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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 TO PARTIAL INTERLOCUTORY APPEAL OF LICENSING BOARD ORDER LBP-00-28**

Pursuant to 10 C.F.R. § 2.786(b)(3), Applicant Private Fuel Storage, L.L.C. ("Applicant" or "PFS") respectfully submits this response in opposition to the "State of Utah's Partial Interlocutory Appeal of LBP-00-28,"<sup>1</sup> filed November 10, 2000 ("Appeal"). The State files its appeal "in the event that the [State's] motion [for reconsideration currently before the Atomic Safety and Licensing Board ("Licensing Board" or "Board")] is denied"<sup>2</sup> and asserts that the Board erred when it denied certain late-filed contentions on the grounds that they failed to meet the late filing criteria of 10 C.F.R. § 2.714(a)(1). Appeal at 1. The Applicant respectfully submits that the State's appeal should be denied. First, it is untimely, in that it concerns issues that are currently before the presiding officer on a pending motion for reconsideration. Second, the denial of late-

<sup>1</sup> Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-00-28, 52 NRC \_\_\_, (Oct. 30, 2000).

<sup>2</sup> State of Utah's Motion for Partial Reconsideration of LBP-00-28 (Nov. 10, 2000) ("Recons. Mot.").

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SECY-02

filed contentions, where a party still has contentions in a proceeding, does not provide grounds for interlocutory review.

## I. BACKGROUND

In June 1997, PFS filed its license application for the Private Fuel Storage Facility (“PFSF”). Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-98-7, 47 NRC 142, 157 (1998). The application included an Environmental Report (“ER”) in which PFS discussed the environmental impacts of the PFSF project.

On June 29, 1998, in anticipation of new contentions being filed on the NRC Staff’s Safety Evaluation Report (“SER”) or draft Environmental Impact Statement (“DEIS”) for the PFSF, the Licensing Board directed that “any contentions based on [the DEIS] should be submitted no later than thirty days after [the] document[is] made available to the public.” Memorandum and Order (General Scheduling for Proceeding and Associated Guidance) (June 29, 1998) at 5. To enable intervenors to make their technical experts available for review of the SER or DEIS, the Board also directed that the NRC Staff provide 15 days advance notice to the intervenors and the Board of the public availability of those documents. Id. In a March 10, 2000 Memorandum and Order, ruling on the admission of late-filed contentions on the partial SER the Staff has issued for the PFSF, the Board reminded the intervenors and the Staff of their obligations. Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-00-7, 51 NRC 139, 143 n.1. See LBP-00-28, slip op. at 9-10.

On June 12, 2000, the Staff notified the Board and the parties that the DEIS for the PFSF<sup>3</sup> would be made available to the parties at the beginning of the upcoming evidentiary hearing, on June 19.<sup>4</sup> LBP-00-28, slip op. at 9-10. On June 19, the Staff distributed a copy of the DEIS to the State and on June 23, the Staff made the DEIS available to the public. Id. at 10. The State filed Contentions Utah LL through OO,<sup>5</sup> asserting deficiencies in the DEIS, on August 2, 2000, 39 days after the DEIS became publicly available (43 days after the State's actual receipt of the DEIS) and 51 days after having received notice that it would become publicly available. Contentions at 1; see LBP-00-28, slip op. at 10.

In ruling on admitting the contentions, the Board determined that because they were filed 51 days after the State received notice that the DEIS would be publicly available, the contentions were six days late. Id. at 10.<sup>6</sup> The State claimed that it had good cause for being late for a number of reasons. Id. But the Board ruled that the State's reasons were deficient. Id. at 11-15 (noting in particular that the Commission had directed its presiding officers to enforce compliance with its hearing schedules (citing Statement

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<sup>3</sup> Draft Environmental Impact Statement for the Construction and Operation of an Independent Spent Fuel Storage Installation on the Reservation of the Skull Valley Band of Goshute Indians and the Related Transportation Facility in Tooele County, Utah, U.S. Nuclear Regulatory Commission, Office of Nuclear Material Safety and Safeguards, NUREG-1714 (June 2000).

<sup>4</sup> Further, the Staff had earlier in a May 8, 2000 conference call with the Licensing Board advised the parties that the DEIS would be published in June. Tr. 1357, 1367-69.

<sup>5</sup> State of Utah's Request for Admission of Late-Filed Contentions Utah LL Through OO (Relating to the DEIS's analysis of spent fuel transportation risks) (Aug. 2, 2000) (hereinafter "Contentions").

<sup>6</sup> The Board did not determine lateness from the June 23 DEIS availability date because by providing notice of the DEIS's availability on June 12, the Staff was four days late (notice should have been provided 15 days before June 23, i.e., by June 8). Id. at 9-10.

of Policy on Conduct of Adjudicatory Proceedings, CLI-98-12, 48 NRC 18, 21 (1998)) and that the State had failed to request additional time to file its contentions). The Board then found that the other four factors in the Commission's late-filing test, 10 C.F.R. § 2.714(a)(1), did not overcome the State's lack of good cause for lateness, and the Board dismissed the contentions.<sup>7</sup> Id. at 13-15.

On November 10, 2000, the State filed a motion for reconsideration with the Licensing Board requesting it to reconsider its decision with respect to a portion of the State's contentions. See Recons. Mot. at 1 & n.1. On the same day, it also filed its appeal with the Commission. See Appeal at 1.

## II. DISCUSSION

### A. **The Appeal Should Be Denied Because It Concerns Matters Before the Licensing Board on a Motion for Reconsideration**

The State's appeal should be denied because it concerns matters before the Licensing Board on the State's motion for reconsideration. The Commission's regulations

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<sup>7</sup> The Board also found that Contention Utah OO, and the part of Contention Utah NN that asserted that the DEIS was deficient for failing to address the economic consequences of a maximum credible spent fuel transportation accident, could have been filed based upon PFS's Environmental Report and hence they were nearly three years late. LBP-00-28, slip op. at 7-8. The State did not seek reconsideration of the Board's ruling on Utah OO and that part of Utah NN. Recons. Mot. at 1 n.1. Nor does it appeal the Board's ruling on those contentions. See Appeal at 1. Although the Board's ruling on the late-filing criteria meant that it did not need to address the admissibility of these contentions under the section 2.714(b), (d) criteria, the Board noted that it "would have denied the admission of late-filed contention Utah LL and contention Utah MM, subparts one and two, as failing to show that a genuine dispute exists with PFS on a material issue of fact or law and contention[] Utah NN . . . as lacking an adequate basis." LBP-00-28, slip op. at 15 n. 3.

are very clear: “A petition for review<sup>8</sup> will not be granted as to issues raised before the presiding officer on a pending motion for reconsideration.” 10 C.F.R. § 2.786(b)(6).

The Commission disapproves of the practice of simultaneously seeking reconsideration of a Presiding Officer’s decision and filing an appeal of the same ruling, because taking that approach would call for rulings on the same issues at the same time from both a trial and appellate forum.

International Uranium (USA) Corp. (White Mesa Uranium Mill); CLI-97-9, 46 NRC 23, 24 (1997) (citation omitted). Therefore, in accordance with past practice, the Commission should take action on any appeal only after the Licensing Board grants or denies the pending request for reconsideration. See id. at 24-25.

**B. The Appeal Should Be Denied Because Board Orders to Deny Late-Filed Contentions Are Not Subject to Interlocutory Review**

In addition to being untimely, the State’s appeal should also be denied, in that the Commission has ruled in this very case that interlocutory review of Licensing Board decisions to deny the admission of late-filed contentions is unwarranted. Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-00-2, 51 NRC 77 (2000). The State argues that the Board’s ruling will have “a pervasive and unusual effect on the proceeding” in that 1) it “completely denies” the State the ability to litigate its late contentions on the DEIS; 2) it erroneously interprets Commission policy, which “could have a pervasive and highly adverse effect on the State during the course of the PFS proceeding;” and 3) the ruling “casts the State as a party that scoffs at or cavalierly ignores Board deadlines.” Appeal at 2-3. Nevertheless, the Commission has clearly stated that “no per-

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<sup>8</sup> While the State’s pleading is entitled an “appeal,” NRC regulations style such pleadings as “petitions for review.” 10 C.F.R. § 2.786.

vasive effect results from the disallowance of a late contention.” CLI-00-2, 51 NRC at 80. Further, the issue of whether, considering Commission policy, the State had good cause for lateness, “turns on fact-specific questions . . . that can be reviewed, if necessary, after the Board’s final decision.” Id. Finally, the State’s objections to the Board’s language simply provide no grounds for appeal. An appeal only lies from an unfavorable action, not from wording with which a party disagrees but which has no operative effect. Duke Power Co. (Cherokee Nuclear Station, Units 1, 2, and 3), ALAB-482, 7 NRC 979, 980 (1978).

### III. CONCLUSION

For the reasons stated above, the Commission should deny the State’s appeal.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that copies of the "Applicant's Response to Partial Interlocutory Appeal of Licensing Board Order LBP-00-28" 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 20<sup>th</sup> day of November 2000.

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