UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED 3/2/00

COMMISSIONERS:

SERVED 3/2/00

Richard A. Meserve, Chairman
Greta Joy Dicus
Nils J. Diaz
Edward McGaffigan, Jr.
Jeffrey S. Merrifield

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

CLI-00-02

MEMORANDUM AND ORDER

I. Introduction

The state of Utah has requested that the Commission grant discretionary interlocutory review of an Atomic Safety and Licensing Board Memorandum and Order, LBP-99-43, 50 NRC 306 (1999), denying Utah's request for the admission of a late-filed contention with respect to the application of Private Fuel Storage, L.L.C.'s for a license to construct and operate an independent spent fuel storage installation (ISFSI). Finding that this question does not meet the Commission's standards for discretionary interlocutory review, we deny the state's petition.

II. Background

PFS proposes to build an ISFSI on the Skull Valley, Utah,reservation of the Skull Valley Band of the Goshute Indians. Utah has filed numerous contentions in this matter, several of which are pending before the Board.

On June 23, 1999, Utah requested the admission of its late-filed Amended Contention C, which challenged the adequacy of revised design basis accident dose calculations incorporated into PFS's license application by a May 19, 1999, amendment. Its original Contention C, which had been timely filed and admitted by the Licensing Board, raised issues concerning the dose analysis for such an accident.

On February 10, 1999, PFS submitted new calculations in response to a staff Request for Additional Information (RAI) asking it to revise its calculations using an alternative methodology contained in a new interim staff guidance document. On April 21, 1999, PFS filed a motion to have Utah Contention C dismissed as moot. On May 7, 1999, Utah responded that the issues raised in its contention were not moot, because PFS's Safety Analysis Report had not been amended and still contained the calculation to which the state objected. After PFS formally amended its SAR in May, the Board granted the motion to dismiss Contention C on June 17, 1999. On June 23, 1999, Utah filed its motion for admission of its late-filed, amended Contention C, which claimed the revised dose analysis was also inadequate.

The Board ruled that Utah did not meet the requirements for the admission of a late-filed contention under 10 C.F.R. § 2.714(a)(1)(i)-(v). Specifically, the Board found that Utah did not have "good cause" for waiting until June to challenge the revised dose analysis when the new calculations had been made available more than four months earlier. Good cause is the most important of the five factors to be weighed in determining whether a late-filed contention will be allowed. See, e.g., Westinghouse Electric Corporation (Nuclear Fuel Export License for Czech Republic -- Temelin Nuclear Power Plants), CLI-94-7, 39 NRC 322 (1994). If good cause is not shown, the contention will be allowed only on a "compelling showing" on the four factors found at 10 C.F.R. § 2.714(a)(1)(ii)-(v). Id.

III. Standard for Interlocutory Review

As a general matter, NRC rules prohibit interlocutory appeals. See 10 C.F. R. § 2.730(f). To qualify for interlocutory review, a petitioner must show that the Licensing Board's decision either threatens "immediate and serious irreparable harm" (10 C.F.R. §2.786(g)(1)), or "[a]ffects the basic structure of the proceeding in a pervasive and unusual manner" (10 C.F.R. §2.786(g)(2)). Utah's petition for review argues that immediate review is warranted under §2.786(g)(2) because the Board's

decision will affect the basic structure of the proceeding by significantly increasing the litigation burden on the intervenors.

We find that the Board's refusal to admit Utah's amended Contention C will not have a "pervasive effect" on this proceeding as that term is used in our regulations. Our prior decisions interpret this provision as allowing review in only exceptional cases. See, e.g., Safety Light Corp., CLI 92-13, 36 NRC 79 (1992) (consolidation of informal proceeding with formal proceeding had a pervasive effect on structure of proceedings). None of our prior decisions has found the admission or denial of a contention, where the intervenor has other contentions pending in the proceeding, to be anything more than a routine interlocutory ruling not subject to immediate appellate review; such rulings must "abide the end of the case." Northern States Power Co., (Tyrone Energy Park, Unit 1) ALAB-492, 8 NRC 251 (1978).[(1)]

In contrast, several cases have considered and rejected the argument that the increased litigation burden caused by the allowance of a contention had a pervasive effect on the structure of the litigation. See, e.g, Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station), CLI-94-2, 39 NRC 91 (1994); Long Island Lighting Co. (Shoreham Nuclear Power Station), ALAB-861, 25 NRC 129 (1987). Similarly, no pervasive effect results from the disallowance of a late contention. At bottom, such cases turn on fact-specific questions of "good cause" for lateness -- questions that can be reviewed, if necessary, after the Board's final decision.

Utah does not claim that the other ground for interlocutory appeal -- serious irreparable harm -- applies. We see nothing in Utah's filing that would suggest it would suffer such harm.

IV. Conclusion

For the foregoing reasons, Utah's petition for discretionary interlocutory review is denied.

IT IS SO ORDERED.

For the Commission

[Original signed by Annette L. Vietti-Cook]

Annette L. Vietti-Cook
Secretary of the Commission

Dated at Rockville, Maryland
this 2nd day of March, 2000

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Commissioner McGaffigan would have granted discretionary interlocutory review, clarified the nature of the intervenor's obligations to timeliness, and remanded the contention to the Board.

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1. In contrast, where all contentions have been denied, thereby precluding the would-be intervenor from participating (10 C.F.R. §2.714a(b)), or where the applicant argues all intervenor's contentions should have been denied, thereby barring the intervenor from the litigation (10 C.F.R. §2.714a(c)), the affected party may appeal as of right.