

**RAS 3939**

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION  
ATOMIC SAFETY AND LICENSING BOARD

LBP-02-07

**DOCKETED 02/22/02**

**SERVED 02/22/02**

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

February 22, 2002

MEMORANDUM AND ORDER  
(Admitting Contention Security-J)

Previously, in a June 14, 2001 memorandum and order, LBP-01-20, 53 NRC 565 (2001), this Licensing Board indicated it was deferring ruling on the admission of late-filed contention Security-J, Law Enforcement.<sup>1</sup> With this contention, intervenor State of Utah (State) asserts that recently adopted Utah legislation prohibiting any local government entity from entering into an arrangement to provide municipal services (including law enforcement assistance) to an independent spent fuel storage installation (ISFSI) renders applicant Private Fuel Storage, L.L.C., (PFS) unable to comply with various NRC regulatory provisions, including 10 C.F.R. § 73.51(d)(6) that mandates a “[d]ocumented liaison with a designated response force or local law enforcement agency (LLEA) must be established to permit timely response to unauthorized penetration or activities” relative to the proposed PFS 10 C.F.R. Part 72 Skull

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<sup>1</sup> As has been noted elsewhere, this Board chaired by Judge Bollwerk retains jurisdiction over contention Security-J (as well as matters concerning contentions Utah E/Confederated Tribes F, Financial Assurance, and contention Utah S, Decommissioning) while the residuum of the case rests with a separately designated Licensing Board chaired by Judge Farrar. See LBP-01-39, 54 NRC \_\_, \_\_ n.3 (slip op. at 2 n.3) (Dec. 26, 2001).

Valley, Utah ISFSI.<sup>2</sup> Although the Board indicated in that decision that the contention appears to meet the standards for late-filed admission under 10 C.F.R. § 2.714(a), (b), we nonetheless decided that deferring a ruling on admissibility was a more judicious use of Board and party resources. The basis for this deferral was a pending federal district court case filed by PFS and intervenor Skull Valley Band of Goshute Indians (Skull Valley Band) contesting the constitutional validity of this and other Utah legislation that PFS indicated would have the impact of foreclosing operation of its proposed ISFSI. In so doing, however, we directed that the parties to the federal court litigation -- PFS, the Skull Valley Band, and the State -- provide us with joint litigation status reports at forty-five day intervals. See id. at 570-71.

Since June, we have received a series of six status reports, the most recent dated February 11, 2002. In the February 11 report, the parties indicate that the current schedule calls for an April 11, 2002 oral argument in federal district court on a variety of pending motions, including a State motion for judgment on the pleadings and PFS and Skull Valley Band motions for summary judgment. And relative to this pending matter, the joint report indicates that the State believes that the Board should continue to defer acting on contention Security-J, while PFS requests that the Board rule on the contention's admissibility. See Sixth Joint Report on the Status of Federal Lawsuit Skull Valley Band v. Leavitt (Feb. 11, 2001) at 5. Additionally,

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<sup>2</sup> Contention Security-J provides:

The Applicant's Physical Security Plan does not comply with 10 CFR Part 73 because the Applicant does not have valid documented liaison with a designated local law enforcement authority (LLEA), and redundant communications between onsite security force members and the LLEA, to provide timely response to unauthorized penetrations at the PFS facility. See 10 CFR §§ 72.180; 73.51(d)(6), (8) and (12); and Part 73, Appendix C.

during a January 17, 2002 prehearing conference, PFS counsel declared that, if admitted, PFS intended to seek summary disposition regarding contention Security-J. See Tr. at 2842.

In this instance, the Board continues to believe that, as a matter of comity and efficiency, it is preferable to allow the issue of the constitutional validity of the Utah statute in question in connection with contention Security-J to be addressed initially in the superior judicial forum of the federal district court. Nonetheless, while oral argument on a variety of potentially dispositive motions is scheduled for early April, the federal court's schedule for addressing the matters pending before it obviously is its own (and unknown at this point). On the other hand, the schedule for this proceeding (which was originally established by this Board and is being carried forward by the Licensing Board chaired by Judge Farrar) looks toward the resolution of all currently admitted issues by September 2002.<sup>3</sup> Under the circumstances, we now find the best course is to admit contention Security-J, for the reasons previously outlined in LBP-02-20, 53 NRC at 570 & n.3,<sup>4</sup> and establish a schedule for any PFS dispositive motion and responses.

In this regard, we are aware that the parties currently are preparing for evidentiary hearings that begin in early April 2002 and potentially could last through mid-May 2002. Given the PFS representations at the January status conference and in the most recent status report

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<sup>3</sup> In addition to contention Security-J, the only other issue on which the question of admissibility is pending is the very recently submitted State request to admit late-filed contention Utah SS, Revised Cost-Benefit Analysis, which challenges purported new cost-benefit assumptions used in the staff's December 2001 final environmental impact statement. This Board, of course, expresses no opinion on the admissibility of that late-filed issue statement, which is before the Licensing Board chaired by Judge Farrar.

<sup>4</sup> Although the reasons why contention Security-J is admissible relative to both the five late-filing factors in section 2.714(a)(1) and the substantive contention admission criteria of section 2.714(b) are clear from the discussion referenced above, we note that the contention clearly is sufficient to establish a genuine material dispute that warrants further inquiry in that, as the staff observed, see NRC Staff Response to [State] Request for Admission of Late-Filed Contention Utah Security-J (Apr. 27, 2001) at 9, unless declared pre-empted by federal law or otherwise unconstitutional, it would call into serious question the degree to which the existing PFS security plan complies with section 73.51 and 10 C.F.R. Part 73, App. C.

that it is ready to move forward on this contention, we anticipate PFS may well be able to lodge its dispositive motion before the hearings begin; however, with the present schedule the State and the NRC staff may require more than the twenty days generally provided by agency rules for their responses. As a consequence, we will afford the parties the opportunity in the first instance to arrive at a mutual agreement on a briefing schedule for the PFS motion. The only constraint we place upon their discussions is that all filings, including any State reply to a staff response supporting a PFS dispositive motion, must be filed no later than fifteen days after the filing of the parties' final responsive findings of fact and conclusions of law relative to the matters being heard in the upcoming evidentiary hearings.<sup>5</sup> Further, absent permission of the Board, the PFS dispositive motion and any responsive pleadings (exclusive of any supporting statements of undisputed/disputed material facts and exhibits) shall not exceed twenty pages in length.

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<sup>5</sup> If, in response to the PFS dispositive motion, the State intends to lodge a cross-motion for summary disposition as well, the timing for PFS and staff responses to that motion likewise should be factored into this time frame.

The interested parties should provide us with a joint report outlining their agreement regarding a dispositive motion briefing schedule for contention Security-J on or before Friday, March 1, 2002. Additionally, the interested parties should continue to provide joint status reports regarding the district court litigation, the next of which is due on or before Thursday, March 28, 2002.

It is so ORDERED.

THE ATOMIC SAFETY  
AND LICENSING BOARD<sup>6</sup>

*/RA/*

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G. Paul Bollwerk, III  
ADMINISTRATIVE JUDGE

*/RA/*

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Dr. Jerry Kline  
ADMINISTRATIVE JUDGE

*/RA/*

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Dr. Peter S. Lam  
ADMINISTRATIVE JUDGE

Rockville, Maryland

February 22, 2002

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<sup>6</sup> 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, Ohngo Gaudadeh Devia, Confederated Tribes of the Goshute Reservation, Southern Utah Wilderness Alliance, and the State; and (3) the staff.

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

In the Matter of )  
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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 (ADMITTING CONTENTION SECURITY-J) (LBP-02-07) 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  
(ADMITTING CONTENTION  
SECURITY-J) (LBP-02-07)

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[Original signed by Adria T. Byrdsong]

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Office of the Secretary of the Commission

Dated at Rockville, Maryland,  
this 22<sup>nd</sup> day of February 2002