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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 RESPONSE TO UTAH'S SUGGESTION OF LACK OF JURISDICTION

Applicant Private Fuel Storage, LLC ("PFS") hereby submits its response to "Utah's Suggestion of Lack of Jurisdiction," filed February 11, 2002 ("Suggestion"). In the Suggestion, the State of Utah ("State") asserts that the Nuclear Regulatory Commission ("NRC" or "Commission") lacks jurisdiction to license the proposed PFS spent nuclear fuel storage facility ("PFSF") and that the State may, by analogy to Federal Rule of Civil Procedure 12(h)(3), raise the issue at any time. The Commission should reject the Suggestion on procedural grounds because the pleading (1) flouts the Commission's procedures regarding the conduct of licensing proceedings and (2) it is inexcusably late, in any event.

I. BACKGROUND

On February 11, 2002, the State submitted to the Commission its Suggestion asserting that "governing federal law, the Nuclear Waste Policy Act of 1982, as amended, deprives the Commission of jurisdiction over" the PFS license application and "that the Commission must therefore dismiss that application forthwith." Suggestion at 1. The support for the Suggestion's

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legal argument was incorporated by reference from the State's Petition,[1] submitted to the Commission on the same date and seeking changes to Part 72 conforming the rule to the State's interpretation of the Nuclear Waste Policy Act ("NWPA") and the Atomic Energy Act ("AEA"). The Petition requested that "the Commission amend the ISFSI regulations [10 C.F.R. Part 72] 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.

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, Utah A, "Statutory Authority," 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 alleged 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," (Nov. 23, 1997) at 4 (citation omitted) (emphasis in original). The State further asserted that the "stark contrast between

[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").

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 Suggestion (and the rulemaking Petition).

The Atomic Safety and Licensing Board ("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). Following the April 1998 ruling, 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 Judg-

ment 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 and the Petition. 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's Suggestion is an attempt to circumvent the Commission's long-established rules regarding the conduct of licensing proceedings and Commission oversight thereof. Nearly four years after a ruling of the Board, and only two months before the start of evidentiary hearings on the remaining contentions, the State for the first time "suggests" to the Commission that the Board erroneously determined that NRC jurisdiction existed and the entire licensing proceeding has been illegal. Regardless of the merits, if any, of the State's assertions, the manner and timing of the instant pleading are improper and undercut the integrity of the Commission and NRC licensing procedures.

Contrary to its assertion, the State did not awaken from its four-year slumber simply to safeguard the Commission's "right to consider its jurisdiction" regarding the PFS license application. Suggestion at 3. Commission rules at 10 C.F.R. §§ 2.730(f) and 2.786(g) and relevant case law provided an explicit means to raise the issue of jurisdiction immediately following the Board's rejection of Utah A in 1998. Having failed to avail itself of these mechanisms in a timely manner, the State should be required to await the normal appeals process following the Board's resolution of the outstanding issues in this case. The Commission should not permit the State to ignore long-established procedures and practices simply to shore up a legally deficient position in another forum.

A. The State's Suggestion Violates Commission Procedure and Policy

The Suggestion ignores long-standing rules of practice that provide procedures for raising significant issues to the Commission for timely consideration. Commission regulations at 10 C.F.R. § 2.730 and associated case law establish the procedures and policies regarding interlocutory review when "a prompt decision is necessary to prevent detriment to the public interest or unusual delay or expense." 10 C.F.R. § 2.730(f). Although it is the Commission's general policy to minimize interlocutory review of Atomic Safety and Licensing Board decisions, the Commission has recognized that "some novel issues that could benefit from early Commission review will not be presented to the Commission." Policy on Conduct of Adjudicatory Proceedings; Policy Statement, 48 NRC 18, 23 (1998). The "policy statement indicated [a] willingness" to "exercise [Commission] interlocutory review authority in situations" where these novel issues "could benefit from early resolution." Private Fuel Storage, CLI-00-13, 52 NRC 23, 29 (2000). The Commission rules of practice, 10 C.F.R. § 2.786, establish criteria to identify the "circumstances in which interlocutory review may be appropriate in a proceeding." Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station) CLI-94-2, 39 NRC 91, 93 (1994). The Commission will review a certified question or referred ruling if it either:

> (1) Threatens the party adversely affected by it with immediate and serious irreparable impact which, as a practical matter, could not be alleviated through a petition for review of the presiding officer's final decision; or
>
> (2) Affects the basic structure of the proceeding in a pervasive or unusual manner.

10 C.F.R. § 2.786(g). The Commission has "entertained petitions for review of an otherwise interlocutory order -- akin to a motion for directed certification -- if the petitioner can satisfy one of the criteria under section 2.786(g)." Rancho Seco, CLI-94-2, 39 NRC at 93; see also Oncology Services Corp., CLI-93-13, 37 NRC 419, 420-21 (1993).

There is no need to create an *ad hoc* procedure. The State is well aware of this procedure and indeed has petitioned the Commission for interlocutory reviews of a number of issues during the PFS proceeding. See, e.g., Private Fuel Storage, CLI-01-01-12, 53 NRC 459 (2001) (inter-

locutory review of the State's exemption-related claims); Private Fuel Storage, CLI-00-13, 52 NRC 23 (2000) (interlocutory review of financial assurance issues); Private Fuel Storage, CLI-00-2, 51 NRC 77 (2000) (denying interlocutory review of revised design-basis accident dose calculations). The State's failure to avail itself of a clearly applicable and available procedure should not provide any basis for creating a new process from whole cloth. The Commission should not undermine its adjudicatory policies and procedures to mitigate the State's failure to seek timely interlocutory review.

While the State creatively asserts that the Commission should invent a new procedure ostensibly patterned after Federal Rule 12(h)(3), that rule provides no analogy here. Rule 12(h)(3) states that whenever it appears that the federal district "court lacks jurisdiction of the subject matter, the court shall dismiss the action." In the current situation, the Board has already considered and rejected the State's argument that "it lacks jurisdiction of the subject matter." Rule 12(h)(3) does not provide that a party, having lost the jurisdictional argument at the district court level can, in the middle of the case, jump to an appellate court. Similarly, absent complying with existing Commission procedures, there is no justification for allowing the State to jump from the Board to the Commission.

B. The State's Action is Untimely

In any event, the State's action is inexcusably late. A certification to the Commission by a presiding officer is required "promptly." 10 C.F.R. § 2.730(f). The most analogous Commission rule specifies a 40 day limit to appeal a decision or action of a presiding officer. Id. § 2.786(a). The State has sat on its hands for nearly four years. Notwithstanding the lack of merit of the State's argument, basic fairness and the need for a consistent and predictable adjudicatory process mandates rejection of what is, in essence, an appeal of an adverse decision. The time has long since passed for the action the State seeks.

The State's inaction defeated the purpose of an interlocutory appeal. The Commission

entertains interlocutory issues when a "prompt decision is necessary to prevent detriment to the public interest or unusual delay or expense," (Private Fuel Storage, CLI-00-13, 52 NRC at 28 citing 10 C.F.R. § 2.730 (emphasis added)) or when "[e]arly Commission review of the Board decision not only will clarify what, if anything, requires further litigation in the current case, but also what may have generic implications for other proceedings." Id. at 29 (emphasis added). Waiting four years to seek review provides for neither prompt or early Commission involvement. The State must now "abide the end of the case." Private Fuel Storage, CLI-00-2, 51 NRC at 80 (quoting Northern States Power Co. (Tyrone Energy Park, Unit 1), ALAB-492, 8 NRC 251 (1978)). There is little reason for the Commission to act now when, in only a few months, the State can seek Commission review of adverse Board decisions in the normal course. See 10 C.F.R. § 2.786.

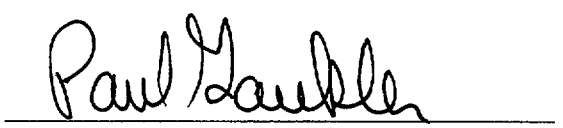
C. Opportunity to Brief the Issues

PFS submits that the State's Suggestion is in violation of Commission rules, late-filed, and procedurally inappropriate and should therefore be rejected. We also note that the State's Petition for rulemaking raises the same issues. The Commission has the discretion to address the arguments the State has raised either by rulemaking or in the on-going licensing proceeding. Private Fuel Storage, CLI-01-12 53 NRC at 474. The Commission, notwithstanding the State's failure to follow NRC rules, also has the discretion to reach down, *sua sponte*, and address the jurisdictional issue at this time or to await the normal appellate process and (assuming it is raised by the State following the conclusion of the Board's decision-making) resolve the issue then. Should the Commission deem it appropriate to resolve the question of jurisdiction in the PFS proceeding at this time, PFS respectfully requests an opportunity to fully brief the issues on a schedule established by the Commission. Should the Commission choose to address the issue in response to the State's rulemaking petition, PFS will file comments on the petition at the appropriate time.

III. CONCLUSION

For the reason discussed above, the Commission should find that the State's Suggestion fails to comport with NRC procedural rules and, in any event is extraordinarily late. In the event that the Commission chooses to address the procedural issue at this time, *sua sponte*, PFS respectfully requests the opportunity to fully brief the issue.[2]

Respectfully submitted,



Jay E. Silberg
Ernest L. Blake, Jr.
Paul A. Gaukler
D. Sean Barnett
SHAW PITTMAN LLP
2300 N Street, N.W.
Washington, DC 20037

Dated: February 21, 2002

Counsel for Private Fuel Storage L.L.C.

Document #: 1216378 v.1

[2] In order to provide the Commission with a appreciation for the weaknesses of the State's arguments, we attach as Enclosure 1 hereto, "Memorandum of Points and Authorities in Opposition to Defendants' Motion for Judgment on the Pleadings" (Nov. 8, 2001) filed with the U.S. District Court for the District of Utah. The argument beginning on page 15 responds to the NRC jurisdictional arguments which the State improperly raised in that forum.

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CERTIFICATE OF SERVICE

I hereby certify that copies of the Applicant's Response to Utah's Suggestion of Lack of Jurisdiction 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.

Emil L. Julian, Assistant for
Rulemakings and Adjudications
Rulemaking & Adjudication Staff
Secretary of the Commission
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555
e-mail: hearingdocket@nrc.gov
(original and two copies)

Jeffrey S. Merrifield, Commissioner
U.S. Nuclear Regulatory Commission
Mail Stop: O-16 C1
One White Flint North
11555 Rockville Pike
Rockville, MD 20852-2738
e-mail: jmer@nrc.gov

Richard A. Meserve, Chairman
U.S. Nuclear Regulatory Commission
Mail Stop: O-16 G15
One White Flint North
11555 Rockville Pike
Rockville, MD 20852-2738
e-mail: chairman@nrc.gov

Michael C. Farrar, Esq., Chairman
Administrative Judge
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
e-mail: MCF@nrc.gov

Edward McGaffigan, Jr. Commissioner
U.S. Nuclear Regulatory Commission
Mail Stop: O-16 G15
One White Flint North
11555 Rockville Pike
Rockville, MD 20852-2738
e-mail: sfc@nrc.gov

Dr. Jerry R. Kline
Administrative Judge
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
e-mail: JRK2@nrc.gov; kjerry@erols.com

Greta J. Dicus, Commissioner
U.S. Nuclear Regulatory Commission
Mail Stop: O-16 G15
One White Flint North
11555 Rockville Pike
Rockville, MD 20852-2738
e-mail: cmrdicus@nrc.gov

Nils J. Diaz, Commissioner
U.S. Nuclear Regulatory Commission
Mail Stop: O-16 G15
One White Flint North
11555 Rockville Pike
Rockville, MD 20852-2738
e-mail: cmrdiaz@nrc.gov

Dr. Peter S. Lam
Administrative Judge
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
e-mail: PSL@nrc.gov

*Office of the Commission Appellate Adjudication
Mail Stop: 16-G-15 OWFN
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
(United states mail only)

Sherwin E. Turk, Esq.
Office of the General Counsel
Mail Stop O-15 B18
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555
e-mail: set@nrc.gov
e-mail: pfscase@nrc.gov

Denise Chancellor, Esq.
Assistant Attorney General
Utah Attorney General's Office
160 East 300 South, 5th Floor
P.O. Box 140873
Salt Lake City, Utah 84114-0873
e-mail: dchancel@att.state.ut.us

Diane Curran, Esq.
Harmon Curran Spielberg & Eisenberg L.L.P.
1726 M Street, N.W., Suite 600
Washington, D.C. 20036
e-mail: dcurran@harmoncurran.com

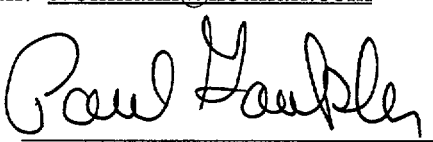
John Paul Kennedy, Sr., Esq.
David W. Tufts, Esq.
Confederated Tribes of the Goshute Reservation and David Pete
Durham Jones & Pinegar
111 East Broadway, Suite 900
Salt Lake City, Utah 84105
e-mail: dtufts@djplaw.com

Joro Walker, Esq.
Land and Water Fund of the Rockies
1473 South 1100 East
Suite F
Salt Lake City, UT 84105
e-mail: utah@lawfund.org

Paul EchoHawk, Esq.
Larry EchoHawk, Esq.
Mark EchoHawk, Esq.
EchoHawk PLLC
P.O. Box 6119
Pocatello, ID 83205-6119
e-mail: paul@echohawk.com

James M. Cutchin
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
e-mail: jmc3@nrc.gov
(e-mail copy only)

Tim Vollmann, Esq.
Skull Valley Band of Goshute Indians
3301-R Coors Road, N.W.
Suite 302
Albuquerque, NM 87120
e-mail: tvollmann@hotmail.com



Paul A. Gaukler

TIM VOLLMANN
3301-R Coors Road N.W., Suite 302
Albuquerque, NM 87120
Telephone: (505) 792-9168
Facsimile: (505) 792-9251
Attorney for Plaintiff Skull Valley
Band of Goshute Indians

JAMES A. HOLTKAMP (1533)
LEBOEUF, LAMB, GREENE & MAC RAE
136 S. Main Street, Suite 1000
Salt Lake City, UT 84111
Telephone: (801) 320-6700
Facsimile: (801) 359-8256
Attorneys for Plaintiff Skull Valley
Band of Goshute Indians

VAL R. ANTCZAK (0120)
J. MICHAEL BAILEY (4395)
H. DOUGLAS OWENS (7762)
PARSONS BEHLE & LATIMER
201 South Main Street, Suite 1800
Post Office Box 45898
Salt Lake City, Utah 84145-0898
Telephone: (801) 532-1234
Facsimile (801) 536-6111
Attorneys for Plaintiff Private Fuel Storage, L.L.C.

JAY E. SILBERG
ERNEST L. BLAKE, Jr.
SHAW PITTMAN LLP
2300 N Street, N.W.
Washington, D.C. 20037
Telephone: (202) 663-8000
Facsimile: (202) 663-8007
Attorneys for Plaintiff Private Fuel Storage, L.L.C.

IN THE UNITED STATES DISTRICT COURT

DISTRICT OF UTAH, CENTRAL DIVISION

* * * * * * *

THE SKULL VALLEY BAND OF GOSHUTE INDIANS and PRIVATE FUEL STORAGE, L.L.C.

Plaintiffs,

vs.

MICHAEL O. LEAVITT, in his official capacity as Governor of the State of Utah, et al.,

Defendants.

MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANTS' MOTION FOR JUDGMENT ON THE PLEADINGS

Case No. 2:01CV00270C

Judge Tena Campbell

* * * * * * *

TABLE OF CONTENTS

STATEMENT OF ISSUES

1. Does the Administrative Orders Review Act divest the Court of jurisdiction to hear Defendants' Motion for Judgment on the Pleadings?

2. Does the Nuclear Regulatory Commission have authority to license the facility proposed by Plaintiff Private Fuel Storage, L.L.C. for the storage of spent nuclear fuel?

Plaintiffs, the Skull Valley Band of Goshute Indians (the "Skull Valley Band" or "Band") and Private Fuel Storage, L.L.C. ("PFS"), submit this Memorandum in Opposition to Defendants' Motion for Judgment on the Pleadings.

SUMMARY OF ARGUMENT

Defendants ask this Court to "hold that governing federal law excludes and disallows PFS' proposed Skull Valley waste facility" and to enter "a judgment that will of necessity fully and finally terminate this action." Memorandum in Support of Defendant's Motion at 45 ("Defs.' Mem."). Defendants' Motion does not address all issues pending before this Court. It raises but a single issue: whether the U.S. Nuclear Regulatory Commission ("NRC") has the authority to issue a license for a private, away-from-reactor interim storage facility for spent nuclear fuel, such as that proposed by PFS.

The Court should deny Defendants' Motion for two reasons. First, the Court lacks jurisdiction to decide the issue because Congress has vested jurisdiction to review NRC licensing matters in the U.S. courts of appeals. The Hobbs Act grants exclusive jurisdiction to the courts of appeals to determine the validity of NRC orders and regulations. Defendants improperly filed their Motion with this Court in direct violation of the governing law.

Second, even if the Court determines it has jurisdiction, Defendants' Motion should be denied because it relies upon faulty assertions and a misunderstanding of the Nuclear Waste Policy Act ("NWPA"). The Atomic Energy Act, not the NWPA, governs the NRC's licensing of PFS's proposed storage facility. The NRC has well-established authority to license private spent nuclear fuel storage sites at away-from-reactor locations under the Atomic Energy Act, authority exercised before and after NWPA. The NWPA does not apply to the present case because its

provisions for temporary storage apply only to federally-owned storage facilities. The NWPA did not repeal the authority previously granted to the NRC to license storage facilities. Indeed, Congress recognized that previously-existing authority when it passed to NWPA. As such, the NRC's ongoing licensing process for the proposed PFS facility is being conducted pursuant to a valid grant of congressional authority.

PROCEDURAL BACKGROUND

Plaintiffs filed this action to establish that legislation enacted by the State of Utah to block construction and operation of a facility to store spent nuclear fuel on Plaintiff Skull Valley Band's reservation is unconstitutional. Defendants Michael Leavitt and Mark Shurtleff then filed a Counterclaim asking the Court to prohibit PFS's spent nuclear fuel storage project for five reasons.[1] Defendants have now moved for judgment on the pleadings on one of these five reasons—that the NRC lacks authority to license the spent fuel storage facility.

On June 20, 1997, PFS submitted a license application to the NRC to construct and operate a temporary Independent Spent Fuel Storage Installation ("ISFSI") on a tract of land within the reservation of the Skull Valley Band. This application commenced proceedings entitled In the matter of Private Fuel Storage, L.L.C., NRC Docket No. 72-22-ISFSI. The license PFS seeks is to receive, transfer and possess spent nuclear fuel on a temporary basis in

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[1] The reasons Defendants identified in their Counterclaim are:

> First, the NRC . . . has no authority or jurisdiction to license [Plaintiffs' proposed facility]. . . . Second, an NRC license for the [facility] will necessarily violate NEPA and therefore be invalid. . . . . Third, the Band has not validly . . . approved the lease [between PFS and the Band]. Fourth, the BIA's [Bureau of Indian Affairs] conditional approval of the lease occurred in violation of governing laws and rules. Fifth, any BIA approval of the lease will . . . be invalid as a breach of the Government's trust obligation to the Band. . . .

Amended Counterclaim ¶ 34. Reasons 2 through 5, which are not the subject of this brief, are also defective and will be the subject of future briefing.

accordance with the requirements of the NRC regulations in 10 C.F.R. Part 72. A decision on licensing has not yet been made.

The NRC licensing process for an ISFSI includes both a thorough-going technical review by the Staff of the NRC as well as an opportunity for a formal adjudicatory hearing before an independent Atomic Safety and Licensing Board ("ASLB"). The NRC Staff technical review covers both safety issues as required by the Atomic Energy Act, 42 U.S.C. §§ 2011-2297, and defined in Part 72 of the NRC's regulations, 10 C.F.R. Part 72, and environmental issues as required by the National Environmental Policy Act, 42 U.S.C. §§ 4321 et seq., and defined in Part 51 of the NRC's regulations, 10 C.F.R. Part 51. The Staff review process involves its evaluation and analysis of the lengthy application (including a Safety Analysis Report and an Environmental Report), and the applicant's response to numerous requests for additional information from the NRC Staff. The conclusion of the NRC Staff's technical review is documented in the Staff's Safety Analysis Report[2] and its Environmental Impact Statement.[3]

In parallel with the NRC Staff technical review, the Atomic Energy Act and the NRC regulations provide for adjudicatory proceedings. 42 U.S.C. §§ 2231, 2239; 10 C.F.R. Part 2, Subpart G. Under those procedures, an interested person may seek a formal adjudicatory hearing on its contentions. See, e.g., 10 C.F.R. §§ 2.105, 72.46. Presiding over that hearing is the ASLB, a board composed of a lawyer as chairman and two technically-trained hearing examiners

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[2] See Safety Evaluation Report Concerning the Private Fuel Storage Facility, Docket No. 72-22 (Sept. 29, 2000). Two supplements to the report resolving remaining open items are due to be published in November and December, 2001.

[3] See NUREG-1714, 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 (June 2000). The final Environmental Impact Statement is scheduled to be published in December, 2001.

(one of which is typically a nuclear engineer or comparably scientifically-trained individual, and the second an environmental scientist). See, e.g., 42 U.S.C. § 2241; 10 C.F.R. § 1.15. After a full adjudicatory hearing, the ASLB issues an "initial decision." 10 C.F.R. § 2.760(a). An initial decision directing the issuance of a license for the construction and operation of the ISFSI becomes effective only upon order of the Commission, and the NRC Staff may not issue such a license until expressly authorized by the Commission. 10 C.F.R. § 2.764(c).[4] The ASLB's initial decision is subject to appeal to the Commission, 10 C.F.R. § 2.786, and the Commission's final decision is in turn subject to a petition for reconsideration, 10 C.F.R. § 2.771, and to appeal to the federal courts of appeals, as described below.

The State of Utah sought and was granted a hearing on the PFS license application.[5] The State submitted 64 contentions, of which the ASLB admitted 26 in whole or in part.[6] Adjudicatory hearings on some of the State's admitted issues took place during June 2000 and adjudicatory hearings on the remaining issues are scheduled for April 2002.

The State of Utah presented to the ASLB the same claim Defendants now urge on this Court—that the NRC has no authority to license the proposed PFS storage facility. See Ex. A, Private Fuel Storage LLC, (Independent Spent Fuel Storage Installation) LBP-98-7, 47 NRC 142, 183-84 (1998) ("ASLB Decision") (a portion of the ASLB Decision was also attached as

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[4] The ASLB's initial decision is also subject to an application for staying its effectiveness. 10 C.F.R. § 2.788.

[5] Nine other parties also sought to participate in the hearing on the PFS application, including two that supported the application, the Skull Valley Band and a group of scientists. Three of these nine, including the scientists' group, were not permitted to participate because of lack of standing or failure to put forward an admissible contention. See Private Fuel Storage, LLC (Independent Spent Fuel Storage Installation), LBP-98-7, 47 N.R.C. 142, 247 (1998); Private Fuel Storage, LLC (Independent Spent Fuel Storage Installation), LBP-99-3, 49 NRC 40, aff'd CLI-99-10, 49 NRC 318 (1999).

[6] The State withdrew two additional contentions and a decision on admitting three others remains pending before the ASLB.

Exhibit 3 to Defendant's Memorandum). The ASLB ruled, inter alia, that Defendants' contention is inadmissible because the NRC had already "clearly established the scope" of its authority, which includes the authority to license an ISFSI such as the facility PFS proposes. Id.

ARGUMENT

Defendants' Motion is both before the wrong court and based on a faulty legal argument.

I. THIS COURT LACKS JURISDICTION TO DECIDE DEFENDANTS' CLAIM AS TO THE NRC'S AUTHORITY TO LICENSE THE TEMPORARY STORAGE FACILITY

This Court lacks jurisdiction to decide Defendants' Motion because the Administrative Orders Review Act, commonly referred to as the Hobbs Act, 28 U.S.C. §§ 2341-51, vests exclusive jurisdiction in the U.S. courts of appeals for the review of matters committed to the NRC and certain other agencies.[7] The Hobbs Act provides in part:

> The court of appeals (other than the United States Court of Appeals for the Federal Circuit) has **exclusive** jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of — . . . (4) **all final orders of the Atomic Energy Commission made reviewable by Section 2239 of title 42.** . . .

28 U.S.C. § 2342 (emphasis added). Clearly, the Hobbs Act vests the courts of appeals with exclusive jurisdiction to review the final orders of the NRC[8] "made reviewable by" 42 U.S.C. § 2239.

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[7] The Hobbs Act also vests jurisdiction in the courts of appeals for review of matters committed to the Federal Communications Commission, the Department of Agriculture, the Department of Transportation, the Federal Maritime Commission, and the Surface Transportation Board, among others.

[8] The Energy Reorganization Act of 1974 transferred the licensing functions of the Atomic Energy Commission to the NRC. The reference in the Hobbs Act to the final orders of the former Atomic Energy Commission thus applies to the NRC. See Florida Power & Light Co. v. Lorion, 470 U.S. 729, 733 (1985) (under the Hobbs Act "the courts of appeals have exclusive jurisdiction over petitions seeking review of 'all final orders of the Atomic Energy

42 U.S.C. § 2239(b), which designates those orders of the NRC that are reviewable pursuant to the Hobbs Act, provides in part:

> The following Commission actions shall be subject to judicial review in the manner prescribed in chapter 158 of Title 28 [the Hobbs Act] and chapter 7 of Title 5 [the Administrative Procedures Act[9]]:
>
> (1) Any final order entered in any proceeding of the kind specified in subsection (a) of this section.

42 U.S.C. § 2239(b). Subsection (a) of § 2239 in turn applies to "any proceeding under this chapter [the Atomic Energy Act], for the granting, suspending, revoking, or amending of any license or construction permit, or application to transfer control, and in any proceeding for the issuance or modification of rules and regulations dealing with the activities of licensees . . . ."

Pursuant to these statutory provisions, review of the issue raised in Defendants' Motion concerning the scope of the NRC's authority to license the PFS facility is committed to the courts of appeals, and consequently this Court lacks jurisdiction to hear it. As described above, PFS is in the midst of a licensing proceeding before the ASLB. This proceeding will result in a

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Commission [now the Nuclear Regulatory Commission] made reviewable by section 2239 of Title 42'") (quoting 28 U.S.C. § 2342) (parenthetical in the original).

[9] This reference to the judicial review provisions of the Administrative Procedures Act (Chapter 7 of Title 5, codified at 5 U.S.C. §§ 701-706) does not alter the exclusive jurisdiction of the courts of appeals, as set forth in the Hobbs Act, over NRC final orders. See 5 U.S.C. § 703 ("[t]he form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action"). Thus, Chapter 7 of Title 5 explicitly provides that judicial review of NRC final orders shall be conducted according to the "special statutory review proceeding relevant to the subject matter"—in this case the Hobbs Act—and "in a court specified by statute"—in this case the courts of appeals. See also Florida Power & Light Co. v. Lorion, 470 U.S. 729, 737 (1985) ("[w]e conclude that ... Congress intended to provide for initial court of appeals review of all final orders in licensing proceedings"); General Atomics v. United States Nuclear Regulatory Comm'n, 75 F.3d 536, 539 (9th Cir. 1996) (citing Florida Power for proposition that Hobbs Act jurisdiction "is to be read broadly to encompass all final NRC decisions that are preliminary or incidental to licensing").

final order of the type described in 42 U.S.C. § 2239(b).[10] Any final order in the licensing matter will clearly be reviewable only in the courts of appeals by operation of 28 U.S.C. § 2342 and 42 U.S.C. § 2239(b). See Florida Power & Light Co. v. Lorion, 470 U.S. 729, 737-41, 746 (1985) (Hobbs Act applies to all NRC decisions concerning licensing); Environmental Defense Fund v. United States Nuclear Regulatory Comm'n, 902 F.2d 785, 786 (10th Cir. 1990) (recognizing that Hobbs Act vests exclusive jurisdiction for review of final orders of NRC with courts of appeal). Application of Hobbs Act jurisdiction is well-established in the courts.[11]

The State of Utah, on whose behalf Defendants claim to act in this case, see Amended Counterclaim ¶ 30, has been admitted as a party in the proceedings before the ASLB and has raised in those proceedings the very question Defendants now raise here as to the scope of NRC authority. The ASLB's determination on this question is reviewable by the Commission under NRC regulations and by the courts of appeals under the Hobbs Act. Defendants' Motion, which collaterally attacks the NRC's licensing authority outside of the licensing proceeding, is exactly the type of issue which case law under the Hobbs Act has found within the exclusive jurisdiction

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[10] As noted, 42 U.S.C. § 2239(b)(1) covers final orders entered pursuant to § 2239(a), which in turn covers "any proceeding under this chapter [i.e. the Atomic Energy Act, codified at 42 U.S.C. chapter 23], for the granting, suspending, revoking, or amending of any license or construction permit . . .". The license sought by PFS pursuant to 10 C.F.R. Part 72 is clearly a license issued under the Atomic Energy Act. See 10 C.F.R. § 72.40(a).

[11] See, e.g. General Atomics v. United States Nuclear Regulatory Comm'n, 75 F.3d 536 (9th Cir. 1996); Grantwood Village v. Missouri Pac. R.R. Co., 95 F.3d 654 (8th Cir. 1996); New Jersey Dep't of Envtl. Protection and Energy v. Long Island Power Authority, 30 F.3d 403 (3d Cir. 1994); Natural Resource Defense Council v. United States Nuclear Regulatory Comm'n, 606 F.2d 1261 (D.C. Cir. 1979); Citizens Awareness Network, Inc. v. U.S. Nuclear Regulatory Comm'n, 854 F. Supp. 16 (D. Mass. 1994); Schneider v. Union Pac. R.R. Co., 864 F. Supp. 120 (D. Neb. 1994); Ohio Edison Co. v. Zech, 701 F. Supp. 4 (D. D.C. 1988); Center for Nuclear Responsibility, Inc. v. United States Nuclear Regulatory Comm'n, 586 F. Supp. 579 (D. D.C. 1984); Sunflower Coalition v. Nuclear Regulatory Comm'n, 534 F. Supp. 446 (D. Colo. 1982); San Luis Obispo Mothers for Peace v. Hendrie, 502 F. Supp. 408 (D. D.C. 1980); Desrosiers v. United States Nuclear Regulatory Comm'n, 487 F. Supp. 71 (D. Tenn. 1980); Honicker v. Hendrie, 465 F. Supp. 414 (D. Tenn. 1979); Concerned Citizens of Rhode Island v. Nuclear Regulatory Comm'n, 430 F. Supp. 627 (D. R.I. 1977); Nader v. Ray, 363 F. Supp. 946 (D. D.C. 1973).

of the courts of appeals. The attack is collateral as Defendants do not seek direct review of the NRC process or ultimate decision, but instead ask by means of their Counterclaim and Motion that this Court hold that the NRC could never properly license the PFS facility. (See Defs.' Mem. at 45) ("this Court should hold that governing federal law excludes and disallows PFS's proposed Skull Valley waste facility, on that basis grant Utah's Rule 12(c) motion, and then enter a judgment on the pleadings in favor of Utah"). In similar circumstances, where the licensing issue is raised in collateral proceedings, courts have uniformly held that the district courts lack jurisdiction.

The Supreme Court has decided a case that is virtually indistinguishable from the instant case. In Federal Communications Commission v. ITT World Communications, Inc., 466 U.S. 463 (1984), ITT opposed certain negotiations engaged in by members of the Federal Communication Commission ("FCC") (another agency covered by the Hobbs Act) with their foreign counterparts 466 U.S. at 465-66. ITT filed a rulemaking petition with the FCC requesting the FCC to disclaim any intent to negotiate with the foreign governments or to reach any binding agreements during the negotiations. See id. ITT argued that the agency's negotiations with the foreign governments were ultra vires, id. at 465, just as Defendants here argue that the NRC lacks authority to license the PFS facility. The FCC denied the rulemaking petition and ITT filed an appeal in the court of appeals. See id. ITT then filed a separate suit in district court, alleging that the FCC's negotiations were ultra vires. Id. The Supreme Court affirmed the district court's dismissal of the claim on jurisdictional grounds, holding:

> Litigants may not evade these provisions [Hobbs Act] by requesting the District Court to enjoin action that is the outcome of the agency's order . . . . Yet that is what respondents have sought to do in this case. In substance, the complaint filed in the District

> Court raised the same issues and sought to enforce the same restrictions upon agency conduct as did the petition for rulemaking that was denied by the FCC .... The appropriate procedure for obtaining judicial review of the agency's disposition of these issues was appeal to the Court of Appeals as provided by statute.

Id. at 468 (citations omitted). Similarly here, Defendants cannot avoid Hobbs Act jurisdiction by seeking a ruling from this Court that concerns the same issues raised in the licensing proceeding before the NRC, even where the claim is that the agency lacks authority to conduct the questioned activity. Defendants' Counterclaim "raised the same issues and sought to enforce the same restrictions upon agency conduct as did the [Defendants' contention] that was denied by the [ASLB]." Id. Consequently, "[t]he appropriate procedure for obtaining judicial review of the agency's disposition of these issues was appeal to the Court of Appeals as provided by" the Hobbs Act. Id. ITT stands squarely for the proposition that where, as here, a party calls into question the scope of an agency's authority, the Hobbs Act remains effective and vests jurisdiction in the courts of appeals over the question of the scope of the agency's authority. See also Natural Resource Defense Council, Inc. v. U.S. Nuclear Regulatory Comm'n, 606 F.2d 1261, 1265 (D.C. Cir. 1979) (NRC's decisions concerning the scope of licensing jurisdiction fall within the purview of the Hobbs Act).

Generally, Hobbs Act jurisdiction is to be interpreted broadly to provide for a single review of NRC decisions in the courts of appeals. In Florida Power & Light Co. v. Lorion, 470 U.S. 729 (1985), the Supreme Court reviewed the policy considerations underlying the Hobbs Act 470 U.S. at 741-43. These considerations indicate that the Hobbs Act applies to the case at bar. The Court reasoned:

> At least two implausible results would flow from [an interpretation allowing review of some issues in the district courts.] First, the

> resulting duplication of judicial review in the district court and court of appeals, with its attendant delays, would defeat the very purpose of summary or informal procedures before the agency . . . Second, such an approach would cause bifurcation of review of orders issued in the same proceeding. While the final order in the licensing proceeding would be reviewed initially in the court of appeals, numerous ancillary or preliminary orders . . . would be reviewed initially in the district court. In the absence of specific evidence of contrary congressional intent, however, we have held that review of orders resolving issues preliminary or ancillary to the core issue in a proceeding should be reviewed in the same forum as the final order resolving the core issue.

Id. at 742-43 (citations omitted).

If this Court were to interpret the Hobbs Act so as to allow Defendants to present to this Court the issue of the NRC's licensing authority, the same problems identified by the Supreme Court in Florida Power will result: duplication of consideration of the same issues in this Court and later in a court of appeals after the licensing decision, and review of "ancillary or preliminary orders" in this Court while the final order will be subject to review in the court of appeals. Id. Here, Defendants are effectively seeking review of the denial of the contention they put forward in the NRC proceeding alleging the NRC lacks authority to license the facility. See ASLB Decision at 183-84. Allowing such collateral review in the district court would disregard the Hobbs Act and the reasoning set forth in Florida Power. Judicial economy and the purposes of the Hobbs Act will be promoted by a decision that this Court lacks jurisdiction, and such a ruling will work no injustice on Defendants. They will be fully entitled to appeal the ASLB's decision to the full Commission, to seek a stay and reconsideration by the NRC, and then to seek review in a court of appeals. On the other hand, review now by this Court would lead to a decision on the merits and a consequent risk of inconsistent outcomes.

As described above, there is as yet no final order in the licensing proceeding reviewable pursuant to 42 U.S.C.§ 2239(b) because the ASLB has not as yet issued its "initial decision," nor has the Commission expressly authorized the issuance of the license. Notwithstanding the absence of a final order, the Hobbs Act is fully applicable. While it is true that the Hobbs Act expressly provides for review of "final orders," the rationale of the foregoing cases against allowing duplicative review is fully applicable before the issuance of the final order. To find otherwise would be to permit any participant in the regulatory process who is dissatisfied with a non-final order to circumvent the agency process by seeking collateral review in a district court. Moreover, the Hobbs Act has been specifically held to apply even where, as here, the agency has not yet reached a final decision. See General Atomics v. U.S. Nuclear Regulatory Commission, 75 F.3d 536, 539 (9th Cir. 1996) (holding that the Hobbs Act should be broadly interpreted, court affirmed that district court lacked jurisdiction to hear claim that NRC lacked jurisdiction over party, where that claim was also pending in a proceeding before the NRC). [12]

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[12] Rather than following through with the licensing process, in which the State has several avenues of appeal from the adverse decision of the ASLB, as described above, the State now attempts an end-run around the administrative process and prematurely presents its contention to the wrong court. It is black letter law that Defendants may not seek what is effectively review of the NRC's licensing decision by mounting a collateral attack on the licensing decision. Rather, they must await final agency action and appeal that decision. See Ohio Citizens for Responsible Energy, Inc. v. Nuclear Regulatory Comm'n, 803 F.2d 258, 260-61 (6th Cir. 1986) (dismissing case and holding that NRC decision not to reopen nuclear power plant licensing proceedings after earthquake was not final agency action because NRC had not yet made licensing decision); City of Benton v. Nuclear Regulatory Comm'n, 136 F.3d 824, 825-26 (D.C. Cir. 1998) (per curiam) (holding that challenged order was not "final," and therefore not reviewable, because the order "did not result in the grant or denial of [the applicant's] request to amend the license"); Sierra Club v. United States Nuclear Regulatory Comm'n, 825 F.2d 1356, 1361-62 (9th Cir. 1987) ("We will not entertain a petition where pending administrative proceedings or further agency action may render the case moot and judicial review completely unnecessary."); cf. Massachusetts v. United States Nuclear Regulatory Comm'n, 924 F.2d 311, 322-23 (D.C. Cir. 1991) (holding that grant of license to begin operation of nuclear power plant satisfied finality requirement, and was thus reviewable, because the decision "result[ed] in granting, denying, suspending, revoking, or amending a license").

The presence of both Hobbs Act and final agency action issues in this case creates insurmountable obstacles to jurisdiction over Defendants' Counterclaim. Either there is no "final order" within the meaning of 42 U.S.C.

Defendants cannot argue that there is an exception to the Hobbs Act because they raise their claim as a counterclaim. Other Hobbs Act decisions find that district courts lack jurisdiction no matter how the collateral attack on the agency action is raised. Thus, for example, the cases establish that the Hobbs Act applies where the collateral attack is raised in a quiet title action, wholly separate from the agency proceedings, see Victor Oolitic Stone Co. v. CSX Transp., Inc., 852 F. Supp. 721, 723 (S.D. Ind. 1994); Grantwood Village v. Missouri Pac. R.R. Co., 95 F.3d 654, 657–58 (8th Cir. 1996); Schneider v. Union Pac. R.R. Co., 864 F. Supp. 120, 124 (D. Neb. 1994), and where the attack is raised as a claim under the National Environmental Policy Act (NEPA). See Citizens Awareness Network v. Nuclear Reg. Comm'n, 854 F. Supp. 16, 17-18 (D. Mass. 1994); New Jersey Dep't of Envtl. Protection and Energy v. Long Island Power Auth., 30 F.3d 403, 410-13 (3d Cir. 1994).

Defendants are vague as to whether they are challenging the ASLB's denial of their contention or whether they are challenging the regulations that permit the NRC to license an

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§ 2239(b) and the Counterclaim is barred for that reason, or there is a final action that, pursuant to the Hobbs Act, divests this Court of jurisdiction. See General Atomics v. United States Nuclear Regulatory Comm'n., 75 F.3d 536, 538 (9th Cir. 1996) (noting that district court dismissed on alternative grounds, either Hobbs Act barred jurisdiction or there was no final, appealable order); City of Trenton v. Federal Communications Comm'n, 441 F.2d 1329, 1332-33 (3d Cir. 1971) (affirming district court order dismissing complaint because order was not final and any final order would be subject to review in courts of appeals). Moreover, as described above, the Hobbs Act applies even before there is final agency action.

The separate doctrine requiring exhaustion of administrative remedies also supports dismissal for reasons similar to the doctrine of finality. NRC regulations expressly require exhaustion of administrative remedies: "[t]he filing of a petition for review [to the Commission of a licensing decision by the ASLB] is mandatory for a party to exhaust its administrative remedies before seeking judicial review." 10 C.F.R § 2.786(b)(1) (emphasis added). While there are apparently no cases directly interpreting this language from § 2.786(b)(1), similar regulations have been held to mandate exhaustion. See Coosewoon v. Meridian Oil Co., 25 F.3d 920, 924-25 (10th Cir. 1994) (upholding dismissal for failure to exhaust administrative remedies because Department of Interior regulations mandated that parties appeal adverse decisions before seeking judicial review); Ciba-Geigy Corp. v. Sidamon-Eristoff, 3 F.3d 40, 44-46 (2d Cir. 1993) (raising exhaustion issue sua sponte, and holding regulation mandated appeal to Environmental Appeals Board before judicial review of EPA decision under Resource Conservation and Recovery Act); City of San Diego v. Whitman, 242 F.3d 1097, 1101 (9th Cir. 2001) (regulation mandated appeal to Environmental Appeals Board before judicial review of EPA decision under Clean Water Act).

away-from reactor spent fuel storage facility. In either case, the Hobbs Act bars jurisdiction. The language of 42 U.S.C. § 2239(a) and (b), discussed above, expressly applies the Hobbs Act to both licensing decisions and to rulemaking proceedings. "The clear words of the statutes involved make no distinction between orders which promulgate rules and orders in adjudicative proceedings." Gage v. U.S. Atomic Energy Comm'n, 479 F.2d 1214, 1219 (D.C. Cir. 1973). The numerous cases cited above clearly establish that the Hobbs Act applies to reviews of adjudicatory proceedings. Other cases apply the Hobbs Act to actions reviewing regulations. See, e.g. Environmental Defense Fund v. United States Nuclear Regulatory Comm'n, 902 F.2d 785, 786-88 (10th Cir. 1990) (Hobbs Act review of NRC regulations); Utility Workers Union of America, AFL-CIO v. Nuclear Regulatory Comm'n, 664 F. Supp. 136, 137-38 (D. N.Y. 1987) ("Whether an order is the result of agency adjudication or agency rulemaking is of no consequence for purposes of determining whether or by what court judicial review is appropriate. . . . Because it is a final order, and because it deals with the activities of licensees, the regulation is subject to review in the manner prescribed in the Hobbs Act."); Izaak Walton League of America v. Schlesinger, 337 F. Supp. 287, 290 (D. D.C. 1971) ("a review of regulations promulgated by the AEC lies outside the jurisdiction of this Court").[13]

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[13] Similarly, it makes no difference whether the ASLB's decision to deny the State's contention is interpreted to be procedural or substantive. Regardless of how the decision is characterized, it falls within Hobbs Act jurisdiction. If the ASLB's decision is interpreted as reaching the merits of the State's contention, review of that decision clearly falls within the Hobbs Act. See, e.g., Florida Power & Light Co. v. Lorion, 407 U.S. at 739-41 (Hobbs Act applies to all NRC decisions concerning licensing). Alternatively, if the ASLB's decision is interpreted to mean that the ASLB lacked authority to make an inquiry into the NRC's authority, then review of that decision also falls within the Hobbs Act. See Ecology Action v. United States Atomic Energy Comm'n, 492 F.2d 998, 999-1002 (2d Cir. 1974) (ASLB order precluding consideration of several issues during the licensing process would nevertheless be reviewable under the Hobbs Act after final agency decision); Thermal Ecology Must Be Preserved v. Atomic Energy Comm'n, 433 F.2d 524, 525-26 (D.C. Cir. 1970) (per curiam) (holding petitioners' challenge of preliminary

The Tenth Circuit has held that collateral attacks similar to the Defendants' are not permissible in analogous situations. See Chemical Weapons Working Group, Inc. v. United States Dep't of the Army, 111 F.3d 1485, 1491-93 (10th Cir. 1997) (upholding dismissal of collateral attack of hazardous waste permit filed in federal district court where Congress mandated that any action for judicial review of such a permit be filed in courts of appeal); United States v. Howard Elec. Co., 798 F.2d 392, 395-96 (10th Cir. 1986) (affirming dismissal of collateral attack challenging penalty assessments under Occupation Safety and Health Act because such challenges must be brought to courts of appeal); Harr v. Prudential Fed. Sav. & Loan Ass'n., 557 F.2d 751, 753–54 (10th Cir. 1977) (securities fraud case dismissed for lack of jurisdiction because plaintiffs' claim to a stock association was essentially an attack on the agency's decision reviewable only in courts of appeal); see also Caribou Four Corners, Inc. v. American Oil Co., 628 F. Supp. 363, 370–73 (D. Utah 1985) (dismissing common law claim that amounted to challenge to premature agency action).

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order excluding evidence in licensing proceeding premature because review could be had when final order was issued).

II. THE NRC HAS AUTHORITY UNDER THE ATOMIC ENERGY ACT TO LICENSE AND REGULATE AWAY-FROM-REACTOR, INDEPENDENT SPENT FUEL STORAGE INSTALLATIONS

Even if this Court determines it has jurisdiction to rule on Defendants' Motion, it must be dismissed for its lack of merit because the NRC has clear and valid authority to license PFS's proposed storage facility, contrary to the Defendants' misreading of the statues and legislative history.

The Nuclear Regulatory Commission acted under a valid grant of congressional authority in conducting a licensing proceeding relating to PFS's proposed spent nuclear fuel storage facility. The Atomic Energy Act clearly gives the NRC authority to regulate and license private, away-from-reactor ISFSIs for the storage of spent nuclear fuel. Defendants' lengthy Memorandum in support of their Motion can be reduced to one basic argument—the Nuclear Waste Policy Act prohibits the NRC from licensing the proposed facility. This is simply not the case. Neither the language of the NWPA nor its legislative history demonstrates such an intent. Defendants ignore the well-established and well-utilized authority granted to the NRC by the Atomic Energy Act. The Atomic Energy Act, and not the NWPA, governs the licensing of the proposed facility.

The Atomic Energy Act provided the NRC with the authority to license and regulate off-site ISFSIs. The Atomic Energy Act grants the NRC authority to regulate the constituents of spent nuclear fuel: special nuclear material, source material, and byproduct material.[14]

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[14] Under definitions in the Atomic Energy Act and the NRC's regulations, "special nuclear material" includes the enriched uranium and other fissionable material that remains in spent nuclear fuel after it is removed from a reactor, "source material" includes unenriched (natural) uranium that can be present in spent fuel, and "byproduct material" is the radioactive material (such as that found in spent fuel) other than special nuclear material which has become

Specifically, under the Atomic Energy Act, the NRC is authorized to issue licenses to "transfer, deliver, acquire, possess, own, receive possession of or title to, import, or export . . . special nuclear material." 42 U.S.C. §§ 2073(a), 2077. The NRC has similar licensing authority over the receipt, ownership and possession of byproduct material. 42 U.S.C. § 2111. The NRC is authorized to issue licenses for source material for research and development, commercial purposes, and "any other use approved by the Commission as an aid to science or industry." 42 U.S.C. § 2093(a) (4). See also 42 U.S.C. § 2201(b) (granting authority to issue rules, regulations and orders governing the use of special nuclear material, source material, and byproduct material). The NRC has relied upon this statutory authority since 1978 as the basis for its specific regulation governing ISFSIs. See 10 C.F.R. Part 72 (Statement of Authority); 43 Fed. Reg. 46309, 46311 (Oct. 6, 1978) (proposed Part 72). In addition, the Atomic Energy Act specifically recognized the licensing of spent fuel storage facilities. 42 U.S.C. § 2021a(a) ("[a]ny person, agency, or other entity proposing to develop a **storage . . . facility** . . . for . . . irradiated nuclear reactor fuel . . . shall notify the Commission as early as possible . . .") (emphasis added).

The Supreme Court has recognized the Atomic Energy Act's grant to the NRC of "exclusive jurisdiction to license the transfer, delivery, receipt, acquisition, possession, and use of nuclear materials." Pacific Gas & Elec. v. Energy Resources Comm'n, 461 U.S. 190, 207 (1983). The Court also recognized that "the NRC has promulgated detailed regulations

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radioactive by exposure to radiation incident to the use of special nuclear material in a nuclear reactor. 42 U.S.C. § 2014(e), (z) and (aa); 10 C.F.R. § 72.3.

governing storage and disposal away from the reactor. 10 C.F.R. pt 72 (1982)." Pacific Gas & Elec., 461 U.S. at 217. Moreover, after considering the provisions of the Atomic Energy Act, the Seventh Circuit concluded that the NRC has authority to regulate "spent fuel storage" because it is given the authority to regulate the constituents of spent fuel (i.e. source material, special nuclear material, and byproduct material):

> The Atomic Energy Act, 42 U.S.C. §§ 2011 et seq., sets up a comprehensive scheme of federal regulation of atomic energy, administered by the Nuclear Regulatory Commission. The Act does not refer explicitly to spent nuclear fuel, but it does refer to the constituents of that fuel, see 42 U.S.C. §§ 2014(e) [byproduct material], (z) [source material] (aa) [special nuclear material]; 10 C.F.R. § 72.3(v); and **the state does not, and could not**, see 42 U.S.C. §§ 2073, 2111, **question the Commission's authority to regulate the storage of spent nuclear fuel.**

Illinois v. General Elec. Co., 683 F.2d 206, 214-15 (7th Cir. 1982) (emphasis added). Accord Jersey Central Power & Light Co. v. Township of Lacey, 772 F.2d 1103, 1112 (3d Cir. 1985) ("pervasive scheme of federal regulation established by the AEA [Atomic Energy Act] . . . includ[es] the storage and shipment of spent fuel"). In addition, as recently as May of this year, the Sixth Circuit recognized that "[t]he AEA grants DOE and the Nuclear Regulatory Commission exclusive responsibility for regulating source, special nuclear, and byproduct material." U.S. v. Kentucky, 252 F.3d 816, 821 (6th Cir. 2001).

The history of the NRC's regulation of private, off-site ISFSIs demonstrates that the NRC interpreted the Atomic Energy Act to provide the authority to regulate away-from-reactor ISFSIs. In 1980, under the authority of the Atomic Energy Act and other statutory authority, the NRC promulgated 10 C.F.R. Part 72 "to cover the specific licensing requirements of the storage of spent fuel in an independent spent fuel storage installation (ISFSI)" 45 Fed. Reg. 74,693

(Nov. 12. 1980).[15] The Statement of Considerations accompanying the proposed rule explicitly justified the need for these new regulations based upon the NRC's conclusion "that there is a need for independent spent fuel storage installations (ISFSI), or as these are sometimes called, away-from-reactor (AFR) storage installations to accommodate some of the accumulating spent fuel." 43 Fed. Reg. 46,309 (Oct. 6, 1978). The NRC further noted, "to ensure adequate protection of the public health and safety, the proposed regulation establishes siting, design, operation and records requirements for away-from-reactor spent fuel storage." Id. Just to make the scope of the proposed rule perfectly clear, the Commission stated that "[a]n ISFSI could be located on the site of another license [sic] facility **or a separate site.**" 43 Fed. Reg. at 46,310 (October 6, 1978) (emphasis added). In discussing the radiation dose limit established for an ISFSI, the NRC pointed out that "[w]ith such a limit, an ISFSI, **if located on a reactor site,** will not add substantially to the risk to the public off site." Id. (emphasis added).

As with the proposed rule, the final rule promulgating Part 72 explicitly recognized its applicability to off-site as well as at-reactor ISFSIs. The Statement of Considerations accompanying the final rule stated that "[a]n ISFSI may be a free-standing, away-from-reactor, fully independent type of facility or it may be located on the site of an existing facility such as a nuclear power plant. . . . The rule is applicable to either type of location . . . ." 45 Fed. Reg. 74,693, 74,697 (Nov. 12, 1980). The Commission then explicitly identified the three existing private, away-from-reactor spent fuel storage facilities that the Commission had already

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[15] Prior to promulgating Part 72, the NRC regulated away-from-reactor and at-reactor storage facilities under 10 C.F.R. Part 70, a more generalized set of regulations governing special nuclear materials. Id.; see also General Electric Co., 683 F.2d at 215.

licensed,[16] and stated that "[i]n the event of an application for use of one of the above facilities as an ISFSI, a license would be issued if the facility meets the requirements of Part 72." 45 Fed. Reg. 74,698 (Nov. 12, 1980). Among those requirements that such a facility would have to meet, the Commission specifically singled out "§51.5(a)(10) [of 10 C.F.R.] for issuance of an initial license for storage of spent fuel in an ISFSI at a site not occupied by a nuclear power reactor." Id. And finally, the Statement of Considerations reported that an application for renewal of the license for the G.E.- Morris facility had been received prior to the promulgation of Part 72 and was under review. "As 10 CFR Part 72 has become effective prior to completion of this licensing action, such licensing action will proceed pursuant to 10 CFR Part 72 which is specifically designed to cover spent fuel storage in an ISFSI." 45 Fed. Reg. 74699.[17]

There can be no dispute that the NRC, the agency charged by Congress with implementing the Atomic Energy Act, interpreted that Act to authorize it to regulate private, away-from-reactor ISFSIs. Defendants have pointed to nothing to contradict this straightforward application of the Commission's authority under the Atomic Energy Act, which the courts have consistently described as "a regulatory scheme which is virtually unique in the degree to which broad responsibility is reposed in the administering agency, free of close prescription in its

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[16] The identified facilities were "G.E.-Morris, Ill. – built under a Part 50 Construction Permit authorization as a reprocessing plant; spent fuel storage now licensed under Part 70; NFS-West Valley-now licensed under Part 50; AGNS – Barnwell, S.C. – built under a Part 50 Construction Permit authorization as a reprocessing plant; but no operating license issued." 45 Fed. Reg. 74,698 (Nov. 12, 1980). Inexplicably, Defendants state in their memorandum that the GE-Morris facility was "one of the three existing (but non-operational) high-level radio active waste reprocessing plants," (Defs.' Mem. at 13), ignoring the fact that GE-Morris was and is a private, away-from-reactor ISFSI.

[17] The G.E.-Morris license was in fact issued as a 10 CFR Part 72 license (Docket No. 72-1) on May 4, 1982, i.e. prior to the enactment of the NWPA. See 51 Fed. Reg. 19107 (May 27, 1986).

charter as to how it shall proceed in achieving the statutory objectives." Siegel v. Atomic Energy Comm'n, 400 F.2d 778, 783 (D.C. Cir. 1968).

Despite all the above, Defendants assert "[t]he AEA does not address the storage and disposal of SNF." (Defs.' Mem. at 39.) Defendants baldly argue as part of their "undisputed facts," that "[t]he governing law is the Nuclear Waste Policy Act of 1982." (Defs.' Mem. at 4.) Not only is the Defendants' assertion disputed—it is simply not true.[18] The Atomic Energy Act, not the NWPA, is the governing law in this case. As demonstrated at length below, Defendants' over-reaching interpretation of the NWPA contradicts both the plain language of the statute and the intent of Congress.

III. NOTHING IN THE NWPA PRECLUDES THE NRC FROM LICENSING AND REGULATING AWAY-FROM-REACTOR, INDEPENDENT SPENT FUEL STORAGE INSTALLATIONS.

A. The Primary Purpose Of The NWPA Was To Establish The Federal Government's Role In The Storage And Disposal Of Nuclear Waste.

A primary goal of the NWPA was to establish a federal permanent repository for nuclear waste. See 42 U.S.C. § 10131. The NWPA also dealt with federal monitored retrievable storage ("MRS") facilities. 42 U.S.C. §§ 10161-69. In addition, Congress recognized the need for a limited federal role in providing for the temporary storage of spent fuel at federally-owned storage facilities in order to prevent civilian reactors from being forced to shut down. See 42

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[18] Defendants cite numerous facts in the section of their Memorandum entitled "Undisputed Background Facts from Congressional Documents." (Defs.' Mem. at 4-7.) These "Background Facts" are not undisputed in the pleadings and cannot properly be considered in a motion for judgment on the pleadings. See e.g. Plaintiffs' Reply to Defendants' First Amended Counterclaim, ¶ ¶ 1-27, 31. The "Background Facts" should be disregarded for the additional reason that many of them are attributed to no source and thus cannot properly be construed as legislative history. Some of the "Background Facts" reference Appendix 1, a portion of a document prepared in 1985 by the Office of Technology Assessment. Apart from the fact that portions of it are inaccurate, that document is not part of any relevant legislative history and is nothing more than inadmissible hearsay. It should be stricken and not considered.

U.S.C. § 10151(b). Congress intended federal interim storage to be a last resort; as a result, the NWPA conditions the use of federal interim storage upon certain eligibility requirements, including, but not limited to, efforts by reactor owners to maximize on-site storage capabilities. 42 U.S.C. § 10155(b). The NWPA did not require reactor owners to construct away-from-reactor storage facilities, as authorized in the Atomic Energy Act, to be eligible to contract for federal interim storage. However, Congress made it clear that "the generators and owners of high-level radioactive waste and spent nuclear fuel have the primary responsibility to provide for, and the responsibility to pay the costs of, the interim storage of such waste and spent fuel until such waste and spent fuel" is accepted for permanent disposal by the federal government. 42 U.S.C. § 10131(a)(5).

The NWPA sets forth conditions for reactor owners and operators to be eligible to enter into contracts with the Department of Energy to store spent nuclear fuel in federal interim storage. 42 U.S.C. § 10155.[19] Defendants mischaracterize these conditions as being the one and only way reactor owners and operators can provide for interim storage. (Defs.' Mem. at 23.) However, the NWPA does not use exclusive language, rather it requires that reactor operators pursue alternatives to federal storage "including" on-site storage. 42 U.S.C. § 10155(b)(1)(B). The eligibility requirements set forth in the federal interim storage provisions of the NWPA apply only to contracting for federal interim storage and say nothing about the NRC's authority to license the private storage facility proposed by PFS in this case.

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[19] Federal interim storage is no longer available to private utilities. See 42 U.S.C. 10156(a)(1) (DOE not authorized to enter into contracts for the storage of spent fuel in interim facilities after January 1, 1990).

In the context of recognizing the NRC's authority under the Atomic Energy Act to regulate away-from-reactor storage facilities, the Supreme Court referred to the NWPA as "a new piece . . . to the regulatory puzzle." Pacific Gas & Elec., 461 U.S. at 219. This is a far cry from the Defendants' claim that "the NWPA is comprehensive in its treatment of the SNF issue." (Defs.' Mem. at 22.) The Court understood, as did Congress, that the NWPA was not intended to replace the Atomic Energy Act, but rather, to address the problem of a permanent disposal site and what role, if any, the federal government would play in the temporary storage of nuclear waste.

In Idaho v. U.S. Department of Energy, 945 F.2d 295 (9th Cir. 1991) the Ninth Circuit determined that an agreement for spent fuel storage between the Department of Energy ("DOE") and a private utility prior to the enactment of the NWPA were not governed by the NWPA. 945 F.2d at 298-99. In doing so, the Ninth Circuit stated, "the interim storage provisions of the Nuclear Waste Policy Act are not comprehensive regulations governing all federal storage of nuclear waste, but remedial legislation addressed to a specific problem." Id. Thus, even as to interim storage provided to utilities by the federal government, the NWPA is not the exclusive basis of licensing authority.

Congress intended that utilities, as much as possible, provide for their own interim storage facilities. Congress also recognized, given the lengthy regulatory process and other difficulties in obtaining a license for private interim storage of spent nuclear fuel, that the federal government might need to provide a limited amount of interim storage. See H.R. Rep. No. 97-491, pt. 1, at 37 (1982), reprinted in 1982 U.S.C.C.A.N. 3792, 3803 (". . . some need for interim storage capacity may exist which utilities cannot meet in a timely manner"). Congress wanted to

ensure that reactors would not be forced to shut down while waiting for the federal government to complete a permanent disposal site. On the other hand, some members of Congress felt that the private sector should provide its own storage. As Rep. Markey commented:

> We are talking about the Federal Government injecting itself into an area of the private sector that it has no business being in until there is a permanent repository which is a legitimate Federal responsibility. There is no role for the Federal Government in bailing out the utilities for the short term.

97 Cong. Rec. at 28,037.

As a result of concerns that providing federal storage of spent nuclear fuel would "represent just the nose of the camel under the tent" and would result in the utilities not "taking initiative to solve their own problems because they will be able to count on the feds coming to their rescue," (97 Cong. Rec. at 28033) (statements of Rep. Lundine), Congress strictly limited the amounts of spent fuel that could be held at a federal storage facility. 42 U.S.C. § 10155(a)(1).

B. The NWPA Does Not Repeal The NRC's Authority Under The Atomic Energy Act To License An Independent, Off-Site Spent Fuel Storage Installation.

Defendants' argument rests on the erroneous premise that the NWPA "precludes" away-from-reactor ISFSIs. Such is clearly not the case. No provision of the NWPA, expressly or implicitly, repeals the authority of the NRC, or prohibits the licensing of private, off-site ISFSIs.

1. The NWPA, and specifically 42 U.S.C. § 10155(h), does not expressly repeal the NRC's authority under the Atomic Energy Act to license private off-site ISFSIs.

Defendants contend that in passing the NWPA, and specifically 42 U.S.C. § 10155(h), Congress "expressly disallowed a private, away-from-reactor, SNF [spent nuclear fuel] waste

facility of the kind PFS seeks to put in Skull Valley." (Defs.' Mem. at 10.) Subsection (h) provides:

> Notwithstanding any other provision of law, nothing in this chapter shall be construed to encourage, authorize or require the private or Federal use, purchase, lease or other acquisition of any storage facility located away from the site of any civilian nuclear power reactor and not owned by the Federal Government on January 3, 1983.

42 U.S.C. § 10155(h). Contrary to Defendants' assertion, there is nothing in the language of subsection (h) which effectuates an explicit repeal of any portion of the Atomic Energy Act, or expressly prohibits the licensing of any private off-site ISFSIs. First, there is no express (or implied) prohibitory language, and second, on its face its application is limited to the NWPA.

Defendants assert that subsection (h) "unambiguously" prohibits the NRC from licensing an off-site ISFSI. (Defs.' Mem. at 14.) Yet there are no words of express prohibition contained in subsection (h). Certainly, if Congress intended to prohibit all away-from-reactor storage facilities it could have included express language in the NWPA that all such facilities were prohibited. "Congress . . . does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes." Whitman v. Am. Trucking Ass'ns, Inc., 121 S. Ct. 903, 909-10 (2001). Instead, Congress used facially neutral language (e.g., "nothing in this Act shall be construed") and expressly limited the application of subsection (h) to the NWPA. Section 10155(h) states that "nothing **in this Chapter** shall be construed" to authorize private, off-site ISFSIs. The word "Chapter" refers to the NWPA, not the Atomic Energy Act. The "Chapter" in which 42 U.S.C. § 10155(h) appears is chapter 108 of title 42 of the U.S. Code. The Atomic Energy Act, on the other hand, comprises chapter 23 of title 42. Therefore, the meaning of subsection (h) is clear, that the

NWPA does not authorize private, off-site ISFSIs. It says nothing about authority granted by other chapters of the U.S. Code such as the Atomic Energy Act. Subsection (h) simply does not address any other existing statutory authority, in particular the Atomic Energy Act. The authority conferred by the Atomic Energy Act thus remains unaffected by the language of § 10155(h). See Illinois v. General Elec. Co., 683 F.2d 206, 215 (7th Cir. 1982) (phrase "nothing in this Act" as used in the Clean Air Act does not limit any powers under the Atomic Energy Act, as the reference to "this Act" can apply only to the act in which it is contained).

It is a well-established rule of statutory interpretation that a tribunal is "to give effect, if possible, to every clause and word of a statute." South Carolina v. Catawba Indian Tribe, Inc., 476 U.S. 498, 510 n.22 (1986) (quoting Montclair v. Ramsdell, 107 U.S. 147, 152 (1882)). It would therefore be inappropriate to treat statutory terms as surplusage or words of no consequence. See Ratzlaf v. United States, 510 U.S. 135, 140-41 (1994). Here, Congress chose the words "this Chapter" instead of language that could have reached beyond the NWPA (e.g., "this and other chapters," or "this title," or simply omitting any limitation). To use the Defendants' own words, "[t]o give no effect to that intent is to make fools out of the Members of Congress . . . and to make nonsensical their clear words." (Defs.' Mem. at 41.) The statute's choice of words must be given effect and the effect of § 10155(h) must therefore be limited to the NWPA.

Inexplicably, Defendants turn to the legislative history in an attempt to muster support for their argument. The attempt is unsuccessful. To the extent the legislative history provides insight into the meaning of subsection (h), it indicates an intent by Congress to prevent the federal government from taking over already existing private facilities. At the time the NWPA

was being considered for passage, three away-from-reactor spent fuel storage facilities were already in existence.[20] The fear of a federal takeover of the ISFSIs is evidenced by Rep. Corcoran of Illinois' remarks that subsection (h) addressed "the heart of the problem that many of us have, that is, the concern about whether or not private away-from-reactor storage facilities would be vulnerable to a Federal takeover under [the NWPA]." 97 Cong. Rec. 28,033 (1982).[21] Rep. Corcoran and others were concerned that if they did not provide some federal storage, then already existing private storage facilities would be more vulnerable to a federal takeover. Id. As such, he opposed Rep. Lundine's proposed deletion of the § 10155 federal "emergency" storage. Thus, a review of the legislative history of subsection (h) does not establish the express prohibition limiting NRC authority over private ISFSIs, as Defendants argue, but rather, concern over federal takeover of private facilities. Moreover, Defendants' need to seek support for their argument in snippets of the legislative history underscores the futility of their attempt to find an express prohibition in the statute itself.

2. Defendants erroneously assert that the Atomic Energy Act has been repealed by implication.

Defendants argue that "implications" can be drawn from the NWPA that have the effect of repealing the authority granted by Congress under the Atomic Energy Act. (Defs.' Mem. at 43.) Defendants assert that the comprehensive nature of the NWPA implicitly precludes private off-site ISFSIs. Through that assertion, Defendants are implicitly arguing that the NRC's pre-existing authority under the Atomic Energy Act was repealed.

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[20] See supra n. 15, 16.

[21] Congressman Corcoran represented the congressional district in which the G.E.-Morris facility is located.

In advancing this argument, Defendants ignore the "cardinal rule . . . that repeals by implication are not favored" and that "[i]n the absence of some affirmative showing of an intention to repeal, the only permissible justification for a repeal by implication is when the earlier and later statutes are irreconcilable." Morton v. Mancari, 417 U.S. 535, 549, 550 (1974) (citations omitted). The Court elaborated:

> The courts are not at liberty to pick and choose among congressional enactments, and when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective. "When there are two acts upon the same subject, the rule is to give effect to both if possible. . . . The intention of the legislature to repeal must be clear and manifest."

Id. at 551 (citations omitted); accord Traynor v. Turnage, 485 U.S. 535, 548 (1988).

Subsequent to Morton, the Tenth Circuit recognized that repeals by implication fall into two categories:

> (1) where provisions in the two acts are in irreconcilable conflict, the later act to the extent of the conflict constitutes an implied repeal of the earlier one; and (2) if the later act covers the whole subject of the earlier one and is clearly intended as a substitute, it will operate similarly as a repeal of the earlier act.

Yellowfish v. City of Stillwater, 691 F.2d 926, 928 (10th Cir. 1982) (citations omitted). Applying these two categories, the NWPA is neither irreconcilable with the Atomic Energy Act nor does it act as a comprehensive substitute for the Atomic Energy Act.

a. The NRC's authority to license private off-site ISFSIs under the Atomic Energy Act does not conflict with the NWPA.

Here, the Atomic Energy Act and the NWPA are capable of co-existence and both can be given effect. Properly understood, the acts are harmonious and consistent with Congress' intent that reactor owners provide for their own storage with only a limited federal role in providing

interim storage. Reactor owners can seek licensing for at-reactor or away-from-reactor storage under the Atomic Energy Act; licensing of such storage facilities is perfectly consistent with the NWPA authorizing federally-provided "emergency storage" conditioned upon the reactor owner's meeting certain eligibility requirements (e.g. diligent pursuit of "licensed alternatives to the use of Federal storage capacity" including various at-reactor storage options). 42 U.S.C. § 10155(b)(1)(B).

With respect to the incompatibility of the acts, Defendants argue that storing 40,000 metric tons of spent fuel at a private ISFSI is incompatible with quantity limitations placed by the NWPA on DOE's storage of spent fuel, i.e. 1,900 metric tons for federal interim storage pursuant to 42 U.S.C. § 10155(a) (1) and 10,000 metric tons for MRS pursuant to 42 U.S.C. § 10168(d)(3). (Defs.' Mem. at 25, 32, 42.) These limitations in the NWPA reflect Congress' intent that reactor owners bear the primary responsibility for interim storage. The limitations explicitly apply only to DOE storage and not to private storage. Defendants' attempt to link these types of facilities to private activity is nothing but smoke and mirrors.

Further, the compatibility of the acts is supported by the legislative history of the NWPA which shows that Congress was well aware of (1) the NRC's pre-existing authority under the Atomic Energy Act, and (2) the use of that authority to license private, away-from-reactor spent fuel storage facilities. During the deliberations on the NWPA, Congress was specifically advised by the Chairman of the NRC that the Commission had just promulgated 10 C.F.R. Part 72, which provided for the licensing of spent fuel storage either at-reactor sites or away-from-reactor sites. S. Rep. No. 97-282, 97th Cong. 1st Sess. at 44 (1981) ("S. Rep. 97-282") (Statement of Chairman Pallidino recognizing that "in anticipation of requests to license away from reactor facilities, the

NRC last fall promulgated 10 C.F.R. Part 72 ... [and] is ready and able to take prompt action for any licensing actions relating to interim spent fuel storage"). The NRC Executive Director for Operations, William J. Dircks, testified in greater detail:

> The Commission has stated with the issuance of its regulation, 10 C.F.R. Part 72, which provides the licensing criteria for independent spent fuel storage installations, that there are no compelling safety or environmental reasons generally favoring either reactor sites or away from reactor sites. **Thus, Part 72 establishes the licensing framework for such storage either at reactor sites or away-from-reactors** using either wet or dry storage technologies.

Radioactive Waste Legislation: Hearings on H.R. 1993, H.R. 2800, H.R. 2840, H.R. 2881, and H.R. 3809 Before the Subcomm. On Energy and the Environment of the House Comm. On Interior and Insular Affairs, 97th Cong. 326 (1981) (emphasis added).

Significantly, Congress was aware that the NRC had already licensed three such facilities at "Morris, Illinois..., Barnwell, South Carolina..., and West Valley, New York...." S. Rep. 97-282 at 65 (supplemental views of Senator Tsongas arguing that because there are private away-from-reactor ISFSI's "[t]here is no need for a Federal role"). Faced with testimony that the NRC stood ready and willing to license private, off-site storage facilities under its Part 72 regulations, and that such facilities were already operational, if Congress had intended to prohibit the use of private, away-from-reactor ISFSIs or to revoke the NRC's pre-existing authority to license such facilities, it would have said so in express terms in the NWPA.[22] In those instances where

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[22] Indeed, initial drafts of the NWPA required as one of the criteria for access to federal interim storage the unavailability of private off-site storage facility capacity. See S. Rep. 97-282 at 19 (Report listing, among other criteria governing access to federal interim storage, the "use of private off-site storage facilities"). Subsequent drafts deleted the use of private, off-site storage facilities as a criterion for such access. H.R. Rep. No. 97-785 (Part I), 97th Cong. 2d Sess. (1982) states as follows in this regard:

Congress intended the NWPA to modify NRC's pre-existing licensing authority, Congress did not hesitate to state those modifications in express terms. See, e.g., 42 U.S.C. § 10141 (NRC required to promulgate technical requirements and criteria under its pre-existing authority to apply in approving or disapproving applications to construct, operate, close, and decommission permanent repositories); 42 U.S.C. § 10153 (NRC required to establish procedures for the licensing of dry storage technologies for use at reactor sites). In short, in enacting the NWPA, Congress neither repealed, nor intended to repeal, the NRC's authority for the licensing of off-site ISFSIs under the Atomic Energy Act. That authority remains wholly intact.

b. The NWPA is not a comprehensive substitute for the Atomic Energy Act.

Defendants argue that the interim storage provisions of the NWPA "comprehensively addresses SNF storage and disposal from commercial reactors." (Defs.' Mem. at 17.) Defendants' miss the mark. If the NWPA scheme is "comprehensive," it is only so as to the federal government's responsibility.[23] Defendants state that the NWPA "system unambiguously reveals Congress' intent as to what interim, away-from-reactor SNF storage facilities will be allowed (and under what constraints) and what facilities will be excluded and disallowed." As Defendants contend, the NWPA did comprehensively specify the role the federal government

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> Another alternative for additional storage capacity is the utilization of a large capacity centralized storage facility, sometimes referred to as an away-from-reactor (AFR) facility, because it would not be located at the site of any of the reactors using it.... **The Committee bill does not require that storage capacity at a private AFR be exhausted or unavailable before a utility would be eligible for storage capacity provided by the Secretary.**

Id. at 41 (emphasis added). Thus, the language in 42 U.S.C. § 10155(h) relied upon by Defendants did not preclude the use of private off-site storage facilities, but simply did not "require" their use as a condition for access to federal interim storage under Subtitle B of the NWPA.

[23] And even as to the federal government's responsibility for managing spent fuel disposal, the NWPA is not exclusive. See, e.g. Idaho v. Dept. of Energy, 995 F.2d 295, 298-99 (9th Cir. 1991).

was to play in providing waste facilities (i.e. by providing a permanent disposal repository, and a maximum of 1900 tons of emergency storage at away-from-reactor federal facilities, as well as by studying monitored retrievable storage. Defendants are simply incorrect in arguing that other facilities are excluded and disallowed. It is also incorrect to assert, as Defendants do, that the "reactor owners were made responsible both for storing their own SNF onsite and for maximizing their capacity to do so, pending the completion of the deep geologic repository." Although the NWPA requires reactor owners to be primarily responsible for storing their own spent fuel, the Act obligates them to maximize their onsite capacity only as a condition to utilizing the federal emergency interim storage. 42 U.S.C. § 10155.

Defendants assert that the "courts" have articulated views consistent with their claim that the NWPA is a comprehensive substitute for the authority granted to the NRC under the Atomic Energy Act to license off-site storage facilities. (Defs.' Mem. 20, 21.) Yet they cite but a single, out-of-context phrase from Indiana Michigan Power Co. v. DOE, 88 F.3d 1272, 1273 (D.C. Cir. 1996) that "[i]n the NWPA, Congress created a comprehensive scheme for the interim storage and permanent disposal of high-level radioactive waste generated by civilian nuclear power plants." (Defs.' Mem. at 21-22.) The next sentence of the opinion reflects the focus of the court's statement:

> NWPA establishes that, in return for a payment of fees by the utilities, DOE will construct repositories for SNF [spent nuclear fuel], **with the utilities generating the waste bearing the primary responsibility for interim storage** of SNF until DOE accepts the SNF "in accordance with the provisions of this chapter." 42 U.S.C. § 10131(a) (5).

Id. (emphasis added). The D.C. Circuit's statement can only be understood in the context of the court's discussion of the federal government's responsibilities as set forth in the NWPA. In that

context, the term "comprehensive" applies to the federal government's responsibility for the interim storage and permanent disposal of spent nuclear fuel and has no application to regulations concerning private storage facilities. Indiana Michigan had nothing at all to do with private storage facilities and everything to do with the federal government's statutory and contractual obligation for the utilities' spent nuclear fuel.

C. Under The Chevron Analysis, The NRC's Interpretation That The Atomic Energy Act Grants It Authority To License The Proposed Facility Should Be Upheld.

The NRC's construction of the Atomic Energy Act and the NWPA is subject to the analysis set forth in Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984). See FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 132 (2000) ("Because this case involves an administrative agency's construction of a statute that it administers, our analysis is governed by Chevron."). Under Chevron, the analysis contains two prongs: First, this Court must first determine "whether Congress has directly spoken to the precise question at issue." Second, if Congress has not spoken directly on the precise issue then the court must defer to the agency's interpretation so long as it is permissible. Chevron, 467 U.S. at 842. Moreover, due to the unique statutory scheme administered by the NRC, "an unusual degree of deference is due NRC agency actions under the AEA [Atomic Energy Act]." Environmental Defense Fund vs. Nuclear Regulatory Comm'n., 902 F.2d 785, 788 (10th Cir. 1990) (citing Carstens v. NRC, 742 F.2d 1546, 1551 (D.C.Cir. 1984) (quoting Siegel v. Atomic Energy Comm'n, 400 F.2d 778, 783 (D.C.Cir. 1968)).

The Tenth Circuit recently applied the framework of Brown & Williamson and its predecessors to determine whether an agency erred in its interpretation of a statute. Kulmer v.

Surface Transp. Board, 236 F.3d 1255 (10th Cir. 2001). The court upheld the agency's interpretation of a statute because "[i]n the absence of a clear congressional expression on the issue, we must uphold the [agency's] interpretation of [the statute] so long as the interpretation is 'permissible.'" Id. at 1257.

1. Applying the first prong of Chevron, the NWPA does not address the precise issue of whether the NRC can license a private away-from-reactor spent nuclear fuel storage facility.

As previously discussed, Congress did not address private, off-site ISFSIs in the NWPA. Moreover, in the instant case the NRC is acting pursuant to the Atomic Energy Act and not the NWPA. "In determining whether Congress has specifically addressed the question at issue, a reviewing court should not confine itself to examining a particular statutory provision in isolation. The meaning–or ambiguity–of certain words or phrases may only become evident when placed in context." Brown & Williamson, 529 U.S. at 132 (citations omitted). See Kuhmer, 236 F.3d at 1257 ("a court must read the relevant provisions in context and, insofar as possible, 'interpret the statute as a symmetrical and coherent regulatory scheme'") (quoting Brown & Williamson, 529 U.S. at 132-134 (citations omitted)). Defendants urge this Court to confine its analysis to the NWPA rather than place that act within the context of Congress' overall framework for regulating the nuclear industry. Even if viewed by itself, there is no support for the conclusion that Congress intended the NWPA to revoke the NRC's authority for private, off-site ISFSIs. And viewing the NWPA within the context of Congress' overall nuclear policy, it is equally clear Congress never intended to revoke the NRC's authority to license private, off-site ISFSIs under the Atomic Energy Act.

Defendants improperly rely on Brown & Williamson to argue that the NWPA precludes the NRC from licensing private off-site ISFSIs. (Defs.' Mem. at 37-44.) Brown & Williamson is not only factually inapposite to the case presently before this Court but in fact weighs against Defendants' interpretation of the NWPA and Atomic Energy Act. There the issue was whether the Food, Drug, and Cosmetic Act (FDCA), 21 U.S.C. § 301 et seq., granted the Food and Drug Administration authority to regulate tobacco products. 529 U.S. at 131. Until 1996, the FDA had always maintained that it had absolutely no authority to regulate tobacco. Id. at 125. Prior to 1996, Congress passed six different pieces of legislation that "created a distinct regulatory scheme to address the problem of tobacco and health, and that . . . preclude[d] any role for the FDA." Id. at 144. In reaching its decision, the Court relied upon the fact that "[i]n adopting each statute, Congress acted against the backdrop of the FDA's consistent and repeated statements that it lacked authority under the FDCA to regulate tobacco absent claims of therapeutic benefit by the manufacturer." Id. at 144. Furthermore, the Court found Congress' tobacco legislation to be "incompatible with FDA jurisdiction." Id. at 156.

In contrast, the NWPA was passed against the backdrop of the NRC's well-established, and well-exercised, authority under the Atomic Energy Act to regulate and license private off-site ISFSIs. This is not a situation, as in Brown & Williamson, where an agency is unexpectedly asserting authority in an area that it has expressly denied having any authority and never before regulated. Nor is this a situation where Congress has expressly precluded the NRC from licensing private, away-from-reactor ISFSIs. In fact, the opposite is true; both the Atomic Energy Act and the NWPA designate the NRC as the administrative agency to regulate in the field of nuclear materials, such as spent fuel. In addition, as discussed above, the NWPA does

not address the specific question at issue in this case—the licensing of an interim storage facility at a private, off-site location. Rather, the NWPA addresses the permanent disposal of nuclear waste and the interim storage of nuclear waste at federally-owned facilities. Finally, as previously discussed, the NWPA is compatible with the NRC's authority under the Atomic Energy Act to license private, off-site storage facilities because the NWPA addresses different issues. Even after applying the Brown & Williamson analysis to the case at hand, it becomes evident that the NRC is acting pursuant to a valid grant of authority from Congress.

2. Under the second prong of Chevron, the NRC's interpretation of the Atomic Energy Act and the NWPA is a permissible interpretation and therefore must be upheld.

Upon analysis of the NWPA and Atomic Energy Act, it becomes clear that the NRC's interpretation is not only permissible but also consistent with the intent of Congress. The NRC has repeatedly and consistently interpreted its authority to include the licensing of off-site ISFSIs as evidenced by the NRC's promulgation of 10 C.F.R. Part 72, its predecessor 10 C.F.R. Part 70, and the NRC's actual licensing of spent fuel storage facilities. See 45 Fed. Reg. 74693, 74698. In the instant case, the ASLB has recognized the NRC's valid interpretation of the Atomic Energy Act and NWPA and rejected the Defendants' argument that the NRC lacks authority to license the PFS facility. (See Ex. A, ASLB Decision at 183-84.)

In implementing the NWPA following its passage, the NRC interpreted the NWPA as not limiting or affecting its authority under the Atomic Energy Act to license private off-site ISFSIs. It is a well-established rule of statutory interpretation that the contemporaneous interpretation of a statute or regulation by those charged with its implementation is entitled to great weight. See, e.g., Watt v. Alaska, 451 U.S. 259, 272-73 (1981) ("[t]he Department's contemporaneous

construction carries persuasive weight"); accord Udall v. Tallman, 380 U.S. 1, 16 (1965). Defendants criticize the NRC for not further "updat[ing] its analysis" with respect to 10 C.F.R. Part 72 after the passage of the NWPA. (Defs.' Mem. at 41.) The NRC in fact did update Part 72 after the passage of the NWPA. See below. However, the obvious reason the NRC did not rewrite 10 C.F.R. Part 72 the way Defendants seek is because the NWPA does not require it.

A review of the Part 72 Statement of Considerations after enactment of NWPA shows that the NRC did not consider the NWPA to have repealed its authority to license private off-site ISFSIs. Rather, its rulemakings under 10 C.F.R. Part 72 continued to consider and provide for the licensing of private, off-site ISFSIs. Both the initial proposed rule (May 1986) and final rule (August 1988) to amend 10 C.F.R. Part 72 in order to provide for the MRS facility authorized by the NWPA make it clear that the intent of the rulemaking is "to **add language** to its regulations in 10 CFR Part 72 to provide for licensing the storage of spent nuclear fuel and HLW in an MRS" [High Level Waste in a Monitored Retrievable Storage facility, i.e., a DOE independent spent fuel storage installation built and authorized by the NWPA]. See 51 Fed. Reg. 19,106 (1986) (emphasis added) (proposed rule); see also 53 Fed. Reg. 31,651 (Aug. 19, 1988) (final rule). The proposed rule, the final rule, and the accompanying Statements of Considerations interpret the NWPA as not affecting the NRC's regulations or authority to license private, off-site ISFSIs. See generally, 51 Fed. Reg. at 19,106; 53 Fed. Reg. at 31,651.

To the contrary, the proposed rule to amend Part 72 after passage of the NWPA explicitly considers the effect of the revisions on the G.E.-Morris facility, a private, off-site ISFSI. The NRC notes that

> [t]here is now one facility which has been licensed as an ISFSI under the existing Part 72. This is the General Electric Company

> Morris Operations at Morris, Ill. . . . Under the proposed rule, the Morris facility would still be considered an ISFSI and **no changes or additional reviews of its license would be required at this time.**

51 Fed. Reg. at 19,107 (emphasis added).[24]

As previously discussed, the NRC's interpretation of the NWPA and Atomic Energy Act is not only permissible, but also consistent with the plain language of the statutes and their legislative histories. Defendants urge this Court to adopt the extreme position that the NWPA can only be interpreted as repealing by implication the NRC's existing Atomic Energy Act authority to license away-from-reactor ISFSIs. However, the only possible interpretation of the NWPA's provisions relating to interim storage is that they were intended only to apply to federally-owned facilities. In light of the foregoing, this Court must uphold the NRC's interpretation of the Atomic Energy Act as granting the NRC authority to license the storage facilities such as the one PFS proposes.

CONCLUSION

Defendants' Motion For Judgment on the Pleadings should be denied for lack of jurisdiction or on its merits. Defendants have failed to bring these issues before the proper court or after final agency action. Even if this Court were to overlook the Defendants' fatal jurisdictional error and rule on the merits, the Motion must still be denied. The NRC has well-established authority to regulate and license the storage facility proposed by PFS. Congress'

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[24] Indeed, Amendments 2 through 9 to the GE-Morris license were issued after the passage of the NWPA. See, e.g., Amendment No. 9 to License SNM-2500, dated June 16, 1995 (Docket No. 72-1).

passage of the NWPA did nothing to repeal that authority. For the foregoing reasons, Defendants' Motion for Judgment on the Pleadings should be denied.

DATED this 8th day of November, 2001.

James Holtkamp
Leboeuf, Lamb, Greene & MacRae
Attorneys for Plaintiff Skull Valley Band of Goshute Indians

Tim Vollmann
Attorney for Plaintiff Skull Valley Band of Goshute Indians

Val R. Antczak
J. Michael Bailey
H. Douglas Owens
Parsons Behle & Latimer
Attorneys for Plaintiff Private Fuel Storage, L.L.C.

Jay E. Silberg
Ernest L. Blake, Jr.
Shaw Pittman LLP
Attorneys for Plaintiff Private Fuel Storage, L.L.C.

CERTIFICATE OF SERVICE

I hereby certify that on the 8th day of November, 2001, I caused to be mailed, postage prepaid, a true and correct copy of the foregoing **MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANTS' MOTION FOR JUDGMENT ON THE PLEADINGS** to:

James R. Soper, Esq.
State of Utah
Office of the Attorney General
160 East 300 South, 5th Floor
Salt Lake City, Utah 84114

Monte N. Stewart, Esq.
c/o Attorney General's Office
236 State Capitol
Salt Lake City, Utah 84114

ENCLOSURE 1

ATTACHMENT A

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

G. Paul Bollwerk, III, Chairman
Dr. Jerry R. Kline
Dr. Peter S. Lam

In the Matter of

Docket No. 72-22-ISFSI
(ASLBP No. 97-732-02-ISFSI)

PRIVATE FUEL STORAGE, L.L.C.
(Independent Spent Fuel Storage Installation)

April 22, 1998

In this proceeding concerning the application of Private Fuel Storage, L.L.C., under 10 C.F.R. Part 72 to construct and operate an independent spent fuel storage installation (ISFSI), the Licensing Board rules on (1) the issues of standing and admissibility of contentions relative to pending hearing requests/intervention petitions either supporting or opposing the application; (2) a 10 C.F.R. § 2.758 rule waiver petition; and (3) various administrative and procedural matters, including the use of "lead" parties and informal discovery.

RULES OF PRACTICE: INTERVENTION

Longstanding agency practice requires that an individual, group, business entity, or governmental entity that wants to intervene "as of right" as a full party in an adjudicatory proceeding concerning a proposed licensing action must establish that it (1) has filed a timely intervention petition or meets the standards that permit consideration of an untimely petition; (2) has standing to intervene; and (3) has proffered one or more contentions that are litigable in the proceeding. *See* 10 C.F.R. §§ 2.714(a)(1)-(2), (b)(2). Further, the Commission

they should be considered even though late filed. As set forth in 10 C.F.R. § 2.714(a)(1)(i)-(v), the factors that must be balanced in determining whether to admit a late-filed contention are (1) good cause, if any, for failure to file on time; (2) the availability of other means whereby the petitioner's interest will be protected; (3) the extent to which the petitioner's participation may reasonably be expected to assist in developing a sound record; (4) the extent to which the petitioner's interest will be represented by existing parties; (5) the extent to which the petitioner's participation will broaden the issues or delay the proceeding. *See, e.g., Duke Power Co.* (Catawba Nuclear Station, Units 1 and 2), CLI-83-19, 17 NRC 1041, 1046-47 (1983).

With these general precepts before us, we turn to each of the Petitioners' claims regarding their contentions.

2. *State Contentions*

UTAH A — Statutory Authority

CONTENTION: 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.

DISCUSSION: State Contentions at 3-9; PFS Contentions Response at 22-25; Staff Contentions Response at 6-14; State Contentions Reply at 9-15; Tr. at 45-64.

RULING: Inadmissible in that the contention and its supporting basis impermissibly challenge the agency's existing regulatory provisions or rulemaking-associated generic determinations. *See* section II.B.1.a.ii above. 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. *See* 10 C.F.R. § 72.2(b); *id.* § 72.3 (definitions of "Independent spent fuel storage installation" and "Person"); *id.* § 72.6(a). 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. *See* 45 Fed. Reg. 74,693, 74,696, 74,698-99 (1980). Thereafter, when the Commission revised Part 72 following the passage of the Nuclear Waste Policy Act of 1982 (NWPA), 42 U.S.C. §§ 5841, 10101-10270 — 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.

In these circumstances, in which the Commission clearly has established the scope of Part 72, inquiry into that determination is beyond our authority.[9]

UTAH B — License Needed for Intermodal Transfer Facility

CONTENTION: PFS's application should be rejected because it does not seek approval for receipt, transfer, and possession of spent nuclear fuel at the Rowley Junction Intermodal Transfer Point ("ITP"), in violation of 10 C.F.R. § 72.6(c)(1), in that:

1. The Rowley Junction operation is not merely part of the transportation operation but a de facto interim spent fuel storage facility at which PFS will receive, handle, and possess spent nuclear fuel for extended periods of time.

2. The anticipated volume and quantity of fuel shipments that will pass through Rowley junction is a large magnitude that is unlike the intermodal transfer operations that previously occurred with respect to shipments of spent nuclear fuel from commercial nuclear power plant sites.

3. The volume of fuel shipments will not be capable of passing directly through Rowley Junction and some type of temporary storage of casks will be necessary at the site of the ITP, thus making Rowley Junction a spent nuclear fuel storage facility. Further PFS fails to discuss the number of heavy haul trucks that will be available to haul casks, the mechanical reliability of these units, and their performance under all weather conditions which is necessary to analyze the amount of queuing and storage that will occur at Rowley Junction.

4. Because the ITP is stationary, it is important to provide the public with the regulatory protections that are afforded by compliance with 10 C.F.R. Part 72, including a security plan, an emergency plan, and radiation dose analyses.

DISCUSSION: State Contentions at 10-15; PFS Contentions Response at 25-42; Staff Contentions Response at 14-19; State Contentions Reply at 15-19; Tr. at 133-63.

RULING: Paragraphs two and three of this contention are inadmissible in that they and their supporting bases impermissibly challenge the Commission's regulations or rulemaking-associated generic determinations, including the provisions of 10 C.F.R. Part 71 governing transportation of spent fuel from reactor sites to the PFS facility. *See* section II.B.1.a.ii above. Regarding paragraphs one and four, as is relevant here, the Part 71 regulations authorize transportation of spent fuel under a general license for a Commission licensee or "carrier," which is defined as a "common, contract, or private carrier," that complies with the general controls and procedures requirements, quality assurance measures, and other provisions of Subparts A, G, and H of Part 71. 10 C.F.R. §§ 71.0(d), 71.4,

[9] Although we agree with Petitioner Confederated Tribes' point that an adjudicatory body generally has the authority to consider its own jurisdiction, *see* Tr. at 100, in this instance we do not find sufficient ambiguity in the Commission's regulatory declaration of its jurisdiction (and concomitantly ours) to permit further inquiry into that question consistent with the dictates of 10 C.F.R. § 2.758.

1-3 (unpublished); Licensing Board Memorandum and Order (Initial Prehearing Order) (Sept. 23, 1997) at 5-7 (unpublished). The parties are reminded of these requirements and the Board's expectation they will be complied with.

In this connection, the filings provided for in section III.C of this Memorandum and Order should be served on the Board, the Office of the Secretary, and counsel for the other parties by e-mail, facsimile transmission, or other means that will ensure receipt by close of business (4:30 p.m. EDT) on the day of filing.

IV. CONCLUSION

For the reasons set forth above, we find that Petitioners State of Utah, Castle Rock Land/Skull Valley, OGD, Confederated Tribes, and the Skull Valley Band, have established their standing to intervene and have put forth at least one litigable contention so as to be entitled to party status in this proceeding. The text of their admitted contentions is set forth in Appendix A to this decision. We also conclude the intervention petitions of David Pete, SSWS, and Ensign Ranches should be dismissed, the first having failed to establish his standing to intervene as of right, the second having failed to show it was entitled to either standing as of right or discretionary intervention, and the third having failed to put forth an admissible contention. Finally, we deny the request of Castle Rock for a waiver of 10 C.F.R. Part 72 and 10 C.F.R. § 51.23 as they are applicable to the PFS application, concluding Castle Rock has not made a prima facie showing that meets the standards set forth in 10 C.F.R. § 2.758 for obtaining a rule waiver.

For the foregoing reasons, it is this twenty-second day of April 1998, ORDERED,

1. Relative to the contentions specified in paragraph three below, the State, Castle Rock Land/Skull Valley, OGD, Confederated Tribes, and the Skull Valley Band requests for a hearing/petitions to intervene are *granted* and these Petitioners are admitted as parties to this proceeding.

2. The requests for a hearing/petitions to intervene of David Fete, SSWS, and Ensign Ranches are *denied.*

3. The following intervenor contentions are *admitted* for litigation in this proceeding: Utah B (paragraphs one and four), Utah C (paragraphs three, four, and five), Utah E (as consolidated with portions of Castle Rock 7 and Confederated Tribes F), Utah F (as consolidated with a portion of Utah P), Utah G (bases one and four), Utah H, Utah K (in part, as consolidated with Castle Rock 6 and a portion of Confederated Tribes B), Utah L, Utah M, Utah N, Utah O (bases one, two (in part), three, and four, as consolidated with Castle Rock 8

and a portion of Castle Rock 10), Utah P (subparagraph b of paragraph seven, as consolidated with Utah F), Utah R (paragraph one (in part) and subparagraph b of paragraphs three and four), Utah S (bases one, two, four, five, ten, and eleven, as consolidated with a portion of Castle Rock 7), Utah T (paragraphs two through eight, as consolidated with a portion of Castle Rock 10 and Castle Rock 12 and 22), Utah U (basis one), Utah V (paragraph two (in part)), Utah W (paragraph three (in part)), Utah Z, Utah AA (as consolidated with a portion of Castle Rock 13), Utah DD (subparagraphs c, d, g, and h of paragraph four, as consolidated with a portion of Castle Rock 16), Utah GG (paragraph five), Castle Rock 6 (as consolidated with portions of Utah K and Confederated Tribes B), Castle Rock 7 (paragraphs a through d, and f, as consolidated with Utah E and a portion of Utah S), Castle Rock 8 (as consolidated with a portion of Utah O), Castle Rock 10 (as consolidated with portions of Utah O and T), Castle Rock 12 (as consolidated with a portion of Utah T), Castle Rock 13 (paragraph a, as consolidated with Utah AA), Castle Rock 16 (paragraph b, as consolidated with Utah DD), Castle Rock 17, Castle Rock 20, Castle Rock 21, Castle Rock 22 (as consolidated with a portion of Utah T), OGD O (bases one, five, and six), Confederated Tribes B (basis five, as consolidated with portions of Utah K and Castle Rock 6), Confederated Tribes F (as consolidated with Utah E and a portion of Castle Rock 7), and the Skull Valley Band contention.[33]

4. The following Intervenor contentions are *rejected* as inadmissible for litigation in this proceeding: Utah A, Utah B (paragraphs two and three), Utah C (paragraphs one and two, paragraph six, and paragraphs seven and eight), Utah D, Utah G (bases two and three), Utah I, Utah J, Utah K (in part), Utah O (basis two (in part)), Utah P (paragraphs one through six, subparagraphs a and c through h of paragraph seven, and paragraphs eight and nine), Utah Q, Utah R (paragraphs one and two (in part), subparagraph a of paragraphs three and four, and paragraph five), Utah S (paragraph three and paragraphs six through nine), Utah T (paragraph one), Utah U (bases two through four), Utah V (paragraphs one and two (in part), paragraphs three and four), Utah W (paragraphs one and two, paragraph three (in part), and paragraphs four through six), Utah X, Utah Y, Utah BB, Utah CC, Utah DD (paragraphs one through three (in part), subparagraphs a, b, e, and f of paragraph four, and paragraphs five and six), Utah EE, Utah GG (paragraphs one through four), Castle Rock 1, Castle Rock 2, Castle Rock 3, Castle Rock 4, Castle Rock 5, Castle Rock 7 (paragraph e), Castle Rock 9, Castle Rock 11, Castle Rock 13 (paragraphs b and c), Castle Rock 14, Castle Rock 15, Castle Rock 16 (paragraphs a and c), Castle Rock 18, Castle Rock 19, Castle Rock 23, Castle Rock 24, OGD A, OGD B, OGD C, OGD D, OGD E, OGD F, OGD G, OGD I, OGD J, OGD K, OGD L,

[33] The language of these admitted contentions is set forth in Appendix A to this Memorandum and Order.

OGD M, OGD N, OGD O (bases two through four), OGD P, Confederated Tribes A, Confederated Tribes B (bases one through four), Confederated Tribes C, Confederated Tribes D, Confederated Tribes E, Confederated Tribes G, and Confederated Tribes H.

5. The December 19, 1997 State request to adopt the contentions of the other Petitioners opposing the PFS application is *denied.*

6. The January 21, 1998 petition of Castle Rock for waiver of the Commission's rules in 10 C.F.R. Part 72 and 10 C.F.R. § 51.23 is *denied.*

7. The parties are to make the filings required by section III.C above in accordance with the schedule established therein.

8. Motions for reconsideration of this Memorandum and Order must be filed on or before *Monday, May 4, 1998,* and are subject to the ten-page limitation described in section III.D above.

9. In accordance with the provisions of 10 C.F.R. § 2.714a(a), as it rules upon intervention petitions, this Memorandum and Order may be appealed to the Commission within 10 days after it is served.

THE ATOMIC SAFETY AND
LICENSING BOARD[34]

G. Paul Bollwerk, III
ADMINISTRATIVE JUDGE

Jerry R. Kline
ADMINISTRATIVE JUDGE

Peter S. Lam
ADMINISTRATIVE JUDGE

Rockville, Maryland
April 22, 1998

[34] Copies of this Memorandum and Order were sent this date to counsel for the Applicant PFS, and to counsel for Petitioners Skull Valley Band, OGD, Confederated Tribes/Pete, Castle Rock, SSWS, and the State by Internet e-mail transmission; and to counsel for the Staff by e-mail through the agency's wide area network system.