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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
MOTION FOR CLARIFICATION

Sherwin E. Turk
Counsel for NRC Staff

December 13, 2000

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The NRC Staff ("Staff") herewith responds to the "State of Utah's Motion for Clarification" ("Motion"), filed on November 28, 2000. In its Motion, the State of Utah ("State") requests clarification from the Commission as to the scope and timing of appeals that may be filed under 10 C.F.R. § 2.786. The State represents that it "is unclear to the State" when it should properly file an appeal from a partial initial decision concerning portions of a contention, where the Licensing Board had previously rejected other portions of that contention or dismissed portions of the contention on summary disposition (Motion at 2). In this regard, the State points to Contention Utah R, with respect to which the Licensing Board is expected to issue a decision shortly concerning matters that were the subject of evidentiary hearings, having previously rejected portions of this contention and dismissed other portions of the contention on summary disposition (*Id.*).

The Staff respectfully submits that the State's Motion should be denied, in that it improperly seeks an advisory opinion on an academic question, in the absence of any compelling need therefor.

DISCUSSION

The State's Motion clearly seeks the issuance of an advisory opinion by the Commission. While the State urges that its Motion is timely, on the grounds that a partial initial decision is expected shortly concerning Contention Utah R, it is undisputed that no such decision has yet been issued, and it is as yet unknown whether that decision will be favorable or unfavorable to the State. In the event that the Licensing Board resolves this contention in favor of the State, no appeal by the State would be needed.¹ Accordingly, prior to the issuance of the Board's decision, the State's Motion is entirely academic.

Second, while the State seeks advice from the Commission as to the proper time for filing appeals in an NRC adjudicatory proceeding, that is a role more properly exercised by counsel for the State. Here, the State is and has been represented by skilled counsel -- including an attorney who has represented various intervenors in numerous Commission adjudicatory proceedings for many years. Accordingly, the advice sought by the State should be obtained from its attorneys, rather than from the Commission.

Finally, this outcome is not affected by the fact that the Commission is not subject to the jurisdictional limitations placed upon Federal courts by the "case or controversy" provision in Title III of the U.S. Constitution. While there is no jurisdictional limitation or other "insuperable barrier" to the Commission's rendition of an advisory opinion,² it is well

¹ The State presented expert testimony concerning this contention, cross-examined the witnesses presented by the Staff and by Private Fuel Storage, L.L.C. ("PFS" or "Applicant"), and submitted proposed findings of fact and conclusions of law, in support of its position concerning this contention.

² *Northern States Power Co.* (Prairie Island Nuclear Generating Plant, Units 1 and 2), ALAB-455, 7 NRC 41, 54 (1978), *remanded on other grounds sub nom. Minnesota v. NRC*, 602 F.2d 412 (D.C. Cir. 1979).

established that the Commission generally will refrain from issuing an advisory opinion unless an issue is of "demonstrable recurring importance," or there exist "the most compelling reasons" to issue such an opinion. In this regard, the Atomic Safety and Licensing Appeal Board has stated as follows:

Questions such as those just outlined normally will receive our attention only if presented in the context of a live controversy. To be sure, as we have had previous occasion to observe, the restrictions placed upon the federal judiciary by the "case or controversy" clause in Article III of the United States Constitution do not govern our jurisdiction. *Northern States Power Co.* (Prairie Island Nuclear Generating Plant, Units 1 and 2), ALAB-455, 7 NRC 41, 54 (1978), *remanded on other grounds sub nom. Minnesota v. Nuclear Regulatory Commission*, 602 F.2d 412 (D.C. Cir. 1979). In that same decision, however, we went on to make clear our disinclination to render advisory opinions absent the most compelling cause to do so. *Ibid.* See also *Tennessee Valley Authority* (Hartsville Nuclear Plants, Units 1A, 2A, 1B, and 2B), ALAB-467, 7 NRC 459, 463 (1978).

Texas Utilities Generating Co. (Comanche Peak Steam Electric Station, Units 1 and 2), ALAB-714, 17 NRC 86, 93 (1983); *accord, Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), ALAB-900, 28 NRC 275, 284 (1988).

No "compelling reason" has been shown to support the State's request for an advisory opinion as to when it should file an appeal from a decision that resolves some, but not all, of the contested issues in an adjudicatory proceeding. Further, while the question raised by the State may be viewed to be of a "recurring" nature, this question has previously been addressed by the Commission in rulemaking³ and in numerous published decisions.

³ See 10 C.F.R. §§ 2.730(f) and 2.786(b).

Accordingly, the State has not raised an issue of “demonstrable recurring importance” which would warrant the issuance of an advisory opinion here.⁴

CONCLUSION

For the reasons set forth above, the Staff respectfully submits that the State’s Motion for Clarification should be denied.

Respectfully submitted,

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

Dated at Rockville, Maryland
this 13th day of December, 2000

⁴ To be sure, the Commission has encouraged its Licensing Boards “to certify novel legal or policy questions” to it, and has indicated that it “will take action in individual proceedings, as appropriate, to provide guidance to the boards and parties and to decide issues in the interest of a prompt and effective resolution of the matters set for adjudication.” *Statement of Policy on Conduct of Adjudicatory Proceedings*, CLI-98-12, 48 NRC 18, 25 (1998). At the same time, however, the Commission has indicated that it “will evaluate any matter put before it to ensure that interlocutory review is warranted.” *Id.* at 23; emphasis added. The Staff submits that Commission guidance in response to the State’s Motion is not warranted, in that the State’s question has not been referred to the Commission by the Licensing Board and, in any event, the State’s question does not constitute a novel issue that requires interlocutory review or the issuance of guidance by the Commission.

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S RESPONSE TO STATE OF UTAH'S MOTION FOR CLARIFICATION" in the above captioned proceeding have been served on the following through deposit in the NRC's internal mail system, with copies by electronic mail, as indicated by an asterisk, or by deposit in the U.S. Postal Service, as indicated by double asterisk, with copies by electronic mail this 13th day of December, 2000:

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