

August 10, 1998

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

NRC STAFF'S COMMENTS ON THE SCHEDULE
IN LIGHT OF THE COMMISSION'S
POLICY STATEMENT ON CONDUCT
OF ADJUDICATORY PROCEEDINGS (CLI-98-12)

By Memorandum and Order dated July 31, 1998,¹ the Licensing Board invited the parties to comment upon the schedule and associated guidance provided in the Board's Order of June 29, 1998,² in light of the Commission's Statement of Policy on Conduct of Adjudicatory Proceedings (CLI-98-12), 48 NRC __ (July 28, 1998), 63 Fed. Reg. 41872 (Aug. 5, 1998).³ In accordance

¹ "Memorandum and Order (Opportunity for Comments on Commission Policy Statement on Conduct of Adjudicatory Proceedings)," dated July 31, 1998.

² "Memorandum and Order (General Schedule for Proceeding and Associated Guidance)," dated June 29, 1998 (hereinafter referred to as "Scheduling Order" or "Order").

³ Comments upon the Licensing Board's Scheduling Order were previously provided by the State of Utah, the Applicant and the NRC Staff, pursuant to the Board's Order of July 8, 1998. See (1) "State of Utah's Comments on the Board's June 29, 1998, Scheduling Order" ("Utah Comments"), dated July 7, 1998; (2) "Applicant's Comments on General Schedule for Proceeding and Associated Guidance" ("PFS Comments"), dated July 7, 1998; (3) "NRC Staff's Response to the State of Utah's Comments on the Scheduling Order of June 29, 1998" ("Staff Comments"), dated July 9, 1998 (noting, in part, the Staff's general agreement with the Applicant's comments); and (4) Applicant's Response to the State of Utah's Comments on the June 29, 1998 Scheduling Order.

with the Licensing Board's request, the NRC Staff ("Staff") herewith provides its comments on the established schedule in this proceeding, in light of the Commission's Policy Statement.

1. In its Policy Statement, the Commission indicated that it seeks to ensure that NRC adjudicatory hearings "are conducted efficiently and focus on issues germane to the proposed actions under consideration," and it directed its hearing boards and presiding officers to employ the measures described in the policy statement "to ensure the efficient conduct of proceedings" (*Id.*, at 1). Among the measures described in the Policy Statement are (1) "adherence to the hearing procedures set forth in . . . 10 CFR Part 2, as interpreted by the Commission" (*Id.*, at 3); (2) use of the techniques for case management set forth in the Commission's 1981 "Statement of Policy on Conduct of Licensing Proceedings," CLI-81-8, 13 NRC 452 (1981), 46 Fed. Reg. 28533 (May 27, 1981) (*Id.*, at 4); and (3) the use of other measures specified in the Policy Statement to ensure the efficient conduct of adjudicatory proceedings.

2. The specific measures identified by the Commission in its recent Policy Statement include the following techniques:

(a) shortening the time for filing where authorized in Part 2, "to the extent practical in a specific proceeding" (*Id.*, at 5);

(b) using simultaneous rather than sequential filings (*Id.*);

(c) using electronic filings and other expedited forms of service (*Id.*);

(d) foregoing the use of summary disposition motions, "except upon a written finding that such a motion will likely substantially reduce the number of issues to be decided, or otherwise expedite the proceeding" (*Id.*, at 6);

(e) postponing the commencement of evidentiary hearings until completion of the Staff's Safety Evaluation Report (SER) or Final Environmental Statement (FES), unless the Presiding Officer finds that starting the hearing on such issues "will indeed expedite the proceeding, taking into account the effect of going forward on the staff's ability to complete its evaluations in a timely manner" (*Id.*);

(f) requiring parties to adhere to established schedules, with extensions of time being granted "only when warranted by unavoidable and extreme circumstances" (*Id.*, at 7);

(g) requiring the parties to provide "appropriate and accurate" references to legal and factual support for assertions made, under penalty that the material may be stricken from the record or the party may be dismissed (*Id.*);

(h) considering contentions in accordance with 10 C.F.R. 2.714(b), limited by the nature of the application (*Id.*, at 8);

(i) avoiding the Licensing Board's adoption of issues *sua sponte*, absent Commission approval (*Id.*, at 9);

(j) requiring informal discovery disclosures such as are contained in the 1993 amendments to Rule 26 in the Federal Rules of Civil Procedure (*Id.*, at 10);

(k) establishment by the Staff of a "case file" in the proceeding, containing the application, any amendments thereto, and any Staff reports and correspondence between the applicant and Staff relevant to the application (*Id.*, at 11);

(l) suspending discovery against the Staff until the Staff's review documents have been issued, unless the Presiding Officer finds that starting such discovery prior to issuance of those documents will expedite the hearing (*Id.*);

(m) establishing reasonable limits on discovery, such as by limiting the number of rounds of interrogatories or depositions, or the time for completing discovery, and allowing "only a single round of discovery regarding admitted contentions related to the SER or the FES," which should commence "shortly after its issuance" (*Id.*);

(n) the issuance of Board decisions within 60 days after the last pleading has been filed (*Id.*, at 6); and

(o) the expeditious issuance of interlocutory rulings, and the certification of questions to the Commission, where the issues are novel and could benefit from early Commission review such as where they involve matters of first impression involving regulatory interpretation (*Id.*, at 6, 9).⁴

3. The Staff believes the schedule established in this proceeding is consistent with the Commission's stated goal of ensuring that its adjudicatory proceedings are conducted in an efficient manner, as set forth in the recent Policy Statement. Indeed, the Commission has already observed that the Licensing Board conducted the early phases of this proceeding "with admirable dispatch," and based on its review of the schedule set forth in the Board's Order of June 29, 1998, the Commission observed that the Board "seems ready to manage the remaining phases of the

⁴ In addition, the Commission provided guidance to the Chief Administrative Judge on the establishment of additional Licensing Boards to preside over discrete issues (Policy Statement, at 6); indicated that it may set milestones for particular proceedings, deviation from which would require a Licensing Board to follow certain specified procedures (*Id.*); and stated that it would monitor proceedings "to ensure that they are being concluded in a fair and timely fashion," and that it will provide guidance and decide issues in individual proceedings, as appropriate, in the interest of achieving the "prompt and effective resolution" of contested issues (*Id.*, at 12).

adjudication with a similar eye on efficiency and speed."⁵ As a result, the Commission stated that it "sees no purpose at this point in attempting to fine-tune the Board's proposed schedule." CLI-98-13, *supra*, slip op. at 13. Rather, the Commission only "urge[d]" the Board and parties "to heed the guidance" set out in the recent Policy Statement. *Id.*⁶

4. For the reasons set forth below, the Staff does not perceive a need to modify the established schedule in this proceeding. First, many of the specific measures described in the Policy Statement have already been put in place in this proceeding. Thus, filing times have been established which appear to be as short as is reasonably practical;⁷ simultaneous filings have been required in lieu of sequential filings, as in the case of proposed findings of fact (*Id.*, at 10), while a similar result has been achieved by requiring the consolidation of other pleadings through the designation of lead parties;⁸ electronic filing has long been required; the parties have been reminded that motions for an extension of time under 10 C.F.R. § 2.711 are required to be supported by a showing of good cause; informal discovery disclosures have been required (*Id.*,

⁵ *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-98-13, 48 NRC __ (July 29, 1998), slip op. at 13, *citing* CLI-98-7, 47 NRC __ (June 5, 1998), slip op. at 5.

⁶ As the Licensing Board is aware, the established schedule largely reflects a proposed schedule which was jointly proposed by the parties, as the most expeditious schedule that is feasible, given the Staff's need to conduct its safety and environmental reviews of this application and rulemaking proceedings for the cask systems that are proposed for use at this facility.

⁷ In certain instances, such as the filing of interrogatory answers or motions to compel discovery, the 7-day and 5-day time limits provided by the Board appear to be too short. *See* Order of June 29, 1998, at 7; PFS Comments, at 2; Staff Comments, at 3.

⁸ *See, e.g.*, Order of June 29, 1998, at 9; "Memorandum and Order (Ruling on Standing, Contentions, Rule Waiver Petition, and Procedural/Administrative Matters)," LBP-98-7, 47 NRC __ (April 22, 1998), at 156-58.

at 5-7; LBP-98-7, slip op. at 160); reasonable limits have been established for formal discovery, including a limit on the number of rounds of interrogatories and depositions to be permitted (LBP-98-7, slip op. at 161), and reasonably prompt dates have been established for commencing and completing discovery, with particular reference to the expected issuance dates of the Staff's review documents (Order of June 29, 1998, Attachment A).

5. Second, while certain other measures specified in the Policy Statement have not been adopted in this proceeding, the Licensing Board's rulings are generally consistent with those measures and do not appear likely to delay the proceeding. Thus, while the Commission contemplated "only a single round of discovery regarding admitted contentions related to the SER or the FES," to commence "shortly after [the document's] issuance" (Policy Statement, at 11), the Board's schedule allows for one round of discovery on the Draft EIS as well as a second round on the Final EIS. Although this would allow more discovery on Staff documents than was contemplated by the Commission, the net result could be to expedite the proceeding, since discovery on the Final EIS should not be expected to go into matters which were addressed in discovery on the Draft EIS. Similarly, while the Policy Statement would bar the filing of summary disposition motions "except upon a written finding that such a motion will likely substantially reduce the number of issues to be decided, or otherwise expedite the proceeding," the Licensing Board has adopted measures to encourage prompt filing and page limits for such motions (Order of June 29, 1998, at 8-9), which may be expected to reduce any associated delay.

6. To be sure, the Licensing Board's schedule differs from the Commission's guidance in certain respects. For example, the Policy Statement would suspend discovery against the Staff until the Staff's review documents have been issued, unless the Presiding Officer finds that

starting such discovery prior to issuance of those documents "will expedite the hearing" (Policy Statement, at 11); in contrast, the schedule adopted by the Licensing Board in this proceeding would allow discovery against the Staff on safety issues to commence prior to publication of the SER, and would allow discovery on environmental issues to commence upon publication of the Draft EIS. Similarly, the Policy Statement would postpone the commencement of evidentiary hearings until completion of the Staff's Safety Evaluation Report (SER) or Final Environmental Statement (FES), unless the Presiding Officer finds that starting the hearing on such issues "will indeed expedite the proceeding, taking into account the effect of going forward on the staff's ability to complete its evaluations in a timely manner" (*Id.*, at 6); in contrast, the Licensing Board would defer hearings on environmental issues until after the Final EIS has been issued, but would commence hearings on safety issues prior to issuance of the SER.

7. Notwithstanding the differences described in Paragraph 6 above, however, the Staff believes the established schedule reflects an appropriate attempt to expedite the proceeding taking into account the effect of going forward on the staff's ability to complete its evaluations in a timely manner. Therefore, the Staff does not believe these aspects of the Licensing Board's schedule require revision at this time. The Staff notes, however, that it shares the Commission's stated concern that completion of the Staff's reviews "not be compromised or delayed by the demands of the adjudicatory process" (CLI-98-13, slip op. at 13). Accordingly, consistent with the Commission's guidance, the Staff will consider seeking adjustments to the adjudicatory schedule if it determines that "hearing, discovery, or other adjudicatory requirements are significantly disrupting or delaying the staff reviews" (*Id.*).

8. Finally, the Staff notes that the Commission has included in its Policy Statement guidance that the Staff should establish and make available a "case file" in Subpart G proceedings, containing the application, any amendments thereto, and any Staff reports and correspondence between the applicant and Staff relevant to the application (Policy Statement, at 11). For the following reasons, the Staff believes that the effort required to create and maintain a case file would not have a commensurate benefit in this ongoing proceeding, because measures have already been adopted in this proceeding which satisfy the Policy Statement's objectives. First, the Policy Statement was issued at a time when this proceeding was already well underway, having commenced one year earlier. Unlike many other proceedings, each of the Intervenors in this proceeding is represented by Counsel in a single location (Salt Lake City). With the Licensing Board's encouragement, a Local Public Document Room (LPDR), containing the documents that would otherwise be included in a case file, has been established for the Intervenors' use at a convenient location in Salt Lake City (*see, e.g.*, Tr. 938-39). Second, the Staff has long ago placed the Intervenors on its service list for Staff reports and correspondence to the Applicant -- and, at the specific request of the State of Utah, the Applicant has placed this principal lead Intervenor on its service list for correspondence to the Staff (*see, e.g.*, Tr. 862, 914-15). Third, the Applicant has established a central document repository in Salt Lake City for use by all Intervenors, as part of the informal discovery process in this proceeding (*see, e.g.*, Tr. 939). In light of these existing arrangements, the Staff submits that the establishment and distribution of a "case file" herein would duplicate the document distribution which has already been established in this proceeding -- unlike future cases which could possibly benefit from the establishment and distribution of a case file. Inasmuch as the Staff anticipates that the

establishment and distribution of a case file (and its periodic updating) will require considerable Staff effort, which could unnecessarily divert resources from the performance of other Staff responsibilities in this proceeding, the potential benefits of establishing a case file here would seem to be outweighed by its associated costs. Accordingly -- and in view of the fact that the Commission has not required strict adherence to its Policy Statement in this proceeding (CLI-98-13, slip op. at 13), the Staff submits that the existing measures for document distribution in this proceeding satisfy the objectives of the Policy Statement.

CONCLUSION

For the reasons set forth above, the Staff submits that no changes are required at present in the schedule established by the Licensing Board, in light of the Commission's Policy Statement. Accordingly, the only schedular changes which should be made are those described in PFS' and the Staff's previous comments, submitted on July 7 and 9, 1998, respectively.

Respectfully submitted,



Sherwin E. Turk
Counsel for NRC Staff

Dated at Rockville, Maryland
this 10th day of August 1998

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S COMMENTS ON THE SCHEDULE IN LIGHT OF THE COMMISSION'S POLICY STATEMENT ON CONDUCT OF ADJUDICATORY PROCEEDINGS (CLI-98-12)" 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 10th day of August, 1998:

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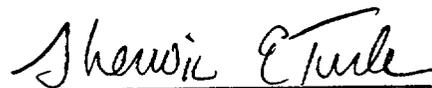
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