

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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

NRC STAFF'S REQUEST FOR A STAY PENDING THE COMMISSION'S
CONSIDERATION OF ANY REQUESTS FOR INTERLOCUTORY
REVIEW OF THE LICENSING BOARD'S DECISION IN LBP-02-08
CONCERNING CONTENTION OGD O (ENVIRONMENTAL JUSTICE)

INTRODUCTION

On February 22, 2002, the Atomic Safety and Licensing Board in this proceeding issued a Memorandum and Order, in which it granted in part, and denied in part, the "Applicant's Motion For Summary Disposition of OGD Contention O - Environmental Justice" ("Motion"), filed by Private Fuel Storage, L.L.C. ("PFS" or "Applicant").¹ The Staff believes that the Licensing Board's decision is incorrect as a matter of law, would result in an improper intrusion into the internal affairs of a Federally recognized sovereign Indian tribe (the Skull Valley Band of Goshute Indians), and would disregard the Commission's government-to-government relationship with that tribe. For these reasons, as more fully set forth below, the Staff believes that the Board's decision affects the basic structure of this proceeding in a pervasive or unusual manner, and threatens to have an immediate and serious irreparable impact on a party which, as a practical matter, could not be alleviated through a petition for review of the Board's final decision in the proceeding. Accordingly, the Staff

¹ See *Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-02-08, 55 NRC ____ (Feb. 22, 200)* ("Memorandum and Order (Ruling on Applicant's Motion for Summary Disposition of 'Contention OGD O' - - Environmental Justice)") (slip op.).

intends to file a request for interlocutory review of the Board's decision, pursuant to 10 C.F.R. § 2.786(g).²

Accordingly, in order to allow sufficient time for the Commission to consider any request for interlocutory review or motion for directed certification prior to the filing of testimony and the commencement of hearings on the issues delineated in LBP-02-08 -- scheduled for March 22 and April 22, 2002, respectively -- the Staff requests that the Commission stay the effect of the Board's decision, pending the Commission's consideration of such requests or motions by the Staff and/or other parties,³ under the stay criteria set forth in 10 C.F.R. § 2.788(e).

BACKGROUND

On April 22, 1998, the Licensing Board admitted Ohngo Gaudadeh Devia ("OGD"), a group consisting of members of the Skull Valley Band or other Native Americans who oppose the PFS license application, as a party to this proceeding. See *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-98-7, 47 NRC 142, 169 (1998). In its decision, the Licensing Board admitted one of OGD's contentions for litigation -- Contention OGD O (Environmental Justice), "limited to the disparate impact matters outlined in bases one, five and six," as further narrowed in the Board's decision. *Id.* at 233.⁴

² Pursuant to 10 C.F.R. § 2.786(b)(1), petitions for review of a Licensing Board decision must be filed within 15 days after service of that decision. Applying that rule here has the result that any requests for interlocutory review (or motions for directed certification) must be filed by March 11, 2002.

³ The Staff has been informed that PFS and the Skull Valley Band are preparing to file motions for directed certification of the Board's decision. In addition, Counsel for the U.S. Bureau of Indian Affairs has expressed serious concerns regarding the Board's decision and its potential impact on BIA, and has expressed interest in the Commission's undertaking immediate review of the Board's decision.

⁴ Bases one, five and six, respectively, raised the following issues: (a) "negative economic and sociological impacts on the Native community of Goshute Indians and OGD members" who live near the proposed site"; (b) cumulative health or environmental effects, due to the presence and emissions of numerous other hazardous waste sites within 35 miles of the Skull Valley Band
(continued...)

Following the Board's ruling in LBP-98-7, the Commission, *sua sponte*, provided guidance to the Board with respect to the adjudication of Contention OGD O. See *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-98-13, 48 NRC 26, 35-36 (1998). Specifically, as pertinent here, the Commission reiterated that Executive Order No. 12,898, upon which the "disparate impacts" issue in Contention OGD O was based, does not establish a legal right or remedy for OGD, but only underscores the requirements in NEPA. *Id.* at 35-36.

On May 25, 2001, the Applicant filed its motion for summary disposition of Contention OGD O in its entirety. On June 28, 2001, the Staff filed its response in support of the PFS Motion,⁵ and OGD filed its response in opposition to the Motion -- to which it attached a 75-page declaration by Skull Valley Band member Sammy Blackbear.⁶ In his Declaration, in addition to presenting a few brief claims that the PFS Facility would have adverse impacts on the members of the Skull Valley Band (Blackbear Dec. ¶¶ 398-99), Mr. Blackbear presented extensive claims that the Tribal leadership had deprived him and other Band members of their civil rights; had engaged in a unfair election practices, embezzlement and other unlawful conduct; and had withheld from him and other tribal members who oppose the PFS Facility any share of the money received by the Band from PFS (*Id.*, ¶¶ 23-24, 28 [*sic*]-285, and 298-397).

⁴(...continued)

Reservation and OGD members' homes; and (c) the effect on "property values of the surrounding lands." See "[OGD's] Contentions Regarding the Materials License Application of [PFS] in an [ISFSI]," filed November 24, 1997 ("OGD Contentions"), at 27-29 and 32-36.

⁵ See "NRC Staff's Response to Applicant's Motion for Summary Disposition of OGD Contention O -- Environmental Justice," dated June 28, 2001 ("Staff Response"), and the Affidavits attached thereto (addressing, respectively, Bases 1, 5, and 6 of the contention).

⁶ See "[OGD's] Response to [PFS'] Motion for Summary Disposition of OGD Contention 'O,'" dated June 28, 2001 ("OGD Response"), and "Declaration" of Sammy Blackbear ("Blackbear Dec."), attached thereto. Included in Mr. Blackbear's Declaration is an assertion that he is the rightful Chairman of the Band, based on his election as Vice Chairman in 1994, which the Bureau of Indian Affairs ("BIA") has improperly failed to recognize. Blackbear Dec. ¶¶ 6, 171-99.

On February 22, 2002, the Licensing Board issued its decision in LBP-02-08, ruling upon the Applicant's motion for summary disposition. The Board granted the Applicant's Motion with respect to Bases 5 (cumulative impacts) and 6 (impacts on property values), *id.* at 29-34, but denied the Motion with respect to Basis 1 (disparate impacts) -- which the Board perceived as raising the issues of operational noise, visual impact, and "cultural insult." *Id.* at 34. More specifically, the Board found that these potential impacts might be borne disproportionately by members of the Band who oppose the PFS project, in that they might experience the adverse impacts without receiving the financial benefits of the project. *Id.* at 34-36. The Board set this issue for hearing and, in particular, directed the parties to submit evidence concerning the payments that have been made by PFS under the lease to date, the payments PFS expects to make in the future, and the manner in which the Tribe has handled all payments to date, including how the funds have been distributed, spent on goods or services, or deposited to the Band's accounts. *Id.* at 36-37. The Board set this issue for hearing during the week of April 22, 2002, requiring that testimony and evidence be submitted by March 22, 2002. *Id.* at 37-38.

DISCUSSION

A. Legal Standards Governing Requests for Interlocutory Review and/or A Stay.

The Commission's regulations generally disfavor interlocutory review. See 10 C.F.R. § 2.730(f). It is well established, however, that interlocutory review is appropriate "where the disputed ruling threatens the aggrieved party with serious, immediate, and irreparable harm or where it will have a 'pervasive or unusual' effect on the proceedings below." *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-01-1, 53 NRC 1, 5 (2001), *citing* 10 C.F.R. § 2.786(g); *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-98-7, 47 NRC 307, 310 (1998). The regulations establish that filing a request for interlocutory review (or motion for directed certification) does not stay the effect of a disputed ruling. See

10 C.F.R. § 2.730(g); *cf.* 10 C.F.R. § 2.786(f). Rather, a stay request must be filed, and is to be considered under the criteria set forth in 10 C.F.R. § 2.788(e), as follows:

- (1) Whether the moving party has made a strong showing that it is likely to prevail on the merits;
- (2) Whether the party will be irreparably injured unless a stay is granted;
- (3) Whether the granting of a stay would harm other parties; and
- (4) Where the public interest lies.

B. The Board's Ruling Warrants the Entry of A Stay Under 10 C.F.R. § 2.788(e).

The Licensing Board's decision sets certain matters for hearing, based on the allegations made by Sammy Blackbear in his Declaration opposing the Applicant's motion for summary disposition. According to the Board, those allegations, if proven true, would establish a "distinct and well-defined population: those who are suffering a disparate burden, bearing the adverse environmental consequences of the PFS project while remaining impoverished as others [within the Band] have their situation improve." *Id.*, slip op. at 23. The Board perceived "no necessary bar to considering the impact of the project on less than the full complement of Band membership," *Id.*, and suggested that, if the allegations were proven true, the result may be that "only the OGD group remains an impoverished population within the meaning of the environmental justice rubric; the Bear group may no longer fit that mold." *Id.* at 24. As a result, the Board required the submission of evidence that would assist it in determining whether a portion of the affected minority group, rather than the group as a whole, may experience adverse impacts, holding that "this type of net disparity can be as much a matter for environmental justice review under NEPA . . . as is the more usual disparate environmental burden viewed alone." *Id.* at 27; emphasis in original. Further, the Board sought to right a perceived wrong, by holding out the "carrot" of settlement in one hand, while brandishing the "stick" of hearing and a decision potentially adverse to PFS and the Band, in the other. *Id.*, at 4, 25, 39-43.

The Staff believes that the Licensing Board's decision is incorrect as a matter of law, is unduly intrusive into matters of tribal governance and sovereignty, and otherwise requires immediate interlocutory review by the Commission. The Staff intends to file a request for interlocutory review of the Board's decision on or before March 11, 2002, in which it will set forth its views concerning this matter. At this time, however, the Staff submits that the Board's decision necessitates an immediate stay, pending the Commission's consideration of any requests for interlocutory review (or motions for directed certification) of the Board's decision -- in that the decision (a) establishes the Board (and the Commission) as a judicial tribunal concerning an intra-tribal dispute, (b) disregards the sovereign status of a Federally recognized Indian tribe and the Commission's government-to-government relationship with that tribe, (c) construes NEPA to create a cause of action under the doctrine of "environmental justice," (d) incorrectly establishes a requirement to consider how an agency action would affect individual members and subgroups within a minority group, rather than the group itself, and (e) requires litigation of an issue that is outside the scope of any admitted contention in this proceeding.

These matters will be set forth at length in the Staff's request for interlocutory review (and/or in the Staff's response to any motions filed by other parties). In brief, the Staff notes that the Board's decision would require litigation of numerous matters set forth in the Blackbear Declaration that are unrelated to the Commission's statutory responsibilities, including allegations that the Applicant's lease payments to the Band were appropriated by its Chairman, exclusively for personal use by him and his allies, and withheld from any Tribal members who oppose the project. *Id.*⁷

⁷ In this regard, the Board required PFS to provide evidence tabulating all payments it has made to date to the Skull Valley Band or to any of its members, and a schedule of future payments if the PFS Facility is approved; and it required the Band to "provide an accounting" of the PFS payments received by the Band or any member thereof, "the manner in which those funds were distributed to individuals in the Band, expended on goods or services, or deposited to the Band's accounts," and "to the extent that the funds went into those accounts, the manner in which those funds were later distributed or put to other uses." LBP-02-08, slip op. at 37.

Other allegations include “disputes over elections, the violation of Tribal norms, the relative standing of the protagonists, the perception of threats and other matters”, *Id.* at 36; and claims that the “purported 'leadership'” does not speak for the tribe -- which, in the Board’s view, “presents . . . the underlying issue on which this case turns.” *Id.* at 18 n.31. Thus, the Board appears poised to delve into the heart of intra-Tribal affairs, in the interest of resolving the “environmental justice” issue raised in Contention OGD O.

The Licensing Board’s decision to explore these matters exceeds the scope of the Commission’s statutory responsibilities under NEPA, in that NEPA nowhere requires the Commission to delve into matters of tribal governance, tribal equity, or tribal distribution of income. Rather, in evaluating the impacts of a proposed action, the agency can and should consider the net costs and benefits of the proposed license -- without requiring consideration of how the Tribe chooses to distribute or share its income within the Tribe, or how the Tribe manages its internal affairs. Such an intrusion into Tribal affairs, accompanied by the Board’s demand that the Tribe provide an accounting of how it handles its financial affairs, threatens a serious and irreparable injury to tribal sovereignty and self-governance which, as a practical matter, cannot be alleviated by appeal from the Board’s final decision.

Further, the Board’s decision to stray into consideration of how the Tribal leadership distributes money received under the PFS lease, thus intruding into wholly intra-Tribal matters, effectively disregards the Presidential declaration of a policy of “government-to-government” relations with Native American tribal governments. See Memorandum of April 29, 1994, “Government-to-Government Relations With Native American Tribal Governments,” 59 Fed. Reg. 22,951 (1994). Therein, executive departments and agencies are directed to conduct their activities “in a knowledgeable, sensitive manner respectful of tribal sovereignty,” in an effort to build a relationship “reflecting respect for the rights of self-government due the sovereign tribal governments.” In this regard, it is important to note that the Skull Valley Band of Goshute Indians

is a sovereign, Federally-recognized tribal government.⁸ Inasmuch as the Commission routinely considers the costs and benefits of other licensing actions in which tax payments resulting from a project may be received by a county or State government, without considering how that government distributes the economic benefits that may result from the licensing action, the same approach should be followed where such payments are received by a Tribal government, under the “government-to-government” relationship.

In addition, the Licensing Board’s decision appears to construe NEPA as creating a cause of action under the doctrine of “environmental justice” -- whereby a proposed licensing action may be rejected if adverse impacts could accrue to certain individuals who may not share the benefits of the proposed action. See LBP-02-08, slip op. at 4, 25-26. Such a reading of NEPA is incorrect. As the Commission explicitly reminded the Board, Executive Order No. 12,898 (upon which the “disparate impacts” issue in Contention OGD O was based) “created no new legal rights or remedies,” and “imposed no legal requirements upon the Commission”; rather, its purpose was merely to underscore the requirements of NEPA. See CLI-98-13, 48 NRC at 35-36. Those requirements necessitate consideration of the reasonably foreseeable impacts of the proposed action and alternatives thereto, but do not require that any particular action be taken once those impacts have been considered. See *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989) (NEPA requires federal agencies to take a “hard look” at environmental consequences, but “does not mandate particular results”; as long as the adverse impacts “are adequately identified and evaluated, the agency is not constrained by NEPA from deciding that other values outweigh the environmental costs.”). The Board’s repeated suggestion that it could deny the proposed licensing action if the adverse impacts to Mr. Blackbear or other tribal members are not outweighed

⁸ See Notice, “Indian Entities Recognized and Eligible to Receive Services From the U.S. Bureau of Indian Affairs,” 65 Fed. Reg. 13,298, 13,301 (2000). The Band’s Reservation was established long ago by Executive Order. See IV Kappler 1048 (Sept. 7, 1917 and Feb. 15, 1918).

by the benefits they receive from the proposed action, is simply inconsistent with this well established principle.

Moreover, the Licensing Board's requirement that the agency consider how a proposed licensing action would affect individual members or subgroups within a larger minority group, rather than consideration of the overall impacts on the minority group itself, establishes a novel and unworkable precedent that would convert NRC licensing boards (and the Commission) into courts of sociological inquiry, focused on resolving intra-community disputes rather than the issues which the Commission is statutorily required to decide. This unprecedented foray into an examination of such issues, and the Board's suggestion that its consideration of these issues could affect the outcome of this proceeding, necessitates prompt review and guidance by the Commission.

For these reasons, the Staff respectfully submits that the entry of a stay is appropriate, pending the Commission's consideration of any requests for interlocutory review or motions for directed certification of the Board's ruling. In this regard, the Staff submits that it has made a strong showing that it is likely to prevail on the merits, for the reasons set forth above. Further, the Staff submits that at least one party to the proceeding (the Skull Valley Band) will be irreparably injured unless a stay is granted, in that without a stay it would be compelled to comply with the Board's demand for an accounting and would find its internal tribal affairs subjected to Licensing Board scrutiny. In addition, the Staff would be irreparably harmed in the absence of a stay, in that the Board's decision would effectively abrogate the government-to-government relationship that exists between the federal government and the Band, and would necessitate the unprecedented filing of testimony and extensive cross-examination of adverse tribal witnesses by the Staff (and potentially, BIA), concerning these intra-tribal matters, resulting in further unwarranted intrusion and scrutiny of such matters -- in effect transforming the Licensing Board proceeding into a court of tribal inquiry.

With respect to the third criterion (whether the granting of a stay would harm other parties), the Staff recognizes that the entry of a stay could delay the conclusion of this licensing proceeding, thus resulting in harm to the Applicant; at the same time, however, immediate Commission review could serve to narrow the issues that must be addressed in the proceeding, thus resulting in a more timely completion of the proceeding. Finally, with respect to the fourth factor (where the public interest lies), the Staff submits that this factor overwhelmingly supports the entry of a stay pending Commission review of the motions for directed certification, in that any decision to reverse the Board's ruling -- or to provide guidance to the Board in its handling of these issues -- would serve to protect important considerations of sovereignty and tribal independence, and would allow time for the Commission to provide important guidance to the Licensing Board and parties in the adjudication of Contention OGD O, should it choose to do so.

CONCLUSION

For the reasons set forth above, the Staff respectfully requests that the Commission enter a stay of the Licensing Board's decision in LBP-02-08, pending its receipt and consideration of any requests for interlocutory review (or motions for directed certification) of that decision.

Respectfully submitted,

/RA/

Sherwin E. Turk
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Counsel for NRC Staff

Dated at Rockville, Maryland
this 4th day of March 2002

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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

CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S REQUEST FOR A STAY PENDING THE COMMISSION'S CONSIDERATION OF ANY REQUESTS FOR INTERLOCUTORY REVIEW OF THE LICENSING BOARD'S DECISION IN LBP-02-08 CONCERNING CONTENTION OGD O (ENVIRONMENTAL JUSTICE)," in the above captioned proceeding have been served on the following through deposit in the NRC's internal mail system, with copies by electronic mail, as indicated by an asterisk, or by deposit in the U.S. Postal Service, as indicated by double asterisk, with copies by electronic mail this 4th day of March, 2002:

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