RAS 4744

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, LLC (Independent Spent Fuel Storage Installation)	)	ASLBP No. 97-732-02-ISFSI
	)	9 August 2002

UTAH'S REPLY TO STAFF'S RESPONSE TO PFS'S MOTION FOR SUMMARY DISPOSITION OF UTAH CONTENTION SECURITY J – LAW ENFORCEMENT

I. INTRODUCTION

With this Reply, Utah addresses two recent developments: Staff's 22 July 2002 Response relative to Security J and Judge Tena Campbell's 30 July 2002 Order in PFS's federal district court action against Utah. We demonstrate that neither development provides any sound basis for granting PFS's motion for summary disposition. We begin with Staff's Response.

Template = SECY-041

SECY-02

II.
BECAUSE STAFF'S RESPONSE IS PREMISED ON FOUR FUNDAMENTAL DEFECTS, THAT RESPONSE PROVIDES NO GOOD REASON TO GRANT PFS'S MOTION.

1. Staff's Response attacks Utah statutes NOT at issue while failing to address meaningfully the genuinely relevant statutes.

The four Utah statutes genuinely at issue relative to Security J are commonly referred to as "the municipal contract provisions." Those four provisions are codified as Utah Code § 17-27-102(2); § 17-34-1(3); § 19-3-301(6); and § 19-3-301(9). In Utah's 31 May 2002 Opposition, at pages 4 -8, we demonstrated that the municipal contract provisions are the only statutes genuinely at issue here and that other state statutes are not relevant to resolution of Security J. Those other statutes are not relevant here simply because they have nothing to do with the adequacy of PFS's security plan. We urge the Board to review those pages of our Opposition.

Yet Staff, with its subsequent Response, chose – and we can only assume chose consciously – to attack not the municipal contract provisions but those other and irrelevant statutory provisions originating in Utah's S.B. 81 – and to do so over and over again, *ad nauseam.* The Response says nothing regarding our Opposition's demonstration that **only** the municipal contract provisions are relevant to this Board's present task. The Response fails to acknowledge that the municipal contract provisions constitute only four of dozens of statutory provisions in S.B. 81, a bill dealing with disparate and varied matters. The Response fails to acknowledge that the other (and irrelevant) provisions of S.B. 81 have nothing to do with the adequacy of PFS's security plan. The Response fails

to acknowledge that S.B. 81 contains a severance provision, now codified as U.C.A. § 19-3-317. The Response fails to acknowledge that under governing law, because of the severance provision, a holding that other (and irrelevant) provisions of S.B. 81 are unconstitutional will have **no** effect on the municipal contract provisions. *E.g., Leavitt v. Jane L.*, 518 U.S. 137 (1996).[1]

In light of the Response's disquieting tactics, it is fair to read the Response as tacitly conceding the invulnerability of the municipal contract provisions to pre-emption attack. Indeed, it is not reasonable to read the Response any other way.[2]

This conclusion of a tacit concession is strengthened by the fact that the Response says nothing meaningful to counter the NRC and court authority set forth in our Opposition – authority that the Atomic Energy Act does not pre-empt a state's "non-participation" decision. (The municipal contract provisions express Utah's non-participation decision.) We address in the next section this fundamental flaw in the Response.

---

[1] The Response also repeatedly mischaracterizes the structure and operation of Utah's statutory treatment of nuclear wastes. Our Opposition sets forth an accurate description. Please compare the two. Opposition, pp. 5-7; Response, pp. 8-9.

[2] The Response's tactics remind us of a bully who, fearful of engaging his appointed opponent, starts beating up on seemingly less muscular by-standers.

2. The Response does not engage directly the NRC and court authority governing resolution of a pre-emption attack on statutes like the municipal contract provisions yet does attempt to avoid those authorities' force by misstating Utah law.

In our Opposition, at pages 13-14, we demonstrated that in *Long Island Lighting Co.*, 21 NRC 644, 900-909 (1985)(Margulies, Kline, and Shon), the Board examined in a thorough, scholarly fashion the very same pre-emption arguments raised here and rejected those pre-emption arguments entirely. We further demonstrated that the court in *Citizens for an Orderly Energy Policy, Inc. v. County of Suffolk*, 604 F.Supp. 1084, 1093-96 (E.D.N.Y. 1985), did the same. Yet the Response refuses to engage those authorities directly. Rather, its tactic is to evade the force of those authorities by doing two things. First, the Response argues that other (and irrelevant provisions) of S.B. 81 do not constitute an expression of the State's "non-participation" decision. Response, at p. 13 n. 20. True, but meaningless and irrelevant, exactly because those other (and irrelevant) provisions have nothing to do with the adequacy of PFS's security plan. Second, the Response misstates Utah law when it argues that Tooele County can and is willing to – independently – "serve as the LLEA for the PFSF" and therefore the municipal contract provisions should not be viewed as an expression of a relevant "non-participation" decision. *Id.* That is a misstatement of Utah law because in Utah a county is **not** an independent governmental entity; a county is rather a political arm or legal subdivision of the State. Utah Constitution, Art. XI, § 1. Thus, when the State makes a decision regarding the allocation of law enforcement resources, that decision is valid and binding, whether it applies to the Highway Patrol or county law enforcement officers.

Thus, the authorities the Response is afraid to mention do apply and do govern, and the Response's silence and evasive tactics regarding them must be deemed, as before, a tacit concession of the invulnerability of the municipal contract provisions to pre-emption attack.

3. The Response's attempted evasion of the role of the threshold issue here will not wash.

In our Opposition, at pages 8-11, we demonstrated that a pro-PFS resolution of the threshold issue was absolutely essential to a holding of unconstitutionality relative to the municipal contract provisions. Stated conversely, we demonstrated that until this Board, on some basis, resolved the threshold issue on the merits in favor of PFS, this Board had to reject or defer PFS's constitutional challenges to the municipal contract provisions.

In the face of this demonstration, the Response relies on, and only on, a material misstatement. The Response says that the Board has already resolved the threshold issue in favor of PFS and that resolution is now *stare decisis.* Response, at p. 14 n. 22. But this misstates what this Board did in rejecting Utah Contention A (raising the threshold issue). Fairly read, the Board's decision simply announced that the Board was not authorized to address a contention constituting an attack on a Commission regulation (or, stated more accurately in these circumstances, a Commission interpretation of a regulation, inasmuch as the Part 72 regulation itself does not expressly authorize an away-from-reactor ISFSI.) *In the Matter of Private Fuel Storage, L.L.C.*, 47 NRC 142, 183-84

(22 April 1998) ("inquiry into that determination [regarding the threshold issue] is beyond our authority") (relevant pages attached for ready reference). Such an acknowledgment of a lack of authority to resolve an issue one way or the other does not constitute such a resolution of an issue as will support notions of *stare decisis.*

And even if – reading the Board's Contention A ruling as pro-PFS as possible – that ruling is seen as a statement that the Commission has already resolved the threshold issue and in a way favorable to PFS, that statement no longer has basis. The Commission's decision to resolve on the merits Utah's 11 February 2002 Suggestion of Lack of Jurisdiction constitutes acknowledgment that the Commission must resolve the threshold issue on its merits exactly because it has not done so previously. *In the Matter of Private Fuel Storage, L.L.C.*, 55 NRC 260 (3 April 2002) (attached for ready reference).

In short, the Response, by relying solely on the misstatement underlying and relative to *stare decisis*, fails to come to grips with and counter in any genuine fashion what our Opposition demonstrated: Until this Board, on some basis, resolves the threshold issue on the merits in favor of PFS, this Board has to reject or defer the constitutional challenges to the municipal contract provisions.

4. The Response's arguments regarding the "realism doctrine" ignore reality.

In our Opposition, at pages 2-4 and 20 and Appendix 2, we demonstrated that the "realism doctrine" cannot sensibly, logically, or safely be applied to the absence of a contract between PFS and local law enforcement. The Response's efforts to counter

wreck on the hard reef of the hard facts. The 2 December 1998 Ahlstrom to Nielson letter attached to our Opposition evidences that, absent a valid, written agreement between Tooele County and PFS regarding the PFS facility and its 820 acres, the County does not see a basis for providing law enforcement services to that facility. The County and PFS never entered into such an agreement, and Utah's "non-participation" decision precludes such an agreement now.

Moreover, the Response's approach to the "realism doctrine" gives rise to a serious constitutional problem. The Response's logic would have the NRC, a federal agency, dragooning a state's law enforcement officers, contrary to the state's wishes, for the accomplishment of a federal purpose or program, provision of security to a federally licensed facility, a facility purportedly not capable of operation without that security. Yet the Constitution prohibits such federal action. *Printz v. United States,* 521 U.S. 898, 933 (1997) ("The Federal Government may not compel the states to enact or administer a federal regulatory program."). This principle would seem to apply with particular force here where, as the Response candidly acknowledges, PFS has a reasonable alternative to dragooning the State's law enforcement officers:

> "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."

Response, at p. 23 n. 33.

* * * * * * * * * *

In short, the Response's treatment of the "realism doctrine" provides no basis for granting PFS's motion for summary disposition. Indeed, each and all of the four fundamental defects in that Response constitute additional support for denial of PFS's motion.

* * * * * * * * * * *

III.
BECAUSE OF THE NATURE AND PROCEDURAL POSTURE OF JUDGE CAMPBELL'S 30 JULY 2002 ORDER, THAT ORDER PROVIDES ONLY A QUICKSAND BASIS FOR GRANTING PFS'S MOTION.

On 31 July 2002, Utah provided the Board with a copy of Judge Campbell's 30 July 2002 Order ("the Order"). Because of the nature and procedural posture of the Order, a Board decision granting PFS's motion cannot be safely or wisely premised on that Order.

First, the Order does not address or resolve the threshold issue. Second, the Order, in ruling against the municipal contract provisions relies on only an AEA pre-emption theory. (The Order engages in Commerce Clause analysis only in connection with statutory provisions not implicated here.) Third, the Order does not analyze the municipal contract provisions separately or distinctly but rather applies a blanket analysis to the many varied provisions constituting Utah's general statutory scheme. Fourth, – and this is a natural consequence of the third feature of the Order – the Order does not engage in any meaningful analysis of the municipal contract provisions – and certainly not any analysis of the depth appearing in *Long Island Lighting Co.*, 21 NRC 644, 900-909

(1985)(Margulies, Kline, and Shon), and *Citizens for an Orderly Energy Policy, Inc. v. County of Suffolk*, 604 F.Supp. 1084, 1093-96 (E.D.N.Y. 1985) (Altimari, J.). Those authorities' holding on the AEA pre-emption issue is contrary to the Order's holding. At the Tenth Circuit, the Board's and Judge Altimari's careful analysis is likely to prevail over what the Order sets forth. Fifth, the Order (in the district court's view) constitutes a final judgment resolving all issues in the action and rendering the action appealable as of right. See attached letter of 30 July 2002 from the district court to counsel. Consequently, Utah is already moving ahead with its appeal to the Tenth Circuit. See attached "Notice of Appeal."[3]

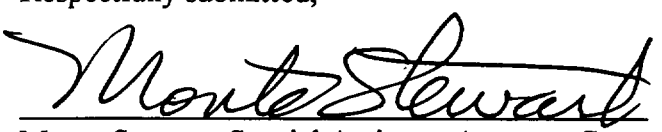
In light of these indisputable facts regarding the nature and procedural posture of the Order, it would be imprudent to use the Order as a basis for summary disposition of Security J. The Board, all the parties, and the process will be better served by the Board doing its own independent analysis and coming to its own conclusions. Certainly if the Board grants PFS's motion for summary disposition on the basis of the Order, some

[3] In Utah's 31 July 2002 filing, we stated our then existing intent to file with Judge Campbell a motion for reconsideration. But in light of the relative quality of the Order and of the need for an expeditious appeal, Utah has now elected not to file such a motion but rather to do all within its power to achieve appellate review as quickly as possible.

months from now upon reversal of the Order we will all be right back here going through this drill all over again. We respectfully submit that wisdom dictates a different course.[4]

DATED: 9 August 2002.

Respectfully submitted,



Monte Stewart, Special Assistant Attorney General
Helen A. Frohlich, Assistant Attorney General
Denise Chancellor, Assistant Attorney General
Connie Nakahara, Special Assistant Attorney General
Utah Attorney General's Office
160 East 300 South, 5th Floor, P.O. Box 140873
Salt Lake City, UT 84114-0873
Telephone: (801) 366-0286, Fax: (801) 366-0292

[4] The Commission's sophisticated treatment of collateral estoppel principles certainly does not mandate a blind adherence here to the Order as a basis for granting PFS's motion. The Commission and the Boards have long acknowledged that some "special public interest factor in a particular case" will sustain a refusal to blindly apply a different adjudicatory body's resolution of an issue. *E.g., Alabama Power Co.*, 7 AEC 203 (27 March 1974); *The Toledo Edison Co.*, 4 NRC 561, 568-89 (Head, AJ, dissenting). The description in the text above of the nature and procedural posture of the Order sustains here a finding of the requisite "special public interest factor" and hence of this Board's power to resolve independently the constitutionality of the municipal contract provisions.

CERTIFICATE OF SERVICE

I hereby certify that a copy of this paper was served on the persons listed below by electronic mail (unless otherwise noted) with conforming copies by United States mail first class, on 9 August 2002.

Rulemaking & Adjudication Staff
Secretary of the Commission
U. S. Nuclear Regulatory Commission
Washington D.C. 20555
E-mail: hearingdocket@nrc.gov
(*original and two copies*)

G. Paul Bollwerk, III, Chairman
Administrative Judge
Atomic Safety and Licensing Board
U. S. Nuclear Regulatory Commission
Washington, DC 20555
E-Mail: gpb@nrc.gov

Dr. Jerry R. Kline
Administrative Judge
Atomic Safety and Licensing Board
U. S. Nuclear Regulatory Commission
Washington, DC 20555
E-Mail: jrk2@nrc.gov
E-Mail: kjerry@erols.com

Dr. Peter S. Lam
Administrative Judge
Atomic Safety and Licensing Board
U. S. Nuclear Regulatory Commission
Washington, DC 20555
E-Mail: psl@nrc.gov

Sherwin E. Turk, Esq.
Catherine L. Marco, Esq.
Office of the General Counsel
Mail Stop - 0-15 B18
U.S. Nuclear Regulatory Commission
Washington, DC 20555
E-Mail: set@nrc.gov
E-Mail: clm@nrc.gov
E-Mail: pfscase@nrc.gov

Jay E. Silberg, Esq.
Ernest L. Blake, Jr., Esq.
Paul A. Gaukler, Esq.
Shaw Pittman, LLP
2300 N Street, N. W.
Washington, DC 20037-8007
E-Mail: Jay_Silberg@shawpittman.com
E-Mail: ernest_blake@shawpittman.com
E-Mail: paul_gaukler@shawpittman.com

John Paul Kennedy, Sr., Esq.
David W. Tufts
Durham Jones & Pinegar
111 East Broadway, Suite 900
Salt Lake City, Utah 84111
E-Mail: dtufts@djplaw.com

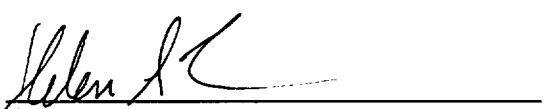
Joro Walker, Esq.
Land and Water Fund of the Rockies
1473 South 1100 East, Suite F
Salt Lake City, Utah 84105
E-Mail: utah@lawfund.org
[*electronic copy only*]

Larry EchoHawk
Paul C. EchoHawk
Mark A. EchoHawk
EchoHawk Law Offices
151 North 4th Street, Suite A
P.O. Box 6119
Pocatello, Idaho 83205-6119
E-mail: paul@echohawk.com

Tim Vollmann
3301-R Coors Road N.W. # 302
Albuquerque, NM 87120
E-mail: tvollmann@hotmail.com

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

Office of the Commission Appellate Adjudication
Mail Stop: O14-G-15
U. S. Nuclear Regulatory Commission
Washington, DC 20555



Helen A. Frohlich
Assistant Attorney General
State of Utah

47 N.R.C. 142
(Cite as: 47 N.R.C. 142, 1998 WL 223777 (N.R.C.))

**1 IN THE MATTER OF
PRIVATE FUEL STORAGE, L.L.C.
(Independent Spent Fuel Storage Installation)

Nuclear Regulatory Commission

Atomic Safety and Licensing Board

LBP-98-7
Docket No. 72-22-ISFSI (ASLBP No. 97-732-02-ISFSI)

April 22, 1998

*142 Before Administrative Judges: G. Paul Bollwerk, III, Chairman; Dr. Jerry R. Kline; Dr. Peter S. Lam

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

RULES OF PRACTICE: INTERVENTION

Longstanding agency practice requires that an individual, group, business entity, or governmental entity that wants to intervene "as of right" as a full party in an adjudicatory proceeding concerning a proposed licensing action must establish that it (1) has filed a timely intervention petition or meets the standards that permit consideration of an untimely petition; (2) has standing to intervene; and (3) has proffered one or more contentions that are litigable in the proceeding. See 10 C.F.R. ss 2.714(a)(1)-(2), (b)(2). Further, the Commission *143 has recognized that, notwithstanding a potential party's failure to meet the elements necessary to establish its standing to intervene as of right, it is possible, as a matter of discretion, to afford that participant party status. See Portland General Electric Co. (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610, 614-17 (1976).

RULES OF PRACTICE: INTERVENTION PETITION(S) (TIMELINESS)

Each intervention petition must be timely filed as prescribed in the notice of opportunity for hearing issued by the agency. For a petition that is not filed on time to be accepted for consideration, the participant seeking to intervene must demonstrate that a balancing of the five

developing a sound record; (4) the extent to which the petitioner's interest will be represented by existing parties; (5) the extent to which the petitioner's participation will broaden the issues or delay the proceeding. See, e.g., Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), CLI-83-19, 17 NRC 1041, 1046-47 (1983).

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

2. State Contentions

UTAH A--Statutory Authority

CONTENTION: Congress has not authorized NRC to issue a license to a private entity for a 4,000 cask, away-from reactor, centralized, spent nuclear fuel storage facility.

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

RULING: Inadmissible in that the contention and its supporting basis impermissibly challenge the agency's existing regulatory provisions or rulemaking-associated generic determinations. See section II.B.1.a.ii above. Nothing in the language of the 10 C.F.R. Part 72 provisions describing an ISFSI and the "persons" authorized to apply for and be issued a license to construct and operate an ISFSI indicates PFS is ineligible to seek such permission. See 10 C.F.R. s 72.2(b); id. s 72.3 (definitions of "Independent spent fuel storage installation" and "Person"); id. s 72.6(a). Indeed, when adopting Part 72 in 1980 the Commission specifically contemplated the possibility of stand-alone, "away from reactor" sites as well as the possibility that there could be "large" installations. See 45 Fed.Reg. 74,693, 74,696, 74,698-99 (1980). Thereafter, when the Commission revised Part 72 following the passage of the Nuclear Waste Policy Act of 1982 (NWPA), 42 U.S.C. ss 5841, 10101-10270--the lodestone for the State's assertion the Board lacks jurisdiction--it made revisions to accommodate the statutory provisions for a monitored retrievable storage (MRS) installation to be constructed and operated by the Department of Energy (DOE). It did not, however, make changes to the original scope of Part 72 that would preclude the creation of an installation such as that now contemplated by PFS. *184 In these circumstances, in which the Commission clearly has established the scope of Part 72, inquiry into that determination is beyond our authority. [FN9]

UTAH B--License Needed for Intermodal Transfer Facility

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

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

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

3. The volume of fuel shipments will not be capable of passing directly through Rowley

55 N.R.C. 260
(Cite as: 55 N.R.C. 260, 2002 WL 531093 (N.R.C.))

****1** IN THE MATTER OF
PRIVATE FUEL STORAGE, L.L.C.
(Independent Spent Fuel Storage Installation)

Nuclear Regulatory Commission

CLI-02-11
Docket No. 72-22-ISFSI

April 3, 2002

***260** COMMISSIONERS: Richard A. Meserve, Chairman; Greta Joy Dicus; Nils J. Diaz; Edward McGaffigan, Jr.; Jeffrey S. Merrifield

STAY OF PROCEEDINGS

In determining whether to grant a stay of a licensing proceeding, the Commission looks at four factors: (1) whether the petitioner has made a strong showing that it is likely to prevail upon the merits; (2) whether the petitioner faces irreparable injury if a stay is not granted; (3) whether the issuance of a stay would harm other interested parties; and (4) where the public interest lies. See Sequoyah Fuels Corp. and General Atomics (Gore, Oklahoma Site), CLI-94-9, 40 NRC 1, 6 (1994); Allied-General Nuclear Services (Barnwell Nuclear Fuel Plant Separations Facility), ALAB-296, 2 NRC 671, 677-78 (1975).

STAY OF PROCEEDINGS

The proponent of the stay has the burden of demonstrating that the four factors are met. See Hydro Resources Inc. (2929 Coors Road, Suite 101, Albuquerque, NM 87120), CLI-98-8, 47 NRC 314, 323 (1998); Alabama Power Co. (Joseph M. Farley Nuclear Plant, Units 1 and 2), CLI-81-27, 14 NRC 795, 797 (1981).

***261** STAY OF PROCEEDINGS: IRREPARABLE INJURY

It is well established in Commission case law that the incurrence of litigation expenses does not constitute irreparable injury for the purposes of a stay decision. See Sequoyah Fuels Corp. and General Atomics, CLI-94-9, 40 NRC at 6. See also Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), CLI-84-17, 20 NRC 801, 804 (1984).

STAY OF PROCEEDINGS: HARM TO OPPOSING PARTIES

The inconvenience of being forced to reschedule attorney and expert time when a scheduled hearing is imminent constitutes harm to opposing parties militating against granting a stay of proceedings. (The argument that opposing party will actually benefit by saving litigation costs if the Commission stays proceedings that will ultimately prove futile once we determine that we have no authority to issue this license. Although this reasoning is imaginative,

PFS does not agree and opposes the stay. The proceedings, which have gone on for over 4 years, are at last nearing completion and further hearings are imminent. If the other parties are forced to reschedule expert and attorney time for some future date, it will cause them great inconvenience.

The imminence of the hearings is also a factor in our determination that the public interest will be served if the parties are allowed to wrap up the matters they have been litigating for so long.

MEMORANDUM AND ORDER

This Order concerns two documents filed by the State of Utah on February 11, 2002, relating to the pending license application submitted by Private Fuel Storage, L.L.C. (PFS). Utah's "Suggestion of Lack of Jurisdiction" argues that the Nuclear Waste Policy Act of 1982, as amended (NWPA), [FN1] deprives the Commission of "jurisdiction" over PFS's application for a license to construct and operate an independent spent fuel storage installation (ISFSI) on the reservation of the Skull Valley Band of Goshute Indians. In its "Petition to Institute Rulemaking and to Stay Licensing Proceeding," Utah asks the Commission to amend its regulations in accordance with this theory, and to suspend related proceedings while the rulemaking is pending.

**2 For the reasons set forth below, we deny the request for stay, set a schedule for interested parties to submit briefs on the substantive issue whether the NRC *262 has authority under federal law to issue a license for the proposed privately owned, away-from-reactor spent fuel storage facility, and defer a decision on the rulemaking petition until we have had the opportunity to decide this threshold legal question.

I. BACKGROUND

In 1980, the NRC promulgated its regulations allowing for licensing of ISFSIs, 10 C.F.R. Part 72, under its general authority under the Atomic Energy Act (AEA) to regulate the use and possession of special nuclear material. [FN2] This was 2 years before Congress enacted the NWPA.

In both its Petition for Rulemaking and "Suggestion of Lack of Jurisdiction," Utah argues that the NWPA contemplates a comprehensive and exclusive solution to the problem of spent nuclear fuel and does not authorize private, away-from- reactor storage facilities such as the proposed PFS facility. Utah rests its argument on the following provision:

> 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 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. [FN3]

Thus, says Utah, the NWPA cannot be said to "authorize" a private, away-from-reactor ISFSI like the proposed PFS facility. Utah claims that because the NWPA established a comprehensive system for dealing with spent nuclear fuel, it is the only possible source for NRC's jurisdiction over spent fuel storage and overrides the Commission's general authority under the AEA to regulate the handling of spent fuel.

PFS opposes Utah's petitions, and argues that nothing in the NWPA expressly repeals the NRC's general, AEA-based licensing authority over spent fuel. PFS emphasizes that the NWPA provision on which Utah relies does not explicitly prohibit a private, away-from-reactor facility. The NRC Staff opposes Utah's

petitions on procedural grounds.

II. DISCUSSION

A. Request for Stay of Proceedings Pending Review

We find that Utah's request does not meet the four-part test for a stay of Board proceedings. In determining whether to grant a stay of a licensing proceeding, the ***263** Commission looks at four factors: (1) whether the petitioner has made a strong showing that it is likely to prevail upon the merits; (2) whether the petitioner faces irreparable injury if a stay is not granted; (3) whether the issuance of a stay would harm other interested parties; and (4) where the public interest lies. [FN4] The proponent of the stay has the burden of demonstrating that these factors are met. [FN5]

First, Utah does not make a strong showing of probable success on the merits. The NWPA on its face does not prohibit private, away-from-reactor spent fuel storage. The NWPA section on which Utah relies, if intended to prohibit such storage, certainly does not do so directly. It says only that "nothing in this act ... encourage[s], authorize[s], or require[s]" the use of such facilities. It does not, in terms, prohibit storage of spent nuclear fuel at any privately owned, away-from-reactor facility - which is Utah's position. We are willing to consider Utah's complex legislative history and statutory structure arguments, but we are not prepared to say that Utah's arguments are likely to prevail.

****3** Second, we find no evidence that Utah faces "irreparable injury" if an immediate stay is not granted. Utah claims that it will suffer a loss of "costs, expenses, and attorneys' fees" resulting from its participation in the PFS licensing proceeding. [FN6] It is well established in Commission case law, however, that we do not consider the incurrence of litigation expenses to constitute irreparable injury in the context of a stay decision. [FN7] Therefore, the State has failed to demonstrate that it would be irreparably harmed if a stay is not granted.

We also find that the third and fourth factors of the stay test are not met. Utah argues that PFS is not harmed, and will in fact benefit by saving litigation costs, if the Commission stays proceedings that will ultimately prove futile once we determine that we have no authority to issue this license. Although this reasoning is imaginative, PFS does not agree and opposes the stay. The proceedings, which have gone on for over 4 years, are at last nearing completion and further hearings are imminent. If the other parties are forced to reschedule expert and attorney time for some future date, it will cause them great inconvenience. The imminence of the hearings is also a factor in our determination that the public interest will be served if the parties are allowed to wrap up the matters they have been litigating for so long.

***264** For the foregoing reasons, we deny Utah's request for a stay of these proceedings.

B. Commission Consideration of NWPA Issue on the Merits

Both the NRC Staff and PFS argue that the Commission should not consider the NWPA issue at this time because the Suggestion of Lack of Jurisdiction is untimely. They maintain that the "suggestion" constitutes an untimely interlocutory appeal of a 1998 Atomic Safety and Licensing Board decision ruling on Contention Utah A. [FN8]

Utah first made its NWPA argument in 1997 in its Contention Utah A in the proceedings before the Licensing Board. [FN9] On April 22, 1998, the Board rejected the contention as an impermissible challenge to the Commission's regulations. [FN10] Utah's newly filed "suggestion" could be viewed as merely a misnamed interlocutory appeal of the 1998 Board ruling, particularly because NRC's rules of practice have no provision for a pleading or motion called a "Suggestion of Lack of Jurisdiction." A petition for interlocutory Commission review, if desired, should have come 15 days after the Board entered the ruling. [FN11] Otherwise, interlocutory rulings must wait for resolution until a final decision is entered.

Despite the reasonableness of the Staff's and Applicant's timeliness argument, we find countervailing concerns that make immediate merits consideration appropriate. The issue presented here raises a fundamental issue going to the very heart of this proceeding. If in fact NRC has no authority to issue PFS a license, completion of the licensing process would be a waste of resources for all parties as well as the Commission. In addition, Utah has filed a petition for rulemaking, arguing that NRC's regulations must be amended in accordance with the state's legal theory. The underlying legal question, whether the law requires a rule change, must be resolved before NRC can accept or deny that petition.

**4 We have decided that the legal issue is better resolved in an adjudicatory format - i.e., through legal briefs - than in a rulemaking format. We therefore take *265 review in the exercise of our inherent supervisory authority over adjudications and rulemakings. [FN12]

The parties to this adjudication are intimately concerned and eminently well informed about the legal question raised in Utah's petition. These litigation parties, as opposed to the general public, are likely to be the source of the most pertinent arguments and information. Public comment is likely to be less useful here, in a situation calling for pure legal analysis, than in the usual situation where the rulemaking proceeding raises scientific, policy, or safety issues. We do consider, however, that persons outside this litigation should have an opportunity to weigh in on the NWPA issue and therefore invite any interested persons to submit amicus curiae briefs.

We conclude that the rulemaking process should be put on hold until the Commission rules on the threshold issue of whether the NWPA deprives it of authority to license a private, away-from-reactor spent fuel storage facility. If the legal issue is ultimately resolved in Utah's favor, then a formal revision clarifying Part 72 could be issued at that time.

III. BRIEFS

We already have before us extensive arguments by Utah (in its Suggestion and Rulemaking Petition) and PFS (in its Response to Utah's Suggestion of Lack of Jurisdiction and attachments). We will consider the legal arguments set forth in those documents.

If these parties wish to supplement the arguments made therein, they may submit further briefs to the Commission by May 15. In addition, interested persons are invited to submit amicus curiae briefs by May 15. Briefs should be no longer than thirty pages and should be submitted electronically (or by other means to ensure that receipt by the Secretary of the Commission by the due date), with paper copies to follow. Briefs in excess of ten pages must contain a table of contents, with page references, and a table of cases (alphabetically arranged), statutes, regulations, and other authorities cited, with references to the pages of the brief where they are cited. Page limitations are exclusive of pages containing a table of contents, table of cases, and any addendum containing statutes, rules, regulations, and like

material.

***266** IV. CONCLUSION

For the foregoing reasons, the request for a stay of proceedings is denied, the petition for rulemaking is deferred, Commission review of the NWPA issue is granted, and the adjudicatory parties and any interested amicus curiae are authorized to file briefs as set out above.

IT IS SO ORDERED.

For the Commission [FN13]

ANNETTE L. VIETTI-COOK

Secretary of the Commission

Dated at Rockville, Maryland, this 3d day of April 2002.

FN1. 42 U.S.C. § 10101 et seq.

FN2. See 45 Fed. Reg. 74,693 (Nov. 12, 1980).

FN3. NWPA § 135(h).

FN4. See Sequoyah Fuels Corp. and General Atomics (Gore, Oklahoma Site), CLI-94-9, 40 NRC 1, 6 (1994); Allied-General Nuclear Services (Barnwell Nuclear Fuel Plant Separations Facility), ALAB-296, 2 NRC 671, 677-78 (1975); cf. Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-02-8, 55 NRC 222, 225 n.7 (2002). This is the same test set forth in our regulations for determining whether to grant a stay of the effectiveness of a presiding officer's decision. 10 C.F.R. § 2.788(e).

FN5. See Hydro Resources Inc. (2929 Coors Road, Suite 101, Albuquerque, NM 87120), CLI-98-8, 47 NRC 314, 323 (1998); Alabama Power Co. (Joseph M. Farley Nuclear Plant, Units 1 and 2), CLI-81-27, 14 NRC 795, 797 (1981).

FN6. Rulemaking Petition at 37-38.

FN7. See Sequoyah Fuels Corp. and General Atomics, CLI-94-9, 40 NRC at 6. See also Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), CLI-84-17, 20 NRC 801, 804 (1984).

FN8. See "NRC Staff's Response to the State of Utah's (1) Request to Stay Proceeding, and (2) Suggestion of Lack of Jurisdiction" (Feb. 26, 2002), at 7-8; "Applicant's Response to Utah's Suggestion of Lack of Jurisdiction" (Feb. 21, 2002), at 4-7.

FN9. See "State of Utah's Contentions on the Construction and Operating License Application by Private Fuel Storage L.L.C. for an Independent Spent Fuel Storage Facility" (Nov. 23, 1997). ("Congress has not authorized the NRC to issue a license to a private entity for a 4000 cask, away-from-reactor, centralized, spent nuclear fuel storage facility.")

FN10. Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-98-7, 47 NRC 142, 183 (1998).

FN11. See 10 C.F.R. § 2.786(b).

FN12. See, e.g., North Atlantic Energy Service Corp. (Seabrook Station, Unit 1), CLI-98-18, 48 NRC 129 (1998); Baltimore Gas & Electric Co. (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), CLI-98-15, 48 NRC 45, 52-53 (1998); cf. Kansas Gas and Electric Co. (Wolf Creek Generating Station, Unit 1), CLI-99-5, 49 NRC 199 (1999).

FN13. Commissioner Diaz was not present for the affirmation of this Order. If he had been present, he would have approved it.

END OF DOCUMENT

UNITED STATES DISTRICT COURT
United States Courthouse
Salt Lake City, Utah

Tena Campbell
United States District Judge

July 30, 2002

J. Michael Bailey
Parsons Behle & Latimer
201 S. Main St. Ste. 1800
P.O. Box 45898
Salt Lake City, UT 84145-0898

James A Holtkamp
Leboeuf Lamb Greene & Macrae LLP
136 S. Main St. Ste. 1000
Salt Lake City, UT 84101

Monte Neil Stewart
Utah Attorney General's Office
5110 St. Office Bldg Fifth Fl.
Salt Lake City, UT 84114

James R Soper
Utah Attorney General's Office
236 State Capitol
Salt Lake City, UT 84114

RE: Skull Valley Band, et al. v. Leavitt, et al.
Civil No. 2:01-CV-270C

Dear Counsel:

The court's order of July 30, 2002, resolved all pending motions. Moreover, the court believes the order also closes the case. If either party believes there are issues yet to be

determined, please contact chambers on or before August 9, 2002.

Yours very truly,

Tena Campbell

TENA CAMPBELL
United States District Judge

MONTE N. STEWART (#8324)
Special Assistant Attorney General
HELEN A. FROHLICH (#8814)
Assistant Attorney General
MARK L. SHURTLEFF (#4666)
Attorney General

Attorneys for the
Defendants and Counterclaimants
5110 State Office Building
Salt Lake City, UT 84114
Telephones: (801) 538-3276
(801) 366- 0353
Facsimile: (801) 538-9727

IN THE UNITED STATES DISTRICT COURT

DISTRICT OF UTAH, CENTRAL DIVISION

THE SKULL VALLEY BAND OF GOSHUTE INDIANS, and PRIVATE FUEL STORAGE, L.L.C., Plaintiffs, vs. MICHAEL O. LEAVITT, in his official capacity as Governor of the State of Utah; MARK L. SHURTLEFF, in his official capacity as Attorney General of the State of Utah; DIANNE R. NIELSON, in her official capacity as Executive Director of the Utah Department of Environmental Quality; THOMAS WARNE, in his official capacity as Executive Director of the Utah Department of Transportation; GLEN EDWARD BROWN, STEPHEN M. BODILY, HAL MENDENHALL CLYDE, DAN R. EASTMAN, SHERI L. GRIFFITH, JAMES GREY LARKIN, and TED D. LEWIS, in their official capacities as Commissioners of the Utah Department of Transportation, Defendants.	**NOTICE OF APPEAL (BY ALL DEFENDANTS AND ALL COUNTERCLAIMANTS)** Civil No. 2:01CV00270C Judge Tena Campbell

MICHAEL O. LEAVITT, in his official capacity as Governor of the State of Utah, and MARK L. SHURTLEFF, in his official capacity as Attorney General of the State of Utah, both on behalf of the STATE OF UTAH and its citizens, Counterclaimants, vs. PRIVATE FUEL STORAGE, L.L.C., and THE SKULL VALLEY BAND OF GOSHUTE INDIANS, Counterdefendant.	

Each and all defendants in this action, and Michael O. Leavitt and Mark L. Shurtleff as counterclaimants, hereby give notice that they (each and all of them) hereby appeal to the United States Court of Appeals for the Tenth Circuit from (i) the Order dated and entered in this action on 30 July 2002 (which the district court by letter dated 30 July 2002 characterized as resolving all pending motions and as operating to close the case) and (ii) from the Order dated and entered in this action on 12 August 2002 denying the counterclaimants' 26 March 2002 Motion for Leave to File Second Amended and Supplemental Counterclaim.

Dated: 12 August 2002

Counsel for the defendants and counterclaimants

By: _____
MONTE N. STEWART

CERTIFICATE OF SERVICE BY MAIL

I certify that a true and correct copy of this document was served by mail, on 12 August 2002, by mailing to:

Tim Vollmann
3301-R Coors Road N.W., Suite 302
Albuquerque, NM 87120

James A. Holtkamp
Leboeuf, Lamb, Greene & MacRae
136 S. Main Street, Suite 1000
Salt Lake City, UT 84111

Counsel for the Skull Valley Band of Goshute Indians

Val R. Antczak
J. Michael Bailey
H. Douglas Owens
Parsons Behle & Latimer
201 South Main Street, Suite 1800
Post Office Box 45898
Salt Lake City, UT 84145-0898

Jay E. Silberg
Ernest L. Blake, Jr.
Shaw Pitman
2300 N Street, N.W.
Washington, D.C. 20037

Counsel for Private Fuel Storage, L.L.C.