

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED
LBP-99-32

ATOMIC SAFETY AND LICENSING BOARD

'99 AUG 27 P2:17

Before Administrative Judges:

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

ON
FILE
ADJL

SERVED AUG 27 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
August 27, 1999

MEMORANDUM AND ORDER

(Granting Motion for Summary Disposition
Regarding Contention Utah G)

Applicant Private Fuel Storage, L.L.C., (PFS) has requested that summary disposition be entered in its favor regarding contention Utah G, Quality Assurance. As admitted, that contention details intervenor State of Utah's (State) claim that the PFS quality assurance (QA) program for its proposed Skull Valley, Utah independent spent fuel storage installation (ISFSI) fails to satisfy the requirements of 10 C.F.R. Part 72, Subpart G. PFS now asserts there is no genuine issue as to any material fact relevant to this contention so that, in accordance with 10 C.F.R. § 2.749, it is entitled to a determination on this contention as a matter of law. The NRC staff supports this request, while the State, the contention's sponsor, does not

directly oppose summary disposition, having declined to file a response to PFS's motion.

For the reasons described below, on this issue we grant summary disposition in favor of PFS.

I. BACKGROUND

Under 10 C.F.R. § 72.24(n), an ISFSI applicant like PFS must provide:

A description of the quality assurance program that satisfies the requirements of subpart G The description must identify the structures, systems, and components important to safety. The program must also apply to managerial and administrative controls used to ensure safe operation of the ISFSI or [multiple retrievable storage facility].

ISFSI quality assurance is also addressed by section 72.140(c) under which an applicant is required to "file a description of its quality assurance program, including a discussion of which requirements of [Subpart G] are applicable and how they will be satisfied" Additionally, an applicant's QA organization "must have sufficient authority and organizational freedom to identify quality problems; to initiate, recommend, or provide solutions; and to verify implementation of solutions" in order to comply with section 72.142(b).

In filing contention Utah G, the State of Utah challenged the sufficiency of the PFS QA program as outlined

in the Safety Analysis Report (SAR) accompanying PFS's application for its Skull Valley facility, alleging that the QA description in the PFS SAR failed to meet these NRC requirements. In our April 1998 decision addressing the validity of intervenor contentions, we admitted contention Utah G, which reads as follows:

Utah G -- Quality Assurance

CONTENTION: The Applicant's Quality Assurance ("QA") program is utterly inadequate to satisfy the requirements of 10 C.F.R. Part 72, Subpart G.

LBP-98-7, 47 NRC 142, 252, reconsideration granted in part and denied in part on other grounds, LBP-98-10, 47 NRC 288, aff'd on other grounds, CLI-98-13, 48 NRC 26 (1998).

Although the Board rejected bases two and three of the contention as impermissible challenges to agency regulatory program, rulemaking and/or generic determinations, it accepted the contention with "its bases one and four that assert a lack of detail in the PFS QA program description and a failure to demonstrate the independence of the PFS QA program." Id. at 188.

Relying on its statement outlining twenty-four material facts not in dispute, the accompanying affidavit of former PFS QA committee chairman John G. Thorgersen, and the discovery deposition of State QA witness Dr. Marvin Resnikoff, PFS now argues that summary disposition is proper

because the two issues raised by contention Utah G -- the level of detail in its QA plan and the independence of its QA organization -- have been resolved. PFS asserts that, in conjunction with its SAR, its QA program description, as provided to the staff in August 1996 and revised in May 1999, complies with applicable standards because that plan contains a level of detail adequate for staff review of the commitments contained within the plan description. PFS also declares that its QA plan ensures that the QA organization has the independence needed to perform its QA functions. See [PFS] Motion for Summary Disposition of Utah G (June 28, 1999) at 4-10 [hereinafter PFS Motion].

Agreeing that there are no issues of material fact in dispute, the staff supports the PFS dispositive motion. As is explained in the affidavit of NRC Office of Nuclear Materials Safety and Safeguards safety inspection engineer Thomas O. Matula that accompanies the staff's response, after reviewing the PFS SAR and its QA plan and supporting documents, the staff has determined that the level of detail in the QA plan and the independence of the PFS QA organization are sufficient, making summary disposition proper for this issue. See NRC Staff's Response to [PFS] Motion for Summary Disposition of Utah Contention G (Quality Assurance) (July 19, 1999) at 7-8, unnumbered exh. 1 [hereinafter Staff Response]; see also NRC Staff's Statement

of Its Position Concerning Group I Contentions (June 15, 1999) at 9-13.

Finally, as previously indicated, the State, as the contention's sponsor, does not directly challenge the PFS motion, having chosen not to file a response to the PFS summary disposition request or the staff's response. See [State] Response to [PFS] Motion for Summary Disposition of Utah Contention G (July 27, 1999) at 1.

II. ANALYSIS

A party to a NRC proceeding is entitled to summary disposition on any or all matters

if the filings in the proceeding, depositions, answers to interrogatories, and admissions on file, together with the statements of the parties and affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a decision as a matter of law.

10 C.F.R. § 2.749(d). As with the analogous Rule 56 of the Federal Rules of Civil Procedure, the movant bears the initial burden of making the requisite showing that there is no genuine issue as to any material fact, which it attempts to do by means of a required statement of material facts and any supporting materials that accompany the dispositive motion. An opposing party must counter each adequately supported material fact with its own statement of material facts in dispute and supporting materials, or the movant's

facts will be deemed admitted. See Advanced Medical Systems, Inc. (One Factory Row, Geneva, Ohio 44041), CLI-93-22, 38 NRC 98, 102-03 (1993). Ultimately, however, the burden remains with the movant to establish that no material facts are in dispute so that it is entitled to a dispositive ruling in its favor. See Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 & 2), ALAB-443, 6 NRC 741, 753-53 (1977) (if evidence before presiding officer does not establish absence of genuine issue of material fact, summary disposition motion must be denied even if unopposed).

Regarding basis one of contention Utah G, PFS asserts that the level of detail in its QA plan complies with the governing QA requirements of Subpart G. PFS acknowledges that under 10 C.F.R. § 72.140(c) it is required to file a QA program description that includes a discussion of the applicable requirements how they will be satisfied. PFS asserts, however, that its QA plan furnishes enough information for the staff to analyze whether its plan satisfies the terms of Subpart G.

In this regard, PFS declares that under the Appeal Board's analogous analysis in Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-734, 18 NRC 11 (1984), the focus of the staff's review is the commitments contained within the QA plan, not the details of

the implementing methodology that may be developed at a later date. See PFS Motion at 5 & n.8. Under this interpretation, PFS asserts, the commitments within its QA plan are fully sufficient to satisfy 10 C.F.R. § 72.24. Id. at 5-6. PFS also maintains that the inadequacies alleged in the State's contention are "either immaterial, because the information is not required, or factually erroneous, because the material is actually present." Id. at 6.

Responding to the State's basis four claim that its QA program lacks the required independence, PFS declares that its "QA organization has sufficient independence to perform its QA functions during the licensing, construction, and operation of the facility." Id. at 7. More specifically, regarding the section 72.142(b) requirement that a QA organization have access to a management level that can ensure cost and schedule concerns will not override QA considerations, PFS notes that its QA committee reports directly to the PFS Board of Directors, the highest level of the organization. Further, addressing the State's concern that there is not a defined relationship between the PFS architect/engineer (A/E) and the PFS QA committee, PFS references the SAR and the QA plan provisions that discuss how the QA committee must approve, review, and audit the A/E and has authority to stop work if there is project QA noncompliance. See id.

As to the State's allegation that the facility SAR did not clearly describe the allocation of day-to-day organizational and scheduling responsibilities and the functional interrelations within the PFS organization, PFS declares that the SAR and the QA plan show that the Project Manager and the A/E, not the QA committee, have day-to-day project design, cost, and schedule responsibilities as well as outline the interaction between the QA organization and other PFS units. Finally, responding to the State's concern about compliance with 10 C.F.R. § 72.144(d) relative to each PFS unit's control over the adequacy of the QA in its own program, PFS maintains that this is based on a misunderstanding of the role of the unit manager relative to QA. According to PFS, unit managers are not to determine their unit's QA performance, but rather are to review that performance to ensure quality project design, construction, and operation, subject to an independent audit by the PFS QA organization. See id. at 8-9.

On this basis, PFS declares, and the staff agrees, that there are no material factual issues remaining in dispute relative to contention Utah G, thereby entitling PFS to summary disposition in its favor on this issue.¹ For its

¹ Citing his deposition testimony, both PFS and the staff also assert that Dr. Resnikoff cannot qualify as an expert for the State on QA matters. See PFS Motion at 3; Staff Response at 7 n.7. Because the State has not provided
(continued...)

part, the State has made no effort to refute this conclusion. After reviewing the PFS and staff submissions, which include a copies of the PFS QA program description, see PFS Motion exh. 1, attachs. 3, 5, we likewise have concluded that the matters of QA plan detail and QA organization independence that were of concern to the State both appear to have been adequately addressed in the PFS SAR and its QA plan. Accordingly, we grant summary disposition in favor of PFS on contention Utah G.

III. CONCLUSION

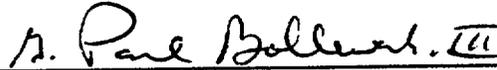
Relative to contention Utah G, Quality Assurance, and the issues of QA plan detail and QA organization independence that were admitted to this proceeding, PFS has established there is no genuine dispute as to any material fact and it is entitled to a judgment in its favor as a matter of law.

For the foregoing reasons, it is this twenty-seventh day of August 1999, ORDERED, that the June 28, 1999 PFS motion for summary disposition regarding contention Utah G is granted and, for the reasons given in this memorandum and

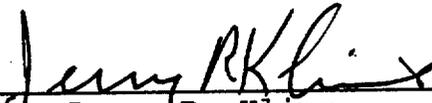
¹(...continued)
any response to the PFS motion, we need not decide this matter.

order, a decision regarding this contention is rendered in favor of PFS.

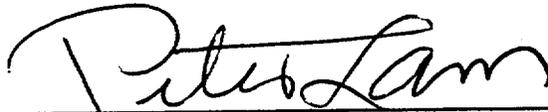
THE ATOMIC SAFETY
AND LICENSING BOARD²



G. Paul Bollwerk, III
ADMINISTRATIVE JUDGE



Dr. Jerry R. Kline
ADMINISTRATIVE JUDGE



Dr. Peter S. Lam
ADMINISTRATIVE JUDGE

Rockville, Maryland

August 27, 1999

² Copies of this memorandum and order were sent this date by Internet e-mail transmission to counsel for (1) applicant Private Fuel Storage, L.L.C.; (2) intervenors Skull Valley Band of Goshute Indians, Ohngo Gaudadeh Devia, Confederated Tribes of the Goshute Reservation, Southern Utah Wilderness Alliance, and the State of Utah; and (3) the NRC staff.

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NUCLEAR REGULATORY COMMISSION

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(Independent Spent Fuel Storage
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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LB MEMO & ORDER (LBP-99-32) 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 MEMO & ORDER (LBP-99-32)

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Dated at Rockville, Md. this
27 day of August 1999


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