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UNITED STATES
NUCLEAR REGULATORY COMMISSION

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SERVED JUN - 5 1998

In the Matter of	)	
	)	
PRIVATE FUEL STORAGE, L.L.C.	)	Docket Nos. 72-22-ISFSI
	)	72-22-ISFSI-PSP
(Private Fuel Storage Facility)	)	

CLI-98-7

MEMORANDUM AND ORDER

This proceeding concerns an application for a license to store spent nuclear fuel at an independent spent fuel storage installation (ISFSI) on the Skull Valley Goshute Indian Reservation in Skull Valley, Utah. The petitioner, Private Fuel Storage, L.L.C. (PFS), seeks interlocutory Commission review of a determination by the Chief Judge of the Atomic Safety and Licensing Board Panel to divide the proceeding and establish a second Licensing Board to "consider and rule on all matters concerning the [applicant's] physical security plan." 63 Fed. Reg. 15,900 (Apr. 1, 1998). PFS argues for reversal of the Chief Judge's ruling on the grounds that the Chief Judge lacked jurisdiction to divide the proceeding and that dividing it may lead to conflicting decisions and consume additional resources with little likelihood of expediting the ultimate merits decision. The NRC staff agrees with PFS that establishing a second Board was inappropriate. No other party has taken a position on the matter.

For the reasons stated below, we grant interlocutory review and reverse the Chief Judge's ruling. While we agree with the Chief Judge that he has sufficient authority to establish multiple Boards to adjudicate a single license application, and we also agree that assigning discrete issues to multiple Boards may sometimes prove a useful tool for resolving proceedings

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expeditiously, we conclude that a second Board was not called for here, given the procedural posture of the case. Once the initial Board rules on the admissibility of all pending contentions, including the security contentions, the Chief Judge may reconsider whether a second Board would be desirable.

I. Background

The initial three-member Board designated to preside over this proceeding was established on September 15, 1997, with Judge G. Paul Bollwerk, III, as its chairman. See 62 Fed. Reg. 49263 (Sept. 19, 1997). It received numerous petitions for intervention, including a petition from the State of Utah, seeking admission of a total of approximately ninety contentions. Of the ninety contentions, Utah filed nine that concerned the applicant's physical security plan; they were designated "Security-A through Security-I." In January, Judge Bollwerk's Board held a site visit in Utah and also convened a prehearing conference where it heard the parties' oral arguments on standing and on the admissibility of the ninety contentions. The Board permitted only a limited presentation on the nine security contentions "to avoid any discussion of nonpublic safeguards or proprietary information." LBP-98-7, 47 NRC __, slip op. at 17-18 (Apr. 22, 1998). The Board subsequently permitted the State, PFS, and the NRC staff to file post-argument pleadings on the admissibility of the security contentions. Id

Two months later, on March 26, before Judge Bollwerk's Board had ruled either on standing or on the admissibility of any contentions, the Chief Judge established a second Board, chaired by Judge Thomas S. Moore, to rule on all matters concerning Utah's nine security plan contentions. See 63 Fed. Reg. 15,900 (Apr. 1, 1998). PFS promptly sought reconsideration of the decision to establish a second Board. The NRC staff supported PFS's petition for reconsideration.

In the meantime, while the petition for reconsideration of the Chief Judge's ruling was still pending, Judge Bollwerk's Board issued a lengthy Memorandum and Order on standing and on the admissibility of the approximately eighty remaining contentions. LBP-98-7, 47 NRC ___

(Apr. 22, 1998). The Bollwerk Board did not rule on the nine security contentions that the Chief Judge had reassigned to the Moore Board. LBP-98-7, 47 NRC at ___, slip op. at 21-22. Twenty-five contentions were admitted, and several parties, including the State of Utah, were accorded standing. Several parties subsequently filed motions for reconsideration.

The next day, on April 23 the Chief Judge denied PFS's request for reconsideration of his determination to establish a second Board to handle the security contentions. Rejecting PFS's claim that he lacked jurisdiction to establish a second Board, the Chief Judge pointed to prior precedent where the Chief Judge had established two or more Boards to decide separate issues in one proceeding. The Chief Judge further reasoned that inherent in the authority to establish multiple Boards is the authority to terminate the jurisdiction of the first Board with respect to the issues that are given to the second. As for the circumstances here, the Chief Judge stated that "the Panel's docket can be most effectively managed and that this proceeding can be more efficiently and expeditiously resolved by establishing a second licensing board." LBP-98-8, 47 NRC ___, slip op. at 4 (April 23, 1998).

On May 6, Judge Moore's Board issued a scheduling order that set June 17 as the date for a prehearing conference on the security plan issues. That Board indicated that it deemed the State of Utah's physical security plan contentions and all parties' pleadings relating to those contentions, previously filed with Judge Bollwerk's Board, to be part of the record before the new Board.[1]

II. Interlocutory Review

The Commission does not readily review interlocutory Licensing Board rulings, but will do so if a particular ruling (1) "[t]hreatens the party adversely affected by it with immediate and serious irreparable impact" or (2) "[a]ffects the basic structure of the proceeding in a pervasive or unusual manner." 10 C.F.R. § 2.786(g)(1) and (2); see Oncology Services Corporation, CLI-

[1]On May 18, Judge Bollwerk's Board ruled on the parties' motions for reconsideration of its decision on the admissibility of contentions. See LBP-98-7, 47 NRC __ (1998).

93-13, 37 NRC 419 (1993). PFS invokes the second prong of our standard.

The decision to create a second Board is not unheard of in our practice, but it is certainly an unusual event, particularly where, as here, the Chief Judge reassigns to a second Board threshold admissibility questions that already are ripe for decision by the initial Board. We agree with PFS and the NRC staff that a ruling of this sort "affects the basic structure of the proceeding," by arguably mandating duplicative or unnecessary litigating steps, and therefore is reviewable now. Cf. Rockwell International Corp. (Rocketdyne Division), ALAB-925, 30 NRC 709, 712-13 n.1 (1989).

III. Authority of the Chief Judge to Create a Second Board

PFS (but not the NRC staff, which takes no position on the matter) insists that the Chief Judge lost all authority to establish a second Board once he initially assigned the entire proceeding to Judge Bollwerk's Board. We disagree.

As a general matter dividing discrete issues between two Boards has the potential to expedite proceedings. It would therefore make little policy sense for the Commission to bar this practice. As a matter of law, nothing in our rules withholds from the Chief Judge the authority to manage the Panel's docket efficiently by dividing work between two Boards. Such authority follows from the Chief Judge's broad authority to establish Boards in the first place. See 10 C.F.R. §§ 2.704, 2.721. Largely for these reasons, the former Atomic Safety and Licensing Appeal Board found that there is "no room for serious doubt that ... the Chief Administrative Judge of the Licensing Board Panel is empowered to both (1) establish two or more licensing boards to hear and decide discrete portions of a licensing proceeding; and (2) to determine which portions will be considered by one board as distinguished from another." Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-916, 29 NRC 434, 438 (1989) (footnote omitted).

We agree with the Appeal Board. It is true, as PFS points out, that 10 C.F.R. § 2.717 specifically states that a Board's jurisdiction ceases at the end of the proceeding or upon the

disqualification of an individual judge. However, the rule does not state or imply that these are the only circumstances under which a Board's jurisdiction may be terminated. In our view, section 2.717 does not abrogate the Chief Judge's inherent authority to manage the Panel's caseload efficiently through reassignments of pending adjudications in whole or in part.

Although establishing multiple Boards can be an effective tool for expediting proceedings, the Commission recognizes that it also creates a risk of conflicting decisions and duplicative work for the Boards and parties. The Commission therefore expects the Chief Judge to exercise his authority to establish multiple Boards only when: (1) the proceeding involves discrete and separable issues; (2) the issues can be more expeditiously handled by multiple Boards than by a single Board; and (3) the multiple Boards can conduct the proceeding in a manner that will not burden the parties unduly. We do not believe that this test was met in the present case.

IV. Timing of Establishment of a Second Board

In our judgment, under the current posture of this proceeding, it is inefficient to have a second Board presiding over the issues related to the security contentions. Those contentions may or may not be admissible; it may be appropriate to combine some or all of them, or to litigate one or more of them together with a previously admitted contention. We believe that Judge Bollwerk's Board, having acted on all other standing and admissibility questions in this proceeding, including motions to reconsider, and having already held a site visit and prehearing conference on the security contentions, is better positioned than the newly established Board to act quickly on these admissibility issues. Had the Chief Judge not stepped in, we have every reason to believe that by now Judge Bollwerk's Board, which resolved the admissibility of the other eighty contentions with admirable dispatch, would also have determined the admissibility of the security contentions.

The newly-established second Board, by contrast, intends to conduct its own prehearing conference, currently set for June 17, before resolving the admissibility of the contentions. It

also is not in a position to combine any of the security contentions with the twenty-five previously admitted contentions, because it has jurisdiction over only the former. Given these circumstances, we think it would invite delay to establish a second Board at this time. We therefore reverse Judge Cotter's ruling and reinstate the initial Board's jurisdiction to decide the admissibility of the security contentions.

We do not mean to suggest that establishing a second Board for the security contentions, or for any other discrete set of contentions, might not at some later date be a prudent means to expedite this adjudication. But the Chief Judge should not address that question until the first Board decides the pending admissibility issues.

PFS and the NRC staff argue that the separate Board contemplated here is inherently unworkable because the security contentions are so intertwined with other contentions that duplicative or conflicting rulings, arguments and pleadings are inevitable. We agree that, as a general principle, a separate Board should not be established if it would likely result in duplicative work or conflicting rulings, but we do not here rule on whether the security contentions are so intertwined with other contentions that such duplication or conflict would be inevitable. Instead, as part of its ruling on admissibility, we expect Judge Bollwerk's Board to decide, as it did with respect to numerous other issues raised in this proceeding, whether the security plan contentions overlap with any others in such a way that they should be combined or litigated with other contentions. See e.g., LBP-98-7, 47 NRC at __, slip op. at 93. Then, keeping in mind the three principles we set forth in section III of this decision, the Chief Judge could reconsider whether to establish a second Board to handle the security (or any other) contentions, in the interest of expedition and efficiency.

V. Conclusion

For the foregoing reasons, we reverse the Chief Judge's decision to establish a second Board to handle the security contentions. Instead, those contentions will remain under the jurisdiction of the initial Board until that Board rules on their admissibility and on any motions for

reconsideration of that determination. Subsequent to those rulings, the Chief Judge may consider, consistent with the discussion contained in this opinion, whether to establish a second Board to further adjudicate any of the admitted contentions.

IT IS SO ORDERED.

For the Commission,[2]

John C. Hoyle
Secretary of the Commission

Dated at Rockville, Maryland,
this 5th day of June, 1998.

[2] Commissioner Dicus was not available for the affirmation of this Order. Had she been present, she would have affirmed the Order.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing COMMISSION MEMORANDUM AND ORDER (CLI-98-7) have been served upon the following persons by electronic mail with conforming copies by U.S. mail, first class, except as otherwise noted.

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COMMISSION MEMORANDUM
AND ORDER (CLI-98-7)

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Dated at Rockville, MD this
5th day of June 1998

Adria T. Byrdsong
Office of the Secretary of the Commission

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of	)	
	)	
PRIVATE FUEL STORAGE L.LC.	)	Docket No. 72-22-ISFSI-PSP
	)	
(Physical Security Plan)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing COMMISSION MEMORANDUM AND ORDER (CLI-98-7) have been served upon the following persons by electronic mail with conforming copies by U.S. mail, first class, except as otherwise noted.

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COMMISSION MEMORANDUM
AND ORDER (CLI-98-7)

Dated at Rockville, MD this
5th day of June 1998

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