

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

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Jeffrey S. Merrifield
Gregory B. Jaczko
Peter B. Lyons

DOCKETED 10/19/05

SERVED 10/19/05

In the Matter of)

PRIVATE FUEL STORAGE, L.L.C.)

(Independent Spent)
Fuel Storage Installation))
_____)

Docket No. 72-22-ISFSI

CLI-05-22

MEMORANDUM AND ORDER

On September 28, 2005, the NRC staff filed a motion for “directed certification.”¹ The staff’s motion sought interlocutory Commission review of a Licensing Board order² establishing a process for reviewing safeguards redactions to a decision on aircraft crashes that the Board had issued earlier this year. The NRC staff’s motion also sought a stay (albeit two days late)³ of the Redaction Order. We deny the NRC staff’s motion as moot, and, pursuant to our customary practice, vacate the Board’s Redaction Order.

A. Background

¹ In support of its motion – in effect, a petition for interlocutory review – the NRC staff invoked two provisions in our former rules of practice (applicable to this case), 10 C.F.R. § 2.718(i) (2004) and 10 C.F.R. § 2.786(g) (2004).

² Order Regarding Redaction of Final Partial Initial Decision (Sept. 15, 2005) (Redaction Order).

³ The staff itself characterized its stay request as late. See NRC Staff’s Motion for Directed Certification, at 2 n.4 (Sept. 28, 2005). In view of our decision today that the NRC staff’s motion is moot, we need not consider whether and when we will consider an out-of-time stay request.

On February 24, 2005, the Board issued two versions of its decision resolving a contention that military aircraft flying over the proposed Private Fuel Storage facility posed an unacceptable risk. One version, made publicly available, summarized the reasons for the Board's findings.⁴ The other version, the Board's "official" partial initial decision, gave a more detailed explanation, including certain figures involved in the Board's calculations. Because precise figures could be of possible use to malefactors intending to attack the facility, the Board designated its partial initial decision a "safeguards" order and did not make it public.

When the Board issued its partial initial decision, it indicated that it would investigate whether there were non-safeguards portions of the decision that could be usefully made public and published in the *Nuclear Regulatory Commission Issuances*. In its recent Redaction Order, the Board instructed the NRC staff to submit a proposed redacted version of the partial initial decision and to forward it to the other litigating parties (Private Fuel Storage, L.L.C., and the State of Utah) for their "comments."

Two weeks later, the NRC staff responded by filing the motion we have before us today. The staff argued that the Board lacked jurisdiction to issue its Redaction Order because the Commission had already issued a final adjudicatory decision in the proceeding,⁵ that the Board's redaction order improperly created an adversarial-type process to decide safeguards questions, and that the Board's order contemplated an improper "balancing" of the NRC's interest in protecting safeguards material against the public's interest in disclosure.

B. Discussion

The NRC staff's appellate challenge to the Board's Redaction Order is now moot. Although the staff requested the Commission to stay the Board's order, the staff almost

⁴ See ADAMS accession number ML050620391.

⁵ *Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation)*, CLI-05-19, 62 NRC ____ (2005).

immediately complied with it by redacting the Board's "air crash" partial initial decision and sending the redacted version to the other two parties.⁶ A few days later, counsel for the State of Utah notified the Board by e-mail that neither the State nor PFS objected to the staff's safeguards designations. The redacted version of the Board's partial initial decision therefore is now ready for publication. There is no outstanding controversy for the Commission to resolve on appeal. Hence, we deny as moot the NRC staff's motion for directed certification and for a stay.

While unreviewed Board decisions do not create binding legal precedent, it is prudent to vacate such decisions when Commission appellate review is cut short by mootness. That is our customary course, and one we take again today.⁷ It eliminates any confusion or future effects stemming from unreviewed Board decisions. We therefore vacate the Board's redaction order.

To provide guidance for the future, we remind our licensing boards that section 147 of the Atomic Energy Act gives NRC authority over protecting safeguards information from unauthorized disclosure.⁸ The protection of safeguards information, where warranted, is absolute;⁹ there is no balancing of the government's duty to protect safeguards information against the public interest in disclosure. Moreover, the Redaction Order appears to contemplate an adversarial process for determining the security classification of information in

⁶ See Letter from Sherwin E. Turk, Counsel for NRC Staff to Denise Chancellor (Sept. 29, 2005).

⁷ See, e.g., *Yankee Atomic Elec. Co.* (Yankee Nuclear Power Station), CLI-99-24, 50 NRC 219, 222 (1999); *Louisiana Energy Services* (Claiborne Enrichment Center), CLI-98-5, 47 NRC 113 (1998). See generally *Northern California Power Agency v. NRC*, 393 F.3d 223, 225-26 (D.C. Cir. 2004).

⁸ See 42 U.S.C. § 2167.

⁹*Id.* "The Commission ... shall prohibit the unauthorized disclosure of safeguards information"

the Board's opinion. If this is what the Board intended, it is improper. When necessary, the Board can seek Commission appointment of an adjudicatory employee to assist the Board in making safeguards redactions.¹⁰

CONCLUSION

For the foregoing reasons, the NRC staff's motion for directed certification and for a stay is *denied* as moot, and the Licensing Board's September 15 Redaction Order is *vacated*.

IT IS SO ORDERED.

For the Commission

/RA/

Annette L. Vietti-Cook
Secretary of the Commission

Dated in Rockville, MD
this 19th day of October, 2005

¹⁰ See 10 C.F.R. § 2.904 (2004).

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing COMMISSION MEMORANDUM AND ORDER (CLI-05-22) have been served upon the following persons by electronic mail or facsimile, followed by deposit of paper copies in the U.S. mail, first class, and NRC internal mail.

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(CLI-05-22)

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[Original signed by Evangeline S. Ngbea]

Office of the Secretary of the Commission

Dated at Rockville, Maryland,
this 19th day of October 2005