

February 13, 2004

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

DOCKETED  
USNRC

BEFORE THE COMMISSION

February 13, 2004 (3:45PM)

In the Matter of )  
 )  
PRIVATE FUEL STORAGE, L.L.C. )  
 )  
(Independent Spent )  
Fuel Storage Installation) )

Docket No. 72-22-ISFSI

OFFICE OF SECRETARY  
RULEMAKINGS AND  
ADJUDICATIONS STAFF

NRC STAFF'S RESPONSE TO  
"OGD'S MOTION TO REOPEN THE RECORD ON OGD CONTENTION O"

INTRODUCTION

Pursuant to 10 C.F.R. § 2.730(c), the NRC Staff ("Staff") hereby files its response to "OGD's Motion to Reopen the Record on OGD Contention O" ("Motion"), filed by Ohngo Gaudadeh Devia ("OGD") on January 29, 2004. In its Motion, OGD requests that the Commission "reopen the record" on OGD Contention O (Environmental Justice), based primarily on the recent Federal indictment of Chairman Leon Bear of the Skull Valley Band of Goshute Indians ("Skull Valley Band") for "theft of tribal funds and federal tax law violations," and his alleged non-cooperation in an Internal Revenue Service ("IRS") investigation (Motion at 1). For the reasons set forth below, the Staff submits that OGD has failed to demonstrate that a reopening of the record on this contention is warranted under 10 C.F.R. § 2.734(a).<sup>1</sup> Accordingly, OGD's Motion should be denied.

BACKGROUND

This proceeding involves the application of Private Fuel Storage, L.L.C. ("PFS" or "Applicant") for a license to construct and operate an Independent Spent Fuel Storage Installation ("ISFSI") on the Reservation of the Skull Valley Band, geographically located in Skull Valley, Utah.

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<sup>1</sup> On January 14, 2004, the Commission published its revised rules governing the conduct of adjudicatory proceedings noticed on or after February 13, 2004. See Final Rule, "Changes to Adjudicatory Process," 69 Fed. Reg. 2182 (Jan. 14, 2004). In this proceeding, of course, the provisions of 10 C.F.R. § 2.734 continue to apply.

On September 12, 1997, OGD (a group of Native Americans and others, including members of the Skull Valley Band who oppose the PFS application) filed a petition to intervene in the proceeding.<sup>2</sup>

On November 24, 1997, OGD filed 16 contentions which it sought to litigate in the proceeding -- including OGD Contention O ("Environmental Justice"), in which OGD challenged the adequacy of the Applicant's consideration of environmental justice issues in its Environmental Report.<sup>3</sup>

On April 22, 1998, the Licensing Board issued its Memorandum and Order ruling on the standing of petitioners for leave to intervene and the admissibility of their contentions.<sup>4</sup> As pertinent here, the Board found that OGD possessed standing to intervene, LBP-98-7, 47 NRC at 169; and it admitted OGD Contention O, in part. *Id.* at 233. Litigation on this and other contentions then followed.<sup>5</sup>

On May 25, 2001, PFS filed a motion seeking summary disposition of OGD Contention O on the grounds that there did not exist a genuine dispute of material fact with respect to the matters raised in the contention.<sup>6</sup> Responses to the Applicant's motion were then filed by OGD and the

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<sup>2</sup> See "Ohngo Gaudadeh Devia's Request for Hearing and Petition to Intervene," dated September 12, 1997, at 2-3.

<sup>3</sup> See "Ohngo Gaudadeh Devia's Contentions Regarding the Materials License Application of Private Fuel Storage in an Independent Spent Fuel Storage Installation," filed November 24, 1997 ("OGD Contentions"), and "Errata" thereto, filed November 25, 1997. See also "Applicant's Answer to Petitioners' Contentions," dated December 24, 1997; and "NRC Staff's Response to Contentions Filed by (1) the State of Utah, . . . [*et al.*]," dated December 24, 1997.

<sup>4</sup> *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-98-7, 47 NRC 142 (1998).

<sup>5</sup> The Licensing Board subsequently modified the scope of OGD Contention O, deleting reference to certain facilities listed therein. *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-98-10, 47 NRC 288, 298-99, 301 (1998). The Commission further limited the scope of OGD Contention O, removing consideration of OGD's challenges to the Applicant's motivation and social equity in siting, as being beyond the scope of NEPA. *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-98-13, 48 NRC 26, 36 (1998).

<sup>6</sup> See "Applicant's Motion for Summary Disposition of OGD Contention O -- Environmental Justice," dated May 25, 2001.

Staff.<sup>7</sup> In its response to the Applicant's Motion, OGD raised numerous new issues, based on a "Declaration" by Sammy Blackbear alleging misappropriation and misuse of Tribal funds, election irregularities, and other misconduct by Chairman Leon Bear of the Skull Valley Band.

On February 22, 2002, the Licensing Board issued its decision in LBP-02-08, in which it granted in part, and denied in part, PFS's motion for summary disposition of this contention.<sup>8</sup> The Board designated certain issues for hearing, involving OGD's claims of financial and other misconduct by Skull Valley Band Chairman Leon Bear; and it directed that a hearing be held on the payments made by PFS to date and the manner in which the Band had spent and distributed those payments. LBP-02-08, 55 NRC at 191-92, 199-200. The Skull Valley Band promptly sought Commission review of LBP-02-08;<sup>9</sup> and on March 7, 2002, the Commission undertook interlocutory review of the Board's decision and stayed all proceedings related thereto.<sup>10</sup>

On October 1, 2002, the Commission issued its decision in CLI-02-20, in which it reversed the Board's decision in LBP-02-08 and directed the Board to grant the Applicant's motion for summary disposition of Contention OGD O, on the grounds that the financial and political

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<sup>7</sup> See "NRC Staff's Response to Applicant's Motion for Summary Disposition of OGD Contention O -- Environmental Justice," dated June 28, 2001; and "[OGD's] Response to [PFS's] Motion for Summary Disposition of OGD Contention 'O,'" dated June 28, 2001.

<sup>8</sup> See *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-02-08, 55 NRC 171 (2002). The Licensing Board found that OGD's allegations, that PFS's lease payments had been misappropriated or inequitably distributed to Tribal members, raised a cognizable environmental justice issue under the National Environmental Policy Act of 1969 ("NEPA"), in that diverse subgroups within the Skull Valley Band might realize different economic benefits to offset the adverse environmental consequences of the project thus resulting in a disproportionate environmental impact. *Id.* at 191-93.

<sup>9</sup> See "Intervenor Skull Valley Band's Motion for Directed Certification for Review of Memorandum and Order (LBP-02-08) of the Atomic Safety and Licensing Board," dated March 4, 2002; see also "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)," dated March 4, 2002.

<sup>10</sup> See *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-02-8, 55 NRC 222 (2002). Following the issuance of CLI-02-8, briefs on appeal were filed by the Skull Valley Band, PFS, the NRC Staff, the U.S. Bureau of Indian Affairs (as *amicus curiae*).

corruption claims raised by OGD were untimely and outside the scope of Contention OGD O, and that they failed to state a cognizable issue under NEPA or the environmental justice doctrine.<sup>11</sup>

On January 29, 2004 -- some 16 months after the Commission issued CLI-02-20 -- OGD filed the instant Motion, seeking to reopen the record on Contention OGD O based primarily on new information that Skull Valley Band Chairman Leon Bear has been indicted for “theft of tribal funds and filing false tax returns” (Motion at 1), that he has allegedly failed to comply with an “ongoing I.R.S. investigation of Skull Valley Band financial dealings” (*Id.*), and that no Tribal court exists in which OGD may seek resolution of its concerns (*Id.* at 4, 8).<sup>12</sup> According to OGD, this new information “provides further evidence that individual band members who do not support the proposed PFS facility and Leon Bear’s leadership 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.” *Id.* at 1-2.

The Staff submits that the Commission’s decision in CLI-02-20 correctly disposed of OGD’s claims of financial and political corruption and the unequal distribution of income from PFS, and that OGD’s instant Motion fails to show any reason that would warrant a reopening of these issues under 10 C.F.R. § 2.734(a). Accordingly, OGD’s Motion should be denied.

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<sup>11</sup> See *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-02-20, 56 NRC 147, 160 (2002).

<sup>12</sup> OGD attached to its Motion the Declaration of OGD member Margene Bullcreek and four Exhibits, including (a) copies of an Indictment of Leon D. Bear, dated December 17, 2003, and an Indictment of Marlinda Moon, Sammy Blackbear, Miranda Wash, and Duncan Steadman, dated December 17, 2003 (Exhibit A); (b) an Order to Show Cause directed to Leon D. Bear and the Skull Valley Band issued by the U.S. District Court in Utah, dated December 19, 2003, together with a petition to enforce IRS Summonses and supporting documents (Exhibit B); (c) a newspaper article concerning the indictments and the IRS investigation (Exhibit C); and (d) a letter from Larry Echohawk, Esq. (Counsel for OGD members Margene Bullcreek, *et al.*) to Leon D. Bear and Scott H. York, Esq., dated June 2, 2003, requesting a copy of a Skull Valley Band executive committee report concerning Ms. Bullcreek and other members of the Skull Valley Band, and information on the availability of a Tribal court and the process for commencing an action in Tribal court.

## DISCUSSION

### A. Applicable Legal Standards.

The Commission has established clear standards governing the consideration of motions to reopen in an NRC adjudicatory proceeding. Specifically, a motion to reopen will not be granted unless it satisfies the criteria set forth in 10 C.F.R. § 2.734(a). That regulation provides as follows:

*§ 2.734 Motions to reopen.* (a) A motion to reopen a closed record to consider additional evidence will not be granted unless the following criteria are satisfied:

(1) The motion must be timely, except that an exceptionally grave issue may be considered in the discretion of the presiding officer even if untimely presented.

(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.<sup>13</sup>

These requirements establish stringent criteria that must be satisfied for a motion to reopen to be granted. *Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), LBP-94-9, 39 NRC 122, 123 (1994). Indeed, as the Commission has observed, the proponent of a motion to reopen bears a heavy burden. *See, e.g., Louisiana Power & Light Co.* (Waterford Steam Electric Station, Unit 3), CLI-86-1, 23 NRC 1, 5 (1986).

### B. OGD Fails to Demonstrate that A Reopening of the Record Is Warranted.

As discussed above, the Commission in CLI-02-20 reversed the Board's decision admitting OGD's allegations of financial and political corruption and the unequal distribution of lease payments, and directed the Board to grant the Applicant's motion for summary disposition of Contention OGD O, finding that these issues failed to state a cognizable issue under NEPA or the

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<sup>13</sup> In addition, pursuant to 10 C.F.R. § 2.734(b), the motion must be accompanied by one or more affidavits which set forth the factual and/or technical bases for the movant's claim that the criteria of § 2.734(a) have been satisfied. In this regard, "[e]ach of the criteria must be separately addressed, with a specific explanation of why it has been met. Where multiple allegations are involved, the movant must identify with particularity each issue it seeks to litigate and specify the factual and/or technical bases which it believes support the claim that this issue meets the criteria in [§ 2.734(a)].

environmental justice doctrine.<sup>14</sup> In particular, the Commission held (1) that OGD's claims of "financial and political corruption" constituted an impermissible "last-second infusion of new elements into a previously admitted contention," and that OGD had failed to file a new contention raising this matter, CLI-02-20, 56 NRC at 150, 157-59; (2) that OGD's claims did not show a disproportionate environmental impact, inasmuch as it had not alleged any disparate or "high and adverse" environmental injury, *Id.* at 153-54; (3) that the Board's decision improperly focused on subgroups within a minority population, which is not required under NEPA or the environmental justice doctrine, *Id.* at 155-57; and (4) that federal Indian law prevents the Commission from undertaking a review of Tribal financial affairs. *Id.* at 158-60.

OGD's instant Motion brings new information to the Commission's attention concerning Chairman Bear's alleged conduct, but fails to establish any basis for the Commission to reopen the record on Contention OGD O. The Motion should therefore be rejected.

First, OGD fails to address the Commission's determination in CLI-02-20 that its claims of financial and political corruption had never been raised in Contention OGD O and were outside the scope of the contention, and that OGD had not filed a new contention raising such issues. OGD's current Motion suffers the same defects, and its failure to address this determination warrants the dismissal of its Motion.<sup>15</sup>

Second, while OGD asserts that its Motion "confirms what is clearly a significant safety and environmental issue . . . that warrants the Commission's action" (Motion at 7), it fails to explain how the safety of the PFS Facility is affected by the indictment of Chairman Bear. To be sure, OGD asserts that "criminal behavior and financial misdealing by the Leon Bear administration legitimately

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<sup>14</sup> See *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-02-20, 56 NRC 147, 160 (2002). To the best of the Staff's knowledge, the Licensing Board has not performed the ministerial task of granting the Applicant's motion for summary disposition.

<sup>15</sup> OGD also fails to satisfy the requirements of 10 C.F.R. § 2.734(d), which provides that "[a] motion to reopen which relates to a contention not previously in controversy among the parties must also satisfy the requirements for nontimely contentions in §§ 2.714(a)(1) (i) through (v)."

call into question the stability of the proposed PFS facility, which if licensed will be located under the jurisdiction of the tribal government led by Leon Bear.” *Id.* at 8. However -- even if the charges in the indictment are ultimately proven and a conviction ensues<sup>16</sup> -- OGD fails to indicate how that event would affect the safety of the PFS Facility, which is to be constructed and operated by PFS as the licensee under an NRC license. Nowhere does OGD allege that Chairman Bear would be involved in management of the PFS Facility, or that his indictment (or conviction) would affect plant safety. OGD’s assertion that the site is located within the jurisdiction of the Skull Valley Band fails to establish any reason to believe that plant safety would thereby be compromised or that PFS, as the licensed operator of the facility, will fail to comply with NRC safety regulations.

Similarly, the Motion fails to raise a significant environmental issue. The Commission has previously determined, in CLI-02-20, that OGD’s earlier allegations of financial and political corruption, and disproportionate sharing of financial benefits by subgroups within the Skull Valley Band, do not state a cognizable environmental issue under NEPA or the environmental justice doctrine. CLI-02-20, 56 NRC at 150, 157-59. OGD has pointed to nothing in Chairman Bear’s recent indictment, his alleged non-cooperation in an IRS investigation, the alleged lack of a Tribal court, or any other information that would warrant reconsideration of this conclusion. Thus, OGD’s motion fails to address a significant safety or environmental issue, contrary to the requirements of 10 C.F.R. § 2.734(a)(2).<sup>17</sup>

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<sup>16</sup> It is fundamental, of course, that the issuance of a criminal indictment does not establish evidence of an individual’s guilt, and an individual is entitled to a presumption of innocence until proven guilty. *See, e.g., Herrera v. Collins*, 506 U.S. 390, 398 (1993). Accordingly, the issuance of an indictment does not establish the “relevant, material and reliable” evidence required to support a motion to reopen. *See* 10 C.F.R. § 2.734(d); *Louisiana Power & Light Co. (Waterford Steam Electric Station, Unit 3)*, CLI-86-1, 23 NRC 1, 5 (1986).

<sup>17</sup> In addition, to the extent that OGD’s Motion asserts that no Tribal court exists, based on the letter of its attorney dated June 2, 2003 (Exhibit D to the Motion), it is inexcusably late. *See* 10 C.F.R. § 2.734(a)(1).

Third, while OGD asserts that the outcome of the motion for summary disposition of its environmental justice 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” (Motion at 8), it fails to provide any credible support for this assertion. Contrary to OGD’s apparent belief (*Id.*), the Commission did not dispose of OGD’s claims of political and financial corruption because OGD had offered mere “perceptions” to support its claims. To the contrary, the Commission’s resolution of this matter was based upon a well-reasoned analysis finding that OGD’s claims -- even if true -- failed to state a cognizable issue under NEPA or the environmental justice doctrine. See CLI-02-20, 56 NRC at 150, 155-57, 159.

Further, contrary to OGD’s assertion, the Commission did not “assume[ ] the existence of an adequate tribal forum for resolution of internal tribal disputes” (Motion at 8). Rather, the Commission observed only that the Skull Valley Band’s actions are “subject to criminal and tribal law,” and that other avenues of federal relief existed in which OGD might pursue its claims. As the Commission succinctly stated:

Claims of financial and political corruption inside the Skull Valley tribe do not belong in our hearing process under the rubric of environmental justice or NEPA. Our mission is to protect the public health and safety and the environment. We lack the expertise, the resources, and the statutory mandate to get to the bottom of tribal corruption charges. Other government bodies, including the Federal Bureau of Investigation and the Bureau of Indian Affairs, are far better positioned to consider OGD’s complaint.

CLI-02-20, 56 NRC at 150; emphasis added.<sup>18</sup> Thus, OGD’s assertions that the recent federal indictment of Chairman Bear rises above the level of “perceptions” and that no Tribal forum exists

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<sup>18</sup> As the Commission also observed, Tribal dissidents have filed administrative appeals within the Bureau of Indian Affairs (“BIA”) and brought actions in federal district court challenging BIA’s approval of the PFS lease; in addition, claims involving the misappropriation of funds had been referred to the Federal Bureau of Investigation for criminal investigation. CLI-02-20, 56 NRC at 160. OGD has demonstrated no reason to believe that such avenues of relief are no longer available for the resolution of its concerns.

in which OGD can seek relief (Motion at 8), fail to establish that the Commission would have reached a different outcome if the matters presented in the Motion had been considered initially.

Finally, OGD asserts that a failure to consider “this new and additional information regarding criminal activity and corruption” would constitute “an overly narrow interpretation of NEPA and environmental justice,” and that the issuance of a license to PFS “where the host tribal government is involved in criminal activity including theft of tribal funds (including funds received from PFS) and violation of federal tax laws (where PFS funds may be involved) . . . is clearly contrary to the intent and purpose of NEPA, environmental justice policy, and 10 C.F.R. § 72.40” (Motion at 9). In so arguing, OGD appears to seek Commission reconsideration of its determination in CLI-02-20 that claims of financial and political misconduct fail to state a cognizable issue under NEPA and the environmental justice doctrine. Nowhere, however, does OGD show that its Motion satisfies the criteria governing motions for reconsideration,<sup>19</sup> or that reconsideration of a decision issued more than one year ago would be consistent with the efficient, fair and expeditious conduct of an adjudicatory proceeding.<sup>20</sup> Accordingly, to the extent that OGD’s Motion seeks to have the Commission revisit its decision in CLI-02-20, its Motion should be rejected as an untimely and improper request for reconsideration.

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<sup>19</sup> In this regard, it has been held that motions for reconsideration may request correction of an error by refining an argument or pointing out a factual misapprehension or a controlling legal decision that was overlooked, but may not be based upon new arguments. *See, e.g., Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-00-21, 52 NRC 261, 264 (2000). The discovery of significant new information that is relevant to the decision in question, in certain circumstances, may be found sufficient to support a motion for reconsideration. *See, e.g., Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Unit 3), LBP-01-17, 53 NRC 398, 403-04 (2001); *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-98-17, 48 NRC 69, 73-74 (1998). *Cf.* 10 C.F.R. § 2.345 (Jan. 14, 2004) (in proceedings noticed on or after February 13, 2004, a petition for reconsideration must demonstrate “a compelling circumstance, such as the existence of a clear and material error in a decision, which could not have been reasonably anticipated, which renders the decision invalid.”).

<sup>20</sup> *See* “Statement of Policy on Conduct of Adjudicatory Proceedings,” CLI-98-12, 48 NRC 18, 24 (1998).

In sum, while OGD asserts that the federal indictment of Chairman Bear provides further evidence in support of its claims that he has engaged in financial misconduct and that subgroups within the Skull Valley Band are not sharing equally in the financial benefits of the PFS project, it fails to address the Commission's pivotal determinations in CLI-02-20 that such claims do not state a cognizable issue under NEPA or the environmental justice doctrine. CLI-02-20, *passim*. Accordingly, OGD has not shown that a reopening of the record to consider this new information is warranted under 10 C.F.R. § 2.734(a), or that the Commission should reconsider its decision in CLI-02-20.

CONCLUSION

For the reasons set forth above, the Staff respectfully submits that OGD's Motion fails to demonstrate that a reopening of the record on Contention OGD O is warranted under 10 C.F.R. § 2.734(a). OGD's Motion should therefore be denied.

Respectfully submitted,



Sherwin E. Turk  
Counsel for NRC Staff

Dated at Rockville, Maryland  
this 13th day of February 2004

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of )  
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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S RESPONSE TO 'OGD'S MOTION TO REOPEN THE RECORD ON OGD CONTENTION O'" 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 13th day of February, 2004:

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