

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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USMRC

ATOMIC SAFETY AND LICENSING BOARD

'99 JUN 14 P1:36

Before Administrative Judges:

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

OF
FUEL
ADJUDICATION

SERVED JUN 14 1999

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

June 14, 1999

MEMORANDUM AND ORDER
(Ruling on Motions to
Extend Discovery and to
Quash Deposition Notice)

Pending with the Licensing Board are two related motions concerning discovery conducted by intervenor Ohngo Gaudedah Devia (OGD). The first is a May 28, 1999 motion from OGD requested that the initial formal discovery period in this proceeding be extended to permit it to depose Leon Bear. See Intervenor [OGD] Motion to Extend the Discovery Period (May 28, 1999) at 1; see also Notice of Deposition for Leon D. Bear (May 28, 1999). Mr. Bear is Chairman of the Executive Committee of the Skull Valley Band of Goshute Indians (Skull Valley Band), which has intervened in this proceeding in support of the application of Private Fuel Storage, L.L.C., (PFS) to construct and operate an

independent spent fuel storage installation (ISFSI) on the Skull Valley Band's Utah reservation.

The second motion comes from PFS as the lead party opposing contention OGD 0 -- OGD's lone admitted contention, which concerns the "environmental justice" aspects of the proposed PFS ISFSI. PFS has submitted a June 4, 1999 filing that both opposes OGD's extension request and asks that the May 28, 1999 Bear deposition notice be quashed (i.e., a 10 C.F.R. § 2.740(c) protective order be entered excusing Chairman Bear from complying with the OGD deposition request). PFS further declares that any OGD attempt to depose Chairman Bear should be deferred to the limited discovery "window" recently established by the Board for Group III environmental contentions like OGD 0. See [PFS] Opposition to OGD's Motion to Extend Discovery and Motion to Quash OGD's Notice of Deposition of Leon Bear (June 4, 1999) at 2-6.

Both intervenor State of Utah (State) and the NRC staff also have submitted responses to the OGD discovery extension request that, respectively, favor and oppose OGD's motion. See [State] Response in Support of [OGD] Motion to Extend Discovery (June 7, 1999); NRC Staff's Response to [OGD] Motion to Extend the Discovery Period (June 4, 1999). Finally, in a filing dated June 11, 1999, OGD has opposed the PFS motion to disallow the deposition notice directed to

Chairman Bear. See Intervenor [OGD] Response Opposing [PFS] Motion to Quash the Deposition of Leon Bear (June 11, 1999) [hereinafter OGD Response].

For the reasons stated herein, we deny the OGD extension request and grant the PFS motion to quash Chairman Bear's deposition.

Although there are several problems with the OGD motion,¹ most troubling is the fact that OGD's various

¹ Despite longstanding Board directives that extension motions should (1) be filed at least three business days before the date for which an extension is sought; and (2) include information apprising the Board of the other interested parties' positions regarding the motion, see Licensing Board Memorandum and Order (Initial Prehearing Order) (Sept. 23, 1997) at 6-7 (unpublished) [hereinafter Initial Prehearing Order], OGD submitted its request on the last day of the discovery period (without any showing of good cause for failing to file previously) or any discussion of the other parties' positions on its motion. In its response to the PFS motion to quash, OGD suggests that the Board's extension request directives do not apply to OGD's motion to extend the discovery period because our order only specified its application to the due date for a "pleading or other submission for which an extension is sought." OGD Response at 1 n.1 (quoting Initial Prehearing Order at 7.) What this overlooks is the fact that, while OGD captions its filing as a request to extend the discovery period, in fact what it is attempting to obtain is permission to extend the time within which its accompanying submission -- the May 28, 1999 notice of deposition of Chairman Bear -- will be effective.

So there are no further misunderstandings in this regard, the parties are advised that absent a Board indication that the parties may extend a deadline by agreement, see, e.g., Licensing Board Memorandum and Order (General Schedule for Proceeding and Associated Guidance) (June 29, 1998) at 7 n.1 (unpublished), motions to extend a Board or rule-established deadline must meet these requirements.

reasons for seeking the extension relate to matters -- February 1999 PFS responses to staff requests for additional information (RAIs); an April 24, 1999 Skull Valley Band tribal council meeting; and a dispute over disclosure of the details about lease payments and benefits to Skull Valley Band members under the PFS lease for its proposed ISFSI -- that OGD apparently has known about for at least five weeks (and in one instance five months) before the close of the discovery period. In its response to the PFS motion to quash, however, OGD asserts that despite these earlier events, it really only became aware of the need for the Bear deposition on May 27, 1999, as a result of a meeting between OGD's Chairman and OGD counsel to review the timely PFS May 20, 1999 responses to OGD's May 10, 1999 first discovery requests. According to OGD, this meeting could not take place any earlier because OGD's Chairman lives a significant distance from OGD counsel's Salt Lake City, Utah office. See OGD Response at 2-3. In addition, OGD asserts it will be prejudiced if, as PFS suggests, Mr. Bear's deposition is deferred until the limited discovery "window" for Group III contentions because it will "effectively be prohibited from continued participation in this case and from effectively responding to statements [relating to OGD's environmental justice claims made by Chairman Bear that are] already

before the NRC which may be incorporated in the EIS relevant to the proposed facility." Id. at 5.

Acknowledging the travel difficulties involved, OGD's response nonetheless does not account for the fact that, as announced in a December 1998 Board issuance, see Licensing Board Memorandum and Order (Revised General Schedule) (Dec. 23, 1998) Attach. 1 (unpublished), the formal discovery period for this proceeding began on March 1, 1999, some ten weeks before OGD made its first discovery requests. It is not apparent from OGD's May 28 motion or its June 11 response, or indeed from its May 10, 1999 first discovery requests, why OGD was unable to posit those requests during the ten weeks preceding its initial discovery filing, so as to provide it with time to obtain responses and conduct additional discovery without seeking an extension of the allotted discovery period.

The totality of the circumstances in this instance suggests that up to this juncture OGD has been less than diligent in pursuing formal discovery in this proceeding. A party that waits until the proverbial "last minute" to seek discovery runs the risk that it may not be able to follow up on the responses it receives. Moreover, the claim of prejudice it cites if we defer Chairman Bear's deposition until the Group III discovery window appears footed primarily in the misapprehension that discovery in this

proceeding is intended to aid OGD in participating in the ongoing staff process to prepare a draft and a final environmental impact statement (EIS) regarding the proposed PFS facility. Discovery at present is intended to provide information relevant to OGD's contention OGD O challenge to the applicant's environmental report, not to provide material for comments or challenges relative to the staff's yet-to-be-issued draft and final EISs.² See 10 C.F.R. § 2.714(b)(2)(iii) (contentions are to be based on applicant's environmental report; new or amended contentions can be filed when staff draft and final EISs are issued).

Thus, we see no basis for giving OGD additional time at this juncture to conduct discovery by taking the deposition of Chairman Bear.³ The Board has indicated it will provide for a short additional period of time for discovery on the

² In its motion to quash response, OGD also raises questions about certain PFS assertions concerning the propriety nature of the lease agreement between the Skull Valley Band and PFS and OGD's unwillingness to sign a confidentiality agreement to obtain access to the lease agreement and related information. See OGD Response at 5-6. It is not necessary that we resolve these issues in deciding the pending OGD and PFS motions concerning Chairman Bear's deposition, although it may become so in the context of ruling on a pending May 27, 1999 OGD motion to compel.

³ OGD also seeks to justify an extension based on the fact the Board has provided additional time beyond the May 28, 1999 deadline to other parties to complete discovery. Those extensions, however, were unopposed and were granted to parties that were diligently pursuing formal discovery on matters in all three contention groups and needed additional time to complete discovery on non-Group I matters.

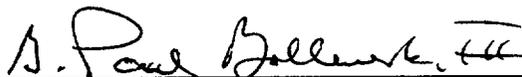
Group III environmental contentions of which OGD 0 is a part. See Licensing Board Memorandum and Order (Granting Motion for Additional Limited Discovery on Group II and Group III Contentions) (Mar. 29, 1999) at 7 (unpublished). As the Board made clear in providing for that additional discovery window, that period is intended to provide an limited opportunity closer to the actual hearing for focused inquiry. See id. at 4-5. If, at the time the Group III limited window is open, OGD still wishes to depose Chairman Bear, it can notice his deposition then, subject to any objections from other parties. The Board, however, would strongly suggest that OGD make arrangements to conduct such a deposition early in the discovery window so that any problems or objections can be dealt with at the outset rather than the close of that additional period.

Accordingly, OGD's May 28, 1999 motion to extend the formal discovery period is denied and PFS's June 4, 1999 motion to quash is granted in that Chairman Bear need not

appear for the deposition scheduled by the May 28, 1999 OGD notice.

It is so ORDERED.

FOR THE ATOMIC SAFETY
AND LICENSING BOARD⁴



G. Paul Bollwerk, III
ADMINISTRATIVE JUDGE

Rockville, Maryland

June 14, 1999

⁴ Copies of this memorandum and order were sent this date by Internet e-mail transmission to counsel for (1) applicant PFS; (2) intervenors Skull Valley Band, OGD, Confederated Tribes of the Goshute Reservation, Southern Utah Wilderness Alliance, and the State; and (3) the staff.

**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 MEMORANDUM AND 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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LB MEMORANDUM AND ORDER**

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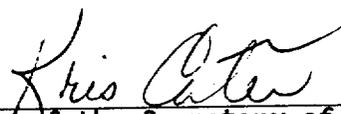
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**Dated at Rockville, Md. this
14 day of June 1999**


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