

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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COMMISSIONERS:

SERVED 03/12/01

Richard A. Meserve, Chairman
Greta Joy Dicus
Nils J. Díaz
Edward McGaffigan, Jr.
Jeffrey S. Merrifield

In the Matter of)
)
PRIVATE FUEL STORAGE, L.L.C.)
)
(Independent Spent Fuel Storage Installation))
)
_____)

Docket No. 72-22-ISFSI

CLI-01-09

MEMORANDUM AND ORDER

The State of Utah has asked the Commission's review of a recent partial initial decision by the Licensing Board. See LBP-00-35, 52 NRC 364 (2000)(Contention Utah R, Emergency Plan). That decision found that the applicant, Private Fuel Storage, L.L.C., had met the applicable regulatory criteria with respect to emergency planning at its proposed independent spent fuel storage installation (ISFSI).

Utah sought in Contention R to raise various emergency planning issues, which were eventually whittled away through summary disposition until only the firefighting aspects of the Emergency Plan were left to be addressed at the Board's June 19, 2000 hearing. Utah claims that the Board departed from governing precedent and raised a substantial policy question by refusing to require that PFS's various fire safety commitments, advanced during the hearing process, be reduced to license conditions. In addition, Utah claims that the Board abused its discretion in finding that it was not necessary for PFS to describe how it would respond to a particular serious accident, i.e., a potential cask tip over.

Utah also asks that emergency planning issues related to a proposed intermodal transfer point (ITP) be deferred until such time, if ever, that the Commission considers whether the ITP needs an NRC license.⁽¹⁾ The Board found that the ITP did not need an NRC license; therefore, all contentions relating to the ITP were dismissed, no hearing was held on those issues, and the partial initial decision did not discuss them.

Our regulations provide standards governing the decision whether to accept review of such matters. The Commission can, in its discretion, accept review, after "giving due weight to the existence of a substantial question with respect to the following considerations:

- (i) A finding of material fact is clearly erroneous or in conflict with a finding as to the same fact in a different proceeding;
- (ii) A necessary legal conclusion is without governing precedent or is a departure from or contrary to established law;
- (iii) A substantial and important question of law, policy or discretion has been raised;
- (iv) The conduct of the proceeding involved a prejudicial procedural error; or
- (v) Any other consideration which the Commission may deem to be in the public interest."

See 10 C.F.R. §2.786(b)(4).

For the reasons set forth below, we find that this standard has not been met here, and thus, we deny the petition for review. We agree with Utah, however, that the time for raising emergency planning issues relating to the ITP would properly be when all issues relating to the ITP are under review.

I. Board's Refusal to Incorporate Commitments as License Conditions

Utah complains that the Licensing Board erred in denying its request to have certain fire safety commitments expressly

incorporated as conditions of PFS's license. Specifically, Utah asked that PFS's promise to satisfy various National Fire Protection Association (NFPA) standards with respect to its fire brigade be imposed as license conditions. During the Board proceedings, PFS agreed to train 11 employees to applicable NFPA fire-fighting standards, at least five of whom will be on call at any given time. See LBP-00-35, 52 NRC at ___, slip op. at 56.

Utah contends that license conditions are needed because PFS has a new financing scheme which, if it fails to bring in sufficient revenue, could encourage PFS to cut operating costs by reducing the number of trained employees at the site. It contends that PFS is "trying to do too much with too few people" by adding firefighting duties to the job descriptions of otherwise assigned employees. Utah cites an earlier Commission decision in this proceeding that required certain financial commitments to be spelled out in PFS's license. See CLI-00-13, 52 NRC 23 (2000).

We reject Utah's argument that PFS's new financing arrangements require license conditions on emergency planning. First, while an underfinanced facility theoretically might take safety-imperiling cost-cutting measures,⁽²⁾ the PFS facility will not be licensed unless the Commission finds PFS's financing arrangements sufficient to meet NRC financial qualifications policy. The adequacy of PFS's proposed financing scheme is an issue in this litigation, but it is not before us on this appeal. Further, in the absence of evidence to the contrary, the NRC does not presume that a licensee will violate agency regulations wherever the opportunity arises. See GPU Nuclear Inc. (Oyster Creek Nuclear Generating Station), CLI-00-06, 51 NRC 193, 207 (2000). Therefore, we will neither assume that PFS will operate without sufficient financing, nor will we assume that an unexpected funding shortfall will induce PFS to ignore its responsibility to train and employ a sufficient number of firefighters. Finally, even were Utah correct that PFS will shirk its duty to protect health and safety, the state fails to show how imposing a license condition would prevent this. If PFS ultimately receives NRC approval of its proposed facility, PFS will be expected to meet all NRC rules and all safety commitments, subject to Commission oversight and enforcement.

Our earlier decision with respect to financial conditions (CLI-00-13) does not support the proposition that all licensee commitments must be converted into express license conditions to be enforceable. Rather, the Commission there ruled that, where PFS sought to establish its financial qualifications through service contracts from its customers (who are also its members), certain provisions should be spelled out in the license to simplify staff review of compliance. Otherwise, the staff could be put in a position of making factual and legal judgments simply to determine whether the licensee had complied with its financial qualification commitments. Our financial qualifications decision sought to reduce post-license verification to an essentially ministerial act. See 52 NRC at 34. That decision should not be read to suggest that promises and representations made to NRC staff and NRC hearing boards are meaningless if they are not reiterated in the license.

No license condition is necessary to confirm PFS's commitments to firefighting. PFS's incorporation into its emergency plan of the promise to train 11 firefighters and keep five on call will ensure that PFS will have adequate firefighting personnel.⁽³⁾ See LBP-00-35 at 64-65. Our regulations require that the licensee "follow and maintain in effect an emergency plan that is approved by the Commission." 10 C.F.R. § 72.44(f). PFS may not change its plan in any manner that could "decrease the effectiveness of the plan" without prior Commission notice and approval. *Id.* Failure to obtain the required approval is a violation of NRC regulations and subject to enforcement.⁽⁴⁾

The Board found that the PFS's representations in its Emergency Plan -- that it would train 11 employees in fire fighting and have five firefighters on call at all times -- were not the type of commitments that need further elaboration in the license itself. We agree. As the Board rightly pointed out, were it to attempt to incorporate every litigation commitment expressly in the license, it might create the impression that anything left out is merely an empty promise. See LBP-00-35, slip op. at 61, n. 7.

We find no basis for Utah's claim that the Board's refusal to impose certain license conditions was legal error.

II. Failure to Describe Response to Particular Accident: Cask Tip-Over

Utah also claims that the Board erred in not admitting as a basis for Utah R the issue whether PFS must describe its response to a potential cask tip over accident. The state argues that the Board's refusal of this basis was an inappropriate exercise of policy judgment.

PFS proposes to use ventilated casks at its site, which could overheat if they were tipped over, blocking the vents. According to the Emergency Plan, cask temperatures could exceed design criteria within 33 hours if there were a complete blockage of all vents. Utah claims that, because the casks would weigh 175 tons, PFS should explain where and how it would get a crane capable of uprighting the casks to the site within 33 hours.

PFS and NRC staff argue that NRC regulations do not require this level of detail in an emergency plan.

NRC regulations require that the emergency plan provide "a brief description of the means of mitigating the consequences of each type of accident." See 10 C.F.R. § 72.32(a)(5). Implementing details, such as where PFS will obtain a crane capable of uprighting the casks, are not required in the emergency plan. See, e.g., *The Curators of the University of Missouri*, CLI-95-01, 41 NRC 71, 140-42 (1995) (Emergency Plan not defective for failing to describe dimensions of room containing nuclear materials, location of firefighting equipment, training of firefighters, and information to be given to offsite emergency response organizations, for the plan "is not intended to be a detailed road map setting forth all the minutiae of emergency response"). The Board's decision was not an imprudent exercise of policy judgment but a reasonable application of agency regulations.

III. Timing of Appeal on Issues Relating to Intermodal Transfer Point

Utah has also asked the Commission's approval of its intention to defer any emergency planning issues that relate to the intermodal transfer point (ITP) until such time as an appeal on all issues relating to the ITP is ripe. In its Contention Utah B (License Needed for Intermodal Transfer Facility), the state claimed that PFS's application is incomplete because the ITP is a de facto interim storage facility that should be required to meet the requirements of 10 C.F.R. Part 72. In 1999, the Board dismissed Contention Utah B, finding that ITP is governed by regulations on the transportation of spent nuclear fuel,⁽⁵⁾ not Part 72. See LBP-99-34, 50 NRC 168. Based on its ruling on Contention Utah B, the Board later dismissed that portion of Utah R that dealt with emergency planning at the ITP. See LBP-99-39, 50 NRC 232, 236.

Utah maintains that it is not possible to raise emergency planning issues relating to the ITP without also attacking the Board's dismissal of Contention Utah B, which would constitute an impermissible interlocutory appeal.

In accordance with our direction in CLI-00-24, 52 NRC ___, (2000), the time for addressing issues relating to the ITP is during an appeal of the dismissal of Utah Contention B. Logically, the Commission cannot review the question whether there is adequate emergency planning at the ITP when it has not reviewed, and does not yet have before it, the Board's determination that the ITP need not be licensed under Part 72. An appeal of that issue would be, as Utah points out, interlocutory. Furthermore, because the ISFSI and the proposed ITP would be 25 miles apart, the issues of emergency planning at the ISFSI and emergency planning at the ITP are not so closely related that these issues must be considered together. Therefore, if, after the Board's final initial decision, Utah appeals the dismissal of Contention Utah B, the issue of emergency planning at the ITP should be raised then.

The NRC staff points out that Utah has not identified in even a general way any error in the Board's ruling dismissing emergency planning issues that relate to the ITP. Because the time for appeal of ITP issues has not arrived, there is no reason why Utah must identify points of error now. If Utah brings a timely appeal of Contention Utah B, the Commission can decide at that time if the state has raised any substantial question of law, fact or policy that warrants review.⁽⁶⁾

IV. Conclusion

The petition for Commission review is denied.

IT IS SO ORDERED.

For the Commission

/RA/

ANNETTE L. VIETTI-COOK
Secretary of the Commission

Dated at Rockville, Maryland
this 12th day of March, 2001

1. The intermodal transfer point refers to the end of the railroad line, where casks would have to be moved from rail cars onto heavy-haul trucks and transported 25 miles to the ISFSI. The applicant's preferred transportation alternative, however, would be to build a rail spur to accommodate the ISFSI.

2. See, e.g., **Gulf States Utilities Company** (River Bend Station), CLI-94-10, 40 NRC 43 (1994).

3. The plan provides:

A minimum of five PFSF staff personnel is required to fully staff a PFSF fire brigade. As a minimum, personnel in Instrument/Electrical Maintenance, Mechanical Maintenance/Operations, and Radiation Protection (11 persons, as shown in Figure 4-1) shall receive fire brigade training. The fire brigade will be organized, operated, trained, and equipped in accordance with NFPA 600 (Reference 12).

4. Our regulations were designed to give the licensee a degree of flexibility in how it meets the requirement to protect health and safety. See 10 C.F.R. 72.44(f). Although the state could object that this regulation gives PFS room to argue that a certain change did not decrease the plan's effectiveness when it in fact did so, we note that even changes that the licensee contends do not decrease effectiveness must be brought to the Commission's attention and therefore would not escape the staff's review.

5. Both the NRC and the Department of Transportation regulate the shipment of spent fuel. See 10 C.F.R. Part 71. A memorandum of understanding between the two agencies provides that NRC regulates licensing, packaging, and physical protection while DOT regulates transportation and operations. See 44 Fed. Reg. 38,690. NRC has issued a general license to any licensee to transport licensed material in an approved package. See 10 C.F.R. § 71.12(a).

6. The staff also argues that Utah cannot defer its appeal on emergency planning at the ITP until after the final initial decision, because the Commission has directed that any claims that "could have affected the outcome" of the partial initial decision should be brought immediately after the partial initial decision. **See** CLI-00-24, 52 NRC at ___, slip op. at 3. We do not agree that the ITP claims, even if accepted by the Board, could have changed the decision's outcome with respect to emergency planning at the ISFSI. The Board was only considering safety factors at the ISFSI site itself, and its partial initial decision found only that that site met agency requirements.