

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of:)	Docket No. 72-22-ISFSI
)	
PRIVATE FUEL STORAGE, LLC)	ASLBP No. 97-732-02-ISFSI
(Independent Spent Fuel)	
Storage Installation))	November 14, 1997

**STATE OF UTAH'S MOTION FOR A PROTECTIVE ORDER
TO REVIEW AND FILE CONTENTIONS ON THE
APPLICANT'S PHYSICAL SECURITY PLAN**

On October 1, 1997, Mr. William Sinclair, Director, Utah Division of Radiation Control and the Governor's designee for spent fuel shipments under 10 CFR 73.21(c), received a copy of the Applicant's Physical Security Plan. The State has endeavored to work with NRC staff to permit the State's attorney to have access to the Plan in order to work with Mr. Sinclair in developing contentions on the Plan. The contentions would be filed confidentially with the Board for in camera review. By letter dated November 13, NRC staff suggested that the State apply to the Board for a protective order pursuant to 10 CFR § 2.744(e) if it desires to file contentions on the Security Plan. The State now applies to the Board for such an order.

A copy of the relevant correspondence between NRC staff and the State is attached and consists of (1) an email from Sherwin Turk, Office of General Counsel, to Denise Chancellor, Assistant Attorney General, dated October 15, 1997 and Denise Chancellor's response to Mr. Turk's email on the same date (attached as one document);

(2) letter from Denise Chancellor to Sherwin Turk, copy to Jay Silberg, attorney for the Applicant, dated November 8; and (3) letter from Sherwin Turk to Denise Chancellor dated November 13, 1997, copy to Jay Silberg (to date, the State has only received an email copy of this letter). This correspondence shows that for the past month the State has been trying to ascertain from NRC staff the appropriate procedures for access to the Security Plan.

The reason for requesting a protective order is to permit the State to file contentions on the Security Plan under appropriate procedures and safeguards. The State asserts that the issue of whether the Security Plan meets the requirements of 10 Part 72 Subpart H is necessary to a proper decision in this proceeding. Under NRC's procedures, a petitioner must file "a list of contentions which petitioner seeks to have litigated in the hearing." 10 CFR § 2.714(b)(1). Whether the Applicant's Security Plan meets the requirements of Subpart H is a legitimate issue that the State seeks to raise and litigate in this proceeding. The fact that the State has obtained a copy of the Plan pursuant to 10 CFR 73.21(c) and not through discovery in this proceeding should not preclude the Board from issuing a protective order to allow the State to formulate contentions. The issue of whether there is adequate security is germane to this proceeding given the fact that the Applicant is a private entity without any demonstrated record in the safeguards area who will be receiving a substantial number of spent fuel shipments (up to 200 shipments per year) from nuclear reactors located throughout the United States. *See* SAR at 1.4-1 & 2.

To deny the State the opportunity to file contentions on the Security Plan would impair the State's procedural rights to bring safeguards concerns before the Licensing Board.

The State requests that Mr. Sinclair and Assistant Attorney Denise Chancellor be granted access to the Security Plan for the purpose of developing and filing contentions on the Plan. In addition, the State also requests that the following State personnel be granted access to the Plan for the purpose of assisting in the development and filing of contentions: Dianne R. Nielson, Executive Director, Utah Department of Environmental Quality; Suzanne Winters-Ramsey, Utah State Science Advisor; Dane Finerfrock, Environmental Manager I (Health Physicist), Utah Division of Radiation Control; Assistant Attorney General Fred Nelson; and Special Assistant Attorney General Connie Nakahara. Finally, the State requests that certain State personnel be permitted to handle and review contentions based on the Security Plan for purposes of providing secretarial and other support. If those State support personnel need to be named, the State will supplement this motion.

If and when the Board grants the requested protective order, the State requests that its contentions on the Security Plan be filed within two weeks from the date of the order.

In addition, the State requests direction from the Board on procedures and safeguards for filing the contentions and the persons to be served.

DATED this 14th day of November, 1997

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Denise Chancellor", written over a horizontal line.

Denise Chancellor
Fred G Nelson
Assistant Attorneys General
Diane Curran
Connie Nakahara
Special Assistant Attorneys General
Attorneys for State of Utah
Utah Attorney General's Office
160 East 300 South, 5th Floor
P.O. Box 140873
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Telephone: (801) 366-0286
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From: Denise Chancellor
To: INET.MAIL."SET@nrc.gov", EQDOMAIN.EQRAD.BSINCLAI
Date: 10/15/97 10:32am
Subject: Security plan -Reply

Sherwin: Thank you for the email. Mr. Sinclair has the plan and any comments in a locked safe. After our telephone conversation yesterday, I informed Mr. Sinclair not to divulge the plan or comments to anyone until I heard back from you. To date, he has shared the information with no one. I am sending Mr. Sinclair a copy of this email.

Under the circumstances, it will be impossible to meet the October 24 contention deadline because starting tomorrow Mr. Sinclair will be out of state on business until after Oct. 24. It is important for us to be in a position to file contentions on the security plan. I am willing to wait NRC's formulation of proper procedures and controls on disclosure provided it does not prejudice the State's ability to raise contentions before the ASLB.

Denise..

>>> Sherwin Turk <SET@nrc.gov> 10/15/97 09:11am >>>

Denise: I am waiting for a reply from NRC security/safeguards staff as to whether the security plan or comments based on the security plan may be divulged by Mr. Sinclair to the AG's office or other persons. For now, please instruct Mr. Sinclair that he should continue to refrain from disclosing the plan or his related comments to any other persons, unless they have a "need to know" the information, as indicated in 10 CFR 73.21(c). Given that there is no impending shipment of spent fuel to the State, I cannot imagine who has a "need to know" this information as yet, prior to establishing a proper procedure and controls for disclosure. For now, a "need to know" should be interpreted as not including persons who seek to prepare contentions to meet the Licensing Board's deadline; and for now, both the plan and Mr. Sinclair's comments should be protected from disclosure by appropriate means, including locked storage, as set forth in 10 CFR 73.21(d).

I hope to get back to you within the next week or so, to discuss the procedures to be followed for disclosure of the plan and drafting and filing contentions.

CERTIFICATE OF SERVICE

I hereby certify that copies of "STATE OF UTAH'S MOTION FOR A PROTECTIVE ORDER TO REVIEW AND FILE CONTENTIONS ON THE APPLICANT'S PHYSICAL SECURITY PLAN," dated November 14, 1997, were served on the persons listed below by electronic mail and also by United States Postage

First Class (unless otherwise noted):

Attn: Docketing & Services Branch
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(*electronic copy only*)

Office of the Commission Appellate
Adjudication
Mail Stop: 16-G-15 OWFN
U. S. Nuclear Regulatory Commission
Washington, DC 20555
(*paper copy only*)

Dated this 14th day of November, 1997.


Denise Chancellor
Assistant Attorney General
State of Utah

November 13, 1997

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

In the Matter of
Private Fuel Storage, L.L.C.
(Independent Spent Fuel Storage Installation)
Docket No. 7222-ISFSI

Dear Ms. Chancellor:

I am in receipt of your letter of November 8, 1997, concerning your interest in obtaining access to the proposed security plan for this facility. As we discussed previously, you indicate that Mr. William Sinclair of the Utah Division of Radiation Control currently has a copy of the security plan, and that you would like to review that plan and work with Mr. Sinclair in framing contentions based on the plan.

I have discussed this matter with NRC personnel in the Division of Fuel Cycle Safety and Safeguards, and wish to suggest the following alternative courses of action to you.

1. Persons who (a) have "a need to know" the safeguards information contained in the security plan, and (b) are specifically designated by the Governor to serve as his designated representative(s), would be permitted to gain access to the security plan, in accordance with 10 C.F.R. § 73.21(c). Such persons are restricted, however, from disclosing the plan to others, and are required to follow the procedures for protection of safeguards information described in 10 C.F.R. §§ 73.21(d)-(h), including such measures as controlled access, restricted markings, locked storage, limited photocopying, and document destruction. Regulatory guidance for compliance with 10 C.F.R. § 73.21 is contained in NUREG-0794, "Protection of Unclassified Safeguards Information," a copy of which is enclosed herewith.

2. Any other access to the security plan and the safeguards information contained therein should be obtained by application to the Licensing Board for an appropriate protective order, pursuant to 10 C.F.R. § 2.744(e). Such protective orders have been entered in other NRC proceedings, to assure the protection of safeguards and other information.

I am not aware of any case law or regulatory interpretation as to whether an Assistant Attorney General's expressed desire to work with State officials in framing contentions (as distinct from

working with State experts after security contentions have been admitted) in an adjudicatory proceeding constitutes a "need to know" within the meaning of 10 C.F.R. §73.21. In the circumstances, I believe the most prudent course of action to follow, in the absence of any clear guidance, would be to apply to the Licensing Board for an appropriate protective order.

I trust that this letter responds to your concerns.

Sincerely,

Sherwin E. Turk
Counsel for NRC Staff

cc w/encl.: Jay E. Silberg, Esq.

I am not aware of any case law or regulatory interpretation as to whether an Assistant Attorney General's expressed desire to work with State officials in framing contentions (as distinct from working with State experts after security contentions have been admitted) in an adjudicatory proceeding constitutes a "need to know" within the meaning of 10 C.F.R. §73.21. In the circumstances, I believe the most prudent course of action to follow, in the absence of any clear guidance, would be to apply to the Licensing Board for an appropriate protective order.

I trust that this letter responds to your concerns.

Sincerely,

Sherwin E. Turk
Counsel for NRC Staff

cc w/encl.: Jay E. Silberg, Esq.

Distribution:

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STATE OF UTAH
OFFICE OF THE ATTORNEY GENERAL



JAN GRAHAM
ATTORNEY GENERAL

CAROL CLAWSON
Solicitor General

REED RICHARDS
Chief Deputy Attorney General

PALMER DePAULIS
Chief of Staff

November 8, 1997

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

VIA FIRST CLASS MAIL AND
EMAIL: "SET@NRC.GOV"

re: Physical Security Plan for Private Fuel Storage, LLC, ISFSI , Docket No 72-22

Dear Sherwin:

This letter confirms my understanding of where we are in determining whether I may have access to the Physical Security Plan, a copy of which is in the possession and control of William J. Sinclair, Director, Utah Division of Radiation Control. Mr. Sinclair is also the Governor's designee for spent fuel shipments under 10 CFR §73.21(c).

I initially contacted you October 14 (when the State's deadline for filing contentions was October 24) to find out about procedures for filing contentions on the Security Plan. I had assumed that as counsel to Mr. Sinclair I could have access to the plan but you informed me that I would need independent authorization to see the plan or draft any contentions based on Mr. Sinclair's review of the plan. In your October 15 email to me you informed me that you were awaiting a reply from NRC security/safeguards staff and would get back to me within a week or so. I responded to your email that as the State would be unable to meet the October 24 filing deadline without an immediate answer to the access question, the State was willing to wait NRC's formulation of proper procedures and controls on disclosures of the plan "provided it does not prejudice the State's ability to file contentions."

Now that the deadline for the State's contentions has been extended to November 24, it could be prejudicial to the State if it is not in a position to file contentions on the security plan by that date. I contacted you by telephone November 5 to find out if NRC staff had determined whether I could have access to the security plan. Your response was that certain NRC personnel necessary to reviewing the matter were out of the office until next week.

I strongly urge NRC staff to make a decision about access within the next few days. Time is of the essence if I am to work with Mr. Sinclair in developing contentions by the November 24 deadline (as documents need to be filed in Rockville by that date, the effective deadline is Friday, November 21). The procedures of how contentions are to be served and on whom are not as time critical as my ability to work with Mr. Sinclair. The NRC regulations recognize that parties, States, and their qualified witnesses and counsel may have access to confidential information, such as the security plan. 10 CFR § 2.744(e).

I would prefer to work out a satisfactory arrangement with NRC staff but if that cannot be timely accomplished, I will apply to Judge Bollwerk for permission to access the plan in order to protect the State's procedural rights.

Sincerely,

A handwritten signature in dark ink, appearing to read "Denise Chancellor", written over a horizontal line.

Denise Chancellor

Assistant Attorney General

cc: Jay E. Silberg, Esq.
Shaw, Pittman, Potts & Trowbridge
2300 N Street, N. W.
Washington, DC 20037-8007
(Via First Class Mail and email: "jay_silberg@shawpittman.com")

William J. Sinclair, Utah Division of Radiation Control