

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSIONBEFORE 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 THE STATE OF UTAH'S
 (1) REQUEST TO STAY PROCEEDING, AND
(2) SUGGESTION OF LACK OF JURISDICTION

INTRODUCTION

On February 11, 2002, the State of Utah (State) filed a "Petition to Institute Rulemaking and to Stay Licensing Proceeding" (Rulemaking Petition).¹ On the same date, the State filed "Utah's Suggestion of Lack of Jurisdiction" (Suggestion), in which the State suggested that the Nuclear Waste Policy Act of 1982, as amended, (NWPA) deprives the Commission of jurisdiction over the license application submitted by Private Fuel Storage, L.L.C. (PFS or Applicant) to construct and operate an independent spent fuel storage installation (ISFSI) on the Reservation of the Skull Valley Band of Goshute Indians, and that the Commission must therefore dismiss the application. For the reasons set forth below, the NRC Staff (Staff) respectfully submits that the State's request for a stay pending the institution of rulemaking proceedings, and its suggestion of lack of jurisdiction and request for dismissal of the PFS application, should be denied.

¹ With respect to the State's Rulemaking Petition, the Staff responds herein solely to the State's request for a stay of the instant proceeding, without addressing the State's request that a rulemaking proceeding be instituted. Any disposition of the State's request for the institution of rulemaking proceedings is beyond the scope of this licensing proceeding and is inappropriate for consideration herein; rather, that portion of the State's petition should be addressed by the Commission separately, pursuant to 10 C.F.R. Part 2, Subpart H (Rulemaking).

BACKGROUND

On April 22, 1998, the Atomic Safety and Licensing Board (Licensing Board) designated to rule on contentions and to preside over this proceeding, rejected as inadmissible Contention Utah A, in which the State asserted that the Commission lacks the authority “to issue a license to a private entity for a 4,000 cask, away-from-reactor, centralized, spent nuclear fuel storage facility.” *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-98-7, 47 NRC 142, 183 (1998). In so doing, the Board found that the contention and its supporting basis “impermissibly challenge the agency’s existing regulatory provisions or rulemaking-associated generic determinations.” *Id.*

In its ruling on Contention Utah A, the Licensing Board reviewed the Commission’s adoption of its regulations in 10 C.F.R. Part 72 and certain amendments thereto, and found that the licensing of a large, away-from reactor ISFSI was specifically contemplated by the Commission in Part 72. Further, the Board found that when the Commission revised Part 72 following passage of the NWPA, it made changes to accommodate the statute’s provisions for a monitored retrieval storage facility but did not make changes to preclude the construction and operation of a private ISFSI. Thus, it ruled that “the Commission clearly has established the scope of Part 72, [and] inquiry into that determination is beyond our authority.” *Id.* at 183-84.² No appeal was ever filed by the State from the Board’s ruling on this matter.

During the years since the Board’s initial ruling on intervention and contentions, the parties have engaged in extensive discovery, the filing of summary disposition motions and responses, and numerous other responsive pleadings before both the Licensing Board and Commission. Numerous decisions have been issued by the Licensing Board and the Commission on a myriad

² Further, the Board did not find “sufficient ambiguity in the Commission’s regulatory declaration of its jurisdiction (and concomitantly [the Board’s] to permit further inquiry into that question consistent with the dictates of 10 C.F.R. § 2.758.” *PFS*, LBP-98-7, 47 NRC at 184 n.9.

of issues, both substantive and procedural. In addition, the parties presented witnesses at hearings before the Licensing Board in the summer of 2000, and the Board and parties are now preparing for an additional round of hearings, to be held in Salt Lake City in April-May, 2002.³ An initial decision related to all remaining contentions is tentatively scheduled for issuance on September 9, 2002.

On February 11, 2002, nearly four and a half years after this proceeding began, the State filed the two instant requests: (1) its "suggestion" that the Commission lacks jurisdiction over the Applicant's license application and its request that the Commission dismiss the application, and (2) its petition to amend the Commission's regulations to provide that 10 C.F.R. Part 72 does not apply to applications for privately-owned, away-from-reactor storage facilities, and its request for a stay of the PFS proceeding pending the institution of rulemaking proceedings.

DISCUSSION

A. The State's Request for a Stay Should be Denied.

As part of its Rulemaking Petition, the State requested that the Commission stay the instant licensing proceeding, until final resolution of the State's petition to amend 10 C.F.R. Part 72. In determining whether to grant a stay of a licensing proceeding, the Commission adheres to the *Virginia Petroleum Jobbers* test. *Virginia Petroleum Jobbers Ass'n v Federal Power Corp.* 259 F.2d 921, 925 (D.C. Cir 1958). See *Allied-General Nuclear Services* (Barnwell Nuclear Fuel Plant Separations Facility), ALAB-296, 2 NRC 671, 677-78 (1975). This test has 4 factors: 1) has the petitioner made a strong showing that it is likely to prevail upon the merits? 2) has the petitioner shown that, without the requested relief, it will be irreparably injured? 3) would the issuance of a stay substantially harm other parties interested in the proceeding? and 4) where does the public

³ For example, the parties are currently engaged in drafting pre-filed testimony, preparing witnesses and organizing evidence for the hearing, and preparing other hearing materials including proposed "key determinations" and cross-examination plans.

interest lie? *Id.* The proponent of the stay request has the burden of demonstrating that the above factors warrant the granting of a stay. *Alabama Power Co.* (Joseph M. Farley Nuclear Power Plant, Units 1 and 2), CLI-81-27, 14 NRC 795, 797 (1981).

The question of irreparable injury is a crucial factor. *See id.* In addressing this factor, the State merely points to its loss of “costs, expenses, and attorneys’ fees” resulting from its participation in the PFS licensing proceeding. Rulemaking Petition at 37-38. The Commission, however, has consistently declared inadequate any claims of irreparable injury based on hearing expenses. *See, e.g., Consumers Power Co.* (Midland Plant, Units 1 & 2), ALAB-395, 5 NRC 772, 779 (1977) (mere litigation expense, even substantial and unrecoupable cost, does not constitute irreparable injury). Therefore, the State has failed to demonstrate that it would be irreparably harmed should a stay not be granted.

Further, the State has not demonstrated that it is likely to prevail on the merits. The State has failed to provide any basis to conclude that it might persuade the Commission to rescind or vitiate its regulations in 10 C.F.R. Part 72 by declaring them inapplicable for private, away-from-reactor ISFSIs. An examination of the issue demonstrates that the Commission has authority to issue licenses for private, away-from-reactor ISFSIs, and has promulgated a regime in Part 72 under which such facilities may be licensed. Moreover, the legality of the Commission’s actions in adopting Part 72 and undertaking the review and licensing of away-from-reactor ISFSIs under those regulations, such as the PFS application, is not open to serious dispute. The Commission’s authority is derived from the Atomic Energy Act of 1954, as amended (AEA), which provides for the regulation of special nuclear material, source material, and byproduct material, all of which are contained in spent fuel. Contrary to the State’s assertion, the NWPA did nothing to impinge or limit

the Commission's authority to license private, away-from-reactor, fuel storage.⁴ Consequently, there is no reasonable likelihood of success on the merits and this factor weighs against the grant of the requested stay.

With respect to the third factor -- harm to other parties - - the State asserts that the Applicant would not be harmed by a stay. Rulemaking Petition at 38. This claim is unsupported. Both the Applicant and the Skull Valley Band have a strong economic interest in the efficient and timely conclusion of this proceeding, and have invested much of their time and resources in the past four years herein. The Commission may properly take notice of this indisputable fact. *See Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3)*, CLI-85-3, 21 NRC 471, 477 (1985) (Commission recognizes monetary loss to applicant caused by delay of operation). *See also Petroleum Jobbers*, 259 F.2d at 925 (to relieve a claimant from irreparable injury at the expense of another may work an inequity). In addition, the Staff, too, has an interest in moving toward the conclusion of a long adjudicatory proceeding that has consumed a considerable amount of time and resources.

Finally, the public interest does not lie with the grant of a stay. The public interest lies in the expeditious and orderly process that has marked the adjudication of this case to date. *See Statement of Policy on Conduct of Adjudicatory Proceedings*, CLI-98-12, 48 NRC 18, 19 (1998) (the Commission's objectives are to provide a fair hearing process, to avoid unnecessary delays,

⁴ As the Board stated:

[T]he passage of NWSA section 135(h), 42 U.S.C. § 10155(h), the principal provision [intervenor] relies upon to support its conclusion the Commission is statutorily precluded from licensing a private, offsite ISFSI like that proposed by PFS, did not repeal or otherwise affect the Commission's pre-existing AEA authority to license a private ISFSI, but simply indicated that nothing in the NWSA impacted on that AEA authority.

PFS, LBP-98-7, 47 NRC at 240 (1998).

and to produce an informed adjudicatory record). The process would neither be fair nor expeditious should the Commission stay the proceeding at this late date pending a decision with respect to the rulemaking Petition.

In sum, the State has not demonstrated that a stay is warranted under the *Virginia Petroleum Jobbers* criteria. Having failed to meet its burden, its stay request should be denied.

B. The State's Suggestion and Motion to Dismiss Should be Rejected.

The State filed its Suggestion pursuant to Rule 12(h)(3) of the Federal Rules of Civil Procedure (FRCP), which states that “[w]henver it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.” The Staff submits that the State’s Suggestion should be denied as untimely, without merit, and contrary to 10 C.F.R. § 2.758, which prohibits collateral attacks on the Commission’s regulations.⁵

First, the State had no cause for waiting four and a half years to file its suggestion of lack of jurisdiction. Although there is no regulatory time frame for filing a suggestion of lack of jurisdiction (indeed, the Commission’s regulations do not explicitly provide for such filings), the State’s filing is inexcusably late in the context of this proceeding. Here, the State specifically filed a contention (Utah A) challenging the jurisdiction of the Commission to entertain the PFS application. The Licensing Board rejected that contention in LBP-98-7 -- but the State altogether failed to seek interlocutory review of that ruling, notwithstanding the fact that it could have done so

⁵ In any event, the Commission’s regulations do not contain any provision that is analogous to Rule 12(h)(3), and there is no reason to suggest that Rule 12(h)(3) should be applied in a Commission adjudicatory proceeding, so as to allow a party to challenge the Commission’s regulations (in a “suggestion of lack of jurisdiction” or otherwise) whenever it wishes, no matter how late in the proceeding.

In addition, the State’s Suggestion does not follow Rule 12(h)(3), which provides for the filing of a suggestion that the court lacks jurisdiction of the “subject matter” and must, therefore, “dismiss the action.” Here, the State’s Suggestion is that the Commission lacks jurisdiction over the “license application” and must “dismiss the application.” Suggestion at 1. The State’s Suggestion, therefore, requests relief that would not be obtainable pursuant to Rule 12(h)(3).

upon a showing that the decision (1) threatened to result in an “immediate and serious irreparable impact which, as a practical matter, could not be alleviated through a petition for review of the . . . final decision,” or (2) affected “the basic structure of the proceeding in a pervasive and unusual manner.” 10 C.F.R. § 2.786(g). *See, e.g., Connecticut Yankee Atomic Power Co.* (Haddam Neck Plant License Termination Plan), CLI-01-25, 54 NRC ____ (Dec. 5, 2001), slip op. at 4-5. The State’s instant filing, although not styled as a request for interlocutory review of LBP-98-7, in effect seeks to bring that same jurisdictional and statutory issue to the Commission’s attention. As such, it is inexcusably late.⁶

Second, the State’s Suggestion offers nothing new to the Commission and, therefore, is without merit. It cannot be contended that the Commission is not aware of the State’s assertion concerning the Commission’s authority in this proceeding. Both the State and the Castle Rock intervenors long ago raised this matter in contentions before the Licensing Board. *See PFS*, LBP-98-7, 47 NRC at 211-212. The Board rejected these contentions. Following the Board’s dismissal of these contentions, the Commission issued a ruling, stating, among other things, that it “is monitoring this [PFS] proceeding . . . as it does all proceedings.” *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-98-13, 48 NRC 26, 1998). In that ruling, the Commission, on its own, provided guidance with respect to the adjudication of two of the admitted contentions. *Id.* at 35. Further, the Commission has participated in Federal court litigation in which

⁶ *See generally*, 10 C.F.R. § 2.786(b)(1) (appeals of ruling on are due to the Commission within fifteen days after service the Board decision.) Further, the Suggestion, if construed as a non-interlocutory request for Commission review of the Board’s ruling in LBP-98-7, is unripe. If the Licensing Board ultimately issues a decision authorizing a license for PFS, the State will then be able to seek Commission review regarding whether the Licensing Board erred in rejecting Contention Utah A. *See Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-00-24, 52 NRC 351, 353-54 (2000) (review of orders dismissing contentions must wait until Board considers the matter in a partial initial decision or completes the proceeding).

the State raised its assertion concerning the Commission's legal authority,⁷ and there filed an *amicus curiae* brief on January 22, 2002, in which it asserted that the court lacks jurisdiction to consider the State's counterclaim that the Commission lacks authority to license this facility under the Atomic Energy Act and the NWSA. Thus, the Commission is aware of the matters contained in the State's Suggestion here.

Third, the State's Suggestion constitutes an impermissible challenge to the Commission's regulations. In general, the Commission's regulations may not be collaterally attacked in individual proceedings. 10 C.F.R. § 2.758. *See also American Nuclear Corp.* (Revision of Orders to Modify Source Materials Licenses), CLI-86-23, 24 NRC 704, 708 (1986). The regulations allow for petitions to challenge the Commission's rules as part of an adjudication only through the filing of a rule waiver petition, which the State has never done.⁸ The State's assertion in its Suggestion that the NWSA deprives the Commission of jurisdiction over the PFS license application constitutes an impermissible collateral attack against 10 C.F.R. Part 72. As recognized by the Board, the Commission clearly has established the scope of Part 72 as it pertains to the provisions of the NWSA. *PFS*, LBP-98-7, 47 NRC at 183-84. Further, in promulgating Part 72, as with any rule, the

⁷ In the Federal court litigation, the State filed a Motion for Judgment on the Pleadings arguing that the NRC lacks statutory authority to license the facility, as the State and PFS noted in a pleading filed in this proceeding. *See* "Sixth Joint Report on the Status of Federal Lawsuit Skull Valley Band v. Leavitt," dated February 11, 2002, at 4. On January 14, 2002, the State filed a Rule 12(h)(3) Suggestion of Lack of Jurisdiction, which the Applicant and Band opposed on January 28, 2002. Oral argument on all pending motions is expected on April 11, 2002.

⁸ *See PFS*, LBP-98-7, 47 NRC at 240 (Petitioner Castle Rock submitted a rule waiver petition with respect to the matter now being raised by the State - - the Commission's authority to license the facility under Part 72).

Commission set forth the statutory authority for the rule.⁹ Therefore, an attack on the Commission's authority to issue a Part 72 ISFSI license to a private entity cannot stand.

Finally, while the Commission has looked to the Federal Rules for guidance, where applicable, it is not bound to follow federal court practices in its own adjudicatory proceedings. *Toledo Edison Co.* (Davis-Besse Nuclear Power Station), ALAB-300, 2 NRC 752, 760 (1975). In this regard, the Commission heretofore has not recognized Rule 12(h)(3) of the Federal Rules of Civil Procedure. Judicial proceedings and administrative adjudicatory proceedings are "not fungible" and "any endeavor to fit one into precisely the same mold as the other could be productive of serious mischief." *Alabama Power Co.* (Joseph M. Farley Nuclear Plant, Units 1 and 2), ALAB-182, 7 AEC 210, 218 (1974).

Allowing a party to an adjudicatory proceeding to file a suggestion of lack of jurisdiction at any time in the proceeding is not conducive to the prompt and fair resolution of Commission proceedings and, further, is not necessary, in light of the Commission's inherent supervisory powers to review developments in a case at any time on its own; the Commission has the authority to consider any matter related to an adjudication pending before a licensing board. The Commission stated that it intends to exercise its inherent supervisory authority, and 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, 20, 25 (1998). The Commission may also exercise its authority to direct certification of particular questions under 10 C.F.R. § 2.718(i).

⁹ The "Authority" section for 10 C.F.R. Part 72 indicates that it was issued pursuant to AEA sections 51, 53, and 57 (special nuclear material), AEA sections 62, 63, 65, and 69 (source material), AEA section 81 (byproduct material), and AEA section 161b (SNM, source and byproduct material), among others.

In sum, the State's Suggestion should be rejected, and the Commission should not permit party filings of suggestions of lack of jurisdiction akin to Rule 12(h)(3) of the Federal Rules of Civil Procedure in adjudicatory proceedings.

CONCLUSION

For the reasons set forth above, the State's stay request should be denied and its Suggestion rejected.

Respectfully submitted,

/RA/

Catherine L. Marco
Counsel for NRC Staff

Dated at Rockville, Maryland
this 26th day of February, 2002

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S RESPONSE TO THE STATE OF UTAH'S (1) REQUEST TO STAY PROCEEDING, AND (2) SUGGESTION OF LACK OF JURISDICTION," 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 26th day of February, 2002:

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