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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

OFFICE OF SECRETARY
RULEMAKING AND
ADJUDICATIONS STAFF

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 PETITION FOR REVIEW
OF LBP-00-35 AND OTHER MATTERS RELATED TO UTAH CONTENTION R**

Pursuant to 10 C.F.R. § 2.786(b)(3), Applicant Private Fuel Storage, L.L.C. ("Applicant" or "PFS") opposes the "State of Utah's Petition for Review of LBP-00-35, 'A First Partial Initial Decision (Contention Utah R, Emergency Plan),' and Other Matters Related to Utah Contention R,"¹ filed January 16, 2001 ("Petition"). The State petitions for review of the Atomic Safety and Licensing Board's ("Board") December 29, 2000 decision in LBP-00-35 that the Emergency Plan ("EP") for the Private Fuel Storage Facility ("PFSF") provides reasonable assurance that, in the event of a fire at the facility, the public health and safety will be protected. Petition at 1. This decision resolved the last part of Contention Utah R ("Utah R") remaining in this proceeding. The State also petitions for the review of the Board's earlier rejection as a contention of the part of Utah R that alleged that the PFSF EP did not provide an adequate response to a postulated spent fuel storage cask tip over accident. *Id.* at 3. PFS respectfully submits that the State's petition

¹ Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-00-35, 52 NRC ___, (Dec. 29, 2000).

be denied. The State fails to show that the Board's decisions contained clear errors of fact or necessary legal conclusions contrary to established law; nor does the State raise substantial and important questions of law or policy.²

I. BACKGROUND

As required by 10 C.F.R. § 72.32(a), the PFSF license application included the EP, identifying potential accidents at the facility and measures for mitigating their effects. One of the State's initial contentions, Utah R, challenged aspects of the PFSF EP.³ In April 1998, the Board admitted the following three parts of Utah R:

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.

² The State also requests that [Utah R] emergency planning issues related to the Intermodal Transfer Point ("ITP") be deferred "and appealed if and when the State appeals dismissal of its [ITP] contention, Utah B [which had asserted that the ITP had to be licensed under 10 C.F.R. Part 72]." Petition at 1-2. The Commission recently directed the State to file a petition with respect to "any claims of error which relate to the subject matter of the partial initial decision" immediately after the decision was issued. Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-00-24, 52 NRC __, slip op. at 3 (Dec. 20, 2000). The subject matter of LBP-00-35 was emergency planning and therefore any "claims of error" regarding emergency planning should have been raised, including any alleged errors regarding emergency planning related to or stemming from Utah B. Thus, the State should have already petitioned for the review of the dismissal of Utah B.

³ State of Utah's Contentions on the Construction and Operating License Application by Private Fuel Storage, LLC for an Independent Spent Fuel Storage Facility (Nov. 23, 1997) at 116-22 ("Contentions"); see Applicant's Answer to Petitioners' Contentions (Dec. 24, 1997) ("PFS Ans."), at 215-236; NRC Staff's Response to Contentions Filed by (1) the State of Utah, (2) the Skull Valley Band of Goshute Indians, (3) Ohngo Gaudadeh Devia, (4) Castle Rock Land and Livestock L.C. et al., and (5) the Confederated Tribes of the Goshute Reservation and David Pete (Dec. 24, 1997) ("Staff Ans."), at 40-49.

Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-98-7, 47 NRC 142, 254 (1998).⁴

The Board rejected the other parts of Utah R, including subpart 4(a), which claimed that the EP was inadequate in 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.” Id. at 196. Based on the design of the spent fuel storage casks and the concrete pads on which they will be placed at the PFSF, there is no credible accident that can tip over a cask. PFS Safety Analysis Report (“SAR”), Rev 0, at 8.2-9, 13, 17, 30.⁵ Nevertheless, the EP noted that to mitigate the consequences of a (non-credible) cask tip over accident, the cask should be righted within 48 hours to ensure spent fuel temperatures remain within applicable limits. EP, Rev 0, at 3-4.⁶

The Board denied admission of Utah R subpart 4(a) for the following reasons:

[T]h[ese] 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.

LBP-98-7, 47 NRC at 196. Subsequently, in response to a State motion for clarification and reconsideration, the Board explained that the reasons it provided for rejecting Utah R

⁴ The Board noted in admitting parts 1 and 2 of Utah R that “further litigation on [their] merits may be subject to any merits disposition of [Contention] Utah B.” LBP-98-7, 47 NRC at 196 n.18.

⁵ The NRC Staff Safety Evaluation Report (“SER”) for the PFSF concurs that cask tip over is not a credible event. Safety Evaluation Report Concerning the Private Fuel Storage Facility, Docket No. 72-22, September 29, 2000, at 15-8.

⁶ The current revision of the EP shows that tipped over casks should be righted in 33 hours. EP, Rev 10, at 3-4.

4(a) and the other contentions should be considered in the context of the record, including the parties' arguments.⁷

The Board later dismissed parts 1 and 2 of Utah R, which concern emergency planning at the ITP and which were premised on the ITP being subject to 10 C.F.R. Part 72, after granting a PFS motion for summary disposition of Contention Utah B.⁸ The Board dismissed Utah B because activities at the ITP fall within the ambit of spent fuel transportation rather than storage and thus the ITP need not be licensed under Part 72.⁹

In June 2000, an evidentiary hearing was held on, inter alia, Utah R part 3. The State, PFS, and the NRC Staff ("Staff") presented evidence regarding the fire protection and related EP measures provided for the PFSF. On December 29, 2000, the Board ruled that "PFS has sustained its burden of proof to demonstrate that the [PFSF] complies with the applicable emergency planning requirements set forth in 10 C.F.R. § 72.32(a) so as to protect adequately the safety and health of onsite employees and the public at large relative to fire protection matters." LBP-00-35, slip op. at 1-2. Thus, the Board resolved Utah R in favor of PFS. Id. at 2.

⁷ Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-98-10, 47 NRC 288, 290-91 (1998) (citing Motor Vehicle Manufacturers Assoc. v. State Farm Mutual Automobile Ins. Co., 463 U.S. 29, 43 (1983)).

⁸ Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-99-39, 50 NRC 232, 234, 236 (1999) (the other contentions premised on the ITP being subject to Part 72 were also dismissed).

⁹ Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-99-34, 50 NRC 168, 178 (1999).

II. DISCUSSION

A. Standard for Granting a Petition for Review

A petition for review of the decisions of a licensing board is granted only at the discretion of the Commission, “giving due weight to the existence of a substantial question with respect to the following relevant 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; [or]
- (v) Any other considerations which the Commission may deem to be in the public interest.

10 C.F.R. § 2.786(b)(4).¹⁰ Since the State raises no substantial questions of any sort here, its petition should be denied.

B. The Commission Should Deny the State’s Petition to Review the Board’s Decision Not to Impose License Conditions Concerning PFS’s Fire Protection Commitments

The State complains that the Board should have imposed license conditions that require PFS (1) to meet its commitment to follow National Fire Protection Association (“NFPA”) Standard 600¹¹ with respect to fire protection at the PFSF and (2) to meet its commitment to have at least 11 employees trained as fire brigade members under NFPA 600 and to have at least 5 of them on site as a fire brigade during operating hours. Petition at 6. The State admits that PFS made those commitments before the Licensing

¹⁰ The State does not claim that the Licensing Board made a procedural error, so 10 C.F.R. § 2.786(b)(4)(iv) is not relevant here.

¹¹ Standard on Industrial Fire Brigades (2000 ed.), introduced as Staff Exh. B. See LBP-00-35, slip op. at 34-39, 55-61.

Board unequivocally and that the Board clearly stated that the NRC has ample means to enforce PFS's commitments. Id. at 5-6; see LBP-00-35, slip op. at 63-64.¹² The State asserts, however, that license conditions are necessary to "eliminate any ambiguity as to what PFS's commitments are and to eliminate any question about whether [they] are fully enforceable." Petition at 5-6 (quoting Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-00-13, 52 NRC 23, 33 (2000)). The State argues further that license conditions are necessary because PFS might "cut corners" to save money by reducing the number of employees at the site, id. at 7-8,¹³ and that even under the fire protection plan approved by the Board, PFS is "trying to do too much with too few people," in that PFS fire brigade members will also have full-time operating duties, id. at 8.

The State's claims are baseless. First, the PFS commitments are unambiguous. PFS committed to training at least 11 employees to be fire brigade members. LBP-00-35, slip op. at 28. A minimum of five brigade members will be on site during operating hours. Id.¹⁴ Brigade members will "be trained and equipped in accordance with NFPA 600." Id.¹⁵ Second, PFS commitments are clearly enforceable. As the Board noted, ap-

¹² See also Pre-filed Testimony of Ken Dungan and Wayne Lewis (June 15, 2000) (inserted after Tr. 1456) at 26; Tr. 1498-99, 1507, 1509, 1525, 1528-29, 1666.

¹³ The State cites the Board's one-sentence description of PFS's financing plan in the introduction to the Board's Factual Findings and Legal Conclusions, speculates that the Board relied on the plan as it existed on January 4, 2000 when making its findings, and claims that therefore, the Board's findings are erroneous and must be reviewed. Petition at 7-8 (citing LBP-00-35, slip op. at 26). The State cites nothing in the Board's opinion to show that it relied on PFS's financing plan in making its findings on Utah R and PFS shows below that the current status of PFS's financing plan is irrelevant to the outcome of Utah R. Moreover, the State improperly raises this claim for the first time on appeal. Sequoyah Fuels Corp. (Gore, Oklahoma Site), CLI-97-13 46 NRC 195, 221 (1997).

¹⁴ The State mistakenly states that the fire brigade would be on site only during "normal business hours," Petition at 6; in fact the brigade will be on site whenever operations are taking place.

¹⁵ As the Board pointed out, PFS's commitment to adhere to NFPA 600 is sufficient to satisfy NRC emergency planning requirements, in that emergency plans need not contain the "how-to and what-to-do details" that are properly set forth in the emergency plan implementing procedures (and which are not subject to litigation in licensing proceedings). LBP-00-35, slip op. at 58-59 (citing Louisiana Power and Light Co.

plicant commitments made in the course of litigation have long been enforceable by the NRC. Id. at 63-64 (citing Florida Power & Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), ALAB-898, 28 NRC 36, 41 n.20 (1988)).¹⁶ The State's reliance on CLI-00-13 is misplaced because the issues of potential ambiguity and unenforceability simply do not exist here and hence review should be declined.¹⁷

Furthermore, converting PFS's commitments into license conditions would deviate from NRC policy, noted by the Board, that license conditions

are to be reserved for those matters as to which the imposition of rigid conditions or limitations upon reactor operation is deemed necessary to obviate the possibility of an abnormal situation or event giving rise to an immediate threat to the public health and safety.

LBP-00-35, slip op. at 62 (quoting Portland General Electric Co. (Trojan Nuclear Plant), ALAB-531, 9 NRC 263, 273 (1979)).¹⁸ Requirements not appropriate as license conditions are properly included in licensee-controlled documents like the SAR, the Security Plan, the Quality Assurance Plan, and the EP, the contents of which remain controlled by NRC regulations. 58 Fed. Reg. at 39,134, 39,136. In particular, changes to the PFSF SAR and the EP are controlled by 10 C.F.R. §§ 72.48 and 72.44(f), respectively.¹⁹ See

(Waterford Steam Electric Station, Unit 3), ALAB-732, 17 NRC 1076, 1106-07 (1983); Curators of the University of Missouri, CLI-95-1, 41 NRC 71, 140-42 (1995)).

¹⁶ See also Louisiana Enrichment Services, L.P. (Claiborne Enrichment Center), CLI-96-8, 44 NRC 107, 110 (1996); Curators of the University of Missouri, CLI-95-1, 41 NRC at 154-58 & n.139 (contested safety issues resolved by applicant commitments). In addition, the making of false statements to the NRC could potentially result in criminal penalties. LBP-00-35, slip op. at 64 (citing 18 U.S.C. § 1001).

¹⁷ In CLI-00-13, the issue was the precise definition of the commitments PFS had made regarding its financing plan for the PFS project. CLI-00-13, 52 NRC at 32, 34. As shown above, PFS's fire brigade commitments are in no way imprecise. Regarding enforceability, in CLI-00-13, the Commission clearly stated that "we disagree with Utah's suggestion that an applicant has no enforceable obligation to stand behind representations made during the licensing process" Id. at 32.

¹⁸ Accord Final Policy Statement on Technical Specifications Improvements for Nuclear Power Reactors, 58 Fed. Reg. 39,132, 39,136 (1993).

¹⁹ PFS's commitments regarding the fire brigade and NFPA standards are set forth in the SAR and EP. SAR §§ 4.3.8.1, 4.3.12, 4.3.13; EP at 4-3, 6-2.

also 58 Fed. Reg. at 39,138 (requirements in licensee-controlled documents remain entirely enforceable by the NRC).

Finally, the State's argument that PFS's financing plan would lead it to cut corners by reducing the staff of the PFSF and thereby fail to meet its fire brigade staffing commitments is wholly groundless. If the PFSF is licensed, PFS will have an NRC-approved financing plan in place that will provide reasonable assurance that the costs of the PFS project will be paid and thus PFS will not be under pressure to cut corners. See CLI-00-13, 52 NRC at 31-32, 35. In the absence of clear support, which the State does not provide, the NRC will not presume that licensees will violate its regulations. GPU Nuclear Inc. (Oyster Creek Nuclear Generating Station), CLI-00-6, 51 NRC 193, 207 (2000).²⁰ Therefore, State speculation that PFS will reduce staff in contravention of the EP to save money is no basis for reviewing the Board's decision not to convert PFS's unequivocal fire brigade commitments into license conditions.

C. The Commission Should Deny the State's Petition to Review the Licensing Board's Decision Rejecting Utah R Subpart 4(a) as a Contention

Utah R subpart 4(a) had asserted that "PFS has not adequately described the 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." LBP-98-7, 47 NRC at 196. The Licensing Board rejected it as inadmissible for the reasons set forth in LBP-98-7, which the Board explained in LBP-98-10 should be taken in the context of the parties' responses to the contention. See Section I, supra. The State asserts that "[t]he

²⁰ The State provides no support, beyond a citation to its proposed findings of fact, for its claim that "PFS is trying to do too much with too few people," which it urges in support of this staffing issue. Petition at 8. The Board rejected that claim, see LBP-00-35, slip op. at 63-65, and the State in no way shows that the rejection was clearly erroneous.

Board's finding that PFS need not address this situation [was] not an appropriate exercise of policy judgement" and requests review on the grounds that this issue "raises important policy questions." Petition at 9. The State also claims that "the Board's conclusion [in LBP-00-35] that the [EP] provides reasonable assurance that health and safety will be protected is factually erroneous" unless PFS addresses the cask tip over issue further as the State requests. Id. Review should be denied as the State mischaracterizes the Board's ruling and fails to raise a substantial and important question of policy.

At the outset, the State erroneously characterizes the Board's rejection of Utah R 4(a) as a decision on the merits. As the Board noted, the contention was denied because it failed to meet NRC pleading requirements. See LBP-98-10, 47 NRC at 291. Thus, contrary to the State's assertion, Petition at 9, the Board never found that "PFS need not address this [cask tip over] situation." Furthermore, the Board's ruling in LBP-00-35 on the adequacy of PFS's emergency planning with respect to fire protection was wholly unrelated to the dismissal of Utah R 4(a). Thus, the State's complaints about Utah R 4(a) have no bearing on LBP-00-35.

The State asserts that on policy grounds, the EP should describe how PFS could procure cranes to right tipped over casks and thus, the Board should have admitted Utah R 4(a). Petition at 9. The parties' responses to the contention, (cited in LBP-98-10, 47 NRC 290-91), and the case law cited therein, clearly show why the Board was correct. First, Utah R 4(a) would have impermissibly required a description of implementing procedures and inappropriate detail for mitigating a beyond design basis accident. Emergency plans need not contain implementing procedures.²¹ Licensing proceedings are not

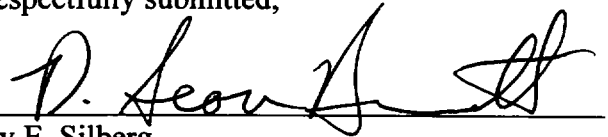
²¹ PFS Ans. at 233 (citing Waterford, ALAB-732, 17 NRC at 1106-07); see Curators of the University of Missouri, CLI-95-1, 41 NRC at 140-42; see also note 15, supra. The Staff also showed that Utah R 4(a)

to become bogged down with litigation about such details.²² Second, with respect to non-credible (i.e., very low probability) accidents, emergency plans need only be core plans with adequate flexibility to develop a reasonable ad hoc response; resources need not be dedicated to handle every imaginable accident scenario.²³ In sum, Utah R 4(a) was simply an impermissible challenge to NRC regulations and advocated stricter standards than the NRC requires. See LBP-98-7, 47 NRC 142 at 182. Thus, denial of the contention was entirely proper. Moreover, the State has provided no reason for the NRC to deviate from its longstanding policy on emergency planning requirements. Thus, the Commission should decline review.

III. CONCLUSION

For the reasons stated above, the Commission should deny the State's petition.

Respectfully submitted,


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advocated a description of equipment in emergency plans, which is more than what ISFSI emergency planning regulations require. Staff Ans. at 46 (citing 10 C.F.R. § 72.32(a)(5)).

²² PFS Ans. at 233 (citing Waterford, ALAB-732, 17 NRC at 1107; Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant, Units 1 and 2), LBP-84-29B, 20 NRC 389, 408 (1984)).

²³ PFS Ans. at 233 (citing Philadelphia Electric Co., (Limerick Generating Station, Units 1 and 2) LBP 84-31, 20 NRC 446, 535 (1984) (quoting Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 and 3), CLI-83-10, 17 NRC 528, 533 (1983))).

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CERTIFICATE OF SERVICE

I hereby certify that copies of the "Applicant's Response to State of Utah's Petition for Review of LBP-00-35 and Other Matters Related to Utah Contention R" 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 26th day of January 2001.

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