RAS 4011

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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 OPPOSITION TO STATE OF UTAH'S PETITION FOR STAY OF LICENSING PROCEEDING

In response to the State of Utah's ("State") petition for a stay of the above captioned licensing proceedings,[1] Applicant Private Fuel Storage, LLC ("PFS") submits its Opposition to State of Utah's Petition for Stay of Licensing Proceedings. PFS respectfully submits that the Nuclear Regulatory Commission ("NRC" or "Commission") should deny the stay request because the State fails to meet the legal standards for such an extraordinary action.

I. BACKGROUND

At the tail end of its February 11, 2002, Petition, the State requested that the Commission pursuant to 10 C.F.R. § 2.802(d) stay the above captioned proceeding pending disposition of the rulemaking portion of the Petition. The rulemaking portion of the Petition requests that "the Commission amend the [independent spent fuel storage installation] regulations to make clear that licensing is allowed only for federally owned and operated away-from-reactor, spent nuclear fuel ('SNF') storage facilities and not for an away-from-reactor storage facility when privately owned." Petition at 1. Thus, the State requests the Commission "to find that NRC's general li-

[1] In The Matter Of The Petition Of The State Of Utah (1) To Amend The ISFSI Regulations Of 10 CFR Part 72 As Those Regulations Relate To A Privately Owned, Away-From-Reactor, Spent Nuclear Fuel Storage Facility And (2) To Stay The Pending Private Fuel Storage, L.L.C., Licensing Proceeding (Petition to Institute Rulemaking and to Stay Licensing Proceeding) (Feb. 11, 2002) ("Petition").

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censing authority (granted by the [Atomic Energy Act], which does not refer to or address the issue of nuclear waste storage), when read in combination with the later-enacted, more specific [Nuclear Waste Policy Act] . . . may not be used to license something the NWPA excludes -- private, away-from-reactor storage facilities." Id. at 34. The State concludes that the "overwhelming likelihood" that its interpretation of the law will prevail "dictates" a stay of the PFS proceeding. Id. at 39.

The proceeding at issue relates to PFS' application to construct and operate an independent spent fuel storage installation ("ISFSI") on the Skull Valley reservation in Utah. The State successfully sought intervenor status in the proceeding. One of the State's proposed contentions was Utah A, "Statutory Authority," which asserted: "Congress has not authorized NRC to issue a license to a private entity for a 4,000 cask, away-from-reactor, centralized, spent nuclear fuel storage facility." Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-98-7, 47 NRC 142, 183 (1998). As the basis for Utah A, the State asserted that:

> In the NWPA of 1982 Congress specifically authorized private storage of spent nuclear fuel at reactor sites. Congress authorized storage of spent nuclear fuel away from reactors only at federally owned facilities. Neither the NWPA, nor the statutory basis in 1980 for NRC to promulgate [10 C.F.R.] Part 72, can be construed as authorizing NRC to issue a license for a 4,000 cask, centralized, privately owned, away-from-reactor, nuclear waste storage facility that is being sought by [PFS].

"State of Utah's Contentions on the Construction and Operating License Application by Private Fuels Storage, LLC for an Independent Spent Fuel Storage Facility," Docket No. 72-22 (Nov. 23, 1997) at 4 (citation omitted) (emphasis in original). The State further asserted that the "stark contrast between what [PFS] is requesting NRC to authorize under Part 72 and the directives Congress imposed on the federal ownership and operation of centralized interim away-from-reactor storage under the NWPA bespeaks the lack of authority for NRC to license the proposed PFS facility." Id. at 5-6. Thus, proposed Utah A raised substantially the same issue that the State presents in the instant rulemaking Petition.

The Board, however, found proposed Utah A inadmissible:

> Nothing in the language of the 10 C.F.R. Part 72 provisions describing an ISFSI and the "persons" authorized to apply for and be issued a license to construct and operate an ISFSI indicates PFS is ineligible to seek such permission. Indeed when adopting Part 72 in 1980 the Commission specifically contemplated the possibility of stand-alone, "away from reactor" sites as well as the possibility that there could be "large" installations. Thereafter, when the Commission revised Part 72 following passage of the Nuclear Waste Policy Act of 1982 (NWPA) -- the lodestone for the State's assertion the Board lacks jurisdiction -- it made revisions to accommodate the statutory provisions for a monitored retrievable storage (MRS) installation to be constructed and operated by the Department of Energy (DOE). It did not, however, make changes to the original scope of Part 72 that would preclude the creation of an installation such as that now contemplated by PFS.

Private Fuel Storage, LBP-98-7, 47 NRC at 183 (citations omitted). The State took no steps to seek certification of this jurisdictional decision to the Commission. Nor, until two weeks ago, did the State seek alteration or recission of the challenged Part 72 rules.

On April 19, 2001, PFS and the Skull Valley Band of the Goshute Indians brought suit in the United States District Court for the District of Utah challenging the constitutionality of five state statutes enacted specifically to block the PFS facility. Skull Valley Band of Goshute Indians v. Leavitt, Case No. 2:01V0027OC, Complaint (Apr. 19, 2001). In response, the State filed a "counterclaim" asserting that the Commission lacks the statutory authority to license a private, off-site facility such as that proposed by PFS. Utah's Answer, Counterclaim, and Demand for Jury Trial (Jul. 17, 2001) at 26-29. On September 20, 2001, the State filed a Motion for Judgment on the Pleadings again arguing its view that the NRC had no statutory authority to license the PFS facility. See generally, Defendant's Memorandum in Support of their Motion for Judgment on the Pleadings (Sept. 20, 2001). The State's claims are substantially the same as those contained (and rejected) in proposed Utah A, as well as in another recent State filing with the

Commission.[2] In addition to PFS' responsive submittals in the Federal District Court, the United States has filed an *amicus* brief regarding the jurisdiction of the District Court to consider the State's counterclaim. United States' *Amicus Curiae* Brief (Jan. 19, 2002) ("Amicus Brief"). The case is awaiting an April 11, 2002, hearing.

II. ARGUMENT

The State fails to meet its heavy burden of persuasion regarding any of the factors the Commission uses to determine if a stay is appropriate. The Commission's long-standing standard for the extraordinary relief requested by the State requires much more than a circular, self-serving argument that there is no "plausible reason" why a federal court will not adopt the State's jurisdictional arguments, and, therefore, that the Commission should do likewise. This vacuous logic and dubious legal argument completely ignores that the Board -- the only adjudicatory body to rule on the State's jurisdictional assertion -- soundly rejected the merits of the State's assertions. The United States' Amicus Brief supports continuing the licensing proceeding. It is clearly not reasonable to conclude that there is an "overwhelming likelihood" that the Commission will reverse the Board.

Further, the State essentially concedes that it cannot meet its burden regarding the remaining factors the Commission uses to determine if a stay should issue. The State attempts to cover all the required factors by stretching its self-declared "overwhelming showing regarding the first test" beyond the breaking point to "answer and satisfy the second, third, and fourth tests." Petition at 39. This serves only to highlight the weakness of the State's position.

The State has offered no legally cognizable basis for issuance of a stay. The Commission, therefore, should decline to issue that extraordinary relief.

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[2] In addition to its Petition, on February 11, 2002, the State submitted to the Commission "Utah's Suggestion of Lack of Jurisdiction," which relies largely on the Petition's arguments for its bases. PFS is separately submitting a response to this pleading.

A. The State Does Not Meet the Legal Standard For A Stay of the Licensing Proceeding

It is firmly established that the "burden of persuasion" in obtaining a stay "rests on the moving party." Alabama Power Co. (Joseph M. Farley Nuclear Plant Units 1 and 2), CLI-81-27, 14 NRC 795, 797 (1981). Where a petitioner is asking for the full relief to which it might be entitled if successful at the conclusion of an appeal, it "has a heavy burden indeed to establish a right to it." Id. (footnote omitted) (emphasis added). It is the State, as the movant, that has the significant burden of convincing the Commission to grant the extraordinary relief it seeks.

The State fails to satisfy any of the applicable regulatory requirements for determining whether a stay is appropriate:

(1) Whether the moving party has made a strong showing that it is likely to prevail on the merits;
(2) Whether the party will be irreparably injured unless a stay is granted;
(3) Whether the granting of a stay would harm other parties; and
(4) Where the public interest lies.

10 C.F.R. § 2.788(e). Of these factors, it is well established that "the most crucial factor is whether irreparable injury will be incurred by the movant absent a stay." Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), CLI-90-3, 31 NRC 219, 258 (1990); see also Farley, CLI-81-27, 14 NRC at 797. Failing to demonstrate irreparable injury, "a strong showing would need to be made on the remaining stay factors in order for any stay to be granted." Seabrook, CLI-90-3, 31 NRC at 260. The State has not made such a showing.

The reasons the State fails to meet its burden of persuasion regarding any of the required factors are discussed below.

1. The State is not likely to prevail on the merits

To meet the standard of making a strong showing that "it is likely to prevail on the merits," the movant "must do more than merely establish possible grounds for" Commission action. Farley, CLI-81-27, 14 NRC at 797. In addition, "an 'overwhelming showing of likelihood of

success on the merits' is necessary to obtain a stay where the showing on the other three factors is weak." Id. (footnote omitted). Especially because its arguments regarding the other factors are so weak, the State must present an overwhelming basis for its claim of prevailing on the merits. It has not and cannot do so.

The Petition lays out a complicated, counterintuitive argument as to why the Commission is without jurisdiction to license PFS' proposed ISFSI. The State's argument, however, offers little beyond verbosity and far from enough to establish it is "likely" to prevail on merits. To the contrary, the State's guarantee of an "overwhelming likelihood of Utah's success" before the "Court of Appeals," Petition at 38, is unfounded.[3]

First, the applicable standard is the likelihood of prevailing on the merits before the Commission, not in the "Court of Appeals." PFS views this reference to the Court of Appeals as an apparent -- though perhaps inadvertent -- concession that the State expects that the Commission will find against it on the merits. Secondly, the only adjudicatory entity to consider the State's jurisdictional argument -- the Board -- completely rejected it on the merits.[4] Private Fuel Storage, LBP-98-7, 47 NRC at 183-84. Finally, the United States' Amicus Brief stated that "the NWPA has no language that would clearly abrogate the Commission's pre-existing authority to provide for and regulate" an away-from-reactor facility such as that being proposed by PFS and that there "is nothing 'flagrantly wrong' with the Commission's moving forward with a proceeding to license the proposed PFS facility." Amicus Brief at 17 n.9, 24. The State's hyperbolic assertion of an "overwhelming likelihood" of prevailing stands in stark contrast to the

[3] For a court to overturn an agency decision that, as here, is not final agency action, the standard is that the decision must be "so flagrantly wrong and demonstrably critical as to make" a reversal a virtual certainty. NRDC v. NRC, 680 F.2d 810, 816 n.15 (D.C. Cir. 1982).

[4] PFS' argument requesting the Board to reject Utah A is set forth in "Applicant's Answer to Petitioners' Contentions," Docket No. 72-22 (Dec. 24, 1997) at 23-25. The NRC Staff's argument against admission of Utah A is set forth in "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," Docket No. 72-22-ISFSI (Dec. 4, 1997) at 7-14.

Board's legal analysis and the United States' Amicus Brief.

Moreover, for the State to support its "overwhelming likelihood of success" assertion, it must convince the Commission that not only is the NRC's on-going consideration of the PFS application illegal, but also that its consideration of the pending application for the Idaho Spent Fuel Facility at the Idaho National Engineering and Environmental Laboratory ("INEEL") is illegal, that its prior consideration of a proposed ISFSI in Goodhue County, Minnesota (Docket No. 72-18) was illegal, and that the Part 72 licenses already issued and in effect for the Morris facility (Docket No. 72-1), the Three Mile Island, Unit 2 Fuel Debris ISFSI at INEEL (Docket No. 72-20), and the Fort St. Vrain ISFSI (Docket No. 72-09) are null and void. Each of these facilities is an away-from-reactor ISFSI licensed or considered under the Commission's Atomic Energy Act authority. The State's argument provides no basis for invalidating these existing licenses or consideration of these proposed ISFSI's. Yet, the Commission would have to accept such a result to find for the State on this factor.

The State has simply not met its burden to make a strong showing or indeed any showing) of a likelihood of success on the merits.

2. The State will not be irreparably injured unless a stay is granted

The State's "injury" is demonstrably not "irreparable," if cognizable at all. The State's only claims of injury are "costs, expenses, and attorney's fees" incurred in the instant proceeding. Petition at 39. The Commission has long held that "mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay, are not enough" to satisfy the "irreparable" standard. Toledo Edison Company (Davis-Besse Nuclear Power Station, Units 1, 2 and 3), ALAB-385, 5 NRC 621, 628 (1977) (citation omitted); see also, Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-865, 25 NRC 430, 437-38 (footnote omitted) ("The courts and the Commission have long held that economic effects are not generally sufficient to establish irreparable injury."). Each of the State's "inju-

ries" are indisputably monetary in nature. They are, therefore, not "irreparable" as a matter of law.

Moreover, the State has willingly incurred the supposedly "irreparable" injury for nearly four years without complaint. Thus, since April 1998, the State apparently did not view either its jurisdictional argument so "likely" to prevail or the injury so "irreparable" as to request the Board certify the Board's rejection of Utah A for Commission review or (prior to February 11, 2002) to seek a rule change. Since the start of the PFS proceeding, the State has actively participated and availed itself of every available means to advance its cause. While clearly within its rights to do so, the State's actions have demonstrated no concern with "expending scarce human and financial resources contesting a proceeding with no lawful basis." Petition at 39. Indeed, it is only after PFS filed suit against the State that Utah revived the discredited jurisdictional argument.

Curiously, the State places great weight on the admission that it "perceives no legal basis for recovering" its "wasted" monetary resources. Id. at 39-40. This is not at all surprising, as the "American Rule" has long been that each party in litigation bears its own "costs, expenses, and attorney's fees." The State also complains, somewhat inconsistently, that PFS would not have the resources to reimburse the State. Id. Its allegations regarding PFS' ability to pay are irrelevant and immaterial. The Commission clearly should not stay this proceeding based on the State's belated recognition that it has to pay its own legal bills.

The State has failed to carry its burden to show any, much less irreparable, injury. Thus, the State must make a particularly strong showing regarding each of the other factors to obtain a stay, which it has similarly failed to do.

3. PFS would suffer demonstrable harm if a stay were granted

In contrast to the State, PFS would suffer real harm from a stay. The Commission considers "the economic harm that an applicant might suffer" in determining if a stay should issue.

Philadelphia Electric Company (Limerick Generating Station, Units 1 and 2), ALAB-808, 21 NRC 1595, 1603 (1985); see also Louisiana Power & Light Company (Waterford Steam Electric Station, Unit 3), CLI-85-3, 21 NRC 471, 477 (1985); Florida Power & Light Company (St. Lucie Nuclear Power Plant, Unit No. 2), ALAB-404, 5 NRC 1185, 1188 (1977). This is because a "refusal to consider economic harm would effectively eliminate" this stay criterion. Limerick, ALAB-808, 21 NRC at 1603.

The State dismisses this factor in a single conclusory sentence asserting that PFS "is not at all harmed by a stay." Petition at 40. Contrary to this baseless statement, the State argues in its most recent late-filed contention that delay places the PFS project at financial risk. "State of Utah's Request for Admission of Late-Filed Contention Utah SS," (Feb. 11, 2002) at 8. Completely inconsistent with its position here, the State asserts as a basis for this contention that if the PFS facility is delayed "the net benefit of the proposed PFSF would be greatly reduced." Id. The State ignores the obvious tension between the its simultaneous, opposing positions. In addition the NRC Staff's cost-benefit analyses in the project's Final Environmental Impact Statement[5] demonstrate that the benefits from PFS will be reduced as the opening of the facility is delayed. FEIS, Table 8.3. Thus, the FEIS' analyses demonstrate that a stay of the licensing proceeding, and the resulting delay of the opening of the facility, would have an adverse financial impact on PFS.

A stay of this proceeding would, therefore, significantly injure PFS.

4. The public interest lies in timely completion of the PFS proceeding

The public interest clearly lies in the timely completion of this proceeding, regardless of the ultimate outcome. The State fails to identify a single public benefit from staying the pro-

[5] NUREG-1714, "Final 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 Toole County, Utah" (Dec. 2001) ("FEIS").

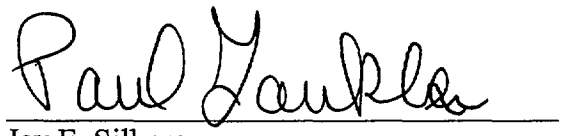
ceeding. Indeed, the State's only stated purpose for seeking a stay is to limit its own legal bills. This self-serving request fails to recognize that the Commission has a duty to the public that extends far beyond providing an indirect financial benefit to a project opponent. It is clearly in the overall public's interest to adjudicate the pending contentions and reach a final decision on the merits of the proposed facility.

In summary, the State has not met its burden of persuasion with regard to any of the factors the Commission considers in determining whether to issue a stay. There is, therefore, no basis for such an action in this matter.

III. CONCLUSION

For the reasons discussed above, the State fails to meet any of the applicable legal standards for a stay and the Commission should decline to issue such extraordinary relief.

Respectfully submitted,



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NUCLEAR REGULATORY COMMISSION

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CERTIFICATE OF SERVICE

I hereby certify that copies of the Applicant's Opposition to State of Utah's Petition for Stay of Licensing Proceeding was served on the persons listed below (unless otherwise noted) by e-mail with conforming copies by U.S. mail, first class, postage prepaid, this 21st day of February, 2002.

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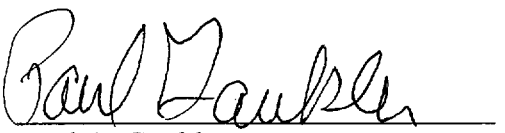

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