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OFFICE OF SECRETARY
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November 11, 2002

Ms. Annette L. Vietti-Cook
Secretary of the Commission
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
Att'n: Rulemakings and Adjudications Staff

Re: Additional Comments of Private Fuel Storage, L.L.C. on Proposed Rule to Amend 10 C.F.R. Part 72: Geological and Seismological Characteristics for Siting and Design of Dry Storage Cask Independent Spent Fuel Storage Installations and Monitored Retrievable Storage Installations

Dear Ms. Vietti-Cook:

On October 22, 2002, we submitted comments on behalf of Private Fuel Storage, L.L.C. ("PFS") pursuant to the Nuclear Regulatory Commission's ("NRC") Notice of Proposed Rulemaking (67 Fed. Reg. 47745) (July 22, 2002) ("NRC Notice") on a proposed rule that would amend the requirements of 10 C.F.R. Part 72 to add a new provision for determining the geological and seismological characteristics for dry cask modes of spent fuel storage and other forms of radioactive waste. On the same day, the State of Utah ("the State") submitted comments on the proposed rule ("State of Utah's Comments on Proposed 10 CFR Part 72 Rule") ("State Comments"). Most of the State's comments consist of legal attacks on the approach proposed by the Commission, which it terms "untenable." State Comments at 2.[1] PFS did not address legal issues in its October 22 comments because it believed that the proposed rule was consistent with applicable law, and did not anticipate that any commenter would question the legal basis for the rule. Such questions having been raised, however, the Commission's development of a final rule might benefit from our brief response to the State's legal challenges.

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[1] The State also comments on technical issues including the appropriate mean annual probability of exceedence ("MAPE") of the design basis earthquake and cask stability. State Comments at 13-16. Those issues are adequately addressed in PFS's October 22, 2002 submittal. Also no response is needed on the State's unwarranted attacks against the Commission Staff. See State Comments at 3, 9-11. Suffice it to say that the State's concededly "harsh" allegations of Staff incompetence and lack of objectivity are without factual support and are as a matter of law irrelevant, for it is well established that doubts about the Staff's ability to discharge its duties are not cognizable in Commission proceedings. See Louisiana Power & Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-812, 22 NRC 5 (1985); Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant, Units 1, 2, 3, and 4), CLI-80-12, 11 NRC 514, 516-17 (1980).

We recognize that our additional comments are being filed after the comment deadline, but because of the nature of the arguments to which they reply (and the inability to anticipate those arguments in our October 22 comments) we respectfully request that they be considered "if its practical to do so." 67 Fed. Reg. at 47745.

A. INTRODUCTION

The State raises two legal arguments against the proposed rule. First, the State alleges that the proposed rule does not comply with the notice and comment provisions of Section 553 of the Administrative Procedures Act ("APA"), 5 USC § 553, because it does not contain substantive standards for the definition of a design basis earthquake but relegates those to a Staff guidance document, Regulatory Guide DG-3021.[2] State Comments at 6-7. Second, the State claims that even if reference to a guidance document were a legitimate method to implement the proposed rule, Draft Reg. Guide DG-3021 "does not contain a binding norm" because "in certain circumstances an applicant may design its facility to a standard lower than a 2,000 year MAPE." Id. at 7. The State's arguments misconstrue the applicable law and misinterpret the intent of the proposed rule and the guidance in Draft Reg. Guide DG-3021.

B. ALLEGED FAILURE TO COMPLY WITH APA NOTICE AND COMMENT REQUIREMENTS

The State alleges that the proposed rule does not comply with the notice and comment provisions of Section 553 of the APA. The State's argument is peculiar, because disputes over compliance with the notice and comment provisions of the APA normally arise when an agency has sought to avoid those requirements by asserting that the action it has taken or proposes to take does not amount to a substantive rule.[3] In the present case, the Commission has announced a proposed substantive rule, and has followed the notice and comment procedures in Section 553. Indeed, the State has taken advantage of those procedures to submit its comments. Thus, the State's arguments suffer from an insurmountable logical inconsistency.

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[2] Draft Regulatory Guide DG-3021, Site Evaluations and Determination of Design Earthquake Ground Motion for Seismic Design of Independent Spent Fuel Storage Installations and Monitored Retrievable Storage Installations (July 2002) ("Draft Reg. Guide DG-3021"). This draft guide was issued separately for comment on July 26, 2002. 67 Fed. Reg. 48956.

[3] The APA exempts from the formal rule-making requirements of Section 553 "interpretative rules, general statements of policy, [and] rules of agency organization, procedure or practice." 5 U.S.C. § 553(b)(3)(A)).

The State asserts that the Commission has failed to comply with Section 553 of the APA because the proposed regulation does not contain standards for establishing the design basis earthquake, but "has placed all issues of substance associated with this rulemaking into a draft guidance document." State Comments at 3-4. Contrary to the State's assertion, the proposed rule contains all pertinent substantive requirements. For example, proposed 10 C.F.R. § 72.103(b) provides that applicants for licenses for sites located in either the western U.S. or in the eastern U.S. in areas of known seismic activity must investigate the geological, seismological, and engineering characteristics of the site using probabilistic safety hazards analysis techniques or suitable sensitivity analyses. Likewise, proposed § 72.103(f)(1) requires that the geological, seismological, and engineering characteristics of a site and its environs must be investigated in sufficient scope and detail to permit an adequate evaluation of the proposed site and to determine the design basis earthquake. Proposed §§ 72.103(f)(2)(i) through (iv) specify criteria for determining the design earthquake for the site, the potential for surface tectonic and non-tectonic deformations, the design basis for seismically induced floods and water waves, and other design conditions.

The details on acceptable means of satisfying the requirements in proposed 10 C.F. R. § 72.103 are contained in Draft Reg. Guide DG-3021. The NRC Notice makes express reference to that document and requests that interested parties such as the State review the draft guide and comment on its content and rationale. 67 Fed. Reg. at 47748, 47751-52. Thus, the State has had both notice and the opportunity to comment on the draft guide,[4] and the comments it has provided will undoubtedly be addressed when the rule and the underlying regulatory guide are finalized.[5] The State offers no authority for its claim that a proposed rule cannot refer to outside documents for some of the rule's details.

There can also be no doubt that the NRC Notice complies with the notice and comment requirements of the APA. The APA requires that the notice of a proposed rulemaking include:

> (1) a statement of the time, place, and nature of public rule making proceedings;

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[4] Indeed, the State has had two separate opportunities to comment on the draft guide since, as noted earlier, Draft Reg. Guide DG-3021 was issued for comment at approximately the same time the proposed Part 72 rule was published. See 67 Fed. Reg. 48956.

[5] The State Comments do address the MAPE of the design basis earthquake, which is covered in Appendix B of Draft Reg. Guide DG-3021. State Comments at 13-14.

(2) reference to the legal authority under which the rule is proposed; and

(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

5 U.S.C. § 553(b). These requirements are met when the notice would fairly apprise interested persons of subjects and issues the agency is considering. The notice need not specifically identify every precise proposal that the agency may ultimately adopt as rule. American Transfer & Storage Co. v. ICC, 719 F.2d 1283 (5th Cir. 1983). The APA requires that agencies provide notice of their proposed rulemakings and afford "interested parties an opportunity to participate in the rulemaking process." 5 U.S.C. § 553(c). The notice must provide sufficient factual detail and rationale for the rule to permit interested parties to comment meaningfully. See, e.g., Connecticut Light & Power Co. v. NRC, 673 F.2d 525, 530-31 (D.C. Cir.), cert. denied, 459 U.S. 835 (1982); Home Box Office, Inc. v. FCC, 567 F.2d 9, 35 (D.C. Cir.), cert. denied, 434 U.S. 829 (1977).

It is thus not necessary for an agency to provide all possible factual detail in its notice of proposed rulemaking or in the statement of considerations of its final rule. For example, the explanation by the Commission in its final notice of a rule imposing a uniform annual fee on nuclear power reactor licensees was held by the reviewing court to be adequate against a claim that the NRC's statements were merely conclusory and did not satisfy the requirements of Section 553 because the NRC provided no explanation of the criteria used to include or exclude particular cost items. The court was satisfied with the Commission's explanation that it had reviewed various costs to insure that only generic costs associated with all power reactors with operating licenses were included in the cost basis. Florida Power & Light Co. v U.S., 846 F.2d 765, 771 (D.C. Cir. 1988). See also, Missouri Limestone Producers Ass'n v Browner 165 F.3d 619, 622 (8th Cir. 1998), reh. denied, 1999 US App LEXIS 4856 (8th Cir. 1999) (agency not required to provide detailed factual data regarding rule making).

The State claims, without citation to any legal authority that directly supports its contention, that the NRC's proposed changes to Part 72 are not a substantive rule. The State cites *dicta* in Paralyzed Veterans of America v. D.C. Arena L.P., 117 F.3d 579, 584 (D.C. Cir. 1997). State Comments at 6-7.[6] In addition to being inapplicable to the proposed NRC rule, the *dicta* in

[6] The Court in Paralyzed Veterans noted that the regulation at issue was not lacking sufficient content, and did not pass on what would constitute sufficient content for a substantive rule:

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Paralyzed Veterans address a situation that is absent here. There is no "mush" in the proposed NRC rule, nor is there any intent to give the rule content through subsequent interpretations. Both the proposed regulation and Draft Reg. Guide DG-3021 indicate that a MAPE of 5.0×10^{-4} is being proposed for the seismic design of ISFSIs and that it will be put into effect when the rule is finally issued, subject only to the comments received during the rulemaking process. Thus, nothing is being deferred to "subsequent interpretations."[7]

Judicial construction of the APA also demonstrates that the proposed rule is substantive. Courts use four criteria to determine whether an agency action is a substantive rule: 1) the present binding effect of the action;[8] 2) the degree of discretion left to the agency after the action is applied;[9] 3) the agency's characterization of the action;[10] and 4) the language of the action itself.[11]

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> A substantive regulation must have sufficient content and definitiveness as to be a meaningful exercise in agency lawmaking. It is certainly not open to an agency to promulgate mush and then give it concrete form only through subsequent less formal "interpretations." . . . . That technique would circumvent section 553, the notice and comment procedures of the APA. But appellants do not actually argue that the regulation at issue is of that type--and we do not think it can be so fairly characterized.

Id. at 584-85.

7 The State also cites several cases where the courts have defined the terms "substantive rule" (Molycorp, Inc. v. EPA, 197 F.3d 543 (D.C. Cir. 1999)) and "general policy statement" (Panhandle Eastern Pipe Line Co. v. FERC, 198 F.3d 266 (D.C. Cir. 1999), and a case holding that agencies cannot circumvent the notice and comment requirements of the APA by labeling a major substantive rule an interpretation (Appalachian Power Co. v. EPA, 208 F.3d 1015 (D.C. Cir. 2000)). None of the cases bear on the issues raised by the State in its comments.

8 American Business Ass'n v. U.S., 627 F.2d 525, 529 (D.C. Cir. 1980).

9 Id. This criterion assesses the net change in discretion. See, e.g., Bellarno Int'l, Ltd. v. FDA, 678 F. Supp. 410, 414-15 (E.D.N.Y. 1988) (ruling that FDA action with no discretion was meant to be enforced strictly).

10 Community Nutrition Institute v. FDA, 818 F.2d 943, 946 (D.C. Cir. 1987) (stating that some deference should be given to agency's characterization of statement); Brock v. Cathedral Bluffs Shale Oil Co., 796 F.2d 533, 537 (D.C. Cir. 1986) (stating that agency's characterization should be considered).

A rule has a present binding effect when it has a substantial impact on the rights of parties,[12] when it is not prospective,[13] when it changes the rights and interests of private parties,[14] and when it places "original" obligations on the interested parties.[15] The Commission's proposed rule meets the requirement of having a present binding effect by instituting a 2,000-year MAPE standard for the design basis of an ISFSI. While the State asserts that this is not a binding norm because an applicant may design its facility to a standard lower than a 2,000-year MAPE, this argument (as discussed below) confuses an exemption from the regulation from the regulation itself. It is nonsensical to argue that the existence of an exemption provision makes a regulation non-binding.

The second criterion is whether the action grants discretion to agency personnel to make decisions. If the action does not provide agency personnel with discretion, the action is substantive.[16] The State suggests that discretion is left to the NRC Staff by the proposed regulation because the Staff may grant an exemption to the 2,000-year MAPE. As discussed below, this argument confuses an exemption provision and the regulation itself.

The third criterion in deciding whether an action is substantive is the agency's own characterization of the action.[17] The Commission has characterized this proposed rule as a substantive rule by promulgating it in accord with Section 553 of the APA.

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[11] Bellarno, 678 F. Supp. at 413.

[12] Noel v. Chapman, 508 F.2d 1023, 1030 (2d. Cir.), cert. denied, 423 U.S. 824 (1975).

[13] See American Business Ass'n, 627 F.2d at 529 (ruling that action was binding norm and, therefore, unlawful, because it did not act prospectively); Community Nutrition Institute, 818 F.2d at 946 (stating that agency pronouncement is substantive if it has "present day" binding effect).

[14] American Hospital Ass'n v. Bowen, 834 F.2d 1037, 1045 (D.C. Cir. 1987) (stating that substantive rules "grant rights, impose obligations, or produce other significant effects on private interests").

[15] Id., 834 F.2d at 1045.

[16] See Community Nutrition Institute, 818 F.2d at 946; American Business Ass'n, 627 F.2d at 529; Bellarno, 678 F. Supp. at 412.

[17] Community Nutrition Institute, 818 F.2d at 946.

The final criterion in deciding whether an action is substantive is the language used in the action.[18] The language the Commission uses throughout the NRC Notice indicates that it intends to establish binding norms through these regulations.[19]

In sum, the proposed NRC rule meets all criteria for substantive rules. The State's first legal argument against the proposed regulation is non-meritorious.

C. ALLEGED FAILURE TO SET FORTH A BINDING NORM IN REGULATORY GUIDE

The State makes the alternative argument that Draft Reg. Guide DG-3021 "does not contain a binding rule" but leaves the door open to the application of a lower standard than the proposed 2,000 year MAPE. State Comments at 7. The State misinterprets the Staff's position in Draft Reg. Guide DG-3021 and misapplies legal precedents.

The State asserts that Draft Reg. Guide DG-3021 recommends a MAPE of 5.0×10^{-4} (i.e., a 2,000-year return period seismic event) "but an ISFSI applicant may 'demonstrate that the use of a higher probability of exceedence value would not impose an undue radiological risk to public health and safety.' DG-3021, App. B § B.2 (at 16)." State Comments at 4, emphasis added. The State misses the point of the discussion in Draft Reg. Guide DG-3021. The guide states that, subject to the comments provided in response to the NRC Notice, it proposes to recommend a MAPE of 5.0×10^{-4} for the design of a dry storage ISFSI, and that "[a]n ISFSI or MRS license applicant would have to demonstrate that the use of a higher probability of exceedance would not impose any undue radiological risk to public health and safety." Draft Reg. Guide DG-3021 at 16, emphasis added. In other words, a higher MAPE value would represent an exception to the proposed rules, not part of them. The draft guide does not

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[18] See Bellarno, 678 F. Supp. at 415; Community Nutrition Institute, 818 F.2d at 947 (ruling that language used by the FDA indicates present binding effect).

[19] Moreover, substantive rules are those that create law, imposing new obligations pursuant to authority properly delegated by Congress; whereas interpretive rules merely clarify or explain existing law or regulations. Southern California Edison Co. v FERC, 770 F.2d 779 (9th Cir. 1985). The NRC's regulations regarding ISFSIs clearly constitute substantive rules that are promulgated pursuant to the Commission's authority to license ISFSIs under Section 161(a) of the Atomic Energy Act ("AEA"), and the authority of the Commission to license and regulate the possession, use, and transfer of source, byproduct, and special nuclear materials as constituent materials regardless of their aggregate form. See AEA §§ 53, 62, 63, 81, 161(b), 42 U.S.C. §§ 2073, 2092, 2093, 2111, 2201(b).

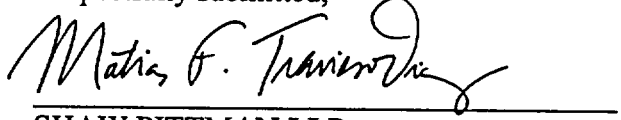
contemplate *allowing* an ISFSI to be designed to a higher MAPE than the value that is ultimately adopted, but *requiring* – in case an applicant requests a departure from the specified MAPE in favor of a higher one – that it demonstrate that the use of the higher probability would not pose undue radiological risks.

The Commission's approach is consistent with the well established principle (acknowledged by the State, see State comments at 3) that applicants can propose alternative means of meeting regulatory requirements than those set forth in the regulatory guides. See, e.g., Curators of the University of Missouri, CLI-95-1, 41 NRC 71, 98 (1995). Indeed, exemptions or waivers are a key "safety valve" for effective regulation. See, e.g., WAIT Radio v. FCC, 418 F.2d 1153, 1159 (D.C. Cir. 1969). This is particularly true in areas of complex regulations, where the authority of an agency to provide such exemption procedures is well established. U.S. v. Allegheny-Ludlum Steel Corp., 406 U.S. 742, 755 (1972). Indeed, rather than a source of unbridled Staff discretion (as claimed by the State) the availability of an exemption procedure of the sort contemplated by the Commission may be regarded as a due process requirement. See, e.g., Chemical Mfr's Ass'n v. Natural Res. Defense Council, Inc., 470 U.S. 116, 133 n.25 (1985) (citations omitted).

D. CONCLUSION

There is ample factual and legal support for the proposed Part 72 rule, and the State's comments pose no bar to its adoption. PFS therefore urges the Commission to give final approval to its proposed rule.

Respectfully submitted,



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