

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

DOCKETED  
USNRC

ATOMIC SAFETY AND LICENSING BOARD

97 DEC 17 P2:15

Before Administrative Judges:

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

OFFICE OF SECRETARY  
RULEMAKING AND  
ADJUDICATIONS STAFF

SERVED DEC 17 1997

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

December 17, 1997

MEMORANDUM AND ORDER

(Protective Order and Schedule for  
Filing Security Plan Contentions)

The physical security plan that is part of the pending application of Private Fuel Storage, L.L.C. (Applicant), to construct and operate a 10 C.F.R. Part 72 independent spent fuel storage installation (ISFSI) in Skull Valley, Utah, contains "protected information" and thus is not subject to public disclosure under 10 C.F.R. Part 73.<sup>1</sup> By memorandum and order issued November 21, 1997, the Licensing Board

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<sup>1</sup> Under 10 C.F.R. Part 73, information contained in a facility physical security plan is generally considered "safeguards information" that is protected from public disclosure. As is noted in the nondisclosure affidavit included as Attachment A to this memorandum and order, the "protected information" involved here is (1) any form of the security plan, including the safeguards contingency plan, and any amendments thereto or portions thereof, for the Applicant's proposed facility, or (2) any information obtained by virtue of these proceedings that is not otherwise a matter of public record and that deals with or describes details of the security plan.

granted the unopposed request of petitioner State of Utah (State) for an order that would permit it to have access to the security plan for the purpose of litigating the plan's adequacy in this proceeding. See Licensing Board Memorandum and Order (Ruling on State of Utah Motion for Protective Order) (Nov. 21, 1997) at 2 (unpublished). The Board also requested that the NRC staff take the lead in preparing a proposed protective order and circulating it for comment among the interested participants. The NRC staff did so, obtaining the consent of the State and the Applicant to a proposed memorandum and order that was provided to the Board on December 12, 1997. See Letter from Sherwin E. Turk, Counsel to the NRC Staff, to the Licensing Board (Dec. 12, 1997).

After reviewing the proposed order, we adopt its terms with modifications.<sup>2</sup> In addition, the Board provides a schedule for the filing of contentions regarding the facility physical security plan that designated counsel, experts, and staff for the State will have access to once they have executed the required nondisclosure affidavits, the form for which is included as Attachment A to this issuance.

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<sup>2</sup> If the Applicant, the State, or the NRC staff have any objections to the modifications adopted by the Board, they should advise us in a pleading filed within five days of the date of this memorandum and order.

## I. DISCLOSURE AND USE OF PROTECTED INFORMATION

This portion of this memorandum and order governs the disclosure and use of 10 C.F.R. Part 73 "protected information" contained in or concerning the security plan for the Skull Valley ISFSI facility, including the safeguards contingency plan, and any amendments thereto.<sup>3</sup> Counsel, experts, and staff for the State and the Applicant in this proceeding who have executed a nondisclosure affidavit, in the form attached to this memorandum and order, shall be permitted access to protected information under the following conditions:<sup>4</sup>

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<sup>3</sup> This memorandum and order does not limit access to protected information by persons authorized to receive such information pursuant to 10 C.F.R. § 73.21(c)(1)(i) and (iii).

<sup>4</sup> In addition to the State, other persons or entities have petitioned for leave to intervene in this proceeding, including (1) the Confederated Tribes of the Goshute Reservation and David Pete (Confederated Tribes/Pete), (2) Ohngo Gaudadeh Devia (OGD), (3) the Skull Valley Band of Goshute Indians (Skull Valley Band), and (4) Castle Rock Land and Livestock, L.C., Skull Valley Company, LTD., and Ensign Ranches of Utah, L.C. (Castle Rock/Skull Valley/Ensign Ranches). Inasmuch as the other petitioners have not expressed an interest in obtaining access to the security plan, see Licensing Board Memorandum and Order (Ruling on State of Utah Motion for Protective Order) (Nov. 21, 1997) at 2 (unpublished), this issuance is addressed only to the State's request for access to the protected safeguards information contained therein. The other organizations/groups and the individual that petitioned for leave to intervene are not being given access to protected information under the terms of this memorandum and order.

A. Only those portions of the security plan and its protected information that are both relevant to and necessary for the preparation or litigation of the State's contentions shall be shown to counsel, experts, or staff for the Applicant or the State pursuant to this memorandum and order.

B. Notwithstanding any other provisions set forth herein, and without waiving any objections the parties may have to any proposed expert's qualifications to testify concerning matters in this proceeding, the following persons may be afforded access to protected information under this memorandum and order for the purpose of preparing and/or responding to contentions:

1. State of Utah

Denise Chancellor, Esq.  
Fred G Nelson, Esq.  
Connie Nakahara, Esq.  
William J. Sinclair  
Karma Pathakis  
Rebecca Waldron  
Jean Braxton

2. Applicant

Jay E. Silberg, Esq.  
Ernest L. Blake, Jr., Esq.  
Paul A. Gaukler, Esq.  
William Hollaway  
Virginia Seymour  
Kimberly Steele

Additions or substitutions to this list of individuals for whom access to protected information may be provided under

this memorandum and order should be made in accordance with the provisions of paragraph I.C. below.<sup>5</sup>

C. 1. Only counsel, experts, and staff for the Applicant or the State who have been qualified in accordance with the requirements of this memorandum and order may have access to protected information on a "need to know" basis pursuant to this memorandum and order. The State and Applicant shall advise each other, the NRC staff, and the Licensing Board of the names and qualifications of any persons, not named herein, for whom access to protected information is sought. Upon approval by the Licensing Board and execution of an nondisclosure affidavit in the form attached hereto, such persons shall have access to protected information.

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<sup>5</sup> In addition, we note that certain persons employed by or on behalf of the Applicant (including Jay E. Silberg, Esq.) or the State (including William J. Sinclair) are already authorized to have access to the protected information that is subject to this memorandum and order. Such persons need not execute the nondisclosure affidavit attached hereto, but are required to comply with the provisions of 10 C.F.R. § 73.21. Further, the provisions of this memorandum and order do not apply to NRC employees, consultants, and contractors. They are subject to internal NRC requirements governing the treatment of protected information. See NRC Management Directive 12.6, "NRC Sensitive Unclassified Information Security Program." However, all persons who serve documents containing protected information on other persons authorized to receive such information in this proceeding shall act in accordance with the procedures for service of documents specified in this memorandum and order and the attached nondisclosure affidavit.

2. To be qualified for access to protected information, an expert must be demonstrated to possess the technical competence necessary to evaluate the portions of the security plan that he or she may be shown. If a proposed expert's qualifications are challenged, the sponsoring party must demonstrate that the expert is qualified to evaluate each section of the security plan that is to be reviewed by the expert. An expert's qualifications to review and evaluate portions of the security plan pursuant to this memorandum and order may be stipulated by written agreement among the NRC staff, Applicant, and State that will be presented to the Licensing Board for approval, or, in the absence of such agreement, may be determined by further order of the Licensing Board.

D. Counsel, experts, and staff who receive any protected information (including transcripts of in camera hearings, filed testimony or any other document that reveals protected information) shall maintain its confidentiality as required by 10 C.F.R. § 73.21 and the annexed nondisclosure affidavit, the terms of which are hereby incorporated in this memorandum and order.

E. Counsel, experts, and staff who receive any protected information shall use it solely for the purpose of participation in this proceeding before the Licensing Board in matters directly pertaining to the security plan and any further Commission or judicial appellate proceedings in this

case directly involving security matters, and for no other purpose.

F. Counsel, experts, and staff shall keep a record of all documents containing protected information in their possession and shall account for and deliver that information for disposal or safekeeping, as may be determined to be appropriate by the Licensing Board or the Commission, to the Licensing Board or the Commission (or to a Commission employee designated by the Board or the Commission), or to a person authorized to receive protected information on behalf of the Applicant, in accordance with the nondisclosure affidavit attached hereto.

G. There shall be a limit of two transcripts per party for any proceeding conducted on the record in which protected information is disclosed or discussed. Parties shall not reproduce or photocopy these transcripts without the express prior approval of the Licensing Board.

H. In addition to the requirements specified in the nondisclosure affidavit appended to this memorandum and order, all pleadings and correspondence in this proceeding (including testimony) that contain any protected information shall:

1. be segregated and served only --

a. on lead counsel,<sup>6</sup> the Assistant for Rulemakings and Adjudications in the Office of the Secretary,<sup>7</sup> and the individual members of the Licensing Board;

b. by United States first class, registered, express, or certified mail, by internal NRC mail, by messenger-courier or overnight delivery service (e.g., Federal Express), or by personal delivery by an individual who otherwise is authorized access pursuant to 10 C.F.R. § 73.21(c); and

c. in two sealed envelopes or wrappers, including (i) an outer mailing envelope, and (ii) a heavy, opaque inner envelope bearing the name and address of the addressee and the statement "PRIVATE. TO BE OPENED BY ADDRESSEE ONLY." Addressees shall take all necessary precautions to ensure that they alone will open envelopes so marked. The outer envelope or wrapper will contain the intended recipient's name and address, and will bear no marking or indication that the document within contains protected information.<sup>8</sup>

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<sup>6</sup> The following attorneys shall be considered "lead counsel" for service purposes: Jay E. Silberg (Applicant), Denise Chancellor (State of Utah), and Sherwin E. Turk (NRC staff).

<sup>7</sup> The original of the pleading or correspondence containing the protected information (without any additional copies) should be directed to Emile L. Julian, Assistant for Rulemakings and Adjudications, Rulemakings and Adjudications Staff, Office of the Secretary.

<sup>8</sup> Notwithstanding the procedure that has been established for the service of copies of documents in this  
(continued...)



2. include an attached cover letter or memorandum, which shall be served on the other participants to the proceeding by United States Postal Service first-class mail, that briefly describes the contents of the pleading or correspondence without reference to any protected information such that the cover letter or memorandum can be placed in the public docket of the proceeding.

I. Counsel, experts, staff, or any other individual who has reason to suspect that documents containing protected information may have been lost or misplaced (for example, because an expected paper has not been received) or that protected information has otherwise become available to unauthorized persons shall notify the Board promptly of those suspicions and the reasons for them.

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(...continued)  
proceeding, see Licensing Board Memorandum and Order (Initial Prehearing Order) (Sept. 23, 1997) at 5 (unpublished), because of the subject matter the parties shall not make any facsimile or e-mail transmission to the Licensing Board or other parties of any document that contains or discusses protected information. With this restriction in mind, and to facilitate the Licensing Board's preparation of an electronic hearing database, see id. at 7-8, the parties should submit to the Board copies of documents that contain or discuss protected information only on a 3.5 inch diskette or CD-ROM transmitted in accordance with the provisions of paragraph I.H.1. above and suitably marked in accordance with paragraph 5(g) of the appended nondisclosure affidavit.

## II. SECURITY PLAN CONTENTIONS FILING SCHEDULE

The State shall file any contentions regarding the Applicant's security plan on or before Monday, January 5, 1998. These contentions should be numbered separately from the contentions already filed by the State, each with the designation "Security-\_\_\_." Applicant and NRC staff responses to any State security plan contentions shall be filed on or before Tuesday, January 20, 1998. If the State's contentions and/or the Applicant and NRC staff responses include protected information, consistent with the requirements of paragraph I.H. above, the contentions and/or responses shall be served by United States Postal Service express mail or other approved means that will ensure receipt by the next business day. Otherwise, consistent with the Board's September 23, 1997 issuance, see supra note 8, the contentions and/or responses should be served by e-mail, facsimile transmission, or other means that will ensure receipt on the date of filing.

In the cover letter or memorandum that is to accompany those filings in accordance with paragraph I.H.2. above, or in the pleadings themselves if the filings do not include protected information, the participants should advise the Board whether they anticipate that any oral argument regarding the security plan contentions at the prehearing conference now scheduled for the week of January 26, 1998,

would involve discussing protected information so as to require an in camera session. The Board will advise the participants prior to the prehearing conference whether it anticipates holding an in camera session to hear arguments on the admissibility of any of the State's security plan contentions.

It is so ORDERED.

THE ATOMIC SAFETY  
AND LICENSING BOARD<sup>9</sup>

G. Paul Bollwerk, III  
G. Paul Bollwerk, III  
ADMINISTRATIVE JUDGE

Jerry R. Kline  
Jerry R. Kline  
ADMINISTRATIVE JUDGE

Rockville, Maryland

December 17, 1997

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<sup>9</sup> Administrative Judge Lam was not available to sign this memorandum and order. Copies of this memorandum and order were sent this date to counsel for the Applicant and for petitioners Skull Valley Band, OGD, Confederated Tribes/Pete, Castle Rock/Skull Valley/Ensign Ranches, and the State by Internet e-mail transmission; and to counsel for the NRC staff by e-mail through the agency's wide area network system.

**APPENDIX A**

## NONDISCLOSURE AFFIDAVIT

I, \_\_\_\_\_, being  
duly sworn, state:

1. As used in this nondisclosure affidavit,

(a) "Protected information" is (i) any form of the security plan, including the safeguards contingency plan, and any amendments thereto (Security Plan), or portions thereof, for the Private Fuel Storage Facility proposed by Private Fuel Storage L.L.C. (Applicant), or (ii) any information obtained by virtue of these proceedings which is not otherwise a matter of public record and which deals with or describes details of the Security Plan.

(b) An "authorized person" is (i) an employee, consultant or contractor of the U.S. Nuclear Regulatory Commission (NRC or Commission) entitled to access to protected information; (ii) a person who, at the invitation of the Atomic Safety and Licensing Board (Licensing Board), has executed a copy of this affidavit; or (iii) a person employed by or on behalf of the Applicant and authorized by it in accordance with NRC regulations to have access to protected information.

(c) A "document" means any audio or video tape recording or written matter of any kind, whether produced, reproduced, or stored on paper, cards, tapes,

ribbons, disks, belts, charts, film, computer files, computer disks or diskettes, computer storage devices or any other medium, and includes, without limitation, books, reports, studies, statements, speeches, notebooks, calendars, working papers, manuals, memoranda, notes, instructions, directions, records, correspondence, diaries, diagrams, drawings, lists, telephone logs, minutes, and photographs, and also includes, without limitation, originals, copies (with or without notes or changes thereon), and drafts.

2. I have read the December 17, 1997 Licensing Board memorandum and order issued in this proceeding and will comply in all respects with its terms and conditions regarding the protected information produced in connection therewith. I will safeguard protected information in accordance with the terms of this affidavit.

3. I will not disclose protected information to anyone except an authorized person, unless that information has previously been disclosed in the public record of this proceeding. I will safeguard documents containing protected information in written or recorded form (including any portions of transcripts of in camera hearings, filed testimony or any other documents that contain such information), so that the protected information contained therein remains at all times under the control of an authorized person and is not disclosed to anyone else.

4. I will not reproduce or copy any protected information by any means without the express approval or direction of the Licensing Board or the Commission, except to the extent necessary to make required service on the Licensing Board, the Office of the Secretary, or other party authorized under the protective order to receive such service. I understand that I may take notes concerning such protected information, subject, however, to the terms of this affidavit and the Licensing Board's December 17, 1997 memorandum and order. So long as I possess protected information, I will continue to take these precautions until further order of the Licensing Board or the Commission.

5. I will safeguard and hold in confidence any data, notes, or copies of protected information and all other papers that contain any protected information by means of the following:

(a) my use of the protected information will be made only at a facility provided for use by designated counsel, experts, or staff in (i) a designated office of the Utah Department of Environmental Quality in Salt Lake City, Utah; (ii) an office of the NRC Staff in Rockville, Maryland; or (iii) an office to be provided by the Applicant in Washington, D.C. Any such facility is to be located in a controlled access building that is either attended around the clock or locked at night.

(b) When not under my direct control or the direct control of another individual authorized to have access thereto, I will keep and safeguard all documents containing protected information (including, without limitation, any notes that I may take) in a safe or other locked security storage container to be obtained by the provider of the facility referred to in paragraph 5(a) above and to be located at all times at the above designated location. Access to the safe or other security storage container will be positively controlled by use of keys or other comparable means. Keys and/or knowledge of lock combinations protecting safeguards information shall be limited to authorized persons.

(c) Any secretarial or administrative work performed at my request or under my supervision will be performed only at the above location by personnel who have executed a nondisclosure affidavit pursuant to the Licensing Board's December 17, 1997 memorandum and order.

(d) If requested, necessary typing and reproduction equipment will be furnished by the provider of a facility referred to in paragraph 5(a) above (it being understood that a nominal photocopying or equipment usage charge may be assessed). In addition, if requested, the facility provider will make



available a telephone, and a facsimile machine for the receipt of nonprotected information only, it being understood that protected information shall not be discussed by telephone or communicated by facsimile transmission.

(e) If protected information is processed on or with automated data processing, computerized word processing equipment, or a personal or laptop computer, access to such equipment shall require the use of an entry code for access to stored protected information. If use of an entry code is not feasible, protected information may be processed on, but shall not be stored in, such equipment. Additionally, any such word processing equipment, data processing equipment, or computer that is used to process or store protected information shall be operated as stand-alone or free-standing equipment, not connected to any other such equipment by means of a Local Area Network (LAN) or Wide Area Network (WAN) or other data-sharing system. Further, if any protected information is backed up or stored on a computer hard drive or other device, that drive or device shall be capable of being removed and shall be stored in the safe or locked security storage container referred to in paragraph 5(b) above, when not in use.

(f) All mailings by me or on my behalf involving protected information shall be made from a facility referred to in paragraph 5(a) above.

(g) Each document that contains Safeguards Information, as defined in 10 C.F.R. § 73.2, shall be marked "Safeguards Information" in a conspicuous manner to indicate the presence of protected information, as set forth in 10 C.F.R. § 73.21(e).

6. If I prepare documents containing protected information to participate in further proceedings in this case, I will assure that any secretary or other individual who must receive protected information to help me prepare those documents has been approved by the Licensing Board and has executed an affidavit like this one and has agreed to abide by its terms. Copies of any such affidavit will be filed with the Licensing Board before I reveal any protected information to any such person.

7. I shall use protected information only for the purpose of preparation for any proceedings in this case dealing with Security Plan issues, and for no other purpose.

8. I shall keep a record of all documents containing protected information in my possession, including any copies of those documents or portions thereof made by me or on my behalf. At the conclusion of this proceeding, I shall account to the Licensing Board or the Commission, or to a Commission employee designated by the Board or the

Commission, for all the documents or other materials containing protected information in my possession and deliver them as provided herein. When I have finished using the protected information they contain, but in no event later than the conclusion of this proceeding (including any related Commission or judicial appeals), I shall deliver those documents and materials for disposal or safekeeping, as may be determined to be appropriate by the Licensing Board or the Commission, to the Licensing Board or the Commission, to a Commission employee designated by the Board or the Commission, or to a person authorized to receive protected information on behalf of the Applicant.

9. I make this agreement with the following understandings:

(a) I do not waive any objections that any other person may have to executing an affidavit such as this one;

(b) I do not waive any objections that I may have or raise at a subsequent time in this proceeding, concerning an expert's qualifications to testify concerning Security Plan issues; and

(c) I will not publicly discuss or disclose any protected information that I receive by virtue of this proceeding, and will not corroborate the accuracy or inaccuracy of information obtained outside this

proceeding by using protected information, or my knowledge thereof, gained through the hearing process.

10. I acknowledge that any violation of the terms of this affidavit or the Licensing Board's December 17, 1997 memorandum and order, which incorporates the terms of this affidavit, may result in the imposition of sanctions as the Licensing Board or the Commission may deem to be appropriate, including, but not limited to, referral of the violation to appropriate bar associations and other disciplinary authorities. I further acknowledge that any unauthorized disclosure of protected information or breach of the protective order issued in this proceeding may be grounds for the imposition of civil and/or criminal penalties, as set forth in 10 C.F.R. § 2.744(e) and sections 223 and 234 of the Atomic Energy Act of 1954, as amended, 42 U.S.C. §§ 2273, 2282.

WHEREFORE, I do solemnly agree to safeguard such protected information as may be disclosed to me in this proceeding, in accordance with the terms of this affidavit.

\_\_\_\_\_  
(Name)

Subscribed to and sworn before me  
this \_\_\_\_ day of \_\_\_\_\_, 199\_

\_\_\_\_\_  
Notary Public

My commission expires: \_\_\_\_\_

**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 M&O (PROTECTIVE ORDER...) 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.

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

Administrative Judge  
G. Paul Bollwerk, III, Chairman  
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Mail Stop - T-3 F23  
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Administrative Judge  
Jerry R. Kline  
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Docket No.(s)72-22-ISFSI  
LB M&O (PROTECTIVE ORDER...)

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Danny Quintana, Esq.  
Skull Valley Band of Goshute Indians  
Danny Quintana & Assocs., P.C.  
50 West Broadway, Fourth Floor  
Salt Lake City, UT 84101

Dated at Rockville, Md. this  
17 day of December 1997

*Adria T. Byrdson*  
Office of the Secretary of the Commission