

RAS 2401

DOCKETED 11/20/00

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of)	
)	
PRIVATE FUEL STORAGE, L.L.C.)	Docket No. 72-22-ISFSI
)	
(Independent Spent Fuel)	
Storage Installation))	

NRC STAFF'S RESPONSE TO "STATE OF UTAH'S
PARTIAL INTERLOCUTORY APPEAL OF LBP-00-28"

Sherwin E. Turk/***RA***/
Counsel for NRC Staff

November 17, 2000

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INTRODUCTION

The NRC Staff ("Staff") herewith responds to the "State of Utah's Partial Interlocutory Appeal of LBP-00-28" ("Appeal"), filed on November 10, 2000. In its Appeal, the State of Utah ("State") asserts that the Commission should undertake review of and reverse LBP-00-28, in which the Licensing Board dismissed late-filed Contentions Utah LL-OO for failing to meet the Commission's late-filing requirements set forth in 10 C.F.R. § 2.714(a)(1).¹ More specifically, the State -- which simultaneously filed a motion for reconsideration of LBP-00-28 before the Licensing Board -- requests that the Commission "take up consideration of the issues raised in the attached Motion for Partial Reconsideration of LBP-00-28 (November 10, 2000), in the event that the motion is denied by the Licensing Board" (Appeal at 1; emphasis added).

¹ *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-00-28, 52 NRC ____ (Oct. 30, 2000) ("Memorandum and Order (Denying Request to Admit Late-Filed Contentions Utah LL Through Utah OO))."

For the reasons set forth below, the Staff submits that the State's Appeal should be dismissed, without prejudice to its being resubmitted following the issuance of a Board ruling on the pending motion for reconsideration.

DISCUSSION

The State submitted Late-filed Contentions Utah LL-OO on August 2, 2000,² challenging various aspects of the transportation impact analysis contained in the Staff's Draft Environmental Impact Statement ("DEIS") for the proposed Private Fuel Storage Facility.³ On October 30, 2000, the Licensing Board issued its decision in LBP-00-28, in which it dismissed these contentions on the ground that the State had failed to show that a balancing of the late-filing factors in 10 C.F.R. § 2.714(a)(1) weighed in favor of their admission. On November 10, 2000, the State simultaneously filed (a) the instant Appeal and (b) a motion seeking partial reconsideration of that decision by the Licensing Board.

The Staff respectfully submits that the instant Appeal should be denied, in view of the fact that the State has filed a motion for reconsideration of LBP-00-28 before the Licensing Board, while simultaneously appealing from that decision before the Commission. The Commission's regulations and case law prohibit or disfavor the filing of appeals from a Licensing Board ruling while a motion for reconsideration of that ruling is pending before

² See "State of Utah's Request for Admission of Late-Filed Contentions Utah LL Through OO (Relating to the DEIS's analysis of spent fuel transportation risks)," dated August 2, 2000.

³ NUREG-1714, "Draft Environmental Impact Statement for the Construction and Operation of an Independent Spent Fuel Storage Installation on the Reservation of the Skull Valley Band of Goshute Indians and the Related Transportation Facility in Tooele County, Utah" (June 2000); see "Notice of Availability of Draft Environmental Impact Statement and Notice of Public Meetings for the Proposed Private Fuel Storage, L.L.C., . . .," 65 Fed. Reg. 39,206 (June 23, 2000).

the Board. See, e.g., 10 C.F.R. § 2.786(b)(6); *International Uranium (USA) Corp.* (White Mesa Uranium Mill), CLI-97-9, 46 NRC 23, 24 (1997); *Houston Lighting and Power Co.* (Allens Creek Nuclear Generating Station, Unit No. 1), ALAB-630, 13 NRC 84, 85 (1981). Accordingly, the State's appeal should be dismissed in view of the State's pending motion for reconsideration,⁴ without reaching the question of whether the State has demonstrated sufficient grounds to warrant an interlocutory appeal from the Board's ruling in LBP-00-28.⁵

Finally, the Staff notes that if the State's Appeal is re-submitted after the Licensing Board has ruled upon the pending motion for reconsideration, the Staff will address the State's argument that the Board's ruling "should be reviewed now because it will have a pervasive and unusual effect on the proceeding" (Appeal at 2) -- pursuant to which the State apparently seeks to overcome the well-established doctrine against interlocutory

⁴ Nor should the Commission merely defer consideration of the State's Appeal until the Licensing Board has ruled upon the motion for reconsideration -- as is suggested by the State (see Appeal at 1) -- in that the issues to be considered on appeal could change depending on the outcome reached by the Board.

⁵ Inasmuch as the denial of the instant Appeal is required in light of the authorities cited above, the merits of the State's Appeal are not addressed herein. Nonetheless, the Staff believes that certain factual statements contained in the State's Appeal, pertaining to the basis for the Board's action, require a brief response. First, the Staff notes that late-filed Contentions Utah LL-OO were not dismissed simply "on the ground that the State was six days late in meeting a Board-imposed thirty day deadline for late-filed contentions" (Appeal at 1). Rather, the Licensing Board applied the late filing factors set forth in 10 C.F.R. § 2.714(a)(1), and determined that the State had not shown that a balancing of those factors favored the admission of its late-filed contentions. See LBP-00-28, slip op. at 2 and 13-15. Second, with respect to the Board's 30-day contention filing deadline, the State fails to observe that this deadline was known to the parties for more than two years, since the Board issued its first scheduling Order in June 1998. See "Memorandum and Order (General Schedule for Proceeding and Associated Guidance)," dated June 29, 1998, at 5. Third, the State fails to note that the 30-day deadline in fact was expanded to 38 days, in order to effectuate the Licensing Board's requirement that the Staff provide 15 days advance notice of the impending issuance of the DEIS. Finally, it must be noted that the State never sought an extension of time to permit it to file these DEIS-related contentions beyond the required date.

appeals from decisions that deny the admission of some, but not all, of a party's contentions. See, e.g., 10 C.F.R. § 2.730(f); *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), ALAB-896, 28 NRC 27, 30 (1988). Inasmuch as the State's Appeal is not ripe for Commission consideration until the Licensing Board acts upon the pending motion for reconsideration, the merits of this issue are not addressed herein.

CONCLUSION

For the reasons set forth above, the Staff respectfully submits that the State's Appeal from the Licensing Board's decision in LBP-00-28 should be dismissed at this time, without prejudice to its being resubmitted following the issuance of a Board decision on the State's pending motion for reconsideration of LBP-00-28.

Respectfully submitted,

Sherwin E. Turk/**RA**/
Counsel for NRC Staff

Dated at Rockville, Maryland
this 17th day of November, 2000

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CERTIFICATE OF SERVICE

I hereby certify that copies of the "NRC STAFF'S RESPONSE TO 'STATE OF UTAH'S PARTIAL INTERLOCUTORY APPEAL OF LBP-00-28'" in the above captioned proceeding have been served on the following through deposit in the Nuclear Regulatory Commission's internal mail system, or by deposit in the Nuclear Regulatory Commission's internal mail system, with copies by electronic mail, as indicated by an asterisk, or by deposit in the United States mail, first class, as indicated by double asterisk, with copies by electronic mail as indicated, this 17th day of November, 2000.

G. Paul Bollwerk, III, Chairman*
Administrative Judge
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, DC 20555
(E-mail copy to GPB@NRC.GOV)

Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Office of the Secretary*
ATTN: Rulemakings and Adjudications
Staff

Dr. Jerry R. Kline*
Administrative Judge
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, DC 20555
(E-mail copy to kjerry@erols.com)

U.S. Nuclear Regulatory Commission
Washington, DC 20555
(E-mail copy to
HEARINGDOCKET@NRC.GOV)

Dr. Peter S. Lam*
Administrative Judge
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, DC 20555
(E-mail copy to PSL@NRC.GOV)

Office of the Commission Appellate
Adjudication
Mail Stop: 16-C-1 OWFN
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

James M. Cutchin, V*
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, DC 20555
(E-mail to JMC3@NRC.GOV)

Jay E. Silberg, Esq.**
Ernest Blake, Esq.
Paul A. Gaukler, Esq.
SHAW, PITTMAN, POTTS &
TROWBRIDGE
2300 N Street, N.W.
Washington, DC 20037-8007
(E-mail copies to jay_silberg,
paul_gaukler, and ernest_blake
@shawpittman.com)

Denise Chancellor, Esq.**
Fred G. Nelson, Esq.
Laura Lockhart, Esq.
Ms. Jean Braxton
Utah Attorney General's Office
160 East 300 South, 5th Floor
P.O. Box 140873
Salt Lake City, UT 84114-0873
(E-mail copy to dchancel@State.UT.US),
[and jbraxton@email.usertrust.com](mailto:jbraxton@email.usertrust.com))

Connie Nakahara, Esq.**
Utah Dept. of Environmental Quality
168 North 1950 West
P.O. Box 144810
Salt Lake City, UT 84114-4810
(E-mail copy to cnakahar@state.UT.US)

Danny Quintana, Esq.**
Danny Quintana & Associates, P.C.
68 South Main Street, Suite 600
Salt Lake City, UT 84101
(E-mail copy to
quintana@Xmission.com)

Joro Walker, Esq.**
Land and Water Fund of the Rockies
2056 East 3300 South, Suite 1
Salt Lake City, UT 84109
(E-mail copy to
joro61@inconnect.com)

John Paul Kennedy, Sr., Esq.**
1385 Yale Ave.
Salt Lake City, UT 84105
(E-mail copy to john@kennedys.org)

Land and Water Fund of the Rockies**
2260 Baseline Road, Suite 200
Boulder, CO 80302

Diane Curran, Esq.**
Harmon, Curran, Spielberg & Eisenberg
1726 M Street, N.W., Suite 600
Washington, D.C. 20036
(E-mail copy to
dcurran@harmoncurran.com)

Sherwin E. Turk/**RA**/
Counsel for NRC Staff