

UNITED STATES OF AMERICA
 NUCLEAR REGULATORY COMMISSION
 ATOMIC SAFETY AND LICENSING BOARD

DOCKETED 11/28/00
SERVED 11/28/00

Before Administrative Judges:

G. Paul Bollwerk, III, Chairman
 Dr. Jerry R. Kline
 Dr. Peter S. Lam

In the Matter of

PRIVATE FUEL STORAGE, L.L.C.

(Independent Spent Fuel Storage Installation)

Docket No. 72-22-ISFSI

ASLBP No. 97-732-02-ISFSI

November 28, 2000

MEMORANDUM AND ORDER

(Denying Motion for Partial Reconsideration of LBP-00-28)

In LBP-00-28, 52 NRC __ (Oct. 30, 2000), we concluded that a balancing of the late-filing criteria of 10 C.F.R. § 2.714(a)(1) did not support the grant of an August 2, 2000 request by intervenor State of Utah (State) to admit late-filed contentions Utah LL through Utah OO, which challenged the adequacy of the NRC staff's June 2000 draft environmental impact statement (DEIS) discussion of spent fuel transportation risk relative to the proposed Skull Valley, Utah 10 C.F.R. Part 72 independent spent fuel storage installation (ISFSI) of applicant Private Fuel Storage, L.L.C. (PFS). Now pending with the Licensing Board is a November 10, 2000 State motion for partial reconsideration of that determination, in particular, our finding that under the first section 2.714(a)(1) element the State lacked good cause for its late-filing.¹ Both PFS and the staff oppose the State's reconsideration request.

¹ Although the State also has pending with the Commission a November 10, 2000 request for interlocutory review of the LBP-00-28, that filing does not deprive this Board of jurisdiction to rule on this motion. See 10 C.F.R. § 2.786(b); see also International Uranium (USA) Corp. (White Mesa Uranium Mill), CLI-97-9, 46 NRC 23, 24, reconsideration denied, LBP-97-14, 46 NRC 55 (1997), aff'd, CLI-98-6, 47 NRC 116 (1998); Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit No. 1), ALAB-630, 13 NRC 84, 85

We deny the State's reconsideration motion for the reasons set forth below.

As we have noted elsewhere in this proceeding:

A properly supported reconsideration motion is one that does not rely upon (1) entirely new theses or arguments, except to the extent it attempts to address a presiding officer's ruling that could not reasonably have been anticipated, see Louisiana Energy Services, L.P. (Claiborne Enrichment Center), CLI-97-2, 45 NRC 3, 4 & n.1 (1997) (citing cases); or (2) previously presented arguments that have been rejected, see Nuclear Engineering Co. (Sheffield, Illinois Low-Level Radioactive Waste Disposal Site), CLI-80-1, 11 NRC 1, 5 (1980). Instead, the movant must identify errors or deficiencies in the presiding officer's determination indicating the questioned ruling overlooked or misapprehended (1) some legal principle or decision that should have controlling effect; or (2) some critical factual information. See Georgia Power Co. (Vogtle Electric Generating Plant, Units 1 and 2), LBP-94-31, 40 NRC 137, 140 (1994); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), LBP-83-25, 17 NRC 681, 687, rev'd and remanded on other grounds, ALAB-726, 17 NRC 755 (1983). Reconsideration also may be appropriately sought to have the presiding officer correct what appear to be inharmonious rulings in the same decision. See LBP-98-10, 47 NRC 288, 296 (1998).

LBP-98-17, 48 NRC 69, 73-74 (1998). Invoking the overlooked/misapprehended legal principle or decision aspect of this standard, the crux of the State's argument is that the Board failed to give sufficient credence to Commission policies regarding the application of the late-filing criteria so as to render its determination "an unwarranted and excessive sanction." [State] Motion for Partial Reconsideration of LBP-00-28 (Nov. 10, 2000) at 3. Referencing an agency brief filed in a 1990 federal appellate case that indicates presiding officers have applied the late-filing test "generously"; a 1981 Commission policy statement, CLI-81-8, discussing factors to be considered relative to the imposition of sanctions for party failures to meet obligations, including the importance of the issues raised; the forty-five day comment period for DEIS public comments; and problems with the availability of the State's supporting witness and its counsel

(1981).

relative to the preparation of DEIS-related late-filed contentions Utah LL through Utah OO, the State maintains that the Board must reconsider and reverse its determination that the State's submission of these issues six days after the Board-established filing deadline did not provide the requisite good cause for late-filing under the first (and most important) section 2.714(a)(1) criterion. See id. at 4-9 (citing Brief for Respondents, Union of Concerned Scientists v. NRC, No. 89-1617, at 41; CLI-81-8, 13 NRC 452, 454 (1981); and 10 C.F.R. § 51.73).

The Board does not agree. We are well aware of the obligations and responsibilities placed upon us by the Commission, as reflected in both CLI-98-12, 48 NRC 18, 21 (1998), and CLI-81-8, and have sought to apply that guidance appropriately as the circumstances present themselves.² At issue in this instance is that aspect of the late-filed contentions good cause factor that concerns the diligence with which the sponsoring party prepares and files an issue statement following the event or document that provides an appropriate "trigger" for such a submission. The time limit for submitting late-filed contentions relating to the staff DEIS was delineated and, indeed, as we pointed out in our other October 30, 2000 ruling, was met by the State in providing another late-filed DEIS-related contention. See LBP-00-27, 52 NRC __, __ (slip op. at 7) (Oct. 30, 2000). The State has not denied it failed to comply with that deadline in connection with these four issue statements, but reiterates that its supporting witness and counsel had other obligations that prevented them from completing the task of preparing and submitting this contention within that time frame. What the State fails to explain, however, is why it failed to bring these concerns to the attention of the Board prior to the expiration of the deadline -- as it clearly should have done. See Memorandum and Order (Initial Prehearing

² For instance, in this proceeding the Board previously declined to sustain a timeliness objection lodged against the State regarding a discovery matter, albeit with the admonition that it should not anticipate that the same result would obtain for similar future missteps. See Licensing Board Memorandum and Order (Ruling on Discovery Requests) (Mar. 10, 2000) at 11-13 (unpublished).

Order) (Sept. 23, 1997) at 6-7 (unpublished). As the Board's October 30 ruling reflects, consistent with the Commission's guidance cited above, this lack of diligence can and should be taken into account in determining whether good cause exists under late-filing factor one.

Thus, what the State describes as a "sanction" was, in fact, the Board's determination that relative to the first section 2.714(a)(1) late-filing factor, the State had failed to meet its burden of establishing good cause. And as to the other matters it now asserts require reconsideration, the only one that merits additional mention -- the newly raised matter of the "significance" of these late-filed issues -- is not one that requires further discussion in the context of the Board's section 2.714(a)(1) factor one good cause finding that is at the heart of the State's concern, see LBP-00-27, 52 NRC at __ (slip op. at 8); see also Commonwealth Edison Co. (Braidwood Nuclear Power Station, Units 1 and 2), CLI-86-8, 23 NRC 241, 248 (1986) (issue importance is a matter to be considered under section 2.714(a)(1) factor three), and, in any event, would not change the Board's overall findings relative to the ultimate balance

that accrues under the five-factor test. We thus conclude that none of those matters requires alteration of the result reached by the Board in LBP-00-28.

For the foregoing reasons, it is this twenty-eighth day of November 2000, ORDERED, that the State's November 10, 2000 motion for partial reconsideration of LBP-00-28 is denied.

THE ATOMIC SAFETY
AND LICENSING BOARD³

/RA/

G. Paul Bollwerk, III
ADMINISTRATIVE JUDGE

/RA/

Dr. Jerry R. Kline
ADMINISTRATIVE JUDGE

/RA/

Dr. Peter S. Lam
ADMINISTRATIVE JUDGE

Rockville, Maryland

November 28, 2000

³ Copies of this memorandum and order were sent this date by Internet e-mail transmission to counsel for (1) applicant PFS; (2) intervenors Skull Valley Band of Goshute Indians, Ohngo Gaudadeh Devia, Confederated Tribes of the Goshute Reservation, Southern Utah Wilderness Alliance, and the State; and (3) the staff.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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PRIVATE FUEL STORAGE, L.L.C.) Docket No. 72-22-ISFSI
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(Independent Spent Fuel Storage)
Installation))

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LB MEMORANDUM AND ORDER (DENYING MOTION FOR PARTIAL RECONSIDERATION OF LBP-00-28) have been served upon the following persons by deposit in the U.S. mail, first class, or through NRC internal distribution.

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Docket No. 72-22-ISFSI
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(DENYING MOTION FOR PARTIAL
RECONSIDERATION OF LBP-00-28)

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[Original signed by Evangeline S. Ngbea]

Office of the Secretary of the Commission

Dated at Rockville, Maryland,
this 28th day of November 2000