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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

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

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)	August 5, 1998

MEMORANDUM AND ORDER
(Granting Motion for Reconsideration)

In LBP-98-13, 47 NRC 360 (1998), we ruled on the admissibility of intervenor State of Utah's (State) nine contentions challenging the adequacy of the physical security plan (PSP) submitted by applicant Private Fuel Storage, L.L.C. (PFS) in support of its application for a 10 C.F.R. Part 72 license to construct and operate an independent spent fuel storage installation (ISFSI) on the Skull Valley, Utah reservation of the Skull Valley Band of Goshute Indians (Skull Valley Band). The State now seeks reconsideration of the portion of that ruling rejecting its argument in support of contention Security-C (as well as two other contentions) that a material issue exists regarding the jurisdiction of the Tooele County sheriff's office, as the designated local law enforcement agency

(LLEA) with which PFS has response arrangements, to exercise law enforcement authority at the PFS ISFSI on the Skull Valley Band reservation.

For the reasons set forth below, we find the State's reconsideration request has merit and so will admit contentions Security-A through Security-C on the issue whether a June 1997 cooperative law enforcement agreement that permits the Tooele County sheriff's office to exercise law enforcement authority on the Skull Valley Band reservation has been properly adopted by Tooele County, thereby allowing the county sheriff's office to fulfill its role as the designated LLEA for the PFS facility.

I. BACKGROUND

In LBP-98-13, 47 NRC at 370, we determined the State had provided inadequate legal and factual information to support that portion of the basis for its contention Security-C alleging noncompliance with the requirements of 10 C.F.R. Part 73, App. C, because the Tooele County sheriff's office lacked jurisdiction and law enforcement authority on the Skull Valley Band reservation and so could not fulfill its role as the designated LLEA for the PFS facility. In doing so, we referenced a June 1997 cooperative law enforcement agreement between Tooele County, the Bureau of Indian Affairs (BIA) of the United States

Department of the Interior, and the Skull Valley Band.[1] See id. This agreement was first provided to the State, the NRC staff, and the Board by PFS during a June 17, 1998 in camera prehearing conference and was later made part of the public record of this proceeding. See Tr. S-15 to S-16; Letter from Jay E. Silberg, Counsel for PFS, to Licensing Board (June 24, 1998). Under the agreement's terms, the Tooele County sheriff's office has the authority and responsibility to provide law enforcement services on the Skull Valley Band reservation. In our ruling we noted that "nothing on the face of the cooperative agreement gives us cause to question its validity as it provides such jurisdiction on the Skull Valley Band's reservation for the designated LLEA." LBP-98-13, 47 NRC at 370 n.9.

In its July 10, 1998 filing requesting reconsideration of that determination,[2] the State acknowledges it was given

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[1] In LBP-98-13, we identified the agreement as being between "the LLEA," the BIA, and the Skull Valley Band. The agreement was actually executed by the Chairman of the Tooele County Commission and is administered by the sheriff's office on the county's behalf. See [State] Motion for Reconsideration of the Board's Ruling on [State PSP] Contentions (July 10, 1998) exh. 1, at 1, 3 [hereinafter State Reconsideration Motion].

[2] Because the PFS security plan and a number of the parties' prior filings regarding the State's contentions challenging that plan involve 10 C.F.R. Part 73 safeguards information, they have been afforded confidential, nonpublic treatment. The State's July 10 reconsideration filing, however, was submitted as part of the public record of this proceeding based on its determination that no "safeguards" information was utilized in that pleading. See State

(continued...)

an opportunity to address the significance of the June 1997 cooperative agreement during the June 1998 prehearing conference, but suggests it was disadvantaged by the fact it had no opportunity to review the agreement before the conference. See [State] Motion for Reconsideration of the Board's Ruling on [State PSP] Contentions (July 10, 1998) at 1-2. It further states that after the Board's LBP-98-13 contentions admissibility ruling, it made an inquiry to the Tooele County clerk's office and was advised there was no record of a Tooele County Commission resolution authorizing the county to enter into the June 1997 agreement. See id. exh. 3 (affidavit of Jean Braxton). This is significant relative to the Board's admissibility determination, the State declares, because of the "Now, Therefore" clause on page one of the agreement that states the accord is being entered into pursuant to section 11-13-5 of the Utah Code Annotated 1953. See id. at 2; see also id. exh. 1, at 1 (June 1997 cooperative agreement). By this statutory provision's terms, agreements between public agencies come into force only upon "[a]doption of appropriate resolutions by the governing bodies of the participating public agencies . . . ." Id. exh. 2 (Utah Code Ann. § 11-13-5

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[2](...continued)
Reconsideration Motion at 1. The PFS and staff responses to the State's motion likewise were submitted as public record materials. Because it relies on these publicly-filed pleadings, this issuance also is being placed in the public record of this proceeding.

(1997)). The State argues that in light of this enactment, the Tooele County Commission's apparent failure to adopt a resolution authorizing the June 1997 cooperative agreement warrants reconsideration of the Board's (1) contention Security-C ruling that no legal or factual material issue exists about the LLEA's jurisdiction on the Skull Valley Band reservation; and (2) rejection of the bases for contentions Security-A and Security-B that likewise posited a lack of LLEA jurisdiction, based on the Board's Security-C ruling on LLEA jurisdiction.

In a July 22, 1998 response, the staff supports the State's reconsideration request as it relates to contention Security-C. See NRC Staff's Response to [State] Motion for Reconsideration of the Board's Ruling on [State PSP] Contentions (July 22, 1998) at 4-6. Noting there is a 1991 Tooele County Commission resolution approving a similar 1991 cooperative agreement that existed between Tooele County, the BIA, and the Skull Valley Band, the staff declares it currently does not have enough information to determine whether the 1991 approval resolution applies to the 1997 agreement. According to the staff, not only is it unclear if the 1997 agreement requires a separate resolution, but the 1991 agreement had a provision making it effective for fifty years, which raises questions about the continuing validity of the 1991 agreement. Suggesting there may be other State or county laws or ordinances that will clarify

the effect of the 1991 resolution vis a vis the 1997 cooperative agreement, the staff concludes that a material dispute exists regarding the validity of the 1997 agreement sufficient to support admission of the State's Security-C concern about LLEA jurisdiction. See id. at 5. As to Security-A and Security-B, however, the staff urges denial of the State's reconsideration request on the grounds the Board's rejection of those contentions was based primarily on other grounds not challenged by the State in its reconsideration motion. See id. at 5 n.3.

Applicant PFS asks the Board to deny the State's reconsideration motion in all respects. In its July 22, 1998 pleading, PFS declares the State's challenge to the validity of the June 1997 agreement is an improper collateral attack on an existing, functioning intergovernmental agreement that the Board should not countenance. This is particularly so, PFS maintains, because the actual parties to the agreement -- Tooele County, the BIA, and the Skull Valley Band -- clearly believe their accord is effective. See Applicant's Response to [State] Motion for Reconsideration of Ruling on [PSP] Contentions (July 22, 1998) at 2-3. PFS further asserts there is no material dispute for the Board to consider because the Tooele County Commission (1) voted approval of the June 1997 cooperative agreement during a June 1997 meeting; and (2) agreed to an extension of the 1997

agreement in a June 23, 1998 meeting. With these approvals and the 1991 Commission resolution cited by the staff in place, PFS maintains, the Board has no cause to delve into the question whether the county has complied with requirement in Utah Code Annotated section 11-13-5 for the adoption of "appropriate resolutions" by participating public agency governing bodies. See id. at 3-4.

II. ANALYSIS

A properly supported reconsideration motion is one that does not rely upon (1) entirely new theses or arguments, except to the extent it attempts to address a presiding officer's ruling that could not reasonably have been anticipated, see Louisiana Energy Services, L.P. (Claiborne Enrichment Center), CLI-97-2, 45 NRC 3, 4 & n.1 (1997) (citing cases); or (2) previously presented arguments that have been rejected, see Nuclear Engineering Co. (Sheffield, Illinois Low-Level Radioactive Waste Disposal Site), CLI-80-1, 11 NRC 1, 5 (1980). Instead, the movant must identify errors or deficiencies in the presiding officer's determination indicating the questioned ruling overlooked or misapprehended (1) some legal principle or decision that should have controlling effect; or (2) some critical factual information. See Georgia Power Co. (Vogtle Electric Generating Plant, Units 1 and 2), LBP-94-31, 40 NRC 137, 140 (1994); Philadelphia Electric Co. (Limerick Generating

Station, Units 1 and 2), LBP-83-25, 17 NRC 681, 687, rev'd and remanded on other grounds, ALAB-726, 17 NRC 755 (1983). Reconsideration also may be appropriately sought to have the presiding officer correct what appear to be inharmonious rulings in the same decision. See LBP-98-10, 47 NRC 288, 296 (1998).

Applying these precepts, we conclude the State's argument is an attempt to have us consider existing information that was misapprehended or overlooked rather than an effort to interject an entirely new thesis, and so provides an appropriate basis for reconsideration. In declaring that nothing on the face of the June 1997 agreement seemingly raised a question about its validity, we were unaware of the import of Utah Code Annotated section 11-13-5 that is cited in the agreement. In this instance,[3] reconsideration of our ruling rejecting the

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[3] If the agreement had come into the record at an earlier point, the meaning and significance of this provision undoubtedly would have had a fuller predecisional airing. With its expressed concern about the need for an LLEA agreement, see [State] Contentions Security-A Through Security-I Based on Applicant's Confidential Safeguards Security Plan (Jan. 3, 1998) at 4, it is unclear why the State chose not to contact the county earlier to ascertain whether, as the PSP represented, such an agreement existed. At the same time, given PFS's position that it was not required to include any LLEA agreement in its PSP, see Applicant's Answer to [State] Contentions Security-A Through Security-I Based on Applicant's Confidential Safeguards Security Plan (Jan. 20, 1998) at 20-21, it is not apparent why it chose to wait until the proverbial "last minute" to utilize the document in responding to the State's claim.

(continued...)

State's claims about the agreement's validity as providing a basis for admitting contention Security-C is appropriate.

Regarding the admissibility of the State's Security-C as it relates to the validity of the PFS LLEA designation, we conclude the State has made a sufficient showing there is a genuine material dispute adequate to warrant further inquiry relative to the question whether the June 1997 agreement has been adopted by Tooele County so as to provide its officials with law enforcement authority at the Skull Valley Band reservation. As we noted above, Utah Code Annotated section 11-13-5 requires that a public agency entering into a cooperative agreement -- in this instance Tooele County -- must adopt an "appropriate resolution." Provisions of the Utah Code also state that a local government resolution or ordinance "shall be in writing before the vote is taken." Utah Code Ann. § 10-3-506 (1997); see Patterson v. Alpine City, 663 P.2d 95, 96 (Utah 1983) (statutory language requiring all resolutions to be in writing is mandatory); see also Utah Code Ann. § 11-13-20 (1997) (publication of resolutions

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[3](...continued)
Neither party's approach is a particularly appealing technique for advancing its litigative position. Nonetheless, because we are more troubled by the element of surprise introduced by the applicant's strategy, in this instance we are unwilling to reject the State's reconsideration rationale as impermissibly post hoc.

or contracts relating to an interlocal cooperation agreement).

The State asserts there is no evidence of such a written resolution for the June 1997 agreement. The staff apparently agrees, albeit with the caveat that any conclusion about the actual existence of a section 11-13-5 approval deficiency may depend on answers to the open questions whether (1) the written resolution adopted by the Tooele County Commission approving the 1991 version of the cooperative law enforcement agreement is effective to approve the 1997 pact; and (2) if the 1997 agreement is invalid, would the fifty-year term 1991 agreement nonetheless remain in effect. Moreover, while PFS has provided Tooele County Commission meeting minutes indicating that within the last fourteen months the commission has on two occasions reviewed and/or endorsed the June 1997 cooperative agreement, it has not demonstrated these actions were in the form of a written resolution, like the 1991 enactment, that seemingly would comply with the requirements of section 11-13-5.

Thus, an unresolved issue exists concerning the effectiveness of the June 1997 agreement that, concomitantly, raises a question about the Tooele County sheriff's office status to act as the designated LLEA for the PFS facility in accordance with 10 C.F.R. Part 73, App. C. Moreover, despite the applicant's assertions to the

contrary, our inquiry into this matter is not barred by the fact we may have to rule on the efficacy of Tooele County's approval of an agreement that the enacting parties, including the federal BIA, consider legitimate.[4] As the staff points out, the agency's recently revised regulations require that a "[d]ocumented liaison with a designated response force or [LLEA] must be established to permit timely response to unauthorized penetration or activities." 10 C.F.R. § 73.51(d)(6); see 63 Fed. Reg. 26,955, 26,963 (1998). In this instance, the State's claims regarding the county's failure to adopt the June 1997 agreement properly under the terms of Utah Code Annotated section 11-13-5 pose a legitimate question about whether the necessary documented liaison has, in fact, been established in accordance with section 73.51(d)(6) of the NRC's regulations. Consequently, our further inquiry into the matter is appropriate. See

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[4] In support of this preclusion argument, PFS cites two agency cases, Tennessee Valley Authority (Yellow Creek Nuclear Plant, Units 1 and 2), ALAB-515, 8 NRC 702 (1978), and Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), LBP-82-43A, 15 NRC 1423 (1982). We find both inapposite, for in each instance the preclusion finding was based on a specific statutory bar, of which there is none here. Nor do we find persuasive the applicant's references to preclusion determinations in Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-85-12, 21 NRC 644, aff'd, ALAB-818, 22 NRC 651 (1985), rev'd on other grounds, CLI-86-13, 24 NRC 22 (1986), and Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-88-13, 27 NRC 509, remanded for further proceedings, ALAB-905, 28 NRC 515 (1988), which relied on rulings rendered or likely to be rendered in pending state judicial proceedings, of which there likewise are none here.

Public Service Co. of Indiana, (Marble Hill Generating Station, Units 1 and 2), ALAB-459, 7 NRC 179, 189-96 (1978) (because agency must determine whether applicant has obtained required Federal Water Pollution Control Act discharge certification from proper state, Board properly may consider dispute over location in river of boundary between states).

Previously, we concluded the State's contention Security-C assertion that PFS has not complied with the 10 C.F.R. Part 73, App. C, requirements for contingency plan contents was litigable in connection with its basis alleging PFS has not described the estimated response times for the Tooele County sheriff, as the principal LLEA, in compliance with agency regulations. Our ruling here means the State may pursue its Security-C claim of regulatory noncompliance that the Tooele County sheriff's office cannot act as the designated LLEA because the alleged failure to comply with the requirements of Utah Code Annotated section 11-13-5 regarding approval of the June 1997 agreement arguably would deprive the sheriff's office of law enforcement authority on the Skull Valley Band reservation. Further, we admit contentions Security-A and Security-B on this same basis. The PSP clearly is premised on the Tooele County sheriff's office acting as the LLEA to respond in the event of unauthorized activities at the PFS facility. Consequently, the State's claim there is no valid cooperative agreement

providing the sheriff's office with law enforcement authority on the reservation would provide adequate grounds for admission of those contentions as they express concerns about the sufficiency of security force staffing, equipment, and training.

III. CONCLUSION

In asking the Licensing Board to reexamine its ruling in LBP-98-13 regarding the validity of the June 1997 cooperative agreement that provides the Tooele County sheriff's office with law enforcement authority on the Skull Valley Band reservation based on our misapprehension about compliance with requirements of Utah Code Annotated section 11-13-5, the State has put forth appropriate grounds for reconsideration. Further, as a basis for the admission of its contentions Security-A through Security-C, the State has shown that this claim establishes a genuine material dispute adequate to warrant further inquiry.

For the foregoing reasons, it is this fifth day of August 1998, ORDERED, that:

1. The July 10, 1998 reconsideration motion of the State of Utah is granted.

2. State physical security plan contentions Security-A and Security-B are admitted for litigation in this

proceeding limited to the issues of whether staffing, equipment, and training deficiencies exist because the purported failure of Tooele County to approve properly a June 1997 cooperative agreement that provides the Tooele County sheriff's office with law enforcement authority on the Skull Valley Band reservation precludes the county sheriff's office from fulfilling its response role as the designated LLEA for the PFS facility.[5]

3. State physical security plan contention Security-C is admitted for litigation in this proceeding limited to the issues of whether the PSP fails to meet the requirements of 10 C.F.R. Part 73, App. C, in that (a) PFS has not adequately described the estimated response times for the Tooele County sheriff's office as the principal LLEA relied upon for security assistance at the PFS facility, see LBP-98-13, 47 NRC at 369-70; and (b) the purported failure of Tooele County to approve properly a June 1997 cooperative agreement that provides the Tooele County sheriff's office with law enforcement authority on the Skull Valley Band reservation precludes the county sheriff's office from

[5] The language of these contentions as admitted is set forth in LBP-98-13, 47 NRC at 368, 369.

fulfilling its designated role as the LLEA for the PFS facility.[6]

THE ATOMIC SAFETY
AND LICENSING BOARD[7]

G. Paul Bollwerk, III
ADMINISTRATIVE JUDGE

Jerry R. Kline
ADMINISTRATIVE JUDGE

Peter S. Lam
ADMINISTRATIVE JUDGE

Rockville, Maryland

August 5, 1998

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[6] The language of this contention as admitted is set forth in LBP-98-13, 47 NRC at 369.

[7] Copies of this memorandum and order were sent this date to counsel for the applicant PFS, and to counsel for intervenors Skull Valley Band of Goshute Indians, Ohngo Gaudadeh Devia, Confederated Tribes of the Goshute Reservation, Castle Rock Land and Livestock, L.C./Skull Valley Company, LTD., 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.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LB M&O-GRANT'G MOT.--LBP-98-17 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
5 day of August 1998

Adria T. Byrdsong
Office of the Secretary of the Commission