

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of

PRIVATE FUEL STORAGE L.L.C.

(Independent Spent
Fuel Storage Installation)

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Docket Nos. 72-22-ISFSI
72-22-ISFSI-PSP

NRC STAFF'S RESPONSE TO APPLICANT'S
PETITION AND BRIEF FOR REVIEW OF
ESTABLISHMENT OF A SEPARATE LICENSING
BOARD FOR SECURITY PLAN MATTERS (LBP-98-8)

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May 18, 1998

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INTRODUCTION

On May 8, 1998, Applicant Private Fuel Storage L.L.C. ("Applicant" or "PFS") filed a petition ("Petition"),¹ seeking review of a Memorandum and Order issued by Chief Administrative Judge B. Paul Cotter, Jr., on April 23, 1998,² denying the Applicant's request for reconsideration of his March 26, 1998 establishment of a separate Licensing Board to preside over "all matters concerning the [Applicant's] physical security plan."³ For the reasons set forth below, the Staff submits that the Chief Administrative Judge's Order appears to be arbitrary and capricious and/or an abuse of discretion. Accordingly, the Staff supports the Applicant's Petition and recommends that the Commission vacate and reverse the Chief Administrative Judge's Order and the establishment of a second licensing board in this proceeding.

¹ "Applicant's Petition and Brief for Review of Establishment of a Separate Licensing Board for Security Plan Matters," dated May 8, 1998 ("App. Pet.").

² *Private Fuel Storage L.L.C. (Independent Spent Fuel Storage Facility)*, LBP-98-8, 47 NRC__ (Apr. 23, 1998) ("Order").

³ See "Private Fuel Storage, LLC; Establishment of Atomic Safety and Licensing Board," 63 Fed. Reg. 15900 (April 1, 1998) ("Notice").

STATEMENT OF THE CASE

This proceeding involves the application of PFS to construct and operate an Independent Spent Fuel Storage Installation ("ISFSI") on the reservation of the Skull Valley Band of the Goshutes (the "Skull Valley Band"), located in Tooele County, Utah. The facility would be licensed to receive, transfer and possess up to 4,000 casks containing spent fuel from domestic commercial nuclear power plants, for an initial license period of 20 years. On July 31, 1997, the NRC published a "Notice of Consideration" of the issuance of a materials license and a "Notice Opportunity for Hearing."⁴ The Notice provided, in part, that if a request for hearing or petition for leave to intervene is filed, the Commission or Chairman of the Atomic Safety and Licensing Board Panel (*i.e.*, the Chief Administrative Judge) would designate a Licensing Board to rule thereon, and the Secretary or the designated Licensing Board would thereafter issue a notice of hearing or other appropriate order. *Id.* Pursuant to that Notice, various requests for hearing and/or petitions for leave to intervene were filed, and on September 15, 1997, a Licensing Board was established to rule upon the requests for hearing and/or petitions to intervene and "to preside over the proceeding in the event that a hearing is ordered."⁵

Following its establishment, the initial Licensing Board that was designated to rule on petitions for leave to intervene and to preside over this proceeding (the "Initial Licensing Board") issued a series of procedural Orders in which it, *inter alia*, established a schedule for

⁴ See "Private Fuel Storage, Limited Liability Company; Notice of Consideration of Issuance of a Materials License for the Storage of Spent Fuel and Notice of Opportunity for Hearing" ("Notice"), 62 Fed. Reg. 41099 (July 31, 1997).

⁵ See "Private Fuel Storage, LLC; Establishment of Atomic Safety and Licensing Board," 62 Fed. Reg. 49263 (Sept. 19, 1997). See also, "Private Fuel Storage, LLC; Notice of Reconstitution of Board," 62 Fed. Reg. 52364 (Oct. 7, 1997).

filing contentions and responses thereto. Numerous contentions were then filed by the petitioners for leave to intervene, addressing various aspects of PFS' license application; these included one contention related to the physical security plan (which was later withdrawn),⁶ and other assertions concerning the risk of terrorism. In addition, on January 3, 1998 -- after the Initial Licensing Board had adopted a protective order permitting certain State of Utah personnel to gain access to the Applicant's physical security plan (filed as part of PFS' license application)⁷ -- the State filed nine contentions based on the physical security plan.⁸ The Applicant and Staff duly filed responses to the petitioners' contentions, including responses to the State's nine security plan contentions.⁹

⁶ See "Ohngo Gaudadeh Devia's [OGD] Contentions Regarding the Materials License Application of Private Fuel Storage in an [ISFSI]," dated November 24, 1997, at 20-22 (Contention H). OGD withdrew Contention H at the Prehearing Conference on January 27-29, 1998 (see Tr. 459-60).

⁷ See "Memorandum and Order (Protective Order and Schedule for Filing Security Plan Contentions)," dated December 17, 1997, as modified by Orders of December 22 and 23, 1997.

⁸ See "State of Utah's Contentions Security-A Through Security-I Based on Applicant's Confidential Safeguards Security Plan," dated January 3, 1998. As required by the Initial Licensing Board's protective order, the State filed its security plan contentions under seal, and restricted service thereof to the persons authorized to receive safeguards information under the protective order.

⁹ See "NRC Staff's Response to State of Utah's Security Plan Contentions," dated January 20, 1998; "Applicant's Answer to the State of Utah's Contentions Security-A Through Security-I Based on Applicant's Confidential Safeguards Security Plan," dated January 20, 1998; and "State of Utah's Reply to NRC Staff and Applicant's Responses to Utah's Security Plan Contentions Security-A Through Security-I," dated February 11, 1998. Like the State's security plan contentions, the Applicant's and Staff's response to those contentions (and the State's subsequent reply thereto, were filed under seal; and service was restricted to the persons authorized to receive safeguards information under the Initial Licensing Board's protective order.

On January 26, 1998, the Initial Licensing Board conducted a visit to the site and other locations relevant to the petitioners' contentions. On January 27-29, 1998, the Initial Licensing Board presided over a prehearing conference in Salt Lake City, Utah, at which the petitioners' standing to intervene and the admissibility of their contentions was addressed. Included among the topics discussed at the prehearing conference were contentions concerning the risk of terrorism, and the qualifications of the individual who had sponsored the State of Utah's security plan contentions.

On March 26, 1998 (published in the *Federal Register* on April 1, 1998), while the parties were awaiting a ruling by the Initial Licensing Board on standing, contentions and certain other matters, the Chief Administrative Judge issued the Notice announcing the establishment of a second licensing board "to consider and rule on all matters concerning the physical security plan of applicant Private Fuel Storage, LLC." In explaining this action, the Notice stated only that the second board was being established "due to the multiplicity of issues" in the proceeding. On April 6, 1998, the Applicant filed a motion before the Chief Administrative Judge, in which it requested reconsideration of the Order establishing a second licensing board.¹⁰ On April 16, 1998, the Staff filed a response in support of the Applicant's Motion, in which it recommended that the issues assigned to the second board be left for resolution by the Initial Licensing Board in this proceeding, before whom the issues had been raised in the first instance.¹¹

¹⁰ "Applicant's Request for Reconsideration of Establishment of a Separate Licensing Board for Security Plan Matters," dated April 6, 1998 ("Motion").

¹¹ "NRC Staff's Response to Applicant's Request for Reconsideration of Establishment of a Separate Licensing Board for Security Plan Matters," dated April 16, 1998 ("Staff Resp.").

On April 22, 1998, the Initial Licensing Board issued its "Memorandum and Order (Rulings on Standing, Contentions, Rule Waiver Petition, and Procedural/Administrative Matters)."¹² Therein, the Initial Licensing Board granted five petitions for leave to intervene, and accepted a total of 25 combined contentions for litigation in this proceeding. The following day, the Chief Administrative Judge issued his ruling denying the Applicant's motion for reconsideration of the establishment of a second licensing board (LBP-98-8). On May 8, 1998, the Applicant filed the instant appeal from that Order.

ARGUMENT

I. Interlocutory Review of the Chief Administrative Judge's Order Denying Reconsideration Is Appropriate.

It is well established that the Commission will not undertake interlocutory review of a ruling unless, in the absence of immediate appellate review, the ruling would "threaten a party with serious irreparable harm or pervasively affect the basic structure of the proceeding." *Sacramento Municipal Utility District* (Rancho Seco Nuclear Generating Station), CLI-94-2, 39 NRC 91, 93 (1994); *Oncology Services Corp.* (Byproduct Material License), CLI-93-13, 37 NRC 419, 420-21 (1993); cf. 10 C.F.R. § 2.786(g)(2). The Chief Administrative Judge's establishment of a second licensing board to preside over physical security plan matters in this proceeding clearly "affects the basic structure of the proceeding in a pervasive or unusual manner." Accordingly, the Staff submits that interlocutory review of the Order denying reconsideration is appropriate.

¹² *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-98-7, 47 NRC ____ (Apr. 22, 1998).

II. The Chief Administrative Judge's Order Appears to Be Arbitrary and Capricious, and/or Represents an Apparent Abuse of Discretion.

As noted in the discussion above, the Chief Administrative Judge's Order of March 26, 1998, recites only one fact in support of the establishment of a second licensing board -- that "a multiplicity of issues" has been raised in this proceeding. The Chief Administrative Judge's characterization of this matter was entirely correct. By the Staff's count, 92 contentions (including the State's nine security plan contentions) had been filed before the Initial Licensing Board, raising a plethora of safety, environmental, emergency plan, security plan, and other issues. This fact, however, did not warrant the establishment of a second Licensing Board, since the Initial Licensing Board had not yet indicated which (or how many) of those contentions were acceptable for litigation. Accordingly, the Chief Administrative Judge's establishment of a second board was premature, given the then-existing procedural posture of this proceeding. This view was expressed by the Applicant (Motion at 4-5), as well as by the Staff in its response to the Applicant's Motion (*see* Staff Resp. at 5, 6), but was nowhere addressed by the Chief Administrative Judge in his Order denying the Applicant's motion for reconsideration.¹³

Further, as the Applicant and Staff pointed out in their filings before the Chief Administrative Judge (App. Mo. at 6-7, Staff Resp. at 7-8), the establishment of a second licensing board is likely to lead to a duplication of effort by the participants and by the two Boards on related issues, and could lead to inconsistent decisions by the two Boards on those

¹³ Moreover, the Initial Licensing Board's recent ruling on contentions, issued on April 22, 1998, demonstrates that the number of issues in the proceeding has now been lessened substantially -- thus affecting the basis for the Chief Administrative Judge's determination that the "multiplicity of issues" in this proceeding warranted the establishment of a second licensing board.

issues. The potential for this result is due to the fact that various contentions were filed before (and admitted by) the Initial Licensing Board, which raise issues that are similar to certain issues raised in the State's security plan contentions (e.g., the risk of terrorism or sabotage, and the applicability of Commission Part 72 regulations, including certain physical security plan requirements, at the Rowley Junction intermodal transfer point or in transportation). Thus, although contentions raising these matters were filed (and remain pending) before the Initial Licensing Board, the security plan contentions raising these matters have now been assigned to the second licensing board.¹⁴ As the Staff pointed out in its response to the Applicant's Motion (Staff Resp. at 7), the fact that similar assertions have been raised in contentions other than the security plan contentions renders it appropriate that all such contentions be considered by a single Licensing Board, in order to avert duplicative efforts by the participants and the Boards, and to avert the potential for inconsistent resolution of these issues by two separate Licensing Boards. See generally, *Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Unit Nos. 1 and 2), CLI-76-1, 3 NRC 73, 74 n.1 (1976); *Philadelphia Electric Co.* (Limerick Generating Station, Units 1 and 2), ALAB-765, 19 NRC 645, 650-51 (1984).

¹⁴ In its response to the Applicant's Motion (Staff Resp. at 7 n.12), the Staff indicated that both Utah Contention B and Utah Contention Security-F contend that a security plan is required for the intermodal transfer point at Rowley Junction; this portion of Utah Contention B was admitted by the Initial Licensing Board in LBP-98-7 (slip op. at 56-58), and is the subject of two motions for reconsideration filed before that Board. Similarly, the Staff indicated that both the State's security contentions (e.g., Contentions Security-G and Security-H) and other contentions (e.g., Utah Contention V and OGD Contention C) raised security and sabotage issues in connection with the transportation of spent fuel to the facility, and that the risk of terrorism or sabotage also appeared as part of the basis for other contentions filed in this proceeding, such as OGD Contention P.

Despite the real potential for duplication of effort and conflicting results, as set forth in the parties' filings before him, the Chief Administrative Judge failed to address this concern in his Order of April 23, 1998. This failure to address the parties' concern over duplication of effort and potential conflicting results appears to be arbitrary and capricious and/or an abuse of discretion.¹⁵ Both the Applicant and Staff had pointed out examples, in their filings before the Chief Administrative Judge, of contentions that had now been assigned to the two boards, that involved a similarity of issues. *See* n.14, *supra*; *see also*, Motion at 6; Staff Resp. at 7 and n.12. Significantly, in its response to the Applicant's Motion, the Staff had pointed out that "[t]he Chief Administrative Judge could not have known of such similarities when he issued his Order of March 26, 1998, in that the State's security plan contentions were filed under seal." Staff Resp. at 7 n.12.¹⁶ Nowhere was this concern mentioned in the Chief Administrative Judge's Order -- and indeed, apart from reciting the fact that the Staff had filed a response in support of the Applicant's Motion (Order at 1), the Chief Administrative Judge never addressed any of the concerns or views expressed by the Staff.

In his Order, the Chief Administrative Judge based his determination to deny the motion for reconsideration on the grounds that (a) he has the "long-standing authority" to establish

¹⁵ A ruling may be viewed as "arbitrary and capricious" if it is "not adequately explained" and is "seemingly irrational." *See Portland General Electric Co.* (Trojan Nuclear Power Station), CLI-95-13, 42 NRC 125, 127 (1995). In contrast, the failure to reach a particular outcome may be found to constitute an abuse of discretion where "a reasonable mind could reach no other result." *Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), ALAB-952, 33 NRC 521, 532, *aff'd*, CLI-91-13, 34 NRC 185 (1991).

¹⁶ The Staff notes that the security plan contentions, as distinct from their bases, were later determined not to contain safeguards information, and that they therefore could be published (albeit without their supporting bases). *See* Staff Resp. at 7 n.12.

separate boards to hear and decide discrete portions of a proceeding, "so that the proceeding can be resolved in the most effective, efficient, and expeditious manner" -- the exercise of which authority "is subject to review only for an abuse of discretion" (Order, at 2), (b) that he has the authority to terminate an existing licensing board's jurisdiction, by appointing a second board to hear issues which may have been filed before the initial board (*Id.* at 3), and (c) that he had determined that "the Panel's docket can be most effectively managed and that this proceeding can be more efficiently and expeditiously resolved by establishing a second licensing board to hear and decide any issues concerning the PFS physical security plan" (*Id.* at 4).

However, regardless of the correctness of the Chief Administrative Judge's view of his authority, his determination that the establishment of a second licensing board for security plan matters would result in a more efficient and expeditious proceeding, is simply incorrect.¹⁷ Indeed, as the Staff pointed out in its response to the Applicant's Motion, the establishment of a second board could, in fact, result in the expenditure of additional effort by the parties and the licensing boards.

In this regard, the Staff notes that the establishment of a second Board should not be expected to result in any savings of time or resources. First, as discussed above, the establishment of a second board will likely result in a duplication of effort and a potential for inconsistent decisions by the Licensing Boards. Second, the Staff submits that no delay would

¹⁷ The Staff notes that its response to the Applicant's Motion expressed no view on the authority of the Chief Administrative Judge to establish the second licensing board, but instead indicated that rescission of the March 26, 1998, Order "is fully justified for non-jurisdictional reasons . . . without need to consider, at this time, the difficult jurisdictional issues presented by the Applicant"; and that rescission of the Chief Administrative Judge's Order, based on the similarity of issues and other factors set forth in the Staff's Response "would avert the need to resolve difficult jurisdictional issues asserted by the Applicant." See Staff Resp. at 5 n.11 and 9.

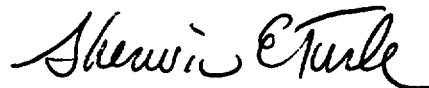
be caused by allowing security plan issues to be decided by the Initial Licensing Board, since the Staff anticipates that its review of physical security plan issues will be completed substantially before its review of safety and environmental issues, such that a hearing on physical security plan issues could be concluded, and an initial decision rendered on such issues, before the Initial Licensing Board is required to devote much time to other contentions. Although the Staff presented these views in its response to the Applicant's Motion (*see* Staff Resp. at 8), the Chief Administrative Judge's Order fails to reflect any consideration thereof.

In sum, the Staff respectfully submits that the Chief Administrative Judge's failure to address the significant considerations discussed above requires that his Order be vacated and reversed as arbitrary and capricious and/or an apparent abuse of discretion, and that the Commission should determine that the establishment of a second licensing board to consider physical security plan issues in this proceeding is unnecessary at this time.

CONCLUSION

For the reasons set forth above, the Staff supports the Applicant's petition for review of the Chief Administrative Judge's Order, denying reconsideration of the establishment of a second licensing board for physical security plan matters, and recommends that the Petition be granted.

Respectfully submitted,



Sherwin E. Turk
Counsel for NRC Staff

Dated at Rockville, Maryland
this 18th day of May 1998

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NUCLEAR REGULATORY COMMISSION**

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S RESPONSE TO APPLICANT'S PETITION AND BRIEF FOR REVIEW OF ESTABLISHMENT OF A SEPARATE LICENSING BOARD FOR SECURITY PLAN MATTERS (LBP-98-8)," in the above captioned proceeding have been served on the following by electronic mail as indicated, with copies by deposit in the Nuclear Regulatory Commission's internal mail system, or by deposit in the United States mail, first class, as indicated by an asterisk, this 18th day of May, 1998:

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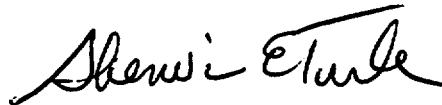
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