

December 29, 1998

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

NRC STAFF'S RESPONSE TO STATE OF UTAH'S
MOTION TO AMEND SECURITY CONTENTIONS

On December 17, 1998, the State of Utah filed a motion seeking to amend its three admitted security plan contentions (Security-A through Security-C), to reflect certain additional information it has received from the Tooele County Attorney.¹ For the reasons set forth below, the NRC Staff ("Staff") opposes the State's Motion and recommends that it be denied.

BACKGROUND

On January 3, 1998, the State of Utah filed a set of nine contentions concerning the adequacy of the physical security plan that had been submitted by Private Fuel Storage, L.L.C. ("PFS" or "Applicant") as part of its license application.² On June 29, 1998, the Licensing Board issued an initial Memorandum and Order concerning the admissibility of those contentions, in which it admitted a portion of one contention (Security-C) and rejected the remaining eight

¹ See "State of Utah's Motion to Amend Security Contentions," dated December 17, 1998 ("Motion").

² See "State of Utah's Contentions Security-A Through Security-I Based on Applicant's Confidential Safeguards Security Plan," dated January 3, 1998.

contentions.³ Subsequently, on August 5, 1998, the Licensing Board granted the State's motion for reconsideration, and admitted an additional portion of contention Security-C along with portions of two other contentions (Security-A and Security-B) concerning the legal authority of the Tooele County Sheriff's Office to serve as the designated Local Law Enforcement Agency (LLEA) at the PFS site.⁴ In particular, the Licensing Board admitted portions of these three contentions "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." LBP-98-17, 48 NRC at 71 (emphasis added).

In its Motion of December 17, 1998, the State provided additional information which it now seeks to incorporate into the bases for contentions Security-A through Security-C. This information essentially consists of a letter dated December 2, 1998, from Douglas Ahlstrom, Esq., Tooele County Attorney, to Dianne R. Nielson, Executive Director, Utah Department of Environmental Quality, in which Mr. Ahlstrom stated, *inter alia*, that "I do not believe Tooele County is obligated to provide law enforcement protection to Private Fuel Storage and their proposed storage site." On the basis of this opinion, the State requests that the Licensing Board

³ *Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation)*, LBP-98-13, 47 NRC 360, 374 (1998). The admitted portion of Security-C alleged that the Applicant had not shown the Tooele County Sheriff's Office, which has been designated to serve as the Local Law Enforcement Agency for the PFS site, is capable of providing a timely response to events at the site. *Id.* at 369-70.

⁴ *Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation)*, LBP-98-17, 48 NRC 69 (1998).

"broaden" its decision of August 5, 1998, to include in the bases for the three admitted contentions the State's assertion that "Tooele County will not provide law enforcement assistance to the PFS ISFSI under the CLEA" (Motion at 4-5; emphasis added).

DISCUSSION

A. The State's Motion Is Untimely Without Good Cause, and Fails to Show That a Balancing of the Factors in 10 C.F.R. § 2.714(a)(1) Favors the Admission of The Additional Statements in the Bases for Its Contentions.

The criteria to be considered when determining the admissibility of a late-filed contention (or basis statement)⁵ are set forth in 10 C.F.R. § 2.714(a)(1)(i)-(v). *See, e.g., Sacramento Municipal Utility District* (Rancho Seco Nuclear Generating Station), CLI-93-12, 37 NRC 355, 363 (1993); *Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), LBP-96-15, 44 NRC 8, 24 (1996); *Consumers Power Co.* (Big Rock Point Plant), LBP-82-19B, 15 NRC 627, 631 (1982).⁶ The relevant factors are:

- (i) Good cause, if any, for failure to file on time.

⁵ As set forth above, the Board limited the contentions to whether the agreement has been properly adopted. *See* LBP-98-17, 48 NRC at 71. The State's assertion that the agreement itself is faulty due to an asserted failure to consider the PFSF facility at the time of the agreement's execution appears to be an entirely new (and late-filed) contention. It does not appear to be an additional basis for the three admitted contentions, in that the new statements, on their face, do not appear to provide a "basis" for the contentions that have been admitted by the Board to date. *See* 10 C.F.R. § 2.714(b)(2) ("Each contention must consist of a specific statement of the issue of law or fact to be raised or controverted. In addition, the petitioner shall provide the following information with respect to each contention: (i) A brief explanation of the bases of the contention"). Alternatively, the letter may be viewed as evidence, rather than as the basis for a new or existing contention. *See* discussion *infra*, at 7-9 and n.9.

⁶ *See also Georgia Power Co.* (Vogtle Electric Generating Plant, Units 1 and 2), LBP-94-27, 40 NRC 103, 105 (1994) (requiring that new basis statements for an admitted contention be timely filed and present important information regarding a significant issue).

(ii) The availability of other means whereby the petitioner's interest will be protected.

(iii) The extent to which the petitioner's participation may reasonably be expected to assist in developing a sound record.

(iv) The extent to which the petitioner's interest will be represented by existing parties.

(v) The extent to which the petitioner's participation will broaden the issues or delay the proceeding.

10 C.F.R. § 2.714(a)(1). While a balancing of these factors is required, where a petitioner fails to show good cause for filing its contentions or bases late, it must make a compelling showing that the other factors weigh in its favor in order for its late contentions or bases to be admitted. *See, e.g., Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-98-7, 47 NRC 142, 173, 175.*

Pursuant to the Licensing Board's Order of October 17, 1997, contentions were required to be filed in this proceeding by November 24, 1997. Any contentions or basis statements submitted after that date -- such as the instant statements -- are considered to be late-filed.

In its Motion, the State contends that its motion to amend the basis statements for its three admitted security plan contentions satisfies the Commission's late filing criteria (Motion at 5-6). The State, however, has not demonstrated that it has good cause for its late filing or that the other factors specified in 10 C.F.R. § 2.714(a)(1) favor the admission of these late-filed statements.

The State asserts that it has good cause for its late filing in that it "only received the new information from the Tooele County Attorney on December 4, 1998," and Counsel for the State was attending the Prehearing Conference in Washington on December 18, 1998, "which precluded filing [the Motion] at an earlier date" (*Id.* at 5).

These assertions fail to establish good cause for the State's late filing. The State has known of the agreement between Tooele County and the Skull Valley Band, which was entered into on June 3, 1997, at least since June 1998, when it was given a copy of the agreement at the prehearing conference on security contentions; the State has also known since at least that time that PFS relies on this agreement to demonstrate the authority of the Tooele County Sheriff's Office to serve as the designated LLEA for the PFS facility.⁷ The cooperative agreement, which was entered into approximately two weeks prior to the Applicant's formal submission of its NRC license application, does not explicitly refer to the operation of an ISFSI on the Reservation of the Skull Valley Band of Goshutes. Accordingly, if the State wished to contend that the agreement does not extend to any projects, like the PFS facility, which are announced following the execution of the agreement, it certainly could (and should) have raised the issue previously.⁸ Further, while it is apparent that Dr. Nielson solicited the County Attorney's views as to the legal effect of the agreement on October 14, 1998 (Motion, Exhibit 2), the State has failed to explain why it could not have solicited and obtained the County Attorney's opinion earlier. Accordingly, the State has failed to demonstrate good cause for the late filing of these matters.

A balancing of the other factors specified in 10 C.F.R. § 2.714(a)(1) similarly fails to support the admission of the additional statements. With respect to factors two and four, other

⁷ See "State of Utah's Motion for Reconsideration of the Board's Ruling on State of Utah Physical Security Plan Contentions" ("Motion for Reconsideration"), dated July 10, 1998, at 1-2.

⁸ Indeed, the State asserted five months ago that the agreement does not authorize the Tooele County Sheriff's Office to respond to events at the PFS site. See State of Utah's Motion for Reconsideration, at 3 (without a County Commission resolution ratifying the agreement, the agreement "is not in force and thus Tooele County is not authorized under the cooperative agreement . . . to conduct law enforcement activities on the . . . reservation.").

means do not appear to be available to protect the State's interest with respect to these issues, and the State's interest is unlikely to be represented by other parties; accordingly, these factors favor the admissibility of the statements. These two factors, however, carry less weight than the other factors specified in the regulation. *See Commonwealth Edison Co. (Braidwood Nuclear Power Station, Units 1 and 2), CLI-86-8, 23 NRC 241, 245 (1986); PFS, LBP-98-7, 47 NRC at 208.*

With respect to factor three, the State has not identified any experts upon whom it intends to rely, and it has not provided a summary of what those experts would say in their testimony. Rather, the State asserts only that its participation "can reasonably be expected to assist in developing a sound record relating to legal issues regarding law enforcement authority," and "the NRC Staff has no special expertise in addressing local law enforcement authority or issues relating to Indian law" (Motion, at 6). These assertions fail to satisfy the requirements for this factor, in that they fail to identify the State's prospective witnesses or summarize their proposed testimony. *See PFS, LBP-98-7, 47 NRC at 208-09.* This factor, therefore, weighs against the admission of the additional statements.

With respect to the fifth factor, it is likely that the admission of these additional statements will broaden the issues and delay the proceeding. At the heart of the State's assertion is a legal question as to whether the agreement between the Tooele County Sheriff's Office and the Skull Valley Band legally obligates the Sheriff's Office to respond to events at the PFS site or whether additional negotiations and a supplemental agreement are required. The proper resolution of such issues may require that either the State, the Skull Valley Band or the Applicant seek a declaratory judgment by a court of competent jurisdiction as to the legal effect of the existing agreement. The potential need for such collateral legal action may well result in substantial delay in this

proceeding -- and could have been avoided, at least in part, if the State had raised this concern in a timely manner and had timely sought a declaratory judgment. Inasmuch as the admission of these basis statements is likely to result in delay and a broadening of the issues before the Licensing Board, this factor weighs against the admission of these statements.

In sum, the Staff submits that the State has failed to establish good cause for the late filing of these additional statements, and has failed to show that a balancing of the factors specified in 10 C.F.R. § 2.714(a)(1) favors their admission. The additional statements, therefore, should be excluded.

B. The Additional Statements Fail to Satisfy the Requirements Governing the Admissibility of Contentions.

In addition to satisfying the late-filing requirements discussed above, in order to amend the bases for its contentions (or to gain the admission of a new contention), the State must demonstrate that the additional statements satisfy the Commission's requirements governing the admissibility of contentions. For the reasons set forth below, the Staff submits that the additional statements by the Tooele County Attorney fail to satisfy these requirements.

The State's three admitted security plan contentions, as formulated, asserted as follows:

Security-A - Security Force Staffing

The Applicant has failed to establish a detailed plan for security measures for physical protection of the proposed ISFSI as required by 10 C.F.R. § 72.180, including failure to demonstrate that it has adequate staffing capability to cope with or respond to safeguards contingency events.

Security-B - Equipment and Training

The Applicant has not described the type or location of security equipment available to security force personnel, nor has the Applicant described adequate training for fixed guards or armed response personnel.

Security-C - Local Law Enforcement

The Applicant has not met the requirements of 10 C.F.R. Part 73, App. C, Contents of the Contingency Plan, Law Enforcement Assistance.⁹

The Licensing Board initially admitted a portion of contention Security-C, limited to the issue as to whether PFS had "described the estimated responses times for the principal LLEA relied upon for security assistance at the PFS facility so as to establish compliance with the requirements" for a timely response to any unauthorized activities at the PFS facility, as set forth in 10 C.F.R. Part 73 and pertinent guidance documents. LBP-98-13, 47 NRC at 363, 369-70 (1998). At that time, the Licensing Board indicated 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 response to the State's motion for reconsideration, the Licensing Board later expanded the admitted scope of contention Security-C -- and it admitted contentions Security-A and Security-B -- on the limited issue of "whether [the] 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

⁹ The Staff notes that the State's contentions nowhere raised a question as to whether the June 1997 cooperative law enforcement agreement would apply, prospectively, to events at the PFS site. Accordingly, while the County Attorney's letter might serve as the basis for a new contention, it is arguable whether it could serve as additional basis for one of the State's three admitted contentions. In addition, the Staff notes that the County Attorney's letter may constitute nothing more than one piece of evidence that the State could try to introduce in support of an existing contention -- if an existing contention is found to embrace the issue raised therein. Under that interpretation, the statements contained in the letter should not be admitted as either a new contention or as an additional basis for an existing contention.

allowing the county sheriff's office to fulfill its role as the designated LLEA for the PFS facility." LBP-98-17, 48 NRC at 71 (emphasis added). While the Licensing Board granted the State's motion for reconsideration, it did so only upon concluding that a determination as to the effectiveness of the June 1997 cooperative law enforcement agreement required the resolution of a factual issue as to whether the agreement had been ratified by the Tooele County Commission, as appeared to be required under Utah statutory law. *Id.* at 74-75.

While the Licensing Board admitted the State's "ratification" issue based upon the State's authoritative citation of Utah statutory law, no authoritative support has been provided for its current challenge to the Tooele County Sheriff's Office authority to serve as LLEA. Rather, the State refers to a letter from the Tooele County Attorney, in which he states as follows:

I do not believe Tooele County is obligated to provide law enforcement protection to Private Fuel Storage and their proposed storage site. Tooele County patrols areas as requested by Skull Valley Tribal government. If they desire to include the Private Fuel Storage site we will have to revisit the CLEA and negotiate to provide this service. At the time the CLEA was signed there was no discussion or contemplation that Private Fuel Storage would be part of the agreement. Moreover, the county has not yet entered into any agreement that has any bearing on locating the PFS storage facility on the reservation.

Although the County Attorney's "belief" that the existing cooperative agreement does not apply to the PFS site may be entitled to some consideration, there is no basis for accepting this assertion as an authoritative interpretation of the agreement, so as to disturb the Licensing Board's previous determination 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. Rather, in order to disturb this

determination, it was incumbent upon the State to provide some substantial basis for its position that the PFS site is not embraced by the existing cooperative law enforcement agreement, such as would be provided by a declaratory judgment entered by a court of competent jurisdiction or a letter from the Tooele County Commission or Sheriff's Office advising that the County would not respond to events at the PFS site under the existing agreement. In the absence of such authoritative basis for its position, the State has failed to establish the existence of a genuine dispute of material law or fact.¹⁰

Further, although the County could unilaterally decide to rescind the June 1997 agreement (upon timely notice to PFS, as set forth in the agreement), or to renegotiate the agreement so as to specifically address the PFS site, the State has not provided any information suggesting that the County has done so. In the absence of such information, no basis has been shown to disturb the Licensing Board's prior observation that the cooperative agreement, on its face, appears to provide law enforcement jurisdiction for the designated LLEA on the Skull Valley Band reservation. *See* LBP-98-13, 47 NRC at 370 n.9.

¹⁰ Significantly, the County Attorney's letter does not set forth any legal analysis to support his opinion that the existing cooperative agreement does not embrace the PFS project because it materialized following the agreement's execution. This assertion appears to be a claim that the PFS project constitutes a changed circumstance that could not have been foreseen at the time the agreement was reached, that it presents some increased difficulty, expense or hardship for the County, and that the agreement therefore may be voided. It must be observed, however, that it is not uncommon for an agreement to have been negotiated and reached at a specific point in time before future developments can be known -- but only risks that could not have been reasonably foreseen at the time a contract was entered may support a rescission of the contract. *See generally, Corbin on Contracts* (1963), Vol. 1A, § 184 at 154. Further, nothing in the County Attorney's letter suggests that the designation of the Tooele County Sheriff's Office to serve as the LLEA for a security incident at the PFS site on the Skull Valley Reservation -- which is already subject to patrols and incident response by the Tooele County Sheriff's Office -- would pose any significant difficulty, expense or hardship upon Tooele County.

Finally, the County Attorney's letter does not provide any support for the State's flat assertion that "Tooele County will not provide law enforcement assistance to the PFS ISFSI under the CLEA" (Motion at 4). On the contrary, while the letter provides the author's opinion as to the scope of the agreement, nothing in the letter addresses the question of whether the Tooele County Sheriff's Office would or would not respond to a security event at the PFS site under the existing cooperative law enforcement agreement. Accordingly, a genuine dispute of material fact or law has not been shown to exist with respect to this issue.

CONCLUSION

For the reasons set forth above, the Staff opposes the State's request to supplement the basis for contentions Security-A through Security-C, and recommends that the State's motion be denied.

Respectfully submitted,

Catherine L. Marco for

Sherwin E. Turk
Counsel for the NRC Staff

Dated at Rockville, Maryland
this 29th day of December 1998

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S RESPONSE TO STATE OF UTAH'S MOTION TO AMEND SECURITY CONTENTIONS" in the above captioned proceeding have been served on the following through deposit in the Nuclear Regulatory Commission's internal mail system, or by deposit in the United States mail, first class, as indicated by an asterisk, with copies by electronic mail as indicated, this 29th day of December, 1998.

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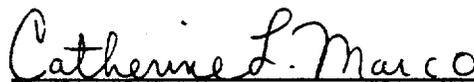
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