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**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

Before the Atomic Safety and Licensing Board

In the Matter of)	
)	
PRIVATE FUEL STORAGE L.L.C.)	Docket No. 72-22
)	
(Private Fuel Storage Facility))	ASLBP No. 97-732-02-ISFSI

**APPLICANT'S RESPONSE TO STATE OF UTAH'S
MOTION FOR PARTIAL RECONSIDERATION OF LBP-00-28**

Pursuant to 10 C.F.R. § 2.730(c) and the Atomic Safety and Licensing Board's ("Licensing Board" or "Board") Order of November 13, 2000,¹ Applicant Private Fuel Storage L.L.C. ("Applicant" or "PFS") hereby responds in opposition to the "State of Utah's Motion for Partial Reconsideration of LBP-00-28" ("State Mot."), dated November 10, 2000. In its Motion the State requests reconsideration of the Board's decision in LBP-00-28² to deny the admission of State contentions Utah LL, Utah MM, and Utah NN³ on the grounds that the State failed to meet the Commission's late filing criteria. State Mot. at 1. The State requests reconsideration on the grounds that the Board's "harsh remedy" was unwarranted in light of Commission policy. Id. PFS opposes the

¹ Order (Schedule for Responsive Pleadings) (Nov. 13, 2000).

² Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-00-28, 52 NRC __ (Oct. 30, 2000).

³ 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) (Aug. 2, 2000) (hereinafter "Contentions"); State of Utah's Reply to Applicant's and Staff's Responses to Late-Filed Contentions Utah LL Through OO and Motion to Amend Contention LL (Sept. 7, 2000) (hereinafter "Cont. Rep.").

State's request on the grounds in that the State has misread Commission policy and has provided no basis for the Board to reconsider its decision in LBP-00-28.

I. BACKGROUND

On June 29, 1998, in anticipation of new contentions being filed on the NRC Staff's Safety Evaluation Report ("SER") or draft Environmental Impact Statement ("DEIS") for the Private Fuel Storage Facility ("PFSF"), the Licensing Board directed that "any contentions based on [the DEIS] should be submitted no later than thirty days after [the] document[] [is] made available to the public." Memorandum and Order (General Scheduling for Proceeding and Associated Guidance) (June 29, 1998) at 5. To enable intervenors to make their technical experts available for review of the SER or DEIS, the Board also directed that the NRC Staff provide 15 days advance notice to the intervenors and the Board of the public availability of those documents. *Id.* In a March 10, 2000 Memorandum and Order, ruling on the admission of late-filed contentions on the partial SER the Staff has issued for the PFSF, the Board reminded the intervenors and the Staff of their obligations. Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-00-7, 51 NRC 139, 143 n.1. See LBP-00-28, slip op. at 9-10.

On June 12, 2000, the Staff notified the Board and the parties that the DEIS for the PFSF⁴ would be made available to the parties at the beginning of the upcoming evidentiary hearing, on June 19.⁵ LBP-00-28, slip op. at 9-10. On June 19, the Staff distrib-

⁴ 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, U.S. Nuclear Regulatory Commission, Office of Nuclear Material Safety and Safeguards, NUREG-1714 (June 2000).

⁵ Further, the Staff had earlier in a May 8, 2000 conference call with the Licensing Board advised the parties that the DEIS would be published in June. Tr. 1357, 1367-69.

uted a copy of the DEIS to the State and on June 23, the Staff made the DEIS available to the public. Id. at 10. The State filed Contentions Utah LL through OO, asserting deficiencies in the DEIS, on August 2, 2000, 39 days after the DEIS became publicly available (43 days after the State's actual receipt of the DEIS) and 51 days after having received notice that it would become publicly available. Contentions at 1; see LBP-00-28, slip op. at 10.

In ruling on admitting the contentions, the Board determined that because they were filed 51 days after the State received notice that the DEIS would be publicly available, the contentions were six days late. Id. at 10.⁶ The State claimed that it had good cause for being late for a number of reasons. Id. But the Board ruled that the State's reasons were deficient. Id. at 11-15 (noting in particular that the Commission had directed its presiding officers to enforce compliance with its hearing schedules (citing Statement of Policy on Conduct of Adjudicatory Proceedings, CLI-98-12, 48 NRC 18, 21 (1998)) and that the State had failed to request additional time to file its contentions). The Board then found that the other four factors in the Commission's late-filing test, 10 C.F.R. § 2.714(a)(1), did not overcome the State's lack of good cause for lateness, and the Board dismissed the contentions.⁷ Id. at 13-15.

⁶ The Board did not determine lateness from the June 23 DEIS availability date because by providing notice of the DEIS's availability on June 12, the Staff was four days late (notice should have been provided 15 days before June 23, i.e., by June 8). Id. at 9-10. The Board also found that Contention Utah OO, and the part of Contention Utah NN that asserted that the DEIS was deficient for failing to address the economic consequences of a maximum credible spent fuel transportation accident, could have been filed based upon PFS's Environmental Report and hence they were nearly three years late. Id. at 7-8. The State is not seeking reconsideration of the Board's ruling on Utah OO and that part of Utah NN. State Mot. at 1 n.1.

⁷ Although the Board's ruling on the late-filing criteria meant that it did not need to address the admissibility of these contentions under the section 2.714(b), (d) criteria, the Board noted that it "would have denied the admission of late-filed contention Utah LL and contention Utah MM, subparts one and two, as failing

II. DISCUSSION

A. Standard for Reconsideration

The State quotes the Commission's standard for reconsideration as applied by the Board in this case which PFS agrees is the appropriate standard to be applied here. See State Mot. at 2-3 (quoting Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-98-17, 48 NRC 69, 73 (1998)).

B. The Board's Ruling Was Consistent With Commission Policy and Should Not Be Reconsidered

The State asserts that the Board should reconsider its ruling on Contentions Utah LL, MM, and NN because the Board overlooked the Commission's policies on the application of the late-filing criteria and the imposition of sanctions for failure to comply with deadlines. State Mot. at 3-4. The State claims that it is the purpose of the Commission's late-filed contention rule to ensure the efficient management of NRC proceedings. Id. at 4-6. Similarly, the Commission's policies on imposing sanctions are also intended to ensure the orderly and fair conduct of hearings. Id. at 6-7. The State then asserts that the Board was wrong in dismissing the State's contentions, in that "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 w[h]ether to impose sanctions for a participant's failure to meet its obligations." Id. at 6-11.

The State's argument is essentially that Commission policy allows it, at least in this instance, to take additional time for filing contentions, without requesting prior per-

to show that a genuine dispute exists with PFS on a material issue of fact or law and contention[] Utah NN . . . as lacking an adequate basis." LBP-00-28, slip op. at 15 n. 3.

mission, on the basis of the State's subjective belief that it needed extra time under the circumstances. The State is incorrect. Indeed, the Commission's rules on late-filed contentions and its policies on imposing sanctions are to ensure the efficient management of NRC proceedings. See Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), CLI-83-19, 17 NRC 1041, 1046-47 (1983); Policy Statement, CLI-98-12, 48 NRC at 18, 21. But efficiency is not served by allowing litigants to arrogate to themselves the power to take extensions of time.

The State argues that the Board's "sanction" of dismissing the late contentions because the State failed to satisfy the late-filed test was overly harsh under Commission policy. The argument is misplaced. The "sanction" is prescribed by the late-filing regulation itself:

Nontimely filings will not be entertained absent a determination by the Commission, the presiding officer or the Atomic Safety and Licensing Board designated to rule on the petition and/or request, that the petition and/or request should be granted based upon a balancing of the following factors in addition to those set out in paragraph (d)(1) of this section: [late-filing factors 10 C.F.R. §§ 2.714(a)(1)(i)-(v)].

10 C.F.R. § 2.714(a)(1) (emphasis added). Thus, the "sanction" for failing to satisfy the Commission's late-filed test is that the late contention "will not be entertained." Therefore, once a board has decided that the test is not satisfied, the board must dismiss the contention.

Given that the "sanction" for unjustified lateness is fixed by the regulation, the only question is whether Commission policy should somehow change the Board's determination that in fact the State failed to satisfy the section 2.714(a)(1) late-filed test. Because the State knew about the pending publication of the DEIS and knew about the

Board's deadline well in advance, and because the Commission has been very clear about a party's obligation to meet the deadlines established during an NRC proceeding, Commission policy does not dictate that the Board reconsider or alter its decision that the State was unjustifiably late.

The State asserts that it has been NRC policy to apply the late-filing criteria "generously," State Mot. at 5, quoting a 1990 NRC brief in Union of Concerned Scientists v. NRC. First, an NRC brief is not a policy statement and carries no legal weight. Second, the brief itself states "Licensing Boards have applied the five-factor test for late contentions generously to admit late-filed contentions upon a showing of good cause." Id. at 6 (emphasis added). Here, the Board determined that the State did not have good cause for its lateness, LBP-00-28, slip op. at 13, so the brief simply provides no support for the State's position.

Next, the State claims that Commission policy on imposing sanctions for missed deadlines "takes into consideration the overall purpose of the sanctions, which is to ensure the orderly and fair conduct of hearings." State Mot. at 5. The State then argues that under Commission policy, the Board should not have dismissed the late contentions because the lateness would not have caused significant harm. Id. at 5-8 (quoting Statement of Policy on Conduct of Licensing Proceedings, CLI-81-8, 13 NRC 452, 453 (1981)).

The State, however, ignores the Commission's 1998 policy statement, which states:

The parties to a proceeding . . . are expected to adhere to the time frames specified in the Rules of Practice in 10 C.F.R. Part 2 for filing and the scheduling orders in the proceeding. As set forth in the 1981 Policy Statement, the licensing boards are expected to take appropriate actions to enforce compliance with these schedules. The Commission of course,

recognizes that the boards may grant extensions of time under some circumstances, but this should be done only when warranted by unavoidable and extreme circumstances.

Policy Statement, CLI-98-12, 48 NRC at 21. Clearly, the policy does not require the Board to allow the State to ignore a deadline without good cause and then complain after the fact that it was treated unfairly when the Board, following the explicit directive of section 2.714(a)(1), denied the State's contentions.⁸ Indeed, the language of the Policy Statement in the above quotation goes to a board's granting of a timely and proper request for an extension, and not to the situation here, where no such request was made.

Indeed, the District of Columbia Circuit recently discussed the application of the Commission's late-filing rules in conjunction with the 1998 policy statement where an intervenor, as the State did here, ignored the Commission's deadlines on the basis of an assumption that it would be awarded an extension of time after the fact:

The [intervenor] was bound to follow prescribed deadlines for the submission of required contentions. They had no basis upon which to assume that those deadlines automatically would be waived upon request pursuant to the old good cause standard. . . . Quite frankly, such an argument [that the intervenor had relied on such an assumption] would be silly.

National Whistleblower Center, 203 F.3d at 264. Thus, the underlying premise of the State's argument that policy requires it to be awarded an extension of time after the fact, when it had merely assumed that it would be granted such an extension, or alternatively

⁸ While the 1998 policy statement endorses the 1981 statement, *id.* at 18, the 1998 statement is a refinement of that statement and was promulgated "in response to 'recent experience and criticism of agency proceedings' . . . to streamline procedures for adjudicatory actions before the agency." National Whistleblower Center v. NRC, 208 F.3d 256, 259 (D.C. Cir. 2000). Thus, entirely apart from being promulgated more recently, for substantive reasons where the 1998 statement differs from the 1981 statement, the 1998 statement should be controlling.

that policy requires no sanction to be imposed, is, in the words of the court, “silly,” and provides no basis for reconsideration of the Board’s decision.

The State’s other arguments, see State Mot. at 8-10, similarly provide no basis for reconsideration. The State first argues that it did not believe that the Board’s order “set a hard and fast 30 day deadline” because 10 C.F.R. § 51.73 sets a 45-day comment period for NRC DEISs generally and the DEIS for the PFSF had a 90-day comment period. Id. at 7. This provides no support for the State, in that the process by which members of the public can file comments on NRC DEISs is simply not the same as the process for the filing of late-filed contentions in an NRC adjudicatory licensing hearing. Moreover, the Board has addressed the time limits for good cause many times in this proceeding, without ever referring to section 51.73 or the PFSF DEIS comment period.⁹ Thus, even if the State subjectively believed that section 51.73 was relevant here, that belief was wholly unreasonable.

Next, the State argues that it was unreasonable to expect its expert to prepare the contentions under the Board’s deadlines because the State’s attorneys were unavailable to help him, the State did not expect the Staff to make the DEIS available when it said it would, and the expert was busy with other things. State Mot. at 7-8. The State’s arguments afford it no relief. The Commission has clearly stated that:

a person who invokes the right to participate in an NRC proceeding also voluntarily accepts the obligations attendant upon such participation. And as a corollary, since intervenors have the option to choose the issues on which they will participate, it is reasonable to expect intervenors to shoul-

⁹ E.g., Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-98-7, 47 NRC 142, 208 (1998); LBP-98-29, 48 NRC 286, 293 (1988); LBP-99-3, 49 NRC 40, 47 (1999); LBP-99-6, 49 NRC 114, 118-19 (1999); LBP-99-7, 49 NRC 124, 128 (1999); LBP-00-16, 51 NRC 320, 325-26 (2000).

der the same burden carried by any other party to a Commission proceeding. While we are sympathetic with the fact that a party may have personal or other obligations or possess fewer resources than others to devote to a proceeding, this fact does not relieve that party of its hearing obligations.

Catawba, CLI-83-19, 17 NRC at 1048 (citations omitted).¹⁰

The State then argues that it has not engaged in “chronic dilatory behavior” and that it was unfair for the Board to conclude that the State’s failure to comply with the time limit reflected a lack of “appropriate concern” for the Board’s deadlines. State Mot. at 8-9. The State’s pleading is meritless, in that the State’s argument is essentially that it should be given at least one free pass to disregard completely the Board’s orders. As discussed above, neither NRC regulations nor policy provide the State with such a free pass.¹¹

The State argues next that the Board erred in not admitting the contentions because of the significance of the issues they raised and the importance of the DEIS. Id. at 10. The argument provides no basis for reconsideration, in that consideration of the “significance” of the issues raised in a contention is part of the evaluation conducted under 10 C.F.R. § 2.714(a)(1)(iii) as to whether a petitioner will assist in developing a sound record. Commonwealth Edison Co. (Braidwood Nuclear Power Station, Units 1 and 2), CLI-86-8, 23 NRC 241, 248 (1986). The Board evaluated the State’s contentions under section 2.714(a)(1)(iii) and found that while that factor moderately favored admission of the contentions, it, and the other three remaining factors, did not provide the compelling

¹⁰ Furthermore, the State received more advance notice of the DEIS’s availability than the formal notice provide by the Staff. In a May 8, 2000 conference call with the parties and the Board, the Staff had told the parties that the DEIS would be publicly available in June. Tr. 1357, 1367-69.

¹¹ Nor has this Board imposed onerous requirements on a party seeking an extension of time.

support needed to overcome the State's lack of good cause for lateness. LBP-00-28, slip op. at 15. The State provides nothing here to show that the Board's assessment of the State's likely contribution to the record was deficient. Thus, reconsideration is not warranted.

III. CONCLUSION

For the foregoing reasons, the State's Motion should be denied.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "D. Sean Barnett", is written over a horizontal line.

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Dated: November 20, 2000

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NUCLEAR REGULATORY COMMISSION**

Before the Atomic Safety and Licensing Board

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PRIVATE FUEL STORAGE L.L.C.)	Docket No. 72-22
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(Private Fuel Storage Facility))	ASLBP No. 97-732-02-ISFSI

CERTIFICATE OF SERVICE

I hereby certify that copies of Applicant's Response to State of Utah's Motion for Partial Reconsideration of LBP-00-28 were served on the persons listed below (unless otherwise noted) by e-mail with conforming copies by U.S. mail, first class, postage pre-paid, this 20th day of November 2000.

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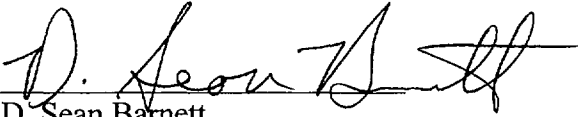
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