

November 19, 1997

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

NRC STAFF'S RESPONSE TO
STATE OF UTAH'S MOTION FOR PROTECTIVE ORDER

INTRODUCTION

On November 14, 1997, the State of Utah filed a motion for a protective order, to enable its attorneys and other specified (and unspecified) persons to see, for the purpose of framing contentions, the proposed physical security plan for the independent spent fuel storage installation (ISFSI) proposed to be built and operated by Private Fuel Storage, LLC (the "Applicant").¹ By Order of November 17, 1997, the Licensing Board directed the Applicant and the NRC Staff ("Staff") to file responses to the State's Motion on or before November 19, 1997, and to include therein an estimate of how long it would take (1) to submit a proposed protective order for consideration by the Board, and (2) for the persons named in the State's

¹ "State of Utah's Motion for a Protective Order to Review and File Contentions on the Applicant's Physical Security Plan" ("Motion"), dated November 14, 1997.

Motion to gain access to the security plan after agreeing to abide by the terms of a protective order.²

The Staff herewith files its response to the State's Motion and the questions posed by the Licensing Board. For the reasons set forth below, the Staff does not oppose the State's request that a protective order be adopted in this proceeding to afford access to the Applicant's physical security plan to persons who have a need to know the details of that plan, subject to the inclusion of appropriate provisions to restrict the unauthorized disclosure of safeguards information contained therein or related thereto.³

DISCUSSION

Pursuant to 10 C.F.R. § 73.21, safeguards information contained in or related to an applicant's or licensee's physical security plan may only be disclosed to persons who have a need to know that information and who fall within one of the categories of persons listed in 10 C.F.R. § 73.21(c)(1). Among such persons with a need to know, to whom disclosure may be made, are "individual[s] to whom disclosure is ordered pursuant to [10 C.F.R.] § 2.744(e)." 10 C.F.R. § 73.21(c)(1)(vi).

The Staff believes that the entry of a protective order is appropriate in this proceeding, in light of the State's expressed interest in filing contentions related to the Applicant's physical

² See "Order (Responses to Motion for Protective Order)," dated November 17, 1997, at 1-2.

³ Indeed, the State filed its Motion at the suggestion of Staff Counsel, upon consideration of the expressed desire by Denise Chancellor, an Assistant Attorney General for the State of Utah, to review the security plan for the purpose of filing contentions in this proceeding. See letter from Sherwin E. Turk (NRC) to Denise Chancellor (Utah), dated November 13, 1997 (Motion at 1, and Attachment 3 thereto).

security plan, and the likelihood that it will be able to identify an expert qualified to evaluate that plan and to testify concerning the adequacy thereof.⁴ Such protective orders have been issued or found to be appropriate in other NRC adjudicatory proceedings related to an applicant's physical security plan, subject to the requirement, *inter alia*, that a qualified expert be identified to evaluate and testify concerning the plan. *See, e.g., Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-600, 12 NRC 3, 14 (1980); *Duke Power Co.* (Catawba Nuclear Station, Units 1 and 2), LBP-82-16, 15 NRC 566, 590 (1982).⁵

While the Staff does not oppose the State's Motion in principle, we note that one aspect of the State's Motion is somewhat problematic. The State requests that access to the security plan be afforded not only to the Director of the Utah Radiation Control Division (Mr. Sinclair, who already has a copy of the plan) and to the State's lead attorney in this proceeding (Ms. Chancellor), but also seeks disclosure to three additional State officials or employees having policy and/or technical responsibilities, two additional State attorneys, and an unspecified

⁴ Although the State has not yet designated the person(s) who would appear as experts on its behalf, the Staff notes that Mr. William Sinclair, Director of the Utah Division of Radiation Control, is already in possession of the plan as an official State representative, in connection with his duties apart from this litigation. *See* Letter from Denise Chancellor (Utah) to Sherwin Turk (NRC), dated November 8, 1997 (Motion, Attachment 2). It is unclear, however, whether Mr. Sinclair is the person who would be designated to appear as an expert on behalf of the State, or whether he is qualified to appear as an expert on security plan issues.

⁵ The Staff notes that, pursuant to 10 C.F.R. § 2.744(g), a request for protective order shall not "be made or entertained before the matters in controversy have been identified by the Commission or the presiding officer . . . except upon leave of the presiding officer for good cause shown." Inasmuch as the filing of admissible contentions under 10 C.F.R. 2.714(b) could require that a petitioner or party review the security plan prior to filing its contentions (*see* Motion at 2), the Licensing Board could arguably find that "good cause" exists to support issuance of a protective order prior to ruling on contentions. *See, e.g., Catawba, supra*, 15 NRC at 590.

number of secretarial and support staff (Motion, at 3). The Staff submits that disclosure of the security plan to such a large number of individuals increases the risk of unauthorized disclosure and should therefore be avoided; and that any person to whom disclosure is sought must be shown to have a need to know the information in question. To this end, the State should be required to explain why individuals having apparently duplicative roles, or duties of a "policy" nature, need to have access to the safeguards information contained in the security plan, where access by a single expert, one secretary, and one attorney would otherwise appear to be sufficient.

Finally, the Staff notes that the State proposes to file contentions on the security plan within two weeks after issuance of a protective order (Motion at 3). The Staff does not oppose the State's filing of such contentions within the suggested period of time.

Response to Board Questions

In its Order of November 17, 1997, the Licensing Board inquired, first, how long it would take for counsel to prepare a proposed protective order. In this regard, Staff Counsel has commenced a review of the protective orders issued in other proceedings, in preparation for filing a proposed form of order. Staff Counsel expects that approximately one week will be required to complete that draft and forward it to other parties and/or the Licensing Board (alternatively, the Applicant, the State, or other interested petitioners could draft a proposed form of order for consideration by other parties). Other parties may then be expected to require up to one week to review that draft and propose any changes thereto; and a final proposed order (or alternative versions thereof) could be submitted to the Licensing Board within a few days thereafter, following the completion of discussions among interested parties. In sum, the Staff

expects that a proposed order could be submitted for consideration by the Board within a period of two or three weeks.

In its Order, the Licensing Board further inquired how long it may be expected for the persons named in the State's Motion to gain access to the security plan after agreeing to abide by the terms of a protective order. The Staff is not aware of any reason why such access should require more than the limited time required (on the order of several days) for the Applicant to photocopy and transmit the security plan to those persons, using appropriate means of transmission, following those persons' execution of the necessary affidavit of non-disclosure. In this regard, the Staff notes that the Applicant's physical security plan contains safeguards information,⁶ rather than national security information or restricted data,⁷ and that personal security clearances are therefore not required.⁸

⁶ "Safeguards Information" is defined in 10 C.F.R. § 73.2 as:

[I]nformation not otherwise classified as National Security Information or Restricted Data which specifically identifies a licensee's or applicant's detailed (1) security measures for the physical protection of special nuclear material, or (2) security measures for the physical protection and location of certain plant equipment vital to the safety of production or utilization facilities.

Cf. section 147 of the Atomic Energy Act of 1954, as amended ("AEA"), 42 U.S.C. § 2167.

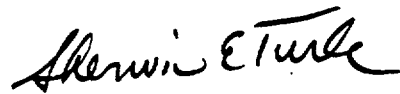
⁷ Where access is sought to "national security information" or "restricted data," security clearances are required in accordance with 10 C.F.R. Part 95. See 10 C.F.R. § 95.35(a); *cf.* AEA § 141, *et seq.*, 42 U.S.C. § 2161, *et seq.*

⁸ Although not applicable here, the Staff notes that when safeguards information is disclosed by a licensee who is authorized to operate a nuclear power reactor, access is restricted to those persons who have been fingerprinted in accordance with the Commission's regulations. See 10 C.F.R. § 73.57; *cf.* section 149 of the AEA, 42 U.S.C. § 2169. However, even in that circumstance, fingerprinting is not required if the disclosure to those persons is made pursuant to a protective order issued under 10 C.F.R. § 2.744(e). See 10 C.F.R. § 73.57(b)(2)(ii).

CONCLUSION

The Staff does not oppose the State's motion for the entry of a protective order, if appropriate conditions are established governing the disclosure of safeguards information contained in or related to the Applicant's physical security plan.

Respectfully submitted,

A handwritten signature in cursive script, reading "Sherwin E. Turk".

Sherwin E. Turk
Catherine L. Marco
Counsel for NRC Staff

Dated at Rockville, Maryland
this 19th day of November 1997

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S RESPONSE TO STATE OF UTAH'S MOTION FOR PROTECTIVE ORDER" 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 19th day of November, 1997:

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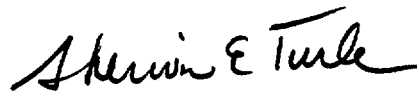
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