

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

RAS 7047

DOCKETED 11/13/03

COMMISSIONERS

SERVED 11/13/03

Nils J. Diaz, Chairman
Edward McGaffigan, Jr.
Jeffrey S. Merrifield

In the Matter of)
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PRIVATE FUEL STORAGE L.L.C.)

Docket No. 72-22-ISFSI

(Independent Spent Fuel)
Storage Installation))
_____)

CLI-03-16

ORDER

With this order, the Commission takes the unusual step, in the interest of efficiency, of calling for appeals of Board decisions that would otherwise be considered interlocutory orders appealable only at the conclusion of the underlying ASLBP proceeding. We do so to expedite the final stages of a licensing process that has dragged on for a number of years. As we said a few months ago, "the time has now come to make every effort to bring the proceeding to closure soon and to decide whether to issue a license or not."¹

Private Fuel Storage, L.L.C., submitted its application for a license to build an independent spent fuel storage installation in Utah in 1997, nearly seven years ago. In response to NRC's notice of opportunity for a hearing, interested parties submitted dozens of contentions that, through outright rejection, summary disposition, or resolution after a hearing, have been winnowed down to a few.

¹ CLI-03-5, 57 NRC 279, 285 (2003).

Only three issues remain before the Board: the consequences of an aircraft crash into the facility, an issue which is awaiting further hearings; certain financial matters, which await resolution after various motions for reconsideration or clarification; and an issue concerning the impacts of building a rail spur, which awaits decision after an already-completed hearing. By far the largest task left before the Board is holding a hearing and rendering a decision on aircraft crash consequences. The aircraft consequences hearing is currently stalled while the applicant, PFS, conducts further technical analyses at the NRC staff's request. Our decision today does not apply to the Board's upcoming decisions in these pending matters.

But a series of prior interlocutory Board orders, many of which are now years old, may well present issues that the parties plan ultimately to bring before the Commission on petitions for appellate review. These include, for example, Board orders rejecting or summarily disposing of contentions without hearing. Ordinarily, of course, absent special circumstances, parties may not appeal interlocutory Board rulings before the end of the case.² We have repeatedly so held in this very case.³ Now, though, because only a few discrete matters remain pending before the Board and because the parties have already had considerable time to review the Board's various interlocutory rulings, we direct all parties to seek immediate appellate review of any interlocutory orders they wish to challenge.⁴ No such appeals will be entertained later.

² See *Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), CLI-02-7, 55 NRC 205, 213 (2002) (citing cases).

³ See, e.g., CLI-01-1, 53 NRC 1 (2001).

⁴ We remind parties of our guidance three years ago that interlocutory Board orders linked to subsequent partial initial decisions should be appealed in connection with the pertinent partial initial decision. See CLI-00-24, 52 NRC 351 (2000). We expect to adhere to that guidance in considering future petitions for appellate review in this case.

The Commission has undoubted power to modify its procedural rules on a case-by-case basis.⁵ As we suggested above, special circumstances warrant a departure here from our usual doctrine disfavoring interlocutory appeals. The Commission has previously expressed its strong interest in expediting this case, and directed the Board to take all steps reasonable and necessary to resolve the pending hearing matters.⁶ By permitting immediate petitions for appellate review of interlocutory Board orders, the Commission can do its part to speed this proceeding to its resolution. In addition, a two-tiered approach to review -- interlocutory appeals now and appeals from partial initial decisions later -- has the advantage ensuring that any important issue that may have been raised by interlocutory orders receives due consideration and is not lost in the process of reviewing the substantial and complex Board decisions still anticipated in this case.

We therefore direct the parties to file petitions for review of any interlocutory Board orders (other than those relating to matters still awaiting final Board decision) they wish to challenge. The petitions shall not exceed 20 pages, must be filed within 21 days after issuance of this order, and otherwise must conform to our rules of practice, including an explanation why particular issues meet the standards for Commission review.⁷ Answers, not to exceed 20 pages, should be filed within 14 days after receipt of any petition for review. To expedite response deadlines and Commission consideration, petitions and answers shall be filed with the Commission, and served on all counsel, by electronic means or, alternatively, by overnight delivery service.

⁵ See *National Whistleblower Center v. Nuclear Regulatory Commission*, 208 F.3d 256, 262 (D.C. Cir. 2000).

⁶ See CLI-03-05, 57 NRC at 284-85.

⁷ See 10 C.F.R. §2.786.

The Commission will thereafter issue an order calling for further briefs on any issue warranting review under the criteria listed at 10 C.F.R. §2.786(b)(4).

IT IS SO ORDERED.

For the Commission

/RA/

Annette L. Vietti-Cook
Secretary of the Commission

Dated at Rockville, MD
This 13th day of November, 2003

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Installation))	

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing COMMISSION ORDER (CLI-03-16) have been served upon the following persons by deposit in the U.S. mail, first class, or through NRC internal distribution with copies by electronic mail or facsimile as indicated.

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[Original signed by Evangeline S. Ngbea]

Office of the Secretary of the Commission

Dated at Rockville, Maryland,
this 13th day of November 2003