

RAS 2976

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED 04/17/01
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ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

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

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

April 17, 2001

MEMORANDUM AND ORDER

(Granting Motion to Compel Response Filing Extension Motion)

Pending with the Licensing Board is the April 11, 2001 motion of intervenor Ohngo Gaudadeh Devia (OGD) for an extension of time to respond to a March 28, 2001 motion of applicant Private Fuel Storage, L.L.C. (PFS), to compel answers to PFS discovery requests filed on February 16, 2001. By timely responses dated April 16, 2001, PFS opposes and intervenor State of Utah supports the grant of this OGD extension. For the reasons set forth herein, we grant the extension motion.

In support of its extension request motion, OGD declares that the law firm of Steadman & Shepley, L.C., was only retained on April 11, 2001, to act as counsel; that former OGD counsel Joro Walker will transfer all records and other information to Steadman & Shepley, L.C., upon her return from vacation at the end of the week of April 14, 2001; and that with ten additional days it will be able to provide a proper response to the PFS motion to compel. According to OGD, this extension will not prejudice PFS and, in fact, will aid in OGD's efforts in promptly making available all proper answers and documents. In its April 16, 2001 response

supporting the OGD motion, the State also asserts that no prejudice will accrue in granting the motion because the extension will not impact on the existing schedule for this proceeding.

In its April 16, 2001 response, declaring that OGD has failed to establish the requisite "good cause" for its requested extension, PFS sets forth what it sees as the relevant background information, including the March 26, 2001 notice of withdrawal of then-OGD counsel Walker, effective April 1, 2001; the March 28, 2001 PFS motion to compel, which it asserts was filed after unsuccessfully attempts to resolve its differences with OGD; the Board's March 29, 2001 order setting April 4, 2001, as the deadline for responses to PFS's motion; and the April 11, 2001 notice of appearance by two members of the law firm of Steadman & Shepley, L.C., and motion filed on behalf of OGD seeking an extension of time. According to PFS, OGD knew before Ms. Walker's withdrawal of the deadline for filing its response. Further, PFS asserts that the representation of OGD's new counsel that it was awaiting Ms. Walker's return from an April 8-14, 2001 vacation is gainsaid by the fact that its counsel spoke with Ms. Walker in her office on April 10, 2001. Finally, PFS asserts that OGD's new counsel cannot claim unfamiliarity with this case as a basis for the extension because the firm has represented several OGD principals in a pending federal court challenge to the PFS lease agreement with intervenor Skull Valley Band of Goshute Indians.

It has been the Board members' experience that it is not unusual for a change in party counsel during a proceeding to engender some confusion. When the Board followed its standard practice for this proceeding in setting the April 4, 2001 deadline for the motion to compel response, see Licensing Board Memorandum and Order (Additional General Schedule Guidance and Informal Discovery Status Conference Schedule) (Aug. 20, 1998) at 4, which was memorialized in a March 29, 2001 order that was sent that date by e-mail to counsel for all the parties, it had been our hope that before her withdrawal became effective, OGD's counsel

would provide the Board with a brief motion outlining “good cause” for an extension, which presumably would be any problems entailed in the change of counsel, and at least a tentative date by which OGD expected to retain counsel and provide a response. Unfortunately, that did not happen. Instead, a week after the deadline, OGD’s new counsel filed the extension request that is now pending.

In these circumstances, and to the degree there appears to be no significant prejudice to PFS or impact on the overall schedule for this proceeding, we find a sufficient basis for the requested extension. OGD’s April 11, 2001 motion for extension of time to respond March 28, 2001 PFS motion to compel is thus granted in that OGD shall have up to and including Monday, April 23, 2001, to respond to that motion.

In taking this action, we provide several additional observations. First, notwithstanding the pendency of the PFS motion, in line with our general practice for this proceeding we expect that OGD’s new counsel and counsel for PFS will make some effort to discuss the resolution of this discovery dispute informally before the OGD response is filed. See LBP-98-7, 47 NRC 142, 245, 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). If this has not occurred already, given the controversy’s present posture, OGD counsel promptly should initiate that contact. Second, in familiarizing themselves with this proceeding, OGD counsel should be aware of the Board’s requirements regarding the representations about other parties’ positions that should be made in time extension and similar motions. See Licensing Board Memorandum and Order (Initial Prehearing Order) (Sept. 23, 1997) at 6-7. Finally, in their appearance statement OGD’s counsel have characterized their representation as “interim and emergency,” raising the spectre that OGD will be making another counsel change. The Board strongly recommends that if a further counsel change is necessary, OGD make that change as soon as

possible. The current schedule for this proceeding makes it apparent that over the upcoming months, the Board and the parties to this proceeding have a number of significant tasks before them. As a consequence, the circumstances surrounding any delay OGD might assert is attributable to an additional counsel change will be closely scrutinized by the Board.

It is so ORDERED.

FOR THE ATOMIC SAFETY*
AND LICENSING BOARD

/RA/

G. Paul Bollwerk, III
ADMINISTRATIVE JUDGE

Rockville, Maryland

April 17, 2001

* 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 of Goshute Indians, OGD, Confederated Tribes of the Goshute Reservation, Southern Utah Wilderness Alliance, and the State; and (3) the NRC staff.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LB MEMORANDUM AND ORDER (GRANTING MOTION TO COMPEL RESPONSE FILING EXTENSION MOTION) have been served upon the following persons by deposit in the U.S. mail, first class, or through NRC internal distribution.

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Docket No. 72-22-ISFSI
LB MEMORANDUM AND ORDER (GRANTING
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[Original signed by Evangeline S. Ngbea]

Office of the Secretary of the Commission

Dated at Rockville, Maryland,
this 17th day of April 2001