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October 24, 2000

**UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION**Before the Atomic Safety and Licensing Board

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

**APPLICANT'S response to state of Utah's Request for  
Admission of Late-Filed Contention Utah RR**

Applicant Private Fuel Storage L.L.C. ("Applicant" or "PFS") hereby responds to the "State of Utah's Request for Admission of Late-Filed Contention Utah RR (Suicide Mission Terrorism and Sabotage)," filed October 10, 2001 ("State Req."). Contention RR asserts that the PFS Safety Analysis Report ("SAR") and Environmental Report ("ER") and the NRC Staff's September 2000 Safety Evaluation Report ("SER")<sup>1</sup> and Draft Environmental Impact Statement ("DEIS")<sup>2</sup> for the Private Fuel Storage Facility ("PFSF") are deficient for failing to assess the impacts from "suicide mission terrorism and sabotage" that could occur at the proposed PFSF and related activities. State Req. at 1-2. The State's request should be denied because Contention RR is an impermissible challenge to NRC regulations concerning the safeguards and security of independent spent fuel storage installations (ISFSIs) and National Environmental Policy Act (NEPA)

<sup>1</sup> Safety Evaluation Report Concerning the Private Fuel Storage Facility, Docket No. 72-22, September 29, 2000.

<sup>2</sup> Draft Environmental Impact Statement for the Construction and Operation of an Independent Spent Fuel Storage Installation on the Reservation of the Skull Valley Band of Goshute Indians and the Related Transportation Facility in Tooele County, Utah, U.S. Nuclear Regulatory Commission, Office of Nuclear Material Safety and Safeguards, NUREG-1714 (June 2000).

requirements and Contention RR lacks the requisite factual basis.

### **I. Background**

In June 1997, PFS filed its license application. Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-98-7, 47 NRC 142, 157 (1998). In November 1997, the State filed contentions on the application, including Contention Utah K, which concerned, *inter alia*, “credible accidents caused by external events and facilities affecting the ISFSI.” *Id.* at 160-61, 190. That contention was admitted in part by the Atomic Safety and Licensing Board (“Board”) and is currently set for hearing later in this proceeding. *See Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-01-19, 53 NRC 416, 418, 455-56 (2001). The State also filed Contention Utah Security G, which alleged that PFS had failed to adequately “assess and describe procedures that will protect spent fuel from unauthorized access or activities, such as terrorism and sabotage . . . .” Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-98-13, 47 NRC 360, 372 (1998). The Board rejected that contention on the grounds that it lacked materiality, impermissibly challenged Commission regulations or generic determinations, lacked adequate factual support, and failed to properly challenge the PFS application. *Id.*

On September 11, 2001, terrorists linked to the al Qaeda network and Afghanistan-based terrorist Osama bin Laden hijacked four American jet airliners in flight and deliberately crashed two of them into the World Trade Center and one of them into the Pentagon. The fourth airliner crashed in southwestern Pennsylvania. Michael Grunwald, “Terrorists Hijack 4 Airliners, Destroy World Trade Center, Hit Pentagon,” *Wash. Post.*, September 12, 2001 at A1. President Bush has called the attack “an act of war.”<sup>3</sup> In response to the attack the Commission announced that it “continues to monitor

<sup>3</sup> Address to a Joint Session of Congress and the American People, <http://www.whitehouse.gov/news/releases/2001/09/print/20010920-8.html>. (September 20, 2001).

the situation, and is prepared to make any adjustments to security measures as may be deemed appropriate.” NRC Press Release, Sept. 21, 2001. The Commission directed the NRC Staff to review the Commission’s security regulations and procedures. Id.

## II. Contention

Utah’s proposed late-filed Contention Utah RR asserts that:

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.

State Req. at 3-4. Based on the events of September 11, the State asserts 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.” Id. at 3. In addition, the State claims—but with no factual support whatsoever—that other terrorist attacks against the PFSF, “such as truck bombs, present day weapons (e.g., tow anti-tank and armor piercing weapons), [and] multi-member, inter-coordinated attacks” are now reasonably foreseeable. Id. at 14. The State also claims that transportation of spent fuel to the PFSF and the PFS intermodal transfer facility may be terrorist targets. Id. at 11-13.

## III. Response

Contention Utah RR should be dismissed for a host of reasons. It should be dismissed as an impermissible challenge to the Commission’s regulations for the security of ISFSIs and NEPA requirements concerning the preparation of environmental reports and environmental impact statements. 10 C.F.R. § 2.758(a). It should be dismissed for impermissibly challenging the NRC Staff’s evaluation of the license application rather

than the application itself. Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-01-12, 53 NRC 459, 472-73 (2001). It should be dismissed for impermissibly raising transportation issues that are outside the scope of this proceeding. Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-99-34, 50 NRC 168, 176-77 (1999). It should be dismissed for lack of factual basis. 10 C.F.R. § 2.714(b)(2)(ii). Finally, it should be dismissed for seeking to litigate a matter that is currently under review by the Commission and may become the subject of a general rulemaking. Duke Energy Corp. (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 345 (1999).

**A. The PFS Safety Analysis Report Need Not Identify and Evaluate Potential Intentional Attacks Against the Facility**

Contention Utah RR is an impermissible challenge to the Commission's regulations governing ISFSI safeguards and security, 10 C.F.R. Part 73. First, it impermissibly seeks to require PFS to protect against enemy attacks, which is beyond the specific requirements for ISFSI security set forth in section 73.51. See also Physical Protection for Spent Nuclear Fuel and High-Level Radioactive Waste, Final Rule, 63 Fed. Reg. 26,955, 26,956 (1998) (ISFSI security level less than that for reactors); 10 C.F.R. § 50.13 (reactor security need not protect against enemy attacks). Second, it impermissibly seeks to require the SAR to identify and evaluate terrorism and sabotage threats, where an ISFSI's safeguards and physical protection against terrorism and sabotage are properly described in the facility physical protection plan. 10 C.F.R. § 72.180.

**1. An ISFSI Licensee Need Not Protect Against Enemy Attacks**

The State claims that the PFS SAR (and the Staff's SER) are inadequate for failing to evaluate suicide mission terrorism and sabotage based on the current state of knowledge. State Req. at 3. The State cites a suicide mission to crash an airliner into a nuclear facility as a "reasonably foreseeable event." Id.; see id. at 9-11. It also claims—with no factual support—that "truck bombs, present day weapons (e.g., tow anti-

tank and armor piercing weapons), [and] multi-member, inter-coordinated attacks . . . should be identified and adequately evaluated.” Id. at 14.

The State’s attack on the Commission’s ISFSI security requirements is plainly impermissible. 10 C.F.R. § 2.758(a). The specific requirements for ISFSI security are set forth in 10 C.F.R. section 73.51. 10 C.F.R. § 73.51(a)(1)(i); see 10 C.F.R. § 72.180. Specific security performance objectives are set forth in section 73.51(b)(2). These consist of: storage of spent fuel within a protected area; restricted access to the protected area; detection and assessment of unauthorized penetration of the protected area; timely communication with a response force when necessary; and management of the security organization so as to maintain its effectiveness. 10 C.F.R. §§ 73.51(b)(2)(i) to (v). Overall, the ISFSI 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). Methods by which licensees are to meet the performance requirements of section 73.51(b)(2) are set forth in section 73.51(d). The Commission may authorize other methods of meeting the performance requirements on a specific basis. 10 C.F.R. § 73.51(d).

Section 73.51, however, does not require an ISFSI physical protection plan to protect against enemy attacks, such as a suicide mission to crash a hijacked commercial airliner. First, ISFSI security requirements are less than those for reactors:

The Commission believes that the appropriate level of physical protection for spent fuel and high-level radioactive waste lies somewhere between industrial-grade security and the level that is required at operating power reactors. The Commission also notes that the nature of spent fuel and of its storage mechanisms offers unique advantages in protecting the material.

63 Fed. Reg. at 26,956; see also id. at 26,955-56. Therefore, ISFSI security systems are not required to protect against the same design basis threat as nuclear reactors. See id. at 26,957 (removing reference to section 73.1 design basis threat, discussing use of force);

compare 10 C.F.R. § 73.1(a). As discussed below, even nuclear reactor licensees do not need to protect against enemy attacks. 10 C.F.R. § 50.13.

Second, in promulgating section 73.51, the Commission specifically rejected suggestions that ISFSI physical protection systems be required to protect against malevolent use of a land or airborne vehicle:

With regard to protection against the malevolent use of a land-based vehicle, NRC has determined, based on the opinions of expert study and a peer review of findings, that there is no compelling justification for requiring a vehicle barrier as perimeter protection for spent fuel and high-level radioactive waste stored under a Part 60 or Part 72 license. Inclusion of an airborne vehicle was assessed for possible inclusion into the protection goal for this rule. However, protection against this type of threat has not yet been determined at sites with greater potential consequences than spent fuel storage installations [i.e., nuclear reactors]. Therefore, this type of requirement is not included within the protection goal for this final rule.

63 Fed. Reg. at 26,956 (emphasis added).

Third, even nuclear reactors are not required to be protected against enemy attacks:

[A license applicant] is not required to provide for design features or other measures for the specific purpose of protection against the effects of (a) attacks and destructive acts, including sabotage, directed against the facility by an enemy of the United States, whether a foreign government or other person . . . .

10 C.F.R. § 50.13.<sup>4</sup>

The Commission enunciated sound policy reasons for this rule:

It would appear manifest, as an initial proposition, that the protection of the United States against hostile enemy acts is a responsibility of the nation's defense establishment and of the various agencies of our

<sup>4</sup> "Attacks and destructive acts" are those above and beyond the threats against which the reactor's physical protection system must defend under the Commission's specific security requirements in 10 C.F.R. Part 73. Commonwealth Edison Co. (Braidwood Nuclear Power Station, Units 1 and 2), LBP-85-27, 22 NRC 126, 137-138 (1985).

Government having internal security functions.

Florida Power & Light Co. (Turkey Point Nuclear Generating Units 3 and 4), 4 AEC 9, 13 (1967), aff'd, Siegel v. AEC, 400 F.2d 778 (D.C. Cir. 1968). Nuclear facility safety features are not specifically intended to protect them against enemy attacks and destructive acts. Id. Although, as noted above, "the nature of spent fuel and of its storage mechanisms offers unique advantages in protecting the material." 63 Fed. Reg. at 26,956.

One factor underlying [the Commission's] practice in this connection has been a recognition that [facility] design features to protect against the full range of the modern arsenal of weapons are simply not practicable and that the defense and internal security capabilities of this country constitute, of necessity, the basic "safeguards" as respects possible hostile acts by an enemy of the United States.

The circumstances which compel [the Commission's] recognition are not, of course, unique as regards a nuclear facility; they apply also to other structures which play vital roles within our complex industrial economy. The risk of enemy attack or sabotage against such structures, like the risk of all other hostile acts which might be directed against this country, is a risk that is shared by the nation as a whole. This principle, we believe, is rooted in our political history and we find no Congressional indication that nuclear facilities are to be treated differently in the subject regard.

Turkey Point, 4 AEC at 13. Therefore, security of the PFSF against hostile attacks, like those perpetrated on September 11, is the primary responsibility of the nation's defense and internal security establishments, not the NRC.<sup>5</sup> Indeed, in the wake of September 11, security around the United States, including at the nation's airports, was increased significantly. Thus, Contention RR challenges the NRC's security regulations and should be rejected.

The State of Utah may argue that the attacks of September 11 do not constitute enemy attacks in that they were committed by individual terrorists rather than by a foreign power. NRC case law, however, holds that they are the same from the

<sup>5</sup> The same philosophy has been applied abroad. See, e.g., Inside NRC (October 22, 2001) at 1 (French government protection for La Hague reprocessing facility against airborne attack threat).

perspective of nuclear facility security requirements. In Consolidated Edison Co. of New York, Inc. (Indian Point Station, Unit No. 2), ALAB-202, 7 AEC 825, 829-30 (1974), the Appeal Board held that an attack by “an armed band of trained saboteurs” would constitute an enemy attack under 10 C.F.R. § 50.13 regardless of the actual nature or allegiance of the attackers. Therefore, “an applicant should be entitled to rely on settled and traditional governmental assistance in handling [the] attack.” Id. at 830.

**2. The PFS Physical Protection Plan—Not the SAR—Provides for Security Measures**

The State claims that under 10 C.F.R. § 72.94, the PFS SAR must identify and evaluate suicide mission terrorism and sabotage as a “design basis external man-induced event.” State Req. at 3. The State’s claim is patently wrong. Section 72.94 is one of the “siting evaluation factors” in Part 72, Subpart E. The purpose of that section is to evaluate “site characteristics” that may affect the safety of the ISFSI. 10 C.F.R. § 72.90(a). Section 72.94 concerns potential accidents associated with “past and present man-made facilities and activities.” 10 C.F.R. § 72.94(a). The purpose of this section is to evaluate the potential for accidents associated with normal human activity in the vicinity of the ISFSI site, not deliberate attacks against the facility. As stated in the context of ISFSI emergency planning requirements, “[t]he Commission’s established practice with respect to dangers of [sabotage, terrorism, and military attacks] is that the protection of the United States against hostile enemy acts is a responsibility of the nation’s defense establishment and the various agencies having internal security functions.” 53 Fed. Reg. 31,651, 31,653 (1988).<sup>6</sup>

As discussed above, the specific security requirements for ISFSIs are set forth in 10 C.F.R. Part 73 and they define what PFS must do. Moreover, section 73.21 requires

<sup>6</sup> Licensing Requirements for the Independent Storage of Spent Nuclear Fuel and High-Level Radioactive Waste, Final Rule.



that safeguards information be protected from public disclosure. Evaluation of security threats in the SAR would violate that provision, in that the evaluation would necessarily include detailed information concerning the physical protection at the PFSF. See 10 C.F.R. § 73.21(b)(1).

**B. NEPA Does Not Require the Assessment of Terrorist Attacks or Sabotage**

The State asserts that the PFS ER and the Staff DEIS are inadequate under NEPA “because they do not adequately identify and evaluate any adverse environmental effects which cannot be avoided from attacks by suicide mission terrorism or sabotage.” State Req. at 3; see also id. at 7, 12, 15-16, 19.<sup>7</sup> The State’s claims provide no basis for the admission of Contention RR. First, the Board has rejected, as challenges to the Commission’s regulations or generic rulemaking-associated determinations, all past attempts by the State to introduce sabotage as a basis for the admission of NEPA contentions. See Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-98-10, 47 NRC 288, 296 (1998). Therefore, Contention RR’s assertion that the ER or the DEIS should consider the effects of sabotage and terrorism should be rejected as well.

Second, it is clear that terrorism and sabotage effects lie outside the scope of NEPA. NEPA does not require the assessment of “remote and speculative impacts.” Limerick Ecology Action v. NRC, 869 F.2d 719, 739 (3d Cir. 1989). In Limerick, the Third Circuit held that NEPA does not require the NRC to consider sabotage risk in an environmental impact statement, because assessment of such risk is attended by a great deal of uncertainty and cannot be meaningfully considered in the decision-making

<sup>7</sup> The State’s declarant, Dr. Marvin Resnikoff, also attacks the DEIS for the way in which it presents information concerning spent fuel transportation risk. Declaration of Dr. Marvin Resnikoff in Support of Utah Contention RR (Oct. 10, 2001) ¶25 (“Resnikoff Dec.”). The State, however, does not cite this claim in its request for admission of Contention RR. Furthermore, since the DEIS was published in June 2000, any contention concerning the way in which it presents information is grossly and unjustifiably late. Thus this claim should not be admitted. 10 C.F.R. § 2.714(a)(1).

process. Id. at 743; see also id. at 744 n.32 (NRC consideration of some speculative risks does not require consideration of sabotage). Thus, the NRC assessment in Limerick satisfied NEPA's requirement to take a "hard look" at environmental impacts. Id. at 743.

The Commission has long recognized the speculative nature of the potential threat of hostile attacks:

Assessment of whether, at some time during the life of a facility, another nation actually would use force against that particular facility, the nature of such force and whether that enemy nation would be capable of employing the postulated force against our defense and internal security capabilities are matters which are speculative in the extreme.

Turkey Point, 4 AEC at 13-14 (emphasis added).

Most recently, in a 1999 rulemaking considering changes to the analysis of transportation in the Generic Environmental Impact Statement for License Renewal of Nuclear Plants (NUREG-1437) (1996), the Commission reiterated:

NRC has not quantified the likelihood of the occurrence of sabotage in this analysis because the likelihood of an individual attack cannot be determined with any degree of certainty.

64 Fed. Reg. 48,496, 48,505 (1999).<sup>8</sup>

Finally, the Commission has also stated that inquiring into the vulnerability of nuclear facilities to enemy attacks in the context of public hearings would be unwise as a matter of public policy:

Moreover, examination into [issues of vulnerability to enemy attacks], apart from their extremely speculative nature, would involve information singularly sensitive from the standpoint of both our national defense and our diplomatic relations. These matters are clearly not amenable to board consideration and determination in the licensing process . . .

Turkey Point, 4 AEC at 14 (emphasis added). Therefore, Contention RR's challenges to the PFS ER and the Staff DEIS should be rejected.

<sup>8</sup> Final Rule, "Changes to Requirements for Environmental Review for Renewal of Nuclear Power Plant Operating Licenses."

**C. Challenges to the NRC Staff's Evaluation of the PFS Application Are Not Permissible**

In addition to challenging PFS's license application, the State also impermissibly challenges the Staff's evaluation of it, asserting deficiencies in the Staff's SER for failure to evaluate "suicide mission terrorism and sabotage." State Req. at 3; see also id. at 8-10 (challenging level of protection provided by NRC safeguards systems). "[C]ontentions must challenge the adequacy of the application, not the adequacy of the Staff's review." CLI-01-12, 53 NRC at 472. "[T]he [applicant] rather than the Staff bears the burden of proof in this proceeding. Consequently, the adequacy of the Staff's safety review is, in the final analysis, not determinative of whether the application should be approved." Id. at 473 (quoting Curators of the University of Missouri, CLI-95-1, 41 NRC 71, 121 (1995)); see also Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), CLI-83-19, 17 NRC 1041, 1048-49 (1983) (SAR, not SER, is "central document" for formulation of safety contentions). Thus, the State's challenges of the Staff's review form no basis for the admission of Contention RR.

**D. Transportation Issues Are Outside the Scope of This Proceeding**

In addition to raising the issue of terrorist attacks against the PFSF itself, the State impermissibly seeks to raise the issue of terrorist attacks against spent fuel transportation to and from the PFSF and against the PFS intermodal transfer facility ("ITF"). State Req. at 3-4; see id. at 11-15. The issue of the safety of spent fuel transportation, including the safety of operations at the ITF, is outside the scope of this proceeding. LBP-99-34, 50 NRC at 176-77. Therefore, these issues may not be admitted for litigation.

**E. Contention Utah RR Should Be Dismissed for Lack of Factual Basis**

In addition to impermissibly challenging the NRC's regulations and seeking to litigate issues outside the scope of this proceeding, the State makes claims in Contention RR that should be dismissed for lack of factual basis. 10 C.F.R. § 2.714(b)(2)(ii). First, the State claims that a suicide aircraft crash into a nuclear facility is now "a reasonably

foreseeable event.” State Req. at 3; see Resnikoff Dec. ¶ 7. Nevertheless, the attacks on September 11 did not take place at nuclear facilities and the State provides no reason to believe that it is any more likely that the PFSF would be attacked than any other facility. Furthermore, the State fails to consider the effect of the nearby presence of Hill Air Force Base and its F-16s on the likelihood that an attack with a hijacked airliner could be made against the PFSF.

Second, the State claims that the PFSF would present an “opportune terrorist target.” State Req. at 9-11. But the State fails to consider the implication of the fact, which it concedes, that the PFSF is located in Skull Valley, “45 miles from a large metropolitan area.” Id. at 10 (emphasis added).<sup>9</sup>

Third, the State claims that the engines of a crashing jetliner would penetrate the storage casks and the transportation casks to be used at the PFSF. State Req. at 11-13; Resnikoff Dec. ¶¶ 9-13. The State’s calculations, however, do not account for the fact that a crashing airliner would in all probability impact at some angle rather than precisely perpendicular to the side of the cask (which is only 19 ft. high). See Resnikoff Dec. ¶ 10, Exh. C (assuming horizontal impact). Since even by the State’s calculation the airliner would have to be traveling very fast to penetrate the cask, an impact at a significant angle would result in no penetration at all. Dr. Resnikoff also alleges with no supporting calculation at all that a crashing airliner would penetrate a spent fuel transportation cask. See Resnikoff Dec. ¶ 26.

Fourth, the State claims that the casks used at the PFSF would not withstand a jet fuel fire that could result from a crash. State Req. at 12-13; Resnikoff Dec. ¶¶ 14-20. The State, however, bases its assertion on the erroneous claim that the HI-STORM 100

<sup>9</sup> The State also fails to note that the Winter Olympics are planned to take place in Salt Lake City itself in February. Utah Governor Leavitt has stated his intent that the games go on despite the terrorist threat. Amy Shipley, “Anthrax Doesn’t Deter Games,” Wash. Post., Oct. 19, 2001 at D2.

storage cask can only withstand a severe fire for 15 minutes. Resnikoff Dec. ¶ 15. In fact, while PFS only analyzed the effects of a 15 minute fire in the SAR, the cask can withstand a hot fire for much longer—on the order of days. See Holtec HI-STORM 100 FSAR at 11.2-12 to 13 (fire duration of 12.8 hours would have almost no effect on contents of fuel canister).

Fifth, the State claims that an impact of a jet airliner at the PFSF would cause a significant release of radioactive material on the basis of an assumption that the effects the aircraft impact would be the same as the impact into a storage cask of an inert 2,000 lb. bomb. State Req. at 13; Resnikoff Dec. ¶¶ 21-23. Dr. Resnikoff's declaration, on which the State relies, is wholly unsupported by analysis and ignores the significant facts that 1) the 2,000 lb. bomb has a much smaller cross-section than the airliner's engine, compare Resnikoff Dec. Exh. C with Exh. H, and 2) the airliner's engine is deformable on impact while the bomb is a solid object.

Finally, as noted above, the State also claims—with absolutely no factual support—that “truck bombs, present day weapons (e.g., tow anti-tank and armor piercing weapons), [and] multi-member, inter-coordinated attacks” are also reasonably foreseeable events at the PFSF. State Req. at 14. Moreover, these are unjustifiably late allegations, 10 C.F.R. § 2.714(a)(1), in that they are not related to the September 11 attacks with hijacked airliners. Thus, Contention RR lacks adequate factual basis and should be dismissed.

**F. Contentions May Not Seek to Litigate Matters that May Be the Subject of a General Rulemaking**

In addition to the foregoing reasons, Contention RR should be dismissed because it seeks to litigate a matter that is now the subject of a comprehensive regulatory review by the NRC. Oconee, CLI-99-11, 49 NRC at 345. “It has long been agency policy that Licensing Boards ‘should not accept in individual license proceedings contentions which

are (or are about to become) the subject of general rulemaking by the Commission.” Id. (quoting Potomac Electric Power Co. (Douglas Point Nuclear Generating Station, Units 1 and 2), ALAB-218, 8 AEC 79, 85 (1974)).

The Commission has clearly stated that in the aftermath of September 11, it is reassessing its facility security requirements:

In the aftermath of the terrorist attacks and the continuing uncertainty about future terrorist intentions, the agency is conducting a comprehensive review of its safeguards and physical security program at the direction of Chairman Richard A. Meserve, with the support of the Commission.

NRC Press Release, October 18, 2001. Moreover, the potential terrorist threat and any new NRC responses to it are relevant to all NRC-licensed facilities nationwide, not just ISFSIs or the PFSF. Therefore, this is a generic issue that is currently being addressed by the NRC and thus the Board should not admit it for litigation that would be, at best, a duplication of effort. See Douglas Point, ALAB-218, 8 AEC at 85.

The fact that the State has filed a contention on this issue does not prevent the Commission from addressing it through rulemaking. It is well established, under both judicial and NRC precedent, that the Commission may lawfully choose to resolve such generic issues either through rulemaking or adjudication. The Commission’s discretion is not affected by an intervenor’s attempt to raise those issues in an on-going licensing hearing. See, e.g., Baltimore Gas & Electric Co. v. Natural Resources Def. Council, 462 U.S. 87, 100-01 (1983); Union of Concerned Scientists v. AEC, 499 F.2d 1069, 1080-82 (D.C. Cir. 1974).

#### IV. Conclusion

For the foregoing reasons, the Applicant requests that the Board deny Utah's request to admit late-filed Contention Utah RR.

Respectfully submitted,

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Dated: October 24, 2001

**UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION**

Before the Atomic Safety and Licensing Board

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

**CERTIFICATE OF SERVICE**

I hereby certify that copies of the "Applicant's Response to State of Utah's Request for Admission of Late-Filed Contention Utah RR" 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 24<sup>th</sup> day of October, 2001.

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