RAS 4797

August 28, 2002
DOCKETED 08/29/02

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	
	)	Docket No. 72-22-ISFSI
PRIVATE FUEL STORAGE, L.L.C.	)	
	)	ASLBP No. 97-732-02-ISFSI
(Independent Spent	)	
Fuel Storage Installation)	)	

NRC STAFF'S RESPONSE TO "APPLICANT'S SUPPLEMENT TO MOTION FOR SUMMARY DISPOSITION OF CONTENTION UTAH SECURITY J - LAW ENFORCEMENT"

INTRODUCTION

Pursuant to the Atomic Safety and Licensing Board's "Memorandum and Order (Summary Disposition Supplemental Filings Regarding Contention Security-J)," dated August 1, 2002, the NRC Staff ("Staff") hereby responds to "Applicant's Supplement to Motion for Summary Disposition of Utah Contention Security J -- Law Enforcement" ("Supplement"), filed by Private Fuel Storage, L.L.C. ("PFS" or "Applicant") on August 19, 2002. For the reasons set forth below, the Staff submits that the Licensing Board should proceed to grant the Applicant's pending motion for summary disposition of Contention Security-J.

BACKGROUND

The Applicant filed its "Motion for Summary Disposition of Utah Contention Security J -- Law Enforcement" ("Motion") on April 30, 2002, in which it argued that Contention Security-J should be resolved in its favor by summary disposition. More specifically, PFS asserted that the Utah law cited in the contention (Utah Senate Bill 81) was (a) preempted by Federal law or invalid under the U.S. Constitution, in that it violated the Supremacy, Commerce and Contracts Clauses (Motion at 4-11); and (b) was immaterial as a matter of law under the Commission's realism doctrine, in that an adequate security response would be provided notwithstanding S.B. 81 (*Id.* at 3, 12-18).

On May 31, 2002, the State of Utah ("State") filed a response in opposition to the Applicant's Motion;[1] and on July 22, 2002, the Staff filed its response to the Motion, in which it substantially agreed with each of the Applicant's arguments.[2]

Specifically, in its response to the Applicant's Motion, the Staff stated its view that (a) Utah Senate Bill 81 ("S.B. 81") impermissibly interferes with the Commission's regulation of nuclear safety under the Atomic Energy Act of 1954, as amended, and is preempted by Federal law (Staff Response at 9-17); (b) S.B. 81 is unconstitutional as an impermissible restriction on interstate commerce (*id.* at 17-20); (c) S.B. 81 is invalid under the Contracts Clause of the U.S. Constitution (*id.* at 20 n.27); and (d) Tooele County may be expected to respond to an unauthorized penetration or activities at the PFS site, rendering summary disposition of the contention appropriate under the Commission's realism doctrine (*id.* at 21-23).

On July 31, 2002, the State filed a notice informing the Licensing Board that the U.S. District Court for the District of Utah had issued a decision in a lawsuit brought against the State by PFS and the Skull Valley Band of Goshute Indians, in which the court declared S.B. 81 and various other State laws directed to the proposed PFS facility, to be invalid.[3] The State attached the District Court's decision to its Notice; stated that it planned to file an appeal from that decision; and asserted that "it would be premature of the Board to rule now on Contention Utah Security J" (Notice at 1). On August 9, 2002, the State further filed a reply to the Staff's Response of July 22,

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[1] *See* "Utah's Opposition to PFS's Motion for Summary Disposition of Utah Contention Security J - Law Enforcement," dated May 31, 2002.

[2] *See* "NRC Staff's Response to Applicant's Motion for Summary Disposition of Contention Utah Security-J" ("Staff Response"), dated July 22, 2002.

[3] *See* "State of Utah's Notification of Actions Relative to Contention Utah Security J'" ("Notice"), dated July 31, 2002.

2002, and provided its views as to the effect of the District Court's decision.[4] In particular, the State argued that the District Court's decision does not provide a "sound basis for granting PFS's motion for summary disposition" (Reply at 1), and it urged the Board to rule on the pending motion without regard to the court's decision (*id.* at 9-10).

On August 19, 2002, the Applicant filed its Supplement, in which it argued that the District Court's decision on preemption requires the grant of its motion for summary disposition, under the doctrines of collateral estoppel and *res judicata* (*Id.* at 5); and "in order to complete the record," it further requested that the Board proceed to rule upon its Commerce Clause and realism doctrine arguments (*Id.* at 6).

DISCUSSION

The District Court's decision declared a series of Utah laws, including S.B. 81, to be unconstitutional under the Supremacy Clause and to be preempted by Federal law.[5] The Applicant, in its Supplement of August 19, states that the District Court's decision "clearly is dispositive" of its first ground for summary disposition, *i.e.,* that the statutory basis for Contention Security-J is invalid on the grounds of Federal preemption (Supplement at 4). The Applicant asserts that this decision requires the grant of its motion for summary disposition, under the doctrines of collateral estoppel and *res judicata* (*Id.* at 5).

The Licensing Board has previously deferred ruling on the admissibility of Contention Security-J, specifically to await the District Court's decision concerning the validity of S.B. 81. *See*

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[4] *See* "Utah's Reply to Staff's Response to PFS's Motion for Summary Disposition of Utah Contention Security J - Law Enforcement" ("Reply"), dated August 9, 2002.

[5] *Skull Valley Band of Goshute Indians v. Leavitt,* Case No. 2:01-CV-270C (D. Utah, 2002), slip op. at 21-23; *appeal pending.* The court did not find it necessary to rule upon the plaintiffs' additional constitutional claims founded on the Commerce, Indian Commerce, Treaty, and Contracts Clauses, the First, Sixth and Fourteenth Amendments, or the Indian sovereignty doctrine. *Id.* at 23 n.12. Further, it rejected as premature, under the Hobbs Act, the defendants' argument that the NRC lacks legal authority to license an away-from-reactor ISFSI. *See id.* at 8, 26-27.

Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-01-20, 53 NRC 565, 571 (2001). When the Board later admitted this contention, it did so on the grounds that the District Court's schedule was unknown, and further delay could adversely affect the timely conclusion of this proceeding. *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-02-7, 55 NRC 167, 169 (2002). That schedular impediment has now been removed, and no reason appears why the Licensing Board should not recognize and apply the court's decision in its ruling on the Applicant's motion for summary disposition.

S.B. 81 -- the law which forms the basis for Utah Contention Security J -- has now been ruled unconstitutional by a court of competent jurisdiction, in a lawsuit involving both the State and PFS. To disregard that ruling, as the State now urges, would require the Licensing Board and the Commission to ignore judicial precedent and fail to give proper deference to a ruling by a federal District Court. In the Staff's view, the doctrine of *res judicata* requires that the Licensing Board give full conclusive effect to the District Court's decision, and that it rule upon the Applicant's motion for summary disposition accordingly. *See Toledo Edison Co.* (Davis-Besse Nuclear Power Station, Units 1, 2, and 3), ALAB-378, 5 NRC 557, 561, 562-63 (1977), *aff'g* LBP-76-40, 4 NRC 561 (1976).[6]

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[6] The doctrines of *res judicata* and collateral estoppel both bar relitigation of an issue that has been litigated previously. The Supreme Court distinguished the two doctrines as follows:

> Under the doctrine of res judicata, a judgment on the merits in a prior suit bars a second suit involving the same parties or their privies based on the <u>same</u> cause of action. Under the doctrine of collateral estoppel, on the other hand, the second action is upon a <u>different</u> cause of action and the judgment in the prior suit precludes relitigation of issues actually litigated and necessary to the outcome of the first action.

Parklane Hosiery Co. v. Shore, 439 U.S. 322, 326 n.5 (1979) (citations omitted; emphasis added). While both doctrines bar relitigation by the same parties of the same substantive issue, "res judicata also bars litigation of an issue that could have been litigated in the prior cause of action." *Ohio Edison Co.* (Perry Nuclear Power Plant, Unit 1), LBP-92-32, 36 NRC 269, 285 (1992).

To be sure, the Staff was not a party to the District Court litigation. Nonetheless, the Staff's non-participation there was of no consequence, in that neither the State nor PFS seeks to apply the doctrine of repose against the Staff.[7] For these reasons, there does not appear to be any "public policy" or other reason to avoid giving the District Court's decision its proper conclusive effect under the doctrine of collateral estoppel. *See id.; Houston Lighting and Power Co.* (South Texas Project, Units 1 and 2), LBP-79-27, 10 NRC 563, 572-73, 574-76 (1979), *aff'd,* ALAB-575, 11 NRC 14 (1980); *see also Philadelphia Electric Co.* (Limerick Generating Station, Units 1 and 2), LBP-82-43A, 15 NRC 1423, 1459 (1982); *Cleveland Electric Illuminating Co.* (Perry Nuclear Power Plant, Units 1 & 2), LBP-81-24, 14 NRC 175, 199 (1981).[8]

The State seeks to avoid application of the doctrines of collateral estoppel and *res judicata*, arguing that the Licensing Board should reach its own decision without regard to the District Court's action (Reply at 8-9). In this regard, the State raises a plethora of issues challenging the

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[7] In contrast, the State was a party to the prior proceeding, and the doctrine of repose may therefore now be applied against it. *See, e.g., Avitia v. Metropolitan Club of Chicago, Inc.,* 924 F.2d 689, 691 (1991); *Southern California Edison Co.* (San Onofre Nuclear Generating Station, Units 2 and 3), ALAB-673, 15 NRC 688 (1982) (identity or privity with a party in prior litigation is required for the doctrine to be applied against a party in the second litigation).

[8] It has been held that the doctrine of collateral estoppel may be applied where the following elements are present:

> In order to apply collateral estoppel several requirements must be met: The prior tribunal must have had jurisdiction to render the decision, there must have been a prior valid final judgment on the merits, the issue must have been actually litigated and necessary to the outcome of the first action, and the party against whom the doctrine is asserted must have been a party or in privity with a party to the earlier litigation. *Houston Lighting & Power Co.* (South Texas Project, Units 1 & 2), LBP-79-27, 10 NRC 563, 566 (1979), *aff'd.*, ALAB-575, 11 NRC 14 (1980); *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326 n.5, 99 S. Ct. 645, 58 L. Ed. 2d 552 (1979); *Southern California Edison Co.* (San Onofre Nuclear Generating Station, Units 2 & 3), ALAB-673, 15 NRC 688, 694-96 (1982).

Commonwealth Edison Co. (Braidwood Nuclear Power Station, Units 1 and 2), LBP-85-11, 21 NRC 609, 620 (1985).

soundness of the court's decision, and argues that if its appeal is successful, "some months from now upon reversal of the Order we will all be right back here going through this drill all over again" (*Id.* at 9-10). In the State's view, "wisdom dictates a different course" (*Id.*).

The State's argument is patently without merit. First, its assertions concerning the correctness of the District Court's decision are pleaded in the wrong forum, for the Licensing Board has no jurisdiction or reason to consider such claims. Second, contrary to the State's suggestion, it is well established that the filing of an appeal from a District Court decision does not negate that decision's *res judicata* effect. *See, e.g., Davis-Besse,* LBP-76-40, 4 NRC at 567; 18 Moore's Federal Practice, 3d Ed., § 131.30[2][c][ii], and cases cited therein. Accordingly, neither the State's resolve to appeal from the District Court's decision, nor its attempt to demonstrate errors in that decision, is of any effect here.[9]

Finally, the Staff notes that it does not oppose the Applicant's suggestion that the Licensing Board rule upon its other stated grounds for summary disposition. By doing so, the administrative record in this proceeding would be complete, and the Commission would have a full basis upon which to consider all of the parties' arguments concerning the validity of Contention Security-J. This course of action would serve the goal of efficiency, in that it would eliminate any need for further proceedings before the Board in the event (however unlikely) that the District Court's ruling on preemption is reversed or vacated in the future.[10]

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[9] Of course, if the District Court's decision is reversed, modified or vacated on appeal, the conclusive effect of that decision would be affected; this potential, however, has no effect on the conclusive nature of the District Court's decision now or during the pendency of the State's appeal. *See* 18 Moore's Federal Practice, 3d Ed., § 131.30[2][c][iii], and cases cited therein.

[10] To the extent that a ruling on the Applicant's other arguments may be viewed to be akin to an "advisory opinion," the Staff notes that advisory opinions are normally disfavored, but there is no bar to the issuance of such an opinion. *See, e.g., Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), ALAB-900, 28 NRC 275, 284 (1989); *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), ALAB-892, 27 NRC 485, 489 n.14 (1988); *Tennessee Valley Authority* (Hartsville Nuclear Plants, Units 1A, 2A, 1B and 2B), ALAB-467, 7 NRC 459, 463 (1978).

CONCLUSION

For the reasons set forth above and in its response to the Applicant's motion for summary disposition, the Staff supports the Applicant's request that the Board proceed to rule upon its Motion in the manner described herein.

Respectfully submitted,

/RA/

Sherwin E. Turk
Counsel for NRC Staff

Dated at Rockville, Maryland
this 28th day of August, 2002

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S RESPONSE TO 'APPLICANT'S SUPPLEMENT TO MOTION FOR SUMMARY DISPOSITION OF CONTENTION UTAH SECURITY J - LAW ENFORCEMENT'" 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 28th day of August, 2002:

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