RAS 4785

August 19, 2002

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 SUPPLEMENT TO MOTION FOR SUMMARY DISPOSITION OF UTAH CONTENTION SECURITY J – LAW ENFORCEMENT

In its August 1, 2002, Memorandum and Order (Summary Disposition Supplemental Filings Regarding Contention Security-J), the Atomic Safety and Licensing Board ("Board") directed that Applicant Private Fuel Storage L.L.C. ("Applicant" or "PFS") may supplement its April 30, 2002 motion for summary disposition of the State of Utah's ("State") contention Security-J (law enforcement). That supplement is to address the significance of a July 30, 2002 decision by Federal Judge Tena Campbell of the U.S. District Court for the District of Utah ("the July 30 Decision") declaring unconstitutional a series of Utah laws, including those which formed the basis for Security-J. Skull Valley Band of Goshute Indians v. Leavitt, Case No. 2:01-CV-270C.[1] The following are PFS's views on the significance of the July 30 Decision.[2]

[1] On August 14, 2002, the Federal District Court issued its Judgment in the Skull Valley Band litigation, denying defendants' motion of judgment on the pleadings and suggestion of lack of jurisdiction, and granting plaintiffs' joint motion for summary judgment and plaintiffs' motion to dismiss the counterclaim.

[2] PFS is filing this pleading within 10 days of the State's announcement that it would not be filing for reconsideration of the July 30 decision. See State's Reply to Staff's Response to PFS's Motion for Summary Disposition of Utah Contention Security J – Law Enforcement (August 9, 2002) ("State's Reply") at fn. 3. The Board's August 1 Memorandum and Order directed that PFS's supplement be filed within 10 days after the time for seeking reconsideration expires (if the State did not file such a motion). It is our understanding that neither the Federal Rules of Civil Procedure nor the local rules of the Utah Federal

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The basis for the State's request to admit Security-J was the enactment on March 15, 2001 of several State laws that – with other recently enacted State laws – were intended to block the Private Fuel Storage Facility project. See State's Request for Admission of Late-Filed Contention Utah Security J (April 13, 2001) ("State's Request"). These March 15, 2001 laws included:

(a) Utah Code Ann. § 17-34-1(3), purporting to prohibit a county from contracting to provide "municipal type services" to "any area under consideration for a storage facility for the placement of high-level nuclear waste." State's Request at 6.

(b) Utah Code Ann. § 19-3-303(b), which defines "municipal type services" to include "law enforcement". Id.;

(c) Utah Code Ann. § 19-3-303(6)(b), which purports to prohibit a county from entering "into any contracts or any other agreements for the purpose of providing any goods, services, or municipal-type services" to a high level nuclear waste storage facility. Id. at 6-7.

According to the State, these provisions invalidated the Cooperative Law Enforcement Agreement ("CLEA") between Tooele County, the Band, and the Bureau of Indian Affairs insofar as the County's law enforcement services would be provided to PFS. Id. at 7. With these new State laws, allegedly invalidating the CLEA, the State claimed that PFS was no longer in compliance with NRC regulations "because the Applicant does not have valid documented liaison with a designated local enforcement authority (LEEA), and redundant communications between onsite security forces members and the LLEA." Id. at 4.

District Court explicitly provide for such a motion for reconsideration. PFS interprets the State's announcement that it will not seek reconsideration as the equivalent of the expiration of the time for the State to seek reconsideration.

In admitting Contention Security J, the Board found that the contention was based upon the newly enacted state legislation. See, e.g., Memorandum and Order (Deferring Admissibility Ruling on Late-Filed Contention Security-J (June 14, 2001) at 4; LBP-02-07, Memeorandum and Order (Admitting Contention Security –J), ___ NRC ___ (February 22, 2002) at 1.

On April 19, 2001, the Skull Valley Band of Goshute Indians and PFS jointly filed a lawsuit before the U.S. District Court for the District of Utah challenging on several grounds, including Federal preemption, the State laws enacted to block the project. The challenged laws included those aimed at voiding the CLEA. See Complaint ¶¶ 66-67. On December 12, 2001, the plaintiffs filed a joint motion for summary judgment asking that the Court declare unconstitutional the offending series of state laws, including Utah Code Ann. § 17-34-1 and § 19-3-303. See Memorandum of Points and Authorities in Support of Plaintiffs' Joint Motion for Summary Judgment at 15-16.

On July 30, 2002, Judge Campbell issued a decision which ruled that the State laws intended to block the Private Fuel Storage project were preempted by the Atomic Energy Act and therefore were invalid[3]. Judge Campbell specifically addressed the application of the federal preemption doctrine to the State law provisions purporting to void the CLEA. July 30 Decision at 22. In fact, the Court quoted from the State's April 13, 2001 Request for Admission of Late-filed Contention Utah Security-J to support its

[3] The Court did not analyze two provisions of the State laws under federal preemption grounds (because they were not challenged as preempted). These dealt with mandatory drug/alcohol testing and litigation of water rights. July 30 Decision at 23-26. The Court found that these two provision did not violate the Commerce Clause, but did not discuss their validity under other Constitutional challenges. In any case, neither of these provisions has any relevance to the subject matter or scope of contention Security J.

conclusion that the State law purporting to void the CLEA "has a direct and substantial effect on the decisions made by those who build or operate nuclear facilities concerning radiological safety levels and, thus, fall within the pre-empted field". Id.

There can be no doubt that the July 30 Decision, and the August 14 Judgment, remove any legal basis supporting contention Security J. Although the State has filed a notice of appeal concerning the July 30 Decision and the August 14 Judgment in the U.S. Court of Appeals for the Tenth Circuit, the District Court's decision is now final.[4] As a result the statutes underlying contention Security J are invalid and therefore unenforceable.

PFS' April 30, 2002 Motion for Summary Disposition set forth several independent grounds warranting a decision in its favor as to contention Security J. We first argued that the State laws involved had no legal effect since they were preempted by the Atomic Energy Act. Applicant's Motion for Summary Disposition of Utah Contention Security J – Law Enforcement at 5-8. Second, we argued that the laws had no legal effect because they violated the Constitution's Commerce Clause. Id. at 8-11. Finally, we argued that summary disposition should be granted based on the Commission's "realism doctrine." Id. at 12-18.

The July 30 Decision clearly is dispositive of PFS' first ground for summary disposition, i.e. the invalidity of the statutory underpinning of contention Security J based upon Federal preemption. The Decision explicitly invalidates the particular provisions

[4] The State has, to our knowledge, not sought a stay of the July 30 Decision and the August 14 Judgment either from the District Court or the Tenth Circuit.

underlying contention Security J.[5] The Licensing Board should therefore grant summary disposition based upon PFS's first ground. Collateral estoppel and res judicata apply. The issue resolved by Judge Campbell is precisely the same as that presented in PFS's Motion for Summary Disposition, it is an issue that was actually litigated in the Federal District Court, the issue was determined by a valid and final judgment, and the ruling was essential to the Federal District Court's judgment. See, e.g., Houston Lighting & Power Co. (South Texas Project, Units 1 & 2), LBP-79-27, 10 N.R.C. 563, 566 (1979). The State argues that collateral estoppel should not apply because of the presence of "the requisite 'special public interest factor'." State's Reply at 10 n. 4. But while the Commission has recognized that res judicata and collateral estoppel need not be applied in administrative proceedings, the circumstances that weigh against application of those doctrines are those "where there are overriding public policy interests which favor relitigation." United States Department of Energy (Clinch River Breeder Reactor Plant), CLI-82-23, 16 N.R.C. 412, 420 (1982). The State has certainly pointed to no such overriding public policy interests. While the State argues that the Board should ignore the July 30 Decision and instead perform its own independent analysis, State's Reply at 9, PFS does not believe that such an independent analysis is needed or appropriate.

The July 30 Decision did not address PFS' second basis for summary disposition, i.e., the Commerce Clause.[6] While not necessary to a decision dismissing contention

[5] Since the July 30 Decision specifically addresses the validity of the statutory provisions supporting contention Security J, the State's argument that a severance provision somehow protects those provisions, see State's Reply at 2-3, is irrelevant.

[6] While, as noted above, Judge Campbell analyzed two other state law provisions against a Commerce Clause challenge, that part of the decision did not address the State statutes implicated in contention Security J.

Security J, Applicants submit that it would complete the record for the Board to provide its analysis under the Commerce Clause. Since the July 30 Decision provides an analytical framework for the Commerce Clause analysis (a framework which is fully consistent with that presented in Applicant's Motion for Summary Disposition), the Board can certainly rely upon the District Court's analysis to determine that the Utah laws purporting to invalidate the CLEA violate the Commerce Clause.

Nor, or course, did the July 30 Decision address PFS's "realism doctrine" argument. Here, too, Applicant believes that it would be appropriate for the purposes of completing the record for the Board to address that argument as well.

It is clear that the State would have the Board disregard the July 30 Decision, or to use the State's terminology, "it would be impudent to use the Order as a basis for summary disposition of Security J". None of the State's argument have any merit. First, the State claims that the July 30 Decision "does not address or resolve the threshold issue," i.e., the State's oft-repeated claim that the Commission lacks jurisdiction to license the PFSF. State's Reply at 8. In fact, the Court did address the State's threshold argument. It ruled that PFS's right to own and operate the facility will be resolved by the Commission (with subsequent judicial appeals), but not by the District Court. July 30 Decision at 5-6, 8. In any event, the State has already presented this jurisdictional issue to the Commission, where it is pending. See, CLI-02-11, ___ NRC ___ (April 3, 2002) (granting review of the State's jurisdictional claim).

Second, the State argues that the Board should not rely on the July 30 Decision because the Court only relied on a preemption analysis, and did not reach plaintiffs'

Commerce Clause analysis. State's Reply at 8. This argument makes no sense, since the Court's preemption analysis was – by itself – more than adequate to strike down the statutory provisions.

Third, the State claims that the July 30 Decision did not separately analyze the particular statutory provisions underlying its contention. Id. However, as noted above, this statement is simply not true.

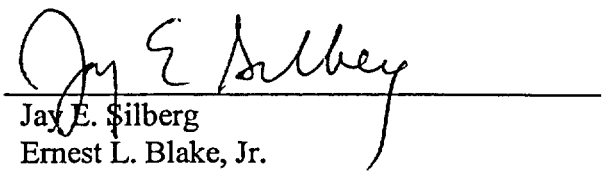
Finally, the State takes issue with the Court's substantive ruling, alleging that the July 30 Decision "does not engage in any meaningful analysis" of the statutes involved. That complaint is, though clearly inaccurate, one for the Tenth Circuit.[7]

For these reasons, we respectfully urge that the Board grant our motion for summary disposition, based upon the July 30 Decision determination that the State laws underpinning contention Security J are preempted by the Atomic Energy Act. In addition, we would respectfully urge that the Board also find that these State laws are also in violation of the Constitution's Commerce Clause, applying the analysis set forth in our

[7] Interestingly, while the State cites an Atomic Safety and Licensing Board decision (Long Island Lighting Co., 21 NRC 644 (1985) and a Federal District Court decision (Citizens for an Orderly Energy Policy, Inc. v. County of Suffolk, 604 F. Supp 1084 (EDNY 1985) as being contrary to the July 30 Decision, State's Reply at 8-9, the State cited neither of these in responding to the plaintiffs' Joint Motion for Summary Judgment.

Motion and the analytical framework set forth in the July 30 Decision (though applied there to other statutory provisions). Finally, the Board should alternatively grant our motion based upon application of the Commission's realism doctrine.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that copies of the Applicant's Supplement to Motion for Summary Disposition of Utah Contention Security J were served on the persons listed below (unless otherwise noted) by e-mail with conforming copies by U.S. mail, first class, postage prepaid, this 19th day of August, 2002.

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