RAS 4807

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
	)	27 August 2002

STATE OF UTAH'S RESPONSE TO PFS'S SUPPLEMENT TO PFS'S MOTION FOR SUMMARY DISPOSITION OF UTAH CONTENTION SECURITY J - LAW ENFORCEMENT

As it is entitled to do under this Board's Order of 1 August 2002, the State of Utah files this Response to Applicant's Supplement to Motion for Summary Disposition of Utah Security J - Law Enforcement (19 August 2002) ("Supplement").

The Supplement either misstates or ignores each key point that the State made in its 9 August 2002 Reply to Staff's Response to PFS's Motion for Summary Disposition of Utah Contention Security J ("Reply").

1. The Supplement ignores that resolution of the "threshold issue" is necessary for resolution of PFS's pre-emption and Commerce Clause challenges.

In Utah's 31 May 2002 Opposition to PFS's Motion for Summary Disposition, at 8-10, we demonstrated that one cannot resolve PFS's pre-emption and Commerce Clause challenges without first resolving the "threshold issue" – whether Congress authorized or prohibited a PFS-type facility. The Supplement necessarily concedes that the district court did not resolve the threshold issue, and that the Commission has not yet resolved that issue[1],

[1] Supplement at 6-7.

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but nowhere even attempts to justify PFS's illogical invitation to the Board to resolve now the pre-emption or Commerce Clause challenges without first resolving the unavoidably essential threshold issue.

The continuing reality is that 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. Such a deferral should continue until completion of appellate review of the threshold issue, now an imminent prospect with the State's appeal to the Tenth Circuit Court of Appeals (August 15, 2002).

This last point is particularly compelling relative to PFS's on-going urging that this Board resolve the Commerce Clause challenge. Supplement at 6. Regarding that challenge, of course, this Board has absolutely no "collateral estoppel" basis for evading the threshold issue; the district court did not resolve the Commerce Clause challenge to the municipal contract provisions.

2. The Supplement ignores the manifold and articulated reasons why the Board ought not apply in this case notions of collateral estoppel.

In our 9 August 2002 Reply, the State demonstrated (i) that 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, and (ii) that this case presents numerous reasons qualifying as "special public interest factors." Reply at 8-10 & n.4. To that demonstration, the Supplement can do nothing more than baldly assert – in wholly conclusory and unsupported fashion – that the "State has certainly pointed to no such overriding public policy interests." That bald assertion will not

make go away these realities regarding the district court's July 30, 2002 Order on which PFS pins all its hopes.

First, the district court's Order did not address or resolve the threshold issue – with all the implications of that reality for this Board's adjudicatory task. See Point 1, above. Second, that Order, in ruling against the municipal contract provisions relied on only an AEA pre-emption theory and made no Commerce Clause analysis in connection with those relevant statutory provisions. Third, the Order did not analyze the municipal contract provisions separately or distinctly but rather applied a blanket analysis to the many varied provisions constituting the State's general statutory scheme. Fourth, – and this is a natural consequence of the third feature of the Order – the Order did 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.* (Shoreham Nuclear Power Station, Unit 1), LBP-85-12 21 NRC 644, 900-909 (Margulies, Kline, and Shon), *aff'd* ALAB-818, 22 NRC 651 (1985), *rev'd on other grounds*, CLI-86-13, 24 NRC 22 (1986), 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 Shoreham Board's and Judge Altimari's careful analysis is likely to prevail over what the Order sets forth.[2]

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[2] The Supplement makes a silly move in its footnote 7, noting that the district court did not have before it the Shoreham Board's and Judge Altimari's careful analysis leading to a conclusion contrary to the district court's. That is a silly move because PFS itself was the party that presented all the challenged statutes to the district court as an undifferentiated blob and repeatedly (and successfully) urged the district court to repudiate the blob without analyzing its many various and distinct provisions.

In short, the district court's 30 July 2002 Order is a quicksand basis for a decision by this Board granting PFS's motion for summary disposition. Walking into quicksand is not good public policy.[3]

DATED: 27 August 2002.

Respectfully submitted,

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[3] The Supplement quotes us as saying that "it would be impudent to use the Order as a basis for summary disposition of Security J." Supplement at 6. It is only the Supplement's error in quotation that is "impudent." What we said was that it would be "imprudent" to so use the district court's Order. Reply at 9.

CERTIFICATE OF SERVICE

I hereby certify that a copy of STATE OF UTAH'S RESPONSE TO PFS'S SUPPLEMENT TO PFS'S MOTION FOR SUMMARY DISPOSITION OF UTAH CONTENTION SECURITY J - LAW ENFORCEMENT was served on the persons listed below by electronic mail (unless otherwise noted) with conforming copies by United States mail first class, on 27 August 2002.

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