

July 1, 1999

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-ISFSI
)
(Independent Spent Fuel)
Storage Installation))

NRC STAFF'S RESPONSE TO APPLICANT'S MOTION FOR
SUMMARY DISPOSITION OF UTAH SECURITY-A AND SECURITY-B,
AND PARTIAL SUMMARY DISPOSITION OF UTAH SECURITY-C

INTRODUCTION

Pursuant to 10 C.F.R. §2.749(a), the NRC Staff ("Staff") herewith responds to "Applicant's Motion for Summary Disposition of Contentions Utah Security-A and Security-B, and Partial Summary Disposition of Contention Utah Security-C" ("Motion"), filed on June 11, 1999, by Private Fuel Storage L.L.C. ("Applicant" or "PFS"). For the reasons set forth below and in the attached Affidavit of Charles E. Gaskin ("Gaskin Aff."), the Staff submits that issues pertaining to the authority of the Tooele County Sheriff's Office to act as the Local Law Enforcement Authority ("LLEA") have been resolved, and there no longer exists a genuine dispute of material fact with respect to Utah Security-A, Utah Security-B, and this portion of Utah Security-C. Inasmuch as these issues have been resolved, the Applicant is entitled to a decision in its favor on this issue as a matter of law. The Staff therefore supports the Applicant's Motion and recommends that it be granted.

BACKGROUND

On January 3, 1998, the State of Utah filed eight contentions challenging the Applicant's physical security plan,¹ in accordance with a protective order entered by the Licensing Board on December 17, 1997.² Following the filing of responses by the Applicant and Staff, and a prehearing conference on June 17, 1998, the Licensing Board admitted one of those contentions (Security-C), limited to the issue of "whether, in accordance with applicable regulatory requirements, . . . the designated LLEA will provide a 'timely' response to any unauthorized activities at the PFS facility."³ Subsequently, on August 5, 1998, the Licensing Board granted the State's request for reconsideration of its previous decision, and admitted an additional issue as part of Contention Security-C and two other contentions (Security-A and Security-B), as to "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."⁴ The Licensing Board explained its decision as follows:

¹ See "State of Utah's Contentions Security-A Through Security-I Based on Applicant's Confidential Safeguards Security Plan" ("Security Plan Contentions"), dated January 3, 1998.

² "Memorandum and Order (Protective Order and Schedule for Filing Security Plan Contentions)," dated December 17, 1998.

³ *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-98-13, 47 NRC 360, 373-74 (1998).

⁴ *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-98-17, 48 NRC 69, 71 (1998).

Previously, we concluded the State's contention Security-C assertion that PFS has not complied with the 10 C.F.R. Part 73, App. C, requirements for contingency plan contents was litigable in connection with its basis alleging PFS has not described the estimated response times for the Tooele County sheriff, as the principal LLEA, in compliance with agency regulations. Our ruling here means 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. Further, we admit contentions Security-A and Security-B on this same basis. The PSP [Physical Security Plan] clearly is premised on the Tooele County sheriff's office acting as the LLEA to respond in the event of unauthorized activities at the PFS facility. Consequently, the State's claim there is no valid cooperative agreement providing the sheriff's office with law enforcement authority on the reservation would provide adequate grounds for admission of those contentions as they express concerns about the sufficiency of security force staffing, equipment, and training.

LBP-98-17, 48 NRC at 75-76. The Board then summarized its decisions admitting these contentions as follows:

. . . State physical security plan contentions Security-A and Security-B are admitted for litigation in this proceeding limited to the issues of whether staffing, equipment, and training deficiencies exist because the purported failure of Tooele County to approve properly a June 1997 cooperative agreement that provides the Tooele County sheriff's office with law enforcement authority on the Skull Valley Band reservation precludes the county sheriff's office from fulfilling its response role as the designated LLEA for the PFS facility.

. . . State physical security plan contention Security-C is admitted for litigation in this proceeding limited to the issues of whether the PSP fails to meet the requirements of 10 C.F.R. Part 73, App. C, in that (a) PFS has not adequately described the estimated response times for the Tooele County sheriff's office as the principal LLEA relied upon for security assistance at the PFS facility, see

LBP-98-13, 47 NRC at 369-70; and (b) the purported failure of Tooele County to approve properly a June 1997 cooperative agreement that provides the Tooele County sheriff's office with law enforcement authority on the Skull Valley Band reservation precludes the county sheriff's office from fulfilling its designated role as the LLEA for the PFS facility.

Id. at 76-77.⁵

In its motion for summary disposition of Contentions Utah Security-A and Security-B, and partial summary disposition of Contention Utah Security-C, PFS asserts that there no longer exists any basis in fact for the contentions' assertion that Tooele County has failed to approve a cooperative law enforcement agreement providing the Tooele County sheriff's office with law enforcement authority on the Skull Valley Band reservation. In support of this assertion, PFS provided a copy of a Cooperative Law Enforcement Agreement dated August 7, 1998, along with documentation showing that a resolution approving this agreement has been executed and ratified by the Tooele County Board of Commissioners, pursuant to the requirements of Utah Code

⁵ As admitted by the Licensing Board, the contentions state as follows:

Utah 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.

UTAH 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 site guards or armed response personnel.

UTAH 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.

section 11-13-5. See Motion at 2-3, 6-7, and Exhibit 1 thereto. Accordingly, PFS concludes that summary disposition of Contention Utah Security-A and Security-B, and partial summary disposition of Contention Utah Security-C (insofar as Contention Security-C raises this issue) should be entered in its favor.

DISCUSSION

A. Legal Standards Governing Motions for Summary Disposition.

Pursuant to 10 C.F.R. §2.749(a), "[a]ny party to a proceeding may move, with or without supporting affidavits, for a decision by the presiding officer in that party's favor as to all or any part of the matters involved in the proceeding. The moving party shall annex to the motion a separate, short, and concise statement of the material facts as to which the moving party contends that there is no genuine issue to be heard." In accordance with 10 C.F.R. §2.749(b), when a properly supported motion for summary disposition is made, "a party opposing the motion may not rest upon the mere allegations or denials of his answer; his answer by affidavits or as otherwise provided in this section must set forth specific facts showing that there is a genuine issue of fact."⁶ In addition, an opposing party must annex to its answer a short and concise statement of material facts as to which it contends there exists a genuine issue to be heard.

⁶ *Accord, Cleveland Electric Illuminating Co.* (Perry Nuclear Power Plant, Units I and 2), ALAB-841, 24 NRC 64, 93 (1986). General denials and bare assertions are not sufficient to preclude summary disposition when the proponent of the motion has met its burden. *Advanced Medical Systems, Inc.* (One Factory Row, Geneva, Ohio 44041), CLI-93-22, 38 NRC 98, 102 (1993). Although the opposing party does not need to demonstrate that it will succeed on the issues, it must at least demonstrate that a genuine issue of fact exists to be tried. *Id.*; *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), CLI-92-8, 35 NRC 145, 154 (1992) (to avoid summary disposition, the opposing party had to present contrary evidence that was so significantly probative as to create a material issue of fact).

10 C.F.R. § 2.749(a). All material facts set forth in the moving party's statement will be deemed to be admitted unless controverted in the opposing party's statement. *Id.* Pursuant to 10 C.F.R. § 2.749(d), "[t]he presiding officer shall render the decision sought if the filings in the proceeding, depositions, answers to interrogatories, and admissions on file, together with the statements of the parties and the affidavit, 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."⁷

The Commission has encouraged the parties in its adjudicatory proceedings to utilize its summary disposition procedures "on issues where there is no genuine issue of material fact so that evidentiary hearing time is not unnecessarily devoted to such issues." Statement of Policy on Conduct of Licensing Proceedings, CLI-81-8, 13 NRC 452, 457 (1981).⁸ Further, the Appeal Board has recognized that summary disposition provides "an efficacious means of avoiding unnecessary and possibly time-consuming hearings on demonstrably insubstantial issues." *Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Unit 1)*, ALAB-696, 16 NRC 1245,

⁷ Pursuant to 10 C.F.R. § 2.749(c), if a party opposing the motion demonstrates in its affidavits that valid reasons exist why it cannot provide facts essential to oppose the motion, the presiding officer may deny the motion, order a continuance to permit affidavits to be obtained, or take such other action as may be appropriate.

⁸ The Commission recently endorsed its earlier policy statement, but indicated that "Boards should forego the use of motions for summary disposition except upon a written finding that such a motion will likely substantially reduce the number of issues to be decided, or otherwise expedite the proceeding." Statement of Policy on Conduct of Adjudicatory Proceedings, CLI-98-12, 48 NRC 18, 20-21 (1998). The Staff submits that partial summary disposition of these contentions will reduce the multiplicity of issues that require hearings in this proceeding, and will otherwise serve to expedite the proceeding.

1263 (1982); *Houston Lighting and Power Co.* (Allens Creek Nuclear Generating Station, Unit1), ALAB-590, 11 NRC 542, 550 (1980).⁹

The Commission's summary disposition procedures have been analogized to Rule 56 of the Federal Rules of Civil Procedure. *See, e.g., Cleveland Electric Illuminating Co.* (Perry Nuclear Power Plant, Units 1 and 2), ALAB-443, 6 NRC 741, 753-54 (1977). The Commission, when considering motions for summary disposition filed pursuant to 10 C.F.R. § 2.749, generally applies the same standards that the Federal courts use in determining motions for summary judgment under Rule 56 of the Federal Rules. *Advanced Medical Systems*, 38 NRC at 102 (1993). Decisions arising under Rule 56 of the Federal Rules may thus serve as guidelines to the Commission's adjudicatory boards in applying 10 C.F.R. §2.749. *Perry*, 6 NRC at 754.

Under Rule 56 of the Federal Rules, the party seeking summary judgment has the burden of proving the absence of genuine issues of material fact. *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 157 (1970); *Advanced Medical Systems*, 38 NRC at 102. In addition, the record is viewed in the light most favorable to the party opposing the motion. *Poller v. CBS, Inc.*, 368 U.S. 464, 473 (1962); *Kerr-McGee Chemical Corp.* (West Chicago Rare Earths Facility), ALAB-944, 33 NRC 81, 144 (1991). However, if the moving party makes a proper showing for summary disposition and the opposing party fails to show that there is a genuine issue of material fact, the District Court (or Licensing Board) may summarily dispose of all of the matters before it on the

⁹ It is well settled that an agency may ordinarily dispense with an evidentiary hearing where no genuine issue of material fact exists. *Veg-Mix, Inc. v. U.S. Dep't of Agriculture*, 832 F.2d 601, 607-08 (D.C. Cir. 1987).

basis of the filings in the proceeding, the statements of the parties, and affidavits. Rule 56(e), Fed. R. Civ. P. *Accord, Advanced Medical Systems*, 38 NRC at 102; 10 C.F.R. § 2.749(d).

The Licensing Board in this proceeding has recently had occasion to rule upon a motion for summary disposition filed by PFS. See "Memorandum and Order (Granting Motion for Summary Disposition Regarding Contention Utah C), LBP-99-23, 49 NRC ____ (June 17, 1999). Therein, the Licensing Board succinctly summarized the standards governing the granting of summary disposition, as follows:

Under 10 C.F.R. § 2.749(a), (d), summary disposition may be entered with respect to any matter (or all of the matters) in a proceeding if the motion, along with any appropriate supporting material, shows 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." 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 not at issue and any supporting materials (including affidavits, discovery responses, and documents) that accompany its 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).

LBP-99-23, slip op. at 10.

As more fully set forth below, the Staff submits that summary disposition is appropriate in accordance with these established standards, with respect to the legal authority of the Tooele County sheriff's office to act as the designated LLEA on the Skull Valley Band reservation.

B. Tooele County's Approval of the Cooperative Law Enforcement Agreement.

1. Applicable Regulatory Standards.

Pursuant to 10 C.F.R. § 72.180, an ISFSI licensee is required to establish, maintain and follow a detailed plan for physical protection as described in 10 C.F.R. § 73.51. In accordance with § 72.180, the plan, *inter alia*, "must describe how the applicant will meet the requirements of § 73.51 . . . and include within the plan the design for physical protection, the licensee's safeguards contingency plan, and the security organization personnel training and qualification plan." Pursuant to 10 C.F.R. § 72.184, the licensee's safeguards contingency plan for responding to threats and radiological sabotage must comply with Appendix C to 10 C.F.R. Part 73.

Requirements for an ISFSI's physical protection plan are set forth in 10 C.F.R. § 73.51.

As pertinent here, § 73.51 requires as follows:

(5) A security organization with written procedures must be established. The security organization must include sufficient personnel per shift to provide for monitoring of detection systems and the conduct of surveillance, assessment, access control, and communications to assure adequate response. Members of the security organization must be trained, equipped, qualified, and requalified to perform assigned job duties in accordance with appendix B to part 73, sections I. A, (1)(a) and (b), B(1)(a), and the applicable portions of II.

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

In addition, section 3 ("Licensee Planning Base") of Appendix C to 10 C.F.R. Part 73 requires:

d. Law Enforcement Assistance -- A listing of available local law enforcement agencies and a description of their response capabilities and their criteria for response; and a discussion of working agreements or arrangements for communicating with these agencies.

2. Approval of the Cooperative Law Enforcement Agreement.

As discussed above, Utah Contentions Security-A, B and C assert that the Applicant fails to satisfy applicable Commission requirements pertaining to staffing, equipment, training and designation of an LLEA, in that the Cooperative Law Enforcement Agreement between the Bureau of Indian Affairs, the Skull Valley Band of Goshute Indians and Tooele County, authorizing the Tooele County sheriff's office to act as the designated LLEA on the Skull Valley Band reservation, had not approved by Tooele County as required by Utah Code Ann. § 11-3-5.

In its motion for summary disposition, PFS provided documentation showing that Tooele County has approved the August 1998 Cooperative Law Enforcement Agreement (CLEA), providing authority for the Tooele County sheriff's office to exercise law enforcement authority on the Skull Valley Band reservation. Specifically, PFS provided the following documents:

(1) an executed "Cooperative Law Enforcement Agreement (CLEA) Between Tooele County, the Bureau of Indian Affairs and the Skull Valley Band of Goshute Indians," Tooele County Corporation Contract No. 98-08-01, approved as to form on August 7, 1998 (Motion, Exh. 1 at 1-2);

(2) Resolution 98-13, "A Resolution Approving and Authorizing a Cooperative Law Enforcement Agreement (CLEA) Between Tooele County, the Bureau of Indian Affairs and the Skull Valley Band of Goshute Indians", executed by Teryl Hunsaker, Chairman of the Tooele County Legislative Body, on September 2, 1998 (*Id.* at 7-10); and

(3) "Minutes of the Regular Meeting of the Tooele County Board of Commissioners Held September 1, 1998," indicating that the County Board of Commissioners duly approved Resolution 98-13 (*Id.* at 11-12).¹⁰

¹⁰ PFS also provided a copy of the earlier "Cooperative Law Enforcement Agreement Between Tooele County, the Bureau of Indian Affairs and the Skull Valley Band of Goshute Indians," dated June 3, 1997 (Exhibit 1 at 3-6). An examination of this document reveals that it is substantially identical to the 1998 CLEA, except as to dates and payment amounts.

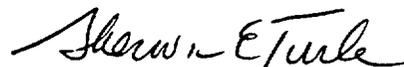
The documents provided by PFS in support of its Motion demonstrate, on their face, that Tooele County has properly approved the 1998 CLEA, providing the Tooele County sheriff's office with law enforcement authority on the Skull Valley Band reservation. Further, as set forth in the attached Affidavit of Charles E. Gaskin, the Staff has reviewed the Statement of Material Facts attached to the Applicant's Motion, and has determined that the facts presented in the Statement of Material Facts are correct (Gaskin Aff. at 2).

In sum, the Staff submits that Tooele County's purported failure to approve the 1997 CLEA is moot in light of the County's subsequent approval of the August 1998 agreement. Accordingly, the Staff submits that there no longer exists any genuine issue of material fact with respect to this issue, and the Applicant is entitled to a decision in its favor on these contentions, insofar as they concern the lack of an approved agreement providing authority for the Tooele County sheriff's office to act as the designated LLEA on the Skull Valley Band reservation.

CONCLUSION

For the reasons set forth above and in the attached Affidavit, the Staff supports the Applicant's motion for summary disposition on Contentions Utah Security-A, Security-B and Security-C, with respect to Tooele County's approval of an agreement providing the Tooele County sheriff's office with law enforcement authority on the Skull Valley Band reservation.

Respectfully submitted,



Sherwin E. Turk
Counsel for NRC Staff

Dated at Rockville, Maryland
this 1st day of July 1999

July 1, 1999

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)

PRIVATE FUEL STORAGE, L.L.C.)

(Independent Spent Fuel
Storage Installation))

) Docket No. 72-22-ISFSI
)
)
)

AFFIDAVIT OF CHARLES E. GASKIN
CONCERNING CONTENTIONS UTAH
SECURITY-A, SECURITY-B, AND SECURITY-C

I, Charles E. Gaskin, having first been duly sworn, do hereby state as follows:

1. My name is Charles E. Gaskin. I am employed as a Senior Safeguards Project Manager in the Division of Fuel Cycle Safety and Safeguards, Office of Nuclear Material Safety and Safeguards, U.S. Nuclear Regulatory Commission ("NRC"), in Washington, D.C. A statement of my professional qualifications is attached hereto.

2. This Affidavit is prepared in response to the "Applicant's Motion for Summary Disposition of Contentions Utah Security-A and Security-B, and Partial Summary Disposition of Contention Utah Security-C" ("Motion"), filed on June 11, 1999, by Private Fuel Storage L.L.C. ("Applicant" or "PFS"), and the "Statement of Material Facts on Which No Genuine Dispute Exists" ("Statement of Material Facts") attached thereto.

3. As part of my official responsibilities, I reviewed the adequacy of the Applicant's Physical Protection Plan, submitted with its application for an Independent Spent Fuel Storage Installation ("ISFSI") license, as revised on June 8, 1999, and am involved in preparing the related

section of the NRC Staff's Safety Evaluation Report ("SER"). In addition, I participated in preparing the "NRC Staff Position" on Contentions Utah Security-A, Security-B and Security-C, as set forth in the "NRC Staff's Statement of Its Position Concerning Group I Contentions," dated June 15, 1999 (at 23-25). The NRC Staff Position accurately represents my views concerning these three contentions.

4. Also as part of my official responsibilities, I have reviewed the Applicant's Motion and the attachments thereto, in which PFS seeks summary disposition of Contentions Utah Security-A and Security-B, and partial summary disposition of Contention Utah Security-C. On the basis of my review of the Applicant's physical protection plan, as revised, and the documents attached to the Applicant's Motion, I am satisfied that the Statement of Material Facts attached to the Applicant's Motion is correct.

5. I hereby certify that the foregoing is true and correct to the best of my knowledge, information and belief.

Charles E. Gaskin
Charles E. Gaskin

Subscribed and sworn to before me
this 1st day of July, 1999.

Circe E. Martin
Notary Public



My commission expires: March 1, 2003

Charles E. Gaskin
Senior Safeguards Project Manager
Division of Fuel Cycle Safety and Safeguards
Office of Nuclear Material Safety and Safeguards
U.S. Nuclear Regulatory Commission

I am a Senior Safeguards Project Manager in the Division of Fuel Cycle Safety and Safeguards. My 38 years have included service in the security and law enforcement fields with the U. S. Navy, the Central Intelligence Agency, the Department of Justice, and the Nuclear Regulatory Commission (NRC). In the capacity of a Senior Safeguards Project Manager, I review of the physical protection programs at NRC-licensed Category I facilities. I also have worked as a Plant Protection Analyst for the NRC with respect to nuclear power reactors licensed under 10 C.F.R. Part 50. In that capacity, I performed reviews and assessments of the adequacy of reactor site physical security plans developed to protect against radiological sabotage and theft. I was responsible for the 10 C.F.R. § 73.55 review for various reactors, including Diablo Canyon, Shoreham, Seabrook, and Clinch River.

Prior to commencing employment at the NRC, I provided technical operational surveillance support in law enforcement for the Drug Enforcement Administration (DEA). While in the position of project manager with that organization, I gained experience in the positive operational side of security. I developed specific surveillance equipment of various operations, conducted hardware feasibility studies, tested surveillance equipment, developed equipment for air and surface vehicles and worked with the international community in the application of technology to law enforcement. Also, I participated in establishing security regulations for the DEA. In addition, I processed wiretap evidence for court presentation, and testified in many drug cases where technical surveillance equipment was deployed.

While at the Central Intelligence Agency, I served as technical security officer with overseas experience in both physical and technical security. I developed and implemented security systems and programs. During this time I worked in many areas of the world.

While in the U.S. Navy, I was with the Naval Security Group and was involved in communications security.

I am a member of the Institute of Electrical and Electronic Engineers and participate in the writing of engineering standards for the industry. I am also a member of the American Society for Industrial Security and the American Standard Testing and Materials.

UNITED STATES OF AMERICA
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BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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PRIVATE FUEL STORAGE L.L.C.) Docket No. 72-22-ISFSI
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Fuel Storage Installation))

CERTIFICATE OF SERVICE

I hereby certify that copies of the "NRC STAFF'S RESPONSE TO APPLICANT'S MOTION FOR SUMMARY DISPOSITION OF UTAH SECURITY-A AND SECURITY-B, AND PARTIAL SUMMARY DISPOSITION OF UTAH SECURITY-C" 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 1st day of July, 1999:

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