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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of:	)	Docket No. 72-22-ISFSI
PRIVATE FUEL STORAGE, LLC (Independent Spent Fuel Storage Installation)	)	ASLBP No. 97-732-02-ISFSI
	)	November 19, 1999

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

Introduction

Pursuant to 10 C.F.R. § 2.786(g), the State of Utah hereby petitions the Commission for interlocutory review of LBP-99-43, Memorandum and Order (Denying Request for Admission of late-filed Amended Contention Utah C), dated November 4, 1999. Review is warranted because 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.

Background

This appeal concerns the proposed licensing of a large centralized dry cask storage facility in Utah, the Private Fuel Storage ("PFS") facility. At the commencement of the licensing proceeding in 1997, the State of Utah submitted its original Contention C, which challenged the adequacy of the Applicant's dose calculations as presented in the Applicant's Safety Analysis Report ("SAR") originally

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submitted to the NRC in June 1997. The Licensing Board admitted most of Contention C in LBP-98-7, 47 NRC 142, 185-86, *aff'd on other grounds,* CLI-98-13, 48 NRC 26 (1998).

Since the proceeding began, the Staff has issued, and the Applicant has responded to, numerous Requests for Additional Information ("RAIs") concerning the PFS license application. On February 10, 1999, the Applicant responded to such an RAI regarding its dose calculations, in part, by submitting a new set of calculations. Subsequently, the State propounded discovery to PFS to determine the basis for the new calculations.[1]

On April 21, 1999, the Applicant moved for summary disposition, arguing that Contention C was moot because PFS had revised its dose calculations in the February 10, 1999, RAI Response. The State opposed the motion on the ground that the contention was not moot, because the Applicant had not amended its license application to incorporate the revised dose calculations. State of Utah's Opposition to Applicant's Motion for Summary Disposition of Contention C (May 11, 1999). The Applicant subsequently amended the license application (Revision 3) on May 19, 1999,

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[1] *See* State of Utah's First Set of Discovery Requests Directed to Applicant [Redacted Version] at 16-21 (April 9, 1999); *see also,* State of Utah's First Set of Discovery Requests Directed to the NRC Staff at 16-22 (June 10, 1999). PFS refused to provide the requested information. Applicant's Objections and Non-Proprietary Responses to States's First Requests for Discovery at 34-37 (April 21, 1999). The State filed a Motion to Compel, which was denied by the Licensing Board in LBP-99-23, 49 NRC 485, 493 n. 5 (1999).

to include the revised dose calculations.

On June 17, 1999, the Licensing Board granted the Applicant's Motion for Summary Disposition, holding that the amendment of the application had the effect of mooting the contention.[2] LBP-99-23, 49 NRC 485, 492-93.

On June 23, 1999, the State of Utah filed a request for admission of late-Filed Amended Contention C, which challenges the adequacy of the revised dose calculations contained in Revision 3 of the SAR. State of Utah's Request for Admission of Late-Filed Amended Utah Contention C ("State's Request").[3] In addressing the "good cause" factor of 10 C.F.R. § 2.714(a)(1), the State argued that the contention was timely because it was filed within 30 days of May 24, 1999, the date of the State's receipt of Revision 3 to the License Application. State's Request at 14. Both the Applicant and the Staff argued, *inter alia*, that the State lacked good cause for the late-filing because the State could have filed the contention when it received the revised dose calculations included in the February 1999 RAI response.[4]

On November 4, 1999, the Licensing Board issued LBP-99-43, denying

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[2] In dismissing Contention C, the Board noted that nothing in its decision foreclosed the State from filing a new contention challenging the new dose analysis, assuming the contention met the admissibility and late-filing criteria. *Id.*, slip op. at 15.

[3] The full text of Amended Contention C (without exhibits) is attached hereto as Exhibit 1.

[4] Applicant's Response to State of Utah's Request for Admission of Late-Filed Amended Contention C (July 7, 1999); NRC Staff's Response to State of Utah's Request for Admission of Late-filed Amended Utah Contention C (July 7, 1999).

admission of Amended Contention C on the ground that the State had failed to meet the Commission's standard for late-filed contentions. The principal basis for the decision was that the State lacked good cause to wait until after the license application amendment was filed before submitting Amended Contention C, because the February 1999 RAI response had provided "an adequate basis, i.e., the requisite factual concreteness, for the formulation of an updated contention."[5] *Id.*, slip op. at 12-13.

ARGUMENT

I. THIS PETITION MEETS THE COMMISSION'S STANDARD FOR INTERLOCUTORY REVIEW.

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. 10 C.F.R. § 2.786(g).[6] The Board's ruling in LBP-99-43 also raises a "novel issue[]" that warrants interlocutory review by the Commission. Statement of Policy on Conduct of Adjudicatory Proceedings, CLI-98-12, 48 NRC 18, 23 (1998).

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[5] Having found that the State lacked good cause, the Board then looked for a "compelling showing" by the State that the remaining four factors are satisfied. The Board found that factors two and four weigh in favor of the State, but that factors three and five weighed against the State. *Id.*, slip op. at 16-17.

[6] Although 10 C.F.R. § 2.786(g) contemplates referral by licensing boards and does not address petitions for interlocutory review by parties, the Commission has made a practice of accepting petitions for interlocutory review. *See, e.g., Private Fuel Storage, L.L.C.* (Independent Spent fuel Storage Installation), CLI-98-7, 47 NRC 307 (1998) (granting petition for interlocutory review by the Applicant in the instant proceeding).

A. The Board Erred In Ruling That The Timeliness of Contention C Should Be Measured from the Date of the State's Receipt of the February 1999 RAI Response.

By ruling that the timeliness of Contention C should be measured from the date of the State's receipt of the February 1999 RAI Response, rather than the date of its receipt of Revision 3 to the license amendment application, the Licensing Board does violence to the plain language of the NRC's regulations and long-standing Commission practice, thus warranting reversal. *National Whistleblower Center v. Nuclear Regulatory Commission*, No. 99-1002, 1999 WL 1024662, – F.3d – (D.C. Cir., November 12, 1999). These regulations and precedents unequivocally require that disputes with the license applicant focus on the "application," not on extraneous documents. As provided in 10 C.F.R. § 2.714(b)(2)(iii), a contention must include:

> references to *the specific portions of the application . . . that the petitioner disputes* and the supporting reasons for each dispute, or, if the petitioner believes that the *application* fails to contain information on a relevant matter as required by law, *the identification of each failure* and the supporting reasons for the petitioner's brief.

(emphasis added). Under the plain language of this regulation, the State was required to frame a dispute with *the application*, not the Applicant's correspondence. This clear requirement has been enforced against intervenors consistently. *See, e.g., Baltimore Gas and Electric Co.* (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), CLI-98-25, 48 NRC 325, 349 (1998) (emphasis in original), in which the Commission affirmed the rejection of contentions based on Staff RAIs to the Applicant ("Under our

longstanding practice, contentions must rest on the *license application*, not on NRC Staff reviews.")[7] The same rule has been applied in the instant case to reject contentions. *See* LBP-98-7, 47 NRC 142, 181 (holding that "a contention that fails to directly controvert the *license application* at issue . . . is subject to dismissal.") (emphasis added). The Licensing Board did not have the discretion to interpret the late-filing standard in a manner inconsistent with these regulations and precedent.

The Licensing Board's interpretation of the "good cause" standard for late-filed contentions 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. In short, the intervenor must always lose. Moreover, the Board's ruling undermines the Commission's own interest in ensuring that contentions identify a real

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[7] *See also Duke Power Co.* (Catawba Nuclear Station, Units 1 and 2), CLI-83-19, 17 NRC 1041, 1048-49(1983), holding that contentions based on Staff's Safety Evaluation Report ("SER") will be considered untimely if they could have been raised earlier in relation to the SAR, "the central document for the formulation of safety contentions." *See also, Duke Energy Corporation* (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 336 (1999), affirming denial of contentions where the intervenors relied solely on RAI's, without establishing "deficiencies in the application." Notably, these are the only two cases cited by the Licensing Board in support of its decision. LBP-99-43, slip op. at 10-11. Neither one of these cases supports a ruling that mere correspondence between the Applicant and Staff constitutes, by itself, a sufficient basis for a contention. In fact, they present the distinctly different issue of whether a contention may rely exclusively on extraneous documents, without also addressing the license application. The answer is a resounding "no." Had the State filed Amended Contention C before the PFS license application was amended in May, it would have run afoul of these precedents.

dispute with the Applicant. Requiring an intervenor to formulate a contention, based on the supposition that statements made in correspondence *may* result in license application changes, leads to precisely the type of "ill-defined 'anticipatory' contentions" that the Commission's admissibility standards "effectively bar." *Oconee*, CLI-99-11, 49 NRC at 338.

B. The Board's Ruling in LBP-99-43 Will Have a Pervasive and Unusual Effect on This Proceeding.

The Board's ruling in LBP-99-43 will have a pervasive and unusual effect on this proceeding, in two ways. First, as discussed above, it sets up a double-standard for the admissibility of late-filed contentions which is unfair to the State and other intervenors.

Second, LBP-99-43 imposes a difficult and confusing burden on the State to "second-guess" whether statements made by the Applicant in the voluminous correspondence connected with this proceeding will eventually result in license application amendments. Rather than simply determining whether the license application has changed, the State must now evaluate the mountain of extraneous licensing documents that it regularly receives in order to "make a judgment about whether the matter is sufficiently facially concrete and procedurally ripe to permit the filing of a contention." LBP-99-43, slip op. at 11. In making this judgment, the Board now requires the State to consider:

> whether the included information was 'put before the agency in a context that is (a) reasonably likely to have a material impact on the administrative process (e.g., will influence Staff consideration of the pending license application); and (b) is subject to consideration in the related adjudicatory proceeding.'

Id., slip op. at 13-14, *quoting* LBP-99-21, 49 NRC 431, 437 (1999).[8] Aside from the inconsistency of this new test with NRC regulations and precedents, it is so vague and general as to apply to virtually anything that is submitted.

The Board's newly devised test places a particularly significant burden on the parties to this case. At the time the PFS application was submitted, a great deal of information was still missing. *See, e.g.*, State of Utah's Contentions at 2 (November 23, 1997). Thus, the PFS application has been the subject of numerous RAIs and "commitment resolutions," which are similar to RAIs. Since filing its application, the Applicant has submitted RAI responses on approximately 30 separate occasions; commitment resolution responses also occurred on approximately 30 separate

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[8] The State notes that the Board first articulated its new test in LBP-99-21, which rejected, on grounds of prematurity, a contention challenging PFS's request for a regulatory exemption. LBP-99-21, however, concerned unique circumstances which are not presented here. As recognized by the Board in LBP-99-21, exemption requests are "atypical," and "more problematic" than license applications, because they request relief from compliance with the regulations, rather than attempting to demonstrate compliance. *Id.* at 437-38. Thus, the Board found that the timeliness of a contention regarding a regulatory exemption request is "more properly judged from the time of Staff action on the exemption request rather than when the exemption request is filed." *Id.* at 438. Amended Contention C, in contrast, concerns a contention relating to the license application itself.

occasions. The amount of paper generated by these responses to the Staff measures approximately three feet. The process of correspondence between the Staff and the Applicant through RAIs and commitment resolutions is far from ended. It would be extremely difficult, if not impossible, for the State to sift through the enormous volume of ongoing correspondence and guess at precisely what point representations might become "facially concrete" or "procedurally ripe" enough to signal that the license application effectively has been changed.

Moreover, it should not be necessary for the State to play this guessing game. If a license applicant intends RAI responses to result in changes to the application, the well-established practice in NRC licensing proceedings is to file a license application amendment in the form of change pages. PFS itself has submitted change pages contemporaneously with at least one RAI response.[9] The State should not have been penalized for PFS's failure to follow established NRC practice by maintaining an up-to-date license application.

CONCLUSION

In LBP-99-43, the Licensing Board interpreted the Commission's late-filing

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[9] *See, e.g.*, letter from John D. Parkyn, PFS, to Director, NRC Office of Nuclear Materials Safety and Safeguards (May 22, 1998), enclosing Rev. 1 to PFSF SAR and Emergency Plan. Rev. 1 incorporates information contained in PFS's RAI Response of May 19, 1998.

standard in a manner that is fundamentally inconsistent with Commission regulations and precedent governing the admissibility of contentions, thereby creating a double-standard by which late-filed contentions may always be rejected. This ruling is likely to have an ongoing adverse effect on the fairness and consistency with which the Board considers additional late-filed contentions in this proceeding. Accordingly, the Commission should take review, reverse the Licensing Board, and direct it to evaluate the five late-filing factors in a manner that is consistent with NRC regulations and precedents.[10]

DATED this 19th day of November, 1999.

Respectfully submitted,

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[10] If the Licensing Board determines on remand that the good cause factor is satisfied, the other four factors would be given less weight than they were accorded in LBP-99-43. Consumers Power Co. (Midland Plant, Units 1 and 2), LBP-82-13, 16 NRC 571, 584 (1982). Thus, the third and fifth factors, on which the Board found the State had failed to make a compelling showing, would not carry as much weight. In any event, the State believes the Board misapplied these factors.

CERTIFICATE OF SERVICE

I hereby certify that a copy of STATE OF UTAH'S PETITION FOR INTERLOCUTORY REVIEW OF LBP-99-43 was served on the persons listed below by electronic mail (unless otherwise noted) with conforming copies by United States mail first class, this 19th day of November, 1999:

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