

September 28, 2005

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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

NRC STAFF'S MOTION FOR DIRECTED CERTIFICATION AND  
STAY OF THE LICENSING BOARD'S "ORDER REGARDING  
REDACTION OF FINAL PARTIAL INITIAL DECISION"

INTRODUCTION

On September 15, 2005 – one week after the Commission rendered its final decision in this proceeding<sup>1</sup> and seven months after the Atomic Safety and Licensing Board issued its February 2005 Final Partial Initial Decision ("Final PID") on aircraft crash consequences<sup>2</sup> – the Licensing Board issued a supplemental "Order Regarding Redaction of Final Partial Decision" ("Redaction Order"). Therein, the Licensing Board directed the NRC Staff ("Staff") to review Part II of the Board's Final PID (pages B-1 to B-43), to propose specific redactions of Safeguards Information ("SGI") from that decision, and to circulate its proposed redactions to the State of Utah ("State") and thence to Private Fuel Storage, L.L.C. ("Applicant" or "PFS") to obtain their concurrence or disagreement – which the Board would consider in balancing the agency's interest in protecting SGI against the public's presumed interest in disclosure.

For the reasons set forth below, the Staff respectfully submits that the Licensing Board's Redaction Order (1) was issued without authority, after the Board's jurisdiction and this

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<sup>1</sup> *Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation)*, CLI-05-19, 62 NRC \_\_\_\_ (Sept. 9, 2005).

<sup>2</sup> *Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation)*, "Final Partial Initial Decision (Regarding F-16 Aircraft Crash Consequences" (Feb. 24, 2005) (slip op.), *reconsideration denied*, LBP-05-12, 61 NRC 319 (2005), *petition for review denied*, CLI-05-19, 62 NRC \_\_\_\_ (2005).

proceeding had terminated; (2) would establish an improper precedent pertaining to the disclosure of statutorily protected Safeguards Information, in which agency determinations of the need to protect Safeguards Information are balanced against other parties' arguments in favor of disclosure; and (3) improperly creates a new issue for litigation and may lead to considerable delay in the conclusion of this protracted proceeding. Further, the Board's Redaction Order affects the basic structure of this proceeding in a pervasive or unusual manner. Accordingly, pursuant to 10 C.F.R. §§ 2.718(l), 2.786(g) and 2.788(a),<sup>3</sup> the Staff requests that the Commission (a) direct certification and undertake immediate interlocutory review of and vacate or reverse the Board's Redaction Order; and (b) stay the effect of that Order pending completion of the Commission's review thereof.<sup>4</sup>

#### BACKGROUND

On February 24, 2005, the Licensing Board issued its Final PID, resolving the last remaining contested issue in this license proceeding, concerning the consequences of an accidental F-16 aircraft crash at the proposed PFS facility. The Board issued two versions of its Final PID: (1) a public non-safeguards version, consisting of a 9-page Summary, four Parts (labeled A, B, C and D), and an Appendix; and (2) a safeguards version, which replaces the 13-page public version of Part B with a 43-page version that contains a detailed discussion of

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<sup>3</sup> Citations to 10 C.F.R. Part 2 herein refer to the NRC's former Rules of Practice, which apply in this proceeding. See Final Rule, "Changes to Adjudicatory Process," 69 Fed. Reg. 2182 (Jan. 14, 2004). Pursuant to 10 C.F.R. § 2.718(i), questions may be certified to the Commission by the Presiding Officer or on direction of the Commission. Further, pursuant to 10 C.F.R. § 2.786(g), a certified question will be reviewed if it either (1) threatens a party "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 basic structure of the proceeding in a pervasive or unusual manner."

<sup>4</sup> Pursuant to 10 C.F.R. § 2.786(b)(1), petitions for review of a Licensing Board decision must be filed within 15 days after service of that decision; accordingly, a request for interlocutory review (or motion for directed certification) of the Redaction Order is due to be filed by September 30, 2005. Pursuant to 10 C.F.R. § 2.788(a), requests for a stay are due to be filed within 10 days after service of the challenged decision; here, any stay request was due to be filed by September 26, 2005. The Staff regrets the inadvertent lateness of the stay request set forth *infra* at 9-10, and respectfully requests leave to file the instant stay request, two days late. In the absence of a stay, the Staff's proposed redactions are due to be transmitted to the State for its concurrence or disagreement on September 29, 2005.

Safeguards Information presented during evidentiary hearings in July - September 2004. On May 12, 2005, the Board issued LBP-05-12, denying the State's request for reconsideration of its Final PID; and, on September 9, 2005, the Commission issued CLI-05-19, denying the State's petition for review of the Final PID and other related decisions.

On September 15, 2005, the Licensing Board issued the instant Redaction Order. Therein, the Board directed the Staff to propose a redaction of Safeguards Information in Pages B-1 to B-43 of the Final PID, and to submit its proposed redactions to the State for its review and concurrence or disagreement; the State, in turn, is to submit its proposed modifications of the Staff's redactions to the Applicant, for its review and concurrence or disagreement. Redaction Order at 2-3.<sup>5</sup> The Board indicated that the Staff's proposed redaction of Safeguards Information would be balanced against the assertions made by Counsel for the other parties that certain material either is not Safeguards Information or should nonetheless be disclosed due to the public's interest in understanding further the reasons underlying the Board's Final PID. *Id.* at 4.<sup>6</sup> In the event of any disagreement among the parties, the Board stated that it would "solicit the parties' oral or written supporting arguments as to the areas in controversy, in a manner to be determined at that time." *Id.* at 2-3. After considering the parties' arguments, the Board would rule on disputed areas and issue a redacted version of its Final PID. *Id.* at 2.

## DISCUSSION

### A. Legal Standards Governing Interlocutory Review.

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<sup>5</sup> The Board directed that "[i]f any party anticipates it will require more than fourteen days from receipt to complete its work, it should request (via formal means) such additional time as it expects will be needed." Redaction Order at 2, n.2; emphasis in original.

<sup>6</sup> The Licensing Board left open the possibility that, "after considering the arguments, we may determine that the required redactions are so significant and pervasive that nothing appreciable would be gained by issuing a redacted opinion." Redaction Order at 2.

The Commission's regulations generally disfavor interlocutory review. See 10 C.F.R. § 2.730(f). It is well established, however, that the Commission will review interlocutory Licensing Board rulings under 10 C.F.R. § 2.786(g), "where the disputed ruling threatens the aggrieved party with serious, immediate, and irreparable harm or where it will have a 'pervasive or unusual' effect on the proceedings below." *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-01-1, 53 NRC 1, 5 (2001); *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-98-7, 47 NRC 307, 310 (1998).

B. Immediate Interlocutory Review Is Warranted Under 10 C.F.R. § 2.786(g).

In accordance with 10 C.F.R. § 2.786(g), immediate interlocutory review of the Board's Redaction Order is appropriate here, in that the Order is likely to have a pervasive or unusual effect on this proceeding. In this regard, the Staff submits that the Licensing Board lacked authority to issue its Redaction Order, in that the Order was issued after the Board's jurisdiction in this proceeding had terminated. Further, the Redaction Order improperly establishes a procedure which could lead to the disclosure of statutorily protected Safeguards Information, in the event that the Board embraces arguments – presented by an untrained litigant's attorney – that certain material is or is not Safeguards Information, that its disclosure would not have a significant adverse effect on public health and safety or the common defense and security, and/or that the public has an overriding interest in viewing that protected information. Finally, the Redaction Order threatens to cause substantial further delay in concluding this protracted proceeding. Accordingly, the Staff respectfully submits that immediate interlocutory review of the Licensing Board's Redaction Order is appropriate.

1. The Licensing Board Lacked Jurisdiction to Issue Its Redaction Order.

The commencement and termination of a Licensing Board's jurisdiction is governed by the provisions of 10 C.F.R. § 2.717. That regulation states, in pertinent part, as follows:

The presiding officer's jurisdiction in each proceeding will terminate upon the expiration of the period within which the

Commission may direct that the record be certified to it for final decision, or when the Commission renders a final decision, or when the presiding officer shall have withdrawn himself from the case upon considering himself disqualified, whichever is earliest.

*Id.*; emphasis added. See, e.g., *Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-782, 20 NRC 838, 841 (1984); *id.* at 842a, 842e (Moore, J., dissenting); *Washington Public Power Supply System* (WPPSS Nuclear Project Nos. 3 and 5), ALAB-501, 8 NRC 381, 382 (1978); *Houston Lighting and Power Co.* (South Texas Project, Unit Nos. 1 and 2), ALAB-381, 5 NRC 582, 591, 594 (1977); cf. *Public Service Co. of Indiana* (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-530, 9 NRC 261, 262 and n.2 (1979) (Commission decision declining review of final Appeal Board decision represented final agency action and terminated the Appeal Board's authority in the proceeding, except as to matters over which the Appeal Board had expressly retained jurisdiction).

Here, the Licensing Board issued its Final PID on February 24, 2005, and denied the State's motion for reconsideration of that decision on May 24, 2005. On September 9, 2005, the Commission denied the State's petition for review of the Final PID and authorized the Staff, upon making the required findings on all non-contested issues, to issue the requested license to PFS. In accordance with 10 C.F.R. § 2.717, the Licensing Board's jurisdiction terminated on that date, and its Redaction Order (issued one week later) is of no legal effect.

To be sure, in issuing its Final PID, the Licensing Board expressed its intent to develop, at some later time, a redacted version of its Final PID. Thus, the Board stated that it "does intend later to work with the parties administratively to prepare a *Redacted Version* of this decision . . . ." Final PID, at C-6; emphasis added. Similarly, it stated:

Although there will be no public access to the Safeguards Version of today's decision, the Board intends to explore the extent to which there are non-sensitive portions of Part II of the decision that could be usefully extracted. If feasible, the Board eventually will prepare a redacted version that would be both published in the bound volumes of the periodic Nuclear Regulatory Commission Issuances and provided electronically in

the agency's ADAMS system for public viewing and reference. If experience is any guide, any eventual redacted version, which would make more information available to the public, will take us some time to prepare because the parties' counsel and the agency's security experts will need to be heavily involved in the review process.<sup>7</sup>

However, the Board did not state that it was retaining jurisdiction to address proposed redactions as a contested matter;<sup>8</sup> rather, it explicitly stated that any redaction of the Final PID would be handled as an "administrative" matter, apparently envisioning an informal process in which "the parties' counsel and the agency's security experts [becoming] heavily involved."

Further, even if the Licensing Board had implicitly retained jurisdiction of this matter upon issuing its Final PID, the Board made these statements nearly seven months before issuing its Redaction Order, and only after the Commission had concluded its review and directed the Staff to issue a license to PFS. The Board's failure to act for such a long time reasonably suggested that it no longer intended to redact the Final PID. Moreover, regardless of its stated intent, its jurisdiction to issue the instant Redaction Order terminated upon issuance of the Commission's final decision on September 9, 2005, as set forth in 10 C.F.R. § 2.717. Accordingly, the Board's Redaction Order, issued after this adjudicatory proceeding had altogether terminated, fundamentally "affects the basic structure of the proceeding in a pervasive or unusual manner," and should therefore be reviewed at this time.

2. The Redaction Order Would Improperly Balance the Protection of Safeguards Information Against A Litigant's Arguments for Disclosure.

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<sup>7</sup> *Private Fuel Storage, LLC* (Independent Spent Fuel Storage Installation), "Memorandum (Providing a Publicly-Available Version of Today's Board Decision on F-16 Aircraft Accident Consequences)" ( Feb. 24, 2005), at 2.

<sup>8</sup> It is well established that a Licensing Board may properly retain jurisdiction over contested issues which have not yet been resolved, even while jurisdiction over other matters passes to the Commission. See, e.g., *Public Service Co. of Indiana* (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-530, 9 NRC 261, 262 and n.2 (1979); *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), ALAB-513, 8 NRC 694, 695-96 (1978); *Virginia Electric and Power Co.* (North Anna Nuclear Power Station, Units 1 and 2), ALAB-551, 9 NRC 704, 709 (1979); *Florida Power and Light Co.* (St. Lucie Nuclear Power Plant, Unit No. 2), ALAB-579, 11 NRC 223, 225-26 (1980).

As discussed *supra* at 3, the Licensing Board's Redaction Order directs the parties to propose redactions of Safeguards Information based upon a balancing of interests:

On the one hand, security interests will demand that certain material be protected, but excessive protection will deprive the citizens of Utah and the nation of the opportunity to understand more fully what underlies the agency's decision on this important issue. The parties should bear these dual responsibilities in mind as they indicate their positions on the document.

Redaction Order. at 4. The Board's procedure is fundamentally flawed, however, in that the Commission, itself, is required to withhold Safeguards Information from public disclosure to the extent required to protect public health and safety and the common defense and security, pursuant to Section 147 of the Atomic Energy Act of 1954, 42 U.S.C. § 2167.<sup>9</sup>

Section 147 of the Act assigns to the Commission the task of protecting Safeguards Information as part of its statutory responsibilities, and entrusts the Commission with the task of considering the extent to which any such information properly may be disclosed. Indeed, the Commission (or by delegation, the Staff) regularly performs this statutorily mandated function, without requiring assistance from litigants in its adjudicatory proceedings. To involve such parties (or here, their Counsel) in redacting a Licensing Board decision is simply improper, particularly where, as here, they have not been found to have any special expertise (a) in identifying Safeguards Information, (b) in determining "the minimum restrictions needed to protect the health and safety of the public or the common defense and security," or (c) in determining whether "the unauthorized disclosure of such information could reasonably be expected to have a significant adverse effect on the health and safety of the public or the common defense and security by significantly increasing the likelihood of theft, diversion, or

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<sup>9</sup> Pursuant to Section 147.a of the Act, the Commission is authorized to withhold Safeguards Information from public disclosure (a) in a manner "so as to apply the minimum restrictions needed to protect the health and safety of the public or the common defense and security," and (b) "upon a determination that the unauthorized disclosure of such information could reasonably be expected to have a significant adverse effect on the health and safety of the public or the common defense and security by significantly increasing the likelihood of theft, diversion, or sabotage of such material or such facility."

sabotage of such material or such facility.” 42 U.S.C. § 2167.a. Further, the Licensing Board’s unprecedented Redaction Order would improperly balance the arguments of an untrained and unqualified litigant’s lawyer against the views of agency personnel who are trained, qualified, experienced, and entrusted with the statutory duty to make such determinations. The Board’s Redaction Order sets an unacceptable procedural precedent affecting the agency’s designation of Safeguards Information, and should be set aside.

3. The Redaction Order Raises a New Issue and Threatens to Cause Substantial Delay in the Conclusion of This Protracted Proceeding.

The Licensing Board’s Redaction Order directs the parties to propose redactions of the Final PID, to advise the Board how much time it needs to do so, and to request additional time if it requires “more than 14 days from receipt” to complete its redactions. Redaction Order at 2 n.2. Further, the Board states that after receiving the parties’ proposed redactions, it “will determine how best to obtain the supporting arguments of each party, as to the portions where there is not agreement, before ruling on any disputed areas and issuing a redacted opinion . . .”

The Board’s required procedure for submitting proposed redactions threatens to cause substantial further delay in the completion of this protracted proceeding. No final time limit has been specified for completion of the redaction process. Further, it is likely – as the Redaction Order intimates, *id.* at 3-4 – that the parties will disagree as to the scope and identity of material to be redacted. Such disagreement will inevitably lead to the filing of legal briefs, responses and replies, addressing each disagreement on a line-by-line basis, before the Board can issue its decision. Even then, however, litigation may not be concluded, because issuance of a Board decision may well lead to motions for reconsideration and/or petitions for Commission review.<sup>10</sup>

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<sup>10</sup> Indeed, such protracted litigation occurred earlier in this proceeding, involving the Applicant’s and State’s extensive disputes over the redaction of the Applicant’s proprietary information – requiring the expenditure of considerable resources by the parties, the Board and the Commission, and the issuance of numerous Licensing Board and Commission decisions, before final resolution was attained. See, e.g., *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-05-16, 62 NRC \_\_\_ (July 22, 2005); *Id.*, CLI-05-08, 61 NRC 129 (2005); *Id.*, CLI-05-01, 61 NRC 160 (2005).

The procedures established by the Licensing Board for the redaction of Safeguards Information from the Board's Final PID are entirely unnecessary and should be set aside. First, the Board has already redacted Safeguards Information from its Final PID, without complaint or request for further disclosures by any party. Second, to the extent that the Board may believe that it needs assistance in making further redactions, such assistance may be obtained from the Commission (or by delegation, the Staff) – which is qualified, experienced, statutorily entrusted, and fully capable of redacting the Board's Final PID prior to publication thereof by the Secretary. No reason appears why Counsel for the litigants in this proceeding should be expected to identify Safeguards Information to be redacted from the Final PID better than the Commission or the Staff, or to reach a more correct decision as to the "minimum restrictions" to be imposed or the potential effect of any disclosure on the public health and safety or common defense and security. Accordingly, in the interest of bringing this 8-year long proceeding to a close, the Staff respectfully submits that the Board's Redaction Order should be set aside, and any redaction of Safeguards Information from the Final PID should be undertaken by the Commission (or upon direction, by the Staff), prior to publication thereof by the Secretary.

C. The Licensing Board's Redaction Order Should Be Stayed Pending Completion of the Commission's Review Thereof.

It is well established that filing a request for interlocutory review (or motion for directed certification) does not stay the effect of a disputed ruling. See 10 C.F.R. § 2.730(g); *cf.* 10 C.F.R. § 2.786(f). Rather, a stay request must be filed, and is to be considered under the criteria set forth in 10 C.F.R. § 2.788(e), as follows:

- (1) Whether the moving party has made a strong showing that it is likely to prevail on the merits;
- (2) Whether the party will be irreparably injured unless a stay is granted;
- (3) Whether the granting of a stay would harm other parties; and
- (4) Where the public interest lies.

As set forth above, the Staff believes that the Board's Redaction Order affects the basic structure of this proceeding in a pervasive or unusual manner, and should be set aside. In order to allow sufficient time for the Commission to consider the Staff's request for directed certification and interlocutory review of the Board's Redaction Order in a timely manner, the Staff requests that the Commission stay the effect of that Order, pending completion of the Commission's review thereof, under the stay criteria set forth in 10 C.F.R. § 2.788(e).

More specifically, the Staff respectfully submits (a) that it is likely to prevail on the merits, for the reasons stated above; (b) that the granting of a brief stay in order to afford the Commission sufficient time to review the Board's Redaction Order would not harm any other party; and (c) that the public interest favors the grant of a stay, in that a stay would serve to avert the improper disclosure of protected Safeguards Information and would avert further lengthy delays in the conclusion of this proceeding. Further, while the Staff does not here contend that it "will be irreparably injured unless a stay is granted," the Staff believes that the procedure established by the Board would set an improper precedent that might be followed in other proceedings if not set aside, potentially causing harm to the agency's ability to perform its statutorily mandated role in protecting Safeguards Information from improper disclosure. For these reasons, a brief stay of the Board's Redaction Order is warranted.<sup>11</sup>

#### CONCLUSION

For the reasons set forth above, the Staff respectfully submits that the Commission should undertake interlocutory review of the Licensing Board's Redaction Order by directed certification, and vacate or reverse the Board's Redaction Order and stay the effect of that Order pending completion of the Commission's review thereof.

Respectfully submitted,

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<sup>11</sup> The Staff notes that it has developed a redacted version of the Final PID and is prepared to provide it directly to the Commission (or the Licensing Board) for consideration, promptly upon the Commission's request or direction to do so.

*/RA/*

Sherwin E. Turk  
Counsel for NRC Staff

Dated at Rockville, Maryland  
this 28<sup>th</sup> day of September 2005

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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PRIVATE FUEL STORAGE, L.L.C. ) Docket No. 72-22-ISFSI  
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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S MOTION FOR DIRECTED CERTIFICATION AND STAY OF THE LICENSING BOARD'S 'ORDER REGARDING REDACTION OF FINAL PARTIAL INITIAL DECISION,'" in the above captioned proceeding have been served on the following through deposit in the NRC's internal mail system, with copies by electronic mail, as indicated by an asterisk, or by deposit in the U.S. Postal Service, as indicated by double asterisk, with copies by electronic mail this 28<sup>th</sup> day of September, 2005:

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