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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
	)	November 10, 2000

STATE OF UTAH'S MOTION FOR PARTIAL RECONSIDERATION OF LBP-00-28

The State hereby moves for partial reconsideration of LBP-00-28, Memorandum and Order (Denying Request to Admit Late-Filed Contentions Utah LL Through Utah OO) (October 30, 2000). The State seeks reconsideration of that portion of LBP-00-28 which denies admission of Contentions LL, MM, and NN on the ground that the State failed to satisfy the Commission's late-filing criteria.[1] As discussed below, the Board should reconsider its decision in light of Commission policy which the Board apparently overlooked in reaching its decision and which militates against the sanctions ordered by the Board. In addition, the State requests the Board re-evaluate the circumstances of this case. The State respectfully submits that the purposes of the criteria for late-filing do not warrant the harsh remedy imposed by the Board for a procedural defect; nor is the penalty assessed by the Board against the State justified in these circumstances.

FACTUAL BACKGROUND

The aspect of LBP-28-00 on which the State seeks reconsideration concerns the reasonableness of the State's timing in submitting a set of contentions on the Draft

[1] Although the State disagrees with the Board's ruling, the State does not seek reconsideration of the Board's ruling on Contention OO, or its ruling on the economic concerns raised in Contention NN.

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Environmental Impact Statement ("DEIS") for the PFS facility. The NRC Staff gave notice of the imminent availability of the DEIS on June 12, 2000; issued the DEIS on June 16, 2000; and hand-served it on the parties on June 19, 2000. LBP-00-28, slip op. at 3. The State filed Contentions Utah LL, MM, and NN, on August 2, 2000.

The Board found the State had good cause with respect to whether the contentions could have been raised in1997 in relation to the original license application but found the State was six days late in relation to the issuance of the DEIS. LBP-00-28, slip op. at 8, 10.

During the relevant time period the State was involved in numerous and disparate aspects of the PFS proceeding. From June 19 through 27, attorneys for the State devoted all their time to participating in adjudicatory hearings on contentions Utah R (Emergency Plan), E (Financial Assurance) and S (Decommissioning) and representing the State at three Limited Appearance sessions. Attorneys for the State attended DEIS public hearings which went until late in the night on July 27 and 28. Later, the State's attorneys devoted their time to developing and drafting Findings of Fact and Conclusions of Law on contentions Utah E, S and R, which were filed on July 31.[2] The State timely filed a DEIS contention, Utah KK,[3] on July 26, 2000.

ARGUMENT

This Licensing Board summarized the standard for reconsideration in LBP-98-17, 48 NRC 69, 73 (1998):

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[2] The State was granted an extension until August 7 to file on Utah R because of relevant new information released by the Staff.

[3] The Board found Utah KK, Potential Impacts to Military Training and Testing and State Economy, to be timely filed with respect to the DEIS but dismissed the contention on other grounds. LBP-00-27.

> A properly supported reconsideration motion is one that does not rely upon (1) entirely new theses or arguments, except to the extent it attempts to address a presiding officer's ruling that could not reasonably have been anticipated, *see Louisiana Energy Services, L.P.* (Claiborne Enrichment Center), CLI-97-2, 45 NRC 3, 4 & n. 1 (1997) (citing cases); or (2) previously presented arguments that have been rejected, *see Nuclear Engineering Co.* (Sheffield, Illinois Low-Level Radioactive Waste Disposal Site), CLI-80-1, 11 NRC 1, 5 (1980). Instead, the movant must identify errors or deficiencies in the presiding officer's determination indicating the questioned ruling overlooked or misapprehended (1) some legal principle or decision that should have controlling effect; or (2) some critical factual information. *See Georgia Power Co.* (Vogtle Electric Generating Plant, Units 1 and 2), LBP-94-31, 40 NRC 137, 140 (1994); *Philadelphia Electric Co.* (Limerick Generating Station, Units 1 and 2), LBP-83-25, 17 NRC 681, 687 *rev'd and remanded on other grounds*, ALAB-726, 17 NRC 755 (1983). Reconsideration also may be appropriately sought to have the presiding officer correct what appear to be inharmonious rulings in the same decision. *See* LBP-98-10, 47 NRC 288, 296 (1998).

Here, reconsideration is warranted because the Board has apparently overlooked important statements of Commission policies on the application of the late-filing criteria and the imposition of sanctions for failure to comply with deadlines. When these policies are applied to the circumstances of this case, it is clear that the harsh remedy imposed by the Board -- complete denial of the admission of Contentions Utah LL, MM, and NN, without ruling on their admissibility -- for the State missing by six days a Board imposed 45 day deadline after receiving notice of the DEIS's imminent availability, amounted to nothing short of an unwarranted and excessive sanction.

As the Board states in LBP-00-28, it established a deadline for filing environmental contentions as a more precise surrogate for the application of the late-filed contention standard where a "triggering document" is involved. Id., slip op. at 9. Thus, it is appropriate to consider the Commission's policies regarding the enforcement of both the late-filed contention standard and deadlines for the submission of filings. The Commission's policy

pronouncements on these standards make clear that their over-arching purpose is to ensure the efficient management of NRC proceedings. In *Duke Power Co. et al* (Catawba Nuclear Station, Units 1 and 2), CLI-83-19, 17 NRC 1041, (1983), for instance, the Commission upheld the application of the late-filing criteria to environmental contentions based on documents that were unavailable prior to the original deadline for filing contentions. In defending the application of the criteria, the Commission repeatedly justified the rule based on its role in ensuring the efficiency of proceedings. *See* 17 NRC at 1046-1047, referring to "the public's interest in an efficient administrative process," "public interest considerations in the efficient and timely conduct of administrative proceedings," and reasonableness of regulations "designed to prevent unnecessary delay in the hearing process."

The *Catawba* doctrine was later affirmed and codified in 10 C.F.R. § 2.714(b)(2)(iii). *See* Final Rule, Rules of Practice for Domestic Licensing Proceedings -- Procedural Changes in the Hearing Process, 54 Fed. Reg. 33,168, 33,172 (August 11, 1989). The Union of Concerned Scientists challenged this rule, including the application of the late-filing criteria to environmental contentions based on previously unavailable documents. In their responsive brief before the U.S. Court of Appeals for the D.C. Circuit, the NRC Commissioners defended the standard on the ground that without it, "the Commission could lose virtually all control over the adjudicatory process, and the ability to complete the hearing and issue a decision would be severely impaired." *Union of Concerned Scientists v. NRC*, No. 89-1617, Brief for Respondents at 34 (1990). A copy of relevant pages is attached hereto as Exhibit 1. The Commissioners asserted that "[a]n elevated though not prohibitive threshold for late-filed contentions is a necessary procedural protection of the public interest

in efficient and expeditious administrative proceedings." Id.. The D.C. Circuit subsequently upheld § 2.714(b)(2)(iii), holding, *inter alia*, that the Commission was entitled to "adopt a pleading schedule designed to expedite its proceedings," and that the NRC need not "disregard its procedural timetable" every time a party raises a new issue that did not occur to it previously. *Union of Concerned Scientists v U.S. Nuclear Regulatory Commission*, 920 F.2d 50, 55 (D.C. Cir. 1990). Thus, throughout the history of the late-filed contention standard, its fundamental purpose and overriding justification has been defined as ensuring the efficiency of a proceeding.

It has also been the Commission's policy and practice to apply the late-filing criteria generously. As the Commissioners noted in their 1990 brief to the U.S. Court of Appeals:

> All the evidence shows that the NRC's rules on late contentions, interpreted in a 'normal and fair' fashion, do not exclude worthwhile contentions from the adjudicatory process. Both before and after the Catawba decision, Licensing Boards have applied the five-factor test for late contentions generously to admit late-filed contentions upon a showing of good cause. [*footnote and citations omitted*].

Union of Concerned Scientists v NRC, No. 89-1617, Brief for Respondents at 41 (1990).

Like the Commission's policy for late-filed contentions, the Commission's policy on imposing sanctions for missed deadlines and other obligations takes into consideration the overall purpose of the sanctions, which is to ensure the orderly and fair conduct of hearings. As the Board notes in LBP-00-28, the Commission "recently has made it clear that it expects its presiding officers to set schedules, that parties will adhere to those schedules, and that presiding officers will enforce compliance with those schedules." *Id.*, slip op. at 11, *citing* CLI-98-12, 48 NRC 18, 21 (1998). CLI-98-12, however, re-affirms CLI-81-8, an earlier policy statement in which the Commission provided an overview of the purpose of the

enforcement policy and the considerations that should be undertaken in its enforcement. As the Commission stated in CLI-81-8:

> When a participant fails to meet is obligations, a board should consider the imposition of sanctions against the offending party. A spectrum of sanctions from minor to severe is available to the boards to assist in the management of proceedings. For example, the boards could warn the offending party that such conduct will not be tolerated in the future, refuse to consider a filing by the offending party, deny the right to cross-examine or present evidence, dismiss one of more of the party's contentions, impose appropriate sanctions on counsel for the party, or, in severe cases, dismiss the party from the proceeding. In selecting a sanction, boards should consider the relative importance of the unmet obligation, its potential for harm to other parties or the orderly conduct of the proceeding, whether its occurrence is an isolated incident or a part of a pattern of behavior, the importance of the safety or environmental concerns raised by the party, and all of the circumstances. Boards should attempt to tailor sanctions to mitigate the harm caused by the failure of a party to fulfill its obligations and bring about improved future compliance.

Statement of Policy on Conduct of Licensing Proceedings, CLI-81-8, 13 NRC 452, 453 (1981), *re-affirmed*, CLI-98-12, 48 NRC 18 (1998) (*emphasis added*).

In determining that the State was inexcusably late, the Board focused exclusively on the transgression itself, without considering the other contextual factors that must be examined under the Commission's policies when determining wether to impose sanctions for a participant's failure to meet its obligations. First is the question of whether the fundamental purpose of the rules, *i.e.*, to ensure the orderly and efficient conduct of the hearing, was thwarted by the State's lateness in filing its contention. The State submits that the current schedule, where already admitted NEPA contentions will be heard in July 2001, could accommodate new contentions based on the DEIS. Therefore, a six day delay will have no adverse effect on the already-established schedule or adversely affect any party.

Moreover, while the State set thirty days from receipt of the DEIS as a target for

filing DEIS contentions, it was unaware that the Board's June 29, 1998 Order at 5, stating "any contentions based on the [DEIS] ... should be submitted no later than thirty days after these documents are made available to the public," set a hard and fast 30 day deadline. The Board's decision implies the State cavalierly disregarded the Board's schedule comparing the State's action to the "proverbial 'last minute'" request to extend discovery. LBP-00-28, slip op. at 12. The Board's characterization of the State's action is unfair and unwarranted and the sanction imposed is excessive.

The State has good reason for believing the 30-day deadline was not cast in stone. First, 10 CFR § 51.73 affords a 45 day comment period on draft environmental impact statements. Second, the DEIS for the PFS facility had a 90 day public comment period. 65 Fed. Reg. 39,206 (comment deadline, September 21, 2000). These two factors show that a significant amount of time is needed to review the DEIS. While a comment period deadline is not synonymous with meeting the 10 CFR § 2.714 late-file factors for filing contentions, it should be given weight because in an NRC proceeding it is only through filing contentions that the State can fully exercise its NEPA statutory rights.

Efficiency of the proceeding has overshadowed the Board's expectation that the State's technical expert could develop contentions without the assistance of counsel. The Board pins its decision, in part, on the fact the Staff's June 12 letter advised of the imminent availability of the DEIS and Dr. Resnikoff, the expert who supported contention LL through OO, was not a participant in the June hearings. Thus, concludes the Board, Dr. Resnikoff should be "on alert" to review the DEIS. LBP-00-28 at 9-11. First, the Staff has on numerous occasions announced deadlines that it has not met. Second, it is unreasonable

for the Board to expect the State to pay its experts to be "at the ready" in case the Staff's announced deadline is accurate. Third, Dr. Resnikoff was generally available but he has obligations other than the PFS case. Fourth, at the hearing on June 19, the Staff handed only one copy of the DEIS to serve the entire State government of Utah. Finally, filing a contention is a collaborative effort between the expert and the attorney. The legal hurdles for admission of a contention means that an expert cannot conduct his review without the benefit of counsel. It makes no sense for the expert to be at the ready to "hit the ground running" if his course is unchartered. The demands on the attorneys in this case during the 30-day DEIS review period impeded that collaborative effort and resulted in filing the contentions six days beyond the Board-imposed deadline.

The Board points to no chronic dilatory behavior by the State that would warrant such a concededly "harsh" remedy as a corrective against future misbehavior. *See* LBP-00-28, slip op. at 11. To the contrary, the record shows that as a general matter, the State has assiduously observed the Board's many deadlines in this case.

The State submits that it was unfair and unfounded for the Board to speculate that the State's failure to comply with the fixed filing deadline reflects a lack of "appropriate concern" for the Board's deadlines. Id. at 12. The Board has pointed to no previous behavior by the State which would justify questioning the State's motives or attitude. In this proceeding the State has used its best efforts to challenge the PFS license application and other relevant documents on substantive grounds; it has not resorted to procedural games. When there is nothing left in a contention to litigate, the State has so informed the Board

and the parties.[4]

Another factor that must be considered under CLI-81-8, and overlooked the Board, is the significance of the issues raised. Contentions LL, MM, and NN raise concerns about one of the most important documents in this proceeding, the DEIS for the PFS facility. As required by NEPA, the DEIS forms the basis for decision making in crucial environmental issues. Through its procedural rules, the NRC has made this adjudicatory hearing the critical path for the State to exercise its statutory right to be heard regarding the adequacy of the DEIS to address the environmental impacts of the PFS facility. Whether or not the Board believes the contentions meet the standard for admissibility, there can be no doubt that the issues they raise, regarding the thoroughness and adequacy of the DEIS's discussion of environmental impacts, are important. Moreover, although the Board mentions it would not have admitted Contentions LL, MM, or NN, other than Part 3 of MM, this does not mitigate the importance of issuing a ruling on their admissibility. The State believes these issues are important enough to warrant an explanation of why they will or will not be admitted, for purposes of understanding the agency's rationale and considering possible appeals.

Finally, as discussed in the Commissioners' brief in *Union of Concerned Scientists v. NRC*, Licensing Boards have made a longstanding practice of applying the late-filed contention generously, so as not to exclude otherwise meritorious contentions. The State respectfully submits that under the circumstances of this proceeding, the Board's ruling was inconsistent with this stated practice.

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[4] *See e.g.*, the State's decision not to go forward with litigating Contention Security-C and the Board's recognition of the State's concern "for avoiding unnecessary resources expenditures by the Board and other litigants." LBP-00-05, slip op. at n. 2.

CONCLUSION

For the foregoing reasons, the State respectfully requests that the Board reconsider its decision in LBP-00-28.

DATED this 10th day of November, 2000.

Respectfully submitted,

Denise Chancellor, Assistant Attorney General
Fred G Nelson, Assistant Attorney General
Connie Nakahara, Special Assistant Attorney General
Diane Curran, Special Assistant Attorney General
Laura Lockhart, Assistant Attorney General
Attorneys for State of Utah
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

CERTIFICATE OF SERVICE

I hereby certify that a copy of State of Utah's Motion for Partial Reconsideration of Lbp-00-28 was served on the persons listed below by electronic mail (unless otherwise noted) with conforming copies by United States mail first class, this 10th day of November, 2000:

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, Potts & Trowbridge
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.
1385 Yale Avenue
Salt Lake City, Utah 84105
E-Mail: john@kennedys.org

Joro Walker, Esq.
Land and Water Fund of the Rockies
2056 East 3300 South Street, Suite 1
Salt Lake City, Utah 84109
E-Mail: joro61@inconnect.com

Danny Quintana, Esq.
Danny Quintana & Associates, P.C.
68 South Main Street, Suite 600
Salt Lake City, Utah 84101
E-Mail: quintana@xmission.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

Denise Chancellor
Assistant Attorney General
State of Utah

EXHIBIT 1

ORAL ARGUMENT SCHEDULED FOR OCTOBER 5, 1990

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 89-1617

UNION OF CONCERNED SCIENTISTS,

Petitioner,

v.

UNITED STATES NUCLEAR REGULATORY COMMISSION
AND THE UNITED STATES OF AMERICA,

Respondents,

NUCLEAR MANAGEMENT AND RESOURCES COUNCIL, INC.,
EDISON ELECTRIC INSTITUTE,

Intervenor-Respondents.

On Petition To Review A Final Rule Of The
United States Nuclear Regulatory Commission

BRIEF FOR RESPONDENTS

WILLIAM C. PARLER
General Counsel

JOHN F. CORDES, JR.
Solicitor

E. LEO SLAGGIE
Deputy Solicitor

CAROLE F. KAGAN
Senior Attorney
Office of the General Counsel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

ROBERT L. KLARQUIST
Attorney, Appellate Section
Environment and Natural
Resources Division
U.S. Department of Justice
Washington, D.C. 20530

August 30, 1990

1. The Requirements Are Reasonable On Their Face.

It is not unreasonable for the Commission to impose higher standards for the admission of late-filed contentions. As petitioner acknowledges, information is uncovered and documents revised right up to the time the license is issued (Pet. Br. at 6, 9).[15] Were the Commission to allow prospective parties to file contentions at any time without regard to the status of the proceeding and the ability of parties to contribute to it, the Commission would lose virtually all control over the adjudicatory process, and the ability to complete the hearing and issue a decision would be severely impaired. An elevated though not prohibitive threshold for late-filed contentions is a necessary procedural protection of the public interest in efficient and expeditious administrative proceedings.

Nor is it unreasonable to apply these standards to contentions based on NRC staff documents. The Commission has explained that the focus of a hearing is on whether the application satisfies NRC regulatory requirements. The NRC staff's views on this issue obviously are of importance, but nonetheless the issue material to licensing is the adequacy of the application, not the adequacy of the NRC staff's performance. See 54 Fed. Reg. at 33171, J.A. 4, citing Pacific Gas and Electric Company (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-728, 17 NRC 777, 807, review declined, CLI-83-32, 18 NRC

[15]Indeed, further information is often discovered during the post-licensing power ascension process and through continuing NRC staff inspection and oversight.

B. The Requirements Have Been Applied Reasonably.

A facial attack on an agency regulation depends on a showing that its "normal and fair interpretation" will deny persons their statutory rights, not on whether the agency in an individual case may "abuse or misapply the new standards." American Trucking Ass'ns v. United States, 627 F.2d at 1318-19 (emphasis added). Petitioner's brief makes the exaggerated assertion that application of the late-filed contention standards to contentions based on staff documents "will operate to deprive the public of any opportunity to respond to the actual licensing decision [i.e. the staff's analysis of the license application]." Pet. Br. at 29. This is plain nonsense. All the evidence shows that the NRC's rules on late contentions, interpreted in a "normal and fair" fashion, do not exclude worthwhile contentions from the adjudicatory process. Both before and after the Catawba decision, Licensing Boards have applied the five-factor test for late contentions generously to admit late-filed contentions upon a showing of good cause.[21]

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[21] See, e.g., Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-883, 27 NRC 43 (1988); Kerr-McGee Chemical Corp. (West Chicago Rare Earths Facility), LBP-89-16, 29 NRC 508 (1989); Consumers Power Co. (Midland Plant, Units 1 & 2), LBP-84-20, 19 NRC 1285 (1984); Kansas Gas & Electric Co. (Wolf Creek Generating Station, Unit 1), LBP-84-1, 19 NRC 29 (1984). And the Catawba decision has not altered the doctrine that the availability of new information is recognized as providing good cause for acceptance of a late contention. Consumers Power Co. (Midland Plant, Units 1 and 2); LBP-82-63, 16 NRC 571, 577 (1982), citing Indiana and Michigan Electric Co. (Donald C. Cook Nuclear Plant, Units 1 and 2), CLI-72-75, 5 AEC 13, 14 (1972); Cincinnati Gas and Electric Co. (William H. Zimmer Nuclear Station), LBP-80-14, 11 NRC 570, 574 (1980), appeal dismissed, ALAB-595, 11 NRC 860 (1980).