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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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Before The Commission

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

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

**APPLICANT'S RESPONSE TO OHNGO GAUDADEH DEVIYA'S
MOTION TO REOPEN THE RECORD ON OGD CONTENTION O**

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Applicant Private Fuel Storage, L.L.C. ("Applicant" or "PFS") hereby submits this response to Ohngo Gaudadeh Devia's ("OGD") Motion to Reopen the Record on OGD Contention O ("Motion") dated January 29, 2004. For the reasons set forth below, the Commission should deny OGD's Motion and decline to reopen the record because (1) the Motion does not raise a significant safety or environmental issue; (2) a materially different result would not have been likely if the material proffered by OGD's Motion had been considered initially; and (3) the Motion seeks to reopen the record to raise an issue that is outside the scope of Contention OGD O.

I. BACKGROUND

In June 1997, PFS filed an application with the NRC for a license to possess and store 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. The ISFSI (the "PFSF") will be owned and operated by PFS and located on tribal land leased by PFS from the Skull Valley Band ("Band") – a federally-recognized Indian tribe – under a lease agreement entered into between PFS and the Band on May 20, 1997. The Band intervened in the licensing proceeding in support of PFS's application. Private Fuel Storage L.L.C. (Independent Spent Fuel Storage Installation), LBP-98-7, 47 NRC 142, 159 (1998).

OGD is an organization which describes itself as being formed specifically to oppose the PFSF; OGD is composed of members of the Band as well as non-Band members.¹ In the contention at issue here, labeled Contention OGD O, OGD claimed that “[t]he license application poses undue risk to public health and safety because it fails to address environmental justice issues.”² OGD O relied upon Executive Order 12898,³ and contained six bases. On April 22, 1998, the Atomic Safety and Licensing Board (“Board”) admitted OGD O, but limited it to “the disparate impact matters outlined in bases one, five, and six.” Private Fuel Storage, LBP-98-7, 47 NRC at 233.⁴ OGD O Basis 1 claimed that the proposed facility would have “negative economic and sociological impacts on the Native Community of Goshute Indians who live very close to the proposed site”⁵ OGD O Basis 5 claimed that “if any type of Environmental assessment is done,” it must consider “the cumulative impacts and disproportionate impacts that the OGD community has been made to suffer” from certain hazardous facilities near the Goshute Reservation.”⁶ OGD O Basis 6 claimed that the Applicant’s Environmental Report failed to address the effect that the PFSF would have on property values of tribal members, members of OGD, or people living in and around the area of the proposed PFSF.⁷

On May 25, 2001, PFS moved for summary disposition of the three admitted bases of OGD O.⁸ OGD’s response opposing PFS’s motion included a declaration from Mr. Sammy

¹ Ohngo Gaudadeh Devia’s Request For Hearing And Petition To Intervene (September 12, 1997) at 3.

² Ohngo Gaudadeh Devia’s Contentions Regarding The Materials License Application of Private Fuel Storage in an Independent Spent Fuel Storage Installation (November 24, 1997) (“Contentions”).

³ In pertinent part, Executive Order 12898 states “[t]o the greatest extent practicable and permitted by law, ... each Federal agency shall make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations in the United States” Executive Order 12898 of February 11, 1994, Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations, 59 Fed. Reg. 7,629 (1994) at Section 1-101.

⁴ On February 5, 2004, the Commission rejected OGD’s petition seeking review of the Board’s April 22, 1998 decision and upheld the Board’s exclusion of Contention OGD O Bases 2, 3, and 4. Private Fuel Storage L.L.C. (Independent Spent Fuel Storage Installation), CLI-04-04, 59 NRC ___, slip op. (Feb. 5, 2004).

⁵ Contentions at 28.

⁶ Id. at 32-34.

⁷ Id. at 34-36.

⁸ Applicant’s Motion For Summary Disposition of OGD Contention O – Environmental Justice (May 25, 2001).

Blackbear ("Blackbear Declaration"), which contained an attack on matters relating to the governance of the Band and management of its finances. Among other things, the Blackbear Declaration claimed that (1) Mr. Leon Bear, the Band's Chairman, had misappropriated funds paid by PFS under PFS's lease with the Band; (2) Mr. Bear had used those funds for personal gain and to bribe other tribe members to support his administration; and (3) tribe members who opposed the PFSF or Mr. Bear's chairmanship were wrongfully denied any share in the lease's proceeds. Private Fuel Storage L.L.C. (Independent Spent Fuel Storage Installation), CLI-02-20, 56 NRC 147, 151 (2002).

The Board granted summary disposition with respect to OGD O Bases 5 and 6, finding that there were no remaining issues of fact regarding the cumulative impacts from the surrounding areas or effects on property values. Private Fuel Storage L.L.C. (Independent Spent Fuel Storage Installation), LBP-02-8, 55 NRC 171 (2002); See also Private Fuel Storage, CLI-02-20, 56 NRC at 151. The Board, however, denied summary judgment of OGD O Basis 1, setting for hearing the question of whether the Band's alleged treatment of the lease proceeds caused a minority "subgroup" of the tribe to suffer a disproportionate environmental impact from the project. Private Fuel Storage, LBP-02-8, 55 NRC at 189-91; See also Private Fuel Storage, CLI-02-20, 56 NRC at 151.

On October 1, 2002, the Commission reversed the Board's partial denial of summary disposition, and directed the Board to grant summary disposition for PFS on all aspects of Contention OGD O. Private Fuel Storage, CLI-02-20, 56 NRC at 160.⁹ The Commission found that: (1) the Band had made no showing of disproportionate environmental impacts; (2) the Board's order improperly examined a "subgroup" of a minority population; (3) OGD's allegations regarding disparate financial benefits were outside the scope of the admitted contentions; and (4) federal Indian law prevents NRC review of Indian tribal financial affairs. For many of these same reasons, this Commission should deny OGD's current Motion.

⁹ The Board has yet to enter an order as directed by the Commission granting summary disposition.

II. STANDARD FOR REOPENING THE RECORD

Under 10 C.F.R. §2.734, a motion to reopen a record will not be granted unless the following criteria, among others, are satisfied:

The motion must be timely (2) The motion must address a significant safety or environmental issue. (3) The motion must demonstrate that a materially different result would be or would have been likely had the newly proffered evidence been considered initially.

10 C.F.R. § 2.734(a). The Commission has held that “[t]he burden of satisfying the[se] reopening requirements is a heavy one.” Louisiana Power & Light Co. (Waterford Steam Electric Station, Unit 3), CLI-86-1, 23 NRC 1, 5 (1986). Furthermore, the new material supporting a motion to reopen the record “must be relevant, material, and reliable.” Id. (citations omitted). As explained below, OGD’s Motion fails to meet these requirements.

III. ARGUMENT

A. OGD’s Motion Fails To Address A Significant Environmental Or Safety Issue, As Required To Justify Reopening The Record.

OGD states that its Motion includes “new and additional evidence regarding the recent criminal indictment of Leon Bear for theft of tribal funds and filing false tax returns,” as well as allegations regarding Mr. Bear’s alleged failure to comply with an ongoing I.R.S. investigation of the Band’s financial dealings.¹⁰ According to OGD, such evidence addresses a significant environmental issue because it demonstrates that Band members who do not support the proposed PFS facility “continue to suffer a disproportionate environmental impact in that they will suffer negative environmental impacts of the proposed project without enjoying the financial benefits of the lease.”¹¹ OGD’s Motion, however, does not address a significant environmental issue (or indeed any environmental issue); it merely raises the same issues which the Commission previously rejected as outside of its environmental justice jurisdiction.

¹⁰ Motion at 1.

¹¹ Motion at 7. See also Motion at 1-2.

As the Commission found in CLI-02-20, issues regarding the financial dealings of Mr. Bear and the Band are wholly outside the scope of the Commission's authority to conduct an environmental justice inquiry. As held by the Commission:

Without for a moment discounting the seriousness of OGD's claims of financial impropriety, we do not agree with the Board that such claims fall within NEPA or justify an NRC hearing on the issue. OGD's allegations show, at most, a disparity in the financial benefits that the PFS project may bring to different members of the Skull Valley Band. But OGD's financial allegations do not display a disparity in the project's *environmental* impacts – the focus of a NEPA-environmental justice inquiry at the NRC.

Private Fuel Storage, CLI-02-20, 56 NRC at 149-150 (emphasis in original), citing Louisiana Energy Services, L.P. (Claiborne Enrichment Center), CLI-98-3, 47 NRC 77, 100-110 (1998) (“LES”). The Commission added “[i]n actuality OGD makes no claim that its members will suffer a disproportionate environmental injury when compared to other members of the tribe, and there is no evidence that they will.... In our view, the executive order [12898] and NEPA generally do not call for an investigation into disparate economic benefits as a matter of environmental justice.” CLI-02-20, 56 NRC at 154. Stating that Executive Order 12898 asks agencies to consider environmental justice “only when disparate environmental impacts are ‘high and adverse,’” the Commission found in CLI-02-20 that there was “no reason ... to conclude that persons who fail to receive their desired share of the PFS lease money are suffering a ‘high and adverse’ environmental impact.” Id.¹²

Commission decisions in addition to CLI-02-20 also support the conclusion that an inquiry into alleged criminal activity or financial corruption would be wholly outside the scope of the Commission's environmental justice authority. Executive Order 12898 “established no new rights or remedies.” LES, CLI-98-3, 47 NRC at 102. Instead, the Executive Order's purpose was to “help ensure that all communities and persons across this Nation live in a safe

¹² As the Commission held in CLI-02-20, the Environmental Impact Statement prepared in this proceeding found the overall environmental impacts on reservation residents to be small or small to moderate. CLI-02-20, 56 NRC at 154. That finding is not in dispute.

and healthful environment.” Id. And the “core interest” of the National Environmental Policy Act (“NEPA”), which Executive Order 12898 was intended to underscore, is “the physical environment – the world around us, so to speak.” Id., quoting Metropolitan Edison Co. v. People Against Nuclear Energy, 460 U.S. 766, 772 (1983). Nothing in Executive Order 12898 or NEPA authorizes the Commission to reopen the record regarding Contention OGD O to conduct a hearing into the internal financial matters of an Indian tribe.

To the extent that it relates to this proceeding, the “new evidence” proffered by OGD’s Motion concerns the governance of the Band and the distribution of economic benefits of the PFSF within the Indian tribe and does not relate to environmental impacts that Executive Order 12898 and NEPA are designed to address. As the Commission has recognized, persons who fail to receive their desired share of PFS lease payments “may well have a grievance against their tribal leadership.” However, “that grievance cannot fairly be considered ‘environmental.’” Private Fuel Storage, CLI-02-20, 56 NRC at 154. Accordingly, the Commission should again decline to undertake a “corruption investigation,” which not only is improper under Executive Order 12898 and NEPA, but which would be a “major undertaking ‘far afield from the NRC’s experience and expertise.’” Id. at 155, quoting LES, CLI-98-3, 47 NRC at 103.

OGD’s Motion states that the Commission should reopen the record to examine the environmental impacts of Mr. Bear’s financial activities to the extent such impacts effect “individual Band members who do not support the proposed PFS facility.”¹³ OGD’s argument essentially asks the Commission to evaluate whether a subgroup of the pertinent environmental justice population – the entire Band – will be negatively impacted. The Commission, however, has refused to apply environmental justice principles to subgroups, finding in this proceeding that such an approach “would create an artificial ‘environmental justice’ concern at virtually all proposed federal projects, for almost any project yields more benefits for some than for others.”

¹³ Motion at 7. See also Motion at 1.

Private Fuel Storage, CLI-02-20, 56 NRC at 155. As the Commission pointed out, an NRC Environmental Impact Statement

looks at the pertinent minority community in general, not at vaguely defined, shifting “subgroups” within that community. Otherwise “environmental justice” becomes simply a device for ventilating intramural disputes within communities – which is not a function Congress has assigned to the NRC and is not a function in which we have skill or expertise.

Id. at 156. Thus, there is no basis here for the Commission to reopen the record to conduct an environmental justice inquiry into “whether one tribal subgroup is siphoning money or benefits from another.” Id. For these reasons, OGD’s Motion fails to raise a significant environmental issue, as is required to reopen the record regarding Contention OGD O.

OGD also states that its Motion addresses the “safety” of the PFSF because “criminal behavior and financial misdealing by the Leon Bear administration legitimately call into question the stability of the proposed PFS facility,” and because the Commission cannot in good faith make the required 10 C.F.R. 72.40(a) finding “knowing that the host tribal government is directly involved in criminal activity.”¹⁴ OGD O, however, was an environmental justice contention and therefore, by definition, an environmental contention. Safety issues are unrelated to the environmental justice contention and, therefore, outside the scope of the admitted contention. See Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-899, 28 NRC 93, 97 (1988). Moreover, the allegations of “criminal activity” by Mr. Bear – theft of tribal funds, filing false tax returns and failure to comply with an I.R.S. investigation – even if proven true do not, and would not, affect the safety of the PFSF. Mr. Bear and the Band are not the owners, nor will they be the operators, of the PFSF. PFS is the sole facility owner.¹⁵ PFS will have sole and complete control over operational activities at the PFSF.¹⁶ Mr. Bear’s

¹⁴ Motion at 7, 8.

¹⁵ See PFSF License Application at §§ 1.1-1.5.

¹⁶ See PFSF Safety Analysis Report §§ 9.1.1.2.3, 9.1.2, Fig. 9.1-3. (e.g., “[d]uring the operational phase, the General Manager will function as Chief Operating Officer, responsible for day-to-day management of all PFSF operations” Id. at 9.1.1.2.3). OGD’s statements that the Band will be “overseeing” the PFSF and that the

alleged criminal activities involve financial matters that are totally unrelated and irrelevant to issues regarding whether PFS will operate the facility in a safe manner. For these reasons, OGD's Motion also fails to allege a significant (or indeed any) safety issue, as is required to reopen the record regarding Contention OGD O.

B. A Materially Different Result Would Not Have Been Likely If The Newly Proffered Material Had Been Considered Initially.

OGD's Motion claims that "[t]he outcome of consideration of OGD's environmental justice contention and determination of the motion for summary disposition of the contention likely would have been different if the Board and the Commission had had the proffered evidence of criminal theft of tribal funds by Leon Bear and financial corruption information."¹⁷ OGD is wrong.

According to OGD, because the proffered material consists of "an actual criminal indictment" a different result would have been likely given that such information "elevates the allegations contained in the Blackbear declaration to much more than 'perceptions'"¹⁸ Whether or not the Blackbear Declaration's allegations were truthful (or likely to lead to criminal indictments) was irrelevant to the Commission's decision directing summary disposition of Contention OGD O. That decision relied on the fact that the allegations were related to economic benefits, rather than environmental impacts. In fact, the Commission in CLI-02-20 clearly indicated that, even if the allegations in the Blackbear Declaration were true, the Commission nevertheless would have directed summary disposition of Contention OGD O. The Commission found: "OGD's charges of corruption *may prove salient* – but for criminal investigators, for civil lawsuits, or for voters in future tribal elections, not for NEPA reviewers." Private Fuel Storage, CLI-02-20, 56 NRC at 157 (emphasis added). The Commission added:

PFSF will be "under the jurisdiction of" the Band, Motion at 7, are simply incorrect to the extent that they seek to imply Band control over the radiological health and safety of the facility.

¹⁷ Motion at 8.

¹⁸ Id.

Our NEPA record already contains ample information on the likely effects and the local and national benefits of the PFS facility, including the infusion of financial resources into the local community. To complete our NEPA review, we do not need to know precisely how those resources are shared.

56 NRC at 157. These conclusions remain equally true today.

Thus, the controlling factor in the Commission's decision directing summary disposition of OGD O was whether the allegations focused on "disparate economic benefits" rather than "disparate environmental effects." *Id.* at 153. According to the Commission, the Board's reasoning behind its failure to grant summary disposition "starts to go awry when it conflates economic benefits and environmental effects." *Id.* at 153-4. The Commission saw "nothing in the executive order or in NEPA to suggest that a failure to receive an economic benefit should be considered tantamount to a disproportionate environmental impact." *Id.* at 154. Likewise, none of the material proffered in OGD's Motion changes the fact that OGD's complaints regarding Mr. Bear's activities were – and still are – based on economic, not environmental, concerns. Accordingly, the Commission's decision directing summary disposition of Contention OGD O would have been the same even if the proffered material was presented earlier, and even if OGD in the future can provide additional information regarding the alleged illegal activities.

OGD also claims that a different result would have been likely because the proffered material "elevates the allegations contained in the Blackbear declaration to much more than ... simply matters of internal tribal political disputes."¹⁹ According to OGD, "[i]n reversing the Board's decision on summary disposition of OGD Contention [O], the Commission assumed the existence of an adequate tribal forum for resolution of internal tribal disputes where it is now clear that no tribal court exists for the Skull Valley Band."²⁰ Although OGD argues that a "tribal court" does not exist,²¹ the tribe has a forum for resolving internal disputes – its Tribal General

¹⁹ Motion at 8.

²⁰ *Id.*

²¹ *Id.* at 8-9.

Council²² – and PFS has been informed by the Band that it utilizes a tribal court from time-to-time. More importantly, contrary to OGD’s claims, the Commission’s summary disposition decision did not assume that a tribal forum existed to resolve OGD’s claims. Rather, as one of various reasons for directing summary disposition, the Commission held that federal Indian law prevents the NRC from reviewing tribal financial affairs. Private Fuel Storage, CLI-02-20, 56 NRC at 158. That holding would have applied even if the Commission had been presented with OGD’s “evidence” challenging the existence of a tribal court.

The Commission in CLI-02-20 found: “NEPA simply is not the vehicle, and NRC not the forum, to resolve the question whether the leadership of an Indian tribe is dealing unfairly with its members.” Id. at 159. According to the Commission:

The specter of quasi-judicial oversight by a federal agency, including the presentation of evidence and cross-examination on tribal financial decisions, undermines well-established principles governing the interaction of the federal government with Indian tribes. The first of these principles is that unless Congress had specifically acted to abrogate a tribe’s sovereign immunity, a wholly intratribal dispute must be resolved within the tribe. The Board thus lacks jurisdiction to provide declaratory or injunctive-type relief to OGD on its complaint that the tribal leadership is mishandling PFS lease payments.

Id. (citations omitted). Moreover, the Commission did not rely on the existence of a tribal forum as the only other available forum to address OGD’s allegations. The Commission pointed out that other “avenues of redress remain open to OGD in its dispute with the Band’s leadership.” Id. at 160. For example, the Commission recognized that administrative appeals filed with the Bureau of Indian Affairs (“BIA”), suits in federal district court challenging the BIA’s approval of PFS’s lease, and claims of misappropriation referred to the Federal Bureau of Investigation were all “more appropriate” than the NRC as avenues for resolving OGD’s concerns. Id. In addition, the Commission pointed out that questions regarding how tribal

²² See Intervenor Skull Valley Band’s Opening Brief Seeking Reversal of February 22, 2002 Memorandum And Order (LBP-02-08) (Apr. 5, 2002) at 3.

revenues are handled were matters subject not just to tribal law, but also to criminal law. Id. Accordingly, information from OGD challenging the existence of a tribal court would not have changed the Commission's decision that the NRC was an inappropriate forum for addressing OGD's claims regarding Mr. Bear's purported financial activities.

C. OGD's Motion Should Be Denied Because Issues Regarding Mr. Bear's Financial Activities Are Outside The Scope Of Contention OGD O.

The Commission also should deny OGD's Motion to reopen the record regarding Contention OGD O because the Motion raises claims which are outside the scope of that contention. The litigable scope of a contention is limited to its terms combined with its stated basis. Seabrook, ALAB-899, 28 NRC at 97. Indeed, it is well-settled that "an intervenor is bound by the literal terms of its own contention." Id. n. 11, quoting Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-819, 22 NRC 681, 709 (1985).

Accordingly, a contention cannot be interpreted to raise issues other than those specifically set forth therein.

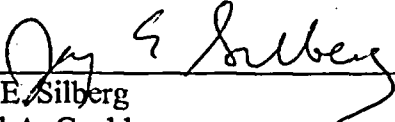
As the Commission found in CLI-02-20, factual disputes over the Band's financial affairs are outside the scope of Contention OGD O. That contention, as admitted, "alleged that the environmental impacts of the proposed ISFSI would have a cumulative adverse effect on tribe members and would adversely affect property values, and that the license application failed to mitigate these impacts." CLI-02-20, 56 NRC at 157. OGD O did not raise the issue of disparate payments to Band members, or other financial improprieties. In fact, the Commission in CLI-02-20 observed that OGD first raised the issue of unequal distribution of lease payments *three years* after OGD had filed its original environmental justice contention. Id. at 158. The Commission added that OGD O as admitted did not give the parties fair notice that they must litigate alleged misappropriation of PFS lease money, or that disparate payments created a "subgroup" of the Band entitled to an environmental justice inquiry. Id. Similarly, Contention OGD O did not raise issues regarding the purported filing of false tax returns or Mr. Bear's

alleged failure to comply with I.R.S. investigations. As the Commission held in CLI-02-20, it would be unfair, and would violate the Commission's rules of procedure, to reopen the record for a hearing on a claim which "departs dramatically from the admitted environmental justice contention." Id.

IV. CONCLUSION

For the foregoing reasons, PFS respectfully requests that the Commission deny OGD's motion to reopen the record concerning Contention OGD O.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that copies of the "Applicant's Response to Ohngo Gaudadeh Devia's Motion to Reopen the Record on OGD Contention O" 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 9th day of February 2004.

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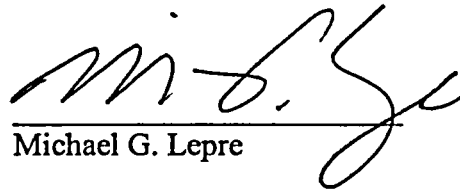
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