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USNRC April 16, 1998UNITED STATES OF AMERICA '98 APR 20 P12:05
NUCLEAR REGULATORY COMMISSIONBEFORE THE CHIEF ADMINISTRATIVE JUDGE
ADJUDICATORY STAFF

In the Matter of)

PRIVATE FUEL STORAGE L.L.C.)

(Independent Spent)

Fuel Storage Installation))

Docket Nos. 72-22-ISFSI
72-22-ISFSI-PSPNRC STAFF'S RESPONSE TO
APPLICANT'S REQUEST FOR RECONSIDERATION OF
ESTABLISHMENT OF A SEPARATE LICENSING BOARD
FOR SECURITY PLAN MATTERSINTRODUCTION

On April 6, 1998, Private Fuel Storage L.L.C. ("PFS" or "Applicant") filed a motion before Chief Administrative Judge B. Paul Cotter, Jr.,¹ in which PFS requested that the Chief Administrative Judge reconsider his Order of March 26, 1998, creating a separate Atomic Safety and Licensing Board "to consider and rule on all matters concerning the physical security plan of applicant Private Fuel Storage, LLC." Order of March 26, 1998, at 1. In accordance with the Chief Administrative Judge's scheduling order of April 7, 1998, the NRC Staff ("Staff") hereby files its response to the Applicant's Motion. For the reasons set forth below, the Staff supports the Applicant's motion and recommends that the Chief Administrative Judge rescind his Order creating a separate licensing board to address security plan issues, and that those issues be left for resolution by the initial licensing board established in this proceeding, before whom those issues were raised.

¹ "Applicant's Request for Reconsideration of Establishment of a Separate Licensing Board for Security Plan Matters," dated April 6, 1998 ("Motion").

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A. Background

This proceeding was initiated by the publication of a notice in the *Federal Register* on July 31, 1997, indicating (1) that the Commission was considering issuance of a materials license to the Applicant, authorizing the storage of spent fuel and other radioactive material at an independent spent fuel storage installation (ISFSI) to be located on the Skull Valley Goshute Indian Reservation in Skull Valley, Utah; (2) that on or before September 15, 1997, persons whose interests may be affected by the proceeding could file a written request for hearing and/or petition for leave to intervene in the proceeding; and (3) that if any such request or petition is filed, the Commission or Chairman of the Atomic Safety and Licensing Board Panel (i.e., the Chief Administrative Judge) would designate a Licensing Board to rule thereon, and the Secretary or the designated Licensing Board would thereafter issue a notice of hearing or other appropriate order.² Pursuant to that notice, five requests for hearing and/or petitions for leave to intervene were timely filed in this proceeding,³ and on September 15, 1997, a Licensing Board was established to rule upon the requests for hearing and/or petitions to intervene and "to preside over the proceeding in the event that a hearing is ordered."⁴

² "Private Fuel Storage, Limited Liability Company; Notice of Consideration of Issuance of a Materials License for the Storage of Spent Fuel and Notice of Opportunity for Hearing," 62 Fed. Reg. 41099 (July 31, 1997).

³ Requests for hearing and/or petitions for leave to intervene were timely filed by (1) the State of Utah, (2) Ohngo Gaudadeh Devia, (3) the Skull Valley Band of Goshute Indians, (4) the Confederated Tribes of the Goshute Reservation and David Pete, and (5) Castle Rock Land and Livestock, L.C., Skull Valley Company, Ltd., and Ensign Ranches of Utah, L.C. In addition, a late petition for leave to intervene was filed in January 1998 (and later amended, in February 1998) by Professor Richard Wilson on behalf of Scientists for Secure Waste Storage.

⁴ "Private Fuel Storage, LLC; Establishment of Atomic Safety and Licensing Board," 62 Fed. Reg. 49263 (Sept. 19, 1997). As originally designated, the Licensing Board was comprised of Administrative Judges Bollwerk, Kline and Murphy; however, the Licensing Board was then reconstituted in accordance with 10 C.F.R. § 2.721, whereby Administrative Judge Lam was appointed in place of Administrative Judge Murphy. See "Private Fuel Storage, LLC; Notice of Reconstitution of Board," 62 Fed. Reg. 52364 (Oct. 7, 1997).

Following its establishment, the initial Licensing Board that was designated to rule on petitions for leave to intervene and to preside over this proceeding (the "Initial Licensing Board") issued a series of procedural Orders in which it, *inter alia*, established a schedule for filing contentions and responses thereto. In accordance with the Board's schedule, numerous contentions were filed by the petitioners for leave to intervene, on or before November 24, 1997. Those contentions addressed various aspects of PFS' license application, including one contention related to the physical security plan (Ohngo Gaudadeh Devia (OGD) Contention H),⁵ and other assertions concerning the risk of terrorism. In addition, on January 3, 1998 -- after the Initial Licensing Board had adopted a protective order permitting the State of Utah's attorneys and other personnel to gain access to the Applicant's physical security plan (which had been submitted to the Commission as part of PFS' license application)⁶ -- the State filed nine contentions based on the physical security plan.⁷ Responses to the petitioners' initial sets of contentions were filed by the Applicant and Staff in December 1997 and January 1998; and responses to the State's

⁵ See "Ohngo Gaudadeh Devia's Contentions Regarding the Materials License Application of Private Fuel Storage in an [ISFSI]," dated November 24, 1997, at 20-22. OGD subsequently withdrew Contention H at the prehearing conference held on January 27-29, 1998 (*see* Tr. 459-60).

⁶ On November 14, 1997, the State of Utah filed an unopposed motion seeking the entry of a protective order to permit its attorneys and other personnel to gain access to the Applicant's physical security plan, and to extend the date for filing contentions on that plan. The Initial Licensing Board granted the State's request in a "Memorandum and Order (Ruling on State of Utah Motion for Protective Order)," dated November 21, 1997. Thereafter, at the direction of the Initial Licensing Board, the Staff filed a draft protective order (to which the Applicant and State had consented); and in December 1997, the Initial Licensing Board issued the requested protective order pursuant to 10 C.F.R. § 2.744(e). See "Memorandum and Order (Protective Order and Schedule for Filing Security Plan Contentions)," dated December 17, 1997, as modified by Orders dated December 22 and 23, 1997.

⁷ See "State of Utah's Contentions Security-A Through Security-I Based on Applicant's Confidential Safeguards Security Plan," dated January 3, 1998. As required by the Initial Licensing Board's protective order, the State filed its security plan contentions under seal, and restricted service thereof to the persons authorized to receive safeguards information under the protective order.

nine security plan contentions were filed by the Applicant and Staff on January 20, 1998, to which the State filed a reply.⁸

On January 26, 1998, the Initial Licensing Board conducted a visit to the site and other locations relevant to the petitioners' contentions. On January 27-29, 1998, the Initial Licensing Board presided over a prehearing conference in Salt Lake City, Utah, at which the petitioners' standing to intervene and the admissibility of their contentions were addressed. Included among the topics discussed at the prehearing conference were the qualifications of the individual who sponsored the State of Utah's security plan contentions. See Tr. 439 and Tr. 446-60.

B. Matters Currently Pending Before the Initial Licensing Board

In addition to the issues of standing and the admissibility of contentions, two other matters of general applicability were raised before the Initial Licensing Board, and remain pending before that Board at this time. First, a challenge has been raised to the Licensing Board's authority to issue any initial decision prior to the issuance of the Staff's Safety Evaluation Report (SER) or Environmental Impact Statement (EIS).⁹ Second, on January 21, 1998, Petitioners Castle Rock Land and Livestock, L.C., *et al.* ("Castle Rock"), filed a petition under 10 C.F.R. § 2.758(b), seeking non-application or waiver of

⁸ See "NRC Staff's Response to State of Utah's Security Plan Contentions," dated January 20, 1998; "Applicant's Answer to the State of Utah's Contentions Security-A Through Security-I Based on Applicant's Confidential Safeguards Security Plan," dated January 20, 1998; and "State of Utah's Reply to NRC Staff and Applicant's Responses to Utah's Security Plan Contentions Security-A Through Security-I," dated February 11, 1998. Like the State's security plan contentions, the Applicant's and Staff's response to those contentions, and the State's reply thereto, were filed under seal; and service was restricted to the persons authorized to receive safeguards information under the Initial Licensing Board's protective order.

⁹ See "Memorandum and Order (Ruling on Motions to Suspend Proceeding and For Extension of Time to File Contentions)," dated October 17, 1997, requesting the participants' views on "the Board's authority to issue a final initial decision on *any* safety, environmental, or other issues that may be admitted in the absence of [the SER and EIS], whether in draft or final form" (*id.* at 10, emphasis added); and "State of Utah's Response to Applicant's and NRC Staff's Pleadings on the Licensing Board's Authority to Issue a Final Initial Decision Prior to Issuance of the NRC Staff's Draft or Final EIS and SER," dated January 7, 1998, at 3-4, 5 n.2, and 10.

certain of the Commission's rules in this proceeding. In particular, Castle Rock asserted that (a) "the Commission does not have authority to grant the License under 10 C.F.R. Part 72, and therefore 10 C.F.R. Part 72 is inapplicable to the Proceeding," and (b) that portions of 10 C.F.R. § 51.23 and the Commission's waste confidence decision should be waived in this proceeding.¹⁰

On March 26, 1998, while the proceeding was in this procedural posture (awaiting decisions by the Initial Licensing Board on the four general matters discussed above), the Chief Administrative Judge issued his Order establishing a second Licensing Board to consider security plan issues in the proceeding.

DISCUSSION

In explaining his decision to establish a second Licensing Board, the Chief Administrative Judge's Order of March 26, 1998 recites only one fact -- that "a multiplicity of issues" has been raised in this proceeding. The Chief Administrative Judge's characterization of this matter is entirely correct. By the Staff's count, 92 contentions (including the State's nine security plan contentions) have been filed before the Initial Licensing Board, raising a plethora of safety, environmental, emergency plan, security plan, and other issues. This fact, however, does not warrant the establishment of a second Licensing Board. Rather, as discussed below, the Staff believes that the establishment of a second Board (a) is premature at this time, in light of the current procedural posture of this proceeding, (b) would lead to a duplication of effort by the participants and by the two Boards on related issues and could lead to inconsistent decisions by the two Boards on those issues, and (c) would not lead to any saving of time or resources but, rather, may result in the expenditure of additional effort by the parties and the Licensing Boards.¹¹

¹⁰ Responses to Castle Rock's petition for rule waiver were filed by the State of Utah, the Applicant and the Staff, on February 18, 1998.

¹¹ In addition, as discussed *infra* at 9, rescission of the Chief Administrative Judge's Order would avert the need to resolve difficult jurisdictional issues asserted by the Applicant, as to whether a second Licensing Board may be established to consider issues which were previously raised before the Initial Licensing Board and over which the Initial Licensing Board has exercised jurisdiction.

First, as the preceding summary indicates, at the time the Chief Administrative Judge issued his Order establishing a second Licensing Board to preside over security plan issues in this proceeding, the Initial Licensing Board had under consideration (1) the petitioners' standing to intervene, (2) the admissibility of the petitioners' various contentions, including the State's security plan contentions and other contentions in which similar issues (*e.g.*, the risk of terrorism or sabotage, and the applicability of Commission regulations at the intermodal transfer point or in transportation) are raised, (3) a rule waiver petition which asserts, in part, that a license may not be issued because the regulations in 10 C.F.R. Part 72 (including security regulations) do not apply to this proceeding, and (4) a challenge to the Licensing Board's authority to issue any initial decision prior to issuance of the Staff's SER or EIS.

These issues should be resolved before any additional Licensing Boards are established. If any of the five petitioners for leave to intervene is found to lack standing, all of that petitioner's contentions would be rejected. Similarly, the Staff believes that many of the petitioners' contentions may be rejected by the Initial Licensing Board, for failing to satisfy the requirements of 10 C.F.R. § 2.714 or other established standards governing the admissibility of contentions. Thus, the "multiplicity of issues" which was observed by the Chief Administrative Judge may well be reduced substantially upon the Initial Licensing Board's issuance of a ruling on standing and contentions, thus eliminating the stated reason for the establishment of a second Licensing Board.

Second, two issues of potentially broad effect upon all of the contentions that have been filed in this proceeding are currently pending before the Initial Licensing Board. These are: (1) whether the Licensing Board has the authority to issue any initial decision before the Staff's SER or EIS have been issued, and (2) whether the regulations in 10 C.F.R. Part 72 (which includes certain security plan requirements, as set forth in §§ 72.180 - 72.186) apply to this facility. The Staff believes that these issues of general applicability should be resolved before any additional Boards are established, in order to avert the need for each Licensing Board to resolve these issues separately, duplication of effort by the

parties and the Licensing Boards, and the potential for inconsistent resolution of these issues by the Licensing Boards.

Third, although the second Board was designated for the specific purpose of considering security plan issues, those issues may not be readily segregated from other issues that have been raised in the proceeding. For example, as indicated above, contentions filed by petitioners other than the State of Utah contain assertions pertaining to the risk of terrorism or sabotage; and, although those contentions were not framed with specific reference to the Applicant's physical security plan, it may be appropriate for these issues to be evaluated in light of the Applicant's physical security plan. Moreover, the State's security plan contentions contain certain themes which appear as well in other contentions -- such as the assertion that the Commission's ISFSI regulations (including those relating to the security plan) are applicable at the intermodal transfer point (ITP) located 24 miles away from the ISFSI site and/or during transportation of spent fuel to this facility.¹² The fact that such assertions have been raised in contentions other than the security plan contentions renders it appropriate that all such contentions be considered by a single Licensing Board in order to avert duplicative efforts by the participants and the Boards, and to avert the potential for inconsistent resolution of these issues by two separate Licensing Boards.¹³

¹² As indicated by the Applicant (Motion at 6), both Utah Contention B and Utah Contention Security-F contend that a security plan is required for the intermodal transfer point at Rowley Junction; and both the State's security contentions (e.g., Contentions Security-G and Security-H) and other contentions (e.g., Utah Contention V and OGD Contention C) raise security and sabotage issues in connection with the transportation of spent fuel to the facility. The risk of terrorism or sabotage also appears as part of the basis for other contentions filed in this proceeding. See, e.g., OGD Contention P. The Chief Administrative Judge could not have known of such similarities when he issued his Order of March 26, 1998, in that the State's security plan contentions were filed under seal. (The security plan contentions, as distinct from their bases, have now been determined not to contain safeguards information and may be published by the Initial Licensing Board. See "NRC Staff's Response to Memorandum and Order (Request for Information Regarding Contentions Involving Proprietary and Safeguards Material) dated March 9, 1998," filed March 18, 1998, at 1; "Memorandum and Order (Request for Information Regarding Contentions Involving Proprietary and Safeguards Material)," dated March 9, 1998, at 3).

¹³ See generally, *Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Unit Nos. 1 and 2), CLI-76-1, 3 NRC 73, 74 n.1 (1976); *Philadelphia Electric Co.* (Limerick Generating Station, Units 1 and 2), ALAB-765, 19 NRC 645, 650-51 (1984).

Fourth, although the Chief Administrative Judge's Order reflects an inherent concern that this proceeding be conducted in an expeditious and efficient manner, the establishment of a second Board should not be expected to result in any savings of time or resources. As indicated above, the establishment of a second Board will likely result in a duplication of effort and a potential for inconsistent decisions by the Licensing Boards. Moreover, no delay would be caused by allowing security plan issues to be decided by the Initial Licensing Board. As the Chief Administrative Judge may be aware, the Staff indicated in an October 1997 status report that it expects to issue a draft EIS within approximately two years, to issue a final EIS six to twelve months later, and to issue an SER in approximately two to three years.¹⁴ While the Staff's review is conducted, the parties will be engaged in discovery concerning safety and environmental issues. Any hearing on safety and environmental issues is unlikely to commence until the Staff's SER and EIS are issued (although the Initial Licensing Board could decide to hear testimony from parties other than the Staff during such time). With respect to security plan issues, however, the Staff presently expects that its review of the security plan will require approximately one year to complete -- so that the Staff could participate in a hearing on security plan issues approximately one year from now, while the Staff's safety and environmental reviews, and discovery on other contentions, proceed.¹⁵ Accordingly, a hearing on security plan issues could be concluded, and an initial decision rendered on such issues, before the Initial Licensing Board is required to devote much time to other contentions. In sum, the Initial Licensing Board should be able to conclude its consideration of security plan issues as

¹⁴ See "NRC Staff's Status Report and Response to Requests for Hearing and Petitions to Intervene . . ." dated October 1, 1997, at 5.

¹⁵ It should be noted that the SER normally contains a summary of the Staff's conclusions regarding the adequacy of an applicant's security plan. Those conclusions would also be presented in the Staff's testimony in the adjudicatory proceeding, to the extent relevant to issues raised in an intervenor's contentions. As the Staff observed during the prehearing conference, the Staff could proceed to hearing on discrete issues embraced by the SER prior to the issuance of that document. See Tr. 807-09.

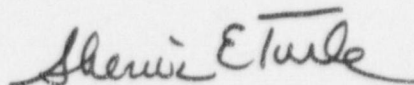
expeditiously as a Licensing Board established to consider security plan issues -- or perhaps more so, given its familiarity with these and other contentions raised in the proceeding.

Finally, the Staff notes that the Applicant's Motion raises difficult jurisdictional issues, as to whether a second Licensing Board may be established to consider issues which were previously raised before the initial Licensing Board designated to preside over this proceeding. Rescission of the March 26, 1998, Order is fully justified for non-jurisdictional reasons as set forth above, without need to consider, at this time, the difficult jurisdictional issues presented by the Applicant.¹⁶

CONCLUSION

For the reasons set forth above, the Staff supports the Applicant's motion for reconsideration of the Chief Administrative Judge's Order establishing a second Licensing Board for security plan issues, and recommends that the Motion be granted.

Respectfully submitted,



Sherwin E. Turk
Counsel for NRC Staff

Dated at Rockville, Maryland
this 13th day of April 1998

¹⁶ Following the issuance of a decision by the Initial Licensing Board on the admissibility of contentions and other currently pending issues, the Chief Administrative Judge, upon soliciting the views of the Initial Licensing Board and admitted parties, may decide to revisit this issue. At such time, any jurisdictional issues could be addressed to the extent then necessary. In any event, the Staff concurs in the Applicant's view that after a ruling on contentions has been issued, "the need, if any, for a second licensing board will be more clear" -- and at such time, the Chief Administrative Judge "could more reasonably decide the extent to which the appointment of a second board for security plan matters [is] warranted" (Motion at 5).

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED
USNRC

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

APR 20 12:05

In the Matter of)	OFFICE
)	FILE
PRIVATE FUEL STORAGE L.L.C.)	ADJ. 72-22-ISFSI
)	72-22-ISFSI-PSP
(Independent Spent)	
Fuel Storage Installation))	

CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S RESPONSE TO APPLICANT'S REQUEST FOR RECONSIDERATION OF ESTABLISHMENT OF A SEPARATE LICENSING BOARD FOR SECURITY PLAN MATTERS" in the above captioned proceeding have been served on the following through deposit in the Nuclear Regulatory Commission's internal mail system, or by deposit in the United States mail, first class, as indicated by an asterisk, with copies by electronic mail as indicated, this 16th day of April, 1998:

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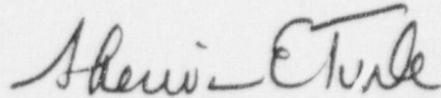
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A handwritten signature in cursive script, reading "Sherwin E. Turk". The signature is written in dark ink and is positioned above a horizontal line.

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