

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

LBP-99031740
USNRC

ATOMIC SAFETY AND LICENSING BOARD

'99 AUG 27 P2:16

Before Administrative Judges:

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

OFF.
ADJ.

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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
August 27, 1999

MEMORANDUM AND ORDER

(Granting Motion for Summary Disposition
Regarding Contentions Security-A and
Security-B and Partial Summary Disposition
Regarding Contention Security-C)

Applicant Private Fuel Storage, L.L.C., (PFS) has requested that summary disposition be entered in its favor regarding contentions Utah Security-A and Security-B and that partial summary disposition be entered in its favor regarding contention Utah Security-C. As admitted, these contentions allege that Tooele County, Utah, failed to properly approve a cooperative agreement providing the Tooele County sheriff's office with law enforcement authority on the reservation of intervenor Skull Valley Band of Goshute Indians (Skull Valley Band), which is the site of PFS's proposed 10 C.F.R. Part 72 independent spent fuel storage installation (ISFSI). According to PFS, there is no genuine issue as to any material fact relevant to these

contentions so that, in accordance with 10 C.F.R. § 2.749, it is entitled to a determination on these contentions as a matter of law. The NRC staff supports the motion for summary disposition, which the State of Utah (State) does not directly challenge.

For the reasons described below, on these issues we grant summary disposition in favor of PFS.

I. BACKGROUND

Pursuant to 10 C.F.R. § 72.180, PFS is required to "establish a detailed plan for security measures for the physical protection" of its proposed ISFSI facility. This plan must "demonstrate how the applicant plans to comply with the applicable requirements of Part 73 . . . and include within the plan the design for physical protection, the licensee's safeguards contingency plan, and the security organization personnel training and qualification plan." The specific requirements for an ISFSI's physical protection plan are set forth in 10 C.F.R. § 73.51(d), which, as pertinent here, requires:

(5) A security organization with written procedures must be established. The security organization must include sufficient personnel per shift to provide for monitoring of detection systems and the conduct of surveillance, assessment, access control, and communications to assure adequate response. Members of the security organization must be trained, qualified, and requalified to perform assigned job

duties in accordance with appendix B to part 73, sections I.A, (1)(a) and (b), (B)(1)(a), and the applicable portions of II.

(6) Documented liaison with a designated response force or local law enforcement agency (LLEA) must be established to permit timely response to unauthorized penetration or activities.

In addition, section 3 ("Licensing Planning Base") of Appendix C to 10 C.F.R. Part 73 requires:

d. Law Enforcement Assistance -- A listing of available local law enforcement agencies and a description of their response capabilities and their criteria for response; and a discussion of working agreements or arrangements for communicating with these agencies.

Thus, compliance with section 73.51 requires documented identification of a local law enforcement agency (LLEA) responsible for responding to unauthorized penetration or activities at the facility and a discussion of arrangements/working agreements for communication with the LLEA.

In this instance, although PFS will provide for onsite security, the Skull Valley Band on whose reservation the PFS ISFSI will be located does not possess the resources and facilities needed to act as LLEA to protect the PFS facility from offsite intrusions. Moreover, because of the sovereign nature of Native American reservations, state and local governments generally do not provide law enforcement on reservations, absent some agreement with the tribe.

Therefore, as was indicated in the PFS security plan, in order to satisfy section 73.51 requirements, the United States Department of the Interior Bureau of Indian Affairs (BIA), the Skull Valley Band, and Tooele County entered into a cooperative law enforcement agreement (CLEA) in June 1997 that provided the Tooele County sheriff's office with law enforcement authority on the Skull Valley Goshute Reservation.

On January 3, 1998, the State filed eight contentions challenging the PFS physical security plan (PSP). The Licensing Board ruled on the admissibility of the State of Utah's contentions on PFS's PSP on June 18, 1998. See LBP-98-13, 47 NRC 360 (1998). The Board held that contentions Security-A and Security-B were inadmissible because they sought "to rely on the question of the designated LLEA's lack of jurisdiction and law enforcement on the Skull Valley Band's reservation." Id. at 368-69. The Board found that the State's assertion that the CLEA failed to provide the Tooele County sheriff's office, as the LLEA, with the needed law enforcement authority lacked adequate legal or factual support. Next, the Board found that part of contention Utah Security-C was inadmissible because "a [CLEA] had been shown to exist between the LLEA [or the sheriff's office], [BIA], and the Skull Valley Band" and that the agreement "had not been subjected to an adequately supported legal or factual challenge by the

State." Id. at 370. Finally, the Board admitted another portion of Security-C that it limited to the issue whether the "LLEA will provide a 'timely' response to any unauthorized activities at the PFS facility." Id.

Following this ruling, the State moved for reconsideration based on the fact it recently had been given access to the CLEA and had identified problems with its enactment. In an August 5, 1998 ruling, the Board found reconsideration appropriate and admitted Security-A and Security-B as well as the remaining part of Security-C. See LBP-98-17, 48 NRC 69 (1998). The Board explained:

Our ruling here means that the State may pursue its Security-C claim of regulatory noncompliance that the Tooele County sheriff's office cannot act as the designated LLEA because the alleged failure to comply with the requirements of Utah Code Annotated section 11-13-5 regarding approval of the June 1997 agreement arguably would deprive the sheriff's office of law enforcement authority on the Skull Valley Band reservation. Further, we admit contentions Security-A and Security-B on the same basis.

Id. at 75-76.

Thus, these three contentions, as admitted, allege that Tooele County's failure to approve the June 1997 CLEA creates a factual dispute about the validity of the section of the PSP that designated the Tooele County sheriff's office as the LLEA. Specifically, the State claimed that Tooele County did not comply with state statutory adoption

requirements when it enacted this CLEA. Under Utah Code Ann. § 11-13-5 (1997):

Adoption of appropriate resolutions by the governing bodies of the participating public agencies are necessary before any [cooperative] agreement may enter into force.

Finding there was no evidence a written resolution had been passed by Tooele County relevant to the CLEA, the Board held that "the State has made a sufficient showing there is a genuine material dispute adequate to warrant further inquiry relative to the question whether the June 1997 agreement had been adopted by Tooele County [in accordance with section 11-13-5] so as to provide its officials with law enforcement authority at the Skull Valley Band reservation." Id. at 74.

As accepted by the Board for litigation, id. at 76-77, the three contentions thus read as follows:

Utah Security-A -- Security Force Staffing

CONTENTION: The Applicant has failed to establish a detailed plan for security measures for physical protection of the proposed ISFSI as required by 10 C.F.R. § 72.180, including failure to demonstrate that it has adequate staffing capability to cope with or respond to safeguard contingency events.

* * * * *

Utah Security-B -- Equipment and Training

CONTENTION: The Applicant has not described the type or location of security equipment available to security

force personnel, nor has the Applicant described adequate training for fixed site guards or armed response personnel.

* * * * *

Utah Security-C -- Local Law Enforcement

CONTENTION: The Applicant has not met the requirements of 10 C.F.R. Part 73, App. C, Contents of the Contingency Plan, Law Enforcement Assistance.

LBP-98-13, 47 NRC at 368, 369.

Thus, the Board found the question was whether, in the apparent absence of a written resolution, Tooele County complied with the "appropriate resolution" requirement of Utah Code section 11-13-5 in approving the CLEA. Without such a resolution, the Board suggested the effectiveness of the CLEA seemingly was in doubt, raising questions "about the Tooele County sheriff's office status to act as the designated [LLEA] for the PFS facility in accordance with the requirements of 10 C.F.R. Part 73, App. C." LBP-98-17, 48 NRC at 75.

As the forgoing makes apparent, under Utah law a CLEA among public agencies would enter into force only after it had been approved by Tooele County through an "appropriate resolution." In a summary disposition motion filed on June 11, 1999, PFS now claims that subsequent events establish that BIA, the Skull Valley Band, and the Tooele County sheriff's office have entered into a valid CLEA agreement. See [PFS] Motion for Summary Disposition of

Contentions Utah Security-A and Security-B, and Partial Summary Disposition of Contention Utah Security-C (June 11, 1999) [hereinafter PFS Motion]. According to PFS, on September 1, 1998, a revised CLEA was approved and authorized by a written resolution of the Tooele County Board of Commissioners. During this meeting, the Commissioners voted "to approve Resolution 98-13 - Approving and Authorizing the Cooperative Law Enforcement Agreement (CLEA) Between Tooele County, the Bureau of Indian Affairs and the Skull Valley Band of Goshute Indians." Id. ex. 1, at 12 (Tooele County Board of Commissioners Sept. 1, 1998 meeting minutes). PFS now contends that the August 1998 CLEA is an "appropriate resolution" and satisfies the Utah Code requirements. To this end, PFS has provided copies of both the August 1998 CLEA and the resolution passed by the Commissioners. See id. at 2-3, 6-7, ex. 1.

In its July 1, 1999 response to the motion, the Staff agrees with PFS's claim that a procedurally valid CLEA is now in force. Referring to the September 1, 1998 resolution by Tooele County Board of Commissions that ratified the CLEA, the Staff concludes that "an approved cooperative law enforcement agreement has been submitted, providing assurance that the Tooele County sheriff's office can act as the LLEA for the PFS facility." NRC Staff's Statement of Position Concerning Group I Contentions (June 15, 1999) at 23.

As the contentions' sponsor, the State does not directly challenge the PFS motion for summary disposition. Instead, it asserts that the Tooele County Commissioners' approval of the August 1998 CLEA does not mean that the sheriff's office has an obligation to respond to incidents at the Skull Valley Reservation. See [State] Response to [PFS] Motion for Summary Disposition (July 1, 1999) at 2 [hereinafter State Response]. The State alleges that there "is nothing in the record to support reliance by PFS on law enforcement assistance from the Tooele County Sheriff." Id. It maintains that the 1998 CLEA resolution was adopted without reference to PFS and that the county had not entered into an agreement allowing PFS to locate on the reservation at the time of this adoption. Therefore, the State concludes that even if the CLEA was properly adopted, Tooele County gave its approval without contemplating the role the sheriff's office would be required to play on the reservation in order to comply with section 73.51. See id. at 2-3. It requests that the staff require a "written agreement or understanding between Tooele County and PFS, that proves that PFS has 'documented liaison with a LLEA' as required by 10 C.F.R. § 73.51(d)." Id. at 3.

II. ANALYSIS

A party to an NRC proceeding is entitled to summary disposition on any or all matters

if the filings in the proceeding, depositions, answers to interrogatories, and admissions on file, together with the statements of the parties and affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a decision as a matter of law.

10 C.F.R. § 2.749(d). As with the analogous Rule 56 of the Federal Rules of Civil Procedure, the movant bears the initial burden of making the requisite showing that there is no genuine issue as to any material fact, which it attempts to do by means of a required statement of material facts and any supporting materials that accompany the dispositive motion. An opposing party must counter each adequately supported material fact with its own statement of material facts in dispute and supporting materials, or the movant's facts will be deemed admitted. See Advanced Medical Systems, Inc. (One Factory Row, Geneva, Ohio 44041), CLI-93-22, 38 NRC 98, 102-03 (1993).

In this instance, PFS has provided a statement of material facts, accompanied by two supporting documents, the Comprehensive Law Enforcement Agreement of August 7, 1998, and Resolution 98-13 by which the Tooele County Board of Commissioners approved the aforementioned agreement. These materials show that the deficiencies alleged in support of

contentions Security-A, Security-B, and Security-C have been remedied by the Tooele County's adoption of the 1998 CLEA by "appropriate resolutions."

As we have previously noted, under Utah Code Ann. § 11-13-5, local governing bodies like Tooele County are required to adopt cooperative agreements through "appropriate resolutions" before they enter into force. Further, resolutions adopted by municipalities must "be in writing before the vote is taken." Utah Code Ann. § 10-3-506 (1997). As the basis for its contentions, the State charged that Tooele County Board of Commissioners failed to comply with section 11-13-5 because the resolution they approved was not in written form. However, the Tooele Commissioners have rectified this procedural error with the approval and authorization of Resolution 98-13 on September 1, 1998. This written resolution accepted and approved the August 1998 CLEA and was executed by the Tooele Commission Chairman the following day. Also, as is evidenced by item nine of the "Minutes of the Regular Meeting of the Tooele County Board of Commissioners Held September 1, 1998," which is included with the PFS motion, Resolution 98-13 was duly approved. Therefore, in terms of the county's participation, the CLEA was ratified in a manner that complies with the requirements of Utah Code section 11-13-5 and by its terms provides the Tooele County

sheriff's office with law enforcement authority on the Skull Valley Goshute Reservation.

As we have noted, the State does not directly challenge PFS's request for summary disposition. The State certainly does not deny that the August 1998 CLEA was adopted in compliance with the procedural requirements set out in the Utah Code. Instead, the State seeks to reintroduce an issue relative to contentions Security-A, Security-B, and Security-C that was rejected by the Board in our previous decision in LBP-99-7, 49 NRC 124 (1999). There, concluding that the State failed to satisfy the five-factor balancing test found in 10 C.F.R. § 2.714(a)(1) that governs the late admission of contentions, we refused to admit a late-filed contention based upon a statement by the Tooele County Attorney that the State claimed established PFS cannot fulfill the requirements of 10 C.F.R. § 73.51(d)(6) and 10 C.F.R. Part 73. See id. at 127; see also State Response at 2-3. Having previously refused to entertain this matter, the Board now declines to revisit that issue as it would be required to do if we were to consider whether we can impose any requirement that the Staff obtain a written agreement as requested by the State.

We thus conclude that PFS has met its burden of establishing that there are no material facts in dispute and that, relative to the issues admitted in the Board's August 5, 1998 ruling in LBP-98-17, summary disposition

should be entered in favor of PFS in toto on contentions Utah Security-A and Security-B and partially on contention Security-C. As admitted, these issues are, for all practical purposes, now moot.

III. CONCLUSION

With regard to contentions Security-A, Security Force Staffing, Security-B, Equipment and Training, and Security-C, Local Law Enforcement, as they were admitted relative to the question of whether a CLEA was appropriately adopted by Tooele County so as to be effective, PFS has established there is no genuine issue as to any material fact and it is entitled to a judgment in its favor as a matter of law.

For the foregoing reasons, it is this twenty-seventh day of August 1999, ORDERED, that the June 11, 1999 PFS motion for summary disposition regarding contentions Security-A and Security-B, and for partial summary disposition regarding contention Security-C is granted and, for the reasons given in this memorandum and order, a

decision regarding these contentions is rendered in favor of PFS.

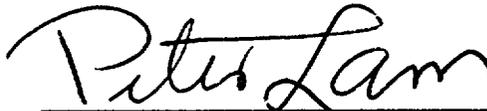
THE ATOMIC SAFETY
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Dr. Peter S. Lam
ADMINISTRATIVE JUDGE

Rockville, Maryland

August 27, 1999

* 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; and (3) the staff.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of

PRIVATE FUEL STORAGE, LLC

(Independent Spent Fuel Storage
Installation)

Docket No.(s) 72-22-ISFSI

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LB MEMO & ORDER (LBP-99-31) have been served upon the following persons by U.S. mail, first class, except as otherwise noted and in accordance with the requirements of 10 CFR Sec. 2.712.

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LB MEMO & ORDER (LBP-99-31)

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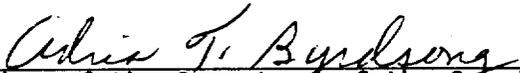
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Dated at Rockville, Md. this
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Office of the Secretary of the Commission