

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

RAS 10183
COMMISSIONERS

DOCKETED 07/22/05

SERVED 07/22/05

Nils J. Diaz, Chairman
Jeffrey S. Merrifield
Gregory B. Jaczko
Peter B. Lyons

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

CLI-05-16

MEMORANDUM AND ORDER

On May 12, 2005, intervenor State of Utah filed a petition for discretionary Commission review of the Licensing Board's April 25, 2005 unpublished Memorandum and Order. In that order, the Board had approved many of Private Fuel Storage's ("PFS") proposed redactions of passages in the Board's prior "financial assurance" and "decommissioning funding assurance" decisions and also many of PFS's proposed redactions of associated documents in the administrative record. We deny Utah's petition in all respects but one.

Utah asks us to set aside various Board-approved redactions on one or more of the following grounds: (i) some of the material has already been publicly disclosed,¹ (ii) the Board redacted certain of Utah's assertions but disclosed PFS's and the Staff's responses to those

¹ Petition for Review at 3.

assertions,² (iii) redactions of PFS's passthrough of transportation costs lack sufficient basis,³ and (iv) some redactions are either misleading⁴ or broader than necessary to protect proprietary information.⁵ Utah also requests, for the first time in this proceeding, the public release of eleven passages from the hearing transcript.⁶

On May 23rd, PFS filed a response opposing all but a small portion of Utah's petition, on the ground that Utah had not satisfied the requirements for Commission review set forth in 10 C.F.R. § 2.786(b)(4) -- our regulation establishing the standards for obtaining discretionary Commission review.⁷ PFS did, however, agree that certain portions of the Board's decisions are now in the public domain and that PFS is no longer pursuing their redaction. Also on May 23rd, the NRC Staff filed a similar response opposing all of Utah's petition except for the portion involving previously disclosed material.

Utah has not addressed its burden of showing "a substantial question" on the types of issues that may merit Commission review.⁸ Moreover, absent a showing that the Board's fact-specific rulings were "clearly erroneous",⁹ *i.e.*, "*not even plausible*" in light of the record viewed

² *Id.* at 3-4, 6.

³ *Id.* at 4-7.

⁴ *Id.* at 7.

⁵ *Id.* at 8.

⁶ *Id.* at 8.

⁷ Although the Commission revised its procedural rules last year (60 Fed. Reg. 2182 (Jan. 14, 2004)), those revised rules do not apply to this proceeding. *Private Fuel Storage* (ISFSI), CLI-05-1, 61 NRC 160, 162 n.5 (2005). Hence, we apply our former section 2.786(b)(4) & (5) in this order.

⁸ 10 C.F.R. § 2.786(b)(4).

⁹ 10 C.F.R. § 2.786(b)(4)(i).

in its entirety,”¹⁰ we generally defer to the Board on matters of factual findings such as these.¹¹ For the most part, we see no reason to do otherwise here.

We decline to deny Utah’s entire petition summarily, however, because both PFS and the NRC Staff have agreed that some of the material the Board redacted is now in the public domain.¹² PFS has identified five passages containing the now-public information.¹³ To that limited extent, we will grant Utah’s petition and instruct the Board not to redact those passages.

Other than the five instances cited by PFS, we cannot accept Utah’s assertion that the Board has redacted information already in the public domain. Utah’s support for this claim is unconvincing. For instance, Utah supports its request for public release of passages addressing specific cost categories by referring us to statements in documents indicating that PFS plans generally to pass through its costs to its customers. But Utah never explains -- nor do we see -- why the public’s current access to *general* statements about PFS’s cost-passthrough intentions somehow justifies releasing information on *specific* cost categories (e.g., estimates), or on how those *specific* costs are to be passed through, or on how PFS intends to assure its customers’ payment of those *specific* costs. Indeed, we addressed these same points in general terms earlier in this proceeding, when we ruled that information about specific cost categories and the details of PFS’s specific cost-passthrough arrangement were proprietary and should be redacted.¹⁴

¹⁰ CLI-05-1, 61 NRC at 174 (emphasis added; footnote omitted).

¹¹ *Id.* at 174, 175.

¹² PFS’s May 23rd Response at 3, 4 n.11; NRC Staff’s May 23rd Response at 2.

¹³ PFS’s May 23rd Response at 4 n.11.

¹⁴ CLI-05-1, 61 NRC at 171, 173-79, 182. *See also Private Fuel Storage (ISFSI)*, CLI-05-8, 61 NRC 129 (2005).

Next, Utah argues that the Board erred in redacting some of Utah's arguments but not PFS's and the Staff's responses to those arguments. Utah appears to imply that the Board's motivation was to avoid embarrassing PFS and the NRC Staff.¹⁵ We interpret the Board's decision quite differently. In our view, what the Board intended to avoid was not embarrassment to two of the parties but rather -- quite properly -- the improper release of proprietary commercial information. The Board properly drew a distinction between Utah's arguments which contained proprietary information about the terms of PFS's Model Service Agreement, and PFS's and the Staff's arguments which contained no such information.

We also reject Utah's general argument that the redactions were broader than necessary to protect PFS's proprietary information. Utah provides no reasoned basis for this claim. As we have repeatedly stated, we do not consider bare, unsupported assertions in our adjudications.¹⁶

And finally, we reject Utah's last-minute challenge to the redaction of eleven passages in the hearing transcript. Utah offers no justification, as required under our rules governing late-filed arguments, why it should be permitted to raise this argument for the first time on appeal.¹⁷

¹⁵ Petition for Review at 3.

¹⁶ See, e.g., *Commonwealth Edison Co.* (Zion Nuclear Power Station, Units 1 & 2), CLI-00-5, 51 NRC 90, 98 (2000).

¹⁷ See, e.g., *Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-96-7, 43 NRC 235, 260 (1996), and cited authority; 10 C.F.R. § 2.786(b)(5).

In sum, we deny Utah's petition for review except insofar as it pertains to the five passages cited in footnote 11 of PFS's May 23rd Response. We direct the Board to lift its redaction of those passages.

IT IS SO ORDERED.

For the Commission¹⁸

/RA/

Annette L. Vietti-Cook,
Secretary of the Commission

Dated at Rockville, MD
this 22nd day of July, 2005

¹⁸ Commissioner Merrifield was not present when this item was affirmed. Accordingly the formal vote of the Commission was 3-0 in favor of the decision. Commissioner Merrifield, however, had previously voted to approve this Memorandum and Order and had he been present he would have affirmed his prior vote.

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing COMMISSION MEMORANDUM AND ORDER (CLI-05-16) have been served upon the following persons by electronic mail or facsimile, followed by deposit of paper copies in the U.S. mail, first class, and NRC internal mail.

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[Original signed by Evangeline S. Ngbea]

Office of the Secretary of the Commission

Dated at Rockville, Maryland,
this 22nd day of July 2005