December 3, 1999

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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

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[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 <u>not</u> 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 <u>or an applicant RAI response</u> 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

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	)	
	)	
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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December 3, 1999

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Commission

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 RESPONSE OPPOSING STATE OF UTAH'S PETITION FOR INTERLOCUTORY REVIEW OF LBP-99-43

Applicant Private Fuel Storage L.L.C. ("Applicant" or "PFS") hereby files its response to the State of Utah's Petition for Interlocutory Review of LBP-99-43 ("State's Pet."). For the reasons described below, Applicant opposes the State's Petition and requests the Commission to deny the petition.

I. BACKGROUND

In the Safety Analysis Report ("SAR") accompanying PFS' license application, PFS relied upon data from NUREG-1536, Standard Review Plan for Dry Cask Storage Systems (Jan. 1997) and a Sandia National Laboratories report, SAND80-2124, Transportation Accident Scenarios for Commercial Spent Fuel (Feb. 1981), to demonstrate that off-site radiation dose consequences complied with 10 C.F.R. § 72.106(b). The State filed, and the Board admitted, contention Utah C, which argued that the Applicant's off-site dose analysis failed to comply with § 72.106(b) because it inappropriately relied upon certain data from NUREG-1536 and SAND80-2124, and it failed to take into account all exposure pathways. See LBP-98-7, 47 NRC 142, 185-86, reconsideration

granted in part and denied in part on other grounds, LBP-98-10, 47 NRC 288, aff'd on other grounds, CLI-98-13, 48 NRC 26 (1998).

On December 10, 1998, the NRC Staff submitted requests for additional information ("RAI") to PFS, including RAI SAR 7-1 on the SAR's dose analysis. RAI SAR 7-1 stated that "[t]he calculation in the SAR has been done inappropriately" and requested PFS to "[r]evise the calculation" in the SAR "to show compliance with the accident dose limits in 10 CFR 72.106(b)." RAI SAR 7-1. PFS revised the calculation as requested by the RAI, and submitted the revised calculation to the Staff on February 10, 1999, copying the State a few days thereafter. See PFS Response to RAI SAR 7-1, February 10, 1999 (Attachment 1 hereto). PFS' February 10, 1999 RAI response stated that "[t]he calculation of the impacts (individual doses) . . . for the PFSF has been revised . . . to show compliance with the accident dose limits in 10 CFR 72.106(b)." See Attachment 1 at 1. This RAI response, together with others, was subsequently incorporated into the SAR.[1]

On April 21, 1999, PFS filed a motion for summary disposition on contention Utah C based upon the revised dose analysis set forth in RAI SAR 7-1. The Board granted PFS' motion on June 17, 1999, ruling that PFS' revised dose analysis rendered the bases in contention Utah C moot. LBP-99-23, 49 NRC 485, 494 (1999).

On June 23, 1999, more than four months after receiving PFS' RAI response and its revised dose calculation,[2] the State sought admission of a late-filed contention chal-

[1] Letter from Parkyn (PFS) to Director, NMSS of May 19, 1999 (5/19/99) (enclosing License Application Amendment #3).

[2] The State acknowledged receiving the revised dose calculation in mid-February. See State of Utah's Request for Admission of Late-Filed Amended Utah Contention C at 18 (June 23, 1999).

lenging the revised calculation. See State of Utah's Request for Admission of Late-Filed Amended Utah Contention C (June 23, 1999). On November 4, 1999, the Board denied the State's request. LBP-99-43. The Board based its decision on the State's failure to demonstrate good-cause for filing the contention more than four months after receiving the revised dose calculation, and for failing to demonstrate, in the absence of good cause, that the other four factors strongly favor admission of the contention. Id., slip op. at 16-17. On November 19, 1999, the State filed its petition.

II. STANDARD FOR OBTAINING INTERLOCUTORY REVIEW

The Commission has long disfavored interlocutory review, and will undertake this extraordinary action only in the most compelling circumstances. Georgia Power Co. (Vogtle Electric Generating Plant, Units 1 and 2), CLI-94-15, 40 NRC 319, 321 (1994). The Commission will entertain a petition for review of an interlocutory Board order only if the petitioner can satisfy one of the two standards of 10 C.F.R. § 2.786(g). Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station), CLI-94-2, 39 NRC 91, 93 (1994). The petitioner must demonstrate that the challenged Board ruling either:

> (1) Threatens the party adversely affected by it with immediate and serious irreparable impact which, as a practical matter, could not be alleviated through a petition for review of the presiding officer's final decision; or
>
> (2) Affects the basis structure of the proceeding in a pervasive or unusual manner.

10 C.F.R. § 2.786(g). The petitioner requesting interlocutory review must demonstrate by a "clear and convincing showing" that at least one of the two criteria is met.[3]

[3] Arizona Public Service Co. (Palo Verde Nuclear Generating Station, Units 2 and 3), ALAB-742, 18 NRC 380, 383 (1983).

III. THE STATE'S PETITION DOES NOT MEET THE STANDARD FOR OBTAINING INTERLOCUTORY REVIEW

The State's Petition fails to satisfy either of the standards of 10 C.F.R. § 2.786(g). At issue is the State's assertion that the Board's application of the five late-filing factors in 10 C.F.R. § 2.714(a)(1)(i)-(v) "is fundamentally inconsistent with Commission regulations and precedent governing the admissibility of contentions." State's Pet. at 10. For this reason, the State charges that the Board has made "a fundamental legal error" which presents a "novel issue."[4] Id. at 4. Even assuming such assertions were true, NRC precedent clearly demonstrates that these are not "compelling circumstances" sufficient to justify the "extraordinary action" of granting interlocutory review.[5]

A. State's Petition Fails to Satisfy the First Prong of 10 C.F.R. § 2.786(g)

The State's Petition fails to satisfy the first prong of the interlocutory review test: "immediate and serious irreparable impact which, as a practical matter, could not be alleviated through a petition for review of the [Board's] final decision." 10 C.F.R. § 2.786(g)(1). Indeed, the State does not even attempt to satisfy this test.[6] Appellate case

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[4] Through its incomplete citation to the Commission's Statement of Policy on Conduct of Adjudicatory Proceedings, CLI-98-12, 48 NRC 18, 23 (1998), the State attempts to insinuate that all "novel issues" are granted interlocutory review. See State's Pet. at 4. However, the State neglects to point out that CLI-98-12 continues on to state that "[t]he Commission, however, will evaluate any matter put before it to ensure that interlocutory review is warranted." CLI-98-12, supra, 48 NRC at 23. The State makes no specific connection between the facts in the present case and the Policy Statement. Here, just like in a prior case, "[t]he Policy Statement is . . . unhelpful, as it refers to interlocutory appeals only generally and nowhere suggests that such appeals are permissible in situations like [petitioner's]." Sequoyah Fuels Corp. and General Atomics (Gore, Okla. Site) CLI-94-11, 40 NRC 55, 62 (1994).

[5] Applicant notes that the State's cavalier observation that "the Commission has made a practice of accepting petitions for interlocutory review," State's Pet. at 4 n.6, ignores the gravity of granting interlocutory review and overlooks the extensive case law history strictly enforcing the standards.

[6] The State places its entire argument under the rubric of "pervasive and unusual" effect, part of the second prong of the interlocutory review test. State's Pet. at 4, 7; see 10 C.F.R. § 2.786(g)(2).

law establishes that Board rulings on admitting contentions do not present exceptional delay or expenses sufficient to meet the interlocutory review criteria.[7]

B. State's Petition Fails to Satisfy the Second Prong of 10 C.F.R. § 2.786(g)

The State's Petition fails to satisfy the second prong of the interlocutory review test: that the Board's ruling "[a]ffects the basis structure of [the] proceeding in a pervasive or unusual manner." 10 C.F.R. § 2.786(g)(2). In fact, the State applies the wrong test. The State attempts to show only that the Board's ruling will have a "pervasive and unusual effect on the proceeding." State's Pet. at 7 (emphasis added). This, of course, completely ignores the requirement to demonstrate that the "basis structure" of the proceeding is affected, the essential element of the second prong. 10 C.F.R. § 2.786(g)(2).

NRC case law clearly demonstrates that the second criterion is not satisfied here, even if the State had addressed it. The State's Petition asserts that the Board has made a "fundamental legal error" in its application of the five late-filing factors for determining admissibility of a contention, State's Pet. at 4, and that the Board's ruling "is fundamentally inconsistent with Commission regulations and precedent governing the admissibility of contentions." State's Pet. at 10. NRC case law clearly establishes that such issues do not "[a]ffect[] the basis structure of the proceeding" within the meaning of 10 C.F.R. § 2.786(g)(2). The fact that a ruling is important or novel, as the State has asserted here, does not change the basic structure of the proceeding. Sequoyah Fuels, CLI-94-11, supra, 40 NRC at 63. A legal error, standing alone, does not alter the basic structure of a proceeding and therefore does not justify interlocutory review. See, e.g., Dr. James E. Bauer

[7] Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-675, 15 NRC 1105, 1113-14 (1982); Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-768, 19 NRC 988, 992-93 (1984).

(Order Prohibiting Involvement in NRC-Licensed Activities), CLI-95-3, 41 NRC 245, 246-47 (1995). Nor does the admission or rejection of a contention.

> [Whether] the Licensing Board failed to apply the proper criteria for admissibility of contentions and incorrectly interpreted Commission regulations [are] reasons [that] have not been adequate in practice to demonstrate that the structure of a proceeding has been affected in a pervasive or unusual way, where the ultimate result is that the Licensing Board simply admits or rejects particular issues for consideration.

Rancho Seco, CLI-94-2, supra, 39 NRC at 94. Most specifically, NRC case law establishes that a Board ruling on the five late-filing factors, including the good cause factor, for admission of a contention does not affect the basis structure of the proceeding in a pervasive or unusual manner, even where the Board's ruling "was assertedly in conflict with Commission case law, policy, or regulations" and "may well be in error."[8]

In short, the State's Petition does not wash with Commission case law. Even if it were true, the State's assertion that the Board committed legal error in applying the five late-filing factors satisfies neither of the two prongs of the interlocutory review test. Because the petition fails to satisfy either of the two standards in 10 C.F.R. § 2.786, the Commission should deny the State's Petition.

IV. THE LICENSING BOARD HAD GOOD CAUSE FOR REFUSING TO ADMIT THE STATE'S LATE-FILED CONTENTION.

According to the State, the Licensing Board applied the wrong test in finding that the State's late-filed contention was untimely. The State claims that the Board should have measured timeliness not from the date the information that formed the basis of its

[8] Perry, ALAB-675, supra, 15 NRC at 1113 (citations omitted); accord, Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-706, 16 NRC 1754, 1756-58 (1982), cited with approval, Safety Light Corp. (Bloomsburg Site Decontamination), CLI-92-9, 35 NRC 156, 159 n.4 (1992).

contention became publicly available, i.e., the February 1999 RAI response, but rather from the date of the receipt of Revision 3 of the License Application. This argument ignores the Commission's regulations and case law, including the cases cited by the State, and is without merit.

The Commission has long recognized that information contained in newly released documents may properly form the basis of a late-filed contention. Good cause may exist for a "late-filed contention which: (1) is wholly dependent upon the content of a particular document; (2) could not therefore be advanced with any degree of specificity . . . in advance of the public availability of the document; and (3) is tendered with the requisite degree of promptness once that document comes into existence . . . ."[9] The State was certainly put on notice of this principle by the Board's prior ruling in this proceeding that where "a new contention purportedly is based on information contained in a document recently made publicly 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."[10]

The Board properly decided that timeliness is determined from the date when the new information first became available. The Board focused "on the substance and sufficiency of the information available to the contention's sponsor." LBP-99-43, slip op. at 10. As the Board determined, and the State does not contest, the February 1999 RAI Response contained "the requisite factual concreteness[] for the formulation of an updated

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[9] Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), CLI-83-19, 17 NRC 1041, 1043-44 (1983).

[10] Private Fuels Storage, LLC (Interim Spent Fuel Storage Installation), LBP-98-29, 48 NRC 286, 292 (1998).

contention." Id. at 11. The Board therefore decided the State's four-month delay in filing the contention did not constitute good cause. Because the decision is consistent with the Commission's practices and does not do "violence to the plain language of the NRC's regulations," State's Pet. at 5, the Board's decision is based on a rational foundation.

To justify its delay, the State claims, notwithstanding its prior knowledge of the revised dose calculation, that its obligation to file was tolled until PFS formally included the information in the SAR by amending the license application. By the State's logic, all documents other than an amended license application are "extraneous," State's Pet. at 5, 6 fn. 7, and 7, regardless of their content. Accordingly, review of these "extraneous" documents should not be required because it would impose "a particularly significant burden" on the State. State's Pet. at 8. Thus, under the State's approach, the importance of information would depend not on its substance but rather the form in which the information is presented. This post hoc rationalization of its failure to promptly file a contention misrepresents well-established Commission policies.

The State cannot ignore the "basic principle that a person who invokes the right to participate in an NRC proceeding also voluntarily accepts the obligations attendant upon such participation." Catawba, CLI-83-19, supra, 17 NRC at 1048. The Commission has held that "intervenors are expected to raise issues as early as possible." Id. at 1050. When a licensing-related document becomes available, an intervenor must file promptly its contentions based on that document.[11] "[W]here information is available to the public several months before a contention is filed and the contention is untimely submitted, then

[11] See Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-89-4, 29 NRC 62, 70 (1989), aff'd, ALAB-918, 29 NRC 473 (1989), remanded, Massachusetts v. NRC, 924 F.2d 311, 333-337 (D.C. Cir. 1991), appeal dismissed as moot, ALAB-946, 33 NRC 245 (1991).

good cause for the tardiness is negated." Commonwealth Edison Co. (Braidwood Nuclear Power Station, Units 1 and 2), LBP-85-11, 21 NRC 609, 628 (1985). "Statements that such material is too voluminous or written in too abstruse or technical language are inconsistent with the responsibilities connected with participation in Commission proceedings and, thus, do not present cognizable arguments." Catawba, CLI-83-19, supra, 17 NRC at 1048. "To the extent that [filing as early as possible] leads to contentions that are superseded by the subsequent issuance of licensing-related documents, those changes can be dealt with by either modifying or disposing the superseded contentions." Id. at 1050.

The State ignored these general principles. More surprisingly, in a case that the State had itself cited (State's Pet. at 6 fn.7, 7), the Commission explicitly recognized that information outside the application can be the basis for a contention. As stated by the Commission, petitioners have 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 of a contention." Duke Energy Corp. (Oconee Nuclear Station, Units 1, 2 and 3), CLI-99-11, 49 NRC 328, 338 (1999) (emphasis added).

More specifically, and in another case which the State itself had cited (State'sPet. at 5), the Commission has explicitly stated that information in RAIs can be the basis of a late-filed contention. Baltimore Gas & Electric Co. (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), CLI-98-25, 48 NRC 325, 350 (1998). "[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)." Id. (citation omitted). There is not even a hint that a petitioner may sit back and wait for the RAI re-

sponse to be incorporated into the license application itself. Other decisions have reached the same conclusion. See, e.g., Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant), LBP-99-25, 50 NRC 25, 27 fn. 4 (1999) ("While the pendency of a Staff requests [*sic*] for additional information (RAI) such as [intervenor's] exhibit 1 is not a basis for delaying the filing of contentions, such an RAI may provide the basis for a contention.")(citation omitted).[12] Contrary to the State's assertion, the admissibility standards do not require a petitioner to wait until the challenged information is incorporated into an application. Rather, they merely require the petitioner to promptly proffer a contention that identifies how the information underlying its contention makes the license application unacceptable.

V. CONCLUSION

For the foregoing reasons, Applicant requests that the Commission deny the State's petition for interlocutory review of LBP-99-43.

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[12] NRC cases have also recognized that other licensing-related documents may support a late-filed contention. See, e.g, Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-734, 18 NRC 11 (1983) (recognizing that late-filed petitions may be based on QA procedures).

December 3, 1999

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Commission

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

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "Applicant's Response Opposing State of Utah's Petition for Interlocutory Review of LBP-99-43" were served on the persons listed below (unless otherwise noted) by e-mail with conforming copies by U.S. mail, first class, postage prepaid, this 3rd day of December 1999.

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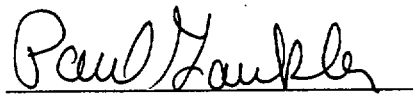

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