

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED
USNRC

ATOMIC SAFETY AND LICENSING BOARD

97 NOV 21 P1:25

Before Administrative Judges:

G. Paul Bollwerk, III, Chairman
Dr. Jerry R. Kline
Dr. Peter S. Lam

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

In the Matter of

PRIVATE FUEL STORAGE, L.L.C.

(Independent Spent Fuel
Storage Installation)

Docket No. 72-22-ISFSI

ASLBP No. 97-732-02-ISFSI

November 21, 1997

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MEMORANDUM AND ORDER
(Ruling on State of Utah
Motion for Protective Order)

As part of its application for the proposed Skull Valley, Utah independent spent fuel storage installation (ISFSI), applicant Private Fuel Storage, L.L.C. (PFS), submitted a physical security plan. See 10 C.F.R. § 72.24(o). Because that plan is considered to contain 10 C.F.R. Part 73 "safeguards information," it has not been publicly disclosed. See id. § 73.21(c). On November 14, 1997, petitioner State of Utah (State) filed a motion requesting that the Licensing Board issue a protective order pursuant to 10 C.F.R. § 2.744(e) that would permit State legal, scientific/technical, and administrative personnel to have access to the PFS security plan. The State also asks for an extension of the existing November 24, 1997 deadline for filing intervention petition supplements to permit it

additional time to prepare contentions regarding the security plan once it has access to that plan via the protective order. See [State's] Motion for a Protective Order to Review and File Contentions on the Applicant's Physical Security Plan (Nov. 14, 1997) [hereinafter State Motion]. Both PFS and the NRC staff have indicated they have no objection to the State's protective order request although, as is detailed below, they do express reservations about certain of the State personnel for whom plan access is requested.

Subject to the conditions set forth below, the Board grants the State's motion for a protective order and its request to extend the time for filing security plan-related contentions.

A. PFS and Staff Positions

Although all participants were afforded an opportunity to address the State's protective order request, see Licensing Board Order (Nov. 17, 1997) at 1 (unpublished), only applicant PFS and the staff chose to respond. In its November 19, 1997 answer to the State's motion, PFS declares it does not oppose the motion for a protective order, although it asserts that (1) not all the individuals the State has requested be covered by the protective order are eligible under the terms of section 2.744(e) as it covers "qualified witnesses and counsel," and (2) the State's request to include unnamed "secretarial or other support"

personnel under the protective order should be rejected in favor of naming particular individuals. PFS also asks that plan access for certain additional personnel in its counsel's Washington, D.C. office be afforded under any protective order that is issued. See Applicant's Response to State of Utah's Motion for Protective Order to Review and File Contentions on the Applicant's Physical Security Plan (Nov. 19, 1997) at 1-2.

In its response filed the same date, the NRC staff likewise does not oppose Board issuance of a protective order, with the caveat that scrutiny should be given to the number of individuals the State wishes to designate. The staff also states that it has no objection to extending the current November 24, 1997 deadline for filing intervention petition supplements relative to any security plan-related contentions. See NRC Staff's Response to State of Utah's Motion for Protective Order (Nov. 19, 1997) at 2-4 [hereinafter Staff Response].

B. Licensing Board Determination

The Board agrees that permitting the State to have access to the PFS physical security plan under a protective order is appropriate. Because an application is a primary source of information for formulating contentions to contest a requested licensing action, the fact the PFS plan is not publicly available with other portions of its application for the Skull Valley ISFSI seemingly creates the proverbial

"Catch 22" for an intervenor attempting to challenge that portion of the application. See Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), LBP-82-16, 15 NRC 566, 589-90 (1982).

Thus, whether pursuant to the "good cause" provision of section 2.744(g),¹ or the Board's general authority under section 2.718 to conduct a fair and impartial hearing, we conclude that the State should have access to the PFS security plan so long as it agrees to abide by the provisions of an appropriate protective order. Further, as the staff has recognized, the State should have an opportunity to review the plan prior to filing any contentions on the adequacy of facility physical security under the plan.

Accordingly, taking into account the time estimates provided by the staff for drafting a protective order and gaining access to the security plan once the order is effective, see Staff Response at 4-5, we direct the following:

¹ Section 2.744(g) of 10 C.F.R. states:

No request [for disclosure of agency records or documents] shall be made or entertained before the matters in controversy have been identified by the Commission or the presiding officer, or after the beginning of the prehearing conference held pursuant to § 2.752 except upon leave of the presiding officer for good cause shown.

1. Preparation and Submission of Proposed Protective Order. Staff counsel has indicated the staff currently is reviewing protective orders issued in other proceedings with an eye toward preparing a proposed order. As the participant likely to have the most experience and expertise concerning the content of such a protective order, the Board requests that the staff continue to take the lead in this regard and prepare and circulate a proposed protective order among the interested participants. After receiving comments from those participants, a proposed protective order should be provided to the Board on or before Friday, December 12, 1997.

2. Designation of Personnel Authorized to Have Access to the PFS Security Plan. The Board agrees with the staff and PFS that, at this juncture, access to the PFS security plan should be limited to those legal, scientific/technical, and administrative personnel who, by reason of their responsibilities, expertise, and experience, will be directly involved in preparing or responding to any State contentions regarding the plan. The Board also agrees that those individuals should be named specifically in the protective order.

To this end, the Board requests that both the State and PFS review the personnel they wish to have designated to have access to the plan to ensure each individual they have proposed meets these criteria. They should then seek to

reach an agreement, along with the staff, about the personnel to be designated. If PFS, the State, and the staff are unable to agree on the personnel to be designated in the protective order, on or before Wednesday, December 3, 1997, any remaining disputes about appropriate designation of personnel should be brought to the Board's attention in a pleading filed by the participant sponsoring the person or persons at issue.

In that filing, the sponsoring participant should provide a detailed justification supporting access designation for each individual at issue, including a resume or other summary of the person's expertise and experience as it relates to the PFS security plan and the task of drafting or responding to any State contentions regarding the plan. Responses to these pleadings shall be filed on or before Wednesday, December 10, 1997.

Also in this regard, we note that if security plan-related contentions are admitted into this proceeding, the Board will entertain participant requests to substitute or add other individuals to the list of designated personnel based on those individuals' need for security plan access to aid in further litigation regarding the merits of the contentions.

3. Protective Order Contents. In drafting the proposed protective order, besides designating the particular individuals who will have access to the security

plan, the participants should, among other things, include provisions outlining (1) the methods for transferring pleadings and other litigation documents that contain security plan-related nonpublic information, see 10 C.F.R. § 73.21(g); (2) any restrictions on photocopying, notetaking, and data/word processing relative to the security plan, see id. § 73.21(f), (h); and (3) procedures for accounting for any safeguards information disclosed under the protective order and for disposing of that information at the conclusion of this proceeding, see id. § 73.21(f).

4. Schedule for Filing Contentions Regarding the PFS Security Plan. As requested by the State, the existing deadline for filing contentions regarding the PFS security plan is hereby suspended pending further action by the Board. With the State's request for a two-week contention drafting period in mind, see State Motion at 3, the Board will establish a new schedule for filing security plan-related contentions and for responding to those contentions when it issues the protective order granting access to the plan. It is the Board's intent that the revised schedule regarding those contentions will mandate the filing of contentions and any responses before the prehearing conference now planned for the week of January 26, 1998.

5. Service of Filings. Finally, the filings required or permitted under paragraphs B.1 and B.2 above should be served on the Board, the Office of the Secretary, and counsel for the other participants by facsimile transmission, e-mail, or other means that will ensure receipt by close of business (4:30 p.m. EST) on the day of filing. See Licensing Board Memorandum and Order (Initial Prehearing Order) (Sept. 23, 1997) at 5-6 (unpublished); Licensing Board Memorandum and Order (Additional Guidance on Service Procedures) (Nov. 19, 1997) (unpublished).

It is so ORDERED.

FOR THE ATOMIC SAFETY
AND LICENSING BOARD²

G. Paul Bollwerk, III

G. Paul Bollwerk, III
ADMINISTRATIVE JUDGE

Rockville, Maryland

November 21, 1997

² Copies of this memorandum and order were sent this date to counsel for the applicant PFS, and to counsel for petitioners Skull Valley Band of Goshute Indians, Ohngo Gaudadeh Devia, Confederated Tribes of the Goshute Reservation and David Pete, Castle Rock Land and Livestock, L.C., et al., and the State by Internet e-mail transmission; and to counsel for the staff by e-mail through the agency's wide area network system.

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LB M&O (RULING...PROT. ORDER) have been served upon the following persons by U.S. mail, first class, except as otherwise noted and in accordance with the requirements of 10 CFR Sec. 2.712.

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Dated at Rockville, Md. this
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