

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSIONBEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

NRC STAFF'S RESPONSE TO STATE OF UTAH'S REQUEST
FOR ADMISSION OF LATE-FILED CONTENTION UTAH RR
(SUICIDE MISSION TERRORISM AND SABOTAGE)INTRODUCTION

Pursuant to 10 C.F.R. § 2.714(c), and the Atomic Safety and Licensing Board's "Order (Schedule for Responsive Pleadings)" and "Memorandum and Order (Granting Response Extension Request)," dated October 11 and 23, 2001, respectively, the NRC Staff ("Staff") hereby responds to the "State of Utah's Request for Admission of Late-Filed Contention Utah RR (Suicide Mission Terrorism and Sabotage)," dated October 10, 2001 ("Request"). For the reasons set forth below, the Staff opposes the admission of this contention and recommends that it be denied.

BACKGROUND

On June 25, 1997, Private Fuel Storage, L.L.C. ("PFS" or "Applicant"), filed an application for a license to possess and store spent nuclear fuel ("SNF") in an Independent Spent Fuel Storage Installation ("ISFSI") to be constructed and operated on the Reservation of the Skull Valley Band of Goshute Indians located within the boundaries of Utah. The application was accompanied by a safety analysis report, environmental report, emergency plan, and physical security plan ("Security Plan").

On July 31, 1997, the Commission published in the *Federal Register* a Notice of Consideration and Notice of Opportunity for Hearing ("Notice") concerning the license application.

See 62 Fed. Reg. 41,099 (1997). Petitions for leave to intervene and numerous contentions were then filed by various petitioners, including the State of Utah ("State").¹ Included among the State's initial contentions were four contentions that raised issues related to the potential for terrorism or sabotage;² and other parties also filed contentions concerning the potential for terrorism or sabotage.³ Subsequently, the State filed nine additional contentions concerning the Applicant's Security Plan, including at least two contentions that expressly raised the issue of terrorism.⁴

On April 22, 1998, the Licensing Board ruled on the petitions to intervene and admissibility of contentions involving matters other than the PFS Security Plan.⁵ On June 29, 1998, the Licensing Board ruled upon the admissibility of the State's Security Plan contentions.⁶ In its decisions, the Licensing Board rejected those portions of the State's contentions that raised issues concerning terrorism and sabotage, on the grounds, *inter alia*, that the contentions constituted an impermissible challenge to the Commission's regulations or generic rulemaking-associated

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" ("Initial Contentions"), dated November 23, 1997.

² The State raised issues related to the potential for terrorism or sabotage in Contentions Utah C (Dose Limits), Utah U (Impacts of Onsite Storage), Utah V (Transportation Impacts), and Utah Z (No Action Alternative). See Initial Contentions at 18, 143, 152-54, and 169.

³ See, e.g., "Ohngo Gaudadeh Devia's ["OGD"] Contentions Regarding the Materials License Application of [PFS] in an [ISFSI]" (undated), Contentions A and C, at 1-3, 7, and 12-14; and "Statement of Contentions on Behalf of the Confederated Tribes of the Goshute Reservation and David Pete," dated November 23, 1997, Contention B, at 4.

⁴ See "State of Utah's Contentions Security-A Through Security-I Based on Applicant's Confidential Safeguards Security Plan" ("Security Plan Contentions"), dated January 3, 1998, Contentions Security F (Intermodal Transfer) and Security-G (Terrorism and Sabotage), at 10-12 and 13-16, discussed in *Private Fuel Storage, L.L.C.* (Independent spent Fuel Storage Installation), LBP-98-13, 47 NRC 360, 371-72 (1998).

⁵ See *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-98-7, 47 NRC 142, as modified, LBP-98-10, 47 NRC 288, 296 (1998).

⁶ *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-98-13, 47 NRC 360, modified on other grounds, LBP-98-17, 48 NRC 69 (1998).

determinations, including 10 C.F.R. Parts 71, 72 and 73. See LBP-98-7, 47 NRC at 179, 186, 199 and 201 (Contentions Utah C, U and V); LBP-98-10, 47 NRC at 296 (Contention Utah Z); and LBP-98-13, 47 NRC at 372 (Security-F and Security-G).

On September 11, 2001, four large commercial airplanes were hijacked in mid-air over the continental United States. Two of those airplanes were deliberately crashed into the twin towers of the World Trade Center in New York City, the third was deliberately crashed into the Pentagon, and the fourth crashed in western Pennsylvania. These events were the basis for the filing, on October 10, 2001, of the State's instant request for the admission of late-filed Contention Utah RR.⁷

DISCUSSION

A. Legal Standards Governing the Admission of Contentions.

It is well established that contentions may only be admitted in an NRC licensing proceeding if they comply with the requirements of 10 C.F.R. § 2.714(b) and applicable Commission case law. See, e.g., *Duke Power Co.* (Catawba Nuclear Station, Units 1 and 2), CLI-83-19, 17 NRC 1041, 1045-47 (1983); *Public Service Co. of Indiana* (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-316, 3 NRC 167, 170-71 (1976); *Philadelphia Electric Co.* (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-216, 8 AEC 13, 20 (1974). Pursuant to 10 C.F.R. § 2.714(b)(2), the following information must be provided in support of a contention:

(i) A brief explanation of the bases of the contention.

(ii) A concise statement of the alleged facts or expert opinion which support the contention . . . together with references to those specific sources and documents of which the petitioner is aware and on which the petitioner intends to rely to establish those facts or expert opinion.

⁷ On October 10, 2001, the State also filed, before the Commission, the "State of Utah's Petition for Immediate Relief Suspending Licensing Proceedings" ("Suspension Petition"); see also "NRC Staff's Response to the State of Utah's Petition for Immediate Relief Suspending Licensing Proceedings," dated October 25, 2001.

(iii) Sufficient information . . . to show that a genuine dispute exists with the applicant on a material issue of law or fact. . . .

10 C.F.R. § 2.714(b)(2).⁸ The failure of a contention to comply with any one of these requirements is grounds for dismissing the contention. See 10 C.F.R. § 2.714(d)(2)(i); *Arizona Public Service Co.* (Palo Verde Nuclear Generating Station, Units 1, 2 and 3), CLI-91-12, 34 NRC 149, 155-56 (1991); *PFS*, LBP-98-7, 47 NRC 142, 178 (1998).⁹ Further, pursuant to 10 C.F.R. § 2.714(d)(2), a contention must be rejected if:

(i) The contention and supporting material fail to satisfy the requirements of [§ 2.714(b)(2)]; or

(ii) The contention, if proven, would be of no consequence in the proceeding because it would not entitle petitioner to relief.

See, e.g., *Palo Verde*, CLI-91-12, 34 NRC at 155; *PFS*, LBP-98-7, 47 NRC at 178. Finally, under the *Peach Bottom* decision, a contention must be rejected if:

(1) it constitutes an attack on applicable statutory requirements;

(2) it challenges the basic structure of the Commission's regulatory process or is an attack on the regulations;

(3) it is nothing more than a generalization regarding the petitioner's view of what applicable policies ought to be;

⁸ The purpose for the "basis" requirements in 10 C.F.R. § 2.714(b)(2) is (a) to assure that the contention raises a matter appropriate for adjudication in a particular proceeding; (b) to establish a sufficient foundation for the contention to warrant further inquiry into the assertion; and (c) to put other parties sufficiently on notice of the issues so that they will know generally what they will have to defend against or oppose. See, e.g., *Peach Bottom*, 8 AEC at 20-21. Contentions that lack a factual and legal foundation should not be admitted. *Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 333-34 (1999); *Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-96-7, 43 NRC 235, 248 (1996).

⁹ The Licensing Board should not accept uncritically an assertion that a document or other factual information or an expert opinion supplies the basis for a contention, but should review the information to ensure that it does so. See, e.g., *Vermont Yankee Nuclear Power Corp.* (Vermont Yankee Nuclear Power Station), ALAB-919, 30 NRC 29, 48 (1989), *vacated in part on other grounds and remanded*, CLI-90-4, 31 NRC 333 (1990); see also *Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), LBP-96-2, 43 NRC 61, 90 (1996).

(4) it seeks to raise an issue which is not proper for adjudication in the proceeding or does not apply to the facility in question; or

(5) it seeks to raise an issue which is not concrete or litigable.

Peach Bottom, supra, 8 AEC at 20-21; *PFS*, LBP-98-7, 47 NRC at 179.

B. Contention Utah RR Is Inadmissible.

In its Request, the State describes the events of September 11 as “unprecedented,” and states that “[n]ow a suicide mission to crash a hijacked commercial airliner loaded with jet fuel into a nuclear facility is a reasonably foreseeable event” (Request at 1, 3). The State asserts in Contention Utah RR as follows (*Id.*):

CONTENTION RR. Suicide Mission Terrorism or Sabotage.

The Applicant, in its Safety Analysis Report, and the Staff, in its Safety Evaluation Report, have failed to identify and adequately evaluate design basis external man-induced events such as suicide mission terrorism and sabotage, “based on the current state of knowledge about such events” as required by 10 CFR § 72.94 (emphasis added). In addition, the scope of the Applicant’s Environmental Report and the Staff’s Draft Environmental Impact Statement is too limited to comply with the National Environmental Policy Act and 10 CFR §§ 72.34, 51.45, 51.61 and 51.71 because they do not adequately identify and evaluate any adverse environmental effects which cannot be avoided from attacks by suicide mission terrorism or sabotage.¹⁰

In support of this contention, the State asserts that (a) “the current state of knowledge” about terrorism changed on September 11, 2001 (*id.* at 3-4); (b) “the NRC’s previous position on design basis external man-induced events” (under 10 C.F.R. § 72.92) cannot support a finding of reasonable assurance of adequate protection of public health and safety in licensing the PFS Facility (*id.* at 4-9); (c) the PFS ISFSI “and its related activities” (*i.e.*, transportation of SNF from the main rail line to the PFS site, and temporary storage of SNF at the Intermodal Transfer Facility

¹⁰ The Licensing Board previously admitted Contention Utah K/Confederated Tribes B, challenging the adequacy of PFS’s consideration of credible accidents, including aircraft crash hazards. See LBP-98-7, 47 NRC at 190-91, 234-35, 253 (1998). That contention does not include terrorist attacks.

("ITF"), present "an opportune terrorist target" (*id.* at 9-11); (d) the PFS Facility "is vulnerable to a September 11th type attack" (*id.* at 11-13);¹¹ and (e) other types of terrorist attacks are now reasonably foreseeable and require consideration in licensing the PFS Facility (*id.* at 13-14).¹²

The events of September 11 have been deemed by the Congress to pose a threat to the national security and foreign policy of the United States.¹³ The Commission is aware of those events, and is assessing the need to take the events into consideration as they may affect the licensing and regulation of nuclear facilities and materials. The State recognizes that the Commission "was quick to respond to the September 11 terrorist attacks," directed nuclear power plants to go to the highest level of security, and directed the Staff to review the NRC's security

¹¹ In support of this basis statement, the State relies upon the Declaration of Dr. Marvin Resnikoff ("Resnikoff Dec."). Specifically, the State asserts that (1) a Boeing 757 or heavier aircraft will penetrate a HI-STORM 100 cask, (2) a HI-STAR shipping cask [which is certified under 10 C.F.R. Part 71] will not withstand a commercial airliner crash, (3) the Canister Transfer Building ("CTB") and the ITF will not withstand a commercial airliner crash, (4) PFS operations are not designed to withstand a fire resulting from such a crash, and (5) a breach of the HI-STORM "storage system," HI-STAR shipping cask, ITF, or CTB by a commercial airplane (which is heavier than a 2,000 pound, inert MK-84 bomb), will result in a release of radiation in excess of the 5 rem standard in 10 C.F.R. § 72.106 (Request at 11-13; Resnikoff Dec. ¶¶ 9-27). While certain flaws appear in Dr. Resnikoff's Declaration (e.g., his assumption that casks cannot withstand events greater than those which were analyzed in the design (*Id.*, ¶¶ 12, 15, 16)), the Staff does not oppose the admission of Contention Utah RR on this basis.

¹² The State asserts that these matters were inadequately considered by PFS in its Environmental Report ("ER") and Safety Analysis Report ("SAR"), and by the Staff in its Draft Environmental Impact Statement ("DEIS") (June 2000) and Safety Evaluation Report ("SER") (September 2000) (Request at 16). To the extent that the State's challenge is based upon the adequacy of the Staff's SER, it fails to state a proper contention. See, e.g., *Curators of the University of Missouri* (Trump-S Project), CLI-95-8, 41 NRC 386, 395-96 (1995); *Louisiana Power and Light Co.* (Waterford Steam Electric Station, Unit 3), ALAB-812, 22 NRC 5, 55-56 (1985); *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-01-03, 53 NRC 84, 97 (2001). Challenges to the adequacy of the DEIS, however, may be permissible. See, e.g., *Duke Power Co.* (Catawba Nuclear Station, Units 1 and 2), CLI-83-19, 17 NRC 1041, 1049 (1983).

¹³ See e.g., S.J. Res. 23, enacted as P.L. 107-40, 115 Stat. 224 (Sept. 20, 2001) (authorizing the use of United States armed forces against those responsible for the recent attacks launched against the United States).

regulations and procedures in light of those events (*Id.* at 4).¹⁴ Further, as the State observes, the Commission has indicated that “[t]he agency continues to monitor the situation, and is prepared to make any adjustments to security measures as may be deemed appropriate” (*Id.*, citing NRC Press Release No. 01-112).

Notwithstanding the seriousness of these matters, the Staff submits that Contention Utah RR should be rejected, for the reasons set forth below.

1. The Contention Constitutes an Impermissible Challenge to the Commission’s Regulations.

While the Commission has commenced consideration of its regulations and requirements in light of the September 11 events, its existing regulations continue to govern the consideration of ISFSI license applications. The potential for sabotage or terrorism is addressed in the Commission’s physical protection requirements, set forth in 10 C.F.R. Parts 72 and 73. Pursuant to 10 C.F.R. §§ 72.180 and 72.184, an applicant for an ISFSI under Part 72 (like PFS) must “establish, maintain and follow a detailed plan for physical protection as described in § 73.51,” and “a safeguards contingency plan for responding to threats and radiological sabotage” as described in 10 C.F.R. Part 73, Appendix C.

Detailed requirements for physical protection at an away-from-reactor ISFSI are provided in 10 C.F.R. § 73.51. An applicant must “establish and maintain a physical protection system with the objective of providing high assurance that activities involving spent nuclear fuel and high-level radioactive waste do not constitute an unreasonable risk to public health and safety.” 10 C.F.R. § 73.51(b)(1). To meet this general objective, the applicant must meet the performance capabilities specified in § 73.51(b)(2), including the storage of SNF within a protected area (“PA”); restricted access to the PA; detection and assessment of unauthorized penetration of or activities within

¹⁴ See NRC Press Release No. 01-112 (September 21, 2001) (“NRC Reacts to Terrorist Attacks”). The Staff is engaged in these and other efforts to address the events of September 11, consistent with the Commission’s responsibility to assure protection of public health and safety.

the PA; timely communication to a designated response force whenever necessary; and managing the physical protection organization to maintain its effectiveness. 10 C.F.R. § 73.51(b)(2)(i) - (v). The physical protection system “must be designed to protect against loss of control of the facility that could be sufficient to cause a radiation exposure exceeding the dose as described in [10 C.F.R.] § 72.106.” 10 C.F.R. § 73.51(b)(3). Specific methods for meeting the performance capabilities of § 73.51(b)(2) are specified in § 73.51(d), although other alternative measures may be authorized by the Commission. In addition, 10 C.F.R. Part 73, Appendix C, provides specific requirements for a licensee’s safeguards contingency plan, including requirements to describe a set of pre-determined decisions and actions for responding to threats, thefts and sabotage.¹⁵

Under the existing regulations in 10 C.F.R. Parts 72 and 73, an ISFSI applicant is not required to address the potential for terrorist attacks like the September 11 events.¹⁶ The State clearly challenges the adequacy of these regulations -- in contravention of 10 C.F.R. § 2.758(a). Thus, in its Petition to the Commission, the State argued as follows:

The current NRC regulations and licensing procedures are being reviewed because they do not contemplate the type of terrorist threat we now face, and are simply inadequate to protect the public. However, unless the Commission suspends the licensing proceeding, those inadequate regulations and procedures will govern the adjudication of Utah Contention RR and will other wise serve as a basis to assess the design and operational requirements of the PFS facility. . . .

. . . If the proceeding moves ahead at this time, the evidence, to the extent it is now available, will be judged against regulations which are no longer valid standards.

¹⁵ The State does not appear to allege that PFS has failed to satisfy the Commission’s existing physical protection requirements. See Request at 6-7.

¹⁶ In 1998, upon amending its regulations for physical protection applicable to ISFSIs, the Commission specifically rejected comments suggesting that protection against the malevolent use of land-based or airborne vehicles should be included within the Commission’s protection goals. See Statement of Consideration, “Physical Protection for Spent Nuclear Fuel and High-Level Radioactive Waste,” 63 Fed. Reg. 26,955, 26,956 (1998).

(Suspension Petition at 7-8; emphasis added).

In light of these assertions, the State's assertion to the Licensing Board that Contention Utah RR "does not challenge" existing regulations (Request at 5, 6), is inexplicable. In fact, Contention Utah RR directly challenges Commission regulations governing the safety and physical security of an ISFSI, as set forth in 10 C.F.R. Parts 72 and 73, and the contention should therefore be rejected. See 10 C.F.R. § 2.758(a); *Peach Bottom, supra*, 8 AEC at 20-21; *PFS*, LBP-98-7, 47 NRC at 179.

2. Section 72.94 Does Not Require Inclusion of the September 11 Attacks In the Design of the Facility.

Notwithstanding the State's apparent recognition that the Commission's physical protection regulations do not mandate consideration of September 11 - type terrorist attacks in the licensing of an ISFSI, the State asserts in Contention Utah RR that such events are required to be considered in the facility's design under 10 C.F.R. § 72.94. Thus, the State asserts that it is now necessary to perform a "new evaluation of the design basis external man-induced events from suicidal terrorism and sabotage, as required by 10 CFR § . . . 72.94" (Request at 4).¹⁷ Further, the State asserts that the Commission cannot find reasonable assurance that "[t]he activities authorized by the [PFS] license can be conducted without endangering the health and safety of the public," as required under 10 C.F.R. § 72.40(13)(i), if the PFS license application is considered under "the old notions of what constitutes design basis external man-induced events siting factors" (*Id.* at 4-5). These assertions are without merit.

¹⁷ Similarly, the State asserts that "evaluation of the design basis threat . . . cannot rest on old assumptions. Such design basis threats create a new state of knowledge about design basis external man-induced events and appropriate methods must be adopted for evaluating those events. 10 CFR § 72.94(c)" (Request at 9). The State further asserts that the SAR and SER do not "identify or adequately evaluate design basis external man-induced events as a result of a September 11th type terrorist attack," citing 10 C.F.R. § 72.94 (*Id.* at 11).

The Commission's regulations governing the design of an ISFSI are set forth in 10 C.F.R. Part 72, Subpart F ("General Design Criteria"). These regulations do not require consideration of events like the September 11 terrorist attacks within the design of an ISFSI. See 10 C.F.R. §§ 72.120 - 130. The State's assertion that 10 C.F.R. § 72.94 establishes design requirements that mandate consideration of terrorist actions like the September 11 events is incorrect. The Commission's regulations in 10 C.F.R. Part 72, Subpart E, in which 10 C.F.R. § 72.94 is codified, identify various factors which are required to be evaluated in the siting of an ISFSI. In particular, § 72.94 requires that "the region must be examined for both past and present man-made facilities and activities that might endanger the proposed ISFSI." Terrorist attacks do not constitute a "past or present" human activity in the region of the proposed PFS ISFSI, and such events therefore need not be considered in evaluating the PFS site under § 72.94.¹⁸

Nor is it apparent that consideration of the September 11 events is required in order for the Commission to find reasonable assurance that activities under the license can be conducted without endangering public health and safety will be protected, as set forth in 10 C.F.R. § 72.40(a)(13) (Request at 4-5). Rather, such a finding may be made upon a demonstration that the application satisfies the regulations and is consistent with applicable law, absent a determination by the Commission that other requirements may apply. See, e.g., *Maine Yankee Atomic Power Co.* (Maine Yankee Atomic Power Station), ALAB-161, 6 AEC 1003, 1004-05, 1008-10 (1973), *aff'd in part and remanded on other grounds*, CLI-74-2, 7 AEC 2, 4 (1974).

¹⁸ Inasmuch as terrorist attacks do not constitute past or present external man-induced events in the region of the PFS site that require siting consideration under 10 C.F.R. § 72.94, the State's emphasis on the need for such events to be evaluated "based on the current state of knowledge about such events" (Request at 5), is without merit. See 10 C.F.R. § 72.94(c).

3. Contention Utah RR Impermissibly Raises Transportation Issues That Are Outside the Proper Scope of This Proceeding.

In its Request, the State asserts that PFS will transport SNF to the PFSF in HI-STAR 100 shipping casks, and that those casks will not withstand the crash of a heavy commercial airliner such as a Boeing 757 (Request at 11-12). Further, the State asserts that SNF will be transported to the PFSF along a rail line to be constructed in an uninhabited portion of Skull Valley; that casks awaiting shipment to the PFSF will be in plain view; that the ITF presents an opportune target for suicide mission terrorism; that the ITF design will not protect the shipping casks from a commercial airliner; that neither the HI-STAR shipping cask nor the ITF would withstand a fire in the crash of a fully-fueled commercial airliner; and that radiation released from a shipping cask in such an event would exceed the 5-rem standard in 10 C.F.R. § 72.106 (*Id.* at 10, 11-13).

The transportation of SNF is governed by 10 C.F.R. Part 71 and regulations promulgated by the U.S. Department of Transportation. Such issues are beyond the permissible scope of this Part 72 ISFSI licensing proceeding. *See, e.g., Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-99-34, 50 NRC 168, 176-77 (1999). Accordingly, to the extent that these assertions challenge the safety of the HI-STAR shipping cask or the transportation of SNF to the PFS Facility (including times when the fuel is located at the ITF), they should be rejected.

4. Contention Utah RR Lacks Sufficient Basis As to NEPA Requirements.

In its Request, the State asserts that a suicide mission to crash a hijacked commercial airliner loaded with jet fuel into “a nuclear facility” is now a “reasonably foreseeable event” (Request at 3; emphasis added); that the proposed PFSF presents an “opportune” or “desirable” terrorist target (*Id.* at 9, 10); that the PFSF is vulnerable to a September 11-type attack” (*Id.* at 11); and that the ER and DEIS “do not adequately identify and evaluate adverse environmental impacts from suicide mission terrorist attacks,” as is purportedly required in 10 C.F.R. §§ 72.34, 51.45, 51.61 and 51.71. *Id.*

The Staff does not dispute the State's assertion that the terrorist attacks of September 11 were unprecedented (*Id.* at 1, 7, 14). Notwithstanding these developments, it is difficult to conclude, as the State suggests, that an actual terrorist attack of this nature, specifically directed against the PFS Facility, now constitutes a "reasonably foreseeable event" (*see id.* at 3). To the contrary, while one can speculate -- as the State does here -- that such an attack might be targeted against one or another type of structure or facility, there is no rational means by which a decision-maker can reasonably predict or foresee that such an attack will be targeted against any particular (nuclear or other) facility. Accordingly, the potential for a terrorist attack at the PFS Facility need not be addressed under NEPA. *See, e.g., Limerick Ecology Action, Inc. v. NRC*, 869 F.2d 719, 743-44 (3d Cir. 1989) (sabotage risk need not be considered in an EIS, in that current risk assessment techniques are subject to a great deal of uncertainty, and the risk could not meaningfully be assessed);¹⁹ *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), ALAB-875, 26 NRC 251 269 (1987); *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-98-10, 47 NRC 288, 296 (1998) (rejecting Contention Utah Z, concerning sabotage as a reasonably foreseeable event under NEPA); *PFS*, LBP-98-7, 47 NRC at 179, 186, 199 and 201 (rejecting transportation sabotage issues under NEPA, in Contentions Utah U, Utah V, and OGD C).

In sum, no factual basis has been provided for these assertions, as is required under 10 C.F.R. § 2.714(b)(2)(ii). Further, no showing has been made that the occurrence of such an event at the PFS Facility constitutes a "reasonably foreseeable" impact of an agency action

¹⁹ The Third Circuit's decision in *Limerick Ecology Action* upheld the Appeal Board's determination that there was no known basis upon which the agency could make "a reasonable prediction of . . . the kind of stochastic human behavior displayed in an act of sabotage," and that sabotage therefore need not be considered in an EIS, as set forth in *Philadelphia Electric Co.* (Limerick Generating Station, Units 1 and 2), ALAB-819, 22 NRC 681 697-701 (1985).

granting the license application such that it must be addressed in an environmental impact statement (“EIS”) for the facility under NEPA. Accordingly, these assertions should be rejected.

5. The Contention Lacks Any Factual Basis As to Other Types of Terrorist Attacks.

In its Request, the State asserts that other types of terrorist attacks are now reasonably foreseeable, citing a newspaper report that NRC Chairman Meserve stated that the agency’s review of security measures should “not focus solely on the aircraft threat”) (Request at 13-14).

On this basis, the State asserts:

The SAR, ER, SER, and DEIS all fail to adequately identify possible terrorist assaults and the consequent impact to safety and the environment. At a minimum, the impacts of terrorist threats such as truck bombs, present day weapons (e.g., tow anti-tank and armor piercing weapons), multi-member, inter-coordinated attacks, and transportation routes should be identified and adequately evaluated.

Id. at 14. However, the State provides no support for its view that the types of attacks enumerated here constitute events that are required to be included in the design basis for the facility or are reasonably foreseeable events that require consideration in an environmental evaluation for a facility license under NEPA.²⁰ Accordingly, these assertions should be rejected as lacking in basis.

6. The Issues Raised in Contention Utah RR Should Be Considered By Rulemaking or Other Generic Basis By the Commission.

The State recognizes that the Commission is conducting “a comprehensive review” of its safeguards regulations in light of the September 11 attacks and the potential for future terrorist acts (Request at 4, 6, 8). This review will consider a broad range of NRC-licensed facilities and activities, throughout the nation. As such, the September 11 attacks are now being addressed by the Commission on a generic basis, as is appropriate. While it is as yet unknown whether or how

²⁰ These claims resemble assertions made in the State’s earlier contentions asserting that other forms of terrorist attack -- unrelated to the events of September 11 -- need to be considered in the licensing of the PFS Facility. See nn. 2 and 4, *supra*. The State provides no factual basis in support of its claim that these types of events are now reasonably foreseeable, apart from its reference to the September 11 attacks and Chairman Meserve’s reported statement.

this review may result in changes to the design basis or physical protection requirements for any particular type of facility, the Commission has the authority to apply any resulting requirements to such facilities or types of facilities as it deems appropriate; further, the Commission may do so at any time, by rule, regulation or order; and it may make such requirements applicable both to applicants and licensees of nuclear facilities -- including the PFSF, if necessary or appropriate. See, e.g., Atomic Energy Act of 1954, as amended, sec. 161b, 42 U.S.C. §2201(b); 10 C.F.R. §§ 2.202, 72.44(b)(2), 72.60, 72.62. The Commission's consideration of these issues on a generic basis, rather than in individual adjudicatory proceedings, is entirely appropriate. See, e.g., *Baltimore Gas & Electric Co. v. Natural Resources Defense Council, Inc.*, 462 U.S. 87, 100-01 (1983); *Union of Concerned Scientists v. AEC*, 499 F.2d 1069, 1081-82 (D.C. Cir. 1974).

C. Legal Standards for Late-Filed Contentions.

The criteria to be considered when determining the admissibility of a late-filed contention are set forth in 10 C.F.R. § 2.714(a)(1)(i)-(v), as follows:

- (i) Good cause, if any, for failure to file on time.
- (ii) The availability of other means whereby the petitioner's interest will be protected.
- (iii) The extent to which the petitioner's participation may reasonably be expected to assist in developing a sound record.
- (iv) The extent to which the petitioner's interest will be represented by existing parties.
- (v) The extent to which the petitioner's participation will broaden the issues or delay the proceeding.

An evaluation of these criteria leads the Staff to believe that these factors do not support the admission of Contention Utah RR. Specifically, the Staff agrees that good cause exists for the late filing of this contention -- except as to terrorist attacks unlike the September 11 attacks -- (discussed *supra* at 12-13), and that the State's interest is not represented by existing parties with respect to this issue. Three factors, however, weigh against the admission of this contention:

(a) the State has not shown that its participation may assist in developing a sound record as to the credibility of a terrorist attack being directed against the PFS Facility, the appropriate design basis for the facility, or the adequacy of PFS's physical security plan;²¹ (b) other means are available whereby the State's interest will be protected, in that the Commission is now reviewing the need and appropriate level of protection against terrorist attacks; and (c) the admission of this contention will broaden the issues and result in delay in the proceeding. Accordingly, a balancing of these factors does not support the admission of Contention Utah RR.

CONCLUSION

For the reasons set forth above, the Staff respectfully submits that Contention Utah RR fails to state an admissible issue, and it therefore should be rejected. Further, the Staff submits that in keeping with the generic nature of the issues raised by the State, it is appropriate that the Commission should continue to consider such issues on a generic basis.

Respectfully submitted,

/RA/

Sherwin E. Turk
Counsel for NRC Staff

Dated at Rockville, Maryland
this 26th day of October 2001

²¹ The State's reliance upon the issue of "radiological dose assessments" and "how PFS's current designs would fail under a September 11th type attack," presented by Dr. Resnikoff (Request at 14-15), fails to provide the requisite demonstration as to these fundamental matters.

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-ISFSI
)	
(Independent Spent)	
Fuel Storage Installation))	

CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S RESPONSE TO THE STATE OF UTAH'S REQUEST FOR ADMISSION OF LATE-FILED CONTENTION UTAH RR (SUICIDE MISSION TERRORISM AND SABOTAGE)," in the above captioned proceeding have been served on the following through deposit in the NRC's internal mail system, with copies by electronic mail, as indicated by an asterisk, or by deposit in the U.S. Postal Service, as indicated by double asterisk, with copies by electronic mail this 26th day of October, 2001:

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