UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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

NRC STAFF'S BRIEF IN RESPONSE TO THE STATE OF UTAH'S BRIEF CONCERNING THE LICENSING BOARD'S DECISION IN LBP-01-37 AND THE QUESTION PRESENTED IN CLI-02-03

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March 12, 2002

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INTRODUCTION

In accordance with the Commission's Memorandum and Order of February 6, 2002,[1] the NRC Staff ("Staff") hereby files its reply to the "State of Utah's Brief in Response to CLI-02-03 and in Support of Utah's Request for Admission of Late-Filed Contention Utah RR (Suicide Mission Terrorism and Sabotage)," dated February 27, 2002 ("Utah Br.").[2] For the reasons set forth below, the Staff submits that the State of Utah ("State") has not presented any reason for the Commission to disturb the Licensing Board's decision in LBP-01-37, in which the Board rejected late-filed Contention Utah RR concerning the threat of suicide mission terrorism.[3]

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[1] *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-02-03, 55 NRC ___ (Feb. 6, 2002).

[2] This Response does not address the "Applicant's Brief on the Admissibility of the Threat of Terrorism as a Contention in the Licensing Proceeding for the Private Fuel Storage Facility" ("App. Br."), dated February 27, 2002, in that the views expressed therein are generally consistent with the views expressed in the "NRC Staff's Brief in Response to CLI-02-03, Concerning the Commission's Review of the Referred Ruling in LBP-01-37"("Staff Br."), dated February 27, 2002.

[3] *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-01-37, 54 NRC ___ (Dec. 13, 2001).

BACKGROUND

This proceeding concerns the license application submitted by Private Fuel Storage, L.L.C. ("PFS" or "Applicant") for an independent spent fuel storage installation ("ISFSI") to be constructed on the Reservation of the Skull Valley Band of Goshute Indians, located within Tooele County, Utah. The background of this proceeding is set forth in the Staff's Brief to the Commission, dated February 27, 2002, and is not reiterated at length herein. In brief, the Licensing Board issued several decisions in 1998, in which it rejected contentions concerning the potential for sabotage or terrorism, sabotage on the grounds, *inter alia*, that the contentions constituted an impermissible challenge to the Commission's regulations or generic rulemaking-associated determinations, including 10 C.F.R. Parts 71, 72 and 73.[4]

On October 10, 2001, the State submitted a request for admission of late-filed Contention Utah RR (Suicide Mission Terrorism and Sabotage), based on the attacks directed against the World Trade Center and the Pentagon on September 11, 2001.[5] On December 13, 2001, the Licensing Board issued its decision denying the State's request to admit Late-Filed Contention Utah RR, on the grounds, *inter alia*, that (a) the contention constituted an impermissible attack on the agency's safety and physical protection regulations, and (b) such attacks need not be addressed in an environmental impact statement ("EIS") under the National Environmental Policy Act of 1969, 42 U.S.C. § 4321, *et seq.* ("NEPA"). LBP-01-37, slip op. at 13 and n.3.

On February 6, 2002, the Commission issued its Memorandum and Order in CLI-02-03, in which it accepted the Licensing Board's referral of its ruling in LBP-01-37, and requested briefs from the parties on relevant issues, including responses to the following question:

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[4] *See Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-98-7, 47 NRC 142, 179, 186, 199 and 201 (1998); *Id.,* LBP-98-10, 47 NRC 288, 296 (1998); *Id.,* LBP-98-13, 47 NRC 360, 372, *modified on other grounds*, LBP-98-17, 48 NRC 69 (1998).

[5] "State of Utah's Request for Admission of Late-Filed Contention Utah RR (Suicide Mission Terrorism and Sabotage)," dated October 10, 2001 ("Request").

> What is an agency's responsibility under NEPA to consider intentional malevolent acts, such as those directed at the United States on September 11, 2001?

CLI-02-03, slip op. at 3. Briefs addressing these issues were filed by the State, PFS and the Staff, in accordance with the Commission's directive. PFS and the Staff supported the Board's ruling and stated their view that NEPA does not require consideration of intentional malevolent acts such as the September 11 attacks, while the State argued that NEPA requires consideration of such acts.

For the reasons set forth below, the Staff submits that the State's arguments do not present any reason for the Commission to disturb the Licensing Board's ruling in LBP-01-37.

ARGUMENT

I. The Licensing Board's Rejection of Contention Utah RR, Insofar As It Raised Safety or Physical Protection Issues, Should Be Affirmed.

In LBP-01-37, the Licensing Board ruled, *inter alia*, (1) that Contention Utah RR presented an impermissible attack on the Commission's safety and physical protection regulations, set forth in 10 C.F.R. Parts 72 and 73 (LBP-01-37, slip op. at 10-13 and n.3); (2) that the transportation issues raised in Contention Utah RR were beyond the permissible scope of this proceeding (*Id.* at 14 n.3); and (3) that the contention's assertion that other types of attacks such as truck bombs, that are unrelated to the attacks of September 11, were inadmissible under the late filing criteria in 10 C.F.R. § 2.714(a)(1) and lacked the requisite factual basis (*Id.* at nn.1 and 3).[6] The Staff and PFS, in their Briefs of February 27, 2001, stated their views that these rulings were correct. *See* Staff Br. at 6-13 and n.21; App. Br. at 7-13 and 27-28.

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[6] The Commission has taken note of these rulings, including the Board's ruling that "the agency's current regulatory regime" excludes "acts by an enemy or enemies of the United States," based on 10 C.F.R. § 50.13 and *Florida Power and Light Co.* (Turkey Point Nuclear Generating Units 3 and 4), 4 AEC 9, 13 (1967), *aff'd sub nom Siegel v. AEC*, 400 F.2d 778 (D.C. Cir. 1968). *See* CLI-02-03, slip op. at 2.

The State has now withdrawn any challenge to these aspects of the Licensing Board's ruling and, indeed, appears to have abandoned these aspects of its contention.[7] Accordingly, the sole issue before the Commission is whether this contention presented a cognizable issue under NEPA or, as stated by the Commission, "what is an agency's responsibility under NEPA to consider intentional malevolent acts, such as those directed at the United States on September 11, 2001."

II. The Licensing Board's Ruling That Contention Utah RR Failed to Raise A Cognizable Issue Under NEPA, Should Be Affirmed.

Stripped of its safety and physical protection claims (which the State has now chosen not to pursue), Contention Utah RR asserts as follows:

> **CONTENTION RR. Suicide Mission Terrorism or Sabotage.** . . . . [T]he scope of the Applicant's Environmental Report and the Staff's Draft Environmental Impact Statement is too limited to comply with the National Environmental Policy Act and 10 CFR §§ 72.34, 51.45, 51.61 and 51.71 because they do not adequately identify and evaluate any adverse environmental effects which cannot be avoided from attacks by suicide mission terrorism or sabotage.[8]

Whether this contention presents a legally cognizable issue depends upon whether NEPA requires consideration of terrorist attacks in an Environmental Impact Statement ("EIS"); if NEPA does not require EIS consideration of such events, the Board's rejection of the contention must be affirmed. *See* 10 C.F.R. § 2.714(d)(2) (a contention must be rejected where, even if proven, it would be of no consequence because it would not entitle petitioner to relief).

In its Brief to the Commission, the State argues (a) that NEPA requires consideration of all reasonably foreseeable environmental impacts of a proposed licensing action, "including those that

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[7] The State advises that "Utah has chosen not to pursue its contentions with respect to the deficiencies in the Safety Analysis Report and Safety Evaluation Report. Accordingly, this Brief is confined to answering the NEPA-related question posed by the Commission." Utah Br. at 3 n.2.

[8] See Staff Br. at 7 (reciting Contention Utah RR, in full). The Staff notes that Contention Utah RR cites 10 C.F.R. §§ 51.45, 51.61, 51.71, and 72.34, in addition to NEPA; those regulations, however, do not establish a separate basis for admitting this contention independent from NEPA, but are merely part of the Commission's NEPA-implementing regulations.

may be caused by intentional malevolent acts," Utah Br. at 3-5; (b) that an airborne assault by terrorists on the PFS Facility is reasonably foreseeable under NEPA, *Id.* at 5-9; and (c) that the rationale underlying 10 C.F.R. § 50.13 does not support the rejection of this contention under NEPA. *Id.* at 9-15. These arguments are without merit.[9]

A. Distinguishing Between Intentional Malevolent Acts and Other Types of Acts Under NEPA.

The State's first argument is that NEPA requires consideration of all reasonably foreseeable environmental impacts of a proposed licensing action, "including those that may be caused by intentional malevolent acts." Utah Br. at 3-5. The Staff does not quarrel with the State's assertion that NEPA requires consideration of all "reasonably foreseeable" environmental impacts of an agency's action; indeed, this fundamental principle underlies all NEPA evaluations. *See* Staff Br. at 15, 19-22. The State's argument fails, however, when it advances to its second premise -- in which the State asserts that "NEPA does not distinguish between environmental impacts caused by intentional malevolent acts and environmental impacts caused by other types of acts"; and "[s]ome acts, even if they are intentional and malevolent, will be eminently foreseeable, while others will be utterly impossible to predict." Utah Br. at 4.

It is clear that NEPA does not explicitly consider which types of acts should be deemed to be "reasonably foreseeable." However, the State has provided no precedent or other legal support for its assertion that NEPA does not distinguish between intentional malevolent acts and other acts. In this regard, the State's asserted principle ignores the element of "causation" -- which the Supreme Court has indicated is a necessary component of any NEPA evaluation. *See Metropolitan Edison Co. v. People Against Nuclear Energy,* 460 U.S. 766, 773-74 (1983). Indeed, other cases appear to point to a different conclusion than that proposed by the State, such that the intentional

[9] Both PFS and the Staff have provided detailed reasons in support of their views that the Licensing Board correctly resolved this issue. *See* App. Br. at 13-27; Staff Br. at 14-33.

acts of third parties should not be viewed as the reasonably foreseeable impacts of an agency's action, where causation is tenuous.[10]

Moreover, this assertion fails to advance the State's argument, in that the State has pointed to no data or means of analysis that would allow a decision-maker to reasonably evaluate the risk that a terrorist attack, of any particular type, magnitude or success, might be directed against a particular facility. Thus, what is lacking in the State's argument -- and what was lacking in Contention Utah RR, contrary to the "basis" requirements of 10 C.F.R. § 2.714(b)(2)(ii) -- is any support for the State's *ipse dixit* assertion that the "reasonably foreseeable" environmental impacts of a proposed licensing action include the consequences of an intentional malevolent act that some third party might decide to inflict upon a facility.

B. Whether An Airborne Assault by Terrorists on the PFS Facility Is Reasonably Foreseeable Under NEPA.

The State's second argument attempts to establish that an airborne assault by terrorists on the PFS Facility is reasonably foreseeable under NEPA, such that it must be addressed in an EIS. *See* Utah Br. at 5-9. Here, the State argues that a "common sense approach" should guide a decision as to which impacts are "reasonably foreseeable," and that a reasonably foreseeable impact is one that "is sufficiently likely to occur that a person of ordinary prudence would take it into account in reaching a decision." *Id.* at 5, *citing Sierra Club v. Marsh,* 976 F.2d 763, 767 (1st Cir. 1992). The State then cites the Commission's statements in a 1994 rulemaking action, in which the Commission decided to provide protection against vehicle bombs at nuclear power

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[10] *See, e.g., Glass Packaging Institute v. Regan*, 737 F.2d 1083, 1092 (D.C. Cir.), *cert. denied*, 469 U.S. 1035 (1984) (NEPA did not require Bureau of Alcohol, Tobacco, and Firearms to consider the effects of criminal tampering with liquor packaged in plastic bottles as an environmental health risk, in the agency's environmental assessment of such packaging); *cf. Sierra Club v. U.S. Forest Service,* 878 F. Supp. 1295, 1307-08 (D. S.D. 1993), *aff'd,* 46 F.3d 835, 839 (8th Cir. 1995) (NEPA requires consideration of impacts resulting from agency's action, rather than the impacts resulting from the independent decisions of a third party, such as a private land owner's decision to "clear cut" his land following a timber harvest on adjacent federal lands).

plants following the vehicle bombing of the World Trade Center and a vehicular intrusion at the Three Mile Island nuclear plant. *Id.* at 5-6, *citing* Statement of Consideration, "Protection Against Malevolent Use of Vehicles at Nuclear power Plants," 59 Fed. Reg. 38,889 (1994).[11]

The State's assertion that terrorist acts like the attacks of September 11 must be evaluated under its "common sense approach" to NEPA is without merit. First, in the 1994 rulemaking cited by the State, the Commission explicitly recognized that attempts to use probabilistic risk assessment techniques to quantify or estimate the risk of terrorist attacks "would not be credible or valid because terrorist attacks, by their very nature, may not be quantified":

> The . . . use of probabilistic risk assessment (PRA) as a tool for estimating risk is sound when based on results from demonstrable, repeatable events and test data . . . . The NRC has examined the use of PRA to predict sabotage as an initiating event and concluded that to do so would not be credible or valid because terrorist attacks, by their very nature, may not be quantified. Past attempts to apply PRA techniques to acts of sabotage have resulted in similar findings. For example, in 1978, NUREG/CR-0400, the "Risk Assessment Review Group Report to the U.S. Nuclear Regulatory Commission" stated, "it was recognized that the probability of sabotage of a nuclear power plant cannot be estimated with any confidence." . . .

59 Fed. Reg. at 38,890. The Commission further found that this conclusion was not altered by the events which preceded the rulemaking (*Id.*):

> The Commission continues to believe that arbitrary selection of numbers to "quantify" threat probability without demonstrable, actual, supporting event data would yield misleading results at best. Knowledgeable terrorism analysts recognize the danger and are unwilling to quantify the risk. Over the past several years, a number of National Intelligence Estimates have been produced addressing the likelihood of nuclear terrorism. The analyses and conclusions are not presented in terms of quantified probability but recognize the unpredictable nature of terrorist activity in terms of likelihood. The NRC continues to believe that, although in many cases considerations of probabilities can provide insights into the relative

[11] As noted by the Licensing Board, the malevolent use of land-based or airborne vehicles was explicitly excluded from the protection goals for the Commission's regulations governing ISFSIs. LBP-01-37, slip op. at 11, *citing* Statement of Consideration, "Physical Protection for Spent Nuclear Fuel and High-Level Radioactive Waste," 63 Fed. Reg. 26,955, 26,956 (1998).

> risk of an event, in some cases it is not possible, with current knowledge and methods, to usefully quantify the probability of a specific vulnerability threat.

Significantly, although the Commission in 1994 adopted vehicle protection requirements for nuclear power plants, for the reasons described fully in connection with that rulemaking, the Commission did not find a vehicle bomb attack to be reasonably foreseeable. This same conclusion applies today in that, despite the occurrence of the September 11 attacks,[12] no reason has been shown to exist that would allow the Commission to reliably predict the probability that a terrorist attack of any particular nature or magnitude will be directed against a specific facility or type of facility, or the extent to which such an attack would succeed in the face of existing plant security, safeguards, and defense establishment protection.

While the Commission may be able to provide a best estimate of the consequences of some postulated attack -- assuming that the attack was to occur -- no reliable basis has been shown to exist upon which the agency can predict the likelihood of its occurrence. Accordingly, no basis has been shown to exist that could support a determination that a terrorist attack of any particular type or magnitude, or having any particular consequence, is "reasonably foreseeable" at a nuclear facility. *See* Staff Br. at 17, 25.[13] To be sure, the Licensing Board in *Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), LBP-01-35, 54 NRC __,

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[12] In discussing these events, the Staff notes there is no basis to conclude that the events of September 11 are in any way comparable to those which gave rise to the 1994 rulemaking.

[13] The Staff does not assert that a best estimate of the consequences of a postulated attack could not be hypothesized -- based, for example, upon an analytical model of the attack. However, any such "consequence" analysis would not meaningfully contribute to the agency's consideration of its licensing action under NEPA without some rational means to estimate the probability that the postulated event will occur at a specific facility, in that a probability estimate is needed to allow an agency to determine whether that attack (or its likely consequences) are "reasonably foreseeable." This view was stated, as well, in the Staff's Brief of February 27. *See* Staff Br. at 17, 24-26, and 29-32. To the extent that any statement therein may not have expressed this position clearly, it should be read in this context. *See* Staff Br. at 17 ("in the absence of any means to reasonably predict or evaluate the occurrence, magnitude, or consequences of such intentional, malevolent acts . . . .").

slip op. at 29, cited by the State (Utah Br. at 8-9), reaches a contrary conclusion; that decision, however, simply fails to recognize the distinction between what is "possible" and what is "reasonably foreseeable" and, in the Staff's view, is incorrect as a matter of law.[14]

C. The Effect of 10 C.F.R. 50.13 On This Determination.

In its final argument to the Commission, the State asserts that "the rationale underlying 10 C.F.R. § 50.13 does not support the Board's rejection of Utah RR as a NEPA issue" (Utah Br. at 9; capitalization omitted). The State proceeds to argue that the Board rejected Contention Utah RR "based on the rationale underlying 10 CFR § 50.13, rather than on an analysis of NEPA itself and what it requires." *Id.* This assertion is simply incorrect.

Contrary to the State's suggestion, the Licensing Board's decision to reject the NEPA claims in Contention Utah RR was based upon two separate grounds: First, the Board found itself "persuaded," like the Appeal Board in *Long Island Lighting Co.* (Shoreham Nuclear Power Station), ALAB-156, 6 AEC 831, 856 (1973), that "the rationale for 10 CFR § 50.13 [is] as applicable to the Commission's NEPA responsibilities as it is to its health and safety responsibilities." LBP-01-37, at 13. Second, the Board cited *Limerick Ecology Action v. NRC*, 869 F.2d 719, 743-44 (3d Cir. 1989), in its conclusion that "sabotage risk need not be considered in [an EIS] because uncertainty in current risk assessment techniques would not allow meaningful risk assessment." *Id.*

The State argues at length that the Board erred in applying § 50.13 to its consideration of the Agency's NEPA responsibilities, based in part on the State's argument that § 50.13 was issued before NEPA was enacted, and that the Commission has "partially repudiated" the approach reflected in § 50.13 (Utah Br. at 10). These arguments are without merit. First, the State ignores the fact that § 50.13 continues in effect as an NRC regulation. Second, the State ignores the fact that its arguments were resolved by the Appeal Board's decision in *Shoreham*, cited in LBP-01-37,

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[14] That ruling is itself now before the Commission. *See Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), CLI-02-02, 55 NRC __ (Jan. 30, 2002).

slip op. at 13, which squarely held that § 50.13 applies to the Commission's responsibilities under NEPA as well as to its safety responsibilities. *See Long Island Lighting Co.* (Shoreham Nuclear Power Station), ALAB-156, 6 AEC 831, 856 (1973). Indeed, the State has failed to discuss (or even mention) the Appeal Board's decision in *Shoreham*, or the Licensing Board's citation to that decision. Further, the State altogether fails to address the Licensing Board's citation to and reliance upon the decision in *Limerick Ecology Action*, in which the Third Circuit Court of Appeals explicitly upheld the agency's determination that the risk of sabotage need not be considered in an EIS due to the lack of any means to perform a meaningful risk assessment.[15]

As the Staff stated in its Brief to the Commission, the Licensing Board's ruling "is consistent with the governing authority" cited by the Board, and "the decisions in *Shoreham* and *Limerick Ecology Action* establish clear precedents which the Licensing Board could not disregard." Staff Br. at 14-15. The State's failure to address these important decisions is significant; and its arguments fail to show any reason why the Board's ruling in LBP-01-37 should not be affirmed.

CONCLUSION

For the reasons set forth above, the Staff respectfully submits that the Licensing Board correctly determined that Contention Utah RR fails to state an admissible issue, and that an evaluation of intentional malevolent acts is not required in an EIS under NEPA.

Respectfully submitted,

/RA/
Sherwin E. Turk
Counsel for NRC Staff

Dated at Rockville, Maryland
this 12th day of March 2002

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[15] *See* LBP-01-37, slip op. at 13. Indeed, while the State recites the language of the Licensing Board's decision, it entirely omits the Board's citation to *Limerick Ecology Action* and the ruling therein. *See* Utah Br. at 9.

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S BRIEF IN RESPONSE TO THE STATE OF UTAH'S BRIEF CONCERNING THE LICENSING BOARD'S DECISION IN LBP-01-37 AND THE QUESTION PRESENTED IN CLI-02-03," in the above captioned proceeding have been served on the following through deposit in the NRC's internal mail system, with copies by electronic mail, as indicated by an asterisk, or by deposit in the U.S. Postal Service, as indicated by double asterisk, with copies by electronic mail this 12th day of March, 2002:

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