Nuclear Regulatory Commission  
One White Flint North, Rm. 17-D1  
Mail Stop 16 C1  
11555 Rockville Pike  
Rockville, MD 20852-2738  
e-mail: [CHAIRMAN@nrc.gov](mailto:CHAIRMAN@nrc.gov)

Edward McGaffigan, Jr., Commissioner  
OCM/EXM  
U.S. Nuclear Regulatory Commission  
One White Flint North, Rm. 18-G1  
Mail Stop 16 C1  
11555 Rockville Pike  
Rockville, MD 20852-2738  
e-mail: [cmmcgaffigan@nrc.gov](mailto:cmmcgaffigan@nrc.gov)



Greta J. Dicus, Commissioner  
OCM/GJD  
U.S. Nuclear Regulatory Commission  
One White Flint North, Rm. 17-D1  
Mail Stop 16 C1  
11555 Rockville Pike  
Rockville, MD 20852-2738  
e-mail: [cmrdicus@nrc.gov](mailto:cmrdicus@nrc.gov)

Jeffrey S. Merrifield, Commissioner  
OCM-JSM  
U.S. Nuclear Regulatory Commission  
One White Flint North, Rm. 18-F1  
Mail Stop 16 C1  
11555 Rockville Pike  
Rockville, MD 20852-2738  
e-mail: [cmrmerrifield@nrc.gov](mailto:cmrmerrifield@nrc.gov)

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

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

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

Nils J. Diaz, Commissioner  
OCM/NJD  
U.S. Nuclear Regulatory Commission  
One White Flint North, Rm. 18 E1  
Mail Stop 16 C1  
11555 Rockville Pike  
Rockville, MD 20852-2738  
e-mail: [cmrdiaz@nrc.gov](mailto:cmrdiaz@nrc.gov)

Office of the Commission Appellate Adjudication  
U.S. Nuclear Regulatory Commission  
One White Flint North, Rm. 14-G13  
Mail Stop 16 C1  
Washington, DC 20555-0001  
email: [rmf@nrc.gov](mailto:rmf@nrc.gov)

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

\* Susan F. Shankman  
Deputy Director, Licensing & Inspection Directorate, Spent Fuel Project Office  
Office of Nuclear Material Safety & Safeguards  
U.S. Nuclear Regulatory Commission  
Washington, D.C. 20555-0001

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

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

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

Diane Curran, Esq.  
Harmon, Curran, Spielberg &  
Eisenberg, L.L.P.  
1726 M Street, N.W., Suite 600  
Washington, D.C. 20036  
e-mail: [dcurran@harmoncurran.com](mailto:dcurran@harmoncurran.com)

\*Richard E. Condit, Esq.  
Land and Water Fund of the Rockies  
2260 Baseline Road, Suite 200  
Boulder, CO 80302

\* By U.S. mail only

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

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

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

  
Paul A. Gaukler