

December 29, 1998

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

Before the Atomic Safety and Licensing Board

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 ANSWER TO STATE OF UTAH'S
MOTION TO AMEND SECURITY CONTENTIONS**

Applicant Private Fuel Storage L.L.C. ("Applicant" or "PFS") hereby submits its answer to the State of Utah's ("State") "Motion to Amend Security Contentions" ("State Mot.") dated December 17, 1998. PFS submits that the State's motion should be denied, in that (1) the State has not justified its late filing of new contention materials, and (2) the State's contentions as amended advocate stricter requirements than those imposed by the Commission's regulations.

I. FACTUAL BACKGROUND

On January 3, 1998, the State of Utah timely filed its security contentions in accordance with the Board's Order of December 17, 1997, which required security contentions to be filed no later than January 5, 1998. In contention Security-C, the State raised two principal issues: "(1) the authority of the Tooele County Sheriff's Office to provide law enforcement assistance to incidents at the Applicant's independent spent fuel storage installation ("ISFSI"); and (2) the time required for Tooele County Sheriff's office to respond to incidents at the ISFSI." See State Mot. at 1. In response to the first issue, at the

June 17, 1998 prehearing conference PFS provided to the Board and to counsel for the State and the NRC staff copies of the June 3, 1997 "Cooperative Law Enforcement Agreement" ("CLEA") between Tooele County, the Bureau of Indian Affairs ("BIA"), and the Skull Valley Band of Goshute Indians under which Tooele County has agreed to provide law enforcement services for the Skull Valley Reservation. See Prehearing Conf. Trans. at S-15.¹

In its Memorandum and Order of June 29, 1998, the Board rejected the State's claim of lack of Tooele County jurisdiction and law enforcement authority on the Skull Valley Reservation and related claims raised by the State. The Board concluded that "a cooperative law enforcement agreement has been shown to exist between the LLEA, the Bureau of Indian Affairs . . . , and the Skull Valley Band" and determined that "nothing on the face of the cooperative agreement gives us cause to question its validity as it provides such [law enforcement] jurisdiction on the Skull Valley Band's reservation for the designated LLEA." Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-98-13, 47 NRC 360, 370 and n. 9 (1998).

On July 10, 1998, the State filed a Motion for Reconsideration of the Board's ruling. In its motion, the State challenged the validity of the CLEA on a procedural basis, claiming that Tooele County had not passed an appropriate resolution to authorize the CLEA. For support, the State referred to an inquiry that it had made to the Tooele County Clerk's Office concerning the CLEA. See State Recon. Mot. at 2 and Exh. 3.

¹ PFS formally filed the CLEA with the Board by cover letter from Jay Silberg dated June 24, 1998.

On August 5, 1998, the Board granted the State's request for reconsideration, stating that:

[T]he 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.

Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-98-17, 48 NRC 69, 75 (1998) (emphasis added). The Board did not, however, disturb its previous conclusion that the substance of the CLEA (as opposed to the procedure used to authorize it) was valid to meet the requirements of 10 C.F.R. § 73.51(d)(6) to have a "[d]ocumented liaison with a designated response force or [LLEA]." Rather, the Board clearly stated that (id. at 75-76):

Our ruling here means that 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.

On October 14, 1998, almost four months after being provided a copy of the CLEA at the June 17, 1998 prehearing conference, the State wrote a letter to Tooele County inquiring about the scope and nature of the County's obligations under the CLEA. See State Mot., Exh. 2 at 1 (Letter from D. Nielson to T. Hunsaker dated October 14, 1998). On December 2, 1998, the Tooele County Attorney sent a one-page letter responding to the State's letter. See State Mot., Exh. 3 at 1 (Letter from D. Ahlstrom to D. Nielson dated December 2, 1998). On December 17, 1998, the State filed its motion to

amend the security contentions requesting to add “an additional legal challenge to the Applicant’s ability to comply with 10 CFR § 73.51(d)(6) and Part 73, Appendix C(d)(3)” based on the substance of the CLEA, claiming that the County Attorney’s letter “clearly establishes that Tooele County will not provide law enforcement assistance to the [PFS ISFSI] under the CLEA.” See State Mot. at 5-6.

II. THE STATE’S MOTION IS UNJUSTIFIABLY LATE

The State’s motion to amend its security contentions must be denied because it is unjustifiably late. Being late, the State must demonstrate that a balancing of the five factors set forth in 10 C.F.R. § 2.714(a)(1)(i)-(v) support accepting its proposed amendment of its security contentions. Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-98-7, 47 NRC 142, 167, 207-09 (1998). The State has not done so here, so the motion to amend its contentions must be denied.

A. The State Lacks Good Cause

The first and most important factor is good cause for lateness. 10 C.F.R. § 2.714(a)(1)(i). The State lacks good cause because the initiation of the process which resulted in the County Attorney’s letter rested solely with the State and it waited too long to do so. The State was given a copy of the CLEA during the prehearing conference on June 17, 1998. Yet the State failed to send its letter to Tooele County regarding the scope and extent of the CLEA (and apparently made no other inquiry concerning its substance) until October 14, 1997, almost four months after the State had received a copy of the CLEA. The State makes no attempt whatsoever to justify this four-month delay. In this regard, the State did make an inquiry to Tooele County in early July, 1998 regarding the

procedure by which the CLEA was adopted in support of its July 10, 1998 Motion for Reconsideration, which focused on the CLEA. See State Recon. Mot. at 2 and Exh 3.

The State has provided no reason why it failed to submit its inquiry concerning the substance of the CLEA during this same timeframe.

Rather, the State's good cause argument focuses solely on the alleged reasonableness of its actions upon receipt of the County Attorney's December 2, 1998 letter. The State claims that it has good cause for late-filing "because [it] only received the new information from the Tooele County Attorney on December 4, 1998" and acted promptly thereafter to file its motion. State Mot. at 7. The State's receipt of the County Attorney's letter is not, however, the right point in time from which to evaluate the timeliness of this motion. Even assuming that the State has filed its motion within a reasonable time after receiving a response from the Tooele County Attorney, it would not excuse the State's four-month delay in making its inquiry to the County. If the State had sent its letter of inquiry to Tooele County in a timely manner after receiving the CLEA, the State could have filed the present motion months earlier.

The State does not give any explanation for this four-month delay. See State Mot. at 7. The Board determined that the State lacked good cause for filing Utah Contention EE late when it was filed after an unexplained one-month delay. LBP-98-7, 47 NRC at 208. Likewise, the Board should determine that the State lacks good cause for its lateness here given its unexplained delay in making its inquiry to the County. This is particularly

true given the brevity and simplicity of the State's October 14, 1998 letter to the County.²

Where good cause is lacking, a compelling showing must be made with respect to the other four factors, which, as discussed next, the State has not done here.

B. The State Fails to Make a Compelling Showing on the Other Factors

The second and fourth factors, which concern the protection of the petitioner's asserted interest by other means or parties, are to be accorded less weight than the third and fifth factors. LBP-98-7, 47 NRC at 208. On these factors, the State simply asserts that it "has no means, other than this proceeding, to protect its interests in the issues identified" in its motion. State Mot. at 7 (emphasis added). The State's bald assertion is devoid of any discussion and is wholly unsupported. The State's claim that it has absolutely no means other than this proceeding by which to protect its interest in assuring law enforcement response to the ISFSI seems surprising and counterintuitive. It would seem likely that the State has one or more other means to protect its law enforcement interests in this matter through State legislative or administrative means. For example, the State could attempt to enter directly into a law enforcement agreement with the Skull Valley Band or PFS. Because the State has failed to support its bald assertion, this factor does not favor granting the State's motion.

The third factor is whether the petitioner will make a strong contribution to the record. To satisfy this factor, a petitioner should, "with as much particularity as possible,

² See *Private Fuel Storage* (Independent Spent Fuel Storage Facility), LBP-98-29, 48 NRC ___, ___, slip op. at 12 n.4 (Nov. 30, 1998) (finding of good cause for the delay between the availability of the information and the filing depends on the "scope and complexity of the 'new' information").

identify its proposed witnesses, and summarize their proposed testimony.” LBP-98-7, 47 NRC at 208 (citations omitted). The State completely fails to satisfy this standard, offering only a bald assertion that “the State’s participation in this proceeding can reasonably be expected to assist in developing a sound record relating to legal issues regarding local law enforcement authority.” State Mot. at 7. The State’s proposed contention concerns the scope and extent of the CLEA contract between Tooele County, BIA, and the Skull Valley Band, a matter of contract interpretation. The State fails to identify those issues concerning the scope and the extent of the CLEA on which it would assist in developing a sound record, fails to identify any witnesses that it would call on such issues, and fails to identify or summarize the proposed testimony of any such witnesses. Therefore, the State has utterly failed to show that it will make a strong contribution to the record. See LBP-98-29, 48 NRC at __, slip op. at 13 (decision on Low Rail Contentions).³ Accordingly, this factor strongly weighs against granting the State’s motion.

The fifth factor concerns the extent to which the petitioner’s participation will broaden or delay the proceeding. The current security contentions concern: 1) whether the CLEA was adopted pursuant to “an appropriate resolution” and 2) the response time of the LLEA. See LBP-98-17, 48 NRC at 74, 76-77. While the current contention concerns the procedure used to authorize the CLEA, the State’s amended contentions would

³ With respect to its Low Rail Contention concerning wildfires, the State had submitted an affidavit from a forestry ecosystem manager in support of the contention and asserted that other, unnamed experts would be available to support its position on the contention. The Board found that this proffer fell “considerably short of the specificity regarding witness identification and testimony summaries the Commission has indi-

also require interpreting the substance of the CLEA itself as a contractual document.

Adding this new contract issue would broaden the security contentions currently in the proceeding. Broadening the issues to be considered in the proceeding will, of necessity, broaden the scope of discovery and the hearing itself, and thereby extend the duration of the proceeding. Hence, this factor also weighs against accepting the State's motion.

In sum, the remaining four factors weighed together militate against granting the State's late-filed motion, and clearly, therefore, do not make the compelling showing required to overcome the State's lack of good cause.

III. THE STATE'S NEW LEGAL CHALLENGE MUST BE REJECTED

The State's proposed new legal challenge which it seeks to incorporate as part of contentions Security-A, B, and C must be rejected because it advocates stricter requirements than those imposed by NRC regulations and therefore raises issues not material to granting or denial of the license.⁴ The State's new challenge focuses on the substance of the CLEA, specifically the scope and extent of the law enforcement services to be provided by Tooele County under the CLEA. State Mot. at 4-6. The State does not rely in any respect on the actual provisions of the CLEA but rather points to the Tooele County Attorney's letter of December 2, 1998 responding to the State's October 14, 1998 inquiry,

cated is needed if this factor is to provide strong support for admissibility." Id. The State's bald assertion here is far less than its proffer on the Low Rail wildfire contention which the Board found inadequate.

⁴ The State's motion also requests that contention Security-C be specifically amended to cite 10 C.F.R. § 73.51(d)(6). See State Mot. at 5 n. 2. The Board, however, has already explicitly addressed and referred to 10 C.F.R. § 73.51(d)(6) in its both its initial June 29, 1998 Order and its subsequent August 5, 1998 Order on the State's Motion for Reconsideration. See LBP-98-13, 47 NRC at 369; LBP-98-17, 48 NRC at 75.

which the State broadly claims “clearly establishes that Tooele County will not provide law enforcement assistance to the [PFS ISFSI] under the CLEA.” Id. at 6. A reading of this letter -- which is the sole basis for the State’s motion -- shows that it is actually confined to issues which are beyond the requirements imposed by NRC regulations.

The Tooele County Attorney’s letter addresses whether Tooele County is obligated to provide ongoing law enforcement protection, specifically patrols of the PFSF site, under the CLEA. See State Mot. Exh. 3.⁵ Such ongoing protection or patrols by the LLEA is not an NRC licensing requirement. NRC’s regulations require that

[d]ocumented liaison with a designated response force or a local law enforcement agency (LLEA) must be established to permit timely response to unauthorized penetration or activities.

10 C.F.R. § 73.51(d)(6) (emphasis added). The regulation addresses whether an LLEA will respond to unauthorized activities that have occurred at an ISFSI.⁶ The regulations do not require an LLEA to patrol or to provide preventive-related protection such as that referred to in the County Attorney’s letter. See, generally, 10 C.F.R. § 73.51.⁷

Because the Board has already addressed this issue, PFS does not believe that the contention needs to be amended and opposes the State’s request to amend this contention.

⁵ The Tooele County Attorney’s letter also notes that “the county has not yet entered into any agreement that has any bearing on locating the PFS storage facility on the reservation.” State Mot. Exh. 3. PFS agrees that it has not yet entered into a specific agreement with Tooele County but such is not relevant to the scope and extent of the substance of the CLEA, the issue presented by the State here.

⁶ This interpretation is further supported by the Standard Review Plan, see NUREG-1619 at 18 (“designated response force,” “if the . . . response force cannot respond”), and the preceding staff guidance document, see NUREG-1497 at 5 (“documented response arrangements,” “designated response force,” “estimated response times.”).

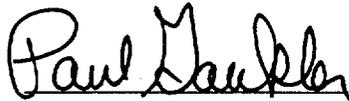
⁷ The difference between 1) patrol and protect, and 2) respond is not just semantic. The definition of “protect” is “to keep from being . . . attacked” or to “guard.” American Heritage College Dictionary at 1099 (3d. ed., 1997). To protect requires actions before-hand to prevent an attack from occurring. NRC

Thus, the State attempts to challenge the PFSF Physical Protection Plan on something which the NRC's regulations do not require -- regular patrols and protection of an ISFSI by the LLEA. The State therefore "advocate[s] stricter requirements than those imposed by the regulations" and its new challenge "is an impermissible attack on the Commission's rules" which must be rejected. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-82-106, 16 NRC 1649, 1656 (1982).

IV. CONCLUSION

For the foregoing reasons, PFS respectfully submits that the State's motion to amend its security contentions must be denied.

Respectfully submitted,



Jay E. Silberg
Ernest L. Blake, Jr.
Paul A. Gaukler
SHAW, PITTMAN, POTTS & TROWBRIDGE
2300 N Street, N.W.
Washington, DC 20037
(202) 663-8000
Counsel for Private Fuel Storage L.L.C.

Dated: December 29, 1998

regulations do not require the LLEA to prevent unauthorized penetrations or activities. See 10 C.F.R. § 73.51(d)(6) ("response to unauthorized penetrations or activities.") The definition of "patrol" is to "mov[e] about an area . . . for purposes of observation, inspection, or security." American Heritage College Dictionary at 1002. NRC regulations also do not require the LLEA to perform routine patrols of an ISFSI.

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CERTIFICATE OF SERVICE

I hereby certify that copies of the "Applicant's Answer to State of Utah's Motion to Amend Security Contentions" 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 29th day of December 1998.

G. Paul Bollwerk III, Esq., Chairman Administrative Judge
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
e-mail: GPB@nrc.gov

Dr. Jerry R. Kline
Administrative Judge
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
e-mail: JRK2@nrc.gov

Dr. Peter S. Lam
Administrative Judge
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
e-mail: PSL@nrc.gov

* Adjudicatory File
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001

Catherine L. Marco, Esq.
Sherwin E. Turk, Esq.
Office of the General Counsel
Mail Stop O-15 B18
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555
e-mail: ppscasc@nrc.gov

Denise Chancellor, Esq.
Assistant Attorney General
Utah Attorney General's Office
160 East 300 South, 5th Floor
P.O. Box 140873
Salt Lake City, Utah 84114-0873
e-mail: dchancel@state.UT.US

John Paul Kennedy, Sr., Esq.
Confederated Tribes of the Goshute
Reservation and David Pete
1385 Yale Avenue
Salt Lake City, Utah 84105
e-mail: john@kennedys.org

Clayton J. Parr, Esq.
Castle Rock, et al.
Parr, Waddoups, Brown, Gee & Loveless
185 S. State Street, Suite 1300
P.O. Box 11019
Salt Lake City, Utah 84147-0019
e-mail: karenj@pwlaw.com

Diane Curran, Esq.
Harmon, Curran, Spielberg &
Eisenberg, L.L.P.
2001 S Street, N.W.
Washington, D.C. 20009
e-mail: Dcurran.HCSE@zzapp.org

* Charles J. Haughney
Acting Director, Spent Fuel Project Office
Office of Nuclear Material Safety and
Safeguards
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Joro Walker, Esq.
Land and Water Fund of the Rockies
165 South Main, Suite 1
Salt Lake City, UT 84111
e-mail: joro61@inconnect.com

Richard E. Condit, Esq.
Land and Water Fund of the Rockies
2260 Baseline Road, Suite 200
boulder, CO 80302
e-mail: rcondit@lawfund.org

Danny Quintana, Esq.
Skull Valley Band of Goshute Indians
Danny Quintana & Associates, P.C.
50 West Broadway, Fourth Floor
Salt Lake City, Utah 84101
e-mail: quintana@xmission.com

Office of the Secretary
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
Attention: Rulemakings and Adjudications
Staff
e-mail: HEARINGDOCKET@NRC.GOV
(Original and two copies)

* By U.S. mail only


Paul A. Gaukler