

October 13, 2005 (11:35am)

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSIONOFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFFBEFORE THE COMMISSIONERS

In the Matter of:

Docket No. 72-22-ISFSI

PRIVATE FUEL STORAGE, LLC
(Independent Spent Fuel
Storage Installation)

ASLBP No. 97-732-02-ISFSI

October 6, 2005

STATE OF UTAH'S RESPONSE TO NRC STAFF'S MOTION FOR DIRECTED
CERTIFICATION AND STAY OF THE LICENSING BOARD'S ORDER
REGARDING REDACTION OF FINAL PARTIAL INITIAL DECISION

On September 28, 2005, the NRC Staff filed Motion for Directed Certification and Stay of the Licensing Board's Order Regarding Redaction of Final Partial Initial Decision. The Staff's motion fails to meet the requirements for interlocutory review or issuing a stay. Moreover, its motion is moot because the issues relating to it have been resolved. Thus, the Staff's request for interlocutory review and request for a stay should be summarily denied.

I. Background

On September 15, 2005, the Board issued an order setting out a procedure by which it could evaluate whether to issue a public version of Part II of its February 24, 2005 Final Partial Initial Decision on Contention Utah K (PID). Under that procedure the Staff was first to redact any safeguards information (SGI) from the PID, then *seriatim*, the State and PFS were given the opportunity to agree or disagree with the Staff's redactions.¹ The Staff

¹This procedure is not inconsistent with the Commission's advice in Duke Energy Corporation (Catawba Nuclear Station, Units 1 and 2), CLI-04-06 59, NRC 62, 75 (2004), where the Commission offered guidance to Licensing Boards on whether litigants have a "need to know" safeguards information. The Commission advised that it is appropriate for Staff experts to first make the decision; if any litigant disputes those decisions, Licensing

did not raise any objections to the September 15th Order with the Board (either formally or informally) or request it to certify or refer its ruling to the Commission pursuant to 10 C.F.R. §§ 2.718(i) or 2.730(f).

Prior to providing the State and PFS with a copy of its proposed SGI redactions, the Staff, on September 28th, filed the instant motion with the Commission. On Friday, September 30th, the State received by express mail from the Staff a copy of PID with the Staff's proposed SGI redactions. Later that day, counsel for the State advised PFS and the Staff that it would not object to the Staff's proposed redactions to the PID. On Monday, October 3rd, PFS reviewed the redacted PID and came to the same conclusion. That same day, the parties, via e-mail, advised the Board that the Staff, PFS and the State were in agreement that the SGI redactions to be made to the PID should be those proposed by the Staff. Copy of e-mail attached hereto.

II. Legal Standard

Pursuant to 10 C.F.R. § 2.730(f), "[n]o interlocutory appeal may be taken to the Commission from a ruling of the presiding officer." Furthermore, the presiding officer has the discretion, in specified circumstances, to refer a ruling to the Commission, or to certify questions to the Commission for its determination. 10 C.F.R. §§ 2.730(f) and 2.718(i).

The Commission will grant discretionary interlocutory review if the Licensing Board's action either (1) threatens the party adversely affected with immediate and serious irreparable impact that could not be remedied by a later appeal; or (2) affects the basic

Boards, while exercising their own judgment, should give considerable deference to the Staff's judgments. Id.

structure of the proceeding in a pervasive or unusual manner. 10 C.F.R. § 2.786(g). The Commission disfavors interlocutory review and will exercise that discretionary undertaking only in the most compelling of circumstances.² Moreover, absent a demonstration of irreparable harm or other compelling circumstances, the fact that legal error may have occurred does not of itself justify interlocutory appellate review.³

A request for a stay must be filed within 10 days of service of the presiding officer's decision or action. 10 C.F.R. § 2.788 (a). Factors to consider for granting a stay include "[w]hether the moving party has made a strong showing that it is likely to prevail on the merits" and "[w]hether the party will be irreparably injured unless a stay is granted." 10 C.F.R. § 2.788(e)(1) and (2). In ruling on requests for a stay, the Commission has held that "irreparable injury" is the most crucial factor.⁴

III. Discussion

The Staff filed its motion pursuant to 10 C.F.R. §§ 2.718(l), 2.786(g) and 2.788(a). Staff Motion at 2. The Staff attempts to meet the interlocutory review standard by relying on the second factor in section 2.786(g); it claims the Board's order will have a pervasive or unusual effect on this proceeding. *Id.* at 4-8. Nowhere in its motion does the Staff claim

²Private Fuel Storage, LLC (Independent Spent Fuel Storage Installation), CLI-01-01 53 NRC 1, 5 (2001).

³See Georgia Power Co. (Vogtle Electric Generating Plants, Units 1 & 2), CLI-94-15, 40 NRC 319 (1994); and Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-734, 18 NRC 11, 15 (1983).

⁴Alabama Power Co. (Joseph M. Farley Nuclear Plant, Units 1 and 2), CLI-81-27, 14 NRC 795, 797 (1981); Vermont Yankee Nuclear Power Corp. and Amergen Vermont, LLC (Vermont Yankee Nuclear Power Station), CLI-00-17, 52 NRC 79, 83 (2000).

that the Board's order will cause it to suffer immediate and serious irreparable harm.

A. Unusual or Compelling Circumstances Do Not Exist for Interlocutory Review by the Commission.

Now that the State and PFS are in agreement with the Staff's proposed redactions to the PID, the issues the Staff elevated to the Commission have become nugatory. Contrary to the Staff's motion, there will be no disputes for the Board to resolve⁵ (motion at 6-8); there are no new issues that threaten to cause a substantial delay in this proceeding (*id.* at 8-9); and the Board need only act in an administrative capacity to release the PID (*id.* at 4-6).⁶

The effect of the State's and PFS's expeditious review and acceptance of the Staff's proposed redactions is that the Staff's motion now rings hollow and it should be dismissed.

B. The Staff's Untimely Motion and Groundless Rationale for a Stay Should Be Denied.

The Staff acknowledges that it was two days late in filing its request for a stay. Staff Motion at n. 4; *see also* 10 C.F.R. § 2.788(a). On that basis alone, the request for a stay should be dismissed.⁷

In addressing the factors in 10 C.F.R. § 2.788(e) required to obtain a stay, the Staff first claims that it will prevail on the merits because the Board's order affects the basic

⁵The Board will not, as the Staff had feared, need to "improperly balance the arguments of an untrained and unqualified litigant's lawyer" against the Staff's expertise in making safeguards determinations. Staff Motion at 7-8 (*emphasis omitted*).

⁶On September 30, 2005, the Staff sent a redacted copy of the PID to Judge Farrar.

⁷*See, e.g., Babcock and Wilcox* (Apollo, Pennsylvania Fuel Fabrication Facility), LBP-92-31, 46 NRC 255, 262 (1992); and *Philadelphia Electric Company* (Limerick Generating Station, Units 1 and 2), ALAB-814, 22 NRC 191 (1985).

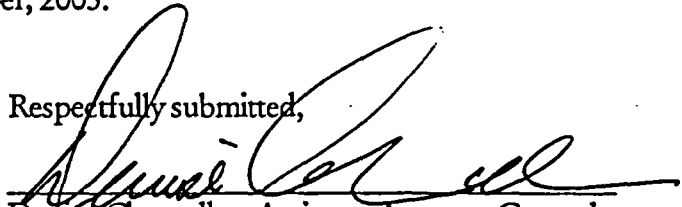
structure of the proceeding in a pervasive or unusual manner. Id. at 9-10. Second and more importantly, the Staff admits that it will not be irreparably injured unless a stay is granted.⁸ Id. at 10. Rather, it requests a brief stay to allow time for the Commission to review its motion or to prevent inadvertent disclosure of safeguards information. As described above, if the issues the Staff has raised with the Commission were ever a concern, they have now been remedied by the State's and PFS's acceptance of the Staff's redactions. Thus, these issues are now moot. The reasons put forth by the Staff for requesting a stay clearly do not meet the requirements of 10 C.F.R. § 2.788(e). Accordingly, its request for a stay should be denied.

IV. Conclusion

For the reasons stated above, the State requests the Commission deny the Staff's motion for interlocutory review and request for a stay.

DATED this 6th day of October, 2005.

Respectfully submitted,



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⁸See Farley, 14 NRC at 797 (an "overwhelming showing of likelihood of success on the merits" is necessary to obtain a stay where the showing on the other three section 2.788(e) factors is weak).

CERTIFICATE OF SERVICE

I hereby certify that a copy of STATE OF UTAH'S RESPONSE TO NRC STAFF'S MOTION FOR DIRECTED CERTIFICATION AND STAY OF THE LICENSING BOARD'S ORDER REGARDING REDACTION OF FINAL PARTIAL INITIAL DECISION was served on the persons listed below by electronic mail (unless otherwise noted) with conforming copies by United States mail first class, this 6th day of October, 2005:

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Denise Chancellor
Assistant Attorney General
State of Utah

From: Denise Chancellor
To: mcf@nrc.gov
Date: 10/3/2005 12:24:46 PM
Subject: Re: Docket No. 72-22 ISFSI -- Redactions to the Utah K PID

Dear Judge Farrar:

On Friday, the State received the NRC Staff's proposed redactions of safeguards information (SGI) from the Board's February 24, 2005 Final Partial Initial Decision on Contention Utah K (PID). The Staff also sent you a copy of those proposed SGI redactions. *See* Letter from Sherwin E. Turk, Counsel for NRC Staff to Denise Chancellor dated September 29, 2005.

I advised counsel for the Staff and Private Fuel Storage (PFS) that the State of Utah would not object to any of the Staff's proposed redactions to the PID.

Today, PFS had the opportunity to review the proposed redactions to the PID. Counsel for PFS advised that he does not object to those redactions.

Accordingly, the parties agreed that I should send you an e-mail to advise you that the Staff, PFS and the State are in agreement as to the SGI redactions to be made to the PID (i.e., all of the SGI redactions proposed by the Staff).

Sincerely,

Denise Chancellor
Counsel for the State of Utah

cc: Administrative Judges Lam and Abramson, ASLB
PFS Service List

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