

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

RAS 2535

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COMMISSIONERS

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In the Matter of)
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PRIVATE FUEL STORAGE L.L.C.)

Docket No. 72-22-ISFSI

Independent Spent Fuel)
Storage Installation)
_____)

CLI-00-24

MEMORANDUM

The State of Utah has requested clarification from the Commission on the scope and timing of petitions for review under 10 C.F.R. § 2.786(b). Because our regulations may be less than clear in the context of complex, multi-issue licensing proceedings such as the one under consideration here, we accept the invitation to clarify our appellate rules.

Background

This proceeding involves the application by Private Fuel Storage L.L.C. for a license to construct an Independent Spent Fuel Storage Installation (ISFSI) on a site on the reservation of the Skull Valley Band of Goshute Indians in Tooele, Utah. Utah intervened in the proceeding and asserted a number of contentions.

The status of Utah's various contentions and underlying bases is quite complex. Some contentions were admitted for hearing, while others were not. In some cases, some bases for an asserted contention were admitted, while other bases for the same contention were not. As

more information has become available during the course of the proceeding, Utah filed additional, late contentions, some of which were admitted while others were not. In addition, some contentions or bases have been dismissed under summary disposition procedures, while others went forward to a hearing.

Utah's Contention R, questioning the adequacy of PFS's Emergency Plan, is such a contention. Some bases were not admitted,¹ some were later dismissed pursuant to the applicant's summary disposition motion,² and the remaining issues went forward to a hearing, which began June 19, 2000.

Utah asks whether the Presiding Officer's decisions rejecting or dismissing bases are ripe for Commission review when the Presiding Officer issues his partial initial decision after a hearing on the admitted bases of the same contention. Because whether an issue is properly considered a "basis" for a contention or a separate contention is not always clear (and sometimes bases and contentions are realigned in the course of litigation), we also consider the question whether the rejection or dismissal of a related contention is ripe after a partial initial decision.

Discussion

The regulatory provision in question, 10 C.F.R. §2.786(b)(1), states that "[w]ithin fifteen (15) days after service of a full or partial initial decision by a presiding officer ... a party may file a petition for review with the Commission on the grounds specified in paragraph (b)(4) of this section." Section 2.786(b)(4) provides that the Commission will use its discretion to exercise review, "giving due weight to the existence of a substantial question with respect to [various]

¹ See Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-98-7, 47 NRC 142, 195-96 (1998).

² See Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-99-36, 50 NRC 202 (1999).

considerations,” including factual findings and legal conclusions. The regulations are somewhat unclear as to whether the “substantial question” for Commission review must be one raised specifically by the initial decision, or can be a question raised by a previous ruling, as where a basis for a contention was rejected.

Consistent with longstanding Commission practice, and, as a matter of both logic and efficiency, all rulings that deal with the subject matter of the partial initial decision should be reviewed at the same time.³ Therefore, the time to ask the Commission’s review of any claim that could have affected the outcome of the partial initial decision is immediately after the partial initial decision is issued. The parties should assert any claims of error which relate to the subject matter of the partial initial decision, whether the specific issue was admitted for the hearing or not, and without regard to whether the issue was originally designated a separate “contention” or a “basis” for a contention. Our holding is in harmony with the logical implications of 10 C.F.R. §2.760(a) of the Commission’s Rules of Practice, under which an initial decision normally will constitute the final decision of the Commission forty (40) days from its issuance unless a petition for review is filed in accordance with 10 C.F.R. §2.786, or the Commission directs otherwise.⁴ Our holding is also consistent with the practice of the now-defunct Appeal Board, which treated appeals from partial initial decisions as including preliminary related rulings, including rulings rejecting contentions. See, e.g., Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-875, 26 NRC 251 (1987).

³An exception to this practice is review of matters already finally decided by the Commission in an interlocutory order.

⁴Parties are reminded of these implications when presiding officers include in the partial initial decisions, pursuant to the directive in 10 C.F.R. §2.760(d), the time within which a petition for review may be filed and the date when the initial decision may become final under the terms of 10 C.F.R. §2.760(a).

Efficiency does not require the Commission to review orders dismissing contentions or bases (or other preliminary order) unrelated to the subject matter of the hearing on which the Licensing Board issued its partial initial decision. Absent special circumstances,⁵ review of preliminary rulings unrelated to the partial initial decision must wait until either the Board considers the issue in a relevant partial initial decision or the Board completes its proceedings, depending on the nature of the preliminary ruling.

For the Commission

/RA/

ANNETTE L. VIETTI-COOK
Secretary of the Commission

Dated at Rockville, Maryland
this 20th day of December, 2000

⁵PFS has asked us adopt here the Appeal Board's standard allowing appeals of preliminary rulings that dispose of a "major segment of the case." See, e.g., Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2) ALAB-894, 27 NRC 632. In particular, PFS wants us to hold that the time for Utah to file an appeal of rulings dismissing various security-related contentions was triggered when Utah abandoned the last admitted security-related contention, thus wrapping up a major segment of the case. Because Utah may never file such an appeal, because this issue has not been briefed by the parties, and because there is no urgency (such as that caused by the impending partial initial decision on the hearing that took place in June) we decline the invitation to rule on this question.

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Docket No. 72-22-ISFSI

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing COMMISSION MEMORANDUM (CLI-00-24) have been served upon the following persons by deposit in the U.S. mail, first class, as indicated by an asterisk (*) or through deposit in the Nuclear Regulatory Commission's internal mail system as indicated by double asterisks (**), with copies by electronic mail as indicated.

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COMMISSION MEMORANDUM (CLI-00-24)

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[Original signed by Adria T. Byrdsong]

Office of the Secretary of the Commission

Dated at Rockville, Maryland,
 this 20th day of December 2000