

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

LBP-02-01

ATOMIC SAFETY AND LICENSING BOARD

RAS 3752

DOCKETED 01/09/02

Before Administrative Judges:

SERVED 01/09/02

Michael C. Farrar, Chairman
Dr. Jerry R. Kline
Dr. Peter S. Lam

In the Matter of

PRIVATE FUEL STORAGE, LLC

(Independent Spent Fuel
Storage Installation)

Docket No. 72-22-ISFSI

ASLBP No. 97-732-02-ISFSI

January 9, 2002

MEMORANDUM AND ORDER

(Ruling on Applicant's Motion for Summary Disposition
of Part B of "Contention Utah L, Geotechnical")

By recently denying the motion of the applicant, Private Fuel Storage, LLC (PFS), for summary disposition of "Part A" of Contention Utah L, we allowed the intervenor State of Utah to continue to pursue a number of geotechnical concerns about the spent nuclear fuel storage facility that PFS proposes to build in Skull Valley, Utah, 50 miles southwest of Salt Lake City. LBP-01-39, 54 NRC ____ (Dec. 26, 2001). We now address another aspect of the geotechnical controversy. It comes to us via the applicant's motion for summary disposition of Contention Utah L's "Part B", which has just become ready for decision. See id. at ____ (slip op. at 37).

In view of (1) our desire to provide the parties early notice of what will be involved in the upcoming April hearing, (2) the extent to which we expressed ourselves in LBP-01-39, and (3) the result we reach, we do not think it necessary to provide the type of detailed discussion set forth in LBP-01-39. The abbreviated reasons given below suffice to show why we must deny the applicant's motion, thus sending the Part B issues to hearing with those in Part A.

1. The Setting. In LBP-01-39, we provided background information about a number of subjects -- the proposed facility, the earlier stages of this proceeding, and the nature of Part A of Contention Utah L. We discussed as well the related Contention Utah QQ, and admitted it into the proceeding.

We need not repeat that background here. All that need be said now about the Part A contention is that, with Utah QQ, it reflected the State's position that, for a number of reasons, the applicant had not demonstrated that its proposed facility was adequately designed to protect against the risk of ground motion resulting from possible earthquakes.

As we noted in LBP-01-39 (*id.* at ____, slip op. at 3 n. 6), Part B presents a related issue, albeit in somewhat different form. It was triggered when, in the course of pursuing its application, PFS sought and obtained from the NRC Staff an exemption from one part of the applicable regulations. As specifically authorized by the Commission itself (CLI-01-12, 53 NRC 459, *aff'g* LBP-01-03, 54 NRC 84 (2001)), the State has presented to us for resolution its challenge to the grant of that exemption, in the form of Part B of its geotechnical contention.

Thus, the difference between the way Part A and Part B of Contention L are framed might be stated as follows. Part A challenges the applicant's efforts to show that its facility design generally meets the requirements of the NRC's rules and regulations regarding seismic risk. Part B challenges the applicant's efforts to rely upon an exemption from meeting one part of those rules and regulations and to substitute another method for demonstrating that the potential seismic risk is being properly addressed.

After the parties conducted most of their discovery on the issue, the applicant moved on November 9, 2001, for summary disposition in its favor, urging that there remains for Part B no genuine dispute of material fact. The staff responded on December 7, defending its grant of the exemption and urging that the matter can be summarily resolved in the applicant's favor.

The State too filed a response to the applicant's motion on December 7. It later filed two more documents: (1) on December 17, a reply to the staff's position and (2) on December 21, a supplement we had authorized following our November 21 resolution (unpublished) of a lingering discovery-related dispute. As might be expected, in all these pleadings the State argues that, because of ample dispute over material facts, it is entitled to proceed to a hearing on its challenge to the exemption, rather than to have it rejected summarily.

2. The Law. We set out at some length in LBP-01-39 the legal principles guiding action on summary disposition motions. Most of those principles are based on the analogous rules governing summary judgment in federal courts. 54 NRC at ___ - ___ (slip op. at 15-19). We need repeat here only that even where there is agreement on baseline facts, disagreements among competing experts about opinions based on those facts also constitute "factual disputes" precluding summary action. In that regard, we pointed to federal court precedent to the effect that it is not appropriate, in ruling on summary judgment, "to untangle the expert affidavits and decide 'which experts are more correct'." *Id.* at ___ (slip op. at 16-17).

We would add only that an oft-quoted federal district court opinion expands on what we touched on in LBP-01-39 (*id.* at ___, slip op. at 18-19). We indicated there that summary judgment will rarely be appropriate on complex issues; the court added that ruling summarily on complex matters with "ever-lurking issues of fact" can prove to be a "treacherous shortcut" that avoids what is clearly needed, "a plenary trial where the proof can be fully developed, questions answered, issues clearly focused and facts definitively found." Petition of Bloomfield Steamship Co., 298 F. Supp. 1239, 1241-42 (S.D.N.Y., 1969).

3. The Arguments. Until recently, the Commission's rules on seismic design required applicants for all facilities to perform a "deterministic" analysis. See 10 C.F.R. Part 100, Appendix A, made applicable to the proposed PFS facility by 10 C.F.R. § 72.102(b); see also 10 C.F.R. § 72.102(f)(1). Since 1997, however, the Commission's rules have allowed

applicants for early site permits for new nuclear power plants, and certain others, to perform a “probabilistic seismic hazard analysis.” 10 C.F.R. §100.23(a), (d)(1). That change has not yet been adopted, however, for facilities of the type proposed here, although the staff has proposed, and the Commission is considering, doing so in rulemaking plans which are under active consideration. See SECY-98-126 (June 4, 1998) and SECY-01-178 (Sept. 26, 2001).

Part of a probabilistic approach involves selection of the recurrence interval of the ground motion to be taken into account, which under the initial rulemaking plan cited above would have focused on either a 10,000 year return period or a less rigorous 1,000 year return period, depending on the safety circumstances. For present purposes, we need not detail each party’s reasoning in support of its position on this subject or trace the course and status of the rulemaking plans. Instead, we note only that, in seeking an exemption that would allow it to incorporate a probabilistic analysis, the applicant initially sought to use a 1,000 year period; for its part, the State urged that the 10,000 year period be employed. In granting the exemption, the NRC Staff settled on a 2,000 year period.

In the final analysis, any applicant must carry the burden of demonstrating that its proposed approach and design provides an appropriate level of earthquake protection. So too here. See CLI-01-12, 53 NRC at 472. In that effort, PFS has provided considerable support for its position in its motion for summary disposition and accompanying documentation. Not surprisingly, the staff, having granted the exemption, supports summary action granting the applicant’s motion and rejecting the State’s challenge.

Some of the staff’s documentation touches on its regulatory approach in granting the exemption. Of course, in most Board proceedings on safety matters, all that is before us is the adequacy of the applicant’s proposal (see preceding paragraph); indeed, there is ample Commission precedent that our proceedings are not to examine the suitability of the staff’s action in reviewing an applicant’s proposal and measuring it against Commission rules and

regulations. See, for example, Curators of the University of Missouri, CLI-95-1, 41 NRC 71, 121-22, reconsideration denied, CLI-95-8, 41 NRC 386, 395-96 (1995), cited when we admitted this issue into the proceeding a year ago (LBP-01-03, 53 NRC 84, 97 (2001)).

Here, however, we are faced with an atypical matter which -- with the Commission's explicit permission (CLI-01-12, 53 NRC at 472-73) -- focuses squarely not only on the reasons for the applicant's request for the exemption from the Commission's usual rules, but also on the somewhat different staff justification for granting the exemption. Accordingly, the merit of the staff's action is part of the controversy and is to be duly reviewed here.

In that regard, the staff refers to its Safety Evaluation Report in defending the grant of the exemption, and argues that its action has removed any material dispute about the issue. The staff stops short, however, of endorsing everything the applicant now puts forward, and in fact takes some pains to indicate where it differs from the applicant's appraisal of its case.

For its part, the State has put forward contrary opinion, and has done so in the way a party opposing summary rejection of its position is supposed to. That is, it set out in great detail wherein it differed with the applicant's assertedly undisputed facts, and pointed to other disputed facts; provided affidavits of its experts to support its factual position and its scientific theories; and wove those supporting materials into a cohesive exegesis of its position.¹

4. The Result. As occurred with Part A of the geotechnical contention, and as suggested by the foregoing, we are faced once again with a battle of the experts: the applicant's and staff's saying that sufficient conservatism has been built into the proposed

¹Put another way, in the face of initially compelling presentations by the other parties, the State did "not rest upon the mere allegations or denials" previously provided but submitted "specific facts," opinions and arguments to cast doubt on their positions. 10 C.F.R. § 2.749(b). For example, the State has, among other things, pointed to opinions of PFS witnesses that it urges are not based on personal knowledge or are outside their area of expertise; conducted its own analysis of cask stability; drawn upon actual earthquake experience; and challenged PFS's ground motion bounding conditions.

approach, the State's saying not. Both sides have marshaled substantial support for their positions, not only in their lengthy briefs but in the statements of their experts and in their detailed construction of the scientific support for their case.

Having reviewed all the documentary materials, we are in no position at this time to say which of the expert viewpoints will prevail. And that is the point. Summary disposition is reserved for those cases where there is no genuine dispute over the basic and ultimate material facts, including those dependent upon expert opinion. Just recently, we were able to resolve part of a much simpler issue about this facility on that basis. LBP-01-40, 54 NRC ____ (Dec. 28, 2001). Here, the disputes are fundamental and extensive. Notwithstanding the sincerity of each party's belief that its view is correct, their genuine disagreements on serious matters can, for the reasons we discussed at length in LBP-01-39, be resolved only at hearing. 54 NRC at ____ (slip op. at 15-19, 26, 36).²

This result should not be surprising. By its very nature, the grant of an exemption from the usual rules, to a first-of-its-kind facility, might be expected to trigger dispute among experts, even where, as here, some guidance can be taken from analogous Commission policy.

This leaves to address only the suggestion of the applicant and staff that the State should not be allowed, based on its initial pleading, to press any of its current assertions about the alleged inadequacies in the facility's proposed design.³ As the parties recognize, at the time

² In line with Commission thinking (see id. at ____, slip op. at 18-19), we choose not to devote any additional resources to the exposition here of the specific nature of the many factual/opinion disputes that emerge from and run through the Part B record. Whatever may be required when we grant summary disposition, thereby issuing our last word on an issue, far less will usually be in order when we decline to take such action, particularly when the contention involves "complex factual/opinion disputes that patently can be resolved only in a hearing." Ibid.

³ As the applicant and staff seem to see it, the State's pleadings would embrace challenges to the adequacy of the standards against which the facility would be designed, but not to the adequacy of the proposed design to meet those standards. That issue may have been mooted by our rulings in LBP-01-39, but in any event we treat it again here.

the papers now before us were filed, similar questions were pending about Contention Utah QQ. We have since resolved those questions in the State's favor in LBP-01-39, where we spoke about the modicum of flexibility that must be accorded both sides as a legitimate controversy progresses, more facts and insights are developed, and the applicant adopts "new approaches to anti-seismic design and construction." *Id.* at ___ (slip op. at 26-27, 30-31). The analogous questions now presented must be resolved the same way.

In that regard, the applicant's initial deterministic approach fell short here, so it sought an exemption to proceed probabilistically. We think that this allowable mid-course substantive correction by the applicant was more significant than the adjustment it challenges the State for adopting, *i.e.*, making explicit what was at least implicit in the State's initial pleading. If more authorization for the State's approach is needed, we need point again only to the inherent interconnectedness of all these issues -- made all the more apparent by the exemption request and its dependence on design features (*see* Applicant's Motion, pp. 3-4) -- to confirm our prior rulings. *Id.* at ___ (slip op. at 27).

5. The Conclusion. As we observed in LBP-01-39, the test now is not whether we think the State will prevail at the hearing. It is, rather, whether "the State's experts have presented a serious, documented, response to the applicant's claims, sufficiently plausible to create doubt about the outcome" (*id.* at ___, slip op. at 26),⁴ doubt of the type that under the applicable summary judgment principles can be resolved only at a hearing (*id.* at ___, ___, slip op. at 17, 36). As the preceding section reveals, the State has met that test, and we -- faced here again with genuine disputes about material facts -- must again reject the applicant's invitation to rule in its favor summarily.

⁴ One aspect of plausibility, of course, can involve the gatekeeping factors discussed in Daubert v. Merrill Dow Pharmaceuticals, 509 US 579 (1993) and Kumho Tire v. Carmichael, 526 US 136 (1999). See LBP-01-39, 54 NRC at ___ (slip op. at 17 n. 19).

Accordingly, Part B of Contention Utah L will be resolved, like the other pending seismic-related issues, not summarily on documents but after full exposition at a hearing. The parties should, therefore, include Part B matters in the "unified geotechnical contention" being jointly drafted to aid preparation for that hearing. See LBP-01-39, 54 NRC at ____ (slip op. at 33).⁵

For the foregoing reasons, it is this 9th day of January, 2002, ORDERED that:

1. The applicant's motion for summary disposition of Part B of Contention Utah L is DENIED; and
2. The parties are DIRECTED to include Part B issues in preparing the "unified geotechnical contention" document called for in LBP-01-39.

THE ATOMIC SAFETY
AND LICENSING BOARD

/RA/

Michael C. Farrar
ADMINISTRATIVE JUDGE

/RA/

Jerry R. Kline
ADMINISTRATIVE JUDGE

/RA/

Peter S. Lam
ADMINISTRATIVE JUDGE

Rockville, Maryland
January 9, 2002

⁵ Given the target of January 17th we had set for its submission, one of the parties may present that jointly prepared document at the prehearing conference to be held on that date if it is not possible to send it to us electronically the previous evening.

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 of Utah; 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 (RULING ON APPLICANT'S MOTION FOR SUMMARY DISPOSITION OF PART B OF "CONTENTION UTAH L, GEOTECHNICAL") (LBP-02-01) 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
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UTAH L, GEOTECHNICAL") (LBP-02-01)

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[Original signed by Evangeline S. Ngbea]

Office of the Secretary of the Commission

Dated at Rockville, Maryland,
this 9th day of January 2002