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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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BEFORE THE COMMISSION

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

In the Matter of:	)	
	)	
PRIVATE FUEL STORAGE, LLC	)	Docket No. 72-22-ISFSI
	)	
(Independent Spent Fuel Storage Installation)	)	
	)	

NRC STAFF'S RESPONSE TO STATE OF UTAH'S PETITION FOR INTERLOCUTORY REVIEW OF LBP-99-43

INTRODUCTION

On November 19, 1999, the State of Utah ("State") filed a petition seeking interlocutory Commission review of a decision by the Atomic Safety and Licensing Board ("Licensing Board") in this proceeding, in which the Licensing Board denied the State's request for the admission of late-filed amended Contention C.[1] *See* "Memorandum and Order (Denying Request for Admission of Late-Filed Amended Contention Utah C)," LBP-99-43, 50 NRC ___ (Nov. 4, 1999). According to the State, the Licensing Board "erroneously applied the 'good cause' standard under 10 C.F.R. § 2.714(a)(1) in a manner that will have a pervasive and unusual effect on the conduct of this entire proceeding" (Petition at 1).

In accordance with 10 C.F.R. § 2.786(g), the NRC Staff ("Staff") hereby responds to the State's Petition. As more fully set forth below, the Staff submits that the extraordinary remedy

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[1] "State of Utah's Petition for Interlocutory Review of LBP-99-43" ("Petition"), dated November 19, 1999.

of interlocutory Commission review is not warranted in this instance, where the Licensing Board's decision rejecting late-filed amended Contention C (a) was consistent with established Commission caselaw, and (b) in any event, will not have a "pervasive and unusual effect" on the conduct of this proceeding. Accordingly, the Staff submits that the State's Petition should be denied.

BACKGROUND

This proceeding involves an application for a license under 10 C.F.R. Part 72 by Private Fuel Storage, L.L.C. ("PFS" or "Applicant") for the construction and operation of an independent spent fuel storage facility on the Reservation of the Skull Valley Band of Goshute Indians, located within Tooele County, Utah. Numerous contentions filed by the State and other intervenors in the proceeding were admitted by the Licensing Board -- including Contention Utah C ("Failure to Demonstrate Compliance with NRC Dose Limits"), which challenged the adequacy of the dose calculations presented in the Applicant's Safety Analysis Report ("SAR") submitted in June 1997. *See Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-98-7, 47 NRC 142, 185-186 (1998), *aff'd on other grounds,* CLI-98-13, 48 NRC 26 (1998).

On December 10, 1998, during its review of the license application, the Staff issued a second round of Requests for Additional Information (RAIs) to the Applicant.[2] Two of those RAIs (RAIs 7-1 and 8-4) concerned the dose analysis set forth in the Applicant's SAR, and related directly to Contention Utah C. In particular, in RAI 7-1, the Staff indicated that "the [dose] calculation in the SAR has been conducted inappropriately," and that "[t]he licensee's calculation of accident impacts in the SAR" did not follow Interim Staff Guidance 5 (ISG-5) -- and the Staff

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[2] *See* Letter from Mark S. Delligatti (NRC) to John D. Parkyn (PFS), dated December 10, 1998 (RAIs 7-1 and 8-4).

therefore directed PFS to "revise the calculation of the impacts of the accident using the release fractions and methodology contained in [ISG-5]." *Id.;* emphasis added.[3]

On February 10, 1999, the Applicant submitted its response to the Staff's RAIs, in which it stated that its dose calculation "has been revised in accordance with [ISG-5]," and it provided details concerning its revised analysis (Response to RAI 7-1; emphasis added).[4] On April 21, 1999, PFS filed "Applicant's Motion for Summary Disposition of Utah Contention C," in which it asserted that its revised dose analysis rendered the contention moot;[5] and on May 19, 1999, PFS submitted a formal revision to its license application which, *inter alia*, incorporated the revised dose analysis in the SAR.[6] On June 17, 1999, the Licensing Board granted the Applicant's motion for summary disposition, finding that the SAR revision had rendered the contention moot.[7]

On June 23, 1999, the State filed Late-Filed Amended Contention Utah C, challenging the adequacy of the revised accident dose calculations contained in the Applicant's May 1999 SAR

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[3] In RAI 8-4, the Staff required the Applicant to "justify" its neglect of certain dose pathways in its SAR analysis. *Id.* The Applicant subsequently revised its pathway modeling in its revised accident dose analysis.

[4] *See* Letter from John D. Parkyn (PFS) to Director, Office of Nuclear Material Safety and Safeguards (NRC), dated February 10, 1999.

[5] Responses to the motion were filed by the Staff and the State. *See* "NRC Staff's Response to Applicant's Motion for Summary Disposition of Utah Contention C (Dose Limits)," dated May 11, 1999; "State of Utah's Opposition to Applicant's Motion for Summary Disposition of Contention C," dated May 11, 1999; and "State of Utah's Reply to NRC Staff's Response to Applicant's Motion for Summary Disposition of Utah Contention C (Dose Limits)," dated May 20, 1999.

[6] *See* Letter from John D. Parkyn (PFS) to Director, Office of Nuclear Material Safety and Safeguards (NRC), dated May 19, 1999 (transmitting, *inter alia*, Revision 3 of the SAR) .

[7] *See* "Memorandum and Order (Granting Motion for Summary Disposition Regarding Contention Utah C)," LBP-99-23, 49 NRC 485 (1999).

revision.[8] With respect to timeliness, the State asserted that "good cause" existed for the late filing of the contention under 10 C.F.R. § 2.714(a)(1), in that the contention was filed within 30 days after the State received SAR Revision 3 (Amended Contention C, at 14).[9] On November 4, 1999, the Licensing Board issued its decision in LBP-99-43, rejecting Late-Filed Amended Contention C on the grounds that it was untimely filed without good cause, and the State had not made a compelling showing that the other factors specified in § 2.714(a)(1) weighed in favor of the contention's admission. LBP-99-43, slip op. at 12-13, 16-17.

ARGUMENT

I. The Licensing Board's Decision Is Not Erroneous.

Pursuant to 10 C.F.R. § 2.714(a)(1) and established Commission caselaw, in determining the admissibility of a late-filed contention the following factors must be considered:

> (i) Good cause, if any, for failure to file on time.
>
> (ii) The availability of other means whereby the petitioner's interest will be protected.
>
> (iii) The extent to which the petitioner's participation may reasonably be expected to assist in developing a sound record.
>
> (iv) The extent to which the petitioner's interest will be represented by existing parties.

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[8] *See* "State of Utah's Request for Admission of Late-Filed Amended Utah Contention C," dated June 23, 1999.

[9] Responses to the contention were filed by the Applicant and Staff on July 7, 1999. *See* "Applicant's Response to State of Utah's Request for Admission of Late-Filed Amended Contention C" dated July 7, 1999; and "NRC Staff's Response to State of Utah's Request for Admission of Late-filed Amended Utah Contention C," dated July 7, 1999. While the Staff indicated its view that the contention should be rejected as untimely, it further indicated that portions of the contention would have otherwise been admissible (Staff Response, at 11-12).

> (v) The extent to which the petitioner's participation will broaden the issues or delay the proceeding.

Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station), CLI-93-12, 37 NRC 355, 363 (1993). A party seeking the admission of a late contention bears the burden of demonstrating that a balancing of these five factors warrants overlooking the contention's lateness. *Boston Edison Co.* (Pilgrim Nuclear Power Station), ALAB-816, 22 NRC 461, 466 n.22 (1985). Where a petitioner fails to show good cause for its lateness, it must make a "compelling" showing that the other four factors favor the contention's admission. *See, e.g., State of New Jersey* (Department of Law and Public Safety), CLI-93-25, 38 NRC 289, 296 (1993).

In considering the admissibility of Amended Contention C, the Licensing Board correctly applied these standards in determining to reject the State's contention.[10] With respect to the question of when a contention should be deemed to be timely filed, the Licensing Board observed as follows (LBP-99-43, slip op. at 9-10):

> Relative to this timing question, the Commission has stated "a petitioner has an 'ironclad obligation' to examine the application, and other publicly available documents, with sufficient care to uncover any information that could serve as the foundation for a contention." Duke Energy Corp. (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 338 (1999). Further, participants in agency proceedings have been counseled to evaluate all available information at the earliest possible time to identify the potential basis for contentions and preserve their admissibility. See Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), CLI-83-19, 17 NRC 1041, 1050 (1983) (intervenors [are] expected "to raise issues as early as possible"). And along this same line, the Board previously has indicated that where "a new contention purportedly is based on

[10] The State, in its Petition, briefly asserts that the Licensing Board "misapplied" some of the other four factors specified in 10 C.F.R. § 2.714(a)(1). Petition at n.10. Inasmuch as this alleged error is not explained in the Petition, this aspect of the Board's decision is not addressed herein.

> information contained in a document recently made publically available, an important consideration in judging the contention's timeliness is the extent to which the new contention could have been put forward with any degree of specificity in advance of the document's release." [*PFS*], LBP-98-29, 48 NRC 286, 292 (1998).
>
> As these decisions suggest, in making a judgment about timeliness, the emphasis is on the substance and sufficiency of the information available to the contention's sponsor. And from the Board's perspective, as we explained earlier in this proceeding, making a determination on such a timeliness issue "calls for a judgment about when the matter is sufficiently facially concrete and procedurally ripe to permit the filing of a contention." LBP-99-21, 49 NRC 431, 437 (1999).

The Licensing Board's application of these standards and its determination that the State had not shown good cause for late filing its contention were correct. As the Board found, while the Applicant's SAR was not formally revised until May 19, 1999, the State had received actual notice of the revision in February 1999 upon receiving the Applicant's RAI response -- four months prior to filing its contention. *Id.*, at 8 n.1. Moreover, the Applicant's February RAI response did not indicate that the dose analysis contained in its SAR "may" be revised (*see* Petition at 7), but that the analysis had, in fact, been revised -- and the RAI response set forth specific details concerning the revised dose analysis. Accordingly, the Licensing Board correctly concluded that the information contained in the RAI response provided "the requisite factual concreteness" to permit the State to formulate a contention "with reasonable specificity and basis." *Id.* at 10-11. Nowhere in its Petition does the State assert that the February RAI response was not sufficiently specific to allow it to frame a contention.

Further, as the Licensing Board noted, the Commission has previously indicated that information submitted in an RAI response "can provide an acceptable basis for a contention."

LBP-99-43, slip op. at 11, *citing Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 338 (1999). Notwithstanding the fact that this information was first submitted in an RAI response rather than a license application amendment, its inclusion in the RAI response rendered it "procedurally ripe" for consideration by the NRC Staff in its review of the application, and by other parties in the adjudicatory proceeding. *Id.* at 12-13. Accordingly, the Licensing Board correctly concluded that "the time at which the State received that [RAI] response was an appropriate point from which 'good cause' considerations began to accrue," and "the State did not have good cause for waiting until June 1999" to file its contention. *Id.* at 13.

In its Petition, the State contends that the Licensing Board's decision to measure the contention's timeliness from the date the State received the RAI response rather from the date of the application's revision "does violence to the plain language of the NRC's regulations and long-standing Commission practice." In support of this assertion, the State cites 10 C.F.R. § 2.714(b)(2)(iii), which indicates that contentions must include references to the specific portions of the application that a petitioner disputes, and it asserts that this regulation requires the State "to frame a dispute with *the application,* not the Applicant's correspondence" (Petition at 5).

The State's assertions are without merit. The Commission has previously held that intervenors must diligently "uncover and apply all publicly available information" to allow the prompt formulation of contentions. *Duke Power Co.* (Catawba Nuclear Station, Units 1 and 2), CLI-83-19, 17 NRC 1041, 1045, 1048 (1983). Further, the Commission clearly indicated that intervenors are expected "to raise issues as early as possible." *Id.* at 1050. Further, the Commission has indicated that RAI responses may form the bases for litigable contentions. *Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 338 (1999)

("if genuinely new and material safety or environmental issues later emerge from RAIs or other NRC staff documents, our contention rule does not prevent their litigation.").[11] Thus, there is no basis for the State's assertion that the Licensing Board's decision "creates, for the first time, a double-standard that allows it to dismiss contentions as inadmissible if they do not address the application, or to dismiss them as late-filed if an intervenor waits until an application has changed before it files a contention." Petition at 6.[12] In sum, the Licensing Board's determination that the State lacked good cause for its four-month delay in filing its contention was not in error.

II. The Petition Fails to Satisfy the Commission's Regulations Governing Interlocutory Review.

In its Petition, the State asserts that "the Commission should take review of LBP-99-43, because it makes a fundamental legal error that will affect the basic structure of the proceeding in a pervasive and unusual manner." Petition at 4, *citing* 10 C.F.R. § 2.786(g). In support of this assertion, the State claims that the Board's decision is "unfair," "sets up a double-standard

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[11] There is no merit in the State's assertion that intervenors have previously been required to file contentions based only upon the license application. *See* Petition at 5, *citing Baltimore Gas and Electric Co.* (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), CLI-98-25, 48 NRC 325, 349 (1998), *review pending sub nom. National Whistleblower Center v. NRC,* Nos. 99-1002, 99-1043 (D.C. Cir.). In *Calvert Cliffs*, the intervenors had based their contention on the existence of a Staff RAI. In that circumstance, the Commission concluded that "[u]nder our longstanding practice, contentions must rest on the license application, not on NRC Staff reviews." *Id.* However, the Commission further indicated that an RAI may support a contention, agreeing with the Licensing Board that "[i]f a petitioner concludes that a Staff RAI or an applicant RAI response raises a legitimate question about the adequacy of the application, the petitioner is free to posit that issue as a new or amended contention, subject to complying with the late-filing standards of section 2.714(a)(1)." *Id.*, at 350; emphasis added.

[12] Indeed, the State was put on notice long ago by the Presiding Officer in this proceeding that it must review all available materials to ensure the timely filing of its contentions. *See, e.g.*, Tr. 947 ("if you know about something you are supposed to bring it to the Board's attention as soon as possible in terms of filing late-filed contentions").

for the admissibility of late-filed contentions," and imposes a "difficult and confusing burden" on the State to evaluate "the mountain of extraneous licensing documents" submitted on the docket of the proceeding and to "second-guess" whether statements made by the Applicant in its submittals "will eventually result in license application amendments." *Id.* at 7. Further, the State asserts that the Board's "newly devised test" as to the type of information that is sufficient to support the formulation of a contention is too "vague and general" to be meaningful. *Id.* at 8.[13]

The State's assertions are without merit. As set forth above, the Board's decision to reject Amended Contention C as untimely without good cause is consistent with the Commission's regulations and established caselaw. Moreover, the Board's decision will not have "an unusual and pervasive effect" on the proceeding and does not impose any undue burden upon the State;[14] rather, the only effect of the Board's decision (apart from its exclusion of Amended Contention C from litigation) is to require, consistent with established Commission caselaw, that intervenors review "the license application and any available related licensing documents" in a timely manner

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[13] The Licensing Board's explanation as to the type of information that may support a contention was not "newly devised." As the State recognizes, this standard was set out in a previous decision in the proceeding, where the Licensing Board found that the timeliness of a contention challenging a request for exemption is "more properly judged from the time of Staff action on the exemption request rather than when the exemption request is filed." *See* Petition at 8, *citing* LBP-99-21, 49 NRC 431, 438 (1999). Here, the Applicant's submittal of information on the docket, indicating that it has revised an analysis contained in its SAR, provides concrete information which may be relied upon by an intervenor in formulating a contention, unlike an applicant's submittal of an exemption request which may never come to fruition unless it first is favorably acted upon by the Staff.

[14] Nor is there any merit in the State's complaint that the Applicant's RAI and commitment resolution responses contain too much material for the State to "sift through" to determine which statements would support a new contention. The provision of such material to the State is to its benefit -- and, indeed, the State requested that it be provided copies of all such correspondence, in order to "avoid . . . late filed contentions" (Tr. 824; *see also* Tr. 823-25, 857-62).

to support the filing of late contentions. *See Oconee, supra*, CLI-99-11, 49 NRC at 338. As the Commission has recognized, requiring that intervenors perform such a review within a limited time frame "can pose a significant burden," but is necessary for the conduct of "efficient and expeditious administrative proceedings." *Id.* at 338-39.

In sum, the Board's decision is consistent with Commission caselaw and will not have a "pervasive and unusual effect" on the conduct of this proceeding. Accordingly, extraordinary relief in the form of interlocutory review of the Board's decision is not warranted.[15]

CONCLUSION

For the reasons set forth above, the Staff submits that the State's petition for Commission review of LBP-99-43 should be rejected.

Respectfully submitted,

Sherwin E. Turk
Counsel for NRC Staff

Dated at Rockville, Maryland
this 3rd day of December 1999

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[15] Interlocutory appeals to the Commission from Licensing Board decisions are disfavored and will be undertaken "only in the most compelling circumstances." *Sequoyah Fuels Corp.* (Gore, Oklahoma Site), CLI-94-11, 40 NRC 55, 59 (1994). The Commission has generally declined to grant interlocutory review of Licensing Board decisions admitting or rejecting contentions under 10 C.F.R. § 2.786(g), in that such decisions generally do not (a) affect the proceeding in a pervasive or unusual manner or (b) cause irreparable harm to an aggrieved party which, as a practical matter, could not be alleviated through an appeal from the Licensing Board's final decision in the proceeding. *See generally, Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), ALAB-838, 23 NRC 585, 592 (1986); *see also*, 10 C.F.R. § 2.730(f).

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	
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PRIVATE FUEL STORAGE L.L.C.	)	Docket No. 72-22-ISFSI
	)	
(Independent Spent	)	
Fuel Storage Installation)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of the "NRC STAFF'S RESPONSE TO STATE OF UTAH'S PETITION FOR INTERLOCUTORY REVIEW OF LBP-99-43" in the above captioned proceeding have been served on the following through deposit in the Nuclear Regulatory Commission's internal mail system, or by deposit in the United States mail, first class, as indicated by an asterisk, with copies by electronic mail as indicated, this 3rd day of December, 1999.

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