

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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BEFORE THE COMMISSION

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In the Matter of:)	Docket No. 72-22-ISFSI	OFFICE OF SECRETARY
)		RULEMAKINGS AND
PRIVATE FUEL STORAGE, LLC)	ASLBP No. 97-732-02-ISFSI	ADJUDICATIONS STAFF
(Independent Spent Fuel)		
Storage Installation))	January 16, 2001	

STATE OF UTAH'S PETITION FOR REVIEW OF LBP-00-35, "FIRST PARTIAL
INITIAL DECISION (CONTENTION UTAH R, EMERGENCY PLAN)," AND
OTHER MATTERS RELATED TO UTAH CONTENTION R
[Non-proprietary Version]

In accordance with 10 C.F.R. §2.786(b)(1), the State of Utah hereby petitions the Commission for review of the Licensing Board's December 29, 2000 decision in LBP-00-35, in which the Board found the Applicant met its burden to establish that its Emergency Plan provides reasonable assurance that, in the event of a fire at the Private Fuel Storage, LLC ("PFS") facility, the public health and safety will be protected. LBP-00-35 (slip op. at 64). Contention Utah R challenged PFS's capability to fight fires at the ISFSI site. In accordance with the Commission's December 20, 2000 decision in CLI-00-24 advising the State that all rulings that deal with the subject matter of a partial initial decision should be reviewed at the same time, the State also petitions the Commission for review of the April 22, 1998 Licensing Board decision rejecting the State's proposed paragraph 4(a) for Contention Utah R. LBP-98-07, 47 NRC 142, 196 (1998). Finally, the State requests that emergency planning issues related to the Intermodal Transfer Facility or Point ("ITF" or "ITP") be deferred and appealed if and when the State appeals dismissal of its ITF contention, Utah B.

I. STANDARD FOR EVALUATING A PETITION FOR REVIEW

A petition for review may be granted at the discretion of the Commission. 10 CFR § 2.786(b)(4). In considering whether to exercise its discretion to grant a petition, the Commission will give due weight to the existence of a substantial question with respect to the following considerations:

- (i) A finding of material fact is clearly erroneous or in conflict with a finding as to the same fact in a different proceeding;
- (ii) A necessary legal conclusion is without governing precedent or is a departure from or contrary to established law;
- (iii) A substantial and important question of law, policy or discretion has been raised;
- (iv) The conduct of the proceeding involved a prejudicial procedural error; or
- (v) Any other consideration which the Commission may deem to be in the public interest.

10 CFR § 2.786(b)(4).

I. BACKGROUND

A. Factual Background

PFS proposes to build the largest independent spent fuel storage installation (“ISFSI”) in the United States on a very small Indian reservation located in western Utah, about 45 miles from Salt Lake City and the populous Wasatch Front. As proposed, this away-from-reactor ISFSI would store up to 40,000 metric tons of uranium (“MTU”) of spent nuclear fuel rods in dry cask storage, over two orders of magnitude larger than any ISFSI presently existing in the United States. LBP-00-35, slip op. at 26. The ISFSI site is located approximately 90 minutes away from off-site assistance. *Id.* at 54; *see also* Tr. at 1515. PFS intends to maintain its own fire brigade, which will be limited to fighting fires at the ISFSI site. *Id.* at 28.

B. Procedural History

The State filed Contention Utah R, related to the adequacy of PFS's Emergency Plan, as part of its initial contentions on November 23, 1997.¹ After further proceedings, including a prehearing conference, the Licensing Board on April 22, 1998 issued an order admitting Utah R, but rejecting several of the proffered paragraphs of that contention.

LBP-98-07, 47 NRC 142, 195-196. As admitted, Utah R stated:

The Applicant has not provided reasonable assurance that the public health and safety will be adequately protected in the event of an emergency at the storage site or the transfer facility in that:

1. PFS has not adequately described the ITP, the activities conducted there, or the area near the ITP in sufficient detail to evaluate the adequacy and appropriateness of the emergency plan.

2. PFS does not address response action, emergency information dissemination, or emergency response training programs for accidents at the ITP.

3. PFS has not adequately described the means and equipment for mitigation of accidents because it does not have adequate support capability to fight fires onsite.

LBP-98-07, 47 NRC 142, 254.

Among the rejected paragraphs was 4(a), which states: "PFS has not adequately described means and equipment for mitigation of accidents, because it ...[d]oes not address how it would procure a crane within 48 hours for a tip over cask accident." Id. at 196.

The Board denied PFS's motion for partial summary disposition of Utah R. LBP-99-36, 50 NRC 202, 209 (1999). On the same day, the Board dismissed the State's contention (Utah B) relating to licensing the Intermodal Transfer Facility, LBP-99-34, 50 NRC 168, and

¹ See State of Utah's Contentions on the Construction and Operating License Application by Private Fuel Storage, LLC for an Independent Spent Fuel Storage Facility (November 23, 1997) ("State's Contentions") at 116-122.

subsequently the Board dismissed those subparts of Utah R involved with the ITF. *Sæ* LBP-99-39, 50 NRC 232 (slip op. at 8).

Following a June 19, 2000 hearing on the remaining issue in Utah R -- whether PFS has the capability to fight fires on-site -- the Licensing Board on December 29, 2000 issued LBP-00-35, which found in favor of the Applicant.

III. ISSUES FOR WHICH REVIEW BEFORE THE COMMISSION IS REQUESTED

A. The Licensing Board's Refusal to Require License Conditions That PFS Will Follow NFPA 600 and Maintain a Certain Number of Fire Fighters On-Site Is Erroneous, Contrary to Governing Precedent and Raises an Important Policy Question.

The State requested that the Applicant's commitments to satisfy various National Fire Protection Association Standards ("NFPA") standards for fire protection at its proposed facility be codified as license conditions in accordance with CLI-00-13 and 10 CFR § 72.32 and 72.122(c). *Sæ* State's Proposed Response Findings of Fact and Conclusions of Law Relating to Contention Utah R (August 28, 2000) at 5-6. The Board did not agree, ruling that because PFS's commitments were based on statements made by PFS's witnesses under oath before the Board or as part of its application, PFS showed a willingness to comply with the NFPA standards that were part of its commitments, and that penalties that flow from making false statements and agency enforcement actions were sufficient to ensure compliance without the need for license conditions. LBP-00-35, slip op. at 63-64.

One critical concern raised by the State in the hearing on Utah R is PFS's capacity to be self-sufficient in its ability to cope with on-site fires. *Sæ* Tr. post 1588; Prefiled Testimony of Gary Wise (June 14, 2000) at 3-10. The State maintained that because PFS is

located in an area where, effectively, there will be no off-site assistance, PFS's fire brigade should follow NFPA standards. Id.; State of Utah's Proposed Findings of Fact and Conclusions of Law Regarding Contention Utah R, Private Fuel Storage, LLC's Capability to Fight Fires On Site (August 7, 2000) ("State's Proposed Findings") at 7-19. Moreover, the State raised doubts about whether PFS would have sufficient trained fire fighting personnel on site to handle fires. State's Proposed Findings at 15-18.

In its prefiled testimony, PFS's witness Kenneth Dungan stated that PFS would have a minimum of five personnel trained to NFPA 600 standards. Tr. post 1456; Applicant's Testimony of Ken Dungan and Wayne Lewis on Fire Protection at the PFSF - Utah R (June 15, 2000) at 26. At the beginning of the hearing on Utah R, PFS introduced an amendment to its Emergency Plan whereby PFS committed to have 11 persons trained to NFPA 600 standards. Tr. 1445-1446 (PFS's Hearing Exhibit G, EP at 4-3, Rev. 9). By the end of the hearing, in response to concerns raised, PFS committed to meeting NFPA 600, 2000 edition, in its entirety. Tr. at 1666; *see also* 1610-11. The Licensing Board relied on this commitment in ruling that PFS had demonstrated that its Emergency Plan provides reasonable assurance that, in the event of a fire at the PFS facility, the public health and safety will be protected.

The Commission's decision requiring license conditions for PFS's financial assurance commitments provides important guidance on this point. CLI-00-13, 52 NRC 23. In CLI-00-13, the Commission required that all PFS's financial assurance commitments be incorporated into PFS's license as license conditions. Id. at 33. The Commission held that PFS's commitments to meet the financial assurance regulation, "should be expressly incorporated into the PFS license in order to eliminate any ambiguity as to what PFS's

commitments are and to eliminate any question about whether these promises are fully enforceable.” Id.

Consistent with CLI-00-13, PFS’s commitment to follow NEPA 600 and have a certain number of its staff trained as fire fighters on-site should also be made license conditions. As PFS has committed to following NFPA 600, and also committed to having a minimum of 11 employees trained as fire fighters, five of whom will be on site during normal business hours, this would not impose any additional requirements on the Applicant other than those the Applicant itself has suggested.

This is particularly important because PFS has put forward a new financing scheme. The revenue shortfall under this new financial plan has the potential to lead PFS into cutting corners.² As most of PFS’s direct costs relate to labor, one likely corner cutting measure is a reduction in personnel PFS employs at the site. The Licensing Board’s failure to recognize this potential problem may relate to its reliance on its erroneous understanding of PFS’s scheme for financing the proposed PFS project “through equity contributions of its owners and by service agreements that commit customers to preshipment payments and annual SNF storage fees.” LBP-00-35, slip op. at 26. This scheme may have been in effect until September 2000 but has since been completely replaced by a new financing scheme. *See e.g.*, Applicant’s Submission of Model Service Agreement (September 29, 2000), filed as a non-public proprietary document. Instead of owner equity contributions and preshipment

² *See* Objections to the Adequacy of the Applicant’s Model Service Agreement to Meet Part 72 Financial Assurance Requirements (November 7, 2000) at 16; *see also* State of Utah’s Response to Applicant’s Motion for Summary Disposition on Issues Remanded by CLI-00-13 on Utah Contention E/confederated Tribes Contention F (December 22, 2000). Both of these documents were filed as proprietary.

payments,

[REDACTED TEXT].³ See footnote 2 *supra*. In light of this substantial change to PFS's financing scheme, the Board's reliance on an outdated scheme is clearly erroneous.

It is also important to include PFS's fire-fighting commitments as license conditions because, as it now stands, PFS has grafted fire-fighting duties onto other full-time duties the fire fighting member must perform. In its Findings, the State pointed out that PFS is trying to do too much with too few people. State's Proposed Findings at 16-17; *see also* LPB-00-35 (slip op. at 22). Thus, PFS can barely adhere to its commitment to meet NFPA 600 with the personnel it plans to employ. State's Proposed Findings at 15-16, 18. This raises a substantial and important question of law relating to the safety of on-site workers and the public. To counter the potential that PFS may attempt to reduce personnel as a cost saving measure, the Commission should require the Staff to turn PFS's NFPA 600 and staffing commitments into license conditions. The apparent reason for the Board's rejection of license conditions is:

The adoption in this Board issuance of license conditions incorporating the PFS commitments outlined by the State may seem to be no more than a ministerial precaution. Nonetheless, repeated commitment incorporation may have the long-term impact of causing applicants to underestimate the gravity of making (or failing to uphold) such commitments to the Board and/or the staff regardless of their adoption as "license conditions" or a Board directive.

³ The State conferred with counsel for the Applicant who represented that the underlined text is claimed by PFS to be proprietary. The State fervently disagrees that the mere mention of PFS's new funding scheme should be treated as proprietary. The State, however, files this portion of its appeal as a proprietary pleading in order not to be accused of violating the State-PFS confidentiality agreement, under which PFS provides the State access to its confidential financial information. The State urges the Commission to find that the underlined text is not proprietary.

LBP-00-35 (slip op. at 64 & n. 7). The Board's rationale is contrary to CLI-00-13; it also offers no adequate protection to on-site workers and the public. Instead it relies solely on the Applicant's good-will. As such, there will be no procedure for verification inspection by NRC of PFS's commitment to comply with NFPA 600 or to have at least five trained fire brigade members on site. This important legal and safety issue is appropriate for Commission review.

B. PFS's Emergency Plan Does Not Describe How PFS Will Mitigate a Potentially Critical Accident: Cask Tip Over.

Basis 4(a) of Utah R asserted that "PFS has not adequately described means and equipment for mitigation of accidents, because it . . . [d]oes not address how it would procure a crane within 48 hours for a tip over cask accident." Utah R at 120-121⁴; *see also* footnote 6 *infra*; and 10 CFR § 72.32(a)(5).⁵ The Licensing Board rejected this basis as inadmissible, with the following explanation:

Inadmissible as to all other portions of paragraph one, paragraph two, subparagraph a. of paragraphs three and four, and paragraph five in that these portions of the contention and their supporting bases fail to establish with specificity any genuine dispute; impermissibly challenge the Commission's regulations or generic rulemaking-associated determinations, including Commission determinations relating to the need for offsite emergency response plans for ISFSIs; lack materiality; lack adequate factual or expert opinion support; and/or fail properly to challenge the PFS application. See section II.B.1.a.i., ii., iv., v., vi. above.

⁴ This matter was also brought before the Licensing Board by the State in its January 16, 1998 State's Reply to the NRC Staff's and Applicant's Response to State of Utah's Contentions A Through DD, at 66-69; and during the January 27-29, 1998 Prehearing Conference before the Licensing Board, Tr. at 792-803.

⁵ 10 CFR § 72.32(a)(5) requires the Emergency Plan to include:

A brief description of the means of mitigating the consequences of each type of accident [described in response to 10 CFR § 72.32(a)(2)], including those provided to protect workers onsite, and a description of the program for maintaining the equipment.

LBP-98-07, 47 NRC 142, 196.

PFS has elected to use a cask that, if tipped over, must be up-righted within “33 hours (assuming a complete blockage of all air ducts) to restore natural convection cooling before the temperature . . . could exceed its design criteria.” EP (Rev. 10) at 3-4.⁶ This critical safety concern could easily be ameliorated by PFS describing in its emergency plan how PFS could procure a crane or cranes capable of up-righting loaded storage casks, each of which weighs 175 tons. *See e.g.*, SAR at 8.2-32d and 8.2-35 (Rev. 17).

The Board’s finding that PFS need not address this situation is not an appropriate exercise of policy judgment. By road PFS is located approximately 75 miles from Salt Lake City (LA Fig. 1-1 (Rev. 2)), and it is not evident how PFS will timely acquire a crane or cranes to upright casks stored at the ISFSI, which could number up to 4,000 casks. *See e.g.*, EP at 1-1 (Rev. 0). Because of the Holtec cask’s passive cooling system, time is of the essence if a cask tip over occurs. EP at 3-4 (Rev. 10); SAR at 8.2-35 (Rev. 17). Review by the Commission is appropriate because the issue raises important policy questions relating to safety and public interest. In addition, the Board’s conclusion that the Emergency Plan provides reasonable assurance that health and safety will be protected is factually erroneous in the absence of this additional assurance.

IV. CONTENTION R ISSUES ENCOMPASSED IN CONTENTION B

The Board dismissed Contention Utah B, ruling that NRC was not required to issue a license for the Intermodal Transfer Facility, located approximately 25 miles from the ISFSI site. LBP-99-34 (slip op. at 2, 16-17). After dismissing Utah B, the Board gave the parties

⁶ The initial EP discussed casks that had to be uprighted within 48 hours. *See* EP (Rev. 0) at 3-4.


the opportunity to address the effect of the dismissal of Utah B on other admitted Utah contentions. In reliance of its dismissal of Utah B, the Board dismissed all emergency plan issues relating to the ITF, thereby imputing into Utah B certain discrete issues relating to Utah R. In order to fully brief the emergency plan issues relating to the ITF, it would require the State to address the substance of Utah B, thus making the appeal interlocutory. The State requests that those emergency plan issues relating to the ITF be preserved and addressed if and when the State appeals the Board's dismissal of Utah B.⁷ Alternatively, if the Utah R issues relating to the ITF are not considered to be interlocutory or subsumed in Utah B, the State requests permission to brief those issues now.

V. CONCLUSION

For the reasons stated above, the State requests that the Commission accepts this petition for review of contention Utah R.

DATED this 16th day of January, 2001.⁷

Respectfully submitted,


Denise Chancellor, Fred G Nelson, Assistant Attorneys General
Connie Nakahara, Special Assistant Attorney General
Diane Curran, Special Assistant Attorney General
Laura Lockhart, Assistant Attorney General
Attorneys for State of Utah
Utah Attorney General's Office
160 East 300 South, 5th Floor, P.O. Box 140873
Salt Lake City, UT 84114-0873, Tel. (801) 366-0286, Fax: (801) 366-0292

⁷ The time for appealing Utah B would be after the Board issues its final initial decision.

CERTIFICATE OF SERVICE

I hereby certify that a copy of STATE OF UTAH'S PETITION FOR REVIEW OF LBP-00-35, "FIRST PARTIAL INITIAL DECISION (CONTENTION UTAH R, EMERGENCY PLAN)," AND OTHER MATTERS RELATED TO UTAH CONTENTION R was served on the persons listed below by electronic mail (unless otherwise noted) with conforming copies by United States mail first class only to those indicated with an asterisk (*), this 16th day of January, 2001:

Emile L. Julian, Assistant for
Rulemakings and Adjudications
Rulemaking & Adjudication Staff
Secretary of the Commission
U. S. Nuclear Regulatory Commission
Washington D.C. 20555
e-mail: hearingdocket@nrc.gov
(*original and two copies*)

Richard A. Meserve, Chairman
U.S. Nuclear Regulatory Commission
Mail Stop O-16 G15
One White Flint North
11555 Rockville Pike
Rockville, MD 20852-2738
e-mail: chairman@nrc.gov

Edward McGaffigan, Jr., Commissioner
U.S. Nuclear Regulatory Commission
Mail Stop O-16 G15
One White Flint North
11555 Rockville Pike
Rockville, MD 20852-2738
e-mail: sfc@nrc.gov

Greta J. Dicus, Commissioner
U.S. Nuclear Regulatory Commission
Mail Stop O-16 G15
One White Flint North
11555 Rockville Pike
Rockville, MD 20852-2738
e-mail: cmrdicus@nrc.gov

Nils J. Diaz, Commissioner
U.S. Nuclear Regulatory Commission
Mail Stop O-16 G15
One White Flint North
11555 Rockville Pike
Rockville, MD 20852-2738
e-mail: cmrdiaz@nrc.gov

Jeffrey S. Merrifield, Commissioner
U.S. Nuclear Regulatory Commission
Mail Stop O-16 C1
One White Flint North
11555 Rockville Pike
Rockville, MD 20852-2738
e-mail: jmer@nrc.gov

G. Paul Bollwerk, III, Chairman
Administrative Judge
Atomic Safety and Licensing Board
U. S. Nuclear Regulatory Commission
Washington, DC 20555
E-Mail: gpb@nrc.gov

Dr. Jerry R. Kline
Administrative Judge
Atomic Safety and Licensing Board
U. S. Nuclear Regulatory Commission
Washington, DC 20555
E-Mail: jrk2@nrc.gov
E-Mail: kjerry@erols.com

Dr. Peter S. Lam
Administrative Judge
Atomic Safety and Licensing Board
U. S. Nuclear Regulatory Commission
Washington, DC 20555
E-Mail: psl@nrc.gov

Sherwin E. Turk, Esq.
Catherine L. Marco, Esq.
Office of the General Counsel
Mail Stop - 0-15 B18
U.S. Nuclear Regulatory Commission
Washington, DC 20555
E-Mail: set@nrc.gov
E-Mail: clm@nrc.gov
E-Mail: pfscase@nrc.gov

Jay E. Silberg, Esq.
Ernest L. Blake, Jr., Esq.
Paul A. Gaukler, Esq.
Shaw, Pittman, Potts & Trowbridge
2300 N Street, N. W.
Washington, DC 20037-8007
E-Mail: Jay_Silberg@shawpittman.com
E-Mail: ernest_blake@shawpittman.com
E-Mail: paul_gaukler@shawpittman.com


John Paul Kennedy, Sr., Esq.*
1385 Yale Avenue
Salt Lake City, Utah 84105
E-Mail: john@kennedys.org

Joro Walker, Esq.*
Land and Water Fund of the Rockies
2056 East 3300 South Street, Suite 1
Salt Lake City, Utah 84109
E-Mail: joro61@inconnect.com

Danny Quintana, Esq.*
Danny Quintana & Associates, P.C.
68 South Main Street, Suite 600
Salt Lake City, Utah 84101
E-Mail: quintana@xmission.com

James M. Cutchin
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
E-Mail: jmc3@nrc.gov
(*electronic copy only*)

Office of the Commission Appellate
Adjudication*
Mail Stop: 16-G-15 OWFN
U. S. Nuclear Regulatory Commission
Washington, DC 20555



Denise Chancellor
Assistant Attorney General
State of Utah