

May 8, 1998

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

Before the Commission

In the Matter of )  
 )  
PRIVATE FUEL STORAGE L.L.C. ) Docket No. 72-22  
 )  
(Private Fuel Storage Facility) )

**APPLICANT'S PETITION AND BRIEF FOR REVIEW  
OF ESTABLISHMENT OF A SEPARATE LICENSING  
BOARD FOR SECURITY PLAN MATTERS**

**I. INTRODUCTION**

On April 23, 1998, Chief Administrative Law Judge B. Paul Cotter, Jr. ("Chief Judge") issued a memorandum and order, LBP-98-8, denying the request filed by Applicant Private Fuel Storage L.L.C. ("Applicant" or "PFS") for reconsideration of the Chief Judge's March 26, 1998 order which created a second licensing board "to consider and rule on all matters concerning the [Applicant's] physical security plan." The Applicant is hereby petitioning for interlocutory review pursuant to 10 C.F.R. § 2.786(g)(2) because appointment of the second licensing board will clearly affect the basic structure of this proceeding in a pervasive and unusual manner. For the reasons set forth below, the Applicant respectfully maintains that the analysis in the Chief Judge's April 23, 1998 Order is without merit and represents an abuse of discretion.

Accordingly, the Applicant requests that the Commission reverse the Chief Judge's Order of April 23, 1998 and abolish the second licensing board.<sup>1</sup>

## II. FACTUAL BACKGROUND

This proceeding began on July 31, 1997 when the Commission published a notice that it was considering issuance of a license to the Applicant for the storage of spent nuclear fuel at an independent spent fuel storage installation ("ISFSI") to be located on the Skull Valley Goshute Indian Reservation in Skull Valley, Utah. 62 Fed. Reg. 41,099 (July 31, 1997). On September 15, 1997, an Atomic Safety and Licensing Board ("Initial Board") was established to rule upon any requests for hearings and any petitions to intervene and "to preside over the proceeding in the event that a hearing is ordered." 62 Fed. Reg. 49263 (Sept. 19, 1997). In accordance with the schedule established by the Initial Board, numerous contentions were filed, including contentions filed by the State of Utah based on the Applicant's physical security plan. Responses to the petitioners' contentions were filed and a prehearing conference was held before the Initial Board on January 27-29, 1998, at which time admissibility of contentions was argued, including certain aspects of the security plan contentions.

After the arguments on admissibility of contentions, but before the Initial Board's rulings, the Chief Judge on March 26, 1998, issued an order which created a second Atomic Safety and Licensing Board ("Second Board") to consider and rule on all matters concerning the Applicant's physical security plan. 63 Fed. Reg. 15,800 (April 1, 1998) Applicant promptly requested the Chief Judge to reconsider his decision to create a Second Board, a request

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<sup>1</sup> If the Commission accepts this petition for review, Applicant is prepared to rest in the interest of time on the arguments as presented herein, absent Commission direction for additional briefing. See 10 C.F.R. § 2.786(d).

supported by the NRC Staff. On April 23, 1998, the Chief Judge issued a terse order denying that request. Just prior to this order, on April 22, 1998, the Initial Board issued a Memorandum and Order, LBP-98-7, ruling on the standing of the various petitioners and on the admissibility of all contentions (other than the State's security contentions). This ruling resulted in a reduction in the number of contentions from eighty-three to twenty-five.

### III. REQUEST FOR INTERLOCUTORY REVIEW

Notwithstanding the Commission's justifiable reluctance to undertake interlocutory review, in this instance Applicant is entitled to interlocutory review of the Chief Judge's April 23, 1998 Order. The Commission has stated that interlocutory review is proper when "one of the standards in Section 2.786(g) is met . . . ." Oncology Services Corporation (Byproduct Material License), CLI-93-13, 37 NRC 419, 421 (1993). Section 2.786(g) authorizes interlocutory review if the certified question or referred ruling (1) threatens the party adversely affected "with immediate and serious irreparable impact" or (2) "[a]ffects the basic structure of the proceeding in a pervasive or unusual manner."

Here, the standard of 2.786(g)(2) is clearly met. Establishment of a Second Board affects the basic structure of the proceeding in a pervasive and unusual manner. Creation of the Second Board will affect the types of issues that are before the Initial Board to consider and decide. The Appeal Board on various occasions recognized that multiple licensing boards could readily affect the structure of the proceeding.<sup>2</sup> Decisions by the Second Board could affect decisions by the Initial Board and vice versa. As the Appeal Board has observed, multiple

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<sup>2</sup> See, e.g., Public Service Company of New Hampshire (Seabrook Station Units 1 and 2), ALAB-916, 29 NRC 434, 438 (1989).

boards "leads to procedural anomalies that generate more dispute."<sup>3</sup> Thus, as more fully explained below, establishing a Second Board will affect the structure in the proceeding, warranting Commission review under 10 C.F.R. § 2.786(g)(2).<sup>4</sup>

#### IV. ARGUMENT ON THE MERITS

##### A. Standard for Review on the Merits

The Chief Judge in the order denying Applicant's request for reconsideration states that his "authority to establish multiple boards is subject to review for only an abuse of discretion," citing Shoreham, ALAB-901, 28 NRC at 307. The Chief Judge is incorrect. In Shoreham the Appeal Board held that:

The appointment of individual Licensing Board members to a particular proceeding is beyond the scope of our authority and is committed to the discretion of the Commission or the Chairman of the Licensing Board Panel. Thus, absent Commission action, the Licensing Board Panel Chairman is free to establish and reconstitute licensing boards with whichever individual Panel members he feels are appropriate, subject to review only for an abuse of discretion.

Id. (cites omitted) (emphasis added). Thus, while the abuse of discretion standard applied to the Appeal Board, it clearly does not apply to the Commission's review. The Commission has plenary authority by statute to appoint licensing boards for the conduct of licensing proceedings. 42 § U.S.C. 2241. Nothing limits that authority and accordingly the Commission is not bound

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<sup>3</sup> Long Island Lighting Company (Shoreham Nuclear Power Station, Unit 1), ALAB-902, 28 NRC 423, 430 n. 11 (1988); see also Long Island Lighting Company (Shoreham Nuclear Power Station, Unit 1), ALAB-901, 28 NRC 302, 306 (1988).

<sup>4</sup> The Commission stated in Oncology Services Corporation, supra at 421, that meeting the criteria in 10 C.F.R. § 2.786(b)(4) is not required for it to accept interlocutory review. Nevertheless, Applicant believes that these criteria are met since there are issues in connection with establishing a Second Board that concern legal conclusions without governing precedent, substantial questions of law, policy and discretion and other considerations in the public interest which support the Commission taking this matter for review.

by an abuse of discretion standard in its review of the Chief Judge's decision. The Commission can exercise its plenary authority here to reverse the Chief Judge's Order establishing a second board without finding an abuse of discretion. In any event, Applicant believes that the Chief Judge's April 23 Order was an abuse of discretion in that it failed to address any of the substantive arguments set forth by Applicant and the NRC Staff for setting aside the appointment of the Second Board.

**B. Legal Authority of the Chief Judge to Appoint Multiple Boards**

As set forth in its motion for reconsideration, the Applicant believes that there are serious legal issues concerning the authority of the Chief Judge to create two separate licensing boards for the same proceeding. At the outset, the regulations suggest that a single board is to be appointed for a proceeding initiated under a notice of hearing or notice of opportunity for hearing, such as that initiating this proceeding.<sup>5</sup> Regardless of whatever authority the Chief Judge may, however, possess to establish multiple hearing 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>6</sup> That provision contemplates the

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<sup>5</sup> 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.

<sup>6</sup> Section 2.717 provides, in pertinent part, that "[u]nless otherwise ordered by the Commission, the jurisdiction of the presiding officer designated to conduct a hearing over the proceeding, including motions and procedural matters, commences when the proceeding commences." (Emphasis added.)

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.

In this case, both the "Notice for Opportunity for a Hearing" issued pursuant to 10 C.F.R. § 2.105(e)(2) and the Chief Judge's Order of September 15, 1997 appointing the Initial Board clearly indicate that the Initial Board was duly established to preside over this proceeding.<sup>7</sup> The scope of the Initial Board's jurisdiction included 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 certainly included security plan matters. As the April 23 Order expressly acknowledges, the March 26 Order terminates the Initial Board's jurisdiction with respect to security plan matters.

The Chief Judge in his denial of the request for reconsideration claims that "the authority to terminate a portion of the initial board's jurisdiction is inherent in the Chief Administrative Judge's already-recognized authority to establish multiple boards." Id. at 3. Although the Chief Judge's practice of appointing multiple licensing boards has been recognized by several Appeal Board decisions,<sup>8</sup> none of those decisions addressed 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

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<sup>7</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>8</sup> See, e.g., Seabrook, supra, ALAB-916, 29 NRC at 438; Shoreham, supra, ALAB-901, 28 NRC at 307.

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.

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 proceeding. However, the Commission does not need to address these issues since the substantive reasons set forth below demonstrate that a second board at this stage of the proceedings is both unnecessary and potentially harmful.

**C. Appointment of a Second Board Is Inappropriate**

The Applicant believes that the Chief Judge has failed to identify a rational basis for appointing a second board and that strong substantive reasons militate against that appointment. The March 26 Order justified the establishment of a second board on "the multiplicity of issues" in the instant proceeding. The April 23 Order (at p. 4) simply states that "it is the judgment of the Chief Administrative Judge that the Panel's docket can be most effectively managed and that this proceeding can be more efficiently resolved by establishing a second licensing board to hear and decide any issues concerning the PFS physical security plan." This determination ignored the reasons advanced by Applicant and the NRC Staff why a second board is inappropriate here.

At the outset, it should be noted that the Initial Board has, to date, conducted the proceeding in a fair, expeditious, and effective manner. Unfortunately, creation of a second board will divide jurisdiction for this proceeding between two independent boards, which, as quoted above, the Appeal Board has noted "leads to procedural anomalies that generate more dispute." Multiple boards create the potential for conflicting decisions and other procedural

complications even if responsibility for specific issues or contentions is clearly defined. Here, similar issues are raised in the security plan contentions transferred to the Second Board and the contentions already admitted by the Initial Board. For example, both Utah Contention B (assigned to Initial Board) and Utah Contention Security-F (assigned to Second Board) contend that a security plan is required for the intermodal transfer point at Rowley Junction. Further, both the State's security contentions (assigned to Second Board), and at least one of its other admitted contentions (assigned to Initial Board) raise security and sabotage issues in connection with spent fuel transportation to the proposed ISFSI. See Utah Contention Z and Utah Contentions Security-G and Security-H.

Thus, the potential for conflicting decisions of two independent boards is real. Indeed such conflicts have occurred in the past.<sup>9</sup> Also, there is the potential for conflict on the resolution of discovery, procedural and scheduling matters. The Chief Judge did not address this potential for conflict in either the March 26 or April 23 Orders.

Further, other than the general statements set forth above, the Chief Judge did not identify specific reasons why a separate board was required here. Typically, multiple licensing boards have 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. As noted in Applicant's Request for Reconsideration, often the order creating a second board refers to a request or communication

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<sup>9</sup> 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 potentially time consuming process which could result in significant delays to the licensing proceeding.

from the existing board on the need or desirability of a second board. Here, the March 26 Order cites to no concern expressed by the Initial 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, as noted earlier, is more broadly stated as “the multiplicity of issues” in this proceeding.

The multiplicity of issues has, moreover, been substantially reduced by the Initial Board’s April 22 ruling on admissibility of contentions. Of the 83 contentions originally filed (excluding the pending security plan contentions), 25 consolidated contentions have been admitted. This reduction calls into question the Chief Judge’s rationale for the March 26 Order, which he never addressed in April 23 Order. Moreover, the Staff, in supporting Applicant’s Request for Reconsideration, noted that it would be ready for hearing on security issues before it would be ready to go to hearing on other matters. Thus, the hearing and initial decision on security plan issues may be concluded before the Initial Board would be required to devote hearing and decision-drafting time to other contentions.

Finally, the NRC’s regulations expressly provide for methods other than a second independent board by which other members of the Licensing Board Panel may provide assistance to existing boards, upon their request, without the potential complications of multiple boards. See 10 C.F.R. §§ 2.718(k), 2.722. These other methods may well provide sufficient additional resources to the Initial Board, should such resources prove to be necessary, thus avoiding the potential conflicts of multiple boards. If, however, the parties or the Initial Board believe at some future point that an additional board should be appointed in order to maintain an

efficient and expeditious proceeding, the appropriate process would be to petition the Commission pursuant to 10 C.F.R. § 2.717 and the Commission's plenary authority.

#### V. CONCLUSION

For all the reasons stated above, the Commission should reverse the Chief Judge's Order establishing a separate licensing board for security matters in this proceeding.<sup>10</sup>

Respectfully submitted,



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Dated: May 8, 1998

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<sup>10</sup> The Second Board has scheduled a prehearing conference for June 17, 1998 to hear oral argument on the admission of the State's security contentions. See Memorandum and Order (Initial Prehearing Order), dated May 6, 1998 (Docket No. 72-22-ISFSI-PSP). The Applicant requests expeditious consideration of this petition in order to have a Commission ruling by that date. Should it appear that such consideration will not be completed prior to that date, Applicant will consider appropriate filings to defer that prehearing conference.

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**CERTIFICATE OF SERVICE**

I hereby certify that copies of the "Applicant's Petition and Brief for Review of Establishment of a Separate Licensing Board for Security Plan Matters," dated May 8, 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 8th day of May 1998.

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