

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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COMMISSIONERS

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Jeffrey S. Merrifield

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

CLI-02-08

MEMORANDUM AND ORDER

On February 22, 2002, the Atomic Safety and Licensing Board issued a lengthy decision that set for hearing some aspects of an “environmental justice” contention filed by intervenor Ohngo Gaudadeh Devia (OGD).¹ Another intervenor, the Skull Valley Band of Goshute Indians, now has sought interlocutory Commission review of the Board ruling, and seeks a stay of Board proceedings on environmental justice pending that review. The NRC staff, too, has filed a motion for a stay of Board proceedings. We grant review, set the matter for full briefing, and stay all Board proceedings on environmental justice, including the hearing itself and all upcoming filing deadlines related to it.

In the ruling challenged by the Skull Valley Band and the NRC staff, the Board found a hearing necessary to resolve the question whether OGD, which includes Band members who oppose the PFS project, might suffer the environmental impacts of the project without enjoying

¹ *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-02-08, 55 NRC ___ (Feb. 22, 2002) (summary disposition ruling on OGD Contention O).

its financial benefits. Among other things, the Board directed the litigants to be ready for hearing on the payments made by PFS to date and on the manner in which the Band has handled, spent, and distributed the payments. Under the Board ruling, the hearing itself would likely take place sometime during the week of April 22, 2002, and pre-filed testimony and evidence would be due a month earlier, on March 22.

Both the Band and the NRC staff raise the serious question whether an NRC hearing board lawfully may inquire into the internal financial and governance matters of a federally recognized sovereign Indian tribe such as the Skull Valley Band.² The NRC staff also represents that "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."³

In these circumstances, the Commission has decided to review the environmental justice ruling. We do not ordinarily undertake interlocutory review of Board orders.⁴ Our regulations provide an exception to this general rule where delaying review could cause "immediate and irreparable impact" on the party requesting review.⁵ We find that the Board decision creates an exceptional situation that warrants immediate Commission attention under this standard. If we defer review until the end of the case, as is our usual practice, the hearing

² The Band, for example, points to a Supreme Court case that seemingly counsels against federal interference in "intratribal disputes." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 60 (1978).

³ 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) (March 4, 2002), at 2 n.3 (electronic version).

⁴ See, e.g., *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-01-1, 53 NRC 1, 5-7 (2001); *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-00-3, 52 NRC 23, 28-29 (2000).

⁵ 10 C.F.R. § 2.786(g)(1). See also *Georgia Power Co.* (Vogle Electric Generating Plant, Units 1 and 2), CLI-95-15, 42 NRC 181, 184-85 (1995).

itself and various evidentiary submissions required by the Board, not to mention the Board's actual review, would go forward unimpeded and prior to any Commission consideration of the tribal sovereignty issues the Band and the NRC staff raise. In other words, the allegedly unlawful Board interference in tribal affairs would take place before the Commission has an opportunity to take corrective action (if necessary). As a practical matter, review of the Licensing Board's ruling after a hearing on the internal tribal matters would provide no relief from the type of harm that conceivably could be suffered as a result of such an inquiry.⁶ Because the possibility of such irreparable harm is obvious, it would be wasteful of time and effort, in our view, to await further petitions for review and responses before obtaining full briefs from the parties.

To allow meaningful Commission review, we also stay all Board proceedings and filings related to OGD's environmental justice contention. For the reasons suggested above, the Board decision raises serious merits questions going to its authority to act and also threatens the Band with irreparable injury. And no one will suffer significant harm from staying Board proceedings. Should the Commission, after review, affirm the Board decision or otherwise conclude that there must be a hearing on environmental justice, the Commission will direct the Board to reset its filing and hearing schedule, with due regard for fairness to all parties. It is reasonable and in the public interest for the Commission to proceed with caution in the sensitive area of relations between Indian tribes and the federal government. In short, prudent case management and the balance of equities favor staying Board proceedings pending Commission review of the environmental justice issue.⁷

⁶See *Oncology Services Corp.*, CLI-93-13, 37 NRC 419, 421 (1993).

⁷ *Cf.* 10 C.F.R. § 2.788 (setting out 4-part test for stays pending appeal). While time considerations have precluded an extensive Commission merits review at this point in the proceeding, and we therefore have not assessed whether various arguments are "likely to prevail," to use the terms of section 2.788, we are satisfied that the Board decision raises

We are aware that all parties are preparing for upcoming hearings in Utah. We have set the following briefing schedule in the expectation that it will provide enough time for diligent parties both to participate effectively in the hearings and to file useful Commission briefs on OGD's environmental justice contention:

1. All parties seeking reversal of LBP-02-08 shall file opening briefs on or before April 3, 2002. Opening briefs shall not exceed 35 pages.
2. All parties seeking affirmance of LBP-02-08 shall file answering briefs on or before April 30, 2002. Answering briefs shall not exceed 35 pages.
3. Parties seeking reversal may reply to the answering briefs on or before May 10, 2002. Reply briefs shall not exceed 10 pages.
4. We invite the Bureau of Indian Affairs to file an *amicus curiae* brief in this case no later than April 15, 2002. The Secretary is directed to serve a copy of this Memorandum and Order on the Bureau immediately.

The parties shall submit briefs electronically (or by other means to ensure that receipt by the Secretary of Commission by the due date), with paper copies to follow. Briefs in excess of 10 pages must contain a table of contents, with page references, and a table of cases (alphabetically arranged), statutes, regulations, and other authorities cited, with references to the pages of the brief where they are cited. Page limitations are exclusive of pages containing a table of contents, table of cases, and any addendum containing statutes, rules, regulations, and like material.

serious legal questions, a threshold sufficient in the unusual current setting to allow a stay of proceedings to prevent possible irreparable injury.

CONCLUSION

For the foregoing reasons, the Commission grants review of LBP-02-08, establishes the briefing schedule set out above, and stays all Licensing Board proceedings on OGD's environmental justice contention (OGD Contention O). All other Licensing Board proceedings should move forward on their current schedule.

IT IS SO ORDERED.

For the Commission

/RA/

Annette L. Vietti-Cook
Secretary of the Commission

Dated at Rockville, MD
This 7th day of March, 2002

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing COMMISSION MEMORANDUM AND ORDER (CLI-02-08) have been served upon the following persons by deposit in the U.S. mail, first class, as indicated by an asterisk (*) or through the Nuclear Regulatory Commission's internal distribution as indicated by double asterisks (**), with copies by electronic mail or facsimile.

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Docket No. 72-22-ISFSI
COMMISSION MEMORANDUM AND ORDER
(CLI-02-08)

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COMMISSION MEMORANDUM AND ORDER
(CLI-02-08)

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[Original signed by Evangeline S. Ngbea]

Office of the Secretary of the Commission

Dated at Rockville, Maryland,
this 7th day of March 2002