December 30, 1997

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

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 MEMORANDUM ON THE BOARD'S AUTHORITY TO ISSUE PARTIAL INITIAL DECISIONS PRIOR TO THE ISSUANCE OF THE SER OR EIS

I. INTRODUCTION

In its October 17, 1997 Memorandum and Order ruling on the State of Utah's motions to suspend the proceeding and for extension of time, the Atomic Safety and Licensing Board (the "Board") requested the Applicant and the Staff to address the question of "the Board's authority to issue a final initial decision on any safety, environmental, or other issues" prior to the Staff's issuance of a draft or final safety evaluation report ("SER") or draft or final environmental impact statement ("EIS"). Applicant Private Fuel Storage L.L.C. ("Applicant" or "PFS") files this memorandum in response to the Board's request.

The practice of issuing partial initial decisions which constitute a licensing board's final initial decision on particular issues is well established under Commission precedent. As discussed below, except for certain issues arising under the National Environmental Policy Act ("NEPA"), the Board's authority to render partial initial decisions resolving issues raised by petitioners is not dependent on the Staff having issued draft or final SER or EIS. With respect to health and safety issues, the Board has complete authority to issue partial initial decisions resolving such issues raised by petitioners in the absence of a draft or final SER. With respect to environmental issues under NEPA, the Board may hear and resolve factual issues that do not pass on the ultimate cost-benefit balance required under NEPA.

II. LEGAL DISCUSSION

A. Authority to Issue Partial Initial Decisions in the Absence of a SER

In the Statement of Considerations to the 1989 amendments to the Rules of Practice, the Commission directly addressed the role of Staff-prepared evaluations in licensing hearings being conducted by its licensing boards. The Commission stated there that:

> With the exception of NEPA issues, the sole focus of the hearing is on whether the application satisfies NRC regulatory requirements, rather than the adequacy of the NRC staff performance.

54 Fed. Reg. 33,168, 33,171 (1989). Thus, the adequacy of the Staff's SER, draft or final, is not the subject of the hearing before the Board, and the Board is authorized to

issue partial initial decisions on health and safety issues raised by petitioners absent the Staff's issuance of a draft or final SER. See, e.g., The Curators of the University of Missouri (TRUMP-S Project), CLI-95-1, 41 NRC 71, 121-23 (1995); Florida Power & Light Company (St. Lucie Nuclear Power Plant, Unit 1), ALAB-921, 30 NRC 177, 185-86 (1989).

In University of Missouri, the intervenors had argued that the Staff's review of certain material license amendment applications "constituted nothing more than a rubber-stamp approval" and that the presiding officer had erred in failing to remand license amendment applications back to the Staff "for additional review and findings." 41 NRC at 121. In that case, the Staff had approved the license amendments without issuing an SER and the intervenors had argued that the Staff was required "to make specific findings of fact or to explain its approval" of the license amendments in a SER or otherwise. Id. at 122-23. The Commission rejected these arguments.

In rejecting the intervenor's argument that the presiding officer should have remanded the applications back to the Staff for further review and findings, the Commission stated as follows:

> [T]he University rather than the Staff bears the burden of proof in this proceeding. Consequently, the adequacy of Staff's safety review is, in the final analysis, not determinative of whether the application should be approved. Given these facts, it would have been pointless for the Presiding Officer to rule upon the adequacy of Staff's review. . . .

> Moreover, even assuming arguendo that Staff did conduct an insufficient review, a denial of a meritorious application on that ground would be grossly unfair -- punishing the applicant for an error by Staff. The subject of the litigation in this proceeding is the University's entitlement to the license amendments, not the adequacy of Staff's review of those amendments.

Id. at 121-22. The Commission similarly rejected the argument that the Staff was required to file specific written findings of fact or explanation for its decisions as follows:

> Although such findings and explanation might have been helpful to both the Presiding Officer and the Parties, they are not required under our orders, policy statements, and regulations. Moreover, such findings and explanation, while useful in the earlier stages of a proceeding, would decrease in importance as the record develops, and would ultimately be completely superseded by the Presiding Officer's (and, later, our own) findings of fact and conclusions of law.

Id. at 122.

In a similar vein, the Appeal Board in St. Lucie rejected an argument that a license amendment for the reracking of the spent fuel pool should not be issued for lack of adequate Staff review. In that case the Staff had issued an SER but the SER did not "independently verify" criticality calculations done by the applicant in support of the license amendment. See 30 NRC at 185-87. The Appeal Board rejected arguments made by the intervenor that such independent staff verification was required:

> Nor is there any basis for [intervenor's] apparent claims that the applicant's criticality calculations are somehow suspect and cannot form the basis for the Board's findings because the staff did not independently verify them. With minor exceptions not relevant here, it is the applicant that bears the ultimate burden of proof in NRC operating license

> amendment proceedings and not the staff. Thus, contrary to the intervenor's apparent belief, the adequacy of the staff's review is not the proper focus for such proceedings.

30 NRC at 186.

Thus, the above authority makes it abundantly clear that the adequacy of the License Application -- and not the Staff's health and safety review in the SER -- is the subject of the litigation in this proceeding. The Staff's formal review in a published SER is not a prerequisite for the Board to issue partial initial decisions on contested health and safety issues, because the Board's findings of fact and conclusions of law would in any event supersede the Staff's analysis and conclusions with respect to contested issues. Further, since inadequate Staff review cannot be the grounds for denial of a meritorious license application, any delays in such review should not be cause for delaying the Board's resolution of contested health and safety issues.

Accordingly, the Board should establish a procedure for scheduling the orderly and final resolution of contested health and safety issues that is independent of the Staff's scheduled completion and issuance of a draft or final SER. For example, the Staff may be in a position to present written testimony on particular issues prior to issuance of a draft or final SER. The Staff may also issue "partial" SERs which would allow the Staff to present its views on certain issues in advance of completion of the remainder of the SER. The Board has inherent authority under 10 C.F.R. 2.718 to schedule the hearing and resolution of these issues.

B. Authority to Issue Partial Initial Decisions in the Absence of an EIS

While there are certain constraints on the NRC Staff taking final positions on environmental issues arising under NEPA, the 1989 amended Rules of Practice and Commission precedent contemplate that the parties will proceed to litigate factual contentions arising under NEPA based on an applicant's environmental report. See 54 Fed. Reg. at 33,171-72. The Statement of Considerations cite and amended Rules of Practice follow the Commission's decision in Duke Power Company (Catawba Nuclear Station, Units 1 and 2), CLI-83-19, 17 NRC 1041, 1049 (1983) which recognized that the factual aspects of environmental issues can be raised and litigated before the EIS is prepared. As stated by the Commission in that case:

> Because the adequacy of [a DES or FES] cannot be determined before they are prepared, contentions regarding their adequacy cannot be expected to be proffered at an earlier stage of the proceeding before the documents are available. But this does not mean that no environmental contentions can be formulated before the staff issues a DES or FES. While all environmental contentions may, in a general sense, ultimately be challenges to the NRC's compliance with NEPA, factual aspects of particular issues can be raised before the DES is prepared. As a practical matter, much of the information in an Applicant's ER is used in the DES.

Id. (emphasis added).

The regulation which places certain constraints on the NRC Staff from taking final positions on environmental issues arising under NEPA is 10 C.F.R. § 51.104(a)(1). This regulation provides that "[i]n any proceeding in which (i) a hearing is held on the

proposed action, (ii) a final [EIS] has been prepared in connection with the proposed action, and (iii) matters within the scope of NEPA . . . are in issue, the NRC staff may not offer the final [EIS] in evidence or present the position of the NRC staff on matters within the scope of NEPA . . . until the final [EIS] is filed with the Environmental Protection Agency, furnished to commenting agencies and made available to the public." This provision, promulgated in 1984, was a revision of former 10 C.F.R. § 51.52(a).[1]

Nothing in 10 C.F.R. § 51.104(a)(1) precludes an applicant and intervenors from litigating factual aspects of environmental contentions based on the applicant's environmental report. Further, properly interpreted, this regulation should permit the NRC Staff to present evidence prior to the issuance of an EIS on preliminary factual issues apart from the ultimate cost-benefit balance required by NEPA. See Philadelphia Electric Company (Limerick Generating Station, Units 1 and 2), ALAB-785, 20 NRC 848, 862-66 (1984). As recognized by the Appeal Board in Limerick, no requirement of

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[1] Former 10 C.F.R. § 51.52(a) provided as follows:

> In any proceeding in which a draft environmental impact statement is prepared pursuant to this part, the draft environmental impact statement will be made available to the public at least fifteen (15) days prior to the time of any relevant hearing. At any such hearing, the position of the Commission's staff on matters covered by this part will not be presented until the final environmental impact statement is furnished to the Environmental Protection Agency and commenting agencies and made available to the public. Any other party to the proceeding may present its case on NEPA matters as well as on radiological health and safety matters prior to the end of the fifteen (15) day period.

NEPA requires environmental hearings to await the preparation and circulation of the Staff's final EIS: "Generally speaking, NEPA does not address the timing of an environmental statement, as long as it is available by the time of the agency's recommendation or report on the proposed federal action." Id. at 866.

In the Limerick case, the Appeal Board upheld the licensing board's consideration of the environmental impacts of operating a supplementary cooling water intake for the Limerick plant prior to the issuance of a draft or final EIS. In that case the Staff, notwithstanding the preclusion of former 10 C.F.R. § 51.52(a) (the applicable regulation at that time) on presenting "the position of the Commission's staff" on NEPA matters until the issuance of the final EIS, filed written testimony concerning this issue. See 20 NRC at 865. Further, although the licensing board had commenced the environmental hearings prior to the issuance of the draft EIS -- directly contrary to the provisions of former 10 C.F.R. § 51.52(a) but not revised 10 C.F.R. § 51.104(a) -- the Appeal Board noted that it was within the discretion of an administrative agency to relax or modify its procedural rules adopted for the orderly transaction of business when in a given case the ends of justice required it. Id. at 864. The Appeal Board found the licensing board's consideration of the environmental issues related to the operation of the supplementary cooling water intake to be appropriate in the circumstances of that case, emphasizing that the resolution of these issues did not involve "passing on the ultimate cost/benefit balance required by NEPA" which "must await the issuance of the staff's environmental statement." Id. at 864, 866.

The Limerick case therefore reflects that it is within the capability of a licensing board (and certainly the Commission could so direct) to consider environmental issues prior to the issuance of the EIS by the Staff so long as it does not consider the ultimate NEPA cost-benefit balance of the proposed action. This is further supported by other Commission precedent, such as Catawba, supra, 17 NRC at 1049, discussed above, which held that the factual aspects of environmental issues could be raised and litigated based on the environmental report. See also Allied-General Nuclear Services (Barnwell Nuclear Fuel Plant Separations Facility), ALAB-296, 2 NRC 671, 681 ("nothing either in NEPA or in the Commission's rules . . . would automatically preclude the hearing of all environmental issues while the impact statement is being redone as to some").

This conclusion is in no way undermined by the promulgation of 10 C.F.R. § 51.104 in 1984. The Limerick decision (issued September 26, 1984) was subsequent to the promulgation of § 51.104 (March 12, 1984). And both § 51.104 and the former § 51.52(a) contain essentially the same language linking the issuance of the EIS to the presentation of the Staff's position. Compare former 51.52(a) ("the position of the Commission's staff will not be presented until" the EIS is furnished to EPA, commenting agencies and the public), with § 51.104(a) ("the NRC Staff may not . . . present the position of the NRC Staff on matters within the scope of NEPA . . . until the final [EIS] is filed with" EPA, commenting agencies and the public). Therefore, the Limerick rationale applies equally to both the old and the new regulations.

Thus, the Applicant believes that under the above precedent the Board can consider factual issues raised by various environmental contentions, for example the actual environmental impacts of the proposed action, prior to the Staff's issuance of the EIS. Nothing in the Commission's rules or regulations preclude an applicant and intervenors from litigating such factual issues prior to the issuance of an EIS. Indeed, as reflected in Catawba and reaffirmed by the Statement of Considerations to the 1989 amended Rules of Practice, the actual contentions filed with respect to environmental issues are based on an applicant's environmental report. Further, as in Limerick, the Staff could prepare and present testimony with respect to such preliminary factual issues prior to the issuance of the final EIS. Such a course of action would be keeping with the Commission's general intent that its "proceedings be conducted expeditiously . . . and that its procedures maintain sufficient flexibility to accommodate that objective." 10 C.F.R. Part 2, App. A.[2] The Applicant believes that a determination of which -- if any -- environmental issues might be so handled should await the Board's rulings on the admissibility of contentions.

III. CONCLUSION

For the reasons stated above, the Board has the authority to schedule the orderly consideration and resolution of contested health and safety issues that is not dependent on

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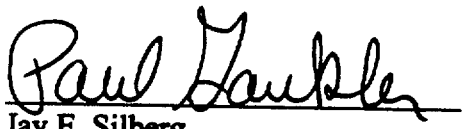
[2] While the specific provisions of Appendix A concern licensing proceedings for production and utilization facilities under 10 C.F.R. Part 50, this expression of general Commission policy would apply equally to other Commission licensing actions.

the Staff's scheduled completion and issuance of a draft or final SER. With respect to environmental issues, the Board may hear and resolve prior to the Staff's issuance of the EIS factual issues that do not pass on the ultimate cost-benefit balance required under NEPA.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that copies of the "Applicant's Memorandum on the Board's Authority to Issue Partial Initial Decisions Prior to the Issuance of the SER or EIS" dated December 30, 1997 were served on the persons listed below (unless otherwise noted) by facsimile with conforming copies by US mail, first class, postage prepaid, this 30th day of December 1997.

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