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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	
	)	Docket No. 72-22-ISFSI
PRIVATE FUEL STORAGE, L.L.C.	)	
	)	ASLBP No. 97-732-02-ISFSI
(Independent Spent Fuel Storage Installation)	)	

NRC STAFF'S RESPONSE TO APPLICANT'S MOTION FOR SUMMARY DISPOSITION OF CONTENTION UTAH SECURITY-J

INTRODUCTION

Pursuant to 10 C.F.R. § 2.749(a) and the Atomic Safety and Licensing Board's scheduling orders in this proceeding,[1] the NRC Staff ("Staff") hereby responds to "Applicant's Motion for Summary Disposition of Utah Contention Security J -- Law Enforcement" ("Motion"), filed by Private Fuel Storage, L.L.C. ("PFS" or "Applicant") on April 30, 2002. For the reasons set forth below, the Staff submits that there does not exist a genuine dispute of material fact concerning this contention, and the Applicant's Motion should be granted as a matter of law.

BACKGROUND

On June 25, 1997, PFS filed an application for a license to possess and store spent nuclear fuel ("SNF") in an Independent Spent Fuel Storage Installation ("ISFSI") to be constructed and operated on the Reservation of the Skull Valley Band of Goshute Indians ("Skull Valley Band") located within the boundaries of Tooele County, Utah. The Applicant's submittal consisted of five documents, including a Physical Security Plan ("PSP" or "Security Plan"). Petitions for leave to

[1] *See* (1) "Order (Granting Summary Disposition Filings Extension Motion)," dated June 17, 2002; and (2) "Order (Summary Disposition Briefing Schedule for Contention Security-J)," dated March 8, 2002; *see also* "Order (Granting Page-Limit Extension Request)," dated July 18, 2002.

intervene were filed by the State of Utah ("State") and other petitioners; and numerous contentions were filed, including nine contentions filed by the State concerning the PFS Security Plan.[2]

On June 29, 1998, the Licensing Board ruled upon the admissibility of the State's Security Plan contentions. *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-98-13, 47 NRC 360 (1998).[3] The Board admitted one of those contentions (Security-C), to the extent it asserted that the Tooele County Sheriff's Office -- PFS's designated Local Law Enforcement Agency ("LLEA") -- will not provide a "timely response" to unauthorized activities at the PFS Facility ("PFSF") as required by 10 C.F.R. Part 73. *Id.* at 369-70, 373-74.[4] Subsequently, the Board admitted, and then resolved by summary disposition, three issues challenging the validity of Tooele County's execution of a Cooperative Law Enforcement Agreement ("CLEA") with the Skull Valley Band and the U.S. Bureau of Indian Affairs ("BIA").[5] On February 14, 2000, the State advised the Board that it did not wish to proceed to hearing on Contention Security-C, and the

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[2] "State of Utah's Contentions Security-A Through Security-I Based on Applicant's Confidential Safeguards Security Plan," dated January 3, 1998.

[3] The Board had previously ruled on contentions involving matters other than the Security Plan. *See Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-98-7, 47 NRC 142 (1998).

[4] *See also Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-99-7, 49 NRC 124 (1999) (rejecting as untimely a proposed amendment of Contention Security-C based on a letter from the Tooele County Attorney stating his opinion that, under the CLEA, the County is not obligated to provide law enforcement protection at the PFSF.

[5] The Board granted the State's request for reconsideration of LBP-98-13 and admitted Contentions Security-A, Security-B and Security-C, insofar as they alleged that Tooele County's adoption of the CLEA was invalid because it had not been approved by a County Resolution as required under Utah law. *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-98-17, 48 NRC 69 (1998). PFS later sought summary disposition of those issues, based on the Tooele County Board of Commissioners' adoption of a resolution approving the County's entry into the CLEA. On August 27, 1999, the Licensing Board granted PFS's motion, ruling that the County had corrected any procedural deficiencies that affected the execution of the CLEA. *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-99-31, 50 NRC 147 (1999).

Board then dismissed that contention. *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-00-05, 51 NRC 64 (2000).

On April 13, 2001, the State filed a request for admission of late-filed Contention Security-J (Law Enforcement), which asserts that Tooele County is prohibited from providing law enforcement assistance to the PFS storage facility or transfer facility, and that PFS therefore fails to comply with various physical security plan requirements in 10 C.F.R. Parts 72 and 73. The contention states:

> **Contention Security J. Law Enforcement.**
> The Applicant's Physical Security Plan does not comply with 10 CFR Part 73 because the Applicant does not have valid documented liaison with a designated local law enforcement authority (LLEA), and redundant communications between onsite security force members and the LLEA, to provide timely response to unauthorized penetrations at the PFS facility. *See* 10 CFR §§ 72.180; 73.51(d)(6), (8) and (12); and Part 73, Appendix C.[6]

In support of this contention, the State asserted that on March 15, 2001, the Governor of Utah signed into law Senate Bill 81 (S.B. 81) ("Provisions Relating to High-Level Nuclear Waste") which, *inter alia,* "prohibits a county from entering into or implementing a contract to provide municipal-type services, including law enforcement, to any area under consideration for a storage facility or transfer facility for the placement of high level nuclear waste" in the State of Utah. Contention Request at 1. The State provided a letter from Governor Michael O. Leavitt dated March 15, 2001, attesting to his action (*Id.,* Exh. 1), along with a copy of pertinent provisions of S.B. 81 (*Id.,* Exh. 2). According to the State, this action voids the Cooperative Law Enforcement Agreement between the Skull Valley Band, the BIA, and Tooele County.

The Licensing Board initially deferred ruling on the admissibility of Contention Security-J, to await the resolution of ongoing federal court litigation in which PFS and the Skull Valley Band

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[6] *See* "State of Utah's Request for Admission of Late-Filed Contention Utah Security J (Law Enforcement)," dated April 13, 2001 ("Contention Request"). *See also*, (1) "Applicant's Response to State of Utah's Request for Admission of Late-Filed Contention Utah Security J -- Law Enforcement," dated April 27, 2001; and (2) "NRC Staff's Response to State of Utah's Request for Admission of Late-Filed Contention Utah Security-J," dated April 27, 2001 ("Staff Response").

contested the constitutionality of S.B. 81 and other pieces of Utah legislation. *See Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-01-20, 53 NRC 565, 571 (2001).[7] However, the Board later admitted this contention, finding that the federal district court's schedule was unknown, and further delay could adversely affect the timely conclusion of this proceeding. *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-02-7, 55 NRC 167, 169 (2002).

On April 30, 2002, PFS filed its Motion seeking summary disposition of Utah Contention Security-J. Therein, PFS asserted that: (1) "S.B. 81 is preempted by Federal law or invalid under the U.S. Constitution, or both, and thus can have no legal effect on the CLEA," and (2) "the assumptions underlying the Commission's realism doctrine provide reasonable assurance that, in the event of an actual security event, adequate LLEA response would occur notwithstanding S.B. 81" (Motion at 3). The State filed its response to PFS' Motion on May 31, 2002, in which it submitted arguments in opposition to those advanced by PFS.[8]

DISCUSSION

A. Legal Standards Governing Motions for Summary Disposition.

Pursuant to 10 C.F.R. § 2.749(a), "[a]ny party to a proceeding may move, with or without supporting affidavits, for a decision by the presiding officer in that party's favor as to all or any part of the matters involved in the proceeding." Pursuant to 10 C.F.R. § 2.749(d), "[t]he presiding officer shall render the decision sought if the filings in the proceeding, depositions, answers to

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[7] In this regard, PFS and the Skull Valley Band filed an action in the U.S. District Court for the District of Utah in which they, *inter alia*, (a) sought a declaratory judgment that various provisions of Utah law (S.B. 66, 78, 81, 164, 177, and 196) are unconstitutional, void, and/or preempted by Federal and tribal law; and (b) requested injunctive relief against the enforcement of those laws. *See Skull Valley Band of Goshute Indians and Private Fuel Storage, L.L.C. v. Michael O. Leavitt, et al.,* Case No. 2:01CV00270C (D. Utah, filed April 19, 2001). The Licensing Board has previously described the legislation involved in the federal court litigation, in LBP-01-20, 53 NRC at 569 n.2.

[8] *See* "Utah's Opposition to PFS's Motion for Summary Disposition of Utah Contention Security-J -- Law Enforcement," dated May 31, 2002 ("State Response").

interrogatories, and admissions on file, together with the statements of the parties and the affidavit, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a decision as a matter of law."[9] The Licensing Board in this proceeding has ruled upon numerous motions for summary disposition, in which it summarized these standards as follows:

> Under 10 C.F.R. § 2.749(a), (d), summary disposition may be entered with respect to any matter (or all of the matters) in a proceeding if the motion, along with any appropriate supporting material, shows that there is "no genuine issue as to any material fact and that the moving party is entitled to a decision as a matter of law." The movant bears the initial burden of making the requisite showing that there is no genuine issue as to any material fact, which it attempts to do by means of a required statement of material facts not at issue and any supporting materials (including affidavits, discovery responses, and documents) that accompany its dispositive motion. An opposing party must counter each adequately supported material fact with its own statement of material facts in dispute and supporting materials, or the movant's facts will be deemed admitted. See Advanced Medical Systems, Inc. (One Factory Row, Geneva, Ohio 44041), CLI-93-22, 38 NRC 98, 102-03 (1993).

Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-99-23, 49 NRC 485, 491 (1999) (granting summary disposition of Contention Utah C).

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[9] The Commission's summary disposition procedures have been analogized to Rule 56 of the Federal Rules of Civil Procedure. *See, e.g., Cleveland Electric Illuminating Co.* (Perry Nuclear Power Plant, Units 1 and 2), ALAB-443, 6 NRC 741, 753-54 (1977); *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation) LBP-99-32, 50 NRC 155, 158 (1999). Indeed, the Commission generally applies the same standards that the Federal courts use in determining motions for summary judgment under Rule 56 of the Federal Rules. *Advanced Medical Systems, Inc.* (One Factory Row, Geneva, Ohio 44041), CLI-93-22, 38 NRC 98, 102 (1993). Decisions arising under Rule 56 of the Federal Rules may thus serve as guidelines to the Licensing Board in applying 10 C.F.R. § 2.749. *Perry,* 6 NRC at 754. Under Rule 56, the party seeking summary judgment has the burden of proving the absence of genuine issues of material fact. *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 157 (1970); *Advanced Medical Systems,* 38 NRC at 102. In addition, the record is viewed in the light most favorable to the party opposing the motion. *Poller v. CBS, Inc.,* 368 U.S. 464, 473 (1962); *Kerr-McGee Chemical Corp.* (West Chicago Rare Earths Facility), ALAB-944, 33 NRC 81, 144 (1991). If the moving party makes a proper showing for summary disposition and the opposing party fails to show that there is a genuine issue of material fact, the District Court (or Licensing Board) may summarily dispose of all of the matters before it on the basis of the filings in the proceeding, the statements of the parties, and affidavits. *See* Rule 56(e), Fed. R. Civ. P.; 10 C.F.R. § 2.749(d); *Advanced Medical Systems*, 38 NRC at102.

Finally, where a contention presents essentially a legal issue, summary disposition is "the appropriate procedural avenue" for resolving the contention. *General Public Utilities Nuclear Corp.* (Oyster Creek Nuclear Generating Station), LBP-97-1, 45 NRC 7, 12-13 (1997), *citing* LBP-96-23, 44 NRC 143, 166-67 (1996). *Cf. American Nuclear Corp.* (Revision of Orders to Modify Source Materials Licenses), CLI-86-23, 24 NRC 704, 706 (1986); *Ohio Edison Co.* (Perry Nuclear Power Plant, Unit 1), LBP-92-32, 36 NRC 269, 280 (1992).

As more fully set forth below, the Staff submits that summary disposition of Utah Contention Security-J is appropriate in accordance with these standards.

B. Utah Senate Bill 81 Would Prohibit Tooele County From Serving as the Designated Local Law Enforcement Agency for the PFS Facility.

1. Pertinent Provisions of Senate Bill 81.

As modified in S.B. 81, Utah Code Ann. § 17-34-1(3) states that a county may not "provide, contract to provide, or agree in any manner to provide municipal-type services, as these services are defined in Section 19-3-303, to any area under consideration for a storage facility or transfer facility for the placement of high-level nuclear waste, or greater than class C radioactive waste"; in turn, § 19-3-303(6) defines "municipal-type services" to include "law enforcement" services. Utah Code Ann. § 19-3-301(6)(b) further mandates that "political subdivisions of the State may not enter into any contracts or any other agreements for the purpose of providing any goods, services, or municipal-type services" to a high level waste storage facility. Finally, the statute declares that any new or existing agreement to provide goods, services or municipal-type services to any entity involved in placement of high-level nuclear waste at a storage or transfer facility within the State of Utah is against the public interest and is void from its inception. *Id.*

In filing Contention Security-J, the State observed that PFS has identified the Tooele County Sheriff's Office as its Local Law Enforcement Agency ("LLEA"), pursuant to the CLEA between Tooele County, BIA and the Skull Valley Band; and it asserted that S.B. 81 would prohibit the

County from implementing that agreement or executing any new agreement to provide law enforcement services to the PFS facility (Contention Request at 5-7). Further, the State asserted that the statute calls into question PFS's compliance with NRC physical protection requirements, including the requirement for documented liaison with an LLEA to permit timely response to unauthorized activities at the site, resulting in a deficiency in the PFS Security Plan (*Id.* at 7-8).[10]

2. The Role of a Local Law Enforcement Agency Under 10 C.F.R. Parts 72 and 73.

The Commission's regulations governing physical protection for an away-from-reactor ISFSI are set forth in 10 C.F.R. Parts 72 and 73. Pursuant to 10 C.F.R. §§ 72.180 and 72.184, an applicant for an ISFSI under Part 72 must "establish, maintain and follow a detailed plan for physical protection as described in § 73.51" and "a safeguards contingency plan for responding to threats and radiological sabotage" as described in 10 C.F.R. Part 73, Appendix C. Detailed requirements for physical protection at an away-from-reactor ISFSI are provided in 10 C.F.R. § 73.51. An applicant must "establish and maintain a physical protection system with the objective of providing high assurance that activities involving spent nuclear fuel and high-level radioactive waste do not constitute an unreasonable risk to public health and safety." 10 C.F.R. § 73.51(b)(1). To meet this general objective, the applicant must meet the performance capabilities specified in § 73.51(b)(2), including the provision of "timely communication to a designated response force whenever necessary." Specific methods for meeting the performance capabilities of § 73.51(b)(2) are specified in § 73.51(d); as pertinent here, these include:

> (6) Documented liaison with a designated response force or local law enforcement agency (LLEA) must be established to permit timely response to unauthorized penetration or activities.
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> * * *

[10] In its Motion, PFS cites various provisions of Utah Law in addition to S.B. 81 (*see, e.g.,* Motion at 5, and Attachments 4-7). While those provisions may establish a legislative framework for S.B. 81, they are not cited by the State in support of Contention Security-J, and they are therefore not addressed specifically herein.

> (8) Redundant communications capability must be provided between onsite security force members and designated response force or LLEA.
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> (12) The physical protection plan must be reviewed once every 24 months . . . . The physical protection review must include an evaluation of the effectiveness of the physical protection system and a verification of the liaison established with the designated response force or LLEA.

In addition, 10 C.F.R. Part 73, Appendix C, provides specific requirements for a licensee's safeguards contingency plan, including a requirement to describe a set of pre-determined decisions and actions for responding to threats, thefts and sabotage, and to stipulate the individual, group or entity responsible for each decision and action, in part "to ensure the integration of the licensee response with the responses by other entities." Further, the plan is required to include, *inter alia*:

> d. Law Enforcement Assistance -- A listing of available local law enforcement agencies and a description of their response capabilities and their criteria for response; and a discussion of working agreements or arrangements for communicating with these agencies.

10 C.F.R. Part 73, Appendix C, "Contents of the Plan," § 3.d.

3. The Apparent Effect of S.B. 81.

Tooele County has entered into a duly ratified Cooperative Law Enforcement Agreement with the BIA and the Skull Valley Band (Motion, Attachment 1). S.B. 81 purports to invalidate this agreement and to prohibit any placement (including storage, transfer, or disposal) of SNF within the State of Utah (*Id.*, Attachment 2, § 19-3-301(1), (9)(a)). The same legislation imposed various permitting requirements in the event that placement of SNF within the State is approved by the federal government. One such requirement calls for a storage permit applicant to demonstrate the availability of emergency services; however, the same legislation simultaneously prohibits any political subdivision of the state from providing such services. *See id.*, § 19-3-301(6)(b).

In sum, S.B. 81, on its face, would prohibit Tooele County from agreeing to serve or serving as the designated LLEA for the PFS facility, thus calling into question PFS's present compliance

with 10 C.F.R. § 73.51 and Part 73, Appendix C. However, as set forth below, S.B. 81 is legally invalid and of no binding effect, in that it runs afoul of the doctrine of federal preemption and the Interstate Commerce Clause.

C. Utah Senate Bill 81 Impermissibly Interferes With the Commission's Regulation of Nuclear Safety Under the Atomic Energy Act, and Is Preempted By Federal Law.

The general principles governing preemption, whereby federal law is elevated above that of the separate States, are well established. The preemption doctrine is founded in the Supremacy Clause of the United States Constitution, Article VI, Clause 2. That clause provides as follows

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.[18]

Congress' authority to legislate in the field of atomic energy has been broadly recognized, based upon its "constitutionally granted powers over the common defense and security, interstate and foreign commerce and promotion of the general welfare." *Northern States Power Co. v. Minnesota*, 447 F.2d 1143, 1147 (8th Cir. 1971) (citing the Atomic Energy Act of 1954, as amended, Sections 1 and 2, 42 U.S.C. §§ 2011, 2012), *summarily aff'd*, 405 U.S. 1035 (1972).

In determining whether federal laws are preemptive, it must be ascertained whether Congress has acted "in such a manner as to exclude the States from asserting concurrent jurisdiction over the same subject matter." *Id.*, 447 F.2d at 1146. As stated by the Supreme Court, federal preemption may be established in one of three general ways. First, Congress' intent to occupy a given field to the exclusion of the states may be demonstrated by stating so in explicit

[18] The Supremacy Clause has often been read In conjunction with the Tenth Amendment to the Constitution, with which it has been noted to be in tension. The Tenth Amendment provides as follows: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

terms; second, Congress' intent may be shown by its establishment of a "'scheme of federal regulation . . . so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it,'" or where an Act of Congress "touch[es] a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject." *English v. General Electric Co.,* 496 U.S. 72, 78-79 (1990), *citing Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947); *accord, Pacific Gas & Electric Co. v. State Energy Resources Conservation and Development Commission,* 461 U.S. 190, 204 (1983). Third, preemption may be established by a finding of "actual conflict" between the State and federal laws:

> Even where Congress has not entirely displaced state regulation in a specific area, state law is preempted to the extent that it actually conflicts with federal law. Such a conflict arises when "compliance with both federal and state regulations is a physical impossibility," *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-143 (1963) or where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

Pacific Gas & Electric, 461 U.S. at 204; *accord, English v. General Electric Co.,* 496 U.S. at 79; *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248 (1984).[19]

An application of these principles to the issues raised by Contention Security-J leads to the conclusion that federal law preempts the State laws cited in this contention. In this regard, the Staff submits that Congress has fully "occupied" the field of atomic energy regulation as it relates to the licensing and nuclear safety of SNF storage at an ISFSI and SNF transportation, to the exclusion of any State role therein. Further, the State laws cited in Contention Security-J "actually conflict" with federal law. Accordingly, a finding of preemption is warranted.

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[19] Where the field asserted to have been pre-empted "includes areas that have 'been traditionally occupied by the States,' congressional intent to supersede state laws must be 'clear and manifest.'" *English v. General Electric Co.,* 496 U.S. at 79, *citing Jones v. Rath Packing Co.,* 430 U.S. 519, 525 (1977), *quoting Rice v. Santa Fe Elevator Corp.*, 331 U.S. at 230. *Accord, Pacific Gas and Electric Co.,* 461 U.S. at 206.

1. Congress' Intent to Occupy the Field of SNF Transportation and Storage.

PFS states that the laws cited by Contention Security-J are preempted by the Atomic Energy Act of 1954, as amended ("AEA" or "Act"), because the Act "grants the NRC 'exclusive jurisdiction to license the transfer, delivery, receipt, acquisition, possession, and use of nuclear materials.'" Motion at 5, *citing Pacific Gas and Electric,* 461 U.S. at 206-07. Further, PFS states that "[p]ursuant to its authority under the AEA, the NRC has issued comprehensive regulations governing away-from-reactor spent fuel storage installations." *Id.* at 6, *citing* 10 C.F.R. Parts 72 and 73. PFS cites *English v. General Electric Co.* and other cases in which the courts have held that the shipment and storage of SNF is an area that has been preempted by the Federal government, leaving no room for State regulation thereof (Motion at 6-7); and it asserts that the municipal contract provisions of S.B. 81 run afoul of this prohibition, in that they "are intended to ban the storage of spent nuclear fuel" and "purport to abolish PFS's ability to contract for safety services in Utah." (*Id.* at 7-8).

A review of S.B. 81 leads to the conclusion that it impermissibly intrudes into an area that has been reserved for the federal government. In this regard, it is well established that the regulation of radiological health and safety matters associated with the storage and shipment of SNF is a field reserved exclusively for the Commission under the AEA. As stated by the Supreme Court with respect to the regulation of radioactive materials under the AEA, "the Federal Government has occupied the entire field of nuclear safety concerns, except the limited powers expressly ceded to the States." *Pacific Gas & Electric*, 461 U.S. at 212. Thus, a state's attempt to regulate radiological health and safety matters, or its enactment of "regulations which affected the construction and operation of federally approved nuclear power plants" would be preempted. *Id.*, at 212-13, 223 n.34. *Accord, County of Suffolk v. Long Island Lighting Co.*, 728 F.2d 52, 58-59 (2d Cir. 1984) (intrusion into the preempted field is impermissible, regardless of its motivation, if it infringes upon the NRC's exclusive authority); *Consolidated Edison Co. of New York* (Indian Point

Station, Unit No. 2), ALAB-399, 5 NRC 1156, 1169-70 (1977); *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), LBP-83-22, 17 NRC 608, 623-24, 635-36, 640-42, *aff'd on other grounds*, CLI-83-13, 17 NRC 741 (1983) (Suffolk County Resolution 111-1983, concluding that no offsite emergency plan could be adequate and committing to assure that no state or federal agency actions would be taken inconsistent with that conclusion, was preempted as an impermissible intrusion into a federal area); *but see Citizens for an Orderly Energy Policy, Inc. v. County of Suffolk*, 604 F. Supp. 1084, 1094 (E.D.N.Y. 1985), *aff'd*, 813 F.2d 570 (2d Cir. 1987) (County Res. 111-1983 was not preempted, in that it was a decision not to adopt or implement a radiological emergency response plan, and to attempt to influence others, unlike an attempt to regulate).[20]

Further, the boundaries of the field preempted by the AEA may be determined, in part, by reference to the motivation behind the state law, such that a state law grounded on nuclear safety concerns would be preempted. *English v. General Electric Co.*, 496 U.S. at 84; *Pacific Gas & Electric*, 461 U.S. at 213. Here, S.B. 81 clearly intrudes in the field of nuclear materials regulation by imposing numerous prohibitions and requirements on the storage, shipment, and disposal of SNF; further, S.B. 81 makes it clear that the law was motivated by radiological health and safety

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[20] Nor is this a case, as asserted by the State, in which the state law merely announces that the State "will not participate in or cooperate with security arrangements for a nuclear facility" (State Response at 13); nor was the State's adoption of S.B. 81 akin to the Shoreham situation cited by the State, where Suffolk County's "only act" was the passage of resolutions effectively establishing the County's "policy to oppose nuclear power facilities within its borders and to refuse to cooperate in radiological emergency response planning" (*Id.* at 14, *citing Citizens for an Orderly Energy Policy, Inc.*, 604 F. Supp. at 1094. Rather, here the State took the additional "positive acts" of banning the importation or transportation of SNF within the State's borders, and prohibiting other persons from cooperating with or rendering assistance to such activities. Accordingly, there is no merit in the State's argument that, here, it has merely "refused to cooperate" in responding to a threat at a nuclear facility (*Id.* at 13-15). Moreover, contrary to the State's argument (State Response at 15), the State's law enforcement response is not at issue here; rather, only Tooele County was designated to serve as the LLEA for the PFSF. Inasmuch as the County has independently undertaken that obligation under an agreement ratified by the County Council, there is no merit in the State's argument that a finding of preemption would "force Utah to use its law enforcement resources where Utah does not want to use them" (*Id.*).

concerns.[21] Accordingly, the regulatory scheme established by S.B. 81 -- from its outright prohibition on spent fuel storage and transportation to its various "fallback" provisions, including a ban on providing municipal-type services -- impermissibly intrudes in a federally preempted field.

Moreover, where a State law has a "direct and substantial effect" on the radiological safety of a nuclear facility subject to federal regulation, "even if [the law was] "enacted out of nonsafety concerns, [it] would nevertheless [infringe upon] the NRC's exclusive authority" and would therefore be preempted. *English v. General Electric Co.*, 496 U.S. at 84, 85, *quoting Pacific Gas & Electric,* 461 U.S. at 212. Here, S.B. 81 would prohibit Tooele County from providing law enforcement services at the PFS site, which could have a direct and substantial effect on radiological safety, in that it could affect the County's timely response to unauthorized intrusions at the facility and impair the Applicant's physical security plan. Thus, regardless of the State's motivation for adopting S.B. 81, the law impermissibly intrudes into a federally preempted field, and is preempted.[22]

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[21] For example, S.B. 81 Section 17-27-102 ("Purpose") states, in part, that the law was enacted "in order to provide for the health, safety, and welfare. . . of the county and its present and future inhabitants . . ." Section 19-3-302(b)(8) ("Legislative Intent") recites findings by the State that "the transportation, transfer, storage, decay in storage, treatment, and disposal of high-level nuclear waste . . . is an ultra-hazardous activity which carries with it the risk that any release of waste may result in enormous economic and human injury." Similarly, Section 19-3-319(1) ("State response to nuclear release and hazards") finds that "the placement of high-level nuclear waste . . . is an ultra-hazardous activity which may result in catastrophic economic and environmental damage and irreparable human injury in the event of a release of waste and which may result in serious long-term health effects to workers . . . . "

[22] The Commission's authority to license and regulate an ISFSI, and to promulgate and implement its physical security plan regulations, is founded upon the broad regulatory authority conferred by the Atomic Energy Act of 1954, 42 U.S.C. § 2011 *et seq*., and the Energy Reorganization Act of 1974, 42 U.S.C. § 5801 *et seq.* The State's extensive argument that the NRC is prohibited from licensing an ISFSI is therefore invalid. *See* State Response of May 31, 2002, at 8-13. The Licensing Board previously resolved this issue in its ruling on Contention Utah A (*see* LBP 98-7, 47 NRC at 183-84); and this issue is now pending before the Commission. *See Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-02-11, 55 NRC 260, 264-65 (2002). Accordingly, the issue of whether the Commission has the legal authority to license an away-from-reactor ISFSI should be viewed as *stare decisis* in any ruling on Contention Security-J.

To be sure, local governments may be designated to provide law enforcement assistance under an ISFSI's physical security plan. For example, 10 C.F.R. § 73.51(d)(6) requires that a "[d]ocumented liaison with a designated response force or local law enforcement agency (LLEA) must be established to permit timely response to unauthorized penetration or activities." *Id.*, emphasis added. However, the Commission did not require local governments to provide law enforcement assistance to an ISFSI -- and an ISFSI could designate some other offsite response force if it so chooses; thus, the State's exercise of its police powers is not absolutely necessary under the regulations. Moreover, nowhere did the Commission provide an opportunity for a State to prohibit or regulate the shipment or storage of SNF within the State's boundaries. Accordingly, the fact that the regulations afford the option for an ISFSI licensee to designate an LLEA to provide timely response to unauthorized penetrations or activities at its facility, does not provide a basis for finding that a state may intrude into the licensing and regulation of an ISFSI.

2. S.B. 81 Is Preempted in that It Creates an Actual Conflict With Federal Law.

As discussed above, a State law may also be preempted by federal law where it presents an "actual conflict" with the federal law. In this regard, the Supreme Court has stated:

> [W]here the federal government, in the exercise of its superior authority in [the] field, has enacted a complete scheme of regulation . . ., states cannot, inconsistently with the purpose of Congress, conflict or interfere with, curtail or complement, the federal law, or enforce additional or auxiliary regulations.

Hines v. Davidowitz, 312 U.S. 52, 66-67 (1941); *accord, Pacific Gas & Electric,* 461 U.S. at 212.[23] As noted *supra* at 10, a finding of actual conflict may be made even where Congress has not fully occupied the field and has left room for the States to supplement the federal regulation. Thus, an actual conflict may be found to the extent that compliance with both the federal and State laws "is

[23] A determination as to whether the state and federal laws actually conflict, such that the state law is invalidated by the Supremacy Clause, is "a two-step process" that requires ascertaining the construction of the two statutes and then determining whether they are in conflict. *Perez v. Campbell*, 402 U.S. 637, 644 (1971).

a physical impossibility," or where the State law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Pacific Gas & Electric,* 461 U.S. at 204.

To determine whether a state law presents a sufficient obstacle to federal regulatory objectives to warrant a finding of "conflict" preemption, one must consider the relevant federal statutes as a whole, identifying their purposes and intended effects:

> "If the purpose of the act cannot otherwise be accomplished– if its operation within its chosen field else must be frustrated and its provisions be refused their natural effect– the state law must yield to the regulation of Congress within the sphere of its delegated power."

Crosby v. National Foreign Trade Council, 530 U.S. 363, 373 (2000), *quoting Savage v. Jones*, 225 U.S. 501, 533 (1912). Among the purposes of the AEA and the Energy Reorganization Act of 1974 are the safe use of nuclear power, and the regulation of nuclear facilities and materials to assure the protection of public health and safety. *See, e.g.,* Energy Reorganization Act, § 2(a); *Pacific Gas & Electric*, 461 U.S. at 220-22. Achievement of these purposes requires, among other things, providing for the safe storage of spent nuclear fuel, in accordance with NRC regulations adopted pursuant to the Commission's authority under the AEA and the Energy Reorganization Act ("ERA"). *See, e.g.,* ERA, §§203(b), 204(b). The natural effect of these statutes is to permit the construction and operation of away-from-reactor spent fuel storage facilities, if the NRC finds that their licensing will not adversely affect public health and safety.[24]

Here, PFS asserts that the "Municipal Contract Provisions" of S.B. 81 (which prohibit the County from serving as the LLEA for the PFS Facility) would interfere with the construction and operation of the PFS Facility under an NRC license; and the State acknowledges that those provisions would interfere with an NRC license. Applicant's Motion at 8; Contention Request at 7-8.

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[24] The legislative history for the Nuclear Waste Policy Act of 1982, as amended ("NWPA"), 42 U.S.C. § 10101, *et seq*., discloses that Congress explicitly contemplated the storage of SNF at a private away-from-reactor site when it enacted the NWPA. *See, e.g.,* H.R. Rep. No. 97-785 (Part I), 97th Cong. 2d Sess. (1982). A discussion of relevant NWPA legislative history on this issue may be found in "NRC Staff's Brief in Response to CLI-02-11," dated May 15, 2002, at 13-15.

The Staff's review leads it to conclude that the State, in enacting S.B. 81, has attempted to frustrate the natural effect of the spent fuel storage and transportation regulatory scheme established under the AEA; further, S.B. 81 interferes with the construction and safe operation of an ISFSI, by prohibiting the facility outright, by imposing new regulatory and financial burdens on the facility, and by prohibiting the provision of municipal services such as law enforcement assistance to the facility. In effect, S.B. 81 imposes regulations that are "tantamount to a rejection" of NRC decision-making authority and the regulatory scheme established by the Commission under the AEA. *See, e.g., Kerr-McGee Chemical Corp. v. City of West Chicago*, 914 F.2d 820, 826-27 (7th Cir. 1990). As such, S.B. 81 frustrates and poses an obstacle to the accomplishment of the full purposes and objectives of Congress in the AEA and ERA with respect to the safe development of nuclear power and federal regulation of nuclear safety and, it is, therefore, preempted. *See, e.g., Jersey Central Power & Light Co. v. Township of Lacey,* 772 F.2d 1103, 1112 (3d Cir. 1985), *cert denied,* 475 U.S. 1013 (1986) (ordinance prohibiting the importation of SNF for storage was preempted by federal regulation of SNF storage and transportation); *Illinois v. General Electric Co.*, 683 F.2d 206, 215 (7th Cir. 1982), *cert. denied,* 461 U.S. 913 (1983) (AEA "preempts state regulation of the storage, and shipment for storage, interstate and intrastate alike, of spent nuclear fuel"); *Long Island Lighting Co. v. County of Suffolk, N.Y.*, 628 F. Supp. 654, 664, 666 (E.D.N.Y. 1986) (law imposing criminal penalties for participation in emergency response exercises in which the roles played by local government officials are simulated, was preempted). *Cf. City of New York v. State of New York*, 715 F.2d 732 (1983), *cert. denied*, 465 U.S. 1055 (1984) (U.S. Department of Transportation regulations preempt state law in the area of hazardous materials transportation).

Moreover, even if the State's laws were drafted with an otherwise valid purpose, those laws would nonetheless be preempted. Thus, in *Perez v. Campbell*, 402 U.S. 637, 651-52, 654 (1971), the Supreme Court held that both the purpose and the effect of the State law must be ascertained, and that a State law should not be permitted to frustrate the operation of federal law simply

because the state legislation enacted its law with some purpose in mind other than one of frustrating the federal law. *Cf. Pacific Gas & Electric Co.*, 461 U.S. at 216 n.28.

D. S.B. 81 is Unconstitutional as an Impermissible Restriction on Interstate Commerce

In its Motion, PFS asserts that S.B. 81 is invalid under the Commerce Clause of the U.S. Constitution, U.S. Const. Art. I, § 8, cl. 3, in that the law places an undue restraint on interstate commerce; further, PFS asserts that "strict scrutiny" applies, and the law is *per se* invalid (Motion at 8-11). The Staff concurs in that assessment.

Under the Commerce Clause, Congress has been given the power to regulate commerce among the several states. The Commerce Clause further has a "negative" or "dormant" aspect, which prohibits any state from unjustifiably discriminating against or imposing undue burdens on the flow of interstate commerce. *Oregon Waste Systems, Inc. v. Dept. of Environmental Quality of Oregon*, 511 U.S. 93, 98 (1994); *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dept. of Natural Resources*, 504 U.S. 353, 359 (1992). This prohibition arises out of the principle that "our economic unit is the Nation, which alone has the gamut of powers necessary to control . . . the economy, [which] has as its corollary that the states are not separable economic units." *Oregon Waste Systems,* 511 U.S. at. 98-99, *citing H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 537-38 (1949).

The first inquiry regarding whether a state has imposed an impermissible restriction on interstate commerce is to determine whether the state law at issue regulates evenhandedly with only incidental effects on interstate commerce, or discriminates (either facially, in purpose, or in effect) against interstate commerce. *Oregon Waste Systems*, 511 U.S. at 99; *Chemical Waste Management, Inc. v. Hunt*, 504 U.S. 334, 342, 344 n.6 (1992). In this context, "discrimination" means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter. *Oregon Waste Systems*, 511 U.S. at 99. If the restriction is discriminatory, strict scrutiny applies and the restriction is considered to be *per se* invalid, *Id.* at 99, unless the

state shows that the restriction "advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives." *Id.* at 100-01, *citing New Energy Co. of Indiana v. Limbach*, 486 U.S. 269, 278 (1988).

In this regard, strict scrutiny has been found to apply where discrimination against interstate commerce is "patent" on its face or in its effect. In such a case, neither widespread benefit to in-state interests nor widespread detriment to out-of-state interests need be shown for strict scrutiny to apply. *See Wyoming v. Oklahoma*, 502 U.S. 437, 456 (1992), *citing New Energy Co.*, 486 U.S. at 276-77. Here, "[w]hat is crucial is the attempt by one State to isolate itself from a problem common to many by erecting a barrier against the movement of interstate trade." *Philadelphia v. New Jersey*, 437 U.S. 617, 628 (1978) (a New Jersey ban on importation of out-of-state waste was invalid under the Commerce Clause). *Accord, Chemical Waste Management, Inc.*, 504 U.S. at 339-40; *Illinois v. General Electric Co.*, 683 F.2d at 213-14 (state law's ban on importing SNF for storage at an Illinois facility violated the Commerce Clause).

Finally, under this doctrine, a state law, even if nondiscriminatory, may be found to be unconstitutional if it imposes an "undue burden" on interstate commerce -- *i.e.*, where it imposes a burden upon interstate commerce that is "clearly excessive in relation to the putative local benefits." *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). In this regard, "the extent of the burden that will be tolerated will . . . depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities." *Id.*

S.B. 81, on its face, does not contain language that explicitly establishes a "discriminatory" regulation of interstate commerce, in that it does not explicitly impose a burden on out-of-state interests for the benefit of in-state interests. However, a finding of discriminatory regulation under the Commerce Clause may also be made where the law has a discriminatory purpose or a discriminatory effect. *See, e.g., Chemical Waste Management, Inc.*, 504 U.S. at 344 n.6, *citing Hunt v. Washington Apple Advertising Commission*, 432 U.S. 333, 352-53 (1977); *Philadelphia v.*

New Jersey, 437 U.S. at 626-27. Here, inasmuch as the shippers of SNF are all out-of state, the effect of the statute is discriminatory. Moreover, S.B. 81 was clearly enacted out of discriminatory purposes: For example, section 19-3-302 (entitled "Legislative intent") states that S.B. 81 was enacted "to prevent the placement of any high-level nuclear waste or greater than class C radioactive waste in Utah." This section was enacted with full knowledge that any such waste would come to Utah from out-of-state, and the stated purpose for S.B. 81 was to discriminate against the importation of SNF from out-of-state sources. Thus, strict scrutiny applies, and S.B. 81 should be found to constitute a discriminatory regulation of interstate commerce.

Further, S.B. 81 establishes a "patent" restriction on interstate commerce, in that it applies broadly to SNF transfer facilities and SNF transportation, and thereby seeks "isolate" the State from a problem that is "common to many by erecting a barrier against the movement of interstate trade." This is accomplished both through the law's outright ban on the importation of spent nuclear fuel,[25] and through its denial of law enforcement and other municipal services to storage facilities.[26] This erection of a complete trade barrier against an article of commerce triggers strict scrutiny and is clearly impermissible. *See Philadelphia v. New Jersey*, 437 U.S. at 624, 628-29.

Under the "dormant" Commerce Clause doctrine, strict scrutiny amounts to a "virtually *per se* rule of invalidity." *Id.* at 624. Applying strict scrutiny in this case, it is clear that S.B. 81 constitutes an impermissible state regulation of interstate commerce. First, the State's purpose of protecting public health and safety is not valid, since the federal government has the exclusive authority to regulate radiological health and safety matters associated with the construction and operation of a spent fuel storage facility and the transportation of SNF. *See* discussion *supra*,

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[25] *See, e.g.*, S.B. 81, §§ 19-3-301(3), (5), (6); 19-3-302(1)(b); 19-3-303(8), (13).

[26] *See, e.g.,* S.B. 81, §§ 19-3-301(6) and (9)). By effectively banning the importation of SNF for storage, the municipal contract provisions make it difficult (and perhaps impossible) for an ISFSI to meet federal regulatory requirements.

at 9-16. In any event, the purposes supporting S.B. 81 -- protection of the public health and safety, environment and the economy from the hazards of SNF transportation and storage (*e.g.,* S.B. 81, § 17-27-102) -- are not compelling enough to support the restriction imposed upon interstate commerce, given the federal regulatory scheme which embraces and addresses these purposes; and they are barred as an impermissible attempt to isolate the State from the importation of an article in the stream of interstate commerce. *Philadelphia v. New Jersey*, 437 U.S. at 629.

Finally, even if strict scrutiny does not apply in this case, S.B. 81 is unconstitutional because the burdens imposed upon interstate commerce by S.B. 81 clearly exceed any putative local benefits. First, the State's interest in protecting public health and safety is satisfied by the NRC's regulation of any ISFSI within the State's boundaries, and by the NRC and U.S. Department of Transportation's regulation of SNF transportation, consistent with those agencies' statutory mandates. Similarly, protection of the environment is accomplished under the existing regulatory scheme. In contrast, S.B. 81 imposes a substantial burden on interstate commerce -- *i.e.*, a total prohibition of the storage, transfer, or transportation of SNF into or within the borders of Utah. Balancing this burden against the putative benefits, S.B. 81 is clearly excessive in its regulation of interstate commerce, and is unconstitutional. *See Pike v. Bruce Church, Inc.*, 397 U.S. at 142.[27]

[27] PFS also asserts that S.B. 81 violates the Contracts Clause of the Constitution (U.S. Const., Art. I, § 10, cl. 1), based, in part, on *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400 (1983). *See* Motion at 11 n.13. Under that decision, S.B. 81 clearly "operate[s] as a substantial impairment of a contractual relationship," *Id.* at 411, in that it would invalidate the CLEA between Tooele County, the BIA and the Skull Valley Band. Further, "a significant and legitimate public purpose" for this impairment is lacking, in that public health and safety for SNF shipment and storage is already provided by federal regulation. Finally, the law's outright prohibition of SNF storage and transportation and its extensive fallback conditions do not constitute "reasonable conditions" and are not "of a character appropriate to the public purpose" of the law, in that far less restrictive legislation could have been devised to accomplish any non-preempted purpose for the law. *Id.* at 412. Accordingly, S.B. 81 is invalid under the Contracts Clause.

E. Summary Disposition of Contention Security-J Is Appropriate Under the Commission's Realism Doctrine.

PFS asserts that summary disposition of Contention Security J should be rendered under the Commission's "realism" doctrine (Motion at 12-18). The Staff agrees with this conclusion.[28]

The realism doctrine was adopted in the context of offsite emergency planning for nuclear power plants under 10 C.F.R. Part 50. The regulations in Part 50 recognize the substantial role that is normally performed by State and local government officials in planning for and responding to a radiological emergency at a nuclear power plant.[29] At the same time, where offsite authorities do not provide an adequate plan, the regulations permit a Part 50 applicant to submit its own offsite "utility plan." In that context, the Commission announced its realism doctrine, stating that it will

[28] The Licensing Board has stated that the legal issue raised in Contention Security-J is "the central -- and likely dispositive -- matter" to be decided in the litigation of this contention. LBP-01-20, 53 NRC at 571. That conclusion is fully consistent with PFS's motion for summary disposition and the State's response thereto, in that no party has argued that any factual issue requires consideration in resolving this contention. *See, e.g.*, Applicant's "Statement of Material Facts on Which No Genuine Dispute Exists," dated April 30, 2002, and "State of Utah's Statement of Disputed and Relevant Material Facts," dated May 31, 2002. In this regard, the Staff notes that the State has not challenged the adequacy of Tooele County's response; and the timeliness of the County's response was resolved by the Board's dismissal of Contention Security-C. *See Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-98-13, 47 NRC 360, 369-70 (1998) (defining the issues in Contention Security-C, as filed); *Id.*, LBP-00-05, 51 NRC 64, 68 (2000) (dismissing Contention Security-C). Thus, neither the timeliness nor the adequacy of the County's response is at issue in this adjudicatory proceeding.

[29] Under 10 C.F.R. Part 50, the Commission must find "reasonable assurance that adequate protective measures can and will be taken in the event of a radiological emergency" which (in the absence of an offsite utility plan), requires consideration as to whether State and local emergency plans "are adequate and whether there is reasonable assurance that they can be implemented." 10 C.F.R. § 50.47(a)(1) and (2). *See also, Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), CLI-83-13, 17 NRC 741 (1983). Under 10 C.F.R. Part 50, State and local officials are normally expected to perform a variety of emergency planning and response functions, such as determining appropriate protective actions for the 10-mile plume exposure pathway emergency planning zone ("EPZ") and 50-mile ingestion pathway EPZ, implementing evacuation procedures, controlling access to the EPZ, activating the public notification system, and participating in emergency planning exercises. *See* 10 C.F.R. § 50.47(b) and 10 C.F.R. Part 50, Appendix E.

recognize "the reality that in an actual emergency, state and local government officials will exercise their best efforts to protect the health and safety of the public." 10 C.F.R. § 50.47(c)(1)(iii).[30]

Although the "realism doctrine" arose in the specific context of offsite emergency planning under 10 C.F.R. Part 50, it should apply as well with respect to a response by a local law enforcement agency to unauthorized penetration or activities at an ISFSI. In both cases, local government officials may be expected to perform the role they have always performed in the event of an actual emergency of any kind, *i.e.*, "they will act to protect their citizenry" and will "do their best to help protect the affected public." *See* n. 29, *supra*. [31]

Moreover, the requirements pertaining to an LLEA's response to unauthorized penetration or activities at an ISFSI under Part 72 are substantially less comprehensive and prescriptive than the requirements applicable to emergency response organizations under 10 C.F.R. Part 50.[32] In this context, particularly where the Applicant's physical security plan includes both an armed onsite

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[30] *See Statement of Consideration,* "Evaluation of the Adequacy of Off-Site Emergency Planning for Nuclear Power Plants at the Operating License Review Stage Where State and/or Local Governments Decline To Participate in Off-Site Emergency Planning," 52 Fed. Reg. 42,078 (1987); *cf. Commonwealth of Massachusetts v. United States*, 856 F.2d 378, 383 (1st Cir. 1988); *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), CLI-86-13, 24 NRC 22, 29-32 (1986). The rule embodying this doctrine was declared to be "generic in the sense that it is of general applicability and future effect, covering future plants as well as existing plants," 52 Fed. Reg. at 42,081; and was founded upon the Commission's recognition that "in an actual emergency, state and local governmental authorities will act to protect their citizenry," notwithstanding any pre-emergency statements to the contrary; and that "[i]t would be irrational for anyone to suppose that in a real radiological emergency, state and local public officials would refuse to do what they have always done in the event of emergencies of all kinds: do their best to help protect the affected public," as "two hundred years of American history amply demonstrates." *Id.* at 42,082.

[31] In the event of an unauthorized penetration or activities which constitute a "threat" at an ISFSI, a federal response may also be expected. *See, e.g.,* "Memorandum of Understanding Between the Federal Bureau of Investigation and the [NRC] Regarding Nuclear Threat incidents Involving NRC Licensed Facilities, Materials, or Activities," 65 Fed. Reg. 31,197 (2000) (providing, *inter alia*, for communication and liaison between NRC, FBI, and local law enforcement agencies, and FBI coordination of federal agency response to threats at NRC-licensed facilities).

[32] For example, an LLEA under 10 C.F.R. Part 72 is not required to perform any of the detailed planning, exercise and response activities specified in 10 C.F.R. Part 50 with respect to offsite emergency response organizations. *See* n.29, *supra*.

force and clearly documented liaison with a local law enforcement agency under a duly executed agreement, there is a firm basis for application of the realism doctrine. Moreover, Tooele County officials have already shown their willingness to respond to threats at the PFS facility, as reflected in the County's execution and ratification of the CLEA. In these circumstances, Tooele County may be expected to respond to unauthorized penetration or activities at the site, supplementing the armed onsite response provided by PFS.[33] Accordingly, summary disposition of Contention Security-J is appropriate on this basis, as a matter of law.

CONCLUSION

For the reasons set forth above, the Staff submits the Applicant's motion for summary disposition of Utah Contention Security-J should be granted as a matter of law.

Respectfully submitted,

/RA/
Sherwin E. Turk
Jared K. Heck
Counsel for NRC Staff

Dated at Rockville, Maryland
this 22nd day of July 2002

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[33] The Staff has previously stated its view that PFS might be able to meet the documented liaison and timely response requirements of Part 73, and other requirements of 10 C.F.R. § 73.51(b), by means other than reliance on Tooele County, in that it could have designated a "response force" other than a "local law enforcement agency" (Staff Response at 9-10). The Applicant, however, stated that the Utah legislation is "so severe and pervasive" that, if it is upheld, PFS would have to abandon the project. *See* LBP-01-20, 53 NRC at 571 n.4. While the Staff does not dispute that assertion, we note that in the Applicant's Motion, PFS further argues that it must rely upon an LLEA, in that PFS is a private entity which lacks the necessary police powers "to investigate, charge and detain law-breakers" (Motion at 13 n.16). The Staff does not share that view. Although PFS is a private entity, it clearly has the authority to retain or provide its own armed response force, so as to provide a timely response to unauthorized penetration or activities at its facility and protect against loss of control of the storage casks, and it could make a "citizen's arrest" of any intruders at the site without relying upon an LLEA to provide a timely response. *See, e.g.*, 10 C.F.R. § 73.51(d)(5) and App. B. After such a "timely response" has been made by PFS's designated response force, PFS could remand any wrongdoers to the proper State or federal authorities for detention and prosecution.

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-ISFSI
	)	
(Independent Spent Fuel Storage Installation)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S RESPONSE TO APPLICANT'S MOTION FOR SUMMARY DISPOSITION OF CONTENTION UTAH SECURITY-J," 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 22nd day of July, 2002:

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