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March 21, 2000

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

OFFICE OF THE
GENERAL COUNSEL
ADJUTANT GENERAL

Before the Atomic Safety and Licensing Board

In the Matter of)
)
PRIVATE FUEL STORAGE L.L.C.) Docket No. 72-22
)
(Private Fuel Storage Facility)) ASLBP No. 97-732-02-ISFSI

**APPLICANT'S OPPOSITION TO STATE OF UTAH'S MOTION TO DELAY
THE HEARING SCHEDULE FOR UTAH CONTENTION E**

On March 17, 2000, the State of Utah filed "State of Utah's Motion to Delay the Hearing Schedule for Utah Contention E" ("State Mot."). The State requests the Atomic Safety and Licensing Board ("Board") to postpone the hearing on the remaining issues in Utah Contention E ("Utah E") until after the Commission rules on the Board's referral to the Commission of the Board's recent decision on Private Fuel Storage, L.L.C.'s ("PFS") motion for partial summary disposition of the contention.¹ Pursuant to 10 C.F.R. § 2.730(c), PFS files this answer opposing the motion.

The State claims that proceeding with the hearing on the remaining issues in Utah E (the costs associated with the Private Fuel Storage Facility ("PFSF") and onsite property insurance, LBP-00-6, 51 NRC at __, slip op. at 65) before knowing what the Commission's decision will be on the referred issue would have a "pervasive effect" on the hearing of the contention. State Mot. at 3. It argues that if the Commission were to determine that other, additional issues had to be heard as well, hearing those other issues at

¹ Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-00-6, 51 NRC __ (2000).

a later date would be expensive and would “destroy the integrity of the State’s presentation of its case.” Id.

The State’s motion should be denied. As indicated in LBP-00-6, “the Board does not contemplate that the pendency of the referral should cause any delay in the litigation” of the remaining portions of Utah E. LBP-00-6, 51 NRC ___, slip op. at 74 n.13 (citing 10 C.F.R. § 2.730(g)). While the State claims that it is not requesting a stay of the proceedings, State Mot. at 2, in fact, with respect to Utah E it is.² Stays pending review are granted only in “unusual cases.” Sequoyah Fuels Corporation (Gore, Oklahoma Site), CLI-94-9, 40 NRC 1, 6 (1994) (citing 10 C.F.R. § 2.788(e)). The possibility that a party will incur additional litigation expenses does not warrant a stay. Id. Nor does the importance or novelty of the issue being reviewed. Id. at 8. Barring a showing of irreparable injury in the absence of a stay, a movant must “make an overwhelming showing that it is likely to succeed on the merits” of the issue(s) under review. Id. at 7. Clearly, given the Board’s decision, the State has not done that.

Moreover, it is hard to conceive how the litigation of the remaining issues in Utah E on the current schedule and the possibility of hearing other, additional issues at some later date in the future (should the Commission so direct) would cause the State harm. The remaining issues left for the June 2000 hearing – the costs of building and operating the PFSF and onsite liability coverage – are factually distinct from the issues the Board

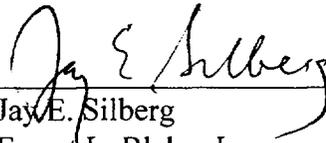
² A request for a delay in hearing one or more individual issues pending review is a request for a stay. See Metropolitan Edison Company (Three Mile Island Nuclear Station, Unit 1), CLI-84-17, 20 NRC 801, 802-04 (1984); Pacific Gas and Electric Company (Diablo Canyon Nuclear Power Plant Units 1 and 2), ALAB-592, 11 NRC 744, 753-56 (1980); see also Allied-General Nuclear Services (Barnwell Nuclear Fuel Plant Separations Facility), ALAB-296, 2 NRC 671, 673, 677-78 (1975).

dismissed in its ruling, – i.e., issues concerning how PFS must demonstrate reasonable assurance that it will obtain the funds necessary to cover the facility’s costs. Thus, it is hard to see how hearing the two sets of issues separately would “destroy the integrity of the State’s presentation.” For the same reason, even if the Commission should reinstate some of the issues that have been dismissed, hearing the two sets of issues separately would entail little or no duplication of effort, in that such separate hearings would involve the review and preparation of factually distinct material. The fact that the State has chosen to use the same witnesses on these different issues hardly establishes a significant burden on them or on the State.

Finally, while the State argues that pushing the remaining aspects of Utah E into future hearings would not affect the overall schedule for this proceeding, the State’s stratagem is wholly inconsistent with the phased hearing approach that the Board and the parties have pursued since the start of this case, i.e., to hear and decide issues as soon as practicable after the Staff position, discovery, and summary disposition have been completed.

Therefore, the Applicant requests that the State’s motion be denied.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that copies of the "Applicant's Opposition to State of Utah's Motion to Delay the Hearing Schedule for Utah Contention E" was served on the persons listed below (unless otherwise noted) by e-mail with conforming copies by U.S. mail, first class, postage prepaid, this 21st day of March 2000.

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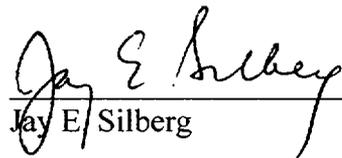
* By U.S. mail only

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