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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION



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| 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 BRIEF IN OPPOSITION TO UTAH'S SUGGESTION OF LACK OF JURISDICTION

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## INTRODUCTION

In accordance with the Commission's order of April 3, 2002 (CLI-02-11), Applicant Private Fuel Storage, L.L.C. ("PFS") submits this brief in opposition to the Suggestion of Lack of Jurisdiction ("Suggestion") and the related Petition to Institute Rulemaking ("Petition") filed by the State of Utah ("State"). In those pleadings, the State argues that the Nuclear Waste Policy Act of 1982, 42 U.S.C. § 10101 et seq. ("NWPA"), prohibits the Commission from licensing any private away-from-reactor ("AFR") spent fuel storage facility. PFS has already addressed the bulk of the State's arguments in a brief filed in Utah federal court, a copy of which was attached to Applicant's Response to Utah's Suggestion of Lack of Jurisdiction, filed with the Commission on February 21, 2002.[1] PFS requests that the Commission consider the arguments made in that brief, as they will not be repeated here.

In this brief, PFS will emphasize and amplify on three main points. First, the NWPA does not preclude, expressly or by implication, the licensing of private AFR storage facilities. Second, the legislative history shows that Congress understood private AFR storage would remain an option. Third, Commission and court decisions are wholly at odds with Utah's position.

## ARGUMENT

### I. THE NWPA DOES NOT PROHIBIT PRIVATE AFR STORAGE FACILITIES

The analysis begins, as it must, with the text of the statute itself. Section 111(a)(5) of the NWPA establishes the general policy that:

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[1] The federal court brief is entitled Memorandum of Points and Authorities in Opposition to Defendant's Motion for Judgment on the Pleadings, and was filed on November 8, 2001 in Skull Valley Band of Goshute Indians v. Leavitt, No. 2:01CV00270C (D. Utah).

> 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 by the Secretary of Energy in accordance with the provisions of this Act.

42 U.S.C. § 10131(a)(5). Obviously, this section expresses no preference for any particular type of interim storage by utilities. Certainly it does nothing to prohibit AFR storage.

Section 131(a) of the NWPA makes a more specific finding:

> (1) the persons owning and operating civilian nuclear power reactors have the primary responsibility for providing interim storage of spent nuclear fuel from such reactors, by maximizing ***to the extent practical***, the effective use of existing storage facilities at the site of each civilian nuclear power reactor, and by adding new onsite storage capacity in a timely manner ***where practical***;

42 U.S.C. § 10151(a)(1) (emphasis added). This provision does encourage on-site storage, but only "where practical" and "to the extent practical."[2] It does not require use of on-site facilities as the only storage solution, nor does it prohibit AFR storage. Indeed, as a congressional finding, § 131 in and of itself has no operative effect at all.

Sections 132, 133 and 134 of the NWPA, 42 U.S.C. §§ 10152-54, require the Commission and other federal agencies to take various steps to encourage efficient use of on-site storage facilities and to expedite expansions of such facilities. But again, nothing in these provisions declares on-site storage to be the only storage solution, nor is there any express or implied prohibition on private AFR storage facilities. If Congress intended any such prohibition, it could have easily said so, but Congress did no such thing.

The State appears to place principal reliance on § 135(h) of the NWPA, which provides:

> Notwithstanding any other provision of law, nothing in this Act shall be construed to encourage, authorize or require the private or Federal use, purchase, lease, or other acquisition of any storage facility located away

[2] Section 131(b) likewise promotes on-site storage where it is "practical" but does not require or prohibit anything. 42 U.S.C. § 10151(b)(1).

> from the site of any civilian nuclear power reactor and not owned by the Federal Government on the date of the enactment of this Act.

42 U.S.C. § 10155(h). This section was primarily designed to limit the federal government's acquisition of private property for spent fuel storage. With respect to private AFR storage, however, § 135(h) says three things, none of which helps the State's argument. It says, first, that the NWPA is not meant to "encourage" private AFR facilities. That fact is self-evident from the provisions discussed above, but the determination not to encourage private AFR storage is a far cry from prohibiting it. Second, § 135(h) states that "this Act, " i.e., the NWPA , does not "authorize" private AFR storage. This is true, but irrelevant because the authorization for licensing private AFR facilities under Part 72 comes not from the NWPA but from the Atomic Energy Act, 42 U.S.C. §§ 2073(a), 2077, 2111. See Illinois v. General Elec.Co., 683 F.2d 206, 214-15 (7th Cir. 1982). The Commission needs no authorization from the NWPA to license private AFR facilities.

Third, § 135(h) disavows any intent to "require" private AFR storage. The State would have the Commission read "not required" to mean "prohibited," an interpretation at odds with the common meaning of words and common sense. This provision in fact is traceable to an earlier version of the NWPA's requirement that the Department of Energy ("DOE") provide a limited amount of AFR storage capacity for utilities unable to meet their own interim storage needs. See S. 1662, 97th Cong., 1st Sess. § 302(a) (1981). Under that bill, utilities could take advantage of DOE storage only by showing that they could not meet their storage needs in either on-site or AFR facilities. See S. Rep. No. 97-282, at 31 (Nov. 30, 1981). In the law as enacted, however, utilities were only required to exhaust on-site storage capacity in order to be eligible for DOE storage. NWPA § 135(g), 42 U.S.C. § 10155(g). It was in this sense that the Act did not "require" private AFR facilities to be constructed; but neither was the option foreclosed.

In short, there is nothing in the NWPA that comes close to prohibiting the construction or licensing of private AFR facilities. The State's position is based on little more than speculation, conjecture and wishful thinking.

Finally, the State advances what it calls the "Big Anomaly" argument. Petition at 22-23 & App. 3. The State catalogues the restrictions and limitations that Congress placed on any federal storage facility, the hurdles that DOE would have to overcome in developing such a facility, and the powers given to the states and Indian tribes to affect the process. The State then declares it anomalous that comparable requirements were not imposed on private parties seeking a license for an AFR storage facility.

The State's argument fails for several reasons. First, the State mixes together requirements for the Monitored Retrievable Storage ("MRS") program and the more limited "Federal Interim Storage" program that DOE was authorized to undertake by § 135 of the NWPA. The MRS is far different in purpose and scope than the AFR facility at issue in this proceeding, so it is not surprising that the MRS should have its own set of unique requirements and limitations.[3] Moreover, even where storage facilities are comparable in scope and purpose, there are good reasons why the federal facility should be treated differently. Federal projects consume federal resources and engender federal obligations. It is hardly surprising that Congress imposed limitations and restrictions on Federal programs designed to conserve resources, monitor progress and control obligations. Thus, Congress limited DOE's Federal Interim Storage program to 1900 metric tons because it wished to minimize the government's obligation and maximize private responsibility for spent fuel. Likewise in the federal siting decision, it is no surprise that Congress gave the states a different role than for purely private commercial projects.

[3] The MRS facility was to be designed for long-term storage of indefinite duration and was considered an alternative "back-up" for the permanent disposal repository. See 42 U.S.C. § 10161(b)(1); H.R. Rep. No. 97-491, pt. 1, at 44 (Apr. 27, 1982).

In any event, if there is any "anomaly," it is one that Congress ordained in the laws that it passed. The NWPA establishes the restrictions and requirements applicable to DOE in its development and construction of an interim storage facility or MRS, as well as the final repository. Other laws specify the requirements applicable to private commercial ventures. The Atomic Energy Act establishes the licensing regime, including specific requirements for licenses, license applications, hearings and license amendments. 42 U.S.C. §§ 2073(a), 2232, 2239. States may participate in any hearing on a license application, and the states are given various additional rights with respect to specific issues and particular licenses. See, e.g., 42 U.S.C. §§ 2021, 2113(b), 2232(c), 2239(a)(2).

In short, Congress chose the licensing scheme for facilities to be licensed under the Atomic Energy Act, and it chose a different process for programs carried out by DOE under the NWPA. The two schemes were never meant to be equivalent and are not interchangeable. There is no support in law or logic for State's "anomaly" argument. Nothing in the NWPA alters the Commission's authority to license private AFR facilities under the Atomic Energy Act, and it is wholly irrelevant that DOE may be subject to different requirements for other programs under different statutory provisions.

## II. THE NWPA'S LEGISLATIVE HISTORY REFUTES THE STATE'S CONTENTION

The Supreme Court has explained that committee reports are the authoritative source of legislative history:

> In surveying legislative history we have repeatedly stated that the authoritative source for finding the Legislature's intent lies in the Committee Reports on the bill, which "[represent] the considered and collective understanding of those Congressmen involved in drafting and studying proposed legislation." *Zuber v. Allen*, 396 U.S. 168, 186 (1969). We have eschewed reliance on the passing comments of one Member, *Weinberger v. Rossi*, 456 U.S. 25, 35 (1982), and casual statements from the floor debates.

Garcia v. United States, 469 U.S. 70, 76 (1984).

In this case, the Report of the House Energy and Commerce Committee addressed the NWPA in substantially its final form, and it speaks directly to the question of private AFR storage:

> 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. Such facilities are required to be licensed by the NRC under Section 202(3) of the Energy Reorganization Act of 1974. ***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.***

H.R. Rep. No. 97-785, pt. 1, at 41 (Aug. 20, 1982) (emphasis added).[4] This statement is virtually conclusive. The Committee clearly recognized that a private centralized AFR facility was one of the interim storage options. Although the Committee did not believe that the statute should *require* exhaustion of such storage capacity, it was understood that private AFR storage would remain an option available to utilities. It is inconceivable that this statement would appear in the Report if the Committee intended, as the State insists, to *prohibit* private AFR storage.

The corresponding Report by the Senate Energy and Natural Resources Committee addressed a different bill (S. 1662) which, as noted earlier, would have required utilities to exhaust both on-site and AFR storage capacity before they could take advantage of the AFR facility that DOE was authorized to construct. S. Rep. No. 97-282, at 12, 19, 31, 65 (Nov. 30, 1981). The House version of the legislation was ultimately enacted rather than the Senate version. Nevertheless, the Senate Report is still germane because it shows that the Senate Energy and Natural Resources Committee would never have favored prohibiting private AFR storage. On the con-

[4] It should be noted that licensing under § 202(3) of the Energy Reorganization Act, 42 U.S.C. § 5842(3), would apply only to a DOE facility. A private AFR storage facility would be licensed under the Atomic Energy Act, as discussed earlier.

trary, the Senate Committee favored a provision that would have encouraged and mandated use of private AFR storage facilities.

The State argues that the Commission should also consider the legislative history of the Nuclear Waste Policy Act Amendments of 2000, which was passed by Congress but was vetoed and never became law. See Petition at 28-31. Ordinarily, subsequent legislative history is a "hazardous basis for inferring the intent of an earlier" Congress. Pension Benefit Guar. Corp. v. LTV Corp., 496 U.S. 633, 650 (1990), quoting United States v. Price, 361 U.S. 304, 313 (1960). And it is a "particularly dangerous ground" where, as here, the subsequent history is a "[f]ailed legislative proposal." Solid Waste Agency v. United States, 531 U.S. 159, 169-70 (2001) (citations omitted). Nevertheless, to the extent the 2000 Amendments are relevant at all, they clearly contradict the State's position. The authoritative Report on this legislation from the Senate Energy and Natural Resources Committee specifically addresses the storage facility proposed by PFS:

> NSP [Northern States Power], along with 33 other utility and 2 contractor partners, began negotiations with the Mescalero Indian Tribe regarding the siting of a privately funded storage facility on tribal lands. Although these negotiations are not proceeding, a similar group of utilities has filed a license application to build a private storage facility on land owned by the Skull Valley Goshute Tribe in Utah. ***Privately funded storage could be constructed as long as the facility met Nuclear Regulatory Commission certification standards.***

S. Rep. No. 106-98, at 14 (June 24, 1999) (emphasis added). This is a clear and unequivocal recognition that private AFR storage facilities may properly constructed and licensed by the Commission.[5] One could hardly ask for a clearer statement of congressional intent.[6]

[5] One version of the legislation went event further and would have authorized DOE to take title to spent fuel and store it at a licensed private AFR facility. S. 1287, § 102(a)(2)(B), 106th Cong., 1st Sess. (1999). While that provision was not ultimately enacted, it does not detract from the Committee's clear recognition that private AFR facilities may be licensed.

[6] The corresponding House Commerce Committee Report is less explicit, but it does recognize the advantages of centralized AFR storage and the existence of one "commercial storage site" (presumably referring to the Morris facility in Illinois). H.R. Rep. No. 106-155, at 28 (May 20, 1999).

In contrast to the authoritative committee reports, the State relies on isolated floor statements by congressmen trying to prevent DOE from storing spent fuel in their states. These are precisely the type of statements that "cannot plausibly be read as reflecting any general agreement," and should be taken "with a large grain of salt." Landgraf v. USI Film Prods., 511 U.S. 244, 262 & n.15 (1994). Nevertheless, none of the statements helps the State's case. For example, the State quotes a statement by Senator Percy of Illinois. Petition at 13. He expressed satisfaction that "the compromise bill prohibits the Federal Government from taking over the interim spent fuel storage facility in Morris, Ill." 128 Cong. Rec. S15659 (daily ed. Dec. 20, 1982). Senator Percy then sought confirmation that § 135 of NWPA would prohibit (as it does) DOE from acquiring a private facility for use as the federal interim storage facility.

The exchange accurately describes the effect of § 135 but is irrelevant here because it says nothing about the construction and licensing of a new AFR storage facility by private utilities. Senator Percy's views on that issue may be inferred from the following statement, which the State neglected to quote:

> One of my primary concerns with the original Senate bill was the section calling for Federal operation of away-from-reactor (AFR) spent fuel storage facilities. I introduced, along with many of my colleagues, an amendment which would have eliminated provisions for Federal operation of AFR's in entirety. ***I continue to believe firmly that the interim storage of spent fuel should remain a private sector responsibility*** . . . .

Id. (emphasis added). Senator Percy clearly believed that any AFR storage should be provided by the private sector rather than the federal government. That view was shared by Senator Mitchell in another statement not mentioned by Utah:

> I would strongly prefer a prohibition against the construction of a federally mandated and owned AFR. ***I believe that an AFR is the clear responsibility of the private sector*** . . . .

Id. at S15670 (emphasis added). Senator Moynihan also shared that view. He sponsored an amendment that would have deleted the DOE storage program but pointed out that nothing

"would prevent utilities from contracting to store spent fuel at privately owned and operated off-site storage facilities." 128 Cong. Rec. S4280 (daily ed. Apr. 29, 1982). Senator Thurmond also favored "use of private AFR facilities." Id. at S4275.

The House debate was largely to the same effect. Rep. Lundine was particularly concerned about the legislation because the West Valley facility, which was already functioning as a private AFR facility, was located in his district. He was worried that DOE might send spent fuel to West Valley: "If we were looking for quick storage capacity in America today, it would not go to Barnwell; it would not go to Morris; it would go to West Valley." 128 Cong. Rec. H8583 (daily ed. Nov. 30, 1982). He therefore offered an amendment that he said was intended "to set aside any AFR program at a federally owned site or at a privately owned site." Id. at H8582. He persisted with the amendment even though Rep. Broyhill pointed out that the bill already contained language in § 135 that would prevent DOE from acquiring West Valley for the federal AFR facility. Id. at H8589. Eventually, the Lundine amendment was rejected 308-84, so his views were clearly not adopted. Id. At H8590.

Rep. Corcoran (of Illinois) took a position similar to that of Senator Percy. He was concerned that the Morris facility in his district might "be vulnerable to a Federal takeover." Id. at H8582. He correctly pointed out, however, that provisions in § 135 would preclude DOE from doing so. Id. As with the Senate debate, this exchange says nothing about the licensing of a new commercial AFR storage facility.

The hearings leading up to the debate reveal that Congress understood that private AFR storage was one available solution to the interim storage problem. NRC Chairman Palladino testified that the Commission had adopted Part 72 and stood ready to license independent spent fuel storage installations. Joint Hearings Before the Senate Comm. on Energy & Natural Res. & the Subcomm. on Nuclear Regulation of the Comm. on Env't & Pub. Works on S. 637 & S. 1662, 97th Cong. 236-37 (Oct. 5, 1981). Shelby Brewer, the Assistant Secretary of Energy, testified

that AFR storage "is a service more appropriately provided by the private sector." Id. at 216. Utility industry representatives testified that the industry was capable of providing its own AFR storage. Hearings Before the House Subcomm. on Energy Conservation & Power of the Comm. on Energy & Commerce on H.R. 1993, et al., 97th Cong. at 478 (June 8, 1992). The prospects for additional private AFR storage facilities were discussed repeatedly during the hearings. See, e.g., Id. at 3, 244; Hearings Before the House Subcomm. on Energy & the Env't of the Comm. on Interior & Insular Affairs on H.R. 1993, et al., 97th Cong. 286, 300, 326, 502 (June 23 & 25, July 9,1981).

Thus Congress knew that private AFR storage was an available solution that the Administration favored and the NRC stood ready to license. Against this background, it is simply not credible to argue that Congress intended to prohibit private AFR storage and that it did so sub silentio. If it had intended that result, Congress surely would have said so in the legislation it passed.

## III. COMMISSION AND COURT DECISIONS SUPPORT PRIVATE AFR LICENSING

The Commission has clearly recognized and consistently reaffirmed its authority to license private AFR spent fuel storage facilities. When the Commission adopted Part 72 in 1980, it specifically addressed the question of AFR storage:

> 18. *At-Reactor versus Away-From-Reactor Siting.* Some commenters favored restricting the siting of ISFSIs to reactor sites, with the thought that this might reduce perceived transportation risks and keep pressure on the nuclear industry to help solve the waste management problem. Others favored away-from-reactor siting, perceiving this to be safest solution even though transportation might be increased.
>
> Also, some commenters interpreted the promulgation of Part 72 as reflecting an NRC bias favoring away-from-reactor siting. This conclusion is not correct. The NRC is not aware of any compelling reasons generally favoring either at-reactor or away-from-reactor siting of an ISFSI. There are many factors to be considered in each situation and in the licensing actions involved; ***accordingly, the rule permits either.***

45 Fed. Reg. 74,693, 74,696 (Nov. 12, 1980) (emphasis added).[7] And from the definition of "person" in § 72.3(p) as well as the "Scope" provisions in § 72.2, it is evident that a private commercial venture may obtain a license for an independent spent fuel storage installation. Thus, if there had been any doubt previously, Part 72 made clear the Commission's authority to license private AFR storage facilities.

Since the adoption of Part 72, the Commission has repeatedly affirmed its authority to license private AFR facilities notwithstanding the enactment of the NWPA. For example, in its initial Waste Confidence decision, the Commission found "reasonable assurance that safe independent onsite or offsite spent fuel storage will be made available if such storage capacity is needed." 49 Fed. Reg. 34,658, 34,660, 34,686, 34,687 (Aug. 31, 1984). This finding was based in part on evidence from DOE and private industry:

> DOE pointed out that additional storage requirements could be satisfied in a number of ways, including: (a) Use of private existing AFR storage facilities; (b) construction of new water basins at reactor facilities or away from reactor facilities by private industry or the utilities . . . .
>
> ...
>
> An implied commitment by industry to implement AFR storage if necessary using one of the several feasible spent fuel storage alternatives is evident from the responses of the utilities, the nuclear industry, and associated groups.

Id. at 34,687 (citation omitted). Obviously, the Commission in 1984 did not believe that the NWPA had outlawed private AFR storage.

The following year, the Commission issued regulations, as required by the NWPA, to establish criteria for determining whether a utility would be eligible for the Federal Interim Storage program. 50 Fed. Reg. 5,548 (Feb. 11, 1985). The Commission agreed that it would need to

[7] The State argues that Part 72 does not specifically authorize an AFR facility. Petition at 3-4. The Commission's explanation, quoted above, leaves no doubt on that issue. See also 45 Fed. Reg. at 74,698 (discussion of definition of "independent").

consider "spent fuel currently stored at an AFR site," thus recognizing the continued viability of private AFR storage. Id. at 5,553.

In 1986, the Commission proposed amendments to Part 72 to provide for an MRS facility. 51 Fed. Reg. 19,106 (May 27, 1986). The Commission discussed the Morris storage facility:

> 3. *Licensing Actions.* There 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. This facility was originally built under a Part 50 Construction Permit authorization as a reprocessing plant. It received an initial license for storage of spent fuel under Part 70 and a subsequent license renewal under Part 72 on May 4, 1982 (Docket 72-1). 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.

Id. at 19,107. Morris is a private AFR storage facility licensed under Part 72. The Commission did not believe that it was illegal under the NWPA, and indeed the Commission is considering an application to renew the Part 72 license for another 20 years. 65 Fed. Reg. 62,766 (Oct. 19, 2000). If the State's argument were accepted, the Commission presumably would have to revoke the Morris license, shut down the facility, and find another home for the fuel stored there.[8]

In 1989, the Commission revisited its Waste Confidence decision in light of developments since 1984, including the 1987 Nuclear Waste Policy Act Amendments ("NWPAA"). The Commission proposed to revise its Finding No. 4 as follows:

> Finding 4: The Commission finds reasonable assurance that, if necessary, spent fuel generated in any reactor can be stored safely and without significant environmental impacts for at least 30 years beyond the licensed life for operation (which may include the term of a revised license) of that reactor at its spent fuel storage basin, or at either onsite ***or offsite independent spent fuel storage installations***.

[8] The amendments proposed in 1986 were adopted in 1988, and again the Commission recognized that spent fuel could be stored in a Part 72 independent spent fuel storage installation "at reactor sites or elsewhere." 53 Fed. Reg. 31,651, 31,657 (Aug. 19, 1988).

54 Fed. Reg. 39,767, 39,768, 39,769, 39,792 (Sept. 28, 1989) (emphasis added). The Finding was supported in part by the fact that "[t]he industry has made a general commitment to provide storage capacity, which could include away-from-reactor (AFR) storage capacity." Id. at 39,797. The Commission also addressed the NWPAA, upon which the State relies in this proceeding:

> Although the NWPAA limits the usefulness of an MRS by linking its availability to repository development, the Act does provide authorization for an MRS facility. The Commission has remained neutral since its 1984 Waste Confidence Decision with respect to the need for authorization of an MRS facility. The Commission does not consider the MRS essential to protect public health and safety. ***If any offsite storage capacity is required, utilities may make application for a license to store spent fuel at a new site.*** Consequently, while the NWPAA provision does affect MRS development and therefore can be said to be limiting, the Commission believes this should not affect its confidence in the availability of safe storage capacity.

Id. at 39,796 (emphasis added).[9] Neither the NWPA nor the NWPAA altered the Commission's judgment that storage needs could be met through private AFR facilities.

The Commission proposed further revisions to Part 72 in 1993. 58 Fed. Reg. 48,004 (Sept. 14, 1993). The Commission again recognized the possibility of licensing "part 72 facilities which are not located at power reactor sites (i.e., GE Morris)...." Id. at 48,006.

Thus, the Commission has consistently held over many years that private AFR storage facilities may be licensed under Part 72 notwithstanding the NWPA and its amendments. The State now asks the Commission to abandon its long-held position and it does so without any compelling legal, factual or technical basis. The State's position must be rejected.

Finally, although the State cites a number of court decisions, it does not address the only case that we have found which actually decided the question presented here — Florida Power & Light Co. v. Westinghouse Elec. Corp., 597 F. Supp. 1456 (E.D. Va. 1984). That case involved

[9] The Commission echoed these statements in its Review and Final Revision of the Waste Confidence decision the following year. 55 Fed. Reg. 38,474, 38,513 (Sept. 18, 1990).

Westinghouse's refusal to take delivery of the utility's spent fuel when it appeared that reprocessing would be impossible. The court considered the possibility of private AFR storage for the fuel in light of the NWPA. The court concluded that "there is no general legal ban against, or technical difficulty with, AFR storage sites." 597 F. Supp. at 1462. Looking at the feasibility of either Florida Power and Light or Westinghouse Electric developing a private AFR facility, the court elaborated:

> Additionally, the NWPA expresses a government policy of encouraging new on-site storage, rather than private AFR's. The government policy does not mean that an AFR would automatically be unlicensable, but in combination with the fact that re-racking could serve the same needs at lower cost and with less political controversy, it would make licensing most difficult. The experts also agreed that in any case a new AFR could not be licensed and built in time to receive fuel before [Florida Power and Light's] existing storage facilities reached their full capacity in 1989.

Id. at 1463. The court correctly assessed the legal effect of the NWPA, if not the licensing difficulties.[10]

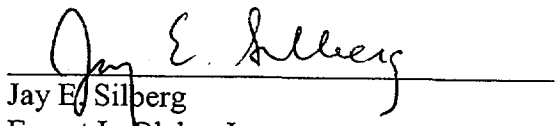
PFS has found no case — and the State has cited none — that supports the State's interpretation of the NWPA. In fact, there is no support for the State's position, and it must be rejected.

## CONCLUSION

The State's claim that the NWPA precludes licensing of private AFR storage facilities is contrary to the text of statute, the legislative history, consistent NRC decisions and the only court opinion to consider the issue. Accordingly, the State of Utah's Suggestion of Lack of Jurisdiction and its related Rulemaking Petition should be denied.

[10] On appeal, the Fourth Circuit affirmed in part and reversed in part on other grounds, but the left intact the District Court's conclusions regarding the NWPA. Florida Power & Light Co. v. Westinghouse Elec. Corp., 826 F.2d 239 (4th Cir. 1987).

Respectfully submitted,



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Dated: May 15, 2002

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**UNITED STATES OF AMERICA**
**NUCLEAR REGULATORY COMMISSION**

Before the Atomic Safety and Licensing Board

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

## CERTIFICATE OF SERVICE

I hereby certify that copies of the Applicant's Brief in Opposition to Utah's Suggestion of Lack of Jurisdiction were served on the persons listed below (unless otherwise noted) by e-mail with conforming copies by U.S. mail, first class, postage prepaid, this 15th day of May, 2002.

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May 20, 2002

By Facsimile

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Re: **Private Fuel Storage L.L.C. Docket No. 72-22-ISFSI**

Dear Mr. Julian:

We are resubmitting "Applicant's Brief in Opposition to Utah's Suggestion of Lack of Jurisdiction," filed on May 15, 2002, in order to include the corrected Table of Contents, Heading and page numbers.

There are no substantive changes to this brief.

Sincerely,

Jay E. Silberg

Jay E. Silberg

Enclosures