

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 "STATE OF UTAH'S MOTION
FOR PRODUCTION OF COMMISSION ORDER RELATING
TO SAFEGUARDS UNDER A PROTECTIVE ORDER
AND FOR OPPORTUNITY TO FILE CONTENTIONS"

INTRODUCTION

Pursuant to 10 C.F.R. § 2.730(c), the NRC Staff ("Staff") hereby responds to the "State of Utah's Motion for Production of Commission Order Relating to Safeguards Under A Protective Order and for Opportunity to File Contentions" ("Motion"), dated November 7, 2002.¹ Therein, the State of Utah ("State") requests (a) that this Licensing Board direct the Executive Director for Operations ("EDO") to produce to the State a copy of Attachment 2 to the Order that was issued on October 16, 2002, to independent spent fuel storage installation ("ISFSI") specific licensees who currently store spent nuclear fuel ("SNF") or are expected to do so in the near term (Motion at 1);² (b) that the State be allowed to file contentions concerning Attachment 2 to that Order within 45 days after the State's receipt thereof (*Id.* at 2); and (c) that the State be allowed to review

¹ Although styled as a request for issuance of a "Commission Order," the State's Motion actually seeks the issuance of an Order by the Licensing Board in this proceeding.

² See "Order Modifying Licenses (Effective Immediately)," EA-02-104, 67 Fed. Reg. 65152 (Oct. 23, 2002) (directed to "all 10 CFR Part 72 licensees who currently store or have near term plans to store spent fuel in an ISFSI under the specific license provisions of 10 CFR Part 72"). See *also*, "Order Modifying Licenses (Effective Immediately), EA-02-104, 67 Fed. Reg. 65150 (Oct. 23, 2002) (directed to "all 10 CFR Part 50 licensees who currently store or have near term plans to store spent fuel in an ISFSI under the general license provisions of 10 CFR Part 72").

Attachment 2 to that Order “to determine whether it needs to take action on Contention Utah RR, Suicide Mission Terrorism” (*Id.* at 3). For the reasons set forth below, the Staff submits that the State’s Motion should be denied.

BACKGROUND

This proceeding concerns the application submitted by Private Fuel Storage, L.L.C., (“Applicant” or “PFS”) for a license to construct and operate an independent spent fuel storage installation (“ISFSI”) on the Reservation of the Skull Valley Band of Goshute Indians, a Federally-recognized Indian Tribe. As part of this proceeding, nine contentions were filed by the State in 1998 concerning the adequacy of the Applicant’s physical security plan, each of which was resolved in calendar years 1999 or 2000 by the Atomic Safety and Licensing Board chaired by Chief Administrative Judge G. Paul Bollwerk (the “Bollwerk Licensing Board”).³

On April 13, 2001, the State submitted late-filed contention Security-J (“Law Enforcement”), in which it asserted that the Applicant’s physical security plan fails to satisfy NRC regulatory requirements, in that recent enactments of Utah law preclude the Tooele County Sheriff’s Office from serving as the designated local law enforcement agency (“LLEA”) under that plan. On October 10, 2001, the State filed a motion to admit late-filed Contention Utah RR (“Suicide Mission Terrorism and Sabotage”), in which it raised safety and environmental challenges to the licensing of the PFS Facility, based on the September 11, 2001 terrorist attacks.

Contentions Utah Security-J and Utah RR were both resolved by the Bollwerk Licensing Board. On December 13, 2001, the Bollwerk Licensing Board rejected Contention Utah RR, on the

³ See *Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation)*, LBP-00-05, 51 NRC 64 (2000) (dismissing Contention Utah Security-C for want of prosecution); LBP-99-31, 50 NRC 147 (1999) (granting summary disposition of Contentions Security-A and Security-B, and partial summary disposition of Contention Security-C); LBP-99-7, 49 NRC 124 (1999) (denying the State’s request to amend Contentions Security-A, B and C); *and* LBP-98-13, 47 NRC 360 (1998) (ruling on Contentions Security-A through Security-I), *as amended in* LBP-98-17, 48 NRC 69 (1999) (admitting, in part, Contentions Security-A, B, and C).

grounds that it constituted an impermissible challenge to the Commission's existing regulatory requirements governing physical security for an ISFSI. *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-01-37, 54 NRC 476 (2001).⁴ The Board then referred its ruling to the Commission, observing as follows:

[A]s all the parties have noted, the Commission currently is considering whether, and to what degree, the agency's regulatory regime, including facility physical security requirements, should be changed to reflect what transpired on that fateful day. See also Statement of Dr. Richard A. Meserve, Chairman, Submitted by the United States Nuclear Regulatory Comm'n to the Subcomm. on Oversight and Investigations of the House Comm. on Energy and Commerce Concerning Nuclear Power Plant Security at 2-5 (Dec. 5, 2001) (ADAMS Access. No. ML013390509) (as part of [a] top-to-bottom physical security review in wake of September 11, 2001 events, Commission is reexamining [the] design basis threat and will modify it, as appropriate). In this light, this ruling seems to be one particularly suited for early review by the Commission and, accordingly, we take the step of referring this decision regarding the admissibility of late-filed contention Utah RR for its consideration.

Id. at 487-88. On February 6, 2002, the Commission accepted the Licensing Board's referral of its decision on Contention Utah RR, and that ruling is now pending before the Commission. See *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-02-03, 55 NRC 155 (2002).

On October 15, 2002, the Bollwerk Licensing Board granted the Applicant's motion for summary disposition of Contention Utah Security-J,⁵ based on a decision by the U.S. District Court

⁴ In addition, the Board found that "the State's attempt to expand the consideration of sabotage/terrorism beyond September 11-type events to (1) other sabotage/terrorism scenarios, such as truck bombs, and (2) transportation issues, would be inadmissible as lacking a factual basis and outside the scope of this proceeding, respectively." LBP-01-37, 54 NRC at 487 n.3.

⁵ *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-02-20, 56 NRC ____ (Oct. 15, 2002) (slip op.). Contention Security-J had been admitted by the Bollwerk Licensing Board on February 22, 2002. See *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-02-07, 55 NRC 167 (2002).

for the District of Utah declaring the State laws to be invalid under the Supremacy Clause of the U.S. Constitution and the doctrine of Federal preemption.⁶

On October 16, 2002, the Commission issued two Orders modifying the licenses of existing Part 50 and Part 72 licensees “who currently store or have near term plans to store spent fuel in an ISFSI.” See EA-02-104, 67 Fed. Reg. 65152 (Oct. 23, 2002) (directed to holders of Part 72 specific licenses), and 67 Fed. Reg. 65150 (Oct. 23, 2002) (directed to holders of Part 72 general licenses). Attachment 2 to those Orders set forth specific interim requirements for those facilities, and was withheld from public disclosure as Safeguards Information. 67 Fed. Reg. at 65152 n.1.

In its Motion of November 7, 2002, the State seeks to obtain a copy of the Safeguards Information contained in Attachment 2 to the Order of October 2002 issued to existing Part 72 specific licensees, for the purpose of framing new contentions and/or taking some undefined further “action” with respect to Contention Utah RR, now pending before the Commission.

DISCUSSION

A. The Orders of October 2002 Were Not Issued to PFS and Therefore Are Not Relevant in This Proceeding.

In its Motion, the State observes that the Commission’s Orders of October 2002 “imposed certain interim safeguard and security measures on ISFSI licensees,” and that these measures “are considered safeguards information” and were therefore withheld from public disclosure (Motion at 1). The State further observes that “all specific licenses issued pursuant to 10 CFR § 72.40 to identified licensees were deemed modified to include the requirements identified in attachment 2 of the Order (*Id.* at 2). Significantly, the State recognizes that PFS “is not subject to the Commission’s October 23, 2002 Order,” but it asserts that “if licensed, PFS would be issued a specific license pursuant to 10 CFR § 72.40” (*Id.*), and that PFS might then become a licensee with

⁶ See *Skull Valley Band of Goshute Indians v. Leavitt*, Case No. 2:01-CV-270C (D. Utah, July 30, 2002) (slip op.).

“near-term” plans to store SNF -- although it is not known whether the requirements in the October 2002 Order would be imposed on PFS. The State asserts:

A site specific ISFSI licensing decision in the PFS matter could occur shortly, thus changing PFS's status from applicant to licensee who has near term plans to store spent fuel. It is unknown whether the Commission will impose Attachment 2 of its Order as a license condition on any license issued to PFS as a licensee.

Id.; emphasis added.

As demonstrated by these statements in the State's Motion, the Orders issued in October 2002 were not issued to PFS -- and it is not known at present whether the actions required in those Orders, or perhaps some other requirements, will be imposed on PFS. However, unless and until the requirements contained in the Orders of October 2002 are imposed on PFS, they are simply not relevant to any determination that the Licensing Board or Commission must make in this proceeding concerning the PFS Facility.⁷

In addition, there is no basis for the State's assertion that the issuance of a license to PFS would change its “status from applicant to licensee who has near term plans to store spent fuel” (Motion at 2; emphasis added). The Orders of October 2002 were not directed to PFS, in that the PFS Facility is not considered to be a facility that plans to store spent fuel in “the near term.” Further, the State provides no basis to believe that PFS would become a “near term” recipient of spent fuel upon the issuance of a license -- and indeed, various other procedural steps will have to occur before PFS would fall within that category.⁸

⁷ In the event that additional requirements are imposed on the PFS Facility by Order, additional hearing rights would then be afforded to the State or other interested persons in connection therewith. See, e.g., 67 Fed. Reg. at 65153.

⁸ For example, the Bureau of Indian Affairs must provide final approval of the PFS lease; the Bureau of Land Management must approve the PFS right-of-way request; and PFS must satisfy certain financial assurance license conditions before it may commence construction of the facility. In addition, construction of the Facility and rail line is likely to require a period of at least 18 months, before PFS could receive any shipments of spent nuclear fuel.

In this regard, the State fails to observe that the requirements imposed by the Orders of October 2002 are identified as “prudent, interim measures,” that are intended to address “the current threat environment.” 67 Fed. Reg. at 65152-53; emphasis added. As the Commission stated, these interim requirements are to “remain in effect pending notification from the Commission that a significant change in the threat environment has occurred, or the Commission determines that other changes are needed.” *Id.* at 65153. Thus, while the Commission determined that certain requirements are required at facilities that currently store spent fuel or plan to do so in the near term, any additional requirements that may be imposed on the PFS Facility could differ from the interim requirements that were imposed on existing licensees and near term recipients of SNF under the Orders of October 2002. Further, the nature of any additional requirements that may be imposed on the PFS Facility will be determined by the Commission in the future, giving due consideration to future developments concerning the threat environment and the Commission’s generic review of its physical protection regulations pertaining to ISFSIs.⁹

In sum, inasmuch as it is not known whether the requirements contained in Attachment 2 to the Orders of October 2002 will be applied to the PFS Facility, those requirements are not relevant here, and disclosure to the State of the safeguards information contained in Attachment 2 to that Order would be improper.

B. The State Has Not Provided A Valid Reason to Obtain the Safeguards Information Contained in Attachment 2 to the Order of October 2002.

The disclosure of safeguards information is governed by 10 C.F.R. § 73.21. In accordance therewith, access to safeguards information is restricted as follows:

⁹ Unless and until the Commission determines to apply any additional requirements to the PFS Facility, the facility continues to be governed by the physical protection requirements set forth in 10 C.F.R. Part 72, Subpart H, and 10 C.F.R. § 73.51. Those regulations are not subject to attack in this proceeding. See *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-01-37, 54 NRC 476 (2001); see also, 10 C.F.R. § 2.758.

(c) *Access to Safeguards Information.* (1) Except as the Commission may otherwise authorize, no person may have access to Safeguards Information unless the person has an established "need to know" for the information and is:

(i) An employee, agent, or contractor of an applicant, a licensee, the Commission, or the United States Government. However, an individual to be authorized access to Safeguards Information by a nuclear power reactor applicant or licensee must undergo a Federal Bureau of Investigation criminal history check to the extent required by 10 CFR 73.57;

(ii) A member of a duly authorized committee of the Congress;

(iii) The Governor of a State or designated representatives;

(iv) A representative of the International Atomic Energy Agency (IAEA) engaged in activities associated with the U.S./IAEA Safeguards Agreement who has been certified by the NRC;

(v) A member of a state or local law enforcement authority that is responsible for responding to requests for assistance during safeguards emergencies; or

(vi) An individual to whom disclosure is ordered pursuant to §2.744(e) of this chapter.

(2) Except as the Commission may otherwise authorize, no person may disclose Safeguards Information to any other person except as set forth in paragraph (c)(1) of this section.

Id.; emphasis added.

As set forth above, the Orders of October 2002 have not been applied to the PFS Facility, and it is unknown at present whether those requirements will be imposed on that facility in the future. Accordingly, in the absence of any demonstrated link to the facility, the State has failed to show a "need to know" the safeguards information contained in Attachment 2 to the Commission's Orders of October 2002. In these circumstances, it would be improper to disclose such safeguards information to the State.

The State cites two reasons in support of its request that it be given the safeguards information contained in Attachment 2 to the Commission's Order of October 2002: It asserts (a) that it requires this information in order to "evaluate whether or not it needs to file any contentions in the PFS proceeding on the adequacy of PFS's security plan or whether PFS could comply with the requirements" in Attachment 2 to the Order (Motion at 2), and (2) that it "would like to review Attachment 2 to determine whether it needs to take action on Contention Utah RR, Suicide Mission Terrorism" (*Id.* at 2-3). The State asserts that "[t]o deny the State the opportunity to file contentions on PFS's Security Plan or to modify Utah RR after reviewing the Commission's order in its entirety would impair the State's procedural rights to bring safeguards concerns before the Licensing Board" (*Id.* at 3).

These reasons fail to support the State's request for disclosure of the safeguards information contained in Attachment 2 to the Order of October 2002. First, the State's request that it be given this information in order to allow it to frame additional contentions fails to provide a valid basis for compelling the disclosure of safeguards information to the State. In this regard, it is well established that discovery is not permissible for the purpose of framing new contentions. See, e.g., *Baltimore Gas & Electric Co.* (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), CLI-98-25, 48 NRC 325, 351-52 (1998); *Northern States Power Co.* (Prairie Island Nuclear Generating Plant, Units 1 and 2), ALAB-107, 6 AEC 188, 192, *aff'd*, CLI-73-12, 6 AEC 241 (1973), *aff'd sub nom BPI v. AEC*, 502 F.2d 424, 428 (D.C. Cir. 1974); see also, *Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), LBP-99-27, 50 NRC 45, 55 (1999) (the scope of discovery is confined to contentions that have been admitted).

To be sure, the Licensing Board has previously ordered the disclosure of security plan information to the State under a protective order in order to allow the framing of contentions

concerning that material, given the State's inability to obtain that information by other means.¹⁰ That rationale, however, does not apply here. While the State may lack any other means to obtain the safeguards information contained in Attachment 2 to the Order of October 2002, the requirements contained in Attachment 2 have not been applied to the PFS Facility and those requirements therefore do not apply to the facility. Thus, even if Attachment 2 were to be produced to the State, that material could not support a new contention as to whether the Applicant has satisfied any requirements that apply to the PFS Facility.

Second, Contention Utah RR is currently pending before the Commission, based on its acceptance of the Bollwerk Licensing Board's referral of its decision rejecting that contention. Jurisdiction over that contention thus resides in the Commission at this time. Requests by the State to take some further "action" concerning that contention, and any requests for discovery concerning that contention, should be directed in the first instance to the Commission.

Further, to the extent that any Licensing Board may have jurisdiction to consider an action concerning that contention, it is appropriate that such request be directed to the Bollwerk Licensing Board, inasmuch as (a) that Licensing Board ruled upon the admissibility of Contention Utah RR, (b) that Licensing Board is familiar with the issues raised in the contention, (c) that Licensing Board is likely to be the Board to which any remand of Contention Utah RR is made. Moreover, the Staff believes that this is not inconsistent with the demarcation of issues set forth in the Licensing Board's Notice of Reconstitution of December 19, 2001, in that the Notice did not address the

¹⁰ See *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), "Memorandum and Order (Ruling on State of Utah Motion for Protective Order)" (Nov. 21, 1997), slip op. at 3-4, *citing Duke Power Co.* (Catawba Nuclear Station, Units 1 and 2), LBP-82-16, 15 NRC 566, 589-90 (1982); see also, *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), "Memorandum and Order (Protective Order and Schedule for Filing Security Plan Contentions)" (Dec. 17, 1997).

potential for a Commission remand to the Licensing Board of any issues concerning Contention Utah RR.¹¹

In sum, the State has failed to show any substantial basis for its request for disclosure of the safeguards information contained in Attachment 2 to the Commission's Order of October 2002.

C. The State Has Failed to Follow Appropriate Procedural Steps to Obtain a Copy of Attachment 2 to the Order of October 23, 2002.

The State's Motion requests that the Licensing Board "order the Executive Director for Operations to provide to the State a copy of Attachment 2 to the Commission's October 23, 2002 Order under such protective terms and conditions as are appropriate," noting that the Bollwerk Licensing Board had "granted the State access to PFS's security plan for the purpose of litigating the plan's adequacy" in 1997 (Motion at 1, n.1).¹² Further, the State asserts that it needs additional time for the filing of contentions based on Attachment 2 to the Order "because of the procedural requirements necessary to qualifying and obtaining Board approval for an expert to be afforded access to Attachment 2" (*Id.* at 2).

In making these assertions, however, the State fails to observe that the Licensing Board's Orders require it to first identify an expert who is qualified to receive the safeguards information at issue, and that such individual(s) be identified in any protective order that is issued. *See Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), "Memorandum and Order (Ruling on State of Utah Motion for Protective Order)" (Nov. 21, 1997), slip op. at 5. In addition,

¹¹ *See Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), "Notice of Reconstitution" (Dec. 19, 2001) (establishing the Licensing Board chaired by Administrative Judge Michael C. Farrar, and transferring jurisdiction over all pending and future matters in this proceeding to that Board, except as to matters involving Contentions Security-J, Utah S, and Utah E/Confederated Tribes F).

¹² The State fails to explain why it did not present its request, in the first instance, to the Staff, under the procedures set forth in 10 C.F.R. § 2.744, such that the Staff could have determined whether to disclose Attachment 2 to the State prior to requiring Licensing Board involvement in this matter. That issue, however, need not be addressed at this time.

the State is required to demonstrate the qualifications of such person(s) and a detailed justification supporting such person(s)' access to the information. *Id.* at 6. The State has failed to make this required showing, and thus has not shown that its requested disclosure of this safeguards information is appropriate.

Finally, while the State suggests that the protective conditions established in the Licensing Board's Protective Order of December 17, 1997 "may provide the appropriate safeguards procedural protection for Attachment 2" to the Order of October 2002 (Motion at 4), this issue is premature, pending a determination by the Commission as to whether Attachment 2 to the October 2002 Order should be disclosed to the State.¹³

CONCLUSION

For the reasons set forth above, the Staff opposes the State's Motion and recommends that it be denied.

Respectfully submitted,

/RA/
Sherwin E. Turk
Counsel for NRC Staff

Dated at Rockville, Maryland
this 18th day of November, 2002

¹³ In this regard, we note that the State has not shown any reason why all five persons named in its Motion need to receive the safeguards information contained in Attachment 2, nor has the State shown that those persons are presently qualified to receive access to such information notwithstanding their authorization to receive safeguards information five years ago.

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S RESPONSE TO 'STATE OF UTAH'S MOTION FOR PRODUCTION OF COMMISSION ORDER RELATING TO SAFEGUARDS UNDER A PROTECTIVE ORDER AND FOR OPPORTUNITY TO FILE CONTENTIONS,'" in the above captioned proceeding have been served on the following through deposit in the NRC's internal mail system, with copies by electronic mail, as indicated by an asterisk, or by deposit in the U.S. Postal Service, as indicated by double asterisk, with copies by electronic mail this 18th day of November, 2002:

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