

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED
USNRC

ATOMIC SAFETY AND LICENSING BOARD

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Before Administrative Judges:

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

OFFICE OF SECRETARY
RULEMAKING AND
ADJUDICATIONS STAFF

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

October 17, 1997

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MEMORANDUM AND ORDER

(Ruling on Motions to Suspend
Proceeding and for Extension
of Time to File Contentions)

Petitioner State of Utah (State) has filed two related motions, both dated October 1, 1997. In one, the State requests that this proceeding be suspended until (1) a local public document room (LPDR) is established in the area of the independent spent fuel storage installation (ISFSI) proposed by applicant Private Fuel Storage, L.L.C. (PFS); and (2) PFS has filed a "substantially complete" application, at which time this proceeding should be renoticed to accord an additional opportunity to request a hearing. In the second motion, the State asks the Licensing Board to extend by forty-five days, or until December 8, 1997, the date for filing a supplement to its hearing request/intervention petition, which would include a list of

contentions and supporting bases. If granted, this extension also would require that the Board reschedule a prehearing conference and site visit now being planned for the week of November 17, 1997.

Petitioners Castle Rock Land and Livestock, L.C., Skull Valley Company, LTD., and Ensign Ranches of Utah, L.C. (Castle Rock, et al.) and petitioner Ohngo Gaudadeh Devia (OGD) have filed responses joining and supporting the State's requests. The State also has represented that petitioners Confederated Tribes of the Goshute Reservation and David Pete (Confederated Tribes/Pete) support both motions. Applicant PFS and petitioner Skull Valley Band of Goshute Indians (Skull Valley Band), which generally supports the PFS application, oppose the suspension/renoticing motion. Both also oppose the extension motion, with PFS suggesting that any extension for filing contentions should be limited to one week. The NRC staff opposes the suspension/renoticing motion, but does not object to a thirty-day extension of time for filing contentions.

For the reasons set forth below, we deny the State of Utah's suspension/renoticing motion, but grant, in part, its request for an extension of the date for filing hearing request/intervention petition supplements, including lists of contentions with supporting bases.

I. Motion to Suspend and Renotice Proceeding

The State's suspension/renoticing motion has two prongs. The first is its assertion that suspension and renoticing is warranted because the lack of an established LPDR has prevented prospective intervenors from having access to those documents that are necessary for them to participate meaningfully in the proceeding, including filing a hearing request/intervention petition. The other is that, because of unavailable documents -- including storage cask proprietary documentation -- and deficiencies in the PFS application -- including a failure to address financial qualifications, decommissioning, and construction costs or to provide adequate emergency response or quality assurance plans -- the State and other prospective intervenors have been severely prejudiced in developing their contentions or will be forced to bear the unfair burden of having to supplement their contentions. See [State's] Motion to Suspend Licensing Proceedings Pending Establishment of a [LPDR] and Applicant's Submission of a Substantially Complete Application, and Request for Re-notice of Construction Permit/Operating License Application (Oct. 1, 1997) at 6-14 [hereinafter Suspension Motion]. Assuming, for present purposes, the Board has the power to do what the

State asks,¹ we find none of its proffered reasons sufficient to justify suspending and then renoticing this proceeding.

With its publication in the Federal Register, 62 Fed. Reg. 41,099 (1997), the staff's July 21, 1997 declaration that it was considering the PFS application and that a hearing on the application could be requested put the general public on notice that (1) the PFS application was available at the Commission's public document room in Washington, D.C.; and (2) those who wanted to request a hearing regarding that application needed to make an effort to gather the information necessary to file a timely hearing request/intervention petition. As is evident from the response of the State and the other petitioners opposing the PFS application, there were entities and individuals who were able to act on that notice and timely provide information to address the agency's intervention requirements. Other than the State's general expression of concern that there may be individuals or groups who were unable to participate, we have no evidence that the lack of an LPDR has affected anyone's ability to file a hearing

¹ The agency case law the State cites in support of its renoticing request does indicate a presiding officer has the authority to renotice a proceeding in cases that have become "stale." See Rochester Gas & Electric Co. (R.E. Ginna Nuclear Plant, Unit 1), LBP-83-73, 18 NRC 1231, 1233-36 (1983). It does not, however, provide any direct support for the State's assertion the Board has the authority to renotice this relatively "fresh" proceeding.

petition that meets the agency's initial requirements that each petitioner set forth the basis for its standing and describe the aspects of the proceeding (i.e., the general subjects) about which the petitioner is concerned.

So too, we do not find the State's assertions about the sufficiency of the PFS application or the supporting documentation provide good cause for suspending and renoticing this proceeding. The adequacy of the PFS application is the overarching issue in this proceeding. If the record in this proceeding as it is developed through litigation of any admissible contentions establishes, as the State maintains, that the PFS application is inadequate to support issuance of the license PFS has requested, then the application must be denied. In their contentions, the State and the other petitioners who contest the PFS application have the opportunity to specify what those deficiencies are and the basis for their belief that those purported shortcomings are, indeed, deficiencies. See 10 C.F.R. § 2.714(b)(2)(iii) (petitioner who believes an application fails to contain information on a relevant matter as required by law should identify each failure and the supporting reasons for its belief); see also New England Power Co. (NEP, Units 1 and 2), LBP-78-8, 7 NRC 271, 281 (1978).

The State's concern about its present lack of access to some information likewise is not a reason for the Board to

suspend this proceeding. The Commission's rules of practice contemplate that during the course of a proceeding, additional documentation may become available to the participants that raises additional issues that are relevant to the question of application adequacy. In such instances, a participant can request that late-filed contentions be admitted to consider those issues. See id. § 2.714(a)(3); see also id. § 2.714(b)(2)(ii) (although National Environmental Policy Act contentions shall be based on applicant's environmental report, petitioner can amend or file new contentions based on staff draft or final environmental impact statement or assessment); 54 Fed. Reg. 33,168, 33,172 (1989). This method of proceeding may well impart some "inefficiencies" into the adjudicatory process. Nonetheless, as the Commission has made clear "intervenors are expected to raise issues as early as possible. To the extent that this leads to contentions that are superseded by the subsequent issuance of licensing-related documents, those changes can be dealt with by either modifying or disposing of the superseded contentions." Duke Power Co. (Catawaba Nuclear Station, Units 1 and 2), CLI-83-19, 17 NRC 1041, 1050 (1983).

We see no reason to suspend or renounce this proceeding. We thus deny the State's request for those actions.

II. Motion to Extend Time to File Contentions

In support of its motion for an extension of time to file its contentions, the State relies upon many of the same factors that it cited in support of its suspension/renoticing request. One that appears to be a facially relevant consideration, at least in terms of the case law cited by the State, is the impact that lack of access to an LPDR can have on a petitioner's ability to craft contentions. See Suspension Motion at 7 (citing Combustion Engineering, Inc. (Hematite Fuel Fabrication Facility), LBP-89-23, 30 NRC 140, 144-45 (1989)); see also Georgia Institute of Technology (Georgia Tech Research Reactor, Atlanta, Georgia), LBP-95-6, 41 NRC 281, 296-98, aff'd, CLI-95-12, 42 NRC 111 (1995). This consideration has less impact in this instance, however, because (1) the State and petitioners Castle Rock, et al., apparently have had copies of the application since late June and mid-July, respectively, and OGD was given access to a copy of the application in early September; and (2) notwithstanding the lack of an officially designed NRC LPDR, since mid-August copies of the PFS application were available for public inspection at libraries in Tooele and Salt Lake City, Utah, some twenty-five and sixty miles, respectively, from the

proposed ISFSI site.² See Applicant's Answer to the [State's] Motion to Suspend Proceedings and Re-notice Opportunity for Hearing (Oct. 14, 1997) at 3-5.

Of more concern to the Board is the State's declarations about its need to provide its experts with additional time to review the application. Given the length and complexity of the original application (which is in excess of 2000 pages) and the State's more recent acquisition of some 1500 additional pages of technical calculations that support the application, we agree with the staff that an extension for filing contentions is warranted.³ We also agree that a thirty-day extension is appropriate and that there should be an additional period of

² In its response to the State's suspension motion, the staff indicates that "shortly" an LPDR will be established in Salt Lake City, Utah. See NRC Staff's Response to [State's] Motion to Suspend Licensing Proceedings and to Require Renotice of the Application (Oct. 10, 1997) at 6 n.10. The Board would hope this can be accomplished by the end of this month.

³ In its response to the State's extension motion (which the Board notes apparently was not provided to us in accordance with our October 7, 1997 order), petitioner OGD asserts it is having a difficult time obtaining a copy of the PFS application and the additional 1500 pages of computations because of its counsel's out of state location and the expense involved. See OGD's Response to [the State's] Motion for Extension of Time to File Contentions (Oct. 14, 1997) at unnumbered pp. 1-3. The Board would hope that counsel for OGD and PFS promptly can reach some accommodation that will allow OGD reasonable access to documents PFS has provided to the other petitioners. Alternatively, OGD may wish to consult with counsel for the other petitioners to see if it can obtain those documents from them or try utilizing the Freedom of Information Act, which has fee waiver provisions, see 10 C.F.R. § 9.41.

time allotted for responses to any supplements to the pending hearing requests/intervention petitions. A revised schedule to this effect is set forth below.

III. Additional Scheduling Matters

Besides ruling on the pending State motions, the Board wishes to take this opportunity to address several other matters relating to the scheduling of this proceeding.

A. Timing of the Staff's Safety and Environmental Review Documents

The Board notes that in the environmental report that accompanies the PFS application, the applicant has set out a schedule that begins access road and facility construction in January 2000. See Private Fuel Storage, L.L.C., Environmental Report [for] Private Fuel Storage Facility at 1.3-1 (rev. 0 June 1997). In response to the Board's inquiry, however, the staff has declared that its draft and final safety evaluation reports (SER) regarding the application and its draft and final environmental impact statements (EIS) regarding the PFS proposal will not be completed for some two to three years. See NRC Staff's Status Report and Response to Requests for Hearing and Petitions to Intervene Filed by (1) [State], (2) [Skull Valley Band], (3) [OGD], and (4) [Castle Rock, et al.] (Oct. 1, 1997) at 5. Thus, at least as it is currently presented, the staff's review of this application will extend as much

as a year beyond the licensee's anticipated starting date for facility construction.

This raises a question about 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 these staff safety and environmental documents, whether in draft or final form. To aid it in setting additional schedules in this proceeding, the Board requests that the applicant and the staff address this question of the Board's authority. In this regard, they should discuss any potentially relevant regulatory provisions, such as 10 C.F.R. §§ 51.100-.104; id. § 72.40(b), and any analogous case authority from reactor licensing or other proceedings that shed light on this matter. Other participants will then be accorded an opportunity to respond to the staff and applicant filings. A schedule for addressing this issue also is set forth below.

B. Prehearing Conference and Site Visit

With our partial grant of the State's request for an extension of time for filing contentions, the prehearing conference and site visit that were being arranged for the week of November 17, 1997, will have to be rescheduled to early 1998. The participants will be advised of the new schedule. The Board continues to anticipate that the prehearing conference will last at least two days. The Board also anticipates that any site visit can be conducted

in half a day, but invites comments from the applicant or any other participants on the accuracy of this estimate.

For the foregoing reasons, it is this seventeenth day of October 1997, ORDERED, that:

1. The State of Utah's October 1, 1997 motion to suspend proceeding and to renotice application is denied.

2. The State of Utah's October 1, 1997 motion for an extension of time to file hearing request/intervention petition supplements, including contention lists, is granted in part in that participant hearing request/intervention petition supplements shall be filed on or before Monday, November 24, 1997.

3. Responses to any hearing request/intervention petition supplements shall be filed on or before Monday, December 22, 1997.

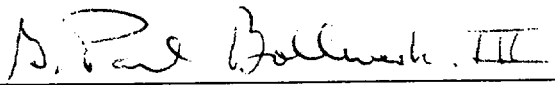
4. Staff and applicant pleadings addressing the question posed in paragraph III.A above shall be filed on or before Tuesday, December 30, 1997.

5. Responses to the staff and applicant pleadings addressing the question posed in paragraph III.A above shall be filed on or before Wednesday, January 7, 1997.

6. The filings provided for in this memorandum and order shall be served on the Board, the Office of the Secretary, and counsel for the other participants by

facsimile transmission, e-mail, or other means that will ensure receipt by close of business (4:30 p.m. EST) on the final day of the filing period. See Licensing Board Memorandum and Order (Initial Prehearing Order) (Sept. 23, 1997) at 5-6 (unpublished).

FOR THE ATOMIC SAFETY
AND LICENSING BOARD⁴



G. Paul Bollwerk, III
ADMINISTRATIVE JUDGE

Rockville, Maryland

October 17, 1997

⁴ Copies of this memorandum and order were sent this date to counsel for the applicant PFS and to counsel for petitioners Skull Valley Band, OGD, Confederated Tribes/Pete, Castle Rock, et al., 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.

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 RULING ON STATE MOTION 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
Atomic Safety and Licensing Board
Mail Stop - T-3 F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555

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

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

Sherwin E. Turk, Esq.
Catherine L. Marco, Esq.
Office of the General Counsel
Mail Stop - 0-15 B18
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Diane Curran, Esq.
Harmon, Curran & Spielberg
2001 S Street, N.W., Suite 430
Washington, DC 20009

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

Jay E. Silberg, Esq.
Shaw, Pittman, Potts and Trowbridge
2300 N Street, NW
Washington, DC 20037

Docket No.(s)72-22-ISFSI
LB MEMO RULING ON STATE MOTION

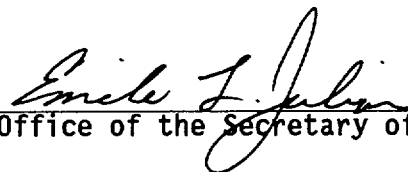
John Paul Kennedy, Esq.
Confederated Tribes of the Goshute
Reservation and David Pete
1385 Yale Avenue
Salt Lake City, UT 84105

Jean Belille, Esq.
Ohngo Gaudadeh Devia
Land and Water Fund of the Rockies
2260 Baseline Road, Suite 200
Boulder, CO 80302

Clayton J. Parr, Esq.
Castle Rock, et al.
Kimball, Parr, Waddoups, Brown & Gee
185 S. State St., Suite 1300
P.O. Box 11019
Salt Lake City, UT 84147

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 October 1997


Office of the Secretary of the Commission

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Administrative Judge
G. Paul Bollwerk, III, Chairman
Atomic Safety and Licensing Board
Mail Stop - T-3 F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555