

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

LBP00047ED
USNRC

ATOMIC SAFETY AND LICENSING BOARD

99 FEB 18 AIC:28

Before Administrative Judges:

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

CR
ADJ

SERVED FEB 18 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

February 18, 1999

MEMORANDUM AND ORDER
(Denying Motion to Amend
Security Contentions)

As part of its challenge to the pending application of Private Fuel Storage, L.L.C., (PFS) for authorization to construct and operate a 10 C.F.R. Part 70 independent spent fuel storage installation (ISFSI) on the Utah reservation of the Skull Valley Band of Goshute Indians (Skull Valley Band), intervenor State of Utah (State) previously sought and gained admission of several contentions regarding the adequacy of the physical security arrangements for the PFS facility. See LBP-98-17, 48 NRC 69, granting reconsideration of LBP-98-13, 47 NRC 360 (1998). In particular, the Board admitted portions of contentions Security-A, Security-B, and Security-C

on the issue whether a June 1997
cooperative law enforcement agreement

[(CLEA)] 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 [local law enforcement agency (LLEA)] for the PFS facility.

LBP-98-17, 48 NRC at 71. The State now seeks to amend these admitted contentions to permit litigation of a new question regarding the participation of the Tooele County sheriff's office in responding to incidents at the PFS facility, a request both PFS and the NRC staff oppose.

For the reasons that follow, we deny the State's security contentions amendment request.

I. BACKGROUND

The State's motion, which was submitted to the Board on December 17, 1998, is footed on a December 2, 1998 letter from the Tooele County Attorney that is attached to the State's pleading. See [State] Motion to Amend Security Contentions (Dec. 17, 1998) exh. 3 [hereinafter State Motion]. Responding to an October 14, 1998 written inquiry from the Executive Director of the State's Department of Environment Quality about the extent of the assistance Tooele County will render for law enforcement on the Skull Valley Band reservation, see id. exh. 2, in that letter the Tooele County Attorney stated:

I do not believe Tooele County is obligated to provide law enforcement protection to [PFS] and their proposed storage site. Tooele County patrols areas as requested by Skull Valley Tribal government. If they desire to include the [PFS] site we will have to revise the CLEA and negotiate to provide this service. At the time the CLEA was signed there was no discussion or contemplation that [PFS] 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.

Id. exh. 3, at 1.

According to the State, this statement by the Tooele County Attorney, who approved the existing CLEA as to form, establishes that PFS cannot satisfy the requirements of 10 C.F.R. § 73.51(d)(6) and 10 C.F.R. Part 73, App. C, § 3.d, which respectively require that an ISFSI applicant must (1) show a documented liaison with a designed LLEA to permit timely response to unauthorized penetration activities; and (2) provide a listing of available LLEAs, as well as a description of their response capabilities and criteria and a discussion of working arrangements or agreements for communication with such LLEAs. Because the December 2 letter shows that Tooele County will not provide law enforcement protection to the PFS facility under the existing CLEA, the State asserted it has (a) raised an additional admissible legal challenge; (b) added substance to the already admitted basis for contention Security-C

regarding LLEA response time; and (c) provided support for broadening the bases of admitted contentions Security-A and Security-B concerning security force staffing, equipment, and training. See State Motion at 5-6. Finally, the State asserted that in connection with its proposed amendment of contentions Security-A, Security-B, and Security-C, it fulfills the five late-filing criteria of 10 C.F.R. § 2.714(a)(1).

Both PFS and the staff opposed the PFS motion in pleadings filed December 29, 1998. PFS declared the State's motion should be rejected because (1) it failed to establish a balancing of the section 2.714(a)(1) standards support late-filed admission of its new assertions; and (2) the State's amended contentions would advocate stricter requirements than those imposed by the agency's regulations. See Applicant's Answer to [State] Motion to Amend Security Contentions (Dec. 29, 1998) at 1 [hereinafter PFS Response]. On the second point, PFS maintained that section 73.51(d)(6) requires only that the LLEA be able to respond to unauthorized activities at the PFS site, not patrol or provide preventative protection. Because assistance of the latter type is the subject of the Tooele County Attorney's December 2 letter, PFS argued that the State is seeking impermissibly to amend the existing contentions on a basis that goes beyond the requirements of the existing

regulations. See id. at 8-10. For its part, the staff challenged the State's request, arguing it (1) had not met its burden under the section 2.714(a)(1) late-filing criteria; and (2) failed to provide authoritative support for its new challenge to the facial validity of the existing CLEA as it vests the Tooele County sheriff's office with jurisdiction to undertake law enforcement activities on the Skull Valley Band reservation. See NRC Staff's Response to [State] Motion to Amend Security Contentions (Dec. 29, 1998) at 3-11 [hereinafter Staff Response].

II. ANALYSIS

Because the State once again is seeking to interpose new matters into this proceeding, it must meet the five-factor balancing test found in 10 C.F.R. § 2.714(a)(1). And as before, we look first to the important factor of good cause for late filing. In this instance, the bone of contention posited by PFS and the staff is not the amount of time the State took to lodge its motion after receiving the Tooele County Attorney's letter, which was less than two weeks, or even the nearly two months it apparently took Tooele County officials to answer the State's information inquiry. At issue instead is the amount of time the State took to request the information in the first instance. The State's letter, dated October 14, 1998, was posted some four

months after the CLEA was first provided by PFS at a June 17, 1998 prehearing conference, see Tr. at S-15 to S-16, and more than two months after this Board admitted the CLEA-related issue on reconsideration.

The precipitating event for a late-filed contention often is a subject of some dispute. For present purposes we will assume the State had no reasonable basis for looking further into the CLEA until we granted its reconsideration request in our August 5, 1998 issuance. Even in this posture, however, we are unable to find the State's unexplained two-month delay in directing questions to county officials has any legitimate justification that would provide good cause for its late filing. Having received a copy of the CLEA, the State was under an obligation, particularly once we indicated that agreement had some relevance to this proceeding, to act promptly to uncover any additional problems with that pact. In this instance, which apparently did not involve any complex scientific or technical analysis, we find the more than two-month period the State took to inquire too long for it to claim that good cause existed for its late filing.

With this failure to demonstrate good cause for late-filing comes the requirement that the State make a "compelling showing" regarding the other four late-filing factors. See LBP-99-6, 49 NRC ___, ___ (slip op. at 8)

(Feb. 17, 1999). As to factors two and four -- availability of other means to protect the petitioner's interests and extent of representation of those interests by other parties -- we find, as the staff suggests, see Staff Response at 5-6, that they weigh in the State's favor. They are, however, accorded less weight in the balance than the other two criteria. Id.

Looking to factor three -- assistance in developing a sound record -- because legal issues are a focal point of the State's motion, the need for an extensive showing regarding witnesses and testimony may be less compelling. See LBP-98-29, 48 NRC 286, 301 n.18 (1998). At the same time, the State seeks to use this matter as a vehicle to gain further consideration of previously rejected factual contentions regarding the adequacy of security force staffing and equipment, albeit without the requisite evidentiary proffer regarding these elements, thereby diluting somewhat the support factor three provides on the admission side of the balance.

Finally, factor five -- broadening the issues/delaying the proceeding -- clearly does not support the State's request to amend its security contentions. Litigation regarding the Tooele County sheriff office's legal obligations under the CLEA is likely significantly to broaden and delay this proceeding, raising as it does a

substantive challenge to the agreement, as opposed to the essentially procedural challenge to its adoption protocols that is now before the Board, as well as the possibility of awaiting the outcome of legal actions in other judicial forums.

In sum, even with the modest support afforded by factors two, three, and four, the compelling showing needed to overcome the lack of good cause under factor one is lacking. The State's request to amend several of its security contentions therefore must be denied.¹

¹ Having found that under a balancing of the section 2.714(a)(1) late-filing factors the State's amendment request should not be entertained, we need not reach the question of its admissibility. Nonetheless, we note that even if it had met those criteria, we would not be inclined to permit the amendment given (1) the import of section 73.51(d)(6)'s reference to LLEA "response"; and (2) the failure of the statements in Tooele County Attorney's letter to call into question our previous pronouncement that "nothing on the face of the cooperative agreement gives us cause to question its validity as it provides [law enforcement] jurisdiction on the Skull Valley Band's reservation for the designated LLEA." LBP-98-13, 47 NRC at 370 n.9.

Nevertheless, with the CLEA's provisions regarding yearly review and termination, see State Motion, exh. 1, at 3, the potential exists for further developments that may call into question the substance of LLEA jurisdiction, see Staff Response at 10. Nothing in our ruling today precludes party requests for the admission of appropriate issues if future events warrant.

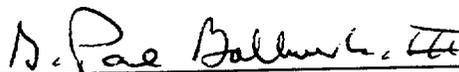
III. CONCLUSION

In seeking to amend its security contentions to introduce questions regarding the validity of the CLEA as it provides that Tooele County will afford law enforcement services on the Skull Valley Band's reservation, intervenor State of Utah has failed to demonstrate that the five factors governing late-admission of contentions under 10 C.F.R. § 2.714(a)(1) support entertaining those

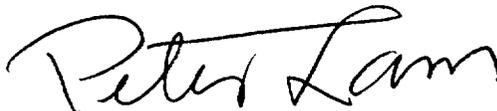
revisions. We thus reject the State's motion to amend its security contentions.

For the foregoing reasons, it is this eighteenth day of February 1999, ORDERED, that the December 17, 1998 motion of the State to amend its security contentions is denied.

THE ATOMIC SAFETY
AND LICENSING BOARD²



G. Paul Bollwerk, III
ADMINISTRATIVE JUDGE



Peter S. Lam
ADMINISTRATIVE JUDGE

Rockville, Maryland

February 18, 1999

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

Judge Kline was unavailable to participate in final deliberations regarding, or to sign, this memorandum and order.

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 MEMO & ORDER (LBP-99-7) 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.

Office of Commission Appellate
Adjudication
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Administrative Judge
G. Paul Bollwerk, III, Chairman
Atomic Safety and Licensing Board Panel
Mail Stop - T-3 F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Administrative Judge
Jerry R. Kline
Atomic Safety and Licensing Board Panel
Mail Stop - T-3 F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Administrative Judge
Peter S. Lam
Atomic Safety and Licensing Board Panel
Mail Stop - T-3 F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Sherwin E. Turk, Esq.
Catherine L. Marco, Esq.
Office of the General Counsel
Mail Stop - 0-15 B18
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Diane Curran, Esq.
Harmon, Curran, Spielberg & Eisenberg
2001 S Street, N.W., Suite 430
Washington, DC 20009

Martin S. Kaufman, Esq.
Atlantic Legal Foundation
205 E. 42nd St.
New York, NY 10017

Joro Walker, Esq.
Land and Water Fund of the Rockies
165 South Main, Suite 1
Salt Lake City, UT 84111

Docket No.(s)72-22-ISFSI
LB MEMO & ORDER (LBP-99-7)

Denise Chancellor, Esq.
Assistant Attorney General
Utah Attorney General's Office
160 East 300 South, 5th Floor
P.O. Box 140873
Salt Lake City, UT 84114

Jay E. Silberg, Esq.
Shaw, Pittman, Potts & Trowbridge
2300 N Street, NW
Washington, DC 20037

John Paul Kennedy, Esq.
Confederated Tribes of the Goshute
Reservation and David Pete
1385 Yale Avenue
Salt Lake City, UT 84105

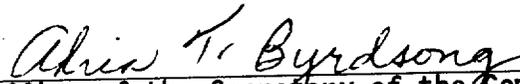
Richard E. Condit, Esq.
Land and Water Fund of the Rockies
2260 Baseline Road, Suite 200
Boulder, CO 80302

Clayton J. Parr, Esq.
Castle Rock, et al.
Parr, Waddoups, Brown, Gee & Loveless
185 South State Street, Suite 1300
Salt Lake City, UT 84111

Danny Quintana, Esq.
Skull Valley Band of Goshute Indians
Danny Quintana & Assocs., P.C.
50 West Broadway, Fourth Floor
Salt Lake City, UT 84101

Richard Wilson
Department of Physics
Harvard University
Cambridge, MA 02138

Dated at Rockville, Md. this
18 day of February 1999


Office of the Secretary of the Commission