

April 6, 1998

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

Before the Chief Administrative Law Judge

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 REQUEST FOR RECONSIDERATION OF ESTABLISHMENT  
OF A SEPARATE LICENSING BOARD FOR SECURITY PLAN MATTERS**

On March 26, 1998, Chief Administrative Law Judge, B. Paul Cotter, Jr. ("Chief Judge"), issued an order creating a separate Atomic Safety and Licensing Board "to consider and rule on all matters concerning the physical security plan of applicant Private Fuel Storage, LLC." According to the order, "[t]he existing Licensing Board shall retain jurisdiction over all other issues relating to the pending Private Fuel Storage application for authorization to construct and operate an independent spent fuel storage installation in Skull Valley, Utah."

Applicant Private Fuel Storage L.L.C. ("Applicant" or "PFS") hereby requests the Chief Judge to reconsider his creation of a second licensing board for security plan matters. While Applicant believes that there are serious legal questions whether NRC regulations authorize the Chief Judge to appoint two or more licensing boards for the same licensing proceeding in the circumstances present here (notwithstanding prior

practice in other circumstances), Applicant believes that as a matter of substance a second board should not be appointed at this stage of the licensing proceeding.

1. NRC Regulatory Authority

The March 26 Order relies upon 10 C.F.R. § 2.721 as the source of authority for the appointment of a second licensing board for the same licensing proceeding. That regulation is, however, ambiguous in view of its use of double plurals -- “establish one or more . . . boards . . . to preside in such proceedings.” 10 C.F.R. § 2.721(a) (emphasis added). Other provisions of the regulations suggest that a single licensing board is to be appointed for a proceeding initiated under a notice of hearing or notice of opportunity for hearing. See, e.g., 10 C.F.R. § 2.704(a) (“the [Chief Judge] will issue an order designating an atomic safety and licensing board appointed pursuant to section 191 of the Atomic Energy Act . . .”) (emphasis added); 10 C.F.R. § 2.105(e)(2) (“[i]f a request for a hearing or a petition for leave to intervene is filed . . . , the presiding officer who shall be an Atomic Safety and Licensing Board established by the Commission or by the Chief Administrative Judge . . . will rule on the request. . . .”) (emphasis added). In accordance with 10 C.F.R. § 2.105(e)(2), the “Notice for Opportunity for a Hearing” issued in this proceeding expressly reflects the Commission’s intent set forth in both 10 C.F.R. § 2.105(e)(2) and 10 C.F.R. § 2.704 to delegate its authority with respect to individual license applications, such as that filed by PFS here, to “an Atomic Safety and Licensing Board,” 62 Fed. Reg. 41,099 (1997) (emphasis added), not multiple boards as contemplated by the March 26 Order.

Moreover, regardless of whatever authority the Chief Judge may possess to establish multiple licensing boards for the same proceeding, the regulations do not vest with him the authority to terminate the jurisdiction of a duly established board once it has been created. See 10 C.F.R. § 2.717.<sup>1</sup> Both the “Notice for Opportunity for a Hearing” and the Chief Judge’s Order of September 15, 1997 appointing the existing Licensing Board reflect that the Board was duly established to preside over this proceeding.<sup>2</sup> The scope of the Board’s jurisdiction includes the breadth of issues encompassed by the Notice of Opportunity for Hearing with respect to the license application for the proposed ISFSI under 10 C.F.R. Part 72, which would include security plan matters.<sup>3</sup> The March 26 Order terminates the existing Board’s jurisdiction with respect to security plan matters, as reflected by its express recognition that the existing Licensing Board “shall retain jurisdiction over all other issues relating to the pending Private Fuel Storage application.” (Emphasis added.) Such termination appears to be directly contrary to 10 C.F.R. § 2.717.

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<sup>1</sup> That provision contemplates the termination of a board’s jurisdiction only by action of the Commission or by the board’s withdrawal. It does not delegate to the Chief Judge authority to terminate an existing board’s jurisdiction.

<sup>2</sup> The Chief Judge’s September 15 Order expressly states in this regard that the “Board is being established in the following proceeding to rule on petitions for hearing and for leave to intervene and to preside over the proceeding in the event that a hearing is ordered.”

<sup>3</sup> It is well established under NRC precedent that a general notice of hearing, such as that here, for the consideration of a license application delegates to the board appointed under that notice “authority over all portions of the license application in the event of [a licensing] proceeding; the application itself therefore sets the bounds of the Licensing Board’s jurisdiction.” Duke Power Company (Catawba Nuclear Station, Units 1 and 2), ALAB-825, 22 NRC 785, 791-92 (1985). Thus, the existing Board’s jurisdiction under the “Notice for Opportunity for a Hearing” and the Chief Judge’s September 15 Order clearly encompassed security plan matters. Indeed, the Board exercised this jurisdiction in issuing a Protective Order for the protection of safeguards information contained in the PFS security plan and a schedule for the filing of security contentions and responses and replies thereto. See Memorandum and Order (Protective Order and

Thus, the Applicant believes that serious legal issues exist concerning the authority of the Chief Judge to create two separate licensing boards for the same licensing proceeding -- at least where one board has already been duly established and vested with jurisdiction over the proceeding -- despite the preexisting practice of the Chief Judge to appoint multiple boards.<sup>4</sup> But these issues need not be faced here because of what Applicant believes are strong substantive reasons that militate against the appointment of a separate board for security issues at this time.

2. Inappropriateness of Appointing a Second Board at This Stage of the Proceeding

Applicant believes that several factors militate against the appointment of a second board, particularly at this stage of the proceeding. First and foremost, the Applicant believes that it is premature to appoint a separate licensing board for security issues before contentions are admitted. Prior to the admission of contentions, the scope and breadth of the hearing on the proposed ISFSI cannot be known. The decision on the admission of contentions will delineate the scope and the multiplicity of the issues to be resolved and the concomitant scope of work involved in this proceeding. At that point in

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Schedule for Filing Security Plan Contentions) dated December 17, 1997; Memorandum and Order (Prehearing Conference Agenda and Schedule for Replies), dated January 21, 1998.

<sup>4</sup> This practice appears to have been blessed by two Appeal Board decisions. See Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-916, 29 NRC 434, 438 (1989); Long Island Lighting Company (Shoreham Nuclear Power Station, Unit 1), ALAB-901, 28 NRC 302, 307 (1988). However, neither of those decisions confronted the issue of whether the Chief Judge has the authority to terminate the pre-existing jurisdiction of a duly established licensing board. Even assuming that 10 C.F.R. §§ 2.704 and 2.721 authorize the Chief Judge to appoint multiple boards for a single licensing proceeding, 10 C.F.R. § 2.717 would still appear to preclude the Chief Judge from unilaterally terminating an existing licensing board's jurisdiction over issues it has previously been assigned, such as that which has occurred here.

time, the Chief Judge, in consultation with the existing Board and the parties, could more reasonably decide the extent to which the appointment of a second board for security plan matters was warranted. If no security contentions were admitted, as Applicant contends should be the case, the creation of a second board would be superfluous.

Thus, the Applicant strongly urges the Chief Judge not to prejudge either the multiplicity of the issues or the scope of work involved before the admissibility of contentions is determined by the current Licensing Board. Indeed, to our knowledge, in all proceedings where second licensing boards have been created, they have been created after the decision on admissibility of contentions.<sup>5</sup> At that point in the proceeding, the need, if any, for a second licensing board will be more clear.

Second, multiple licensing boards have typically been created where conflicting schedules or workload of the existing board or its members mandate establishment of a second board in order to provide for expeditious consideration of a pending license application.<sup>6</sup> Often the Order creating a multiple board refers to a request or communication from an existing board concerning the need or desirability of a second

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<sup>5</sup> See 47 Fed. Reg. 37,984 (1982) (Shoreham); 48 Fed. Reg. 22,235 (1983) (Shoreham); 48 Fed. Reg. 32,417 (1983) and 50 Fed. Reg. 37,608 (1985) (Seabrook); 49 Fed. Reg. 7,893 (1984) (Catawba); 49 Fed. Reg. 13,611, 13,612 (1984); (Shoreham); 49 Fed. Reg. 13,613 (1984) (Comanche Peak); 50 Fed. Reg. 32,498 (1985) (Braidwood); 51 Fed. Reg. 21,815 (1986) (Shoreham); 51 Fed. Reg. 42,669 (1986) (San Onofre); 54 Fed. Reg. 17,848 (1989) (Limerick); 55 Fed. Reg. 47,411 (1990) (Seabrook). The Applicant was unable to find any instances in which a second licensing board was created prior to the decision on admissibility of contentions.

<sup>6</sup> See Statement of B. Paul Cotter, ¶¶ 3-5, attached to (but not published with) Suffolk County and State of New York Motion for Disqualification of Chief Administrative Judge Cotter (Shoreham Nuclear Power Station, Unit 1) LBP-84-29A, 20 NRC 385 (1984).

board.<sup>7</sup> Here, the March 26 Order does not refer to any concern expressed by the existing Licensing Board of conflicting schedules or work burden of the Board, or of its individual members. Nor is the March 26 Order explicitly premised on any such concern. Rather, its basis is more broadly stated as “the multiplicity of issues” of the instant proceeding. As already stated, Applicant believes that the multiplicity of issues and the concomitant scope of work can best be ascertained after the current Licensing Board determines the admissibility of contentions.

Third, the creation of a second licensing board divides jurisdiction for this licensing proceeding between two independent licensing boards, thereby creating the potential for conflicting decisions and other potential complications. Even if responsibility for specific contentions is clearly defined, similar issues are raised in the State’s security contentions and other contentions filed by both the State and other parties. For example, both Utah Contention B and Utah Contention Security-F contend that a security plan is required for the intermodal transfer point at Rowley Junction. Similarly, both the State’s security contentions and its other contentions (as well as OGD contentions) raise security and sabotage issues in connection with the transportation of spent nuclear fuel to the proposed ISFSI. See Utah Contention V and Utah Contentions Security-G and Security-H; OGD Contention C.

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<sup>7</sup> See 47 Fed. Reg. 37,984 (1982) (Shoreham); 48 Fed. Reg. 22,235 (1983) (Shoreham); 49 Fed. Reg. 7,893 (1984) (Catawba); 49 Fed. Reg. 13, 611, 13,612 (1984)) (Shoreham); 49 Fed. Reg. 13,613 (1984) (Comanche Peak); 55 Fed. Reg. 47,411 (1990) (Seabrook).

Thus, the potential for conflicting decisions of two independent licensing boards - both in determining the admissibility of contentions and in subsequent decisions on the merits -- is real.<sup>8</sup> In addition, there is the potential for conflict on the resolution of discovery, procedural and scheduling matters. The NRC's regulations expressly provide for methods other than a second independent licensing board by which other members of the Atomic Safety and Licensing Board Panel may provide assistance to existing licensing boards, upon their request, without the potential complications of multiple boards. See 10 C.F.R. § 2.722. These other methods may well provide sufficient additional resources to the existing Licensing Board, which could be evaluated upon a determination of admissibility of contentions, avoiding the creation of multiple board jurisdiction.

Fourth, because the appointment of a second board affects the basic structure of a licensing proceeding, the Applicant believes that the Chief Judge should obtain the input of the parties concerning the necessity or appropriateness of a second board, subsequent to a determination on the admissibility of contentions or at some later date in this proceeding.

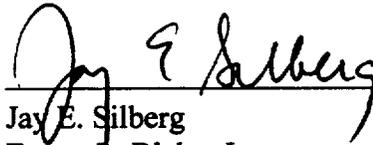
In sum, the Applicant requests the Chief Judge to reconsider the Order of March 26, 1998, and to defer the creation of a second board for physical security issues in this

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<sup>8</sup> Indeed, such conflicts have occurred in the past where jurisdiction over the same licensing proceeding has been divided among two or more licensing boards. See Seabrook, supra, ALAB-916, 29 NRC at 437-39. In previous situations, the Appeal Board was available to resolve the conflicts. In the absence of the Appeal Board, such conflicts would now need to be certified to the Commission for resolution. This would be a time consuming process which could result in significant delays to the licensing proceeding.

proceeding pending the current Licensing Board's decision on the admissibility of contentions. At such time, with input from the parties, the Chief Judge will be able to more effectively determine the need, if any, for the appointment of a second board to hear security plan matters in this proceeding.

Respectfully submitted,



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Dated: April 6, 1998

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**CERTIFICATE OF SERVICE**

I hereby certify that copies of the "Applicant's Request for Reconsideration of Establishment of a Separate Licensing Board for Security Plan Matters dated April 6, 1998, 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 6th day of April 1998.

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