UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

LBP-03-05

ATOMIC SAFETY AND LICENSING BOARD

RAS 6120 **DOCKETED 03/21/03**

Before Administrative Judges:

SERVED 03/21/03

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

In the Matter of	Docket No. 72-22-ISFSI
Private Fuel Storage, L.L.C.	ASLBP No. 97-732-02-ISFSI
(Independent Spent Fuel Storage Installation)	March 21, 2003

MEMORANDUM AND ORDER
(Re Safeguards and Security Matters)

By motion filed November 7, 2002, intervenor State of Utah requested access to a nonpublic list of post- 9/11 supplemental safeguard and security requirements that an October 16, 2002 NRC order had imposed on certain licensees of 10 C.F.R. Part 72 independent spent fuel storage installations (ISFSIs). Additionally, the State requested time to use the list of supplemental requirements as a basis for framing such additional contentions as might be appropriate. In responses submitted on November 15, 2002, and November 18, 2002, Applicant Private Fuel Storage (PFS) and the NRC Staff, respectively, opposed the State's motion. For the reasons set forth below, we deny the State's request.[1]

[1] We note that there was some concern expressed by the parties regarding whether the State's motion should be handled by this PFS Licensing Board or the original one chaired by Judge Bollwerk. Having consulted with him in his capacity as Chief Administrative Judge, we advise the parties that under the deliberately-drawn terms of his December 19, 2001, notice reconstituting this proceeding to establish this Board, the only matters intended to be before the Bollwerk Board, now and in the future, are those specifically referenced in the reconstitution order. See 66 Fed. Reg. 67,335 (Dec. 28, 2001). Accordingly, under the plain language of the reconstitution order, and absent some other directive, all other aspects of the PFS proceeding -- including newly-arising or regenerated items relating to matters that previously were before the Bollwerk Board -- now fall within the jurisdiction of this Board.

1. *Background*. In October 2001, a year before filing the pending motion, the State proffered late-filed Contention Utah RR, entitled "Suicide Mission Terrorism and Sabotage." That contention challenged, in the aftermath of the September 11, 2001 terrorist attacks, planned security at the Applicant's proposed Skull Valley, Utah facility. Ultimately, the Board decided not to admit that contention (finding it represented an impermissible challenge to the NRC's existing regulatory requirements and policies pertaining to ISFSI physical security) but referred its ruling to the Commission. See LBP-01-37, 54 NRC 476, 488-89 (December 2001), referral accepted, CLI-02-3, 55 NRC 155 (February 2002).[2]

The issue of post-9/11 security requirements was thus pending during 2002 in connection with this and other ongoing licensing adjudications. In a related development, the agency published in the Federal Register the October 16, 2002 order that, effective immediately, imposed additional 9/11-related requirements on all existing ISFSI licensees operating under 10 C.F.R. Part 72. See 67 Fed. Reg. 65,152 (Oct. 23, 2002).

Existing Commission regulations require Part 72 licensees to follow the safeguards contingency plan procedures in 10 C.F.R. Part 73, App. C, along with the specific safeguards requirements detailed in 10 C.F.R. §§ 73.55, 73.71. Going further, the October 16 order contained interim requirements to "supplement existing regulatory requirements," and indicated that specific licenses would be adjusted accordingly. Id. at 65,152-53. The specific safeguards information for affected licensees, which was provided in Attachment 2 to the October 16 order,

---

[2] After the parties filed their pleadings on the matter now before us, the Commission resolved the matter referred to it about the role of terrorism-related contentions in adjudicatory proceedings. Specifically, the Commission held, in CLI-02-25, 56 NRC 340 (December 18, 2002) and related cases, that the National Environmental Policy Act provides no justification for including a terrorism review in nuclear licensing cases (the Commission indicated that such matters were being handled by the agency in a comprehensive but different fashion). See also Long Island Lighting Co. (Shoreham Nuclear Power Station), ALAB-156, 6 AEC 831, 851 (1973). For purposes of ruling on the pending motion, we will assume, without deciding, that the Commission's decision leaves room for intervenors to file legitimate contentions regarding licensees' compliance with terrorism-related orders imposed by the Commission.

was not, however, made publicly available. See id. at 65,153 n.1 . The October 16 order also provided an opportunity for licensees and those "adversely affected" by its dictates to request a hearing. Id. at 65,153-54.

Filed in the wake of the October 16, 2002 order, the State's pending motion requests that the Board (1) require the Executive Director for Operations (EDO) to make available a copy of Attachment 2, albeit under any necessary protective measures; and (2) provide a 45-day time period following the actual availability of Attachment 2 within which to submit related contentions. Additionally, the State asserts that a review of Attachment 2 is necessary to enable it to determine whether it needs to "take action" regarding Contention Utah RR. See State Motion for Production at 1-3.

2. *Ruling*. By its terms, the October 16 order is limited in scope to "licensees who currently store spent fuel or have identified near term plans to store spent fuel in an ISFSI under the specific license provisions of 10 CFR part 72." 67 Fed. Reg. at 65,152 (emphasis supplied). Obviously, PFS is not a licensee at this juncture; and even assuming it were to be granted a license in relatively short order,[3] there is every indication that the storage of spent nuclear fuel at the PFS facility cannot logistically be a matter of "near term plans." [4] PFS is thus not an entity that would come under any aspect of the October 16 order.

It also is unclear whether the October 16 order would ever apply to PFS even if it were to be granted a license. As the State recognized in its motion (p. 2), nothing in the order

---

[3] Cf. our recent decision herein on "Credible Accidents," LBP-03-04, 57 NRC ___ (March 10, 2003).

[4] In this regard, in its response to the State's motion, the NRC Staff listed a number of additional procedural contingencies the Applicant must meet before it would be ready to receive spent nuclear fuel at the proposed Skull Valley facility, including receiving authorizations from the Bureau of Indian Affairs and the Bureau of Land Management and fulfilling specific financial assurance license conditions prior to construction. Of course, it also would need to perform the actual construction of the facility and an associated rail line, which could require at least eighteen months for completion. See NRC Staff Response (Nov. 18, 2002) at 5 n.8.

indicates that Attachment 2 would then be applied as a condition to any PFS license. In that regard, the October 16 order indicates that the requirements listed in Attachment 2 are "interim requirements" that could be altered if "a significant change in the threat environment has occurred, or the Commission determines that other changes are needed." 67 Fed. Reg. at 65,153. Thus, again assuming PFS is eventually granted a license, there is a considerable degree of uncertainty as to whether, and to what degree, the supplemental safeguards under Attachment 2, rather than some other mandate, would be applicable to the Skull Valley facility.

It thus is apparent that the State's requests are premature. Cf. Yankee Atomic Electric Co. (Yankee Nuclear Power Station), CLI-96-7, 43 NRC 235, 274 (1986) (rejecting contention as not ripe where applicant had not pursued, nor had been granted, a license amendment that would trigger the concern to which the contention was addressed). Further, if Attachment 2 (or something like it) is eventually applied to the PFS facility, any adversely affected person would, as the October 16 order noted, have the opportunity to request a hearing. See 67 Fed. Reg. at 65,153-54. Under that procedure, the State would seemingly have the opportunity then to request a hearing.[5]

In sum, PFS is not currently a licensee and so is not directly affected by the October 16 order and its Attachment 2. Nor is there any concrete indication that the safeguards requirements in Attachment 2 would apply to PFS even if it is granted a license in the future, although the State will have an opportunity to request a hearing if Attachment 2 (or something like it) is applied to any PFS Part 72 license. As a consequence, the State's motion requesting

---

[5] See id.; see also Pacific Gas & Electric Co. (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), CLI-02-23, 56 NRC 230, 240 (Nov. 21, 2002) (in denying request to suspend ISFSI construction/operation authorization proceeding pending agency post-9/11comprehensive review of adequacy of security measures, Commission noted that if additional license requirements were be imposed in the future, petitioner could submit late-filed contentions).

access to review Attachment 2 to the agency's October 16, 2002 order and for additional time to file contentions relating to that attachment is denied as premature.[6]

It is so ORDERED.

THE ATOMIC SAFETY
AND LICENSING BOARD

/RA/

Michael C. Farrar, Chairman
ADMINISTRATIVE JUDGE

/RA/

Jerry R. Kline
ADMINISTRATIVE JUDGE

/RA/

Peter S. Lam
ADMINISTRATIVE JUDGE

Rockville, Maryland
March 21, 2003

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, Ohngo Gaudadeh Devia, Confederated Tribes of the Goshute Reservation, Southern Utah Wilderness Alliance, and the State of Utah; and (3) the NRC Staff.

[6] It should be added that to the degree that the State sought to support its motion based on the asserted need to "take action" relative to Contention Utah RR, jurisdiction relative to that contention then resided, by reason of the accepted referral, with the Commission rather than this Board. Of course, by reason of the Commission's decision in CLI-02-25, above, upholding our dismissal of the contention, that matter has since been resolved before the agency.

We also note that although the State cites 10 C.F.R. § 2.744 in support of its request that the Board order production by the agency's EDO of Attachment 2 to the October 16 order, it apparently has not complied with the procedural prerequisites for obtaining such an order, i.e., the submission of such a request to the EDO and that official's denial of the request. See 10 C.F.R. § 2.744(a), (b). Nevertheless, as the Staff suggests, see Staff Response at 10 n.12, it is not necessary at this time to decide the issue of the State's compliance with § 2.744, given that the State's request has been denied on the alternate ground of prematurity.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LB MEMORANDUM AND ORDER (RE SAFEGUARDS AND SECURITY MATTERS) (LBP-03-05) have been served upon the following persons by deposit in the U.S. mail, first class, or through NRC internal distribution.

Office of Commission Appellate Adjudication
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

Administrative Judge
Michael C. Farrar, Chairman
Atomic Safety and Licensing Board Panel
Mail Stop - T-3 F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

Administrative Judge
Jerry R. Kline
Atomic Safety and Licensing Board Panel
Mail Stop - T-3 F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

Administrative Judge
Peter S. Lam
Atomic Safety and Licensing Board Panel
Mail Stop - T-3 F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

Sherwin E. Turk, Esquire
Catherine L. Marco, Esquire
Office of the General Counsel
Mail Stop - 0-15 D21
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

Diane Curran, Esquire
Harmon, Curran, Spielberg & Eisenberg, L.L.P.
1726 M Street, NW, Suite 600
Washington, DC 20036

Joro Walker, Esquire
Director, Utah Office
Land and Water Fund of the Rockies
1473 South 1100 East, Suite F
Salt Lake City, UT 84105

Martin S. Kaufman, Esquire
Atlantic Legal Foundation
205 E. 42nd St.
New York, NY 10017

Docket No. 72-22-ISFSI
LB MEMORANDUM AND ORDER
(RE SAFEGUARDS AND
SECURITY MATTERS) (LBP-03-05)

Denise Chancellor, Esquire
Assistant Attorney General
Utah Attorney General's Office
160 East 300 South, 5th Floor
P.O. Box 140873
Salt Lake City, UT 84114

John Paul Kennedy, Sr., Esquire
David W. Tufts, Esquire
Confederated Tribes of the Goshute
Reservation and David Pete
Durham Jones & Pinegar
111 East Broadway, Suite 900
Salt Lake City, UT 84105

Tim Vollmann, Esquire
3301-R Coors Road N.W., #302
Albuquerque, NM 87120

Marlinda Moon, Chairman
Sammy Blackbear, Sr., Vice-Chairman
Miranda Wash, Secretary
Skull Valley Band of Goshute Indians
P.O. Box 511132
Salt Lake City, UT 84151-1132

Jay E. Silberg, Esquire
D. Sean Barnett, Esquire
Shaw Pittman
2300 N Street, NW
Washington, DC 20037-1128

Richard Wilson
Department of Physics
Harvard University
Cambridge, MA 02138

Paul C. EchoHawk, Esquire
ECHOHAWK LAW OFFICES
151 North 4th Avenue, Suite A
P.O. Box 6119
Pocatello, ID 83205-6119

Philip N. Hogen, Esquire
Associate Solicitor for Indian Affairs
Stephen L. Simpson, Esquire
Office of the Solicitor
Department of the Interior
Division of Indian Affairs
1849 C Street, NW, Mailstop 6456-MIB
Washington, DC 20240

[Original signed by Adria T. Byrdsong]

Office of the Secretary of the Commission

Dated at Rockville, Maryland,
this 21st day of March 2003