**RAS 3748**

January 7, 2002
**DOCKETED 01/08/02**

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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

NRC STAFF'S RESPONSE TO THE STATE OF UTAH'S REQUEST FOR AN OPPORTUNITY TO BRIEF THE LICENSING BOARD'S REFERRED QUESTION IN LBP-01-37

Pursuant to 10 C.F.R. § 2.730(c), the NRC Staff ("Staff") hereby responds to the "State of Utah's Request to the Commission for an Opportunity To Brief the Licensing Board's Referred Question to the Commission in LBP-01-37 ("Request"), filed by the State of Utah ("State") on December 21, 2001. For the reasons set forth below, the Staff (a) submits that briefing of the Licensing Board's decision is not necessary, but (b) if the Commission determines that such briefing would be useful, the Staff requests an opportunity to file a brief in response to any brief filed by the State.

BACKGROUND

On October 10, 2001, approximately one month after the terrorist attacks of September 11, the State filed Contention Utah RR, in which it asserted as follows:

> **Contention Utah 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 . . . . 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 of Utah's Request for Admission of Late-Filed Contention Utah RR (Suicide Mission Terrorism and Sabotage)," dated October 10, 2001, at 3.

On December 13, 2001, the Licensing Board issued its decision in LBP-01-37, in which it (a) declined to admit Late-Filed Contention Utah RR, and (b) referred its ruling to the Commission in accordance with 10 C.F.R. § 2.730(f).[1] More specifically, the Licensing Board held that a balancing of the "good cause" and other late-filing criteria in 10 C.F.R. § 2.714(a)(1) supports the admission of contention Utah RR as it relates to a September 11-type terrorist attack. LBP-01-37, slip op. at 9.[2] The Licensing Board further held, however, that the contention was inadmissible, based on its review of applicable Commission regulations governing physical security requirements at an independent spent fuel storage installation ("ISFSI") under 10 C.F.R. Parts 72 and 73,[3] in that the contention "constitutes an impermissible challenge to existing agency regulatory requirements." *Id.* at 10, *citing Dominion Nuclear Connecticut Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-01-24, 54 NRC __ (slip op. at 21) (Dec. 5, 2001) (contention that amounts to general attack on regulations is impermissible).

The Staff submits that the Licensing Board's ruling is clear, and is in accordance with well-established governing principles of law. Further, nowhere does the State challenge the

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[1] *Private Fuel Storage, L.L.C.* (Independent spent Fuel Storage Installation), LBP-01-37, 54 NRC ___ (2001) ("Memorandum and Order (Denying Motion for Admission of Late-Filed Contention Utah RR and Referring Ruling to the Commission)").

[2] The Licensing Board observed, however, that good cause for late filing did not exist with respect to "the State's additional concerns about other purported terrorist activities such as truck bombs," and that a balancing of the late-filing criteria did not support the admission of those issues. LBP-01-37, slip op. at 9 n.1.

[3] *See* LBP-01-37, slip op. at 10-13.

Licensing Board's understanding of the Commission's regulations governing physical security for an ISFSI, which underlies the heart of the Board's ruling, nor does the State contend that the Board's ruling was incorrect as to any matter of law or fact. Thus, briefing of the safety-related aspects of the Board's decision would not contribute to the Commission's consideration of the Board's ruling.[4]

Further, a need for briefing of the Licensing Board's ruling is not established by the State's assertions that (a) the Board observed that "the question of the agency's NEPA responsibilities relating to a September 11, 2001-type event was 'a close one'" (Request at 2, *citing* LBP-01-37, slip op. at 13); (b) "a direct conflict" exists between the Board's ruling and the decision in *Duke Cogema Stone & Webster* (Mixed Oxide Fuel Fabrication Facility), LBP-01-35, 54 NRC ___ (slip op. at 50-55) (Dec. 6, 2001), *request for reconsideration pending*; and (c) a question exists as to the "application of 10 C.F.R. § 50.13" (Request at 2).[5] These assertions ignore the fact that the Licensing Board, itself, took note of the decision in the MOX Fuel proceeding and 10 C.F.R. § 50.13, and explained that its decision was based on the following principle:

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[4] Moreover, the Commission recently observed that it has undertaken a "top-to-bottom review of its regulations concerning physical protection of all licensed facilities and materials to determine if any revisions should be made in light of the September 11, 2001, events," and that this review will include "those applicable to independent spent fuel storage installations." *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-01-26, 54 NRC ___ (Dec. 28, 2001), slip op. at 2, 3. As the Commission observed, "[i]f a review of the terrorism threat causes the NRC to revise its requirements concerning facility protection at an ISFSI, PFS may well be subject to new regulations. . . . Even if PFS has already received its license, the NRC can order that the facility be backfit where it is necessary to protect public health and safety." *Id.* at 10. Thus, there is no need for the parties to file briefs addressing the physical protection requirements that apply to an ISFSI.

[5] 10 C.F.R. § 50.13 ("Attacks and destructive acts by enemies of the United States; and defense activities"), states, *inter alia*, that Part 50 applicants are 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, or (b) use or deployment of weapons incident to U.S. defense activities."

> [A]t this juncture we are persuaded, as the Appeal Board observed a number of years ago, that "the rationale for 10 CFR § 50.13 [is] as applicable to the Commission's NEPA responsibilities as it is to its health and safety responsibilities." Long Island Lighting Co. (Shoreham Nuclear Power Station), ALAB-156, 6 AEC 831, 851 (1973); see also Limerick Ecology Action v. NRC, 869 F.2d 719, 743-44 (3d Cir. 1989) (sabotage risk need not be considered in environmental impact statement because uncertainty in current risk assessment techniques would not allow meaningful risk assessment).

Thus, the basis for the Board's decision is clear, and the Commission may consider the correctness of the Board's ruling without any need for further briefing by the parties.

Further, while the State asserts that a question has been raised concerning the meaning or effect of 10 C.F.R. § 50.13, the Commission is well aware of that regulation, and recently referred to it in this proceeding, stating as follows:

> Historically, the NRC has drawn a distinction between requiring its licensees to defend their facilities against sabotage and requiring them to protect against attacks and destructive acts by enemies of the United States. Even NRC-licensed facilities that are required to meet the most stringent security requirements (because the potential consequences of sabotage are greatest) are not required to protect against enemies of the United States. For example, reactor licensees are required to protect against a prescriptive list of possible threats, referred to collectively as the "design basis threat." [footnote omitted]. However, our regulations stipulate that power reactors are not required to be designed or to provide other measures to counteract destructive acts by "enemies of the United States."[7] The basis for this distinction is that the national defense establishment and various agencies having internal security functions have the responsibility to address this contingency, and that requiring reactor design features to protect against the full range of the modern arsenal of weapons is simply not practical.[8]
>
> The top-to-bottom review of our physical protection regulations will consider these distinctions, which have been underlying principles of the Commission's regulations in this area, and apply them as appropriate. . . .

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[7] 10 C.F.R. § 50.13.

[8] *See* "Licensing of Production and Utilization Facilities; Procedures for Review of Certain Nuclear Reactors Exempted from Licensing Requirements," 32 Fed. Reg. 13,445 (Sept. 26, 1967). *See also Siegel v. AEC*, 400 F.2d 778, 780-84 (D.C. Cir. 1968).

*PFS,* CLI-01-26, slip op. at 3-4. Thus, the meaning of § 50.13 is clear, and briefing of this issue is not necessary to assist the Commission in its consideration of this matter.[6]

CONCLUSION

For the reasons set forth above, the Staff submits that briefing of the Licensing Board's decision is not necessary but, if the Commission determines that such briefing would be useful, the Staff requests an opportunity to file a brief in response to any brief filed by the State.

Respectfully submitted,

**/RA/**

Sherwin E. Turk
Counsel for NRC Staff

Dated at Rockville, Maryland
this 7th day of January 2002

[6] In referring its ruling to the Commission, the Licensing Board observed that the Commission had indicated it "currently is considering whether, and to what degree, the agency's regulatory regime, including facility physical security requirements, should be changed to reflect what transpired on [September 11]. In this light, this ruling seems to be one particularly suited for early review by the Commission . . . . " LBP-01-37, slip op. at 14. Thus, the Licensing Board's decision to refer its ruling to the Commission appears to be based on its recognition that the issues addressed in its ruling may be pertinent to the Commission's consideration of related matters, rather than the difficulty or novelty of any issue addressed therein.

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S RESPONSE TO THE STATE OF UTAH'S REQUEST FOR AN OPPORTUNITY TO BRIEF THE LICENSING BOARD'S REFERRED QUESTION IN LBP-01-37," 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 7th day of January, 2002:

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